

MARCH 2016

UNPACKING THE RENTAL HOUSING AMENDMENT ACT 35 OF 2014

Rescue the business *before*
liquidation is considered

The independent counsel doctrine
and **legal advice on insurance
coverage** – a review of US case law

South Africa **tops** at international
moot court competition

National Forum on the Legal
Profession: One year on

**LSSA strongly opposes
Debt Collectors Amendment Bill**





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THE SA ATTORNEYS' JOURNAL



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18 Unpacking the Rental Housing Amendment Act 35 of 2014

The Rental Housing Act 50 of 1999 came into force on 1 August 2000, it regulates the relationship between landlords and tenants and it provides for dispute resolution by the Rental Housing Tribunal. The Rental Housing Act has often been criticised for its shortcomings especially pertaining to enforcement. However, the Constitutional Court in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) stressed the importance of the Act and the Rental Housing Tribunal. The shortcomings of the Rental Housing Act have recently been addressed by enactment of the Rental Housing Amendment Act 35 of 2014 (Amendment Act), which will come into operation on a date to be proclaimed. **Kgopotso Bapela and Philip Stoop** write that only a few landlords, tenants or practitioners have taken notice of the Amendment Act, despite it having a substantial impact on the rental industry. Some of the major amendments are pointed out in their article.

22 Rescue the business before liquidation is considered

In terms of s 132(1)(a)(i) of the Companies Act 71 of 2008, business rescue proceedings commence when a company files a resolution to place itself under supervision in terms of s 129(3) of the Act. But what happens if a creditor has already served an application for the liquidation of the company? **Schalk Bezuidenhout** writes that s 129(2)(a) of the Act determines that a resolution contemplated in s 129(1) of the Act, may not be adopted if liquidation proceedings have been initiated by or against the company. He asks in his article what is meant by liquidation proceedings. Is it the mere service and filing of an application with the Registrar of the court, or does it mean that the application for liquidation must actually have been adjudicated?

24 The independent counsel doctrine and legal advice on insurance coverage – a review of US case law

Litigious matters of large companies often involve complex legal issues, which may also result in complex insurance issues. The tripartite relationship between insurer, insured and legal representative originates from the standard liability insurance policy, which typically provides protection against damages arising from a claim against the insured company and the legal costs for defending such a claim. **Marietjie Botes** writes about her experience with the conflict of interests between a large corporate client, with international dealings, and its insurance company, which led her to investigate the issues in her article and a study of the case law in the United States, as case law dealing with these issues are non-existing in South Africa.

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The proud voice of the attorneys' profession for 60 years

2016 marks the year *De Rebus* achieves a tremendous milestone of 60 years in existence. Initially named *De Rebus Procuratoriis* (about the affairs of attorneys), the journal was first distributed to members of the then Law Society of the Transvaal in September 1956. The journal was distributed nationally in 1968 with the word '*procuratoriis*' having been dropped from its masthead along the way.

As early as 1948, the Association of Law Societies (ALS) noted in the minutes of its annual meeting that a journal was necessary to serve as a mouthpiece for the association and to serve as a link between the association and the members of the attorneys' profession. At that stage the four statutory law societies were communicating with their members by means of newsletters.

In 1955 Allen Snijman and Theo Boezaart – respectively President and Secretary of the then Incorporated Law Society of the Transvaal (ILST) – attended the British Empire and Commonwealth Law Conference in London and it was there that the idea of publishing a monthly 'information letter' for Transvaal attorneys was conceived.

After initial dissension about the cost of such an undertaking, Mr Snijman and Mr Boezaart received permission from the ILST council to proceed publishing the monthly 'information letter'. The main purpose of the newsletter was to disseminate

notices from and news about the work of the council to all Transvaal attorneys.

The first issue, with the title *De Rebus Procuratoriis* and with Mr Boezaart as Editor, was distributed in September 1956. Mr Snijman wrote: 'May this journal rapidly become the recognised organ of official communication and at the same time the vehicle of a bond of fellowship and loyalty to the tenets of our profession. Read it, advertise your requirements in it, send in contributions to it and let us build it into something worthy of the intellect it represents' (1956 (Sept) *DRP* 1).

The first Editorial Committee comprised Mr Snijman and council member George Cook. In October 1957 the committee was expanded to include Paa van Niekerk, Bill Hitge and Mon-ty Knoll.

Besides the editorial and a letters column, the early issues almost exclusively carried information on the activities of the council and circle councils. A 'small advertisements' section was also included.

In 1958, as a result of an increasing demand for *De Rebus* from attorneys outside the Transvaal, it was decided that non-members of the ILST could subscribe to *De Rebus*.

Throughout the years the journal has seen a number of changes, from the profession and the format it is published. *De Rebus* has grown from a newsletter to a publication that is published on a number of platforms. During the upcoming months, we will be writing snippets detailing the



Mapula Thebe – Editor

growth of the journal during the decades.

- See also 50th anniversary supplement (2006 (Sept) *DR*).

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 22 March and 18 April 2016.

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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.

Sheriff's artful use of longer route

Our offices instructed the Sheriff's offices to serve combined summons on a defendant.

On receiving the return of service, our offices were suspicious of the travelling amount that was charged.

It was queried with the returns clerk of the Sheriff's offices, who informed us that it was 20 km to the service address.

The travel distance was then researched by our offices and it was found that there were two routes to the service address, one being approximately 14,9 km and the alternate route as approximately 21,5 km.

By making use of the longer route, it would mean travelling in the opposite direction and re-joining the route to the destination – a deliberate departure from convention as a shorter route runs closer to the office of the Sheriff and it would be logical to use this route to serve on the defendant.

We have yet to receive the Sheriff's satisfactory explanation for this unusual state of affairs.

Thirusha Muthen,
attorney, Durban

Book announcements

A practical approach to criminal law in Botswana

By William Molebatsi Modise

Botswana: Light-books
(2015) 1st edition
Price: R 880 (incl VAT)
(price may vary to exchange rate)
377 pages (soft cover)



Administrative Justice in South Africa: An introduction

By Geo Quinot (ed)

Cape Town: Oxford University Press
(2015) 1st edition
Price: R 529.95 (incl VAT)
332 pages (soft cover)



Expert Evidence in Clinical Negligence: A practitioner's guide

By Patrick van den Heever and

Natalie Lawrenson
Cape Town: Juta
(2015) 1st edition
Price: R 365 (incl VAT)
141 pages (soft cover)



CSLAR Property law under scrutiny

By Susan Scott and Jeannie van Wyk

Cape Town: Juta
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Price: R 400 (incl VAT)
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Retirement ceremony of Justice Johann van der Westhuizen

A special ceremonial session of the Constitutional Court was held on 29 January to mark the retirement of Justice Johann van der Westhuizen. The full Bench was present, including retired judges from the Constitutional Court, as well as a number of dignitaries and government officials.

Tributes

At the ceremony, which was open to the public, a number of professional bodies bid farewell to Justice van der Westhuizen, namely:

- Chief Justice Mogoeng Mogoeng;
- Chairman of the Advocates for Transformation, advocate Vuyani Ngalwana SC;
- President of the Black Lawyers Association, Lutendo Sigogo;
- Publicity Secretary of the National Association of Democratic Lawyers, advocate Gcina Malindi SC;
- Co-chairperson of the Law Society of South Africa, Richard Scott;
- Chairman of the General Council of the Bar, advocate Jeremy Muller SC;
- Deputy Minister of Justice and Constitutional Development, John Jeffrey; and
- Speaker of the National Assembly, Baleka Mbete.

Last judgment delivered

Justice van der Westhuizen delivered his last judgment before the retirement ceremony took place. In the unanimous judgment, the court had to decide on the constitutional validity of s 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008 (the Act) in *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* (CC) (unreported case no CCT 114/15, 29-1-2016) (Van der Westhuizen J).

The applicant, Tronox KZN Sands (Pty) Ltd (Tronox), is a large producer of titanium ore and titanium dioxide. In February 2014 its application for prospective land-use rights was approved by the fourth respondent, Umlalazi Municipality. Section 45 provides that any person who is aggrieved by a municipality's planning decision may appeal to the first respondent, the KwaZulu-Natal Planning and Development Appeal Tribunal (the tribunal).

Before the tribunal could decide the two appeals, Tronox launched proceed-



ings in the KwaZulu-Natal Division, Pietermaritzburg, challenging the constitutionality of s 45 of the Act.

The court held that s 45 was unconstitutional since the appeal process created by the province impermissibly interfered with the municipalities' constitutionally-recognised power to manage municipal planning. The court declared the two appeals unlawful, subject to the declaration of invalidity being confirmed by the Constitutional Court.

Before the Constitutional Court, Tronox asked for confirmation of the High Court order. The confirmation application was opposed by the fifth respondent, the Member of the Executive Council for Co-operative Governance and Traditional Affairs (MEC). She contended that s 45 is constitutionally acceptable, as the tribunal is an independent and impartial body staffed by experts and not provincial officials.

The court confirmed the High Court order insofar as it declared s 45 of the Act is constitutionally invalid. It agreed with the High Court that s 45 of the Act interfered with municipalities' exclusive constitutional power to make municipal planning decisions. The court held that neither a reading-down nor a reading-in was possible in this case. It also declined to suspend the declaration of invalidity. It held that appeals already finalised under s 45 were not to be affected. Appeals still pending in terms of the appeal process had to continue until finalised. However, in considering them, the tribu-

nal was required to uphold the municipalities' integrated development plans, if in existence. Accordingly, the MEC's application for leave to appeal was dismissed and she was ordered to pay the legal costs of Tronox.

He will be remembered for his humour

Chief Justice Mogoeng said it was a unique and challenging task to pay tribute to Justice van der Westhuizen and expressed his appreciation to the University of Pretoria for producing, 'a giant' like Justice van der Westhuizen, and also continuing to demonstrate their confidence in him without hesitation by having him return to the university after his retirement from the court.

Chief Justice Mogoeng said Justice van der Westhuizen has a particular gift of being humorous regardless of where he found himself and quoted Justice van der Westhuizen's doctorate speech where he said: "A sense of humour is very useful when one deals with the stress of human relationships and conflict." This is true indeed. Many people do not know how many times we go through very difficult moments as justices of the Constitutional Court at conference, when we deal with issues, particularly judgments.'

Chief Justice Mogoeng said that many South Africans do not have the resources to send their children to university and added that there were worries about the quality of the LLB degree, with sugges-



From left: Black Lawyers Association President, Lutendo Sigogo, and Law Society of South Africa Co-Chairperson, Richard Scott attended the retirement ceremony of Constitutional Court Justice, Johann van der Westhuizen (middle).

tions that it should be a five-year degree and added that he was worried about the situation. The Chief Justice said that in Europe the equivalent of the LLB degree is three years and the quality was beyond reproach. Chief Justice Mogoeng asked: 'What is it that is so fundamentally wrong about South Africa, that in circumstance where Europe has it for three years, we have it for four years and yet the quality seems to leave much to be desired?' Chief Justice Moegoeng said that maybe Justice van der Westhuizen could offer some of his time and do some research in this regard and how the quality of the degree can be improved.

Protecting the human rights

Mr Jeffrey referred to a conference that he attended, where Professor van der Westhuizen, as he was known then, said "The ideology of racism still poisons everything in South Africa. ... The whole nature of the political system had to change." In short, here was a white academic, of an Afrikaans background, advocating for human rights – long before it became fashionable to do so. This unwavering commitment to human rights is something that would characterise his entire career.'

Mr Jeffrey said that in the year of the 20th anniversary of the Constitution, the role of the Constitutional Court and its judgments in protecting people must be acknowledged. 'If one considers many of the court's judgments, and in particular, some of those written by Justice van der Westhuizen, it is evident how the court has gone about formulating and protecting the rights of the poor and the marginalised, guaranteeing their constitutional rights,' he said.

Mr Jeffrey concluded by saying: 'As we pay a fitting tribute to Justice van der Westhuizen we know that whoever has to fill his position will have big shoes to fill. The challenge for the Judicial Services Commission will be in finding candidates who can fill these big shoes and follow in his footsteps – incumbents who further contribute to the collective wisdom of this court.'

Personal history of Justice van der Westhuizen

Justice van der Westhuizen was born in Windhoek Namibia. His father was a civil servant who as the Justice said: 'Wrote Apartheid propaganda by day and revolutionary Afrikaans poetry about the red flag of the resistance by night. Who pointed out the cruelty of human rights abusers to a confused toddler, and a mother, who thought that one must: One, save money; two, obey God; and three, obey the government.'

The Justice and his family moved to

Pretoria after being effectively expelled from the then, South West Africa, ruled by Apartheid South Africa, because of a short story that was written by his father, in which he says his father 'insulted important people'.

Academic life

Justice van der Westhuizen received degrees in BA Law (*cum laude*) LLB (*cum laude*), LLD and LLD *honoris causa* from the University of Pretoria. He spent time doing research in Germany as an Alexander von Humboldt-Fellow and also spent time in the United States of America, the Netherlands and the United Kingdom.

Justice van der Westhuizen recalled how the University of Pretoria was known as the Voortrekker University and was the largest Afrikaans University in the World and while he studied there, seminars were held entitled 'Threats to the Afrikaner'. 'When we invited black speakers to conferences, in the 1980s even, we had to fill in forms to state, amongst other things, whether the speakers would use the toilet facilities on the campus.'

Justice van der Westhuizen was a professor and the head of the department of legal history, comparative law and jurisprudence at the faculty of law. He said that the University gave him the opportunity to start a new course on legal philosophy and allowed him to start the Centre for Human Rights, which has since won numerous prizes for its work in Africa and elsewhere in the world. He said that while in Germany, he learnt that criminal procedure was based on and linked to human rights. He became involved in human rights activism and the constitutional negotiation. As an academic he has taught widely in South Africa and abroad and presented numerous papers at national and international conferences.

Life in law

Justice van der Westhuizen was admitted as an advocate of the High Court and



Constitutional Court Justice, Johann van der Westhuizen with his sons Alexander (left) and Vincent.



Chief Justice, Mogoeng Mogoeng and Justice Johann van der Westhuizen, at the special ceremonial session of the Constitutional Court held on 29 January.

was an associate member of the Pretoria Bar. He acted as counsel in many human-rights matters, and served as a consultant and in-house advocate for the Legal Resources Centre and on the governing body of Lawyers for Human Rights.

Justice van der Westhuizen said that the Constitution drafting process was an enormous experience. He worked with the likes of Baleka Mbete, Naledi Pandor, current deputy president Cyril Ramaphosa and others and he joked that he got his 'photo opportunity' with former president, Nelson Mandela.

In 1999, Justice van der Westhuizen was appointed by former President Mandela, as a Judge in the Transvaal Provincial Division of the High Court (now the Gauteng Division) in Pretoria. Justice van der Westhuizen said that he had learnt a great deal from his five year tenure at the High Court in Pretoria. 'I learnt much from the vast experience of the white male judges, appointed before 1994, about the law; court procedure; and farming. I also learnt from a few of them, how people should not be treated and how justice should not be dispensed,' Justice van der Westhuizen said.

He said that former President, Thabo Mbeki, appointed him to the Constitutional Court on 1 February 2004, in spite of the protestations of the opposition leader at the time.

Legacy

Justice van der Westhuizen, said that a journalist once asked him what kind of legacy he would like to leave behind after leaving the Constitutional Court. Justice van der Westhuizen said that he told the journalist that he had not yet thought about it. At his farewell, he jokingly said: 'But now, I think my legacy may well be, that through a few of my judgments and speeches, and the speech

of the deputy minister, my legacy might be that I was the first judge to bring *The Great Gatsby*, President John F Kennedy, Monty Python, Kris Kristofferson and Bob Dylan into our constitutional jurisprudence. These will henceforth all be authorities to be quoted.'

He said that the 12 years in the Constitutional Court was a wonderful privilege and honour and that the founding father and mothers achieved a miracle. Out of nothing, they founded a court that is an international benchmark admired by the world. 'The values of the Constitution live on and we remain bound by the precedents set by its decisions,' he said. He added the court's work and its environment have changed. 'According to statistics ... 27 applications were received in 1998 and 14 judgments delivered. ... In 2004, when I was appointed, this court received 75 applications and gave 17 judgments. In 2014 we received 219 applications and delivered 35 judgments. And on the agenda of the judges conference [held on 25 January] ... 72 new applications were, amongst other issues, also requiring attention,' Justice van der Westhuizen told the court.

Justice van der Westhuizen thanked his colleagues in the court for the honour and privilege to work with them and also thanked his wife, Sarojini and his three children, Alexander, Dassie and Vincent, for all their support.

Seven wishes

In his conclusion, Justice van der Westhuizen concluded with a wish list for the future. He wished:

1 For democracy to grow stronger and for all in South Africa to realise that humankind has not been able to think of a better alternative for democracy, in spite of all its flaws. He said democracy is something that needs to be worked on continuously.

2 The Constitution be respected. He said that it might be a result of a compromise, but it did not mean that it represents 'selling out'. 'It was born from the aspirations, and the blood, and brains of our people. Before we blame it, before we amend it, let us study it closely and use it to its full potential.'

3 That corruption in the public and private sectors be eradicated. Justice van der Westhuizen said 'corruption eats up its own children' and referred to a short story '*Drie kaalkoppe eet tesame*' written by Afrikaans author Jan Rabie. 'In this story it shows in gruesome graphic detail how the greed and gluttony of the greedy devour them and only their bloody, slimy, empty skulls remain around a restaurant table.'

4 Poverty be eradicated and that all people can receive a proper education and that people can be more equal. 'It hurts and saddens an old judge, who has tried in a small way to work for a just

society, to see children begging in rags in the blistering sun, 21 years in to our democracy.'

5 'The trend among litigants and their lawyers, perhaps, especially in criminal matters, to use the rules aimed at ensuring a fair trial to play with technical loopholes in order to get postponements and avoid justice.'

6 Judicial independence and integrity. The government, the non-government organisations and the business world must respect the independence of the judiciary. 'The judiciary is one of three indispensable arms of the state. I wish that the judiciary would not be undermined by vulgar populist attacks by disobedience to court orders, by attacks on the integrity of judges. A judge in a leadership position once said at a conference, that the courts must earn their independence. How can they earn it? Should they first show their loyalty to politicians or business or some or other force? Independence is not to be earned, it is a constitutional imperative. ... A court that is not independent is not a real court. ... The responsibilities on judges in courts are huge. Independence is not only to be free from political control, it comes from within, and it is directly linked to integrity. We must be honest with ourselves and with all those around us. We must guard against all the temptations and petty grievances and aspirations for promotion or other advantages and desires for temporary joy that comes from the windmills of our minds and the dark corners of our psyche in judgments and otherwise. Judges are humans and human beings make mistakes, they stumble, hurt and get hurt. Judges must be in touch with their society but try to be independent at all times from undue temptation.'

7 That South Africa can emerge from racism and accusations of racism. Justice van der Westhuizen said that he does agree that 'racists should run'. 'I wish that racist thoughts and conduct would stop. There is absolutely no place for it in our constitutional democracy, but I also wish that we would all pause when we accuse others of racism and ask why do we do it? To expose an evil? That is our duty. To paralyse others in order to gain power or material wealth? That is what Apartheid did. This is how Apartheid used race for a long time. I wish that all of us, before we solemnly declare "I am not a racist" would pause and look deep into our hearts and souls. The world is not just black and white. There are at least 50 shades of grey or perhaps brown in between.'

Kathleen Kriel
Kathleen@derebus.org.za

South Africa tops at international moot court competition

South Africa has come out tops at the 2016 International Moot Court competition at The Hague in the Netherlands. This is the third time that this competition has taken place and is held every second year.

This year, the competition took place from 18 to 22 January. The topic focused on the issue of crimes against humanity during war time.

Twelve countries participated in the competition, namely, Argentina, Bulgaria, Germany, Mongolia, Netherlands, Poland, Romania, Russia, St Martens, the United States of America (US), Venezuela and South Africa. Contestants were given an opportunity to argue using international criminal law and treaties that are relevant to the International Criminal Court.

After eight preliminary rounds held over three days at the Leiden University, the two teams with the highest accumulated scores were the US and South Africa. One team would argue the case of the defence and the other, the case of the prosecution. To determine this, lots were drawn, and team South Africa (team SA) was to argue the case for the defence. The two teams competed in the final held at the International Court of Justice (ICJ) at the Peace Palace.

Team SA was made up of the top eight learners of the National School Moot Court competition, which took place in late 2015 (see 'National Schools Moot Court competition' 2015 (Dec) *DR* 16). The team consisted of three lawyers for the prosecution, three for the defence and two alternates. These learners were Katelyn Chetty and Shandr  Smith from Gibson Pillay Learning Academy; Claire Rankin and Clara-Marie Macheke from Springfield Convent School; Paseka Selinyane and Simon Motshweni from MH Baloyi in Winterveldt in the Northwest of Pretoria, as well as Nthabiseng Mbatha and Mandisa Xaba from Sakhelwe High in Ladysmith in KwaZulu-Natal.

Team SA's defence team went against team United States' prosecution team. Ms Smith (17), Ms Rankin (17) and Ms Macheke (16) made up South Africa's defence team.

Ms Smith, who enrolled for her first year of her BA law degree at the University of the Witwatersrand this year, told *De Rebus* that she is still overwhelmed that they beat the US. She said that she feels ecstatic about the win adding that



The International Court of Justice where the final round of the moot court competition took place.

the experience was a great one. 'I would like to be involved in the research part of law,' she said. Ms Smith said that her favourite part of the competition was meeting other children from all the different cultures. 'Speaking at the ICJ in front of a large crowd made me extremely nervous even though I knew what I was doing and was prepared,' she said. She added: 'We won a trophy but the title in itself holds a lot of weight, no one can ever take that title away from us'.

Ms Rankin, who is currently in matric said that winning the competition 'was incredible and affirming to know that

your hard work pays off. It was such a great start to the year'. Ms Rankin added that she would like to be a state attorney one day and that the competition gave her a chance to explore the profession of law where she found out that 'public speaking and arguing is right up her ally'.

Ms Rankin said that no one expected them to win. 'We were the under dogs. We only had four days to prepare. It was a team of just girls. People never thought that we were capable,' she said. She added that she thoroughly enjoyed the experience as it was her first time out of



Team South Africa's defence team (from left) Shandr  Smith, Clara-Marie Macheke and Claire Rankin, beat team United States at the 2016 International Moot Court competition at The Hague.



Pictured with Team South Africa is (from left): Principal at Gibson Pillay Learning Academy, Mahalingam Pillay; family member of Clara-Marie Macheke, Fortune Moyo; Simon Motshweni; Paseka Selinyane; Ambassador for South Africa in the Netherlands, Vusi Koloane; Department of Basic Education: Deputy director of social cohesion and equity in education, Malebo Lefoka; Claire Rankin; Clara-Marie Macheke; Katelyn Chetty; Shandré Smith; teacher at MH Baloyi High School, Stephanie Mashilo; Mandisa Xaba and Nthabiseng Mbatha. Missing from picture: Gift Kgomosotho, coach.

the country. 'It was incredible,' she enthused.

Ms Macheke, who is also currently in matric said that it felt phenomenal to have been part of a winning team. 'I want to be in a career that tangibly helps people and law is one of those careers. I have applied for law and medicine next year,' she said. She reiterated Ms Rankin's sentiments that no one expected them to win, adding that 'when we started doing well, people were very surprised'.

Ms Macheke said that the competition

opened them to a different experience. She said that she enjoyed meeting different people and experiencing different cultures.

De Rebus also had the opportunity to speak to team SA's coach, Gift Kgomosotho. Mr Kgomosotho completed his LLB degree in 2015. At the moment he is working as a legal researcher for The Institute of International and Comparative Law in Africa at the University of Pretoria. He would like to become an advocate one day.

Mr Kgomosotho holds the titles of South African National Championship and Best Oralist in the Phillip C Jessup International Law Moot Court Competition 2014 and has won a number of moots. He told *De Rebus* that he is incredibly proud of the team. 'The first phase of the training happened via correspondence, the second phase was during a workshop I hosted in Pretoria. The team had very limited time, and they worked very hard and diligently. What is more, is that they all got together and really formed a team. The learners displayed an intuitive ability to interact with international criminal law, which is something I found to be very impressive for that level,' he said. Mr Kgomosotho added that team SA was the only African team that took part in the competition.

• All pictures supplied by Gift Kgomosotho



Team South Africa's defence team and team United States prosecution team arguing in the final round of the international moot court competition in January.

Nomfundo Manyathi-Jele
Nomfundo@derebus.org.za

NADEL AGM date

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

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

Admission examination dates for 2016

Admission examination:

- 16 August
- 17 August

Conveyancing examination:

- 11 May
- 7 September

Notarial examination:

- 8 June
- 19 October

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

National Forum on the Legal Profession: One year on

On 23 January, at its fourth meeting since the launch of the National Forum on the Legal Profession (NF) in March 2015, two of the NF members – Martha Mbhele and Willem van der Linde – were replaced by their nominating constituents as they had both been appointed to the Bench. The Law Society of South Africa (LSSA) nominated its former Co-chairperson, Kathleen Matolo-Dlepu from the Black Lawyers Association to replace Ms Mbhele, and the General Council of the Bar replaced Mr Van der Linde with Geoff Budlender SC.

At the January meeting, the NF was in the process of finalising its staff complement of administrative and research staff. However, the practitioners in the four working committees continued to deal with the tasks allocated to those committees at meetings scheduled – usually on Saturdays – between the NF meetings. As matters are ripe for recommendations, such recommendations from the working committees will serve before the plenary of the NF for debate and finalisation. In the meantime, the NF's chairperson and deputy chairperson – Kgomoiso Moroka SC and Max Boqwana – continue to brief the Minister and would be presenting the second

six-monthly report on the NF's progress, which must be made to Justice Minister Michael Masutha in terms of s 98(4) of Legal Practice Act 28 of 2014 (LPA).

The Governance Committee is preparing recommendations to the NF on whether there should be nine provincial councils (see s 23) and committees (s 23(6)) at every seat of the High Court, or whether it would be more feasible to have six provincial councils or four based on the current provincial law societies' jurisdictions. The committee has worked on an allocation of functions at national, provincial and committee level.

The committee has also consulted with state law advisers to review *lacunae* in the Act with a view to making amendments so that a proper hand-over period is provided for. This will allow the NF to oversee a parallel implementation process from the current dispensation to the new dispensation.

The Rules and Code of Conduct Committee has been working on a code of conduct, which is envisaged to contain broad principles in its preamble, referring to the Constitution, transformation imperatives and prohibition of unfair discrimination. The rules are being drafted taking into account the current uniform rules for the attorneys' profession, as well as rules relating to the advocates' profession.

The Education, Standards and Accreditation Committee has been discussing the future of vocational training focusing on the extent to which it may be possible to coordinate the training of attorneys and advocates, and looking at specific training that may be required for candidate legal practitioners entering each branch of the profession.

Besides dealing with the recruitment and appointment of NF administrative staff, the Admin and Human Resources Committee will commence work on the human resources organogram for the LPC and the consultation process of negotiating and transferring staff from the current statutory law societies to the LPC.

- Updated information on developments relating to the Legal Practice Act can be viewed on the LSSA website at www.LSSA.org.za (under the tab 'Legal Practice Act').

- For reports on previous meetings see 'First meeting of the National Forum of the Legal Practice Act' 2015 (May) *DR* 12; 'National Forum starts shaping the new dispensation' 2015 (Sept) *DR* 18 and 'National Forum meets for third time to continue Legal Practice Act work' 2015 (Nov) *DR* 16.

LSSA strongly opposes Debt Collectors Amendment Bill

The Law Society of South Africa (LSSA) expressed its strong opposition to the Debt Collectors Amendment Bill, 2016, in submissions made to the Justice Department at the end of January. The LSSA Co-chairpersons were also seeking a hearing with Justice Minister Michael Masutha to discuss the Bill.

The controversial Bill proposes making attorneys and their staff subject to the jurisdiction of the Council of Debt Collectors and the provisions of the

Debt Collectors Act 114 of 1998. In its submissions, the LSSA noted that the attorneys' profession was being blamed unfairly for ambiguities in the legislation governing emolument attachment orders and for the conduct of a relatively few attorneys.

The LSSA is, in particular, concerned that the measures introduced by the Bill –

- will not contribute towards a solution, instead it will create more setbacks than solutions;
- are premised on flawed interpretations

of court cases and media reports with regard to the abuses regarding the collection of debts;

- will make significant inroads into the independence of the legal profession;
- will result in the overwhelming majority of attorneys, if not all, together with their staff members having to register as debt collectors, including those attorneys who do not primarily engage in debt collection;
- are based on misconceptions as to the extent of abuses by attorneys. We submit

that there are relatively few attorneys that are guilty of such abuses;

- completely disregard existing legislation regulating attorneys and duplicate the regulation of attorneys;
- disregard proposed amendments to the Magistrates' Courts Act 32 of 1944 to remedy the abuse of emolument attachment orders and jurisdictional matters, which are due to be promulgated in early 2016;
- completely disregard the firmly established principle of legal privilege, which is an inherent part of the South African and global legal profession;

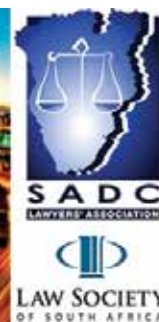
- will render invalid, in terms of s 8(3) of the Debt Collectors Act, any agreement (or parts thereof) entered into between an attorney and his or her client (which involves debt collection) before or after the Bill becomes law – if the attorney is not registered with the Council for Debt Collectors. This will have far-reaching implications for the overwhelming majority of law firms and their clients;
- may result in a situation where a legal practitioner, who has been reprimanded by a law society for a relatively minor transgression such as not having answered correspondence timeously, is

considered not to be competent to be registered as a debt collector and will effectively be prevented from operating a legal practice; and

- endeavour to compare fees between attorneys in litigious matters and debt collectors in non-litigious matters, even though there is virtually no comparison between the academic qualifications of debt collectors and attorneys.

The LSSA's full submissions can be accessed on the LSSA website at www.LSSA.org.za (under the tab 'Our initiatives' > Advocacy > Comments on legislation).

Meet and network with SADC practitioners at the SADC Lawyers Association Conference in Cape Town in August



The Southern African Development Community Lawyers' Association (SADC LA) annual conference and general meeting (ACGM) is the premier event for lawyers in the 15-member Southern African Development Community (SADC) region. This year, the Law Society of South Africa (LSSA) is proud to co-host the conference with the SADC LA at the Cape Town International Convention Centre in Cape Town from 17 to 19 August. The last time this conference was held in South Africa was in the year 2000.

Over the years the event has grown in profile and relevance to the legal com-

munity, the governments of SADC, civil society partners, citizens of SADC and the business community. From attendance by a handful of lawyers at inception, the SADC LA ACGM now attracts an average of 500 participants annually. Participants are drawn from practising lawyers and advocates, Ministers of Justice, attorneys general, members of the judiciary, human rights advocates and civil society actors. In addition, over the years, the ACGM has also attracted the presence of senior government officials from the various SADC countries.

This year's conference will feature a special half-day networking side event to provide a forum for practitioners from

the region to meet specifically to network with potential associates. There are also two social events that will provide further networking opportunities: A welcome cocktail sponsored by First National Bank, and a closing conference gala dinner.

A range of sponsorship and expo packages provide a unique forum to showcase products, firms and services to the SADC legal community.

Accommodation has been negotiated with specific hotels close to the conference venue.

For more information see www.LSSA.org.za or e-mail LSSA@LSSA.org.za



LEAD seminars 2016

For more information and to download the brochures and registration forms, visit www.LSSALEAD.org.za or contact the seminars division at e-mail: seminars@LSSALEAD.org.za or call (012) 441-4613/4644/4608.

People and practices

Compiled by Shireen Mahomed



Front from left: Susanne Rall-Willemse, Philip Niemann and Merlenn Titus. Back: Clive Hendricks.

Marais Muller Yekiso in Cape Town have changed the firm's name to **Marais Muller Hendricks Attorneys**.

Clive Hendricks, a director on the management committee specialises in employment law.

Susanne Rall-Willemse has been promoted to a director. She specialises in conveyancing and estates.

Philip Niemann has been promoted to a director. He specialises in commercial litigation, contract, transport law and debt collecting.

Merlenn Titus has been promoted to a director. He specialises in commercial litigation, contract, transport law and debt collecting.



Webber Wentzel in Johannesburg has appointed Leslie de Bruyn as a partner in the corporate department. He specialises in regulated and negotiated mergers and acquisitions, equity capital markets, joint ventures, real estate investment trusts and resources transaction.

Mncedisi Ndlovu & Sedumedi Attorneys in Johannesburg has four promotions.



Mandla Mnisi has been promoted to a director. He specialises in corporate, commercial and municipal law.



Thobani Mnyandu has been promoted to a director. He specialises in construction and engineering law.



Nkosenhle Mzinyathi has been promoted to a director. He specialises in commercial litigation and labour law.



Phumzile Phala has been promoted to a director. He specialises in property and commercial law.



Bowman Gilfillan in Johannesburg has appointed Ulla Murphy as a partner in the tax department. She specialises in advisory tax services on the financial services sector.

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.



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By
Hennie
Welgemoed

Non-profit companies and public companies: There are no longer 'late proxies'

In the matter between *R du Plessis Barry v Clearwater Estates NPC and Others* (GP) (unreported case no 82306/2014, 13-11-2015) (Van der Westhuizen, AJ), it was decided that the provisions of Articles (contained in the Memorandum of Articles) stipulating, *inter alia*, (1) that a proxy must be deposited at the office of the company not less than 48 hours before the time appointed for holding of a meeting and (2) if not deposited timely, it shall not be treated as valid. It 'would result in an internal conflict within section 58 of the Act' and '... are inconsistent with the provisions of the Act and in particular with provisions of section 58(1) of the Act. Consequently the provisions of the articles ... of the first respondent's Memorandum of Incorporation are void to that extent' (see para 30 and 31).

As per para 32 of the judgment, it was also found that the condoning of and acceptance of the alleged late proxies at the annual general meeting of the NPC were consistent with the provisions of s 58(1) of the Companies Act 71 of 2008 (the Act).

One can only ponder the dire consequences of the practical utility of the above judgment in respect of, *inter alia*, the following:

- I estimate that at least 90%, if not more, of our colleagues who have drafted a Memorandum of Incorporation (MOI) on behalf of their corporate clients, were wrong and advised their company clients incorrectly.
- I further estimate that 90%, if not more, literally thousands of registered MOI's in our country contain void stipulations, which are inconsistent with the Act pertaining to late proxies.
- General meetings or annual general meetings will be disrupted and inconvenienced to the extent that no meeting will commence on the stipulated time scheduled in the notice until all proxies delivered, whether a millisecond or a nanosecond before the time scheduled for that meeting are firstly scrutinised, the validity thereof verified and counted.
- One can only imagine what absolute chaos will ensue in instances when public companies with literally hundreds

and possibly thousands of eligible voter members giving proxies, are confronted with proxies delivered a second before the scheduled time for the commencement of the meeting.

The concept of disqualifying 'late proxies' stood the test of judicial scrutiny over time since the Companies Act 46 of 1926, the previous Companies Act 61 of 1973 and I, therefore, suggest that the reasoning behind or justification for the conclusions in the above judgment, are wrong.

Section 58 of the Act stipulates, *inter alia*, the following:

'58(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to -

(a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or

(b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60.

(2) A proxy appointment -

(a) must be in writing, dated and signed by the shareholder; and

(b) remains valid for -

(i) one year after the date on which it was signed; or

(ii) any longer or shorter period expressly set out in the appointment, unless it is revoked in a manner contemplated in subsection (4)(c), or expires earlier as contemplated in subsection (8)(d).

(3) *Except to the extent that the Memorandum of Incorporation of a company provides otherwise -*

(a) ...

(b)...

(c) a copy of the instrument appointing a proxy must be *delivered to the company*, or to any other person on behalf of the company, *before the proxy exercises any rights* of the shareholder at a shareholders meeting' (my emphasis).

In para 22 of the judgment, with reference to s 58(3)(c), it was, in my view, incorrectly concluded:

'That section does not refer to or relate in any way as to the time when the proxy is to be so delivered. That is provided in section 58(1) of the Act.'

Surely 'before the proxy exercises any

rights' refers to and relates to time, 'before' can be nothing else than time related.

Surely the introductory wording 'except to the extent that the Memorandum of Incorporation of a company provides otherwise' postulates that the contents of s 58(3)(c) is alterable as stipulated in s 15(2) of the Act, which reads as follows:

'15(2) The Memorandum of Incorporation of any company *may* -

(a) include any provision -

(i) ...

(ii) altering the effect of any alterable provision of this Act;

(iii) imposing on the company a higher standard, greater restriction, *longer period of time* or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act' (my emphasis).

An 'alterable provision' is defined by s 1 of the Act, as follows:

'[A] provision of this Act in which it is *expressly contemplated* that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by the company's Memorandum of Incorporation' (my emphasis).

Does 'except to the extent that the Memorandum of Incorporation of a company provides otherwise' not mean 'expressly contemplated' within the meaning of an alterable provision?

The 'any time' referred to in s 58(1) relates to the giving of a proxy *inter partes* between the member and whomever the member appoints in terms of the proxy. However, as far as the company is concerned for purposes of regulating its own administrative procedures as provided for in s 15(2)(a)(iii) above, it is entitled to change 'before' as stipulated in s 58(3)(c) to '48 hours before'. *Inter partes* the proxy giver and the proxy receiver, it can be done any time.

Hennie Welgemoed *Blur (UP) BProc (UP)* is an attorney at Botha Massyn & Thobejane Attorneys in Kempton Park.



By Dr
Tapiwa
Shumba

Legal forensic education: Crossing the divide between law and science

In an adversarial system such as ours, the administration of justice relies heavily on the acumen and knowledge of legal representatives. This insight is dependent on many factors including an understanding of the different forms of evidential material, which may include scientific evidence, involved in the case.

Although the use of expert witnesses compensates for the lack of forensic knowledge on the part of practitioners, there is no doubt that practitioners still need to be knowledgeable about science for various reasons. A practitioner can only fully engage with forensic evidence presented by experts if he or she has an understanding of how to engage with such evidence. It is only then that a practitioner would be able to apply the test for reliability, credibility and even admissibility, in some cases.

Of course questions about whether the LLB curriculum needs to be adjusted to include science subjects or whether law students should also study accompanying science courses, are controversial and complex policy issues. Decisions on such matters, therefore, tend to be evolutionary and painstakingly slow, if ever made.

The invasion of science in our criminal justice system is a global phenomenon. However, there is no global solution in sight yet and in our case, we have to approach this matter based on the needs of a criminal justice system defined by the values of fairness, justice and equality before the law. We must decide whether justice is being adequately served by the current situation and whether more could be done.

Of course even a new LLB curriculum cannot change the situation of those already in legal practice. However, there are various avenues that could be explored to equip practitioners with the necessary knowledge and skills for working with forensic science, which has become an indispensable element of our criminal law.

The Law Society of South Africa, the National Prosecuting Authority, the Bar and the Judicial Services Commission, among other bodies involved in

the regulation of the role players in our criminal justice system, can take a lead in ensuring that their members become adequately capacitated to deal with the increasingly important issue of forensic science.

At the moment, academic institutions cannot compel students and qualified practitioners to undertake additional courses in forensic law. However, it has also become critical for universities and other institutions of higher learning to contribute towards addressing this pertinent issue. For instance, universities can offer short courses on forensic law to mitigate the current situation. In any case, even if professional bodies appreciate the need, it still boils down to whether academic institutions have the capacity to offer the necessary education.

The Nelson Mandela School of Law (faculty of law) at the University of Fort Hare hosts a project known as a Research Niche Area (RNA) on law science and justice (forensic law). This interdisciplinary law, science and justice research niche area was launched by the Faculty of Law in 2014. It is headed by Professor Lirieka Meintjes-van Der Walt, a distinguished scholar on the African continent in the area of forensic law who is among the leading researchers in the field.

The RNA primarily aims to -

- conduct relevant research on the appropriate use of science in legal fact finding and decision-making and policy;
- build capacity in law, science and justice research and to promote future advances in these areas;
- develop staff members as scientists and legal scholars with national and international recognition as experts in their fields with emphasis on scientific development and National Research Foundation rating;
- publish and disseminate research findings so as to advance knowledge of relevant target groups, workshops, scientific reports, conference contributions and publications in national and international journals;
- optimise the quality and quantity of research outputs and post-graduate training, evaluated on an annual basis; and
- provide a source of expertise and as-

sistance to statutory councils and parliamentary decision-makers on matters of research and knowledge in this field and to train and equip legal practitioners and policy makers with the knowledge and skills required in the sophisticated and complex legal arena.

These projects of the RNA are part of the national and global efforts towards supplementing the short-comings of the general law degree. Of course practitioners are not compelled to take up these opportunities to equip themselves, but the RNA offers what could be the bridge between what practitioners have and that which they ought to have in order fully to engage with forensic aspects of our criminal law.

In the long run, it can only be hoped that such efforts will become the mainstay of dealing with the ever advancing technological and scientific world of our criminal justice system. Indeed these efforts are needed to and will remain crucial to fill the void in our practitioners; a problem that is becoming apparent in the day to day administration of justice. Although they are not the panacea to the problem, these efforts together with other multiple initiatives from other role players could help to reduce the knowledge gap that our criminal justice system cannot afford.

Of course a permanent remedy is required to bridge the chasm between lawyers and scientists. However, before a lasting solution can be provided by those with the authority to do so, for the present moment we might have to rely on multiple efforts from different angles to mitigate the effects of the new wave of scientific and technological advancements impacting on the administration of justice.

Dr Tapiwa Shumba LLB Cum Laude (UFH) LLM (UCT) LLD (Stell) is a Post-doctoral Research Fellow in RNA Law, Science and Justice at Nelson R Mandela School of Law at the University of Fort Hare in East London. Dr Shumba writes in his personal capacity. □

By the
prosecutions
and the financial
forensic units of
the Attorneys
Fidelity Fund

Technology: A necessary tool

In today's world, technology is changing so fast that attorneys can never catch up and from a cost-benefit point of view, perhaps they should not even try. For the tech savvy attorneys, there is usually a strong temptation to have the latest and greatest tools in their practice, but for all intents and purposes, one should not get caught up in the hype to the extent that it diminishes ones productivity and ultimately ones businesses.

Just as the saying goes, 'guns do not kill people...', the use of a mobile devices in a trial will not kill a court case. However, what it certainly can do is assist an attorney with presentation of evidence in a more professional and seamless manner than would have been possible, say ten years ago. One, however, should always be cognisant of the requirements for admissibility of electronic evidence as defined in the Electronic Communications and Transactions Act 25 of 2002 (ECT Act).

Section 11(1) of the ECT Act recognises information in electronic form and not simply computer printouts, as done by most of its predecessors.

Section 15(1) of the Act dealing with admissibility of data messages states:

'In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –

(a) on the mere ground that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.'

As pointed out in the *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) case, this subsection facilitates admissibility by excluding evidence rules that deny the admissibility of electronic evidence purely because of its electronic origin. Section 15 places electronic information on the same footing as traditional paper-based transactions, and thus does not do away with the requirements governing the admissibility of documentary evidence, which are relevant, authentic and original.

Let us look at some of the main reasons legal practitioners should be up to speed with technology and related innovations:

• Increased productivity

If a long term approach is taken on the procurement of trust and business accounting packages, a lot can be gained through applications that allow room for innovation. For example, a trust and business accounting package may be further supported by a mobile application. The mobile application can be fully featured and allow its users to have real time access to all of their business' core financial functions including fee books, inquiries, business reporting and accompanying documentation – yes, all completely mobile. The advantage of this feature is that practitioners need not be confined to an office in order to do their work or provide oversight, but can have access from anywhere, anytime.

Here are some of the benefits in which technology can increase productivity for practitioners:

– Transactions can be tracked and a proper audit trail can be

maintained, that can tell what was done, by whom and when. This feature is very useful when one needs to retrieve past data and respond to specific queries. By entering a reference number/code, all information pertinent to a transaction is retrieved at the click of a button.

– Processing of transactions is uniform making it easy and quick to access to use for reporting purposes. For example, items get grouped and any potential clerical errors are eliminated.

– One person can perform more than just one function, functions which could have been performed by more than one person in a manual environment, while the system ensures that oversight is still provided without engaging a second person. This reduces the need for a large head count while at the click of a button more than one function is performed.

– While there is a lot of cybercrime and/or hacking into computers, there are companies of professional hackers who through their processes can evaluate the vulnerability of the firm's computer environment and assist firms to secure their environment.

– Computers further enhance management oversight. This can be done through running of reports that can provide management with required information. Practitioners can define things that they would regard as exceptional and require attention when they programme their systems and monitor these in order to supervise productivity.

– Practitioners can build checks and balances into systems that will ensure that certain automated processes take place without the involvement of a physical person. This feature may further reduce the delays where, for example, one could be waiting for a signature in order to proceed with service offering.

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• Increased footprint

While there are various ways in which a law firm may increase its footprint including word-of-mouth, billboards, etcetera. A law firm can also make use of innovative technology to improve or expand its footprint, for instance, by making use of a web application that helps large organisations to manage the distribution of content. Its application helps law firms to connect peers with the right content; and allows users to share via various social media platforms. With web applications, business professionals can share to LinkedIn, Twitter and other social networks without leaving their inbox. This may help law firms bring in more business through mass sharing of content, blogs and articles.

Sticking to social media, according to the World Wide Worx and Fuseware report 'South African Social Media Landscape 2015' (www.worldwideworx.com, accessed 4-11-2014), Facebook is the number one social platform in South Africa with over 11 million users as of August 2014. YouTube was second with around 7 million users. Twitter had over 6 million users while LinkedIn sat at just under 4 million users. These numbers cannot be ignored if a law firm is trying to increase its brand awareness and value via social media. The connection between social media and new clients or business may not be readily recognisable, and measuring the associated return on investment is particularly difficult. However, it is fair to say that social media plays an important role in the marketing of a law firm and the associated advantages in terms of recognition, referrals and relationships.

Another way a law firm can increase its client base is through the implementation of an interactive website that is not only user friendly, but tells the firm's story and evidence of its expertise in an attractive way. For instance, video explanations and walkthroughs on websites may be used to achieve this and while many people may loathe videos, statistics do show it to be the overwhelmingly favoured choice for content consumption.

• Compliance

While the use of most technological innovations remains a choice for users, it is slowly becoming compulsory in other spheres. For instance, the 2016 Fidelity Fund Certificate (FFC) Application Form as gazetted on 30 September 2015 (GN R898 GG39239/30-9-2015), has been automated and applications are only accepted through an online process.

Attorneys are regulated through the Attorneys Act 53 of 1979 and the rules of the various provincial law societies, with the Act requiring them to hold an FFC in order to charge fees for legal services rendered. This is, therefore, a compliance issue but in order to comply, it is compulsory for them to interact with a computer system. Similar innovations have been seen with other institutions as well such as the South African Revenue Services (Sars), the Financial Intelligence Centre (FIC), etcetera.

From 1 March, it will become mandatory for practitioners to pay over trust interest to the Attorneys Fidelity Fund (AFF) via the relevant law society on a monthly basis. For some attorneys, the calculations and number crunching to determine the amounts to be paid to the AFF are an administrative burden, especially if it has to be monthly. The AFF has worked very closely with the banking industry and products are available for attorneys to automate their monthly interest payments in a seamless fashion, with little or no practitioner involvement, and recoverable bank charges are automatically set off against the interest earned. For a more in-depth study of the process see 'Interest earned on trust current banking accounts: To be paid over monthly' 2015 (Jan/Feb) *DR* 29.

While banks can offer this product to practitioners, this does not absolve the practitioners of their responsibility to pay over

the interest but reduces the administrative burden on the part of the practitioner/firm. Readers are further advised to read the following articles –

- 'Have you paid your dues?' 2014 (April) *DR* 23; and
- 'Interest earned on trust current banking accounts: To be paid over monthly' 2015 (Jan/Feb) *DR* 29.

The Attorneys Insurance Indemnity Fund (AIIF) provides a computerised diary system to attorneys, a Prescription Alert system, which is a valuable tool offered to legal practitioners at no cost. It records particulars of all time barred matters (such as motor vehicle accident claims (MVA)) and more recently, other civil claims registered by practitioners in order to provide them with early notification of the impending prescription dates. These kinds of initiatives are there in order to assist practitioners to best manage their activities and practitioners are encouraged to take full advantage of them.

Conclusion

Like any other investment, investing in technology involves a financial injection for procurement of computers, the system/s required, security of the system/s and data stored in the system/s, etcetera. This injection may mean that the firm has to decide on what to set aside that could also require funding. A cost versus benefit analysis should therefore be conducted and an informed decision taken. It is imperative for practitioners to have and maintain proper backups outside of their offices in order to ensure continuity should disaster like fire, theft of computers, strike, etcetera. This will ensure that the practitioner can continue to service clients with very little disruptions experienced.

While we promote and encourage the use of automated systems, we caution practitioners to ensure that they have the proper checks and balances in place. An automated system is as good as its programming and *vice versa*. It is important to identify potential risks associated with information technology on time and put in place measures to reduce their likelihood and impact to acceptable levels.

While we acknowledge that one way to land new business and clients is from referrals based on excellent client service and personal relationships, it is important to take an all-round approach as the competition intensifies and the smarter use of technology becomes a key catalyst for growth. You may not be an early adapter to technology, but it is never too late to get into the mix and learn because, it is an essential and indispensable part of any modern business.

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By
Kgopotso
Bapela and
Philip
Stoop

Unpacking the Rental Housing Amendment Act 35 of 2014

The Rental Housing Act 50 of 1999 (the Act) came into force on 1 August 2000. This Act regulates the relationship between landlords and tenants and it provides for dispute resolution by the Rental Housing Tribunal. This Act has often been criticised for its shortcomings especially pertaining to enforcement (SI Mohamed 'Enforcement of Rental Housing Tribunal Orders' June 2008 *Property Law Digest* 3; PN Stoop 'The law of lease' 2008 *Annual Survey of South African Law* 891; SI Mohamed 'RHTs "Exclusive" Jurisdiction over Unfair Practice' June 2012 *Property Law Digest* 9). However, the Constitutional Court in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) stressed the importance of the Act and the Rental Housing Tribunal. The shortcomings of the Act have recently been addressed by enactment of the Rental Housing Amendment Act 35 of 2014 (Amendment Act), which will come into operation on a date to be proclaimed. Only a few landlords, tenants or practitioners have taken notice of the Amendment Act despite it having a substantial impact on the rental industry, and landlords and tenants. Some of the major amendments are pointed out in the overview below.

The Rental Housing Act 50 of 1999 prior to amendments - purpose

Several practical and statutory weaknesses have evolved ever since the introduction of the Act in 2000. Although the Constitutional Court confirmed the position of the Rental Housing Tribunal as the body conferred with 'special' powers to determine whether the rights of the landlord or tenant has been violated by and unfair practice some provinces still have to establish a Rental Housing Tribunal. Another weakness relates to the Rental Housing Tribunal having no 'teeth' since it could not enforce its ruling. Additionally, commissioners and staff appointed by the Rental Housing Tribunal did not all undergo relevant training, and municipalities have failed to establish rental housing information offices as required by Rental Housing Amendment Act 43 of 2007 (Amendment Act of 2007) (SI Mohamed 'The Rental Housing Act: Second Generation Amendments' March 2014 *Property Law Digest* 6).

Post Amendment

The Amendment Act was drafted to address some of these challenges. The aims of the Amendment Act includes to -

- set out the rights and obligations of the tenants and landlords in a coherent manner;
- require leases to be in writing;
- extend the application of ch 4 to all provinces; require Members of the Executive Council (MEC) (the members of the provincial executive council

Picture source: Gallo Images/iStock



concerned with housing matters) to establish Rental Housing Tribunals in all provinces;

- extend the powers of the Rental Housing Tribunals;
- provide for an appeal process;
- require all local municipalities to have Rental Housing Information Offices;
- provide for norms and standards related to rental housing; and
- to extend offences.

Responsibility to promote rental housing

The responsibility of the government to promote rental housing is regulated by subs 2(5) and (6), which amend s 2 of the Act. The Minister of Human Settlements is obliged, through means, to develop guidelines, programmes, directives and measures to promote rental housing, and to monitor and assess the impact of the Act on landlords and tenants, especially on poor and vulnerable tenants. The duties of national and provincial government with regard to rental housing are provided for in the new subs 3(5) and (6). The government has to develop and fund programmes to train members of Rental Housing Tribunals and other officials appointed in terms of the Act. Provincial governments are obliged to assist local municipalities not yet on level three accreditation, in establishing Rental Housing Information Offices.

Relations between tenants and landlords

Chapter 3 of the Act, which is amended substantially, regulates the rights and duties of landlords and tenants. The newly inserted subs 4A and 4B respectively regulate the rights and obligations of tenants and landlords. Sections 16(aA) and (aB) provide that interference with the rights and duties of a landlord or tenant in terms of subs 4A and 4B is an offence punishable with a fine or imprisonment not exceeding two years or both.

• *Payment of a deposit*

The Amendment Act contains several detailed provisions dealing with deposits paid in terms of a lease. Under s 4B(1) a landlord may require a tenant to pay a deposit before moving into a dwelling, which must be deposited in an interest-bearing account. Section 4A(1) requires the landlord to issue a written receipt for all payments received from the tenant, including for payment of a deposit. Additionally the tenant is in terms of ss 4A(2) and 4B(2) entitled to request the landlord to provide him or her with written proof in respect of interest accrued on the deposit. Section 4A(3) requires that the deposit and interest accrued on it must be paid to the tenant within seven days of the expiration of the lease.

Section 4B(3) provides that reasonable cost incurred in repairing damage to the dwelling may be deducted from the deposit, but relevant receipts reflecting these costs must be made available to the tenant for inspection. Failure by a landlord to repay the deposit to the tenant is a criminal offence in terms of s 16(aB), which is punishable with a penalty or imprisonment not exceeding two years or both.

• *Inspection of the dwelling*

Subsection 4B(4) provides that before moving into the dwelling, the tenant and landlord must together determine the existence of any defects or damage to the property with a view to determining the landlord's responsibility to rectify them or to register the defects or damage. In order to determine damage to the dwelling, ss 4A(4) and 4B(5) provide that on the request of the landlord, and at least three days before the expiry of the lease, the tenant must make himself or herself available to conduct a joint inspection of the dwelling at a time convenient to both of them and subject to the tenant's right to privacy. The purpose of this inspection is to determine if any damage has been caused to the dwelling during the tenant's occupancy.

• *Payment of rent and other costs*

Section 4A(8) creates a payment duty by providing that the tenant is liable, on the due date, for rental and other costs agreed on in the lease. However, this subsection also provides that for costs other than those agreed to in the lease, the tenant is only liable on proof of factual expenditure by the landlord. The reason for the latter liability is not completely clear as the amended subs 5(6) (h) requires that a contract of lease must contain information on the amount of any charges payable in addition to rental. It also provides that all other charges must be identified in the lease.

• *Subletting*

Under subs 4A(9), a tenant may not sublet a dwelling without the consent of the landlord. However, the landlord may not unreasonably withhold consent.

• *Condition of the dwelling*

Subsection 4B(11) is a general clause setting out requirements regarding the condition of a dwelling by providing that a landlord has an obligation to provide the tenant with a dwelling that is in a 'habitable' condition. The definition of 'habitability' has been inserted in the Act and it provides that 'habitability' has a corresponding meaning. 'Habitability' refers to a dwelling being safe and suitable for living with specific reference to the following factors –

- adequate space;
- protection from the elements and other threats to health;
- physical safety of the tenant, the tenant's household and visitors; and
- a structurally sound building.

Non-compliance with the requirement of habitability is a criminal offence under s 16(aB), which provides that a person who fails to fulfil his or her obligations as landlord in terms of s 4B(11) respectively will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both.

Provisions pertaining to leases

• *Writing*

Section 5 of the Act deals with provisions of the lease agreements and the agreements themselves. Subsection 5(1) has been replaced. This subsection now requires all leases not subject to the provisions of the Formalities in respect of Lease of Land Act 18 of 1969 to be reduced to writing, and the onus for doing so rests on the landlord. Subsection 16(a) of the Act has been amended to provide for a general offence. This subsection provides that a person who fails to comply with subs 5(1) will be guilty of an offence and be liable on conviction to a fine or imprisonment not exceeding two years, or to both such fine and such imprisonment. Therefore, a person who fails to reduce a lease to writing will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and such imprisonment.

• *Contents of a lease agreement*

Subsection 5(6) deals with information to be included in a lease and provides that all leases must include certain information, including –

- the names and addresses of the parties for the purposes of formal communication;
- a description of the dwelling;
- the amount of rental;
- reasonable escalation;
- the frequency of payment;
- the amount of deposits if any;
- the lease or notice period;
- information relating to the rights and obligations of the tenant and landlord as set out in subs 4A and 4B;
- information relating to any other obligations of the tenant and landlord; and
- information on the amount of any charges payable in addition to rental.

• *Standardised lease agreements*

The new subs 5(6A) provides for standardised lease agreements that will improve proactive compliance with the

Act by providing that the Minister of Human Settlements must develop a *pro forma* lease agreement in all 11 official languages, containing the minimum requirements set out in the Act.

• List of defects

The amended subs 5(7) provides that a list of defects must be attached as an annexure to the lease agreement.

Rental Housing Tribunal

Chapter 4 of the Act regulates all aspects of the Rental Housing Tribunal. In terms of the amended s 6, ch 4 applies to all provinces of South Africa.

In terms of the amended s 7, every MEC must, within the first financial year following the commencement of the Amendment Act, establish a Rental Housing Tribunal in the province.

Section 13 regulates complaints to the tribunal. Subsection 13(4)(c) has been amended in order to expand the tribunal's power in respect of orders. The amended subs 13(4)(c) provides that where an unfair practice exists, the tribunal may make any ruling that is just and fair to terminate any unfair practice, including, a ruling to discontinue, among others, but not limited to, overcrowding,

unacceptable living conditions, exploitative rentals or lack of maintenance.

In terms of subs 13(12A), the tribunal may of its own accord and at the request of one of its members or on application by any affected person, rescind or vary any of its rulings if the ruling was erroneously sought or was granted in the absence of the person affected by it.

General provisions

The general provisions of the Act are dealt with under ch 5 and includes among other things, the amended s 15, which empowers the minister to adopt regulations under the Act on, *inter alia*, unfair practices in terms of the Act and regulations related to the calculation method for escalation of rental amounts and the maximum rate of deposits that may be payable.

Section 17 has been amended to provide that the proceedings of a Rental Housing Tribunal, including appeal proceedings, may be brought under review of a High Court. Section 17A makes provision for appeals against the decisions of a tribunal. A person who feels aggrieved by a tribunal's decision may file an appeal against that decision of the tribunal with the MEC who must then se-

lect a panel of adjudicators to adjudicate the appeal.

Conclusion

The Amendment Act was published in 2014 and will come into operation on a date to be determined by the President in the *Government Gazette*. Any additional or amended obligations imposed on a landlord or tenant by the Amendment Act shall become effective six months from the date of commencement of the Amendment Act. The Amendment Act has significantly amended the statutory rights and obligations of landlords and tenants, rules related to inspections, deposits, the condition of a dwelling, and the contents of a lease contract, as well as the powers of the Rental Housing Tribunal.

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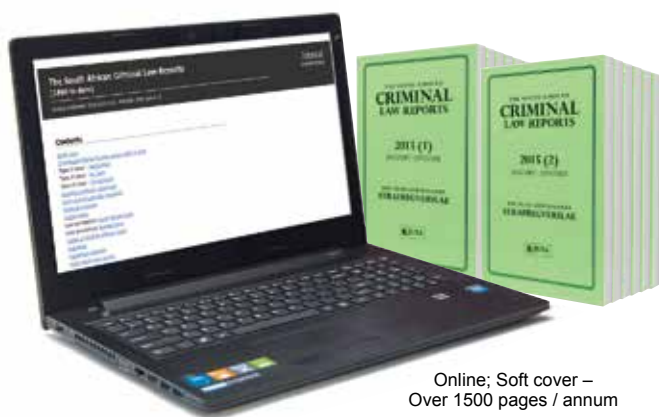
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Rescue the business before liquidation is considered

By
Schalk
Bezuidenhout



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In terms of s 132(1)(a)(i) of the Companies Act 71 of 2008 (the Act), business rescue proceedings commence when a company files a resolution to place itself under supervision in terms of s 129(3) of the Act.

But what happens if a creditor has already served an application for the liquidation of the company? Section 129(2)(a) of the Act determines that a resolution contemplated in s 129(1) of the Act, may not be adopted if liquidation proceedings have been initiated by or against the company.

Liquidation proceedings

What is meant by liquidation proceedings? Is it the mere service and filing of

an application with the Registrar of the court, or does it mean that the application for liquidation must actually have been adjudicated?

There are two sides of the coin, begging for an answer. On the one hand, companies against whom liquidation applications have been issued, may want to commence business rescue proceedings, as there is a reasonable prospect of rescuing the company and the company may even be successfully rescued before adjudication of the liquidation application. On the other hand, creditors launching liquidation applications may be disrupted by subsequent resolutions to commence business rescue proceedings.

What the courts say

In *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* 2012 (4) SA 266 (KZD), the court interpreted the meaning of 'initiated' and it was held that 'the word "initiated" in s 129(1) must have been intended to have the same meaning as the word "commenced" in s 131(6)'.

In *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP) the court granted the following declaratory order:

'The meaning of the words liquidation proceedings in s 131(6) of the Companies Act 71 of 2008 is confined to the actual process of winding-up a company consequent upon an order of winding-up having been issued by a court, and

is the actual process followed in winding-up and overseen by the liquidators and the masters. *The words liquidation proceedings do not include the legal proceedings taken by a creditor for purposes of obtaining an order that a company be wound-up*’ (my italics).

In *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP), the court held the following at para 17:

‘[17] In terms of s 348 of the Companies Act, 1973, a winding-up order by the court is, by way of a fiction (obviously for purposes of the proper administration of a winding-up order), “deemed to commence at the time of the presentation to the Court of the application for the winding-up”, but this deeming clause only comes into operation after it has been determined *ex post facto* that a winding-up order had been granted. *If no such order has been granted, any liquidation proceedings cannot be deemed to have commenced*’ (my italics).

Companies Act 71 of 2008

Section 131(1) of the Act provides that ‘[u]nless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.’

Section 131(6) of the Act provides that ‘[i]f liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings ...’.

In the *Summer Lodge* case the court considered three applications for provisional liquidation orders and considered whether applications in terms of s 131(1) of the Act, by virtue of s 131(6) of the Act, suspended the applications for provisional liquidation orders. The court held the following:

‘[21] The applicant in these applications is accordingly *not debarred from moving for the orders* claimed in its applications filed long before the applications for business rescue proceedings were filed.

[22] ...

[23] *Any order for the liquidation or the provisional liquidation of the respondents will, however, on the one hand, be suspended, and on the other, prevent any further legal proceedings being instituted against the companies, until such time, as provided in para (a) or (b) of s 131(6), the process set in motion by the application for business rescue has been finalised*’ (my italics).

Logic has it that, if an application in terms of s 131(1) of the Act does not bar the granting of a liquidation order (or results in the suspension of an application for a liquidation order), a mere application for a liquidation order does not bar

a company from adopting a resolution in terms of s 129(1) of the Act. The logic lies therein that if an application for a liquidation order is not susceptible for suspension by an application in terms of s 131(1) of the Act, such application for a liquidation order does not amount to ‘liquidation proceedings’ as contemplated in s 131(6) of the Act. Consequently, if an application for a liquidation order does not amount to liquidation proceedings, the launching of such an application would not amount to initiation of liquidation proceedings and will not prevent a company from adopting a resolution in terms of s 129(1) of the Act, as no liquidation proceedings have been initiated or commenced by or against the company.

Companies Act 61 of 1973

In support of the above reasoning, the provisions of the repealed Companies Act 61 of 1973 (the old Act) are considered. Chapter 14 of the Act still applies in respect of winding-up and liquidation of companies. Where a specific chapter or section is repealed, same will be indicated in brackets.

Business rescue proceedings can be compared to the repealed judicial management in terms of chap 15 (repealed) of the old Act. Section 427(3) (repealed) of the old Act provides as follows: ‘When an *application for the winding-up* of a company is made to Court under this Act and it appears to the Court that if the company is placed under judicial management ...’ (my italics).

Section 348 of the old Act provides that ‘[a] winding-up of a company by the Court shall be deemed to *commence* at the time of the presentation to the Court of the application for the winding-up’ (my italics). The wording of this section is wide enough to allow for interpretation to an extent. For a full discussion on the interpretation of this section, see Meskin Philip L (formerly edited by The Late Hon Mr Justice PM Meskin), assisted by JA Kunst, P Delpont, and Q Vorster *Henochsberg on the Companies Act 61 of 1973* 5ed (Durban: LexisNexis 2011) at 740(1) to 740(3).

Section 354 of the old Act provides that ‘(1) [t]he Court may at any time *after the commencement of a winding-up*, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all *proceedings* in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the *proceedings* or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit’ (my italics).

Section 358 of the old Act provides that a company may apply to court for a stay of legal proceedings ‘[a]t any time *after the presentation of an application*

for winding-up and before a winding-up order has been made ...’ (my italics).

Section 367 of the old Act provides that ‘[f]or the purpose of conducting the *proceedings* in a *winding-up* of a company the Master shall appoint a liquidator or liquidators as hereinafter provided’ (my italics).

From the wording of the above sections, it is clear that a distinction is made between an application for the winding-up of a company and the winding-up proceedings itself. If the application for the winding-up of a company was the commencement of winding-up proceedings, the legislator would uniformly have referred to ‘winding-up proceedings’ or the commencement thereof. In terms of s 367, the Master appoints a liquidator for the purpose of conducting the proceedings in a winding-up of a company. A liquidator is not appointed before an order for the liquidation of a company is granted. As a result, the period before an order for liquidation is granted does not amount to liquidation proceedings.

Conclusion

Section 5(1) of the Act provides that the Act must be interpreted to give effect to its purposes as set out in s 7(k), which includes to ‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders’.

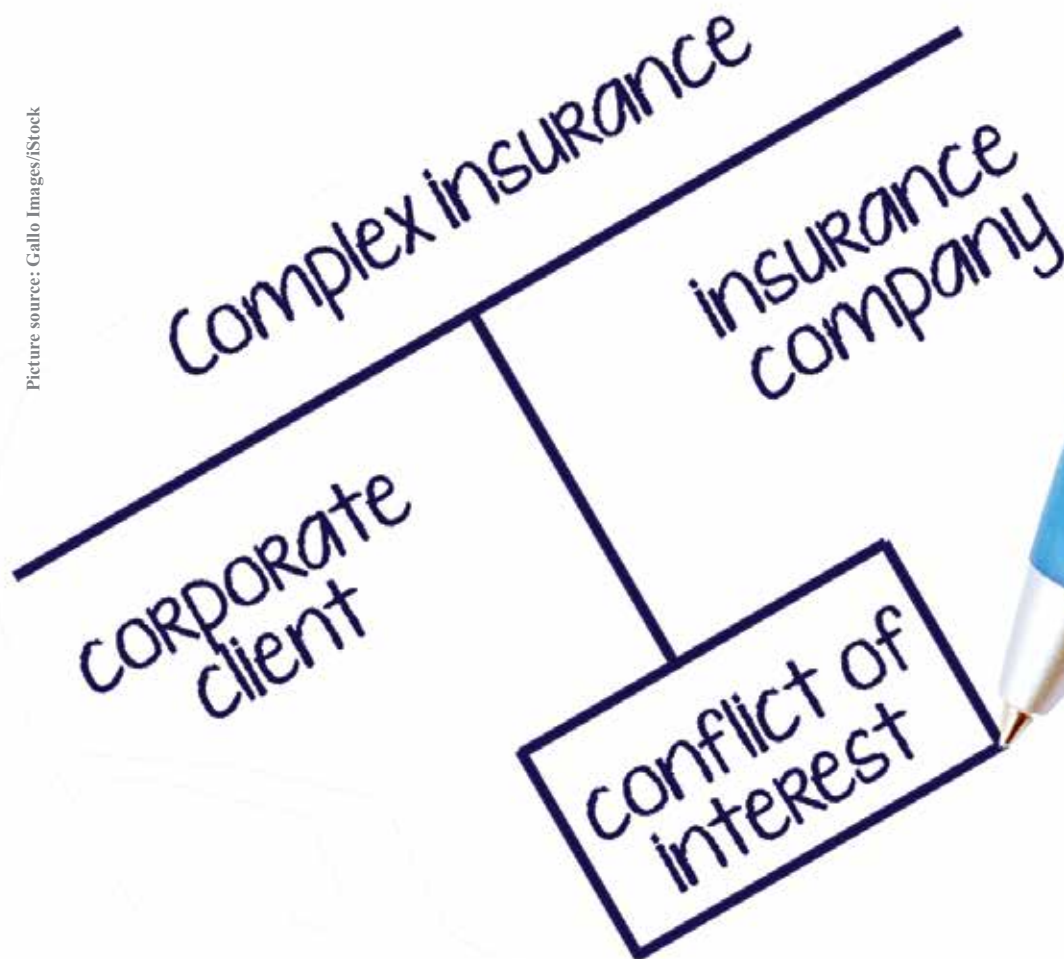
As a result, s 129(2)(a) of the Act should be interpreted in favour of the purpose of the Act as set out in s 7(k), opposed to favouring liquidation, which is not a purpose of the Act.

A creditor has remedies in terms of s 130 of the Act to object to a *mala fide* resolution by the board of a company to commence business rescue proceedings, but the board of a company does not have a corresponding remedy if liquidation proceedings are commenced by the mere service and filing of an application for liquidation. Only affected persons (which excludes directors and/or the board of a company) may apply in terms of s 131 of the Act to a court for an order to place the company under supervision and commence business rescue proceedings, after liquidation proceedings have commenced.

A mere application for a liquidation order should not be interpreted as ‘liquidation proceedings’ for the purpose of s 129(2)(a), to enable the board of a financially distressed company to commence business rescue proceedings and probably rescue the company, before an application for its liquidation is adjudicated.

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By
Marietjie
Botes

The independent counsel doctrine and legal advice on insurance coverage – a review of US case law

Litigious matters of large companies often involve complex legal issues, which may also result in complex insurance issues.

The tripartite relationship between insurer, insured and legal representative originates from the standard liability insurance policy, which typically provides protection against damages arising from a claim against the insured company and the legal costs for defending such a claim. Unless the claim against the insured company clearly shows no grounds for insurance coverage, the insurer will generally defend the claim on behalf of the insured. For these defences the insurer will normally appoint a defence attorney (from their panel of attorneys) with whom they have an ongoing relationship, while the appointed attorney and the insured company will only

have limited interaction for the duration of the matter.

Considering the difference and degree of interaction between the parties to this tripartite relationship, it is clear that conflicting interests may arise. In *United States Fidelity & Guar. Co. v Louis A. Roser Co.* 585 F2d 932 n.5 (8th Cir. 1978) the court vocalised this concern by stating that –

‘... the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client – the one who is paying his fee and from whom he hopes to receive future business – the insurance company’.

My experience with the conflict of interests between a large corporate client, with international dealings, and its insurance company, led me to investigate

the below issues which, although not yet embedded in our legal system, is worth noting for future similar developments in South Africa’s legal system. Accordingly, considering that case law dealing with these issues is extremely rare in the United States of America (US) and non-existing in South Africa, I will, therefore, only discuss the US case law.

The independent counsel doctrine

The principle that an insured, notwithstanding the insurer’s reservation of rights in this regard, may choose its own attorney (counsel), or so-called off-panel representation is called the independent counsel doctrine in the US.

Globally, insurance companies are increasingly implementing Service Level Agreements containing stringent billing

guidelines that often mandate attorneys to first obtain approval from the insurer before proceeding with particular litigation activities such as discovery, pre-trials, etcetera. In this regard the court, in the matter of *The Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedure*, 2 P.3d 806. 814 (Mont. 2000), held that:

‘... the requirement of prior approval fundamentally interferes with defence counsel’s exercise of their independent judgement.’

By limiting an attorney’s independent judgement in this way, it is easy to see how major disputes may arise between parties of the tripartite relationship regarding litigation strategy and its effect on issues such as the insured company’s reputation and commercial relations with international business partners, the bottom line of the insurer and legal fees.

When these disputes indeed arise, or are foreseen prior to involving the insurer (see discussion below), or when the insured refuses to accept the appointment of specific legal representation by the insurer in accordance with the insurance policy, the policy holder should be entitled to choose its own defence attorney, whose reasonable fee is to be paid by the insurance company, especially considering that most corporate clients already

have their own trusted attorneys with whom they have a long and ongoing relationship.

In *San Diego Navy Federal Credit Union v Cumis Insurance Society, Inc*, 208 Cal. Rptr. 494 (Cal. App. 1984) the court held that where the policyholder does not consent to representation by the insurance company’s chosen counsel, the insurance company must pay the reasonable cost of independent counsel hired by the policyholder.

The court in *CHI of Alaska, Inc. v Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993) held similar convictions and determined that –

‘... the general rule is that, if an insured refuses to accede to the insurer’s reservation of rights, the carrier must either accept liability under the policy and defend unconditionally or surrender control of the defence’.

It is, however, questionable whether South African insurance companies will pay the fees of independent legal representation appointed by the policy holder if they have to surrender control of the litigation process. In my experience, the insurance company is willing to pay same, on condition that they remain very closely involved in the whole litigation process.

Legal advice on insurance coverage

Although s 3(2) of the Contingency Fees Act 66 of 1997 allows juristic persons to enter into contingency fees agreements, corporate clients never sign such agreements, as opposed to individuals who cannot afford legal services and claim for damages resulting from personal injuries, as it is generally accepted that companies will have the necessary means to pay legal fees, thus there seems to be no need for legal representatives to carry the risk of cost recovery. Accordingly, attorneys hardly ever discuss litigation financing options with corporate clients as provided for in s 3(3)(b)(i) of the Contingency Fees Act.

Policies providing insurance coverage for liability generally also include coverage of legal fees incurred to defend such actions instituted against the policy holder. Subsequently, an insurance claim may provide to be one viable form of litigation financing. However, considering that commercial litigation usually entail complex legal and business issues, attorneys are usually so involved with the management of these issues that inquiring about and advising a corporate client regarding insurance coverage as a form of financing litigation costs and

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escaping financial liability, hardly ever surface. But in some circumstances a legal malpractice action may be instituted against an attorney for failing to investigate such insurance coverage.

This is exactly what happened with *Darby & Darby P.C. v VSI International Inc et al* 1 No. 114 2000 NY Int. 111 (Darby), one of America's oldest intellectual property firms. Darby defended VSI in two patent, trademark and trade dress infringement cases. Eventually VSI fell behind with the payment of Darby's bills and VSI's files were turned over to new counsel, who immediately advised VSI that the company's comprehensive general liability (CGL) insurance policy might cover the legal fees and costs incurred by Darby in the initial litigation. VSI's insurance carrier agreed to pay VSI's legal fees going forward, but denied coverage of all legal expenses VSI incurred prior to filing their insurance claim. Darby sued VSI for their outstanding legal fees and VSI responded with a counter claim based on legal malpractice committed by Darby for their failure to advise VSI that their insurance might cover the defence litigation costs.

During the ensuing hearing Darby argued that:

'... [their professional duties and responsibilities as VSI's attorneys] only extended to the actual litigation and that it was not incumbent upon the law firm to advise the defendants about matters which related to the financing of the litigation'

and '... [that VSI] had the sole responsibility for realizing that the policy might cover the lawsuits against them and for submitting a claim for coverage.'

VSI countered by arguing that:

'... [an attorney who is retained to represent a client in litigation] is not merely a technician whose responsibilities ... are limited to legal strategy ... [but also] a counsellor who has a duty to advise a client who has been sued on all matters pertaining to the litigation so as to minimize the client's liability.'

Eventually on appeal a unanimous panel decided this dispute and held that:

'In the absence of a factual assertion that the scope of the task for which counsel was retained specifically included inquiry into the nature and extent of

its insurance coverage and whether it was applicable to the claim, the retention of counsel for the defence of such an action simply does not include any responsibility for assisting the client in determining whether sources exist from which to pay for that defence and any ultimate liability finding.

...
[There is] no support for the proposition that an attorney who was retained to defend a business client in intellectual property litigation has a duty to inquire into the existence, nature and scope of insurance policies previously procured by the client, and to determine whether any such policy provides the client with any entitlement in relation to the claim being litigated.

...
[T]his court will not impose an obligation upon a law firm not otherwise imposed by law, based upon the tasks performed by successor counsel.'

Accordingly an attorney's duty to advise clients about all available causes of action and avenues of defence does not include a broad duty to inquire into the client's insurance coverage. The court made it clear that it was VSI themselves who procured the general liability insurance policy and thus their duty to access coverage in respect thereof.

In another matter, *O'Shea v Brennan*, 2004 WL 583766 (S.D.N.Y. 2004), Brennan similarly instituted a counter claim against O'Shea resulting from alleged legal malpractice for failing to advise him about insurance coverage, when O'Shea sued Brennan for outstanding legal fees resulting from legal services rendered in a defamation matter. In this matter the court held that:

'... it is not clear, given the complexity of the law in this area, whether a jury could conclude, without the benefit of expert testimony, either that O'Shea's failure to advise his client about his insurance coverage was a breach of his professional duty of care or that his conduct caused the defendant's alleged damages.'

By critically considering these cases it is clear that an attorney may not always escape liability for failing to advise on insurance coverage, but rather that the nature or complexity of the theory

or possibility of coverage must be considered before liability is decided. If the availability of insurance coverage is clear and simple at the time an attorney is appointed, there will be no excuse for failing to advise a client regarding insurance coverage, and might the courts, under such circumstances, have reached different conclusions to the above discussed matters.

Whether an attorney would be negligent by failing to advise a client on insurance coverage would primarily turn on the scope of the client's mandate, which is ultimately a question of fact, and if, considering all relevant circumstances, an attorney failed to exercise reasonable skill and knowledge commonly possessed by a member of the legal profession.

In this regard the court, in the matter of *Fireman's Fund Ins. Co. v Farrell* 289 AD2d 286 [2001] and *Perks v Lauto & Garabedian*, 306 AD2d 261 [2003] held that an attorney's duty to investigate insurance coverage arises only if the attorney is in a better position than the client to ascertain the existence of such coverage.

'[W]here the circumstances are such that the client has superior or equal knowledge of potential sources of additional coverage, unless requested to investigate by the client, the attorney has no duty to explore hypothetical theories of additional insurance coverage.'

The above issues and debates have only started in the US and I foresee that it is only a matter of time before the South African courts will be faced with similar disputes. In the meantime I would advise colleagues to promptly advise clients to ascertain whether they have insurance coverage for the legal issues or litigation you have been mandated with, alternatively ask for a copy of their complete insurance policy and propose a legal opinion regarding their possible insurance coverage, to avoid any notification to, and consultation with your own professional liability insurer.

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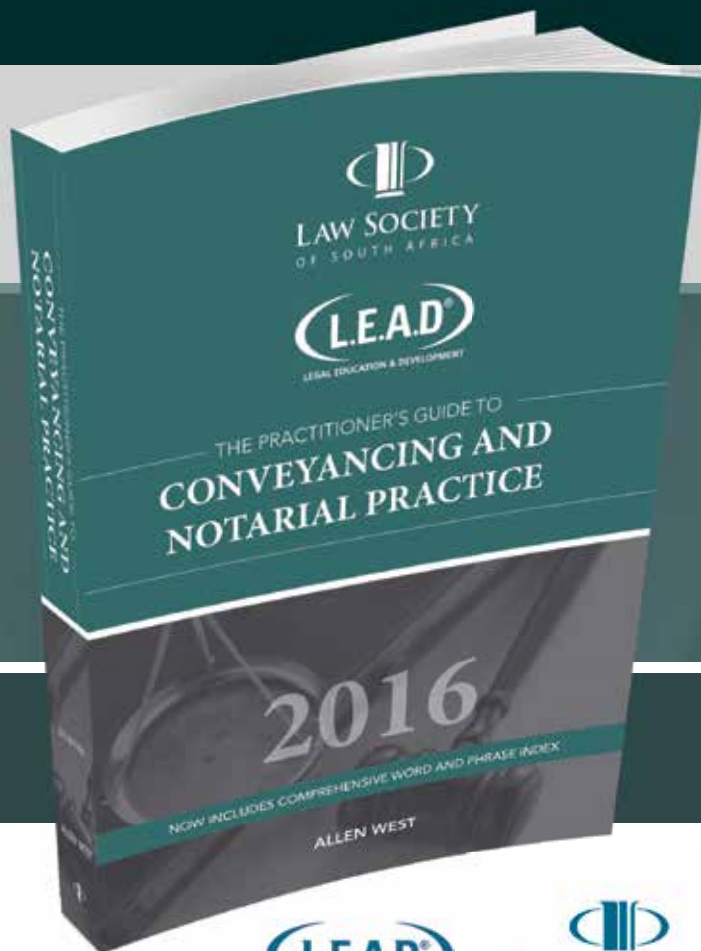
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Allen West was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred articles in leading law journals.

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THE LAW REPORTS



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January 2016 (1) South African Law Reports (pp 1 – 322);
[2015] 4 All South African Law Reports December no 1
(pp 543 – 688); and no 2 (pp 690 – 815);
[2014] 3 All South African Law Reports July
no 1 (pp 1 – 114); and no 2 (pp 115 – 257)

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

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

Banking

Unauthorised withdrawals:

In *DA Ungaro & Sons (Pty) Ltd v Absa Bank Ltd* [2015] 4 All SA 783 (GJ) the court held that where a bank allows the manager of a company who has opened an account in the name of the company to make unauthorised withdrawals from the account, the bank will be held liable to the company.

The facts were as follows: In July 2000 the plaintiff's manager, Huang, opened a savings account with the defendant, Absa, on behalf of and in the name of the plaintiff. Over a period of a year

Huang unlawfully withdrew more than R 11 million from the savings account, of which R 9 million was eventually recovered. Some of these withdrawals had seemingly been performed telephonically and included cash withdrawals.

The plaintiff claimed the remaining R 2,6 million from Absa on the basis that the latter was negligent in letting Huang withdraw money from the account while in fact he was not authorised to do so.

The plaintiff further argued that there was an obligation on Absa to obtain written authority on each occasion from the plaintiff when the account was operated on by any person.

It was common cause that Absa had not loaded signatories on its computer system in respect of the account. Absa argued that the plaintiff acted negligently in clothing Huang with authority to partly operate on the account.

Three issues arose for decision –

- first, whether the opening

of the account on behalf of the plaintiff resulted in the conclusion of an agreement between the plaintiff and Absa;

- secondly, if so, whether it was a term of the agreement, express or tacit, that Absa agreed to make payments out of the plaintiff's account only on the instructions authorised by the plaintiff; and/or
- thirdly, whether Absa and its official acted negligently in dealing with the account.

Moshidi J pointed out that it is trite that the relationship between a banker and its client is based on mandate. The reciprocal rights and duties included in the contract between a banker and its client are to a great extent based on custom and usage. There was thus an agreement between the plaintiff and Absa.

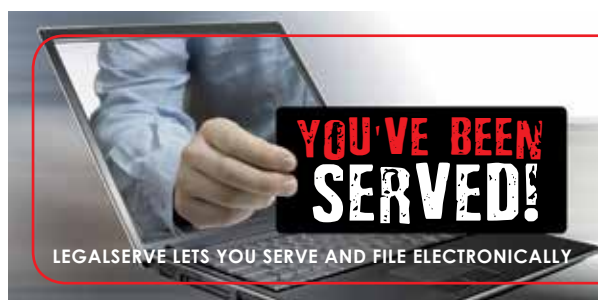
The court held that it was an implied term of the agreement that Absa agreed to only make payments and transfers out of an account on specific instructions by the plaintiff. When each of Absa's employ-

ees attended to the numerous unauthorised withdrawals, they were mindless whether Huang could in fact withdraw or transfer funds.

As no card and PIN had been issued in respect of the plaintiff's account, Absa's employees would have known, or ought to have known that the only way money could be withdrawn from the account, was by the signature of an authorised person from the plaintiff.

In the absence of any indication on the plaintiff's file with Absa as to the names and identity of authorised persons who could withdraw money from the plaintiff's account, steps should have been taken by Absa to obtain the plaintiff's company documents to clarify the issue and to ensure that Absa had all the appropriate information at hand. A reasonable banker should have and would have done so in the circumstances of the present case.

The plaintiff's claim was accordingly allowed with costs.



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Consumer protection

Housing – exemption from registration as a builder: In *Ruiters v Minister of Human Settlements and Another* 2016 (1) SA 239 (WCC) the court was asked to consider the grounds for an exemption of the requirement of registration and enrolment as a builder.

At the heart of the present matter was s 10 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act). It provides that no person shall 'carry on the business of a home builder ... unless that person is a registered home builder [with the National Home Builders Registration Council [the council]]. Section 14 of the Act provides that a home builder shall not commence the construction of a home unless 'the council has issued a certificate of enrolment ... to the home builder'. Section 10A, however, provides that an owner builder 'may, in terms of section 29, apply to the council for exemption from sections 10 and 14'.

Section 29(1)(a) – (c) provides that the council may exempt a person or a home from any provisions of the Act if satisfied that –

'(a) the granting of the exemption would be in the public interest;

(b) ... would not undermine the objectives of this Act or the effectiveness of the council; or

(c) should the exemption not be granted, the effect would be extremely prejudicial to the interest of the applicant and housing consumers'.

At stake in the present case was whether the council may refuse an owner builder's application for a s 10A exemption on the basis that construction of the home in respect of which exemption was sought had commenced at the time of such application.

Donen AJ held that in the light of part (b) of the definition of 'home builder', read with s 10A (which must in turn be read with s 29 of the Act), it seemed incumbent

on the council, when it was faced with an application for exemption, to investigate and establish the jurisdictional fact for an application for exemption, namely that an applicant was in fact an owner builder. If an applicant satisfied the council that he or she was a bona fide owner builder, the duties that rest on a home builder, and consequences of breach of those duties, ceased to exist from the time that the owner builder applied for exemption.

The only considerations raised by the Act were whether the applicant fulfilled the definition of an owner builder, and satisfied the council as to the criteria mentioned in ss 29(1)(a), (b) and (c). A builder complying with the definition of an owner builder could not conceivably harm the interests of housing consumers or the council in any way which required regulation under the Act.

Furthermore, severe prejudice to a bona fide owner builder would result if exemption were not granted, because the burdens of protecting housing consumers would be imposed on him or her for no reason. This would not be in the public interest. *Prima facie*, therefore, a proven owner builder satisfied the requirements of ss 29(1)(a), (b) and (c).

Finally, the court ordered that the decision of the Minister be set aside and that the matter be referred back to the council for determination as to whether the applicant is entitled to exemption in terms of s 10A and s 29 of the Act. The Minister was ordered to pay the applicant's costs.

Constitutional law

Powers of Public Protector: In *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others (Corruption Watch as amicus curiae)* [2015] 4 All SA 719 (SCA) the facts were as follows: In February 2014 the seventh respondent, the Public Protector, released a report detailing 'pathological corporate deficiencies' within the first appellant, the South African Broadcasting Corporation

(SABC). The report singled out the third appellant, the Chief Operating Officer (COO) of the SABC, Motsoeneng, for scathing criticism.

The Public Protector found that –

- Motsoeneng's appointment as Acting COO was irregular;
- his salary progression from R 1,5 million to R 2,4 million in one fiscal year was irregular;
- he had fraudulently misrepresented to the SABC that he had a matric qualification; and
- he had grossly abused his powers to benefit himself and others, including the unilateral adjustment of certain SABC employees' salaries.

The Public Protector directed the SABC and the second appellant, the Minister of Communication, to implement various remedial steps, including, the institution of disciplinary proceedings against Motsoeneng; and to submit implementation plans. In July 2014, instead of implementing the Public Protector's remedial action, the SABC permanently appointed Motsoeneng as COO.

The justification for ignoring the Public Protector's remedial action was that the SABC had appointed a firm of attorneys to investigate the correctness of the findings contained in the Public Protector's report. The attorneys' report exonerated Motsoeneng.

The first respondent, the Democratic Alliance (DA), approached the court *a quo* for an order for the suspension of Motsoeneng and the institution of disciplinary proceedings against him.

The court *a quo* held that the SABC had to institute disciplinary proceedings against Motsoeneng. It also held that the findings of the Public Protector were not 'binding and enforceable' in the same way as a court order.

On appeal Navsa and Ponnan JJA held that the court *a quo*'s finding that the SABC had to institute disciplinary proceedings against Motsoeneng were correct. In the light of Motsoeneng's senior position at the SABC there was a real risk that the in-

tegrity of the disciplinary process against him would be undermined if he was not suspended.

However, the court held that the reasoning in the court *a quo* regarding the Public Protector's powers was wrong. The office of the Public Protector, like all institutions provided for in ch 9 of the Constitution, is a venerable one. Remedial action recommended by the Public Protector should not be ignored.

State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any person or institution aggrieved by a finding of the Public Protector might, in appropriate circumstances, challenge that by way of a review application.

However, in the absence of a review application, such a person or institution may not embark on a parallel investigation process and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector.

The appeal was accordingly dismissed with costs.

Credit law

Scope of National Credit Act (credit provider): In *Asmal v Essa* 2016 (1) SA 95 (SCA); [2014] 3 All SA 115 (SCA) Asmal borrowed money from Essa to buy medical equipment. In return Asmal gave Essa a number of blank cheques, the amounts of which included a 'participating share of the profit' to be made by Asmal on the resale of the equipment. The profit share was to be determined by Asmal. The cheques were dishonoured and Essa, who was not a registered credit provider, sued for provisional sentence. Section 40 of the National Credit Act 34 of 2005 (the NCA) provides who is a credit provider and requires it to register as such.

The question put to the court was whether the loans were 'credit agreements' in terms of s 8 of the NCA, in which case provisional-sentence proceedings would fail because of Essa's failure to

comply with several aspects of the Act.

Asmal averred that since the cheques were not meant to be cashed but were security for the underlying loans, the loans were 'secured loans' in terms of s 8(4)(d), alternatively that the profit shares were a 'charge' in terms of s 8(4)(f), either of which would mean that the loans were indeed credit agreements that were covered by the Act.

The court *a quo* dismissed Asmal's 'charge' argument.

On appeal Maya JA held that the NCA was intended to protect consumers against, *inter alia*, hidden costs arising from credit agreements. Therefore, the parties had to quantify the charge, fee or interest and specify the manner of their payment when they concluded the credit agreement. It followed that the indeterminate profit shares agreed on by Asmal and Essa, for which no date of payment was fixed, and whose value, if any, was to be determined by Asmal at his sole discretion, did not qualify as a 'charge' under the Act.

The court *a quo* correctly rejected Asmal's argument that the agreements were secured loans because the cheques were not pledged or ceded to Essa as required in the definition of the 'secured loan' in s 1 of the Act. The cheques were issued by Asmal with the intention that they would be honoured on due presentment and, if they were dishonoured, that Asmal would compensate Essa as holder.

Asmal's reliance on Essa's not being registered as a credit provider was also misplaced. Section 40 required the existence of a credit agreement to kick in, and since there were no credit agreements between Asmal and Essa, the latter was not required to register. Nor was Essa compelled to comply with the Act's debt-enforcement procedures before commencing litigation against Asmal.

The parties did not intend to conclude any credit agreements or bring their dealings within the scope of the Act. Essa was thus fully entitled to invoke the provisional sentence procedure to en-

force his claims, which were disputed on purely technical grounds.

The appeal was dismissed with costs.

Criminal law

Arson – own property: The case of *Dalindyebo v S* [2015] 4 All SA 689 (SCA) enjoyed a high level of media attention, mostly because of the royal status and political affiliations of the accused. The present discussion will be restricted to one specific aspect of the trial, namely the question whether the crime of arson can be committed when a person sets fire to his own immovable property.

The appellant (the accused) was the Paramount Chief of a tribe in the Eastern Cape. The state's case against him was that he had set fire to dwellings that housed the three complainants, who were his 'subjects' and tenants, to secure their eviction when he considered that they had breached tribal rules. He was also alleged to have publicly assaulted three young men as punishment, without a trial, for criminal acts allegedly committed by the young men in question. Arising from the above, the accused was charged and convicted of, *inter alia*, arson and kidnapping. The sentence imposed on the various counts resulted in an effective term of 15 years' imprisonment.

The accused challenged his convictions on a number of constitutional grounds, none of which will be discussed here. Furthermore, the accused challenged the merits of his conviction of arson. He argued that the two houses he had set on fire were his property and he could, therefore, not rightly have been convicted of arson.

Navsa AJ and Baartman AJA pointed out that a primary problem for the accused was that while the farm, on which the dwellings which he had set alight, was registered in his name, the restrictions contained in the title deed were significant. The restrictions showed that the land was held by the accused as hereditary monarch for the benefit of his tribe and sub-

jects. Therefore, it could not be said that the property was his to set fire to at will. *In any event*, so the court reasoned, arson can be committed where a person sets fire to his own immovable property with the intention to injure another person.

The appeal was thus dismissed and the accused's conviction confirmed.

Delict

Loss of support – non-biological child: The facts in *Engela v Road Accident Fund* 2016 (1) SA 214 (GJ) were as follows: The plaintiff and her partner (the deceased) lived in a permanent heterosexual relationship. The plaintiff sued the defendant, the Road Accident Fund (RAF) for the loss of support sustained by her two sons, T and O, as a result of the death of the deceased, her ex-husband, in a motor vehicle accident. T was the illegitimate son of the plaintiff with another man, and brought into the marriage with the deceased. Subsequent to their divorce and a brief separation, the plaintiff and deceased reconciled, and commenced living together again as a family of four. There existed no express agreement between the deceased and the plaintiff that the former would support T.

The question that arose was whether the deceased owed T a duty of support at the time of the former's death, which called for the court to decide whether the principle in *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA), which extended the dependant's action to permanent heterosexual relationships, applied. The RAF argued that *Paixão* was distinguishable because there the deceased had promised to enter into a marriage relationship as soon as he had divorced his wife, while in the present case the parties had, post-divorce and on reconciling, specifically agreed not to conclude another marriage relationship.

Mashile J confirmed that the salient principle of the *Paixão* case was the extension of the dependant's action to permanent heterosexual re-

lationships. In applying this principle to the facts of the *Engela* case, the court reasoned that underlying the agreement entered into between the parties regulating the resumption of their relationship, was a mutual commitment to live together as a family. It was irrelevant whether or not such agreement was governed by a marriage certificate.

The court further held that the duty of support would not only arise in circumstances where the deceased had during his lifetime undertaken to support an illegitimate child beyond the dissolution of a marriage. The absence of such an agreement would not affect the deceased's legal duty to financially support T.

In the present case there existed, on a balance of probabilities, a tacit agreement that the deceased would support T as his own child. The deceased accordingly owed T a legal duty of support at the time of his death.

The RAF was ordered to pay the plaintiff in her representative capacity as mother and natural guardian of O and T the amounts of R 799 894 and R 458 399, respectively, plus costs of suit.

Land

Agricultural land – option to purchase portion of agricultural land: The central issue in *Four Arrows Investments 68 (Pty) Ltd v Abigail Construction CC and Another* 2016 (1) SA 257 (SCA) was whether a contract concluded between the appellant, Four Arrows, and the first respondent, Abigail, conferred on Four Arrows an option to purchase a demarcated portion of an undivided immovable property. Alternatively, whether the contract constituted a sale of the property, which was subject to a suspensive condition.

Four Arrows argued that an option for the sale of a portion of agricultural land – the nature of the immovable property in question – does not fall within the prohibition contained in s 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 (the Act). This section provides that 'no

portion of agricultural land ... shall be sold or advertised for sale ... unless the Minister has consented in writing'. The definition of 'sale' in s 1 of the Act includes a sale subject to a suspensive condition.

Swain JA held that the object of the legislation was not only to prohibit concluding sale agreements, but also preliminary steps, which may be a precursor to the conclusion of a prohibited agreement of sale. The target zone of the Act is much wider. This is clear, for example, from s 3(e)(i), which also prohibits advertisements for sale. Since advertisements obviously precede the actual sale or alienation of an undivided portion, it is by no means absurd to infer that the legislature intended to prohibit any sale of an undivided portion of farmland, whether conditional or not, unless and until the subdivision has actually been approved by the minister.

In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the

option holder. The fact that the option may provide that the option holder may only exercise the option after the consent of the minister was obtained, is irrelevant.

Four Arrows failed to prove that it was entitled to obtain transfer of the whole property and the appeal was accordingly dismissed with costs.

• See case note 'Subdivision – end of the road? Options to purchase subdivision of agricultural land' (2015 (Dec) DR 46).

Marriage law

Three cases dealing with proprietary rights in terms of divorce proceedings were reported in the period under review.

Accrual system – when determined: The parties in *KS v MS* 2016 (1) SA 64 (KZD) were married on 4 April 1992. Prior to the marriage, and on 1 April 1992, the plaintiff and the defendant signed a power of attorney in favour of one Watson. This power of attorney authorised Watson to

appear before a notary public and to execute an antenuptial contract on behalf of the parties. The antenuptial contract was annexed to the power of attorney and was initialled by the parties in confirmation thereof. The antenuptial contract provided, *inter alia*, that there shall be no community of property or profit or loss between the parties; and that the accrual system, shall be applicable to the marriage between the parties.

It was common cause that due to some reason unknown to the parties the aforesaid antenuptial contract was not executed and registered in the deeds office.

The plaintiff accordingly contended that the marriage was in community of property, as the antenuptial contract contemplated and intended by the parties had not been registered.

The crisp issue was whether accrual was determined at *litis contestatio* or the date of divorce.

Kruger J held that the established principle is that the operative moment is *litis*

contestatio, for that is the moment when the dispute crystallises and can be presented to the court for decision.

This approach is in accordance with the *obiter* comments in *MB v DB* 2013 (6) SA 86 (KZD) (see law reports 'Husband and wife' 2014 (Jan/Feb) DR 43). The court rejected the reasoning in *JA v DA* 2014 (6) SA 233 (GJ) (see law reports 'Marriage – property rights' 2015 (Jan/Feb) DR 50), in which the court disagreed with earlier case law that the right to accrual, which existed during the marriage and which becomes crystallised at *litis contestatio*, is perfected at the date of dissolution of the marriage. The practical effect of *litis contestatio*, being the date of determination of accrual, is to expedite the trial and 'do much to limit the temptation to squander assets that some spouses seem to find irresistible'. It will also discourage (as is frequently experienced in divorce litigation) the situation where a spouse deliberately delays the proceedings in order to increase his or her

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claim when the divorce order is eventually granted.

The court accordingly held that the marriage relationship between the parties was one out of community of property and subject to the accrual system. The date for determination of accrual is at *litis contestatio*.

Islamic law – r 43: In *TM v ZJ* 2016 (1) SA 71 (KZD) the wife, in a r 43 application, sought maintenance *pendente lite*, and certain other relief, for herself and two minor children pending a divorce action against her husband. The marriage had been conducted in terms of Islamic law and was not registered under the Marriage Act 25 of 1961 (the Act). In the divorce action she sought, *inter alia*, recognition of the validity of such marriages under the Act. The husband objected *in limine*, arguing that no marriage existed and accordingly r 43, which pertained to matrimonial matters, did not apply. His grounds for so arguing were that he had already terminated the marriage by pronouncing a '*talaq*' (divorce) and that a marriage according to Islamic law was not valid in terms of the Act.

Mokgohloa J held that it was unnecessary for the applicant in a r 43 application to prove *prima facie* the validity of the marriage. The entitlement to maintenance

pendente lite arose from the general duty of a husband to support his wife and children. Accordingly the wife could not be precluded from obtaining relief in terms of the rule by virtue of her Muslim marriage, irrespective of whether the husband had pronounced a *talaq* or not.

The point *in limine* was dismissed and the relief sought granted. The husband was ordered, *inter alia*, to contribute R 15 000 to the wife's legal costs.

Trust assets – alter ego: In *YB v SB and Others* NNO 2016 (1) SA 47 (WCC) YB and SB were married to each other out of community of property, but with accrual. YB had instituted an action for divorce and now applied to amend her particulars of claim. The amendment sought was that assets ostensibly held by a trust were in fact SB's assets, and should be added to his estate for the purposes of calculating accrual in terms of ss 3 and 4 of the Matrimonial Property Act 88 of 1984.

YB asserted that transactions reflecting the trust as acquiring and holding assets were simulated, and that the assets were part of SB's estate.

Two main issues arose for decision:

- First, whether the relief claimed in the amended particulars was good in law.

- Secondly, whether the trustees had been misjoined in the action.

The parties agreed that the application be decided as if on exception – if the particulars (as amended) were excipiable, the application should be refused.

Riley AJ held that, as to the first issue, that the relief claimed was competent; and as to the second issue, that it had been correct to join the trustees.

Of particular importance was the court's decision regarding the true nature of the trust's assets. In this regard it referred with approval to the earlier decision in *RP v DP and Others* 2014 (6) SA 243 (ECP) (see law reports 'Marriage – property rights' 2015 (Jan/Feb) DR 51) where the court held that where 'the trust form is abused and the trustee treats the trust as his or her alter ego (or that of the founder), then the court pierces the trust veil and enquires into the separateness of the trust assets from the personal assets of the trustee or founder'. The court in *YB v SB* held that certain assets that were acquired and held in the name of the trust were simulated and that such assets were in truth assets, which from the outset fall within the personal estate of SB. The court, therefore, took the trust assets into account for the purposes of calculating the accrual in SB's personal estate.

as prescribed by s 2 of the Petroleum Products Act 120 of 1977 (the Act) and regulations thereto.

On termination of the lease, Snyders requested transfer of the site licence in order to continue with the fuelling-station business. Believing the licence to be its asset, Louistef refused. The parties then concluded a written agreement of sale for the site licence, for R 1 million. After receiving legal advice, Snyders approached the High Court for an order declaring the agreement null and void. This was on the basis that a site licence was not a *res* (ie, thing) capable of being sold.

Janse van Nieuwenhuizen J held that in terms of regulations 12, 30 and 38 to the Act the site licence had to be transferred to a new owner or lessee when ownership or possession of the site terminated. The licence was a statutory requirement granted to the owner or lessee of a site in order to enable the person/entity to retail petroleum products from the site. The site licence, therefore, remains the physical property of the Department of Minerals and Energy.

Taking into account the statutory framework regulating the granting of such a licence, its status could be equated with that of a liquor licence. In the premises, a site licence had no commercial value and was not a *merx* or *res vendita*. The sale agreement accordingly did not comply with the essential elements of a valid sale agreement and was null and void.

Stock exchange

Insider trading: In *Zietsman and Another v Directorate of Market Abuse and Another* 2016 (1) SA 218 (GP) the facts were as follows: During 2011 the two appellants (the traders) traded in the shares of African Cellular Towers (ACT). The traders had information that ACT would be getting a R 99 million loan from the Industrial Development Corporation (IDC). At the time when the share trading took place the granting of



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Minerals and petroleum

Site licence for fuelling station: In *Snyders NO v Louistef (Pty) Ltd and Others* 2016 (1) SA 123 (GP) the applicant, Snyders, was the owner of a certain immovable property in Brits. The property had a fuelling station (the site), from which the first respondent lessee, Louistef, retailed petroleum products. For this purpose the parties concluded consecutive lease agreements. In order to conduct the business, the necessary licences, including a site licence, were obtained

the loan to ACT was not public knowledge.

After the shares had been bought the share price increased by 54,5%. However, shortly thereafter, and while the traders were still in possession of the shares, ACT went into liquidation. The traders lost the entire value of their holding and thus never realised a profit from the trade.

The trade came to the attention of the Financial Services Board (FSB) and it was forwarded to their Enforcement Committee, which found the traders guilty of insider trading in terms of s 73(1)(a) and s 73(2)(a) of the Securities Services Act 36 of 2004 (SSA).

The FSB imposed an administrative penalty, jointly and severally, in terms of s 77(1) – (2), read with s 77(5) of the SSA, of R 1 million plus costs.

On appeal the traders argued that –

- the information regarding the IDC loan was vague, imprecise and not 'likely to have a material effect' on the price or value of the ACT shares;
- there was no material difference between the information available to them at the time of the trades in question and information that had already been 'made public' prior to

them acquiring the shares;

- they consequently did not believe or 'know' that they had inside information as required by s 73 and 77 of the SSA; and
- because ACT was liquidated before they could sell the shares, they made no profit on the trade and by implication did not benefit from it.

Avvakoumides AJ pointed out before the Insider Trading Act 135 of 1998 came into force, the insider trading offence fell under the Companies Act 61 of 1973, which contained a criminal sanction only. Because of the burden of proof in criminal cases (that is, proof beyond reasonable doubt) successful prosecutions on the charge of insider trading were rare.

Reforms regarding insider trading were brought about due to a history of non-prosecution of the criminal offence under the Companies Act. The Insider Trading Act introduced a civil action in respect of insider trading. This required a lesser burden of proof (that is, proof on a balance of probabilities). When the Insider Trading Act was repealed by the SSA, Ch VIII of the SSA introduced administrative sanctions in respect of capital market contraven-

tions in addition to existing civil and criminal sanctions.

The court held that the Enforcement Committee of the FSB is an administrative tribunal and as such is entitled to make rulings and impose penalties as they had done in the present proceedings. The information pertaining to the amount of the IDC loan was specific and precise and constituted inside information in terms of s 72 of the SSA.

The court held that just because the traders genuinely believed that the information they had did not constitute inside information is not in itself a defence. There must be reasonable grounds for their belief. The fact that the traders did not sell the shares and lost the entire value of their holding is irrelevant.

The court referred with approval to foreign case law (*The Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKCFAR 205), in which it was held that the correct approach was 'to treat the relevant profit as gained by the insider dealer [here: the third party] when the information was made public ... [at] that date, the amount of the inside dealer's profit, whether realised or not, was fixed once and for all. Subsequent changes in

market prices are irrelevant.'

The appeal was accordingly dismissed with costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administration of estates, administrative law, attorneys, aviation, civil procedure, companies, contract, criminal procedure, education, evidence, human rights, labour law, land, mining, mortgages and practice.

Additional note: In the company law report in the law reports column (2016 (Jan/Feb) DR 43), the author referred to other judgments which were delivered. The references for the said judgments are:

- *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2014 (4) SA 343 (GP) (see 2014 (Oct) DR 44) and 2015 (5) SA 38 (SCA) (see 2015 (Nov) DR 36); and
- *Biochlor (Pty) Ltd v GE Betz South Africa (Pty) Ltd* (GP) (unreported case no A710/2013, 12-2-2014) (Mothle J).



On a lighter note: Law books in the bedroom

Du Plessis v Du Plessis 1976 (1) SA 284 (W)

Margo J: 'In her founding affidavit the applicant says that the respondent deserted her, and that since 1968 he has been living [in] a flat.

On 1 September 1972 she caused the summons in her matrimonial action to be served on the respondent. The respondent, when he was notified that a summons was going to be served on him for the restitution of conjugal rights, wrote a letter to the applicant dated 30 August 1972 and sent copies to both his attorney and her attorney. Mr Goldsmid has criticised the contents of that letter as being entirely inconsistent with a sincere and *bona fide* intention to restore conjugal rights.

Then, on 1 September 1972, presumably after he had received the summons, the respondent, despite the fact that the applicant was strongly opposed thereto, returned to the house and installed himself in the applicant's bedroom. He did this after notifying the applicant through his attorney and her attorney that he intended to do so. He brought with him several law books, which he displayed in the bedroom. These included Nathan, *Handbook on Divorce*, and the 3rd

edition of Hahlo, *The South African Law of Husband and Wife*. It is material to observe at this stage that the respondent is not a lawyer, but an engineer. He says that there was nothing strange in his being in possession of books relating to marriage and divorce, and that, since his attorney was absent at a military H camp at the time, he (the respondent) –

“felt that it was necessary that if any situation developed I should immediately be able to appraise myself of the legal position, particularly as I did not wish to take the law into my hands”.

Indeed, in his letter of 30 August to the applicant, he quoted Hahlo to her on the proposition that normally a deserting spouse is entitled to terminate the desertion at any time up to pronouncement of the final decree of divorce.

The applicant alleges that after the respondent's return to the house she made repeated attempts to persuade him to leave. She says that he told her that she had no possible ground for divorce and that he was determined to restore conjugal rights. Later he agreed that there was nothing left of the marriage and that divorce would be the only way out.'



By
Bouwer
van
Niekerk
and Harold
Smit

When does a business rescue practitioner become *functus officio*?

Landosec (Pty) Ltd t/a Lasertech v McLaren
(ECP) (unreported case no 2231/2015, 3-11-2015) (Smith J)

Does a business rescue practitioner (BRP) become *functus officio* after business rescue proceedings end in terms of s 132 (2)(c)(i) of the Companies Act 71 of 2008 (the Act), namely after the business rescue plan that had been proposed had been rejected? This is the question that the court was tasked to answer in the judgment.

The facts

The company under supervision sought an order declaring, among others, that the business rescue proceedings of the company came to an end on a certain date – the date on which the business rescue plan was rejected, that the BRP ceased to act in his capacity as such, and was thus *functus officio*.

The BRP submitted a business rescue plan on 14 October 2014 for the consideration of the creditors at the second meeting in terms of s 151 of the Act. This plan was rejected by the creditors. No other resolutions were adopted at that meeting, nor were any instructions given to the BRP in regard to liquidation proceedings subsequent to the meeting.

Thirteen days after the meeting, the BRP issued a notice to all the affected persons, in which he confirmed that the business rescue plan had been rejected by the creditors, and that he had no option but to end the business rescue proceedings. In this notice, he also stated that he had instructed attorneys to launch an application for the winding-up of the company. The BRP intended to launch such proceedings out of the same court that presided over the application by the company, dependant on whether the court found that he had the requisite *locus standi* to move such an application.

During this period, the BRP continued to act on behalf of the company, and in particular purported to terminate the contracts of employees of the company, dealt with suppliers and customers of the company and closed the business of the company. The company sought an order declaring these acts of the BRP were null and void.

The legal question

The question posed at the beginning of this article surrounds the interpretation of s 132(2)(c)(i) of the Act. This section reads:

'132 Duration of business rescue proceedings

(2) Business rescue proceedings end when –

...

(c) a business rescue plan has been –

(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in Section 153.'

The court commented on this section as follows:

'The language of this provision is unambiguous and, when considered in the light of ordinary rules and grammar and syntax, and when read in context, brooks no other interpretation than the one contended for by the applicants, namely the business rescue proceedings end when the rescue plan is rejected by creditors and no affected person has taken any action in terms of section 153 (1) of the Act' (para 7).

The court found that the BRP's term of office came to an end on the date that the business rescue plan was rejected, that the BRP, therefore, did not retain any residual powers in terms of the Act, and was consequently *functus officio*. The court concluded that any subsequent decisions purportedly taken by the BRP on behalf of the company was null and void.

Although we agree with the judgment, we submit that the court did not deal with the most obvious section of the Act in coming to its conclusion.

In deciding this judgment, the court (correctly) referred to the judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA). The judgment in the *Natal* matter is, in our view, the new *locus classicus* on interpretation in South African law, and is indispensable authority in interpreting not only legislation, but all legal documents. We quote the following passages from the *Natal* judgment that, in our opinion, would have greatly assisted the court in coming to its conclusion:

'Interpretation in the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

...

The "inevitable point of departure is the language of the provision itself",

read in context and having regard to the purpose of the provision and the background to the interpretation and production of the document' (para 18) (our italics).

When considering the question as to when a BRP becomes *functus officio*, we submit that one of the first, if not the first, section that should have been considered by the court is the section containing the definition of a BRP – how does the Act define a business rescue practitioner? Surely this section should provide some insights into when a BRP is *nomine officio* (and provide some clue as to when he or she is *functus officio*)? The relevant section is s 128(1)(d) of the Act. It reads –

"business rescue practitioner" means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and "practitioner" has a corresponding meaning' (our italics).

The *Natal* judgment tells us to look at words used in the document (in this case, the Act). The Act clearly tells us what the term 'business rescue practitioner' means. This meaning is simple, and, on our reading of the Act, is not contradicted or subject to the reservation of any other section contained in ch 6 – the chapter governing business rescue proceedings.

Thus, the answer to the question posed in this judgment can be amplified as follows: A BRP is only a BRP during business rescue proceedings; he or she is only *nomine officio* for that term. This is so because that is how a BRP is defined in terms of s 128(1)(d) of the Act. Once the business rescue proceedings end, so does the BRP's term, rendering him or her *functus officio*. This is not only the case where s 132(2)(c)(i) of the Act applies, but in all instances where business rescue proceedings end. Such instances are (in addition to that mentioned above) when –

- the court sets aside the resolution or order that began the business rescue proceedings (s 132(2)(a)(i));
- the court has converted the business rescue proceedings to liquidation proceedings (s 132(2)(a)(ii));
- the BRP has filed with the Commission a notice of termination of business rescue proceedings (s 132(2)(b)); and
- a business rescue plan has been adopted in terms of part D of ch 6 of the Act,

and the BRP has subsequently filed a notice of substantial implementation of that plan (s 132(2)(c)(ii)).

In addition to the above, a BRP will necessarily become *functus officio* when the court sets aside his or her appointment in terms of s 130(6).

A BRP will also become *functus officio* if he or she is removed by a court on application by an affected person on any of the following grounds –

- incompetence to perform the duties of a BRP (s 139(2)(a));

- failure by the BRP to exercise the proper degree of care in the performance of his or her duties (s 139(2)(b));

- when the BRP engages in illegal acts or conduct (s 139(2)(c));

- if the BRP no longer satisfies the requirements set out in s 138(1) (s 139(2)(d));

- when a conflict of interest or lack of independence arises (s 139(2)(e)); and

- when the BRP is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capac-

ity within a reasonable time (s 139(2)(f)).

Lastly, a BRP will become *functus officio* if he or she dies or resigns.

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financial intelligence centre

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INVITATION TO ATTORNEYS TO TEST THE FINANCIAL INTELLIGENCE CENTRE'S NEW REGISTRATION AND REPORTING SYSTEM

The Financial Intelligence Centre (the FIC) will be implementing a new integrated information and communications technology (ICT) platform known as goAML. goAML will enhance the security and quality of reporting to the FIC and will enable the FIC to better realise its objectives in terms of the Financial Intelligence Centre Act 38 of 2001 (the FIC Act).

The goAML platform will be replacing the current system being used by the FIC for registration and reporting and will go live in late April 2016. The impact of this for attorneys includes:

- Assigning a new registration number.
- All attorneys firms must register and report per branch (example: A firm holding a Cape Town and Pretoria office will each have their own registration reference number and report separately to the FIC).
- A unique email address per user and per institution will be required.
- Information provided to the FIC will be verified before user accounts are created for the institution on goAML.
- All reporting will be required to be submitted to the FIC via goAML from a specified date.
- Registered institutions will have access on goAML to a unique message board to receive messages and requests for information from the FIC.

The FIC urges all accountable and reporting institutions and businesses, including attorneys, to begin testing the new goAML platform immediately. When the platform goes live in late April 2016, all users will be required to thoroughly understand and use the platform to fulfill their registration and reporting compliance obligations in terms of the FIC Act.

The testing environment can be accessed using the following URL link:

https://goStage.fic.gov.za/goAMLWeb_UAT

When accessing this link, there are guidelines available on the landing page to assist you through the registration process.

Further information regarding the goAML system is available on our website at www.fic.gov.za

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NEW LEGISLATION

Legislation published from
30 December 2015 – 29 January 2016

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Selected list of delegated legislation

Agricultural Pests Act 36 of 1983

Amendment of regulations. GN R67 GG39627/29-1-2016.

Amendment of control measures. GN R66 GG39627/29-1-2016.

Agricultural Products Standards Act 119 of 1990

Regulations relating to the grading, packing and marking of sorghum intended for sale in South Africa. GN R15 GG39580/8-1-2016.

Regulations relating to the grading, packing and marking of maize products intended for sale in South Africa. GN R63 GG39627/29-1-2016.

Regulations relating to the grading, packing and marking of durum wheat intended for sale in South Africa. GN43 GG39613/22-1-2016.

Regulations relating to the grading, packing and marking of bread wheat intended for sale in South Africa. GN64 GG39627/29-1-2016.

Air Traffic and Navigation Services Company Act 45 of 1993

Rules for levying air traffic service charges (from 1 April 2016). GN1246 GG39568/31-12-2015.

Income Tax Act 58 of 1962

Determination of a date on which the new employees tax deduction tables as prescribed in terms of para 9(1) of the fourth schedule of the Act came into operation (1 March 2015). GenN1247 GG39571/31-12-2015.

Regulations in terms of para 12D(5)(a) of the seventh schedule to the Act on the determination of the fund member category factor. GN R17 GG39582/7-1-2016.

Magistrates' Courts Act 32 of 1944

Creation of magisterial districts and establishment of district courts in Mpumalanga. GN32 GG39601/15-1-2016.

Creation of magisterial districts and establishment of district courts in the Limpopo province. GN33 GG39601/15-1-2016.

Variation of certain regional divisions in Gauteng, Limpopo, Mpumalanga and North-West. GN3 GG39603/18-1-2016.

Description of service areas in respect of sheriffs affected by the realisation of magisterial districts. GN57 GG39619/25-1-2016.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers. GN59 GG39617/25-1-2016.

National Qualifications Framework Act 67 of 2008

Policy and criteria for evaluating foreign qualifications within the South African NQF. GN1289 GG39566/30-12-2015.

Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN6 and BN7 GG39636/29-1-2016.

Superior Courts Act 10 of 2013

Regulations on the criteria for the determination of the judicial establishment of the Supreme Court of Appeal and divisions of the High Court of South Africa, 2015. GN R26 GG39595/14-1-2016.

Determination of areas under jurisdiction of divisions of the High Court of South Africa (Limpopo, Polokwane and Gauteng, Pretoria). GN30 GG39601/15-1-2016.

Tax Administration Act 28 of 2011

Returns to be submitted by third parties in terms of s 26 of the Act. GenN1 GG39575/6-1-2016.

Draft legislation

National Pollution Prevention Plans Regulations in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN5 GG39578/8-1-2016.

Declaration of greenhouse gases as priority air pollutants in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN6 GG39578/8-1-2016.

Draft amendment of the norms and standards for marking of rhinoceros horn, and for the hunting of rhinoceros for trophy hunting purposes in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN5 GG39589/12-1-2016.

Draft Perishable Product Export Control Bill. GenN7 GG39593/15-1-2016.

Draft amendment regulations for the establishment of a National Institute for Humanities and Social Sciences. GN35 GG39605/20-1-2016.

Determination of application, registration and renewal fees (for credit providers, credit bureaux, debt counsellors, payment distribution agents and alternative distribution agents) in terms of the National Credit Act 34 of 2005 for comment. GN36 GG39609/21-1-2016.

Regulations relating to the grading, packing and marking of pineapples intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GenN12 GG39613/22-1-2016.

Draft African Exploration Mining and Finance Corporation Bill. GN56 GG39615/22-1-2016.

Draft Franchise Industry Code of Conduct of South Africa in terms of the Consumer Protection Act 68 of 2008. GenN33 GG39631/29-1-2016.



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There is no charge for the service at the Government Printing Works but you will need to register. Usually the gazettes are published on the website within a day of their publication.

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

Employment law update



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Section 197 transfers

In *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd and Another* [2016] 1 BLLR 13 (LAC), the Labour Appeal Court (LAC) was required to consider whether s 197 applied on the municipality cancelling a service agreement with the service provider, Rural Maintenance. In 2011 the municipality appointed Rural Maintenance to maintain and manage the supply of electricity for a period of 25 years. On Rural Maintenance's appointment, it was agreed that 16 of the municipality's employees would transfer to Rural Maintenance. Over time, Rural Maintenance expanded its business and increased its workforce to 127 employees. In 2013 the municipality argued that the contract between the municipality and Rural Maintenance was null and void as the signatory to the contract did not have the requisite authority from the municipality to enter into the contract. Rural Maintenance alleged that the municipality was in breach of the contract and sought to cancel the contract on this basis.

Rural Maintenance then took steps to transfer the 127 employees involved in performing the electricity management and maintenance services to the municipality. It also returned to the municipality the properties, tools, equipment and vehicles that had initially been transferred to it when the contract commenced. Rural Maintenance did, however, retain certain assets such as vehicles and computer stations. The Labour Court (LC) found that there had been a transfer of a business as a going concern and it ordered that the 127 employees be transferred to the municipality in accordance with s 197.

On appeal, the municipality argued that s 197 did not apply as Rural Maintenance had not taken positive steps to transfer the business back to the municipality, which argument the LAC rejected. Furthermore, the municipality argued

that there was not a transfer of a business as a going concern as the municipality could not carry out the business in substantially the same way as it had been carried out by Rural Maintenance and thus it did not constitute the same business but in different hands. This was because specialised tools and significant assets were not handed over by Rural Maintenance and the municipality was accordingly unable to perform the comprehensive service that had been carried out by Rural Maintenance with only the basic infrastructure at its disposal. The only way in which the municipality would be able to continue the business as a going concern was if it had received the specialised infrastructure from Rural Maintenance or had acquired it themselves. The LAC accordingly found that there had not been a transfer of a business as a going concern as the municipality was not able to seamlessly continue the business after the transfer.

Sexual harassment – a heinous misconduct that plagues a workplace

In the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* [2016] 1 BLLR 1 (LAC), the LAC considered whether unwelcome conduct of an employee, Mr Simmers, of a non-physical nature during a business trip constituted sexual harassment, which justified dismissal. The Labour Court (LC) had found that Simmers' dismissal for sexual harassment and unprofessional conduct was substantively unfair and reinstatement with a final written warning was ordered.

Simmers stayed at a lodge in Botswana while attending to business together with a work colleague and an employee of another company, which had formed a consortium with Campbell Scientific. Evidence was led that after the three of them had dinner Simmers made unwelcome advances towards the complain-

ant. In this regard, he asked the complainant whether she had a boyfriend and repeatedly asked her to come to his room. The complainant rejected these advances and was then told to phone him if she changed her mind. The complainant later gave evidence that she had felt uncomfortable and insulted by Simmers' conduct and was of the view that he had acted inappropriately towards her. She consequently refused to work with Simmers going forward. Simmers' version was that he had merely made an invitation to the complainant in a conversation between consenting adults, which had been meant to be taken lightly. He said that the invitation was made half-jokingly. A disciplinary inquiry was convened and Simmers was dismissed. When he referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, the commissioner found that dismissal was an appropriate sanction as the misconduct was serious and Simmers did not show remorse, which demonstrated that any future relationship between the parties was not possible.

The matter was then taken to the LC where it was found to constitute an unfair dismissal. In finding that the dismissal was unfair, the LC considered factors such as the fact that Simmers and the complainant would not work together again as she had moved to Australia, they were not co-employees, there was no disparity of power, the conduct was once-off and it occurred outside of working hours. It was found that in line with the requirement to apply progressive discipline the employee should have been issued with a final written warning.

The LAC considered sexual harassment in light of the Constitutional right to human dignity and equality and the fact that sexual harassment constitutes a barrier to the achievement of substantive equality in the workplace. It was found that although this incident had occurred

at a social event, this was a work-related social event, which Simmers and the complainant would not have been at had it not been for Simmers' employment. The incident was thus not unrelated to his employment.

The LAC found that the LC had erred in finding that there was no power disparity. According to the LAC, there was a power differential based on Simmers' age and gender. Thus, the fact that they were not co-employees and Simmers did not hold a more senior position than the complainant did not negate the power

disparity at play. The LAC also found that the fact that this was a once-off occasion and did not involve physical conduct or the persistent pursuit of the complainant by Simmers did not mean that it did not constitute sexual harassment. The LAC did not agree with the LC's finding that Simmers had merely been 'trying his luck'. Simmers had violated the complainant's right to equality in the workplace when he elected to make unwelcome advances towards the complainant. The LAC held that the Constitution affords women the right to

engage constructively and on an equal basis within the workplace without infringements on their right to dignity and equality.

The LAC found that the dismissal was fair as it was serious misconduct and Simmers had not shown remorse and thus there was little opportunity for rehabilitation. The LAC also stated that it wanted to send out a message about the seriousness of sexual harassment and the fact that this will not be tolerated and will be met with the harshest penalty.



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The consequence of not diligently prosecuting a review application

Toyota SA Motors (Pty) Ltd v CCMA and Others (CC) (unreported case no CCT22814, 15-12-2015) (Nkabinde J with nine other judges concurring).

On his return to work after being absent without leave from 28 February 2011 to 3 March 2011, the employee, Mr Makhotla was charged with unauthorised absenteeism by his employer Toyota SA Motors (Toyota).

Subsequent to receiving his notice to attend his disciplinary hearing, but prior to the commencement of the inquiry, Makhotla tendered his resignation on 7 March 2011 with effect 31 March 2011. Notwithstanding this, Toyota took the decision to continue with Makhotla's hearing, which resulted in him being dismissed on 24 March 2011.

Makhotla referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The arbitrator found Makhotla's dismissal substantively unfair and ordered Toyota to reinstate Makhotla and pay him R 218 400 in 'back pay'.

On 19 October 2011 Toyota launched an application to review and set aside the award on various grounds including the allegation that the arbitrator failed to have regard to Makhotla's conflicting explanations for being absent as well as the

allegation that the arbitrator prevented Toyota from cross examining Makhotla on his conflicting versions.

On 18 November 2011 the CCMA delivered an incomplete record of the arbitration proceedings – it delivered one disc that only had 20 minutes of the process recorded on it. On 30 November Toyota instructed its correspondent attorney to uplift the record at the Labour Court (LC), which it received on 2 February 2012. On 6 March 2012 Toyota sent the arbitrator's handwritten notes to be transcribed and on 19 March 2012 delivered the record in terms of r 7A(6) but did not include the arbitrator's transcribed notes.

In response the Retail and Allied Workers Union, acting on behalf of Makhotla, requested from Toyota the complete record. Toyota informed the union that it received an incomplete record and was awaiting a transcript of the arbitrator's notes.

On 7 June 2012 the CCMA informed Toyota that it could not locate the remaining portion of the record and offered to set down the matter for reconstruction.

On 20 June 2012 the transcribers advised Toyota that 70% of the arbitrator's notes were illegible but they would attempt to finalise the transcript.

On 23 August 2012 Toyota sent a second follow-up letter to the transcribers and on the same day also sent a letter to the CCMA informing it that the arbitrator's notes were illegible and requested the matter be set down for reconstruction.

In the absence of the CCMA responding to this request, Toyota and the Union met on 28 November 2012 in an attempt to reconstruct the record. On 23 January 2013 the arbitrator's notes were transcribed and ready for collection. On 31 January 2013 Toyota sent the Union the transcribed notes of the reconstruction process, which the parties participated in and advised them that it would be sending through the arbitrator's transcribed notes.

Having not received the transcript of the arbitrator's notes, the Union on 8 August 2013 launched an application to the LC to have Toyota's review application dismissed (the dismissal application) on the basis of undue delay in prosecuting its application and further to make the arbitration award an order of court.

The LC per Fourie AJ granted Makhotla's dismissal application. Both the LC and the Labour Appeal Court (LAC) refused Toyota's application for leave to appeal, therein after Toyota approached the Constitutional Court (CC).

Although the CC found it had jurisdiction over the matter, the question was whether or not it should exercise its discretion in favour of Toyota by granting leave to appeal. While not a decisive factor into this inquiry, an important factor was whether or not Toyota had prospects of success if leave to appeal was granted; put differently whether the LC was correct in granting Makhotla's dismissal application.

The court went on to say that when assessing the reasonableness of a delay one must incorporate the ethos of the Labour Relations Act 66 of 1995 (LRA) into such an inquiry – the LRA provided for the simple, quick, cheap and informal approach to labour disputes.

Having evaluated the sequence of events that culminated in Makhotla's dismissal application, the court held:

'... it is plain that in 22 months Toyota did very little to prosecute the review. The delay is wholly excessive. There is no explanation for the delays between 30 November 2011 and 24 January 2012, and 19 March and 23 August 2012. The approach to procuring a full record of the hearing was not diligent, the prosecution of the review was not expeditiously pursued and the explanation for the delays is not reasonable ...'

Another hurdle of an added inordinate delay that Toyota had to surmount, which remains unexplained, relates to the period between about February and August 2013. It is common cause that the transcription of the arbitrator's

notes was done on 22 January 2013 and the transcribed notes were subsequently filed by the CCMA with the Registrar of the LC on 23 January 2013. These notes were made available to Toyota on or about 29 January 2013. Despite all of this, Toyota only delivered the reconstructed record on 27 August 2013 – some seven months later. This was after Mr Makhotla's application to dismiss the review and make the award an order of Court was lodged.'

The court went on to find that as the party who initiated a review application, Toyota, was obliged to take steps to reconstruct the record as soon as it became aware that there was a problem with the record (that being in February 2012).

Turning to the merits of Toyota's review application and after reading the reconstructed record, the CC found that there was no merit in Toyota's argument that the arbitrator failed to consider Makhotla's different explanations for being absent or that Toyota was prevented from cross examining him over this issue.

The court further declined to consider Toyota's argument that the arbitrator erred in awarding Makhotla reinstatement when he was dismissed seven days before his resignation was to come into

effect. In so doing the court held that Toyota failed to place this argument before the LC in opposing the dismissal application and it would be unfair on Makhotla, at this stage of litigation, if Toyota were allowed to pursue this argument for the first time.

In its order the court refused Toyota leave to appeal with costs.

In a dissenting judgment Zondo J, began by recording the reasons why the LC granted Makhotla's dismissal application. These reasons were: Firstly, Toyota did nothing for 18 month's to 'improve the record'; and, secondly, Toyota did not have 'excellent' prospects of success and thirdly, Toyota failed to place an adequate record before the court.

On an overall assessment of the events Zondo J held that the LC erred in finding Toyota had not done anything to pursue its review application for some 18 months and further erred by finding Toyota was at fault for failing to file the record, under circumstances where the onus was with the CCMA to file a complete set of digital recording at the LC.

Zondo J criticised the LC for failing to take into account the issue of prejudice. Had the court done so, it ought to have found that any prejudice Makhotla suffered due to the delay in finalising the review application, would have been

cured if Toyota's review application was dismissed on merit (as opposed to being dismissed for want of prosecution). In contrast by granting the dismissal application, Toyota was saddled with an award without having the legal recourse to test the competency of same.

Next Zondo J turned to Toyota's prospects of success in the review application and found that Toyota had reasonable prospects of success in that the arbitrator –

- unduly prevented Toyota from adequately cross examining Makhotla over his different versions for being absent;
- failed to take into account the different versions Makhotla gave for his absence and further failed to make a finding that Makhotla was guilty of the charge levelled against him; and
- failed to appreciate that reinstatement was not a competent remedy given the fact that Makhotla had resigned, which would have come into effect days after his dismissal.

Zondo J concluded by saying he would have granted Toyota leave to appeal and upheld the appeal by substituting the LC's order with an order dismissing Makhotla's dismissal application.





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By
Meryl
Federl

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By
David
Jesse

Why a Constitutional Court appeal for Oscar Pistorius may succeed

What is a constitutional matter?

Any matter, which is raised in terms of s 38 of the Constitution and raises a question regarding the enforcement, protection and upholding of any person's fundamental rights is a Constitutional matter.

Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) at 44 held:

'I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the the Constitution and is subject to constitutional control.'

What rules apply in a constitutional matter and how is it adjudged?

The court rules required in regard 'fundamental rights' proceedings and, subsequent due process is not contained in any formal legislation. There is a *lacuna*.

This notwithstanding, there are, however, peremptory procedures that must be applied in fundamental rights litigation and that are contained in, *inter alia*:

- *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 102 – 105.
- *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC).
- *Moise v Transitional Local Council of Greater Germiston and Others* 2001 (8) BCLR 765 (CC).
- *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2004 (5) BCLR 445 (CC).
- *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* 2010 (5) BCLR 422 (CC) at 37.

For example *Billiton* at para 37, gives an example of the 'rules and procedures' both an applicant and a respondent must adhere to in the compilation of their respective pleadings.

Highlighting just two of the many differences – the onus is completely different and the final order is not restricted to the prayer.

Notwithstanding failure of its onus by the respondent, the Constitutional Court may still defer to policy considerations in order to reach an alternative conclusion to that sought –

- if any claim of justification is based on the pursuit of policy it is a question that must first be cogently set out in a respondent's pleadings;
- it must be determined by express reference to the requirements and parameters of s 36 of the Constitution of South Africa;
- the *Director of Public Prosecutions, Gauteng v Pistorius* (SCA) (unreported case no 96/2015, 3-12-2015) (Leach JA) is a 'fundamental rights' application (although raised under an appeal), which is premised entirely the 'direct' application of the Bill of Rights;
- within the area of 'direct' application of the Bill of Rights the Constitution overrides ordinary law and conduct to the extent that they are inconsistent with it;
- it contains its own procedural rules and generates its own set of remedies;
- important in this regard is that s 2 cannot be read aside from s 237 of the Constitution;
- any court, including the Constitutional Court, is thus compelled to properly identify the constitutional and legislative matrix of a 'fundamental rights' case; and
- any court is obligated to give express content thereto. This is a material requirement under s 165(2) as read with sch 2(6) of the Constitution.

It is apposite to point out at this juncture that the legislative matrix is wholly subordinate to the Constitution namely, s 36 and that under ss 231 – 233 of the Constitution, international law and treaties must be properly considered.

Thus, any court is compelled to give

express content to the constitutional dimension of a 'fundamental rights' case and then properly set it out. Any court is compelled to view all aspects of the case through the prism of the Bill of Rights.

Oscar Pistorius – his case under appeal

Pistorius has two arrows to his bow. These are important questions that the Constitutional Court is required to answer (per, *inter alia*, *S v Basson* 2005 (12) BCLR 1192 (CC) applied in context and *mutatis mutandis*) –

Fistly, the Constitutional Court is required to distinguish as to whether a criminal trial is a 'theatre' or the serious administration of justice trying an individual with all the dignity and fairness guaranteed under the Constitution.

Because, if it is 'theatre' with all its flash-lights and cameras and press (which it was) then Pistorius is entitled to be adjudged with 'stage fright' and no court may admonish him for being a poor witness, but rather admonish the state for playing to the gallery (*S v Kuse* 1990 (1) SACR 191 (E) is instructive if read in context).

I submit that the public's right to know does not reach so far as to turn a criminal trial into a 'movie set' and theatre (*South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC)).

A 'public trial' must be held to mean that the 'public gallery' is open to the public; not that television stations can make millions of rands from the misfortune of an accused and where the accused is in his entirety stripped of his dignity and his right to provide a proper defence.

The allowing of the *Pistorius* trial to become 'a movie set' inhibited the application of justice. Freedom of expression, (encompassing freedom of the press) can never override the right to a fair trial under s 35(3).

Even the Supreme Court of Appeal (SCA) admitted the 'spotlight and movie style trial' in their praise of Msipa J. This is unfair in that it credits the judge but

impugns Pistorius' inability to perform 'under the spotlight'. It is arbitrary and irrational.

Secondly, the SCA overstepped its bounds of authority and *ultra vires* the Constitution deliberately re-examined fact under the pretense of dealing with a question of law.

The SCA is precluded from that under s 35(3) of the Constitution (*Basson op cit*) and, which rights are non-derogable and superior to the SCA's power to stray from its duly authorised acts.

In other words the SCA impugned Pistorius' testimony and labelled him a poor witness and took account of 'evidence' which is 'fact' when it was not permitted to make this finding.

Attributed to Pistorius' mental position of a reasonable objective able-bodied man, not an amputee with a fragile personality and paranoid fear of being attacked. This is *ultra vires* the Constitution.

I also submit that *dolus eventualis* was misapplied. In context it can be best rep-

resented as 'a man shoots at another in a busy restaurant, missing him but killing another, or a man drives a car into a crowd but says "I did not intend to kill anyone."'.

This is not applicable to an amputee, petrified, and not rationalising anything but the protection of him and his girlfriend. If he did not rationalise because of fear, he cannot be held guilty of *dolus*.

Even further damning of the SCA is that in succumbing to the state's questions of law, they had to set forth a proportionality test under s 36 of the Constitution to supersede and novate existing common law (precedent).

Not only did they not do this, but the SCA never addressed the issue of proportionality in their answering of the state's first two questions of law instead giving no reasons within the prism of the Bill of Rights as to why current precedent should be overridden and a new standard accepted. This renders their decision arbitrary irrational unfair and materially biased. It is *ultra vires* the Constitution.

To allow the state to commence raising ill-disguised questions of law, which in reality are reconsiderations of fact to arrive at their prayed for decision on an untenable question of law, imbues the SCA with power beyond the ordinary course and scope of its authority.

This indeed is a dangerous precedent and must be struck down by the Constitutional Court as egregiously contravening s 35(3).

A convicted accused is entitled to absolute finality by the trial court and not, in essence, to be retried, without being given the chance again to meet his onus in the case he is newly required to meet.

McNally J in *Zimbabwe Electricity Supply Authority v. Dera* 1998 (1) ZLR 500 (SC) A at 3, once stated that it was better ten guilty persons go free than one innocent man be convicted. This is the principle to be applied in this instance.

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