LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

JANUARY/FEBRUARY 2016

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FEATURES

EDITOR:
Mapula Thebe
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:
Kathleen Kriel –
BTech (Journ) (TUT)

NEWS EDITOR:
Nomfundo Manyathi-Jele –
NDip Journ (DUT)
BTech (Journ)(TUT)

SUB-EDITOR:
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BIS Publishing (Hons) (UP)

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Shireen Mahomed

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EDITORIAL OFFICE: 304 Brooks Street, Menlo Park, Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

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Classifieds supplement: Contact: Isabel Janse van Vuren
Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela
Tel (012) 366 8800 E-mail: david@lssa.org.za

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Tel (012) 441 4629 E-mail: gail@lssalead.org.za
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NEW SUBSCRIPTIONS AND ORDERS: David Madonsela
Tel: (012) 366 8800 • E-mail: david@lssa.org.za

LAW SOCIETY
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Viral racism

The beginning of 2016 saw the racial debate being resuscitated by several social media posts. This highlighted the importance of being mindful when posting on social media, the need for legislation that will appropriately deal with such and the fact that one cannot be protected under the guise of freedom of speech for hate speech.

Currently racism is a matter that has no threat of legal consequences, a situation government seeks to remedy in future. The applicable legislations in relation to these matters are the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Deputy Minister of Justice, John Jeffery, is quoted as saying that government is working on adding hate speech and racist behaviour to the existing Bill on hate crimes. While Minister of Justice Michael Masutha noted that the Bill would have to strike a balance between discouraging hate speech and allowing for freedom of speech.

Following the racist posts, the National Association of Democratic Lawyers issued a press release stating that: 'So often racists give qualified excuses and get away with the crime of racism which our Constitution prohibits. The time has come for the state to use its power to punish racists instead of lamenting it. The time has come also for all South Africans to act on racism and racists instead of expressing mere outrage.'

The KwaZulu-Natal Law Society also issued a press statement following the racist posts. The press release said:

'Notwithstanding the fact that South Africa has the most liberal Constitution in the world which underpins the values of democracy, equality and freedom, including the freedom of expression, it is clear that our cumulative laws are not sufficient to address and curb the pockets of overt racist conduct manifested in the posting.

While the KwaZulu-Natal Law Society reinforces its commitment to the right of the freedom of expression and the defence thereof we believe that such freedom extends to the robust and vital discourse necessary for the enhancement of a democratic society and was never intended to protect prejudiced and bigoted utterances which are manifestly of a divisive and deeply hurtful nature.'

When posting on social media, an individual may see this as a social platform that is only seen by those who are their contacts, which is written in their personal capacity and is not linked to their professional lives. All it takes is for one of the contacts to screengrab the post sending it to several others, before long the post is seen by thousands going viral or trending on all social media platforms. It is a misleading notion that individuals can post on social media in their personal capacity as it was evident in the many cases of people losing their jobs due to posts made on social media.

While social media can be a useful tool for promoting an attorney or a practice, it also has its disadvantages, which attorneys need to be aware of. Young attorneys were reminded of the pitfalls of using social media late last year at a symposium organised by the Law Society of South Africa in conjunction with the International Bar Association (see 'Beware of social media pitfalls' on p 10). Speakers at the symposium also reiterated the fact that attorneys are held accountable to higher standards of ethical conduct, this of course extends to the usage of social media.

Mapula Thebe – Editor

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: 15 February and 22 March 2016.**

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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.

A birth of a school – memories of 25 years

The article 'From pilot project to more than just a legal education institution' (2015 (Sept) *DR* 20) commemorating the 25 years of existence of the school for Legal Practice re-awoke in me memories almost forgotten.

The birth of the school, while a notable achievement, had a forerunner, which germinated the bringing to life of the school some ten to 12 years after the event.

The history of the matter, not generally known, was related by me at the recent Annual General Meeting of the KwaZulu-Natal (KZN) Law Society as follows:

During the mid-1970s, when I was chairman of the Durban Legal Circle, the abysmal pass rates for the attorneys' admission examinations were a source of serious concern. I, therefore, proposed to my committee that we should initiate a series of informal training sessions/lectures to assist the candidate attorneys in tackling the admission examinations.

It was not difficult to secure the gratuitous services of a group of experienced attorneys as lecturers and the local candidate attorneys association embraced the idea with enthusiasm. The KZN Law Society granted us permission to use the Durban Law Library as a venue (where a group areas permit was not required for persons).

After a year or two there was a noticeable improvement in the pass rate, which was a matter of considerable satisfaction to me personally.

In 1979, I happened to mention these initiatives to one of my partners, the late David Sampson, who was the President-elect of the KZN Law Society and also in line to be the President of the Association of Law Societies. David was enthusiastic about the project and promised to raise it at national level and to promote its further propagation.

As a result, a small pilot project (preceding that mentioned in your article) was arranged at Pretoria University and proved both popular and worthwhile. It was repeated, and later rolled out at all the major universities.

This project was the forerunner of the School for Legal Practice and it was a matter of great satisfaction to observe that from 1989 attendance of the PLT course was made a requirement for admission to practice.

I applaud the good work done by the school and hope that it may continue to play an important part in the new dispensation for the profession.

Michael Hands, executive consultant, Durban

Road Traffic Management Corporation thoroughly misguided

News reports appeared in December 2015 indicating that the Chief Executive Officer (CEO) of the Road Traffic Management Corporation (RTMC), advocate Makhosini Msibi informed journalists that officers would be exercising 'zero tolerance' and that motorists would be arrested for the following offences –

- driving without a licence;
- driving under the influence of alcohol and drugs;
- failing to wear a seatbelt;
- using an unroadworthy vehicle;
- using an unregistered vehicle or having
- an expired licence disc;
- exceeding the speed limit;
- overtaking on a barrier line;
- driving though a red traffic light;

• not having number plates on each end of the vehicle. (See Enca 'Road offenders to face jail time: RTMC' www.enca.com, accessed 5-1-2016 and Justice Project South Africa 'Why is RTMC threatening people with arrest?' www.jp-sa.org, accessed 5-1-2016.)

For clarification purposes, the following road traffic offences are offences for which one can be arrested, which appear in the list of nine above:

• Driving under the influence of alcohol or drugs having a narcotic effect.

• Exceeding the speed limit by more than 30km/h in an urban area or more than 40km/h outside of an urban area or on a freeway.

• Reckless or negligent driving. Overtaking on a 'barrier line' in the face of oncoming traffic, as well as disregarding a red traffic signal could be interpreted to be both, reckless and negligent, but both have admission of guilt fines attached to them.

• Not displaying any number plates on your motor vehicle. Motorcycles and trailers, for example need only display one number plate on the rear of the vehicle.

It is well known in all legal circles that there can be no punishment without a crime (the legal maxim *nullum crimen et nulla poene sine lege* refers).

While it is clear what traffic authorities are attempting to do – which is, to limit fatalities on South African roads and is imbued with noble intent, it is the principle of how laws are enacted and applied that is important here.

There has been no national legislation enacted for these so-called 'new' crimes.

The National Assembly – occupied by 400 members of Parliament – makes national legislation. They are the elected representatives with this function.

Laws are not made overnight by an individual convening a press conference or having a casual telephonic conversation with a journalist. Laws are enacted through due process. Proposed legislation must be debated on, presented, published for public comment and eventually signed by the President into law – none of which took place.

If traffic officers in fact take (or have taken) the views of Mr Msibi seriously and act/acted on them, I believe that the following parties should immediately be sued for wrongful arrest –

• the Road Traffic Management Corporation;

• the applicable municipal metropolitan police department;

• the Minister of Police; and

• the Minister of Transport.

The legal fees of all organs of state will, no doubt, be footed by the taxpayer as will the plentiful payments for restitution that will have to be made to the victims of illegal arrests.

At a time when the South African economy is under enormous strain and service delivery crises are endemic, such a waste of taxpayers' resources on either side is highly negative for the country, profoundly unfortunate and hopefully will not be required as long as traffic officers do not take the CEO of the RTMC seriously.

Unfortunately, traffic officers are not usually attorneys, advocates, judges or magistrates or any type of legal academic and it is therefore, highly possible, that the reckless comments made by Mr Msibi will be acted on.

Michael Shackleton, attorney, Pretoria

❑

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

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Association for legal practitioners discussed at Free State AGM

The Free State Law Society (FSLS) held its annual general meeting (AGM) at the Windmill Sun Casino in Bloemfontein.

Judge President of the Free State Division, Mahube Molemela, was the guest speaker at the gala dinner held on 29 October 2015.

Judge Molemela said that the focus of her speech was divided into three parts, namely –

- a brief history of the Free State Division, juxtaposing the past with the present;
- enumerating some of the challenges faced by the legal fraternity; and
- spelling out the role that the attorneys profession plays in offering solutions.

A brief history

Judge Molemela referred to an article written by Henriette Murray ('Free State High Court, Bloemfontein – A brief history' April 2010 *Advocate* 45). She said the article sets out a very fascinating history of a court practitioners know and serve in various ways. She added: 'A superior court of the independent Orange Free State, consisting of only three judges, was established in 1875. The establishment of this court was vehemently opposed by some members of Parliament who questioned the government's ability to afford the Chief Justice's annual salary of which was an amount of £ 2 400 and the two puisne judges' salaries of £ 2 000 each'.

By 1910, the court was known as the Orange Free State Provincial Division of the Supreme Court of South Africa. 'Its Chief Justice became known as the Judge President,' Judge Molemela said, adding that with the advent of democracy, the court became known as the Free State High Court and gradually started the process of transforming into a court that was more representative of the South African population. On 21 June 1999 Judge Hendrick Musi, was welcomed as the first black judge to the Bench in the division. 'He went on to become the first black Judge President of this division in 2008. Seven years later the Bloemfontein High Court welcomed myself, as its first female Judge President. Since then, steps have been taken to ensure that the compliment of permanent judges matches the compliment designated in the institutions establishment. This, I believe, will go a long way towards ensuring that the division has enough human resources to dispose of the division's increasing case load promptly,' she said.

Judge President of the Free State Division, Mahube Molemela, was the guest speaker at the gala dinner of the Free State Law Society on Thursday 29 October 2015 at the Windmill Casino in Bloemfontein.

Judge Molemela told guests that the division, currently had 15 permanent judges and the number included two judges designate who were recently recommended for appointment by the Judicial Services Commission. 'The confirmation of the appointments of these two judges designate will mean that in a space of 12 years the division shall have moved from 0% representation of female judges to almost 50%. A testimony of great strides that have been made to achieve a transformed judiciary … and I am so glad to see that there are so many female practitioners present here tonight. It really bodes well for the future,' she said.

Judge Molemela said the courts are seen as much needed beacons of hope for society and it is in the interest of the stability of our county that the confidence and trust shown in the judiciary by the society be preserved. 'An independent judiciary is integral to a stable economically viable society in the global arena and this independence should be jealously guarded,' she said.

Access to justice and technology

Judge Molemela continued by saying that South African courts face a number of challenges, which impact on the primary roles of dispensing justice and these challenges have evolved over the years. 'Access to justice remains a challenge in many ways and this is one area where no utopia has been reached. In the face of new technology, like the Internet, which has had serious impact on economic activity, the society is in a state of constant change. Tweets and Facebook posts are all fascinating, the downside is the increase of defamation law suits and cybercrime, but then again, this opens up new areas of work for practitioners. This area is breaking new ground for legal practitioners and judges and the interaction between evidence and technology will, no doubt, be more complex. … Courts have to adapt to the use of technologies that have been successful in other jurisdictions. … Otherwise there will be a disparity between the public's expectations on the speed of litigation and the pace delivered by the judicial system,' she said.

Judge Molemela said a limited budget unfortunately means that some of these technologies are not yet available in our courts. 'Notwithstanding budgetary constraints, courts must still evolve to serve the public and to serve it in more effective and efficient ways, as quicker resolution of legal disputes will bring quicker certainty and will be continued to the advancement of the economy,' she said.

The judge added that efficiency, effectiveness and the consequent access to justice are hampered when litigants are forced by circumstances to resort to self-representation in complex matters. 'Many [litigants] become discouraged and end up abandoning their litigation due to lack of expertise. … Given the limited public resources, it is quite understandable, that although Legal Aid generally increases access to courts, by affording indigent litigants legal representation, it cannot do so in respect of every case and every litigant. This is where attorneys … can play a significant role in promoting access to justice by accepting *pro bono* instructions in respect of cases that Legal Aid does not cover,' she said.

The judge urged attorneys to get involved with *pro bono* cases even if it was a sacrifice. 'We need to awaken the spirit of volunteerism shown by the likes of Nelson Mandela and Oliver Tambo … attorneys who sacrificed their own freedom and comfort in pursuit in the kind of justice that would be enjoyed by all,' she said.

Judge Molemela said courts cannot undertake the journey of attaining jus-

tice for all on their own, because judicial function is often limited to specific cases with a peculiar set of facts. 'Therefore courts can only make progressive decisions where legal disputes have been brought to them for resolution. Attorneys as litigation initiators in several matters, play a central role in this regard. Attorneys, therefore, should never display a cavalier attitude towards injustice. … Attorneys as initiators of litigation, must realise that it is their responsibility to lay the existence of injustice bare, by bringing it to the courts so that courts can deal decisively with it and this they must be prepared to do, even when they do not stand to benefit financially from it,' she said.

Case flow management

Judge Molemela said another challenge that impacts on access to justice is case backlogs and the attorneys' profession has an important role to play, as they control the pace of litigation. 'The significant reduction to case backlogs, in our division, is attributable to the implementation of case flow management in this country. … Case flow management is a tool that has been used successfully by first world jurisdictions for decades it is a collaborative process requiring engagement with other institutions concerned with criminal justice. For the courts effective communication with the various stakeholders they serve is central to the efficient administration of justice. It is thus important for case flow management to be embraced by all. … It is clear that case flow management can only be successful when all stakeholders synergise,' she said.

Briefing patterns

Judge Molemela also touched on an area, which calls for urgent improvement, namely, briefing patterns, an issue, which had been very topical in the recent past. 'The historic skewed briefing patterns are well documented and need no further elaboration from me. The challenges pertaining to briefing patterns are real and not perceived. Having acted at the Competition Appeal Court and the Constitutional Court respectively, and seeing counsel appearing in those courts, all I will say, is that the statistics of their racial and gender profile speak for themselves and they are not good. These are challenges that need to be addressed. Here too attorneys play a significant role, for they are, at this stage still, largely responsible for making a decision as to which advocate has to be briefed. Attorneys who are committed to transformation, thus have an ability to play an important role in the transformation of the Bar. A transformed Bar and side Bar will in turn result in a transformed judiciary, because it is from this pool that appointments to the Bench are made. A transformed judiciary will in turn result in an equally transformed society, which we all need,' she said.

Judge Molemela closed off by saying that for every challenge there is a solution and some of the solutions are firmly in the hands of the attorneys and she asked attorneys to play their part in the solution process. 'I implore you to collaborate with all justice sector stakeholders and organisations that represent communities in seeking other innovative ways of improving access to justice,' she said.

From left: Co-chairperson of the Law Society of South Africa, Busani Mabunda; Judge President of the Free State Division, Mahube Molemela; new Free State Law Society President, Deidre Milton and outgoing Free State Law Society President, Vuyo Morobane, at the Free State Law Society AGM on 30 October 2015.

Association for legal practitioners discussed

On Friday, 30 October 2015, the outgoing President of the Free State Law Society, Vuyo Morobane, welcomed delegates to the AGM.

Co-chairperson of the Law Society of South Africa (LSSA), Busani Mabunda, presented the mid-term report. The report can be found on the LSSA website at www.LSSA.org.za.

After his report, Mr Mabunda told delegates that they should be alive to the contents of the Legal Practice Act 28 of 2014 (the LPA) and said that it is regula-

tory in nature, its purpose is largely to make sure that members are subject to the discipline within the profession and that members pay their subscription fees. He said that practitioners needed to formulate an organisation to deal with, *inter alia*, building a relationship with various Bar associations globally. 'That voice is not there and we obviously need to endorse and accept that there is a need for that particular society, which has to represent the aspirations of the profession. There is a lot which has been done, there has been circulars which were sent … what we need is understanding and endorsement by practitioners, but not largely as a matter of choice but as a matter of necessity, given that law societies, as you know them today, including this one, will be collapsing,' Mr Mabunda said.

Ed Southey, consultant partner from Webber Wentzel, was asked by the LSSA to assist with some issues arising from the LPA. Mr Southey said Mr Mabunda had made a crisp and all-encompassing comment about the LPA and added that he would fill in the necessary detail and in his discussion he would –

- indicate what the current position is;
- discuss some changes in the LPA;
- discuss the significance of the changes; discuss voluntary associations and Bar associations in general;
- discuss a proposed model; and
- give a recommendation.

Mr Southey said all attorneys are familiar with the current position, namely, that attorneys are regulated by the Attorneys Act 53 of 1979. There are four autonomous law societies who regulate attorneys, attorneys are a self-regulated profession and are regulated through councils. The law societies perform a dual function, namely, regulation and representative function to look after the profession and the public. 'That method of regulation for professions has fallen out of favour, not only in South Africa but all over the world. … Nowadays it is very seldom that [professions] are self-regulating. The new regime under the LPA is going to change that,' Mr Southey said.

Mr Southey gave a brief history of the LPA, which was passed in 2014. Only ch 10 is in force, which relates to the National Forum (NF) and the transitional provisions. The NF has a number of duties, including drafting a code of conduct and making recommendations for adoption by the Legal Practice Council (LPC) and the NF only has 24 months to do that in. 'There will be considerable changes of governance when the LPA comes fully into force. There is only going to be one council, not four, and that is the LPC. It will have jurisdiction over all legal practitioners throughout South Africa, advocates and attorneys. … The function of the LPC is purely regulatory. There is no trade union function, no representative function. … The LPC is not a law society as we know it, it will have no members. So you, who are now members of the Free State Law Society, will not be members of any law society in the future,' Mr Southey said.

Ed Southey discussed the association for legal practitioners at the Free State Law Society's annual general meeting.

Mr Southey added that the LPC 'is not a representative body and it does not represent the interests of practitioners. There is no entity within the coming structure that will do the representative function. ... The law societies and the LSSA, as you heard and well-know, do a great deal to represent the attorneys' profession in the public interest. ... Who is going to represent the legal profession in the future on issues relating to the profession? In the Co-chairperson's mid-term report, Mr Mabunda referred to legislation and that we are expected to make comments on legislation. The LPC is not going to do that. Who is going to make representation on fees, court process, court rules, competition law issues, the rule of law? There are a whole host of issues, close to the heart of every practitioner, which will not be dealt with by the LPC. We cannot allow that to go by default. … As Mr Mabunda pointed out, we need a structure or an entity within the legal profession structure to represent the interests, which are currently represented by the law society'.

Mr Southey said that the answer lies within a voluntary association. He added that there was no legislation in the current Attorneys Act or the LPA to prevent attorneys or advocates from forming voluntary associations. Mr Southey noted that current voluntary associations' scope and reach is limited and they will not be able to represent all the members of the profession. 'The LSSA believe the solution lies in a National Bar association. … Attorneys have no countrywide national structure to represent our interests, and what the LSSA has in mind is that there should be a Bar association to perform the trade union and representative function. … Who will be members of that association has not been decided yet. … This is a matter which will have to be determined,' Mr Southey said.

Model for the association

Mr Southey said that he proposed to the LSSA that a model, similar to the South African Institute of Chartered Accountants (SAICA) model should be followed. Mr Southey said that the accounts' regulator is Independent Regulatory Board for Auditors (IRBA), which never performs any kind of trade union function. 'The accountants recognised this shortcoming in their profession many years ago and in 1980 they established SAICA to do their trade union function. It has been hugely successful. … SAICA represents all the interests of accountants who qualify to be auditors. It is a voluntary association, but it has 35 000 members, it does a great deal of work for the members of the profession and provides a wide range of services, namely, accountancy advice, auditing advice, tax advice, conducting examinations, etcetera. … To be able to do that they have to charge a subscription. … If you want to establish an association like that you have to believe that you are getting value and the members of SAICA believe that they get value. The real value to be a member of SAICA is the CA(SA) designation. … If you have the CA(SA) designation, your earnings will be 50% more than if you do not have that designation,' Mr Southey said.

Mr Southey told delegates at the AGM that the LSSA had a similar entity to SAICA in mind. A voluntary association that provides services to its members, which will not be provided by the LPC and possibly also functions which could be delegated to it, like education, continuing professional training, and to be the mouth piece of the profession, to be what people will regard as being the representative body of the legal profession. 'It could be the LSSA, which would have to be adapted, or it may have to be a new entity, but what it must certainly be is a voluntary association. … Fundamental to the success of such an entity is that members believe they are going to get value for their money. … That is the background to what the Bar association is about. The LSSA is of the firm opinion that it is in the interest of the profession and in the interest of the public that there should be a strong vibrant and independent profession and that can be facilitated greatly by an act of a voluntary association to promote the interest

of the profession. The SAICA model has been shown to work and it has made the accounting profession highly respected throughout the world, so the legal profession must get itself organised and it is our firm belief that that form of organisation must be through the Bar association for legal practitioners,' Mr Southey concluded.

In the questions and answer section after the presentation, Mr Mabunda said: 'We have taken into account those issues regarding the issue of representatively in that when we look at the structure, it must be a structure which enjoys legitimacy and it does not entrench a particular hegemony or else the retention of what may be understood as the *status quo*, hence there is a circulated document, which clearly deals with the fact that the representation must align itself with the provisions of the LPA, as well as the Constitution of the Republic and to that end, it also talks about the electoral college, the manner of voting and equally dealing with those particular issues, so that document is there, ... it is a principle document.'

Mr Southey added that Mr Mabunda's comment was crucial and said: 'If this entity does not have legitimacy or recognition, then it is not going to get anywhere.'

Other speakers at the AGM included: Manager of the Attorneys Development Fund, MacKenzie Mukansi; Chairperson of the Minister's Advisory Committee on Mediation, Judge Cassim Sardiwalla; Chief Librarian of the KwaZulu-Natal Law Society Law Library, Thembikosi Ngcobo; and Legal Risk Manager of the Attorneys Insurance Indemnity Fund, Ann Bertelsmann.

The new council of the FSLS

At the time of going to print, the FSLS council still had one Black Lawyers Association member and two National Association of Democratic Lawyers members to deploy, which would be finalised at their Council meeting on 29 January. The council is as follows:

- Deirdré Milton (President)
- Sizane Jonase (Vice-President)
- Vuyo Morobane
- Johannes Fouchè
- Tsiu Matsepe
- Etienne Horn
- Henri van Rooyen
- David Bekker
- Jan Maree

Kathleen Kriel
Kathleen@derebus.org.za

Mandate of the ADF discussed at the AGM

From left: Chairperson of the Board of the Attorneys Development Fund, Etienne Horn and Manager of the Attorneys Development Fund, Mackenzie Mukansi, at the annual general meeting held on 26 November 2015.

The Attorneys Development Fund (ADF) held its second annual general meeting in Johannesburg late last year. Key issues discussed at the meeting included, the mandate of the ADF, the future of the ADF and funding of existing law firms.

Chairperson of the Board of the ADF, Etienne Horn, highlighted the fact that in 2015 the ADF embarked on an exercise to bring partners on board to expand their mandate as per the request of the profession. He added: 'It is noteworthy that the profession that we are geared to serve is rapidly changing, ... we have remained steadfast in a changing environment and adapted steadily to follow the direction and flow of energy with swift pace and steady caution to ensure that we remain relevant in the changing legal landscape. ... One of the issues we need to deal with is whether the scope of our mandate should include assistance to established firms, as currently our mandate states that only new firms may be assisted. We need input from the members of the profession in deciding to broaden the mandate to established firms. ... We rely heavily on the law societies who operate on the grass roots level, the board cannot get to the issues if it is not assisted by the law societies.'

Answering a question from the floor, member of the ADF Board, Mimie Memka, said: 'We have been receiving applications from existing firms for different types of funding. We have brought the notion of funding of existing firms to this forum to get views. We are also getting applications outside the scope of the ADF. There are some firms applying for educational loans, we turn the applications away as it is not our mandate.'

Manager of the ADF, Mackenzie Mukansi, noted that the bulk of the recipients of funding from the ADF are in urban areas. He said that in future, the focus of the ADF would be to assist attorneys in the outlying areas.

Speaking about the future of the ADF, Mr Horn said that the mandate of the ADF will be reviewed.

Speaking from the floor, Chief Executive Officer of the Attorneys Fidelity Fund, Motlatsi Molefe, reminded delegates that the issue of the mandate of the ADF has to be looked at in its entirety because it is linked to the available resources of the ADF. Adding that the ADF has to remain a sustainable entity. 'This is the wrong forum to discuss the issue of the mandate, we should rather have a rounded focus, fully at a properly constituted workshop,' he said.

Mapula Thebe
Mapula@derebus.org.za

Beware of social media pitfalls

The Law Society of South Africa (LSSA) in conjunction with the International Bar Association (IBA) held a symposium on 16 November 2015 in Johannesburg. The purpose of the symposium was for young lawyers to engage with international and local speakers on the new frontiers of legal ethics and their relevance in practice to social media, globalisation and the new business of law.

In his welcome address, Co-chairperson of the LSSA, Richard Scott, noted that the legal profession is expected to hold high standards of conduct when dealing with their clients especially because the profession deals with highly confidential information. 'Attorneys are expected to carry out instructions with due diligence and integrity. This is a duty we owe both our clients and the courts. We should always remain constant and ensure that we maintain high standards of ethical conduct,' he added.

Attorney and LSSA representative to the IBA Council, Tshepo Shabangu, remarked that this was the opportune time to have such a discussion in South Africa as it is no longer 'business as usual'. She said that one of the reasons for this was the rapid speed of globalisation and the effect social media has had on society. 'Attorneys need to adapt but be cautious of the ethical considerations surrounding social media. … Social media can be used to advance business but this should be done in an ethical manner,' she said.

From left: Senior Legal Adviser at the IBA Head Office and Chairperson of IBA Social Media Working Group, Anurag Bana; Senior Manager at Legal Education and Development (LEAD), Ogilvie Ramoshaba; Professor of intellectual property law at University of South Africa (Unisa), member of the National Cybersecurity Advisory Council, attorney and notary, Tana Pistorius; Chief Executive Officer of the Law Society of South Africa (LSSA) and Director at LEAD, Nic Swart; Facilitator at the LSSA and LEAD, Jeanne-Mari Retief; attorney and senior lecturer at Unisa, Freddy Mnyongani; Chairperson of IBA Multi-disciplinary Practices Committee, Co-chairperson of American Bar Association International Law Section Ethics Committee and IBA Advisory Board council member of Section on Public and Professional Interest, Steven Richman; and Co-chairperson of the LSSA Richard Scott.

Ethics in the globalised legal landscape

Chairperson of IBA Multi-disciplinary Practices Committee, Co-chairperson of American Bar Association International Law Section Ethics Committee and IBA Advisory Board council member of Section on Public and Professional Interest, Steven Richman, spoke on ethics in the globalised legal landscape. He said that ethics is not the same as morality but rather rules of professional conduct. 'As a lawyer, ethics tell you how to conduct yourself with your client. Lawyers have an obligation to make sure they know what they are doing. In the United States (US), lawyers have an obligation to the IBA General Principles for the Legal Profession. Lawyers have to show confidence and diligence in their work as this impacts on costs to the client,' he added.

Speaking on multi-national firms, Mr Richman said: 'One of the issues when dealing with ethics, is the rise of the multi-national firms. What do they mean to the practice of law? For example in the US, lawyers cannot practice law in the states they are not admitted in. This is a big issue that is being dealt with. How do you apportion boundaries in todays' world?'

Mr Richman said that another developing issue in the practice of law is the notion of billing and how to engage with clients on this issue. 'Lawyers need to be sensitive to the fact that they deal with different kinds of clients. Obviously all bills must be reasonable, but what does that mean? It means that you have to engage with your client and explain to them why you bill a certain way, let them know about the number of years you have in practice, the time it will take to complete the matter and the going rate in your area. But also note that you may be faced with an unreasonable client who can pose a challenge, so how can you solve this? An engagement letter may assist in such a situation,' he said.

Mr Richman advised the young attorneys present at the symposium to refer to the rules of ethical conduct in instances when senior attorneys ask them to perform duties they are not comfortable with.

LSSA council member and chairperson of LSSA Ethics Committee, Krish Govender, began his address by saying that ethics and morality are always an issue. 'We have to link ethics to justice. If there is no justice in the world, nothing good will come of it. If you are going to be a good lawyer you will not find it easy to practice. There are some lawyers who are greedy and are only interested in getting rich quickly. Lawyers also have to be good and descent people. … In todays fast paced world people are always tempted to say things too quickly and take rash decisions. Let me give one of "Krish's golden rules", don't respond immediately,' he said.

Speaking about the business of law, Mr Govender said that today law is about making profit. Adding that: 'In the past law used to be a calling, we have moved away from that notion. … A good lawyer that wants to protect the indigent and has a sense of justice is always a poor lawyer, but he or she sleeps well at night.'

Tips for lawyers – ethics and social media

Senior Legal Adviser at the IBA Head Office and chairperson of IBA Social Media Working Group, Anurag Bana, noted that

common sense is no longer common when it comes to social media. Adding that lawyers tend to take this for granted. He said that in 2011, the IBA conducted a survey on social media with law societies and Bar associations across the world, which the LSSA also responded to. One of the questions that was asked in the survey was whether social media posed as a challenge to the practice of law and the majority of Bar associations and law societies responded in the positive. 'However, the respondents also noted that the advantages of social media outweighed the disadvantages. 70% of the respondents said that it was acceptable for lawyers and judges to be contacts, while 90% said that it was unacceptable to post on cases that they were working on. The majority of respondents also stated that it was fine for journalists to posts on proceedings of courts,' he said.

Attorney and senior lecturer at University of South Africa (Unisa), Freddy Mnyongani, said that social media has invaded our lives and made a high impact on our lives. 'In the field of ethical discourse there is a debate on how far should our personal lives impact on our professional lives? This debate has been resuscitated by social media. The LSSA guidelines on the use of Internet-based technologies in legal practice (www.lssa.org.za) give lawyers guidance on how to use social media. But as the title suggests, they are just guidelines, there is evolvement every day and there is no way the guidelines can keep up. The fact

LSSA council member and Chairperson of LSSA Ethics Committee, Krish Govender, spoke on ethics and morality.

is, social media is here to stay, we can choose to ignore it or ride on the bandwagon. How we use it may have ramifications, we all live in glass houses and we must behave accordingly,' he said.

Mr Mnyongani asked: 'Given the fact that social media is a private space, why should the profession be interested in who I am friends with? If I am friends with a judge who is presiding on a matter I am working on, should the judge recuse himself or herself? How far do we go with advertising our services? Can we give legal opinion or serve court documents on social media? There is a need for diligence when using social media. Of course the profession is interested in what you post as a lawyer. Whether you use it ethically is in your hands.'

Professor of intellectual property law at Unisa, member of the National Cybersecurity Advisory Council, attorney and notary, Tana Pistorius reminded delegates of the relationship between social media and commerce. Adding that on social media there is no line between private and personal life. 'When posting on social media, the rules of data messages apply. Posts on social media do have legal effect,' she added.

Prof Pistorius went on to cite cases where data messages had legal effect. Such as *Sihlali v SA Broadcasting Corporation Ltd* [2010] 5 BLLR 542 (LC), where an SMS was accepted as a letter of resignation. Other cases she mentioned were:

- *Spring Forest Trading v Wilberry* (SCA) (unreported case no 725/13, 21-11-2014) (Cachalia JA) (see 2015 (Jan/Feb) *DR* 57;
- *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC); and
- *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) (see 2012 (Oct) *DR* 47).

Mapula Thebe
Mapula@derebus.org.za

Bloemfontein School for Legal Practice celebratory breakfast

The School for Legal Practice: Free State marked the year end with a celebratory breakfast at the end of 2015. In addition to the school's instructors, the function was attended by members of the Board of Control, as well as the Chief Executive Officer of the Free State Law Society.

In past years the director, Willem Spangenberg, used the year-end function to reflect over the achievements of the year; express his appreciation of the work done by the staff; and invite suggestions about how the service of the law school could be improved.

2015 being the twenty-fifth anniversary of the establishment of the School for Legal Practice, the director used the opportunity to reflect over the institution and growth of the School for Legal Practice. An informative video mentioned that the first School for Legal Practice was established in Pretoria in 1990 with 51 candidate attorneys in response to two closely related needs –

- law graduates from universities were found generally to be inadequately prepared for the practical requirements of law firms; and
- more specifically this deficiency was still greater and more encumbering for students from disadvantaged backgrounds.

To accommodate candidates who were working during the day, night courses started after hours. The video further detailed its beginnings, the growth of the School for Legal Practice – the number of schools, number of courses offered and the number of students enrolled. Schools now exist in ten locations around South Africa and 25 different courses are offered with more to be introduced soon; and 1 400 students are presently enrolled. Since 1990, 23 000 students have graduated. The intention that the schools serve a practical and social need was emphasised; and several past students commented appreciatively on the benefit they had gained.

Key figures received particular attention. Mr Spangenberg was warmly congratulated by Jan Maree, a founder of the Bloemfontein School for Legal Practice, for having initiated and headed the Bloemfontein branch for the full duration of its existence, a task requiring considerable organising skill, a strong idealism, and the ability to motivate and enthuse others. In turn, Mr Spangenberg thanked the instructors and members of the Board of Control for their work and awarded six members for long and exceptional service (as attested to also by students' assessments) to the Free State School.

Bloemfontein School of Legal Practice,
bloemfonteinschool@lssalead.org.za

Renovation of the Gauteng Local Division High Court Library

In September last year Judge Fayeeza Kathree-Setiloane, the Gauteng Local Division High Court Library Committee Chairperson, welcomed guests to the refurbished Gauteng Local Division High Court Library. Among the guests were Judge President of both the South and North Gauteng Division of the High Court, Dunstan Mlambo; Deputy Judge President of the South Gauteng High Court, Phineas Mojapelo; and Deputy Judge President of the North Gauteng Division of the High Court, Aubrey Ledwaba.

As part of the renovation project of the court, the library was renovated from a single storey resource facility to a double storey. The ground floor of the library continues to house various collections of legal texts, loose-leaf journals and law reports both national and international for use by lawyers as well as members of the public involved in litigation in the court. The second floor houses a collection of legal texts, loose-leafs and law reports for exclusive use by judges.

This new space offers judges a quiet place for research and writing with access to computers and network points to access digital resources, as well as a kitchen with tea and coffee.

Judge Kathree-Setiloane, said between the years 2007 and 2010 it was particularly challenging for the library. Senior librarians were poached by law firms and universities offering competitive salaries and better employment conditions.

Judge Kathree-Setiloane said 'to put it simply, the library was in "tatters"'. The texts and collections in the library and judge's chambers lacked integrity and dependability.

'The *Government Gazettes* and loose-leaf collections had not been updated since 2008, new edition legal texts were not purchased and the cataloguing systems were non-existent,' said Judge Kathree-Setiloane.

From left: Johannesburg Bar representative on the Gauteng Local Division (GLD) Library Committee, Seena Yacoob; Chief Librarian, Thulisile Nzimande; Chairperson of the GLD Library Committee, Judge Fayeeza Kathree-Setiloane; Deputy Judge President Phineas Mojapelo; Judge President Dunstan Mlambo; former Chief Librarian, Salome Vranas; former Chairperson of the Library Committee, Justice CJ Claassens; and members of the GLD Library Committee: Judge Bashier Vally, Judge Segopotje Sheila Mphahlele, and Judge Roland Sutherland.

Judge Kathree-Setiloane said Justice CJ Claassens in his capacity as then Chairperson of the Library Committee expressed his concern at the state of the library.

In 2011 the library committee employed Salome Vranas as acting Chief Librarian. 'Ms Vranas was tasked with doing a complete "clean up" and "revamp" of the library,' said Judge Kathree-Setiloane.

With the assistance of LexisNexis the library staff updated over 4 000 loose-leafs.

In 2014 the library upgraded the judges chamber libraries to the value of R 1,5 million.

Judge Kathree-Setiloane said the Gauteng Local Division Library is the largest High Court library in the country with approximately 76 000 books.

'The library has finally developed into a major repository for judges, lawyers and members of the public,' said Judge Kathree-Setiloane.

The library is currently led by Thulisile Nzimande.

Kevin O'Reilly
kevin@derebus.org.za

NADEL AGM date

The National Association of Democratic Lawyers' (NADEL) National Annual General Meeting (AGM) will be held on 1 – 3 April 2016. The AGM will be held in Port Shepstone at a venue to be advised.

For further information, contact Fazoe Sydow, NADEL National Coordinator at 078 514 3706 or e-mail: fazoe@nadel.co.za

Admission examination dates for 2016

Admission examination:

- 9 February
- 10 February
- 16 August
- 17 August

Conveyancing examination:

- 11 May
- 7 September

Notarial examination:

- 8 June
- 19 October

Attorneys warned against temptations

From left: Executive officer of the Free State Law Society, Alida Obbes; attorney, Drinette du Randt; Director at Ramothello, Raynard Tsotetsi Angerlo Raynard; and Bloemfontien Law School Coordinator, Hanlie Bezuidenhout.

Free State attorneys held a one-day *pro bono* workshop organised by the current students of the Bloemfontein School for Legal Practice on 3 December 2015.

Candidate attorneys in the Free State were advised to balance the rigours of legal practice with the demands of personal lives to avoid probable emotional and financial pitfalls.

The workshop, which was also attended by some recently qualified attorneys, discussed the pressures that, in some instances, can force attorneys to misappropriate trust funds or turn to drugs, promiscuity and alcohol abuse.

Organisers chose the theme following a spate of suicides among top attorneys in the Free State and around the country after they had dipped into trust funds or had failed to cope with work-related stress.

The Free State Law Society's, executive officer, Alida Obbes, advised the aspirant attorneys to set realistic goals for themselves and not to direct all their energies towards achieving perfection.

Ray Mungoshi, student
bloemfonteinschool@lssalead.org.za

Rule of law champions honoured

Two leaders in the legal fraternity were conferred the Rule of Law Champion Award by LexisNexis late last year. The recipients of the award were Judge Dennis Davis and Chief Executive Officer of the Law Society of South Africa and Director: Legal Education and Development, Nic Swart.

The inaugural South African award aims to celebrate and acknowledge those within the South African legal fraternity who have led efforts to advance the rule of law and strengthen civil society.

Pictured with Nic Swart (left) is the Marketing Director of LexisNexis, Thabo Molefe, at the award ceremony held on 18 November 2015.

Mapula Thebe
Mapula@derebus.org.za

People and practices

Compiled by Shireen Mahomed

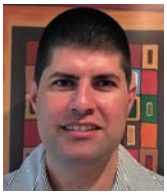
Steyn Le Roux Inc in Johannesburg has three promotions.

Peter Mennen has been promoted to a director.

Jaco Jansen van Vuuren has been promoted as an associate.

Anja Van Wijk has been promoted as an associate.

Shepstone & Wylie has appointed Simphiwe Shozi as an associate in the Pietermaritzburg branch. He specialises in conveyancing and property law.



Usher Attorneys in Pietermaritzburg has appointed Gary Warne as a professional assistant. He specialises in business rescue and insolvency matters.

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.

***De Rebus* offers this service free of charge to attorney firms. To feature in this column, e-mail shireen@derebus.org.za**

Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za

LSSA Co-chairpersons stand in solidarity with Lesotho lawyers against threats

Law Society of South Africa (LSSA) Co-chairpersons, Busani Mabunda and Richard Scott, joined a number of other observers at the Maseru High Court on 2 December 2015, in solidarity with Lesotho practitioners who had reported threats and harassment against themselves and their clients, being Lesotho Defence Force (LDF) soldiers who were alleged to have mutinied earlier in 2015.

The LSSA was informed by the Law Society of Lesotho that defence lawyers had been experiencing threats to themselves and their families, court orders had been ignored and judges intimidated. Lawyers had also been denied access to their clients.

In a press statement in November 2015, the LSSA called on the Lesotho authorities to uphold and respect the rule of law, the independence of the judiciary and of legal practitioners at all times. Also, the LSSA stressed that the Lesotho authorities must ensure that due process of the law is respected in this matter without subjecting the accused to any form of abuse of their rights, which included the right to have access to legal representation.

The Co-chairpersons said: 'The Lesotho authorities must safeguard the right of legal practitioners to practise freely without fear of intimidation, arrest or assault. Lawyers must be able to consult freely with their clients to provide effective representation. What our colleagues in Lesotho are being subjected to represents an infringement of the United Nations Basic Principles on the Role of Lawyers, which state that "Governments shall ensure that lawyers … are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference … and … that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics".'

The President of the Southern African Development Community Lawyers' Association (SADC LA), Gilberto Caldeira Correia, also expressed the concern of the regional body about the threats being directed at lawyers and the judiciary in the course of their work in Lesotho. He called on the legal profession in Southern Africa to stand up in solidarity with their counterparts in Lesotho, to defend the rule of law and independence of the judiciary in that country and to advocate for fair trial rights for the 23 soldiers.

He stated in a press releases: 'These threats have been simmering for a long time but were brought to the fore following the arrest, detention and court martialling of 23 members of the Lesotho Defence Forces (LDF) on charges of mutiny in May 2015. The threats that are directed at the judiciary and the legal profession in Lesotho present serious challenges to the independence of the judiciary, the legal profession and the observance of the rule of law in that country.'

SADC LA noted that, since the arrest of the 23 soldiers, at least six lawyers had been seized with the case at various stages. They had all faced different kinds of threats, harassment and intimidation from members of the LDF. One of the six had been forced into exile and was in South Africa. The other five lawyers, though still in Lesotho, had been confronted by members of the LDF and told that they were being 'watched' or that they were 'next'. This had the effect of undermining the rights of the lawyers to practise their profession without fear or intimidation and the rights of the accused persons to legal representation of their choice.

From left: Africa Director at the International Commission of Jurists, Arnold Tsunga; past President of the Law Society of the Free State, Vuyo Morobane; Law Society of South Africa Co-chairperson Busani Mabunda; Lesotho attorney, Tumisang Masotho and Law Society of South Africa Co-chairperson Richard Scott, outside the Maseru High Court in December.

SADC LA explained that a 'hit' list had been circulated on social media and the names of two of the six lawyers were on that list. Although the 'hit' list could not be attributed to the state or any of its organs, the lawyers concerned were apprehensive given that two people whose names were on a previous 'hit' list circulated on social media had been killed soon after the circulation of the list.

Mr Correia said: 'The SADC LA therefore calls upon the State to investigate the origins of that "hit" list and bring those responsible to book. This will help in assuring the lawyers representing the 23 soldiers that they have got the necessary protection from the State. The United Nations Basic Principles on the Role of Lawyers calls on authorities to ensure adequate safeguarding of lawyers where their security is threatened as a result of discharging their functions, a responsibility that the Government of Lesotho should assume. The arrest of the 23 soldiers has also underlined the continued disregard of the rule of law and threats to the independence of the judiciary in Lesotho. On two occasions, the courts have ruled that the 23 soldiers must be released on "open arrest", a form of bail. On both occasions, the LDF have refused to comply with the court orders. Instead of releasing the 23 soldiers, the LDF proceeded to place them in solitary confinement thereby subjecting them to torture, inhuman and degrading treatment. This disregard for court orders has the effect of undermining the independence, effectiveness and authority of the judiciary and the justice delivery system in Lesotho'. The SADC LA called on the Prime Minister of Lesotho to ensure that the LDF obeys court orders and are not portrayed as an institution that is above the law.

Attorneys invited to join the LSSA 2016 election observer team – training in February and March

The Law Society of South Africa (LSSA) will shortly launch its observer mission for the 2016 local government elections. Attorneys are invited to join the LSSA election observer team. Online registration – also for the training – is available on the LSSA website at www.LSSA.org.za (under 'Our initiatives').

To join the election observer team, you must –

- be a practising attorney;
- be in good standing with your provincial law society;
- attend one *free* observer training session provided by the LSSA (dates and centres indicated below); and
- be registered to vote and be voting on election day.

Attorneys are required to visit at least three voting stations of their choice on election day and report on their observations.

For more information or to register for training, e-mail Jeanne-Mari Retief at jeanne-mari@LSSA.org.za

Training centres and dates

Centre	Observer training session dates
Johannesburg	16 February 2016 22 March 2016
Pretoria	29 January 2016 4 March 2016
KwaZulu-Natal	22 January 2016
Cape Town	25 February 2016 26 February 2016
East London	25 February 2016
Port Elizabeth	9 March 2016
Polokwane	4 March 2016
Bloemfontein	5 February 2016
Potchefstroom	26 February 2016

In 2014 the LSSA launched its first observer mission during the national elections and attorneys were deployed to voting stations across the country to observe the voting process at various voting stations.

A report was compiled from the observer feedback and sent to the Electoral Commission (IEC). The LSSA's goal was to place trained attorneys in the field on election day to observe the election processes at voting stations. The final report compiled by the LSSA was submitted to the IEC. This can be viewed on the LSSA website under 'Our initiatives'.

Scam alert –

scamster purporting to have paid funds from the LSSA incorrectly into law firm bank account and requesting refund

The Law Society of South Africa (LSSA) has been made aware of a scam in December 2015 in which a caller, 'Antony', purports to be from the LSSA and to have deposited funds incorrectly into the attorneys' firm bank account, and then requests a refund.

The LSSA urges attorneys to be vigilant and alert to such scams and to inform their bookkeeping staff too.

Some signs to look out for:

- Incorrect address on the document.
- Telephone number is a fax number.
- Incorrect banking details for the LSSA.
- Signatory provides only a cell phone number.
- E-mail address is not an LSSA e-mail address but a generic one.

Good practice always requires confirmation from the client (telephonic and written) and from the client's bank (stamped original).

If you receive a request regarding incorrect payments from the LSSA, please contact the LSSA Finance Department immediately at (012) 366 8800 or e-mail: contact@LSSA.org.za to confirm whether this is a legitimate transaction or a scam.

LSSA Significant Leadership for Women Lawyers also in KZN in 2016

The Law Society of South Africa's (LSSA's) popular Significant Leadership for Women Lawyers programme will continue developing a network of strong, leading women in the legal profession. The programme will continue in 2016, and due to demand, the LSSA is also considering expanding the programme to KwaZulu-Natal.

The Significant Leadership for Women Lawyers programme is aimed at equipping and empowering women attorneys with an understanding of key concepts in order to consider taking leadership positions in the legal profession. The LSSA's aim is to do its part to increase the number of female attorneys in leadership and decision-making positions.

The programme has been presented in Gauteng twice. The first course ran for six full days with the first three-day session in November 2014 and the second session in February 2015. As a result of the success of the initial course, a second programme ran in August and October of 2015, with the latter course sponsored by law firms Hogan Lovells, Cliffe Dekker Hofmeyr Inc and Bowman Gilfillan.

Presenters, all experts in their fields, presented the following key topics at the programme –

- understanding 'branding' and how to develop your own brand;
- learning about leadership styles and discovering how to apply your own style;
- the requirements of powerful writing;
- the power of organisational politics and how to manage this reality;

- thinking and acting strategically;
- understanding emotional intelligence and interacting effectively at different levels; and
- learning about the challenges/obstacles for women leaders and how to overcome these.

The feedback received from participants was positive and encouraging.

More information on the Significant Leadership for Women Lawyers programme can be obtained from Jeanne-Mari Retief at jeanne-mari@LSSA.org.za

LSSA introduces seminar on attorneys adjusting to the changing legal services landscape

Many articles have been written, both nationally and internationally, about the changing legal landscape facing lawyers and their professions. The common theme throughout these articles is that the business model of traditional law firms has already changed and will continue to change in the future. It is important to note the law itself is not becoming less relevant but rather there is an urgent need for better and cheaper legal services that can keep pace with the demands of a rapidly globalising world.

Many permanent changes are already in place, which include –

- using digital media to promote law firm branding and practice law;
- shrinking bespoke work;
- commoditisation of legal work;
- greater pricing competition;
- cloud data storage and access;
- e-discovery;
- competition from non-traditional legal service providers; and
- non-hourly billing arrangements.

It is noticeable from the above examples that the significance of information and communication technologies has been growing exponentially in legal practice over the past few years. Making technology work for all participants in the justice system benefits all sectors of society as it enhances access to justice. For example, the public's Internet connectivity has led to greater access to the law via advice and self-help legal services. Advancing technology should, therefore, serve as a means of closing rather than widening the justice gap.

A variety of systems are used in the electronic transfer of information, which includes interfacing with government systems, for example, the South African Revenue Services transfer duty submission system. All indications are that these types of mandatory electronic reporting interfaces are likely to increase as government prioritises the development and implementation of business solutions in key strategic areas.

To survive the changes, law firms need to respond strategically and effectively to differentiate themselves from the competition. Many law firms have already transformed and streamlined their websites to reflect a strong, modern brand that is client centric (focuses on solving client problems through effective, efficient services). There is no doubt that the effective use of social media is one of the top skills required by an attorney in the 21st century. Indeed, a competent attorney's skillset needs to evolve as technology evolves.

It is a strategic imperative that law firms adapting to the changing landscape engage in due diligence exercises as part of business risk management to ensure that their professional responsibilities are still being executed properly.

In February/March of 2016, the Legal Education and Development (LEAD) division of the Law Society of South Africa will hold a seminar where specialists in their fields identify and discuss current and future trends in the profession, both nationally and internationally. The seminar will highlight why attorneys should think differently about their profession to remain relevant in the future.

If you are interested in attending the LEAD seminar called 'The end of legal practice as we know it', e-mail Barbara Makhanda on seminars@LSSALEAD.org.za.

***Ros Elphick**, Communication Practitioner, LSSA*
Ros@LSSALEAD.org.za

Join the LSSA attorney-to-attorneys mentoring programme

The Law Society of South Africa (LSSA) recognises the important role one-on-one mentoring plays in underrepresented groups in the profession and its Legal Education and Development (LEAD) division manages a 'Mentors in Legal Practice' programme to recruit and match mentee to mentor attorneys.

Due to South Africa's ever-changing legal landscape, mentors are viewed not only as a source of skills transfer but also as a source of motivation and career development in new areas of practice within the profession. The LSSA foresees its mentorship programme as being a key mechanism to transfer professional skills and values in the future dispensation.

LEAD matches attorneys around compatibility, based on practice areas, levels of experience and location. To assist both parties develop the relationship fully, LEAD provides ongoing support throughout the period on mentorship. Various materials in the form of mentorship manuals, DVD's and seminars are also being developed to train mentors to transfer skills more effectively.

LEAD encourages prospective mentees (newly admitted attorneys or attorneys who have not had the opportunity to gain the skills required to practise in an area of law in which they have shown a keen interest) to fill out their profiles on the LEAD website at www.LSSALEAD.org.za and then get matched for compatibility with available mentors. These are experienced attorneys who have completed profiles identifying their practice areas of expertise. Mentors are encouraged to consider including the transfer of 'soft skills' such as business development, the effective use of digital media, marketing and leadership.

While LEAD will make every effort to match a mentee to a mentor, the match will depend on the number of mentors available in the mentee's geographical preferred area plus their practice area interests. Although LEAD cannot guarantee an immediate match, it will maintain the mentee's details on its database and continue to look for a suitable match.

If you are interested in forming part of the LSSA's network of mentors and mentees, e-mail Stephne Pieterse at mentorship@LSSALEAD.org.za.

***Ros Elphick**, Communication Practitioner, LSSA*
Ros@LSSALEAD.org.za

By Caitlin Askew

Step-by-step guide to mediation in the magistrate's court

The magistrates' courts are currently over-flowing with cases. Various disputes are brought before the courts on a daily basis. Attempts to get a trial date or a date on the roll can leave you waiting months before your matter is heard. In light of the above, the legislature has looked into ways in which we can reduce the amount of cases that go to trial, in essence, alternative dispute resolution. In December 2014, ch 2 of the magistrates' courts rules came into operation providing an alternative to formal litigation, namely voluntary mediation in selected magistrates' courts.

Mediation is the process whereby a third party, namely a mediator, assists the parties in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. This mediation process applies to parties in both actual and potential litigation. The main objectives of this mediation process is to facilitate discussions between the parties and to preserve the relationships between the parties that may become strained or destroyed through the adversarial nature of litigation.

A step-by-step practice note guideline follows:

Step 1: When to refer a matter to mediation

A matter can be referred to mediation before or after litigation but must be done before judgment is handed down. If the trial has commenced the parties must first obtain consent from the court to proceed with mediation. There is also a duty on judicial officers to inquire into the possibility of mediation and provide the parties the opportunity to refer the dispute to mediation.

Step 2: How to refer

Parties desiring to refer the matter to mediation, both prior to the commencement of litigation and during the commencement of litigation, must make a request in writing to the clerk of the court. The clerk of the court must inform all parties to the dispute that mediation is being sought and must call on all the parties to attend a conference within ten days, for the purpose of determining whether all or some of the parties agree to refer the dispute to mediation.

Step 3: Giving notice

Where the parties in the case of an intended action, have agreed to submit their dispute to mediation, one of the parties must notify the clerk of the court by means of the prescribed notice. Where the action has already been instituted, one of the parties must notify the court concerned through the prescribed notice. In an action that has already been instituted, the clerk will file the notice under the number assigned to the case in question and submit it to the court where the case originated and request the court to adjourn the dispute for mediation proceedings. A request for mediation can be considered in chambers, however, this is at the discretion of the adjudicator or magistrate.

Step 4: Appointment of mediator

The clerk, along with the parties must appoint a mediator. If consensus cannot be reached, the clerk must appoint the mediator. The clerk will then also set a time, date and venue for the mediation and assist the parties to conclude a written mediation agreement, which must be signed by the parties. The party claiming relief must lodge a statement of claim with the clerk within ten days of signing the agreement. The party against whom relief is being claimed must lodge a statement of defence with the clerk.

In the event that litigation has already commenced, the parties are to provide the mediator with copies of the summons and plea, or statement of defence where no plea is filed in the case of action proceedings. In application proceedings the parties are to lodge copies of the founding, answering and replying affidavits, or statement of defence if no answering affidavit has been filed.

Step 5: Filing of documents

The parties are entitled to file, with the clerk of the court, any document or evidential material on which the action is based, or which the parties intend to use at mediation proceedings at least seven days before the mediation proceedings. The parties may also file or supplement these documents during the mediation proceedings.

Step 6: Representation at mediation

The parties have a right to be represented at mediation proceedings, however, this is not mandatory.

Step 7A: Successful mediation

Should the parties reach agreement as a result of the mediation, the mediator must assist the parties to draft the settlement agreement, which must then be transmitted by the mediator to the clerk. On receipt of the agreement, the clerk must place the agreement before a magistrate in chambers for noting that the dispute has been resolved or to make the agreement an order of court, by the agreement of the parties.

Step 7B: Unsuccessful mediation

If settlement is not reached in mediation between the parties, the clerk must, on receipt of the report from the mediator, file the report to enable litigation to continue, from which all suspended time periods will continue to run.

Mediation is quicker than the usual route of full blown litigation and is more cost-effective, amicable and may prove more successful for both parties involved. Attorneys, litigants and parties to a dispute are encouraged to entertain the mediation route and settle their disputes cordially outside court.

Caitlin Askew *LLB (Rhodes)* is a candidate attorney at BKM Attorneys in Johannesburg.

By
Ronald
Rikhotso

Bad practice continues: Who must administer an oath in criminal proceedings?

Despite the provisions of s 162(1) of the Criminal Procedure Act 51 of 1977 (the CPA), supported by precedents of decided cases, the practice of allowing court interpreters to administer the oath in criminal proceeding still continues, especially in remote areas. This often occurs when the presiding judicial officer is not familiar with the language that is commonly used at that particular district where he or she presides, thereby allowing witnesses to be sworn in by interpreters.

Section 162(1) of CPA provides: 'Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form: "I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God"'.

In *S v Mashava* 1994(1) SACR 22 (T) it was held that the oath must be administered by a judicial officer and not the interpreter. In the event that the oath is not administered by the judicial officer as prescribed by s 162, the witnesses are not properly sworn in and their evidence is, therefore, inadmissible.

The Supreme Court of Appeal was faced with the same question in 2014 and made the following findings in *Matshiva v S* [2014] 2 All SA 141 (SCA): 'The reading of section 162(1) makes it clear that, with the exception of certain categories of witnesses either falling under section 163 or 164, it is peremptory for all witnesses in criminal trials to be examined under oath. … the testimony of a witness who has not been placed under oath properly, has not made a proper affirmation or has not been properly admonished to speak the truth as provided for in the Act, lacks the status and character of evidence and is inadmissible' (at para 10).

In 2015 the North West Division was faced with a similar question in *S v Pilane* (NWM) (unreported case no CA 10/2014, 17-9-2010) (Hendricks J), wherein the regional court in Rustenburg, heard the testimony of three witnesses, who were not properly administered under oath, and convicted the accused of rape and sentenced him to three years imprisonment. On appeal, the sole question was whether s 162(1) had been complied with. Is it permissible for the court interpreter, as opposed to the magistrate, to administer the oath? The court held that because the evidence of all three witnesses was not given under oath, in terms of the peremptory provisions of s 162(1) of CPA, it followed that there was no admissible evidence against the appellant. The conviction and sentence were set aside.

Section 165 provides that: 'Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be'.

From this section it is also clear that even where evidence is tendered to in court, with the assistance of an interpreter or intermediary, the oath, affirmation or admonition under s 162, 163 or 164 must still be administered by the presiding judge, judicial officer or registrar of court. However, since the interpreter is present, such oath, affirmation or admonition can be administered through him or her. The legislation is clear that an oath can be administered by a court interpreter. Even where the oath and evidence is administered through a court interpreter, the provisions of r 68 of magistrates' court rules must be heeded. Such an interpreter must be a competent interpreter who has taken an oath or made an affirmation in terms of the rules that he or she will interpret truly and correctly. In *S v Siyotula* 2003 (1) SACR 154 (E), the evidence of two witnesses and the accused were interpreted by an interpreter who had not been properly sworn in as an interpreter. The interpreter also administered the oath to the accused. The accused's evidence had to be disregarded as the interpreter was not sworn in and thus the oath could not be administered by him.

Conclusion

From my point of view, the interpretation of s 162 and 165 provides a clear general practice for the oath to be administered by a presiding judge, judicial officer or Registrar of court. The phrase 'Registrar of court' in my view is not wide enough to include court interpreters. Therefore, the oath administered by the interpreter causes irregularity and as a result the evidence given by the witnesses tend to be inadmissible since they were not properly sworn in.

Ronald Rikhotso *LLB (University of Limpopo)* is an attorney at RS Rikhotso Attorneys in Burgersfort.

The Attorneys' Admission Examination 2016 Syllabus

In this examination candidates must have a sound knowledge of substantive law and be able to apply it regarding matters covered by this syllabus.

2016 examination dates

- 9 and 10 February 2016.
- 16 and 17 August 2016.

The registration fee is currently: First paper R 114 (incl VAT), second, third and fourth papers R 57 (incl VAT) per paper.

The examination system

The guidelines for the admission examination are set out in s 14 of the Attorneys Act 53 of 1979 (the Act).

The examination format

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.

- **First paper (s 14(1)(*a*))** – this paper is written on the first day of the examinations from 9 am to 12:15 pm.
- **Second paper (s 14(1)(*c*))** – this paper is written on the first day of the examinations from 2 pm to 4:15 pm.
- **Third paper (s 14(1)(*c*))** – this paper is written on the second day of the examinations from 9 am to 11:15 am.
- **Fourth paper (s 14(1)(*b*))** – this paper is written on the second day of the examinations from 2 pm to 4:15 pm.

Examination criteria

A candidate who attains 50% or more in a paper will not have to attend an oral, except if a special reason exists for calling a candidate to an oral. Candidates who achieve between 40% and 49% in any of the papers will be permitted to do an oral in respect of that paper. Candidates who attain less than 40% in any of these papers will not be given an oral and will fail the paper concerned.

Remark

Candidates who are dissatisfied with their marks in any section of the examination may have their paper remarked before orals are conducted if –

- they apply in writing for a remark to the provincial law society concerned within one week of the results of the examination becoming available; and
- they pay a remark fee equivalent to twice the fee payable for the section of the examination in which the remark is requested. If the remark is successful in that the status improves (eg, failed and after remark is eligible for an oral) this fee will be refunded.

Regulations

- A candidate may complete the four phases of the examinations in any sequence. Ideally the papers should be completed simultaneously (see r 3(2) in GN 23 *GG*11091/8-1-1988)).
- Some candidates are uncertain about

whether, having successfully completed a certain part of the examination, they may in the oral be examined on the part completed previously when they attempt the next paper at a later stage and are called for an oral. This is unlikely but possible. The golden thread of ethics runs through the whole examination and it can never be considered finished before the whole examination has been completed. Questions concerning ethical matters and questions concerning the rules of a specific law society may be asked at all times.

Composition of the papers

• Section 14 of the Act prescribes the appointment of examiners.
• Examiners and experts in the various fields set the papers. Moderators, appointed from the ranks of the examiners, check, discuss and approve these papers.

Practical orientation

Although the emphasis in the examination is on practical aspects, this can never be totally separated from a thorough knowledge of the law, the Acts with regulations and the rules of court.

Allocation of marks

The allocation of marks is a good indication of the detail required. Do your planning for each section accordingly.

General

• Unless you are informed of the contrary, all questions should be answered with reference to the current rules, legislation etcetera.
• Do not spend two hours on one section of a three-hour paper consisting of four questions; it is futile to attain 80% in two questions and only 20% in the other two questions. Determine beforehand the amount of time needed for each question and keep to your timing.
• Copies of previous papers and answer guides are available from the Legal Education and Development (LEAD) section of the Law Society of South Africa. Contact Sipho Mdluli at (012) 441 4611.

Guide to the nature and scope of the Attorney's Admission Examination (syllabus)

1 *Introduction*

• In terms of s 14 of the Act, examinations are conducted in respect of:
– **s 14(1)(*a*) of the Act:** High court, magistrates court, criminal procedure and motor vehicle accidents.
– **s 14(1)(*b*) of the Act:** Practical attorney's bookkeeping.
– **s 14(1)(*c*) of the Act:** The practice, functions and duties of an attorney including administration of estates.
• At present the examination is conducted as follows:
– **First paper:** High Court procedure, magistrate's court procedure, motor vehicle accidents (Road Accident Fund claims) and criminal procedure. This paper is set as a three hour paper and counts 100 marks.
– **Second paper:** Administration of estates; drafting of wills and succession. This paper is set as a one and a half hour paper, but two hours are allowed for completing it to allow candidates to read the questions carefully before answering them. This paper counts 100 marks.
– **Third paper:** General attorney's practice, namely, the practice, duties, ethics and functions of an attorney. This paper is set as a one and a half hour paper, but two hours are allowed for completing it to allow candidates to read the questions carefully before answering them. The paper counts 100 marks.
– **Fourth paper:** Attorney's bookkeeping. This paper is set as a one and a half hour paper but two hours are allowed for completing it. The paper counts 100 marks.
• A candidate may complete the four papers of the examination in any sequence. Ideally the papers should be completed simultaneously (see *GG op cit*).
• In general terms, candidates are tested in the written paper on their ability to draft and record matters related to the fields of practice set out above. It is obvious that they cannot be tested without also testing their ability to apply the relevant substantive law. The written test is fundamental to the success or failure of the candidate. Candidates who have to present themselves for oral examinations will be tested on their verbal presentation of legal knowledge. Special attention is given to the practical application of the particular fields of law, and to candidates' knowledge and insight into the ethical standards applicable to an attorney's practice.

The examinations are conducted with a view to establishing whether candidates meet these standards. Examination questions may be set with more than one object in view. In a single question, candidates may be tested on their knowledge of the rules and practice in the courts in whose jurisdiction they are examined and, simultaneously, they may be tested on their ability to examine and analyse facts placed before them, to apply the substantive law to the facts and to draft documents logically and coherently based on the facts that are relevant.

Similarly, a question may test the ability of the candidates to find the applicable law by using facilities such as encyclopaedias, textbooks, journals, indices and the like (whether by electronic means or hard copies), and to reduce such material into an effective letter, opinion or argument before a court or other tribunal. Candidates are also expected to have reasonable practical knowledge of proper procedures to be applied in a well-run office.

2 *Nature of the examination: Objectives*

The content of the syllabus (and the nature of the examination) aims at ensuring that candidates have certain skills and experience. The level expected is that of a newly admitted attorney in a general medium-sized firm. This implies the following:
• Candidates must have a general understanding of the role of the attorney as a practitioner and an officer of court, of the role of the legal profession in society, of the ethics of the profession and an ability to recognise conflicts of interest and ethical difficulties. Candidates will be required to know the rules of the law society of the province in which they are being examined, in as far as they relate to professional conduct.
• Candidates must be competent and have adequate experience in the basic skills and techniques of attorneys and for that purpose –
– be able to handle facts and apply legal principles to factual situations;
– be able to research legal problems and to use the sources of law;
– have knowledge of the practical aspects of advocacy (the arguing of elementary cases before courts and tribunals and the effective presentation of written legal arguments), which shall include knowledge of negotiation (eg, to settle the terms of an agreement, out of court settlements, finalising disputes without recourse to the courts), the preparation for and the conduct of a trial in the High Court, the magistrate's court and other tribunals, the gathering and preparation of evidence and the procedures relating to the calling of witnesses in civil and criminal courts;
– understand office procedures and routines, including the keeping of attorney's books and the preparation and rendering of bills of cost and accounts and administer the affairs of clients;
– be experienced in the drafting of documents (straightforward contracts, wills, pleadings, opinions, briefs to counsel and, in particular, pleadings in the magistrate's court and, where relevant, in the High Court);
– be able to communicate effectively with clients, colleagues and officials orally and in writing.

The above objectives presuppose that candidates have adequate knowledge of the relevant principles and provisions of substantive law.

3 *Analysis of various papers*

The various papers test the following skills and knowledge.

• Paper 1: Court procedure

– High Court

The practical application of the High Court Act and rules.

The ability to draft notices of motion, affidavits and causes of action for a summons, and other notices and documents in respect of which no prescribed forms exist; draft instructions to counsel on pleadings; conduct all types of proceedings in the High Court and write letters and opinions.

– Magistrate's court

The practical application of the Magistrates' Courts Act 32 of 1944 and rules. The ability to draft applications, affidavits, summons, pleadings and other notices and documents except where prescribed forms exist; conduct all types of proceedings in the magistrate's court and write letters and opinions.

– Motor vehicle accidents

Candidates should know all aspects of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (as amended), as well as the Road Accident Fund Act 56 of 1996 the regulations promulgated in terms of this Act, as well as the case law, concerning the rights of injured persons and dependants and the procedure relating to the formulation, computation and institution of claims against the Fund. As candidates are aware, significant changes to the relevant legislation are pending but are not yet effective. Candidates must ensure that they are aware of the changes as and when they come into operation, questions relating thereto may be included in examination papers.

– Criminal procedure

Aspects regarding the role of the prosecutor, investigation of crime and the various methods to secure the accused's attendance in court.

The procedure relating to a criminal trial, including applications for bail, the procuring of evidence and a general working knowledge of the Criminal Procedure Act 51 of 1977 with emphasis on ss 3, 6, 20, 23, 24, 26, 27, 30, 34, 35, 37, 39, 40, 49, 50, 54, 55, 56, 57, 59, 60, 62, 65, 66, 73, 103, 112, 113, 114, 115, 123, 124, 150, 195, 196, 201, 217, 220 and 297.

• Paper 2: Estates

A general working knowledge of the Administration of Estates Act 66 of 1965 and its regulations including the drafting of estate accounts, drafting and execution of wills, including testamentary trusts, the application of the law of testate and intestate succession, a knowledge of the principles of estate duty and capital gains tax relating to deceased estates and a rudimentary knowledge of estate planning.

• Paper 3: General attorney's practice

Professional ethics figure very prominently in this section. This term means all the rules of professional conduct appertaining to an attorney in his professional life – as an officer of court, in his relationship with his client, colleagues (including those at the Bar) and his staff – also extra-professionally while he remains in the profession.

• Sources:

– *The ALS Practice Manual*, (Durban: LexisNexis, 2014) (contains, *inter alia*, Attorneys Act and regulations, Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941 and law societies' rules)

– Relevant provincial law society rules

– Lewis *Legal Ethics: A guide to professional conduct for South African Attorneys*, (Cape Town: Juta 1982)

• Optional reading:

IM Hottman *Lewis & Kyrou's Handy Hints on Legal Practice* (Durban: LexisNexis 2011). The second broad subject that is included in this section is the drafting of the following documents:

– deeds of sale – movable and immovable goods;
– partnership agreement;
– suretyship – reference to relevant Act;
– acknowledgement of debt;
– cession and assignment;
– option;
– right of pre-emption;
– sale of business;
– lease of fixed property;
– letter of demand;
– pledge;
– cancellation of agreement; and
– indemnity.

The paper on general practice does not stand in complete isolation to the content of other papers in the examination. For example, a question on ethics may relate to a situation arising during litigation and the legal opinion may be one relating to magistrate's court procedures.

Finally, the purpose of the paper is to cover subjects or topics that do not strictly belong to any other sections on which the examination is conducted, but are very important in an attorney's practice.

The following are the prescribed Acts and regulations:

– Attorneys Act and Regulations including ch II on the Attorneys Fidelity Fund.
– Prescription Act 68 of 1969, terms of prescription, stay of prescription, extinctive and acquisitive prescription.
– Alienation of Land Act 68 of 1981, only ss 2 and 28(2).
– Matrimonial Property Act 88 of 1984, especially s 15.
– Value-Added Tax Act 89 of 1991, liability for and payment of VAT, VAT implications of various contracts, VAT and the drafting of agreements.
– Insolvency Act 24 of 1936, proving of claims, impeachable transactions and selected sections relating to the appointment of trustee/liquidator.
– Companies Act 71 of 2008, selected sections regarding formation of company, transfer of shares, ss 19, 20, 44, 112, 76 and 77.
– Trust Property Control Act 57 of 1988, procedure for registering a trust, difference between ordinary trust and discretionary trust.
– Justices of the Peace and Commissioners of Oaths Act 16 of 1963, how to take an oath.
– Contingency Fees Act 66 of 1997.
– National Credit Act 34 of 2005.
– Consumer Protection Act 68 of 2008.

• Paper 4: Attorney's bookkeeping

This entails a test in respect of the practical skills necessary for the keeping of attorney's books of account.

Candidates must show a thorough knowledge of the concept of trust money and of the essential requirements of the modern double entry bookkeeping system as applied to attorney's bookkeeping, the functions of the various books of account and must have sufficient practical knowledge of the supervision of bookkeeping to enable them to maintain the books of account required in an attorney's office. They must be able to apply accepted measures, controls and ethical standards to bookkeeping and financial matters.

Questions on VAT are included in this paper.

Please note: No bookkeeping paper will be provided in the answer books. Candidates must draw the necessary columns for the various books of account required. Pocket calculators may be brought along and utilised for this paper.

4 *Legislation*

Apart from the other relevant Acts already mentioned above, the undermentioned additional Acts including rules and regulations, where applicable, are relevant in all papers but particularly in Attorneys' Practice –

• Apportionment of Damages Act 34 of 1956;
• Justices of the Peace and Commissioners of Oaths Act 16 of 1963;
• National Credit Act 34 of 2005;
• Credit Agreements Act 75 of 1980 (in as far as it relates to the recovery of goods and the payment of monies owing);
• Conventional Penalties Act 15 of 1962;
• Trust Property Control Act 57 of 1988;
• Prescription Act 68 of 1969;
• Attorneys Act 53 of 1979;
• Insolvency Act 24 of 1936;
• Divorce Act 70 of 1979;
• Matrimonial Property Act 88 of 1984;
• Maintenance Act 23 of 1963/99 of 1998;
• Constitution Act 106 of 1996;
• Consumer Protection Act 68 of 2008;
• Prevention of Illegal Eviction (PIE); and
• Unlawful Occupation of Land Act 19 of 1998.

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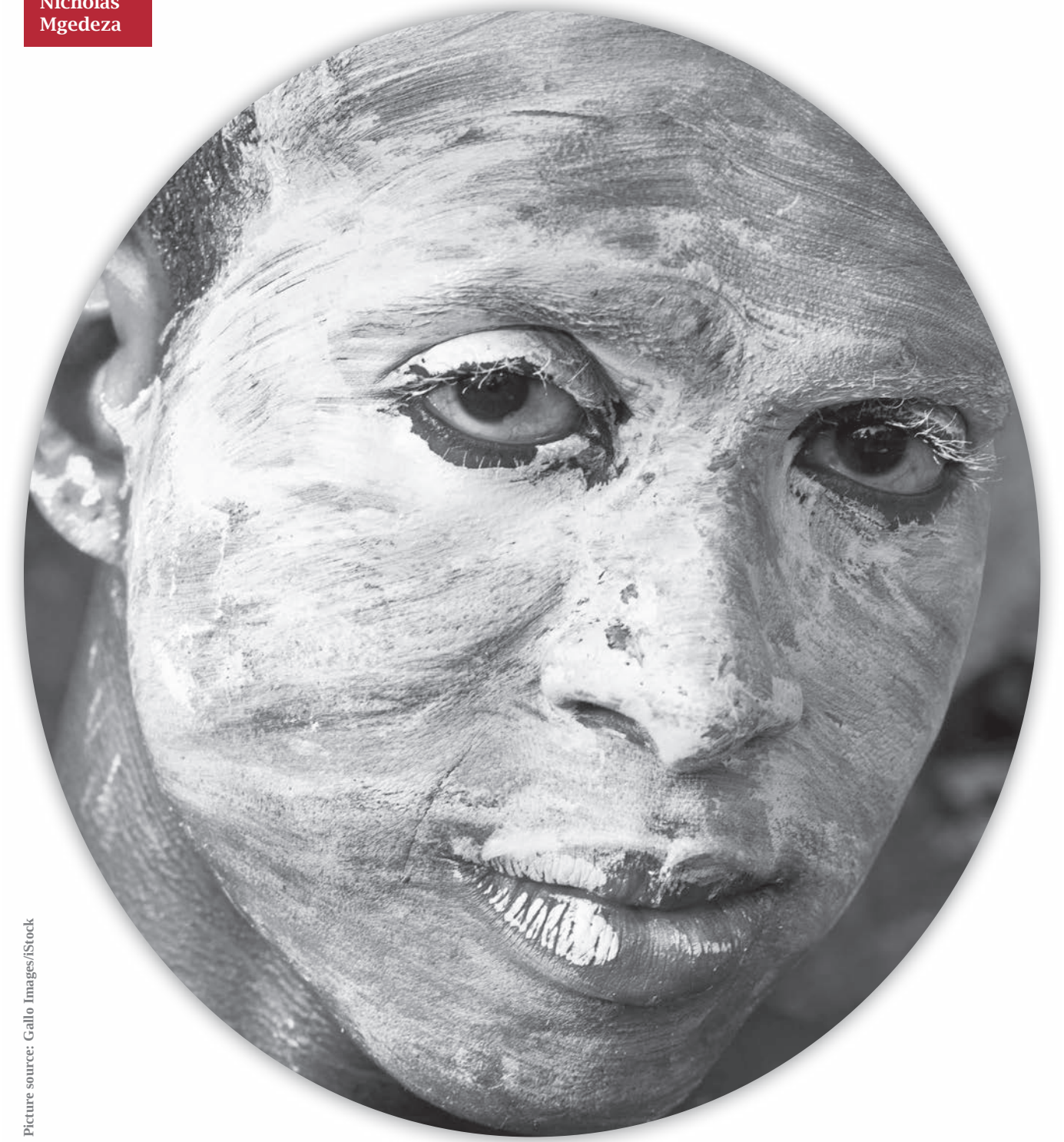
How does the law protect initiates and their rite of passage?

By Nicholas Mgedeza



Picture source: Gallo Images/iStock

In South Africa initiates annually go to initiation school. Teenagers are the most vulnerable to initiation. In this article, I scrutinise if the registered or unregistered traditional surgeons of the circumcision schools, who are ill-equipped to conduct initiation and the subsequent death of initiates could, in principle, be criminally liable or alternatively be charged with common law murder; culpable homicide or assault. I will look into the issue of determining culpability and constitutional perspective as benchmark of the initiate's rights, and lastly, I will make a determination on the legal effects of death as the result of negligent conduct of the traditional surgeons. Since there is no codified law in our jurisprudence, I make recommendation for enactment legislation to curb this unfortunate trend.

It is axiomatic that there are illegal circumcision institutions lingering in all corners of our country and, as the result of lack of know-how, unruly dispositions, hazardous health conditions, assault, incompetence and gross negligence, some initiates die while they are at the illegal initiation schools. However, one cannot overlook that such practises also take effect in the registered or legal initiation schools. The question is whether our jurisprudence does countenance that the person(s), under whose auspices the illegal and legal schools are under, can be charged with murder as the consequence for death of initiates, culpable homicide and assaults?

Applicability of elements of crime of murder

In our jurisprudence, murder is a common law offence. Murder is defined as the unlawful and intentional causing of the death of another human being (CR Snyman *Criminal Law* 5ed (Durban: Lexis Nexis 2008) at 447). Claassen's Dictionary of Legal Words and Phrases vol 3 defines 'murder' as: '*Murder* is an unlawful killing of another person with what is generally described as intent to kill. … Where the crime of *murder* is fully discussed. "To constitute in law an intention to kill there need not, however, be a set purpose to cause death or even a desire to cause death. A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."' In order to bring the routine and persistent death of initiates to a complete halt – at both legal and illegal initiation schools – common law criminal liability for murder can be utilised in order to avert the recurrence of such deaths, to deter the traditional surgeons from persisting with such illegal or unwarranted conduct and as the form of retaliation against such perpetrators. In a criminal trial, the burden of proof is on the state to prove the guilt of the accused beyond reasonable doubt. Thus the state needs to prove all the elements of the crime of murder.

Culpa and causation

The element of intention needs to be proved by the state to be successful. In principle, the intention can be direct (*dolus direct*) or indirect (*dolus eventualis*). Some deaths are attributed to maltreatment, malnutrition, abuse (mostly physical in relative to mental). In these circumstances, the culprit probably knows that he is committing an unlawful act (murder). Accordingly, there must be certainty from the culprit that the deceased (victim) will die. Another benchmark on which intention of the culprit can be measured is *dolus eventualis.* In the latter, the culprit should subjectively foresee the possibility that, in striving towards his or her main objective, the unlawful act may be committed or the unlawful result may cause death; and he or she reconciles himself or herself with such possibility (*S v Humphreys* 2015 (1) SA 491 (SCA)).

The institution of illegal initiation schools is analogous to the circumstance where a bogus medical doctor conducts an operation on the patient and consequently the patient passes away as a result of the operation. The mere fact that one conducts a sensitive life threatening practice, and lucidly knows that he or she does not have the comprehensive medical training in that field, should foresee the possibility that due to his or her lack of expertise knowledge, and nevertheless proceeds with such an activity, detrimental effects might ensue. If such facts exist, in principle, *dolus eventualis* might be proven without any hassle. Moreover, on the issue of causation, *condition sine qua non* test will suffice in determining the factual causation of the initiates' death. See *S v Tembani* 2007 (1) SACR 355 (SCA), *S v Lifatila* (Namibia High Court) (unreported case no12/2011, 5-6-2012) (Liebenberg, J) unless there is *novus actus intervenes* to the issue of causation.

Culpable homicide

Culpable homicide is the unlawful, negligent causing of death of another human being. This form of crime is different from murder in the form of culpability, to wit, negligence is a determining factor and the former is determined by an objective test (a reasonable man test). In the event the initiates are assaulted or neglected and as the result of such assault or neglect the initiate subsequently passes away, I deem that the traditional surgeon of both the legal and illegal initiation schools can be convicted of culpable homicide. In the matter of *S v Mutsinda* 2011 JDR 1017 (LT), the accused, who was certified to run an initiation school, pleaded guilty to culpable homicide after an initiate died as the result of beating and kicks and the accused was ultimately sentenced to undergo periodical imprisonment and a fine. Thus, this case substantiates that the traditional surgeon can be charged and convicted of culpable homicide as a result of his or her conduct that culminates in the death of an initiate. Furthermore, this lucidly indicates that – in the event the state failed to prove intention – this is not treated with impunity in that the state can prove negligence on part of the traditional surgeon and, as the result, can be convicted of culpable homicide.

Assault

On the issue of assault, it is reminiscent in my mind of the SABC 'Initiation school assault prompts three arrests' (www.sabc.co.za, accessed 10-12-2015) wherein it was alluded that 'Police in Ngqeleni in Eastern Cape have arrested three young men following an assault of five initiates at an initiation school at Qhokama village. … [T]he initiates sustained severe head injuries'. Physical assault is designed to affect discipline and to prepare the initiates for the hardship of manhood. In principle, assault encompasses common assault and assaults with intent to cause grievous bodily harm (assault GBH). I submit that it is prudent to focus on the latter, assault GBH, as it is most common among the initiates. Legally, the definition of 'assault' denotes '... any unlawful and intentional act or omission –

(a) which results in another person's bodily integrity being directly or indirectly impaired, or

(b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place' (Snyman *op cit* at 455).

The crime of assault GBH has the same meaning as aforementioned but what is supplemented therein is grievous bodily harm. So in essence, this type of assault has the impact of causing injuries to somebody else, namely, injury on the head as the result of being hit with the *knobkerrie*. It is quite inevitable that initiates or the guardian of the minors have the absolute right to lay criminal assault GBH against perpetrators at initiation schools, as assault is reprehensible and criminal conduct. Common law definition of assault will have to be proved in the court of law and they have to adduce evidence in a court to prove *facta probanda* in order to secure a conviction.

Constitutional dimension

In principle, our Constitution reigns su-

preme to other legal instruments. Section 2 of the Constitution provides that: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. 'What this means is that the provisions of the Constitution are binding on all branches and organs of the state. It also means that the provisions of the Constitution have priority over any other laws in the country. More importantly, it means that any law or conduct that is, for whatever reason, "inconsistent with the Constitution, will be null and void"' (John C Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Cape Town: Juta 2004)).

The inevitable factual point is that almost all the patrons at initiation schools are minors and the latter are conferred rights that are contained in the Bill of Rights like any other citizens. Sections 10 and 11 of the Constitution respectively grants every child (under 18 years of age) the inherent dignity and the right to have their dignity respected and protected; and the unfettered right to life. Thus the enormous death of the initiates as the result of botched circumcision (from both legal and unregistered initiation schools) culminates into infringement of the initiates' rights to dignity and right to life in particular. Moreover, the death that is attributed due to malnutrition and abuse is undoubtedly the infringement of s 28(1)(*d*) of the Constitution, which provides that: 'Every child has the right … to be protected from maltreatment, neglect, abuse or degradation.'

The infringement of the aforementioned Constitutional provisions clearly indicate that the death of initiates from initiation schools is an outright violation of the Constitution. Moreover, on the social level, it is vividly known that such conduct is morally reprehensible and is *contra bonos mores.* Likewise, one may not sway from the fact that the initiation from such bogus initiation schools is deleterious to the lives of our future generations. One might contend that such schools are exercising religious and cultural activities. I might unequivocally be in agreement with such contention, however, one must not overlook that such schools are illegal, unregistered and the initiation procedure is conducted by unregistered traditional surgeons who lack precise knowledge of the entire procedure and, in some instance, conducts the procedure while inebriated. Therefore, the Constitution recognises the freedom of religion, belief and opinion, but the internal limitation thereon is that such must be consistence with the Constitution. This affirms the position that Constitution reigns supreme and the bogus initiates schools are unlawful institutions in that the personnel therein and traditional surgeon and other functionaries are not trained. In addition, they are effecting botch circumcision at the peril of the lives of the minor children.

Furthermore, in registered initiation schools, regulations must kick in to regulate and monitor the standard training of initiation schools as botched circumcisions taking effect and the initiates are dying as the result thereof. Moreover, criminal charges can be laid against the perpetrators of assault GBH as the common law defines such crimes and subsequently the state manages to prove all the elements of the offence.

Recommendation

In principle, it is inevitable that unregistered and some registered initiation schools immensely violates the initiates' Constitutional rights. Moreover, with our common law definition of murder, culpable homicide and assault GBH criminal charges can be laid against the unregistered traditional surgeons and registered traditional surgeons for murder (in instances of death of the initiates), culpable homicide and attempted murder in instances where the initiates escaped death. Alternatively, assault GBH charges can be laid in instances where the assault was grievous. However, the outreach programmes (which can be initiated and conducted by the bureaucracy, to wit, Department of Co-operative Governance and Traditional affairs and/or the Chiefs) will be necessary to conscientise the parents, Non-Government Organisations, civic organisations, traditional leaders, social workers, police officers and regents and other stakeholders that criminal charges may be instituted against the traditional surgeons of the illegal and legal traditional initiation schools. In such a move government can partner with the National Prosecuting Authority in such outreach programmes. I deem that the laying of criminal charges will ostensibly avert the rampant unregistered initiation schools, and will be deterrence to all traditional surgeons from persisting with such preposterous act. In the same breath, parents and teachers must play a pivotal role in informing boys about the ramifications of attending illegal initiation schools and the guard against abuse and reporting channels about the crime committed on them at initiation schools, both legal and illegal.

Furthermore, the enactment of the national legislation to abolish such illegal schools, criminalise such lethal and intolerable conduct of traditional surgeons (both legal and illegal initiation schools) will be a conspicuous mobility by the nation to tackle this calamity. I deem that such legislation will be a solution to this impasse, which has been holding over for quite too long unlegislated. Consequently, the lives of the young generations and the future generations will be spared immensely as the perpetrators of these heinous acts will be prosecuted and conceivably be purged from the society or be deterred by the heavy fines that might be prescribed by the legislation on conviction by the court of law.

Conclusion

This precedented conduct and detrimental practices must come to a halt. Young men are perishing every year in such illegal and legal initiation schools. As initiation school forms part of our historic culture, it will be absolutely wrong for the government to close them. However, legislation must regulate the conduct of the initiation schools. Moreover, it will be prudent if illegal initiation schools are abolished in the legislature and the conduct of traditional surgeon is regulated in the legislature that such conduct must be criminally punishable and hefty sentences are prescribed by the legislature. In addition, outreach programmes must be initiated to educate the youth, parents, and educators and other relevant stakeholders about such illegal initiation schools and about the laying of criminal charges against the atrocious traditional surgeons at both legal and illegal initiation schools. Lastly, I infer that murder charges can be laid against the traditional surgeons for the subsequent death of initiates.

Furthermore, common law definition culpable homicide and assault can be utilised to open criminal charges against perpetrators of such immoral acts and securing convictions against the unscrupulous traditional surgeons will conceivably act as the deterrence of such recurring act.

Nicholas Mgedeza *BProc Cert in Provincial and Local Government Law (Unisa)* is a non-practising attorney in Boksburg. ❑

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Ukuthwala: Is it all culturally relative? in 2015 (Aug) *DR* 28

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Section 65A(1) Notice to appear for a s 65 hearing of the Magistrate's Court Act

By Yusuf Mahmood Surty

Section 65A(1) of the Magistrate's Court Act 32 of 1944, in the District Court, is a procedure in order to inquire into the financial position of such debtor where he or she has not satisfied a judgment for the payment of a sum of money granted against him, and to enable the court to make such an order which has at its aim the settlement of the judgment debt as it may deem just and equitable (see *Lombard v Minister Van Verdediging* 2002 (3) SA 242 (T) and see also 'The law reports' 2002 (July) *DR* 43).

This procedure could also be used where judgment was granted in another district or the High Court or of a regional court, a copy of the judgments certified by the clerk or registrar of the court that granted the judgment must first be obtained and filed in the court out of which the s 65A, proceedings are to be instituted.

This article deals with Form 40 of the Annexure 1 Notice of the magistrate's court rules, the Certificate of Judgment; creditor's attorneys or affidavit or affirmation of the judgment creditor if in person and the registered letter advising the judgment debtor by registered letter of the terms of the judgment against him or her.

Form 40 Notice to appear in terms of s 65A (1)

The s 65A(1) Notice is in the form of a summons. It is served out of the court in whose area of jurisdiction the debtor resides, conducts on business, or is employed, or from the court in the district of which the registered office or main place of business of the debtor or juristic person is situated.

Regarding the said notice as far back as the Constitutional Court case of *Coetzee v the Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC), Judge Kriegler made some distinct comments regarding the 'so-called' Notice to show cause issued, pursuant to a s 65A notice in that:

- It does not spell out what the defences are or how they could be established.
- The burden cast on the debtor with regard to inability to pay although possibly defensible in principle as pertaining to matters peculiarly within his or her knowledge is so widely couched that persons genuinely unable to pay are nevertheless struck.
- The judgment debtor is entitled in terms of his Constitutional rights to a fair trial with procedural safeguards including the right to legal assistance at public expense, if justice so requires.

Considering the above, my view of the notice is that it does not state the following:

- Whether the judgment was taken against the judgment debtor by default.
- Where parties were married in community of property both spouses should be called to court and the notice refers to the singular, 'you' and not 'we', the plural.
- If judgment was taken from another court the extract of the judgment is never attached for the judgment debtor to know which court granted judgment against him or her.
- The amount claimed does not even state if it includes interest or not.
- The notice does not refer the parties to their constitutional right to legal representation at the inquiry.

Picture source: Gallo Images/iStock

Certificate of judgment of creditor attorneys or an affidavit/affirmation of the judgment creditor

In terms of s 65A(4): 'If the court has given judgment for the payment of an amount of money in installments, no notice under subsection (1) shall be issued unless – the judgment creditor has delivered an affidavit or affirmation or his or her attorney has delivered a certificate to the clerk of the court in which is mentioned the outstanding balance of the judgment debt, in what respects the judgment debtor has failed to comply with the court order, to what extent he or she is in arrear with the payment of the installments and that the judgment debtor was advised by registered letter of the terms of the judgment.'

The usual practice for attorneys is to include in the certificate the following:

I, _____, attorney for the judgment creditor hereby certify:

1 That on _____ judgment was obtained against the above named judgment debtor.

2 That the judgment or order has remained unsatisfied for a period of 10 (ten) days from the date on which it was given.

3 That the judgment debtor has failed to comply with the judgment or order referred to in s 65A(1) of the Act in that he/she has failed to pay any part thereof.

4 That the amount in arrears is R_____ and the outstanding balance is R_____.

5 That the judgment debtor has been advised by registered letter of the terms of the judgment and of the consequences of his failure to satisfy the judgment.

6 That a period of 10 (ten) days has elapsed since the date on which the said registered letter was posted.

7 That the court is not barred by the provisions of s 19 of the Credit Agreements Act 75 of 1980, from making a decree or otherwise or an order referred to in that section.

Regarding para 1, the attorney should state which court granted the judgment and how. Whether by default or by the court after hearing of a trial.

The most important para is 5 and 6, which states that the judgment debtor has been advised by registered letter of the terms of the judgment and of the consequence of his or her failure to satisfy the judgment and that a period of ten days has been elapsed since the date on which the registered letter was posted.

In practice, attorneys only attach a registered slip to the registered letter, which will be on outline in the subheading on the registered letter.

Regarding para 7 states that s 19 of the Credit Agreement Act, the court is not barred from making an order.

The judgment debtor does not even know what this Act implies and more should be stated in simple terms by the attorney in this regard.

In my opinion the public are now more familiar with the National Credit Act 34 of 2005 and issues relevant to this Act should be stated in this s 65A procedure.

There is, therefore, no specific format of such certificate and if a judgment creditor is in person, affidavit/affirmation is usually very brief and does not even refer to all relevant issues.

I suggest that a form should be drafted by the legislature to assist attorneys regarding the certificate as well as the in person judgment creditor who has to dispose of an affidavit/affirmation.

The registered letter in terms of s 65A(2) to the judgment debtor

In terms of the above, s 65A(4), r 45(1)(d) of the Magistrate's Court Act (as amended) also provide that the judgment debtor has been advised by registered letter of the terms of the judgment or the expiry of the period of suspension under s 48(*e*) of the Act, as the case may be, and that a period of ten days has elapsed since the date of the said letter was posted.

Van Loggerenberg *Jones & Buckle The Civil Practice of the Magistrate's Courts in South Africa* (Cape Town: Juta 1988) in their commentary refer to proof of the satisfaction of this letter to the clerk of the court and not the magistrate who determines the proof of satisfactory service of the registered letter and cite an old case of *Greek Farming Syndicate Ltd v Zevenfontein Ltd* 1926 CPD 248C.

I am of the opinion that judicial notice should certainly be taken into account of the ongoing strikes of the South African Postal Services in respect of registered letters, which are never in fact received by the public. In the above s 65A(2) proceeding, no proof is furnished that the judgment debtor has received the registered letter other than the registered slip attached to the letter of the terms of the judgment.

In my recent appearance as a presiding officer in a s 65 case, all the judgment debtors in the court were asked if they knew of the judgment against them. None of them received the 'registered letter' sent to them and, in fact, were not even aware when judgment had been handed down. The judgment debtor then advised the court to grant a postponement to them to apply for a rescission the judgment and the inquiry is then postponed for this purpose.

I am of the view that judicial oversight should be taken by the courts of how the judgment letter is drafted by the attorney, judgment creditor if in person, as well as that the registered letter that comes to the knowledge of the judgment debtor like in the cases of the s 129 notice of the National Credit Act where a track and trade report can also be shown to the court, rather than to the clerk of the court (see cases of *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)).

In my view, the legislature should rather consider a similar amendment to the s 65A (r 45(e)) procedure regarding service of the 'registered letter' as to the recent amendment of the s 129 of the National Credit Amendment Act 19 of 2014, which came into operation on 13 March 2015.

These subsections provide:

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

(*a*) by registered mail; or

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

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

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

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

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

If the above is done in the above subheadings notice, certificate, registered letter and registered slip in s 65A procedure, surely the judgment debtors would have knowledge of the judgment taken against them and would contact the judgment creditor or their attorney even prior to s 65A(1) procedure is applied by the judgment creditor.

Yusuf Mahmood Surty *BProc LLB (Wits)* is a magistrate in Boksburg.

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Reading the small print – are e-mail disclaimers really important?

By Jesicca Rajpal

E-mail disclaimers have become so routine and monotonous, often referred to as boilerplate language, that most people do not even notice their existence. Yet, these disclaimers are ubiquitously appended to nearly all outgoing e-mails. The reasons for such inclusion are various: Confidentiality, defamation; unintended contract formation; misdirected e-mails, employee liability, legal privilege; infringement of copyright; and other wrongful acts are a few reasons for its inclusion. Despite its wide use, there is currently no legal doctrine or theory under which an e-mail disclaimer is enforceable in South Africa and nor has it been tested in any South African court.

Today, the value and effectiveness of e-mail disclaimers has remarkably diminished because of overuse. Disclaimers are attached extensively to virtually all electronic communications, whether appropriate or not. Such behaviour can possibly be ascribed to the fact that the disclaimer is appended automatically when the sender presses the 'send' button and, as a result thereof, one even finds them on casual lunch and dinner invitations sent by e-mail. This often results in a situation where the sender is completely ignorant of the existence of the e-mail disclaimer or what it says. With regards to the recipient on the other hand, he or she is unlikely to read the small print in an e-mail, especially where it follows the content of the e-mail. He or she is, therefore, unlikely to even read or spot the disclaimer since it appears at the very bottom of the e-mail. Furthermore, unintended recipients are called on to delete the e-mail if they are not the intended recipient. This request appears unrealistic. In the first instance, senders have no control

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over the actions of the recipients after receipt, and further, even if recipients comply with the request to delete the communication, such communication can still remain on the recipients computer system elsewhere. Nevertheless, even if the parties do read the contents of the e-mails, including disclaimers, it is unclear what the precise extent of the disclaimer may be and questions could arise as to whether the disclaimer applies to only the wording in the e-mail or does it cover any attachments to the e-mail as well. Essentially, the nature of the disclaimer dictates a unilateral act and one would need to consider whether such act is binding, as the other party did not have the opportunity to consent to such terms. Further, e-mail disclaimers use standard, generic wording. It is not tailored to meet the individual requirements of the particular situation but is rather appended to the e-mail indiscriminately. Since the disclaimer is sent in such a generic manner, there may be a complete contrast between the intention of the parties and the proviso in the e-mail disclaimer.

This is precisely what the California Court of Appeal had to consider in the unpublished case of *Romero v Romero* 2011 Cal, App. Unpub. Lexis 8706 (Cal. App. 4th Dist, Nov. 14, 2011). In this case, the plaintiff applied for a domestic violence protective order against her husband alleging that he had repeatedly sent her e-mails threatening to kill her. In one of the e-mails, the defendant sent to the plaintiff, he wrote 'pay-back is really a b****' and 'you and your others still have a gigantic debt to pay to me, which will be paid no matter what. I spend every second of every day contemplating an appropriate method of payment'. The e-mail ended with the following statement: 'Your most determined, unstoppable, and visceral enemy'. Further, at the bottom of the e-mail the following disclaimer appeared:

'DISCLAIMER: Not one word herein should be construed by anyone as meaning violent or threatening intentions, and instead the entire contents is to be taken by the strict literary meaning. There have not been, and will be any elucidated threats of violence or intent, either expressed or implied, within the entirety of this document'.

The husband claimed his e-mails were protected by his First Amendment right of free speech and also claimed that, as a result of the disclaimer included in the above e-mail message, these acts could not be the basis for a protective order. The court was not convinced and explained to the defendant that: 'You can't send documentation of both a threatening and harassing manner and then think that you can get away with that by simply putting a disclaimer on it'. Clearly, a sender of e-mails of such a nature should not attempt to hide behind an e-mail disclaimer; a disclaimer will do nothing to shelter a person who sends e-mails of a threatening or harassing nature.

Similarly, the European Union Technical Board found that an e-mail in *Phillips* [2012] E.P.O.R. 41, was not confidential despite its disclaimer, due to the fact that the disclaimer was automatic. In establishing the sender's intent to keep information confidential, the board stated:

'General email disclaimers asserting among other things confidentiality of the content and that the content was intended for the recipient only had almost no value and provided little guide as to the sender's intent. Firstly, they were almost always added indiscriminately to all emails, whether confidential or not, usually automatically. Secondly, such disclaimers could not unilaterally impose a duty of confidence on a reader who might not agree with them'.

The board stated that generic e-mail disclaimers were not useful in evaluating the confidentiality of a message but rather the recipient had to 'decide for himself based on the email as a whole whether or not it was reasonable for him to keep its content secret'. The board went on to state that:

'If the recipient did not agree to keep something secret, secrecy could not be imposed unilaterally (e.g. a blanket footer asserting "confidentiality" in all emails from the sender was not enough). … The nature of the relationship might be relevant to whether a third party reasonably knew the message was secret'.

In this case, the e-mail contained a two-part disclaimer at the bottom of the message. The first part was more personal to the sender and stated 'Confidential information may only be sent to me by e-mail if your e-mail mailbox is within the akzonobel.com server'. The second part was a standard corporate e-mail disclaimer, which is added automatically to every e-mail from the company, which could not be removed or edited. It stated that: '"[R]etention, dissemination, distribution or copying" of the email by anyone who was not the recipient, was prohibited'. The court stated that these disclaimers were not 'internally consistent' as, ironically, the first part indicated that the e-mail might not be a safe method of transmitting confidential information, whereas the second part tried to affirm the confidentiality of the information, contrary to the fact, that these were the very activities that a recipient might be required to perform. The court held that: '[S]uch a person could not accept the terms of this disclaimer (which in any event was not a contract) and they could not be imposed unilaterally on him'. This case elucidates that useless inclusions of standard, automatic and inappropriate wording in disclaimers will not simply translate into binding contractual terms.

Recent case law

In the recent case, *Langley (Township) v Witschel* 2015 BCSC 123 heard at the British Columbia Supreme Court during January 2015, the court considered e-mail disclaimers and whether its inclusion in an e-mail resulted in admission of liability. The facts of the case were briefly as follows: The plaintiff, a municipality, alleged that on 13 October 2011, a traffic signal controller was damaged as a result of being struck by a vehicle operated by the defendant. The plaintiff sent the defendant's insurer an invoice for replacement of the controller and wrote e-mails to follow up on unpaid invoices. The defendant brought a motion of dismissal on the basis that the claim had prescribed. The plaintiff acknowledged that the claim was filed beyond the two-year limitation period, but stated that the defendant had confirmed the cause of action in two e-mails sent before expiration of the limitation period. The defendant asserted that the e-mails contained disclaimers and thus could not be read as admissions of liability. In this case, the court had to specifically consider the effectiveness of a disclaimer located at the bottom of an e-mail that appears to be an automatic addition or attached to the communication. The court held that:

'While the location and font of the disclaimer in the present case does leave the impression that it is automatically generated, I do not see that this means the language must necessarily be ignored. It depends on the situation. If the disclaimer directly contradicts the substance of the e-mail and has been used in a multitude of communications between these parties, regardless of their purpose, then the overall impression left on a reasonable person may well be that the disclaimer language is to be ignored in favour of the substantive message'.

Nonetheless, the court concluded that, in this particular case, it did not have any evidence showing a use of the disclaimer in communications between these parties that is 'so automatic, and perhaps inappropriate', which would ordinarily result in the disclaimer being meaningless. However, the court did state that the placement of the disclaimer, namely, at the bottom of the e-mail, and its differing font, could cause a reasonable person to give less weight to it in considering the e-mail as a whole. From the above, it is apparent that a court will not

look at a disclaimer independently but will consider each situation individually taking into account the substantive content of the e-mail as a whole, including a disclaimer, before it reaches a conclusion on a specific issue. The above case provides a clear warning to drafters that should an e-mail disclaimer be drafted and appended in a manner that is 'so automatic' and 'inappropriate', such disclaimer could be rendered 'meaningless'.

Joshua L Colburn, in his article 'Don't Read This If It's Not for You: The legal inadequacies of modern approaches to e-mail privacy' (www.minnesotalawreview.org, accessed 11-12-2015), states that as most users place e-mail disclaimers at the end of their messages, such placement questions the effectiveness of the e-mail disclaimer. He advises that such placement is analogous to the unringing of a bell; one cannot go back and unread the contents of the e-mail, it is simply irrevocable. Colburn recommends placing the disclaimer at the beginning of the e-mail, namely, before the contents of the e-mail. For attorney/client privilege, he proposes that an additional notice be placed in the subject line stating that the message is a privileged communication. He suggests further that where one is dealing with private information, such information should be placed in a separate e-mail attachment, with the body of the e-mail restricted only to the wording of the disclaimer. He advises that the e-mail disclaimer should again be reiterated at the top of the attached document. This, he says, will maximise the effectiveness of the disclaimer. I agree with Colburn that such prominence and placement of the e-mail disclaimer will improve the chances of the disclaimer being read and noticed by its recipient, resulting in compliance therewith. Colburn also suggests that where one is dealing with sensitive information, encryption should also be considered.

There are many extenuating reasons for including a properly drafted and positioned e-mail disclaimer in electronic communications. Users of e-mail disclaimers might do well to use them sparingly, only when required and in appropriate situations, taking care to avoid misuse of disclaimers. To achieve this, every company should undertake a review of its information security systems, policies (especially its e-mail usage policy) and guidelines in order to take appropriate preventative measures to limit the detrimental effects of a poor e-mail disclaimer. Finally, the question as to the legal validity and enforceability of e-mail disclaimers in South Africa, is left at the discretion of our courts. Since the Constitution allows for international and foreign law to be considered when a question of interpretation is placed before the courts, it will in all likelihood follow the route adopted by other countries in establishing the case law with regards to e-mail disclaimers; it will decide on a matter pursuant to its investigation into the surrounding circumstances, taking into account the content and context of an e-mail message, considering the e-mail as a whole, including the e-mail disclaimer, before it reaches a decision.

• An earlier version of this paper was submitted to Wits University for the Cyberlaw course, in part fulfilment of the requirements of LLM degree.

Jesicca Rajpal *LLB (Unisa)* is an attorney at TP Mabasa Attorneys in Johannesburg. ❑

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Will legislation protect your virtual space?

Discussing the draft Cybercrime and Cyber Security Bill

By Dingaan Mangena

It is estimated that offences with cyber elements cost South Africa (SA) in excess of R 1 billion a year. In terms of the medium term strategic framework for government for the period 2014 – 2019, insofar as it relates to the outcome 'All people in South Africa are and feel safe' – measures to address cyber security are identified as an area of priority.

There are various laws dealing with cyber security, some with overlapping mandates administered by different government departments and the implementation of which is not coordinated. The legislation, which is currently in place, when viewed collectively does not address SA's cyber security challenges adequately. The Department of Justice and Constitutional Development (DOJ&CD), was mandated to analyse the laws of the Republic of SA in order to determine –

- the adequacy thereof when they are compared with legislation of other jurisdictions, and international and regional instruments;
- whether there are any gaps which may impact on cyber security in general;
- whether the current laws make adequate provision for the investigation and prosecution of cybercrime; and
- whether it is feasible to consolidate all provisions relating to cybercrime and cyber security in a single law.

The outcome of this analysis is that:

- The legislation dealing with cybercrime is 'silo-based' in that it only criminalises cybercrime in relation to certain government departments or state bodies; the Electronic Communications and Transactions Act 25 of 2002 (the ECTA), being the exception. The common law is used to prosecute some of the offences but needs to grapple with new concepts such as intangible data. Furthermore, our cybercrime laws are not in line with those of the international community, which is essential for purposes of international cooperation, which is mostly based on reciprocal laws.
- Procedural laws in SA have not kept pace with the more intrusive and complex investigative measures, which are needed to investigate cybercrime.
- The laws dealing with electronic evidence are, in general, sufficient for the purposes of criminal proceedings.
- Jurisdiction in relation to cybercrime in SA is dealt with differently in our laws. In general, our laws afford broad jurisdiction to criminal acts, which affect national security in SA, while jurisdiction is significantly narrower in ordinary criminal cases.
- There is at present no coordinated approach relating to cyber security in SA.
- There is no legislation which specifically provides for the protection of critical information infrastructures in SA.
- SA is not a party to any international or regional instruments that deal specifically with cooperation in cybercrime matters.
- There are no specific obligations on electronic communications service providers in order to assist with the reporting and prevention of cybercrime.
- There is limited sharing of information between government and the private sector on cyber threats.

The draft Cybercrimes and Cyber Security Bill (GN 878 *GG*39161/2-9-2015) aims to address these and other shortcomings.

The Bill contains 11 chapters. The various chapters deal with the following aspects:

Clauses 1, 2, 26 and 50 contain various definitions of a technical nature, which are necessary for the interpretation of the Bill. Furthermore, definitions were inserted in various clauses of the Bill in order to aid in the interpretation of those clauses.

In terms of ch 2 of the Bill, various new offences are created in order to address illegal conduct in cyberspace; some of which do not currently exist in terms of SA law. Furthermore, various other common law and statutory offences, which are currently used to prosecute conduct relating to cybercrime are adapted by the Bill in order to make them more 'usable' for the prosecution of cybercrime. The penalties in respect of all these new offences are also increased substantially.

Clause 21 further criminalises the harbouring or concealing of persons who commit offences in terms of the Bill. Any attempt, conspiring, aiding, abetting, inducing, inciting, instigating, instructing, commanding, or procuring to commit offences in the Bill are also criminalised in terms of clause 22. Clause 23 provides that a court must consider it an aggravating circumstance if offences in terms of the Bill are committed in concert with other persons or where persons in trust commit certain offences provided for in the Bill.

Jurisdiction in respect of all offences which can be committed in cyberspace is expanded substantially in terms of ch 3 of the Bill.

Insofar as the investigation of cybercrime is concerned, the provisions of ch 2 of the Criminal Procedure Act 51 of 1977, are currently applied in the investigation of cybercrime, in conjunction with the provisions of the Regulation of Interception of Communications and Provision of Communication-related

Information Act 70 of 2002 (RICA). The Criminal Procedure Act, is adequate insofar as real evidence is concerned, but it has various shortcomings in respect of digital evidence. RICA relates mainly to the interception of communications and the storing of call-related information and it too has various shortcomings in the investigation of cyber-related offences. Chapter 4 of the Bill, therefore, contains various provisions that are designed to investigate cyber-related offences.

Clauses 26 to 37 regulate aspects relating to the search and seizure of evidence. Clause 38 of the Bill prohibits a person from disclosing any information which he or she obtained in the exercising of his or her powers or the performance of his or her duties in terms of the Bill except insofar as it is authorised by the clause. Clause 39 provides for the interception of data. Clause 40 of the Bill provides for the expedited preservation of data. Clause 41 provides for the issuing of a disclosure of data direction by a judicial officer after considering an application by a law enforcement agency.

Clauses 42 and 43 make provision for a procedure to preserve other evidence relating to a cybercrime. Clause 44 regulates access to certain information and the provision of unsolicited information to foreign law enforcement agencies, as well as the receipt of such information from foreign law enforcement agencies. Clauses 45 to 48 regulate aspects relevant to requests for and the provision of foreign assistance and cooperation in the investigation of cybercrime.

South Africa does not currently have an institutionalised 24/7 point of contact relating to cooperation in criminal matters. Chapter 5 of the Bill provides for the establishment of a body within government, more specifically the South African Police Service (SAPS), which will act as a 24/7 point of contact in order to request cooperation from other countries or to provide cooperation to other countries in cyber criminal matters.

Chapter 6 of the Bill gives statutory recognition to the various bodies, which need to be established. The Bill aims to coordinate their functioning in relation to each other.

• Clause 51 of the Bill establishes the Cyber Response Committee, which is the coordinating body to implement government policy relating to cyber security.

• Clauses 52 and 53 aim to establish the Cyber Security Centre and Government Security Incident Response Teams in the State Security Agency, respectively.

– The Cyber Security Centre is the body in control of the Government Security Incident Response Teams. The functions of the Cyber Security Centre are, among others, to facilitate the operational coordination of cyber security incident response activities regarding national intelligence and the protection of National Critical Information Infrastructures (NCII).

– The Government Security Incident Response Teams are the operational structures which must, among others, implement measures to deal with cyber security matters impacting on national intelligence and national security and the protection of NCII.

• Clause 54 aims to establish the National Cybercrime Centre as a dedicated structure within the SAPS to deal with the operational coordination of cyber security incident response activities with regard to the prevention, combatting and investigation of cybercrime.

• Clause 55 aims to establish the Cyber Command within the South African National Defence Force to facilitate the operational coordination of cyber security incident response activities regarding national defence and to develop measures to deal with cyber security matters impacting on national defence.

• Clause 56 provides for the establishment of the Cyber Security Hub, within the Department of Telecommunications and Postal Services. The functions of the Cyber Security Hub are, among others, to coordinate general cyber security activities in the private sector and to provide best practice guidance on Information and Communications Technology security to government, electronic communications service providers and the private sector. The Cyber Security Hub must oversee the Private Sector Security Incident Response Teams established in terms of clause 57.

• Clause 57 establishes Private Sector Security Incident Response Teams. One of the functions of a Private Sector Security Incident Response Team is to ensure information-sharing between the private sector and government, via the Cyber Security Hub, on cyber threats and measures, which have been implemented to address the cyber threats.

The Bill further provides for the functions, responsibilities and accountability, of these structures.

Chapter 7 of the Bill contains provisions relating to NCII, which could be either state owned or privately owned. Clause 58 of the Bill provides for the identification and declaration of NCII and for the implementation of measures to secure such information infrastructures. Clause 59 deals with the establishment of the NCII Fund, which is to be utilised mainly for the implementation of disaster management measures in respect of NCII in disaster situations. Clause 60 deals with the auditing of NCII to ensure compliance with the implementation of security measures.

Chapter 8 of the Bill deals with aspects relating to evidence. Clause 61 aims to regulate the admissibility of affidavits by experts in relation to technological aspects involving data, computers and electronic communications networks. Clause 62 deals with the admissibility of evidence obtained as a result of a direction requesting foreign assistance and cooperation. Clause 63 provides for the admissibility of data or a data message in evidence, in criminal proceedings.

Chapter 9 of the Bill (clause 64) imposes obligations on electronic communications service providers to report cyber related offences, which come to their knowledge and which were committed on their electronic communications systems, to the SAPS and to mitigate the impact of cyber offences. In terms of this clause electronic communications service providers must further –

• take reasonable steps to inform its clients of cybercrime trends, which affect or may affect the clients of such an electronic communications service provider;

• establish procedures for its clients to report cybercrimes with the electronic communications service provider; and

• inform its clients of measures which a client may take in order to safeguard himself or herself against cybercrime.

Chapter 10 of the Bill provides that the President may enter into any agreement with any foreign state or territory regarding –

• the provision of mutual assistance and cooperation relating to the investigation and prosecution of cybercrimes; and

• cooperation relating to various other aspects, which may impact on cyber security.

Chapter 11 deals with various miscellaneous aspects, namely –

• the repeal and amendment of laws (clause 66);

• the making of regulations to further regulate aspects provided for in the Bill (clause 67); and

• the short title and commencement (clause 68).

In terms of clause 66 various provisions of other laws are repealed as a consequence of the provisions of the Bill. Various current offences on the Statute book are assimilated in the Bill. It is therefore not necessary to have a duplication of offences.

Clause 68 also aims to effect amendments to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in order to deal with cybercrimes involving child pornography.

• Comments closed on 30 November 2015. The DOJ&CD, intends to introduce the Bill into Parliament early in 2016.

Dingaan Mangena *LLB (UJ)* is an attorney at the Department of Justice and Constitutional Development in Pretoria. ❑

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By Bouwer van Niekerk and Amy Parker

Beware the double edged sword in litigating with a company in business rescue

Chetty v Hart (SCA) (unreported case no 20323/2014, 4-9-2015) (Cachalia JA)

'Caesar:
Danger knows full well,
That Caesar is more dangerous than he.
We are two lions litter'd in one day,
And I the elder and more terrible.'
The Plays of William Shakespeare
(Philidelphia: C and A Conrad & Co, 1809)

Two parties were involved in a dispute, each having a claim against the other. The one is an individual, the other a company. The parties elected to settle their dispute by way of arbitration proceedings. After evidence was led on both the claim and the counterclaim, but before hearing argument, the company was placed under business rescue. Thereafter, and unaware of the company's new status, the arbitrator heard argument, and subsequently made his award.

Both parties were successful with their respective claims. However, the company's claim was substantially more than that of the individual. During this time, the individual was also not made aware of the fact that the company was under supervision, nor informed thereof by the business rescue practitioner (BRP). When this fact was eventually brought to the individual's attention, she launched an application to the High Court seeking that the arbitration award be reviewed and set aside. When launching the application, the company was no longer in business rescue; it was in liquidation. This application was unsuccessful. Dissatisfied with the outcome, the individual was granted leave to appeal the matter to the Supreme Court of Appeal (SCA).

These were the salient facts that appear from the judgment of *Chetty v Hart* (SAC) (unreported case no 20323/2014, 4-9-2015) (Cachalia JA). In this article, we will focus on three questions posed and answered by the SCA in this case and we will conclude by making some observational remarks on the rationale employed in the judgment in answering one of the questions posed.

1 How should the term 'legal proceedings' as used in s 133(1) of the Companies Act of 71 of 2008 (the Act) be interpreted?

In interpreting the term 'legal proceedings', the court, among others, took into consideration the language of the provision at issue, the language and design of the statute as a whole, as well as its statutory purpose. The court utilised the ordinary rules of grammar and syntax in order to interpret and give effect to the language employed in the provision. Where more than one meaning was attributable to a certain word, the court found that the more sensible and business-like meaning is to be preferred over the one with the contrary effect.

The court then contemplated the various definitions of legal proceedings provided for in legal dictionaries, international arbitration law and the Internet. The court found that, contextually dependent, the phrase 'legal proceedings' may be afforded a broad enough interpretation to include arbitration tribunals as provided for by the three aforementioned sources.

The court goes on to consider 'legal proceedings' in a wider context, by analysing other provisions of the Act, including ss 142(3)(*b*), 5(1), 7(*k*), 128(1)(*b*) and 133(1). But for ss 5(1) and 7(*k*) of the Act, which deals with the interpretation and application of the Act, the aforementioned sections all define and/or regulate business rescue proceedings, including the general moratorium placed on legal proceedings during business rescue and the relevant duties of the directors. According to s 142(3)(*b*), a director of a company in business rescue is obligated to assist the business rescue practitioner by providing details of –

'any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company'.

The court emphasised that one requires an understanding of the purpose of the provisions as they apply to business rescue proceedings. In doing so, the court observed that s 5(1) should be read with s 7(*k*). Section 5(1) of the Act directs that its interpretation and application must give effect to the purposes as stated in s 7. Section 7(*k*) in turn provides that one of the purposes of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balance the rights and interest of all relevant stakeholders'.

The court continued its purposive interpretation by considering s 128(1)(*b*) of the Act. In terms thereof, the Act defines business rescue as proceedings, which facilitate the rehabilitation of a financially distressed company by providing for the temporary supervision and moratorium on the rights of claimants, and the development and implementation of a plan to rescue the company. The BRP must assess the adverse financial effects of a claim against a company. As such, a general moratorium on the rights of creditors is essential in order to achieve financial stability. Taking into consideration the ubiquitous use of arbitrations to resolve commercial disputes, the court found that it would be erroneous to exclude them from the ambit of s 133(1). It became apparent that an interpretation that included arbitrations within the meaning of 'legal proceedings' enabled s 133(1) to be read harmoniously with s 142(3)(*b*).

The court accordingly found that the phrase legal proceeding may, depending on the context within which it is used, be interpreted restrictively to mean court proceedings, or more broadly to include proceedings before other tribunals, including arbitral tribunals. The language employed by s 133(1) suggested that a broader interpretation be adopted, which is supported by the contextual indications in s 142(3)(*b*).

2 Is the failure by the individual to seek and obtain the BRP's consent before continuing with the arbitration fatal to the outcome of the arbitration, and should it for this reason be invalidated?

The court answered this in the negative. It reasoned that the arbitrator derived his or her jurisdiction from the arbitration agreement, not the provisions of the Act. The provisions of the Act merely placed a statutory moratorium or procedural bar on a party (not the company) to institute or proceed with legal proceedings. It did not invalidate the proceed-

ings. Put differently, s 133 of the Act did not affect the arbitrator's jurisdiction to adjudicate a claim wherein one of the parties (the company) was in business rescue.

The rationale applied in coming to this conclusion stemmed from a proper interpretation of the relevant section of the Act. We surmise it thus:

- Section 133(*b*) of the Act allows a creditor to seek leave of the court to institute legal proceedings against a company under supervision with or without first obtaining the consent of the BRP.
- The fact that a creditor can seek such leave without first attempting to obtain the BRP's consent shows that such consent cannot be an absolute bar instituting or proceeding with legal proceedings against a company in business rescue.
- The section itself does not make provision for the lack of consent (or the lack of leave of the court, or any of the other exceptions mentioned in s 133) to cause the legal proceedings to be a nullity, as it does for example in s 129(5).
- Moreover, it appears as if s 133(1) was enacted solely for the benefit of the company and the BRP. This is a defence *in personam*; a creditor has no *locus standi* to rely thereon. It is only the BRP that may waive compliance therewith.

3 Can the company continue with legal proceedings against an individual or legal entity while being under business rescue, while disallowing (through the BRP) the individual/legal entity to continue with his/her/its legal proceedings against the company?

Given what is surmised in bullet four above, yes, it can.

However, this does not mean that the creditor is proverbially and euphemistically left to navigate insalubrious waters without any manner of propulsion. In such circumstances, the creditor may still approach the court for the requisite leave to continue with the legal proceedings. 'The creditor is also entitled, under s 133(1)(*c*) to set off a claim by the company in legal proceedings commenced before or during the moratorium.' Section 133(3) furthermore suspends the period within which proceedings against the company is to be instituted. 'The exercise of a creditor's rights are therefore suspended during the moratorium, but this is balanced by the other protections afforded in the section itself' (see para 45).

Observational remarks

As far as we can ascertain, our courts have not delivered a judgment wherein it had considered the circumstances under which a creditor will be allowed to institute or continue with legal proceedings against a company in business rescue where the BRP refused to consent thereto. It will be interesting to see how such a test is formulated. We submit, that in circumstances where the company is also pursuing a claim against the creditor in the same legal proceedings, such circumstances should persuade the court to allow the continuation of those legal proceedings. Should it not, it would offend the rules of natural justice and the *audi alteram partem* doctrine.

- See also case note 'Do arbitration proceedings fall within the general moratorium on legal proceedings against a company under business rescue?' 2015 (Nov) *DR* 43.

Bouwer van Niekerk *BA (Law) LLB (Stell) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (Unisa & LEAD)* is an attorney and Amy Parker *BCom (Law) LLB (Stell)* is a candidate attorney at Smit Sewgoolam Inc in Johannesburg. ❑

Book announcements

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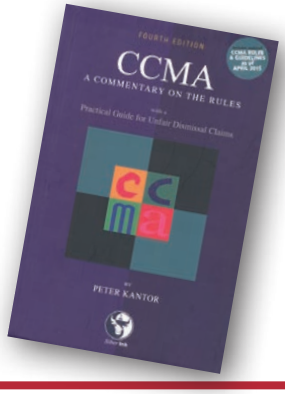

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THE LAW REPORTS

Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

November 2015 (6) South African Law Reports (pp 1 – 316); [2015] 4 All South African Law Reports October no 1 (pp 1 – 130); and no 2 (pp 131 – 254); [2014] 2 All South African Law Reports June no 1 (pp 493 – 633) and no 2 (pp 635 – 726)

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

ECG: Eastern Cape Division, Grahamstown
ECP: Eastern Cape Local Division, Port Elizabeth
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Advocates

Costs – attorney and client costs: In *Society of Advocates of KwaZulu-Natal v Levin* 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) the applicant law society brought an application to remove the respondent advocate from the roll of advocates. On the first day of the hearing the respondent consented to his removal from the roll of advocates and to an order, which included provision for costs, in terms of which the respondent was directed to pay the applicant's costs on the attorney and client scale. In passing, attorney and client costs are intended to ensure that a successful party will recoup all reasonable expenses, including counsel's fees, incurred as a result of litigation. The taxing master has a discretion in this regard.

The applicant, having presented its bills for taxation, was unhappy with the taxing master's deduction of R 246 000 from its (senior) counsel's fees of R 403 000, and requested the taxing master to state a case in respect of the disputed rulings. According to a survey by the Society of Advocates of KwaZulu-Natal, the fee spectrum for senior counsel ranged from R 2 400 to R 4 500 per hour and from R 19 200 to R 36 000 per day for consultations. The taxing master's stated case and final report were placed before the court for determination. The applicant's main objection to the taxing master's ruling was that, although the court had ordered attorney and client costs, specified the necessary witnesses and directed that counsel's preparation and consultation fees be included in the order, the fees in question (which were necessary and reasonable) were in many instances disallowed. The respondent, in turn, argued that the taxing master had complied with the court order and that no interference with the taxed bill was warranted.

Moodley J referred with approval to earlier case law in *City of Cape Town v Arun Property Development (Pty) Ltd and Another* 2009 (5) SA 227 (C) and *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 227 (C) and held that while the decisive criterion remained the value of the work done, it was permissible to charge counsel's fees on a time-spent basis. In this regard it held that an objective assessment of the features of the case is primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work.

The court further held that the taxing master had to assume that the agreed fees were reasonable unless there were compelling grounds for thinking otherwise. In the present case counsel's rate of R 2 400 per hour and R 24 000 per day were at the lower end of the senior counsel's fee spectrum and hence reasonable.

The court held that the applicant was correct in arguing that the taxing master should have assessed counsel's fees for the drafting of the heads of argument on a time-spent basis, which ought to be standard practice in KwaZulu-Natal. Although advice on evidence and consultations with necessary witnesses might be considered attorney and client costs, they would nevertheless be allowed in an attorney and client bill, even when payable by the unsuccessful party. The taxing master should in the present case have found that the impugned witness consultations were reasonable and necessary, though their duration and number were susceptible to assessment. While clients were expected to attend con-

sultations between instructing attorneys and counsel, their absence did not necessarily mean that the costs incurred were unreasonable. The taxing master should not have disallowed the consultation costs.

The applicant further disputed a number of individual rulings by the taxing master. The court dealt with each of the rulings ordered that the changes allowed on review be substituted for the amounts allowed by the taxing master.

Attorneys

Misconduct: In *Law Society of the Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG) the court was asked to decide whether the respondent attorney was a fit and proper person to continue to practise as an attorney.

Seeking an order that the respondent attorney's name be struck off the roll of attorneys, the applicant law society referred to criminal proceedings against the attorney and a co-accused. The latter's plea explanation made reference to the attorney and incriminated the attorney in criminal activity. The law society applied for leave to file a further affidavit in which the co-accused confirmed the correctness of the allegations in his plea explanation. As the co-accused was not in South Africa, the law society contended that the hearsay evidence contained in the plea explanation should be admitted in evidence in terms of s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988 on the basis that it would be in the interests of justice.

Alkema J held that experience and common sense dictated that allegations in plea explanations are more often than not designed to shift blame to a co-accused or to underplay the accused's own involvement and overemphasise the role played by others. The potential prejudice to the attorney if the relevant documents were admitted in evidence was clear. The documents were declared to be inadmissible hearsay evidence, and were excluded in their entirety.

The facts underlying the application involved the attorney's role as trustee, member and vice-chairman of the governing body of a school. The law society contended that the attorney's personal interest conflicted with his duties to the school and he was not entitled to make a secret profit at the expense of the school.

A court derives its power to strike an attorney from the Roll of Attorneys from s 22(1)(*d*) of the Attorneys Act 53 of 1979 (the Act). Section 22(1)(*d*) of the Act provides that if the attorney in question, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney, his name may be struck from the roll of attorneys. Thus, the essential question in this case was whether the attorney was a fit and proper person to continue to practise as an attorney.

The inquiry into whether a person is a fit and proper person, in turn, contemplates a three-stage inquiry –

- first, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities;
- secondly, if so, whether in the discretion of the court, the person is a fit and proper person to continue to practise as an attorney; and
- thirdly, if not, whether in all the circumstances the person in question is to be removed from the roll of attorneys, or whether an order suspending him from practice for a specified time will suffice.

Whether a fiduciary duty exists, depend on the facts of each case. Here the attorney at all material times had attracted a fiduciary duty to the school. Those in a position of trust who have such a fiduciary duty must act in the best interests of the beneficiaries of that trust and they may not act to their own advantage at the cost of the beneficiaries.

The attorney was found to have acted in breach of his fiduciary duties, and the court held that there was no reason not to strike his name from the roll.

Company law

***Locus standi* of creditor in winding-up:** In *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA); [2014] 2 All SA 513 (SCA) the court was asked to consider the *locus standi* of a creditor of a company that was being wound up.

Express Model Trading 289 CC (the applicant) was the owner of units in the Dolphin Ridge sectional title development outside Bloubergstrand on the West Coast. Over a long period it fell in arrears with the payment of the levies due under the sectional title scheme. This resulted in the applicant owing a substantial amount to the respondent, the body corporate. The body corporate subsequently obtained a provisional winding-up order against the applicant. An undisclosed third party settled the arrears. However, the proceedings continued and a final winding-up order was granted. The applicant appealed to the SCA, but its appeal lapsed when it failed to file heads of argument in time. It then applied for condonation. The question was whether there were prospects of success on appeal.

The applicant contented that –

- payment of the arrears by the third party – the basis of the winding-up application – caused the body corporate to lose its *locus standi*;
- its ability to pay its debts could be inferred from it being able to procure the third party to pay the arrears; and
- it had assets – which it could liquidate – which covered all its liabilities.

Ponnan JA held, regarding the applicant's first contention, that the body corporate retained *locus standi*. The levies were an ongoing obligation which, even after the payment, the applicant continued to breach.

Regarding the applicant's second contention, the court held that while a debtor's ability to raise a loan might demonstrate its creditworthiness and thence its ability to pay its debts, it might also demonstrate the opposite. It depends on the facts of each case. Here it emerged that the third party was ultimately controlled by the applicant's sole member. Creditworthiness could thus not be inferred from the fact that the applicant managed to arrange payment of its debts by a third party.

As to the applicant's third contention, the court held, on the basis of a report by the liquidator, that the applicant's liabilities exceeded its assets. The court confirmed that absent an adequate explanation for the delay and prospects of success on appeal, condonation could not be justified.

The appeal was dismissed with costs.

Delict

Loss of support: In *Osman v Road Accident Fund* 2015 (6) SA 74 (GP) the plaintiff's son (the deceased) was killed in a motor-vehicle accident. The plaintiff's claim was based on the notion of indigency in that she alleged that the deceased supported her during his lifetime. The deceased at the time of the collision was 28 years old. He was married and he resided in the same house as the plaintiff. The deceased was, at the time of the collision, employed at Standard Bank of South Africa and earned a monthly salary of R 7 837.

Ismail J dealt with the case law relating to indigency. In *Oosthuizen v Stanley* 1938 AD 322 (at 327 – 328) the court held that: 'There is no doubt on the authorities which are quoted in *Waterson v Mayberry* (1934 TPD 210) that the plaintiff had to prove not only that [his children] contributed to his support but that there was a legal duty to contribute because his circumstances were such as that he needed the contribution. The liability of children to support their parents, if they are indigent (*inopes*) is beyond question; … Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income is a question of fact depending upon the circumstances of each case'. In *Fosi v Road Accident Fund and Another* 2008 (3) SA 560

(C) this duty was explained as follows: 'Simplistically put, the deciding principle seems to be whether the parent can prove that he or she was dependent on the child's contribution for the necessities of life. Indeed, what constitutes necessities of life will in turn depend upon the individual parent's station in life.'

The court held that a child's duty to support a needy parent, as recognised under African customary law, must be extended to cultures – such as Muslim and Hindu – which share African culture's societal norms in respect of parents and the elderly, and impose a similar duty on children to support their parents.

In the present case the plaintiff was dependent on her deceased son's support and awarded her an amount of R 136 060,40 as damages.

Medical negligence: In *Nzimande v MEC for Health, Gauteng* 2015 (6) SA 192 (GP) the plaintiff, Nzimande, claimed damages, both in her own capacity and on behalf of her child, arising from their treatment during and after a caesarean birth at a hospital administered by the Member of the Executive Council for Health in Gauteng (the MEC). Nzimande claimed that both she and her newborn daughter endured unnecessary pain and suffering as a result of the negligence of doctors and nurses at the hospital. It emerged from the evidence of Nzimande that her child – who was cut on an arm during the procedure – was afterwards taken to the neonatal ward without Nzimande having been allowed to see her new-born child.

When, after three days, Nzimande was finally taken to her child, she found her in a non-functioning incubator and with her wounds untreated. The child was neither fed for three days, nor was she put on a drip. The child was simply neglected. In the meantime Nzimande herself had been left untreated, in pain, and ridden with anxiety about the welfare of her child. Medical experts stated the cut on the child's arm was 'undoubtedly due to the negligence of the surgeon'; that she thereafter 'suffered pain and discomfort for three months'; and that she was left with scarring that would require further treatment and, eventually, surgery. According to expert evidence procured by the court the whole ordeal left Nzimande with mild post-traumatic stress disorder characterised by feelings of dismay, fear and anxiety.

For his part the MEC offered no more than a bare denial of liability, and counsel for Nzimande submitted the doctrine of *res ipsa loquitur* (the matter speaks for itself) should apply to her claim.

Bertelsmann J held that while *res ipsa loquitur* seldom applied in medical negligence cases, the present circumstances were unusual enough to justify its application. The evidence established a strong *prima facie* case of grave negligence in the treatment of both mother and child. The MEC, having decided to oppose the action without leading evidence to dispel the allegation that the conduct of the personnel involved was substandard, had only himself to blame if the doctrine found application. Without refutation by the MEC, the strong *prima facie* case became proof on a balance of probabilities. While the issue of the potential consequences of the negligence was not properly addressed by counsel for Nzimande, this unfortunate mistake would not be allowed to derail the claim: Expert evidence would, in the interests of justice, be obtained by the court. In addition to the mother and child's future medical expenses, R 300 000 and R 200 000 would be awarded as general damages for the child and mother, respectively.

The court awarded attorney and client costs against the MEC as a mark of the court's disapproval of his uncompassionate and obstructive conduct.

Divorce law

Jurisdictional conflict: In *SW v SW and Another* 2015 (6) SA 300 (ECP) divorce proceedings between the applicant, the husband, and the first respondent, the wife, were pending before the regional court, when the husband brought an urgent application before the High Court in terms of r 43 of the Uniform Rules. It was opposed on the ground that it was not urgent and that it constituted an abuse of the process. The wife filed a counter-application seeking, in the event that the application was not dismissed for the reasons stated, that it be postponed to enable her to deal comprehensively with the husband's papers.

The divorce litigation between the parties was acrimonious and hard fought. A central issue in the litigation concerned the care and residence of the parties' six-year old daughter. That dispute involved allegations and counter-allegations relating to what is termed parental alienation. The question of what care and contact arrangements were in the best interests of the minor child had been considered by several experts appointed by the parties, respectively. One of these reports was that of the family-advocate. The husband did not agree with the content of the report and it was his dissatisfaction with the report that prompted him to launch the present application.

The husband requested the court for various types of relief, the first of which was an order directing the family advocate to reinvestigate the issue of parental responsibilities in relation to the primary care and residence of the minor child and to report on the investigation.

The core issue before Goosen J was whether the present court had jurisdiction to hear the application. The court held that a litigant who is a party to a divorce action pending before another court (in this case, the regional court) cannot invoke the jurisdiction of the High Court to secure relief in terms of r 43 of the Uniform Rules of Court. The court can, however, exercise its inherent common-law jurisdiction to act in appropriate circumstances in the interests of minor children to make an order, notwithstanding such proceedings. To invoke such inherent jurisdiction the applicant (here: the husband) must establish –

- that considerations of urgency justify the intervention; and
- that intervention is necessary to protect the best interests of the minor.

It is not a jurisdiction that will be lightly exercised. The court retains an inherent discretion not to exercise such jurisdiction to avoid a multiplicity of suits with the concomitant risk of jurisdictional conflict.

The application was accordingly dismissed with costs.

Property

Sale of church property: The facts in *Savage and Others v Order of the Sisters of the Holy Cross, Cape Province and Others* 2015 (6) SA 1 (WCC); [2015] 4 All SA 199 (WCC) were as follows: The first respondent, the church, is the registered owner of immovable property, which belonged to the Catholic Church. Because of financial difficulties, the church decided to sell the property to the third respondent (the buyer). The applicants were tenants of six cottages on the property, and had lived there for many years. Their forebears had lived on the property for multiple generations as guests of the Catholic Church (represented by the second respondent), and later, the applicants occupied the property as tenants of the first respondent.

The applicants, who were paying a nominal monthly rental, sought to interdict the transfer pending an application to be brought by them. The applicants alleged that their tenancy was based on cessions of lifelong leases, which the church had concluded with their forebears. They argued that the property was under the umbrella of the church, and that canon law and common-law principles precluded the church from alienating it. They also relied on the humanistic and communitarian principles of *ubuntu*.

The church, in turn, invoked economic necessity, arguing that it had to sell

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because the property was an untenable drain on their strained financial resources.

According to the applicants, they feared that should the transfer proceed, the buyer might evict them, leaving them destitute. They contended further that the church had not complied with canon law governing the Catholic Church, regarding the sale of church property.

Mahomed AJ held that the applicants were required to establish the requirements for a final interdict, namely, a clear right, infringement of such right and the absence of a suitable alternative remedy.

While the courts would not interpret property rights without regard to principles of *ubuntu*, they were not compromised by the church's effort to address its financial woes by selling the cottages. Though the alleged cession agreements could not be construed on the affidavits, the applicants were able to establish *prima facie* rights emanating from the lifelong lease.

A serious factual dispute thus existed regarding the extent of the applicants' rights in the property. There were two mutually destructive versions and various disputes of fact, which could not be resolved on the affidavits.

The transfer of the property was imminent, and unless the interdict was granted the applicants' claim in the main action would be defeated. The court reasoned that the refusal of the interdict would be final to the applicants' cause, whereas its grant would not.

In the light of the circumstances of the case and having regard to the fact that the trial court would be seized with the merits of the matter, the court held that there was no other satisfactory remedy available to the applicants and that the application for an interim interdict should be granted.

Spoliation

Requirements for spoliation order: The crisp facts in *Top Assist 24 (Pty) Ltd t/a Form Work Construction (Registration No: 2006/037960/07) v Cremer and Another* [2015] 4 All SA 236 (WCC) were that the applicant, the contractor, and the respondents, the owners, agreed that the former would erect a house for the latter. Suffice it to say that the relationship soured and that the owners were unhappy with various aspects of the contractor's work.

The owners appointed an independent third party to compile a list of defects in the building project. The owners discussed the content of the list with the contractor but the parties held conflicting views on the correctness of the list. The contractor rejected the owners' cancellation of the building contract.

While the contractor was off-site, the owners convinced the contractor's foreman and site manager to hand them the keys of the house, thus depriving the contractor access to the property. The third party, acting on the owners' instruction, ordered and/or requested the site manager to vacate the site and to remove the contractor's equipment from the site.

The contractor applied for a spoliation order to restore peaceful and undisturbed control and possession of the property to enable him to complete the building project.

Boqwana J pointed out that a spoliation order is a final determination of the immediate right to possession. It is the last word on the restoration of possession *ante omnia*.

In order to obtain a spoliation order the contractor must prove that it was in possession of the property and that the respondent deprived it of the possession forcibly or wrongfully against its consent. The possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person that holds possession jointly with others, as was the case here.

Because the contractor rejected the owners' purported cancellation of the agreement between them, the court held that there was no proof that the contractor, or its site manager consented to vacate the premises.

Because the parties had joint possession of the premises immediately before the site manager handed the owners the keys (both parties had keys to the premises) the granting of a spoliation order did not give the contractor more rights that it had prior to being deprived.

The spoliation order was accordingly granted with costs. The owners were ordered to restore the contractor's peaceful and undisturbed possession of the property.

Suretyship

Limitation on surety's liability: In *Kilburn v Tuning Fork (Pty) Ltd* 2015 (6) SA 244 (SCA) the facts were as follows: The surety admitted that he had signed a deed of suretyship in favour of Kilburn Auto Enterprises (Kilburn). The company (the creditor) was later divided into five trading divisions. The surety's undertaking was in favour of one of the divisions known as the 'After Market Products division'.

It was common cause that Kilburn's indebtedness to the After Market Products division had been discharged. However, Kilburn was indebted to the Yamaha Distributors to the amount of R 800 000. Kilburn failed to make any payments in terms of this indebtedness.

When the creditor obtained a judgment against Kilburn for an unpaid debt and thereafter sought payment from the surety, the surety raised the defence that the debt had been incurred by another division of the company that traded under a different name. This defence was unsuccessful in the High Court because the court held that it was clear from the suretyship undertaking that the surety undertook liability for all the debts of Kilburn. The court pointed out that the divisions of a juristic entity (such as a company) are not, in law, regarded as distinct or severable or having separate personalities.

On appeal to the SCA, Saldulkar AJ and Meyer AJA pointed out that the *Kilburn* case turned on the interpretation of the deed of suretyship. Its provisions had to be interpreted in accordance with the established principles of interpretation. It was also important to understand 'the factual matrix within which the deed of suretyship came into existence'. The particular contract that the surety signed contained the heading 'Deed of Suretyship – Tuning Fork (Pty) Ltd t/a After Market Products'.

The court held that although the undertaking by the surety was for the 'due fulfillment by the debtor of all its obligations to the creditor of whatsoever nature and howsoever arising, whether already incurred or which may from time to time hereafter be incurred, as a continuing surety … a court should not conclude, without good reason, that words in a single document are tautologous or superfluous'.

The heading of the undertaking and the detailed provisions of the deed of suretyship had to be read together. The heading was not meaningless or superfluous and the meaning that the High Court attributed to the concluding words of the heading 'T/A After Market Products', namely that they were intended to enhance the identification of the creditor, had no basis in its language or context.

Linguistically, when these words are read in isolation and in the context of the body of the deed of suretyship, it may be thought that they are not clear. However, clarity is achieved when the language is considered in the light of the relevant factual matrix, including the purpose of the deed of suretyship and the circumstances in which it came to be prepared and produced.

The court concluded that it was clear that the deed of suretyship came into existence only because security was required for Kilburn to buy goods on credit from the 'After Market Products division'. Kilburn was rendered personally liable on the terms set out in the deed of suretyship for only the debts

incurred by Kilburn Auto in purchasing goods on credit from the 'After Market Products division'.

While there is, in law, only one creditor, there is nothing to prevent a suretyship securing only certain debts due to that creditor. The factual context, including the document's purpose and the circumstances in which it came to be prepared, had to be taken into account – and here shed light on its intended meaning. The deed was drafted because After Market required security from Kilburn for its purchases on credit – it was intended to secure debts arising from those purchases only.

The appeal was accordingly allowed with costs, and the court *a quo's* decision that Kilburn was liable to Tuning Fork for debts arising from Kilburn Auto's purchases from Yamaha Distributors, reversed.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with civil procedure, constitutional law, costs, criminal law, labour law, land law, local authorities, motor-vehicle accidents, property law, revenue and sale of land.

❑

THE LAW REPORTS

December 2015 (6) South African Law Reports (pp 317 – 643); [2015] 4 All South African Law Reports October no 1 (pp 1 – 129) and no 2 (pp 131 – 254); November no 1 (pp 255 – 399) and no 2 (pp 401 – 542); 2015 (11) Butterworths Constitutional Law Reports – November (pp 1265 – 1405)

David Matlala *BProc (University of the North) LLB (Wits) LLM (UCT) LLM (Harvard) LLD (Fort Hare) HDip Tax Law (Wits)* is an adjunct professor of law at the University of Fort Hare.

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

FB: Free State Division, Bloemfontein
CC: Constitutional Court
GP: Gauteng Division, Pretoria
GJ: Gauteng Local Division, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

Provision of security for costs by plaintiff/applicant company: In *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2015 (6) SA 375 (FB) the appellant, Hennie Lambrechts (as defendant in the main action) made an application in terms of r 47 of the Uniform Rules of Court for the furnishing of security for costs by the respondent, Bombenero (the plaintiff in the main action) notwithstanding the fact that unlike the Companies Act 61 of 1973 (the old Act), the Companies Act 71 of 2008 (the new Act) does not have provisions requiring security for costs to be furnished. The application was dismissed, hence the present appeal to the full Bench. The appeal was upheld with costs. The respondent was ordered to furnish security in the amount to be determined by the Registrar of the court. The appellant was granted leave to apply for dismissal of the respondent's main claim if the required security was not provided within ten days of the Registrar's determination.

Mocumie J (Lekale J concurring while Moloi J dissented) held that the instant case presented a typical situation in which the common law had to be developed beyond existing precedent. That was particularly so as the courts have always had the discretion, depending on the circumstances of each case, and in line with the grounds set out in s 13 of the old Act and those pronounced on by the courts, to determine whether to order the respondent to furnish security. A finding, as a general rule, that an *incola* company, regardless of the particular facts which warranted the furnishing of security, was not bound to provide security would be incongruent with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish security because of the unfortunate absence of the equivalent of s 13 of the old Act, would be without remedy and thus left to suffer the considerable financial consequences of such an absence, which eventually would in turn offend against the principles of equality and of 'just and equitable decisions'. The approach to an application in terms of r 47 should be that in the case of an *incola* company, unlike a natural person, the respondent should adduce all the evidence which would convince the court that it had sufficient funds to pay costs in the event of an adverse costs order. Courts should insist on more details and not the say-so of the *incola* company.

Note:
- Although only reported now, the above judgment was in fact delivered in February 2014. Since then a few other judgments have been delivered on the issue.
- As Moloi J indicated in the dissenting judgment, it would appear that continuing to apply the repealed s 13 of the old Act, which does not find an equivalent in the new Act, under the guise of development of the common law, may not be the correct approach.

Suspension of a director and conflict of interest: In *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 (6) SA 338 (WCC) the applicant, Mthimunye-Bakoro, was an executive director and chief financial officer of the first respondent PetroSA, a state owned corporation. After the first respondent suffered an estimated R 15 billion loss, the applicant was accused of poor performance and financial irregularities. As a result a meeting of the

board of directors was convened to discuss the suspension of the applicant and the group chief executive officer (GCEO). Neither the applicant nor the GCEO was given notice of the meeting, which was duly held and the two, in their absence, were put on precautionary suspension with full pay. The purpose of the suspension was to investigate the two with a view to disciplinary action. The suspension was confirmed at a second board meeting, which both the applicant and the GCEO were notified of and attended, but were excused from participating in the deliberations. As a result the applicant approached the High Court for an order declaring the two board meetings unlawful and setting aside her suspension. The application was dismissed with costs.

Davis J held that in the instant case there was a manifest conflict of interest. It could not be contended that when the decision of the board concerned the preliminary suspension of an employee, who happened to be a director, such a director did not have a conflict of interest in the deliberations, which had to be undertaken by the board. Given the breadth of the definition of personal financial interest and the existing common-law principle regarding conflict of interest, as well as the applicant's own version regarding reputational damage and the possible implications for her employment with the first respondent, she could not, by virtue of the provisions of the Act, or alternatively the common law, be permitted to participate in meetings regarding her suspension. In addition, the first respondent's articles of association expressly precluded the applicant from participating in any decisions in respect of her contract, such as her contract of employment. There could be no rational basis for suggesting that a person who faced suspension had no conflict of interest and could deal with the matter impartially, without taking her own interest into account and only taking account of the company's interest.

Costs

No taxation of legal fees and disbursements after payment: The facts in *Werkmans Incorporated v Praxley Corporate Solutions (Pty) Ltd* [2015] 4 All SA 525 (GJ) were that the applicant, Werkmans Inc, a law firm, rendered legal services to the respondent, Praxley, in respect of arbitration proceedings which the respondent had against a third party, ODM. From time to time the applicant would issue an invoice for work done, which was duly honoured. Eventually arbitration proceedings were scheduled for five days of hearing and to that end the applicant briefed counsel. However, the arbitration proceedings did not take place as scheduled but were instead stood down for three days, during which the parties waited for the outcome of an application for appointment of a business rescue practitioner for ODM. That appointment, if made, would have suspended or stayed arbitration proceedings. Counsel for the applicant submitted an invoice for the days of standing down the matter, as he was on brief during that time and could not do other work, in an amount which after offers and counter-offers, was agreed as some R 122 000. The respondent refused to pay the amount contending that it, together with the attorney's fees and disbursements that had long been paid, should be taxed by the Taxing Master. The respondent rejected the offer to have counsel's fees only submitted to taxation, insisting that both such fees, together with attorney's fees and disbursements, which had already been paid as indicated, should be submitted to taxation. That being the case the applicant, after giving a warning about this, applied for winding-up of the respondent on the ground that it was unable to pay the debt. The respondent filed a counter-claim alleging that the winding-up application was an abuse of the winding-up process and accordingly sought a declaration to that effect in terms of s 347(1A) of the Companies Act 61 of 1973. If the declaration was granted, it would have entitled the respondent to claim damages suffered as a result of the vexatious, frivolous or abusive winding-up proceedings.

Makume J granted with costs an order requiring the respondent to pay counsels' fees as sought by the applicant and dismissed the respondent's counter-claim for declaration of the winding-up application as abusive. The court held that there was no reason for the respondent not to pay counsel's fees for the days when the matter stood down on the respondent's instructions. The respondent was not saying that the fees charged by counsel were not fair and reasonable. Instead it was saying that the fees charged by its attorneys, the applicant, were not fair and reasonable and accordingly demanded that they be submitted to taxation. The applicant's argument that it should not be compelled to tax bills that had already been paid was correct. As the respondent received the accounts, scrutinised them, was satisfied and proceeded to pay without asking for taxation, it could not thereafter demand that the bills be taxed.

The court was also not persuaded that in launching liquidation proceedings the applicant acted maliciously or vexatiously as it had established a debt that was due and payable but which the respondent resisted on unreasonable grounds under circumstances, which raised a suspicion that it was unable to pay its debts. Accordingly, it could not be held that there was an abuse of the winding-up process.

Divorce

Motion proceedings are not permissible in matrimonial matters: In *BR and Another v TM; In re: LR* [2015] 4 All SA 280 (GJ) the second applicant (wife) and the respondent, TM (husband), were married in terms of customary law. A child (LR) was born of the marriage. A few years later the relationship between the two ended, as a result of which they parted ways to start a new life separately. Each found a new partner and married initially in terms of customary law but later according to civil law. It was at that stage that the parties were advised of the need to formally terminate their customary marriage. To solve the problem the respondent instituted a divorce action against the second applicant. Because of the resemblance between the first applicant and the minor child LR, it appeared that he was the minor's biological father, something which paternity tests confirmed. For that reason, and while the divorce action was pending, the first applicant and second applicant launched motion proceedings for an order declaring that the –

- first applicant was the minor's biological father;
- first and second applicants be accorded full parental rights and responsibilities in respect of the minor; and
- first and second applicants were sole holders of parental responsibility of maintenance in respect of the minor.

Kathree-Setiloane J declined the request for the order sought, making no order as to costs, and instead referred the issue to the divorce court for determination in the pending divorce action. It was held that all the issues raised by the order sought were also at stake in the pending divorce action and were central to its finalisation. A court would not grant a decree of divorce until it was satisfied that all issues relating to a minor or dependant children, who were born of the marriage, were resolved in their best interests. The best interests of the child standard, as prescribed in s 28(2) of the Constitution, determined the outcome of all legal proceedings concerning a child. The courts have consistently held, on grounds of public policy, that motion proceedings were not permissible in matrimonial causes since it was undesirable for a court to grant a divorce action without hearing oral evidence of the parties, first because not only was the status of the parties themselves involved, but also those of the children, and second because of the interests of the state in the preservation of the binding nature of marriage. A

court rarely granted a divorce without having had the opportunity to hear evidence of at least one of the parties in a divorce action, particularly if there were minor or dependent children involved.

It was essential that the parties to a contested divorce action be given the opportunity to testify and put evidence before the divorce court on issues that were raised for determination. Where the paternity and parental rights and responsibilities of a husband were in dispute in divorce proceedings, it was important that he be given the opportunity to present evidence in the divorce action for consideration and evaluation by the court presiding therein. It was not appropriate for a party to attempt to circumvent a pending divorce action by applying to have matters, whether disputed or not, which were raised in the divorce action, determined by a court in motion proceedings. Any attempt to pre-empt the findings of a divorce court by instituting motion proceedings to deal with matters that were in issue in the divorce action and concerned the parties to the divorce would effectively fetter the discretion of the judge presiding in the divorce action to hear oral evidence, consider and evaluate it, something which was undesirable.

Revenue

Conservancy and anti-dissipation order: In *Krok and Another v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA); [2015] 4 All SA 131 (SCA) the Australian Tax Office (ATO), acting in terms of a double taxation agreement (DTA) concluded between Australia and South Africa, and doing so on behalf of the Australian Commissioner of Taxation, requested the respondent Commissioner, South African Revenue Service (Sars) to obtain a preservation and anti-dissipation order against the assets of the first appellant, Krok. The order was duly granted by the GP per Fabricius J in terms of the Tax Administration Act 28 of 2011 (the Act) and a *curator bonis* was appointed to take care of the property. The first appellant appealed against the High Court order on the ground that as the amendment to the DTA, which made provision for request for recovery of a tax debt in South Africa by ATO through Sars, came into effect on 1 July 2010 whereas the tax debt sought to be recovered arose between 2003 and 2010, the tax claimed by the ATO fell outside the scope of DTA. The second appellant, Jucool Inc, contended that as the assets generating income and/or the income thus generated had been sold by the first appellant to it, they could not be preserved for a debt due by the latter. The appeal against that order was dismissed with costs by the SCA.

Maya JA (Mhlantla, Wallis JJ, Dambuza and Meyer AJJA concurring) held that it was open to the parties to the DTA to apply the provision on assistance in the collection of taxes to revenue claims arising before that agreement came into force and that the question was whether it was their intention that the agreement should have that effect. In the instant case all indications were that such was the intention. The effect of the amendment to the agreement was plainly prospective as it could only be invoked when the parties so agreed and its provisions came into effect. Tax claims that arose in the past in respect of which assistance was sought would also be covered. It was a firmly established principle of the law that a statute was not retrospective merely because a part of the prerequisites for its action was drawn from time antecedent to its passing. When the amendment came into effect on 1 July 2010, it applied to a revenue claim, that is, an amount owed in respect of taxes of every kind and description. Therefore, the first appellant's jurisdictional challenge to the preservation order had to fail.

Turning to the second appellant's contention it was held that the assets and income still belonged to the first appellant, and not the second appellant, as there had been no transfer in the deeds office, in the case of immovable, delivery in the case of movables and cession in the case of incorporeal assets.

Jurisdiction of the tax court in tax matters: In *Ackermans Ltd v Commissioner, South Africa Revenue Service* 2015 (6) SA 364 (GP) the respondent Commissioner raised additional assessment in the amount of some R 185 million on tax to be paid by the applicant taxpayer, Ackermans Ltd. The respondent alleged that the applicant had engaged in a series of transactions including a loan agreement, subscription agreement, sale of shares agreement and swap agreement, all of which were simulated transactions intended to evade tax by claiming purported interest deductions. It was alleged that having regard to the true nature and substance of the transactions, which had been misrepresented or were not disclosed, the applicant ought not to have claimed interest deductions as it did.

The applicant approached the High Court for an order reviewing and setting aside the additional assessment on the ground that, as administrative action, it should have been done within a reasonable time as required by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). That was so as instead of raising the additional assessment within three years as required by s 79 of the Income Tax Act 58 of 1962 the respondent did do only after some six years, which was very late. Moreover, in terms of s 237 of the Constitution all constitutional obligations are required to be performed diligently without delay. The respondent raised the point in *limine* that as raising additional assessment was a tax issue, objection against it should have been taken to the tax court and not the High Court. Moreover, as there was misrepresentation or non-disclosure of material facts on the part of the applicant, the three-year period of limitation did not apply.

Mothle J held that because the review application under PAJA raised the issue of fundamental right in terms of the Constitution, which empowered the High Court to decide on any constitutional matter, the High Court had jurisdiction to hear the application. For that reason the point in *limine* had to fail. However, as the respondent contended that there was misrepresentation or non-disclosure of material facts while the applicant argued that such was not the case, there was a dispute of fact that was relevant to deciding whether, apart from other explanations, the delay in raising additional assessment fell or did not fall within the three-year period of limitation as provided for in s 79. If it was to be concluded, on the resolution of the disputed facts, that there was misrepresentation or non-disclosure on the part of the applicant, the delay by the respondent in raising additional assessment would be covered by s 79 and would as a result be reasonable. If, on the other hand, it was to be found that there was no misrepresentation or non-disclosure of material facts the delay, which occurred before additional assessment was raised, would be unreasonable and hit by the three-year period of limitation. That being the position the disputed facts and issues raised in the application required the expertise of a tax court, and not the High Court, to adjudicate. Accordingly, the court dismissed the review application, ordering each party to pay own costs. As the court did not deal with the merits of the case it was indicated that the applicant could proceed to the tax court by way of appeal against the additional assessment raised by the respondent.

Sentencing

Interests of young children when sentencing their primary caregiver: In *NDV v S* [2015] 4 All SA 268 (SCA) the appellant NDV pleaded guilty to 31 counts of fraud and one of contravening s 4(*b*)(i) of the Prevention of Organised Crime Act 121 of 1998 (the Act). That was after she, as a paralegal, stole trust money amounting to some R 1,4 million from her employer, an

attorney. She was 28 years of age, a mother of two children aged eight and ten years, and in the process of divorce. The death of her father when she was nine years old had seriously affected her. At the age of 14 years she started using marijuana, after finishing school, she experimented with heroin and cocaine. Her husband, a hardened drug addict, was not able to assist her or her minor children. Her father-in-law was an unrehabilitated insolvent while her mother was a senior citizen (66 years of age), had very little income which could not support the minor children, was ill, had psychological problems and abused prescription medication (sleeping pills). Moreover, the appellant made two suicide attempts on her life. Because of the plea of guilty the only issue left was sentencing. By that time she had repaid the money, which benefited her personally, while the assets bought with the proceeds of her crime had been forfeited to the state in terms of the Act. The regional magistrate sentenced her to eight years of imprisonment, three of which were suspended on the usual terms. An appeal to the GJ was dismissed with costs by Tshabalala and Monama JJ.

A further appeal to the SCA was upheld. Her sentence was reduced to three years' imprisonment from which she was eligible for placement under correctional supervision (house arrest) in the discretion of the Correctional Services Commissioner or a parole board. Lewis JA (Mhlantla, Leach, Majiedt and Petse JJA concurring) held that the courts were guilty of grave misdirections. For example, the regional court failed to have regard to any of the expert reports and material evidence before it and did not, as it should have done, consider the interests of the children. The evidence and reports were those of a social worker who was also a probation officer, a clinical psychologist and general physician.

The children's rights were paramount and more important than anything else but that did not mean that everything else was unimportant. When a custodial sentence of a primary caregiver was in issue the court had four responsibilities, namely to –

- establish whether there would be an impact on the children;
- consider independently the children's best interests;
- attach appropriate weight to those interests; and
- ensure that the children would be taken care of if the primary caregiver was sent to prison.

In a number of decisions where a woman (as primary caregiver) had been convicted of theft or fraud, sentences were set aside on appeal and reduced or remitted to the trial court to consider sentence afresh, taking into account properly the interests of minor children.

In the instant case the fraud committed by the appellant against her employer, when she was in a position of trust, was such that a custodial sentence was required. Society had to be assured that persons who abused positions of trust for their gain would not be allowed to walk free. At the same time, taking into account the best interests of the appellant's very young children, the period of imprisonment should not be lengthy and should take into account the period for which she was incarcerated after her appeal to the full Bench failed and before she was again released on bail. Also, she had to be given an opportunity to make arrangements for her minor children's care and support before her incarceration.

Telecommunication

Statutory right of network operator to use municipal infrastructure to install network: Section 22 of the Electronic Communications Act 36 of 2005 (the Act) provides among others that: 'An electronic communications network service licensee may –
(*a*) enter upon any land … ;
(*b*) construct and maintain an electronic communications network or electronic communications facilities…; and
(*c*) alter or remove its electronic network or communications facilities.'

In doing so the licensee is required to have due regard to the applicable law and environmental policy of the country. To carry out any of the above activities the licensee is required, in terms of s 24, to give the local authority or person owning or responsible for the care and maintenance of any street, road or footpath where the work is to be done, a 30-day written notice period. The section further grants the local authority or person the right, at all times while the work is in progress, to supervise the work and receive payment of reasonable expenses incurred in connection with any alterations caused or supervision of the work involved.

In *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) the respondent Link Africa, which was an electronic communications network service licensee, gave the applicant City of Tshwane Metropolitan Municipality (Pretoria) (hereinafter referred to as the City) the required 30-day written notice that it was going to install telecommunication network infrastructure in the form of fibre-optic cables and subsequently started doing so, completing the first phase thereof. The City approached the High Court for an interdict restraining the respondent from continuing with its network installation as well as for removal of cables already installed. It was the City's contention that the licensee was required to seek its consent before installing the cables and that doing so without such consent amounted to arbitrary deprivation of property. The constitutionality of both ss 22 and 24 was also challenged. The GP per Avvakoumides AJ dismissed the application and denied leave to appeal. That leave was also denied by the SCA, hence an approach to the CC, which granted leave to appeal but dismissed the appeal itself with costs.

Reading the majority decision Cameron and Froneman JJ (Khampepe, Madlanga JJ, Molemela and Theron AJJ concurring) held that ss 22 and 24 of the Act were not constitutionally invalid, nor did the Act permit an arbitrary deprivation of property, as the minority judgment of Jafta J and Tshiqi AJ (Moseneke DCJ and Nkabinde J concurring) found. The majority agreed with the minority that a licensee did not need the consent of the City before installing network infrastructure. Both private and public law recognised that the law could grant to one person a right in the property of another, entitling the former to use and enjoy the other person's property or to prevent the latter from exercising certain entitlements flowing from the usual right of ownership. However, where the law imposed that obligation on landowners it required

fair procedures and equitable compensation in appropriate circumstances. In the present case s 24 did just that. First, the licensee was required to provide 30 days prior written notice of its intention to construct, maintain or alter electronic communications facilities. Second, the notice had to specify the manner in which the infrastructure was to be constructed and maintained. Third, the notice could provide for compensation for all reasonable expenses incurred or any supervision of work relating to such alteration, where applicable. Because of the landowner's multiple safeguards, both substantive and procedural, the deprivation of property was entirely reasonable and was not arbitrary.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with business rescue, claim by sub-contractor for payment for services rendered, correction of incorrectly recorded servitude, declaration of portion of national road as toll road, defamation of public official, discretion of court to allow new matter to remain in replying affidavit, duty of property owners to protect visiting children from injury or harm on their property, extradition, identification of headmen, leave to intervene in proceedings, no obligation on Legal Aid South Africa to fund legal representation before commission of inquiry, obligation of Department of Education to provide education to youth at child care and youth care centres, onus of proof, relief aimed at giving proper effect to court order already granted, service of summons on company after liquidation and supplementing written agreement by oral agreement and e-mails and usage of cellular telephone communication as evidence.

Humorous judgment: The ambidextrous sheriff

Dreyer v Naidoo 1959 (2) SA 629 (NPD)

'HOLMES, J.: This is a whimsical case about a deputy sheriff who served a summons upon himself as defendant. As far as counsel are aware, this is the first time that it has happened in South Africa.

The plaintiff issued summons against the deputy sheriff at Estcourt claiming £2,000 as damages for wrongful attachment. When the plaintiff's attorneys forwarded the summons to the deputy sheriff for service, he raised the question whether it would be regular for him to serve it on himself, and their reply was that this course would not be irregular, and indeed that if the summons were not served without further delay, the plaintiff would regard this as an irregularity!

Thereupon the deputy sheriff served the summons on himself. He does not say how he accomplished this dextrous feat, save to aver modestly that he "went through the motions" - thereby no doubt letting his left hand know what his right hand was doing.'

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NEW LEGISLATION

Legislation published from 26 October – 24 December 2015

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

Bills published

National Public Health Institute of South Africa Bill of 2015.
National Health Laboratory Service Amendment Bill of 2015.
Performing Animals Protection Amendment Bill B9A of 2015.
Performing Animals Protection Amendment Bill B9B of 2015.
Local Government: Municipal Electoral Amendment Bill B22A of 2015.
Local Government: Municipal Electoral Amendment Bill B22B of 2015.
Taxation Laws Amendment Bill B29 of 2015.
Taxation Laws Amendment Bill B29B of 2015.
Tax Administration Laws Amendment Bill B30 of 2015.
Financial Intelligence Centre Amendment Bill B33 of 2015.
Financial Sector Regulation Bill B34 of 2015.
Foreign Service Bill B35 of 2015.
Higher Education Amendment Bill B36 of 2015.
Films and Publications Amendment Bill B37 of 2015.
Administrative Adjudication of Road Traffic Offences Amendment Bill B38 of 2015.
Broadcasting Amendment Bill B39 of 2015.
Protected Disclosures Amendment Bill B40 of 2015.

Promulgation of Acts

New Development Bank Special Appropriation Act 20 of 2015. *Commencement:* 15 December 2015. GN1235 *GG*39513/15-12-2015.
Protection of Investment Act 22 of 2015. *Commencement:* To be proclaimed. GN1236 *GG*39514/15-12-2015.
Finance Act 19 of 2015. *Commencement:* 15 December 2015. GN1234 *GG*39512/15-12-2015.
Agrément South Africa Act 11 of 2015. *Commencement:* To be proclaimed. GN1233 *GG*39511/15-12-2015.
Criminal Matters Amendment Act 18 of 2015. *Commencement:* To be proclaimed. GN1241 *GG*39522/15-12-2015.
Defence Laws Repeal and Amendment Act 17 of 2015. *Commencement:* To be proclaimed. GN1240 *GG*39521/15-12-2015.
Disaster Management Amendment Act 16 of 2015. *Commencement:* To be proclaimed. GN1239 *GG*39520/15-12-2015.
Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2015. *Commencement:* See the respective sections for commencement dates. GN1144 *GG*39421/17-11-2015.

Commencement of Acts

Veterinary and Para-veterinary Professions Amendment Act 16 of 2012. *Commencement:* 9 November 2015. GN R1081 *GG*39380/9-11-2015.

Selected list of delegated legislation

Allied Health Professions Act 63 of 1982
Code of ethics in terms of s 54(9). BN268 *GG*39531/18-12-2015.
Broad-Based Black Economic Empowerment Act 53 of 2003
Exemption of the upstream petroleum industry and mining and minerals industry for a period of 12 months. GenN1047 *GG*39350/30-10-2015.
Amended B-BBEE Verification Manual. GenN1055 *GG*39378/6-11-2015.
Amended Tourism B-BBEE Sector Code. GN1149 *GG*39430/20-11-2015.
Civil Aviation Act 13 of 2009
Tenth and 11th Amendment of the Civil Aviation Regulations, 2015. GN R1025 and GN R1026 *GG*39339/30-10-2015.
Twelfth Amendment of the Civil Aviation Regulations, 2011. GN R1284 *GG*39563/24-12-2015.
Thirteenth Amendment of the Civil Aviation Regulations, 2011. GN R1287 *GG*39563/24-12-2015.
Continuing Education and Training Act 16 of 2006
National norms and standards for funding community education and training colleges. GN1083 *GG*39381/9-11-2015.
Debt Collectors Act 114 of 1998
Amendment of regulations relating to debt collectors, 2003. GN R1272 *GG*39552/23-12-2015 (see editorial 'Bill to deal with debt collection issues' 2015 (Nov) *DR* 3).
Diplomatic Immunities and Privileges Act 37 of 2001
Agreement between South Africa and the Organisation for the Prohibition of Chemical Weapons (OCPW) on the privileges and immunities of the OPCW. GN1079 *GG*39379/6-11-2015.
Electronic Communications and Transactions Act 25 of 2002
Amendment of regulation 2(2) of the Alternative Dispute Resolution Regulations under the Act. GN1228 *GG*39504/11-12-2015.
Employment Equity Act 55 of 1998
Code of Good Practice on Employment of Persons with Disabilities. GN1085 *GG*39383/9-11-2015.
Engineering Profession Act 46 of 2000
Guideline for services and processes for estimating fees for persons registered in terms of the Act. BN138 *GG*39480/4-12-2015.
Income Tax Act 58 of 1962
Agreement between South African and the Republic of Kenya for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GenN1158 *GG*39422/19-11-2015.
Agreement between South Africa and the Hong Kong Special Administrative Region of the People's Republic of China for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GenN1173 *GG*39444/24-11-2015.
Protocol amending the convention between South African and Botswana for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GenN1194 *GG*39485/10-12-2015.

Protocol amending the convention between South African and Norway for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GenN1195 *GG*39486/11-12-2015.
Regulations in terms of terms of para 12D(5)(*b*) of the Seventh Schedule of the Act on information to be contained in contribution certificates. GN1262 *GG*39538/18-12-2015.

Magistrates' Courts Act 32 of 1944
Abolishment of certain districts, subdisctricts and appointed places for the holding of a court. GN1267 *GG*39540/21-12-2015.

Marine Living Resources Act 18 of 1998
Amendment of regulations (recreational fishing permits, recreational west coast rock lobster permits, and recreational or subsistence permits). GN1090 *GG*39390/11-11-2015 and GN1091 *GG*39391/11-11-2015.
Military Ombud Act 4 of 2012
Military Ombud Complaints Regulations, 2015. GN R611 *GG*39375/6-11-2015.
Military Pensions Act 84 of 1976
Determination of amounts. GN R614 *GG*39375/6-11-2015.
National Credit Act 34 of 2005
Regulations on Review of Limitations on Fees and Interest Rates. GN1080 *GG*39379/6-11-2015.
National Environmental Management Act 107 of 1998
Regulations pertaining to the financial provision for prospecting, exploration, mining or production operations. GN R1147 *GG*39425/20-11-2015.
National Forests Act 84 of 1998
Declaration of certain trees as 'champion trees'. GenN1056 *GG*39379/6-11-2015.
List of protected tree species. GenN1161 *GG*39433/20-11-2015.
National Gambling Act 7 of 2004
Maximum number of casino licences that may be granted throughout the Republic. GN1031 *GG*39344/30-10-2015.
National Health Act 61 of 2003
National environmental health norms and standards for premises and acceptable monitoring standards for environmental health practitioners. GenN1229 *GG*39561/24-12-2015.
National Heritage Resources Act 25 of 1999
Regulations relating to the registration of dealers in heritage objects and the control of trade in heritage objects. GN1258 *GG*39533/18-12-2015.
Nursing Act 33 of 2005
Fees payable to the South African Nursing Council. GN R1051 *GG*39360/3-11-2015.
Occupational Health and Safety Act 85 of 1993
Incorporation of safety standards into the Electrical Installation Regulations, 2009. GN1225 *GG*39504/11-12-2015.
Pharmacy Act 53 of 1974
Fees payable to the council in 2016. BN244 *GG*39369/6-11-2015.
Road Accident Fund Act 56 of 1996
Tariff of fees in respect of the cost of an assessment conducted. GN1163 *GG*39437/20-11-2015 and GN1168 *GG*39446/24-11-2015.
Social Assistance Act 13 of 2004
Increase in respect of social grants (from 1 October 2015). GN1084 *GG*39382/9-11-2015.
South African Civil Aviation Authority Levies Act 41 of 1998
Amendment of fuel levy on the sale of aviation fuel. GN R1285 and GN R1286 *GG*39563/24-12-2015.
South African Language Practitioners' Council Act 8 of 2014
South African Language Practitioners' Council Regulations, 2015. GN1105 *GG*39408/13-11-2015.
South African Schools Act 84 of 1996
Regulations pertaining to the National Curriculum Statement Grades R-12. GN1102 *GG*39406/13-11-2015 and GN1162 *GG*39435/20-11-2015.
Regulations pertaining to the conduct, administration and management of the national senior certificate examination. GN1103 *GG*39406/13-11-2015 and GN1162 *GG*39435/20-11-2015 .

Superior Courts Act 10 of 2013
Determination of areas under the jurisdiction of certain divisions of the High Court of South Africa. GN1266 *GG*39540/21-12-2015.

Tax Administration Act 28 of 2011
Threshold for the amount of tax in dispute for purposes of hearing of an appeal by the tax board (R1 000 000) from 1 January 2016. GenN1196 *GG*39490/17-12-2015.
Veterinary and Para-veterinary Professions Act 19 of 1982
Regulations relating to the performance of compulsory community service. GN R1082 *GG*39380/9-11-2015.

Draft legislation

Regulations relating to emergency medical services at mass gathering events in terms of the National Health Act 61 of 2003 for comment. GN1023 *GG*39337/29-10-2015.
Regulations relating to access and use of government waterworks and surrounding state-owned land for recreational purposes in terms of the National Water Act 36 of 1998 for comment. GN R1046 *GG*39348/30-10-2015.
Amendments to the Environmental Impact Assessment Regulations, 2014 and certain listing notices in terms of the National Environmental Management Act 107 of 1998 for comment. GN1030 *GG*39343/30-10-2015.
Regulations regarding fees payable to presiding officers, medical assessors, employer and employee assessors, interpreters and members of the compensation board in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GN1049 and GN1050 *GG*39354/2-11-2015; and GN1060 and GN1061 *GG*39366/6-11-2015.
Traditional Health Practitioners Regulations 2015 in terms of the Traditional Health Practitioners Act 22 of 2007 for comment. GN1052 *GG*39358/3-11-2015.
Guidelines for the issuing of licences for pharmacy premises in terms of the Pharmacy Act 53 of 1974 for comment. GN1065 *GG*39376/6-11-2015.
Draft Immigration Amendment Bill. GenN1201 *GG*39501/11-12-2015.
Amendment of the regulations (reg 107) relating to children in terms of the Children's Act 38 of 2005. GN R1112 *GG*39410/13-11-2015.
Draft Credit Life Insurance Regulations in terms of s 171(1)(*d*)(ii) of the National Credit Act 34 of 2005. GN1104 *GG*39407/13-11-2015.
Proposed amendments to the Municipal Electoral Regulations, 2000 in terms of the Local Government: Municipal Electoral Act 27 of 2000. GenN1170 *GG*39436/20-11-2015.
Draft regulations relating to miscellaneous additives in foodstuffs in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. GN1165 *GG*39441/23-11-2015.
Regulations defining the scope of the profession of oral hygiene in terms of the Health Professions Act 56 of 1974 for comment. GN1171 *GG*39453/26-11-2015.
Proposed amendment of the regulations regarding supply chain management in terms of the Local Government: Municipal Finance Management Act 56 of 2003. GN1197 *GG*39460/27-11-2015.
Administrative Adjudication of Road Traffic Offences Amendment regulations in terms of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 for comment. GN1204 *GG*39482/7-12-2015.
Meat inspection scheme in terms of the Meat Safety Act 40 of 2000 for comment. GN1238 *GG*39519/15-12-2015.
Draft regulations on the code of conduct for premium rated services in terms of the Electronic Communications Act 36 of 2005 and the Independent Communications Authority of South Africa Act 13 of 2000. GN1237 *GG*39515/15-12-2015 and GN1260 *GG*39536/17-12-2015.
Draft guidelines on the assessment of public interest provisions in merger regulation under the Competition Act 89 of 1998. GenN1228 *GG*39560/22-12-2015.

Employment law update

Talita Laubscher *BIur LLB (UFS) LLM (Emory University USA)* is an attorney at Bowman Gilfillan in Johannesburg.

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

Remedies in unfair discrimination dismissals

In *Arb Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] 11 BLLR 1081 (LAC), Mr Hibbert contended that he was forced to retire at the age of 64. He contended that his retirement was not in accordance with s 187(2) of the Labour Relations Act 66 of 1995 (LRA) as he had not agreed to retire at that age. He therefore claimed that he was dismissed and that his dismissal was automatically unfair as it was based solely on his age. He instituted a claim in the Labour Court (LC) for an automatically unfair dismissal in terms of the LRA and for this he sought 24 months' compensation. He also claimed damages and compensation for the alleged unfair age discrimination in terms of the Employment Equity Act 55 of 1998 (EEA).

The LC, per Lagrange J, held that there was no agreement that Hibbert would retire at the age of 64 and that the respondent had unilaterally decided to retire him when he reached that age. In the circumstances, Hibbert's dismissal was automatically unfair. The court accepted that this amounted to unfair age discrimination.

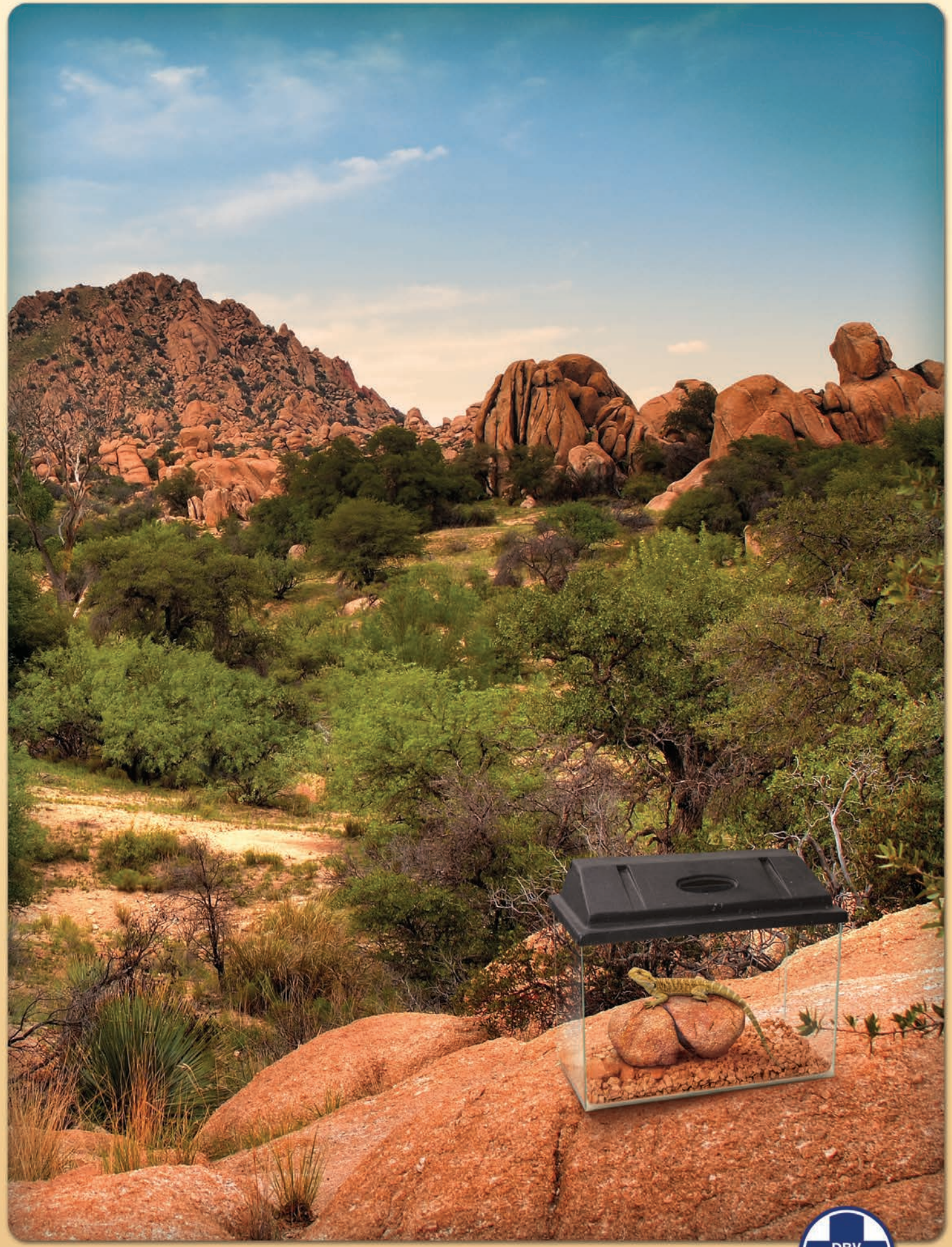
As regards the remedy to which Hibbert was entitled, the LC held that he could not claim compensation under both the LRA and the EEA. Furthermore, the court was of the view that the unfair discrimination Hibbert complained of was not the most egregious type of automatically unfair dismissal and an award for compensation equal to 24 months' remuneration would, therefore, be excessive. Therefore, taking into account Hibbert's own expectation that he would have retired at the age of 65, the court awarded him compensation equal to 12 months' remuneration.

The LC recognised that while compensation may not be awarded under both the LRA and the EEA, the position is different when it comes to damages. This is because the EEA specifically empowers the LC to make an award for damages in the case of unfair discrimination claims, while the LRA does not recognise damages claims. However, in order to be successful with a damages claim, the employee must prove that he suffered damages and must prove the quantum of damages suffered. In this case, Hibbert failed to prove his damages and the court was accordingly unable to hold the respondent liable for damages.

Arb Electrical appealed and Hibbert cross-appealed. The Labour Appeal Court (LAC), per Waglay JP, Ndlovu JA and Coppin JA, summarised the law on remedies in the case of unfairly discriminatory dismissals as follows:

- The primary remedy in the case of a dismissal is reinstatement. Reinstatement *must* be ordered unless the exceptions set out in s 193(2) apply.
- Reinstatement implies being placed back in employment from the date of dismissal and the employee is, therefore, entitled to his full salary from the date of dismissal to the reinstatement date. With regard to re-employment, this can be ordered from any date after the date of dismissal.
- Payment from the date of dismissal to the reinstatement date (or in respect of back-dated re-employment) is not *compensation* for purposes of the LRA. It is payment of the salary the employee would have received had he not been dismissed unfairly.
- Under the LRA, where reinstatement or re-employment is not ordered, compensation may be ordered. Such compensation is not aimed at making good any patrimonial loss the employee had suffered. It is monetary relief for the injured feeling, humiliation and impairment of the human dignity that the employee suffered at the hands of the employer.
- Compensation under the LRA must be just and equitable. In determining the amount of compensation that may be ordered, factors such as the nature and seriousness of the infringement, the circumstances in which it took place, the behaviour of the employer and the extent of the complainant's humiliation or distress would be relevant.
- Compensation under the LRA is limited to 12 months' remuneration in the case of 'ordinary' dismissals, and 24 months' remuneration in the case of discriminatory dismissals.
- The EEA permits the payment of compensation, as well as damages. Damages may be awarded in respect of patrimonial losses suffered and proved. Compensation is monetary relief for the affront of human dignity arising from the unfair discrimination suffered by the complainant. The amount of compensation that may be awarded in terms of the EEA is not limited and must be just and equitable.
- There is no bar to an employee to claiming compensation under the LRA for an automatically unfair dismissal based on having been discriminated against, and to claiming compensation under the EEA for having been unfairly discriminated against. The employee may bring these claims in the same action.
- Where the employee's dismissal is found to have been automatically unfair in terms of the LRA and that he had been subjected to unfair discrimination under the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not award separate amounts as compensation, but must consider what is just and equitable for the indignity the employee has suffered.
- If the claim is under the LRA only, the court must determine the amount of compensation that is just and equitable. If this amount exceeds the limits in s 194, the amount must be reduced accordingly. The amount does not have to be reduced if the claim is both under the LRA and the EEA, because the EEA prescribes no limit to the amount of compensation that may be awarded. This recognises the employee's right to claim under both the LRA and the EEA and at the same time, the employer is not penalised twice for the same wrong, because a single determination is made as to what is just and equitable in the circumstances of the case as a whole.

The LAC then turned to consider the relief ordered by the court *a quo*, namely 12 months' remuneration as compensation. The LAC held that because the court *a quo* exercised its discretion in determining 'just and equitable' compensation, it was not open to the LAC to interfere, unless the discretion was not properly exercised. The LAC held that



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the court *a quo* had properly exercised its discretion with reference to all the relevant facts and that the compensation amount of R 420 000 was therefore not unreasonable. As regards the claim for damages, LAC noted that Hibbert had failed to prove his patrimonial losses and in the circumstances, the court *a quo* was correct in not awarding any damages under the EEA. The appeal and the cross-appeal were accordingly dismissed.

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

Question:

My colleague has an award for compensation issued in her favour in the amount of R 119 000 based on unfair dismissal. The arbitrator, in his ruling, did not specify as to whether such compensation was subject to tax (South African Revenue Service (Sars)) deductions or not.

The respondent requested a tax directive in respect of that amount, which provided that the applicant was supposed to pay R 29 000 plus at that time. Six months later, the respondent did not make any payments, either to Sars or the applicant. The respondent then asked for another tax directive, this time around the tax directive was with penalties and standing at R 51 000 plus.

The matter was referred to the Labour Court (LC) seeing that the respondent was reluctant to pay and such arbitration award was made an order of the LC. Despite such court order, the respondent still failed to pay, until the applicant instituted contempt proceedings the LC, where the respondent argued that it was not in contempt, that it has paid the applicant an amount of R 51 000 after tax deductions.

Despite no proof to substantiate such averments, through production of tax directives and payment into the applicant's bank account, the judge found the respondent was not in contempt and dismissed the contempt application.

The first question is: Is an award for compensation subject to tax, and my second question would be, on whose account must the penalties from Sars be imputed?

Answer:

I have researched the labour journals and could not find any information in respect of why or under what circumstances Sars would penalise a person. While I suspect the answer may be found in the relative legislation dealing with income tax, I am nevertheless hesitant to speculate over your second question. For this reason I shall only deal with the first part of your question.

In answering this question I shall refer to the LC's decision in *Penny v 600 SA Holdings (Pty) Ltd* (2003) 24 ILJ 967 (LC) per Francis J.

The facts in that matter are similar to the circumstances you have presented. The employee was awarded compensation in the amount of R 312 000, the employer deducted R 131 040 to pay to Sars and, a further deduction, which is not relevant for the purpose of this article and made a tender to pay the employee the balance. The employee rejected the tender and made an application to the LC in terms of s 158(1)(*c*) of the Labour Relations Act 66 of 1995, to enforce the award.

At proceedings the employee argued that compensation awarded in terms of s 194 of the LRA does not attract tax as compensation is not income but rather it takes the form of damages.

In addressing this argument the court held:

'An employer has a statutory obligation in terms of the Income Tax Act 58 of 1962 (the Income Tax Act) to deduct the required tax from any remuneration which it pays to an employee. Gross income is defined in s 1(*d*) of the Income Tax Act as:

"Any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or any appointment (or right or claim to be appointed) to any office or employment. Provided that ... ."

Part 1 of sch 4, item 1 defines remuneration as:

'Means any amount of income which is paid or is payable to any person by way of any salary, leave pay, allowance, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and *whether or not in respect of services rendered*,' [my emphasis].

In terms of sch 4 item 2(1) of the Income Tax Act, an employer who —

'pay or becomes liable to pay any amount by way of remuneration to an employee shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from that amount by way of employee's tax an amount which shall be determined as provided in paragraphs 9, 10 and 12 whichever is applicable, in respect of liability for normal tax of that employee'.

The 'Commissioner' referred to is a Sars Commissioner and not a Commission for Conciliation, Mediation and Arbitration (CCMA) Commissioner.

Therefore, it is implied that any compensation awarded to an employee for an unfair dismissal or unfair labour practice is always subject to lawful tax deductions. It is only Sars, in terms of a directive, which can calculate the correct amount which needs to be deducted.

Moving away from your specific query but in keeping with the general scheme of the question, the same principle applies to compensation owing to an employee in terms of a settlement agreement. However, parties can agree that the amount contained in the agreement is nett of tax and that the employer will be liable to pay the taxable amount to Sars directly.

By way of an example, let us assume an employee earns R 100 per month gross tax and pursuant to the employee's claim for unfair dismissal, parties agree that the employer will pay the employee three months' salary equating to R 300. The parties can further agree that the R 300 is nett tax, which means the employee receives the full amount and the employer, over and above making the R 300 payment to the employee, will pay into Sars the appropriate amount of tax, which the R 300 attracts. If we assume for argument sake that the tax on R 300 is R 75 then this would translate to the employer paying the employee the full R 300 and further pays Sars R 75, thus the employer total monetary liability is R 375. This principle was confirmed by the LC in *Motor Industry Staff Association and Another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd* (2003) 24 ILJ 421 (LC).

The court did, however, say that under the above circumstances the parties must specifically record that the amount set out in the settlement agreement is nett of tax and that the employer will be responsible to pay Sars the appropriate tax on the quantum. In the absence of such a clause, the amount contained in the agreement will be gross tax and subject to lawful tax deductions in accordance with the provisions of the Income Tax Act referred to in the *Penny* matter.

❑

By Meryl Federl

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
CILJSA	Comparative and International Law Journal of Southern Africa	Unisa	(2015) 48.2
SAMLJ	South African Mercantile Law Journal	Juta	(2015) 27.3
TSAR	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2015) 4

Air law

Dube, A 'Of neighbours and shared upper airspaces: The role of South Africa in the management of the upper airspaces of the Kingdoms of Lesotho and Swaziland' (2015) 48.2 *CILJSA* 221.

Child law

Sonnekus, JC 'Kinderaanneming dra gevolge wat nie ligtelik afgelê kan word nie – *Turner v Turner* saak no 13040/2013 (ongerapporteer) 19-6-2015 (GJ)' (2015) 4 *TSAR* 886.

Company law

De Lange, S 'The social and ethics committee in terms of the 2008 Companies Act: Some observations regarding the exemptions and the role of the Companies Tribunal' (2015) 27.3 *SAMLJ* 507.

Delport, H '*Lien* held by company on members' shares' (2015) 27.3 *SAMLJ* 540.

Kawadza, H 'The liability regime for insider dealing violations in South Africa: Where we have been, where we are' (2015) 27.3 *SAMLJ* 383.

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By
Patrick
Bracher

Standard suretyship wording is enforceable

I refer to the article by Robert dos Santos '*The lazy man's suretyship: Are unlimited debts of limited application?*' (2015 (Sept) *DR* 26). I believe that it is irresponsible to argue in favour of a conclusion and to disguise the flaws in the agreement by suggesting that a commonly and correctly held view is 'questionable' or that 'the possibility arises that … there may be non-compliance'.

The author would have us believe that a suretyship in terms of which the surety is liable for 'the due and punctual payment and performance by the debtor of all debts and obligations of whatsoever nature and howsoever arising which the debtor may now or in future owe to the creditor' may not be enforceable because s 6 of the General Laws Amendment Act 50 of 1956 (the Act), requires the scope of the surety's obligations to be ascertainable from the document.

Such clauses have been widely used and enforced before and after the Act was passed. There is nothing open-ended about that standard provision. The surety stands surety for all debts that the debtor may now or in future owe to the creditor. That wording is clear and enforceable. If you want to know what debts the surety is securing you simply look to see whether the principal debt is a debt owed by the debtor to the creditor. As long as anything is owing, the surety has an accessory obligation to the creditor.

Wide language was enforced by the appellate division in *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1(A) where the suretyship related to 'all sums of money which the debtor may have in the past owed or may presently or in the future owe to you [followed by some listed debts] … or any cause of indebtedness whatsoever'. The court found that the suretyship, in essence, amounted to a promise by each of the sureties to the creditor to guarantee any indebtedness which the debtor may incur to the creditor and judgment was granted in favour of the creditor. It is true that some specific debts were listed but this did not detract from the generality of the provision. In *Cope v Atkinson's Motor Garages Ltd* 1931 AD 366 the appellate division enforced a bond 'in respect of the indebtedness upon any just cause of indebtedness whatsoever'. The court, in *Sapirstein*, was happy to enforce the mortgage bond, which it saw as an 'unlimited continuing guarantee for payment of all sums of money which the principal debtor may in future owe to the creditor'.

The issue was again dealt with in *Swift Air Freight CC v Singh* 1993 (1) SA 454 (D). The court was considering a suretyship 'for the due, proper and faithful performance by the debtor of the conditions, stipulations and obligations arising from various transactions between the creditor and the debtor'. It was argued for the surety that the suretyship was unenforceable by virtue of the Act because 'various transactions' could mean some transactions and not others or different and unspecified transactions but not all transactions. The court held that the expression 'various transactions' must be taken to mean all transactions even though they may be of different classes. The intention of the creditor was to cast the net as wide as possible. The suretyship did not offend against the provisions of s 6 of the Act.

In *Vitamax (Pty) Ltd v Executive Catering Equipment CC and Others* 1993 (2) SA 556 (W) Mahomed J had no difficulty enforcing a suretyship by which the sureties bound themselves as sureties with the customer of a catering equipment company 'for the due fulfilment of all the customer's present and future obligations to Vitamax without limitation'. Similarly, the Eastern Cape High Court upheld the validity of a suretyship for 'the due and punctual … performance of any obligation, all of which may now or in future become owing by the debtor for any reason whatsoever' (*De Villiers v Nedfin Bank, a division of Nedcor Bank Ltd* 1997 (2) SA 76 (E)). There have probably been thousands of unopposed unreported judgments since 1956 upholding this form of suretyship.

It is also strange to argue that the standard wording becomes enforceable if the general words are followed or preceded by a reference to identified principal debts. In that case you are either enforcing the general words or the specific words depending on the drafting and it adds nothing to the argument. The surety is not being held liable for debts not envisaged by the suretyship. The debts for which the surety is bound are clear and intrinsic evidence is admissible to show that the amount claimed is money owed by the debtor to the creditor.

If the purpose of the article under discussion is to urge those drafting sureties to do so carefully and to describe things plainly, no one would argue with that suggestion.

That is why the standard wording has been upheld as long as the Act has been part of our law. It clearly, succinctly and enforceably sets out what creditors want covered and what sureties owe.

Patrick Bracher *Attorneys Admission Diploma (Unisa)* is an attorney at Norton Rose Fulbright in Johannesburg. ❑

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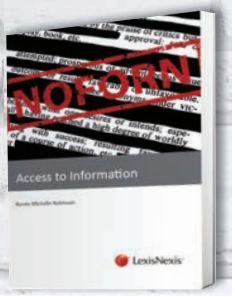

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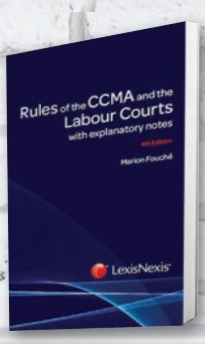

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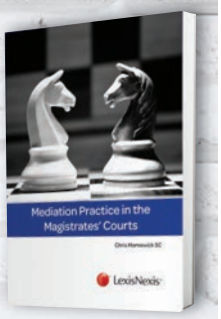

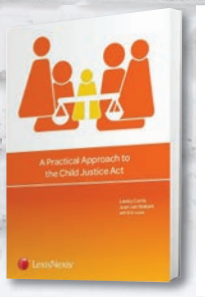

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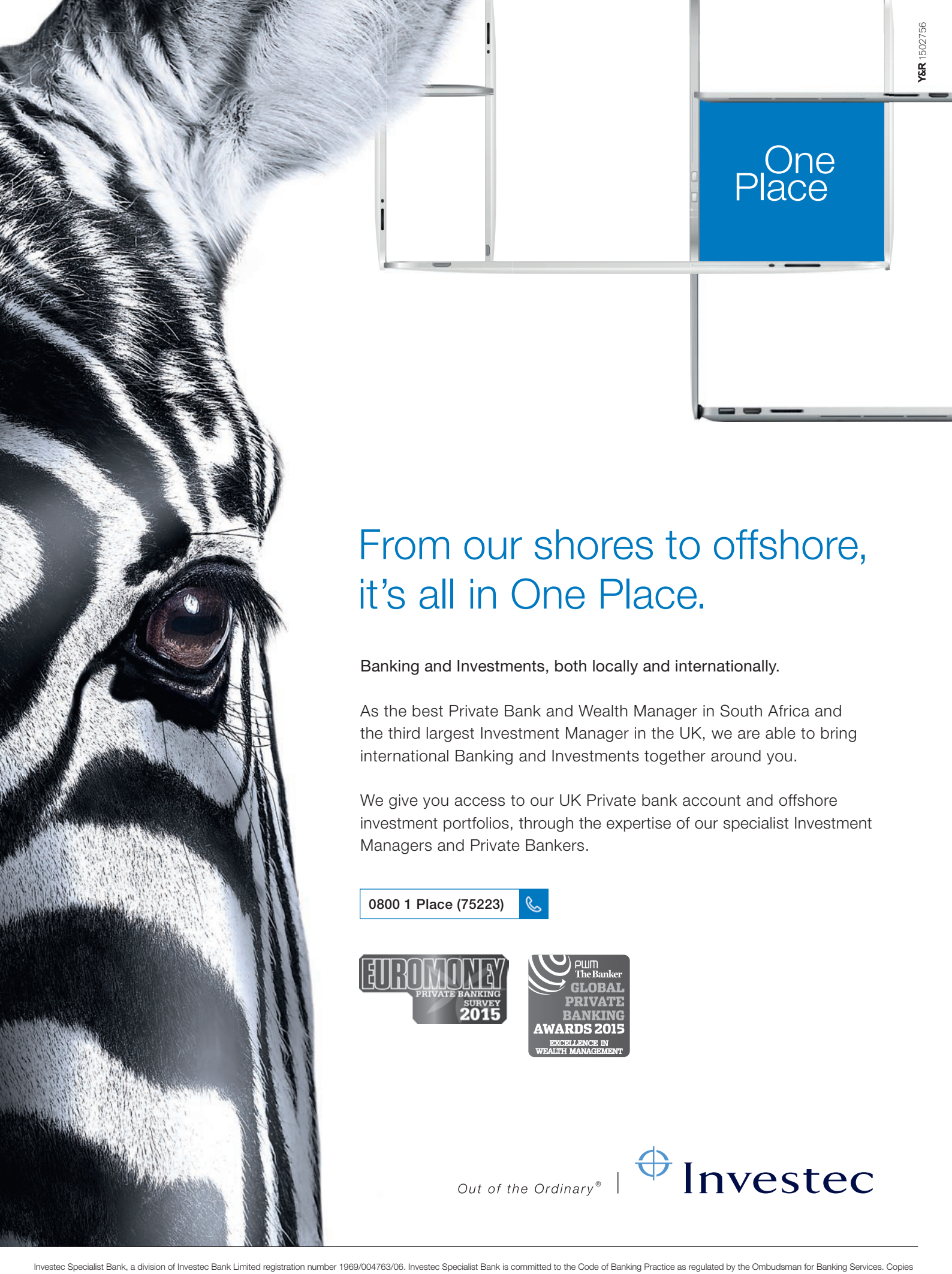

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RISKALERT

FEBRUARY 2016 NO 1/2016

IN THIS EDITION

AIIF: Ann Bertelsmann, Risk Manager, Attorneys Insurance Indemnity Fund, 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900
Website: www.aiif.co.za • Twitter handle: @AIIFZA

Prescription Alert, 2nd Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 149 • Tel: (021) 422 2830 • Fax: (021) 422 2990
E-mail: info@aiif.co.za • Website: www.aiif.co.za

Attorneys Fidelity Fund, 5th Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 154 • Tel: (021) 424 5351 • Fax: (021) 423 4819
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Attorneys Insurance Indemnity Fund (NPC)
Est. 1993 by the Attorneys Fidelity Fund

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RISK MANAGER'S COLUMN

Brand new professional indemnity policy as from 1 July 2016

IMPORTANT NOTE

All practitioners please carefully read the comments below, together with the draft Master Policy for the coming insurance year (which runs from **1 July 2016 to 30 June 2017**). The draft policy can be found on p 3. There are some changes in the new policy, which may affect the way in which you run your practice and/or that may necessitate your buying insurance cover for specific areas of your practice. (The **2015/2016** policy can be found on the AIIF website at www.aiif.co.za.)

Ann Bertelsmann, Risk Manager

In re-drafting the policy, the Attorneys Insurance Indemnity Fund NPC (AIIF) has been guided by three factors: the interests of the profession, the interests of the public and the sustainability of the company.

Our aim was to re-draft the policy in the plainest and clearest language possible, to make it more accessible to all. We have also changed the construction of the policy for the same reason.

The amount of cover and standard excesses/deductibles remain the same as in the previous year.

What are the noteworthy changes?

➢ Only legal services in respect of South African law will be indemnified. Work done in respect of the law of another jurisdiction will only be indemnified if the person doing such work has been admitted to practice in that jurisdiction. – see definition XX.

➢ The additional penalty excess/deductible, for failing to use or comply with Prescription Alert in Road Accident Fund matters, increases from 15% to 20% of the applicable excess/deductible. – see clause 12 a) and Schedule B, column A.

An additional penalty of 20% will also be applied to the excess/deductible in matters where documents are "witnessed" without the signature having actually been witnessed or where a false representation has been made in a certificate – see clauses 13 and 20 and Schedule B, columns A and B.

➢ The following have now been expressly excluded from cover:

- Liability arising out of cybercrime – clause 16 o) (also see definition IX);
- Liability arising out of the misappropriation or unauthorised borrowing of money or property belonging to client or a third party, whether held in trust or otherwise – see clause 16 b).
- Liability which should have been insured under another policy – see clause 16 c);
- Liability arising out of the intentional giving of an unqualified and

RISK MANAGER'S COLUMN continued...

binding undertaking, the fulfilment of which is dependent on the act of someone else – see clause 16 j);

- Liability arising out of a defamation claim between two practitioners – see clause 16 n);
- Claims by an entity in which the insured has a material interest – see clause 16 p);

➢ The Risk Management Questionnaire must now be completed annually – see definition XXIV.

➢ If necessary, the insured must give the insurer reasonable access to its premises, staff and records in the conduct of the investigation of a claim – see clause 26.

➢ The insurer will be entitled to report an insured to the regulator, for failure to cooperate or assist the insurer in terms of the policy – see clause 27, and for material non-disclosure or misrepresentation relating to an application for indemnity – see clause 35.

➢ Clause 40 contains a consolidated dispute resolution procedure.

➢ The definition of dishonesty in XI should also be noted.

Ann Bertelsmann
Legal Risk Manager, AIIF
(ann.bertelsmann@aiif.co.za)

SCAM NEWS

Almost on a daily basis, we are being notified about one or other scam being attempted (and sometimes successfully effected) on members of the profession and their staff. Sadly, we all have to be doubly alert.

With the recent e-mail interception scam (see RAB 5/2014, p5) practitioners can protect themselves by following some of our suggested guidelines and, as far as securing e-mails is concerned, they need to make sure that they make use of a reputable e-mail hosting service. Advice should be sought from IT specialists and technicians about encryption, internet security and e-mail hosting.

Unfortunately, clients are also getting scammed. This is more difficult to control. The scammer intercepts e-mail correspondence between the attorney and the client and then provides the client with incorrect banking details into which funds must be deposited. We suggest that practitioners warn anyone who needs to deposit funds into their trust accounts to telephonically confirm banking details which have been received by e-mail.

RAF MATTERS

Adjustment of the statutory limit for loss of income/loss of support as at 31 October 2015

BOARD NOTICE 234 OF 2015

In accordance with section 17(4A)(a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, the Road Accident Fund adjusted the amounts referred to in subsection 17(4)(c) to **R237,850.00** with effect from **31 October 2015**.

Attorneys Insurance Indemnity Fund (NPC)
Est. 1993 by the Attorneys Fidelity Fund

THE ATTORNEYS FIDELITY FUND PROFESSIONAL INDEMNITY INSURANCE SCHEME 1 JULY 2016 TO 30 JUNE 2017

Preamble

The **Attorneys Fidelity Fund**, as permitted by the **Act**, has contracted with the **Insurer** to provide professional indemnity insurance to the **Insured**, in a sustainable manner and with due regard for the interests of the public by:

a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
b) protecting the public against indemnifiable and provable losses arising out of **Legal Services** provided by the **Insured**, on the basis set out in this policy.

Definitions:

I. Act:
The Attorneys Act 53 of 1979 (as amended or as replaced by the Legal Practice Act 28 of 2014);

II. Annual Amount of Cover:
The total available amount of cover for the **Insurance Year** for the aggregate of payments made for all **Claims, Approved Costs,** and **Claimants' Costs** in respect of any **Legal Practice** as set out in Schedule A;

III. Approved Costs:
Legal and other costs incurred by the **Insured** with the **Insurer's** prior written permission (which will be in the **Insurer's** sole discretion) in attempting to prevent a **Claim** or limit the amount of a **Claim**;

IV. Attorneys Fidelity Fund:
As referred to in Section 25 of the **Act**;

V. Bridging Finance:
The provision of short term finance to a party to a **Conveyancing Transaction** before it has been registered in the Deeds Registry;

VI. Claim:
A written demand or the institution of legal proceedings against the **Insured** for compensation or damages arising out of the **Insured's** provision of **Legal Services**; or

A notification by an **Insured** of circumstances that may in the future give rise to a legal liability to pay compensation or damages arising out of the **Insured's** provision of **Legal Services**;

(For the purposes of this definition, a written demand is any written communication that either makes a demand for or intimates or implies an intention to demand compensation or damages from an **Insured**);

VII. Claimant's Costs:
The legal costs the **Insured** is obliged to pay to a claimant by order of a court, arbitrator, or by an agreement approved by the **Insurer;**

VIII. Conveyancing Transaction:
A transaction which:

a) involves the transfer of legal title to or the registration of a real right in immovable property from one or more legal entities or natural persons to another; and/or
b) involves the registration or cancellation of any mortgage bond over immovable property; and/or
c) is required to be registered in any Deeds Registry in the Republic of South Africa, in terms of any relevant legislation;

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

X. Defence Costs:
The reasonable costs the **Insurer** (or **Insured** – with the **Insurer's** consent) incurs in investigating and defending a **Claim** against an **Insured**;

XI. Dishonest:
Bears its ordinary meaning but includes conduct which may occur without an **Insured's** subjective purpose, motive or intent, but which a reasonable legal practitioner would consider to be deceptive or untruthful or lacking integrity or conduct which is generally not in keeping with the ethics of the legal profession;

XII. Employee:
A person who is or was employed or engaged by the **Legal Practice** to assist in providing **Legal Services**. (This includes in-house legal consultants, associates, professional assistants, candidate attorneys, paralegals and clerical staff but does not include an independent contractor who is not a **Practitioner**.);

XIII. Excess:
The first amount payable by the **Insured** (or deductible) in respect of each and every **Claim** (including **Claimant's Costs**) as set out in schedule B;

XIV. Fidelity Fund Certificate:
A certificate provided in terms of section 42 of the **Act**;

XV. Innocent Principal:
Each present or former **Principal** who:

a) may be liable for the debts and liabilities of the **Legal Practice**;
b) did not personally commit or participate in committing the **Dishonest**, fraudulent or other criminal act and had no knowledge or awareness of such act;

XVI. Insured:
The persons or entities referred to in clauses 5 and 6 of this policy;

XVII. Insurer:
The Attorneys Insurance Indemnity Fund NPC, Reg. No. 93/03588/08;

XVIII. Insurance Year:
The period covered by the policy, which runs from 1 July of the first year to 30 June of the following year;

XIX. Legal Practice:
The person or entity listed in clause 5 of this policy;

XX. Legal Services:
Work reasonably done or advice given in the ordinary course of carrying on the business of a **Legal Practice** in the Republic of South Africa. Work done or advice given on the law applicable in jurisdictions other than the Republic of South Africa are specifically excluded, unless provided by a person admitted to practise in the applicable jurisdiction;

XXI. Practitioner:
Any attorney, notary or conveyancer as defined in the **Act;**

XXII. Prescription Alert:
The computerised diary system that the **Insurer** makes available to the **Insured;**

XXIII. Principal:
A sole **Practitioner**, partner or director of a **Legal Practice** or any person who is publicly held out to be a partner or director of a **Legal Practice**;

XXIV. Risk Management Questionnaire:
A self- assessment questionnaire which can be downloaded from or completed on the **Insurer's** website (www.aiif.co.za) and which must be completed annually by the senior partner or director or designated risk manager of the **Insured** as referred to in clause 5;

XXV. Road Accident Fund claim (RAF):
A claim for compensation for losses in respect of bodily injury or death caused by, arising from or in any way connected with the driving of a motor vehicle (as defined in the Road Accident Fund Act of 1996 or any predecessor or successor of that Act) in the Republic of South Africa;

XXVI. Senior Practitioner:
A **Practitioner** with no less than 15 years' standing in the legal profession;

XXVII. Trading Debt:
A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:

a) a refund of any fee or disbursement charged by the **Insured** to a client;
b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client;
d) any labour dispute or act of an administrative nature in the **Insured's** practice;

For the purposes of this policy, "disbursement" does not include any amount paid to counsel or an expert.

What cover is provided by this policy?

1. On the basis set out in this policy, the **Insurer** agrees to indemnify the **Insured** against professional legal liability to pay compensation to any third party:
   a) that arises out of the provision of **Legal Services** by the **Insured**; and
   b) where the **Claim** is first made against the **Insured** during the current **Insurance Year**.
2. The **Insurer** agrees to indemnify the **Insured** for **Claimants' Costs** and **Defence Costs** on the basis set out in this policy.
3. The **Insurer** agrees to indemnify the **Insured** for **Approved Costs** in connection with any **Claim** referred to in clause 1.
4. The **Insurer** will not indemnify the **Insured** in the current **Insurance Year,** if the circumstance giving rise to the **Claim** has previously been notified to the **Insurer** by the **Insured** and registered in an earlier **Insurance Year**.

Who is insured?

5. Provided that each **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate** at the time the **Claim** is made, the **Insurer** insures all **Legal Practices** providing **Legal Services**, including:
   a) a sole Practitioner;
   b) a partnership of Practitioners;
   c) an incorporated Legal Practice ;
6. The following are included in the cover, subject to the **Annual Amount of Cover** applicable to the **Legal Practice**:
   a) a **Principal** of a **Legal Practice** providing **Legal Services**, provided that the **Principal** has, or is obliged to have, a current **Fidelity Fund Certificate**;
   b) a previous **Principal** of a **Legal Practice** providing **Legal Services**, provided that that **Principal** had, or was obliged to have, a current **Fidelity Fund Certificate** at the time of the circumstance giving rise to the **Claim**;
   c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance giving rise to the **Claim**;
   d) the estates or legal representatives of the people referred to in clauses 6(a) 6(b) and 6(c).

Amount of cover

7. The **Annual Amount of Cover**, as set out in Schedule A, is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance giving rise to the **Claim**.
8. Schedule A sets out the maximum **Annual Amount of Cover** that the **Insurer** provides per **Legal Practice**. This amount includes payment of compensation (capital and interest) as well as **Claimant's Costs** and **Approved Costs.**
9. Cover for **Approved Costs** is limited to 25% of the **Annual Amount of Cover** or such other amount that the **Insurer** may allow in its sole discretion.

Insured's excess payment

10. The **Insured** must pay the **Excess** in respect of each **Claim,** directly to the claimant or the claimant's legal representatives, immediately it becomes due and payable.
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance giving rise to the **Claim**, and the type of matter giving rise to the **Claim,** as set out in Schedule B.
12. The **Excess** set out in column A of Schedule B applies:
    a) in the case of a **Claim** arising out of the prescription of a **Road Accident Fund claim**. This **Excess** increases by an additional 20% if **Prescription Alert** has not been used or complied with by the **Insured**, by timeous lodgement or service of summons in accordance with the reminders sent by **Prescription Alert**;
    b) in the case of a **Claim** arising from a **Conveyancing Transaction**.
13. In the case of a **Claim** where clause 20 applies, the **excess** increases by an additional 20%.
14. No **Excess** applies to **Approved costs** or **Defence costs**.
15. The **Excess** set out in column B of Schedule B applies to all other types of **Claim**.

What is excluded from cover

16. This policy does not cover any liability for compensation:
    a) arising out of or in connection with the **Insured's Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**;
    b) arising from or in connection with misappropriation or unauthorised borrowing by the **Insured** or **Employee** or agent of the **Insured** or of the **Insured's** predecessors in practice, of any money or other property belonging to a client or third party and/or as referred to in Section 26 of the **Act**;
    c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the **Insured**, covering a loss arising out of the normal course and conduct of the business. This includes but is not limited to Misappropriation

of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;

d) arising from or in terms of any judgment or order(s) obtained in the first instance other than in a court of competent jurisdiction within the Republic of South Africa;

e) arising from or in connection with the provision of investment advice, the administration of any funds or taking of any deposits as contemplated in:

(i) the Banks Act 94 of 1990;

ii) the Financial Advisory and Intermediary Services Act 37 of 2002;

(iii) the Agricultural Credit Act 28 of 1996 as amended or replaced;

(iv) any law administered by the Financial Services Board and or the South African Reserve Bank and any regulations issued thereunder;

f) arising where the **Insured** is instructed to invest money on behalf of any person, except for an instruction to invest the funds in an interest-bearing account in terms of section 78(2A) of the **Act,** and if such investment is done pending the conclusion or implementation of a particular matter or transaction which is already in existence or about to come into existence at the time the investment is made;

This exclusion does not apply to funds which the **Insured** is authorised to invest in his or her capacity as executor, trustee, curator or in any similar representative capacity;

g) arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*;

h) arising out of or in connection with any work done on behalf of an entity defined in the Housing Act 107 of 1997 or its representative, with respect to the National Housing Programme provided for in the Housing Act;

i) directly or indirectly arising from, or in connection with or as a consequence of the provision of **Bridging Finance** in respect of a **Conveyancing Transaction.** This exclusion does not apply where **Bridging Finance** has been provided for the payment of:

(i) transfer duty and costs;

(ii) municipal or other rates and taxes relating to the immovable property which is to be transferred;

(iii) levies payable to the body corporate or homeowners association relating to the immovable property which is to be transferred;

j) arising from the **Insured's** having intentionally given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party;

k) arising out of or in connection with a breach of contract unless such breach is a breach of professional duty by the **Insured**;

l) arising where the **Insured** acts or acted as a liquidator or trustee in an insolvent estate, except in cases where the appointment is or was motivated solely because the **Insured** is a **Practitioner** and the fees derived from such appointment are paid directly to the **Legal Practice**;

m) arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence or about to come into existence, at the time of the receipt or payment and in respect of which the **Insured** has received a mandate;

n) arising out of a defamation **Claim** brought by one **Insured** against another;

o) arising out of **Cybercrime**;

p) arising out of a **Claim** against the **Insured** by an entity in which the **Insured** and/or related or interrelated persons* has/have a material interest and/or hold/s a position of influence or control**.

* as defined in section 2(1) of the Companies Act 71 of 2008
** as defined in section 2(2) of the Companies Act 71 of 2008

For the purposes of this paragraph, "material interest" means an interest of at least ten (10) percent in the entity;

q) arising out of or in connection with a **Claim** resulting from:

(i) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war is declared or not) civil war, mutiny, insurrection, rebellion, revolution, military or usurped power;

(ii) Any action taken in controlling, preventing, suppressing or in any way relating to the excluded situations in (i) above including, but not limited to, confiscation, nationalisation, damage to or destruction of property by or under the control of any Government or Public or Local Authority;

(iii) Any act of terrorism regardless of any other cause contributing concurrently or in any other sequence to the loss;

For the purpose of this exclusion, terrorism includes an act of violence or any act dangerous to human life, tangible or intangible property or infrastructure with the intention or effect to influence any Government or to put the public or any section of the public in fear;

r) arising out of or in connection with any **Claim** resulting from:

(i) ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion or use of nuclear fuel;

(ii) nuclear material, nuclear fission or fusion, nuclear radiation;

(iii) nuclear explosives or any nuclear weapon;

(iv) nuclear waste in whatever form;

regardless of any other cause or event contributing concurrently or in any other sequence to the loss. For the purpose of this exclusion only, combustion includes any self-sustaining process of nuclear fission or fusion;

s) arising out of or resulting from the hazardous nature of asbestos in whatever form or quantity.

Fraudulent applications for indemnity

17. The **Insurer** will reject a fraudulent application for indemnity.

Claims arising out of dishonesty or fraud

18. Any **Insured** will not be indemnified for a **Claim** that arises:

a) directly or indirectly from any **Dishonest,** fraudulent or other criminal act or omission by that **Insured**;

b) directly or indirectly from any **Dishonest**, fraudulent or other criminal act or omission by another party and that **Insured** was knowingly connected with, or colluded with or condoned or acquiesced or was party to that dishonesty, fraud or other criminal act or omission.

Subject to clauses 19 and 20 below, this exclusion does not apply to an **Innocent Principal**.

19. In the event of a **Claim** to which clause 18 applies, before the **Insurer** makes any payment, the **Innocent Principal** must take all reasonable action to:

a) institute criminal proceedings against the alleged

Dishonest party and present proof thereof to the **Insurer**; and/or

b) sue for and obtain reimbursement from any such alleged **Dishonest** party or its or her or his estate or legal representatives;

Any benefits due to the alleged **Dishonest** party held by the **Legal Practice,** must, to the extent allowable by law, be deducted from the **Legal Practice's** loss.

20. Where the **Dishonest** conduct includes:

a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;

The **Excess** payable by the **Innocent Insured** will be increased by an additional 20%.

21. If the **Insurer** makes a payment of any nature under the policy in connection with a **Claim** and it later emerges that it wholly or partly arose from a **Dishonest**, fraudulent or other criminal act or omission of the **Insured**, the **Insurer** will have the right to recover full repayment from that **Insured** and any party knowingly connected with that **Dishonest,** fraudulent or criminal act or omission.

The Insured's rights and duties

22. The **Insured** must notify the **Insurer** in writing as soon as practicable, of any **Claim** made against them, but by no later than one (1) week after receipt by the **Insured**, of a written demand or summons or application. In the case of a late notification of receipt of the written demand, summons or application by the **Insured**, the **Insurer** reserves the right not to indemnify the **Insured** for costs and ancillary charges incurred prior to or as a result of such late notification.

23. Once the **Insured** has notified the **Insurer**, the **Insurer** will require the **Insured** to provide a completed **Risk Management Questionnaire** and to complete a claim form providing all information reasonably required by the **Insurer** in respect of the **Claim**. The **Insured** will not be entitled to indemnity until the claim form and **Risk Management Questionnaire** have been completed by the **Insured**, to the **Insurer's** reasonable satisfaction and returned to the **Insurer**.

24. The **Insured** agrees not to, without the **Insurer's** prior written consent:

a) admit or deny liability for a **Claim**;

b) settle a **Claim**;

c) incur any costs or expenses in connection with a **Claim** unless the sum of the **Claim** and **Claimant's Costs** falls within the **Insured's Excess**;

failing which, the **Insurer** will be entitled to reject the **Claim,** but will have sole discretion to agree to provide indemnity, wholly or partly.

25. The **Insured** agrees to give the **Insurer** and any of its appointed agents all information, documents, assistance and cooperation that may be reasonably required, at the **Insured's** own expense.

26. The **Insured** also gives the **Insurer** the right of reasonable access to the **Insured's** premises, staff and records for purposes of inspecting or reviewing them in the conduct of an investigation of any **Claim** where the **Insurer** believes such review or inspection is necessary.

27. Notwithstanding anything else contained in this policy, should the **Insured** fail or refuse to provide assistance or cooperation in terms of this policy, to the **Insurer** or its agents and remain in breach for a period of ten (10) working days after receipt of written notice to remedy such breach (from the **Insurer** or its agents) the **Insurer** has the right to:

a) withdraw indemnity; and/or

b) report the **Insured** to the regulator; and/or

c) recover all unnecessary payments and expenses incurred by it.

For the purposes of this paragraph, written notice will be sent to an address that appears on the original notification of the **Claim** to the **Insurer** and will be deemed to have been received five (5) working days after electronic transmission or sending by registered mail.

28. By complying with the obligation to disclose all documents and information required by the **Insurer** and its legal representatives, the **Insured** does not waive any claim of legal professional privilege or confidentiality.

29. Where a breach of, or non-compliance with any term of this policy by the **Insured** has resulted in material prejudice to the handling or settlement of any **Claim** against the **Insured**, the **Insured** will reimburse the **Insurer** the difference between the sum payable by the **Insurer** in respect of that **Claim** and the sum which would in the sole opinion of the **Insurer** have been payable in the absence of such prejudice. It is a condition precedent of the **Insurer's** right to obtain reimbursement, that the **Insurer** has fully indemnified the **Insured** in terms of this policy.

30. Written notice of any new **Claim** must be given to:

Attorneys Insurance Indemnity Fund NPC
1256 Heuwel Avenue|Centurion|0127
PO Box 12189|Die Hoewes|0163
Docex 24 | Centurion
***Email*: claims@aiif.co.za**
Tel:+27(0)12 622 3900

The Insurer's rights and duties

31. The **Insured** agrees that:

a) the **Insurer** has full discretion in the conduct of the **Claim** against the **Insured** including, but not limited to, its investigation, defence, settlement or appeal in the name of the **Insured**;

b) the **Insurer** has the right to appoint its own legal representative(s) or service providers to act in the conduct and the investigation of the **Claim**;

The exercise of the **Insurer's** discretion in terms of **a)** will not be unreasonable.

32. The **Insurer** agrees that it will not settle any **Claim** against any **Insured** without prior consultation with that **Insured**. However, if the **Insured** does not accept the **Insurer's** recommendation for settlement:

a) the **Insurer** will not cover further **Defence Costs** and **Claimant's Costs** beyond the date of the **Insurer's** recommendation to the **Insured;** and

b) the **Insurer's** obligation to indemnify the **Insured** will be limited to the amount of its recommendation for settlement or the **Insured's** available **Annual Amount of Cover** (whichever is the lesser amount).

33. If the amount of any **Claim** exceeds the **Insured's** available **Annual Amount of Cover** the **Insurer** may, in its sole discretion, hold or pay over such amount or any lesser amount for which the **Claim** can be settled. The **Insurer** will thereafter be under no further liability in respect of such a **Claim**, except for the payment of **Approved Costs** or **Defence Costs** incurred prior to the date on which the **Insurer** notifies the **Insured** of its decision.

34. Where the **Insurer** indemnifies the **Insured** in relation to

only part of any **Claim**, the **Insurer** will be responsible for only the portion of the **Defence Costs** that reflects an amount attributable to the matters so indemnified. The **Insurer** reserves the right to determine that proportion in its absolute discretion.

35. In the event of the **Insured's** material non-disclosure or misrepresentation in respect of the application for indemnity, the **Insurer** reserves the right to report the **Insured's** conduct to the regulator and to recover any amounts that it may have unnecessarily incurred as a result of the **Insured's** conduct.

36. If the **Insurer** makes payment under this policy, it will not require the **Insured's** consent to take over the **Insured's** right to recover (whether in the **Insurer's** name or the name of the **Insured**) any amounts paid by the **Insurer**. The **Insurer** will not, however, exercise its right to recover from the **Insured**, except in the case of that **Insured's Dishonest** or criminal act or omission in relation to the **Claim**.

37. All recoveries made in respect of any **Claim** under this policy will be applied (after deduction of the costs, fees and expenses incurred in obtaining such recovery) in the following order of priority:

a) the **Insured** will first be reimbursed for the amount by which its liability in respect of such **Claim** exceeded the **Amount Of Cover** provided by this policy;
b) the **Insurer** will then be reimbursed for the amount of its liability under this policy in respect of such **Claim**;
c) any remaining amount will be applied toward the **Excess** paid by the **Insured** in respect of such **Claim**.

38. If the **Insured** gives notice of any circumstance which may give rise to a **Claim**, of which the **Insured** becomes aware during an **Insurance Year**, then any **Claim** in respect of that circumstance subsequently made against the **Insured** after the expiry of that **Insurance Year**, will for the purposes of this policy be treated as having been made during the **Insurance Year** first mentioned.

39. This policy does not give third parties any rights against the **Insurer**.

How the parties will resolve disputes

40. Subject to the provisions of this policy, any dispute or disagreement between the **Insured** and the **Insurer** as to any right to indemnity in terms of this policy or as to any matter arising out of or in connection with this policy, must be dealt with in the following order:

a) written submissions by the **Insured** must be referred to the **Insurer's** internal complaints/dispute team at complaints@aiif.co.za or to the address set out in clause 30 of this policy, within thirty(30) days of receipt of the written communication from the **Insurer** which has given rise to the dispute;
b) should the dispute not have been resolved within thirty (30) days from the date of receipt by the **Insurer** of the submission referred to in a) then the parties must agree on an independent **Senior Practitioner**, to which the dispute can be referred for a determination. Failing an agreement, the choice of such **Senior Practitioner** must be referred to the President of the Law Society (or his/her successor in title) having jurisdiction over the **Insured**;
c) the parties must make written submissions which will be referred for determination to the **Senior Practitioner** referred to in b). The costs incurred in so referring the matter will be borne by the unsuccessful party;
d) the unsuccessful party must notify the successful party in writing, within 30 days of the determination by the **Senior Practitioner**, if the determination is not accepted;

The procedures in **a) b) c)** and **d)** above must be completed before any legal action is undertaken by the parties.

Complaints may be lodged with the:
Short Term Insurance Ombudsman
Tel: 011 726-8900
Fax: 011 726-5501
Share call: 0860 726 980
E-mail info@osti.co.za
Web: http:/osti.co.za
Physical Address: Sunnyside Office Park, 5th Floor, Building D, 32 Princess of Wales, Terrace, Parktown
Postal Address: PO Box 32334, Braamfontein, 2017

SCHEDULE A
Period of Insurance: 1st July 2016 to 30th June 2017 (both days inclusive)

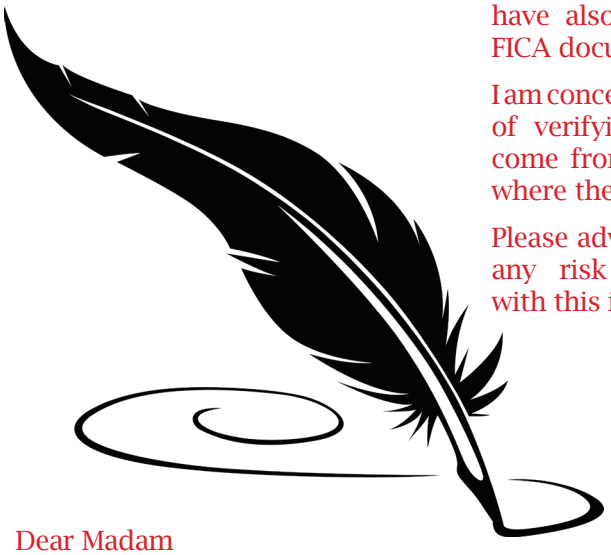
No of Principals	Annual Amount of Cover for Insurance Year
1	R1 562 500
2	R1 562 500
3	R1 562 500
4	R1 562 500
5	R1 562 500
6	R1 562 500
7	R1 640 625
8	R1 875 000
9	R2 109 375
10	R2 343 750
11	R2 578 125
12	R2 812 500
13	R3 046 875
14 and above	R3 125 000

SCHEDULE B
Period of Insurance: 1st July 2016 to 30th June 2017 (both days inclusive)

No of Principals	Column A Excess for prescribed RAF* and Conveyancing Claims**	Column B Excess for all other Claims**
1	R35 000	R20 000
2	R63 000	R36 000
3	R84 000	R48 000
4	R105 000	R60 000
5	R126 000	R72 000
6	R147 000	R84 000
7	R168 000	R96 000
8	R189 000	R108 000
9	R210 000	R120 000
10	R321 000	R132 000
11	R252 000	R144 000
12	R273 000	R156 000
13	R294 000	R168 000
14 and above	R315 000	R180 000

*The applicable **Excess** will be increased by an additional 20% if **Prescription Alert** is not used or complied with.
The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.

LETTERS TO THE EDITOR



Dear Madam

I have recently opened my practice and would like some advice on a potential client, who has approached me to act on his behalf in transactions involving the sale of industrial diamonds.

The potential client, who was referred to me by a mutual acquaintance has sourced a seller for the diamonds in the Democratic Republic of the Congo and he has purchasers lined up in Hong Kong, that will buy the diamonds. Funding for the transaction has apparently also been secured through NAFCOC.

NAFCOC will pay the money to fund the entire deal into my trust banking account and I will then receive invoices to pay the seller, commissions and so forth. There will be no rush on the payments so I will be able to confirm with my banker that the money is indeed in my account before I make any payments and I have opened a separate trust account through which all this will be facilitated. I have also obtained the necessary FICA documents.

I am concerned as I do not have a way of verifying where the diamonds come from and also cannot verify where the money comes from.

Please advise me whether there are any risk management problems with this instruction.

Kind regards

Name withheld.

Thank you for giving us the opportunity to give our risk management perspective on this matter. It is difficult to know where to start as there a many issues that could potentially cause you prejudice.

My colleagues and I all agree that this has many of the features of a **scam and/or a money laundering exercise**. It may be worthwhile for you to read the judgment in *Hirschowitz Flionis v Bartlett and Another,* 2006 (3) SA 575 SCA. The facts are similar.

As far as we are aware, NAFCOC does not give funding for this type of transaction. Have you contacted them to check? You would also probably have an obligation to notify the Financial Intelligence Centre of some of the transactions regardless of client confidentiality. It may also be worthwhile contacting the Central Selling Organisation (CSO) or Industrial Diamond Distributors Limited to find out if there are any specific procedures or institutions that could assist you in the verification process.

Also, from your letter it would appear that you would essentially be acting as a paymaster. In our view this is not legitimate legal work and it exposes your firm to the many unnecessary risks in dealing with third parties' funds. In addition, please note that your professional indemnity insurance scheme policy through the AIIF (Attorneys Insurance Indemnity Fund) specifically excludes this type of instruction in the following clause:

5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:

5.1.12 arising out of or in connection with the receipt or payment of funds, whether into or from trust or otherwise, where that receipt or payment is unrelated to or unconnected with a particular matter or transaction which is already in existence, or about to come into existence, at the time of the receipt or payment and in respect of which the insured has received a mandate."

You would need to approach your own broker to ensure that you are adequately covered for this sort of work.

NB: In the 2016/2017 policy, clause 5.1.12 is replaced by clause 16 m) which has the same wording.

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- Funding offshore trusts – tax considerations
- The new European succession regulations
- The *Van Zyl* vs *Kaye* judgement
- Practical war stories on trusts
- Doing business in Africa
- Southern Africa - the economic report card and prospects for the future
- CRS and Practitioners
- Botswana and Namibia Roundup

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Automatic exchange information

South Africa: A place in the sun for retirees

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Keynote address

Estate duty and trusts in South Africa – the future prognosis?

Professor Matthew Lester,
Rhodes Business School, South Africa

OUR SPEAKERS INCLUDE:

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ENSAfrica

Justice Ashley Binns-Ward
High Court of South Africa

Jeff Blackbeard
Moore Stephens

Dan Foster TEP
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Louis Niemand
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Conference programme

3 APRIL 2016

18.00	Welcome Drinks Reception
	The Radisson Blu Hotel, Waterfront, Cape Town

DAY 1 - 4 APRIL 2016
BELMOND MOUNT NELSON HOTEL

08.15	Registration
	Exhibits open
08.50	Welcome from STEP Cape Town
	Rupert Worsdale TEP, *Maitland Advisory (Pty) Ltd, South Africa*
08.55	Welcome from Conference Chair
	Harry Joffe TEP, Discovery Life, South Africa
09.00	Keynote address:
	Estate duty and trusts in South Africa – the future prognosis? *Professor Matthew Lester,* *Rhodes Business School, South Africa*
10.30	Cross-border holistic planning with Namibia - some implications of moving to a source-based tax system
	Prof. Willie van der Westhuizen TEP, *Millers Attorneys, South Africa*
11.00	Networking and refreshments
11.30	Funding offshore trusts - tax considerations
	• Transfer pricing and outbound loans • Application of "tax back" and "roll up" rules to founders and beneficiaries • The new reportable arrangement notice *Dan Foster TEP, Webber Wentzel, South Africa*
12.05	Doing business in Africa
	• The practical challenges to be aware of • The cultural differences across the continent • The rewards and benefits *Jeff Blackbeard, Africa Strategy Advisor,* *Moore Stephens, South Africa*
13.00	Lunch
14.00	Country updates
	• Seychelles as a base for investment into Africa: *Shammeem Abdoolakhan TEP, Maitland Group, Mauritius* • Middle East/North Africa: *Yann Mrazek TEP, M/Advocates of Law, Dubai* • Mauritius as a base for investment into West Africa: *Amal Autar TEP, MITCO, Mauritius* • East Africa: *Mona K Doshi, Anjarwalla & Khanna, Kenya*
15.30	Networking and refreshments
16.00	The new European succession regulations and their effect on succession planning for South Africans with assets in Europe, as well as Europeans with assets in South Africa
	Richard Pease TEP, Consultant, Switzerland
16.30	Panel discussion – South Africa: A place in the sun for retirees
	• Retiree Visa (Home Affairs) and Panel Chair - *Hugo van Zyl TEP, Breytenbachs Advisory, South Africa* • Tax issues, foreign pension funds, local pension funds where employment was outside South Africa - *Rupert Worsdale TEP,* *Maitland Advisory (Pty) Ltd., South Africa* • Exchange control issues - *Charles van Staden, Hogan Lovells, South Africa*
17.30	Day one closing address
18.00	Reception and dinner
	The Lawns, Belmond Mount Nelson Hotel, Cape Town

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Richard Wilson TEP, Director,
Intercontinental Trust Pte Ltd, Singapore

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DAY 2 - 5 APRIL 2016
BELMOND MOUNT NELSON HOTEL

08.30	Welcome refreshments
	Exhibits open
08.55	Welcome from Conference Chair
	Dale Irvine TEP, Sentinel Trust, South Africa
09.00	The *Van Zyl* vs *Kaye* judgment
	• Does it firmly contextualize Jordaan once and for all? • When will the court allow the trust veneer to be pierced? • What are the consequences for trustees if trusts are not properly administered? *Justice Ashley Binns-Ward, High Court of South Africa*
10.00	Botswana and Namibia round up
	• Botswana the "Switzerland of Africa"? • Namibian trusts - to trust or not to trust *Celia Becker, ENSAfrica, South Africa* *Prof. Willie van der Westhuizen TEP, Millers Attorneys, South Africa*
11.00	Networking and refreshments
11.30	CRS and Practitioners
	• STEP's guidance and position on CRS • A global view on CRS *George Hodgson, STEP, UK* **Kindly sponsored by:** **Guernsey International Finance Centre**
12.15	Practical war stories on trusts "speaking from experience"
	Harry Joffe TEP, Discovery Life, South Africa *Richard Pease TEP , Consultant, Switzerland*
13.00	Lunch
14.00	Panel Discussion – Automatic information exchange
	• How will the new ownership register affect OFC's? • Is there still a future for confidentiality? • Does the G20 intend to destroy "offshore"? • What does the future hold? • A practical look at the consequences of CRS *Panel Chair –* *Rupert Worsdale TEP, Maitland Advisory (Pty) Ltd, South Africa* *George Hodgson, STEP , UK* *Andrew Knight TEP, M Partners, Luxembourg* *Richard Pease TEP, Consultant, Switzerland*
15.00	Southern Africa – the economic report card and prospects for the future?
	Louis Niemand, Investec Asset Management , South Africa
15.45	Conference close

Speaker biographies can be found at
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STEP SOUTH AFRICA CONFERENCE
4 - 5 APRIL 2016

Social Activities Include:

Welcome drinks reception at the Radisson Blu Hotel

This international five star hotel is spectacularly situated on the edge of the Atlantic Ocean, with magnificent views overlooking a private marina and adjacent to the world famous V&A Waterfront. Meet your fellow delegates before the conference begins for an evening of networking and socializing.

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Following on from the highly popular inaugural **STEP Global Congress** in 2014, the 2016 STEP Global Congress will take place on the 30 June - 1 July 2016, at the Hotel Krasnapolsky in Amsterdam.

Find out more and register at www.stepglobalcongress.com

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Today we have over 20,000 Members across 95 countries. They include lawyers, accountants and other trust and estate specialists.

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