

'DIVORCE DEBT' CREATED BY THE GEFP

Onwillekeurige verstryking
van algemene prokurasie

If it is not **original** it is **inadmissible** –
*the uncertainty of 'data messages'
in court proceedings*

Understanding certain
provisions of the
**Domestic Violence
Act**: A practitioner's
perspective

Protection of Investments Act –
A balancing Act between
policies and investments

SAHRC celebrates
20 years of
existence

**LSSA hosts
summit on
briefing
patterns**

Law Societies' Presidents commit
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24 'Divorce debt' created by the Government Employees Pension Fund

The Government Employees Pension Fund (GEPF) is Africa's largest pension fund with more than 1,2 million active members, some 360 000 pensioners and beneficiaries. The GEPF is the only fund in South Africa which, when its members are divorcing, pay out the members' former spouses' divorce claims and creates 'divorce debts' for its members. Members are required to pay back to the fund when they exit the fund, which debts attract interest. This article, written by **Clement Marumoagae** discusses the rationale behind the creation of 'divorce debts' and evaluates whether such debts have the potential of prejudicing divorcing members of the GEPF.

26 Protection of Investments Act – A balancing Act between policies and investments

On 3 November 2015 the Protection of Investment Act 22 of 2015 was passed in Parliament despite staunch opposition. It is not difficult to understand why there has been opposition to the Act. In this article, **Amy Farish** gives a background to the Act and discusses the balance that South Africa has to strike between protecting its own policies and encouraging investment at the same time.



28 Onwillekeurige verstryking van algemene prokurasie

In dié artikel verwys die skrywer na die aanbevelings deur die Regshersieningskommissie, wat tot dusver nie uitgevoer is nie. Die huidige algemeenaanvaarde beginsel is skynbaar dat 'n algemene prokurasie onwillekeurig verval indien die volmaggewer 'n verandering van status ondergaan waardeur sy of haar handelingsbevoegdheid aan bande gelê word. **Willie Herbst** bespreek dié standpunt en die uitspraak in die saak *Tucker's Fresh Meat Supply (Pty) Ltd vs Echakowitz* 1958 (1) SA 505 (AA).

32 If it is not original it is inadmissible – the uncertainty of 'data messages' in court proceedings

With the advent of the Electronic Communications and Transactions Act 25 of 2002, and the subsequent repeal of the Computer Evidence Act 57 of 1983, the answer to the admission of 'data messages' whether as 'documents' 'real' 'private' or 'public' is now simple. **David Jesse** writes that the original unaltered version of the copy of the fax, e-mail or short message service (SMS) must be available for scrutiny by the court on the relevant instrument.

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A task team that dare not fail

The task team that must carry forward the resolutions of the high-level summit on Briefing Patterns in the Legal Profession has a critical and heavy burden on its figurative shoulders. It will have to meet the aspirations of many black and female practitioners to rectify skewed briefing patterns. It will also have to prove many cynics wrong.

The summit – convened at the end of March by the Law Society of South Africa (LSSA) and attended by numerous relevant stakeholders, from legal practitioners to representatives of the Justice Department and state-owned enterprises – was regarded to be of such serious significance, that Chief Justice Mogoeng Mogoeng felt it necessary to give the opening address even though he was delivering the historic ‘*Nkandla*’ judgment that very morning in the Constitutional Court.

Delegates at the summit collectively expressed their deepest concerns about briefing patterns in the public and private sectors. They were of the view that these endanger the constitutional democracy insofar as the perceived and real bias against black practitioners and women practitioners in these sectors was concerned. (See p 6 of this issue for a report on the summit.)

There was general agreement that this contravened the principles

of non-racialism and non-sexism in the Constitution. It further has a negative impact on the progress of affected practitioners and their economic wellbeing.

The summit recognised that meaningful action must be taken by all stakeholders and that this process must be subjected to strict accountability.

Government is expected to embrace decisive action and must not be seen to promote skewed briefing patterns.

The task team – to be convened by the LSSA – will include representatives of legal practitioners, the state through the Department of Justice and Constitutional Development, as well as of business through the Black Business Council and Business Unity South Africa.

The task team, which is to give due consideration to all views raised at the summit, is tasked with –

- developing a uniform protocol on the procurement of legal services;
- setting targets for entities doing state work;
- establishing a common register for the recording on state legal work, with reference to name, frequency, value and nature of briefs;
- drafting a code of conduct for private enterprise in respect of legal work, with which the private sector can associate;
- considering relevant research, training and development; and

- monitoring progress with regard to briefing patterns for a report to summit delegates and for considering the necessity of a follow-up summit.

This task team must have the unqualified support of the profession, the department and all other stakeholders if it is to make meaningful progress.

Barbara Whittle,
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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.

S v Pilane

I refer to the article 'Bad practice continues: Who must administer an oath in criminal proceedings?' (2016 (Jan/Feb) DR 18). Subsequent to *Pilane v S* (NWM) (unreported case no CA10/2014, 5-3-2015) (Hendricks J) the review court in the unreported judgment of *S v Maloma* (GP) (unreported case no A376/2015, 11-6-2015) (Bam J) correctly ruled that: 'The oaths administered to the witness by the interpreter ... was correct in law'.

Ambrose Mfayela, regional magistrate, Scottburgh

Who must administer an oath?

In the article by Ronald Rikhotso 'Bad practice continues: Who must administer an oath in criminal proceedings?' (2016 (Jan/Feb) DR 18), the question of who must administer an oath in criminal proceedings is asked. In the article the author indicates that the oath cannot be administered by the court interpreter. In view of the full Bench decision in *S v Maloma* (GP) (unreported case no A376/2015, 11-6-2015) (Bam J) this assertion is not correct. In the *Maloma* judgment the court had to consider the question whether it is correct in law that an interpreter in a criminal trial may administer the oath to witnesses.

In referring to the judgment in *S v Pilane* (NWM) (unreported case no CA10/2014, 5-3-2010) (Hendricks J), which Mr Rikhotso also refers to as authority for his view, the court finds that: 'What, however, the North West Court, with respect, did not consider, are the provisions of section 165. This may be due to the fact that counsel appearing for the appellant and the State, ... failed or neglected to draw the Court's attention to that section, and for that matter, the country wide long standing practice of the application thereof in all our criminal courts' (*Maloma* at para 9).

The court then quotes s 165, which reads as follows: 'Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be (emphasis added)' (*Maloma* at para 10).

The court then proceeded (in *Maloma* at para 12): 'Subsequently, in the matter of *Machaba and Another v The State* [[2015] 2 All SA 552 (SCA)], the Supreme Court of Appeal, in paragraphs [8] and [9] of the judgment, with reference to

Pilane, confirmed that it is peremptory in terms of section 162 that either the presiding judge, or the registrar in the case of a superior court should administer the oath to witnesses. The question whether it was justified in law that the interpreter was empowered to administer the oath, was not addressed and the Court was clearly not called upon to consider Section 165. The Court merely referred to the provisions of section 162. Accordingly the decision in *Machaba*, with respect, did not solve the problem.'

The court then came to the following conclusion: 'Accordingly, in conclusion, it is found that the administration of the oath by the interpreter in this matter was consistent with the provisions of section 162, read with section 165, and that no irregularity was committed' (*Maloma* at para 16).

The end result is, therefore, that the interpreter can administer the oath to a witness in criminal proceedings in the presence and under the eyes of the presiding judicial officer in view of the provisions of s 165 of the Criminal Procedure Act 51 of 1977.

Gerhard van Rooyen, magistrate, Emlazi

Prisoners of poverty

The annual report of the Judicial Inspectorate for Correctional Services (2014/15) (www.judicialinsp.dcs.gov.za,



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accessed 31-3-2016) has once again shown (as it has for the last 20 years) that thousands of detainees who have not yet been convicted of a crime languish in already overcrowded jails simply because they are too poor to afford bail.

The South African Institute of Race Relations has warned in a study that the country's overpopulated prisons are being swelled by nearly 7 500 detainees who cannot afford to pay for their release in 2015.

Institute analyst Kerwin Lebone was quoted in an article (African News Agency 'IRR urges lawmakers to assist poverty stricken prisoners' www.mg.co.za, accessed 31-3-2016) as saying: 'The figures are concerning for several reasons. The first is that a great many people who have not been convicted of any crime are in jail simply because they are too poor to afford bail - they are what we describe as prisoners of poverty. ... The presence of so many remand detainees in our jails compounds the prison overcrowding crisis faced by the Department of Correctional Services. ... There is a significant cost to the taxpayer in housing this number of remand detainees and these resources could be more effectively employed elsewhere in the criminal justice system'.

Prisoners of poverty must fall - and I call on the Minister of Justice and Correctional Services, Michael Masutha or Deputy Minister John Jeffery to take urgent, definitive steps in this regard.

Chris van der Maas, attorney,
Knysna

The controversial judgment - Janusz Walus

On 10 April 1993, the late Chris Hani was brutally killed by Janusz Walus. This murder was pre-meditated and politically motivated by the right wing elements who wanted to plunge the country into turmoil following the unbanning of the African National Congress (ANC) and the release of the late Nelson Mandela. There is no doubt whatsoever in my mind, that

this atrocity cannot be condoned. Following a fair trial the assassin, Mr Walus, and Clive Derby-Lewis were both convicted of murder and were sentenced to death. The death sentences were later commuted to life imprisonment after the death penalty was declared *ultra vires* by our Constitution. The applications for amnesty by Mr Derby-Lewis and Mr Walus before the Truth and Reconciliation Commission were refused. Mr Derby-Lewis was released on medical parole last year.

The application by Mr Walus for release on parole was heard by the duly constituted parole board and was eventually recommended. The Minister of Justice and Correctional Services, Michael Masutha, refused to allow Mr Walus to be released, which brought about an application for a review of his decision by Mr Walus to the High Court Gauteng Division, Pretoria (*Walus v Minister of Correctional Services and Others* (GP) (unreported case no 41828/2015, 10-3-2016) (Janse van Nieuwenhuizen J)).

I have read the judgment and I heard radio discussions on the issue. I understand and appreciate that for the family of the deceased, nothing can ever bring him back or fill the void left by him in their lives.

During the course of the hearing the judge inquired of counsel whether, 23 years after the brutal killing, it was not time for the family to move forward. This was, as I understand it, merely an inquiry made by the judge as to brood over one's sorrow is to embitter one's grief.

I read nothing in the judgment which dealt with this aspect other than for the judge to remark that the family of the deceased had rejected the attempted apology of Mr Walus and of the fact that they declined to meet with him. The judge found that there was nothing which was flawed in the process before the parole board and that there was no valid reason by Minister Masutha to override that decision. On the basis of this finding, coupled with her finding that Mr Walus qualified to be released on parole, she arrived at her conclusion.

It is noted that the minister lodged an Application for Leave to Appeal and it is inappropriate for me to comment on his prospects of success. In due course the application will be heard and argued and I am sure that an educated and properly motivated judgment in respect of the application will be handed down.

From a practitioner's perspective we are confronted daily with findings handed down by our judiciary. Some decisions find favour with us, while others do not and the appeals process is there to ensure that justice is seen to be done. We also have to bear in mind that all our judges are left with difficult issues to determine which they must decide impartially, fairly and competently after applying their minds to all the information placed before them and apply the law.

What is unacceptable though, in my view, is the constant criticism that our judiciary hands down decisions which show lack of transformation laced with Apartheid-type discrimination and that our judges are counter revolutionary. Personal attacks on judges are also unacceptable.

We of the legal profession are enjoined to support our judges and magistrates by appreciating and recognising that they do apply their minds, as best as possible, in the matters placed before them for which they need to be shown the respect which they are entitled to. Hopefully, by us setting this example, we can play our part, small though it may be, in bringing an end to the debilitating plethora of statements, which perpetuate racial hatred.

Leslie Kobrin, attorney,
Johannesburg

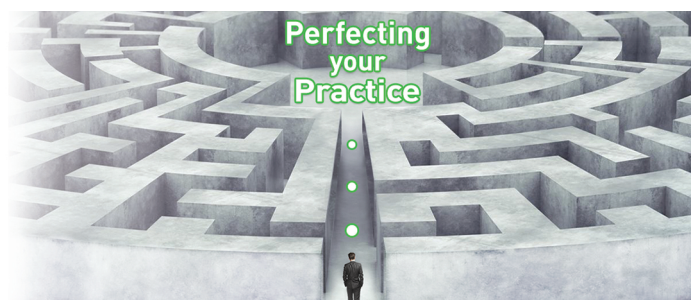
On 14 April in the Gauteng Division, Pretoria, Janse van Nieuwenhuizen J dismissed the State's application for leave to appeal the parole of Janusz Walus.

- Editor



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LSSA hosts summit on briefing patterns

The Law Society of South Africa (LSSA) held a summit on briefing patterns in the legal profession in Kempton Park on 31 March.

Speakers at the summit included Chief Justice Mogoeng Mogoeng; Justice Deputy Minister, John Jeffery; the Justice Department's Director-General, Nonkululeko Sindane; and senior lecturer at the University of South Africa and LSSA's independent consultant, Tsili Phooko.

The 'legal' panel included Chairperson of the Johannesburg Bar Council, advocate Dali Mpofu SC, advocate Samantha Martin and attorneys Max Boqwana and Baitseng Rangata. Consumers of legal services were represented by Mohale Ralebitso of the Black Business Council and the Director-General.

At the summit there was robust discussion around the equal distribution of legal work to attorneys and advocates. Delegates were also taken briefly through past and present discriminatory practices experienced by legal practitioners when it comes to the distribution of work and briefing. Delegates highlighted challenges faced by advocates and counsel in the execution of their work. The focus of the summit was to find solutions and to devise a monitoring mechanism that will ensure that the identified resolutions are implemented.

In the opening address, Chief Justice Mogoeng said that South Africa was divided because white people were seen as superior and women were looked down upon during Apartheid times. He said that this has sadly been engraved in our minds. Chief Justice Mogoeng added that the economy of the country was controlled by design during Apartheid times. 'We recognised this was an injustice that needed to be tackled,' he said.

Chief Justice Mogoeng said that we will never know how gifted a person is until we allow them an opportunity to show us. 'Imagine if the late former Chief Justice Pius Langa was seen as a person instead of black from the beginning? He probably would have been appointed Chief Justice earlier. Do not write off anyone just because you have not yet seen what they are capable of doing. Do not allow us to go back to where we came from. We need a strong base at attorney and advocate levels to build a strong judiciary. If there is no change in briefing patterns soon we will



Chief Justice, Mogoeng Mogoeng, gave the keynote address at the Law Society of South Africa's summit on briefing patterns in the legal profession held in Kempton Park on 31 March.

not achieve what we have the capacity to achieve,' he warned.

The Chief Justice added that a change in briefing patterns will never work if it is sought to be imposed. 'We need to strengthen the judiciary. A weak person can be swayed this way and that way. If work is only given to whites then there is no guarantee that there will be a turnout to [judicial] positions that we deserve,' he said.

'Let us take care of fundamental issues that used to divide us in the past. Women were excluded by design. Let that not happen,' Chief Justice Mogoeng warned.

Outgoing co-chairperson of the LSSA, Busani Mabunda said that some people are using exclusively white counsel and asked what message was being sent. 'Day in and day out, they see the same faces. Skewed briefing patterns are depriving black practitioners. The opportunities need to be unlocked,' he said. He added that most judicial applicants are being turned down because of a lack of exposure and experience among black practitioners.

A study of briefing patterns was conducted by Mr Phooko. At the summit, he spoke on the research findings.

Mr Phooko said that the research was conducted from 5 January 2015 to 12 February 2016. He said that a questionnaire had been sent to 86 government and state-owned entities, but only eight had responded by the deadline date. Mr

Phooko said that responses were still being received the day before the summit and these responses had not been included in the findings. He added that three law firms stated that they could not disclose any information because of their non-disclosure clauses, but had informed him that they were in compliance with black economic empowerment and public-private partnership requirements.

Findings

Speaking on the findings, Mr Phooko said that the few entities that had responded had briefed 93 advocates collectively. Of these, 15 were white; 59 were black; 12 were Indian and seven were coloured. In terms of gender, 71 were male and 22 female.

Of the black advocates briefed, 50 % were male and 17 % female. Of the Indian advocates briefed, nine were male and three were female and only two of the seven coloured advocates that were briefed were female. None of the 15 white advocates briefed were female.

Next Mr Phooko spoke on the 32 attorneys receiving work in both the private and public sector. He said that black attorneys dominated at 21. There were six whites and five Indians.

Mr Phooko said that some of the challenges the participants spoke about included being overlooked for work if they are female, the exception to this is 'if they are pretty'. Some said that being black comes with stereotypes such as being incompetent. He said black lawyers were sometimes excluded because they studied at a particular institution or live at a particular place. He added that this cannot be an issue solved overnight.

Mr Phooko said that the research also found that most private firms excluded disadvantaged groups and the senior practitioners instruct which advocates are to be briefed. He added that the legal profession was a referral profession and that networking was very important.

Recommendations

Some of the recommendations that Mr Phooko suggested were -

- that regulatory bodies should be more involved;
- there should be an audit on the state attorney;
- there should be a policy to regulate state-owned enterprises to brief from the previously disadvantaged group;
- untransformed corporates should be



Senior lecturer at the University of South Africa and LSSA independent consultant, Tsili Phooko, speaking on his preliminary research findings of his study on briefing patterns in the legal profession at the briefing patterns summit held in Kempton Park in March.

pressured to brief black-owned firms;
 • clerks should be employed by entities to distribute work; and
 • there should be a circular of junior advocates, as well as areas of expertise.

In conclusion Mr Phooko said that although the limited preliminary information indicates otherwise, submissions and research revealed that there is an unequal distribution of work. He added that the lack of response was a concern and said that one of the entities informed him that it does not keep records of race and gender, which was a huge concern to him. He added that monitoring and policy was also needed to address this issue.

Mr Phooko said that because of the lack of responses, his research was not conclusive. He reiterated that this was a preliminary report.

It was suggested from the floor that the research should also investigate the monetary value of briefs and that the research as a whole must be ongoing.

Justice Department statistics

Ms Sindane began her speech by explaining that state attorneys are responsible for managing litigation and including management and distribution of briefs to private practitioners. She said that state attorneys are also committed to upholding and defending the Constitution by providing comprehensive, cost effective, efficient and professional litigation and legal services to national, provincial government and other state-funded bodies.

Ms Sindane said there are 12 state attorney's offices, situated in all the provinces except Mpumalanga. There are

three offices in the Eastern Cape; two in Gauteng, two in Limpopo and one in each of the other provinces.

Ms Sindane explained that the Office of the State Attorney is created in terms of the State Attorney Act 56 of 1957 as amended and therefore, the services rendered are in line with the provisions of the said Act.

'The function of the State Attorney is to perform, in court or in any part of the country, work on behalf of the government, that is by law practice or custom performed by attorneys, notaries or conveyancers,' she said. 'The strategic objective of state attorneys is to improve the management of litigation on behalf of the state, to reduce costs and transform the legal profession,' she added.

Transformation

Speaking on transformation Ms Sindane said in terms of the Justice Department's policies on transformation, the state attorney's key performance indicator is that 76 % of value of briefs be allocated to previously disadvantaged individuals (PDIs).

She added that state attorneys are committed to promoting the equal distribution of briefs to PDIs taking into account qualification, skills and experience. 'The briefing policy (still draft) will give effect to the above. The empowerment of female practitioners remains a specific focus area in order to redress the imbalances of the past. Therefore preference is to be given to female PDIs,' she said.

Ms Sindane said that there was a need for the advancement and transfer of skills by way of exposure to all areas of legal work to PDIs to broaden the pool of qualified legal practitioners and the judiciary. She added that the transfer of skills between skilled private practitioners and those practitioners who are still at developmental stage is not only imperative, but also beneficial to the state and the country. 'Government is committed to exposing legal professionals to skills development programmes by acceleration of projects targeting PDIs and women in particular,' she said.

Ms Sindane went through the briefing statistics from 2013/14 to quarters one to three of 2015/16. She noted that in 2013/14 a total of 4 115 people were briefed. Of these, 1 378 were women of which 760 were African, 164 were white, 123 were coloured and 331 were Indian. There was a total of 2 737 men who had been briefed of which 1 829 were African, 474 were white, 223 were coloured and 211 Indian. In 2014/15 the numbers had gone up with a total of 4 578 being briefed. Of these, 1 517 were female and 3 061 were male; 2 620 were African, 447 were coloured, 777 were Indian and 734 were white.

Ms Sindane also looked at counsel pay-

ments. It was noted that the total value of briefs for the 2014\15 was R 638 271 945,03. The total for females amounted to R 69 737 439,06 whereas males received R 511 494 424,36. Surprisingly, briefs to Africans had the most value worth R 347 105 978,90 whereas the value to whites was R 175 288 943,64.

Ms Sindane said currently, statistics are collected and managed manually and online through a tool created by the National Operations Centre (NOC). She added that payments of counsel and success rate reports are drafted in each office and sent to the national office for collation and verification.

Regarding payment of counsel she said that focus was on the amount paid, advocate paid, gender and race, percentage of value of briefs to females, percentage of value of payments to PDIs. She added that the success rate is also managed through the NOC tool. 'This contains the number and percentage of finalised damages claims with savings and the percentage of money saved.'

Ms Sindane concluded by saying that in the future, a reporting console will be provided where all reports can be drawn as per 2016/2017 reporting requirements. This will be the single source of information for the State Attorney's Office.

Ms Sindane said that what they had noticed was that some counsel are not getting any work while there are those who are getting much of the work. She said that there needed to be a transparent process which shows exactly who is getting briefed. She said another issue that makes briefing difficult is the late issue of briefs.

Comments from the floor included practitioners saying that they have seen



Justice Department's Director-General, Nonkululeko Sindane, gave statistics on briefing patterns in the legal profession at the Law Society of South Africa's summit on briefing patterns held in Kempton Park on 31 March.

the numbers but that they were still skeptical.

In a panel discussion Ms Martin spoke of the hurdles faced when at the Bar. She said that there is no one to mentor young female advocates and that this needed to be addressed.

Mr Mpofu said that what underlies the problem of briefing patterns is racism and gender discrimination. 'We must first accept that we have failed dismally. This is not a problem that can be resolved overnight,' he said.

Mr Mpofu added that the Justice Department's statistics of 76 % of briefs going to PDIs was all a 'waste of time'. 'The numbers on their own are meaningless, 76 % of what? We must look at the quality. Young female advocates come to the bar and give up within a year or two because they have no work,' he said.

Ms Rangata said 'whiteness and white supremacy' is at the heart of the skewed briefing patterns in the legal profession. 'It is an open secret that for a black practitioner to be generally accepted he or she must work three or more times than his or her white counterpart in expectation of ten times less in reward. The lack of instructions or briefs to black legal practitioners is not as a result of them

being of less quality - we attend the same universities using the same study materials and pass on merit - This is just prejudice and stereotypes and nothing else. It is well known that many black professional assistants and associates in white law firms are nothing more than trophies and statistics instruments for BEE compliance meant to attract or lure lucrative contracts to the offices of their masters. Once business is secured they are not exposed to the physical files to work on them. As such there is no experience gained, no skills transference, not because they are incapable to do work but because they are systematically excluded,' she said.

Ms Rangata added that in terms of white privilege blacks are perceived as incompetent, unprofessional, inefficient, ineffective and lazy, no matter how much they prove themselves. She said that that was the reason why blacks were seen as undeserving of serious and fairly rewarding briefs and instructions. 'This mind set prejudices blacks because it does not appreciate the fact that the system is designed to provide opportunities for white people at the expense of black people. Our legal profession in general and briefing patterns in particu-

lar will not transform itself. It will only transform in response to legislative intervention,' she said.

Ms Rangata concluded by saying: 'This must be addressed without any further waste of time. Twenty-two years post democracy is a period too long for the majority of this country to keep on waiting. Unequal distribution of wealth sows resentment and if resentment remains unattended it brews uprising. ... These imbalances are human made; as such they will have to be reversed by human beings.'

Deputy Minister Jeffery said that an average of R 524,4 million was spent on briefs to counsel each year. He said that the value of brief targets was being met. He added that there were certain people getting a lot of the work and that was what needed to be looked at first.

Delegates convened into working groups and each group presented resolutions and a way forward.

- See the editorial on p 3 of this issue for the resolutions from the summit.

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Pro bono national stakeholder engagement

The National Association of Democratic Lawyers (NADEL) recently held a national stakeholder engagement workshop to inform provincial dialogues on *pro bono* and community service. The workshop was held in Kempton Park in March.

Seehaam Samaai from the Foundation for Human Rights (FHR) addressed delegates on the NADEL *pro bono* project. She said that the purpose of the stakeholder engagement was to inform what should happen in the provincial dialogues. She added that there was a need for both attorneys and advocates to indicate what was taking place in terms of *pro bono* services. Ms Samaai said the intention of the engagement was to investigate relevant models for the delivery of legal services and enhancing discussions on the launching of social activism among the legal profession.

The project had been conceptualised by the FHR in conjunction with NADEL.

According to Ms Samaai, the expectation was that the outcomes of the provincial dialogues would be engage-



Seehaam Samaai from the Foundation for Human Rights speaking at the National Association of Democratic Lawyers' recent national stakeholder engagement workshop to inform provincial dialogues on pro bono and community service.

ment on the development of social justice consciousness among the legal profession, discussions on the implication of the community service provision, discussions on the modalities for provision of *pro bono* services by the legal profession and the development of mechanisms to give effect to community service provisions in the Legal Practice Act 28 of 2014 (the Act). It was noted that s 29 of the Act - which formed the legal framework that would govern community service by legal practitioners - must be considered.

Ms Samaai highlighted the following:

- The decline in social activism within the legal profession after 1994.
- The poverty and inequality characterising South Africa, with the majority of citizens unable to afford legal services from attorneys or advocates.
- Section 24 of the Act empowered the Justice Minister to prescribe requirements for community service.
- No express provision catered for *pro bono* in the Act.
- *Pro bono* services should not be limited to court appearances but should also include a wide range of services such as

education, support through community-based offices, cooperation and mediation.

- Community advice offices or centres were key. Legal practitioners in these centres assisted communities by providing easier access to law and social services to people. Legal practitioners in community-advice offices informed people of their rights, conducted public education programmes and took up individual cases. They also encourage people to resolve matters through alternative dispute resolution mechanisms and mediation.

- Most community advice centres were accredited, allowing attorneys to claim *pro bono* hours for the time spent assisting the communities.

- There were more than 250 community advice offices in the country.

Ms Samaai said that in terms of output, it was expected that there would be reports on the provincial workshops on *pro bono* services, discussion documents on the delivery of *pro bono* services best practice models, discussion documents in relation to what should form part of the *pro bono* scheme, as well as recommendations to the Justice Department on the framework of the national *pro bono* scheme and also an information legal framework. She said the whole process was anticipated to take some 18 months.

According to Ms Samaai, the engagements in the provinces had been linked with the four provincial law societies to

make it easy for adequate representation. She said the intention would be to have four dialogues with participation by key stakeholders. 'Because of the vast geographical area covered by the Cape, consideration would be given to hold another dialogue in the Eastern Cape...', she said.

The stakeholder engagements would ultimately result in a report to and engagement with the National Forum on the Legal Profession in terms of the community service provision in the Act.

Ilan Lax from NADEL and the chairperson of the Law Society of South Africa's (LSSA) *Pro Bono* Committee, advised that the Act did not make provision for *pro bono* although the rules of the attorneys' profession did so. He said that the rules had not been satisfactory in terms of providing guidance on what could and could not be done. His view was that the discussion had to focus on what the Act meant by referring to community service. He said it would be important for the stakeholders to shape the definition of community service in terms of what they wanted to achieve by it. This could include *pro bono* as part of community service or as a separate concept on its own. 'Failure to do so would result in the Justice Department imposing a definition of community service,' he said.

The LSSA's Manager of Professional Affairs, Lizette Burger, said that at the time that the LSSA made submissions on the Legal Practice Bill to the Justice Portfolio Committee, the view of the Portfolio

Committee was that *pro bono* was not community service. She added: 'However, the Portfolio Committee had also advised that there was nothing that would prevent the Legal Practice Council from making rules regarding *pro bono*. The legal profession's view was that *pro bono* should form an element of the broader community service concept.'

A suggestion was made that community service could be defined as any activity or project that one would do before being admitted as a practitioner.

It was suggested that there was a need to clarify the implications of not having *pro bono* in the Act, but rather catered for in the rules of the profession. Further, the implications of community service in the Act had not been defined. Provincial law societies defined *pro bono* in different ways. The law societies could be required to summarise what they were doing in terms of *pro bono* and how that would feed into s 29 of the Act. There was a need to ascertain if the activities would fit into the provision of s 29.

- The provincial dialogues must be completed by August.

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SOGIE rights in the spotlight

The South African Human Rights Commission (SAHRC), the Justice Department and the Department of International Relations and Cooperation held a three-day seminar on finding practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression (SOGIE). The seminar was held in Kempton Park in early March.

Among those who attended the seminar were Minister of Justice and Correctional Services, Michael Masutha; Deputy Minister of Justice and Constitutional Development, John Jeffery; SAHRC Chairperson, Lawrence Mushwana as well as human rights groups, international and regional bodies, civil society and academics from around the continent. The seminar focused primarily on implementing Resolution 275, which was adopted by the African Commission on Human and Peoples' Rights in 2014.



Minister of Justice and Correctional Services, Michael Masutha, gave the keynote address at a three-day seminar on finding practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression held in Kempton Park.

The resolution condemns violence and other human rights violations against the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, as well as attacks by states against people on the basis of their sexual orientation or gender identity.

The African Charter

Delegates were welcomed by Mr Mushwana who acknowledged that it had been a 'lengthy and protracted process to see this seminar reach fruition'. He said that, 'addressing the rights of sexual minorities is particularly challenging, and possibly even more so here on the African continent'. Mr Mushwana further noted that, despite unacceptably high levels of violence that are perpetrated solely due to another person's sexual orientation or gender identity, he is aware that discussions on these matters are either difficult or not tolerated by many leaders, be they politicians or religious, traditional, or community leaders.

In his keynote address, Minister Masutha began by reminding those present of article 2 of the African Charter on Human and Peoples' Rights which came into effect on 21 October 1986 and states: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. It further states that every individual shall be entitled to equal protection of the law.

Minister Masutha said the African Commission on Human and Peoples' Rights, at its 55th Ordinary Session held in 2014 adopted Resolution 275 on the protection against violence and other human rights violations on the basis of their real or perceived sexual orientation or gender identity. In explaining what Resolution 275 was, he said: 'Resolution 275 condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity. It further condemns the situation of systematic attacks by state and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity.'

The Minister said that although the world still has a long way to go in achieving substantive equality, the fact that SOGIE issues are the topic of this global conversation is a progressive step. He added that keeping SOGIE issues on the global agenda, means that efforts to raise awareness must be enhanced, networks must be built and collaborations and partnerships must be strengthened. He added that South Africa will endeavor to act as catalysts for positive policy and legislation.

Minister Masutha said that government is often asked the question, 'but what about people's traditional views or their culture or their religious beliefs?' He added that former United Nations (UN) High Commissioner for Human Rights, Navi Pillay, put it nicely when she said: 'People are entitled to their opinion. They are free to disapprove of same-sex relationships, for example ... they have an absolute right to believe and follow in their own lives whatever religious teachings they choose. But that is as far as it goes. The balance between tradition and culture on the one hand and universal human rights on the other must be struck in favour of human rights.'

In conclusion Minister Masutha said: 'At the heart of the work to be done in the region on SOGIE issues, lies one central message, that we must change societal attitudes. That as national

human rights institutions we must ensure the protection of the rights of every human being regardless of our differences. That as civil society we must strive to effect positive change in our societies. That as government we must respect, promote, protect and fulfill the human rights all our people. The most important message we need to send is one of our common humanity. Regardless of the colour of our skin, our gender or sexual orientation, gender identity and expression, we all want the same things - respect, care, compassion and acceptance. We are all human beings.'

Progress on human rights relating to SOGIE issues

At the gala dinner Deputy Minister Jeffery said that the promotion of human rights relating to SOGIE issues is a matter of significant importance to South Africa. The Deputy Minister said that South Africa had the equality clause in the Constitution, a progressive legislative framework, has legislated against discrimination on the grounds of sexual orientation in the workplace and has legalised same-sex marriages and joint and step adoption of children by same-sex couples.

'Much has been achieved in the area of legislation and policy initiatives and we are very proud of the work being done by our National Task Team, albeit that we still have a long way to go,' he said.

Deputy Minister Jeffery said that the challenge lies in changing societal attitudes, in order to ensure that persons are not victims of violence or discrimination in their daily lives on the grounds of their sexual orientation, gender identity and gender expression. 'The challenge for us lies in changing the perception that being gay is somehow "un-African." The challenge lies in getting the message out that being gay does not infringe on any other person's rights,' he said.

According to Deputy Minister Jeffery, in June 2015, the United Nations Human Rights Office released its report on the state of LGBTI rights around the world. He pointed out that the report noted substantial progress on LGBTI equality, while highlighting the violence, criminalisation and discrimination that people continue to face, in every region of the world, because of their sexual orientation, gender identity and gender expression.

Deputy Minister Jeffery said that the report shows that in recent years, governments in all regions have pursued a variety of initiatives to reduce the levels of violence and discrimination and gave the following examples. He said since 2011:

- 14 states had adopted or strengthened anti-discrimination and hate crime laws, extending protection on grounds of sexual orientation and/or gender identity and, in two cases, also introducing legal protection for intersex persons.
- Three states had abolished criminal sanctions for homosexuality.
- 12 had introduced marriage or civil unions for same-sex couples nationally.
- 10 had introduced reforms that, to varying degrees, made it easier for transgender persons to obtain legal recognition of their gender identity.
- In dozens of countries, police, judges, staff in correctional centres, educators and medical staff were receiving gender and sexuality sensitivity training, anti-bullying programmes had been launched in schools and shelters had been built to house homeless LGBTI youth.
- In all regions, LGBTI human rights defenders and activists were more vocal and visible.

Deputy Minister Jeffery then looked at the year 2015, in particular, and said that it has been a year of progress in the area of LGBTI rights. He said this was because:

- Both Cyprus and Chile passed civil union legislation in 2015.
- In May, 62% of Irish voters had voted 'yes' in the first-ever referendum for marriage equality in the world.
- Also in May, the Constitutional Council of Kazakhstan found

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**South African Human Rights Commission (SAHRC),
Chairperson,
Lawrence Mushwana, speaking
at the Africa regional seminar
on finding practical solutions for
addressing violence and
discrimination against persons
based on SOGIE.**

a proposed bill, which would have criminalised LGBT human rights' advocacy, invalid.

- In the United States, a landmark Supreme Court ruling in June gave effect to nationwide marriage equality.
- Also in June, Mexico's Supreme Court ruled that state bans on same-sex marriage were unconstitutional, which paved the way for same-sex marriages.

- In June, Mozambique decriminalised homosexuality by introducing a new penal code that scrapped colonial-era prohibitions on homosexuality, dating back to 1886 that could condemn gay persons to three years' hard labour.

- In September, there had been the adoption of a new constitution in Nepal that provided for the protection for LGBT people from discrimination, violence, and abuse – this is a first for an Asian nation.

The Deputy Minister noted that the world had come a long way but added that despite the progress that has been made, there would still be homophobia, violence and discrimination against persons on the grounds of their sexual orientation, gender identity and gender expression.

'We know, from our history in South Africa that we can overcome. Gay rights are human rights. As Madiba taught us – "it always seems impossible until it's done." Just as we have struggled to overcome colonialism and Apartheid, so we can overcome homophobia and discrimination,' he said, adding that: 'My wish is that we can build societies in which people are free to live their lives, where we celebrate difference and diversity, where we realise that we are all part of the same humanity. My wish is that here in Africa, and across the world, we can

change violence and discrimination into acceptance and respect.'

The declaration

Over the three days, delegates spoke about their experiences in their countries. There were also personal narratives from a survivor of gender-based violence. A draft declaration was adopted at the end of the seminar. The declaration focuses on finding practical solutions to the following issues:

- changing perceptions and creating awareness;
- violence and discrimination in accessing education;
- economic justice;
- health and psycho-social support;
- legal support for victims of violence and discrimination and their families;
- secondary victimisation in the criminal justice system and in border control systems; and
- accurate data on incidences of violence and discrimination based on SOGIE.

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Press Ombud finds unfair reporting against attorney

The Press Ombudsman, Johan Retief, has found the *Sunday Times* in breach of s 1.1 of the Code of ethics and conduct for South African print and online media (the Code) which states: 'The media shall take care to report news truthfully, accurately and fairly.'

This finding comes after Eastern Cape attorney, Zuko Nonxuba complained about a story in the *Sunday Times* (Sabelo Skiti and Monica Laganparsad 'The tragic tale of a penniless SA millionaire' *Sunday Times* 17 January 2016 at 1 (www.timeslive.co.za, accessed 12-4-2016)).

The article reported that a young man, Avela Mathimba (26) was awarded a total of R 9,6-million in two separate damages claims against the Road Accident Fund (RAF) and the Eastern Cape Department of Health, which was paid to his lawyer in 2013. According to the article Mr Mathimba apparently never received a cent.

The article quoted Mr Mathimba as saying that, when he 'grilled' his lawyer about the money, Mr Nonxuba rushed to court with an application to have a curator appointed to manage Mr Mathimba's affairs. 'The attorney cited the possibility of brain damage, his client's "tender years" and "limited education", and fears that his money would be misspent by his family,' the story said.

According to Mr Mathimba, Mr Nonxuba raised the issue of his mental state to prevent him from getting his money. He said he had seen a court order that clearly said the RAF would pay Mr Nonxuba (his legal fees) directly. 'When I confronted him [Nonxuba] he said we could maybe get R 20 000, but I later found out he claimed for R 13-million,' the article quoted Mr Mathimba.

The article also stated that a former client of Mr Nonxuba, Phumzile Masekwana, told them she had received just over R 850 000 out of a R 1, 8 million payout, meaning that just under R 1

million of the RAF payout went to fees. Another client, Zukile Tutsu, said he had been paid R 700 000 out of a total payout of R 5,6 million by the RAF and the provincial department of health. He said the payout was made in 2013 and that Mr Nonxuba had promised to pay the balance the 'next Wednesday'.

Mr Nonxuba complained that –

- the story was selective in that it failed to reflect the contents of existing court reports (which confirmed that his conduct in maintaining the proceeds of a damages award in his trust account was in accordance with a valid court order);
- delays occurred primarily because of Mr Mathimba's new attorneys (not because of his own actions); and
- no expert evidence had been produced to suggest that he had acted wrongfully.

According to the Press Ombud, his complaint boils down to misleading and unfair (and not to inaccurate) reporting.

According to the ruling, the legal editor of the newspaper, responded by say-

ing that the article was not a court report, but rather a human interest story about a young man who was surviving on a pittance when he, at least on paper, was a millionaire.

She submitted that the court cases were important aspects of the story because they arose from an accident which left Mr Mathimba a paraplegic, and they resulted in him being awarded pay-outs that should to some extent compensate for his suffering.

She argued that nothing in the Code prevents the newspaper from using court documents to write human interest stories, nor does anything in the Code compel the publication to tell such stories only through court documents. She added that Mr Nonxuba has not pointed out any alleged breach of the Code. He was given ample opportunity to respond to queries and his responses were fully covered in the newspaper.

The legal editor denied that the story failed to reflect the contents of the court records and the facts therein. 'In fact, we submit, we did cover the main points made by both parties insofar as they were relevant to the story.'

'She adds the accusation that *Sunday Times* failed to reflect that the delays appear to be on account of steps taken by [Mr] Mathimba is without merit. "At best, that contention is Mr Nonxuba's opinion. While the story makes it clear that Mr Mathimba has instituted court action, this has been to defend his interests, as he i[s] entitled to do. It is not very convincing to imply that these efforts to gain control of his payout is the reason for the delay in receiving it. He was, after all, injured in 2004 and the payout was made to Mr Nonxuba in 2013. Mr Mathimba's court action was also instituted only after a curator was appointed as a result of action by Mr Nonxuba", the ruling states.

'She describes as "frivolous" the accusation that the article failed to reflect the absence of evidence showing that the orders regarding the *curator bonis* were erroneous or unreasonable – saying, "The story makes it clear that these were orders of court," the ruling states.

She also denied allegations that the *Sunday Times* did not speak to Mr Tutsu and Ms Masekwana. She went on to supply translated transcripts of the interview which was originally conducted in isiXhosa.

According to the ruling, in his response, Mr Nonxuba argued that 'had the reporter correctly reported the contents of the court papers, the following would have been disclosed:

- He did not "rush to court" for ulterior and unethical purposes (to have a curator appointed to investigate the need to appoint a *curator bonis* to manage these

funds in Mathimba's interests) – he went to court for the purposes expressed in court papers (an order was obtained in terms of an agreement between himself and Mathimba's legal representative at court to protect the funds realized for his ultimate benefit);

- This court documentation included a number of medico-legal reports which substantiated Mathimba's claims for damages, and the settlement of these claims for damages was favorable to him;

- The report of the *curator bonis* (an independent advocate, appointed by the court) clarified that he (Nonxuba) had no role to play in respect of investigations into the matter, and was not responsible for any delays in the paying out of the funds;

- The application for the appointment of this curator was supported by the Law Society of the Northern Province (he quotes from a letter by the Law Society to substantiate his argument);

- Mathimba engaged a number of sets of further attorneys, who thereafter sought to have the earlier order granted by agreement set aside on a basis which had subsequently been held by the High Court to be without any legal or factual foundation;

- The subsequent (unsuccessful) "interlocutory applications" brought by Mathimba's more recent attorneys led to significant delays in the finalisation of the initial application; and

- His actions were determined by the effect of the court order, which was that the proceeds of the damages claim be held in trust by him pending the outcome of the application proceedings. He says the order by agreement stated, "In the interim and pending the finalisation of this application the Applicant is ordered to retain the proceeds of the damages claims in Trust." After Mathimba terminated his mandate, the next attorney should have taken steps to secure a release or partial release of funds as considered by the High Court (if necessary).'

Mr Nonxuba concluded by saying: 'In these circumstances, the report in question contains an unjustified gloss and innuendo, is highly and unfairly selective, distorts the true position, and is grossly unfair.'

In his analysis the Press Ombud noted that Mr Nonxuba's complaint is that the story failed to reflect the contents of existing court reports which validated his actions, and that the delays in the payout of the money to Mr Mathimba was not the former's fault – therefore, the reportage unfairly put him in a bad light.

He also added: 'I do not believe that the story can rightfully be described as a human interest article, as Smuts argues. True, the text does contain elements of

human interest – but the many references to fraud in general (details about RAF's litigation) and to Nonxuba in particular (the RAF has launched a forensic investigation into several claims paid to his firm) took the article some way out of the realm of "human interest" and into the sphere of hard news. (Had the story been a human interest one only, it would have focused much more on the hardship that Mathimba had been suffering despite the money due to him.)

'Smuts's argument that the article was not court reporting is correct, of course – but still, when allegations such as those contained in the story are made, the journalists should ensure that they do not misrepresent court documents *in the sense that the reportage reflects unfairly on Nonxuba*. She is also correct that a newspaper may use court documents to write human interest stories and that a publications is not compelled to tell such stories only through court documents. Nonxuba's main complaint is not so much about what was written, but rather about what was omitted.'

Mr Retief found that it was unfair to Mr Nonxuba not to balance out Mr Mathimba's statement about 'rushing to court' with Mr Nonxuba's argument that his actions were determined by a court order – which may have left the impression that he had acted in haste to cover for himself. He added: 'If this was true, *Sunday Times* should have produced evidence to provide reasonable substantiation for such a potentially damaging allegation (which it did not do).'

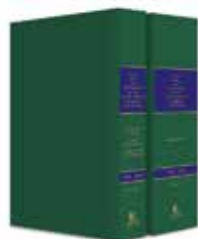
Section 8 of the Complaints Procedures distinguishes between minor breaches (tier 1), serious breaches (tier 2) and serious misconduct (tier 3). The level of breach of the *Sunday Times* in this case was tier 2.

The *Sunday Times* was directed to publish this outcome on the same page on which the offending story was carried. 'The text, which should be approved by [the ombud], should start with the sanction; and end with the sentence, "Visit www.presscouncil.org.za for the full finding",' he said. He added: 'The headline should reflect the content of the text. A heading such as *Matter of Fact*, or something similar, is not acceptable. If the story appeared on the newspaper's website, this text should be published there as well.'

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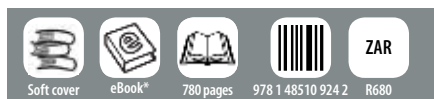
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SAHRC celebrates 20 years of existence

The South African Human Rights Commission (SAHRC) recently held a national conference to commemorate 20 years of its existence. The conference was held in Midrand from 14 to 15 March. The commission turned 20 years in October last year.

The objective of the two-day conference was to provide a multi-stakeholder platform to critically evaluate the gains and challenges of the SAHRC with regard to the execution of its mandate. On the first day, the conference reflected broadly on the role of the SAHRC regarding promoting respect and protection of human rights. On the second day, it gave special focus to the scourge of racism in the country and considered the roles and responsibilities of both state and non-state actors in building and fostering racial reconciliation and an equal society.

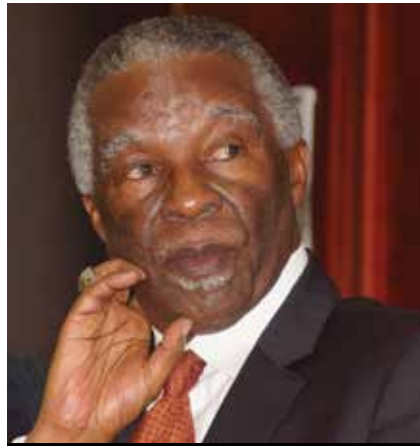
The main aim of the conference was to get national consensus and formal commitment to addressing racism jointly. It was attended by delegates from international, regional and national institutions.

The speakers included former South African President, Thabo Mbeki; Speaker of the National Assembly, Baleka Mbete; Justice and Correctional Services Minister, Michael Masutha; Chairperson of the Portfolio Committee on Justice, Dr Mathole Motshekga; and SAHRC Chairperson, Lawrence Mushwana. Other SAHRC commissioners and various delegates from the government, private sector and other Chapter 9 institutions also spoke.

Racism

The SAHRC chose to focus on racism as the theme. According to Mr Mushwana, the theme was triggered by a sudden spike in racism-related complaints lodged with the commission in January this year. The complaints related to allegations of racism perpetuated mainly through the use of social media.

In his address former President Mbeki said that the fact that the conference is taking place to discuss, among others, the issue of racism, and national reconciliation and nation building, constitutes a justifiable acknowledgement that South Africa has still not accomplished the objective stated in the Constitution of building a new South Africa based on the values of non-racialism and non-sexism. He said that South Africa is a country of two nations – one is white and wealthy and the other one is black and poor.



Former South African President, Thabo Mbeki, gave the keynote address at the South African Human Rights Commission's conference to commemorate 20 years of its existence in Midrand in March.

President Mbeki said that over the years, South Africans have 'spoken less and less about the fact of the racist legacy whose eradication must surely constitute the heart and focal point of the struggle to create the non-racial society visualised in our Constitution,' adding that the country was still confronted by the scourge of racism.

President Mbeki said to combat subjective racism South Africa must, among others:

- strengthen the capacity of the SAHRC, expeditiously to identify, expose publicly and condemn all manifestations of racism, including anti-semitism;
- strengthen the legal capacity of the state to act against racism, including its punishment as unacceptable hate language, with the necessary respect for the constitutionally protected freedom of speech;
- ensure that the school curricula, from the lowest grade, and the curricula in higher education inculcate in the young the values of non-racism and non-sexism and the celebration of common humanity;
- work to cultivate a common patriotism among all people, based on recognition of the reality that we share a common destiny, that none can truly succeed without the other, and that we are to one another, our brother's and sister's keepers;
- strive to ensure that all our national

institutions and organised formations, both public and private, properly manifest healthy cooperation within a context representative of our demographic diversity; and

- insist that especially government and the corporate sector do everything possible within their own structures, and continuously, such that they serve as exemplars of what it means to have a non-racial society, expressive of the values of true national reconciliation, non-racialism and non-sexism.

SAHRC cases

Mr Mushwana said most of the complaints processed by the SAHRC dealt with administrative issues and equality. He said the commission investigated thousands of cases and added that while the SAHRC has a long way to go, it has had good successes.

'In the 20 years of its existence, the commission has provided individuals and groups with resolutions of their complaints and enquiries; between 2009 and 2013 for instance, the commission received over 35 000 complaints and resolved 33 000 of those. In addition, the commission has conducted over 30 investigations into structural systemic challenges to service delivery across the country,' he said.

Mr Mushwana said that the SAHRC received an overwhelming number of complaints on racism this year. 'In the past few weeks, the commission has received and is now processing an additional 160 complaints in relation to racism. This is despite the admirable work of numerous segments of our society, including the commission itself. Even though racism has economic social and political causes, we cannot afford to reduce our response to political and blame games,' he explained.

In her address, Ms Mbete, said land allocation and a de-racialised economy remain central to tackling the challenge of inequality in the country. She said income trends were still reflective of the country's past and had to be addressed in order to defuse racial tensions.

Ms Mbete said that unity and cohesion are imperative to meet South Africa's goal. She said that South Africa was one of the most unequal societies in the world.

Ms Mbete added that there was no country free of racism, racial discrimination and xenophobia. 'We do not want to fuel the flames of the past, but in order

for us to move beyond the past, we must talk about the issues that still confront us,' she said.

Ms Mbete said the topic of racism invariably needed to remain on the public agenda 'so that all of us can engage with it ... in parliament, workplaces, the media, churches and mosques, universities and schools so that we guard this country against any form of division.' She urged the delegates to insist that the economic growth trajectory deracialise the economy as a step in changing the ownership patterns of the past. 'This must also include the acceleration of the allocation of land. Unless we do so, reconciliation will be shallow and a dream deferred,' Ms Mbete warned.

Ms Mbete said while South Africans should not fuel the flames of the past, citizens must all confront the challenges that face the country. She said that the landscape of opportunities still reflects the contours of Apartheid and added that South Africa's history is evidence that this country can fight anything, including racism, to build a united and inclusive society.

Ms Mbete spoke about how Parliament has deteriorated to a place of disorder and while it reflects the kind of society South Africa has become, she said, as an institution, Parliament has a responsibility to lead by example.

In his address Minister Masutha said that his department was finalising a draft Bill seeking to criminalise hate speech. He said the Bill would be tabled in Parliament for debate 'around August, September, this year'. Minister Masutha added that attempts were also being made to expand the draft to include other provisions dealing with hate speech as an offence.

Minister Masutha said the Bill would be subjected to a broad consultative process before it was submitted to Parliament.

He added that government has a responsibility to support all Ch 9 institutions. Institutions such as the SAHRC were established to strengthen South Africa's constitutional democracy. He added that all Ch 9 institutions must be respected and given space to do their work freely.

Former Chief Electoral Officer of the Electoral Commission, Pansy Tlakula, gave an overview of the history of the SAHRC.

Dr Motshekga said that he believes that no amount of campaigning can rule out racism.

Racism and the law

Retired judge of the Constitutional Court, Justice Johann van der Westhuizen, who was actively involved in the drafting of the Constitution, said that when drafting the Constitution everyone involved agreed that freedom of expres-



Speaker of the National Assembly, Baleka Mbete, addressing delegates at the recent conference to commemorate 20 years of the South African Human Rights Commission's existence.

sion had to be protected. He added that without freedom of expression, democracy was not possible.

Justice Van der Westhuizen said that it was agreed that racist hate speech was not wanted and the drafters asked themselves how they would ensure that freedom of expression did not include hate speech.

Justice Van der Westhuizen went on to say that because all rights protected in the Constitution can, in principle, be limited, we have a limitation clause in s 36.

Giving an example of a limitation of a right, Justice Van der Westhuizen said: 'We all know about our freedom of movement, but surely the authorities can limit my freedom of movement by making a rule that says I must drive on the left side of the road, below 120km/h. I cannot rely on my right to freedom of movement to drive on any side of the street at any speed. That is the limitation of my right to movement, but it is a very justifiable limitation.'

According to Justice Van der Westhuizen, South Africa could have just protected freedom of expression and if need be, have measures against hate speech or make another law, such as a censorship law and to say this is a limitation to the right to freedom of expression.

'However with freedom of expression the Constitutional Court decided that it was to define freedom of speech in a way that from the beginning it does not include hate speech. We say from the outset that your freedom of expression does not include the freedom to advocate hatred against other races, for example. What it means in principle is that hate speech is not even speech. As far as freedom of expression or freedom of speech is concerned. He cited s 16:

"Section 16: Freedom of expression

(1) Everyone has the right to freedom of expression, which includes -

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm", he said.

Justice Van der Westhuizen said that hate speech, provided that it falls within this definition, is not constitutionally protected.

He said that freedom of expression is protected because it is important for democracy. 'If political parties are not allowed to say what they are going to do and if they are not allowed to criticise others, then there would be no meaning for elections.' He added: 'Why is it important that we have the right to freely express ourselves? Because if we cannot, our very nature as human beings is being violated. Solitary confinement shows that. Evidence shows that if you are locked up in a space where you cannot communicate it affects your entire human nature very deeply. Freedom of expression is important for my dignity as a human being because I need to communicate with others.'

Justice Van der Westhuizen said that when speech is not used to communicate but is used as a weapon to injure, humiliate, scare, or intimidate, then it does not deserve the protection that free speech deserves as it is hate speech and does not deserve the protection.

Hate speech

Justice Van der Westhuizen spoke on how hate speech is dealt with in the law.



Retired judge of the Constitutional Court, Justice Johann van der Westhuizen, spoke on racism and the law at the South African Human Rights Commission's conference to commemorate 20 years of its existence in Midrand in mid-March.

He said that the Constitution is the supreme law of the land as it guides us. 'We seldom can apply the Constitution directly in legal situations. For example, the Constitution guarantees the right to a fair trial. For any accused person, however, we still need a Criminal Procedure Act to spell out how a fair trial is conducted. Similarly the Constitution protects clauses about labour law and administrative justice but we need pieces of other legislation to make that complete. We are sometimes a little bit quick to simply grab the Constitution to say you have offended the Constitution or you are guilty of a criminal offence,' he said.

He added: 'The Constitution does two things, it is a set of rights and values, and in that sense, s 16 does guide us but we may well need other pieces of legislation to make it applicable to specific situations. The obvious one would be censorship, a censorship law or legislation regarding education,' he said.

Speaking on criminalising hate speech Justice Van der Westhuizen said that if one wants to do so, one would need something else as the Constitution is the framework. He said criminalising it can be done in two ways. The first way

is by legislation. 'Parliament can make a law either where they define racist hate speech as a criminal offence or it can make a law where they extend a definition of an existing crime for example, *crimen injuria*...'. However, we do not necessarily need Parliament, what could also happen is if someone says something blatantly racist, we can simply try to charge that person under *crimen injuria* as it exists and then try to persuade a court that in terms of the general definition of *crimen injuria*, this kind of act does fall under it. Something like this happened with the definition of rape. It was extended and confirmed by the Constitutional Court,' he said.

Justice Van der Westhuizen said that the law does not care what you think, the law only cares about what you do. 'So if I walk around with tendencies of being a serial killer or a rapist, it is my problem and not the problem of the law as long as I do not do anything about it. But, do we want that? Do we want people walking around fantasising to be serial killers? We do not want them among us. We want something more than where the law can reach and that is where we need education or therapy.

We cannot punish them because the

law can only punish you for what you do. Maybe I am a racist but I keep it in my head but we still need to address that'.

The way forward

'So what can we do, what is the way forward?' he asked. He said that there were three things that South Africans could do. These are:

- Fight against and expose racism as it is an evil and hate speech is the practical manifestation of it.
- Think a little bit more carefully before we accuse somebody of being a racist. If we do it to expose an evil, that is fine because that is our duty. If we do it to disarm someone, to bully someone out of material benefits or a job, or to eliminate someone out of society, then we must think carefully about our own motives.
- Think even more carefully before we quietly say I am not a racist or I have never been a racist or when we vouch for someone else, because very few of us have been left untouched by the history of our country.

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PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

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

Hogan Lovells in Johannesburg has three new appointments and eight promotions.



Lesley Morphet has been appointed as head of the competition law department.



Nkondo Hlatshwayo has been appointed as a partner in the competition law department.



Vaughn Harrison has been appointed as a partner in the corporate and commercial department.

The following are all promoted as associates.



From left: Ronan Bekker, Pranith Mehta, Kyleene Weyers, Kenita Moodley, Refiloe Vengeni, Palesa Nhlapo, Danika Wright and Ushir Ahir.

Garlicke & Bousfield Inc in La Lucia Ridge has three new appointments.



Shamla Pather has been appointed as a director in the litigation department.



Patrick Forbes has been appointed as a director in the litigation department.



Thando Mbili has been appointed as a senior associate in the employment department.

Stegmanns Inc in Pretoria has six new appointments.



Zain Sujee has been appointed as a professional assistant in the bond registration department.



Anthony van Zantwijk has been appointed as patent and design consultant.



Left to right: Jaco Grobler, Louis Koster, JJ Thiert and Emmie de Kock.

- Jaco Grobler has been appointed as a senior associate and head of the Intellectual Property and Commercial Law department.
- JJ Thiert has been appointed as an associate. He specialises in trade mark law.
- Emmie de Kock has been appointed as Intellectual property consultant.
- Louis Koster has been appointed as a professional assistant the Intellectual Property and Commercial Law department.

Kunene Ramapala Inc in Johannesburg has four new appointments.



Mandla Nyalunga has been appointed as a director. He specialises in litigation, advisory services and employment law.



Busisiswe Shoba has been appointed as a director. She specialises in public law, commercial contracts and litigation.



Stephanie Chetty has been appointed as an associate. She specialises in insurance and planning.



Chester Muzarakuza has been appointed as an associate. He specialises in insurance and commercial litigation.



Danie Cronje, director of liquor law services at Cluver Markotter Inc, has established **Danie Cronje Attorneys Inc**, a separate law firm which specialises in liquor law in Cape Town.

Erratum: **KISCH IP** in Johannesburg was incorrectly spelt in the April column of People and Practices.

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

Notyesi and van Rensburg elected to lead Law Society of South Africa

Mthatha attorney Mvuso Notyesi and Brits attorney Jan Janse van Rensburg were elected Co-chairpersons of the Law Society of South Africa (LSSA) at its annual general meeting in Kempton Park on 2 April.

Mr Notyesi and Mr van Rensburg noted that the role of lawyers in society is not a selfish or self-serving one. Practitioners stood in a privileged position where they can influence developments and support and protect vulnerable members of society.

They added: 'It is an indictment that, after 22 years of democracy, we are still talking of racism and disparity in briefing patterns. These are urgent matters to be dealt with by the profession and by others through the various charters that have been adopted by government.' The Co-chairpersons stressed the pressing need to unify the profession in accordance with the Constitution and the Legal Practice Act 28 of 2014. They indicated that they would focus on concrete steps to unify the profession, taking clear direction from the various chapters in the Act as it moves towards implementation.

About the Co-chairpersons

Human rights lawyer and activist, Mvuso Notyesi is the current President of the National Association of Democratic Lawyers (NADEL). He holds the BProc and LLB degrees from the University of Transkei and was admitted as an attorney in 1999 after completing his articles and attending the LSSA's School for Legal Practice in East London. He has since then



Jan van Rensburg (left) and Mvuso Notyesi have been elected Co-chairpersons of the Law Society of South Africa.

practised as director at Mvuso Notyesi Incorporated.

Mr Notyesi has been a council member of the Cape Law Society since 2011 and is currently its Vice President. He has been a member of the Board of Legal Aid South Africa since 2011; and he represents the LSSA on the Judicial Service Commission. Mr Notyesi has a passion for education and was appointed a part-time lecturer at the University of Transkei in 1999 and as an instructor at the LSSA's School for Legal Practice in East London last year. He is also an examiner for the Attorneys Admission Examination. Mr Notyesi is Chairperson of the Notyesi Foundation, which awards bursaries to disadvantaged students to attend university.

Jan van Rensburg has represented

the Law Society of the Northern Provinces (LSNP) on the LSSA Council since 2001. He has twice served as president of the LSNP, in 2008 and 2011. He has also served on the North West Attorneys Council since 1997. He sits on a number of committees at both the LSSA and LSNP and on the Remuneration Committee of the Attorneys Fidelity Fund. He has represented the LSSA on the Council for Debt Collectors since 2009.

Mr Van Rensburg has the BCom (University of Pretoria) and BProc (Unisa) degrees, as well as an Advanced Diploma in Labour Law from the University of Johannesburg. He was admitted as an attorney in 1984 and is also a notary and conveyancer. He practises as a sole practitioner at Jan van Rensburg Attorneys in Brits.



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In a joint press release on 11 April, the presidents of the four statutory law societies – Ashraf Mahomed of the Cape Law Society; Lunga Peter of the KwaZulu-Natal Law Society; Deidré Milton, of the Law Society of the Free State; and Anthony Millar of the Law Society of the Northern Provinces committed themselves to a clean, ethical and responsive legal profession. They stressed that they would do all that was necessary in the interest of the public and clients.

'We understand that while much has already been done to achieve this, more needs to be done to ensure effective access to a fair legal process, particularly in regard to the investigation of complaints by members of the public, court officials and the legal fraternity in a fair, independent and impartial manner,' they said.

The presidents referred to recent numerous disturbing media reports regarding the unprofessional and/or unethical conduct of certain members of the law societies. In noting the reports, they wished to assure the public and the media that the cases are being dealt with in the appropriate manner. They said: 'The cases are complex and investigations are at a sensitive stage where the law societies may not be at liberty to readily share information in response to media queries. This simply means that in order to preserve the integrity of the investigation and ensure the protection of the rights of all concerned, we may be constrained to comment in the media at that particular time.'

They emphasised their commitment to ensuring a transparent and accountable legal profession and would provide information where this was appropriate and in the public interest.

The presidents explained: 'The law so-

Law Societies' Presidents commit to a clean, ethical and responsive legal profession



From left: President of the Law Society of the Northern Provinces, Anthony Millar; President of the KwaZulu-Natal Law Society, Lunga Peter; and President of the Cape Law Society, Ashraf Mahomed. Deidré Milton was absent.

cieties perform regulatory functions in nature, which include taking disciplinary steps against their members that are found to be in breach of the Attorneys Act [53 of 1979] and Rules. No member of the legal profession is beyond the law societies reach or influence. The investigations are conducted strictly in accordance with the rules that govern the law societies and may result in action being taken against members.'

They pointed out that the consequences of these interventions are very serious, and therefore, the law societies are obligated to ensure that the investigation process is fair to all concerned. In many

cases the investigation takes longer to be concluded than is expected. This may happen, for instance, when the outcome of separate civil or criminal court proceedings is required so as to ensure that complaints are dealt with holistically.

'Members of the public are encouraged, if they have complaints against members of any of the law societies, to contact the relevant provincial law society where that member is practising and they will be given information and guided on the process to be followed,' the presidents concluded.

LSSA expresses grave concern at views by President Zuma on the courts

The Law Society of South Africa (LSSA) expressed its grave concern at the comments relating to the courts made by President Jacob Zuma when addressing a gathering of Traditional Leaders in Pretoria on 7 April.

'The principle of *audi alteram partem* – or 'listen to the other side' – is vested in our legal system, and the insinuation that our courts lis-

ten only to one side of a story is ludicrous,' said LSSA Co-chairpersons Mvuso Notyesi and Jan van Rensburg in a press release.

They added: 'The fact that this address – and the views relating to the courts – was made shortly after our highest court, the Constitutional Court, found that the President's actions in relation to the Public Protector's 'Secure in Comfort' report had been inconsistent with the Constitution, illustrates the President's persis-

tence in flouting the Rule of Law.'

The Co-chairpersons stress that the President's comments were regrettable and called on him to acknowledge clearly that South Africa is a constitutional democracy where the Rule of Law, the courts, the judiciary and the judgments of the courts must be respected by all, including the government and the Head of State.

LSSA applauds landmark judgment on the binding nature of the Public Protector's remedial action

At the end of March, outgoing Co-chairpersons of the Law Society of South Africa (LSSA), Busani Mabunda and Richard Scott noted the landmark judgment of the Constitutional Court in the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (unreported case no CCT143/15 and CCT171/15, 31-3-2016) (Mogoeng CJ) case, and in particular its confirmation of the binding nature of the remedial action taken by the Public Protector in terms of s 182(1)(c) of the Constitution.

The Co-chairpersons said: 'The LSSA believes in respect for the Constitution, the Rule of Law and for the Chapter 9 institutions, of which, the Office of the Public Protector is one.'

The LSSA stressed the court's finding that there is an obligation to assist and protect the Public Protector so as to ensure the independence, impartiality, dignity and effectiveness of the Office of the Public Protector by complying with her remedial action.

'We applaud our judiciary in its decision in this important judgment. This reinforces the need for respect for our Constitution, as well as the enhancement of our constitutional democracy,' said Mr Mabunda and Mr Scott.

LSSA condemns the conduct of the Bobroffs and urges them to respect the administration of justice

Early in April, the outgoing Co-chairpersons of the Law Society of South Africa (LSSA), Busani Mabunda and Richard Scott issued a press release calling on attorneys Ronald Bobroff and Darren Bobroff to return to the country and take accountability for their actions.

Earlier, the Law Society of the Northern Provinces (LSNP) noted with concern that the Bobroffs, who were facing serious charges of overcharging clients and related fraudulent actions, had allegedly absconded from South Africa to Australia.

The LSNP stated that it had already instituted legal proceedings against the pair and their co-director in the law firm, Ronald Bobroff & Partners Inc, to have them struck from the roll of attorneys and a curator had been appointed to the firm in order to protect the interests of the firms' clients. The judgment of the court was awaited.

The LSSA, as the national representative body of the attorneys' profession in South Africa, said it placed on record that it did not condone the actions of attorneys who act unethically. The LSSA was concerned that Messrs Bobroff had chosen to leave the country rather than take accountability for their actions, and did not heed the call by their regulatory body, the LSNP – under whose jurisdiction they fall – to return and face justice. 'This conduct is highly deplorable and unbecoming of members of the attorneys' profession,' said Mr Mabunda and Mr Scott.

They added: 'Such conduct brings our noble and honourable profession into disrepute. As attorneys and officers of the court, there is a higher duty on us to uphold the administration of justice.'

The LSSA echoed the call by the LSNP for Messrs Bobroff, if they purport to be the honourable members of our esteemed profession that they claim to be, not to be fugitives of justice, but to do the honourable thing and answer to the allegations against them relating to their professional conduct, including the pending criminal charges.



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- 11 May
- 7 September

Notarial examination:

- 8 June
- 19 October

- For the Attorneys' admission examination syllabus, see 2016 (Jan/Feb) DR 19.

- For the Notarial examination syllabus, see 2016 (April) DR 19.

Registration for the examinations must be done with the relevant provincial law society.

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By
Siyabonga
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Understanding certain provisions of the Domestic Violence Act: A practitioner's perspective

The Domestic Violence Act 116 of 1998 (the Act) was regarded as a step in the right direction towards acknowledging that violence against the vulnerable, especially women and children, was an issue demanding immediate and efficient attention. This Act succeeded the defunct Prevention of Family Violence Act 133 of 1993. The purpose of the Act, *inter alia*, is to afford victims of domestic violence maximum protection of the law. Nearly 20 years later, we can ask ourselves: What has been achieved?

At the inception of the Act a handful of cases were reported and to date the numbers continue to increase. In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC) the appellant challenged, *inter alia*, the constitutional validity of s 8 of the Act, in particular the issuing of a protection order accompanied by a warrant of arrest. He argued that this infringed on the right to freedom and security of person, a fair trial and access to courts as it enabled the holder of a warrant to summarily cause an arrest. The court rejected the applicant's argument. It held that the operation of a warrant of arrest was suspended on condition that the order is complied with. Clearly this is not what was envisaged by the drafters of statutes. The preamble of the Act states that the purpose of the Act, *inter alia*, is to uphold the international obligation to end violence against women and children. However, statistics show that South Africa is failing in its role as cases of domestic violence continue to be reported. Is the Act a failure? A study of selected key provisions of the Act might provide insight.

The Act

The Act provides for the obtaining of protection orders by victims of domestic violence. Applying for a protection order is a civil process. Before one can obtain a protection order, certain requirements must be met.

- First, the applicant (victim) must show that he or she is in a domestic relationship with the respondent.
- Secondly, once it has been established that a domestic relationship does exist between the parties, the applicant has to show that an act of domestic violence has occurred. The concepts 'domestic

relationship' and 'domestic violence' as defined in s 1 of the Act are defined in broad terms.

- Once an applicant has established the above, he or she may approach a police station or a court of law to apply for a protection order. There is an express duty on police officers to assist victims of domestic violence (s 2) by referring them to a court responsible for protection orders, which usually forms part of the family courts section, as well as to inform them of their right to institute criminal proceedings. This duty was stressed by the court in *Khanyile v Minister of Safety and Security and Another* 2012 (2) SACR 238 (KZD) at paras 38 and 39.
- While applications for protection orders are by way of an affidavit, in practice the applicant approaches the clerk of the court who will talk to the applicant regarding the process. The applicant will relate his or her case to the clerk of the court who will take down what the applicant is saying.
- Once this has been done, the clerk of the court will cause that the respondent be served with papers calling on him or her on a date determined by the court to show cause why the applicant should not be granted a final protection order. For purposes of service it is important that the applicant has the respondent's particulars, however, this is not an issue as the papers are usually served by the police with the assistance of the applicant.
- As proof that the news reached the respondent the return of service must be filed, failing which the whole process might be invalid.

Interim protection order

Section 5 provides that the court may issue an interim protection order if it is satisfied that the respondent is or has committed an act of domestic violence and undue hardship may result on the applicant, if an order is not issued. The decision to issue an interim protection order is at the discretion of the court. In *Omar (op cit)* the Constitutional Court held that the issue of interim protection orders without notice to the respondent was not a violation of the right to a fair trial. The court observed that the right to a fair trial s 35(3) applies to an accused. A respondent is not an accused and, therefore, it is incorrect to say that he is not afforded a fair trial.

The interim protection order must be accompanied by a stayed warrant of arrest (s 8(1)(a)) (see also *Greenberg v Gouws and Another* 2011 (2) SACR 389 (GSJ) at para 25).

A copy of the interim protection order must be served on the respondent calling on him or her – on a date determined by the clerk of the court – to show cause why the order should not be made final (s 5(3) – (7)).

Failure to serve the interim protection order renders it invalid (s 5(6)). In summary there are two set-backs to an interim protection order:

- First, to be effective, it must be served on the respondent.
- Second, it is only valid until the return date (s 5(5)).

Return date

On the return date the applicant will start by stating his or her case to the court. The respondent will respond by stating his or her side of the case. The standard of proof is on a balance of probabilities (*Omar (op cit)* at para 25). If the applicant makes a case, the order will be made final. If the respondent makes a case, the order will not be made final and the interim order will fall as if it never existed.

Final protection order

The final protection order need not be served on the respondent since he or she is also present in court when the court confirms the order. However s 6(5) requires that it be served. It happens on numerous occasions that the respondent ignores the call to oppose confirmation of the protection order. This does not exonerate the applicant from making a case against the respondent. The absence of the respondent only eases the standard of proof expected from the applicant.

It also happens that both parties do not attend the proceedings on the return date – this is not unusual, especially where there is a conjugal relationship between the parties. In such a case the order will not be confirmed.

If the applicant makes out a case and the order is confirmed, a warrant of arrest must be given to the applicant.

Protection order proceedings

Applications for protection orders are

catered for by ss 4 and 6. Section 4 deals with *locus standi*. However, s 14 read with ss 4(2) and 6(3) provides that any of the parties may be represented by legal representatives. If the parties both appear in person, the proceedings are less formal and short; however, once legal representatives are involved the proceedings are prolonged. An unfair situation usually occurs if only one of the parties is represented. In such a case the mere presence of a legal representative may intimidate the unrepresented party. This is worse if the represented party is the respondent. More so, in light of s 6(3), which specifically provides that a respondent may not cross-examine the applicant directly; he or she may only do so through the court, however, his or her legal representative may cross-examine him or her directly. It is conceivable that some applicants may prefer being cross-examined by the respondent rather than his legal representative.

Effecting an arrest for breach

If an act of domestic violence is committed by the respondent after an interim order or a final order has been issued, the applicant may take the protection order, together with the warrant of arrest, and approach the nearest police station.

At this stage the proceedings cease to be *quasi-civil*.

The applicant becomes the complainant and the respondent becomes the accused or the suspect.

The complainant has to make a statement in terms of s 8(4)(a) to the effect that there has been a breach or violation of a term of the protection order. Section 8(4)(b) provides that if, based on the complainant's statement, it appears to a police officer that there is reasonable ground that the complainant may suffer imminent harm as a result of the alleged breach, the police officer must arrest the suspect in execution of a warrant.

If there are insufficient grounds to arrest, the police officer must warn the suspect to appear in court (s 8(4)(c)). 'Reasonable grounds' has been interpreted to mean what is reasonable by a reasonable man's standard. The grounds must be 'objectively sustainable'.

It is clear from the above that executing a warrant of arrest for breach of a protection order requires a careful assessment of facts. There is usually no time to assess facts or ascertain whether, based on what has been said by the complainant, it can be said that reasonable grounds exist to believe that the complaint will suffer imminent harm if the suspect is not arrested. A series of

reported cases show that the police do not assess the truth in the complainant's case. Their approach is to arrest the suspect immediately. This often results in suits against the state for unlawful arrest. In the words of Murugasen J in *Khanyile (op cit)*:

'The lack of training and the failure to inform police officers of the provisions of the Act, impacts adversely on their appreciation of their responsibility and ability to balance the rights of the complainant with the rights of the respondent ... public resources are depleted as a result of the litigation which emanates from the unlawful conduct of the police.'

Conclusion

Whereas the Act emphasises the importance of affording victims of domestic violence maximum protection, it fails to safeguard the state against litigation resulting from the unlawful conduct of the police. This *lacuna* can be avoided if police are properly trained to assess matters, particularly when to detain. It is, therefore, doubtful whether the Act is the ticket to a domestic violence-free society.

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'Divorce debt' created by the Government Employees Pension Fund

By
Clement
Marumoagae



Picture source: Gallo Images/iStock

The Government Employees Pension Fund (the GEPF) is Africa's largest pension fund with more than 1,2 million active members, some 360 000 pensioners and beneficiaries; as well as assets worth R 1 trillion (www.gepf.gov.za). The GEPF is the only fund in South Africa which, when its members are divorcing, pays out the members' former spouses' divorce claims and creates 'divorce debts' for its members. Members are required to pay back to the fund when they exit the fund, which debts attract interest. This article evaluates the rationale behind the creation of 'divorce debts' and evaluates whether such debts have the potential of prejudicing divorcing members of the GEPF.

Clean-break principle

In 2007, progressive amendments were made to the Pension Funds Act 24 of

1956 (the Act), which is the main statute regulating private pension funds. These amendments ensured that a non-member spouse was able to claim his or her share of his or her spouse's pension interest immediately on the date of divorce, thereby introducing the so called 'clean-break' principle. Later on, public pension funds such as the GEPF also had to align their practice with the clean-break principle and the necessary amendments were made to the legislation regulating such funds in order to bring about the clean-break principle. It has been correctly argued that '[i]n the public sector pension funds, the clean-

break principle was introduced by the enactment of the Government Employees Pension Law [Amendment Act], 19 of 2011 (section 24A), South African Post Office SOC Ltd [Amendment] Act, 38 of 2013 and the amendment of the Transnet Pension Fund Rules. These legal prescripts provides that a pension interest accrue[s] to the non-member spouse on the date of divorce in terms of the decree of divorce granted under section 7(8)(a) of the Divorce Act [70 of 1979] or a decree for the dissolution of a customary marriage under the Recognition of Customary Marriages Act [120 of 1998]' (Lufuno Nevondwe *Divorce orders: Issues for pension funds* (www.pensionlawyers.co.za, accessed 23-3-2016) at 9, paper presented at the Pension Lawyers Association Conference held at Cape Town on 3-3-2014).

Divorce debts

Rule 14.10 of the GEPF rules generally assigns a share of a member's pension interest to his or her former spouse. It

is surprising, however, that what the fund ultimately pays to the former spouse is not an amount taken from the member's pension interest, but the fund itself pays this amount from its reserves and creates a 'debt', which the member is obliged to pay back to the fund.

If the amount paid to the former spouse was taken from the member's pension interest, there would not be a need for the former spouse to repay anything to the fund. In terms of r 14.10.9 of the GEPF rules:

'When a benefit becomes payable to the member in terms of these rules –

14.10.9.1 the amount of the gratuity, if any, then payable to the member must be reduced by the amount of the divorce debt; and

14.10.9.2 if the amount of the divorce debt exceeds the amount of the gratuity and there is an annuity payable to the member then –

(a) the capital value of the annuity must be determined by the actuary;

(b) the value determined by the actuary must be reduced by

an amount equal to the balance of the divorce debt then remaining; and

(c) the capital value that results from this calculation must be annuitised by the actuary on a basis determined by the board in consultation with the actuary to determine the amount of the annuity which will then be payable.'

This rule should be read together with r 24a(2)(d), which was introduced by the Government Employees Pension Law Amendment Act, which reads:

'(d) The amount of any pension benefit that is subsequently payable to the member in terms of the rules will be reduced by the equivalent of the amount of the share of the pension interest of the member which –

(i) was deemed to accrue to the member as a benefit in advance of the benefit ordinarily payable in terms of the rules; and

(ii) was assigned to the member's former spouse, less the amount of any additional voluntary contributions, if any, paid by the member to the Fund from time to time, and accumulated over the period from the date on which payment to the former spouse or transfer to the approved fund as referred to in para-

graph (e) took place to the date on which the member first became entitled to a part or the whole of the balance of the benefit, with interest as the Board from time to time deems appropriate.'

It is clear from this rule that, in actual fact, the GEPF is granting 'divorce loans' to its divorcing members in order to create the so-called 'divorce debt'. Unlike private pension funds mandated by s 19(5) of the Act, which are able to grant home loans to their members, it is well known that the GEPF rules do not empower it to grant any sort of loans to its members. While this 'divorce debt' is not referred to as a loan, it nonetheless has characteristics of a loan in the sense that the fund charges interest on it from the day the payment was made to the former spouse to the date the divorcing member would be exiting the fund. On its website, the GEPF sought to clarify the position by stating among others that: 'The new rules state that on the date of payment of a divorce benefit GEPF will create a debt against the member that is equal to the amount payable to the non-member spouse. The debt amount will build up, with interest, until the member exits the Fund' (www.gepf.co.za, accessed 23-3-2016). The amount payable by the member when he or she would be exiting the fund would be determined by the fund's actuaries because it has accumulated interest.

This is problematic in the sense that the divorcing member is not provided an opportunity to decide whether he or she agrees to the 'divorce debt' or he or she is comfortable that, at the time of his or her divorce, the fund could reduce his or her pension interest as directed by the divorce order. Secondly, the precise percentage of interest attracted by the 'divorce debt' is not prescribed in the GEPF rules. This is disturbing because, in terms of r 14.10.9(2) of the GEPF rules, the 'divorce debt' can exceed the benefit which the member should receive. If the interest is so high that it enables the fund to repay itself by taking a substantial amount of the divorcing member's pension benefits, this goes against the very reason why pension funds are established. The divorcing member might not be left with enough to support himself or herself after retirement. This indeed will infringe on the divorcing member's right to have access to the social security guaranteed by s 27(1) of the Constitution. It is further concerning that the GEPF is the only fund that makes its divorcing members indebted to it in this way and, as such, this could only make the fund vulnerable to a constitutional challenge based on unfair differentiation in terms of s 9(1) of the Constitution.

I submit that r 14.10 in its entirety does not comply with s 7(8) of the Divorce Act, which specifically provides that:

'Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) *any part of the pension interest of that member* which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member; ...' (my italics).

This simply entails that the portion of the pension interest due to the non-member spouse should be paid directly from the pension benefits of the member spouse, not from any other source, except if the member has agreed otherwise with the fund. This may be the case if the member has entered into an agreement with the fund not to pay from his or her benefits, but to provide him or her with a loan, which would be used to cover the non-member spouse's claim. But this has to be by agreement, and not something which is orchestrated by the fund without involving the member. Ultimately, this rule effectively widens the investment options of the fund unreasonably, by making divorcing members investment vehicles by forcing a debt onto them and further requiring them to pay interest. There seems to be no justification for this arrangement, given the fact that the member already has a financial vehicle which enables him or her to cover his or her ex-spouse's claim against his or her pension interest. The mere fact that this is not a negotiated process makes the whole arrangement irrational and outright unreasonable.

Conclusion

I submit that r 14.10.9 of the GEPF rules should consider removing the rule which allows it to grant loans to its members, thus making them indebted to it. It is important that the fund complies fully with divorce orders, which directly order it to reduce its divorcing members' pension interest and thus settle their former spouses' divorce claims directly from its members' pension benefits, even if this will affect their pensionable service if they remain active in the fund. Such would be a direct financial consequence of the marital regime they have chosen to enter into when they conclude their marriages.

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Protection of Investments Act –

A balancing Act between policies and investments

By
Amy
Farish

Picture source: Gallo Images/Stock



On 3 November 2015 the Protection of Investment Act 22 of 2015 was passed in Parliament (the Act) despite staunch opposition. It is not difficult to understand why there has been opposition to the Act.

Background

On 1 November 2013 the first Promotion and Protection of Investment Bill (the first Bill) was introduced in South Africa (SA). It is thought that the introduction of the first Bill was prompted by the case of *Piero Foresti, Laura de Carli and Others v The Republic of South Africa* ICSID case no ARB(AF)/07/1, which led the government to review its investment laws and regulations. The concern arose as foreign investors challenged the South African policy of Black Economic Empowerment (BEE) in an international arbitration. This international arbitration was presided over by two American nationals and one British national acting as head of the arbitral proceedings, all of whom did not have intimate knowledge of SA's history and policies. This was seen as a threat as the government was concerned that certain South African governmental policies, in this case the BEE system, would not be protected through the international arbitration dispute resolution mechanism.

Along with the introduction of the first Bill came the termination of Bilateral Investment Treaties (BITs) between SA and various countries, which had previously governed their investment regimes. The introduction of the first Bill, the termination of the BITs and the backlash that followed led to a revised Bill being introduced on 22 July 2015. The Act, however, does little to allay the concerns of investors.

The expropriation clause

The first Bill contained a

clause that limited the meaning of expropriation to such a degree that in certain circumstances relief would be excluded even though constructive expropriation had taken place. The first Bill stated that if expropriation took place, the matter would be dealt with in accordance with the Constitution. This meant that market value would not be provided as compensation, but rather an amount that is 'just and equitable' taking various factors into account.

This was the first proverbial 'nail in the coffin' as investors were wary that assets would be expropriated and they would receive less than market value as compensation. However, the first Bill went a step further to state that certain acts did not amount to expropriation, meaning that the protection of the Constitution and just and equitable compensation was not guaranteed.

The Act has done away with the expropriation section, yet still retains that the government may take any measures, in accordance with the Constitution and legislation, to redress historical inequalities, uphold the values and principles of the Constitution, promote cultural heritage, foster economic development and protect the environment. Whether this includes expropriation has yet to be seen but the phrasing of the section suggests that expropriation may still occur. Critics have argued that this section is too vague in its current form and it may be faced with a constitutional challenge in the future.

International arbitration

The first Bill did not provide for international arbitration, which led to an outcry among the foreign investment community. The Act has attempted to downplay concerns by stating that international arbitration may be resorted to, but only if the arbitration is consented to by government, after domestic remedies have been exhausted. The provision of this limited recourse to international arbitration has been labelled a 'retrogressive step' as access to international arbitration provides security to investors. For an international investor there is uncertainty as to the efficient and proper functioning of the courts in SA and the skills and expertise of potential mediators and arbitrators, leading them to query whether disputes will be dealt with in a proper manner.

Furthermore, the court, arbitrator or mediator will be South African and, therefore, there is the suspicion that South African interests will be placed

ahead of those of international investors. Dr Rob Davies, the Minister of Trade and Industry, and a strong supporter of the Act, states that doing away with international arbitration will better protect South African investors and the economy. It will be easier to predict the outcome of a dispute as South African courts will have, most likely, dealt with the same or very similar situations domestically and pronounced on such situations. This will lead to certainty within the dispute-resolution setting. However, critics are concerned that, with so many factors detracting from investment in SA, the lack of international arbitration may add to these factors.

Equal treatment of foreign investors

The previous BITs operated on the basis of an agreement between the parties and the parties were, therefore, treated equally within the investment relationship. The first Bill and the Act make an attempt to comfort foreign investors by providing they will 'not be treated less favourably than South African investors'. This would prove comforting if the drafters had not gone on to qualify this statement significantly with the words 'in like circumstances'. This section is much the same in the first Bill and in the Act and explains that in determining 'like circumstances' one takes into account various factors including the –

'(a) effect of foreign investment in the Republic, and the cumulative effects of all investments;

(b) sector that the foreign investments are in;

...

(e) effect on third persons and the local community;

...

(g) direct and indirect effect on the environment'.

This is the South African government taking into account South African circumstances, leaving little room for foreign investors' interests.

The investment security provision also states that the foreign investor will get the same level of security as the domestic investor but that this is subject to the state's available resources and capacity.

The unilateral nature of the Act

The Act empowers the Minister of Trade and Industry by notice in the *Government Gazette* to make any regulations regarding the criteria for the appointment of a mediator, process and procedure relating to dispute resolution mechanisms, any matter prescribed in terms of the Act and any other matter, which is necessary to achieve the purposes of the Act.

It is clear from this section that the

Minister holds the power unilaterally to alter the investment relationship. This could deter foreign investors from becoming involved in an investment arrangement, which circumstances could change without their input or without their protests being taken into consideration. This is a drastic change from the previous regime, which was, as is obvious from its name, bilateral. Previously, the parties had to agree to any amendment to their investment relationship with each country holding equal, or as close to equal, bargaining power. Of course this equal bargaining power is often considered a fallacy, but at least the sentiment was there.

Support for the Act

The question arises as to whether these concerns are legitimate. Will the Act actually cause any significant difference to the investment climate of SA? It is argued that the main concern for investors is the return on their investments and whether they have access to an effective legal system. Over the years, SA has fared well on both counts and, therefore, international investors' concerns may be alleviated.

Furthermore, the minister notes that after the first Bill was introduced, with all of its apparent flaws, and the termination of several BITs, a German motor company, invested R 3 billion even though they were aware of the first Bill and its potential effect going forward. Germany was one of the countries with which SA had terminated its BIT.

The majority of the BITs were entered into before the Constitution came into effect and, therefore, did not adequately protect the interests and values propounded in the Constitution. It is argued that some form of investment governance was needed in order adequately to take into account the Constitution.

On the question of arbitration, it is often stated that international arbitration is not considered to be suitable for developing countries. An international arbitrator may not adequately appreciate the difference in concerns between the investors based on the country in which they are investing, and where the investor comes from. It could lead to the one party being severely prejudiced. The Act takes this into account in the South African context and has put SA's interests first and foremost.

Furthermore, it is argued that the Act is in line with international practice where countries are terminating BITs and introducing legislation to deal with investments internally within their countries.

The current reality

It is currently too early to determine

what long-term effect the Act will have on investment in SA. However, there have been cautious remarks made by international investors regarding the Act. Notably, the European Union's Regional Chamber of Commerce and Industry has stated that foreigners are hesitant to invest in SA at present for fear that there will be a lack of protection over their investment. This has led investors to look elsewhere in Africa and abroad.

Locally, there have been alarm bells ringing as many South African companies rely on foreign investments for their continuation. An example of such a company is Anglo-American SA, where representatives have stated that it is necessary for there to be an improvement in SA's investment policies and the Act is not such an improvement. There are fears that the Act will drive out investment to the detriment of a large number of companies whose compromised generation of wealth may have a negative impact on the SA economy.

The European Union's Regional Chamber of Commerce and Industry furthermore stated that the withdrawal of the BITs does not reflect well on SA. It sets the scene of a developing country struggling for power and wanting to dominate foreign investors, rather than an attitude of wanting to work together for the benefit of both parties. The termination of the BITs has also made it more expensive to do business in SA as a greater insurance premium attaches to investments made in countries where there is a lack of a BIT.

Conclusion

It is clear that there are many concerns with the Act in its current form. The government is placing SA's interests and policies first to the detriment of foreign investors. This is good in principle but it is doubtful whether SA is in a strong enough bargaining position at present to be alienating investors. Although the proponents of the Act argue that the Act is in keeping with international trends, the two countries that they offer as examples, Australia and Canada (that have terminated treaties and regulated investments internally) are countries with vastly different economic environments compared to SA.

It is necessary for SA to strike a balance between protecting its own policies and encouraging investment at the same time. The Act has not achieved this balance and only time will tell whether the Act will have a negative effect on the investment environment of SA going forward.

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Picture source: Gallo Images/Stock

Onwillekeurige verstryking van algemene prokurasie

Deur
Willie
Herbst

In die artikel deur Bobby Bertrand 'The need for enduring powers of attorney for older persons with impaired decision-making capacity' (2011 (Mei) *DR* 38) verwys die skrywer na die aanbevelings deur die Regshersieningskommissie, wat tot dusver nie uitgevoer is nie. Die huidige algemeenaanvaarde beginsel is skynbaar dat 'n algemene prokurasie onwillekeurig verval indien die volmaggewer 'n verandering van status ondergaan waardeer sy of haar handelingsbevoegdheid aan bande gelê word. Hierdie standpunt word onderskryf deur die skrywers en die uitspraak in die saak *Tucker's Fresh Meat Supply (Pty) Ltd vs Echakowitz* 1958 (1) SA 505 (AA) op 509 tot 511.

Die Romeins-Hollandse gesag waarop al die bogenoemde gesagsbronne steun,

is Voet 23.2.44 en 2.4.36 (Percival Gane *The selective Voet being the Commentary on the Pandects Paris edition of 1829*, vol 4 (Durban: Butterworths & Co 1956)). Ek het Gane se vertaling van hierdie gedeeltes nagegaan, maar ek is onder die indruk dat Voet se kommentaar rondom die regmatigheid van optrede deur 'n vroulike 'public trader' wat as haar eiegenoot se gemagtigde sodanige beroep beoefen, wentel.

In die *Tucker's* saak op 511F is die hof van die mening dat: 'The second legal proposition advanced by appellant's counsel was that the consent of the husband which is required by a wife to enable her to carry on business as a public trader, if the consent is given before the husband's insanity, continues to be effective after his insanity. Counsel rightly

admitted that when a sane husband permits his wife to carry on business as a public trader, his consent is a continuing one which he may, however revoke at any time and he was quite unable to persuade us that an insane husband could continue such consent. Nor were we able to find any fault with the statement of Williamson J, that the wife, in carrying on business as a public trader, was acting as the agent of her husband (Voet 23.2.44 and 2.4.36) and that her agency was terminated by the insanity of her husband.'

Die bogenoemde standpunt deur Hoexter AR is vatbaar vir die interpretasie dat die kranksinnigheid van die volmaggewer beteken dat hy nie in staat was om deurlopend volmag (magtiging) aan sy vrou te verleen om 'n handelaar

Abstract: Involuntary lapse of power of attorney

In its unanimous judgment handed down by Hoexter JA in the case *Tucker's Fresh Meat Supply (Pty) Ltd vs Echakowitz* 1958 (1) SA 505 (AD) the Appellate Division makes the finding that the consent by a husband to his wife, to whom he is married in community of property, to carry on business as a public trader in the name of the joint estate, does not continue to be effective after his insanity.

This has apparently led to a fairly general acceptance of the principle that, whenever the mandator of a power of attorney should suffer a change of mental status during the subsistence of such power of attorney, the power of attorney lapses involuntarily. This approach can create serious humiliation when applied, for instance, to the case where a husband grants a written general power of attorney in favour of his wife, specifically to address the possible situation that the husband may later on suffer from Alzheimer's disease, and then has need of the wife's ability to attend to the administration of his financial affairs.

A possible solution to this vacuum would be for the mandator and agent to combine the power of attorney with a mandate agreement, which creates a financial obligation on the mandator to pay a consideration to the agent to perform in terms of the general power of attorney until the death of the mandator.

Such was the situation in the case *Glover v Bothma* 1948 (1) SA 611 (W), and applied by Caney J in the case *Ward v Barrett N.O. and Another* 1962 (4) SA 732 (NPD). I submit that this is the legally correct approach, namely, that the intention and mental ability of the mandator at the time the power of attorney are the decisive factors to be taken into account and applied regarding the question whether a particular power of attorney should lapse when a change of the mandator's mental ability should take place during the subsistence of the power of attorney.

te bly nie en dat daar derhalwe aanvaar moet word dat die volmag (wat nodig was vir die vrou om as handelaar voort te gaan) verval het toe die volmaggewer kranksinnig geword het.

Hierdie standpunt is ongetwyfeld nie net regtens nie, maar ook logies korrek, indien die handeling wat deur die 'public trader' uitgevoer wil word namens haar eggenoot, as volmaggewer, telkens uit die aard van die handeling 'n vars volmag benodig het. Dit was juis die hof se standpunt in die *Tucker's*-saak dat die volmagnemer (mev Echakowitz) haar eggenoot (wat *non compos mentis* is) se magtiging benodig het vir elke afsonderlike handeling wat sy as handelaar verrig het. Dit beteken dat die volmaggewer dan telkens 'n nuwe magtiging vir elke handeling sou moes gee en, ooglopend beteken dit dan dat, indien die volmaggewer nie meer oor die vermoë beskik om 'n regsbesluit te neem nie, beteken dit dat die volmagnemer (sy eggenote) nie meer volmag het vir die nuwe handeling nie.

Oorweeg egter die scenario waar 'n volmaggewer wat, terdeë daarvan bewus is dat hy of sy chirurgie moet ondergaan en vir 'n periode van drie weke onder verdoving gehou sal word en dus nie in staat sal wees om 'n regmatige regsbesluit te neem nie, 'n prokurasie verleen aan 'n volmagnemer om hom of haar gedurende daardie drie weke in alle opsigte en met alle transaksies te verteenwoordig. Sy of haar bedoeling tydens die gee van die volmag is om juis voorsiening

te maak vir die reg van die volmagnemer om namens hom of haar te handel tydens die periode wat hy of sy nie in staat is om enige besluit te neem nie.

Dit blyk derhalwe vir my meer korrek te wees dat indien die volmaggewer by die gee van die volmag by sy of haar volle verstandelike vermoë is om regsbesluite te neem, en sy of haar bedoeling juis is om aan die volmagnemer die magte te gee soos uiteengesit in die skriftelike 'algemene prokurasie' wanneer hy of sy (die volmaggewer) nie meer oor die verstandelike vermoë sal beskik om besluite te neem nie, dit 'n perd van 'n ander kleur is.

Dit gebeur elke dag dat persone skriftelik 'n volkome korrekte en regmatige testament verly en in die testament sekere magte aan sekere persone verleen (bv, aan die eksekuteur of 'n trustee van 'n testamentêre trust) en daardie magte verval nie by die dood van die testateur nie. Inteendeel.

In die saak van *Ward vs Barrett N.O. and Another* 1962 (4) SA 732 (NPD) verwys Caney R op 737D en verder na verskeie moontlikhede wanneer 'n volmag herroep kan word en hy die opmerking: 'In such event the power of authority if irrevocable by the principal, is revoked by his insolvency' (737F). In daardie geval is die verval 'n gevolg nie van 'n verandering van verstandelike status van die volmaggewer nie maar omdat die Insolvensiewet 24 van 1936 se bepalings dan van krag word.

Na my mening is Caney R se benade-

ring regtens korrek, naamlik: Dieselfde beginsels en benadering wat toegepas is op die vraag of die volmaggewer die reg het om die volmag te herroep, (naamlik wat was die *bedoeling* wat die volmaggewer gehad het met die gee van die volmag tydens die gee van die volmag), is van toepassing by die vraag oor wanneer 'n volmag onwillekeurig verval (my kursief).

Natuurlik is al die bogenoemde menings onderhewig aan enige moontlike statutêre ingryping, soos die bepalings van die Insolvensiewet, en dit is ook onderhewig aan enige moontlike bevel wat deur 'n bevoegde hof gemaak kon gewees het met betrekking tot die betrokke feitekompleks.

In die vooropstelling word aan die hand gedoen dat, indien 'n eggenoot 'n 'algemene prokurasie', ten gunste van sy eggenote verly juis met die verklaarde bedoeling om aan sy eggenote die reg en bevoegdheid te gee om alle finansiële handeling namens die eggenoot te verrig wanneer die eggenoot as gevolg van Alzheimer's se siekte nie meer in staat is om dit te doen nie, en die eggenoot tydens die verlyding van die 'algemene prokurasie' ten volle handelsbevoegd was en die prokurasie verskaf het juis om voorsiening te maak vir daardie regte wanneer hy totaal onkapabel is, sal die volmag nie verval as gevolg van die volmaggewer (die eggenoot) se verandering van status wat sy handelsbevoegdheid inperk of totaal vernietig nie.

Dit is vanselfsprekend dat 'n kontrak, soos byvoorbeeld, 'n huurkontrak wat vir 'n bepaalde tydperk gesluit word, se regswerking nie beëindig word deur die dood van een van die partye daartoe nie. Ek kan my byvoorbeeld 'n scenario indink van 'n bejaarde plaaseienaar wat sy veeplaas vir 'n periode van sê vyf jaar verhuur maar bedag is op die moontlikheid dat die huurder die grond mag oorbeweï en derhalwe skade aan die verhuurder kan toebing. Juis om hierdie aspek te beheer, word 'n klousule dan in die huurkontrak aangebring dat 'n agent van die verhuurder die veebesetting deur gereëde besoek aan die plaas sal monitor. Vir hierdie doel verskaf die verhuurder dan dienooreenkomstig 'n skriftelike volmag aan sy agent. 'n Jaar na die aanvang van die huurtermyn is die verhuurder as gevolg van 'n beroerte volkome handelingsonbevoeg. Kan daar ooit redelikerwys geargumenteer word dat die volmag wat hy aan sy agent verskaf het dan verval?

Ek is van mening dat dit onlogies en regtens onontvanklik is.

Die bestaan en regswerking van die huurkontrak word nie daardeur geaffekteer nie. Dit is geykte reg.

Die verhuurder se belange het behoefte aan beskerming minstens vir solank die betrokke huurkontrak bly bestaan.

Aanvaar vir doeleindes van hierdie scenario dat die agent geen handelsbelang het in die monitor van die verhuurder se belange nie en dat hy dit doen bloot as 'n vriendskapsgebaar (hoewel hy dit baie doeltreffend en effektief doen). Kan daar dan hoegenaamd geargumenteer word dat die huurder, indien die agent hom sou aanspreek omdat die plaas oorbeweis word, hom daarop kan beroep dat die agent geen volmag, het om in te meng in die wyse waarop die huurder die plaas benut nie? Dit kan tog nie. Tydens die gee van die volmag, was die verhuurder volkome handelsbevoeg en het hy die volmag gegee juis om sy belange te beskerm minstens vir die duur van die huurkontrak selfs al sou hy (die verhuurder) nie in staat wees om dit self te doen nie.

Indien die volmag geskep is as 'n bepaling in die betrokke huurkontrak, sal die agent natuurlik die kontrak as sodanig kan gebruik as sy gesag om die betrokke weiveld te ondersoek. Indien die kontrak egter nie so 'n bepaling bevat nie en die verhuurder 'n afsonderlike 'algemene prokurasie' aan die agent verskaf het sonder om die huurder in kennis te

stel van die inhoud of selfs die bestaan van sodanige algemene prokurasie, waarom sal die agent dan nie geregtig wees om, op grond van die bestaan van die algemene prokurasie, namens die verhuurder die nodige inspeksie van die huurgrond te doen nie? Dit is tog onlogies dat hy verbied sal word om sy volmaggewer se belange ingevolge van die huurkontrak te beskerm ten spyte van die bestaan van die volmag.

In Bertrand se artikel verwys die skrywer na die redelike algemene gebruik van bejaarde persone om 'n algemene prokurasie te verly, juis om voorsiening te maak vir 'n situasie soos hierbo geskets. Hy verwys dan ook na studies wat op twee verskillende geleenthede deur die Suid-Afrikaanse Regshersieningskommissie onderneem is en aanbevelings wat deur hierdie liggaam gemaak is vir die skep van sekerheid deur statutêre bepalinge. Dit is verstommend dat die regering steeds nie van hierdie verstandige en deurdagte aanbevelings van die kommissie gebruik maak nie.

Dit skyn vir my 'n moontlike oplossing vir 'n taamlik algemene situasie te wees dat die volmaggewer en die volmagne-

mer (in die scenarios waarna hierbo verwys word) telkens 'n lasgewingskontrak met mekaar sluit, met bepalinge dat die lasgewing sal voortbestaan tot met die afsterwe van die volmaggewer, of die vroeëre skriftelike herroeping daarvan deur die volmaggewer (mits die volmaggewer oor die geestelike vermoëns beskik om dit te herroep) en telkens ook met die verdere bepaling dat die volmagnemer 'n ooreengekome vergoeding (bv R 5 per maand) sal ontvang vir die handelinge wat hy of sy verrig. Dit maak dit dan 'n kontrak wat skynbaar volgens bestaande gesag 'n verandering van die status deur die volmaggewer met betrekking tot sy of haar handelingsbevoegdheid, sal oorleef.

Willie Herbst BCom (Stell) LLB (OVS) is 'n prokureur by Hill McHardy & Herbst in Bloemfontein.



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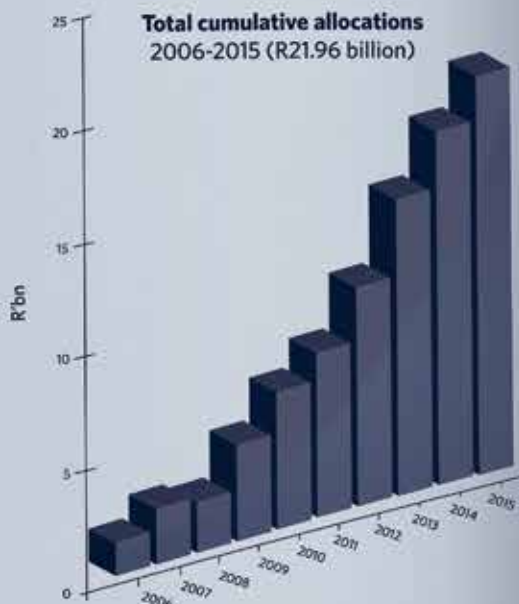
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By
David
Jesse

EVIDENCE SE

If it is not original it is inadmissible – *the uncertainty of 'data messages'* *in court proceedings*

With the advent of the Electronic Communications and Transactions Act 25 of 2002, (the ECTA) and the subsequent repeal of the Computer Evidence Act 57 of 1983 the answer to the admission of 'data messages' whether as 'documents' 'real' 'private' or 'public' is now simple. The original unaltered version of the copy of the fax, e-mail or short message service (SMS) must be available for scrutiny by the court on the relevant instrument.

This is more so if challenged by the other side. In motion proceedings an affidavit in a set form must be placed before the relevant court with the 'transcribed data messages' attached to it or transcribed in it. It is also necessary that if the relevant data messages were addressed to a third party, namely, not the plaintiff/defendant/applicant/respondent/and not originating from, namely, the plaintiff/defendant/applicant/respondent/ but a third party, then it constitutes in real terms 'hearsay evidence' and the re-

cipient and or addressee (third party) of the relevant 'data message' is required to provide testimony at the trial and/or in motion proceedings in an affidavit affirming the peremptory requisites of the ECTA in order for the relevant data messages to be admitted in evidence. For example, person one submits as his affidavit annexure A in a case against person two being an e-mail he or she was given by person three who was given it by person four who received it from 123456789@vodamail.co.za. Is it an ex-

act copy of the original or a composite version in order to bolster his case? Whether this is difficult to determine or not is no longer a matter for concern nor does every court need to deal with this on a case-by-case basis.

It is as simple for unscrupulous litigants to create doctored documents as copying, cutting and pasting from an e-mail to a Word document or a fax to a design program document and then deleting the words required and entering one's own words and printing it out and presenting it as an annexure in motion proceedings to meet one's own ends. It happens every day and is done by ordinary people. It does not require sophistication. However, with the increase in the sophistication of fraud forgery and the production of composite documents in order to

data message be properly identified and the recipient and/or addressee of the relevant data message be both identified and, if a third party, place under oath the peremptory attestation required of the third party in terms of ECTA.

It is only in this material compliance with ECTA, that any data messages will be admitted to any court and this will in most cases exclude the necessity of any 'trial within a trial' and creates the 'rules' for admission thereof.

In motion proceedings, unless these peremptory requirements are met, the data messages will not be admitted; and even if met, the matter may still, at the discretion of the court, be referred to oral evidence and examination that can be tested.

Required legal preamble – ECTA

Exact identification of the computer and/or cellphone

It is peremptory to state under oath that the fax and/or e-mail and/or SMS were received at and/or sent from (and name the relevant instrument) and state that they are electronically stored there and identify the serial number of that specific instrument, namely:

• Attestation that the production thereof is competent

It is peremptory to attest to the fact that the producer of the relevant data message is competent to do so, is competent to operate the identified instrument; and has not altered its form or content in any fashion and that the '[c]omputer/cellphone is unaffected in its operation by malfunction, interference, disturbance or interruption; and, a party is qualified to give testimony; has knowledge of, and experience in computers and cellphones and the examination of the records and facts regarding the operation of the computer/cellphone; and, and in terms thereof are to be considered authentic original documents having been printed out/transcribed from the same.'

• Attestation that the data messages from the instrument comply with the ECTA

It is a material requirement that the deponent attest to the fact that the data message complies with s 12 of ECTA and is in writing and in the form of a data message as envisaged by the Act and is accessible in a manner usable for subsequent reference as required by the Act.

• Attestation to material compliance with s 14 of the ECTA

It is peremptory to state that in terms of s 14 of the ECTA all evidence is original and maintains

'(a) the integrity of the information from the time when it was first generated in its final form as a data message ...; and (b) that information is capable of being displayed or produced to the person to whom it is to be presented'.

These are vital requisites in the production of data messages in any trial – civil or criminal – and unless this is complied with, a court should be loath to accept same. It would be considered an 'unsafe verdict' otherwise; especially if contested by the other side.

• Attestation under s 15 of the ECTA

It is necessary to state that –

- in terms of s 15 of the ECTA it is the best evidence that could reasonably be expected to be obtained; and
- there is no factor which influences the reliability of this evidence.

This is because viruses can alter and keystroke copiers can give a party external access to a computer and they can open and change material contents of a data message. This is especially applicable to unsecure Wi-Fi connections from public places.

• Material compliance with s 25 of the ECTA

In terms of s 25 of ECTA both the originator and the addressor must be identified in the event of their not being one and the same requiring adequate supporting evidence.

In terms of s 25 of ECTA both the recipient and/or addressee must be identified in the event of their not being one and the same requiring adequate supporting evidence.

Conclusion

Without these peremptory allegations reduced to writing or orally placed under oath on record, no data message whether it be a fax, an e-mail or an SMS from any computer or cellphone ought to be admissible in any court of law in South Africa. There is a high likelihood of it being produced as a composite document in order to bolster the case of the party submitting it. This is a greater risk in criminal trials. As a standard the least that must be expected is that the original is stored on the relevant instrument and is capable of being produced to the relevant court. If this is not the case it ought not to be admitted.

David Jesse BSc (Hons) MSc PhD LLB is an author in Pinetown.



bolster a case, it has become necessary to make certain attestations under oath in terms of the ECTA which include the 'personal' identification of the instrument on which the 'data message' was received and that the 'original' is available for inspection. It is further necessary to render it unchanged to the court. Without these peremptory requisites the relevant 'data message' will not be permitted to be produced in any trial as evidence.

It is a further material requirement that the originator and addressor of the

THE LAW REPORTS



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March 2016 (2) South African Law Reports (pp 1 – 316);
[2016] 1 All South African Law Reports February (pp 313 – 628);
[2015] 4 All South African Law Reports October no 1 (pp 1 – 129)
and no 2 (pp 131 – 254); 2016 (1) Butterworths Constitutional
Law Reports – January (pp 1 – 155)

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

Abbreviations:

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal

Child law

Surrogate motherhood: In *AB and Another v Minister of Social Development* 2016 (2) SA 27 (GP); [2015] 4 All SA 24 (GP) the applicant, AB, was a single woman. She was unable to carry a child to term or to contribute a gamete to a surrogate mother. Her medical condition was permanent and irreversible. She wished to enter into a surrogacy arrangement whereby a surrogate mother would bear her a child conceived from donated male and female gametes.

However, she was barred by s 294 of the Children's Act 38 of 2005, which provides that: 'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of

the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

AB challenged the constitutionality of the provision on the grounds that the genetic link requirement violates the first applicant's rights to equality, dignity, reproductive healthcare, autonomy and privacy. AB submitted that it is trite that most people would prefer to use their own gametes in order to establish a genetic link with a child. However, so she argued, there is no justification for the limitation of these rights on this basis and enforcement of such a preference on everyone in the context of surrogacy, especially where such a limitation does not exist in the context of *in vitro* fertilisation (IVF).

Basson J held that s 294

was unconstitutional and invalid. This was because there was no rational connection between the limitation, on the one hand, and the purpose of the legislation, to wit, to allow parents, including a single parent, to have a child, on the other hand. Persons in the surrogacy situation requiring donor gametes were, irrationally, treated differently to individuals undergoing IVF who required the same.

Finally, the court held that the provision infringed also several other constitutional rights, including the right to dignity, to make decisions concerning reproduction, privacy and access to healthcare services.

Consumer Protection Act

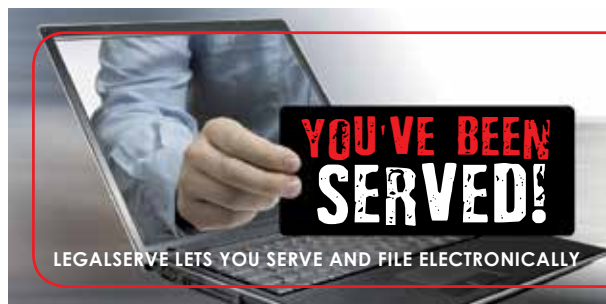
Delictual liability of a 'producer': The decision in *Halstead-Cleak v Eskom Holdings Ltd* 2016 (2) SA 141 (GP) concerned the question regarding strict liability of a utility company in terms of the Con-

sumer Protection Act 68 of 2008 (the CPA).

The plaintiff, while riding a bicycle, inadvertently came into contact with a low-hanging live power line spanning a footpath. The plaintiff sustained severe full-thickness electrical burns to the right forehead and burn wounds to the chest, arms and both thighs. The defendant, Eskom, was a licensee in terms of and for purposes of the Electricity Regulation Act 4 of 2006. Eskom was at all material times, responsible for the power line in question.

The parties agreed to separate the issues of delictual liability, quantum and strict liability under s 61 of the CPA. This case concerned only the so separated CPA issue. In dispute was whether the CPA applied where, as in the present case, the plaintiff's injuries were not suffered in the course of utilising a supply as a consumer.

The parties further agreed that the delictual part of the plaintiff's claim and the is-



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sue of the alleged quantum of damages be separated and postponed *sine die*; and that the possible contributory negligence on the part of the plaintiff was not an issue in relation to the CPA attack.

Baqwa J held that the fact that Eskom was a 'producer' and a 'retailer' in respect of electricity supplied to consumers in general did not mean that a 'consumer' had to be the injured party in this instance. Such an interpretation would not be in accordance with the spirit and purpose of the CPA, which provided protection to and redress for 'any person', that is, not only in respect of 'consumers' or a 'consumer', in a number of its provisions. Examples were s 5(5), which provided that ss 60 and 61 were applicable even in respect of transactions exempt from the provisions of the CPA; and s 61(5), which made it clear that liability arose not only in respect of 'consumers' as defined or consumers in the general sense, but also in respect of 'any natural person'.

Eskom's submission, that an innocent third party who suffered loss, but who was not a 'consumer' *stricto sensu* could not claim redress because he or she was not the consumer, was held to be contrary to the spirit and purpose of the CPA. The plaintiff need not be a 'consumer' in the contractual sense or as defined in order for Eskom to be liable to him.

The court further pointed out that Eskom, on learning of the incident, rectified the situation by causing the electricity to be switched off and the power line to be dismantled. Eskom's actions after the incident reinforced the notion that it had introduced the source of danger which led to the plaintiff's injuries, for which it would be held liable.

Finally, the court pointed out that it was notable that Eskom neither pleaded nor adduced any evidence to substantiate the non-applicability of the CPA. Eskom was accordingly held liable in terms of s 61(1) of the CPA.

Contract law

Cancellation of tender: The facts in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* [2016] 1 All SA 332 (SCA) were as follows: From 1 August 2009 until 31 December 2012, the respondent, Nambiti, was contracted to the first appellant, the municipality, to provide the latter with SAP computer software support services (SAP). On 11 December 2012 the municipality informed Nambiti that the tender contract would be cancelled on 31 December 2012. A new tender was awarded to another party up to 31 December 2013.

Nambiti was dissatisfied with the cancellation of the tender and applied to the GP that the decision of the municipality be reviewed. On review, the High Court set aside the cancellation of Nambiti's tender contract and ordered the municipality to adjudicate and award the tender within two months of the court's order.

On appeal, the central issue before the SCA was whether the cancellation of Nambiti's tender was an administrative action, thus bringing the case within the purview of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Wallis JA held that the question whether the cancellation of a tender before adjudication amounted to an administrative action, depended on whether it involved a decision of an administrative nature and whether it had a direct, external legal effect.

The court held that in cancelling the tender with Nambiti, the municipality was doing no more than exercising a right it reserved to itself not to proceed to procure those particular services on the footing set out in the tender. The court reasoned it is in any event always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender.

Regulation 10(4) of the Pro-

urement Framework Regulations 2011 provides that prior to awarding a tender, an organ of state may cancel a tender in three circumstances, namely if –

- due to changed circumstances there is no longer a need for the services, works or good required;
- funds are no longer available; or
- no acceptable tenders are received.

In the present case there was a change in circumstances. The needs of the municipality had been reviewed and it no longer required that SAP services be provided for the period stipulated or on the terms included in Nambiti's tender.

Importantly, so the court reasoned, a decision not to procure certain services does not amount to an administrative action. Further, a decision not to procure services (as has happened in the present case) does not have any direct, external legal effect. Once Nambiti's legal entitlement to provide SAP support services to the municipality expired on 31 December 2012, it had no further right to provide those services.

The decision by the municipality to cancel Nambiti's tender was thus not an administrative action and was not susceptible for review in terms of PAJA.

The appeal was accordingly allowed with costs.

Tender contracts: In *Tasima (Pty) Ltd v Department of Transport and Others* [2016] 1 All SA 465 (SCA) the facts were as follows: The appellant, Tasima, was the successful tenderer for the redevelopment and implementation of the National Traffic Information System (eNaTIS).

The turnkey agreement between Tasima and the respondent, the department, was intended for a fixed period of five years. It would have expired on 31 May 2007, with the possibility of an extension of the contract. Because of the complexity and importance of the eNaTIS system, its management could

not be transferred from Tasima to the department or a third party quickly. Hence the agreement made detailed provisions regarding the transfer of the management of the eNaTIS system, including a transfer management plan meeting and a transfer management plan.

After the initial contract had expired on 31 May 2007, the contract was not renewed by the department for another five years, but continued on a month-to-month basis. However, in May 2010 the then Director General (the DG) of the department approved Tasima's application for the renewal of the contract for a second five-year period, ending on 30 April 2015. A dispute arose between Tasima and the department regarding the question whether the contract was validly extended by the DG to 30 April 2015. The department averred that the DG had failed to comply with a certain Treasury directive, as well as s 38(2) of the Public Finance Management Act 1 of 1990 and it informed Tasima that the contract would expire on 31 May 2012. Tasima invoked the dispute resolution mechanism provided for in clause 24 of the agreement. It further successfully brought an application for an order that the department must perform its obligations in terms of the agreement.

Notwithstanding the court order against it, the department acted contrary to the court order. The court *a quo* dismissed Tasima's application for an order of contempt of court against the department, as well as a third party – the Road Traffic Management Corporation (RTMC) – which was appointed by the department to fulfil some of the obligations in terms of the original tender contract.

On appeal Brand JA held that the outcome of the review application was entirely irrelevant to the question whether the department was in contempt of court. Should the review application have been successful, it could have impacted on the future in that it could have served as a basis for setting aside the

court orders. But unless and until those orders were set aside by a court of competent jurisdiction, they stood and had to be obeyed.

The court confirmed that court orders must be obeyed even if they are considered to be wrong.

Because the review application was brought under s 6 of the Promotion of Administrative Justice Act 3 of 2000, it was subject to the time bar in s 7. In terms of s 7, proceedings for judicial review in terms of s 6 must be instituted without unreasonable delay and not later than 180 days of the administrative conduct. Section 9 allows for an extension 'where the interests of justice so requires'. In the *Tasima* case the department waited five years before it instituted review proceedings.

The court finally held that *Tasima* was not seeking to compel performance of a contract. It sought performance of court orders in its favour. The court thus concluded that the illegality or otherwise of the contract was of no consequence as long as the court orders stood.

Credit law

Credit agreement: The decision in *Land and Agricultural Development Bank of South Africa v Chidawaya and Another* 2016 (2) SA 115 (GP) yielded yet another judicial pronouncement on the vexed s 129 of the National Credit Act 34 of 2005 (the NCA).

The facts concerned an application for summary judgment in which the plaintiff, the bank, claimed payment from the defendants, the debtors, of the balance due on their loan agreement with the bank, together with interest. It was trite that the bank had attached the notice of default by the creditor (as required by s 129 of the NCA) to the summons. The bank conceded that the s 129 notices were 'returned to sender' and that they therefore, did not reach the debtors, as intended.

The crisp issue was whether the bank complied with the provisions of s 129 of the NCA by merely attaching the s 129 notice to the summons,

without the notice ever actually reaching the debtors.

Baqwa J held that a notice in terms of s 129 may be attached to a summons as proof of compliance with the Act, but not as constituting compliance. For the purposes of compliance with the notice requirements in terms of s 129 of the NCA, the service of a s 129 notice by means of attaching it to the summons does therefore not suffice. It is clear from the wording of the Act that a s 129 notice is a pre-litigation step and must accordingly precede litigation.

If litigation is embarked on without compliance with s 129, then s 130(4) provides the procedural mechanism to remedy this defect. To hold otherwise, and dispense with the requirement of the pre-litigation notice, would render s 130(4) irrelevant. It would also ignore the directives of the legislature, as well as undermine the purpose of the Act as set out in s 3, namely to address issues such as over-indebtedness and debt restructuring.

The court ordered that the application for summary judgment had to be postponed *sine die*. The bank was directed to serve s 129(1)(a) notices on the debtors. The court made no order as to costs.

Criminal law

***Dolus eventualis*:** In *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA) the court was faced with the question whether the respondent (the accused) acted with the necessary *dolus eventualis* when he had shot and killed his girlfriend at his home in a secured complex. What was at issue was whether in doing so, the accused had committed the crime of murder (involving the intentional killing of another), or the lesser offence of culpable homicide (involving the negligent killing of another). The trial court found him guilty of the lesser offence.

The appellant (the state) contended that the trial court erred on certain legal issues, and appealed on reserved questions of law. The appeal

related solely to count 1 of the indictment, viz the alleged murder of the deceased.

In terms of s 258 of the Criminal Procedure Act 51 of 1977 (the CPA), culpable homicide is a competent verdict on a charge of murder. Therefore, having found that the state had not proved that the accused was guilty of murder, but had shown that he was guilty of culpable homicide, the trial court relied on s 258 to convict him on the latter charge.

The main issue before the SCA was whether the trial court had erred in regard to the issue of *dolus eventualis*.

Leach JA held that in order to prove murder, the state had to establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*. Mere negligence would be insufficient. The two forms of intention which apply to murder are *dolus directus* and *dolus eventualis*. *Dolus directus* is present where a person commits the offence with the object and purpose of killing the deceased. *Dolus eventualis* in turn, arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur. Significantly, the wrongdoer does not have to foresee death as a probable consequence of his actions. It is sufficient that the possibility of death is foreseen, and is coupled with a disregard of that consequence. (See also: 'Fight back and you might be found guilty: Putative self-defence' 2015 (Aug) DR 34 and 'Elevating culpa to crime' 2015 (Sept) DR 40.)

The SCA held that the trial court's question wrongly applied an objective rather than a subjective approach to the question of *dolus*. The issue was not what was reasonably foreseeable when the accused fired at the toilet door, but whether he actually foresaw that death might occur when he did so. Thus, the critical distinction was between subject foresight (what actually went on in the mind of the accused) and objective foreseeability (what would have

gone on in the mind of a reasonable person in the position of the accused). That distinction must not be blurred. The court held that the trial court's conclusion that the respondent had not foreseen the possibility of death occurring as he had not had the direct intent to kill stemmed from the application of the incorrect test.

A further error identified in the trial court's conclusions related to whether the respondent knew that the person in the toilet was the deceased. The accused's incorrect appreciation of who was in the cubicle was not determinative of whether he had the requisite criminal intent. Therefore, in confining its assessment of *dolus eventualis* to whether the accused had foreseen that it was the deceased behind the door, the trial court misdirected itself as to the appropriate legal issue.

The court was thus satisfied that in firing the fatal shots, the accused must have foreseen, and therefore did foresee, that whoever was behind the toilet door might die, but reconciled himself to that event occurring. That constituted *dolus eventualis* on his part, and the identity of his victim was irrelevant to his guilt.

The conviction and sentence for culpable homicide by the trial court were set aside and replaced with a conviction of murder. The case was remitted to the trial court for sentencing afresh.

Delict

Loss of future income: The facts in *Terblanche v Minister of Safety and Security and Another* 2016 (2) SA 19 (SCA) were as follows: The appellant, Terblanche (the plaintiff), was a farmer. While he was in police custody, he incurred severe injuries to his head, neck and back, as a result of being tossed around in the back of a police van negligently driven by police officers over rough terrain at high speed.

The only issue in the present appeal was whether or not the plaintiff had proved a claim for future loss of

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earning capacity against the respondents, the Minister of Safety and Security and a police officer named Inspector Mogale (the police), before the trial court in the GP. The trial court found that the plaintiff had not proved his loss of earning capacity and the full court upheld this finding.

The present appeal was against the decision of the full court, with the special leave of the SCA.

Mayat AJA held that where a plaintiff, in an action for damages for personal injury negligently caused, claims damages for loss of earning capacity and establishes before the trial court that he would sustain a pecuniary loss in his personal capacity because he has to employ additional, necessary labour in order to substitute certain aspects of his functions which he can no longer perform because of the injuries he has sustained, such plaintiff would be entitled to be compensated for the cost of such substituted labour.

While the SCA accepted that the plaintiff did not establish a case for a mechanically skilled foreman (at the highest level) to assist him in performing certain farming activities, it found that the plaintiff had established a case for the additional costs of an unskilled employee, who could potentially be trained over time. Counsel for both parties agreed in the context of the present appeal that, on the basis of the available actuarial computations, substituted labour for an artisan for specified physical functions was fairly and equitably calculated to constitute the sum of R 1 557 136,69.

In this regard it referred with approval to its earlier decision in *President Insurance Co Ltd v Mathews* 1992 (1) SA 1 (A); [1992] 1 All SA 179, where the court held (at 5 E-G) that: 'There is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages arising from a plaintiff's inability to carry on his pre-collision trade or profession.'

The SCA concluded that the

trial court, as well as the full court, erred in finding that the plaintiff had not established a claim for loss of earning capacity. The appeal relating to the plaintiff's claim for the diminution of his earning capacity was thus upheld.

Family law

Proprietary rights Constitutionality of s 9: In *MC v JC* 2016 (2) SA 227 (GP) Mr and Mrs C were married out of community of property but with accrual. After 26 years of marriage Mr C sought, and received in a magistrate's court, a decree of divorce, on the ground of irretrievable breakdown of the marriage. The regional magistrate also ordered that Mrs C partially forfeit the patrimonial benefits of the marriage in terms of s 9(1) of the Divorce Act 70 of 1979. Section 9(1) provides that: 'When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any *substantial misconduct* on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited' (my italics).

Mrs C's 'substantial misconduct' was adultery.

On appeal to the High Court Semanya AJ held that Mrs C would not 'unduly benefit' were she to receive the patrimonial benefits of the marriage and, accordingly, that she should not forfeit them.

The court had also requested, in the course of the hearing, argument on the constitutionality of s 9(1) with respect to forfeiture on the ground of substantial misconduct. It held, by way of an *obiter dictum*, that s 9(1) might infringe the right to equality. This was because it placed the party who had committed substantial misconduct in an unfavourable position when it came to dis-

tribution of the patrimonial benefits of the marriage. In this regard the court referred with approval to the decision in *DE v RH* 2015 (5) SA 83 (CC) (see law reports 'Delict' 2015 (Nov) DR 37). It also pointed out that being forced to remain in an unhappy matrimonial relationship for fear of losing patrimonial benefits may deprive a spouse of the right to dignity.

It might also, in certain circumstances, infringe a woman's reproductive rights; or a person's rights to dignity, freedom and security of the person.

The court did not, however, decide the issue, but instead ordered that the procedure in Uniform Rule 16A be followed, and also that certain persons be joined, before it finally determined the constitutional point.

The procedure in Uniform Rule 16A involves that the appellant (Mrs C) must join the Minister of Justice and Correctional Services as the executive authority responsible for the administration of the Divorce Act (r 10A); as well as the Speaker of Parliament, as the legislative body. Failure to do so would mean that the present court was not empowered to declare the provisions of s 9 invalid for inconsistency with the Constitution.

Prescription

Extinctive prescription of suretyship: In *Miracle Mile Investments 67 (Pty) Ltd and Another v Standard Bank of SA Ltd* 2016 (2) SA 153 (GJ) the respondent bank, Nedbank, concluded an agreement with one Mr NC Papachrysostomou (the client) in terms of which Nedbank granted him a credit facility. An account was opened for the client in the books of Nedbank and he was granted a line of credit to the maximum amount of R 13,9 million. Nedbank undertook to pay out or lend money on behalf of the client and debit his account with such sums. It was a requirement of the facility that the client's debt to Nedbank had to be secured by collateral or suretyships. The applicants (the sureties) accordingly executed surety-

ships in favour of Nedbank and registered 12 bonds as security pursuant to the suretyships signed by them.

The client agreed to pay the principal debt with interest and charges in 240 monthly instalments. By 21 October 2008 the client owed Nedbank R 7,4 million. The client did not thereafter draw on the credit facility or make any payments. Nedbank did not take action against the client for a period of more than three years thereafter. The sureties then applied for the cancellation of the mortgage bonds, contending that the principal debt and hence their accessory liability had prescribed under s 11 of the Prescription Act 68 of 1969 (the Act).

Nedbank opposed the application on a number of grounds. First, it contended, as to when prescription commenced, that the failure by the client to pay a particular monthly instalment did not automatically accelerate the payment of the balance of the debt or render it immediately due and payable. This was so because the credit facility only entitled Nedbank to convert the facility to one repayable on demand if he failed to pay any instalment due in terms of the agreement and if he did not remedy this failure within seven days of written notice given to him by Nedbank to do so. As no such notice had been given to the client, the amount due in terms of the facility did not become due and prescription had accordingly not commenced running.

Secondly, Nedbank contended that in terms of s 11 of the Act the applicable period of prescription was 30 years, because the period of prescription of a debt secured by a mortgage bond was 30 years.

Thirdly, Nedbank argued that the client had in 2012, in sequestration proceedings against him by another bank, acknowledged his liability to Nedbank and that such acknowledgment of liability interrupted the running of prescription in terms of s 14(1) of the Act.

Gaibie AJ held as follows.

First, as to when prescription began to run the court reasoned that the question whether the debt incurred by the client in terms of the facility had prescribed depended on whether the debt became 'due' within the meaning of s 12(1) of the Act. Section 12 provides that 'prescription shall commence to run as soon as the debt is due'. According to the applicable case law and jurisprudence, prescription was not prevented from running if Nedbank was entitled to accelerate payment of the balance and claim the full amount but failed to do so. Prescription ran from the date Nedbank had the right to enforce payment of the full amount due to it even though it did not do so and was prepared to wait longer.

Secondly, as to the period of prescription, it held that it was clear from the terms of the facility granted to the client that the suretyships and the mortgage bonds were collateral for the principal debt offered to the client by Nedbank. In the circumstances, and in the absence of the principal debt, neither the suretyships nor the mortgage bonds would have existed. The sureties registered the bonds as security for their obligations as sureties and co-principal debtors, and therefore did not undertake a separate, independent liability as principal debtors, and their debt remained accessory to the principal debt. The mortgage bonds that were passed were essentially passed to secure the sureties' liability and to secure the liability of the client as the principal debtor, and therefore the prescriptive period of the client's debt was three years.

Thirdly, as to the contention that the running of prescription had been interrupted, that the phrase 'acknowledgement of liability' in s 14(1) of the Act had, on the decided cases, to be construed as meaning an acknowledgement to the creditor or its agent.

The acknowledgment in the sequestration proceedings was made in 2012, after the debt had become prescribed in 2011. The acknowledgment, if any, had to refer to

an existing liability and not to a liability that had existed in the past. If the acknowledgment was made after the prescription period had elapsed, the acknowledgment had no effect and could not interrupt the running of prescription in terms of s 14(1) of the Act.

The application was accordingly granted with costs.

Voluntary association

Disciplinary proceedings: The facts in *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC) were as follows: De Lange, a Methodist Church minister, announced to her congregations her intent to enter into a same-sex marriage. This caused the church to charge her with breaking its rules. The rule in question was that ministers had to obey church policy, and church policy recognised only heterosexual marriages. The church's district disciplinary committee later found her guilty.

De Lange appealed to the church's connexional disciplinary committee. It confirmed the verdict, and as sentence discontinued her holding of the office of minister. De Lange then referred the matter to arbitration, and its convenor entered into an arbitration agreement on her behalf. The church rules provided that arbitration had to be used for resolution of disputes between ministers and the church.

However before the arbitration proceeded, De Lange approached a High Court and applied to set aside the arbitration agreement; for a declaration that the decision to discontinue her ministry was unlawful in its being based on a policy that was unfairly discriminatory on the ground of sexual orientation; for the review and setting-aside of the disciplinary committee's decisions; and for her reinstatement. She later abandoned the claim of unfair discrimination in her replying affidavit.

The High Court dismissed the application and held that De Lange ought first to have concluded the arbitration. It

granted leave to appeal to the SCA.

On appeal, the SCA found likewise and confirmed the abandonment of the discrimination claim (see law reports 'Arbitration' 2015 (Mar) *DR* 31). De Lange then applied for leave to appeal to the CC. She sought there to reverse the decisions on good cause, and also to advance the discrimination claim. The issue was whether it would be in the interests of justice to grant leave. Moseneke DCJ held that it would not be.

In this regard the CC reasoned that:

- First, there was no prospect of finding differently from the High Court and SCA.
- Secondly, that there was no good cause to set aside the arbitration agreement. Indeed arbitrating the matter would spare the court having to determine questions of Church doctrine.
- Thirdly, it would be unfair to the Church to allow De Lange to revive the discrimination claim at this stage.
- Fourthly, it held that the principle of subsidiarity debarred De Lange making her discrimination claim outside of the process provided by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The court held, in passing, that in a matter involving an Equality Act question and an unrelated question, there was 'much to be said' for allowing the same High Court to decide both questions, sitting alternately as the Equality Court and the High Court.

• Fifthly, De Lange had failed to give notice in terms of Uniform Rule 16A that she intended to raise a constitutional issue. This had possibly prevented interested parties from intervening or joining as *amici curiae* at the High Court stage of the proceedings.

Finally, the court concluded that the discrimination issue was complex and had wide ramifications, and it was undesirable for the CC to decide it as the court of first and last instance. Leave to appeal was accordingly refused.

In a separate concurring judgment Van der Westhuizen J suggested that the more private the area of dispute, the less appropriate it was for a court to enter and to decide the tension of rights such as equality and religion. Thus, it was more appropriate to attempt to resolve the present dispute by way of arbitration.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, civil procedure, constitutional law, criminal procedure, discovery and inspection, environmental law, evidence, immigration, interpretation of contracts, language rights, local authorities, local government planning law, municipal rates, racketeering, rape and right of way.

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Sir Frederick Lawton, former Lord Justice of Appeal ((1992) 37 *Journal of the Law Society of Scotland* 154).

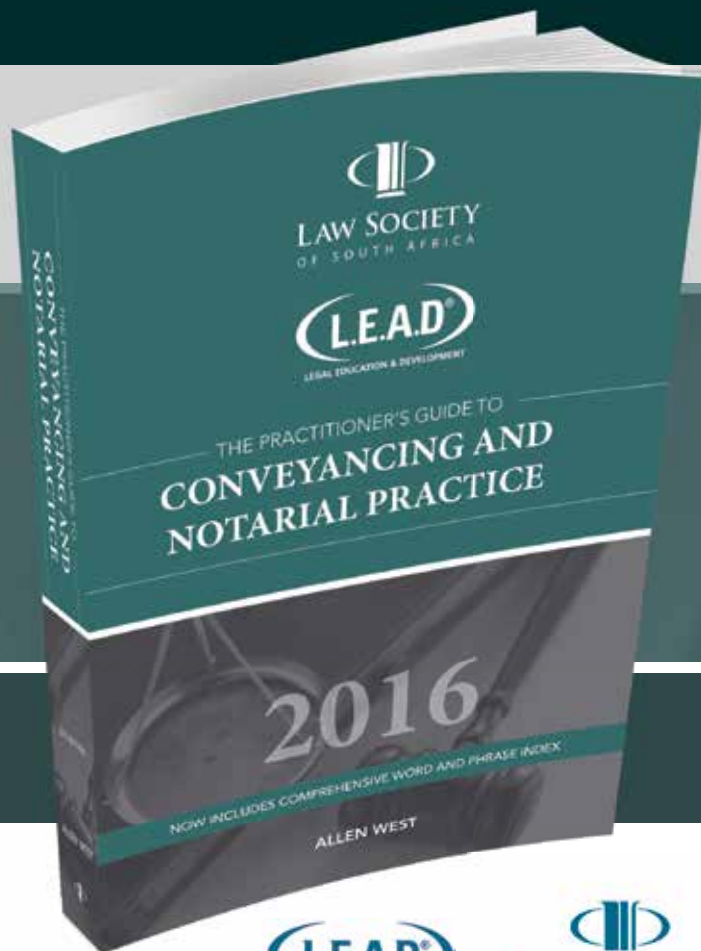
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Allen West was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred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

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By
Elzaan
Potgieter

NCA: The line in the sand – Can a cancelled agreement be revived?

Standard Bank of South Africa Ltd v Botes t/a JHLS Botes Vervoer (NWM) (unreported case no: M85/2015, 13-8-2015) (Landman J)

A proper interpretation of the National Credit Act 34 of 2005 (the NCA) often continues to bewilder, especially when considering aspects of the ‘cancellation’ or ‘reinstatement’ of a credit agreement as envisaged in s 129(3) and (4). However, there appears to be light at the end of the tunnel of ‘debt enforcement’.

The High Court recently made a significant ruling in the case of *Standard Bank of South Africa Ltd v Botes t/a JHLS Botes Vervoer* (NWM) (unreported case no: M85/2015, 13-9-2015) (Landman J). The court stated that the NCA does not regulate cancellation of a credit agreement and, thus, common law cancellation prevails. It further draws the proverbial line in the sand, whereafter a consumer can no longer reinstate the credit agreement.

Background

During 2012 the Standard Bank of South Africa Ltd (the applicant) and Botes t/a JHLS Botes Vervoer (the respondent) concluded nine instalment sale agreements (the agreements) in terms of which, *inter alia*, the respondent purchased various vehicles (the assets) and undertook to make fixed monthly payments.

During 2014 the respondent reneged on his monthly instalment obligations causing the applicant to dispatch several debt enforcement notices for each agreement in terms of s 129 of the NCA to the respondent. These notices were delivered to the respondent on 28 March 2014.

Pursuant to and in consequence of the notices, the applicant and respondent, on 30 April 2014, entered into a re-payment plan to afford the respondent the opportunity to liquidate the arrears (the repayment plan).

The repayment plan, *inter alia*, contained a *lex commissoria* (common law cancellation clause, alternatively an *interpellatio* provisor was applied).

The respondent, almost immediately after the conclusion of the repayment plan, breached its terms by failing to make payment, thereby necessitating the applicant to cancel the repayment plan to institute proceedings for the recovery of the assets.

On 5 February 2015 the applicant’s attorneys addressed a letter to the respondent informing him that he was in

‘breach of the agreements by failing to make timeous payment of the arrears and monthly payments’.

The letter of demand records the following:

- It called on the respondent to rectify his breach within 10 days from date of the letter.
- The respondent was informed that in the event of his failure to settle the arrears and remedy his breach, the applicant elected to –
 - enforce the applicant’s indebtedness in terms of the respective agreements;
 - cancel all the respective agreements without any further notice; and
 - proceed with legal action for return of the respective assets and subsequent shortfall damages.

The respondent failed to remedy his breach and the agreements were consequently cancelled on 23 February 2015. The respondent never completely purged the arrears.

On 17 March 2015, after the agreements were cancelled and legal action instituted, the respondent tendered payment of the arrears.

Basis of opposition

The respondent opposed the application on, *inter alia*, the following grounds –

- the agreements were not validly cancelled; and
- further s 129 notices were required.

The respondent maintained that the agreements had to be re-instated against his tender for payment of 17 March 2015. The respondent relied on the provisions of s 129(3) of the NCA.

Does the NCA oust common law cancellation?

The court had to consider the following –

- what is ‘cancellation’ in terms of the NCA, the validity of relying on a *lex commissoria* or does the NCA dictate this procedure and thus ousts the common law provisions;
- were the agreements validly cancelled; and
- was it necessary to dispatch second s 129 notices?

Section 123 of the NCA encapsulates when an instalment sale agreement may be cancelled before it expires:

‘(1) A credit provider may terminate a credit agreement before the time provid-

ed in that agreement only in accordance with this section.

(2) *If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement*’ (my italics).

The respondent contended that s 129 read with s 130 of the NCA restricted the applicant’s right to enforce a common law cancellation. The respondent relied on a dictum in *Mhlongo v MacDonald* 1940 AD 299 at 310 which reads: ‘... where an Act creates an obligation and gives a special and particular remedy for enforcing it, the remedy provided by the statute must be followed and it is not competent to proceed by action at common law’.

The court accepted the applicant’s argument that there must be a contractual basis for the cancellation of a credit agreement. The respondent relied on *ABSA Bank Ltd v Havenga* 2010 (5) SA 533 (GNP) and similar cases, which reads that there must be ‘a right vesting in the credit provider’ before it may cancel a credit agreement.

The court held that a credit provider may rely on a *lex commissoria* to cancel a credit agreement but is obliged first to comply with ss 129 and 130 of the NCA as enjoined by s 123.

The court held that the NCA restricts the effectiveness of the *lex commissoria*/common law cancellation by permitting a consumer to purge the default before cancellation by paying only the arrears and other default administration charges before cancellation. The right to cancel an agreement is lost once all arrears are paid and the applicant would then be obliged to deliver new notices in terms of s 129. If a credit agreement has been cancelled it may not be revived. In this instance the arrears were never liquidated.

The line in the sand – when the consumer cannot reinstate

Compliance with the payments in terms of a payment plan agreement is intended to purge the default, and may thus lead to the remedying of the default as contemplated by s 129(3). Until then, the consumer remains in default, albeit one that prevents the credit provider from acting on it.

'129. Required procedures before debt enforcement –

...
...

Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of the default was remedied.

A credit provider may not re-instate or revive a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123' (my italics).

Section 129(3) of the NCA utilises the term 'cancelled'. The court found that according to the usual cannons of interpretation, it may properly be inferred that the legislature meant to use 'cancel' or 'cancellation' in its common law contractual sense but with the added requirements of s 129 notices (see also:

Standard Bank of SA Ltd v Mbane (ECM) (unreported case no 58/2015, 23-4-2015) (Majiki J) and Sieg Eiselen 'National Credit Act 34 of 2005: The confusion continues' (2012) 75.3 *THRHR* 386 at 396).

The court held that the respondent's tender for payment was not the equivalent of reformatory action as contemplated by s 129(3) of the NCA; actual payment by the respondent of all arrears was required.

The court further held that s 129(3) of the NCA affords a consumer the opportunity to re-instate an agreement only if it has not been cancelled; a consumer is thus precluded from reinstating an agreement after its cancellation, which is reinforced by s 129(4) (as amended with effect from 13-3-2015), which prohibits a credit provider from reinstating a credit agreement it had previously cancelled.

In *casu* the court held that the agreements were validly cancelled, confirmed same and granted relief for the return of the assets.

The respondent applied for leave to appeal this judgment. The court granted leave directly to the Supreme Court of Appeal. The appeal lapsed and unfortunately this judgment has thus not been subjected to appellate division muster, although successfully applied in several other matters.

Conclusion

The legislature meant to use 'cancel' or 'cancellation' in its common law contractual sense, but within the added requirement of s 129 of the NCA.

The NCA affords a consumer the opportunity to reinstate an agreement only if it has not been cancelled.

A payment plan constitutes an extension of the original default and such default is remedied only once a consumer has made payment of all arrears.

The line in the sand is drawn when the credit provider validly cancels the credit agreement.

When a credit provider and consumer entered into a payment plan, a default is only remedied once a consumer has made a final payment in respect of all arrears and only under such circumstances will a credit provider again be obliged to comply with ss 129 and 130 of the NCA. Thus when a consumer has received a s 129 notice, concludes a payment plan and is still in the process of remedying a default, the s 129 notice is still operative until all the arrears described in it have been discharged.

Elzaan Potgieter is a final year law student and candidate attorney at Stupel & Berman Inc in Johannesburg. □

By
Leslie
Kobrin

Transport utility's duty to prevent harm to passenger

Mashongwa v PRASA 2016 (2) BCLR 204 (CC).

On 31 January 2011, Irvine Van Sam Mashongwa boarded a train operated by the Passenger Rail Agency of South Africa (PRASA) at Walker Street Station in Pretoria. He was the only passenger in the coach when the train pulled out of the station and it was possible for passengers to move from one coach to another. There were no security guards on the platform at Walker Street Station or on the train.

Approximately two minutes into the journey three unarmed men entered the coach in which Mashongwa was travelling from an adjoining coach. They approached him and demanded his money, wallet and cellphone, which he gave to them without protest. They then hit and kicked him and he was thrown out of the moving train shortly before it reached Rissik Street Station. He landed about 30 metres away from the station platform and sustained serious injuries to his left leg, which had to be amputated.

These events were the prelude to an action Mashongwa brought against PRA-

SA in the matter of *Mashongwa v Passenger Rail Agency of South Africa t/a Metro Rail* (GNP) (unreported case no 29906/2011, 1-10-2013) (Pretorius J).

Mashongwa alleged that PRASA –

- did not adopt reasonable measures to ensure his safety; and
- as an organ of state, had a duty to protect, promote and fulfil his constitutional rights by reason of its obligations in terms of the provisions of the South African Transport Services Act 9 of 1989 (the SATS Act).

He asserted that he enjoyed the right to be free from all forms of violence in terms of s 12 of the Constitution.

The court held that PRASA had been negligent because it did not ensure that the doors of the train were closed when the train left Walker Street Station. It also ought to have ensured that at least one armed guard was deployed on each train in order to deter prospective criminals. Pretorius J also held that although crime can never be completely prevented PRASA had a duty to secure its passengers' safety. As a result PRASA was held

to be liable in an amount equivalent to 100% of Mashongwa's agreed or proven damages.

PRASA lodged an appeal to the Supreme Court of Appeal (SCA) (*Passenger Rail Agency of South Africa v Mashongwa* (SCA) (unreported case no 966/2013, 28-11-2014) (Dambuza AJA)). The SCA held that both grounds of negligence alleged, could be held to have been the cause of Mashongwa's injuries and invoked the 'but for' test set out in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A). The court held that leaving the doors of the coach open while the train was in motion did not dispose of the issue of causation as the assailants could have easily forced the doors open in order to throw Mashongwa out of the moving train. If at least one security guard had been deployed on Mashongwa's coach the attack could have been avoided but expressed doubts as to whether it would have made any difference. PRASA's appeal was upheld.

Mashongwa then escalated the matter to the Constitutional Court (CC) in

Mashongwa v PRASA 2016 (2) BCLR 204 (CC).

Jurisdiction of the CC

First, the court had to consider whether it was vested with jurisdiction to entertain the application for leave to appeal to it bearing in mind that there is no automatic right of appeal to it. It is well known that the court will have such jurisdiction only if the issue on which it is called to pronounce embraces a constitutional issue and if the matter in question raises a point of law of general public importance.

The court concluded that the issues in this case raise a constitutional issue and an arguable point of law of general public importance relating to PRASA's legal obligations to protect its rail commuters from harm and, as such, granted leave to appeal, having found that Mashongwa had reasonable prospects of success and that it was in the interests of justice that leave to appeal be granted.

Mogoeng CJ then described the situation of commuters travelling by train by observing that many rail commuters are constrained to use trains to travel to and from work. He also observed that when acts of violence are perpetrated while a train is in motion commuters are confined to the carriages, are virtually trapped and are under the control of PRASA. Commuters cannot escape the attack by alighting from the train.

Wrongfulness

This case concerned and centred around physical harm suffered by passengers when attacked on a train and later thrown off a moving train, whether the measures employed by PRASA to control the safety of passengers sufficed and whether in this matter PRASA's conduct was wrongful.

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 (12) BCLR 1397 (CC) at para 22, Khampepe J stated: 'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful.'

Mogoeng CJ, in accepting the validity of this principle, held it remains appropriate and correct irrespective of whether one is dealing with positive conduct such as an assault, or the negligent driving of a motor vehicle, or whether one is dealing with negative conduct such as failing to observe a pre-existing duty such as failure to provide safety equipment in a factory. In relation to public carriers such as PRASA, he observed that they have always been regarded as having a duty of care towards passengers to protect them from physical harm while making use of their services.

In this case, it was contended by Mashongwa, that PRASA –

- failed to ensure that there were security guards on the train; and
- permitted the train to travel from Walker Street Station to Rissik Street Station with the train doors open.

In *casu* the court was required to consider whether a reasonable train operator would have foreseen the risk of harm befalling its passengers arising from such conduct and whether it ought to have taken steps to guard against such harm occurring in answering the inquiry into negligence. The court held at paras 26 and 27:

'Safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA, as an organ of state. The norms and values derived from the Constitution demand that a negligent breach of those duties, even by way of omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages.'

When account is taken of these factors, including the absence of effective relief for individual commuters who are victims of violence on PRASA's trains, one is driven to the conclusion that the breach of public duty by PRASA must be transposed into a private law breach in delict. Consequently, the breach would amount to wrongfulness.'

Mogoeng CJ concluded that PRASA is under a public law duty to protect its commuters and this duty, together with the constitutional values, have altered the situation of a private law duty to prevent harm to commuters. As a result the court became obliged to consider whether Mashongwa had proved negligence on the part of PRASA.

Negligence

In the GNP, PRASA contended that it took all measures, which were reasonably required of it to secure its passengers.

Following the *dictum* in *Shabalala v Metrorail* 2008 (3) SA 142 (SCA) the court held that PRASA was not required to provide measures which would guarantee its passengers absolute freedom from crimes of violence.

After considering the evidence presented by PRASA at the trial as to the reasonableness or otherwise of having a security guard on the coach in which Mashongwa was a passenger, it concluded that no negligence on the part of PRASA was established in it not having posted a security guard on the coach in which Mashongwa was travelling.

On the question of the open doors

of the coach in which Mashongwa was a passenger between the Walker Street and Rissik Street stations, the court concluded that particularly during peak periods where trains are overcrowded leaving doors of a moving train open poses a real danger to passengers on board. At para 52 the court stated:

'It must be emphasised that harm was reasonably foreseeable and PRASA had an actionable legal duty to keep the doors closed while the train was in motion.'

In the circumstances the court held that PRASA was negligent in not ensuring that the doors to the coach were closed while the train was in motion.

Causation

The CC now had the task of dealing with the finding of the SCA in regard to establishing whether causation had been established. It held that, had the doors to the carriage been closed, it would have been unlikely that the assailants would have been able to throw Mashongwa out of the doors of the moving train, and at para 69 the court further held:

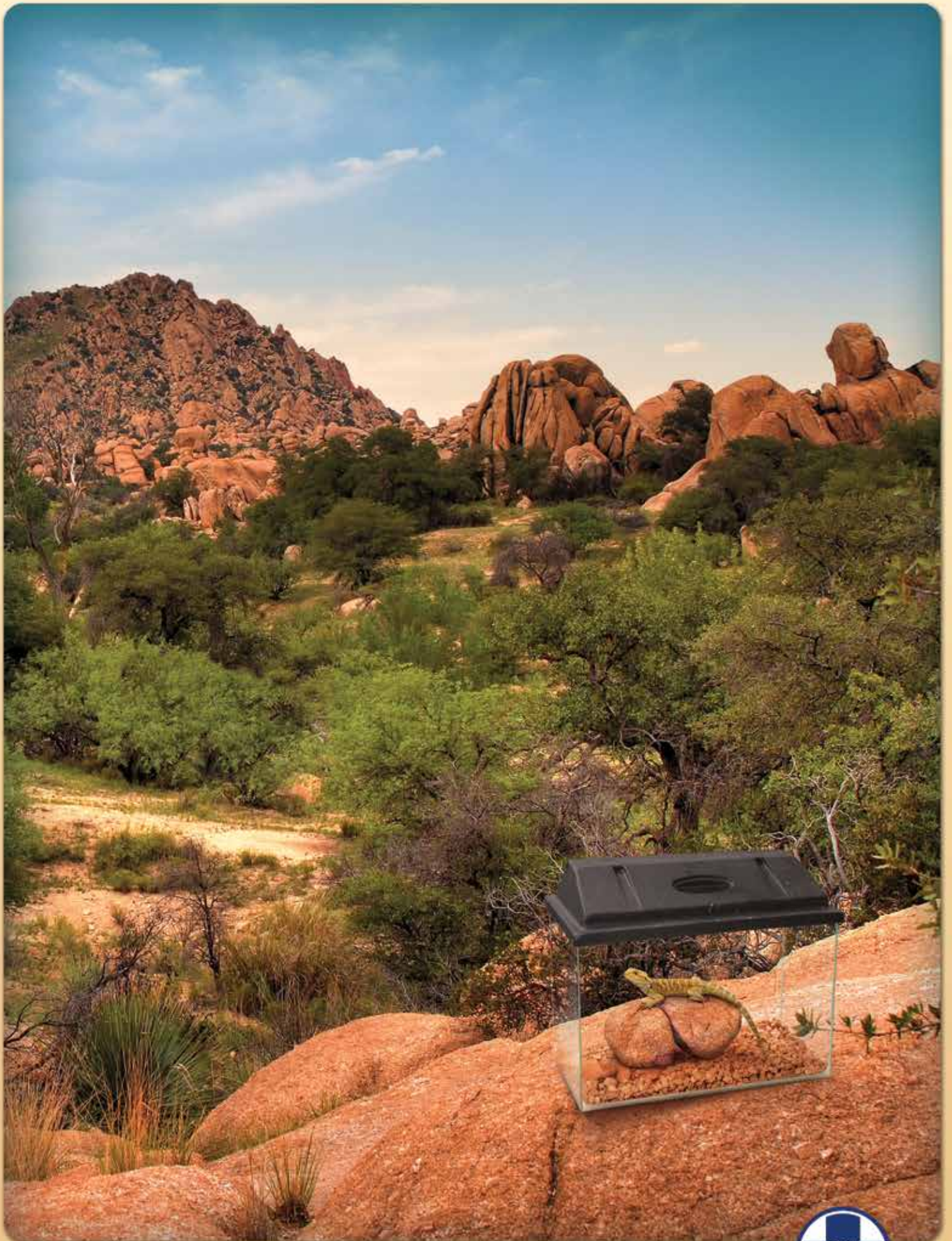
'That the incident happened inside PRASA's moving train whose doors were left open reinforces the legal connection between PRASA's failure to take preventative measures and the amputation of Mr Mashongwa's leg. PRASA's failure to keep the doors closed while the train was in motion is the kind of conduct that ought to attract liability. This is so not only because of the constitutional rights at stake but also because PRASA has imposed the duty to secure commuters on itself through its operating procedures. More importantly, that preventative step could have been carried out at no extra cost. It is inexcusable that its passenger had to lose his leg owing to its failure to do the ordinary. This dereliction of duty certainly arouses the moral indignation of society. And this negligent conduct is closely connected to the harm suffered by Mr Mashongwa. It is thus reasonable, fair and just that liability be imputed to PRASA.'

Accordingly, PRASA was held liable to pay to Mashongwa an amount equivalent to 100% of his agreed or proven damages.

Conclusion

This decision, being a unanimous judgment, sets out the circumstances under which an organ of state will be held liable for damages in respect of personal injury befalling any person in respect of whom such organ of state has a duty of care to protect and fails to do so.

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New Legislation



**Legislation published from
29 February – 31 March 2016**

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

COMMENCEMENT OF ACTS

Marine Living Resources Amendment Act 5 of 2014. *Commencement:* 8 March 2016. Proc12 GG39790/8-3-2016.

SELECTED LIST OF DELEGATED LEGISLATION

Auditing Profession Act 26 of 2005

Fees payable to IRBA. BN25 GG39802/11-3-2016.

Amendments of the code of professional conduct for registered auditors relating to the provision of non-assurance services and public interest entities. BN32 GG39860/24-3-2016.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Classification of industries. GN224 GG39784/4-3-2016.

Annual increase in medical tariffs for medical service providers. GenN139 to GenN144 GG39848 to GG39853/23-3-2016, GenN146 to GenN147 GG39858 to GG39859/24-3-2016, GenN185 GG39890/31-3-2016 and GenN161 GG39882/31-3-2016.

Deeds Registries Act 47 of 1937

Amendment of regulations (schedule of fees). GN200 GG39757/29-2-2016.

Electronic Communications Act 36 of 2005

Numbering Plan Regulations. GN370 GG39861/24-3-2016.

Increase of administrative fees in relation to the type of approval. GN358 GG39856/24-3-2016.

Increase of the radio frequency spectrum licence fees. GenN145 GG39855/24-3-2016.

Increase of administrative fees in relation to service licences. GenN151 GG39864/29-3-2016.

Standard Terms and Conditions Amendment Regulations for Individual Licences. GenN158 GG39875/30-3-2016.

Amendment Processes and Procedures

for Class Licences Regulations. GenN157 GG39874/30-3-2016.

Standard Terms and Conditions Amendment Regulations for Class Licences. GenN155 GG39872/30-3-2016

Amendment Processes and Procedures for Individual Licences Regulations. GenN154 GG39871/30-3-2016

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Amendment of regulations relating to the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators, appeals and imports. GN372 GG39862/29-3-2016.

Financial Intelligence Centre Act 38 of 2001

Directive: Accountable and reporting institutions to update registration related information. GN220 GG39779/4-3-2016.

Higher Education Act 101 of 1997

Regulations for the Registration of Private Higher Education Institutions, 2016. GN R383 GG39880/31-3-2016.

Income Tax Act 58 of 1962

Regulations in terms of s 12T(8) on the requirements for tax free investments. GN R209 GG39765/1-3-2016.

Determination of the date on which the new employees' tax deduction tables in terms of para 9(1) of sch 4 to the Act will come into force. GN338 GG39839/22-3-2016.

Independent Communications Authority of South Africa Act 13 of 2000

ICASA Local Television Content Regulations. GN346 GG39844/23-3-2016.

ICASA South African Music Content Regulations. GN344 GG39844/23-3-2016.

Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of the remuneration of Constitutional Court judges and judges. GN325 GG39829/17-3-2016.

Landscape Architectural Profession Act 45 of 2000

Fees and charges payable to the South African Council for the Landscape Architectural Profession. BN30 GG39823/18-3-2016.

Magistrates Act 90 of 1993

Determination of the remuneration of magistrates. GN327 GG39829/17-3-2016.

Marine Living Resources Act 18 of 1998

Regulations relating to small-scale fishing. GN229 GG39790/8-3-2016.

National Education Policy Act 27 of 1996

Policy on the South African standard for principalship. GN323 GG39827/18-3-2016.

National Environmental Management: Air Quality Act 39 of 2004

Regulations prescribing the atmospheric emission licences processing fee. GN250 GG39805/11-3-2016.

Regulations for the procedure and criteria to be followed in the determination of an administrative fine. GN332 GG39833/18-3-2016.

National Environmental Management: Protected Areas Act 57 of 2003

Norms and standards for the management of protected areas in South Africa. GN382 GG39878/31-3-2016.

Occupational Health and Safety Act 85 of 1993

Amendment of the schedule in the Lift, Escalator and Passenger Conveyor Regulations, 2010. GN R256 GG39817/16-3-2016.

Prescribed Rate of Interest Act 55 of 1975

Interest rate increase from 1 March 2016 to 10,25% per annum. GN226 GG39785/4-3-2016.

Public Finance Management Act 1 of 1999

Rate of interest on government from

NEW LEGISLATION

1 March 2016: 10,25% per annum. GenN104 GG39802/11-3-2016.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of traditional leaders, members of national and provincial houses of traditional leaders. GN326 GG39829/17-3-2016.

Tax Administration Act 28 of 2011

Regulations for purposes of para (a) of the definition of 'international tax standard' specifying the changes to the OECD standard for automatic exchange of financial account information in tax matters. GN R210 GG39767/2-3-2016.

DRAFT LEGISLATION

Regulations relating to the fortification of certain foodstuffs in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 for comment. GN217 GG39776/3-3-2016.

Draft regulations regarding fees for the provision of aviation meteorological services. GN216 GG39772/3-3-2016.

Proposed fees and charges in terms of the Architectural Profession Act 44 of 2000 for comment. BN20 GG39786/7-3-2016.

Draft Deeds Registries Amendment Bill. GenN101 GG39793/9-3-2016.

Proposed directive on implementing interoperable and cooperative arrangements between market infrastructures in terms of the Financial Markets Act 19 of 2012. BN27 GG39809/11-3-2016.

Amendments to the regulations relating to assistance to victims in respect of higher education in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 for comment. GenN114 GG39806/11-3-2016.

Proposed Amendments to the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN26 GG39802/11-3-2016.

Draft Amended Financial Services Sector Code in terms of the Broad-Based Black Economic Empowerment Amendment Act 53 of 2003. GN257 GG39818/17-3-2016.

Draft regulations to amend the remuneration and allowances of appraisers prescribed in terms of the s 103 of the Administration of Estates Act 66 of 1965. GenN118 GG39823/18-3-2016.

Draft Training of Security Service Provid-

er Regulations, 2016 in terms of the Private Security Industry Regulation Act 56 of 2001. GN R324 GG39828/18-3-2016. Draft Marine Spatial Planning Bill. GN347 GG39847/24-3-2016.

Draft National Standard on Land Cover Classes and definitions made in terms of s 11 of the Spatial Data Infrastructure Act 54 of 2003. GenN148 GG39860/24-3-2016.

Draft regulations on the Constitution of the Consumer Advisory Panel in terms of the Electronic Communications Act 36 of 2005. GenN160 GG39879/31-3-2016.



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Employment law update



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



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

Appropriate sanction

In *Trans Hex Group Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2016] 2 BLLR 144 (LAC), the employee responded to a radio call for the lubrication of trucks at a workshop. The employee drove a company truck to the workshop without permission, without a licence and without stopping at intersections along the way. When he attempted to bring the vehicle to a stop, he failed to do so timeously and drove into a wall causing damage to both the vehicle and the wall. In spite of the employee's 16 years of service with his employer, he was dismissed. He also received a final written warning for crashing the vehicle, causing approximately R 100 000 damage.

The employee took issue with the fairness of his dismissal citing his long service, his immediate report of the incident and the remorse he had shown. In addition, the employer's disciplinary code recommended a written warning as an appropriate sanction for a first offence of this nature. Aggrieved by his dismissal, the employee referred an un-

fair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA commissioner identified the issue for determination to be whether the employee's dismissal was the most appropriate sanction in the circumstances. The commissioner found that the contravention of the rule by the employee did not go to the heart of the employment relationship and that his long service warranted progressive discipline. Furthermore, his behaviour was capable of correction and his personal circumstances mitigated against dismissal. Accordingly, the commissioner ruled that the sanction of dismissal was too harsh and the employee was retrospectively reinstated, subject to a final written warning. The employer subsequently took the matter on review to the Labour Court that declined to interfere with the award.

On appeal to the Labour Appeal Court (LAC), the employer contended that the commissioner had misconceived the nature of the enquiry before him in applying the incorrect test, namely, whether the dismissal was the most appropriate sanction. The employer also contended

that the commissioner failed to give due regard to the seriousness of the offence and the context of the misconduct in that the employee drove through a high-risk area of the mine, causing substantial damage to company property and putting other workers' lives at risk. In addition, the employee violated serious health and safety regulations.

The LAC found that an erroneous categorisation of an issue by an arbitrator will not justify the setting aside of an award unless such error is material to the outcome, caused unfairness or prejudice, or resulted in an award which was so unreasonable that it falls to be set aside. The LAC accepted that the commissioner had mistakenly formulated the issue for determination as whether dismissal was the appropriate sanction. The issue was rather whether the dismissal was fair. However, the LAC found that the decision reached by the commissioner was not one which a reasonable decision maker could not have reached. The appeal was thus dismissed with costs.



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

The consequences of setting aside an arbitration award post a s 197 transfer

NEHAWU obo Cornelius and Others v High Rustenburg Estate (Pty) Ltd and Another (unreported case no C459/2004, 10-2-2016) (Rabkin-Naicker J).

Section 197 of the Labour Relations Act 66 of 1995 (LRA) is triggered when a business is transferred as a going concern and dictates the rights and obliga-

tions between an old employer, new employer and the transferred employees.

The relevant portion of s 197 for purposes of this judgment is s 197(5) which reads:

'(a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by -

(i) any arbitration award made in terms of this Act, the common law or any other law ...’.

Background

The applicant union referred an unfair dismissal dispute on behalf of its members who had been dismissed by their employer, High Rustenburg Hydro (Hydro). At arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) the employees’ dismissals were found to be fair. The union, thereafter approached the Labour Court (LC) to review and set aside the CCMA arbitration award.

After the CCMA award was delivered, but before the LC heard the review application, Hydro sold its business to Iprop (Pty) Ltd who in turn sold the business to the first respondent, High Rustenburg Estate (Pty) Ltd (Estate).

Subsequent to Estate acquiring the business, the LC set aside the arbitration award and substituted it with a finding that the employees’ dismissals were unfair and awarded each employee 12 months’ compensation.

The union obtained a writ and attached Estate’s property to satisfy the order of the LC.

Having heard an application challenging the validity of the attachment, the LC found that the employees were entitled to enforce their claims against Estate by virtue of the provisions in s 197.

On appeal the Labour Appeal Court (LAC) set aside the LC’s findings. The relevant portion of the LAC’s order reads:

‘(i) The dispute between the appellant and the respondent shall, in terms of

Rule 58(6)(i) of the Consolidated Rules of the High Court be dealt with by way of a special case to be heard in the Labour Court.

(ii) The special case must determine whether s 197(5) of the Labour Relations Act 68 of 1995 applies to an arbitration award which was reversed by the Labour Court but only after the transfer of the relevant undertaking had taken place.’

Proceedings before the LC

In executing the order of the LAC, the LC held that the question before the court was whether ‘an award that [binds] the old employer in terms of section 197(5) [is] susceptible to review and does a new employer take on the risk of an award (which serves its interests at date of transfer), from being substituted on review subsequent to transfer, by an award that does not’.

The court examined the phrase ‘immediately before the date of transfer’ and in following past authorities held there was no reason not to afford this term its ordinary meaning. The CCMA award, was, therefore, binding on Hydro and the employees immediately before the date the business was transferred as a going concern.

Having regard to the purpose of s 197 as set out by the Constitutional Court in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC) the LC held:

‘In my view, an award binding on the old employer immediately before date of transfer in terms of section 197(5), cannot be considered *sui generis*, i.e that

it is an award not susceptible to review in terms of the LRA. It could not have been intended that a review judgment in respect of such an award could have no legal force and effect, if the award is reviewed and substituted subsequent to the transfer of the business. That the effect of such substitution by the Labour Court may impact on the employees of the old employer and on the new employer (who has stepped into the shoes of the old), is consistent with a constitutionally sensitive reading of section 197. In other words **both** employees of the old employer and new employers carry the risk that a court order may intervene after transfer, affecting the respective rights and obligations between them by virtue of section 197. Of course this risk is tempered by the opportunity provided by section 197(5)(b) that the parties may enter into an agreement in terms of section 197(6).

I therefore find, that s 197(5) of the Labour Relations Act 68 of 1995 applies to an arbitration award which was reversed and substituted by the Labour Court but only after the transfer of the relevant undertaking had taken place. In the context of this matter’.

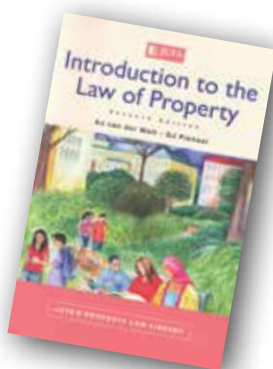
The court ordered that the rights the employees had against Hydro subsequent to their dismissal were rights that were transferred to Estate by virtue of s 197. For this reason the writ of execution obtained by NEHAWU was lawfully issued and the assets attached could be sold to satisfy the order of the reviewing court.



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<i>SACJ</i>	SA Journal of Criminal justice	Juta	(2015) 28.2 (2015) 28.3
<i>SALJ</i>	South African Law Journal	Juta	(2016) 133.1
<i>SA Merc LJ</i>	SA Mercantile Law Journal	Juta	(2016) 28.1

Academic publishing

Carnelley, M 'Identifying predatory open-access academic journal publishers, in light of the South African Department of Higher Education and Training's decision to retrospectively de-accredit certain journals' (2015) 36.3 *Obiter* 519.

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Jak, N and Van Ommeren, F 'Semi-public entities and the public/private-law divide in South African and Dutch law' (2016) 133.1 *SALJ* 102.

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Walker S 'Determining the criminal capacity of children aged 10 to 14 years: A comment in light of *S v TS* 2015 (1) SACR 489 (WCC)' (2015) 28.3 *SACJ* 337.

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The cedent, the cessionary and the moratorium – *quo vadis?*

By
Bouwer
van Niekerk
and Shani
du Plooy

A business (the company) borrows money from a credit provider (the bank) in order to finance its day-to-day operations (the debt). In securing the debt, the bank takes cession *in securitatem debiti* of all the company's book debts. Subsequent thereto, the company is placed under supervision in terms of ch 6 of the Companies Act 71 of 2008 (the Act) – namely, the provisions relating to business rescue. These provisions, specifically those contained in s 133, among others, stipulate that there is a moratorium on legal proceedings against the company (including enforcement action) or in relation to property belonging to the company.

Confronted with these facts, can the bank now realise its securities held (and by implication, exert its securities held as aforesaid) notwithstanding the aforesaid moratorium?

What is a cession *in securitatem debiti*?

A cession *in securitatem debiti* is a form of security cession in terms of which a right, or part of a right, is transferred for the limited purpose of securing a debt owed by the cedent (on our facts, the company) to the cessionary (on our facts, the bank). On discharge of the secured debt, the cedent will regain full title to the right ceded. This type of security cession is widely regarded as being in the form of a pledge (where the cedent retains the *dominium* of the claim or a reversionary right to it), as opposed to a security transfer (where the right for purposes of security is completely transferred from the cedent to the cessionary) (see D Hutchinson and CJ Pretorius (eds) *The Law of Contract in South Africa* 2ed (Cape Town: Oxford University Press 2012) at 366 – 367; SW van der Merwe *et al Contract General Principles* 4ed (Cape Town: Juta 2012) at 425; RH Christie and GB Bradford *Christie's the Law of Contract in South Africa* 6ed (Durban: LexisNexis 2011) at 489; and AJ Kerr *The Principles of the Law of Contract* 6ed (Durban: Butterworths 2002) at 451). This is fundamental, as will become clearer later on.

What is the moratorium envisaged in terms of s 133 of the Act?

When a company commences with business rescue proceedings, the Act protects the company's financial position by temporarily placing a general moratorium on all legal proceedings that creditors and employees may have against the company, which in turn allows the company to try and find its business footing again. It is meant to give the company some breathing space (see R Bradstreet 'The new business rescue: Will creditors sink or swim?' (2011) 2 *SALJ* 352 and *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC)). It is during this general moratorium that a company should channel all of its available resources to attempt to obtain investors willing to bail the company out of its financial troubles, instead of paying off its existing debt (see Bradstreet *op cit* at 352). As a result, business rescue has certain significant legal consequences, not only for the company's activities, but also for its stakeholders (Dennis Davis (ed) *Companies and Other Business Structures in South Africa* 3ed (Cape Town: Oxford University Press 2013) at 235).

Section 133 of the Act reads as follows:

'133 General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.'

The application of the general moratorium is regarded as one of the most important consequences of business rescue. It results in the enforcement of claims against the company, or property belonging to the company, or that which is within its legal possession, to be temporarily prohibited and suspended for the entire duration of the business rescue (see Davis *et al (op cit)* at 235. See also FHI Cassim (managing ed) *Contemporary Company Law* 2ed (Cape Town: Juta 2012) at 879). Legal action against the company will be allowed only with the written consent of the practitioner or with the leave of court, and in accordance with any terms the court considers suitable (s 133 (1)(a) and (b) of the Act).

Who can realise the security held *in securitatem debiti*?

As a general rule, the principles governing the consequences of out-and-out cessions also apply to security cessions. Likewise, the requirements for a cession *in securitatem debiti* are those applicable to ordinary cessions (see Van der Merwe *et al (op cit)* at 428).

On our facts outlined above, once the cession has been made the company loses its right against the debtor. What it acquires is a personal right against the bank for re-cession of the right on redemption of the principal obligation,

flowing from the contractual arrangement accompanying the cession. 'This so-called *pactum fiduciae* also places the cessionary under a duty to preserve the subject matter of the cession. On default of the cedent, the cessionary is entitled to realise the security. This may be done either directly by claiming performance from the debtor and applying the performance in satisfaction of the principal debt, or indirectly by doing the same with the proceeds of a sale of the ceded right. Any balance remaining after the satisfaction of the principal debt must be paid over to the cedent' (Van der Merwe *et al* (*op cit*) at 428 - 429).

What is of importance is that the company (cedent) cannot now claim any monies from its debtors; that right has been ceded to the bank (cessionary). This has been enunciated in the case of *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A). We quote the passage most relevant to our discussion:

'The true position is of course that the cessions divested the respondent of the right to claim its contractual remuneration Only the bank could thenceforth, and until the overdraft was repaid, recover payment of any amounts due for work done. That the respondent,

as cedent, continued to collect payment of its book debts made no difference: [T]hat is frequently a particular term of the arrangement between cedent and cessionary especially where book debts are ceded In short, having surrendered its claim for payment to the bank, the respondent surrendered any *lien* it may have had against Canadian Gold or, for that matter, the appellant' (paras 29 - 30 of the judgment).

Taking cognisance of the above and incorporating it into our set of facts, it appears to be plain that only the bank is vested with the power to recover payments of book debts of the company. The company will be able to enforce its personal right in court only after taking re-cession of the right. It is up to the bank to either enforce the right against the debtor, or to sell the right to a third party. In either event the proceeds are used to satisfy the debt. Should there be any surplus available, this must be paid to the company (see Hutchinson and Pretorius (*op cit*) at 369). Should the bank chose to sell (on-cede) its rights, the maxim *nemo plus iuris ad alium transferre potest quam ipse haberet* (no one can transfer more rights than he himself has) will necessarily apply.

What can the bank do?

The bank's rights and obligations are, in our opinion, obvious. The bank, and only the bank, can collect the book debts of the company. The bank needs re-cede its rights to the company only once the debt has been repaid to the bank in full. The moratorium in terms of s 133 of the Act will therefore not affect the bank's rights to realise its security whatsoever; the actions that the bank will be taking against the debtors of the company fall within the ambit of taking legal proceedings or enforcement proceedings against the company, or in relation to any property belonging to the company, or lawfully in the company's possession.

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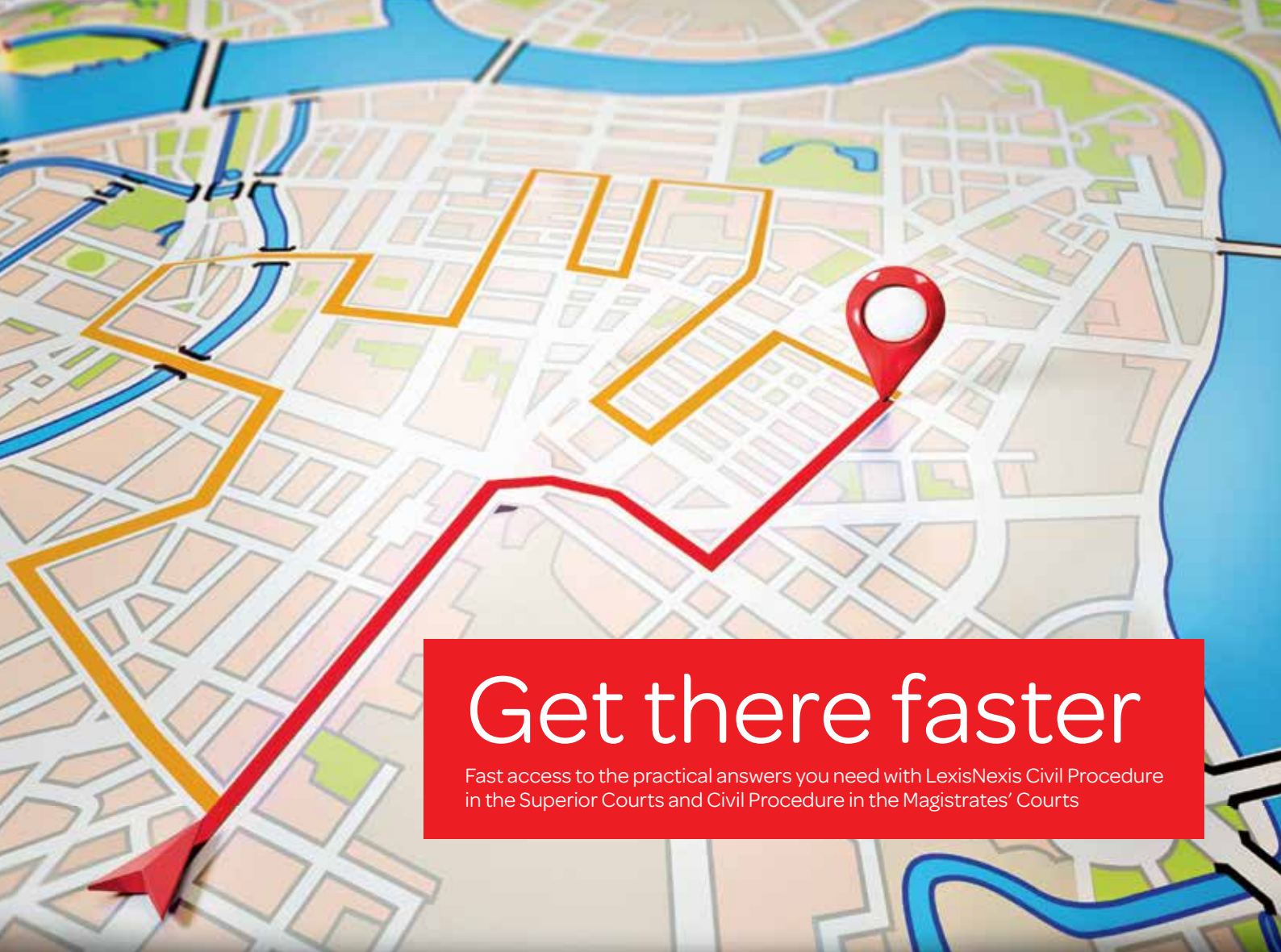
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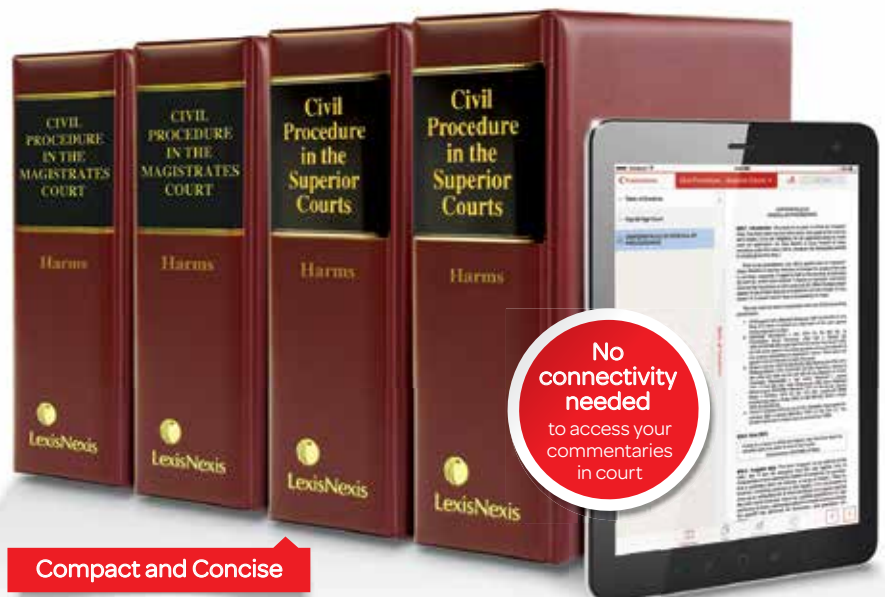
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RISKALERT

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RISK MANAGER'S COLUMN

CLAIMS AGAINST ATTORNEYS

THE PROFESSION'S CO-OPERATION IS REQUESTED: CLAIMANTS' ATTORNEYS PLEASE NOTE.

The Attorneys Insurance Indemnity Fund (AIIF) is a non-profit company providing a primary layer of professional indemnity cover to all practising attorneys - currently at no cost to practitioners. It is funded by the Attorneys Fidelity Fund (AFF) by way of a single annual premium.

The purpose of the AIIF cover is twofold:

1. it provides a measure of protection to the public, in the event that they suffer damages as a result of a legal practitioner's failure to properly carry out a mandate; and
2. it provides the primary layer of insurance protection to the practitioner, in the event that a claim arises out of such failure.

The aim is to ensure that the public is placed in the position that they would have been in, but for the practitioner's failure to carry out the mandate. Unfortunately many claimants' attorneys lose sight of - or choose to ignore - this important consideration. It surely goes without saying that a claim against a practitioner cannot yield a better result than it would have against the original defendant, at the relevant time. We therefore respectfully request that claimants' attorneys deal with these matters in the light of the above, and avoid inflating claims and clients' expectations.

We also request that claimants' attorneys adopt a less adversarial approach, as was the case generally in the past, when attorneys were willing to co-operate reasonably and sensibly (without prejudicing their client in any way).

When claimant's attorneys refuse to hold matters over for a reasonable period or refuse to provide the AIIF with necessary information or



**Ann Bertelsmann,
Risk Manager**

documentation to facilitate a quicker settlement, it becomes the proverbial "lose-lose situation".

The claimant:

- ultimately ends up having to pay attorney and own client costs and can only recover party and party costs, if successful; and
- must sit out the often cumbersome and lengthy court procedures and sometimes wait several years for the resolution of the matter and any damages that may be payable.

The AIIF:

- ends up paying attorney and own client fees for lengthy litigation and, if successful, can only hope to recover party and party costs - which inevitably the claimant is often unable to pay.

Clearly this approach is neither to the advantage of the client nor the AIIF.

The AIIF employs admitted, experienced attorneys to deal with claims in-house. This of course is a more cost-effective arrangement than outsourcing the handling of claims to outside attorneys. If claimants' attorneys refuse to hold matters over, then outside attorneys have to be employed to defend actions that could potentially be settled in-house in a shorter period of time and at less cost to both sides.

AIIF funds are limited and the value

RISK MANAGER'S COLUMN continued...

of claims is escalating at an alarming rate. So too are the AIIF's **investigation costs** – the costs of employing outside attorneys to litigate.

THIS IS YOUR FUND! WE APPEAL TO ALL CLAIMANTS' ATTORNEYS TO ASSIST IN KEEPING LITIGATION COSTS TO A MINIMUM, BY NOT BEING OVERLY RIGID IN

THEIR APPROACH TO NEGOTIATING THE SETTLEMENT OF THESE CLAIMS.

Practitioners please note! Financial Intelligence Centre Act: A directive has been gazetted (GG 39779 of 4 March 2016) providing that registered accountable and reporting institutions must update their registration related information in order to access the new FIC platform before 5pm 22 April 2016.

E-MAIL SCAMS PERPETRATED ON CLIENTS PAYING INTO ATTORNEYS' TRUST ACCOUNTS

To prevent clients from being duped into paying funds into fraudulent accounts, in place of their practice's trust account, attorneys Morkel and De Villiers have, very sensibly, incorporated the following message into their e-mail signature:

"SCAM WARNING: OUR TRUST ACCOUNT DETAILS REMAIN THE SAME; IF YOU RECEIVE AN EMAIL FROM "US" ADVISING THAT OUR BANK DETAILS HAVE CHANGED AND AN ALTERNATIVE BANK ACCOUNT IS TO BE USED PLEASE IMMEDIATELY REPORT THIS TO THE SECRETARY/ ATTORNEY DEALING WITH YOUR MATTER."

Ann Bertelsmann, Legal Risk Manager, Ann.bertelsmann@aiif.co.za

MEDICAL MALPRACTICE CLAIMS

In recent years the Attorneys Insurance Indemnity Fund (AIIF) has seen a surge in claims against attorneys, alleging negligence in their handling of medical malpractice claims. It would appear that a larger number of practices are doing this work than in previous years. We cannot comment on the extent to which the increase in claims against the medical profession is the result of a deterioration in the quality of medical care. However, this trend can also be attributed to various factors such as an increasing awareness on the part of the public and the legal profession as well as to changes taking place in the legal profession.

Most notably, an increasing number of practitioners seem to be opting out of the Road Accident Fund (RAF) sphere and taking on medical malpractice instructions – particularly in the light of the proposed implementation of the Road Accident Benefit Scheme. The similarities between personal injury claims against the RAF and medical malpractice claims appear to make these claims a logical alternative to RAF work. But the ability to run a successful RAF practice does not necessarily mean that the practitioner and his staff will be able to do

the same with medical negligence claims areas – despite some similarities between the two.

What has become evident from a claims perspective, is that some attorneys are making similar mistakes in their handling of these matters, to those made in RAF claims. But they are also failing to sufficiently appreciate the fact that the field of medical malpractice is a specialised one and requires a sound understanding of the law and of medical professional negligence itself, in order to successfully prosecute a client's claim.

We have often found, during our investigations into the merits of a claim, that the attorney who dealt with the erstwhile client's claim did not have the requisite understanding of what course to take in the prosecution of the claim.

The purpose of this article is to highlight some of the recurring problems that the AIIF anticipates or has noted when investigating claims against attorneys

arising from their handling of medical negligence claims – and to provide a few guidelines.

Prescription

A key difference between RAF and medical malpractice matters lies in the applicable prescriptive periods. For RAF matters, prescription is governed by the provisions of the Road Accident Fund Act 56 of 1996, whereas the prescription of medical malpractice claims is governed by the Prescription Act 68 of 1969. Claims against the State will be governed by the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

Prescription of medical malpractice matters appears to be a common phenomenon. An important aspect here is to ascertain when prescription will start running. In this regard we refer specifically to section 12(3) of the Prescription Act:

"(3) A debt shall not be deemed to be due until the creditor has knowledge of the

MEDICAL MALPRACTICE CLAIMS continued...

identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

This aspect was dealt with in the Supreme Court of Appeal's decision in **Truter v Deyssel** [2006] SCA 7 (RSA). In summary the appeal court overturned the court *a quo*'s dismissal of the special plea of prescription raised by the appellants. The counsel for the respondent had contended that the meaning of the words "*knowledge... of the facts from which the debt arises*" included knowledge of the facts showing that the defendant had failed to adhere to the standards of skill and diligence expected of a medical practitioner.

Furthermore, it was contended that until the claimant had sufficient detail *vis a vis* a medical opinion indicating that the appellants had failed to exercise the necessary degree of diligence, skill and care and in what respects they had failed to do so, the claimant could not have attained knowledge as envisaged in section 12(3).

The Court disagreed with counsel for the respondent and held that "*For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable... In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts.*" The Court held that a cause of action for the purpose of prescription, is every fact necessary for the plaintiff to prove, but it does not comprise every piece of evidence which is necessary to prove each fact.

Practitioners who wish to institute action for medical negligence would do well to remember the distinction between the facts needed to prove the cause of action (*facta probanda*) and those facts which are adduced in support of the former (*facta probantia*).

Knowledge of facts not legal conclusions

In **Anderson v Bredenkamp N.O.** (5469 /2007) [2015] ZAFSHC 25 (8 January 2015) the Supreme Court of Appeal held that, what is required for prescription to start running, is knowledge of the minimum facts necessary to institute action. It has also determined that in order to successfully invoke s 12(3) of the Prescription Act, either actual or constructive knowledge of such facts must be proved.

Constructive knowledge is established

if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts from which the debt arises by exercising reasonable care.

The test for constructive knowledge is what a reasonable person in the creditor's position would have done to acquire the necessary knowledge. In order to delay prescription in terms of s 12(3) the creditor is therefore expected to act reasonably and with the diligence of a reasonable person in acquiring that knowledge. She "*cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription*".

No sustainable cause of action

Another important difference between this work and RAF claims, is that RAF claims generally involve a fairly simple assessment of negligence in relation to the driving of a motor vehicle by the reasonable man in the circumstances. In medical malpractice claims we are dealing with professional negligence/breach of mandate. A working knowledge of this field is essential.

The starting point practitioners need to consider when accepting instructions from their prospective clients is whether or not there is a sustainable cause of action. We often find that an insured may in fact have breached his mandate or fallen short of the duty of care owed to the client, however, there had been no sustainable cause of action on the underlying claim to begin with. In other words there was no causal link between the breach and the damage alleged.

Where possible it is always important to manage the client's expectations as to what cause of action she or he has, before rushing into litigation. This aspect was most aptly canvassed by Hiemstra, J (in reference to Prof Wille's statement) in **Makgae v SentraBoer** 1981 (4) SA 239 (T):

"Before you can draw a pleading you've got to know the law". In this regard practitioners would be well advised to take the following steps before drafting or appointing counsel to draft any pleadings:

1. Ensure that you and your staff have the necessary knowledge of and training in this field of law;
2. Have all medical and/or hospital records/notes in your possession to begin your investigation;
3. Make sure you have obtained the view of the necessary medical experts to ensure that you have a basis for the legal conclusions you ultimately want to aver (This should not be confused

with material facts needed to prove the cause of action – *facta probanda vs facta probantia* discussed above).

Once the cause of action is established the attorney needs to ensure that the client's claim is pursued in terms of the correct branch of law and for the purposes of this discussion we are more concerned with contract and/or delict. The implications for the client are that they may or may not be able to claim certain heads of damages depending on how the claim is couched e.g. delict for non-patrimonial loss and contract for patrimonial loss. (In this regard, see Dutton *A practitioner's guide to medical malpractice in South African law* (Siber Ink: Cape Town 2015) page 14.)

Action not taken against the correct party/parties

Another problem area which our insureds face, is the identification of the correct party. It is vital that the practitioner knows who the defendant is and what the correct procedure to follow is, depending on the status of said defendant. An example of this would be whether or not the health care provider in question is the doctor (private capacity), the hospital, an external company which the hospital has outsourced work to, the provincial or national government or the MEC/Minister of health. The identity of the defendant has its own implications for prescription and the commercial viability of litigation for the claimant amongst other things. If the defendant is a state hospital or the department of health is joined to proceedings then the practitioner would have to comply with section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

Under-settlement

Lastly, as mentioned earlier, the field of medical negligence shares a number of similarities with Road Accident Fund claims. One of the similarities, albeit not a prevalent problem at present, is the possibility of an under-settlement. When quantifying this type of claim, practitioners should always take into account all aspects of the claim prior to settlement. This ties in with the point made earlier with regard to how the client's claim is drafted in the particulars of claim and on what basis in law the damages will be sought. It is also crucial that every settlement offer is canvassed fully with the client prior to settlement.

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EXECUTOR BONDS

The Attorneys Insurance Indemnity Fund NPC (AIIF) issues bonds of security to practising attorneys who are appointed as executors of deceased estates.

The AIIF has recently reviewed its executor bonds line of business and the condition in terms of which bonds are granted. It was necessary to put in place new Terms and Conditions that would effectively regulate the relationship between the AIIF and the profession utilising this facility. These Terms and Conditions together with the new Application form and Resolution were approved by the AIIF Board at the beginning of 2016 and they have been in effect from 1 February 2016.

These documents have been circulated to those firms that already utilise the facility and whose details were available to the AIIF.

We take this opportunity to highlight the following changes brought about by these Terms and Conditions (which are published **on page 5** for easy reference):

1. The cumulative total of all bonds issued to any one firm will not exceed R20 million *at any given time*. In the past the limit was R20 million per firm *per annum*.
2. If a practitioner is part of, or holds himself or herself out to be part of more than one firm simultaneously, such practitioner and all entities associated with that practitioner will hold a maximum cumulative total of R20 million in bonds at any given time.

It was imperative that the AIIF put these measures in place to ensure that the exposure associated with this line of business is contained. The company currently has over **R10 billion** in bonds that are regarded as active on its books. This figure includes active bonds that were issued as far back as 2001, but cannot be closed, due to the lack of feedback or cooperation from the profession after a bond has been issued. Unfortunately the AIIF is not



in a position to cancel a bond until a release form or Master's filing slip is received from the firm that received a bond. Without feedback from the profession, the AIIF is also not in a position to determine the date from which it is on risk or that it is not in fact on risk in the case where a bond has been issued, but the attorney is not subsequently appointed as the executor by the Master of the High Court.

The company's inability to accurately assess its risk because of a lack of feedback from attorneys who have obtained bonds, results in a significant financial impact for the AIIF, in the form of:

1. High reinsurance premiums which are calculated on the number of active bonds on its books.
2. Unnecessary filing costs as these files may not be destroyed and therefore occupy filing space.

We urge the firms that wish to utilise this facility to read the Terms and Conditions carefully and to ensure that the AIIF is fully informed of the major developments in the administration of the estate and that it is provided with copies of documents, such as letters of executorship, provisional and final liquidation and distribution accounts

releases and removal from the office by the Master. These firms should apply for the release form or Master's filing slip once the administration has been finalised and provide the AIIF with a copy thereof. It is also very important for us to be informed when firm names or contact details change or the practitioner dealing with the estate leaves the firm.

Copies of the Terms and Conditions, Application form, Resolution and Requirements may be obtained from our website www.aiif.co.za. For further information or queries the team may be contacted on:

- Ms Haniffah Mbela on:
012 622 3926
email: haniffah.mbela@aiif.co.za
- Ms Patricia Motsepe on:
012 622 3927
email: patricia.motsepe@aiif.co.za
- Mr Mpho Shibambo on:
012 622 3939
email: mpho.shibambo@aiif.co.za
- Mr Sifiso Khuboni on:
012 622 3935
email: sifiso.khuboni@aiif.co.za

Zodwa Mbatha
Operational Manager
Email: zodwa.mbatha@aiif.co.za
Tel: 012 622 3925



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund

EXECUTOR BONDS OF SECURITY (BONDS): POLICIES, TERMS AND CONDITIONS

1. GENERAL PROVISIONS

- 1.1 The AIIF will provide a bond only to the executor of a deceased estate, the administration of which is subject to the provisions of South African Law, and who is an attorney practising in South Africa with a valid Fidelity Fund Certificate.
- 1.2 The AIIF will, in its sole discretion, assess the validity and risk associated with the information supplied in the application form, before issuing a bond to an applicant.
 - 1.2.1 If the applicant disputes the AIIF's rejection of the application, such dispute will be dealt with in the following order:
 - 1.2.1.1 Written submissions by the applicant should be referred to the AIIF Executive Committee at disputes@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the communication from the AIIF rejecting the application;
 - 1.2.1.2 Should the dispute not have been resolved within thirty (30) days, then such dispute will be referred to the Sub-Committee appointed by the AIIF's board of directors for a final determination.

2. EXCLUSIONS

Before completing the application, please note that a bond will NOT be issued where:

- 2.1 the applicant would be appointed in any capacity other than as the executor;
- 2.2 the day to day administration of the estate would not be executed by the applicant, partners or co-directors or members of staff under the applicant's, partners or co-directors' supervision, within the applicant's offices;
- 2.3 the administration of the estate would be executed by any entity other than the legal firm of which the applicant is part;
- 2.4 the co-executor is not a practising attorney;
- 2.5 any claim involving dishonesty has been made against the applicant or any member of his or her firm. We reserve the right not to issue any bonds to the applicant or any firm in which the applicant is/ was a partner or director or member of staff at the time of the alleged dishonesty or thereafter;
- 2.6 the applicant or his or her firm has not provided the AIIF with all updates or the required information in respect of previous bonds, or complied with the Terms and Conditions;
- 2.7 the applicant has a direct or indirect interest in the estate for which the bond is requested other than executor fees;
- 2.8 the applicant is an unrehabilitated insolvent, suspended or interdicted from practice, or where proceedings have commenced to remove him or her from the roll of practising attorneys;
- 2.9 the applicant has been removed from a similar office.

3. TERMS AND CONDITIONS

- 3.1 An applicant must complete the prescribed application form, and provide the AIIF with all the relevant supporting documents. A copy of the application form is attached as annexure "A".
- 3.2 In the case of an application for co-executorship, each applicant must sign and submit a separate application form and also sign the Undertaking (Form J262E). Each applicant will be jointly and severally responsible for adhering to all the terms and conditions contained in this application.
- 3.3 The applicant undertakes:
 - 3.3.1 to finalise the administration of the estate for which the bond is requested, expeditiously in the prevailing circumstances;
 - 3.3.2 to provide the AIIF with information and access to records and correspondence relating to each estate for which the AIIF has issued a bond, as if the AIIF were in a similar position to the Master of the High Court or any beneficiary. In this regard:
 - 3.3.2.1 a copy of the letter of executorship must be provided to the AIIF within 30 days of being granted by the Master;
 - 3.3.2.2 a separate estate account must be opened as required in terms of Section 28 of the Administration of Estates Act 66 of 1965;

RISKALERT

- 3.3.2.3 copies of the provisional and final liquidation and distribution accounts must be provided to the AIIF, within six (6) months from the granting of the letter of executorship. Alternatively proof of an application for and the granting of an extension or condonation must be provided.
- 3.3.2.4 if applicable, within 30 days of the final liquidation and distribution account having been approved, the executor must formally apply to the Master of the High Court for a reduction of the value of the bond and provide proof of such application to the AIIF within 30 days of doing so.
- 3.3.2.5 the Master's filing slip or release must be provided to the AIIF within 30 days of issue by the Master.
- 3.3.3 to ensure that all insurable assets in the estate are sufficiently and appropriately insured, within 24 hours of receipt of the letters of executorship, and to provide the AIIF with proof of such insurance within 30 days of such appointment. The insurance must remain in place for the duration of the administration of the estate, failing which the applicant and his firm will be personally liable for any loss or damage that may result from the absence of such insurance.
- 3.3.4 to keep the AIIF fully informed about the progress of the administration of the estate - in the same way as he or she would inform the Master of the High Court or any beneficiary, of the progress of the administration;
- 3.3.5 to inform the AIIF within 30 days of becoming aware of a change in his or her status as a practitioner or of any application for removal or suspension as attorney or executor or any similar office.
- 3.4 Once a bond has been issued, the applicant will not seek to reduce its value, unless the Master of the High Court is satisfied that the reduced security will sufficiently indemnify the beneficiaries and has given written confirmation of such reduction. A copy of such written confirmation must be provided to the AIIF within thirty (30) days of it being provided.
- 3.5 The applicant consents to the AIIF making enquiries about his or her credit record with any credit reference agency and any other party, for the purposes of risk management.
- 3.6 The applicant consents to the relevant law society or regulator giving the AIIF all information in respect of the applicant's disciplinary record and status of good standing or otherwise.
- 3.7 The applicant undertakes to give the AIIF all information, documents, assistance and co-operation that may be reasonably required, at the applicant's own expense. If the applicant fails or refuses to provide assistance or co-operation to the AIIF, and remains in breach for a period of thirty (30) days after receipt of written notice from the AIIF to remedy such breach, the AIIF reserves the right to :
 - 3.7.1 report the applicant to the law society or regulator having jurisdiction over the executor; and/or;
 - 3.7.2 request the Master to remove him or her as the executor.
- 3.8. The applicant accepts personal liability for all and any acts and/or omissions, including negligence, misappropriation or maladministration committed or incurred whether personally or by any agent, consultant, employee or representative appointed or used by the applicant in the administration of an estate.
- 3.9 In the event of the AIIF's having made a payment in respect of a claim arising out of a fraudulent act or misappropriation or maladministration, it reserves the right to take action to:
 - 3.9.1 institute civil and/or criminal proceedings against the applicant; and/or
 - 3.9.2 report the applicant to the law society or regulator having jurisdiction over the executor.
- 3.10 The other partners or directors of the firm must sign a resolution acknowledging and agreeing to the provisions set out in that resolution. A copy of such resolution is attached as annexure "B".
- 3.11 If there is any dispute between the AIIF and the executor as to the validity of a claim by the Master of the High Court, then such dispute will be dealt with in the following order:
 - 3.11.1 written submissions by the executor should be referred to the AIIF's internal dispute team at dispute@aiif.co.za or to the address set out in clause 6 of this document, within thirty (30) days of receipt of the written communication from the AIIF, which has given rise to the dispute;
 - 3.11.2 should the dispute not have been resolved within thirty (30) days from the date of receipt by the AIIF of the submission referred to in 3.11.1, then the parties must agree on an independent senior estates practitioner with no less than 15 years standing in the legal profession, to which the dispute can be referred for a determination. Failing an agreement, the choice of such senior estates practitioner will be referred to the president of the law society (or his/her successor in title) having jurisdiction over the executor.
 - 3.11.3 the parties must make written submissions which will be referred for a determination to the senior estates practitioner referred to in 3.11.2. The costs incurred in so referring the matter will be borne by the unsuccessful party;
- 3.12 A certified copy of the executor's current Fidelity Fund Certificate must be submitted annually within (thirty) 30 days of issue, but no later than the end of February each year.

4. LIMITS

- 4.1 The value of any bond is limited to R5 million per estate. The cumulative total of all bonds issued to any one firm will not exceed R20 million at any given time.
- 4.2 If a practitioner is part of, or holds himself or herself out to be part of, more than one firm simultaneously, such practitioner and all the entities associated with that practitioner will hold a maximum cumulative total of R20 million in bonds at any given time.
- 4.3 In the case of co-executorship, each executor needs to meet the criteria as specified in this document. The limits will apply as mentioned in 4.1 and 4.2 above as if there were no co-executorship.

5. SOLE RECORD OF THE AGREEMENT

- 5.1 This document constitutes the sole record of the agreement between the AIIF, the firm and the applicant in relation to the bond to which this document applies.
- 5.2 This document supersedes and replaces all prior commitments, undertakings or representations, (whether oral or written) between the parties in respect of this application.
- 5.3 No addition to, variation, novation or agreed cancellation of any provision of this document shall be binding upon the AIIF unless reduced to writing and signed by or on behalf of both parties, by authorised persons.
- 5.4 If there are any material changes to the information contained in this application, the applicant undertakes to inform the AIIF in writing within fifteen (15) days of such change.

6. DOMICILIUM

The parties choose as their *domicilia citandi et executandi* for the service of notices given in terms of this agreement and all legal processes, the following addresses:

- 6.1 **AIIF: 1256 Heuwel Avenue**
Centurion
0127
Email: courtbonds@aiif.co.za
- 6.2 **The Applicant: The address provided in the application form**
- 6.3 Notices or legal processes may be delivered by hand or sent by electronic mail to the above addresses. The date of receipt by the addressee will be the date of hand delivery or transmission.
- 6.4 Either party may change its domicilium by giving the other party written notice of such change.

7. DECLARATION

If the bond is granted, I agree:

- (i) to fully comply with the terms and conditions contained in clause 3;
- (ii) that all estate funds will be invested strictly in terms of the Administration of Estates Act 66 of 1965, the Attorneys Act 53 of 1979 or the Legal Practice Act 28 of 2014 and the rules and regulations as promulgated in respect thereof;
- (iii) to furnish the AIIF with the annual audit certificates completed by my or our external auditors, verifying the continued existence of the property or funds under my control as executor within thirty (30) days of such certificate being issued;

I hereby confirm that I have read, understand and agree to be bound by the terms and conditions contained in this document.

DATED AT ON THIS DAY OF 20..

.....

.....
WITNESS (Full names & signature)

.....
APPLICANT (Full names & signature)

.....

.....
WITNESS (Full names & signature)

PRESCRIPTION MATTERS

Myathaza vs Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus, 2015, Labour Appeal Court (JA 122/14)

The Labour Appeal Court (LAC) adjudicated upon this and two other matters simultaneously, in dealing with the question whether arbitration and CCMA awards in terms of the Labour Relations Act 66 of 1995 (LRA) prescribe, and if so what the applicable prescriptive time-periods are.

In two of the three matters, the appeals of the employees were against findings of the Labour Court that the Prescription Act 68 of 1969 (PA) applied to such arbitration awards. In the third matter, the employer appealed the finding of the Labour Court that the PA did not apply.

(All of these matters involved arbitration awards made before 1 January 2015 and were to be decided on the LRA as it stood before the amendment of section 145 of that Act and the insertion of section 145(9) which only applies to arbitration awards made after 1 January 2015.)

In order to clarify the situation and settle the uncertainty brought about by differences of opinion concerning the applicability of the PA to these arbitration awards, the LAC considered the following three questions:

1. Whether the PA applies to arbitration awards;
2. If so, what prescriptive time periods are applicable to such arbitration awards; and
3. If so, whether an application brought to review and set aside an arbitration award interrupts the running of prescription, or constitutes an impediment to the running of prescription as contemplated in section 13(1) of the PA.

With regard to the first question, Coppin JA referred to *Moloi and Others v Road Accident Fund* 2001 (3) SA 546 (SCA), where it was held that:

'Although section 16 of the Prescription Act is not drafted as clearly as it might be it is reasonably plain that what is intended is that the provisions of Chapter III will apply to all debts save where they are ousted by the provisions of an Act of Parliament which is inconsistent and then only to the extent of the inconsistency.'

It is clear from section 16(1) of the PA that every debt contemplated in that section, must in our law prescribe within a certain period. If the Act of Parliament under which the debt resides does not prescribe such a period, then the PA applies. The LRA does not prescribe such a period.

The LAC considered the argument that the LRA provided for its own time periods, and that there was inconsistency between the LRA and the PA. It found no inconsistency – on the basis that the time periods in the LRA applied to the pre-arbitration and pre-adjudication phases and did not apply to the periods after the statutory dispute resolution processes had been finalised. The PA would apply to the period after finalisation of the dispute

resolution process and its strict time limit of three years was consistent with one of the main objects of the LRA, which is to promote the speedy resolution of disputes.

The LAC also noted that the 2014 Labour Relations Amendment Act, which only came into operation on 1 January 2015, fortified its view that the PA applied to all awards issued under the LRA.

In dealing with the argument that the LRA is based in equity and fairness while the PA is not, and that the application of the PA would frustrate employees' rights to fair labour practices – contrary to public policy – Coppin JA quoted from several sources supporting the view that prescription *per se*, is justified and necessary and is in fact based on considerations of fairness and equity.

However, the LAC had then to consider whether or not an arbitration award is a "debt" as envisaged by the PA. The term "debt" is not defined in the PA, but courts have held that the term should be given a broad and general meaning.

In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G, it was held that a "debt" means "that which is owed or due; anything as money, goods or services which one person is under an obligation to pay or render to another".

The LAC held that any arbitration award that creates an obligation to pay or render to another, or to do something, or to refrain from doing something, does meet the definitional criteria of a 'debt' as contemplated in the PA.

Having determined that arbitration awards, generally, constitute "debts" as contemplated in the PA and that the provisions of Chapter III thereof apply to them, the LAC then dealt with the second question – the determination of the prescriptive period applicable to such "debts".

The applicable prescriptive period is dependent on whether an arbitration award constitutes a judgment debt – in which case a thirty-year period would apply – or a simple debt where a three-year period would apply.

Coppin JA noted that Section 158(1)(c) of the LRA, which empowers the Labour Court to make "any arbitration award an order of court", provides unequivocal confirmation that an arbitration award is not the equivalent of an order or judgment of the Labour Court. If they were the same thing, section 158(1)(c) would be superfluous.

The LAC therefore found that, in the circumstances, to give the term "judgment debt" in the PA a meaning which includes "arbitration awards" made under the LRA, "would unduly strain the language of the Prescription Act." Accordingly, the LAC held that a three-year prescriptive period applied to such arbitration awards.

Lastly, the LAC looked at the third question

being the issue of interruption of prescription. It held that the debt encompassed in the award is due, unless otherwise indicated, upon delivery of the award, regardless of whether or not it is certified as contemplated in section 134 of the LRA. The Court did however rule that prescription is interrupted by the process whereby a creditor claims payment for the debt and the final granting of the order necessary for the interruption is successful.

With regard to the question whether an application to set aside an arbitration award interrupts prescription, the LAC found that this depended on whether the award was made before or after the commencement date (1 January 2015) for the amendment to section 145 of the LRA, which inserted a new section 145(9) providing that "an application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969) in respect of that award".

In terms of section 145(10), section 145(9) only "applies to an arbitration award issued after such commencement date".

Accordingly, the LAC held that applications to review or set aside arbitration awards issued prior to 1 January 2015 would not interrupt prescription. The debt could therefore prescribe before the review process was finalised. However, Coppin JA noted that the review "...is not a bar to the bringing of an application to make the award an order of court." The service of the application "will trigger the deemed interruption of prescription ...although the final granting of the order is necessary for the interruption to be successful in the end."

In summary:

- The Prescription Act applies to arbitration awards made in terms of the LRA.
- Arbitration awards prescribe three years after being delivered, as they are not judgment debts until they have been made orders of court – whereafter the thirty-year prescriptive period applies.
- Since the amendment of section 145 of the LRA (effective 1 January 2015), an application to have a CCMA arbitration award reviewed, interrupts the running of prescription of that award.
- The amendment to section 145 is not retrospective. Where an arbitration award was delivered before 1 January 2015, a review application will not interrupt prescription. The debt could prescribe before the review process is finalised. It is suggested in this case that prescription should be interrupted by serving an application to make the award an order of court.

Jonathan Kaiser, Legal Adviser AIIF
Jonathan.kaiser@aiif.co.za



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First Semester	<input checked="" type="checkbox"/>	Venue and Language	Dates	*Early reg.
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	<input type="checkbox"/>	Pretoria (English)	16 – 19 Feb	26 Jan
	<input type="checkbox"/>	Port Elizabeth (English)	23 – 26 Feb	2 Feb
	<input type="checkbox"/>	Durban (English)	23 – 26 Feb	2 Feb

Language preference for conveyancing notes

Afrikaans ☐ English ☐

Second Semester	<input checked="" type="checkbox"/>	Venue and Language	Dates	*Early reg.
	<input type="checkbox"/>	Port Elizabeth (English)	12 – 15 July	21 June
	<input type="checkbox"/>	Cape Town (English)	12 – 15 July	21 June
	<input type="checkbox"/>	Pretoria (Afrikaans)	12 – 15 July	21 June
	<input type="checkbox"/>	Kaapstad (Afrikaans)	19 – 22 July	28 June
	<input type="checkbox"/>	Johannesburg (English)	19 – 22 July	28 June
	<input type="checkbox"/>	Pretoria (English)	19 – 22 July	28 June
	<input type="checkbox"/>	Durban (English)	26 – 29 July	5 July
	<input type="checkbox"/>	Bloemfontein (Afrikaans)	26 – 29 July	5 July

Course in Notarial Practice (*Closing dates for early registration)

First Semester	<input checked="" type="checkbox"/>	Venue and Language	Dates	*Early reg.
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	<input type="checkbox"/>	Johannesburg (English)	14 – 15 March	22 Feb
	<input type="checkbox"/>	Pretoria (Afrikaans)	17 – 18 March	25 Feb

Language preference for notarial notes

Afrikaans ☐ English ☐

Second Semester	<input checked="" type="checkbox"/>	Venue and Language	Dates	*Early reg.
	<input type="checkbox"/>	Pretoria (Afrikaans)	11 – 12 Aug	21 July
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	<input type="checkbox"/>	Bloemfontein (English)	15 – 16 Aug	25 July
	<input type="checkbox"/>	Johannesburg (English)	15 – 16 Aug	25 July
	<input type="checkbox"/>	Pretoria (English)	18 – 19 Aug	28 July
	<input type="checkbox"/>	Durban (English)	22 – 23 Aug	1 Aug
	<input type="checkbox"/>	Cape Town (English)	25 – 26 Aug	4 Aug

Registration is subject to the "Registration Rules" as stated on our website www.aktepraktik.co.za

