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JULY 2016

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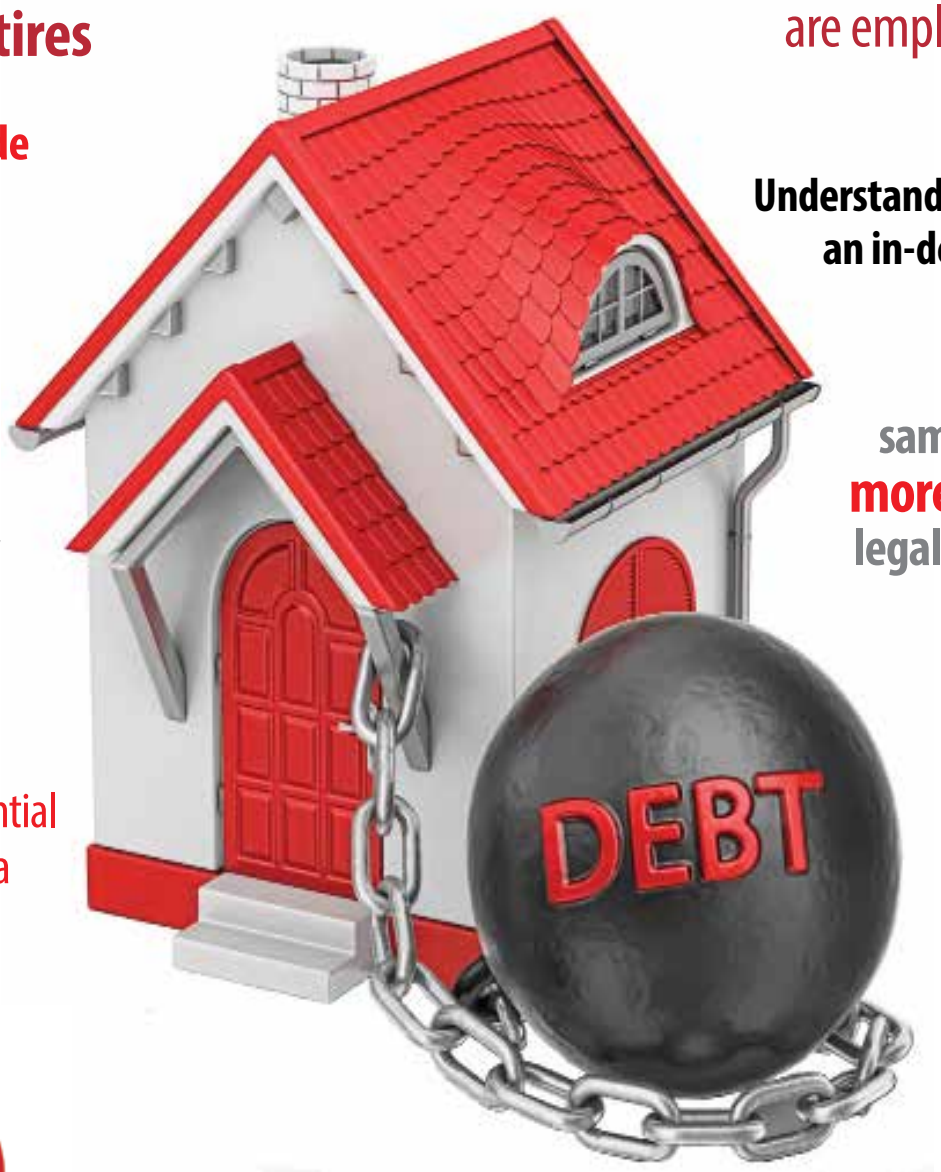

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Are there issues with laws passed after 1994?

Government has undertaken a task to relook at all laws that were passed after 1994. The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, chaired by former President Kgalema Motlanthe, has extended the deadline for written submissions from the public to 20 August.

According to a press statement issued by the panel, the South African Legislative Sector's Speakers' Forum launched the panel in January to assess the effectiveness of key legislation passed by Parliament and Provincial Legislatures since 1994, through public consultations across the country and other research process. The panel will also assess implementation of South African laws, identify gaps and propose necessary interventions and recommendations. This will involve identifying laws that need strengthening or amendment and which are enablers of the country's transformational agenda. It will also involve assessing laws that impede South Africa's developmental agenda. The panel is scheduled to submit its final report in August 2017.

The panel is looking at the legislation passed through three main focus areas –

- poverty, unemployment and the equitable distribution of wealth;
- land reform, sustainable livelihoods and rural development and security of tenure; and
- social cohesion and nation building.

The legislation to be relooked at would include laws that have the greatest direct impact on South Africans such as combating poverty, services and delivery thereof, education, health, employment, housing, combating crime, social development and the legislation that seeks to protect and improve the lives of women and children.

Legal practitioners are more exposed to legislation than other members of society that is why it is imperative for practitioners to take this opportunity and raise any issues they may have had with laws passed since 1994.

Only written submissions will be accepted, however, if legal practitioners wish to make oral submissions, this will be accommodated by means of the planned radio debate and public hearings. Submissions, with the details of senders, should be sent by to PO Box 2164, Cape Town 8000 (attention Leanne Morrison) or e-mailed to highlevelpanel@parliament.gov.za. Public hearings in all provinces will be held in the following months:

- Eastern Cape – August 2016
- Free State, Northern Cape – September 2016
- KwaZulu-Natal – October 2016
- Gauteng – November 2016
- Western Cape – early December 2016
- Limpopo, Mpumalanga – late January 2017
- North West – February 2017

Mapula Thebe – Editor

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

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

- **Please note that the word limit is 2000 words.**
- **Upcoming deadlines for article submissions: 18 July and 22 August 2016.**

LETTERS TO THE EDITOR

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

The office of the Public Protector: Who is next?

It is timely for attorneys to reflect on the constructive role their profession played in the creation of the Office of the Public Protector, one of the Chapter Nine Institutions formed to support constitutional democracy in South Africa. The recent announcement that Professor Malegapuru Makgoba will soon serve as the first 'Health Ombudsman' in the country is a strong indication that government remains committed to the establishment of offices to deal with complaints from the public in an effective and efficient manner that is affordable to complainants. This is participative democracy in action at its best.

We have come a long way from the days of the Advocate General, a pale predecessor to our much more muscular Public Protector. The Constitutional Court has now affirmed, in its unanimous 'Nkandla judgment' (*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC)), that the words in the Constitution that the Public Protector 'has the power … to take appropriate remedial action' mean that binding and enforceable rulings can be made in the reports on investigations by the staff of the Public Protector into maladministration in state affairs and the public administration. This welcome finding means that the popularity of the free services to the public available at any office of the Public Protector will surely grow.

It is a truism that the effectiveness of any institution, whether public or private, is only as good as the ethos of its leadership. The fidelity of the current Public Protector to her independent mandate and her willingness to 'speak truth to power' at great personal risk has illustrated this principle so vividly that *Time* magazine has accorded Thuli Madonsela recognition as one of the 100 most influential people in the world.

The question we should all be asking ourselves is who is the best candidate to step up on 15 October 2016? The answer to that question could play a vital role in the future trajectory of the rule of law and constitutionalism in the country. Openness, accountability and responsiveness are our constitutional watchwords. Who is best suited to take over as our fourth Public Protector and uphold these foundational values?

It behoves the organised profession, and indeed individual attorneys, to apply their minds and energy to lobbying for the appointment of a suitable successor to Ms Madonsela, whose seven-year non-renewable term expires on 14 October 2016. The ability to act without fear, favour or prejudice is the basic criterion and the proper understanding and application of constitutionalism, as adumbrated in the tenets and principles of the Constitution, a necessary prerequisite for the successor. Executive mindedness and limp-wristed spinelessness will not do. It is highly arguable that every Public Protector should be a trained and experienced lawyer, preferably a practitioner or a judge, whether retired or not. Politicians of whatever persuasion, whether amateur or professional, ought not to feature on any short-list of candidates due to the baggage they inevitably carry.

Louis van Zyl, attorney,
Cape Town

Divorce arbitration: Why not? The court remains upper guardian

The South African Law Reform Commission is currently calling for representations from interested parties regarding a proposal to repeal s 2 of the Arbitration Act 42 of 1965 and to permit the intro-

duction of arbitration into family law, which the section prohibits.

There are compelling arguments in favour of such a course not least of which is the reluctance of most judges to be seized with defended divorce actions. In the event of family arbitration becoming a reality, one would argue in favor of it being confined to issues relating to divorce, 'divorce arbitration'. It is suggested that to extend the proposal beyond divorce would be unworkable.

It is disappointing that a reference in the pilot project to court-annexed mediation is voluntary. Far preferable if it had been made mandatory. The proof of this is that court-annexed mediation thus far is less impressive than expected.

Divorce arbitration should be voluntary, since unlike mediation, it is adjudicative.

One of the major criticisms of arbitration, generally, is the lack of appeal other than where there exists agreement to the contrary. In arbitration, appeal lies to an arbitration tribunal but never to the court. In any event, modern jurisprudence suggests that the court's function in arbitration should be confined to supervision (ie, review) and enforcement.

Arbitrators have 'the right to be wrong' either in law or on the facts. If this is the determining factor for disputants the court route beckons warts and all.

There are, however, other factors which may influence the decision in favor of a reference to divorce arbitration.

The litigants are free to agree on the identity of the arbitrator and the rules to be applied. An absolute no-no is the application of the rules of court, otherwise why bother? Other advantages include expedition, costs and finality.

Collating diaries will always be problematic. In the context of arbitration there is nevertheless greater scope to avoid inordinate delays. Arbitrators are involved from their appointment to driving the arbitration process and are, therefore, able to influence bringing a matter to trial without undue delay.

The saving of costs can be relative. Using the services of highly expensive lawyers is a matter of choice. Utilising rules aimed at expedition, choosing an arbitrator approved by the parties in and of themselves contain their own merits.

Lawyers experienced in family law and having undergone training specifically designed for arbitrators will likely ensure a high degree of competence. This in turn necessitates the creation of an overseeing authority, which the profession together with the Department of Justice, academics and other interested parties are surely capable of creating.

It is fundamental to the intended procedure that contracts giving rise to 'divorce arbitration' contain a simple provision such as: A and B agree to refer their disputes to arbitration by an arbitrator agreed between them – or failing such agreement – appointed by (XYZ Association) to be governed by the rules of the (XYZ Association).

The rules themselves should be designed for expedition and should not be burdened with a plethora of regulations. Solving issues not covered by the rules can be left to the discretion of the arbitrator.

It is argued that there are no issues involved in divorce that cannot be adjudicated on by a trained competent arbitrator. Insofar as children are concerned, they are protected by the court as upper guardian.

There appears no reason why a competent arbitrator thoroughly versed in family law should not be suited to adjudicate issues concerning children. It is assumed that this would preclude matters falling within the jurisdiction of the Children's Court with the further assumption that arbitrators would be aware of this and act accordingly. Issues relating to children in the ordinary course require scrutiny by the Family Advocate and the enforcement of an arbitrator's award requires the court's sanction in terms of s 31 of the Act. Thus in the final analysis the court would scrutinise provisions relating to children.

It is time to consign s 2 of the Arbitration Act to the ash heap of legal history.

Charles Cohen, attorney,
Johannesburg

Carpe diem

As lawyers we have some exposure to Latin terminology, to differing extents, depending on how long one has been in the profession. One of the classical phrases that people are generally aware of is *carpe diem.*

This phrase means 'seize the day'. It talks of having a presence of mind to recognise and take advantage of opportunities when they are presented.

Last week I relearnt a valuable lesson when I took two matters to trial. Both matters were beset with legal and factual difficulties, which militated against them succeeding. At times it happens that we take on matters without assessing them properly. Our judgment is susceptible to being clouded by a sense of justice, though most times justice and the law do not always dovetail. Sad, I know, but it is what it is.

As the trial dates neared I became despondent and began to develop a negative attitude towards the matters. I then recalled that during the previous week I had been reading about taking advantage of opportunities. I had learnt that if one looks hard enough one will – quite often – find that there is an opportunity, which if taken, can tilt the scales of justice to your and your client's advantage.

There and then I decided to adopt a positive attitude and mindset. From that moment I began to see and connect dots that were previously 'hidden'. Judgment was reserved in both matters, therefore, the outcome is yet to be determined. However, judging by both magistrates' 'off the record comments', we are in with a fighting chance.

It is often said that 'the opportunity of a lifetime must be seized within the lifetime of the opportunity'. Our inability to recognise and take advantage of opportunities, as trial lawyers, can disadvantage us and our clients. Perhaps it is time for institutions of higher learning to consider introducing this type of 'soft skills' training in their *curricula.*

Lwazi Dekeda, attorney,
East London

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Deputy Chief Justice Moseneke retires

The Deputy Chief Justice, Dikgang Moseneke has retired from the Bench of the Constitutional Court. On 20 May, a special sitting was held at the Constitutional Court where Justice Moseneke delivered his final judgment (*Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* (unreported case no CCT209/15, 20-5-2016) (Moseneke DCJ)) to mark his retirement.

Included in the guests that attended the special sitting were former president, Thabo Mbeki; former deputy president, Kgalema Motlanthe; human rights lawyer, George Bizos; and various representatives from different legal entities.

Deputy Chief Justice Dikgang Moseneke and his wife Kabo Moseneke at the special sitting to mark Justice Moseneke's retirement recently.

Who is Justice Moseneke?

According to the Constitutional Court website, Justice Moseneke was born in Pretoria in December 1947. He attended primary and secondary school in Pretoria. At the age of 15, while in standard eight, Justice Moseneke was arrested, detained and convicted of participating in anti-Apartheid activity and was sentenced to 10 years' imprisonment, which he served on Robben Island. He was the youngest prisoner to be taken to Robben Island.

Justice Moseneke studied for his matric, as well as two degrees while in jail. He obtained a BA in English and political science, as well as a BIur degree while in jail. 'He later completed an LLB. All three degrees were conferred by the University of South Africa', his biography on the website reads.

'[Justice] Moseneke started his professional career as an attorney's clerk at Klagbruns Inc in Pretoria in 1976. In 1978 he was admitted and practised for five years as an attorney and partner at the law firm Maluleke, Seriti and Moseneke. In 1983 he was called to the Bar and practised as an advocate in Johannesburg and Pretoria. Ten years later, in 1993, he was elevated to the status of senior counsel.' Justice Moseneke was the first black advocate to be admitted at the Pretoria Bar. Justice Moseneke also served on the technical committee that drafted the interim Constitution of 1993. 'In September 1994 … Moseneke accepted an acting appointment to the Transvaal Provincial Division of the Supreme Court. Before his appointment as Justice of the Constitutional Court, in November 2001 Moseneke was appointed a Judge of the High Court in Pretoria. On 29 November 2002 he was appointed as judge in the Constitutional Court and in June 2005, Moseneke was appointed Deputy Chief Justice of the Republic of South Africa,' his biography reads.

Tributes

At the special sitting representatives from numerous entities paid tribute to Justice Moseneke. Chief Justice Mogoeng Mogoeng said Justice Moseneke's life

should be an inspiration to South Africans. 'It is difficult to know what to say and what lessons to draw from a life so well lived. But one of the most profound lessons to draw from, is his life,' Chief Justice Mogoeng told a packed Constitutional Court.

Chief Justice Mogoeng said Justice Moseneke was a great leader from whose life every South African should learn from. Justice Moseneke was overlooked for the Chief Justice position three times, but he took it in his stride, Chief Justice Mogoeng said. 'He went through so much and was unquestionably qualified and experienced to be the next Chief Justice. He knew it too, that he was qualified and experienced to take over. I was impressed by what he said regarding that issue, that it is an honour for him to become a judge, a judge of a high court and more so, to become a Deputy Chief Justice,' said Chief Justice Mogoeng.

Chief Justice Mogoeng praised him for not being a bitter man after his suffering when he came out of prison. 'He returned to Pretoria, and sharpened his legal skills. He worked in the same Pretoria Bar that had refused to admit him. In the words of an American: "Ask not what your country can do for you, but what you can do for your country." Let us be selfless, let us be content with the little we have, knowing that there are more who go to bed without having eaten,' he said.

Various persons from the legal profession also paid tribute to Justice Moseneke, including chairperson of Advocates for Transformation, Dumisa Ntsebeza, who told the full Bench that the occasion was like no other. 'His has been a life lived in full … from a political rebel to a justice in this court. He had battles against Apartheid even after his release from prison, when the then Transvaal Law Society refused to admit him on the basis that he was not a South African, but a resident of Bophuthatswana … but he soldiered through.'

The President of the Black Lawyers Association, Lutendo Sigogo described Justice Moseneke as a 'great son of the soil. The humble servant of the people of South Africa.' He said that he lacked appropriate words to describe the role the outgoing Deputy Chief Justice played in the transformation of the country.

'His judgments are not influenced by emotions, prejudice and stereotypes. In his judgments there is no favouritism or fear ... [Justice] Moseneke will leave a void in [the] court, which will never be easy to fill … What is however pleasing, DCJ, is that you are not leaving us forever. You will always be available when South Africa needs you … Today you are only retiring from active service as a judge,' Mr Sigogo said.

He added that the country looks at Justice Moseneke as one of the strongest judges in this court, 'a towering legal mind'. 'DCJ this retirement takes you from the court room and puts you directly at the dispensary of the people. With your sharp mind please engage in the national discourse and make your voice be heard,' he pleaded.

Former president, Thabo Mbeki and former deputy president, Kgalema Motlanthe, recently attended the special sitting at the Constitutional Court, which marked Deputy Chief Justice Dikgang Moseneke's retirement.

Speaking as the President of the National Association of Democratic Lawyers (NADEL) and Co-chairperson of the Law Society of South Africa, Mvuso Notyesi described Justice Moseneke as a courageous man. 'At the tender age of 14, you must have been a courageous man to choose the side of the oppressed and champion their cause. It must have taken a special wisdom – at one's risk – since the wrath of the oppressors who were subject to no restraint, awaited. The pain and suffering of your people, coupled with the vision of a free society in which all would enjoy the universal freedoms, compelled you to reject and abandon the life, which the majority of your age group elected to live. Prospects of solitary confinement, long imprisonment, torture and long separations from your parents became a path to endure, for a cause of the majority and the future of your people,' he said. He added: 'Your response to the call by the masses to assume the responsibility of the Bench was an attestation to the commitment you made for the freedom of your people. As I understand it, your personal importance or position were never a consideration. Guided by your conscience, you easily agreed to leave your lucrative practice and other responsibilities which brought personal wealth and riches. Your commitment to our people and the life of South Africans as promised in the Constitution, is fortified in your numerous written judgments.'

On behalf of the General Council of the Bar, advocate Jeremy Muller, SC said that the news of Justice Moseneke's retirement had been received with reluctance to admit that an end of an era has arrived. 'Your contribution to the work of this court has been immense and it is difficult to single out any one judgment,' he said.

The Director of Public Prosecutions in South Gauteng, advocate Andrew Chauke from the National Prosecuting Authority (NPA) thanked Justice Moseneke for his service to South Africa. He said that the NPA would not have succeeded in its endeavours if it was not for the guidance and assistance that Justice Moseneke gave it. He congratulated him and wished him well.

Deputy Minister of Justice and Constitutional Development, John Jeffery, said that the executive had come to know Justice Moseneke as a 'highly principled, fearless and outspoken jurist – one who never shies away from speaking his mind, one who pronounces on the law without fear, favour or prejudice, a man who is not afraid to speak truth to power,' adding that: 'It is his ability to comprehend the human condition, to see human beings as human beings, not as mere parties to litigation, which makes Dikgang Moseneke one of the most respected and astute legal minds in the history of our country.'

On behalf of Parliament the Chairperson of the National Council of Provinces, Thandi Modise said Justice Moseneke is a man who first set foot inside a courtroom at 14 years old as an accused for

Deputy Chief Justice Dikgang Moseneke's mother, Karabo Moseneke said that she was very proud of her son.

wanting to set South Africa free. It is the same foot that has left an incredible footprint in our court system. There is no judge anywhere else in the world who can boast of such a record; a once accused and a prisoner and now not only a judge but a Deputy Chief Justice.

Justice Moseneke responds

Responding to the tributes Justice Moseneke said that the pain and adversity in his childhood prepared him 'for a life-long commitment to conduct that will bring true and full liberation of our land and all its remarkable people. The sojourn on Robben Island set me on a course of constantly asking: What are the features of a good society? Out of all that emerged two cardinal lessons. First, you cannot merely dream about your revolutionary ideals. You have to take real and concrete steps to pursue legitimate ideals. The second lesson was that I was my own liberator,' he said.

Justice Moseneke said that he knew when he came out of Robben Island that he had to make a choice; either to go into exile or to remain a combatant in the domestic struggle. 'I chose to do things the way I know best. To become a lawyer of remarkable excellence, of unfailing integrity and of commitment to the broader struggle of our people in all their kinds, shapes and colours for an equal and just society,' he said.

'To that end, I wanted to become an attorney even if I was a convicted terrorist. I did everything to achieve that. I litigated against the Law Society to let me in. I went onto the Bar Council, which had a race clause that excluded black people. There too I kicked the door open. I was very determined to become a spokesperson for our people in difficult times in our troubled past,' he said.

Justice Moseneke said that he was a senior counsel with only ten years of practice at the Bar after five years of practice as an attorney. He added that he was blessed with near perfect health. In the 15 years of service on the Bench, he has never taken sick leave, the only time he was away from work was for a week, after his son passed away.

Justice Moseneke concluded by addressing his colleagues: 'I urge you to remain on this hallowed Bench not unaware of what a privilege it is. You must recognise that we are standing on the shoulders of giants. You must promise that you shall remain true and faithful to all that you have been, as a colleague. You must promise to defend fearlessly the independence of the judiciary, the rule of law and the full realisation of the basic rights that our Constitution affords to each one of our people. You will be very much part of the transformation enterprise and the democratic project to make our country reflect the text and living spirit of our Constitution.

Fidelity to our oath of office is important, not because we are important but because without it, it is not us, but our people who will suffer. By our people, I mean the full diversity, poor and rich, white and black, female and male, urban and rural, the marginalised and the powerful all deserve our unwavering protection, which our Constitution demands us to provide. After all, you are the ultimate guardians of our Constitution for and on behalf of our people.'

Justice Moseneke told *De Rebus* that there were many challenging times on the Bench. 'I am not sure which would be the most. It is always a challenge when you have a very difficult and complex case. An example is the *Glenister* case. It is a famous well-known case but was such a challenge getting to the outcome that we got to.' And his best moments: 'There were many, such as writing judgments, you know I love writing. I love sitting down and writing things. Those were definitely my best moments on the Bench,' he enthused.

Words from Justice Moseneke's family

De Rebus had the opportunity to speak to Justice Moseneke's 90-year-old mother, Karabo and his wife, Kabo. His mother shared how it was to have more than one son at Robben Island.

'Today I am feeling good. All the tributes from everyone gave me such pride. We have gone through thick and thin, all five of my boys were picked up at schools and universities and taken to Robben Island. But look at them now. They went back to school and I am so proud of all my boys.'

She added that it was terrible having them at Robben Island. 'For all those ten years, I never had Christmas at home, I spent it at Robben Island. It was difficult to see Dikgang as a prisoner because he was still young. The warden told me that when I am at Robben Island I am not allowed to cry because it breaks Dikgang so much.'

When questioned what it was like being married to the Deputy Chief Justice, Mrs Moseneke said that he was not the Deputy Chief Justice at home. 'He was my husband and the father to my children.'

Final judgment

In his final judgment, the Constitutional Court ordered Gauteng Education MEC, Panyaza Lesufi, to determine the feeder zones for public schools in the province within 12 months from 20 May. Currently a child falls into a school's feeder zone if the child's home or parents' workplace is within a 5 km radius of the school. According to the judgment, the Constitutional Court, found traction in Equal Education's (who joined the case as an *amicus curiae*) attack on the constitutional validity of the default feeder zones on the ground that they unfairly discriminate by perpetuating Apartheid geography.

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Find an advocate on new Pretoria Bar website

The Pretoria Society of Advocates (Pretoria Bar) launched its new website in May. This means that attorneys looking for counsel that accept briefs in specific fields can search for this information on the new website.

Information available on the website includes –

- the management of the Pretoria Bar;
- contact details of individual members of the Pretoria Bar;
- fields of practice of individual members;
- the procedure for lodging complaints against members;
- contact details of the Arbitration Foundation of South Africa, as well as its rules, tariffs, venues, filing procedure and Panel of Arbitrators and Mediators; and
- information regarding pupillage.

'Of particular importance for attorneys is the page listing the various fields of practice of the individual members of the Pretoria Bar. By selecting a specific field of practice, a list appears of all members, in order of seniority, who accept briefs in that specific field. By further selecting the name of a specific member, the professional profile of that member appears, which shows his or her personal contact details,' Chairperson of the Pretoria Bar, advocate Norman Davis SC, said in a press release.

The daily court rolls (ie, day rolls, motion court rolls and urgent court roll) of the Gauteng Local Division of the High Court in Pretoria, are also made available on the website. The main aim of the new website is to enhance access to, not only the services provided by the Pretoria Bar and its members, but also to have access to justice in general.

- The website can be accessed at www.pretoriabar.co.za

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The criminalisation of cartel conduct

Advocates Michael Hellens SC, a criminal law expert and David Unterhalter SC who is a competition law expert, at a seminar on the criminalisation of cartel conduct.

Webber Wentzel recently held a breakfast seminar on the criminalisation of cartel conduct. The seminar took place at its offices in Sandton on 17 May.

The seminar addressed the recent criminalisation of cartel conduct. With effect from 1 May, price fixing, market division and collusive tendering between actual and potential competitors can result in criminal liability for directors or managers.

The seminar was in the form of a panel discussion and issues discussed included –

- the implications of the criminalisation of cartel conduct for firms, directors and managers;
- the interplay between the Competition Commission and the National Prosecuting Authority (NPA) in investigating and enforcing criminal sanctions; and
- the role of leniency in the NPA's investigation and prosecution of directors and managers.

The panel was made up of advocates David Unterhalter SC who is a competition law expert and Michael Hellens SC, a criminal law expert. Martin Versfeld, one of the partners in Webber Wentzel's competition law practice, gave the introduction and background. The panel was facilitated by Robert Wilson, another partner in the competition law practice.

According to Mr Versfeld, in 2007 the Department of Trade and Industry introduced the Competition Amendment Bill. The Competition Amendment Act 1 of 2009 was then assented to in August 2009 and in April this year, the president proclaimed that s 73A(1) to (4) would come into effect. This section states:

'A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person –

(*a*) caused the firm to engage in a prohibited practice in terms of section 4(1)(*b*); or

(*b*) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(*b*).

(2) For the purpose of subsection (1)(*b*), "knowingly acquiesced" means having acquiesced while having actual knowledge of the relevant conduct by the firm.

(3) Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if –

(*a*) the relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(*b*); or

(*b*) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(*b*).

(4) The Competition Commission –

(*a*) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances; and

(*b*) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.'

According to Mr Versfeld, this means that from 1 May a director or person who has management authority may be held criminally liable for cartel conduct, which includes price fixing, market allocation and collusive tendering.

Mr Versfeld said that 'director' is not defined in the Competition Act and neither is 'position having management authority' within the firm.

Martin Versfeld, one of the partners in Webber Wentzel's competition law practice, giving the introduction and background at a recent seminar on the criminilisation of cartel conduct.

Mr Versfeld said that according to subss 73A(1) and (2), a director or person who has management authority within a firm commits an offence if –

- he or she caused the firm to fix prices, allocate markets or collusively tender; or
- knowingly acquiesced in the firm engaging in a prohibited practice in terms of s 4(1)(*b*).

He added that 'knowingly acquiesced' means having acquiesced while having actual knowledge of the firm's prohibited conduct.

Mr Versfeld said that s 73A(3) states that a person may be prosecuted for an offence in terms of s 73A only if –

- the firm has acknowledged in a consent order that it engaged in a prohibited practice in terms of s 4(1)(*b*); or
- the Competition Tribunal or the Competition Appeal Court has made a finding that the firm engaged in a prohibited practice in terms of s 4(1)(*b*).

Speaking on leniency, Mr Versfeld said that s 73A(4) states that the Competition Commission may not seek or request the prosecution of a person for an offence if the Commission has certified that the person is deserving of leniency. He added that the section goes on to say that the Commission may make submissions to the NPA in support of leniency in respect of any person certified as deserving of leniency in the circumstances. 'Deserving of leniency in the context of section 73A means that the person has provided information to the Competition Commission, or otherwise co-operated with the Commission's investigation of an alleged prohibited practice in terms of section 4(1)(*b*) to the satisfaction of the Commission (highly subjective and discretionary),' Mr Versfeld said.

Mr Versfeld spoke of the other pro-

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visions of this Act, which have not yet been brought into effect. These include sections such as –

- '73A(5) which is an acknowledgement in a consent order by the firm or a finding by the Competition Tribunal or Competition Appeal Court that the firm engaged in a prohibited practice in terms of section 4(1)(*b*) is *prima facie* proof that the conduct occurred in the criminal proceedings. [This may] violate fair trial rights and have a chilling effect on the Competition Commission's corporate leniency policy (CLP).
- '73A(6) which prevents a firm (directly or indirectly) from paying the fine of a person convicted of an offence or indemnify, reimburse, compensate or otherwise defray the expenses of a person incurred in defending the prosecution – unless the prosecution is abandoned or the person acquitted. [This may] violate fair trial rights and have a chilling effect on the CLP.
- '74 which states that a person convicted of an offence in the case of a contravention of section 73(1) is liable to a fine not exceeding R 500 000 or to imprisonment for a period not exceeding ten years, or to both a fine and imprisonment. Presumably the default sanction provided in section 74(1)(*b*) of a fine of R 2 000 or imprisonment for no more than six months or both, may be imposed.
- '50 which states that at any time after receiving or initiating a complaint, the Competition Commission may certify, with or without conditions, that any particular person contemplated in section 73A, is deserving of leniency in the circumstances. Nothing in this section directly or indirectly establishes any right of a person to be certified as deserving of leniency, in whole or in part or with or without any conditions or require or demand that the Competition Commission issue such a certificate or consider doing so.'

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Latest copyright judgment discussed at Press Club

The National Press Club held a discussion regarding the latest copyright judgment entitled 'The possible implications for the future of journalism'. The discussion was held on 17 May at the Court Classique Hotel in Pretoria.

The discussion was on the *Moneyweb (Pty) Ltd v Media 24 Ltd and Another* (GJ) (unreported case no 31575/2013, 5-5-2016) (Berger AJ) case and included a panel of experts in the field, namely, Wits University professor and co-editor of the *South African Law Journal*, Professor Pamela Andanda; intellectual property attorney from Adams and Adams and *Afro-IP* contributing blogger, Darren Olivier; and Press Club legal adviser and *Rapport* news editor, Herman Scholtz.

Press Club chairperson and freelance journalist, Tanya de Vente-Bijker, welcomed delegates and asked each panellist to give their opinion about the case.

Prof Andanda who joined the discussion via Skype said that she had two preliminary observations that she came across, which was that the *Moneyweb* matter gave the court an opportunity to clarify issues in relation to online journalism and news articles, which at international level, had never been dealt with to such a great extent before. 'The court had a difficult task of applying established corporate law principles to a very sensitive issue,' she said.

Prof Andanda said the judgment was a well-balanced judgment from the court. She referred to s 12(8)(*a*) of the Copyright Act 98 of 1978, which refers to 'mere items of press information'. Prof Andanda said the manner in which the court interpreted the 'mere items of press information' was quite clear and added what is protected is the journalist's original way in covering that event and publishing that information. 'You are taking building blocks and building something unique. However, it is a little bit tricky when you are talking about news and you have a number of journalists in the same space trying to express themselves built on the same factual events, so that is the difficult task that the court had to deal with,' she said.

From left: Press Club legal adviser and Rapport news editor, Herman Scholtz, intellectual property attorney from Adams and Adams and Afro-IP contributing blogger, Darren Olivier; and Press Club chairperson and freelance journalist, Tanya de Vente-Bijker during the discussion held on 17 May.

With regard to the evidence, Prof Andanda said that establishing originality is a task that entails looking at the relevant considerations and making a value judgment. Prof Andanda further stated: 'When you have to make a value judgment based on relevant facts and information that is placed before you in evidence that is what becomes very tricky. … You can see that out of the seven articles [with regard to the originality], Moneyweb articles one to four, the court was unable to establish the nature and extent of the author's contribution. … It moves from, what was expressed at the event to what is creatively expressed by the authors.' Prof Andanda added that the court found the three other articles (Moneyweb five to seven) to be original, because the evidence before it was clear and extensive.

Prof Andanda added that she had concerns with regard to Moneyweb article six. 'The court was of the view that it was not very clear with the recording of the

interview that was transcribed and that speaks to the extent of the contribution of the author of that article. In my view, that pushes this particular article closer to the first four articles. … If the court – in this particular case article six – could say that … looking at the structure of this article and at the way it is constructed, the court is able to determine that it is original, then why could the court not do the same in the first four articles? I was a little bit concerned with the inconsistent manner in which the evidence was treated.'

Prof Andanda said the court thoroughly established substantial copying saying that this was a well-established principle. She added that the court came to the conclusion that the most substantial copying came from Moneyweb article six. 'It was a matter of quality not quantity. Of course quality is what determined the court's decision, that only the sixth article had elements of substantial reproduction, but the other two, there were elements of copying, but the court determined that it was not substantial to warrant a finding of infringement,' Prof Andanda said.

Further in her discussion, Prof Andanda said she was concerned with the current Amendment Bill to the Act (the Copyright Amendment Bill 2015), which includes the American concept of fair use, as it would be in direct conflict with the current s 12. 'It does not affect the judgment that we are discussing, but I think we have to apply our minds and really contribute to the on-going debates in the drafting of the new Bill,' she said.

According to Prof Andanda, the court clearly considered s 12(1) and noted that the test for fair dealing was an objective one and supplied this in an objective manner limited to the fact that the time of dealing, which was very helpful. 'Because if you look at the international trend, especially the American jurisprudence, the South African consistency in applying their fair use test, I think our courts have made a breakthrough in applying the test for fair dealing in a very clear and consistent manner by indicating that first of all you need to apply this once you have determined that there is an issue of originality and at the same time, much as hyperlink was thought to be sufficient, it does not stop there. The court issued a very useful caution telling us that the proficient for the hyperlink itself, is not method in fair dealing,' she said.

Mr Olivier said that he wanted to discuss two aspects. 'One, is that I work every day with enforcing copyright and trade mark law, so what is the judge saying? He is saying that I have to spend more time showing the court that there is copyright in the articles, which raises the costs of litigation quite substantially. There is no registration process for copyright as there is for trade marks. … In one sense I have a problem with that,' he said.

Mr Olivier said that as a blogger, there are times when one aggregates a news story, to compile it in a way that it can be read. 'You can take general information that is available, a press release for example, adjust that press release so you know that your readers are going to read it. Give it a title … put someone's picture on it before you can publish it. To me that deserves protection. It deserves, I think, recognition by a judge that some time and effort has gone into that. … It should meet the threshold of originality,' he said.

Mr Olivier said that the idea behind copyright is to protect and nurture creativity, which includes journalism. He said it falls short in many instances of journalism as it is very expensive to litigate. 'It takes two big media houses to take something to court. We love this judgment because it is 65 pages of material you do not get to see day-to-day,' he said.

Mr Olivier said this judgment endorses the need for writer's to keep a diary or timesheet as to what they do on a daily basis as evidence of the work that went into that article and for writer's to enforce their copyright quickly and more cost effectively. Mr Olivier added that it would be necessary for players in the industry to get together and work out a practical way on what is regarded as acceptable and to monitor and be made aware of what is being published.

Mr Scholtz gave his view on the matter as legal representative of the Press Club. He said that there was no winner in this case, but that was beside the point. 'IP law is a blunt instrument that stuck with me when I read this judgment. It does not really appreciate journalistic practice as we think about it. … If we look at the ambit of items of press information and if we look at the examples that the court decided to view as articles not being original, as professor Andanda pointed out, it was purely evidential thing. It was just that Moneyweb did not go through all the hoops to prove it,' he said.

Mr Scholtz added that the definition laid down by the court of items of mere press information, was extremely wide on what the court feels in that regard. 'Should the article be original, we accept that it is not items of mere press information; it may be items of press information, but not mere press information. So, if your article is original, it will be protected. … But I do think it is a very wide definition, which does not take into account of what we do on a daily basis,' Mr Scholtz said.

In his view, Mr Scholtz said he did not think that this case opened the floodgate of court cases and he was not sure if the parties were planning on an appeal. He did add that after the judgment many commentators and editors felt that the sky was falling with this decision. 'Because nobody is going to invest in journalism; nobody is going to do the work because everybody can just copy from one another. … They feel it is going to clamp down on the creativity in the industry. But I tend to disagree. I think the entire business model in the media is being disrupted and we disrupt it ourselves. We take Facebook pictures from victims, where there is also copyright, we take those pictures, we take some of the content from the internet from private individuals and incorporate that into our articles. The whole industry is being disrupted … but in ten years time, this is not going to be an important conversation. … This is not a matter that the courts are going to clarify for us, but it is a matter of ethics. … We should instil some honour in the process and keep it out of the courts,' he said.

• See case note 'What is determined as copyright infringement?' at p 53.

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Destruction of essential infrastructure now a criminal offence

The Criminal Matters Amendment Act 18 of 2015 (the Act) is now operational, it commenced on 1 June.

According to the *Government Gazette*, the Act amends the –

- Criminal Procedure Act 51 of 1977, so as to regulate bail in respect of essential infrastructure-related offences;
- Criminal Law Amendment Act 105 of 1997, so as to regulate the imposition of discretionary minimum sentences for essential infrastructure-related offences and create a new offence relating to essential infrastructure; and
- Prevention of Organised Crime Act 121 of 1998, so as to insert a new offence in sch 1 to the Act and to provide for matters connected therewith.

The Act ensures that there are stricter conditions for the granting of bail in respect of essential infrastructure-related offences, there is also imposition of harsher sentences to perpetrators. The Act is viewed by most as a timely tool to deal with increasing acts of vandalism and theft of infrastructure.

Speaking on offences relating to essential infrastructure, s 3 of the Act states:

'(1) Any person who unlawfully and intentionally –

(*a*) tampers with, damages or destroys essential infrastructure; or

(*b*) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (*a*),

and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332(2) of the Criminal Procedure Act, 1977, a fine not exceeding R100 million.'

De Rebus asked a few members of the public what they thought of the amendment.

Venice Sedibeng: 'Crimes such as murder, rape and robbery are criminal offences yet people still commit them daily. We do not need a law. The problem is in the influence people get to commit these acts. Target their influence (leaders) to change their solutions approach and their people will follow. The amendment means nothing.'

Nicole Tobias: 'I did not realise that dangerous criminal groups were becoming involved in these incidents often, I must be honest. I believe this is an interesting and important Act, considering some of the recent events we have experienced in South Africa. The incidents that have led to schools and schooling being affected, need action. I see improved schooling as the best way to empower people, because you are giving your learners the information and power they need to raise themselves out of poverty. But then, I do understand that there is a balancing act involved, because some other infrastructure damage can affect the whole country and economy in what might feel like a more immediate way. Neither are good for South Africa in the long term though, which makes the focus on this Act important.'

Philip Sergeant: 'With the recent public displays of damage inflicted on schools in the Vuwani District costing in the region of R 500 million, many of these already cash strapped institutions have been placed on life support.

The victims of these violent acts of damage to property are those scholars living in these very communities who have had their basic right to an education infringed.

It is long overdue that harsher penalties than those previously provided for by the common law offence of malicious damage to property are imposed as a means to deter this continued and senseless destruction of infrastructure during protests.'

Stevland Marney: 'This Act is a direct defensive to compress the voices of the protesting students at the various universities. Instead of creating meaningful platforms for engagement and to seek genuine resolutions to a fundamental problem, our law makers have introduced the stick when the carrot should suffice. This is abhorrent and distasteful. I would have hoped that our law makers are above this. I sincerely hope that a retraction of this law is imminent, and more meaningful proposals are put forth. Also, the irony that the government is criminalising the very acts that won us the war against Apartheid, is not lost on the general populous.'

Ntombi Twala: 'I think the New Criminal Matters Amendment Act is a good idea because it will limit, if not prevent people from burning down important and essential infrastructure during protests. This type of vandalism not only makes the country go backwards with regards to progress but it ends up costing the government millions to rebuild schools, libraries and universities, etcetera. People need to know that there are serious consequences for such behaviour, surely there are other channels that can be used to express their anger and disappointment at the government other than burning down and destroying the very same infrastructures that are meant to create a better future (schools, libraries, universities) and make lives easier for the people of South Africa.'

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NADEL's National Gender Desk and Cell C
'Take a Girl Child to Work Day'

Simone Prienka Maharaj (left) with attorney, Charmane Pillay, participated in the 2016 'Take a Girl Child to Work Day'.

National Association of Democratic Lawyers (NADEL) branches all over the country, participated in the Cell C 'Take a Girl Child to Work Day' on 26 May. This initiative promotes imparting knowledge to girl children. Many learners from grade 11 and 12 spent the day in law firms to get first-hand exposure to the courts and the legal arena. One of the learners who participated, Simone Prienka Maharaj, a grade 11 learner from Heather Secondary School, described her experience as 'a very eye opening experience – nothing like the popular legal series portrayed on television.'

This event sees local schools and attorneys partnering together in ensuring that girl children are exposed to the work environment. Many attorneys gave of their time, to spend the day with these girls.

One of the many attorneys that participated on the day was Charmane Pillay from Charmane Pillay and Company. Ms Pillay, a member of NADEL has practiced law for some 36 years. Ms Pillay is one of the attorneys who has continuously supported and hosted a girl child on numerous occasions, as part of the NADEL Gender Initiative, which was introduced by Harshna Munglee of the NADEL Gender Desk in 2014 nationally.

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Silas Nkanunu honoured

From left: Mayor of Port Elizabeth, Danny Jordaan; NADEL honorary member, Silas Nkanunu; and Judge in the Western Cape High Court, Vincent Saldanha.

In April the United Cricket Club together with the Law Society of South Africa held a dinner to honour National Democratic Lawyers Association (NADEL) honorary member, Silas Nkanunu. The dinner was also held to celebrate the 40th anniversary of the United Cricket Club.

Among the dignitaries who attended the event were Judge in the Western Cape High Court, Vincent Saldanha; Mayor of Port Elizabeth, Danny Jordaan; and Deputy Chairperson of the National Forum on the Legal Profession, Max Boqwana.

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The culture of racism and its effects on black legal practitioners

The Black Lawyers Association (BLA) held its national general meeting (NGM) on 21 May in Pietermaritzburg, KwaZulu-Natal. The NGM was held under the theme: 'The culture of racism and its effects on black legal practitioners.'

The keynote address was presented by Public Protector, Thuli Madonsela. Opening her address, Ms Madonsela said that 39 years after the formation of the BLA, the chosen theme of dialogue was very apt, given the recent racist utterances in the country. 'The dialogue is timely because the nation is celebrating 20 years of the Constitution and as we celebrate we need to ensure that every person has an improved quality of life. … All forms of inequality have to be dismantled. The dialogue is also timely because racist hate speech has surfaced meaningfully because of the advent of social media. Racism is not on the raise it has always been with us, unarticulated racist speeches are raising to the surface,' she added.

Elaborating on the nature of racist, Ms Madonsela said: 'The average racist is not a "Terre'Blanche kind of person", that is not the case. The average racist is a good human being who is a product of a society that supports hierarchy based on differences, states that you are skilled and competent based on your race and that you are not credible because of your race.'

Speaking on the impact of racism on black practitioners, Ms Madonsela said that racism hurts. 'It undermines human development and social cohesion. When it is intended, the sting hurts more; the sting also lasts far more when intended.'

Expanding on the impact of racism on black legal practitioners, Ms Madonsela said that structural racism exists in the legal profession, due to the number of black legal practitioners in the profession there are less chances of a black candidate attorney securing employment and less chances of black legal practitioners getting briefed.

Ms Madonsela noted that the Constitution was implemented as a bridge to a new society and that it was never implemented to intend that South Africa is a new society that that does not have racism. She asked: 'Why is there racism? How do we go forward? Accumulated advantages and disadvantages began with colonialism; they did not start with Apartheid. Apartheid gave racism a name, institutionalised it and stated that if you are a certain race, you deserve certain things. … After Apartheid, there is still real evidence of inequalities, how do we dismantle racism? … We dismantle racism by placing our vision on "Mandela's new world" that states that there should be a constitutional order of a new South Africa that is based on justice for all. … We create a new world where everyone's humanity is affirmed. … We create a non-racial South Africa that wants us not to be defined by race, a South African future where race does not matter.'

Public Protector, Thuli Madonsela, (center) pictured with the National Executive Committee of the Black Lawyers Association at the national general meeting held in May.

Speaking on the role legal practitioners should play to dismantle racism; Ms Madonsela said that lawyers move the philosophy of the country, particularly black lawyers. She added that since lawyers move the philosophy of the country, they should lead South Africa to a future where race does not matter.

'Why should we use the word race? Should we not find another word? … Should we use such concepts? We need to rethink the notion of race. Black practitioners should not allow others [to] make them believe they are different or inferior, the only difference you have is your pigmentation. … As Oprah said: "Excellence is the best deterrent to racism or sexism",' Ms Madonsela said.

Ms Madonsela noted that government should make sure that the briefing patterns are in line with the achievement of equality. She concluded: 'Do we encourage that we are entitled to briefing because of our race, because that is the same as saying one is not entitled to briefing because of one's race. Black practitioners should rather say they are entitled to briefing because of their excellence. People learn through practice when given a chance. … If you believe in people and give them an opportunity, they will flourish. Also, if you believe in yourself you will achieve the impossible. …. Education is the greatest tool that can be used to change the world and it also changes attitudes, not just skills.

Legal practitioners should lead and invite fellow South Africans to define the new world and enter it. We should all be part of that journey and process.'

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

LSSA and Nigerian Bar Association sign preliminary statement of intent of cooperation

Law Society of South Africa (LSSA) Co-chairpersons Mvuso Notyesi and Jan van Rensburg signed a statement of intent with Nigerian Bar Association President Augustine Alegeth SAN at a meeting at OR Tambo International Airport on 9 June.

A delegation from the Nigerian Bar Association (NBA) was on a trade mission visit to Johannesburg and Pretoria, and the meeting between the LSSA's Management Committee (Manco) and some members of the NBA Executive was scheduled as a preliminary discussion with a view to setting up a memorandum of understanding between the two organisations.

The LSSA and NBA reiterated their commitment to the rule of law and independence of the profession, as well as their commitment to promoting high standards of practice, ethical conduct and the interest of the public.

The two associations exchanged information on developments in their respective jurisdictions and committed to exploring constructive engagement provided, the terms of which would be communicated to each other by 31 August this year.

There was general agreement that there should be synergies among lawyers in South Africa and Nigeria, being two of the three major economies – together with Egypt – in Africa. A Nigerian-South African Lawyers Forum could be established to assist particularly smaller law firms, which have clients trading in Nigeria.

Back: Nigerian Bar Association (NBA) President, Augustine Alegeth SAN, LSSA Co-chairperson, Jan van Rensburg and Olawale Fapohunda from the NBA. Seated: LSSA Manco member, Mimie Memka, LSSA Co-chairperson, Mvuso Notyesi, and Ifueko Alufohai, Executive Director of the NBA, at a meeting between the NBA and LSSA in June.

The NBA has some 130 000 lawyers on its database of which some 60 000 are practising lawyers not in government service.

Labour Court hearings in other courts

Members of the Law Society of South Africa's (LSSA) Labour Law Committee met with Deputy Judge President Lazarus Tlaletsi of the Labour Appeal Court on 6 April. The Deputy Judge President thanked the LSSA for its earlier successful collaboration with the Labour Courts when eligible attorneys were appointed to act as judges on a *pro bono* basis to help clear the backlogs in the Labour Courts. The LSSA was also informed that the Labour Court will, in future, conduct hearings in Limpopo and Mpumalanga. The Labour Court will have a court room available at each of the High Court seats in those provinces with the headquarters of the Labour Court still in Johannesburg. The intention is to increase access to the Labour Court, which may conduct hearings in other jurisdictions. This may happen in situations where, for example, there is only one matter, but many parties or witnesses. Labour attorneys should approach the Registrar of the Labour Court to make the necessary arrangements.

The LSSA undertook to advise legal practitioners of this development via *De Rebus*.

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Women attorneys' panel takes AGM discussion to the next level

The group of women attorneys who drafted an outcomes document from a panel discussion on 'A better deal for women in practice' at the Law Society of South Africa (LSSA) annual general meeting on 2 April 2016, met with LSSA Co-chairpersons Jan van Rensburg and Mvuso Notyesi and LSSA Management Committee (Manco) member, Mimie Menka, to discuss taking the objectives document forward. The meeting was attended by attorneys Beverley Clarke, Reshoketsoe Malefo and Dr Jeanne-Mari Retief; Thina Siwendu and Seehaam Samaai joined by conference call.

It was agreed at the meeting that the panel would draft an action plan focused on priority objectives identified during the AGM panel discussion (see AGM news 'Towards a unified independent legal profession' 2016 (Jun) *DR* 13), which were as follows:

- Better representation of women in the organised legal profession: The profession should work toward a 50% representivity for women in the structures of the organised legal profession.
- Monitoring and evaluation: Structural changes need to be implemented through proper monitoring and evaluation. It was proposed that the LSSA draft a gender charter and gender strategies that can serve as a practical guideline to the profession and to put systems in place to assist in the implementation processes of these policies.

The LSSA should also formulate a system to encourage transparency by the government to ensure monitoring and evaluation of the briefing patterns by government to women lawyers. Indications from the Summit on Briefing Patterns in the Legal Profession held on 31 March (see news 'LSSA hosts summit on briefing patterns' 2016 (May) *DR* 6), are that women are not receiving work from government departments and state-owned enterprises.

- Creating an enabling environment for tracking and monitoring young attorneys: Creating a good and nurturing environment for all young lawyers is very important. Mentorship by women lawyers is encouraged and should be promoted. A monitoring and tracking system for this purpose needs to be developed to ensure that young attorneys receive the most out of their careers, and to assist in identifying the reasons why women lawyers opt out of practice.
- Practicalities relating to employment equity and transformation plans: It was acknowledged that large law firms have the capacity and infrastructure to develop plans and practices to level the playing field for women in the legal profession, but this is unfortunately not the case for small to medium-sized law firms. Therefore, it is important to formulate effective procedures that promote transformation throughout the profession. To do this it is necessary to assess how transformation plans are being formulated, how committees are structured and how accountability and transparency can be ensured.
- It is important to understand that women should not be seen as a group apart with special needs, but that plans should nonetheless be developed around maternity leave that will empower women and also ease their transition back into practice.
- The new Legal Practice Act 28 of 2014 should include an appropriate section that deals with gender transformation in the legal profession.
- Training in business skills: Many women lawyers may not have the necessary experience to run a practice and preliminary investigations have shown that there are no real packages or business courses tailored to women attorneys. There should be more programmes in place that promote this form of self-empowerment.

Law Society of South Africa Co-chairpersons Mvuso Notyesi (back left) and Jan van Rensburg, with Dr Jeanne-Mari Retief (centre), and front, Reshoketsoe Malefo, LSSA Manco member, Mimie Memka and Beverley Clarke at a meeting in June to discuss taking forward objectives identified to empower women lawyers in practice.

People and practices

Compiled by Shireen Mahomed

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Bowman Gilfillan in Johannesburg has appointed Patricia Williams as a partner in its tax practice. She specialises in tax-related dispute resolution.

Phukubje Pierce Masithela Attorneys in Johannesburg has appointed Gugulethu Majija as an associate. She specialises in corporate, commercial, privacy and media law.

Webber Wentzel in Cape Town has appointed Karen Miller as a tax consultant.

Eversheds in Johannesburg has three promotions.

Tomiwa Toriola has been promoted as an associate.

Naledi Mdyesha has been promoted as an associate.

Michael Peters has been promoted as an associate.

Dyason Inc in Pretoria has two new appointments.

Khethani Swuhana has been appointed as a director in the litigation department.

John Letsoalo has been appointed as a director in the litigation department.

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

By
Ann
Bertelsmann

Are you only a secretary/ administration clerk/candidate attorney/paralegal?

Who should read this risk/practice management article? Practitioners who delegate or rely on assistants should first read it and then prescribe it as compulsory reading for staff.

Our article 'Effective supervision in your legal practice' (2015 (Dec) *DR* 26) was primarily aimed at practising attorneys. This article is the alter-ego of the previous one – primarily aimed at support staff. Each and every member of the law firm has a role to play in the management of risk.

The Attorneys Insurance Indemnity Fund NPC (AIIF) is a non-profit company established by the Attorneys Fidelity Fund (AFF) in 1993. It protects the profession and the public by providing automatic professional indemnity cover to all South African legal practices, in situations where errors in their practice of law have led to clients or the public suffering financial loss.

It may surprise readers to discover that, not only do attorneys and their staff often make mistakes, but clients are becoming increasingly aware of their rights to claim against attorneys and their practices. The AIIF annually receives notifications of a minimum of 400 such claims. The majority of these claims come from two areas of practice, namely, conveyancing and Road Accident Fund (RAF) matters. For more information on what goes wrong in conveyancing and RAF matters please read the following articles:

- 'Risk Alert Bulletin' Nov 2014 (www.aiif.co.za, accessed 2-6-2016).
- 'Red Flag Areas in Conveyancing' (www.aiif.co.za, accessed 2-6-2016).

Many of these claims result from errors made by legal support staff who may have been –

- delegated tasks for which they have little formal training or expertise;
- ineffectively supervised;
- given little or no training; and/or
- unable to understand the implications of their role and appreciate the consequences of their actions or inaction.

Managing risk

Although all law firms do have Professional Insurance (PI) cover through the AIIF, (which includes cover for errors by support staff) you will appreciate that being sued by a client has more far-reaching consequences for the practice than simply having the insurer pay a claim and having to pay an excess. Think about it. If you were a client whose attorneys had messed up your case in one way or another, would you instruct them in other cases? Would you recommend them to other people? If you knew that a practice was being sued, would you instruct them?

The loss of clients and reputation can have serious consequences for everyone in the firm – from the senior partner/director through to the junior level of support staff. Reductions in the workforce – even retrenchments – could result. Responsible employees may well be subjected to disciplinary action and adverse performance ratings. All of these can change a positive working environment into a negative one and affect morale. At least for the above reasons, all legal practices need to ensure that they manage the common risks of practice.

How can you, as a legal support staff member help manage the risk of things going wrong with clients' cases? Do you have any valuable role to play?

For things to run smoothly, your whole law practice must act as a team in which all members work together and rely on one another to properly fulfil their functions. (Think of yourselves as members of a soccer team – a bad goalkeeper can undo all the work that the rest of the team has done – no matter how good your strikers are, they rely on you to keep the sheet clean on your side, and to distribute the ball effectively.) Training, communication, insight, cooperation, and commitment are key for effective teamwork. As happens in life generally, we very often fail to see the bigger picture and, however, small our role may seem, we do not appreciate its importance – and the very big consequences of our actions or inaction.

What are the pitfalls you should look out for?

1 **Legal ethics** – this is possibly the single most important behaviour that an attorney is required to learn and practice and it is crucial that all staff in the practice have an understanding of what it entails – and behave accordingly. Put simply it is a code of conduct underpinning lawyers' moral and professional duties to clients, colleagues, the courts and society.

2 **Rules for the attorneys' profession** (GenN2 *GG*39740/26-2-2016) – any breach of these rules by your attorney is a source of risk. Ensure that you have access to and understand these rules, which may be obtained at www.lssa.org.za.

Some of the practical aspects of ethical behavior in the practice of law are:

- **Client confidentiality** – ensure that your employers explain this to you in more detail. In essence, everything you find out about the client or the client's case is covered by professional privilege and cannot be disclosed to anyone. You cannot even discuss the client or his or her case with your family. All clients documents and correspondence must also be regarded as privileged. Correspondence, documents or files should not be left lying around for all to see. These must be stored safely and disposed of in a way that ensures privacy – for example, by shredding. E-mails pose a threat to confidentiality. Make sure that each time, you send to the correct address. The reply to all button can be your worst enemy. There is also a host of legislation in South Africa dealing with the protection of data and this must be complied with.
- **You must clarify your role.** As a non-attorney, you may not establish a lawyer/client relationship or give any legal advice or opinion or create the impression that you are acting in the capacity of a qualified attorney. You should not be doing work that should be done by a qualified attorney unless you are effectively supervised by an admitted attorney. It is your supervising attorney's duty to supervise you and you need to

ensure that this happens (see communication (point 7) and Beverly D Flaxington 'Eight Ways To Manage Up Effectively' (www.psychologytoday.com, accessed 2-6-2016) and Dana Rousmaniere 'What everyone should know about managing up' (www.hbr.org, accessed 2-6-2016)).

• **Conflict disclosure** – if you are not sure, speak to your supervising attorney about what this means. You must disclose any conflict of interests you may have in relation to clients or their matters. An example of a possible conflict may be that a member of your family works for the company that the client is suing or where you have an interest (other than in your capacity as an employee of the practice) in the outcome of a matter.

3 **Client relations and retention** – this is the area where client-facing support staff can play a crucial role. A warm, friendly and helpful receptionist can influence potential clients to choose your firm – or keep existing clients happy. Likewise, a cooperative personal assistant who remembers your children's names, listens and gets back to you when he or she says she will, can even persuade a dissatisfied client to overlook errors or delays.

4 **Certification and witnessing documents** – this is a red-flag area. Many claims arise from this not being done correctly. Should such a claim be made against your practice, an excess loading of 20% will apply. Copies of documents must not be certified without careful scrutiny of the original. Where documents must be signed in front of witnesses, the witnesses must actually see the signing. Too often the document is not signed in the presence of the so-called 'witnesses' who sign at a later stage. This exposes you to fraud. (In one claim against a conveyancer, the son had asked to take the documents for his supposedly frail, elderly father to sign on his sickbed. Some weeks later, the sprightly father discovered that his house had been sold by his son.)

5 **Client identification** – especially for financial transactions, you need proof that the person you are dealing with is who he or she purports to be and proof of his or her residence and banking details. (Always retain copies of the documents presented as proof.) Never change banking details on telephonic or e-mail instructions without verifying the instruction – for example, by telephoning the client at a number that you already have on file. Be aware that there is currently a scam doing the rounds – in which the scammer attempts to change banking details by e-mail. For more on this, see 'Latest scams' (www.aiif.co.za, accessed 2-6-2016).

Follow your practice's Financial Intelligence Centre Act 38 of 2001 (FICA) policies to the letter, without exception. If the policy is inadequate or non-existent then draw your attorney's attention to this – see Flaxington and Rousmaniere (*op cit*).

6 **Communication** with clients, colleagues, and outside attorneys/counsel must always be polite and professional. File notes detailing all important case-related discussions must be made when you communicate with these people. Messages for colleagues/supervising attorneys should immediately be written down with full details and given to them as soon as possible. You might wish to remind them to return the calls – to manage the risk of a claim or complaint by a dissatisfied client.

7 **Communication** with your employer should also be professional and polite. It is important that you learn to communicate constructively and openly with your employer or person that you report to, especially about client matters. If you are uncertain about any aspect of your work or any instruction given, you must clarify what is expected of you. Help your attorney to supervise you effectively (see Flaxington and Rousmaniere (*op cit*)). Whenever you are out of your depth or feel uncertain, for example about an ethical problem, ask your supervisor. If you have made an error never try to cover up rather own up immediately so that you can both find a way to fix it, before it is too late and puts the practice at risk. You will also build trust by doing this.

8 **Drafting** of pleadings, correspondence and other documents – is another red-flag area. You are probably aware of the danger of relying on precedents, but it is worth noting anyway. Many claims arise from this. Ensure that precedents are carefully adapted for the purpose and individual requirements of the matter concerned. Attention to detail is important. Knowledge of the specific area of law and the relevant facts is crucial. Successive drafts need to be numbered and retained for record and billing purposes. Common errors are, for example, conditions omitted from or incorrect erf numbers put into title deeds, references to incorrect party/parties or incorrect rentals or increase clauses in lease agreements.

9 **Diary and calendar** – here support staff can positively influence risk management and manage up (managing up (*op cit*)) effectively. Be proactive. Encourage your attorneys to diarise effectively and the practice to keep a centralised system of important dates, like court and prescription dates. Why not design a workable system? Bear in mind that a diary system is only as good as the people who use it. A file cannot come out of diary if it cannot be found in the filing cabinet or on the attorney's desk.

10 **Filing** – the person who attends to the filing plays one of the most important roles in managing risk. It goes without saying that the file should be filed correctly, but if there is no way of managing the removal and return of files to the filing room/cabinet, there is a risk. The practice should keep a log of all client matters, which should retain it indefinitely. The practice must be familiar with the legal requirements and corporate best practices in respect of data storage and retention – in order to be effective and efficient.

11 **Arranging service and filing** – it may surprise you how often claims arise from problems in this area. Many claims prescribe because summons is issued at the last minute. Sheriffs cannot be relied on to serve by the requested date. The employee responsible for having applications and summonses issued can also not always be trusted to do it in time. Follow up if there are time issues. Remember that service means delivering a copy of the pleading to the opposing party/parties and filing the original at court. Delivery on the last permissible day may result in the late filing of documents at court. In certain instances (eg: Appeals, summary judgment applications and pleading under bar) this could have disastrous consequences.

12 **Incoming correspondence** – be alert and draw all important correspondence to your supervisor's attention. For example, filing away a notice bar can and has led to judgments against clients and claims against attorneys.

13 **Handling of trust money** – space does not allow for a full discussion of this red-flag area. Ensure that you follow your practice's and law society's rules on this to the letter. Tactfully and confidentially report to your employer, any instances where rules are broken. Trust money belongs to the depositor and not to the practice.

14 **Helplines** – if you are unsure at any time about matters relating to trust money, call the Attorneys Fidelity Fund for advice. The AIIF will be able to give you advice about risk management issues and the law society should give you information about its rules.

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

By
David
Mohale

Protection offered by s 129 of the National Credit Act

In the recent Constitutional Court judgment of *Nkata v FirstRand Bank Limited and Others (The Socio-Economic Rights Institute of South Africa as* Amicus Curiae*)* (CC) (unreported case no CCT73/2015, 21-4-2016) (Moseneke DCJ), the provisions of s 129 of the National Credit Act 34 of 2005 (NCA) were, once again, put under scrutiny.

My comments and views on the matter are as follows:

Section 3 of the NCA stipulates that the purpose of the Act is to 'promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –

…

(*d*) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(*e*) addressing and correcting imbalances in negotiating power between consumers and credit providers by –

…

(iii) providing consumers with protection from … unfair or fraudulent conduct by credit providers …;

…

(*i*) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'

Section 129 debacle

Section 129 of the NCA serves three purposes:

- It brings to the attention of the consumer the default status of his or her credit agreement.
- Provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain repossession of the asset subject to the credit agreement.
- It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.

In this matter, the credit provider instituted legal action prematurely due to the improper service of the s 129 notices issued. Before legal action can commence, the provisions of s 129(1) should be complied with (in conjunction with the provisions of s 168, which deals with the manner of serving documents).

The credit provider sent the s 129 notices to an incorrect address leading to the consumer's attention not been drawn to the default status of her credit agreement. Thus the consumer was unable to exercise her rights as provided by s 129.

Secondly, the credit provider relied on the erroneously served s 129 notice to institute legal action and obtain default judgment. The default judgment is void as the provisions of s 129(1) were not complied with. The legality of the default judgment is also questionable as it was granted by the Registrar and not the court. Due to the above, the legal costs incurred by the credit provider should have been borne by the credit provider as legal action was instituted prematurely.

The consumer entered into a settlement agreement with the credit provider before the property was sold on public auction. She settled the arrears on the account. By arrears I am referring to 'all amounts that are overdue, together with the credit providers' permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement' as stipulated in s 129(3).

It is the responsibility of the credit provider to bring to the attention of the consumer the arrears applicable on the account. Most credit providers will debit such arrears on the consumers' account, clearly stipulating what the arrear charges are. The consumer then brings his or her account up to date by paying the required monthly instalment together with the arrears amount.

In this matter the consumer settled the arrears on the account.

As the property was not sold before the consumer settled the arrears on the account, thus the provisions of s 129(4) were not yet effective to preclude the consumer from reinstating the credit agreement.

After settling the arrears applicable on the account, the credit provider had to rescind the 'default judgment'. If then the consumer falls into arrears again, the credit provider will need to issue a new s 129 notice in order to be able to commence with legal action as the effect of the previous s 129 notice has been nullified by the account being brought up to date.

In my view, the credit provider's omission to agree to the rescission of the 'default judgment' even after the account was brought up to date is in conflict with the provisions of subss 3(*d*) and 3(*i*) of the Act.

Acceleration clauses in credit agreements

The inclusion of acceleration clauses in credit agreements defeats the purpose of the NCA as stipulated in s 3(*i*).

Acceleration clauses, if effected, will lead consumers to become over-indebted and being unable to satisfy all their credit obligations in a consistent and harmonised manner. An acceleration clause, when effected, will urge the consumer to neglect their other credit obligations in order to repay the full balance on the affected credit agreement.

Did the settlement agreement or re-instatement of the credit agreement constitute an amendment of the initial credit agreement entered into?

The settlement agreement entered into by the parties was a temporary mechanism to urge the consumer to settle the arrears applicable on the account. After the account was brought up to date the

settlement agreement falls away and the consumer may revert to paying the initial agreed on monthly instalment. Thus a settlement agreement does not suffice to be categorised as an alteration or amendment to the original credit agreement as it is only a temporary measure. If for other purposes the settlement agreement was to be considered as an alteration of the credit agreement, the credit provider should have then complied with the provisions of s 117(1).

The reinstatement of a credit agreement by operation of s 129(3) also does not alter the original credit agreement as there are no changes made to the credit agreement.

On reinstatement of a credit agreement, the original terms and conditions resume, unless there is a reduction of the consumer's liabilities or change to the repayment terms (instalment or period). Alterations to credit agreements are only effective if agreed on by both parties or except in circumstances permitted by ss 118 to 120 of the NCA. Circumstances stipulated in ss 118 to 120 did not occur in the *Nkata* matter, thus no alteration of the initial credit agreement occurred.

• The views and opinions expressed in this article are those of the writer hereof and not binding on any individual or organisation.

• See feature article 'Nkata: The court's interpretation of s 129 of the NCA and the meaning of reinstatment' on p 28 and 'Banks beware: Reinstatement of mortgage loan agreements' on p 52 of this issue.

David Mohale *Dip Labour Law LLB (UL)* is an advocate at Credit 2 Debt Solutions in Johannesburg. ❑

By Chantelle Gladwin and Sean Piveteau

The sins of the fathers:

Termination of supply and execution against immovable property for a prior owner's debt

This article deals with instances when a municipality is entitled to disconnect and/or refuse to reconnect the supply of services to purchasers of properties burdened by a prior owner's historical municipal debt, as well as when a municipality is entitled to execute against (attach and sell at auction) the property of a current owner to satisfy debts owed by prior owners to the municipality.

Case law

In the case of *Stand 278 Strydom Park (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (GJ) (unreported case no 23503/2014, 27-4-2015) (Strydom AJ), the case was between the owner of a property and the Ekurhuleni Municipality. The municipality in effect threatened to terminate the supply of services to the property as a result of the unpaid historical debt attached to the property, which was incurred by prior owners of the property. Although there were several different legal principals involved in the overarching disputes between the parties, only two of the issues are relevant for the purposes of this article.

Legal issues in the *Stand 287* case

• Although the court did not expressly make a finding on this issue, the court did consider whether a municipality is entitled to disconnect the supply of an owner, and/or refuse to reconnect that supply if disconnection had already taken place. It was also considered whether a municipality can refuse to reconnect the supply of a service until such time as the present owner has made payment (or conducted satisfactory payment arrangements agreeable to the municipality) of the amounts owing by prior owners.

• The second issue that the court examined and made a finding on was: At what stage could a municipality attach a purchaser's property as a result of unpaid municipal debts incurred by prior owners?

Termination of supply for old owner's debts

Relief sought

In the first issue, the applicant sought an urgent court order declaring (among other things) that the municipality was not entitled to disconnect its municipal supply as a result of unpaid arrears, which were incurred not by it, but by prior owners. The municipality conceded the relief sought, meaning that its legal representatives agreed in court that the correct legal position is that a municipality is not entitled to disconnect for unpaid debts of prior owners. This relief was made part of the court order handed down by agreement between the parties.

Importance of judgment

It is important to note that although the order contained relief regarding the termination of supply, the court did not explicitly consider the matter as it was conceded by the municipality. As a result there is no judgment (or reasons for judgment) that one can rely on to set a precedent for future cases. The judge did, however, expressly state in the written judgment that, in his view, the municipality had correctly conceded that it was not entitled to terminate the purchaser's services as a result of the unpaid historical municipal debt of prior owners. This comment will accordingly serve as compelling persuasive authority for future courts faced with the same decision – if indeed any municipality is of the view that this very strong and express indication by the Johannesburg High Court is insufficient to create legal certainty as to what the legal position is.

Execution against the property

Finding of the court

Although the municipality conceded the relief sought above, it required clarity on whether a municipality could attach a purchaser's property as a result of unpaid municipal debts incurred prior owners. The court held that a municipality can only approach a court for an order

to attach a property, and sell it at auction to satisfy the debts of prior owners, after obtaining judgment against the prior owners who incurred that debt on the property. In this particular case, the municipality had not yet obtained judgment against the prior owner responsible for incurring the historical municipal debt in question. The consequence of this was that the municipality was not entitled to take legal action to attach the property in the hands of the purchaser to satisfy prior owners' historical municipal debt.

Implications for property owners

The court's ruling in connection with the attachment of a property goes: A municipality will not be able to attach and sell a property of a purchaser for the historical municipal debt of prior owners, unless it has first obtained judgment against the prior owner or owners concerned. There are still several procedural questions that remain to be answered, such as –

- whether a purchaser will be entitled to raise any defences against the municipality in court that were not initially raised by the seller;
- how the onus of proof will work in such an instance; and
- what rights the purchaser has to obtain confidential information from the municipality relating to whatever disputes the seller may have had with the municipality in relation to the historical municipal debt.

It is likely that these questions will only be answered on a case by case basis as the need arises when test cases are brought to court.

Conclusion

With regard to the first legal issue, the termination of supply, the court did not actually decide on the issue, and hence did not set legal precedent to the extent that a municipality cannot terminate the supply of services to a property for the unpaid debts of prior owners. However, the fact that the municipality in question conceded the relief, and further that the judge in question expressly endorsed that concession as being correct in law, creates compelling (and in our view, unavoidable and concrete) persuasive authority for future litigants facing the same legal issue.

The court's findings regarding a municipality's right to attach and sell a property is a step in the right direction for property owners, in the sense that it clarifies the position as to when and what steps the municipality must follow before it can attach a purchaser's property and sell it to satisfy the historical municipal debt of prior owners.

Chantelle Gladwin *BA LLB (Rhodes) LLM (Unisa)* is an attorney and Shaun Piveteau *BA Law LLB (UP)* is a candidate attorney at Schindlers Attorneys in Johannesburg. ❑

By Tamara Klos

Step-by-step guide to residential housing eviction proceedings in the magistrate's court

In order to evict an unlawful occupier (lessee) from residential property, the procedure in terms of ss 4 and 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act) must be complied with. Basically, the lessor has to obtain a court order to evict an unlawful occupier. Sections 4 to 6 of the Act provides for procedure in case of evictions (including for urgent eviction).

The main purpose of the Act is to protect both occupiers and landowners by providing for the prohibition of illegal eviction on the one hand and procedures for eviction of unlawful occupiers on the other.

The Act does not take away any of the landowner's proprietary rights but merely prescribes the procedures to be followed before an eviction order can be granted. The Act delays the exercise of the landowner's proprietary rights until the court has decided whether it is just and equitable to evict the unlawful occupier after considering all relevant circumstances.

Step one: Letter of demand and cancellation

Firstly, it must be established whether the lease agreement has come to an end, whether by cancellation due to breach by the tenant or by due notice given in terms of the lease. The tenant of the property must be an unlawful occupier meaning that the lease agreement has come to an end, yet the tenant remains in unlawful occupation of the property, without the consent of the landlord. Therefore, the lessee has no right to occupy the property, and is an unlawful occupier.

The first step would be to obtain the signed lease agreement from the client and details of the breach of the tenant. In the event of the tenant failing to pay rental, full details of the arrears must be provided by the client.

Peruse the lease agreement, and in the event of breach of the lease by the tenant, pay close attention to the 'Breach Clause' in the written agreement. A typical breach clause should provide for a further cancellation clause. Also, pay attention to the clause, which provides for manner in which notices and legal process must be served and at what address, namely, by e-mail or by post to a specific address, such a clause is usually headed 'Notices'.

In the case of *mora debitoris* on the part of the lessee, the lessor has the right to cancel the contract by notifying the lessee that he reserves the right to cancel if the lessee fails to perform (pay the arrear rental, whatever the case may be) by a certain date. The breach clause in the agreement usually stipulates the number of days that must be afforded to the lessee to remedy his or her breach. In the event that no time period is provided for in the breach clause, then the lessor must afford the lessee a reasonable time to perform, taking into account what steps the tenant may have to take, after receiving the notice, in order to effect performance (*Nel v Cloete* 1972 (2) SA 150 (A)). To effect cancellation, a further juristic act is required, namely a notice that the lessor cancels the contract. The lessor may combine the two notices to bring about *mora* and gain a right to cancel in one single act (the *Nel* case). Should the lease agreement contain a breach clause, send out a letter in which notice of breach and cancellation of the lease due to breach (such as non-payment of rental).

However, the KwaZulu-Natal Local Division of the High Court's recent case law has confirmed that service of proceedings for ejectment constitutes notice to a tenant of a landlord's intention to terminate the lease agreement (*LOT 695 Hibberdene (Pty) Ltd vs Coalition Trading 689 CC* (KZD) (unreported case no 414/2013, 30-4-2015) (Thatcher AJ)).

If the lease is for an indefinite period of time on a month-to-month basis (for example), then notice in writing must be sent out with notice of the relevant notice period as prescribed by the lease or one calendar months' notice (from 1 to the 30/31 of the month), as the case may be.

Step two: Draft eviction papers (action and application)

If the lessee fails to remedy breach and the lease has been cancelled, and the tenant remains in occupation of the premises, then proceed with the legal process in terms of the Act and the Rules of Court, without delay. The institution of action (summons), together with application (notice of motion), is the process to follow in the event that the lessor intends to claim arrear rental and damages coupled with an application for eviction.

• *Action: Summons and particulars of claim*

The summons may contain an automatic rent interdict to prevent the tenant from removing any of the lessee's possessions from the property (once default judgment or summary judgment is granted, a warrant of execution is issued and the Sheriff can then sell these possessions at a sale in execution in satisfaction of the arrear rental).

Particulars of claim to contain prayers for the following (where applicable) –

– confirmation of cancellation of the lease agreement;
– confirmation of rent interdict appearing on face of the summons;
– arrear rental up to date of summons;
– interest on the arrear rental;
– leave to prove damages;
– interest on the damages;
– ejectment of the defendant from the premises (however, must comply with the Act procedures); and
– costs (attorney-and-client or party-and-party, as the case may be).

• *Application: Notice of motion, affidavit, s 4 notice (in two official languages)*

Draft notice of motion containing Part A (*ex parte* application) and Part B (application for eviction). Part B must be in long form notice of motion.

Draft affidavit deposed to by the lessor stating, *inter alia* –

– the relevant terms of the lease agreement;
– that the lease agreement was cancelled;
– the tenant failed to vacate the premises despite the fact that notice of cancellation was given; and
– the reasons for the requested eviction and why it is just and equitable to evict the unlawful occupant.

Furthermore, the affidavit must contain reference to the two notices, which is attached as annexures to the affidavit and the language of the notices.

• *Section 4 notice in terms of the Act*

Section 4 notice contains details of the hearing of the proceedings on at least 14 days' notice to the unlawful occupier and the local authority (municipality) having jurisdiction (written and effective notice of the proceedings). In practise, usually more than 14 days' notice is given. This is the minimum notice period and the matter has to be set down on the

day of the week that the court hears motion proceedings.

Section 4(5) of the Act sets out the structure and content of the notice of proceedings contemplated. The notice must –

– state that the proceedings are being instituted in terms of the Act;
– indicate on what date and at what time the court will hear the proceedings;
– set out the grounds for the proposed eviction; and
– state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

Draft the notice in terms of the Act in two languages that the unlawful occupier will understand.

The Magistrates' Courts Rules compel a procedure differing from that in the High Court. In the matter of *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA), Bosielo JA, found that, as long as the notice achieves the general purpose contemplated by the Act and the Magistrates' Courts Rules, the fact that the notice does not strictly comply with such provisions is not necessarily fatal. In this case, two notices in two separate documents were not required. The court is obliged to ensure that the notice will be 'effective' in the circumstances of the case, having regard to the intent and import of the Act and s 26(3) of the Constitution.

Step three: Issue summons and/or application

Attend on the clerk of the court for issuing of the summons and notice of motion. The action and the application should be issued with the same case numbers. Obtain the soonest possible date in order to attend on the magistrate in chambers for the *ex parte* application.

Step four: *Ex parte* application (first court hearing)

This is the first part of the application (Part A of the notice of motion), which is an *ex parte* application. The purpose of the *ex parte* application is that the consent of the court must be obtained to proceed with the application for eviction and authorisation for the issuing of the s 4 notices. The magistrate may be seen in chambers.

Step five: Issuing of the notice by the clerk of the court

Once the court has authorised the issuing of the s 4 notices, notices must be given to the clerk of the court for immediate issuing.

Step six: Service of papers by the Sheriff

Instruct the Sheriff to serve the papers as follows:

• On the defendant/respondent:
– Rent interdict summons (together with particulars of claim).
– Application (notice of motion, affidavit and annexures).
– Both s 4 notices (in each language).
• On all other occupiers:
– Application (notice of motion, affidavit and annexures).
– Both s 4 notices (in each language).
• On the municipality:
– Application (notice of motion, affidavit and annexures).
– Both s 4 notices (in each language).

Take note of the fact that at least 14 days' notice of the proceedings must be given to the relevant parties. Therefore, service of the action and application must be made timeously. Sometimes the papers have to be sent to two different sheriff offices for service as the property and the municipality may not be in the same jurisdiction in respect of which the Sheriff serves.

Step seven: Index and paginate the court file

Once you have received the original papers and the returns of service from the Sheriff, index and paginate court and office file.

Step eight: Return date (second court hearing)

On the return date the court may grant further orders with regard to the postponement or finalisation of the eviction. You may have received notice of opposition prior to the court hearing, in which case the matter will be argued as an opposed motion before court.

Before a court can grant an eviction, it has to consider all the relevant circumstances and be in a position to rule that such an eviction is just and equitable. The owner approaches the court on the basis of ownership alone and the unlawful occupation. It is then the occupier who may rely on special circumstances and it is their duty to raise and present the special circumstances to the court. The court gives special regard to the rights of elderly, children, disabled persons and households headed by women. The court may only grant the eviction after considering all the relevant circumstances and has a very wide discretion in ordering the date on which the unlawful occupier is to vacate (*Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 17 and 19).

The circumstances to be considered by a court in determining whether an eviction order will be just and equitable are outlined in s 6(3) of the Act.

At the hearing the unlawful occupier may attend and put forward reasons why he or she should not be evicted. The court then has discretion to grant the unlawful occupier time by which to –

• vacate; and
• the date on which the eviction is to take place if the unlawful occupier has not vacated as per the court's order.

Note the difference in the factors that the court will take into account in terms of subss 4(6), 4(7) and s 5 of the Act.

Step nine: Court order

The court order must clearly state on which date the occupiers must vacate the premises and, furthermore, state that if they fail to vacate the premises, the Sheriff will be authorised to remove them from the premises as of a specified date. The Sheriff is then empowered by virtue of this order, to evict the tenant by force if necessary.

Step ten: Service of court order by Sheriff (in the event of lessee/unlawful occupiers not being present at court hearing)

After an order for eviction has been granted in default, it must be served on the unlawful occupier/s by the Sheriff.

Step 11: Removal by the Sheriff and warrant of ejectment

If the occupiers fail to vacate the property on the date stipulated in the court order, without delay, have the clerk of the court issue no 30 Warrant of Ejectment. Thereafter, instruct the Sheriff to remove the occupiers of the premises and to utilise the services of a locksmith if necessary. Provide the Sheriff with r 38 indemnity.

Time: The length of procedure

Generally, an eviction can be effected within three months from receipt of instruction. This time period, however, depends on whether the lease has been validly cancelled after the breach of the lease agreement and the date of eviction ordered by the court.

Lastly, follow through with the action procedure in order to obtain judgment: Default or otherwise.

Variation to the steps above

Section 5 of the Act provides for urgent evictions.

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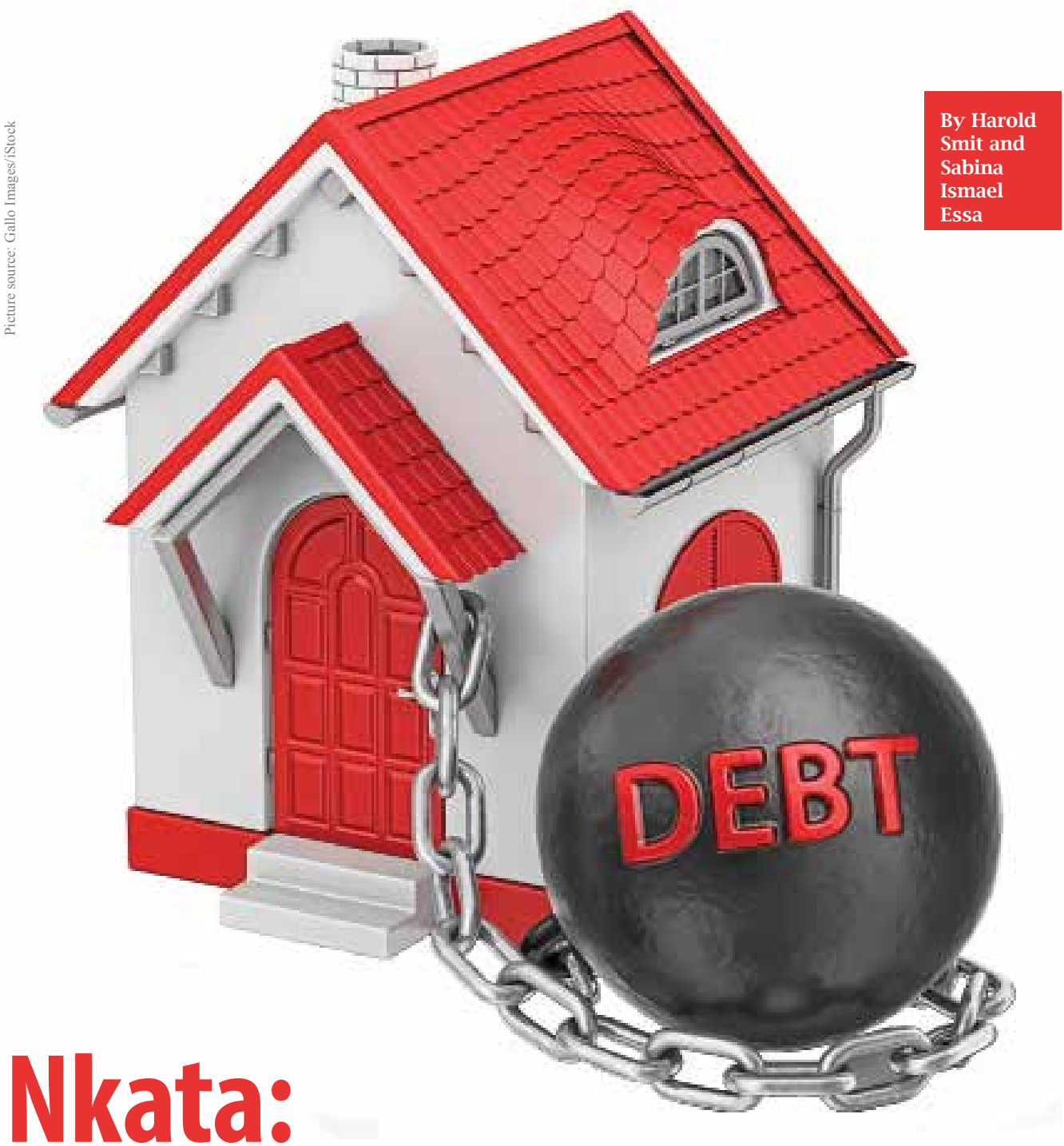

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By Harold Smit and Sabina Ismael Essa

Nkata:

The court's interpretation of s 129 of the NCA and the meaning of 'reinstatement'

On 21 April 2016 the Constitutional Court (CC) delivered a very important judgment in the matter of *Nkata v FirstRand Bank Limited and Others (The Socio-Economic Rights Institute of South Africa as* Amicus Curiae*)* (CC) (unreported case no CCT73/2015, 21-4-2016) (Moseneke DCJ).

In the way that Nkandla dominated the political scene during the previous two years, it can be assumed that the *Nkata* matter will be mentioned whenever the National Credit Act 34 of 2005 (NCA) is applicable.

The judgment predominantly dealt with the interpretation of subss 129(3) and 129(4) of the NCA and also made important comments with regard to s 129.

These comments dealt with the effect of judgments obtained and execution, specifically, with regard to mortgage loan agreements.

The most important word dealt with, is the meaning of 'reinstatement' with specific reference to s 129(3).

Interestingly, the court deviated from the normal format of judgments in that:

- Cameron J delivered a main judgment that summarised the basic facts of the matter.

• Moseneke DCJ and others delivered the majority judgment.
• Nugent AJ, with whom Cameron J agreed, delivered a minority judgment on their view with regard to costs.
• Jafta J delivered another minority judgment, which predominantly dealt with non-compliance with s 129.

All the judges agreed that subss 129(3) and (4) creates an option for a debtor to pay the full arrears and certain other amounts and it would have the legal effect of the reinstatement of an accelerated mortgage loan agreement. No consensus is therefore necessary with regard to the second agreement that is concluded in law as soon as all arrears are paid.

It is our view that the court predominantly relied on the introduction and purpose of the NCA. The court then found that in all disputes – which relates to the NCA – the first few sections of the Act should be consulted and decisions, which will produce a result envisaged in the purpose and definitions section of the NCA should be taken.

The majority of the court found that:
• Leave to appeal from the Supreme Court of Appeal (SCA) was granted and the appeal succeeded.
• The order of the SCA was set aside.
• It was declared that the credit agreement between FNB and Ms Nkata was lawfully reinstated by payment of the arrears and that the default judgment entered against Ms Nkata and the subsequent warrant of execution against her home, had no legal force.
• The public auction of the home of Ms Nkata was set aside.
• An order was made that the property may not be transferred to the third respondent that bought it at a sale in execution.
• The bank had to pay all the costs of Ms Nkata in the High Court in the Western Cape, the SCA and the CC, which included the costs of two counsel.
• The major difference between the view of the majority judgment and that of Cameron J and Nugent AJ appears to be their interpretation of s 129(3), which provides that at any time before the credit provider has cancelled the agreement, the consumer may reinstate the credit agreement that is in default by paying to the credit provider –
– all amounts that are overdue;
– together with the credit providers permitted default charges; and
– reasonable costs of enforcing the agreement up to the time of reinstatement.
• It is important to note that the decision dealt with the interpretation of subss 129(3) and (4) before the amendment of 2015.

Cameron J stated in para 22 that Rogers J, in the Western Cape Division of the High Court in Cape Town, found that reinstatement took place when, what would have been the arrears, had been paid and that the debtor did not have to pay the full accelerated outstanding indebtedness.

The High Court found that the costs debited against Ms Nkata's bond account with regard to costs incurred and previous rescission proceedings and cancelled sales in execution should have at least been taxed or agreed.

In para 26, Cameron J referred favourably to the finding of Rogers J that Ms Nkata did not have to intend to reinstate the credit agreement. She also did not have to signal to the bank any intention to do so. This was because reinstatement takes place 'by operation of law if the consumer as a fact makes the payments contemplated by section 129(3).'

The SCA found that the bank had already executed the default judgment in terms of s 129(4) by the time Ms Nkata paid her arrears. It found that when the property was sold at the sale in execution, execution took place.

It was then stated that everybody at the CC hearing agreed that the finding of the SCA was wrong.

It should also be noted that the SCA found that any amendment to an agreement in terms of the NCA, needed to be recorded in writing and signed as envisaged in s 116 of the NCA.

In para 33, Cameron J stated that interpretation of the NCA raised constitutional issues, and held that Ms Nkata did not deal with or contest the banks exposition and calculations in the schedule to its affidavit with regards to the payments made by herself and the costs debited against her bond account. It was then stated that the High Court treated it as common cause that she had paid her bond account arrears but not any legal costs owing to the bank. It was stated that it was on that basis that the High Court adjudicated the application and on which Cameron J found that the costs of enforcing the judgment were not paid.

In para 48, Cameron J held that: '"Payment" has always been understood in our law to mean "the delivery of what is owed by a person competent to deliver to a person competent to receive"' and referred to authorities stated by Innes CJ in *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539.

It is then stated that 'payment means the "satisfaction of performance" of an obligation' (at para 49).

Cameron J held that he could not conclude that the bank, in debiting Ms Nkata's bond account, made a tacit representation that it waived to receive full payment of the costs incurred in the litigation, which must be distinguished from the default costs.

In para 53 it states that: 'We agree on this fundamental premise: In interpreting section 129(3), we must bear in mind the NCA's aims. The statute tells us what they are and how they are, to be achieved. It aims to protect consumers by "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers"'.

Cameron J then made it clear that he and Nugent AJ differed from the majority judgment, specifically only with regard to the litigation costs debited against the account of Ms Nkata.

The majority found that since the costs had not been taxed or agreed, they could not have been considered reasonable, hence they were not due and payable (at para 54).

It was then mentioned that the majority found that in those circumstances, the consumer is required to do no more than pay the outstanding arrears to reinstate the credit agreement.

Cameron J then seemed to differ from the view of the majority that stated that the bank, if it wanted to recover the costs of enforcing the credit agreement from the consumer, must take proactive steps to tax or agree on the costs before the amount can be considered as reasonable costs.

In para 55, Cameron J stated that the bank did not want to recover the costs of enforcing the agreement from the consumer at all. 'It was quite content to capitalise those costs for its, and Ms Nkata's convenience'.

Very important in interpreting the NCA is para 63 of the judgment of Cameron J, where he refers favourably to the words of Mhlantla AJ in *Kubyana v Standard Bank of South Africa Ltd* 2014 (4) BCLR 400 (CC):

'It deserves re-emphasis that the purpose of the [NCA] is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."'

In paras 92 and 93, Moseneke DCJ repeats that the overarching objects of the NCA and the narrower purpose of s 129(3) and what it lays down.

It was then stated that s 2 of the NCA enjoins the court to interpret the provisions of the NCA in a way that gives effect to its purposes as described in s 3.

Moseneke DCJ, in para 96, again states: 'In sum, the Act is "a clean break from the past" and encourages dialogue between consumers and credit providers'.

It is furthermore stated that the *Kubyana* matter, as well as in the matter of *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (8) BCLR 785 (CC), the court relied on *Sebola* to make the point that the provision aspires 'to facilitate the consensual resolution of credit agreement disputes' (at para 97).

It is our personal view that the court will soon find that it is imperative that

the bank makes sure that the s 129 notice reaches the consumer, because it is an important view that the NCA wishes to afford an opportunity to the consumer to apply for debt restructuring and/or approach the credit provider to create dialogue to resolve disputes.

In this article, we will remain with the present judgment and not deal with the poor postal service that South Africa is faced with and the continuous strikes and post office lock down because landlords did not receive their rent.

In para 100, Moseneke DCJ stated that subss 129(3) and (4) have introduced a novel relief of reinstatement, which parts ways with the debt collection measures of old and he could have stated that it parts ways with the basic contractual principals of consensus if a new agreement is reached between two parties.

The court stated that once the consumer makes specified overdue payments, the agreement is reinstated.

In para 104, Moseneke DCJ held: 'The clear import is that for purposes of reinstatement, the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver.'

In para 105, it is stated again that: 'The reinstatement occurs by operation of law'.

In para 121, the majority found that the credit agreement was indeed reinstated when Ms Nkata settled her bond arrears in full, being outstanding capital and interest. The court then found that at that point, the banks legal costs were not due and payable. The court held that: 'It is undisputed that the bank had not given Ms Nkata notice of the nature and extent of the legal costs. It had not demanded their payment properly or at all. Also, the legal costs were not shown to be reasonable'.

In para 121, the majority held that: '[T]he bank chose to be the sole arbiter of the extent of the legal costs and one-sidedly debited the costs against the bond account of Ms Nkata.'

The majority agreed with the High Court that it could not be expected of the consumer to take proactive steps to find out what the costs, for reinstatement to be effected, would be. The consumer could also indeed not be expected to start taxation or to reach agreement with the credit provider on the quantification of these costs.

Conclusion

We submit that many authorities exist and that all lawyers always know that before costs can be recovered from a defendant, taxation had to take place or an agreement had to be reached on the costs in terms of prescribed tariffs. We can, however, understand that counsel for the bank, in the *Nkata* matter, endeavoured to uphold the validity of the sale in execution and was forced to argue that the parties should accept that the costs debited against the bond account were reasonable, which appeared to be the view of Cameron J and Nugent AJ.

The bank argued that the word 'execution' used in s 129(4) meant the attachment of the property.

The majority appeared to find, in para 136, that Ms Nkata paid the credit provider all amounts that were then overdue, together with default charges. For these reasons, the High Court correctly ordered that the default judgment and writ of execution ceased by operation of law, to have any force or effect as from 8 March 2011 when the arrears were paid. It found that the payment of the arrears reinstated the credit agreement.

- See practice note 'Protection offered by s 129 of the National Credit Act' on p 23 of this issue and 'Banks beware: Reinstatement of mortgage loan agreements' on p 52 of this issue.

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Alternatives to retrenchment – are employers obliged to save jobs?

By Neil Coetzer

Picture source: Gallo Images/iStock

With the steady decline of the South African economy, employment law lawyers have found themselves consulting increasingly on possible retrenchments and restructuring exercises as employers seek to remain profitable or even to avoid total closure. As employers in a contracting economy continue to shed jobs, the number of unemployed South Africans seems to be growing daily. The situation has become so dire that even the Commission for Conciliation, Mediation and Arbitration (CCMA) offices around the country have affixed posters to their walls requesting employers, unions and employees to work together to save jobs. The seriousness of the situation has led to increased participation from unions and greater focus on alternatives to retrenchment in an attempt to preserve those jobs that are currently available. Those alternatives, however, are usually either temporary in nature (such as a resort to short-time or lay-off) or propose changes to existing terms and conditions of employment (such as a salary reduction or withdrawal of benefits).

Retrenchments and the LRA

Section 189 of the Labour Relations Act 66 of 1995 (LRA), as amended, permits an employer to dismiss employees for operational requirements or reasons. The phrase 'operational requirements' is a broad term referring to economic, technical, structural or similar needs of an employer. Before effecting such dismissals, however, the LRA places an obligation on employers to engage in a meaningful joint consensus-seeking process in an attempt to reach consensus on, *inter alia*, appropriate measures to avoid and/or minimise the number of dismissals. An employer could, as part of the s 189 process, advise employees that in order for it to remain viable and operative, employees would have to agree to a reduction in their remuneration or other terms and conditions of employment. Those employees who refuse to agree to the reduction could be lawfully dismissed in order to allow the employer to employ employees who are prepared to accept the reduced terms and conditions of employment. This is, in essence, the reasoning that was adopted by the Supreme Court of Appeal in *NUMSA and Others v Fry's Metals (Pty) Ltd* [2005] 3 All SA 318 (SCA).

However, in some instances employers are unwilling or even unable to dismiss employees. The reasons for this are varied, but usually stem from an operational necessity to maintain production or the inability to pay severance packages due to cash shortages. In the present economic climate it also seems to be a social and moral imperative to prevent job losses wherever possible. However, in these circumstances the question arises whether an employer is entitled to implement alternatives suggested during the s 189 consultations unilaterally if the purpose of doing so is to avoid a loss of jobs. In other words – instead of dismissing employees to achieve the reduction in cost, as per the *Fry's Metals* scenario, is it not preferable for an employer to retain its current complement of employees, but simply to implement whichever alternatives would reduce the employer's cost?

Alternatives to retrenchment and the consultation process

According to Professor Alan Rycroft ('Employer and Employee Obligations with regard to Alternatives to Retrenchment' (2015) 36 *ILJ* 1775), s 189 contains an underlying assumption that consultation can only be meaningful and consensus-seeking if all parties engage in the process, full disclosure is made by the employer and any exchanges by the parties are well-motivated and rational. Dismissals for operational requirements may also only be effected as a measure of last resort. As a consequence, much attention must be given to alternatives which can be agreed to. Such alternatives include, *inter alia* –

- the reductions or changes to terms and conditions of employment;
- lay-off;
- short-time, placing a moratorium on new appointments, overtime or Sunday work;
- transferring affected employees to other jobs in the employer's business or group;
- training or re-skilling employees for other available positions; and
- granting extended unpaid leave.

Ideally, employers and employees should engage in constructive and rational dialogue on these issues in order to reach agreement. Such agreements, which are concluded between majority unions and the employer, can be extended to all employees at the employer's workplace(s) in terms of s 23 of the LRA. It often happens, however, that no agreement can be reached on alternatives. Parties routinely adopt polarised positions and engage in brinkmanship in order to force a particular outcome and thus undermine the entire consultation process. In those circumstances, employees may be forced to make an election as to whether they are prepared to accept the alternatives or not. As set out above, the position in respect of *Fry's Metals* is clear. However, whether an employer is

entitled to implement alternatively unilaterally is not.

Implementing alternatives unilaterally

In *Entertainment Catering Commercial & Allied Workers Union of SA and Others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 *ILJ* 1347 (LC) the Labour Court (LC) found that employers are entitled to unilaterally change employees' conditions of service in order to save jobs. This was confirmed in *Media Workers Association of SA and Others v Independent Newspapers (Pty) Ltd* (2002) 23 *ILJ* 918 (LC) where the court held as follows:

'Implementation of s 189 often results in changes in terms and conditions of employment. *Such changes are justified if they are made in the course of a bona fide retrenchment exercise and as an alternative to retrenchment.* ... In this case they were not underpinned by the ulterior motive to dismiss for not acceding to a demand. ... Merely because dismissal was not considered as a probability does not mean that changes were not brought about in terms of s 189. *Dismissal is one, though not a necessary, consequence of restructuring*' (my italics).

Author John Grogan (*Workplace Law* 11ed (Cape Town: Juta 2014) at 214 – 215) points out that in both the *ECCAWUSA* and *Independent Newspapers* judgments, the courts found that the changes proposed by the employers were *bona fide* and genuine attempts to avoid retrenchment. In *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) the LAC pointed out that the employer could have implemented the changes to the shift system without having to resort to retrenching the employees who refused to accept the changes. This confirms the position in the *ECCAWUSA* and *Independent Newspapers* judgments.

A subsequent judgment of the Labour Appeal Court (LAC) went further to impose a duty on an employer to take all steps to avoid dismissals. Although the case concerned the redundancy of a position, the principles remain relevant. In *Oosthuizen v Telkom SA Ltd* (2007) 28 *ILJ* 2531 (LAC) the LAC found as follows at para 8:

'In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can perform either without any additional training or with minimal training. *This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements.* ... In such a case the dismissal is a dismissal that could have been avoided. *A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason*' (my italics).

As can be seen from the above, there is sufficient support for the view that alternatives can be implemented unilaterally by employers. In fact, the judgments above seem to evince a duty on an employer to implement alternatives which are likely to save jobs. Conversely, an employer that neglects or refuses to implement alternatives could be said to have acted unfairly.

A further question, however, arises in regard to whether the alternative that will be implemented needs to be reasonable. Section 41(4) of the Basic Conditions of Employment Act 75 of 1997, as amended (the BCEA) relieves an employer of the duty to pay severance pay in circumstances where the employee who is dismissed for operational requirements 'unreasonably refuses to accept the employer's offer of alternative employment'. In *Irvin and Johnson Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2006) 27 *ILJ* 935 (LAC) the LAC found that the purpose of this provision was to promote employment and to incentivise employers to take the necessary steps to provide alternative employment for all employees facing dismissal for operational requirements. While this provision clearly underscores the importance of job preservation, it is also important to point out that an employee's refusal of an unreasonable offer of alternative employment would not absolve the employer from having to pay a severance package. The LC, as a court of fairness and equity, will inevitably inquire into the fairness and reasonableness of the employer's chosen alternative as well as the final decision to implement the alternative unilaterally (see *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical Energy Paper Printing and Allied Workers Union* (2014) 35 *ILJ* 140 (LAC)). The courts may, for instance, take a dim view of an employer that implements an alternative which has the effect of reducing an employee's salary by more than 20% or imposes an indefinite lay-off or short-time process, although there may be compelling reasons for doing so.

Remedies for employees

In respect of large-scale restructuring exercises, subs 189A(7) and (8) of the LRA provide that once employees are issued with notices of termination of their employment, they may either give notice of their intention to strike or, alternatively, refer a dispute to the CCMA in respect of the alleged unfairness of the reason for their dismissal. However, this situation would not arise in the circumstances described above since no notices of termination would have been issued.

In the event that alternatives are implemented and dismissals are avoided, are employees entirely without recourse?

In circumstances where the implementation of the alternative affects the training or benefits of an employee, it is possible that an unfair labour practice claim in terms of s 186(2)(*a*) of the LRA could be referred to the CCMA. In addition, an employee could either institute a contractual claim for breach of contract in terms of s 77(3) of the BCEA or refer a dispute concerning a unilateral change to terms and conditions of employment in terms of s 64(4) of the LRA. The most obvious defence to all of these potential claims is, of course, that the employer is entitled to change terms and conditions of employment through a s 189 process. The defence is yet to be tested, however, although I cautiously suggest that the fairness of the employer's conduct may become an important consideration in the determination of any dispute referred in terms of ss 186(2) or 64(4). A claim in terms of s 77(3) is, however, a contractual claim and, once formulated, may fall outside of the fairness jurisdiction of the LRA.

However, a claim concerning a unilateral change to terms and conditions of employment in terms of s 64(4) of the LRA is not capable of being arbitrated and would consequently permit employees to engage in a protected strike in support of a demand to have their previous terms and conditions restored. Whether such a strike could be interdicted on the basis that the reduction was effected through a lawful s 189 process is not clear and may be argued before the LC in due course.

A retaliatory strike in these circumstances seems to be at odds with the noble motive of job preservation. It seems, to my mind at least, manifestly unfair to permit employees to engage in a strike after an employer has discharged its statutory duties lawfully, fairly and in circumstances where an employer has also implemented alternatives which have resulted in fewer or no dismissals for operational requirements. Even s 189A only permits a strike where employees are actually dismissed – something that would be avoided if an alternative is implemented. To penalise an employer for avoiding retrenchments seems counterintuitive and constitutes a disincentive for employers to save jobs. It is also worth considering whether such an outcome offends the constitutional notion of fair labour practices, particularly since it is guaranteed to 'everyone'. The issue definitely requires further consideration and our courts should seek to give more clarity on the consequences of implementing fair and reasonable alternatives unilaterally.

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Understanding parole – *an in-depth discussion*

By Dr Llewelyn Gray Curlewis

This article is an attempt to explain and facilitate the basic functioning of the parole system and purports in no way to be comprehensive or without fault.

Parole can be defined as a period whereby an offender who has served the prescribed minimum detention period of his or her sentence in a correctional centre, is conditionally released to serve the remaining sentence in the community under the supervision and control of the Department of Correctional Services. Parole placement is subject to certain conditions (until the expiry of the full sentence), being accepted prior to release. These offenders are referred to as 'parolees' while on parole in the system of community corrections.

Parole should not be confused with 'correctional supervision'. Correctional supervision is a sentencing option exercised by the court and is served within the community. This sentencing option can be imposed where a person must firstly serve a portion of the sentence in a correctional centre or is admitted directly into the community corrections system from court. These offenders are referred to as 'probationers' who are subject to the rendering of community service and compliance with set conditions while in the system of community corrections.

Definitions

'Day parole' is a management mechanism preceding the parole phase to gradually assist an offender to be released into the community at his own responsibility under controlled circumstances. The offender will be compelled to return to a correctional centre after hours.

The 'sentence expiry date' is the date when the total determinate sentence expires after amnesty and/or special remission of sentence have been deducted from the maximum date. That is, the release of the offender occurs at the expiry of his or her total sentence.

The granting of 'amnesty' is the prerogative of the President and is usually allocated on special occasions or events. Amnesty is a sentence reduction and the terms and conditions are determined by the President. In this regard the Department of Correctional Services must comply with the administrative steps as specified in the presidential decree.

Section 80 of the Department of Correctional Services Act 111 of 1998 (the Act) makes provision that the commissioner may allocate 'special remission of sentence' to an offender where he or she has acted highly meritoriously. Such special remission of sentence can only be deducted from the parole period and not from the non-parole period (if applicable) and does not affect the minimum detention period (half of the sentence or non-parole period). If special remission of sentence has no effect on the offender's term of imprisonment such as life imprisonment a monetary reward may be allocated.

'Medical parole' is considered when an offender suffers from a highly contagious disease or is terminally ill due to his or her physical condition and on recommendation of more than one medical practitioner or specialist physicians, the minister, the commissioner, the parole board or where the relevant court may approve that such an offender be released on medical parole to die a dignified and consolatory death.

'Non-parole period' is a term that can be imposed by a court, but may not exceed two-thirds of the relevant sentence imposed by such court.

A 'determinate sentence' refers to a definite period of imprisonment imposed by a court with or without the option of a fine.

Case management committee

In terms of the Act, a case management committee must be established at each correctional centre. This multi-disciplinary committee consists of representatives composed of custodial staff, as well as specialists such as educationists, social workers, psychologists and spiritual workers. The case management committee is responsible for:

- Ensuring that each sentenced offender is assessed and that a sentence plan is created.
- Interviewing each offender on a regular basis, reviewing the sentence plan and the progress made and, if necessary, amend such plan.
- Submit a report to the Correctional Supervision and Parole Board regarding the –

– offence for which the offender has been sentenced;
– previous criminal record of such an offender;
– conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental health state of such an offender;
– likelihood of relapse into crime, the risk posed and the manner in which this risk can be reduced; and
– possible placement of such an offender on day parole, and the conditions for such placement.

In this article, I do not deal with the sentence plan as a mechanism *per se*, neither with any of its many key service delivery areas.

The Correctional Supervision and Parole Board

The Correctional Supervision and Parole Board's composition is as follows –

- chairperson;
- vice-chairperson;
- one member from Department of Correctional Services nominated as secretary;
- two members of the community;
- one representative from the South African Police Service (SAPS) (can be co-opted when necessary); and
- one representative from the Department of Justice (can be co-opted when necessary).

The minister may appoint one or more such boards. The functions of the board may be summarised as follows:

- A Correctional Supervision and Parole Board, after having considered a profile report (Form G326) submitted by the case management committee or any other representation on any offender serving a determinate sentence exceeding 12 months may:

– Place an offender on medical grounds.
– Place an offender under correctional supervision, day parole or parole.
– Make recommendations to the court *a quo* for the conversion of sentence of imprisonment into correctional supervision.
– Make recommendations to the court *a quo* regarding day parole or parole, offenders sentenced to life imprisonment and those declared as dangerous offenders in terms of s 286B of the Criminal Procedure Act 51 of 1977 (CPA).
– The release of offenders on the expiration of their total sentence.
– Consider amendment of conditions or cancellation of placement on day parole; parole; or correctional supervision on serious violation or substantial change in circumstances in respect of cases pertaining to ss 276(3)(*a*) and 287(4)(*b*) of the CPA.
– Recommend amendment of conditions or cancellation of placement to the court or National Council on serious violation or substantial change in circumstances in respect of those sentenced to life imprisonment.

This article does not cover the many duties of the board members, neither the working procedures between a case management committee and the Correctional Supervision and Parole Board. Needless to say, that a special inter-relationship exists and is fostered between these institutions.

The secretary of the Correctional Services and Parole Board has a huge responsibility, starting two months before the actual parole board hearing, to ensure all relevant information is readily available for consideration, including informing victim/s in writing of same and notifying every one of the date, venue, time, etcetera. The arrangements regarding facilities and equipment are also the responsibility of the secretary.

- Regarding the hearing, the following general points are adhered to:
- The chairperson must ensure that the profile report (Form G326) minimum detention period and sentence expiry dates are correctly calculated and adjusted according to allocated special remission(s) of sentence or amnesty (if applicable).
- The chairperson must convene a meeting of the board in terms of the general procedures, which is applicable to meetings in general, for example, the meeting must be addressed through the chairperson, the chairperson must ensure that no unruly behavior is allowed, etcetera.
- The chairperson or vice-chairperson must ensure that a quorum is formed prior to the sitting.
- Members present at the meeting must give meaningful inputs to formulate a recommendation where after a decision in respect of placement and/or release must be taken. Should additional information be required, the board may request such information and reconsider the case once the information is available.
- After the Correctional Supervision and Parole Board have deliberated over a case and consensus is reached in terms of a formulated recommendation, the board must approve or disapprove conditional placement.
- Only one offender at a time appears before the Correctional Supervision and Parole Board. All co-accused should be taken into consideration. If they are not in the same correctional centre or management area, the chairperson should liaise with other relevant parole boards.
- The Correctional Supervision and Parole Board, before considering conditional placement of the offender, must also consider written or oral representations or inputs from the complainant or victim or the complainant or victim's next of kin.
- The chairperson must fully comment or deal with, on the offender's profile report (Form G326) as to why the offender is not considered to be a suitable candidate for placement. If placement is recommended or ordered, full motivated reasons must also be noted. In the aforementioned cases it is imperative that any decision taken by the board must be mo-

tivated, as it can serve in a court of law as to why parole is granted or not granted (principles of administrative law).

- The offender may have legal representation or representation by a lay person, but not a fellow offender or member from the Department of Correctional Services, SAPS or Department of Justice. The representative for the offender may only deliver representation for placement on behalf of the offender – no legal arguments or cross-examination will be allowed. Arguments related to the trial will also not be allowed.
- A decision of the majority of members eligible to vote and present at the meeting constitute a resolution of the board. The chairperson has a casting vote in addition to a deliberative vote in the case of an equality of votes on any matter.

Who qualifies for placement on parole or under correctional supervision?

In terms of the provisions of the Act: 'All offenders qualify to be considered for placement under correctional supervision or parole once they have served the prescribed minimum detention period of their sentence' (*CSPB Manual* 2005 (at 29 para 3.3.1)). The conditional placement of offenders sentenced to 12 months imprisonment or less is dealt with by the area manager and are dealt with in accordance with the policy applicable to offenders serving sentences longer than 12 months. Offenders sentenced to terms of longer than 12 months imprisonment are dealt with by the Correctional Supervision and Parole Board.

Offenders sentenced to life imprisonment and offenders sentenced in terms of s 286B of the CPA, who have been declared as dangerous persons, are referred to the court *a quo* for a decision (only new admissions after implementation of the Act). Offenders sentenced prior to the implementation of the Act still have to be referred to the Minister (see s 136 of the Act).

Emphasis is placed on consideration and an offender is not automatically placed out after completion of the minimum detention period of his or her sentence. Each and every case must therefore be considered on its own merits.

Although an offender has to serve his full sentence, the Department of Correctional Services realises that, in the interests of the successful re-integration of the offender, it is normally not appropriate for him or her to serve the full period of his or her sentence in a correctional centre. The possible parole placement or conversion of sentence of each offender is, therefore, considered individually on own merit in order to determine the most appropriate stage for placement. When consideration is given to releasing an offender the potential risks related to such a placement are thoroughly considered and specific measures are put in place to ensure that the necessary control and supervision will be exercised over the offender until expiration of sentence.

Although an offender has no right to be paroled, parole is an integral part of the penal system and where an offender has demonstrated during his or her incarceration that he or she has been rehabilitated; that he or she is unlikely to be a danger to society and that there is a full awareness of and a contrition for the crime committed the case management committee may recommend that an offender be released on conditions. Parole, therefore, provides offenders with the incentive to demonstrate their commitment to rehabilitate and reform, which is an important element of punishment.

The Correctional Supervision and Parole Board must function and consider cases in accordance with the provisions of ss 73, 74 and 75 of the Act.

Specific attention must be given to the type of crime committed, the length of the sentence and the gravity thereof must be counterbalanced with other factors for consideration, including circumstances surrounding the committing of crime rather than the crime itself. Even the initial remarks of the presiding magistrate or judge also play a vital role.

In practice, cognisance is taken regarding basically any or all relevant applicable and reliable aggravating and/or mitigating circumstances pre- or during and post-trial.

One of the conditions that may be set, if not ordered by the court, is the rendering of community service as specified in ss 52 and 60 of the Act. This is an important part of the restoration of justice and all offenders released on parole or correctional supervision should be compelled to do community service where practicably possible.

• In the next article, which will be published in the August issue, I will explain medical parole and write about the members of the Review Board. I will also discuss placement dates and various terms and conditions thereof.

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Unmarried same-sex couples more favourable legal position than heterosexual counterparts

By Bradley Smith

The legal position pertaining to persons who cohabit out of wedlock (domestic partners) in South Africa is complex. Contrary to certain other jurisdictions, a domestic partnership, irrespective of its duration, is not deemed to be a 'common law marriage'. Instead – and despite the recommendations of the South African Law Reform Commission in its 2006 '*Report on domestic partnerships*' (www.justice.gov.za, accessed 2-6-2016) and the publication of a draft Domestic Partnerships Bill 2008 (GN36 *GG*30663/14-1-2008) – South Africa has no dedicated domestic partnership legislation. The general rule thus remains that none of the invariable consequences of marriage are automatically attached to such a relationship (*Butters v Mncora* 2012 (4) SA 1 (SCA) at para 11). Consequently, domestic partners must self-regulate the legal consequences of their relationship by invoking the ordinary rules and remedies of the law (such as contracts, wills or unjustified enrichment). They may also, where apposite, rely on piecemeal recognition that has, particularly since the advent of democracy, been conferred on such partnerships by the judiciary and the legislature (see J Heaton *South Africa Family Law* 3ed (Durban: LexisNexis 2010) at 243; B Smith 'The dissolution of a life or domestic partnership' in J Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (Cape Town: Juta 2014) at 389).

As Sachs J stated ten years ago in *Minister of Home Affairs v Fourie and Another (Doctors for Life International and Others,* Amici Curiae*); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) at para 125, domestic partnerships are, therefore, still governed by 'a patchwork of laws that [does] not express a coherent set of family law rules'. This position is unsatisfactory, for a number of reasons. The first – and most obvious – is that it is unacceptable, given the steadily increasing incidence of cohabitation in South Africa, for the legislature to continue to ignore the plight of domestic partners. According to the 2011 Census more than 3 million or 8,6% South Africans were involved in relationships of this nature. In 1996 this proportion was 5% and in 2001 it was 7,8% (Smith in Heaton (*op cit*) at 393). Secondly, the position sketched above entails that legal practitioners must engage in a continuous stock-taking process to ascertain the rights (and duties) of domestic partners. This process is cumbersome and leads to uncertainty for attorneys and the public alike. This problem is compounded by the fact that the existing legal position is anomalous because, as will be seen below, unmarried same-sex couples continue to find themselves in a more favourable legal position than their heterosexual counterparts. Although the acuteness of this anomaly has steadily been blunted over the last few years (see para on the next page), a major inconsistency that remains is that unmarried same-sex couples continue to be entitled to mutual rights of intestate succession while their heterosexual peers are not (*Duplan v Loubser NO and Others* (GP) (unreported case no 24589/2015, 20-11-15)). Although this position appears to be stalemated due to the precedent-setting nature of the Constitutional Court's judgment in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), I will contend, in this article, that it is not. In this manner I hope to strengthen the vital interrelationship between practice and academia by sharing some of the findings of my recent research with practitioners who may be approached by clients faced with this problem.

The road thus far: Piecemeal recognition and the creation of a deadlock

When the Civil Union Act 17 of 2006 (the Act) was enacted, South Africa became only the fifth country in the world to legalise same-sex marriage. The first step towards this development was taken eight years earlier when, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) (*NCGLE*), the crime of sodomy was found to be incompatible with the new constitutional order. This paved the way for our courts to permit a number of incremental extensions of certain spousal benefits to same-sex domestic partners on the basis that withholding these benefits from them, while simultaneously prohibiting them from marrying, amounted to unfair discrimination on the basis of sexual orientation and also violated the constitutional right to dignity. These included –

- the right to qualify for spousal medical aid and immigration benefits (*Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T) and the *NCGLE* matter);
- entitlement to the same pension benefits as the surviving spouse of a deceased judge (*Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC));
- the right to institute the common law dependant's action for loss of support in the case of the demise of a breadwinner (*Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA));
- the possibility of joint adoption and guardianship of children (*Du Toit and Another v Minister for Welfare and Population Development and Others (Lesbian and Gay Equality Project as* Amicus Curiae*)* 2003 (2) SA 198 (CC)); and
- the right to inherit on intestacy (*Gory v Kolver NO and Others (Stark and Others Intervening)* 2007 (4) SA 97 (CC)).

The latter development is of great significance for this article. In the *Gory* matter, the Constitutional Court used the body of jurisprudence sketched above as a platform from which to order the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' to be read-in after the word 'spouse' in the Intestate Succession Act 81 of 1987 (the ISA) so as to permit a partner who complied with these threshold criteria to inherit in the same manner as a surviving spouse. This judgment was delivered merely one week before the Act was enacted. Importantly, in the *Gory* matter, the court – aware that the legalisation of same-sex marriage was imminent, but unsure as to how the legislature would facilitate this – made it clear that the piecemeal protection, that had been conferred on same-sex unmarried couples up to that point by the courts, would continue to stand until the legislature expressly intervened (*Gory* at paras 27 – 31). As it turned out, the Act did not curtail any of this protection in any way (*Duplan* para 19). Same-sex couples who elected to remain unmarried despite being entitled to marry would therefore remain entitled to these benefits.

The position in respect of *heterosexual* domestic partners is very different. This is due to the majority judgment of the Constitutional Court in the *Volks* matter. *In casu*, R, the female surviving partner in a domestic partnership that had existed between herself and Mr S for some 16 years, contested the constitutionality of her inability to claim maintenance as a 'spouse' from S's deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. On the facts it was clear that she and S had mutually supported one another during the existence of their relationship. Her exclusion from the Act was nevertheless held neither to constitute unfair discrimination against her on the ground of marital status, nor to violate her constitutional right to dignity. The court's rationale was that by choosing not to marry, despite being legally entitled to do so, S and R had elected to opt out of an important social (and internationally recognised) institution that – in contrast to a domestic partnership – created moral and legal obligations for the spouses involved. One such obligation was the *ex lege* creation of a reciprocal duty of support between spouses *stante matrimonio*, which duty was extended beyond the death of a spouse by the Act. Consequently, the Act's failure to cater for domestic partners could not 'be said to be unfair *when considered in the larger context of the rights and obligations uniquely attached to marriage*' (para 56, my italics). This failure also did not violate R's right to dignity, as she was 'not being told that her dignity [was] worth less than that of someone who is married … [but was simply being] told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance' (para 62).

The message sent by *Volks* was therefore clear: If heterosexual domestic partners choose not to marry, they must abide by the consequences of that choice. In particular, they must reconcile themselves to the fact that withholding any benefit 'uniquely attached' to a marriage by operation of law was constitutionally tenable. On the other side of this (unbalanced) equation, same-sex couples who remained unmarried would, as clearly stated in *Gory* and recently confirmed in the *Duplan* matter, continue to be entitled to the benefits that had been extended to them prior to the promulgation of the Act. Only legislative intervention would change this. Failing this, the only way for the position of heterosexual domestic partners to improve would be if a loophole in the *Volks* ratio could be found. Although subsequent developments have contributed towards balancing this equation (see ss 40 and 231 of the Children's Act 38 of 2005 (regarding, respectively, children conceived by artificial fertilisation and the persons who may adopt a child) and *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA) in which the dependant's action was also extended to surviving heterosexual domestic partners) the anomaly in respect of intestate succession persists. In fact, as rights of intestate succession in terms of the ISA have, since democracy, also been extended to the surviving spouses of customary marriages (*Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC)); and marriages concluded only in terms of religious law (see *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) and *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D)), the heterosexual domestic partnership is the only recognised form of intimate relationship that remains excluded from this benefit.

Given that the Domestic Partnerships Bill (which would have solved this problem – see clauses 20 and 31 thereof) has languished in obscurity for almost a decade, legislative intervention appears to be unlikely. Could litigation, aimed at removing this anomaly, be a viable option for a surviving heterosexual domestic partner?

A strategy for litigating for a right of intestate succession

In another article I wrote entitled 'Intestate succession and surviving heterosexual life partners using the jurists laboratory to resolve the ostensible impasse that exists after *Volks v Robinson*' (2016) 133.2 *SALJ* 284, I used a hypothetical set of facts in order to test the viability of finding a way around the precedent-setting *ratio* in *Volks*. (In what follows I will attempt to provide a summary of my views.)

In essence, a practitioner must be satisfied that a potential litigant whose domestic partner has died intestate is able to prove that –

- the relationship was permanent; and
- during the relationship, the partners

had either expressly or tacitly created a contractual reciprocal duty of support (on proving these requirements, see Smith in Heaton (*op cit*) at 407 – 427).

The next step is to decide on the angle of attack. Two possibilities present themselves. First, the survivor could argue that the prevailing position constitutes unfair discrimination on the ground of *marital status*. This would, however, presumably be met with the counter-contention (for example, by the deceased's relatives) that the ratio in *Volks* (and its approach to choice) has disposed of this possibility. In the alternative, the survivor could argue that the unfair discrimination is based on the ground of sexual orientation, because same-sex domestic partners are still entitled to this right even if they remain unmarried. This argument could conceivably be challenged by relying on MC Wood-Bodley's contention ('Intestate succession and gay and lesbian couples' *SALJ* 2008 46 at 54 – 60) that the privileged position of same-sex partners is justified because the prevalence of homophobia in our society deprives such couples of a 'real' choice to marry. (This argument could be bolstered by the view of H de Ru 'A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006' (2009) *Speculum Juris* III at 122 – 126 who embroiders on Wood-Bodley's argument by insisting that the *status quo* should be entrenched as an affirmative action measure).

My advice is not to opt for either of these alternatives, but instead to combine them. This could be done by arguing that the law unfairly discriminates against heterosexual partners on the *intersecting* grounds of marital status and sexual orientation (see *National Caolition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 30 – 40). This permits the argument that the ratio in the *Volks* matter is not binding on the future court because – by virtue of the *Gory* matter and other case law – the right to inherit on intestacy is no longer a benefit that is 'uniquely attached to marriage'. In post-1994 South Africa this right has been developed so as not only to be available to spouses in religious marriages that are not formally recognised, but has in fact been extended beyond the realm of marriage *per se* by the *Gory* matter. (For a comparable argument in the context of the dependant's action, see *Paixão* at paras 24 – 27). Thus freed from the shackles of precedent, the hypothetical court would be enabled to re-evaluate the *Volks* matter and the court's approach to choice and to appreciate, as acknowledged in *Paixão* (paras 31 – 34), that domestic partnerships often involve vulnerable members of society for whom the 'choice' to marry is illusory 'for social, cultural or financial reasons'. These reasons are compelling enough to permit the conclusion that in South Africa neither same-sex nor opposite-sex domestic partners are necessarily able to exercise a free and unfettered choice to marry. Therefore, it constitutes unfair discrimination to continue to recognise this lack of choice in the context of only one group but not the other, while both comply with the threshold criteria prescribed in *Gory*. Similarly, in my view the *status quo* could not be regarded as an affirmative action measure, because it fails to meet the requirements of the internal test in s 9(2) of the Constitution.

Having thus proved unfair discrimination, I contend that it follows that the right to dignity of the potential litigant has also been breached (see *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 27).

The only remaining issue is for the court to decide on an appropriate constitutional remedy to broaden the ambit of the ISA. This is a complex issue that considerations of length do not permit me to address here. It will suffice to say that deciding on a remedy in this context raises a complication that has never been addressed in our constitutional jurisprudence, namely that the court *a quo* may be required to tamper with a standing reading-in order granted by the Constitutional Court. I have analysed this problem in another publication (BS Smith 'Surviving heterosexual life partners and the Intestate Succession Act 81 of 1987: A "test case" for the fashioning of an appropriate constitutional remedy in cases of "judicially-generated residual discrimination"' (2016) 32 *SAJHR*, to which I refer the reader.

Conclusion

In this article, I have attempted to provide a viable solution to the apparent deadlock that prevents surviving heterosexual domestic partners from accessing the right to inherit (a portion of) the intestate estate of their deceased partners. I hope that the arguments in this article (and the publications from which they are drawn) may assist practitioners who may be tasked with litigating on this issue in future.

Bradley Smith *BCom LLD (UFS)* is an Associate Professor in the Department of Private Law at the University of the Free State. ❑

Non-compliance with the Domestic Violence Act and vicarious liability

By Yashin Bridgemohan

Section 2 of the Domestic Violence Act 116 of 1998 (the Act) states:

'Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported –

(*a*) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;

(*b*) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and

(*c*) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.'

Section 8(1)(*a*) of the Act provides as follows:

'Whenever a court issues a protection order, the court must make an order –

(*a*) authorising the issue of a warrant for the arrest for the respondent, in the prescribed form.'

Case law: The *Khanyile* matter

In the case of *Khanyile v Minister of Safety and Security and Another* 2012 (2) SACR 238 (KZD), an interim protection order was granted against the plaintiff, Khanyile, on 5 January 2007. The complainant was provided with a certified copy of the protection order and warrant of arrest in accordance with s 8(1)(*a*) on 25 January 2007.

The next day the complainant advised the second defendant (an inspector), that she was threatened by the plaintiff in contravention of the protection order and provided him with the warrant of arrest. No interim protection order, any affidavit or statement was attached to the warrant of arrest.

The second defendant then executed the warrant and arrested the plaintiff at his home at around 14:30 pm. The plaintiff was detained until 19:00 pm on 27 January 2007, when he was granted bail.

The plaintiff then instituted action for unlawful arrest and detention against the first defendant (the Minister of Safety and Security) and the second defendant.

Issues before the court

The basis of the plaintiff's case was that the warrant for his arrest issued in terms of s 8(1)(*a*) of the Act and issued for the violation of an interim protection order was invalid, as the complainant omitted to make her statement and hence there was no reason for his arrest.

Judgment

The defendants conceded that the arrest of the plaintiff was made before the statement in question was made. However, the defendants argued that 'the warrant was not invalid when executed and that the arrest and detention of the plaintiff was lawful'.

Murugasen J noted the case of *Seria v The Minister of Safety and Security and Others* 2005 (5) SA 130 at 144 E – G, where Meer J held that: 'The validity of a warrant of arrest lay in the authority for its issue being ordered by a court under section 8(1)(*a*) of the Act

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simultaneously with the issue of a protection order. In the case of the warrant in question being undated and contrary to the regulations and prescribed form, whilst a serious omission, did not detract from its validity.'

The court noted the second defendant had not been provided with a warrant of arrest in accordance with the Act previously or received any training on the implementation of the provisions of the Act, particularly the execution of a warrant of arrest issued in terms of the Act but as an experienced member of the South African Police Service (SAPS), he should have known that the arrest of an individual is an infringement of the arrestee's constitutional rights to freedom and security of person as enshrined in s 12 of the Constitution and 'a warrant should therefore not be executed in haste and without due consideration of all the pertinent facts, particularly as there was only an allegation, not conclusive proof, that the order had been breached' (at para 33).

The court's decision

Murugasen J found that the first defendant was liable for the plaintiff's claim as the second defendant was acting in the course and scope of his employment when he arrested the plaintiff hence, the second defendant could not be penalised with liability. Accordingly an order was made that judgment be granted for the plaintiff against the first defendant for damages, which the plaintiff can prove or agrees to.

The *Naidoo* matter

In the case of *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA), the appellant, Naidoo, was assaulted by her then husband on 12 April 2010. During the altercation the appellant was pushed by her husband and, as she fell, she hit her head against the kitchen door. As a result of the incident she suffered a concussion and was unconscious for a period of time. She was taken to hospital by paramedics and she was discharged the next day.

On 14 April 2010 she went to her local police station to lay a charge of assault under the Act. The police officer who dealt with the appellant advised her that she required a protection order from the magistrate's court before they could provide assistance to her.

On visiting the magistrate's court the appellant was advised that a protection order was not mandatory for a charge of assault to be opened. She was further advised that if she desired she could apply for a protection order after opening a charge.

On returning to the police station, the appellant dealt with the same officer who advised her at the charge office and she was still not provided with assistance. The matter had instead taken an unfortunate turn.

The officer had then passed the matter on to the second respondent, an inspector at the station. The second respondent requested the appellant to furnish him with her then husband's telephone numbers. On contacting him, the second respondent requested that he come to the charge office and advised the appellant to wait for him to arrive.

On her then husband's arrival the second respondent spoke to him on the side, after which the second respondent requested the parties to try and resolve the matter between themselves. This proved futile.

The second respondent then advised the appellant that her husband would lay a similar charge of assault against her, if she persisted with her charge. The second respondent then requested both the appellant and her husband to write out their statements. They both were then arrested, charged and detained.

The next day, the appellant was assaulted by a police officer, the third respondent who threw her into a police van in the course of transporting her to the magistrate's court.

The appellant suffered physical injuries comprising soft tissue injuries in the right arm and right leg with severe swelling. During her attendance at the magistrate's court, the charges against her were withdrawn by the prosecutor.

The appellant instituted action for damages against the Minister of Police as the first defendant and the officials connected with her incident at the Gauteng Local Division of the High Court.

The foundation of the appellant's case was that the officials involved were acting in the course and within the scope of their employment as servants of the first defendant and that the first defendant was vicariously liable for their wrongful actions. The trial came before Mbongwe AJ who, at its conclusion, dismissed the appellant's action with costs. The appellant then pursued the matter in the Supreme Court of Appeal (SCA) after being refused leave to appeal by the court *a quo*.

Issues before the SCA

The issues before the SCA were whether the first respondent was vicariously liable for the conduct of his employees and needed to compensate the appellant on the following three grounds –

- that the respondents had wrongfully and negligently failed to comply with a legal duty owed to her in terms of the Act and the Regulations and National Instructions issued in terms of the Act, which comprehensively detail the manner in which victims of domestic violence must be treated and assisted;
- unlawful arrest and detention; and
- assault by a police officer.

SCA's judgment

Claim one

Petse J found that what the appellant experienced on 14 April 2010 at the hands of members of SAPS constituted a breach of the legal duty that those members owed to her.

The SCA held that: '[T]he emotional harm, humiliation and trauma that the

appellant was subjected to is the antithesis of what the Act, the Regulations and the National Instruction – with their extensive remedies – seek to accomplish' (at para 33).

Claim two

The SCA accepted that an arrest will be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law (at para 41).

The court noted that the second respondent's discretion to arrest the appellant as he saw fit was not within the bounds of rationality (at para 42).

The court further found that the counter charge made by the appellant's then husband was instigated by the second respondent as a ruse in order to cajole her into withdrawing the charge made against her then husband (at para 42).

Claim three

The court *a quo* had held that the appellant was not entitled to succeed with this claim as the member of the SAPS responsible for the assault had passed away by the time that the matter had come to trial and she had failed to substitute his estate. Further that she had signed a statement withdrawing the charges against her husband, which amounted to a waiver of her claim against the respondents.

Counsel for the first respondent accepted that the first respondent is vicariously liable for the wrongful acts of his servants, however, denied liability on the part of the minister due to the fact the appellant had withdrawn her statement based on the reasoning of the court *a quo*.

The court found this contention lacked merit (at para 46). This was due to the fact that when the appellant signed her withdrawal of charge statement, she had no discussion with the second respondent that she was contemplating instituting action for delictual damages against the respondents.

Secondly, when the charge against the appellant was withdrawn by the prosecution, this was to allow the second respondent, in his capacity as an investigating officer, time to proceed with further investigations. As such, the second respondent sought a statement from the appellant's daughter who declined to furnish one.

Thirdly, once the second respondent accepted that there was no possibility of the appellant's daughter providing him with a statement, he turned to the appellant who advised him that she and her then husband had decided to withdraw their respective charges against one another.

Lastly, was the text of the statement itself. What was withdrawn was 'the case against the accused'. It cannot reasonably be inferred that the respondents were the accused referred to therein. This was because the appellant had laid no charge against them, nor was the second respondent investigating any charge against the respondents.

SCA's decision

In the concurring judgment the appeal of the appellant was upheld on all three claims and the SCA replaced the order made by the court *a quo* with the following order:

'The first defendant is ordered to pay the following sums to the plaintiff:

(a) the amount of R 200 000 in respect of claim one;

(b) the amount of R 70 000 in respect of claim two;

(c) the amount of R 10 000 in respect of claim three.'

Conclusion

Both judgments discussed highlight the importance of the duty of police officials to comply with the provisions of ss 2 and 8(1)(*a*) of the Act. Where officials fail to comply with said mentioned provisions, vicarious liability may arise depending on the facts of each case.

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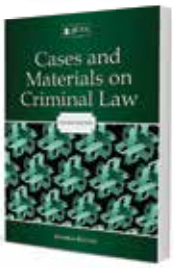

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THE LAW REPORTS

May 2016 (3) South African Law Reports (pp 1 – 314);
[2016] 2 All South African Law Reports April (pp 317 – 637)

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
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Attorneys

What is trust money? Bridging finance: In *Attorneys Fidelity Fund v Injo Investments CC* 2016 (3) SA 62 (WCC) the second defendant, a firm of attorneys (the firm), had misappropriated money, which was paid into its trust account. The payment was made for the purpose of providing bridging finance to certain clients of the firm. The payments had been made in terms of 'discount agreements' entered into between the respondent (plaintiff) and such clients of the firm, on the strength of false representations made by the firm that these clients had sold their immovable properties and required finance, pending payment to them of the proceeds of such sales on transfer.

The plaintiff's claim was for an amount of R 1,04 million and arose from eight substantially identical claims, in respect of which, the plaintiff had already obtained default judgment against the firm. Having ultimately failed to recover the money from the firm, the plaintiff sued the appellant, the Attorneys Fidelity Fund Board of Control (the Fund), in terms of s 26(*a*) of the Attorneys Act 53 of 1979 (the Act), on the basis that it had suffered pecuniary loss as a result of the theft by the firm of money entrusted to it. The Fund was sued in its capacity as professional indemnity insurer. The Fund repudiated liability.

The plaintiff then successfully sued the Fund in the court *a quo*. The key issue to be decided on appeal, was whether the money paid by the plaintiff into the trust account of the firm was entrusted by the plaintiff to the firm, as envisaged in s 26(*a*) of the Act. It was the Fund's contention that it was not. Such assertion was based on the fact that the plaintiff had made payment into the firm's trust account only to discharge its obligation to the firm's 'client', and given that it was the client who had nominated the firm's trust account as the payment mechanism, and there was nothing in the discounting agreement which stipulated that no other mechanism could be used – this was irrespective of what the plaintiff might have asserted or thought to the contrary.

The plaintiff further argued that its intention when making payment into the firm's trust account was the determining criterion; in the circumstances, rather than payment to the firm being in discharge of a debt, it was intended by the plaintiff to be security for payment by the firm to the client. Accordingly, so the plaintiff continued, intention was sufficient to establish entrustment for purposes of s 26(*a*). In support of its claim it relied on, *inter alia*, *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 1997 (1) SA 136 (A) (the *ICF* case).

Cloete J held that at all material times the firm purported to represent the client in accepting payment of the money into its trust account. The firm's obligation was not to retain the money in trust and to deal with it on the client's behalf, but simply to pay it straight over to the client. The court referred with approval to *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) in finding that the firm's trust account was nothing other than a conduit. There was thus no entrustment of money by the plaintiff to the firm.

The court further held that to the extent that the court in the *ICF* case relied on the intention of a claimant in paying over money into the trust account of the wrongdoing attorneys, it did so in the light of the particular facts of that case. In accordance with the approach adopted in the *Mettle Property* case, the payer's intention was not the overriding criterion in determining whether there had been entrustment for the purposes of s 26(*a*) of the Act.

The appeal was accordingly upheld with costs.

Constitutional law

Language rights: In *Lourens v Speaker of the National Assembly of Parliament of the Republic of South Africa and Others* [2016] 2 All SA 340 (SCA) the appellant, Lourens, practised as an attorney. He is Afrikaans-speaking. He argued that the current practice of Parliament in relation to the language used for legislation, and the rules of Parliament in that regard, amounted to unfair discrimination against him and all non-English speaking people in the country in that Bills are introduced into Parliament invariably in English, are published in English, and that the official text that is sent to the President for signature is also, invariably, in English only.

Accordingly, so Lourens argued, the failure to translate all Acts of Parliament into all 11 official languages amounts to unfair language discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

He brought proceedings in the Equality Court seeking, *inter alia*, a declaration that the respondents (the government) were guilty of conduct that amounted to unfair language discrimination as suggested above. The Equality Court dismissed the application but granted leave to appeal to the SCA because the issues raised were 'important constitutional questions of national importance', which deserved the attention of the SCA.

Lewis JA held that although s 6 of the Constitution accords 11 languages official status, s 6(3) expressly allows government at national and provincial level to act in a minimum of two of the official languages. Thus, the Constitutional Assembly intended that not all official languages have to be employed in the process of government.

The court referred to the provisions of the Constitution that govern the processes of Parliament and the enactment of statutes, and then the joint rules of Parliament that deal with its use of language. It found that recently, Parliament had been in breach of its own rules and of s 6(3) of the Constitution in that many of the Acts of Parliament passed since 1996 were published in only one language – English. Similarly, amendments to Acts, even those where the signed version of which was in Afrikaans, had been amended in English only.

The court pointed out that s 9 of the Constitution, dealing with equality, is given effect to by the provisions of the Equality Act. Lourens was required to make out a *prima facie* case of discrimination on the ground of language. While not disputing that there was discrimination, the government argued that such discrimination was not unfair. Section 14 of the Equality Act sets out the test for fairness. Applying the test set out therein, the court found that in so far as Parliament and the National Government did not pass Bills, and enact them, in all official languages, they were not guilty of unfair discrimination. Although Parliament's failure to comply with its own rules relating to language as set out above had to be remedied, the appeal had to fail. Government did not ask for the costs of the appeal.

• See Law reports 'Equality legislation' 2015 (April) *DR* 40.

Consumer Protection Act

Defects in second-hand goods: In *Vousvoukis v Queen Ace CC t/a Ace Motors* 2016 (3) SA 188 (ECG) the court was asked to consider whether the provisions in the Consumer Protection Act 68 of 2008 (CPA) protecting consumers against defective goods, also includes second-hand or used goods.

The facts were that Vousvoukis (the consumer), a businessman of Queenstown, instituted an action against Ace Motors (the supplier) for the restitution of the purchase price of a second-hand BMW motor (the vehicle) that he bought from the latter in September 2011 for the sum of R 470 000. In December 2011, having driven approximately 4 000 km the vehicle experienced mechanical problems. It was agreed that the engine would be replaced at the expense of the supplier. The repaired vehicle was eventually returned to the consumer in February 2012. In July 2012, after another 8,000 km the replaced engine experienced mechanical problems. The oil pump drive gear was badly damaged due to some unknown cause.

The consumer tendered the return of the vehicle, but the tender was rejected. He then lodged proceedings claiming termination of the agreement claiming a refund of the purchase price. In the alternative he claimed restitution in terms of s 56 of the CPA in that the supply of the vehicle contravened the implied warranty of quality provisions of s 55. In a further alternative he claimed that the second engine that was installed contained a latent defect at the time of installation. He claimed restitution under the *actio redhibitoria*.

The supplier argued that the provisions of ss 55 and 56 of the CPA were inapplicable as they did not apply to used goods and that the defect was not so serious that the buyer was entitled to rescind the contract. Section 5(1)(*a*) provided specifically that the Act applies to 'every transaction occurring within [South Africa]', unless it was specifically exempted.

Pickering J held that although there is a definition of 'used goods' in the CPA, the term is not referred to again in the Act. None of the exemptions were relevant to the present transaction. The court held that the generic term 'goods' includes used goods. There is no indication that the legislature intended to exclude used goods from the protection against defective goods in ss 55 and 56.

The court further held that even if there is uncertainty, the CPA must be interpreted

in a manner which best promotes the spirit and purpose of the Act. To exclude used goods would undermine the Act and would exclude protection for that part of the population most in need of such protection, namely the socio-economically vulnerable.

The court pointed out that the protection against defective goods under the CPA lapses after the six month period stipulated in s 56(2). Equally, the protection for defective repairs lapses after three months in terms of s 56(3).

In the present case both these terms had lapsed and the consumer was not entitled to rely on the protective rights under ss 55 and 56. The replacement of the engine did not amount to a new supply of goods or separate transaction, but was a repair under the original transaction, especially since the supplier paid for the engine itself. The seller did not supply a defective engine, but a defective vehicle.

The court further confirmed that neither a court nor the National Consumer Tribunal has the power to extend the periods stipulated in s 56. However, where the statutory rights have lapsed, consumers still retain their common law rights under the aedilitian actions for latent defects. In order to terminate the agreement, the consumer must prove that the defect was serious enough to warrant termination. The test is whether a reasonable consumer would have declined to enter the transaction if he had known about the defect.

The court concluded that the latent defect was not serious enough to warrant rescission as the defect could be repaired relatively easily by replacing the oil pump at a cost of about R 15 000.

The consumer's claim for rescission under the CPA, alternatively under the *actio redhibitoria*, were accordingly rejected with costs.

Contract law

Authority to enter into contract, essential requirements: The facts in *Millcreek Trading CC t/a Pro Arm Firearm Training Academy v Passenger Rail Agency of South Africa (PRASA) t/a Metrorail* [2016] 2 All SA 537 (KZD) were as follows: The plaintiff, Millcreek, a close corporation, alleged that the defendant, Passenger Rail Agency of South Africa (PRASA) had committed breach of contract. Millcreek's core business is in the area of providing firearm training and the obtaining of competency certificates in terms of the Firearms Control Act 60 of 2000 (the Firearms Act). It alleged that it was approached in 2008 by an employee of PRASA to urgently undertake work on behalf of the latter in securing competency certificates for its protection officers, who were required to carry firearms as part of their duties. The issuing of a competency certificate is regulated by the provisions of ch 4 of the Firearms Act.

Millcreek immediately commenced work on the basis of the urgent request, and took fingerprints, as well as photographs of the protection officers for certification. It also engaged with various service providers for the printing of firearm manuals in respect of each of the firearm unit standards applicable to the protection officers, as well as securing the services of trainers to conduct the necessary training. Shortly thereafter, Millcreek was invited and duly submitted a bid in respect of a tender put out by PRASA for training for its protection officers in terms of the new firearm standards. However, in December 2008, Millcreek was informed that it had not been successful in its bid.

In seeking to claim damages from PRASA in the amount of R 489 072 for 'lost profit and opportunity', Millcreek did not rely on a written agreement, and based its claim entirely on a verbal agreement concluded with one Chami, an employee of PRASA and whom Millcreek alleged it had at all material times believed to be duly authorised to represent PRASA and to contract on its behalf.

PRASA, in turn, contended that no legally binding and enforceable agreement had been entered into between it and Millcreek, and even if Millcreek contracted with Chami, the latter lacked the necessary authority to do so on behalf of PRASA. PRASA further specifically pleaded that the procurement of services and goods by PRASA, as a state entity, was regulated by the provisions of the Public Finance Management Act 1 of 1999 (PFMA) read with s 217 of the Constitution. Accordingly, the procurement of goods and services by PRASA in excess of R 350 000 had to be undertaken via a competitive and prescribed bidding process. It was contended that Millcreek was fully aware of the procedures required to contract with PRASA, and knew or ought to have been aware that when it contracted with Chami, that such contract was inevitably concluded in breach of the PFMA and that it would accordingly be unenforceable.

Chetty J held that the onus was on Millcreek to establish the essential requirements for a valid contract with PRASA, including the authority of Chami to contract on behalf of and bind PRASA.

The court found that Millcreek's evidence was deficient in that it omitted mention of the agreed contract price and details of whether the service provided by Millcreek was sufficient to comply with the certification process in terms of the Firearms Act. The absence of any evidence from Millcreek as to payment in terms of the contract was relevant to PRASA's contention that any contract in excess of R 350 000 was required to follow a competitive bidding process. There was also no documentation placed before the court to confirm that the sole member of Millcreek was authorised, even as a peace officer, to take fingerprints for competency certificates. Significantly, of the 110 applications for firearm competency which Millcreek claimed to have processed, 31 of the applicants were shown not to have been in PRASA's employment at the time.

Millcreek further failed to call Chami to prove its claim that he had the necessary authority to enter into contracts on behalf of PRASA. There was also no evidence adduced to suggest that Millcreek was justified in believing that Chami had the requisite authority to bind PRASA. Moreover, as PRASA was a state-owned enterprise it was improbable that a single employee of it could have the authority to bind PRASA.

Millcreek's claim was accordingly dismissed with costs.

Exit agreement: In *Padayachee v Adhu Investments CC and Others* [2016] 2 All

SA 555 (GJ) the parties concluded an agreement involving the plaintiff, the first two defendants, and certain other entities. The plaintiff was to be paid a fee of R 2,5 million (the fee) for assisting in the raising of funds from a funder to facilitate a transaction. The plaintiff would then exit the transaction.

The plaintiff instituted action against the first and second defendants for damages for financial loss caused by them to him by preventing payment of the fee. He averred that the defendants failed to perform such acts as might be necessary to give effect to the terms of the exit agreement. The first two defendants admitted the conclusion of the exit agreement, but denied that the conditions necessary for payment of the fee were met. They denied that the plaintiff had done what was required of him for payment of the fee. The duties of the plaintiff and second defendant were recorded in the written agreement.

Two issues arose for determination:

- First, what the plaintiff's obligations in terms of the exit agreement were and whether he complied with his obligations.
- Secondly, whether the second defendant breached the exit agreement; and if so, whether the plaintiff was obliged to comply with the breach clause in the exit agreement and whether he did.

In deciding the matter Opperman AJ held that the factual disputes which existed between the evidence adduced on behalf of the plaintiff, and the evidence presented on behalf of the defendants be dealt with in the manner laid down in *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA). In the latter case the court held that: 'To come to a conclusion on the *disputed issues* a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities' (my italics).

In applying these guidelines, the court in the *Padayachee* matter held that the first question for determination was whether the evidence of the plaintiff and second defendant, over and above that which was recorded in the agreement in relation to what their obligations were, was admissible in evidence. Evidence about what the parties thought their obligations are, which is at variance with the express provisions of the exit agreement, would be inadmissible as offending the integration rule (a sub-rule of the parol evidence rule).

The court further referred to the 'new' approach to interpretation, which has abolished one of the branches of the parol evidence rule (that is, the 'interpretation rule', which stated that extrinsic evidence was not admissible in order to determine the meaning of a written instrument). However, the abolishment of the one 'branch' does not affect the operation of the other 'branch' of the parol evidence rule, being the so-called 'integration rule', which determines the content or limits of a written instrument. Thus, the integration rule remains in force.

The court accordingly held that the evidence of the plaintiff was to be preferred to that of the second defendant. It concluded that the plaintiff had performed his contractual obligations in terms of the exit agreement.

Judgment in the amount of R 2,5 million was granted against the defendants jointly and severally.

Delict

False imputation of racism: In *Du Plessis v Media 24 t/a Daily Sun and Another* 2016 (3) SA 178 (GP) the defendant-newspaper falsely imputed an act of racism to Du Plessis (the plaintiff). It reported, under the headlines, 'Frozen – for an onion' and 'Orel was in a cold room for two hours' that the plaintiff, who is a produce-market stall owner, tied the hands of a suspected onion thief, Orel Khoza, with 'a plastic strip' and 'shoved' him into a cold-storage room, where he remained 'for two hours', until the police, alerted by Khoza's friends, arrived.

The article went on to state that the ordeal left Mr Khoza with 'frozen hair' and that he was 'still shivering' an hour later. The court found most of this to be exaggeration: Although the plaintiff had indeed locked Khoza in a cold-storage room for stealing an onion, he was not tied up as alleged, nor 'shoved', nor detained for two hours (it was 45 minutes), nor found with his hair frozen (he was bald), nor found still shivering.

The plaintiff alleged that the article had racial undertones and was inherently defamatory. The defendant claimed public interest and denied that the article was inherently defamatory. They argued that since the plaintiff did not claim innuendo, the court could not ascribe racial undertones to the article. They further argued that even if these were found to exist, they would only tend to increase public interest.

Tokota AJ held that the article was an embellishment and substantially false account of the event. The article would be viewed by the ordinary reader as intending to impute that the plaintiff had little or no regard for other groups in the community. As such, the article was inherently defamatory. Innuendo need not have been pleaded.

The fact that the article was substantially false militated against the 'public-interest' defence. It was not in the public interest to embellish information – so as to create unnecessary sensation – which undermined the integrity of an individual.

The defendant newspaper was guilty of defamation and ordered to pay the plaintiff R 80 000 in compensation.

Restraint from unlawful interference: In *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd and Another* [2016] 2 All SA 351 (SCA) the court was asked to consider the parameters of a restraint clause in a lease agreement.

The facts in *Masstores* were that in February 2006, the appellant, Masstores, leased part of the CapeGate shopping centre in Brackenfell for the purpose of operating a retail business. The lease agreement stipulated that a general food supermarket could not be operated on the leased premises. In May 2006, the first respondent, Pick n Pay, concluded a lease agreement in terms of which it leased premises at the same shopping centre. Its lease agreement contained an exclusivity clause in terms of which the lessor, Hyprop, would not permit the operation of another supermarket in the centre.

Although Masstores' products initially excluded food,

just before 2010 it began selling non-perishable food and grocery items. In September 2013, Masstores introduced fresh fruit and vegetables and fresh pre-packed meat products at its store in the shopping centre. As a result, Pick n Pay launched an application in the court *a quo*, seeking a final interdict against Masstores, restraining it from interfering in the contractual relationship between Pick n Pay and Hyprop by carrying on a business exclusively granted to Pick n Pay in terms of the latter's lease agreement. The court upheld Pick n Pay's contentions, and granted a final interdict.

On appeal Majiedt JA confirmed that a delictual action lies in instances where an outside party knowingly deprives a person of his rights under a contract with another.

Masstores denied that it had operated a supermarket in violation of the lease agreement. Masstores contended that the word 'supermarket' had a specialised meaning. The SCA rejected this contention and agreed with Pick n Pay that it was an ordinary and well-known word with an ordinary meaning. The trial court relied on a dictionary meaning of the word 'supermarket' in terms of which the store must be large and it must carry a wide range of products. The SCA approved this meaning and rejected Masstores' attempts to introduce expert evidence on the meaning of the word.

On the photographic evidence, it was clear that Masstores conducted a general food supermarket at its store and was, therefore, trading in competition with Pick n Pay in breach of Masstores' lease obligations.

Next, the SCA considered the three requirements that had to be met for a successful claim by Pick n Pay based on the unlawful interference by Masstores in the former's contractual relationship with Hyprop. There had to be an unlawful act; which constitutes an interference in the contractual relationship; and which is committed with some form of *dolus*.

In applying these three requirements to Masstores' conduct, the court held, first, that in trading in competition with Pick n Pay, contrary to its contractual restraint, after it was made aware of Pick n Pay's right to exclusivity, Masstores acted unlawfully.

Secondly, it held that inducement or enticement is not a requirement in a claim based on the unlawful interference in a contractual relationship. It held that Masstores had acted wrongfully in preventing Pick n Pay from obtaining the performance to which it was entitled by virtue of its contractual right of exclusivity.

Thirdly, the court considered the requirement of intent. Pick n Pay had asked Masstores in writing to desist from conducting a supermarket at the leased premises, but the latter failed to heed the request. This constituted direct intent or, at the very least, *dolus eventualis*. The requirements of the delictual action had therefore been proved by Pick n Pay.

The appeal was dismissed with costs.

International law

Diplomatic immunity: The decision in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and Others as* Amici Curiae*)* [2016] 2 All SA 365 (SCA) enjoyed a high level of media attention, both locally and abroad. The facts are well-known and suffice it to mention here that the South African government failed to arrest and surrender the President of Sudan, Omar Hassan Ahmad Al-Bashir (Al-Bashir), when he attended a session of the Assembly of the Africa Union (AU) in Johannesburg in June 2015. The International Criminal Court (ICC) had earlier issued a warrant for Al-Bashir's arrest for war crimes and crimes against humanity, and genocide.

South Africa is a signatory to the Rome Statute, which it incorporated into domestic law by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). Chapter 4 of the Implementation

Act provides the mechanism whereby South Africa cooperates with the ICC in regard to the arrest and surrender of persons accused of international crimes.

A number of issues arose for decision in the SCA. The central issue before Wallis JA was whether Al-Bashir enjoyed immunity under customary international law and s 4(1) of the Diplomatic Immunities and Privileges Act 37 of 2001 (the DIPA). The government's argument was that in terms of customary international law, heads of state enjoy immunity by virtue of the office they hold, and are not subject to the criminal or civil jurisdiction of the courts of other countries or any other form of restraint.

The court held that South Africa is bound by its obligations under the Rome Statute. It is obliged to cooperate with the ICC and to arrest and surrender to the court persons in respect of whom the ICC has issued an arrest warrant and a request for assistance. The relationship between the Implementation Act and the head of state immunity conferred by customary international law, on the one hand, and the DIPA, on the other hand, lies at the heart of this case. The Constitution provides a specific mechanism whereby obligations assumed under international agreements become a part of the law of South Africa.

Next the court considered whether there is an international crimes exception to the principle of head of state immunity, enabling a state or national court to disregard such immunity when called upon by the ICC to assist in implementing an arrest warrant. That question was answered in the negative. Whether the Implementation Act had the effect of removing the immunity that Al-Bashir would otherwise enjoy was a matter of the proper construction of the Implementation Act. The court held that the DIPA is a general statute dealing with the subject of immunities and privileges enjoyed by various people, including heads of state. The Implementation Act is a specific Act dealing with South Africa's implementation of the Rome Statute. In that special area, the Implementation Act enjoys priority. Section 4(1)(*a*) of DIPA continues to govern head of state immunity unless such immunity is excluded by the operation of the Implementation Act.

The court concluded that the conduct of the South African Government in failing to take steps to arrest and detain Al-Bashir was inconsistent with South Africa's obligations in terms of the Rome Statute and s 10 of the Implementation Act, and thus unlawful.

• See case note, 'SCA dismisses Al-Bashir Appeal' on p 56 of this issue.

• See also:

– News 'Court criticised over Al-Bashir judgment' 2015 (Aug) *DR* 6;

– LSSA News 'Profession stands behind Chief Justice and judiciary in raising concern on the attacks on judiciary and the rule of law' 2015 (Aug) *DR* 14;

– Law reports 'International law' 2015 (Nov) *DR* 39; and

– AGM News 'Justice Minister focuses on transformation at Cape Law Society AGM' 2015 (Dec) *DR* 8.

Land

Transfer of: In *Absa Ltd v Moore and Another* 2016 (3) SA (SCA) the respondents (the plaintiffs) fell victim to a property scam of one Brusson. The plaintiffs fell into arrears with their bond repayments and they were unable to pay other debts as well. They were in dire financial straits.

Under the impression that they were applying for a secured loan, the plaintiffs sold their house to an 'investor', one Kabini, to whom the defendant (Absa) granted a home loan secured by a mortgage bond. The property was transferred to Kabini and the plaintiffs' five mortgage bonds cancelled simultaneously with the registration of Kabini's bond. When Kabini later defaulted on his loan, Absa took judgment against him and attached the property in execution of his debt. At the time of execution the

house was still occupied by the plaintiffs. The plaintiffs received some R 160 000 from Brusson while the purchase price payable by Kabini was R 686 000.

The High Court granted the plaintiffs' application for an interdict prohibiting the proposed sale in execution and declaring the various transactions between Brusson, the plaintiffs and Kabini, as well as Kabini's bond, to be invalid. The court ordered the restitution of the property to the plaintiffs subject to the reinstatement of their five bonds and payment to Absa of the money they received from Brusson (less payments already made to it).

On appeal Absa argued that it should not be deprived of its real right in the property when it was innocent of any wrongdoing. The plaintiffs, in turn, argued that since Kabini never acquired ownership, he could not have encumbered the property with a mortgage bond in favour of Absa.

Like other victims of the scam, the plaintiffs were made to sign the following documentation:

- An offer to purchase under which an unnamed third party (the name of Kabini was later inserted) offered to buy the home.
- A deed of sale under which Kabini sold the house back to the plaintiffs.
- A memorandum of agreement which regulated the tripartite relationship between Brusson, the plaintiffs and Kabini.

The Brusson scam enjoyed judicial attention in a number of other judgments involving other banks and victims. Most of the judgments which dealt with the scam found that the transactions were invalid simulated sales. The High Court judgment followed one of these cases.

Lewis JA held that the transactions were not simulated. The plaintiffs and the other victims of the Brusson scam never intended to disguise their contracts as something they were not, but were instead hoodwinked as to their true nature. The real issues were –

- what the victims really intended to achieve by contracting with Brusson and the so-called investors; and
- whether the contracts were rendered invalid as a result of fraud.

When they signed the documentation, the plaintiffs thought they were obtaining a loan and not concluding a sale, and that they never had any intention of authorising a transfer of their property. The High Court's finding of simulation was thus unwarranted. The plaintiffs were victims of the scam and were induced to enter into the contracts by the fraudulent misrepresentations of Brusson.

The registration of property has no effect if the transferor did not intend to transfer ownership. Kabini therefore did not acquire ownership. Nor had he the legal capacity to pass a bond over property he did not own. The High Court finding on these aspects and reliance on the SCA's earlier decision in *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) was thus correct. (Incidentally, the judgment in the latter case was delivered by Lewis JA; who also delivered the judgment in the *Moore* matter.)

There was, however, no basis for the High Court's restitution-for-repayment order. Absa did not ask for it and the court could not make a contract between Absa and the plaintiffs or order the plaintiffs to pay money they did not owe. Neither could the court order that the plaintiffs register a bond over their property in favour of Absa, because there was simply no longer a contractual nexus between them.

The court concluded that Absa have an unsecured claim against Kabini and perhaps also against the conveyancer responsible for the registration of the bond in the first place. The court based this *obiter* comment on the possible liability of the conveyancer on s 15A(1) of the Deeds Registries Act 47 of 1937. Section 15A(1) provides generally that a conveyancer who prepares and signs the relevant documents in a property transfers, accepts responsibility for the accuracy of the facts mentioned in the documents.

The appeal was thus dismissed with costs.

- See Law reports 'Rescission of judgment' 2015 (Aug) *DR* 50.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Appeals, civil procedure, constitutional law (legislation), corporate law (business rescue), courts, criminal law, criminal procedure, evidence, government procurements, immigration, insolvency, intellectual property, judgments, labour law, local authority, practice, provincial government and revenue. ❑

On the lighter side:

Honour among …

Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd 1975 (2) SA 420 (A)

Holmes JA: 'To sum up on the question of the respondent's knowledge, I hold that, when the respondent sold the car to Vorster on 17 June 1971, it knew that the car had previously been sold by the appellant to Pretorius under hire purchase agreement with reservation of ownership. It knew, too, that in October and November 1970 the appellant had stoutly maintained that there was still an unpaid balance owing under the hire purchase agreement, and that the appellant claimed the car. And the respondent probably knew, too, that on 8 June 1971 the appellant was enquiring from the respondent's attorney the correct citation of its name and whether it still had the car in its possession. Finally, before the respondent disposed of the car in June 1971, if he were bona fide it would have been a simple and reasonably prudent precaution, in view of all that had gone before, to telephone to the appellant and ask whether the coast was now clear. No doubt there should be honour among motor dealers.' ❑

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By Gian Louw

Banks beware: Reinstatement of mortgage loan agreements

Nkata v FirstRand Bank Ltd and Others (The Socio-Economic Rights Institute of South Africa as Amicus Curiae*)* (CC) (unreported case no CCT73/2015, 21-4-2016) (Moseneke DCJ)

The Constitutional Court (CC) recently delivered a judgment, which may hold dire consequences for banks and other credit providers, whose contractual dealings with its clients are governed by the National Credit Act 34 of 2005. At the core of the litigation between Mrs Nkata (Nkata) and FirstRand Bank Limited (the bank) was the validity of Nkata's reinstatement of the mortgage loan agreement (the agreement) between the parties. Rogers J in the High Court held that the agreement had been reinstated (*Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC)). The Supreme Court of Appeal (SCA) overturned the High Court's order (*FirstRand Bank Ltd v Nkata* [2015] 2 All SA 264 (SCA)). Different views were expressed by the justices of the CC. The view of the majority, namely that Nkata's reinstatement was valid, is discussed in this case note.

Facts

Nkata purchased an undeveloped property in 2005. She developed it and moved into the house with her children in 2007. The purchase was financed by the bank subject to mortgage bonds being registered over the property.

In 2010 Nkata fell in arrears with her repayments to the bank. Default judgment was granted in September 2010 for the accelerated debt of almost R 1,5 million. The bank caused a writ of execution against the property to be issued. The property was attached and to be sold in execution in December 2010.

Nkata approached the High Court on an urgent basis for an order to rescind the judgment in November 2010. The parties settled the matter in accordance with a standard Quicksell agreement. This essentially entailed that the sale in execution would not proceed on condition that Nkata paid the arrears with costs on a monthly basis. The costs included wasted costs of the sale in execution together with costs of the application as taxed or agreed.

On 8 March 2011 Nkata paid all arrear amounts but fell into arrears again the following month and on 24 April 2013 the bank sold the property at a public auction. The transfer to the new owner was, however, suspended due to a fresh rescission application instituted by Nkata.

The CC's decision

The first question was whether Nkata fulfilled the requirements of s 129(3).

Section 129(3) requires the consumer to pay three items in order to reinstate a credit agreement –

- all overdue amounts (arrears);
- the credit provider's permitted default charges; and
- the credit provider's reasonable costs of enforcing the agreement up to reinstatement (enforcement costs).

When Nkata paid the arrears she did not pay the enforcement costs, which the bank had debited to her mortgage loan agreement in respect of the cancellation of the sale in execution and attorneys and counsel's fees for the rescission application. The bank did not notify Nkata or demand payment from her of the enforcement costs. The CC found that the enforcement costs were not due and payable when Nkata paid the arrears. It held that enforcement costs only become due and payable when the costs are 'reasonable, agreed or taxed and on due notice to the consumer' (para 80). A consumer cannot be expected to take proactive steps to ascertain the exact enforcement costs before reinstatement can be effected nor to initiate taxation or reach agreement on the quantification of the enforcement costs. To the contrary, the credit provider has to take the appropriate steps to recover its enforcement costs.

The CC held that because the enforcement costs have not been taxed or agreed, it was not reasonable and thus not due and payable. Under those circumstances Nkata had to do no more than to pay the arrears to reinstate the agreement.

The second question was whether s 129(4) precluded reinstatement. The CC held that because the proceeds of the sale were not realised before Nkata paid the arrears she was entitled to reinstate the agreement, which the bank had not cancelled. Like the High Court, the CC found on the facts that neither the default judgment nor the writ of execution constituted an attachment order as envisaged by s 129(4). The CC further agreed with the High Court that 'the barrier to a revival of the credit agreement applies only when proceeds of a sale in execution have been realised' (para 131).

It is also noteworthy that this judgment settled the debate on whether a consumer is required to give notice of reinstatement to a credit provider. The CC held that: 'The reinstatement occurs by operation of law' (para 105), namely, reinstatement is triggered by payment of the required amounts. Notice is not required.

The CC issued a declaration in terms of which –

- the agreement was lawfully reinstated;
- the default judgment and writ of execution had no legal force from 8 March 2011;
- the sale of the property was set aside; and
- transfer of the property to the purchaser was precluded.

The bank was ordered to pay Nkata's costs in the High Court, the SCA and the CC.

Conclusion

Banks will be well-advised to, before debiting clients' accounts with enforcement costs, notify clients thereof and attempt to reach agreement in respect thereof. If enforcement costs are not agreed it should be taxed otherwise the bank bears the risk that the consumer may reinstate the credit agreement without making payment of the enforcement costs because the costs are not due and payable. Banks should be aware that a consumer may, under certain circumstances, reinstate a credit agreement after judgment, even up to such a late stage as after a sale in execution of the bonded property has taken place, provided the proceeds of the sale have not yet been realised.

• See practice note 'Protection offered by s 129 of the National Credit Act' on p 23 and feature article 'Nkata: The court's interpretation of s 129 of the NCA and the meaning of reinstatment' on p 28 of this issue.

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By Kathleen Kriel

What is determined as copyright infringement?

Moneyweb (Pty) Ltd v Media 24 Ltd and Another (GJ) (unreported case no 31575/2013, 5-5-2016) (Berger AJ)

The applicant, Moneyweb, and the respondent, Media24 are both media houses who are in the business of publishing articles on the Internet. Moneyweb and Media24 are direct competitors.

In this matter, Moneyweb contended that Media24 infringed its copyright under the Copyright Act 98 of 1978 (the Act). Moneyweb contended that seven articles, which were first published on their website, were unlawfully copied, appropriated and/or plagiarised by Fin24, although the articles were not published verbatim.

In their extensive heads of argument, three issues were at the centre of the matter, namely:

- A dispute concerning the originality of Moneyweb's articles, which Media24 argues that Moneyweb failed to prove originality.
- If Moneyweb was able to prove originality in the article, the next issue is whether Media24 reproduced a substantial part of the article. Media24 admitted to reproducing part of the Moneyweb articles but denied that the reproduction was substantial.
- Media24 contended that it is absolved from liability by virtue of its defence in s 12(1)(*c*)(i) and 12 (8)(*a*) of the Act.

Originality

According to the court, there is no definition of 'original' in the Act and creativity is not required to make a work original. In *Haupt t/a Soft copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA) at para 35, the court held that a work is considered to be original 'if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.' However, it was still possible to achieve originality even where the author of a work makes use of existing material.

Berger AJ said that there was some dispute whether the 'sweat of the brow' test was a part of South African law. 'It seems to me that the expression "sweat of the brow" is imprecise and capable of being misunderstood. A court will only be able to determine originality after it has weighted up all relevant considerations and made a value judgment. Our law still regards the time and effort spent by the author as a material consideration in determining originality. But the time and effort spent must involve more than a mechanical, or slavish, copying of existing material' (at para 15).

Synopsis of articles

The court had to consider each of the seven articles placed before it. Each is discussed shortly:

- The first article, 'Annual packages for MPs may reach well over R1m' (Moneyweb 1), was published on 25 July 2012 and was written by Kim Cloete, a freelance contributor contracted to Moneyweb. The court held that more evidence was required to establish that this article was original, as the article was based on information that was made available at a press conference. The court referred to *Pyromet (Pty) Ltd v Bateman Project Holdings Limited and Another* 2000 BIP 355 (W) at 359, where Nugent J said: 'Where existing material has been used to create the relevant work, there may well be cases in which detailed evidence will be required as to the manner in which the work was created to show that, notwithstanding use being made of an existing work, the nature and extent of the author's contribution was such as to constitute more than mere copying.'

  Berger AJ went on to say: 'I do not know how much of this article is Ms Cloete's own work or simply a repetition of what was said in her presence or contained in a written press release. … I find that Moneyweb has not established that Moneyweb 1 is an original work' (para 24 and 25).
- 'Group Five hits rock bottom' (Moneyweb 2) was published on 13 August 2012 and was written by Sasha Planting, a freelance contributor contracted to Moneyweb. Ms Planting wrote the article after participating in a conference call. The same issue applied in Moneyweb 2 as in Moneyweb 1. The court could not distinguish how much of the article was a repetition of what was said in the authors presence and concluded that Moneyweb did not establish that the article was an original work.
- 'McDonalds plans to launch McKitchen' (Moneyweb 3) was first published on 26 August 2012 and was written by Eleanor Seggie, an employee of Moneyweb. Ms Seggie wrote the article after she and two other journalists from other media groups visited the site of the restaurant. Again, the court could not establish how much or the article was Ms Seggie's own work or how much was repeated from the media visit and the court concluded that Moneyweb had not established that Moneyweb 3 was an original work.
- 'Hout Bay castle sold for R 23m' (Moneyweb 4) was published on 14 September 2012. The article was written by the late Michel Schnehage, a property journalist contracted to Moneyweb. Although there was no direct evidence, the court held that the article was largely a copy of the press release and there was not enough contributed to produce an original piece of work. The court found that Moneyweb had not established that Moneyweb 4 was an original work.
- 'Angloplats' Griffith responds to Shabangu outburst' (Moneyweb 5) was published on 16 January 2013 and written by Ryk van Niekerk, an editor at Moneyweb. The interview was aired on a radio programme on 15 January 2013 and was recorded and transcribed by Mr Van Niekerk to source quotes from Mr Griffith for the article. The court held: 'In my view, Mr Van Niekerk applied his mind to the transcript and sought to write an article that captured the essence of the interview with Mr Griffith. … It is clear that Mr Van Niekerk has not slavishly copied from the transcript. In the circumstances, I am satisfied that Moneyweb has proved that Moneyweb 5 is an original work' (at para 44 and 45).
- 'Defencex mastermind rallies support' (Moneyweb 6) was published on 9

March 2013 and was written by Malcolm Rees, an employee of Moneyweb. Mr Reese wrote the article after attending an event at the University of the Witwatersrand. Mr Rees purchased a ticket for R 800 to gain access to the event. The court was satisfied that Moneyweb produced enough evidence to establish that Moneyweb 6 was an original work, due to the event not being open to the media and it was unlikely that there would have been a press release about the event.

- 'Chris Walker breaks the silence' (Moneyweb 7) was published on 1 July 2013 and was written by Mr Rees. On 30 June, Mr Rees interviewed Mr Walker by posing as a prospective investor and was the only one who interviewed Mr Walker. He wrote the article after the interview. The court was satisfied that Moneyweb 7 was an original work.

Section 12(8)(*a*) of the Act

Section 12(8)(*a*) of the Act provides:

'No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, *or in news of the day that are mere items of press information*' (the court's emphasis).

Three categories of works are covered in the above section, namely,

- official texts and their translations;
- political and legal speeches; and
- certain news of the day.

Official texts include: Statutes, regulations, court judgments and government notices. Burger AJ added that awards and rulings of administrative tribunals would be included and recognised that the list was not exhaustive. The court held: '"Speeches" in this context means speeches that have been reduced to material form. … A speech that has not been reduced to material form is not eligible for copyright, regardless of the provisions of section 12(8)(*a*)' (para 61).

The court held that s 12(8) appears to be derived from art 2(8) of the Berne Convention, which states:

'The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information' (www.wipo.int, accessed 6-6-2016).

In para 68 the court states: 'Article 2(8) of the Convention appears to apply more widely than section 12(8) of the Act. Put differently, section 12(8) affords greater protection to original works. Whereas Article 2(8) would exempt all news of the day and miscellaneous facts having a certain character, section 12(8) exempts only certain news of the day.'

'News of the day that are mere items of press information' refers to works that have been reduced to material form. If the works are original, then s 12(8) applies; if they are not, s 2(1) applies and according to the court, either way, they are not entitled to copyright protection.

'Items of press information' that are exempted from copyright would include – but are not limited to – press statements and press interviews concerning 'news of the day', which journalists and anyone else would be free to use, in whole or part thereof without authorisation being required from anyone. Berger AJ then held: 'Anyone who communicates information to the media intends that information to be put into the public domain. In my view, it is certainly in the public interest that the general public be easily aware of information communicated to the media that is either already in the public domain or soon will be. … In all these instances, the items of information were given to the media with full knowledge that the information would be put into the public domain. … In these two cases [Moneyweb 6 and 7], there was no expectation that the information would be given to the press and put into the public domain; they were therefore not items of press information' (para 73 – 75).

The court found that s 12(8)(*a*) of the Act did not apply to Moneyweb 5, 6 and 7.

Substantiality

The issue the court focussed on was whether Media24 reproduced any substantial part of the articles that were proved to be original works, namely, Moneyweb 5, 6 and 7.

The court referred to *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 (1) SA 276 (A), where a test was applied to determine whether there had been an infringement of copyright. Corbett JA (as he then was) stated: '[I]t is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: *It is sufficient if a substantial part of the work has been reproduced.* … [I]n order for there to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof …; and (ii) that the original work was the source from which the alleged infringing work was derived, ie that there is a casual connection between the original work and the alleged infringing work' (the courts emphasis) (at 280).

The court, in determining whether a substantial part of the work had been reproduced, had to make a judgment based on the work as a whole and focus on the quality of what had been taken rather than the quantity.

Below is a synopsis of each article:

- 'Amplats CEO cites JSE rules' (Fin24 5) was published on 16 January 2013, the same day as Moneyweb 5. Seven hours separated the publication of the two articles. Much of the article is a word-for-word copy of Moneyweb 5. The court held: 'Moneyweb 5 focuses on two main issues … . Both issues, the core of Moneyweb 5, have been reproduced in Fin24 5. Accordingly, Fin24 has indeed reproduced a substantial part of Moneyweb 5' (at para 88).
- The article 'Defencex boss rallies support' (Fin24 6) was published one day after Moneyweb 6 was published. According to the court, Fin24 took very little quantity from Moneyweb 6. In para 90 to 92, the court states: 'The first three paragraphs, and two paragraphs towards the end, of Fin24 6, are also copied from Moneyweb 6. … It is correct, as Moneyweb says, that the headline and introductory paragraphs of an article are important to retain the readers' interest in reading the article to completion. … Fin24 6 contains very little detail of the meeting and is barely descriptive. In my view, Fin24 has not reproduced a substantial part of Moneyweb 6.'
- 'Defencex boss opens up to Moneyweb' (Fin24 7) was published more than three days after the Moneyweb 7 article. This article focusses on one of the issues covered in the interview, Fin24 copied certain extracts almost word-for-word and the extracts copied come from different parts of the discussion on Moneyweb 7. The court was of the view, that Fin24 had not reproduced a substantial part of Moneyweb 7.

Fair dealing

Section 12(1) of the Act states:

'Copyright shall not be infringed by any fair dealing with a literary or musical work –

…

(*c*) for the purpose of reporting current events –

(i) in a newspaper, magazine or similar periodical; or

…

Provided that, in the case of paragraphs (*b*) and (*c*)(i), the source shall be mentioned, as well as the name of the author if it appears on the work.'

The court held: 'The key provisions of section 12(1)(*c*)(i), for the purposes of this case, are that the dealing must be "fair"; the purpose must be to report "current events"; and the source, including the name of the author, must be "mentioned"'.

With regard to fair dealing, Berger AJ said that there did not appear to be any South African decision on the point. In para 113, Berger AJ stated: 'In my view, the factors relevant to a consideration of fairness within the meaning of section 12(1)(*c*)(i) include: The nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work.'

Did Media24 prove that their publication of Fin24 5 constituted 'fair dealing'? According to the court the fact that the article was of topical interest to its readers did not relieve Fin24 of its obligation to deal fairly with Moneyweb 5.

Berger AJ held: 'Fin24 5 was published online within seven hours, and on the same news day as Moneyweb 5. Almost all of Fin24 5 is a word-for-word copy of Moneyweb 5. In my view, Fin24 5 has taken more than a substantial part: It has taken the core of Moneyweb 5. … Even though Fin24 5 referred twice to Moneyweb, it seems that the article was likely to be substitute for Moneyweb 5. The provision of a hyperlink does not by itself discharge the burden of proving "fair dealing". In my judgment, the respondents have not proved that their publication of Fin24 5 constitutes "fair dealing" within the meaning of section 12(1)(*c*)(i)' (paras 129 – 131).

Unlawful competition

With regard to Moneyweb's claim of unlawful competition, the court held that it could not succeed where a claim of copyright infringement had failed.

Order

The court ordered the following:

'It is declared that the respondents' publication of the article of 16 January 2013, entitled "Amplats: CEO cites JSE rules", constituted infringement of the applicant's copyright under the Copyright Act 98 of 1978;

It is declared that the respondents are liable to the applicant for the damages suffered by it as result of the unlawful publication of the said article;

The quantum of the damages to be paid, including the quantum of any additional damages payable pursuant to section 24(3) of the Copyright Act 98 of 1978, will stand over for determination in a damages enquiry;

For purposes of the damages enquiry, the applicant is to file a declaration particularising the damages claimed within 20 days of the date of this order and the respondents are to file a plea within 20 days thereafter;

The Rules of Court applicable to the exchange of pleadings and the process of discovery will apply in this regard;

The applicant is to pay 70% of the respondent's costs of this application, including the costs of two counsel.'

• See news 'Latest copyright judgment discussed at Press Club' on p 12 of this issue.

Kathleen Kriel *BTech (Journ) (TUT)* is the production editor at *De Rebus*.

By Nomfundo Manyathi-Jele

SCA dismisses Al-Bashir appeal

Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and Others as Amici Curiae*)* [2016] 2 All SA 365 (SCA)

The Supreme Court of Appeal (SCA) has dismissed the state's appeal against a High Court ruling that government's failure to arrest Sudanese President, Omar Al-Bashir, was inconsistent with its constitutional duties.

When Al-Bashir entered South Africa (SA) in June 2015 for an African Union (AU) summit, the South African Litigation Centre (SALC) approached the High Court for an order that government enforce an International Criminal Court (ICC) arrest warrant on him.

South Africa is a signatory to the ICC's Rome Statute, which sets out the crimes falling within the ICC's jurisdiction and the procedures and mechanisms for states to co-operate with the court.

On 15 June 2015, the Local Division of the High Court in Pretoria ordered government to arrest Al-Bashir and said its failure to do so would be unconstitutional. Despite this, he was allowed to leave the country.

The ICC had two outstanding warrants for Al-Bashir, issued in 2009 and 2010 and wanted him to stand trial on allegations of crimes against humanity, genocide and war crimes committed in Sudan's western province of Darfur.

Background

According to the judgment, when President Al-Bashir arrived in SA to attend the AU assembly in June 2015 government took no steps to arrest him. It adopted the stance that it was obliged not to do so as President Al-Bashir enjoyed immunity from such arrest. Its failure to do so resulted in the respondent, the SALC, bringing an urgent application on Sunday 14 June 2015, to the High Court, seeking orders declaring the failure to take steps to arrest President Al-Bashir to be in breach of the Constitution and to compel government to cause President Al-Bashir to be arrested and surrendered to the ICC to stand trial pursuant to the two warrants.

Government opposed the urgent application and obtained a postponement until 11:30 am on Monday, 15 June 2015 to enable affidavits to be prepared. But there was concern that President Al-Bashir might leave the country in the interim in order to escape arrest. In granting the postponement, the High Court ordered that President Al-Bashir was prohibited from leaving SA until a final order was made in this application, and the respondents were directed to take all necessary steps to prevent him from doing so.

The judgment states that at the hearing the following day before a specially constituted full Bench of three judges, presided over by Judge President Dunstan Mlambo, the High Court sought the assurance from counsel leading for the government, advocate William Mokhari SC, that President Al-Bashir was still in the country. Mr Mokhari informed the court that according to his instructions President Al-Bashir was still in the country and this was repeated during the course of the argument. At about 3:00 pm the High Court made the following order:

'1. That the conduct of the respondents to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al-Bashir (President Bashir), is inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

2. That the respondents are forthwith compelled to take all reasonable steps to prepare to arrest President [Al-]Bashir without a warrant in terms of section 40(1)(*k*) of the Criminal Procedure Act 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

3. That the applicant is entitled to the cost of the application on a *pro bono* basis.'

According to the judgment, immediately after the order was made Mr Mokhari told the court that President Al-Bashir had left the country earlier that day. It was later discovered that he left on a flight from Waterkloof Air Base at about 11:30 am that morning.

'Senior officials representing government must have been aware of President Al-Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of government set out to mislead the court and misled counsel in giving instructions, or the representatives and counsel misled the court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct,' Malcom Wallis JA held.

Wallis JA said that largely because of President Al-Bashir's departure, the High Court refused leave to appeal, saying that the litigation had become moot. On petition to the SCA it ordered that the application for leave to appeal be set down for argument in terms of the provisions of s 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the Superior Courts Act).

Litigation history

According to the judgment, the foundation for SALC's argument before the High Court was the obligations undertaken by SA in terms of the Rome Statute and the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). It contended that, by virtue of these, SA was obliged to give effect to the request of the ICC to enforce the two warrants for President Al-Bashir's arrest and surrender to the ICC for prosecution in respect of the charges of war crimes, genocide and crimes against humanity.

'The Government did not make any attempt to challenge these propositions. Instead it founded its defence to the application on certain special arrangements that it had made with the AU for the holding of the assembly in Johannesburg,' Wallis JA said.

According to the judgment, the re-

cently resigned director-general at the Department of Justice and Constitutional Development, Nonkululeko Sindane, said that after SA agreed to host the AU Summit in June 2015 it entered into an agreement (the hosting agreement) with the commission of the AU relating to the material and technical organisation of the various meetings that were to take place at the summit including the 25th Assembly of the AU. Based on this agreement, Ms Sindane said that President Al-Bashir had been invited to attend by the AU and not by the government. She then referred to art VIII of the hosting agreement, which was headed 'Privileges and Immunities', and read: 'The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU.'

Wallis JA said: 'On this basis, and this basis alone, Ms Sindane claimed that the immunities and privileges referred to in Article VIII of the hosting agreement prevented the Government from arresting President Al-Bashir "during the duration of the Summit and an additional two days after the conclusion of the Summit". The application was argued on this basis and the High Court quite correctly summarised the issue before it as being "whether a Cabinet resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of state against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide".'

The judgment goes on to say that with the advent of new counsel, led by advocate Jeremy Gauntlett SC, an entirely different argument emerged in the application for leave to appeal to this court. It was now based on what were said to be the provisions of customary international law and the provisions of s 4(1)(*a*) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA), which reads: '(1) A head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as –

(*a*) heads of state enjoy in accordance with the rules of customary international law …'.

Matters to be resolved

The SCA had to determine the following among others:

- Did the departure of President Al-Bashir render the issues moot?
- Should leave to appeal be granted?
- Did art VIII of the hosting agreement, together with the ministerial proclamation, provide President Al-Bashir with such immunity, at least for so long as the proclamation was not set aside?
- If not, was President Al-Bashir entitled to immunity from arrest and surrender in terms of the arrest warrants issued by the ICC by virtue of customary international law and s 4(1) of DIPA?
- If President Al-Bashir would ordinarily have been entitled to such immunity did the provisions of the Implementation Act remove that immunity?
- If the appeal does not succeed, should the order stand or should it be varied in certain respects?

Is the appeal moot?

The High Court based its refusal of leave to appeal on s 16(2)(*a*)(i) of the Superior Courts Act, which provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the court may dismiss the appeal on that ground alone. The High Court reasoned that because President Al-Bashir had left the country the case no longer presented a live controversy.

'It is correct that no present effect can be given to the order that the government take steps to prepare to arrest President Al-Bashir, because he is not in South Africa. But the order remains in existence and SALC indicated that any attempt by President Al-Bashir to return to this country would prompt it to seek its enforcement. As such the order had a continuing effect that would have to be taken into account by the government in the future conduct of its diplomatic relations,' Wallis JA said. He added that in those circumstances the High Court erred in holding that there had ceased to be a live and justiciable controversy between the parties.

Should leave to appeal be granted?

According to the judgment, apart from its finding that the appeal had become moot the High Court also referred to s 17(1)(*a*)(i) of the Superior Courts Act and held that an appeal had no reasonable prospect of success. But in reaching that conclusion it did not consider the new basis on which the government sought to justify its opposition to SALC's claim.

Article VIII of the hosting agreement

Wallis JA said that this was not only the principal, but also the only, argument advanced by government before the High Court. He added that his argument assumed secondary importance when the application for leave to appeal was brought.

Wallis JA found that there was no basis for saying that heads of state attending the Assembly were encompassed by the reference to delegates in art VIII of the hosting agreement. 'The agreement was concluded between the AU and the South African government. There is nothing to indicate that the AU was representing the heads of state of member states or their delegations in concluding the agreement or was concerned with their entitlement to immunity when visiting South Africa. That was a matter for the diplomatic relationship between South Africa and other member states, not the AU. It is an agreement relating to the "material and technical organisation" of various meetings including the Assembly. It makes no reference to heads of state in any of its provisions,' he states in his judgment.

He adds that the key words in art VIII are the '"delegates and other representatives of inter-governmental organisations attending the meetings." That relates only to persons who are there because of their entitlement to be there on behalf of one or other inter-governmental organisation, not to those who are there on behalf of a member state.'

'The necessary conclusion is that President Al-Bashir was not a person included in the reference to "delegates" in Article VIII.1 of the hosting agreement. As such the hosting agreement did not confer any immunity on President Al-Bashir …' he said.

Conclusion

Wallis JA ruled that the appeal was dismissed. He added that the order of the High Court is varied to read as follows: 'The conduct of the Respondents in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al-Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful. The applicant is entitled to the costs of the application on a *pro bono* basis.'

- See law reports 'International law' on p 48 of this issue, as well as: News 'Court criticised over Al-Bashir judgment' (2015 (Aug) *DR* 6); LSSA News 'Profession stands behind Chief Justice and judiciary in raising concern on the attacks on judiciary and the rule of law' (2015 (Aug) *DR* 14); Law reports 'International law' 2015 (Nov) *DR* 39; and AGM News 'Justice Minister focuses on transformation at Cape Law Society AGM' 2015 (Dec) *DR* 8.

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New Legislation

Legislation published from 3 May – 2 June 2016

*** Items marked with an asterisk will be discussed later in the column.**

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Bills introduced

Courts of Law Amendment Bill B8 of 2016.
Border Management Authority Bill B9 of 2016.
Expropriation Bill B4C of 2015.
Expropriation Bill B4D of 2015.
Higher Education Amendment Bill B36A of 2015.
Higher Education Amendment Bill B36B of 2015.
Financial Intelligence Centre Amendment Bill B33A of 2015.

Commencement of Acts

Criminal Matters Amendment Act 18 of 2015. *Commencement:* 1 June 2016. Proc33 *GG*40010/24-5-2016.

Selected list of delegated legislation

Banks Act 94 of 1990
Amendment of regulations. GenN297 *GG*40002/20-5-2016.
Basic Conditions of Employment 75 of 1997
Sectoral determination 50: Chamber of Mines of South Africa. GN537 and GN538 *GG*40001/20-5-2016.
Broad-Based Black Economic Empowerment Amendment Act 53 of 2003
Marketing, Advertising and Communication Sector Code. GN506 *GG*39971/6-5-2016.
Competition Act 89 of 1998
Guidelines on the assessment of the public interest provisions in the Merger Regulations. GenN309 *GG*40039/2-6-2016.
Electricity Act 41 of 1987
Licence fees payable by licenced generators of electricity. GN519 *GG*39985/13-5-2016.
Financial Services Board Act 97 of 1990
Levies on financial institutions. BN81 *GG*40032/1-6-2016.
Gas Regulator Levies Act 75 of 2002
Levy and interest for the piped-gas industry. GenN283 *GG*39990/17-5-2016.
Local Government: Municipal Electoral Act 27 of 2000
Amendment to the Municipal Electoral Regulations, 2000. GN569 *GG*40020/25-5-2016.
Medicines and Related Substances Act 101 of 1965
Preparations containing ibogaine to be registered as medicine. GN502 *GG*39970/4-5-2016.
Exclusion of certain medicines. GN565 *GG*40015/25-5-2016.
National Credit Act 34 of 2005
Determination of application, registration and renewal fees regulations. GN514 *GG*39981/11-5-2016.
* Determination of a threshold for credit provider registration. GN513 *GG*39981/11-5-2016.
National Environment Management Act 107 of 1998
Consolidated environmental implementation and management plan for the Department of Environmental Affairs. GN530 *GG*39998/19-5-2016.
Petroleum Pipelines Levies Act 28 of 2004
Levy and interest for the petroleum pipelines industry. GenN282 *GG*39990/17-5-2016.
Private Security Industry Regulations Act 56 of 2001
Increase of annual fees. GN R500 *GG*39966/3-5-2016.
Small Claims Courts Act 61 of 1984
Establishment of a small claims court for the area of Kagiso. GN578 *GG*40021/27-5-2016.
Establishment of a small claims court for the areas of Potchefstroom and Ventersdorp. GN579 *GG*40021/27-5-2016.
Establishment of a small claims court for the area of Malamulele. GN580 *GG*40021/27-5-2016.
Establishment of a small claims court for the area of Philipstown. GN581 *GG*40021/27-5-2016.
Establishment of a small claims court for the areas of Kuruman and Kudumane. GN582 *GG*40021/27-5-2016.
Establishment of a small claims court for the areas of Schweizer-Reneke and Maquassi Hills. GN583 *GG*40021/27-5-2016.
Establishment of a small claims court for the area of Orkney. GN584 *GG*40021/27-5-2016.
Social Assistance Act 13 of 2004
Amendment of regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. GN R511 *GG*39978/6-5-2016.
Increase in respect of social grants. GN R525 *GG*39986/12-5-2016.
South African Maritime Safety Authority Act 5 of 1998
Determination of charges and levies. GN560 *GG*40005/19-5-2016, GN559 *GG*40005/19-5-2016 and GN567 and GN566 *GG*40016/25-5-2016.
South African Police Service Act 68 of 1995
Amendment of regulations (ranks). GN R563 *GG*40008/24-5-2016.

Draft legislation

Activities that may be excluded from the requirement to obtain an environmental authorisation but that must comply with standards for land-based abalone aquaculture in terms of the National Environmental Management Act 107 of 1998 for comment. GN504 *GG*39971/6-5-2016.
The adoption of standards for land-based abalone aquaculture in terms of the National Environmental Management Act for comment. GN503 *GG*39971/6-5-2016.
Regulations defining the scope of the profession of dental therapists in terms of the Health Professions Act 56 of 1974 for comment. GN512 *GG*39979/10-5-2016.
Amendment of the regulations regarding the general control of human bodies, tissue, blood, blood products and gametes in terms of the National Health Act 61 of 2003 for comment. GN515 *GG*39982/11-5-2016.
Draft Critical Infrastructure Protection Bill. GenN276 *GG*39985/13-5-2016.
Amendments to regulations relating to qualification criteria, training and iden-

tification of, and forms to be used by environmental inspectors in terms of the National Environmental Management Act 107 of 1998 for comment. GN520 *GG*39985/13-5-2016.
Proposed amendments to the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN55 *GG*39985/13-5-2016.
Proposed amendment of the determination made by the South African Civil Aviation Authority Levies Act 41 of 1998. GN R528 *GG*39993/18-5-2016 and GN R531 *GG*39999/19-5-2016.
Determination of the upper limit of the total remuneration packages payable to municipal managers and managers directly accountable to municipal managers in terms of the Local Government: Municipal Systems Act 32 of 2000 for comment. GenN287 *GG*40000/19-5-2016.
Municipal Structures Amendment Bill, 2016 for comment. GN568 *GG*40017/25-5-2016.
Draft declaration of certain electoral and voting practices for the appointment of trustees of medical schemes irregular or undesirable practices in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001 and the Medical Schemes Act 131 of 1998. GenN305 *GG*40022/27-5-2016.
Registration routes, criteria and processes in terms of the Landscape Architectural Profession Act 45 of 2000 for comment. BN65 *GG*400021/27-5-2016.

Aspects of the determination of a threshold for credit provider registration in terms of the National Credit Act

The registration of credit providers

Section 40 of the National Credit Act 34 of 2005 (NCA) provides that a person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold determined by the Minister of Trade and Industry in terms of s 42(1). Section 42(1) obliges the minister to determine, by notice in the *Government Gazette*, a threshold for determining whether a credit provider is required to register in terms of s 40(1).

The initial thresholds

Prior to the amendment of the NCA a person had to register as credit provider if he or she was the credit provider in at least 100 credit agreements other than incidental credit agreement or the principal debt owed to him in terms of all current credit agreements other than incidental credit agreements exceeded R 500 000.

After the amendment of the NCA by the National Credit Amendment Act 19 of 2014 a person was required to register as a credit provider if the total principle debt owed to him in terms of all current credit agreements other than incidental credit agreements exceeded R 500 000.

The new threshold

On 11 May 2016 a new threshold has been published under GN513 *GG*39981/11-5-2016. The new threshold is R0 (nil). All credit providers are, therefore, required to register as credit providers with the National Credit Regulator. Failure to register as credit provider will have the consequences set out in s 40. Furthermore, all credit providers are now obliged to apply for registration, conditions may be set for registration; and application, registration and renewal fees are payable by all credit providers (ss 45 – 54).

When will the new threshold take effect?

Section 42(2) of the NCA provides that each subsequent threshold determined by the minister in terms of s 42 takes effect six months after the date on which it was published in the *Government Gazette*. The determination was published on 11 May 2016 and will, therefore, take effect on 11 November 2016.

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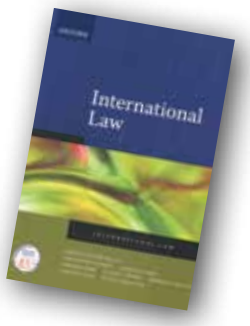
Book announcements

International law
By Hennie Strydom (ed)
Cape Town: Oxford University Press
(2016) 1st edition
Price: R 569 (incl VAT)
628 pages (soft cover)



Inleiding tot die Sakereg
By André van der Walt and Gerrit Pienaar
Cape Town: Juta
(2016) 7th edition
Price: R 650 (incl VAT)
453 pages (soft cover)

The new derivative action under the Companies Act –Guidelines for judicial discretion
By Maleka Femida Cassim
Cape Town: Juta
(2016) 1st edition
Price: R 450 (incl VAT)
252 pages (soft cover)

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Employment law update

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Equal pay for equal work

Pioneer Foods (Pty) Ltd v Workers Against Regression and Others (unreported case no C687/15, 19-4-2016) (Steenkamp J) is one of the first appeals decided in terms of s 10(8) of the Employment Equity Act 55 of 1998 (EEA), which came into effect on 1 August 2014.

In accordance with a collective agreement between Pioneer Foods and the Food and Allied Workers' Union (FAWU), Pioneer pays all newly appointed employees for the first two years of their employment at 80% of the rate paid to longer serving employees. This agreement came about because FAWU had persuaded Pioneer to reduce the extent to which it was using the services of various forms of 'precarious' employees, including employees supplied by labour brokers. At the same time, FAWU proposed the creation of a pay scale that showed differentiation between new hires and employees who had been in the company for many years. The 80% scale was accordingly adopted and was consistently applied to all new hires for the first two years of their employment with Pioneer.

Seven employees, who were all employed as drivers on 1 November 2014, took issue with this practice and contended in the Commission for Conciliation, Mediation and Arbitration (CCMA) that this constituted unfair discrimination. The commissioner agreed and found in his award that paying new entrants at 80% was 'in conflict with the requirement of equal pay for equal work'. His reason for this conclusion was that some of the employees had performed services as drivers to Pioneer through a labour broker before they were employed directly by Pioneer. The commissioner accordingly held that these employees were not 'new entrants' in the true sense of the word, and the differentiation in pay was unfair because the employees' previous indirect employment via the temporary employment service was ignored. In the circumstances, the commissioner found that the employees were entitled to damages and ordered Pioneer to pay them the equivalent of the difference in remuneration between them and the longer serving drivers for the period 1 November 2014 to 1 August 2015. He also ordered Pioneer to correct their remuneration to the 100% ratio of the applicable grade with effect from 1 August 2015.

Pioneer appealed to the Labour Court (LC) in terms of s 10(8) of the EEA. The LC, per Steenkamp J, upheld the appeal.

The court noted that the employees did not rely on any of the 12 listed grounds in s 6(1). Rather, their complaint was that they were unfairly discriminated against because of some other ground, namely, length of service. Regarding the burden of proof, s 11(1) of the EEA was accordingly not applicable, and s 11(2) had to be followed. In terms of this section, the complainant must prove, on a balance of probabilities, that –

- the conduct complained of is not rational;
- the conduct complained of amounts to discrimination; and
- the discrimination is unfair.

In order to prove that the conduct complained of 'amounts to discrimination', the complainant must identify the listed or unlisted arbitrary ground of discrimination. As was held in *Ntai and Others v South Africa Breweries Ltd* [2001] 2 BLLR 186 (LC), 'the mere "arbitrary" actions of an employer do not, as such, amount to "discrimination" within the accepted legal definition of the concept'. The ground complained about must furthermore be the reason for the disparate treatment – there must be a causal link between the ground and the difference in treatment.

In this case, the ground of alleged unfair discrimination was that the applicant employees were 'newer employees'. First, the court considered whether 'being newer employees' is an unlisted arbitrary ground of discrimination, namely, is it irrational? The court held that it is not. In fact, it is a classic example of a ground of differentiation which is rational, legitimate and exceedingly common. The court stated: 'There is quite manifestly a rational connection between using length of service as a factor determining pay, and the objective of recognising long service and loyalty of existing employees.' The court noted further that the legislature shares the view that length of service is a rational and legitimate ground for differentiation in, *inter alia*:

'Regulation 7(1)(a) of the Employment Equity Regulations 2014, which includes "length of service" as one of the "factors justifying differentiation in terms and conditions of employment";

Section 198 D (2)(a) of the [Labour Relations Act 66 of 1995], which includes "length of service" as a "justifiable reason" for differential treatment;

Clause 7.3.1 of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value'.

Clause 7.3.1 states that it is not unfair discrimination if the difference is fair and rational and is based on, *inter alia*, the individuals' respective seniority or length of service.

Second, differentiating on the basis of length of service does not amount to 'discrimination'. In order to amount to 'discrimination' the ground must be based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner. Treating people differently in the workplace in accordance with their length of service with the employer does not have this effect and thus does not impair their fundamental human dignity. It accordingly does not amount to 'discrimination'.

Third, it is not 'unfair'. In this regard, the court held that it was not unfair for Pioneer to agree with FAWU that new employees should earn less than those who had loyally remained in its service, and to implement this agreement. Absence this agreement, it was questionable whether these jobs would have existed at all.

The court noted that some of the employees were engaged by a labour broker before they were employed by Pioneer directly. The arbitrator was of the view that it had to consider the provisions of s 198A of the Labour Relations Act 66 of 1995 (LRA), which provides *inter alia* that, in certain circumstances, labour broker employees are deemed to be the employees of the client. Steenkamp J held, however, that s 198A had no application to the dispute –

• the claim was brought in terms of the EEA, not s 198A of the LRA, and had to be determined with reference to the provisions of the EEA;
• the differential treatment arose out of the FAWU collective agreement which was concluded some 18 months before s 198A took effect. Section 198A does not have retrospective application; and
• by the time s 198A came into force, the applicant-employees had already become employees of Pioneer and they were no longer labour broker-employees.

In the circumstances, appeal was upheld and the commissioner's award was reversed and substituted by an order dismissing the claim.

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Question:

Please advise if I stand a chance.

I have recently resigned from my previous employ due to malicious charges that were brought against me.

I had a fallout with a certain executive (and I have concrete proof of that fallout) and he reported false allegations against me. He alleged that I gave confidential information to one of the shop stewards. As a board secretariat that could have ended my career. Disciplinary proceedings then ensued in June 2015. They dragged up until January 2016. On 20 January the main witness in the case (the executive) did not attend proceedings. I then took a decision to resign. I resigned due to the fact that my reputation and dignity were destroyed. My performance, as well as my health were deteriorating. The person I am alleged to have provided confidential information to is my witness that I did no such thing.

Answer:

I shall respond to your query on the understanding that you would like to know whether you can claim a constructive dismissal under the circumstances you have described above.

It would be apposite to firstly set out the test for constructive dismissal. The first point to mention is that it is an employee who bears the initial onus to establish a dismissal and if successful the onus shifts to the employer to prove the fairness thereof.

In *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC) the Labour Appeal Court (LAC) said the following in respect of an employee's onus in a claim for constructive dismissal:

'[T]here are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established.'

By resigning you have met the first requirement to a claim for constructive dismissal. On your version you make mention that it was an executive of the entity you worked for who 'engineered' the charges against you – for purposes of this article I shall therefore accept that you would be able to establish that it was your employer who allegedly made continued employment intolerable thus satisfying the third requirement set out in the *Solid Doors* matter.

Your prospects of success in a potential claim for constructive dismissal therefore turns on whether you can objectively prove, on a balance of probability, that your employer made continued employment intolerable.

In attempting to establish intolerable working conditions, there was a view that an employee should show that they had no other option but to resign due to the intolerable working conditions created by the employer (see *Jordaan v CCMA and Others* [2010] 12 BLLR 1235 (LAC)). However the Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others* [2009] 9 BLLR 847 (CC), when presented with an argument that the employee's claim for constructive dismissal should fail as he was given a choice to resign or face a poor performance investigation, held:

'The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.'

Thus the fact that you resigned as opposed to concluding your disciplinary enquiry should not pose as a bar to a claim for constructive dismissal.

Having made this point it would be prudent to inform you that the general view is that an employee who resigns in the face of disciplinary action would have a 'hard case to meet' in a claim for constructive dismissal (see *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC)). However, it is nevertheless open for an employee, when attempting to establish intolerable working conditions, to argue that the pending or incomplete disciplinary action was a sham intended to frustrate and harass the employee by subjecting him or her to frivolous and vexatious charges. In *SALSTAFF on behalf of Bezuidenhout v Metrorail* (2) (2001) 22 ILJ 2531 (BCA), Grogan A, sitting as arbitrator in a matter where the employee claimed a constructive dismissal held:

'I would add, with respect, that once an employee reasonably forms the suspicion that disciplinary action taken against him is a form of harassment, he or she cannot be criticized for resigning to avoid the stigma that would result from being dismissed for "misconduct".'

From the information you have provided I am unable to provide you with an instructive view on whether you can establish intolerable working conditions, I am, however, able to share with you that on the strength of the above authorities your decision to resign before the disciplinary process was concluded is not fatal to a claim for constructive dismissal. In addition if you can establish that the disciplinary inquiry you were subjected to was a sham intended to frustrate and harass you and brought about in response to a fall out with an executive, then this would go far in supporting your potential claim. What could further strengthen your argument is the fact that your ex-employer did not conclude your disciplinary inquiry within seven months (ie, from June 2015 to the date you resigned in January). If you did not have a hand in bringing about this delay, then you may well argue that in a further attempt to frustrate and harass you, your ex-employer unduly dragging out the disciplinary process, which in turn contributed to the intolerable working conditions.

As stated in the response to the question (above), my approach was whether the person writing the question could refer a constructive dismissal dispute to the CCMA. It is trite in labour law that an employee cannot claim damages at any CCMA dispute, put differently the CCMA does not have jurisdiction to award damages – it can only award reinstatement, reemployment or compensation. In short, a person cannot claim damages at the CCMA. Compensation vastly differs from damages in the employment law context. ❑

By Meryl Federl

Recent articles and research

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

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Abbreviation	Title	Publisher	Volume/issue
CILJSA	Comparative and International Law Journal of Southern Africa	Institute of Foreign and Comparative Law, Unisa	(2015) 48.3
ESR Review	ESR Review: Economic and Social Rights in South Africa	Dullah Omar Institute, University of the Western Cape	(2015) 16.3
ILJ	Industrial Law Journal	Juta	(2016) 37 April
PER	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2016) 19
SALJ	South African Law Journal	Juta	(2016) 133.2
SLR	Stellenbosch Law Review	Juta	(2016) 27.1
THRHR	Tydskrif vir Hedengdaagse Romeins-Hollandse Reg	LexisNexis	(2016) 79.1

Access to information

Adeleke, F and Ward, R 'The interrelation between human rights norms and the right of access to information' (2015) 16.3 *ERS Review* 7.

Alternative dispute resolution

Feehily, R 'The certainty of settlement' (2016) 27.1 *SLR* 25.

Feehily, R 'The role of the lawyer in the commercial mediation process: A critical analysis of the legal and regulatory issues' (2016) 133.2 *SALJ* 352.

Animal law

Muir, A 'Of fences, game and property – some unresolved issues of ownership of wild animals in South Africa' (2016) 27.1 *SLR* 136.

Child law

Skosana, T and Ferreira, S 'Step-parent adoption gone wrong: *Turner v Turner* (GJ) (unreported) case number 13040/2013 of 19 June 2015' (2016) 19 *PER*.

Civil procedure

Uys, JF 'Homologasie' (2016) 79.1 *THRHR* 129.

Company law

Esser, IM and Delport, PA 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' (2016) 79.1 *THRHR* 1.

Gerber, SC 'Reckless trading and building contracts' (2016) 79.1 *THRHR* 121.

Lombard, M 'Relief under s 163 of the Companies Act 71 of 2008 – unscrambling the omelette – *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC)' (2016) 79.1 *THRHR* 133.

Constitutional law

Davis, DM 'Separation of powers: Juristrocracy or democracy' (2016) 133.2 *SALJ* 258.

Ndima, DD 'Conceiving African jurisprudence in a post-imperial society: The role of Ubuntu in constitutional adjudication' (2015) 48.3 *CILJSA* 359.

Criminal law

Nkoane, P 'The Prevention of Organised Crime Act: The proving of "Instrumentality" in cases of obscured use of intangible things' (2016) 27.1 *SLR* 182.

Spies, A 'Perpetuating harm: The sentencing of rape offenders under South African law' (2016) 133.2 *SALJ* 389.

Theophilopoulos, C and Tuson, S 'Dissecting the dead in order to safeguard the living: Inquest reform in South Africa' (2016) 27.1 *SLR* 161.

Data privacy law

Naude, A and Papadopoulos, S 'Data protection in South Africa: The Protection of Personal Information Act 4 of 2013 in light of recent international developments (1)' (2016) 79.1 *THRHR* 51.

Delict

Parker, J 'Small comfort for bereaved children. A cautious response to loss of parental care claims – *Minister of Police v Mboweni* 2014 6 SA 256 (SCA)' (2016) 79.1 *THRHR* 146.

Zitzke, E 'Realist evolutionary functionalism and extra-constitutional grounds for developing the common law of delict: A critical analysis of *Heroldt v Wills* 2013 2 SA 530 (GSJ)' (2016) 79.1 *THRHR* 103.

Education law

Liebenberg, S 'Remedial principles and meaningful engagement in education rights disputes' (2016) 19 *PER*.

Evidence

Flemming, HCJ '*Quare quo quattuor quotiens*' (2016) 79.1 *THRHR* 30.

Family law

Epstein, CA and Zaal, FN 'Financial compensation for vulnerable engagement-reliant cohabitees: The emergence of a problematic judicial approach' (2016) 27.1 *SLR* 3.

Van der Linde, A 'Whether trust assets form part of the joint estate of parties married in community of property: Comments on "piercing of the veneer" of a trust in divorce proceedings – *WT v KT*, 2015 3 SA 573 (SCA)' (2016) 79.1 *THRHR* 165.

Housing Law

Chilemba, EM 'Evictions in South Africa during 2014 – an analytical narrative' (2015) 16.3 *ESR Review* 3.

International criminal law

Dyani-Mhango, N 'The *Jus Cogens* nature of the prohibition of sexual violence against women in armed conflicts and state responsibility' (2016) 27.1 *SLR* 112.

Killander, M and Nyathi, M 'Accountability for the Gukurahundi atrocities in Zimbabwe thirty years on: Prospects and challenges' (2015) 48.3 *CILJSA* 463.

Kohn, L 'The *Bashir* judgment raises the red flag for the rule of law and the judiciary' (2016) 133.2 *SALJ* 246.

International humanitarian law

Bosch, S and Kimble, M 'A new way forward for the regulation of the private military and security industry' (2015) 48.3 *CILJSA* 431.

International trade law

Brink, G and Van Heerden, C 'The need for an International Trade Tribunal' (2016) 133.2 *SALJ* 409.

Shumba, T 'Harmonising business laws in the Southern African Development Community (SADC): Should SADC member states join OHADA?' (2016) 27.1 *SLR* 59.

Intestate succession

Smith, B 'Intestate succession and surviving heterosexual partners using the jurist laboratory to resolve the ostensible impasse that exists after *Volks and Robinson*' (2016) 133.2 *SALJ* 284.

Islamic law

Salah, O and Rautenbach, C 'Islamic finance: A corollary to legal pluralism or legal diversity in South Africa and the Netherlands?' (2015) 48.3 *CILJSA* 488.

Labour law

Esitang, TG and Van Eck, S 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO conventions' (2016) 37 April *ILJ* 761.

Fourie, E 'Exploring innovative solutions to extend social protection to vulnerable women workers in the informal economy' (2016) 37 April *ILJ* 831.

Germishuys, W 'An analysis of *Edcon v Steenkamp* with reference to its effect on the De Beers principle' (2016) 79.1 *THRHR* 38.

Henrico, R 'Religious discrimination in the South Africa workplace: Regulated regimes and flexible adjudication' (2016) 37 April *ILJ* 847.

Laubscher, T 'Equal pay for work of equal value – a South African perspective' (2016) 37 April *ILJ* 804.

Smit, D and Madikizela, S 'A critical analysis of "absolution from the instance" in South African labour law with specific reference to the CCMA' (2016) 79.1 *THRHR* 85.

Smit, D 'Labour law, the queen bee syndrome and workplace bullying: A contribution to the shattering of at least one glass ceiling for female employees' (2016) 37 April *ILJ* 779.

Snyman, S 'The principle of majoritarianism in the case of organisational rights for trade unions – is it necessary for stability in the workplace or simply a recipe for discord?' (2016) 37 April *ILJ* 865.

Law of contract

Pretorius, CJ and Pretorius, JT 'Failed suspensive conditions and the law of suretyship: Some basic principles – *Firstrand Bank Ltd v Meyer*, unreported case no 11996/2010 (WCC) of 19 October 2012' (2016) 79.1 *THRHR* 154.

Legal education

Fourie, E 'Constitutional values, therapeutic jurisprudence and legal education in South Africa: Shaping our legal order' (2016) 19 *PER*.

Legal ethics

Visser, JM and Van Zyl IV, CH 'Legal ethics, rules of conduct, and the moral compass – considerations from a law student's perspective' (2016) 19 *PER*.

Medical law

Pienaar, L 'Investigating the reasons behind the increase in medical negligence claims' (2016) 19 *PER*.

Mining law

Humby, T 'The community-preferent right to prospect or mine: Navigating the fault-lines of community, land, benefit and development in Bengwenyama II' (2016) 133.2 *SALJ* 316.

Pension law

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

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Cleaning up the unclaimed benefit industry – addressing issues of complexity

By Carmen Schubert

In an attempt to tackle the pertinent issue of the unclaimed benefit 'black hole', where insurers and administrators lack incentive to trace beneficiaries and pay out unclaimed benefits as they are then able to continue claiming admin fees and accrue interest, the Financial Services Board (FSB) is in the process of enacting new legislation to quantify the 'depth' of the issue and also enforce better best practice through enforced compliance, according to the organisation's information circular (PF no 4 of 2015) (www.fsb.co.za, accessed 3-5-2016) and its draft notice no 2 (www.fsb.co.za, accessed 3-5-2016).

Personally, I agree with the ethos and principle behind these proposed changes as the FSB is trying to protect the interests of fund members and the FSB and feels this regulation will go a long way to tightening up the market. I believe that this approach will negatively impact unclaimed benefit fund members and beneficiaries as the associated costs will need to be carried by the fund, and the members themselves, thereby reducing the benefit they ultimately receive.

In the face of these proposed changes, and in the spirit of treating customers fairly, administrators will need to simplify processes and cut overheads to keep fees down. In this regard, there are numerous ways in which this can be achieved.

For starters, fund administrators could consider keeping an actuary on retainer and appointing them as a valuator on all the funds under administration. This approach means that the valuator would be paid a set fee to fulfil the statutory requirements of each fund, instead of a fee for issuing a s 14 certificate to each fund, which can often be in the region of R 2 000 – R 4 000 per certificate. This should offer cost savings based on the economies of scale that can be achieved.

Another approach would be for administrators to amend fund rules and procedures to allow for a single transfer per fund or participating employer per year to be made to an unclaimed benefit fund, instead of transferring when the member's benefit becomes 'unclaimed'. This would mitigate the associated costs of multiple transfers.

This approach would enable administrators to transfer as many benefits as possible at a time, to minimise FSB and actuarial costs. In the interim, the benefit should remain invested in the occupational fund earning investment returns, but can merely be marked as a 'paid up member' or as an 'inactive member'. Paid-up members in an active fund would generally be charged lower fees as the active members are also contributing to the costs of running the fund. In addition, by remaining invested in the fund's investment portfolios, while there is greater investment risk, this reduced fee should be offset by the higher investment return earned.

In a similar vein, the industry could maximise the time and input of fund trustees to extract the greatest value from them, for example, waiting for trustee meetings to get signatures can reduce costs. By giving trustees adequate notification that there will be multiple certificates to sign, and saving these administrative requirements for the scheduled trustee meetings when they are already engaged in fund-related activity, gives administrators leverage to include the signing of documents into the fees charged by trustees for attending such meetings rather than having to pay additional hourly-based fees for trustees to sign documents.

Lastly, large administrators can also consider in-sourcing a tracing department, provided they can get the same access to the databases that external agents use.

There are, however, two stumbling blocks to this approach:

- Firstly, the cost of accessing these databases requires the right economies of scale to make it viable.
- Secondly, the Protection of Personal Information Act 4 of 2013 (POPI) may affect an administrator's ability to obtain the relevant personal information, and any exemptions from sections of POPI required for funds and administrators to address this problem may be last on the Regulator's list of considerations in the application of POPI. Greater clarity in terms of POPI is required to determine what degree of access an administrator will have in obtaining and processing member information without active and informed consent being obtained from the member before this step can be considered, which is impossible due to the nature of an unclaimed benefit.

Whatever the challenges, and there will be more given the nature of proposed changes to the legislation that governs unclaimed benefits, I believe that the impact they will ultimately have on fund members can be mitigated to some degree with a bit of creativity and ingenuity by the industry.

The industry needs to work with the FSB to find a solution to the issues facing the unclaimed benefits market, and we can do this by working smarter to keep costs down so that administrators can do their job and meet the FSB's proposed new administrative requirements without eroding the benefits of members.

- See also part one of the article 'Cleaning up the unclaimed benefit industry – the FSB's unclaimed benefit bugbear' 2016 (June) *DR* 55.

Carmen Schubert *BA (Psych) (UJ) BA (Hons) (Cantebury)* is a legal and compliance officer at Fedgroup in Johannesburg.

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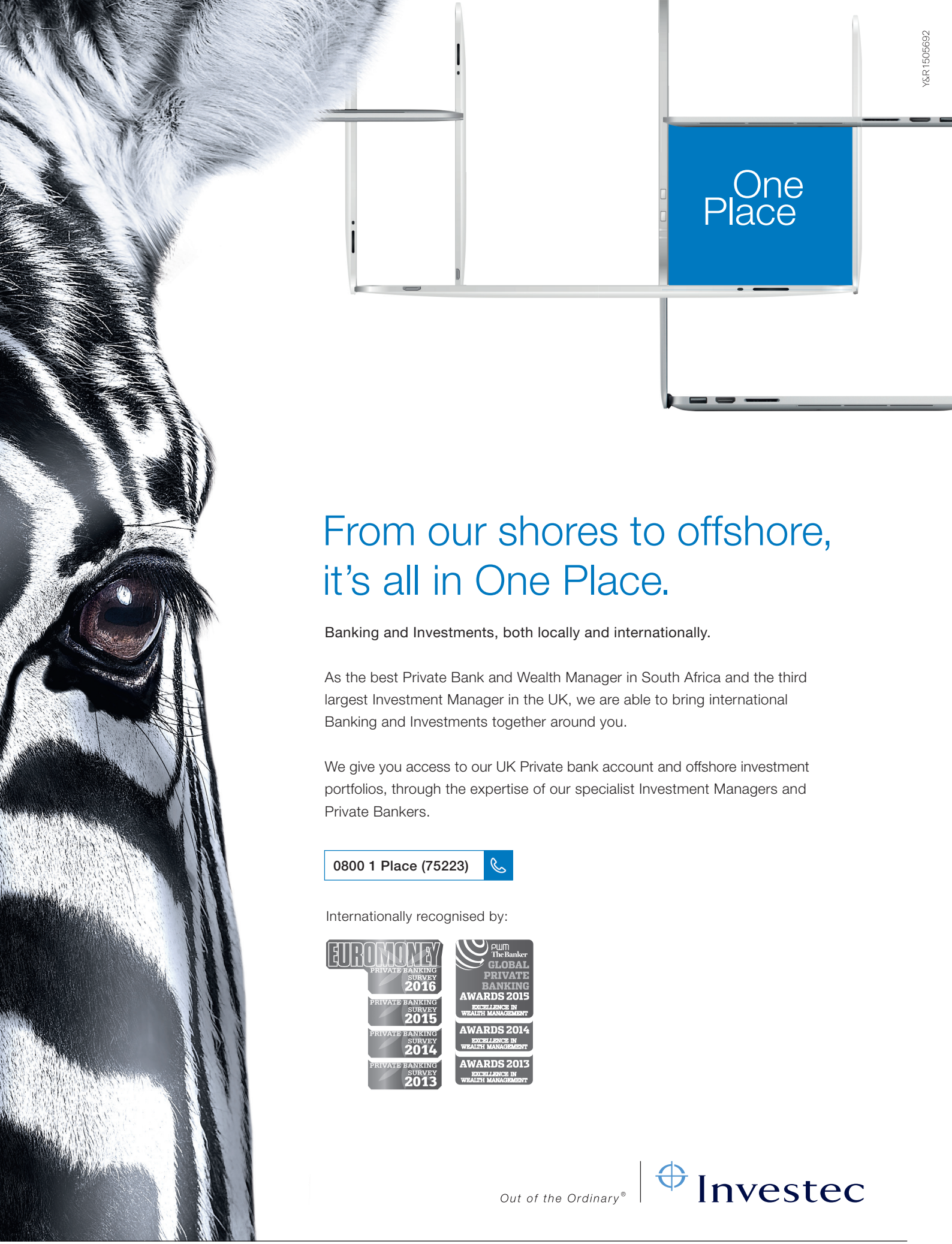

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RISKALERT

SPECIAL POLICY EDITION – JULY 2016 NO 3/2016

IN THIS EDITION

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RISK MANAGER'S COLUMN

NEW SCHEME POLICY

We previously published the draft professional indemnity master policy for the legal profession in the February *Bulletin*. In this *Bulletin* we publish the final version, which comes into effect on 1 July 2016. We have tightened up the wording for greater clarity, but there are no significant changes to the cover that was provided in the earlier draft published in February.

Ann Bertelsmann, Risk Manager

It is important that all practitioners take special note of the substantive changes made to the cover, by comparison to the 2015/2016 and earlier policies. Some of the changes may necessitate your consulting your broker on changes to your existing top-up cover.

Please read my column in the February *Bulletin*, discussing the noteworthy changes to the policy are discussed.

We have widely published information about the e-mail scam on our website, in the *Bulletin* and in other media. Up until the present, the insurer has come to the assistance of the profession in these matters. As from 1 July 2016, the insurer will no longer entertain these matters. We recommend that all practitioners put in place measures to protect themselves in these situations – be it through effective risk management measures or additional insurance protection … or preferably both.

Ann Bertelsmann
Ann.bertelsmann@aiif.co.za

RAF MATTERS

BOARD NOTICE 51 OF 2016

The amounts referred to in subsection 17(4)(c) of the Road Accident Fund Act No. 56 of 1996, as amended, have been adjusted to **R 244 405.00,** with effect from 30 April 2016

GENERAL MATTERS

PRESCRIBED RATE OF INTEREST

The purpose of the Prescribed Rate of Interest Act, No. 55 of 1975 (the Act) is, *inter alia,* to provide for the calculation of interest on a debt, in certain circumstances, at a prescribed rate. The Judicial Matters Amendment Act 24 of 2015 (which came into effect on 8 January 2016) amended section 1 of the Act substantially. It introduced the South African Reserve Bank repurchase (repo) rate as the basis for the calculation of the rate of interest.

In terms of section 1(2)(a), the rate of interest will be calculated by reference to the repo rate, as determined from time to time by the South African Reserve Bank, plus **3.5%** per annum.

The effect of this is that the rate of interest will cease to depend on the determination thereof by the Minister. It will now change every time the Reserve Bank makes a change to the repo rate. In terms of section 1(2)(c), the new rate, after the Reserve Bank announces a change therein, will always take effect from the first day of the second month following the month of the announcement of the new repo rate.

The Act stipulates that a Cabinet member (read Minister?) responsible for the administration of justice must, whenever the repo rate is adjusted by the South African Reserve Bank, publish the amended rate of interest by notice in the *Gazette*.

Since 1993, the prescribed rate of interest had been 15.5% per annum. From **1 August 2014**, the Minister reduced this rate to **9%** per annum. This position lasted only for a period of about eighteen (18) months before the Minister increased the rate of interest to **10.25%** per annum with effect from **1 March 2016**, in ***Government Gazette* 39785** of **4 March 2016**.

This rate has again been changed effective from **1 May 2016**. *Mora* interest, including interest on damages claims, which begins to run from this date is now **10.5%** per annum, in accordance with GN 461 in ***Government Gazette* 39943** of **22 April 2016**.

S J Kunene
Claims Manager AIIF

Practitioners please note that it would seem that the rate of interest applicable to any debt is the rate at the time when the debt arose, and will not be affected by the commencement of legal proceedings even though there might be subsequent rate changes.

In this regard see *Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A); and *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2013] 2 All SA 1 (SCA).

Ed.

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 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 for compensation from the **Insured**, which arises out of the **Insured's** provision of **Legal Services**;

(For the purposes of this definition, a written demand is any written communication or legal document 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 or a real right 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 back-up 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** in an earlier **Insurance Year,** on the basis set out in clause 38.

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, act, error or omission giving rise to the **Claim**;
   c) an **Employee** of a **Legal Practice** providing **Legal Services** at the time of the circumstance, act, error or omission 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, act, error or omission 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.

    Where two or more **Claims** are made simultaneously, each **Claim** will attract its own **Excess** and to the extent that one or more **Claims** arise from the same circumstance, act, error or omission the **Insured** must pay the **Excess** in respect of each such **Claim**;
11. The **Excess** is calculated by reference to the number of **Principals** that made up the **Legal Practice** on the date of the circumstance, act, error or omission 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 and complied with by the **Insured**, by timeous lodgement and 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;
(v) the Medical Schemes Act 131 of 1998 as amended or replaced;

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 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, the **Insurer** will have the discretion not to make any payment, before the **Innocent Principal** takes 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;

a) give immediate written notice to the **Insurer** of any circumstance, act, error or omission that may give rise to a **Claim**; and

b) 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/counterclaim 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** or its appointed agents 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 appointed 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 appointed agents) the **Insurer** has the right to:

a) withdraw indemnity; and/or
b) report the **Insured's** conduct to the regulator; and/or
c) recover all payments and expenses incurred by it.
For the purposes of this paragraph, written notice will be sent to the address last provided to the **Insurer** by the **Insured** and will be deemed to have been received five (5) working days after electronic transmission or posting 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 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**;

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 during an **Insurance Year**, of any circumstance, act, error or omission (or a related series of acts, errors or omissions) which may give rise to a **Claim** or **Claims**, then any **Claim** or **Claims** in respect of that/those circumstance/s, act/s, error/s or omission/s subsequently made against the **Insured**, will for the purposes of this policy be considered to fall within one **Insurance Year**, being the **Insurance Year** of the first notice.

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 disputes@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 and the costs of the **Senior Practitioner** will be borne by the unsuccessful party;

    d) the unsuccessful party must notify the successful party in writing, within thirty (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 and complied with.
The applicable **Excess will be increased by an additional 20% if clause 20 of this policy applies.

LETTERS TO THE EDITOR

The following letters are queries received about the new policy that was published previously in the February Risk Alert Bulletin (1 of 2016)

1 Good day
Quick question. Is it only the practitioner/partner/director who is in possession of a fidelity fund that has cover with the AIIF?

What happens to PA/Associates etc. in a practice.?

In the old policy, clause 7 extends the cover to all employees. In the new policy (2016/2017) clause 6 (c) does the same.

2 Referring to the Risk Management Questionnaire which has to be submitted annually, completed copy attached hereto, for what period will it be valid, ie. when will the next questionnaire be required?.

The next one will be required after one year has elapsed. (At this stage, there is no sanction per se, for your failure to complete or submit the questionnaire. However, in the event that you report a claim against your practice, it will have to have been completed within the previous year, before you can be indemnified.)

3 Who is the Regulator referred to in clause 27(b) of the new policy for 2016/2017?

We have used the term "Regulator" rather than specifically referring to the provincial law societies, which will fall away when the Legal Practice Council begins to regulate the affairs of the profession.