

JUNE 2016

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an in-depth discussion

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30 Municipalities have a hypothec over debts for rates



The Supreme Court of Appeal interprets the provisions of s 118(3) of the Local Government: Municipal Systems Act 32 of 2000 in an important judgment in the matter of *City of Tshwane Metropolitan Municipality v Mitchell* [2016] 2 All SA 1 (SCA), which saw the majority of the coram agreeing and one judge dissenting. **Tshepo Mashile** discusses the background to the case, the statutory position, the position under common law and the judgment implications of a sale in execution *vis-à-vis* sale by public auction.

34 Understanding imprisonment – an in-depth discussion



A lot of confusion erupted over the last couple of months regarding the issue of parole. Cases, such as that of Schabir Shaik, Oscar Pistorius, Clive Derby-Lewis and many others added to the debate and public scrutiny. The procedures and principles described *infra* suggests the law in a perfect world would be where no interference by, *inter alia*, politicians, is tolerated. Section 276 of the Criminal Procedure Act 51 of 1977 mentions the possible punishments for crimes available to South African courts. Imprisonment is one such type of punishment. Although imprisonment is probably the best-known form of punishment, there is a great deal of ignorance about it, even among lawyers and sentencing officers. **Dr Llewellyn Gray Curlewis** discusses imprisonment in part one of his series of articles regarding parole in South Africa.

36 PAJA – what jurisdiction does the court have?

Jurisdiction is an essential element of procedural law. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) has important implications for the jurisdiction of courts in proceedings for the judicial review of administrative action. Yet this aspect of PAJA has not received much attention. The aim of this article, written by **Willem-Henri van Eetveldt** is to highlight PAJA's important – but often overlooked – jurisdictional provisions.

38 The loaded danger of deduction when dealing with illegal possession of ammunition

This article, written by **Hendrik Beukes**, considers the danger of deduction when dealing with technical issues in a case where an accused has been charged with the unlawful possession of ammunition. He submits that in a case where an accused has been charged with either the illegal possession of ammunition and/or illegal possession of a firearm, the result is that the prosecution bears the burden to prove the charge.

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how can we help you?

Let your voice be counted

In today's world, correct information is key to ensuring a successful business, more so in the legal fraternity, as this might set your firm apart from competitors.

The Law Society of South Africa (LSSA) has partnered with LexisNexis to develop a review of legal practice in South Africa. The report will be focussed primarily on the changing legal landscape, particularly trends in technology, equity and practice management.

To develop the report, the LSSA requires legal practitioners to complete a survey. By completing the survey, legal practitioners will assist in contributing to the knowledge pool and assist the LSSA in making more informed decisions relating to the attorneys' profession and the environment in which

practitioners are practising in today.

By participating in the survey, practitioners will be ensuring that they receive a copy of the results. The results of the survey will provide practitioners with valuable insights as they compare their firm against the status *quo*. All responses will be confidential and the report will provide cumulative results only.

In addition to the survey findings, participants will receive a 15% discount voucher for the LexisNexis online bookstore and stand a chance to win an iPad and access to selected LexisMobile titles for 12 months.

The survey is conducted online, however, participants can opt to conduct the survey telephonically. Links to the survey are available on the *De Rebus* website and app.



Mapula Thebe - Editor

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 20 June and 18 July 2016.

**NATIONAL
WILLS
WEEK**

**NASIONALE
TESTAMENT-
WEEK**

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National Wills Week 2016: Register now to participate

National Wills Week will take place from 12 to 16 September.

Attorneys are invited to register to participate in this initiative before 15 June.

Online registration can be done on the LSSA website at www.LSSA.org.za. Alternatively please request a registration form from your provincial law society or e-mail: LSSA@LSSA.org.za or call (012) 366 8800.

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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.

Arrogance of commercial banks

I refer to a communication received from Standard Bank recently.

While one must be mindful of the amount of fraudulent activity confronting all banks on a daily basis, the arrogance of the banking sector has now plummeted to new depths.

On what basis does Standard Bank refuse documents certified by an attorney or a notary? What is the reason for requiring a copy of the last will and testament of the deceased? Why is there exception allowed for Standard Bank estate banking accounts? And finally, how do any of these requirements add any value to the issue at hand being the alleged prevention of fraud, risk and, the buzzword of this new millennium, compliance?

I am a sole practitioner and unable to leave my office for the time that will be necessary to find the person with the necessary authority at Standard Bank to approve these documents. Until recently I practiced in partnership with my (now retired) father. Neither of us has ever practiced outside of the fields of administering deceased estates, curatorship estates and the day-to-day ad-

ministration of testamentary and *inter vivos* trusts, my father being involved in the practice of fiduciary services for 53 years and myself for 24 years.

Over the years, we have witnessed the position of the attorney executor/curator/trustee becoming weaker and weaker and that of the banking sector stronger and stronger, while the profession remains trapped in a strange form of inertia that has led to the attached communication.

Regretfully, this practice is not limited to Standard Bank but (and not limited to) the three other major banks as well. Some recent examples:

- After submitting Letters of Curatorship to Absa in October 2013 (who changed the address on record of the patient's accounts to that of my office, which involved convincing a member of Absa's legal department that a Death Certificate is not required to obtain Letters of Curatorship), Absa continued to allow the patient to operate the accounts leading to the loss of some R 50 000. When queried, Absa denied that the curatorship was placed on record by the curator, but cannot explain under what authority then, the address was changed.
- Nedbank recently returned documents

to me in a deceased estate that were certified by a notary with what can be described by no less than a demand that I return the documents certified by a commissioner of oaths.

- Standard Bank itself is notorious for refusing to accept a general power of attorney unless prepared on its stationery (which requires only one witness instead of the more common placed two).

One is and must be sympathetic to the banking sector's need for fraud prevention and it is a sad indictment on the present day that fraud is rife and the fraudsters' cunning increases daily. However, I do not accept that our profession (which admittedly has members and former members who are not always beyond reproach and act in their own self-interest) has sunk to the level that any bank official's certification of a document supersedes mine as a notary.

- The purpose of this letter is twofold –
- to open the debate among the profession (protection v arrogance) and to request a commitment from those that represent us at Law Society of South Africa and provincial law society level to engage with the banking sector urgently; and
 - to take a stand and protect the members of the legal profession whom they



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represent from what has become, simply put, ongoing abuse at the hands of the banking sector.

Nicholas Yeowart, attorney and notary, Cape Town

• The communication received from Standard Bank, which Mr Yeowart refers to in his letter, can be found on the *De Rebus* website at www.der-rebus.org.za under the letters section – **Editor**.

Drawing the line in the sand

I refer to my article 'NCA: The line in the sand – can a cancelled agreement be revived?' (2016 (May) DR 41). In the recent

judgment in the Constitutional Court (*Nkata v FirstRand Bank Limited and Others (The Socio-Economic Rights Institute of South Africa as Amicus Curiae)* (CC) (unreported case no CCT73/2015, 21-4-2016) (Cameron J), the case relates to the judgment in the article above (*Standard Bank of South Africa Ltd v Botes t/a JHLS Botes Vervoer* (NWM) (unreported case no M85/2015, 13-8-2015) (Landman J). The two judgments, although distinguishable on the facts – are *ad idem* on the law.

Nkata supports the legal principle (confirmed in the *Botes* matter) that a credit agreement can only be reinstated in terms of s 129(3) before the credit provider has cancelled the agreement (see, *inter alia*, para 110 of *Nkata*).

In *Botes* s 129 had been complied with and the arrears were never purged. It

was found that there was no reason to send a further s 129 notice pursuant to the breach of the payment plan, as the arrears had not been purged. Valid cancellation took place – which drew the line in the sand – whereafter reinstatement in terms of s 129(3) was no longer possible.

In *Nkata* the arrears were purged pursuant to a settlement agreement and thus the agreement reinstated in terms of s 129(3) – prior to the line in the sand or proper cancellation by the credit provider – who did not comply with s 129 on a factual level.

Elzaan Potgieter, candidate attorney, Johannesburg



Equality and Justice

National Association of Democratic Lawyers Action Plan to Combat Human Trafficking

FACT:

Human trafficking is the fastest growing criminal activity in the world second only to the drug trade.



How can you help someone who has been trafficked?

Contact your nearest social worker to arrange counselling services for the victim of trafficking, so that they can deal with the experience they have gone through. Information on shelters in your area will be provided by the social worker or the Department of Welfare in your province, where the victim can be given a place to stay. Remember that a person who is suspected of trafficking can be charged with the crime and even brought back to South Africa in order to stand trial, so report human trafficking!

WHAT CAN LAWYERS DO?

Join us for a workshop with presenters:

Advocate Dawn Coleman-Malinga

Senior State Advocate: Sexual Offences and Community Affairs Unit

Advocate Val Dafel

Advocate at National Prosecuting Authority

Date: 20 June 2016

Venue: KwaZulu-Natal Law Society

Time: 13:00 – 15:00

RSVP by no later than 13 June 2016

Limited seats available!

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PLEASE CONTACT YOUR NADEL BRANCH FOR DATES OF HUMAN TRAFFICKING WORKSHOPS IN YOUR AREA

Racial prejudice impediment to socio-economic transformation

The National Association of Democratic Lawyers (NADEL) held its elective annual general meeting (AGM) and conference on 27 and 28 February in Margate, Kwa-Zulu-Natal. The AGM was held under the theme: 'Racial prejudice is a fundamental impediment to socio-economic transformation and social cohesion.'

On the first day of the conference, incoming President of NADEL and Co-chairperson of the Law Society of South Africa, Mvuso Ntyesi, opened the conference by saying that NADEL, as an organisation, was founded on democratic values and the Constitution. Commenting on the racial attacks on social media at the time, Mr Ntyesi said that the racial issues rub salt into the wounds of South Africans and go against the principles of the Constitution. He added that the aim of the theme of the AGM was to seek a radical response from the delegates on the issues raised by the spate of racial attacks.

One of the most important discussions in the country

Member of the Executive Council (MEC) for Economic Development Tourism and Environmental Affairs, Mike Mabuyakhulu, addressing the delegates, thanked the leadership of NADEL for inviting him to share his thoughts on issues surrounding racial prejudice. MEC Mabuyakhulu noted that South Africa is indebted to NADEL for being a positive force that brought about the democratic dispensation in the country and that the organisation is still going forward with this mandate.

MEC Mabuyakhulu added: 'We are participating in one of the most important discussions in the country; a nation that does not have internal dialogue will suf-



President of the National Association of Democratic Lawyers (NADEL) and Co-chairperson of the Law Society of South Africa, Mvuso Ntyesi, opened the conference by saying that NADEL, as an organisation, was founded on democratic values and the Constitution.

fer internal fatigue. We are delighted that central to the deliberations is racism and its adverse impact on socio-economic transformation. What is so important for socio-economic transformation and social cohesion? As a country that comes from the tragedy of Apartheid ... a system that believed in the subjugating of the majority by the minority. While Apartheid was not pure slavery or colonialism, it built on imperialistic tendencies. ... During Apartheid there was exclusion of the majority in the economy of the country. ... The critical task for democracy was to put in place measures to grow the economy and level the playing field for a prosperous society. While we move away from Apartheid we need to

ensure that we also build a society that is united in its diversity.'

Commenting on the recent spate of racist utterances MEC Mabuyakhulu said he condemns the statement made by Penny Sparrow on social media as it brought up the simmering tensions on issues surrounding race in the country. 'There are some who defend [Ms Sparrow] using the right to freedom of speech as a defence. We have to condemn all acts of racism as they are a danger to the public and have divisive and destructive tendencies. ... Sparrow was lamenting the loss of exclusive privilege she enjoyed during Apartheid. We should expect that the scramble for resources will take many forms. Despite what Sparrow said, we should guard against the dangerous notion that all whites are racists,' he added.

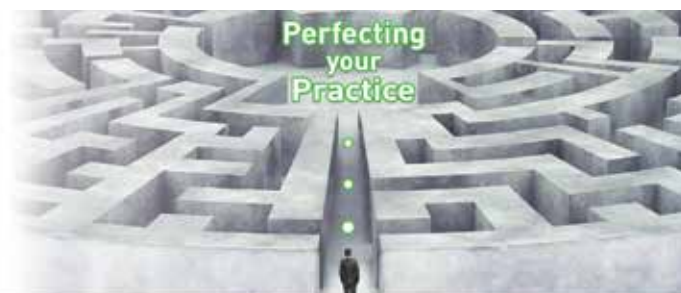


Member of the Executive Council for Economic Development Tourism and Environmental Affairs, Mike Mabuyakhulu, spoke about racism and its adverse impact on socio-economic transformation.



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Speaking about the role NADEL plays in society, MEC Mabuyakhulu said: 'NADEL still has a big role to play, providing courageous leadership to the challenges of the nation. ... There is a little number of the profession that is writing on issues from their own views. The profession has to be constructively critical. ... The [media] space is dominated almost by the views of the minorities in the country. What is the profession discussing. ... Who comments on legal cases? ... Previously disadvantaged legal professionals deserve to be heard and government is prepared to listen. If the government and the legal profession complement one another, we can build a better country.'

Answering a question from the floor, MEC Mabuyakhulu said that, currently there is no legislation against racism. He added: 'Our political settlement is a negotiated settlement that resulted in our Constitution. We have removed racism linked statutes in our legislation, we have to go a step further and legislate against racism so that we can prosecute racists. In my view, it would have been very difficult, at a time when we were seeking to build a society that must work together, to legislate against racism. There were interventions, in a sense, to ensure that we accept our diversity while building a unified country. ... Nations are formed during difficult times.'

Race issues not a surprise

Deputy Minister of Justice and Constitutional Development, John Jeffery, opened his address by saying that before Ms Sparrow expressed her views, there were a number of racial incidents in the country. He added that it was not surprising that there are race issues in the country and that government was in the process of making laws surrounding racial issues more refined.

'Twenty-two years after the dawn of

democracy we still have a long way to go in terms of race. The country's economy still rests with the minority. In terms of statistics, the racial composition of top management in companies still needs to be addressed to ensure that it reflects the demographics of the country. When it comes to the legal profession the figures are worse. The majority of law students are women and black, but as you go higher within the ranks, the legal profession goes whiter and male. ... We have a lot to do until the profession is transformed; we also have to take a closer look into transformation in terms of gender.'

Commenting on briefing patterns, Mr Jeffery said that the state is accused of not ensuring transformed briefs. 'All government departments have to ensure that 70% of their briefs are in line with transformation, and that figure is met. We have to consider what the private sector is doing in terms of briefing patterns,' Mr Jeffery said.

Resistance to the transformation agenda

Judge of the Constitutional Court, Justice Mbuyiseli Madlanga presented the keynote address at the gala dinner held on the night of 27 February. Justice Madlanga's speech was based on South Africa's resistance to the transformation agenda. Justice Madlanga began his address by pointing out the difficulties he experienced when he attended school, he further noted that these difficulties were not unique to the area he schooled and were evident in other rural areas in the country. He went on further to point out that to this day, scholars in rural and township school still face the same difficulties he faced years ago.

Justice Madlanga added: 'The current state of affairs in black schools is a result of a deliberate and sustained programme calculated to keep blacks at the



Judge of the Constitutional Court, Justice Mbuyiseli Madlanga, presented the keynote address at the gala dinner held on the night of 27 February.

lowest rung of human gradation, as if human beings had to be graded. It is the legacy of Apartheid, the legacy of exclusion, the legacy of marginalisation to the fringes, the legacy of deliberately crafted disadvantage. I should not be misunderstood; it would be simplistic to suggest that Apartheid was about education only. I single out disadvantage in education because education is a spring board onto virtually all facets of life. Otherwise the essence of the pre-democracy era was apartness, hence the Afrikaans [word] Apartheid. Its tentacles reached every facet of human existence; at its core was racial segregation in terms of which white equalled superior and black equalled inferior.

Fast forward to 27 April 1994, it does not require rocket science to realise that at the dawn of our constitutional democracy virtually all facets of human activity would be dominated by whites, ... the reason why whites were and continue to be better qualified is not far to seek. ... It is for this reason that there is a fundamental difference between our Constitution and some constitutions of western countries Our Constitution is transformative; it proceeds from a recognition of the reality that because of the legacy of Apartheid, inequalities are bounds. It seeks to transform our society in order to achieve equality. Unsurprisingly even though section 9(1) of the Constitution declares that: "Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 9(2) provides that: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."



Vice President of the National Association of Democratic Lawyers, Xolile Ntshulana (left), seated with Deputy Minister of Justice and Constitutional Development, John Jeffery.

Speaking about the transformative agenda of the Constitution, Justice Madlanga noted: 'A number of Acts have been passed to address injustices and inequality brought by colonialisation and Apartheid a few examples are the Employment Equity Act [55 of 1998] and the Broad-Based Black Economic Empowerment Act [53 of 2003], which were enacted pursuant to section 9(2) of the Constitution. We also have the Restitution of Land Rights Act [22 of 1994], which gives effect to section 25(7) of the Constitution. We now find ourselves in the center of a new debate, a debate at the heart of which is race. Some within the white group, which for centuries has been the beneficiary of privilege and advantage claim that the Constitutional transformative agenda is tantamount to racism in reverse. Inexplicably, there is a sprinkling of blacks who share this

view. Well our Constitution guarantees freedom of expression; they too are entitled to express their view. This group of whites and sprinkling of blacks maintain that it is unjust to apply the transformative instruments given that young whites who were neither guilty of Apartheid atrocities nor direct beneficiaries of the Apartheid system [are subjected to these instruments]. The claim continues that 21 years is too long a time for the effects of Apartheid not to have been reversed. ...

Black schools in South Africa continue to be under-resourced and have significant numbers of poorly qualified teachers. Our economy is in the hands of a white minority, the senior management in the private sector is predominantly white. For some to suggest that our nation's transformative agenda must now come to an end, defies logic.'

Executive Committee

The following are the newly elected National Executive Committee members -

- Mvuzo Notyesi (President);
- Xolile Ntshulana (Vice President);
- Patrick Jaji (General Secretary);
- Nolitha Jali (Assistant General Secretary);
- Poobie Govindasamy (Treasurer);
- Strike Madiba (Assistant Treasurer);
- Sam Mkhonto (Fundraising);
- Rehana Rawat (Projects);
- Memory Sosibo (Publicity Secretary);
- Harshna Munglee (Gender Desk); and
- Ugeshnee Naicker (Youth Desk).

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Towards a unified independent legal profession

The Law Society of South Africa (LSSA) held its annual general meeting (AGM) on 1 and 2 April in Johannesburg. Topics discussed at the AGM included -

- the Legal Practice Act 28 of 2014 (LPA);
- regional engagement;
- economic impact of professionals;
- the technology revolution: Advantages for smaller firms, impact on methods of service delivery and client management;
- a better deal for women in practice;
- alternative dispute resolution, court-annexed mediation and family arbitration; and
- human trafficking.

The outgoing Co-chairperson of the LSSA, Richard Scott, welcomed delegates to the AGM, while President of the Law Society of the Northern Provinces, Anthony Millar, welcomed attendants to Gauteng.

Outgoing Co-chairperson of the LSSA, Busani Mabunda, presented the LSSA's annual report, which can be accessed at www.LSSA.org.za.

A word from the Attorneys Fidelity Fund

Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa said that there was a need for the AFF to seek new ways of doing business and redesigning its operating model in order to meet the obligations



Former Co-chairperson of the Law Society of South Africa, Richard Scott, welcomed delegates to the annual general meeting.

of the LPA. She added: 'As the process unfolds we will ensure that we engage all stakeholders in this regard who will be affected by the process. The AFF is party to the National Forum process and is represented by Abe Mathebula, as the board closely watches and monitors the developments.'

Speaking about the finances of the AFF, Ms Khanyile-Kheswa said that at the end of 2015 the fund's reserves stood at R 4,2 billion. She added that the fund saw an escalation of claims in 2015 as

the claims lodged last year amounted to R 271 million. 'This trend needs to be curbed as soon as possible,' she said.

Ms Khanyile-Kheswa noted that last year the AFF brought about a change with the online application of Fidelity Certificates. 'There were concerns from the profession of its user friendliness. We continue to improve the system as it will provide credible and reliable information, going forward,' she added.

In closing Ms Khanyile-Kheswa said that providing bursaries for legal education is one of the key risk mitigating factors that the fund continues to engage in.

- See p 13.

Discussions on the LPA

Member of the National Forum on the Legal Profession (NF), Jan Stemmet began his presentation by stating that as from 1 March new uniform rules for the attorneys' profession (GenN2 GG39740/26-2-2016) were put in place. The new rules consolidated all the rules of the four provincial law societies. He added: 'The main reason why we had to do that is to modernise the old rules that became updated with the new Constitution and the Competition Act, etcetera. It took us seven years to consolidate all the law society rules and they were promulgated in the *Government Gazette*. These rules also serve as a basis for the new rules that we are designing in terms of the Legal



Chairperson of the Attorneys Fidelity Fund, Nonduduzo Khanyile-Kheswa said that there was a need for the Attorneys Fidelity Fund to seek new ways of doing business and redesigning its operating model in order to meet the obligations of the Legal Practice Act.

Practice Act. The aim of that is to have a set of rules that will not only apply to attorneys but also to advocates and to that extent we also have to incorporate the existing Codes of Conduct, etcetera, of the various advocates structures.'

Commenting on the envisaged new structure that will regulate the profession Mr Stemmett said: 'The new governing structure of the profession will look quite different from the four provincial law societies that we have at the moment, partly because we have to take the advocates on board and regulate them all as legal practitioners. At the moment we have four statutory law societies where all the powers are centered, in future we will have one unitary structure, which is the Legal Practice Council, that will come into operation on the targeted date of February 2018. It is by that time the existing law societies will be converted into the new structures. The existing Bar Councils, will not disappear but will be stripped of their regulatory powers and these will be taken up by the new Legal Practice Council. Of course the Legal Practice Council will have regional structures and the recommendation at this stage from the Governance Committee of the National Forum is that there should be nine provincial councils in line with what the Act ultimately envisages. These substructures, the provincial councils, will also have their own substructures in the form of various committees.'

Mr Stemmett said that the Legal Services Ombuds office will also play a role in the regulation of the profession as it will have an oversight role as far as disciplinary matters are concerned. He added that the AFF will become the Legal Practitioners' Fidelity Fund because it will also

have to cater for advocates who want to take direct briefs from the public and will have trust accounts. 'The Legal Practitioners' Fidelity Fund will also have an administrative role in the sense that they will conduct compliance inspections among the other functions they will be performing,' he said.

Deputy Chairperson of the NF, Max Boqwana, informed attendees that the LSSA took a strategic decision to take a leadership role in the process of transforming the legal profession. 'We will take leadership because we have some experience as the organised attorneys' profession that we needed to share with the rest of the legal practitioners. When eventually the LSSA was formed in 1998, it was formed after a very long concerted effort trying to bring together the statutory component [National Association of Democratic Lawyers] and [Black Lawyers Association]. With great difficulties and tribulations, we were scared to come together but low and behold when we came together, the skies did not fall. And that is why we are here today, as this unit. We needed to extend the same message to the advocates in South Africa that if we find ourselves in the same room; the skies are not going to fall. In actual fact this country is facing a number of challenges that requires the collective wisdom of all of us,' he said.

Speaking about the work the NF has done thus far, Mr Boqwana said: 'Because we are enjoined by legislation to provide six month reports to the Minister of Justice, we have presented the first report [and second] to the Minister of Justice and we [met] with the Minister of Justice in May to take him through that report. All I need to say is that we are on course but there are a number of dangers that [the profession] has to look at' (see p 22).

He added: 'If you look at the Act it has absolutely nothing to do with the transformation of the legal profession. Secondly, if you look at the Act, it has come with something that we were very scared of in all those other drafts that were done, that the Act will thoroughly divide the profession. Many of us are still looking at this Act as if we are creating a new law society, in actual fact it means the end of law societies, it means only the existence of a regulator. We have to find a way as to how are we going to proceed forward as a united, strong, independent profession. This you will not find in the Act.'

Mr Boqwana noted that all four provincial law societies play a dual role. 'That is the role of representing, which talks about things that are in the interest of the practitioners but at the same time they play a role of the regulator ... The Act only deals with the latter part, which is regulation. The LSSA is not formed in terms of statute, it is a voluntary body.

This means that when all of these law societies come to an end, when their role is taken over by the regulator. There will be nothing left in terms of dealing with the members' interest. ... We have to create a Bar Association that combines all of us,' Mr Boqwana said.

Answering a question from the floor, Mr Stemmett said the existing reserved work will remain as they are in the new legislation and the forms of legal practice will remain as they are. 'If you are an attorney you can practice for your account, you can practice in a partnership, or in an incorporated company. There is no provision at this stage for companies, which are not owned or consisting of lawyers to form entities that can do reserved work, but that only applies to reserved work and the challenge is for us to compete effectively, with those areas of practice which are not reserved work and which we have been battling with up to now,' Mr Stemmett added.

Mr Boqwana noted: 'In the current Act there is an enabling provision for the creation of multi-disciplinary practices. ... There is still going to be a long process, even after the coming into effect of the Legal Practice Council, to investigate the feasibility of the multi-disciplinary practices. We may remain with the conservative approach that we have or we may have the hybrid approach that the United Kingdom Law Society, for instance, has where there is a diluted ownership of the law firms or with the extreme example of Australia where you can even have public offerings in the ownership of a law firm.'

Regional engagement

The second session of the LSSA AGM



Deputy Chairperson of the National Forum, Max Boqwana, informed attendees that the Law Society of South Africa took a strategic decision to take a leadership role in the process of transforming the legal profession.



From left: President of the Law Society of Swaziland, José Rodrigues, President of the Southern African Development Community Lawyers Association, Gilberto Caldeira Correia, and President of the Law Society of Namibia, Wouter Rossouw.

was on the topic of regional engagement. President of the Law Society of Namibia (LSN), Wouter Rossouw, spoke on the current situation of the LSN. Mr Rossouw said: 'The biggest project that we envisage at this stage is called the "changed project" looking at the fact that as an organised legal profession in Namibia we have come to realise that we are not serving the requirements of the profession any longer. ... As legal practitioners, as we are called in Namibia, we can no longer afford to be seen only as these high powered individuals sitting behind expensive desks dishing out advice to people, we have to engage with the community, with the society that we serve. ... We have a duty towards the Namibian people, we must try to provide them with the best legal services that we can. Truly to champion their cause in courts and at all administrative forums that exists.'

Speaking about the challenges Namibian legal practitioners face, Mr Rossouw said that they were looking into the question of reserved work. He added: 'It is a ruling of the competition commission, to make allowances for sharing of fees between legal practitioners and persons from outside, coupled with the fact that they have said that we will be forced to allow multi-disciplinary practices in future. We will have to look at the framework that we put into place and we must make provision for the regulations of these aspects. ... The plan is to really go and interrogate our rules, to look [at] our rules [in] our current Legal Practitioners' Act and to rethink the whole system. There are some risks involved but we prefer to see it as an opportunity to expand and to create solutions and to add value to the product that we as legal practitioners are going to be able to give to our stakeholders.'

President of the Southern African Development Community Lawyers Association, Gilberto Caldeira Correia, said that the legal profession has been under increasing political pressure in the region. He added: 'Our quest to promote human rights and defend the rule of law, the independence of the legal profession and the judiciary has seen many of our colleagues in the region face various forms of harassment, intimidation, and persecution. ... I believe that as the legal profession in the region we must stand up against such violations of the rights of our members and generally of the citizenry in the region.'

President of the Law Society of Swaziland (LSS), José Rodrigues gave a brief update on the affairs of the legal profession in Swaziland. He said: 'Sadly the legal profession insofar as the judiciary is concerned is not a healthy one. ... We face a unique situation in the sense that the attack on the rule of law and the independence of the judiciary came from the executive and within the judiciary. ... The chief propagator of this attack came from the chief custodian of the law, the independence of the judiciary, and access to justice in the name of our then Chief Justice, Michael Ramodibedi. It [is] the role of every law society to ... maintain and uphold the rule of law [and] to ensure the freedom of representation and access to justice of all its citizens. To do so, we require a sound and independent judiciary.'

Mr Rodrigues highlighted the fact that the situation in Swaziland was so bad that at some point there was a standoff between the judiciary and the LSS resulting in a complete boy-

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cott of the courts, whereby attorneys resolved not to litigate at all, for a period of over four months, in the courts at great personal cost to themselves. He added: 'The operation of the courts literally came to a standstill. The administration of justice did not function despite court rolls being set, attorneys did not attend court. The attorneys took to the streets, marched in their full regalia to sensitise the nation about the infringement of the rule of law and rights to justice, despite some assurances by then Chief Justice of Swaziland that attorneys should return to practice on condition that there would be further engagement on these matters of all stakeholders in the administration of justice and the law. This unfortunately was not to happen.'

Lessons from SAICA

Chief Executive Officer of the South African Institute of Chartered Accountants (SAICA), Dr Terence Nombembe, delivered the keynote address under the heading 'Economic impact of professionals'. Dr Nombembe said that SAICA has realised that in order to meaningfully transform South Africa, they should not take shortcuts on the issue of education. He added: 'When I speak of education, I mean education that seeks to emphasise one fundamental principle, the principle of professionalism, so that whatever we do we can put absolute confidence and trust that our members and our professionals will always be standing us in good stead in everything that they do. ... A quality education model can never be taken for granted, because the moment you take shortcuts it is going to catch up with you. ... It takes seven to ten years to develop a chartered accountant so that when they get to the other end of the chain they will be good enough for what they are meant to be, and that is why globally every country is looking for our South African chartered accountants.'

Commenting on professionals competing in the same market space, Dr Nombembe said: 'We have realised that within SAICA, if we within ourselves as the leadership of SAICA, are fragmented in our thinking, some of us are thinking in a competitive kind of language, where you do not want anything working and touching us and coming close to us because they are going to taint our brand, or taint our supremacy. We are saying, take away that kind of logic it does not make sense; we can never succeed. South Africa needs more collaboration than competition, ... I have no doubt that all these issues, equally applied to the law society, to the engineers, to the medical colleagues, architects, you name it, for us to have that mind-set that says, how do we build South Africa together and collectively without competing and wanting to outshine one another. And that's



Chief Executive Officer of the South African Institute of Chartered Accountants, Dr Terence Nombembe, delivered the keynote address under the heading 'Economic impact of professionals'.

the culture we are working on building within SAICA, because if it is not there within our institute it will never be there to persuade the rest of our membership, which is about 40 000.'

Dr Nombembe said one project that SAICA is looking to collaborate with lawyers on is the question of how to deal with issues of fraud and corruption in South Africa. 'The only two professions that have the ability, capacity and insight of how to break the camel's back when it comes to the issues of fraud and corruption, are accountants and lawyers. Our idea is to commission a moving and an ongoing intervention that says, how do we look into not only thought leadership in this issue but coordinated action that brings together our collective intellect to deal with this issue. Because it can look at any case and any situation of fraud and corruption, a lawyer and an accountant is always involved, but how do we then work together in favour of our society, to protect our society from being taken deeper and deeper into the challenges of fraud and corruption,' he said.

Living embodiment of the Constitution

Deputy President, Cyril Ramaphosa, was unable to attend the LSSA AGM, in his absence Mr Mabunda presented his speech at the gala dinner held on the night of 1 April. The speech read:

'I am honoured and pleased to address this important gathering of the Law Society of South Africa. This respected body is an integral part of our constitutional democracy and a worthy partner in our efforts to ensure access to justice for all. We look to members of the Law Society of South Africa to be the living embodiment of our Constitution. We look to the

legal profession to champion the values of our Constitution and to advance human dignity and equality. We will not achieve a better life for all our people without the legal fraternity adopting an activist demeanour and paying attention to the cries of the impoverished and marginalised in our society. ...

Lawyers representing the poor and vulnerable in our society need to be committed to their role as agents of social transformation. This role is reflected in efforts made at increasing *pro bono* work and the institutionalisation of community service in the Legal Practice Act. It requires the inculcation among young aspiring lawyers – whether during their articles, pupillage or other forms of training – of the basic values in our Constitution. These are the values that as officers of the Court, it is their responsibility to apply in all that they do and to infuse into the administration of justice itself.

Since 1994, we have done much to restructure the judiciary, making sure that our independent courts apply the law impartially and without favour. Working together we have transformed the administration of justice to meet the constitutional obligations of human dignity, equality, human rights and freedom. The role of the Judicial Service Commission in appointing judges continues to contribute to the evolution of a judiciary that is increasingly representative of South African society. The courts, in particular the Constitutional Court, have played a central role in the emergence of a developmental jurisprudence. This is in line with the imperative contained in the National Development Plan to create a capable developmental state. ...

As we commemorate 20 years of our Constitution, we must recognise that legal practitioners have a critical role to play in efforts to bring about change. There is a special onus on the legal profession to support and empower ordinary citizens to enforce the rights contained in the Constitution. Legal practitioners must fulfil their special role in building, enhancing and protecting our democratic values.

As government, we recognise our responsibility to promote the transformation of the profession. As a significant consumer of legal services, government has the means to ensure that black and women legal practitioners get the opportunities that continue to be denied them. This will also have an impact on the transformation of our judiciary. By ensuring that more black and women practitioners gain access to meaningful, diverse and properly remunerated work, we will be more successful in expanding the pool of suitably qualified candidates for judicial appointments.

Closer interaction between govern-



Deputy President, Cyril Ramaphosa, was unable to attend the Law Society of South Africa's annual general meeting, in his absence outgoing Co-chairperson of the LSSA, Busani Mabunda, presented his speech at the gala dinner held on the night of 1 April.

ment and the legal profession must be encouraged. A healthy relationship between government and the profession contributes to the delivery of quality services to the community. The legal

system, in particular an independent judiciary and legal profession, contributes to a favourable landscape for economic growth. Investors and trade partners need to be assured of a well-founded system for the enforcement of their rights and the efficient settlement of claims.'

The full speech can be accessed at: www.lssa.org.za, accessed 20-5-2016.

A better deal for women in practice

On the second day of the AGM a panel discussion was held under the topic 'A better deal for women in practice'.

Speaking from the perspective of a practitioner from a large and established law firm, attorney at Webber Wentzel Pulane Kingston said: 'Insofar as ensuring that a better deal for women in practice becomes more of a reality, every firm above a certain size is compelled by law to develop an employment equity plan, whose objective is to secure employment equity and fair treatment in the workplace. From my perspective, employment equity is what lies at the very heart of transformation. The entire process by which barriers to employment are identified, through to the deployment or the development of barrier removal action plans, present the ideal opportunity for

women to ensure that firm policies and practices work for and serve us well as women.

In our case, when we went through the process of consultation, and analysis of our policies and workplace procedures, from a Webber Wentzel perspective, we identified the need to develop an extremely robust gender strategy, as a retention mechanism for women in the firm. The strategy covers a number of initiatives, which are designed to support our careers in a manner that is empowering and rather than in a manner that ends up stereotyping us in a negative way and as women with special needs. One issue of overwhelming significance for us pertains to when a woman is at the prime of her career, but also chooses start thinking about a family. In this regard, we realised that while our policy was and remains best practice, we needed to develop a maternity programme that will serve two purposes. First of all, to afford women who are pregnant, much greater support throughout that life cycle of her pregnancy to when she returns to work, and secondly, to empower her team in a manner that ensures an ease of transition back into the firm at the end of maternity leave. I am sure those of you who have gone through this

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exercise, have experienced the situation where you leave for maternity leave and when you get back you have to start your practice from scratch, because your clients have gone to your other colleagues and there is no way of making sure that you, necessarily, can get those back.'

Attorney Beverly Clark noted that it is time women practitioners ask themselves two important questions. 'One, what are we as women not doing that our male colleagues are doing, or are doing better than we are? And two, what do we as women bring to the table that through our powerful leadership could change the profession for the better? In answer to the first question, I think that many women lack the hard skills, the business skills; management and finance skills, which men seem somehow to acquire while we are not looking. ... I do not want to generalise, but for whatever reason, the statistics show that many women come out of law school with few, if any, business skills. We then rush into practice, often snapped-up for articles before men ... but we are so busy fulfilling multiple roles of professional, mother, partner, home maker that the little free time we have is not likely to be spent on brushing up on our financial acumen,' Ms Clark said.

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Court-annexed mediation

One of the breakaway sessions at the AGM was on court-annexed mediation. This session gave an update on the process. Developments in family arbitration was also discussed.

On the panel was Acting Judge, Cassim Sardiwalla; LSSA alternative dispute resolution committee member, Ebrahim Patel, as well as LSSA family law committee members, Susan Abro and Zenobia du Toit.

The facilitator of the session, Co-chairperson of the LSSA, Jan van Rensburg, said that over the last couple of years, South Africa has been criticised for its civil procedure and litigation process in court. 'We are too slow, we are too expensive, we are too technical, and a lot of other criticisms were raised against the system. Now, one of the solutions that we are looking at is the court-annexed mediation,' he said.

Judge Sardiwalla said that court-annexed mediation was a very important

topic that has raised many eyebrows, and had received tremendous support and just as much criticism.

Judge Sardiwalla gave some background on court-annexed mediation. He said that the project was launched in Mafikeng in 2015 and that it is a project that was initiated by the former Minister of Justice and Constitutional Development, Jeff Radebe. He added that the process of drafting rules commenced almost three years prior to the actual launch of the project. 'It was in 2014 that the Minister appointed an Advisory Committee to advise him on the project and its roll-out and I... have been heading that project,' he said.

Judge Sardiwalla explained what court-annexed mediation is. 'It is a mediation process that is linked to the courts, not controlled by the courts, not a function of the courts, not a function of anyone within the court system, but an independent facility that is housed, for convenience, at courts,' he said.

He added that the background behind the court-annexed mediation was that litigation has become far too expensive and that the majority of the people in this country cannot afford to resolve their disputes in a formal manner. 'And many a families and many individuals have been totally destroyed because of disputes that could have been resolved. They just did not have the capacity and the support to have these disputes resolved,' he said.

Judge Sardiwalla said that the process of court-annexed mediation was accessible to everyone, although, targeted for the less fortunate. He added that in the two years since the launch of the 12 sites in Gauteng and North West, 1 500 disputes had been resolved.

Judge Sardiwalla said that there has been consultation with the universities where deans of all the faculties of law were addressed about this mediation. He added that his committee had received an overwhelming nod for the project and the deans are planning to introduce mediation as a course in the LLB degree.

Judge Sardiwalla also said that there has been great interest by state organisations. The State Attorneys have met with them on several occasions, they would like to use the court-annexed mediation process to try and have a first bite at resolving disputes in a semi-formal way, without the court process.

Mr Patel said the most important things when we look at any new system, is that it needs to be user focused and accessible.

Speaking on family arbitration, Ms Abro said that it was going to happen and that it was going to happen very soon. 'We are already training. We already have the draft rules. We are already discussing with the government and with the Rules Board about amending the Act to remove the prohibition. However, because family lawyers are so progressive, we are going to start anyway,' she said.

Explaining what family arbitration was and how it would work, Ms Abro said: 'An arbitrator will be allocated, you can choose your own arbitrator or you can get assistance in choosing one, and then the parties will agree, in advance, that the award will be made an order of court. So, it is along the same basis as the settlement agreement, except you are now going to have an objective third party making the decision, upon which you have agreed.'

Ms Abro said that the Family Law Arbitration Forum of South Africa was already on the way. She explained that people from the United Kingdom came to South Africa to assist in family arbitration training.

Ms du Toit said arbitration identifies issues, reduces obstacles to communication between parties, limits time, is cost effective, maximises the exploration of alternatives and assists the parties in reaching agreements.

She added that s 2 of the Arbitration Act 42 of 1965 (the Act) prohibits family law arbitrations, but in many cases family law arbitration has been allowed where there are specific agreements in court orders that the financial aspects of divorce be arbitrated post-divorce. She added that in 2001, the law commissioner recommended that the Act should be amended to permit arbitration, but 'very sadly that derailed and went onto the back burner'. 'We envisage that the Arbitration Act will be amended so as to provide for arbitration in family law,' she concluded.

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High Court judge granted special leave for Facebook comments

Justice and Correctional Services Minister, Michael Masutha, placed Judge Mabel Jansen of the Gauteng Division of the High Court, Pretoria on special leave following a complaint laid against the High Court judge over her Facebook comments about black people and rape. Judge Jansen's Facebook comments caused public outrage.

In a press release, the Justice Department said Minister Masutha's granting of the leave follows the request from Judge President Dunstan Mlambo of the Gauteng Division of the High Court, to place Judge Jansen on special leave, pending finalisation of a complaint submitted to the Judicial Services Commission (JSC).

The minister also approved an acting appointment to fill the vacancy during this time.

The JSC also issued a press release stating that it notes with concern the public outcry of the social media posts attributed to Judge Jansen. It went on to state that 'all judges are subject to the Code of Judicial Conduct, which serves as the prevailing standard for judicial conduct which judges must adhere to.'

Explaining what steps to take in laying a complaint against a judge, the JSC said: 'A complaint of alleged misconduct against a Judge can be lodged with the Judicial Conduct Committee (JCC) by way of an affidavit or an affirmed statement specifying the nature of the complaint and the facts on which the complaint is based. Such a complaint will then be dealt with by the JCC in terms of the JSC Act.'

The JSC also confirmed that a complaint had been lodged by advocate Vuyani Ngalwana SC in his capacity as the Chairperson of the Advocates for Transformation and also in his personal capacity with the JCC.

On 12 May the Black Lawyers Association (BLA) delivered a memorandum to the court manager at the Gauteng division in Pretoria, Jeanette Ngobeni. The memorandum is addressed to the Judge President Dunstan Mlambo, but was delivered to Ms Ngobeni in his absence.

Handing over the memorandum the BLA president, Lutendo Sigogo, said the BLA demands -



Black Lawyers Association President, Lutendo Sigogo, handing over the BLA's memorandum on Judge Mabel Jansen to court manager Jeanette Ngobeni.

- Judge Jansen to resign from her position as a judge with immediate effect;
- impeachment of Judge Jansen in terms of s 20(4) of the Judicial Service Commission Act 9 of 1994; and
- judicial review of all the criminal cases (especially rape and murder cases) in which Judge Jansen presided over where black people were involved either as an accused person or victim.

Mr Sigogo also said: 'Judges are not law unto themselves. Judges account to the people of South Africa through the Constitution. This is why they must be careful of what they say in and outside courts. There are codes and laws which governs how they should conduct themselves, we expect Judge Jansen to be conscious to this moral expectation.' Adding that Judge Jansen broke the oath of her office that she will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. 'To generalise and conclude that all black men are rapists is a racist remark outlawed by

the Constitution. It shows her prejudice against black people as a whole. She cannot be trusted to adjudicate on criminal cases (rape and murder) involving black people either as culprits or victims,' he said.

Meanwhile, several legal bodies have expressed their shock and concern. The Law Society of South Africa issued a press release urging the JSC to deal with the allegations of racism expeditiously and transparently, so as to not aggravate an already inflammatory and complex situation around the issues of racism in the country. In a press release Co-chairpersons Jan van Rensburg and Mvuso Notyesi said: 'Racist comments as we have seen repeatedly this year - and more so from a judge - are polarising and traumatic for our society. Society demands an explanation.'

The KwaZulu-Natal Law Society (KZN-LS) stated that it was 'incomprehensible that a judicial officer should make such prejudicial utterances where such office is held to the highest account in upholding our Constitution and Bill of Rights.' It added that it was 'equally concerned

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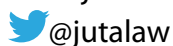
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Black Lawyers Association members at the Palace of Justice at the High Court after the BLA president delivered the BLA's memorandum pertaining to racist remarks by Judge Mabel Jansen.

that the judge's alleged comments were only made public a year after they were made.'

The KZNLS said it was imperative that the JSC deals with the matter expeditiously in order to defuse the volatile atmosphere of repeated racist comments 'under which we are all bearing heavily and against which all South Africans must emphatically stand and take measures to root out.'

In its press release, the National Association of Democratic Lawyers (NADEL) stated: 'Section 165 of the Constitution of South Africa states that courts are

subject only to the Constitution and the law which they are required to apply impartially and without fear, favour or prejudice. The South African judicial ethics state that in order for the judiciary to fulfil its constitutional obligation, the judiciary needs public acceptance of its moral authority and integrity. A duty is placed on judicial officers to maintain and protect the status of the judiciary. Judges are to refrain from expressing views in a manner which may undermine the standing and integrity of the judiciary.'

In the press release, NADEL goes on to

state that Judge Jansen's comments, if well founded, impugn the integrity, and undermine the independence of the judiciary adding that the alleged comments amount to a serious and gross misconduct that violates the Constitution and the judges oath of office to uphold, protect and apply the Constitution without fear, favour or prejudice.

NADEL goes on to state: 'The statements further cast doubt as to her fitness to hold the office of a judge and her ability to execute her duties in a manner that will ensure that all those who appear before her will receive equal protection and the benefit of law. From her statements it is clear that she harbours racial prejudice against black males, believing them to be rapists and therefore guilty until proving themselves innocent. This mentality from a judge is a threat to proper administration of law and the culture of human rights which is enshrined in our Constitution.'

NADEL has also lodged a formal complaint with the JSC where it also requested the JSC to investigate the complaint against Judge Jansen and to take appropriate action to recommend that she be removed as a judicial officer as contemplated in s 177 of the Constitution.

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Limpopo High Court launched

The Limpopo Division of the High Court in Polokwane is now operational. It was launched on 25 January. Judge Ephraim Mampuru Makgoba is Judge President of the division, which was proclaimed on 15 January.

The High Court Building in Polokwane has two blocks; block A is the actual High Court building with six criminal courts and 11 civil courts, while block B houses offices of the State Attorney, National Prosecuting Authority, Master of the High Court, Legal Aid South Africa, the Family Advocate and the office of the Chief Justice's provincial centre.

The opening of the Limpopo High Court also saw the launch of the Polokwane Society of Advocates (also known as the Polokwane Bar Association (PBA)), which is affiliated to the General Council of the Bar of South Africa. Its chairperson is advocate William Mokhari SC.

At the launch of the PBA, Mr Mokhari, who gave the keynote address, said



*The new Limpopo High Court in Polokwane.
Photo credit - Advenga Inc.*

the PBA is a non-racial Bar association. He said the establishment of the Bar, was a culmination of a desire by some advocates who said that given that the

province now has a High Court, it must have a respectable Bar established in the province.

Addressing the attorneys present at

the launch, he said: '... this occasion represents the beginning of a partnership that must last for a very long time. Partnership between you and the advocates that you brief in terms of the structure of our profession, the ethical rules that advocates will not take instructions directly from a lay client. And you remain a bridge between the advocate and the client, but you also remain an important pillar to the advocates' ability to execute their briefs with the abilities that they may have, your presence here should also serve to interact with the advocates and start building relationships.' He added: '... to ordinary men and women of this province, rich or poor, I say that here we are, we have come to this province to bring to you the best legal practice at your doorstep. Our members will execute the briefs they get irrespective of from who or where they come from, because their ethical duty is to represent their clients with the best intellectual capabilities they have. Our members remain independent and independent minded but they also understand that their independence must be guided by the ethical rules of the profession.'

Mr Mokhari warned the advocates that Limpopo was different to Johannesburg as Limpopo was largely rural. 'Here we



*The office of the Polokwane Society of Advocates in Polokwane.
Photo credit - Advenga Inc.*

are going to be confronted with people who largely come from rural areas, be patient with them, understand that they do not have the money and this is all because of historical settings of our country; give them justice in accordance with your ethical principles that those who cannot afford, still deserve to be represented by you ... This is a commitment that I would like the members of this Bar

to make because if they do not do it that way, the formation and existence of this Bar is worthless,' he said.

The High Court is situated at 36 Bickard Street in Polokwane.

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Best articles in *De Rebus* for 2015

Johannesburg attorney, notary and conveyancer, Diana Mabasa, has won the 2015 LexisNexis Prize for Legal Practitioners for the best article by a practising attorney published in *De Rebus*.

She has won the award for her article titled 'Ukuthwala: Is it culturally relative?' which was the cover feature in the August issue last year (2015 (Aug) *DR* 28). The article dealt with the controversial practice of *ukuthwala* and highlights how *ukuthwala* affects only black women and girls in a negative way. The article also proposes a particular kind of intervention for law and policy reform, which will combine the effects of race and gender discrimination to assist in delivering effective strategies for the security and wellbeing of those historically marginalised as a result of race and gender.

Ms Mabasa said that she is 'ecstatic' about winning the prize. She has won a Lenovo tablet and one year's free access to LexisMobile.

Ms Mabasa is the founder of Diana Mabasa Inc. She specialises in environmental and constitutional law. She has



Johannesburg attorney, Diana Mabasa, has won the 2015 LexisNexis Prize for Legal Practitioners for the best article by a practising attorney published in De Rebus.

also acted as a judge in both the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg High Court and is involved in various community based



Krugersdorp attorney, Nokubonga Fakude, has won the 2015 Juta Prize for Candidate Attorney article for the best article by a candidate attorney.

organisations which strive to uplift and empower women and girls.

Meanwhile, Krugersdorp attorney, Nokubonga Fakude, has won the 2015

Juta Prize for Candidate Attorneys for her article titled 'Redundant or relevant? The law of unjustified enrichment' published 2015 (Apr) DR 36.

The article was on the South African law of unjustified enrichment and the action of the unauthorised administrator where Ms Fakude investigated the relevance of the two actions in current South African law.

Ms Fakude wrote the article while she was doing her clerkship at Krugersdorp law firm, Mauritz Breytenbach Attorneys. When asked what inspired her to write the article Ms Fakude said: 'In the final year of my LLB study, the law of unjustified enrichment formed part of the curriculum. At that stage I had completed

the other fields of law that later became relevant in the article in question. While undertaking my studies in the law of unjustified enrichment I came across a few topics that I considered as having "loop-holes". Due to the nature of my studies there was not much of a platform to express this (apart from class discussions and consultations) because when writing tests and exams one has to answer questions precisely and not deviate from what is being assessed. Therefore, once I began with my articles of clerkship ... I would ... read *De Rebus* to keep myself up to date with the law ... and that is when I decided to [write an article].'

At the time of going to print Ms Fakude was still employed at Mauritz

Breytenbach Attorneys and was awaiting her board exam results. She has a strong interest in commercial law and commercial litigation and enjoys civil procedure and the interpretation of statutes and contracts.

Ms Fakude has won a tablet and a Jutastat online Essential Legal Practitioners Bundle.

• Would you like to write an article for *De Rebus*? Turn to p 4 for more information or visit our website at www.derebus.org.za for article guidelines. – Editor

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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.

Cox Yeats in Durban has new appointments and promotions.



Tsele Moloi has been promoted as an associate.



Jenna Padoa has been appointed as a partner.



Carol McDonald has been appointed as a partner.



Left to right: Spencer Cason has been appointed as an associate, Wade Ogilvie has been promoted as an associate, Laura Maitre has been promoted as an associate, Douglas de Jager has been appointed as an associate.



Kunene Ramapala Inc in Bryanston has appointed Sandile Ngwane as an associate. He specialises in commercial litigation, advisory services and employment law.

Bowman Gilfillan has three new appointments.



Bonnie Steyn has been appointed as a partner in the dispute resolution department in Cape Town. She specialises in litigation and dispute resolution.



Warren Hamer has been appointed as a partner in the real estate department at Bowman Gilfillan's new office in Durbanville. He specialises in property development and commercial conveyancing.



Zano Nduli has been appointed as a partner in the mergers and acquisitions department in Johannesburg. He specialises in corporate transactions in the banking, gambling, insurance and mining industries.

Smit Sewgoolam Inc in Johannesburg has four promotions and one new appointment.



From left: Kris Harmse, Megan Rosseau, Peto Otto, Loni Supkaran and Siphelele Kubheka.

Kris Harmse, Megan Rosseau, and Loni Supkaran have been promoted as associates. Mr Harmse and Ms Supkaran are employed in the foreclosures department. Ms Rosseau is employed in the insolvency and debt review department. Peto Otto was promoted as a senior associate in the litigation department. Siphelele Kubheka was appointed as an associate in the commercial department.

Kekana Hlatshwayo Radebe Inc in Johannesburg has four promotions and one appointment.



Back, from left: Jabulani Mkhwanazi has been promoted to a senior associate, Tlou Mokgohloa has been promoted to an associate, Thabang Shivambo has been appointed as a professional assistant. Seated, from left: Simiso Sukwana has been promoted to a director, Vincent Vos has been promoted to an associate.

Klagsbrun Edelstein Bosman De Vries Inc in Pretoria has two new appointments.



Candace Deppe has been appointed as an associate in the corporate and commercial department.



Venashan Seerangam has been appointed as an associate in the tax department.



Christodoulou & Mavrikis Inc in Johannesburg has appointed Alex Protulis as a director. He specialises in commercial, franchise, cyber law and commercial litigation.

Managing IP Global Awards

Managing Intellectual Property (IP) held its 2016 Managing IP Global Awards in London in March. The awards recognise the outstanding IP law firms of the past year.

This year, Adams & Adams was awarded the regional prize for the leading law firm in Africa while Spoor & Fisher received the prize for the best IP law firm in South Africa.

The other shortlisted South African law firms were Sandton law firms, Bouwers Inc and KISCH IP; and Cape Town law firm, Von Seidels.

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

First recommendations emerge from National Forum deliberations

At its fifth meeting on 23 April, the National Forum on the Legal Profession (NF) resolved to recommend to the Justice Minister that there should be nine provincial councils under the Legal Practice Council (LPC), one situated in each province. The Governance Subcommittee of the NF has been debating the structure of the LPC over several meetings and has considered various options ranging from four provincial councils based on the jurisdiction of the current four provincial law societies, to six provincial councils. The majority of the subcommittee members finally resolved to recommend nine provincial councils (s 97(1)(a)(ii) of the Legal Practice Act 28 of 2014 (the Act)). The NF must take into account s 23(2) (a) of the Act, which enjoins it to take into consideration the interests of legal practitioners, candidate legal practitioners and the public, as well as provincial needs, interests and sensitivities. Accessibility for the public and for practitioners is also paramount.

A provincial council will consist of between eight to 12 council members. The proportion of attorneys to advocates at each provincial council will be determined by the number of attorneys and advocates in the province.

The NF also resolved to recommend

that there should be committees (s 23(6)) at each seat of the High Court where there is no provincial council. The committee will consist of not fewer than four legal practitioners.

The functions that are to be performed at national level by the LPC and those that it can delegate to the provincial councils and the committees were allocated at the three levels. It was agreed that not all provincial councils and committees will necessarily perform the same delegated functions. The delegation of functions will be determined by considerations of what is practical and cost-effective.

An initial basic organogram for the LPC and provincial councils was approved on the above basis.

However, it was resolved that the NF will appoint an organisational development advisory company to interrogate the above structure for cost efficiency and effective functioning. This may eventually result in a different configuration of provincial councils and committees, as the cost of the structure will ultimately impact on the subscription to be paid by legal practitioners.

Elections of LPC councillors

Section 7 of the Act determines that 16 of the 23 councillors of the LPC will be

legal practitioners (ten practising attorneys and six practising advocates). These 16 councillors must be elected. The NF resolved that only practising legal practitioners will be entitled to vote for council members.

The other seven council members are nominated as follows –

- two teachers of law (one a law dean and the second a teacher of law);
- three designated by the Justice Minister;
- one designated by Legal Aid South Africa; and
- one designated by the Legal Practitioners Fidelity Fund.

Code of Conduct and Rules

The NF considered a first draft of a Code of Conduct, as well as rules that will apply to both attorneys, advocates practising with trust accounts and referral advocates. This is an extensive work in progress and members of the NF have undertaken to consider the first draft and make preliminary comments to the Rules and Code of Conduct Committee next month.

- See also 'National Forum on the legal profession: One year on (2016 (March) DR 10.

Network with colleagues from the SADC region in Cape Town on 17 to 19 August 2016

Do you advise clients who are considering expanding in the Southern African Development Community (SADC) region? Are you looking for a correspondent or associate in one of the SADC countries?

The 2016 SADC Lawyers Association annual conference and general meeting (SADC LA ACGM) is the premier event for lawyers in the 15-member SADC region and will provide an opportunity for practitioners to network with colleagues from the region. This is only the second time this conference is being hosted in South Africa. The venue for this year's conference is the Cape Town International Convention Centre (CTICC) from 17 to 19 August.

The event has grown over the years in profile and relevance to the legal community, the governments of SADC, civil society partners, citizens of SADC and the business community. From attendance by a handful of lawyers at inception, the SADC LA ACGM now attracts an average of 500 participants annually. Participants are drawn from practising lawyers and advocates, Ministers of Justice, the Attorneys General, members of the judiciary, human rights advocates and civil society actors.

Special networking session

Open only to registered conference delegates, the networking session will provide an opportunity for practitioners

seeking to learn more about practising in the SADC region or seeking to meet and network with practitioners in specific SADC countries.

How the networking session will work:

- Separate registration is essential for this (included in your conference registration).

- Firms will complete a registration form, which includes all their contact information and areas of specialisations.

- Firm profiles will be included in a prospectus that will be circulated to all those registered for the networking session before the conference.

- Contact a firm or practitioner prior to the conference and arrange to meet at the networking session in Cape Town.

- Or just attend the networking session and meet your colleagues there.

Conference topics

Conference sessions over the two days will cover topics that are relevant and critical across the region and include –

- environmental regional challenges;
- wildlife poaching – legislative frameworks;
- prosecutions;
- closing trafficking routes;
- lessons from Kenya: Developments in commercial arbitration in the region;
- finding a balance between the free movement of persons (immigrants, asylum seekers, migrants) and combatting human trafficking; and
- the appointment of judicial officers: How selection processes contribute towards independent, impartial and accountable judiciaries.

The plenary session on Thursday, 18

August will be a keynote address by His Excellency, Festus Mogae, Former President of the Republic of Botswana, who is an internationally acclaimed economist.

The plenary session on Friday, 19 August will focus on economic protection and the role of African multilateral institutions (the New Economic Partnership for Africa's Development, the SADC and the African Union), in particular the impact of economic partnership agreements and regional integration processes in the SADC region.

Social functions

An opening cocktail will be held on Wednesday evening, 17 August. Separate registration is required for the opening cocktail. The conference closing gala dinner will be held on Friday evening, 19 August in the Ballroom at the CTICC. Gala dinner attendance is included in the conference registration.

Accommodation

Accommodation has been negotiated with a number of hotels within easy access of the CTICC.

Sponsorship opportunities: Showcase your firm or products to the SADC legal community

Sponsoring the event provides an opportunity for firms to showcase their services to their colleagues in the region. Service providers to the legal profession will have the chance to exhibit and demonstrate their products. A range of sponsorship options are available to suit all budgets.

- More information on the conference can be viewed on the LSSA website at www.LSSA.org.za. Alternatively e-mail barbara@LSSA.org.za or prudence@sadcla.org

Registration is now open for the 17th SADCLA Annual Conference and General Meeting co-hosted by the SADC Lawyers Association and Law Society of South Africa Cape Town International Convention Centre 17 to 19 August 2016

Breakaway sessions

- Environmental regional challenges: Wildlife poaching
- Developments in commercial arbitration in the region
- Finding a balance between the free movement of persons and combatting human trafficking
- Appointment of judicial officers: How selection processes contribute towards independent, impartial, accountable judiciaries

Plenary sessions

- Keynote address by world-acclaimed economist, His Excellency Festus Mogae, Former President of the Republic of Botswana
- Focus on economic protection and the role of African multilateral institutions (NEPAD, SADC and AU) - The impact of economic partnership agreements and regional integration processes in the SADC region.

Reduced rates for South African practitioners until 31 July 2016

SPECIAL NETWORKING SESSION FOR LAW FIRMS

Marketplace forum for practitioners seeking to learn more about practising in the SADC region or seeking to meet and network with practitioners in specific SADC countries.

SPONSORSHIP OPPORTUNITIES

Showcase your firm or products to your SADC colleagues.

Register online at www.LSSA.org.za
or request a registration form: LSSA@LSSA.org.za
or call (012) 366 8800

Meet and network with your SADC colleagues



By the financial
forensic unit of
the Attorneys
Fidelity Fund

Does cyber risk impact the practitioners' environments?

With the evolving use of technology, and the evolving need for use of technology, all players in all industries find themselves at one point or another confronted by cyber risk. The Institute of Risk Management (IRM) defines 'cyber risk' as 'any risk of financial loss, disruption or damage to the reputation of an organisation from some sort of failure of its information technology systems' (www.thirm.org, accessed 5-5-2016).

While in the past some organisations could survive without the use of any kind of information technology (IT), nowadays organisations find difficulty or even impossible to exist, let alone survive, without any form of engagement with IT. It is for this reason that as part of the high risks identified, in almost all industries, cyber risks is on top of the risks list. While businesses have seen and embraced the benefits of using IT, criminals have also seen and embraced the opportunities that present themselves as risks to businesses, which are brought about by innovations. The same innovations are used to circumvent the benefits for legitimate businesses. Practitioners are not immune from such risks and could easily find themselves victims of cybercrime if no measures are taken.

Cybercrime has no colour, no age restriction, no gender and everyone is at risk. Anyone who uses technology, irrespective of the instrument used, be it a desktop, a laptop, a tablet or a smartphone may be at risk. The first step to dealing with cybercrime is to acknowledge that you are at risk. You may like to believe that you are careful enough, and maybe you are, but is everyone around you, everyone that shares your IT resources and/or equipment, as careful? Some people think cybercrime attacks only happen to people who are tech savvy. The truth is, even the less technologically advanced people can fall victim to cybercrime attacks. If you make use of a smart device, laptop, desktop, tablet, or any other form of computer equipment which accesses e-mails, Internet, etcetera, you are potentially a victim to cybercrime. It therefore becomes im-

portant that as a business person you protect yourself and your business from cyber-attacks. These attacks do not give notice, once it hits, you are doomed, and therefore, you have to be on guard. It becomes crucial that as a practitioner you identify all potential events that can make your business susceptible to cyber risks. Readers are urged to also read the articles 'Find the problem before it finds you' (2015 (July) *DR* 29) and 'Technology a necessary tool' (2016 (March) *DR* 15).

Data storage

Practitioners are in possession of personal, business and financial information by virtue of their business. This information, in more cases than not, resides on computers. Criminals work tirelessly trying to get into practitioners' records to get information about their clients, be it for a specific purpose or just for the fun of it, yes, some do it for fun just to prove a point. Irrespective of the motive, the practitioner is expected to protect and keep the information at his or her disposal confidential. Access to client information may result in breach of confidentiality, which may result in problems for the practitioner and the firm. Some of the information is onsite at the practitioner's offices and some is offsite as backed up information. The Protection of Personal Information Act 4 of 2013 (POPI) specifically deals with issues of divulgence of personal information to other parties without the consent of the owner of that information. Should information or data relating to clients and stored by the practitioner find its way to the wrong hands, the practitioner and the firm may find themselves facing the might of the law.

Here are some of the measures that practitioners may put in place to protect and ensure confidentiality of client information:

Practitioners need to ensure physical security of computer equipment and access controls. Computers are physically secured if kept in places where not anyone and everyone can have access

but only authorised persons. Access controls are present where authorised persons can be identified to log into the computers and specific software and applications. Computers can identify authorised persons in various ways ranging from unique passwords, to finger or thumb prints, to lock patterns, etcetera. Should the form of access identification be a unique password, it is important that rules are built into applications on how authorised persons should create their passwords. These passwords should be strong enough to avoid being easily cracked by criminals. An example of a strong password could entail that it is has at least one capital letter, numerical number and some special characters with a minimum number of characters. Having a strong password may not necessarily be enough, but there is a need for the password to be changed periodically. Staff have a tendency of sharing passwords among themselves. It is in the practitioner's interest to ensure that staff are trained and made aware of the risks of sharing passwords and what impact it could potentially have on the firm and on them individually should information or data pertaining to the clients of the firm leak and it is discovered that their passwords were used.

While all staff at a firm may have access rights to systems and/or applications, it may differ depending on the levels of the employees or the need to have access to the information. Some access may be limited to viewing rights, while some may extend to amending rights, all this goes with responsibility. Breach of confidentiality should be avoided through cautious assignment of access rights to approved individuals, rendering access to information only for a purpose for which it is intended and for the duration of time the information should be used.

The practitioner should also implement robust legal mitigating measures against breach of confidentiality. These may include incorporating confidentiality clauses in contracts such as employment contracts or other business contracts. Where practitioners have engaged third parties that interact with the firm's

information systems, the practitioner must get comfort over the following:

- Adequacy and sufficiency of physical and management controls of third-party service providers.
- Are third-party staff adequately trained in information and data privacy and protection?
- Are there third party employees or staff vetting and monitoring mechanisms where sensitive and confidential data is in place?
- Practitioner may request a cyber risk management policy from the third parties.

Readers are encouraged to also read the article 'Outsourcing by legal practitioners' (2015 (Sept) DR 28).

Communication systems

Communication is an integral part of the function of practitioners. In today's world there is electronic communication between the practitioner and the clients. Cyber risk existence may be demonstrated in the form of misleading and incorrect statements on e-mail, websites or any other Internet-based platforms and may lead to compensation claims and loss of reputation by the practitioner. The practitioner should be alert to the use of social networking sites by staff. Staff may post unwarranted statements on the social media related to the firm's business matters. This may require of firms to have robust policies in place regarding use of computer equipment and social networking sites at the firm. Where staff are found to be using computers in contravention of the policies, a strong message should be sent to the rest of the staff through actions taken against the perpetrators in order to serve as deterrent mechanism.

Some practitioners and/or firms also make use of Electronic Fund Transfer (EFT) systems to transact on the accounts, and this method of transacting has proved to be very efficient. During the transaction, systems communicate with other systems and hackers can intercept that communication and gain access to funds illegally.

The Attorneys Fidelity Fund (the Fund) has recently introduced a portal used by the provincial law societies to issue Fidelity Fund Certificates to practitioners. Practitioners access the system via the Internet from any device, wherever they are. A huge amount of information about the practitioners and firms is stored on the portal and security of the portal is vital. Professional hackers have tested the system for potential flaws that may result in hacking and ensured that the portal is secured. Practitioners should equally ensure security on their side as they interact directly with the portal.

Online hacking and activism

Some practitioners may have websites or other information technology applications linked to their internal information systems. Practitioners need to be aware of cyber-attacks that may be perpetrated over the interfaces between internal applications and the website. An example would be phishing. 'Phishing' is defined as an 'act of illegally gaining access to a computer, stealing private information and then utilising that information for harmful activities. ... popular through various e-mail frauds and Internet related activities' (www.thelawdictionary.com/phishing, accessed 19-5-2016). There may be financial implications associated with online activism as attacks perpetrated through phishing of sensitive and confidential client information may render the firm's information systems unavailable.

One of the risks that is emerging from online activism is the use of malicious programs that encrypt data and information pertaining to client and use of malicious e-mails or short messages demanding payment for decryption or release of the information. Practitioners may be faced with financial losses as a result of online hacking and activism and need to be aware of the adverse impacts of online hacking and activism on the practitioners operations and information systems. In order to curb oc-

currence of these incidents, the practice may consider the following:

- IT security controls that focus on the secure isolation of practice critical information and data.
- Practitioner information system intruder detection.

IT hardware

Cyber risk arises in an environment where there is also hardware components such as computers, mobile tablets and mobile phones. Practitioners should consider the risk of damage or loss to the hardware component. Practitioners must ensure that all devices used in furtherance of the practitioner's operations are physically and logically controlled. No unauthorised parties should have access to the devices carrying sensitive and confidential client information.

Practitioners need to maintain a high level of sensitivity of areas within the practice that are susceptible to cyber risk. A continuous review of the emergence of cyber risk is critical to the rapidly changing IT and communications era to prevent attacks on the firm's information assets.

Conclusion

Practitioners should always ensure that they understand the environment that they operate under and have the necessary controls in place to deal with uncertain events that may present themselves. Cyber risk management is not a one-time or once-off event, but a continuous battle that for as long as you make use of computer devices you have to be aware of. It hits when you least expect it and, therefore, requires that at no point should you relax your controls. Cyber risk is a reality and its results can be very devastating and it should never be undermined.

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



What we do for ourselves dies with us. What we do for others and the world remains and is immortal – Albert Pine

www.salvationarmy.org.za

Biotech inventions – the impact in South Africa of recent case law in other jurisdictions

By Chyreene Truluck and Waheed Mahomed

The decision of the United States (US) Supreme Court in *Association for Molecular Pathology, et al. v Myriad Genetics, Inc., et al* 569 U.S. 133 S.Ct. 2107 (2013) (the US *Myriad* case) was a landmark case on the patentability of biotechnological inventions. In particular the US *Myriad* case dealt with the issue of patentability of naturally occurring genes or nucleotide sequences, which have been isolated and characterised. Myriad Genetics, Inc. is a molecular diagnostic company specialising in predictive and personalised cancer diagnostic methods centred on the isolated BRCA1 and BRCA2 genes and was founded as a spinoff company out of the University of Utah. In August 1994 the first BRCA1 gene US patent was filed followed by the BRCA2 gene US patent in 1995. In 1996, Myriad launched their BRCA Analysis product, which detects certain mutations in the BRCA1 and BRCA2 genes that put women at high risk for breast cancer and ovarian cancer. Their discovery of the breast cancer gene, BRCA1 was universally acclaimed as a monumental achievement, but sparked controversy regarding the patentability of DNA molecules and their use in diagnosis and drug identification. Prior to the case against Myriad Genetics, the US Patent and Trademark Office (USPTO) had granted numerous patents in respect of technologies containing isolated DNA sequences as a composition of matter.

In the US *Myriad* case, a number of US courts, and finally the US Supreme Court, considered whether claims directed to isolated genes, diagnostic methods and methods for identifying drug candidates were valid under 35 U.S.C. § 101 which states that: 'Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.' The judicial exceptions to this section include laws of nature, natural phenomena, and abstract ideas.

The Association for Molecular Pathology, along with several medical associations, researchers and doctors challenged the resulting BRCA1 and BRCA2 patents,

granted by the USPTO. In its landmark decision, the US Supreme Court held that naturally occurring DNA sequences and natural derivative products from such sequences are not patentable as they are natural phenomena, or products of nature. However, it was held that synthetically produced complementary DNA (cDNA) and gene sequences modified by synthetic processes, and their products are patentable. It was also emphasised by the US Supreme Court that the claims of the BRCA1 and BRCA2 patents, which were directed to new applications of knowledge for naturally occurring DNA sequences, were not challenged and as a result these in all likelihood are valid.

This decision, although welcomed by many, created some confusion, as it only related to human DNA sequences, and raised questions about how proteins and non-human DNA would be treated. In December 2014 the USPTO published the 2014 Interim Guidance on Subject Matter Eligibility, which was updated in July 2015 (the guidelines). These documents set out the USPTO's interpretation of subject matter eligibility requirements of 35 U.S.C. § 101 in view of the US *Myriad* case and others. The primary guidance provided is that naturally occurring substances and substances that do not have 'markedly different' characteristics to what occurs in nature are not patentable under 35 U.S.C. § 101. In other words, the primary test is whether the claimed product, or product of a claimed process is markedly different from its naturally occurring counterpart.

In 2015, the issue of patentability of the BRCA1 gene by Myriad arose again in Australia in *D'Arcy v Myriad Genetics Inc* [2015] HCA 35 (the Australian *Myriad* case). In the Australian *Myriad* case the Australian High Court decided that claims directed to an isolated nucleic acid coding for a mutant BRCA1 protein is not patentable. Under Australian patent law, in order to be patentable an invention must be 'a manner of manufacture', which has been preserved as the threshold test for patentability, and interpreted by the courts over time. In the Australian *Myriad* case, the court stated that an isolated nucleic acid is not 'made' by human action as contemplated by Australian law, but rather it is discerned. The Australian High Court further held

that a nucleic acid bearing certain mutations or polymorphisms depends on the characteristics of the person from which it is isolated and has nothing to do with the person isolating it. The court also reiterated the warning that a patent over a single gene may prove to set up a barrier against its use in a genetic procedure for a different condition. It thus held that claims to the gene or nucleic acid sequences themselves are too broad. It was noted in the decision that: 'For the primary judge, the issue of patentability turned on ... whether an isolated nucleic acid, which may be assumed to have precisely the same chemical composition and structure as that found in the cells of some human beings, constitutes an artificial state of affairs', which was held not to be the case.

In light of the decision the Australian Patent Office has issued a note on updated examination practices, which was released in January 2016, following the Australian *Myriad* case. In an interesting move, and perhaps in an effort to inspire confidence in the biotech sector, the Australian Patent Office proposed in December 2015 to retain patentability of most naturally occurring products, with the exception of coding nucleic acid sequences. However, the finalised examination practice note states that naturally occurring nucleic acids, whether human or non-human, coding or non-coding, are excluded from patentability based on the decision in the Australian *Myriad* case. Claims to cDNA, synthetic nucleic acids, probes, primers and isolated inhibitory nucleic acids will be excluded where they merely replicate the genetic information of a naturally occurring organism. However, it would seem that other biological inventions such as regulatory DNA, isolated bacteria, viruses, polypeptides, chemical molecules, cells and transgenes will still be patentable, provided they fulfil all the other requirements for patentability, namely, they are not naturally occurring, or do not merely replicate the genetic information of a naturally occurring organism.

The Australian and US *Myriad* decisions reach the same conclusion with regard to naturally occurring genes and DNA sequences but differ with regard to the patentability of cDNA, due to the differing approaches of the two courts.

The US Supreme Court held that BRCA cDNA has no natural existence and, is therefore, patent eligible. The Australian High Court focused on the information contained within the DNA molecule rather than the 'form' of the molecule and concluded that cDNA represents the same information as its complementary genomic DNA (and expresses the same protein) and was thus held to be patent ineligible.

It is worth noting that in contrast to the approach adopted in the USA and Australia, the patentability of isolated genetic sequences is expressly recognised under European law. Article 5 of the EU Biotechnology Directive provides that: 'An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element' provided that the industrial application of such sequence is disclosed in the patent application.

However, '[t]he human body ... and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.'

The current South African Patents Act 57 of 1978 does not define an invention but rather lists a number of exclusions as to what would constitute a patentable invention. In particular, s 25(2)(a) provides that a discovery is not an invention for the purposes of this Act. This is in contrast to the previous South African Patents Act where the definition of an 'invention' included a 'composition of matter'. This is similar to the wording of 35 U.S.C. § 101. Furthermore, the previous Patents Act 37 of 1952 provided that a claim for a new substance does not include that substance when found in nature.

Although South Africa has no case law on the meaning of 'discovery' or the patentability of biotech inventions, the abovementioned international cases will have persuasive value if a patent with

claims to an isolated gene or nucleotide sequence is challenged in our courts. Therefore, we postulate that from the cases discussed, as well as the both the current and repealed Patents Acts, naturally occurring nucleic acid sequences and proteins, and synthetic versions which replicate these, will likely be held not to be patentable by our courts as they will be considered to be discoveries of substances found in nature. However, this will likely not preclude the patentability of synthetic nucleic acids or proteins which are significantly different from naturally occurring sequences or new applications of nucleic acid sequences and proteins.

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By
Magdaleen
de Klerk

Claims based on universal partnerships in divorce matters

Claims based on tacit universal partnerships are frequently encountered in divorce litigation, where the spouses were married to each other out of community of property with the exclusion of the accrual system.

In several recent decided cases, our courts had to adjudicate on exceptions raised in such matters, on the grounds that allegations of a universal partnership agreement (the essence of which is profit sharing) would contradict the terms of an antenuptial contract (excluding community of profit and loss) alternatively would constitute an attempt to amend the parties' antenuptial contract, which is legally untenable (see: *JW v CW* 2012 (2) SA 529 (NCK), *AL v CE* (GSJ) (unreported case no 09/25924, 25-10-2012) (Kathree-Setiloane J) and *RD v TD* 2014 (4) SA 200 (GP)).

In the case of *RD v TD* (*op cit*) the parties concluded a partnership agreement more than two years after they were married out of community of property. The agreement applied to a commercial fish farm enterprise. The court found that the partnership, which was envisaged, constituted a separate legal entity from the matrimonial regime applicable

to the parties. The nett benefits derived from the partnership were to be divided between the parties and to accrue to their separate estates. The parties were therefore business partners like any other two individual partners, each having his or her separate estate.

The general legal principles

Our courts have, as long ago as 1945 (in the case of *Fink v Fink and Another* 1945 WLD 226 at 228) found that a universal partnership existed between spouses who were married to each other out of community of property in respect of a milk-producing business.

In *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) the Appellate Division (as it was then called) found that a universal partnership in respect of certain commercial enterprises (*inter alia*, an electroplating business) existed between spouses who were married to each other out of community of property.

In *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) at 213 it was held that a universal partnership exists if the necessary requirements for its existence are met regardless of whether the parties are married, engaged or cohabitating.

The requirements for a partnership are as follows:

- that each of the partners bring something into the partnership, whether it be money, labour or skill;
- that the business should be carried on for the joint benefit of the parties; and
- that the object should be to make a profit. (See: *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390.)

The two kinds of universal partnerships

Our law distinguishes between two kinds of universal partnerships. The first is the *societas universorum bonorum* by which the parties agree to put in common all their property, present and future. The second type is the *societas universorum quae ex quaestu veniunt*, where the parties agree that all they may acquire from every kind of commercial undertaking, shall be partnership property (see *Butters v Mncora* 2012 (4) SA 1 (SCA)).

While the *societas universorum quae ex quaestu veniunt* is confined to commercial undertakings the *societas universorum bonorum* also include the non-profit making part of their family life.

An example of a *societas universorum*

bonorum is found in the case of *Butters (op cit)* where the parties lived together as husband and wife for nearly 20 years. The court found that a universal partnership came into existence between the parties in that Ms Mncora shared in the benefits of Mr Butter's financial contribution (income of the business conducted by him) and he shared the benefits of her contribution to the maintenance of their common home and the raising of the children.

Examples of *societas universorum quae ex quaestu veniunt* are found in the cases of *Fink*, *Mühlmann* and *RD v TD (op cit)* where our courts found that universal partnerships existed between spouses only in respect of certain commercial enterprises and not all their property.

Tacit contract

In the case of *Fink (op cit)* at 228 it was said: 'If the agreement is not in writing the intention of the parties must be ascertained from their words and conduct ... the mode in which they have dealt with each other, and the mode in which it has, with the knowledge of the other, dealt with other people. This can be shown by books of accounts, by testimony of clerks, agents and other persons, by letters and admissions and, in short, by any of the modes by which facts can be established.'

In *Mühlmann (op cit)* at 124 C – D it was held that the approach as to whether a tacit agreement can be held to have been concluded was to be, 'whether it was more probable than not that a tacit agreement had been reached'. It was also stated that a court must be careful to ensure that there is an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife.

It was further stated that the following facts were indicative of a common intention that the business was a joint one for the mutual benefit of the parties:

Where a wife –

- had rendered services manifestly surpassing those ordinarily expected of a wife;
- had not worked for a salary; and
- contributions made by her towards the business in kind (assets, capital) however modest in size.

In *McDonald v Young* 2012 (3) SA 1 (SCA) at 11 it was held that: 'In order to establish a tacit contract, the conduct of the parties must be such that it justifies an inference that there was consensus between them. There must be evidence of conduct which justifies an inference that the parties intended to, and did, contract on the terms alleged.'

Exceptions raised in this regard

In *McDonald (op cit)* it was held that a court is precluded from inferring that a tacit contract had come into existence where it would conflict with the terms of an express contract.

In *JW v CW* 2012 (2) SA 529 (NCK) it was held: 'In my view an agreement that all of the parties' movable and immovable assets, both existing and future, would form part of the assets of a partnership between them, [*universorum bonorum*] would clearly be irreconcilable with the antenuptial contract, which excludes community of both existing and future property of the parties.'

...

[T]he alleged agreement would in my view have amounted to a revocation, or at the very least an amendment, of the very essence of the antenuptial contract in this case. That could not have been done, even with "the mutual consent of the parties", without an order of court.'

'The specific terms of a particular antenuptial contract may exclude a future partnership – by whatever name it may be called – if the terms of the particular partnership would contradict the antenuptial agreement.'

In the case of *AL v CE (op cit)* the defendant pleaded the formation of a *universorum bonorum*. The plaintiff raised a special plea that the defendant's claim did not disclose a cause of action as the claim would contradict the terms of the antenuptial contract entered into between the parties.

The court held in this regard that: 'A universal partnership, such as alleged by the defendant, is an agreement in terms of which all of the parties' movable and immovable assets, both present and future, form part of the assets of the partnership between them, without limitation. An agreement of this nature would clearly be irreconcilable with the antenuptial contract entered into by the parties, which expressly excludes community of both existing and future property of the parties.'

Conclusion

This brings the decision of the court in *RD v TD (op cit)* full circle where the court reiterated the distinction drawn between the two kinds of universal partnerships and concluded that where the spouses carried on a *bona fide* business (*societas universorum quae ex quaestu veniunt*) and the essential elements to create a partnership agreement are present, a partnership exists.

It is evident from the aforesaid case law that, in simple terms, the provisions of an antenuptial contract (excluding community of profit and loss) would preclude the existence of a *societas universorum bonorum* but not necessarily a *societas universorum quae ex quaestu veniunt*.

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Municipalities have a hypothec over debts for rates

By
Tshepo
Mashile

The Supreme Court of Appeal interprets the provisions of s 118(3) of the Local Government: Municipal Systems Act 32 of 2000 (the Act) in an important judgment in the matter of *City of Tshwane Metropolitan Municipality v Mitchell* [2016] 2 All SA 1 (SCA), which saw the majority of the coram agreeing and one judge dissenting. The dissenting judge's reasons are not relevant for purposes of this article.

Background

On 22 February 2013 Mitchell (the respondent) purchased a fixed property known as Erf 296, Wonderboom Township, Gauteng (the property), at a sale in execution. The property is situated within the City of Tshwane Metropolitan Municipality's (the appellant) municipal boundaries. Clause 6.4 of the 'Conditions of sale in execution of immovable property' provided: 'The purchaser shall be responsible for payment of all costs and charges necessary to effect transfer including conveyancing costs, rates, taxes and other like charges necessary to procure a rate clearance certificate, transfer duty or VAT attracted by the sale and any Deeds registration office levies.'

When the respondent applied for a clearance certificate, the appellant issued a 'written statement' reflecting an outstanding amount of R 232 828,25 in respect of municipal service fees, levies and rates. That amount included debts older than two years preceding the date of the application for a clearance certificate, something to be known as a historical debt.

Section 118(1) of the Act provides that:

'(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate -

(a) issued by the municipality or municipalities in which that property is situated; and

(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties

during the two years preceding the date of application for the certificate have been fully paid.

...

(3) An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.'



Picture source: Gallo Images/Stock

The respondent disputed the correctness of the amount reflected in the 'written statement' as being payable for purposes of obtaining a clearance certificate in terms of s 118(1). The dispute was, however, settled and the appellant issued a certificate reflecting the outstanding amount due to it as R 126 608,50, which represented only the debt due for the two years preceding the date of the respondent's application for issue of the certificate. The respondent paid that amount, leaving the historical debt of R 106 219,75 still outstanding, due and payable if it had not become prescribed.

The respondent subsequently sold the property to Lynette Prinsloo who, before taking transfer, applied to the appellant for the supply of municipal services such as electricity, waste removal and water to the property. A municipal official refused to open an account in her name and informed her that she would be held liable for the historical debt. Ms Prinsloo accordingly gave instructions to the attorney who was to deal with the transfer not to proceed with it until the issue of the historical debt had been resolved (between the appellant and the respondent).

The respondent then approached the Gauteng Division of the High Court, Pretoria, seeking, among others, an order declaring that he, 'or his assigns and successors in title of the Property', were not liable for the historical debt owed to the appellant by previous owners. In *Mitchell v City of Tshwane Metropolitan Municipality* 2015 (1) SA 82 (GP) the High Court, per Fourie J, granted the following order in favour of the respondent:

'1. It is declared that:

1.1 the security provided by s 118(3) of Act 32 of 2000 in favour of the respondent with regard to the property known as erf 296, Wonderboom Township, Registration Division JR, Gauteng, was extinguished by the sale in execution and subsequent transfer of that property into the name of the applicant;

1.2. the applicant (or his successor in title); is not liable for the payment of outstanding municipal debts older than two years which were incurred by his predecessor(s) in title prior to the date of transfer of the said property into his name;

1.3. the respondent has no right to refuse the supply of municipal services (such as electricity, water, sanitation and waste removal) to the applicant (or his successor in title) with regard to the said property only because of outstanding municipal debts older than two years.

2. There shall be no order with regard to costs.'

The statutory position

In *BOE Bank Ltd v Tshwane Metropolitan Municipality* (SCA) (unreported case

no 240/2003, 29-3-2005), Brand JA observed that provisions such as those contained in s 118(1), 'sometimes referred to as "embargo" or "veto" provisions, can be traced back to provincial ordinances concerning local authorities passed many years ago'.

He said: 'Whereas s 50(1) of the ordinance contained an embargo or veto provision, similar to s 118(1), s 50(2) provided for a 'charge' similar to s 118(3), which has since been described as amounting to a tacit statutory hypothec ...'.

The court was referring to s 50(2), which later became s 50(3) of the Transvaal Local Government Ordinance 17 of 1939 which contained wording similar to s 118(36) of the Act.

In *City of Johannesburg v Kaplan NO and Another* 2006 (5) SA 10 (SCA), the SCA described the principal elements of s 118 as 'an embargo provision with a time limit (s 118(1)) [and] a security provision without a time limit (s 118(3))'. It held that the effect of s 118(3) is to create a security for payment of outstanding municipal debts in favour of the municipality. As to the extent of the outstanding municipal debts, the following was held in the *BOE Bank* matter:

'For purposes of s 118(3) it therefore does not matter when the component parts of the secured debt became due. The amounts of all debts arising from the stipulated causes are added up to become one composite amount secured by a single hypothec which ranks above all mortgage bonds over the property.'

It follows that in the present matter the historical debt was a charge on the property, as was the amount paid for purposes of obtaining the clearance certificate.

The position under common law

The court *a quo* observed that security in the form of a tacit statutory hypothec is a limited real right (as opposed to a personal right) in the property of another that secures an obligation. 'Generally speaking', it said, 'there is no reason, whilst the principal debt is still outstanding, why transfer in the normal course of business should terminate this right.' And, quoting Voet 20.1.13 (Percival Gane *The selective Voet being the Commentary on the Pandects Paris edition of 1829*, vol 4 (Durban: Butterworths & Co 1956)), the court held that 'immovables subject to a special hypothec pass subject to their burden – whether they have been transferred by onerous or lucrative title to another and whether that other is aware or unaware of the mortgage bond'. However, after referring to an exception to this 'rule' contained in Voet 20.1.1311 (*op cit*), it concluded thus: 'It therefore appears that in terms of the common law, when mortgaged proper-

ties have been sold and delivered "on the petition of creditors by order of a Judge" – which is another way of referring to a sale in execution – the hypothec was extinguished and the new owner would be granted a clean title. *This is, in my view, still the law today*' (my italics).

With regard to the application of the exception to the present matter the court *a quo* reasoned that it must be accepted that the appellant was aware of the sale in execution prior to transfer, as it had been requested to issue a certificate in terms of s 118(1) of the Act and that, while holding a statutory hypothec, it kept silent by not exercising its right of preference over the proceeds of the sale of the property. In those circumstances, it should follow, so the court held, that the appellant's statutory hypothec 'was extinguished by the sale in execution and subsequent transfer of the property into the name of the [respondent]'.

Sale in execution *vis-à-vis* sale by public auction

In holding that the appellant's security over the property (hypothec) had been extinguished by the sale in the execution and subsequent transfer of the property, the court *a quo* distinguished the present matter from SCA's decision in *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA), on the basis that in that case the property was sold, 'not at a sale in execution, but by public auction on behalf of the mortgagor'. In *Mathabathe*, the property was sold by public auction at the request of the owner and by agreement between him, as mortgagor, and the mortgagee. The municipality sought an undertaking from the owner, or transferring attorney, that the historical debt would be paid on the date of transfer or soon thereafter. The municipality alleged that it needed the undertaking because its security over the land would be lost once transfer took place. The court held that: 'Unlike ss (1), ss (3) is not an embargo provision – it self-evidently is a security provision.' There was therefore no need for the municipality to seek any undertaking.

This court has therefore clearly held that a transfer of property from one owner to another does not extinguish the security created by s 118(3). Counsel for the respondent did not argue that *Mathabathe* was wrongly decided, but submitted that at least in respect of sales in execution, the statutory hypothec created in terms of s 118(3) 'is to be enforced against the proceeds of the sale of the property at a sale in execution'.

Judgment implications

Section 118(3) creates a hypothec (in favour of a municipality), which in essence is the same hypothec that a landlord in



an agreement of lease enjoys. In a lease agreement a hypothec is a special security assisting in the collection of arrear rental from tenants, which is called the 'landlord's hypothec'. Any action taken in the collection of arrear rental is based on this security. The hypothec allows the landlord to sell the movable goods of the tenant (and in certain instances movables of a third party), which are on the leased premises, if the tenant fails to pay the rent. The hypothec created under s 118(3) allows a municipality to recover any debts owing, for municipal service fees, levies, rates and taxes, on a property within the particular municipality's authority. This security is not extinguish by a sale of the property, in execution, in public auction or in the normal course of business, or subsequent transfer of the property from one owner to another.

The municipality may, at any time perfect its statutory hypothec under s 118(3) to the value of outstanding municipal debts, provided that such debts

have not become prescribed, by obtaining an appropriate court order; selling the property in execution and applying the proceeds to settle the outstanding municipal debts notwithstanding the fact that those debts were incurred by an erstwhile owner/occupier prior to registration of transfer of the property into the name of the current owner. As long as the debt is less than three years old, the current owner is liable for all debts, incurred by previous owners, for municipal service fees, levies, rates and taxes.

Conclusion

In the court's view, the distinction drawn by the court *a quo* between the present matter and *Mathabathe*, and relied on by counsel for the respondent in this court, is not justified. In the court's view, the exception in Voet 20.1.13 (*op cit*), on which the court *a quo* relied, does not apply to a hypothec created by a statute that places no limit to its duration.

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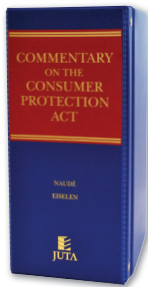
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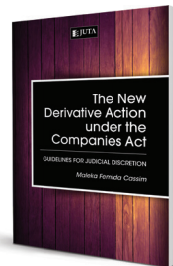
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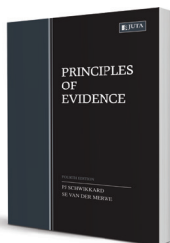


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Understanding imprisonment – *an in-depth discussion*

A lot of confusion erupted over the last couple of months regarding the issue of parole. Cases, such as that of Schabir Shaik, Oscar Pistorius, Clive Derby-Lewis and many others added to the debate and public scrutiny. The procedures and principles described *infra* suggests the law in a perfect world would be where no interference by, *inter alia*, politicians, is tolerated.

Section 276 of the Criminal Procedure Act 51 of 1977 (CPA) mentions the possible punishments for crimes available to South African courts. Imprisonment is one such type of punishment. Although imprisonment is probably the best-known form of punishment, there is a great deal of ignorance about it, even among lawyers and sentencing officers.

So what is imprisonment?

Imprisonment can be defined as the admission into a prison, and confinement of an offender in a prison for the duration determined by the court (or, in some instances, by statute). The prison authorities, however, also have a fairly wide discretion to determine the duration of detention. That discretion has since been limited by s 73 of the Correctional Services Act 111 of 1998.

Section 36 of the Correctional Services Act reads:

‘Objective of implementation of sentence of imprisonment. – With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of incarceration has the objective of enabling the sentenced offender to lead a

socially responsible and crime-free life in the future.’

The cold reality is more difficult to comprehend. South African lawyers, as a rule, receive very little training in penology – ironic and unfortunate in a country with a shockingly high rate of imprisonment and overpopulated prisons. Michel Foucault discusses in *Discipline and Punish: The Birth of the Prison* (US: Penguin 1991) at 264 – 265 the institution of prisons as the big failure of penology. Sentencing officers can fruitfully study his censure, criticisms which have been raised against imprisonment since 1820 and which can today be repeated almost unchanged (see A Kruger *Hiemstra’s Criminal Procedure* (Durban: LexisNexis 2008) Issue 1 at 28 – 25).

Imprisonment has two forms, namely ‘ordinary’ (continuous) and periodical.

Other distinctions refer to the term of detention, namely –

- life imprisonment (which will be discussed below);
- declaration as habitual criminal (see s 286 of the CPA); and
- imprisonment from which the prisoner can be released to correctional supervision (see s 276A of the CPA).

It is important to understand what exactly 'parole' is and to consider the relevant legislation, in order to determine whether remarks made by many individuals regarding, for example, the powers vested in the Minister of Justice and Correctional Services, are sound.

The relevant legislation should always be the starting point. Obviously, this implies that any person dealing with such issues should take cognisance of the Correctional Services Act; the previous Correctional Services Act 8 of 1959 (with specific reference to ss 5C, 22A, 63, 54 and 65); relevant sections of the CPA; relevant delegations of authority; relevant policies of the Department of Correctional Services (especially those under reference 1/8/B or 1/8P) and also the relevant Chapters of the Orders of the Department of Correctional Services (ie, the B-Order and the After Care Order) (see *CSPB Manual* 2005 (at 6 para 3)). Only if considered in conjunction with each other and not in isolation, will it be possible to give sound advice.

It is also necessary to take note of the existence of the so-called 'Correctional Supervision and Parole Board', which is an independent body that has certain recommendation and decision-making competencies.

The primary task of the Board is directed at the responsible consideration and approval or disapproval of placement of offenders under correctional supervision; on day parole; parole; medical grounds; and the release of offenders on expiry of sentence.

The minister may establish Roving and Non-Roving Correctional Supervision and Parole Boards for one or more management areas. A Roving Board may serve one or more prisons and a Non-Roving Board has a permanent seat at a specific prison. Currently, there are 52 boards country-wide and these will be expanded further within the next few years.

The primary purpose of the correctional system is to enforce the sentences of the courts and as such sentences of imprisonment remain valid until they expire. This does not imply that an entire sentence of imprisonment must be served in the correctional centre. Part of the sentence may be served in the community under the supervision of officials of the Department of Correctional Services. Persons can also be placed under correctional supervision by the court as an alternative to imprisonment.

Statutory limits of imprisonment

Courts have the power to impose imprisonment for any common-law offence and for any statutory offence for which it is expressly prescribed (which includes virtually all offences). Theoretically a High Court can impose any term, but in practice 25 years is regarded as so long that it is only imposed in exceptional cases (*R v Mzwakala* 1957 (4) SA 273 (A) at 278E; *S v Sibiya* 1973 (2) SA 51 (A)). In regional courts a general limit of 15 years applies. This is increased by five years if the regional court is imposing sentence under the minimum-sentences legislation (proviso to s 51(2) of the Criminal Law Amendment Act 105 of 1997). The limit in district courts is three years, but there are several statutory exceptions. In some circumstances the regional courts' sentencing jurisdiction are in sync with that of a superior court.

When the Minister of Correctional Services is satisfied that the prison population in general or at a particular prison is reaching such proportions that the safety, human dignity and physical care of the prisoners are being materially affected, the matter must be referred to the National Council. The National Council may recommend the advancement of the approved date for placement of any prisoner or group of prisoners under community corrections and the minister may act accordingly (s 81(1) and (2) of Correctional Services Act). In view of the overpopulation in South Africa's prisons and of the fact that heavier sentences are imposed as a result of the introduction of minimum sentences, and that only a few additional prisons are being built, there is little doubt that the space problem is not going to improve soon (see *Hiemstra*, (*op cit*) at 28 – 29).

The reason for long-term imprisonment, namely to protect the community through the prolonged removal from the community of dangerous criminals (*S v Cele* 1991 (2) SACR 246 (A) at 248I), applies more to life imprisonment.

In *S v Tcoeb* 1996 (7) BCLR 996 (NmS) it was held that life imprisonment is not unconstitutional in Namibia. It still allows for hope on the possibility of release (*S v De Kock* 1997 (2) SACR 171 (T) at 211 F – G).

Before the abolition of the death penalty, life imprisonment was seldom imposed and almost never served to the end. Originally such a sentence was regarded as a 20 year sentence. The Correctional Services Act provides that a prisoner sentenced to life remains in prison for the rest of his or her life (s 73(1)(b) of the Correctional Services Act). A person sentenced to life may not be placed on parole until he or she has served at least 25 years of the sentence; but a prisoner may, on reaching the age of 65 years, be

placed on parole if he or she has served at least 15 years of such sentence (s 73(6)(b)(iv)) of the Correctional Services Act). Peet M Bekker expresses the view that life imprisonment is not the most severe sentence ('*The maximum length of imprisonment by South African Courts: Life, dangerous criminal or 60 years?*' 2002 (15) SACJ 207 at 222) (see also *Hiemstra* (*op cit*) at 28 – 29).

Rule 60(2) of the United Nations Standard Minimum Rules for the Treatment of Prisoners stipulates with regard to the bridging of offenders from correctional centers to the community that:

'Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.'

The social reintegration of sentenced offenders can be regarded as the most challenging aspect of rehabilitation in effectively combating recidivism. It is also recognised that offenders are especially vulnerable at the beginning of the social reintegration process. It is said that the strategy to allow offenders to serve part of their sentences in the community is, therefore, a crucial mechanism to facilitate the bridging between the correctional centre and the community.

It is important to note that the provisions of the Correctional Services Act are only applicable on 'new admissions' as from 1 October 2004. Section 136 of the Correctional Services Act stipulates that all offenders in the system prior to the enactment of the Correctional Services Act must be dealt with in accordance with the release policy applicable before the enactment of the Correctional Services Act.

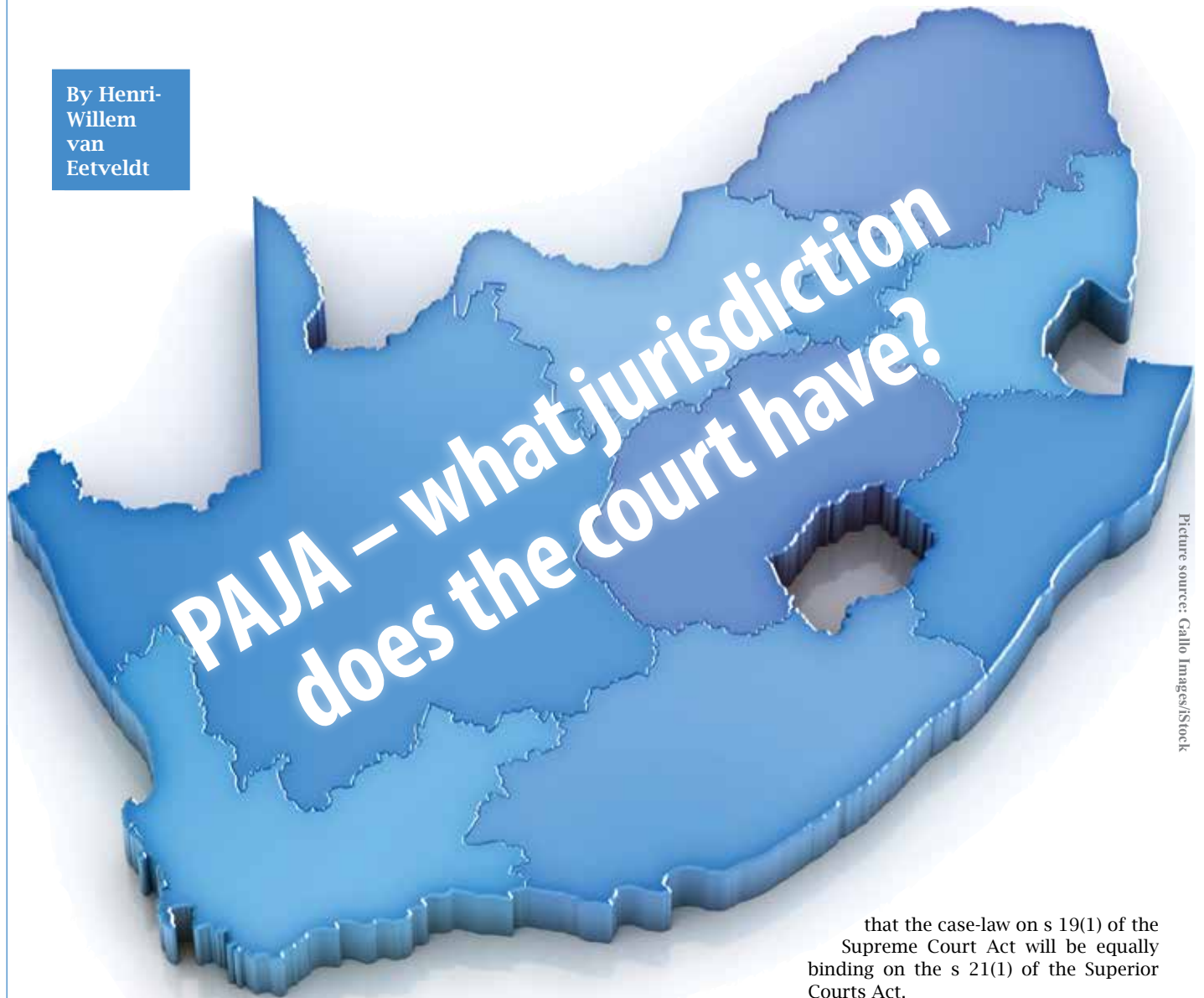
For this reason alone, the matters and cases mentioned *op cit* as examples, which confuses the public, cannot necessarily be compared to each other.

In the next article, which will be published in the July issue, I will attempt to explain and facilitate the basic functioning of the parole system, which purports in no way to be comprehensive or without fault.

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By Henri-
Willem
van
Eetveldt



Picture source: Gallo Images/Stock

Jurisdiction is an essential element of procedural law. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) has important implications for the jurisdiction of courts in proceedings for the judicial review of administrative action. Yet this aspect of PAJA has not received much attention. The aim of this article is to highlight PAJA's important – but often overlooked – jurisdictional provisions.

Jurisdiction under the common law: Brief principles

Jurisdiction is 'the power vested in a court to adjudicate upon, determine and dispose of a matter' (*Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at para 6). This power is territorial. In other words, 'it does not extend beyond the boundaries

of, or over subjects or subject-matter not associated with, the Court's ordained territory' (*Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G – H).

The territorial jurisdiction of each division of the High Court is determined by a hybrid of sources, being the Constitution, the common law, the High Court's inherent jurisdiction, the Superior Courts Act 10 of 2013, and various statutes, including PAJA.

Section 21 of the Superior Courts Act determines that a division of the High Court 'has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance ...'. Section 21 of the Superior Courts Act materially corresponds with its statutory predecessor, s 19(1) of the Supreme Court Act 59 of 1959. It is accordingly submitted

that the case-law on s 19(1) of the Supreme Court Act will be equally binding on the s 21(1) of the Superior Courts Act.

Section 21(1) of the Superior Courts Act and its statutory predecessors determine that a division of the High Court has jurisdiction, *inter alia*, 'in relation to all causes arising' within its territorial jurisdiction. In a long line of cases, the phrase 'in relation to all causes arising' has been interpreted to refer to proceedings in which the court has jurisdiction under the common law, with the result that a court's jurisdiction is determined by reference to the common law or any relevant statute (*Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) at 17G; *Bisonboard Ltd v k Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486H – J).

Under the common law, the doctrine of effectiveness is the basic principle of jurisdiction. The essence of this doctrine is that a court will only have jurisdiction to adjudicate on a matter if its order will be effective (*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)* 1987 (4) SA 883 (A) at 893F).

Although the doctrine of effectiveness 'lies at the root of jurisdiction', it does not, on its own, afford a division of the

High Court jurisdiction. What is additionally required is a *ratio jurisdictionis*, namely, a ground of jurisdiction (*Gallo Africa Ltd (op cit)* at para 10).

A common ground of jurisdiction is the *ratione domicilii*. Under this ground of jurisdiction, a division of the High Court will have jurisdiction where the defendant/respondent is domiciled or resident in the court's area of jurisdiction. Although this is not the only ground of jurisdiction, it is the only ground of jurisdiction that this article will focus on.

This *ratione domicilii* gives effect to the general principle, originating in Roman Law, that the plaintiff/applicant must follow the defendant/respondent to the latter's place of domicile or residence, and institute process against the defendant/respondent there (*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305C). This is the *actor sequitur forum rei* (or 'the plaintiff follows the defendant's court') principle.

It is the correlative of the *actor sequitur forum rei* principle that the domicile of the plaintiff/applicant does not determine a court's jurisdiction (*Gallo Africa Ltd (op cit)* at 332D – E).

Jurisdiction under PAJA

PAJA provides for a ground of jurisdiction that contrasts with these general principles of our common law.

Section 6(1) of PAJA provides that: 'Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action'. Section 6(2) provides that: 'A court or tribunal has the power to judicially review an administrative action ...'. The relevant part of the definition of 'court' for the purpose of PAJA is '... a High Court or another court of similar status ... within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced' (my italics).

Ordinarily, in review proceedings under PAJA, the applicant will be 'the party whose rights have been affected'. So, in terms of the statutory ground of jurisdiction created by PAJA, a division of the High Court will have jurisdiction to adjudicate on a matter if the applicant is domiciled or resides within that division's jurisdiction. This is exactly the converse of the *ratione domicilii*, and the *actor sequitur forum rei* principle that underlies the *ratione domicilii*. By the same token, it is an exception to the rule that the domicile of the plaintiff/applicant never determines jurisdiction.

Given that this statutory ground of jurisdiction differs so markedly from the

common-law position, it is somewhat surprising that the issue has not received much attention. It does not appear as if this issue has attracted the attention of academic commentators; similarly, our courts have not had much occasion to consider it.

In *National Arts Council and Another v Minister of Arts and Culture and Another* 2006 (1) SA 215 (C) the High Court recognised that PAJA creates statutory grounds of jurisdiction. The court held that the question of whether a court has jurisdiction in review proceedings under PAJA 'must be answered with reference to both the Supreme Court Act read with the provisions of ss 1 and 6 of [PAJA]' (at para 15).

However, upholding a point *in limine* raised by the respondents, the court held that the applicants failed to establish that the court had jurisdiction in terms of PAJA.

The applicants – the National Arts Council and its acting Chairperson – sought the review of a decision of the first respondent – the Minister of Arts and Culture – to dissolve the Council. The applicants brought the application in the Western Cape Division of the High Court.

The court found that the administrative action occurred outside its area of jurisdiction as the impugned decision was taken in Pretoria (para 21). The applicants were not domiciled or resident in its area of jurisdiction as the National Arts Council's principal place of administration was in Johannesburg (para 28). And the mere fact that some of the National Arts Council's members resided in Cape Town did not mean that the adverse effect of the administrative action was experienced there. The administrative action did not adversely affect each member. But it adversely affected the first applicant directly. And, as mentioned above, the first applicant resided in Johannesburg (para 28).

In contrast to the applicants in the *National Arts Council* case, the applicants in *B.O. Mahony NO and Others v MEC, Health and Social Development, Eastern Cape and Others* (WCC) (unreported case no 1444/15) (Mayosi AJ) successfully relied on PAJA's statutory ground of justification.

This was an interlocutory application in which the applicants asked the High Court to rule on whether it had jurisdiction to decide the main application. In the main application, the applicants sought a *mandamus* compelling the second respondent, the superintendent general of the Eastern Cape's Department of Health, to make a decision on a hospital licence application that the applicants had submitted to the second respondent in May 2013.

The applicants resided and were domi-

ciled within the court's area of jurisdiction. The respondents were not. Their respective principal places of business were in the Eastern Cape (para 6).

The applicants argued that the court had jurisdiction by virtue of the fact that they resided and were domiciled in the court's area of jurisdiction (para 11). The respondents conceded that the court had jurisdiction (para 19), but argued that, in terms of the principle of convenience, the matter should be heard in the Eastern Cape Division of the High Court (para 19).

The court held, with reference to the *National Arts Council* case, that in proceedings for the judicial review of administrative action 'the question of where this Court has jurisdiction must be answered with reference to both the Superior Courts Act read with the provisions of ss 1 and 6 of [PAJA]' (para 15). The court accepted that the principle of convenience would have a bearing on the issue of jurisdiction, but held – contrary to the respondents' argument – that the principle of convenience favoured the matter to be heard in the Western Cape. Ultimately the court found that it had jurisdiction to hear the main application.

Assessment

Our courts have thus recognised that PAJA creates statutory grounds of jurisdiction for the review of administrative action, one of them being that a court will have jurisdiction where the applicant is resident or is domiciled in the courts' area of jurisdiction. Measured against the common-law grounds of jurisdiction this is quite a departure. It is exactly the opposite of the *ratione domicilii* and the *actor sequitur forum rei* principles. PAJA's jurisdictional provisions are, therefore, of considerable interest to potential litigants and to their legal representatives. These provisions may determine that a particular court has jurisdiction over a matter under circumstances where the same court would not have jurisdiction under the common law.

It will be interesting to track the development of this area of the law in the future. It remains to be seen how our courts will interpret and apply PAJA's jurisdictional provisions to the facts of the cases before them.

- The author was a candidate attorney at Cliffe Dekker Hofmeyr, the attorneys of record for the applicants in the *Mahony* case.

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The loaded danger of deduction when dealing with illegal possession of ammunition

By
Hendrik
Beukes

This article considers the danger of deduction when dealing with technical issues in a case where an accused has been charged with the unlawful possession of ammunition. I submit that in a case where an accused has been charged with either the illegal possession of ammunition and/or illegal possession of a firearm, the result is that the prosecution bears the burden to prove the charge. In doing so, it is critical for the prosecution to lead evidence of a technical nature and failure to do so, should lead to an acquittal. Case law will be considered to illustrate the nature of the technical considerations and application in such matters.

The definition of ammunition and technical aspects

Relevant definitions in terms of the Firearms Control Act

The Firearms Control Act 60 of 2000 (the Act) provides the following definition in s 1 with respect to –

- “ammunition” means a primer or complete cartridge; and

- “cartridge” means a complete object consisting of a cartridge case, primer, propellant and bullet’.

- “Firearm” means any –

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6ft-lbs);

(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;

(c) a device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm with the meaning of paragraph (a) or (b).’

For purposes of this article, the focus is on ammunition/cartridge as defined in the Act, which requires propellant to function through a firearm as contemplated in the definition of ‘firearm’ in s 1 of the Act.

This brings one to examine the question as to how testing is conducted to establish whether the material contained in a cartridge is indeed propellant. One definition (see M Bussard *Ammo Encyclopedia* 5ed (USA: Blue Book Publications Inc 2014) at 53) of propellant is a flammable solid which, ‘when confined and

ignited, rapidly completes an exothermic reaction (deflagrates) which releases its stored chemical energy in the form of hot, expanding gases. As a heat engine, a firearm converts this energy to kinetic energy using the propellant as fuel’.

Now in order for propellant to be considered as such, it is tested to determine its ballistic properties in a closed vessel.

The closed vessel test

There is only one test (to determine gas volume formation and properties for propellant) as to whether the ‘powder’ inside a cartridge case is in fact propellant and that is the closed vessel test. It is important in the process of determining as to what exactly it is one is dealing with in terms of whether the ‘powder’ inside the cartridge is propellant and, therefore, regulated in terms of the Act. Also, that by simply burning (the suspected propellant) without testing for gas volume formation, does not constitute proper scientific testing. (See *S v Thinzi and Others* (WCC) (unreported case no SS27/2013, 7-8-2014) (Dolamo J)).

Case law

The following case law will be considered

in order to examine how the court deals with the technical nature of the subject.

In the matter of *S v Filani* 2012 (1) SACR 508 (ECG), the appellant was convicted in a regional court on a number of charges including the unlawful possession of a firearm and unlawful possession of ammunition in contravention of the provisions of the Act. The appellant appealed against the conviction and sentence imposed on the various counts. No forensic analysis was conducted on any of the items nor were any photographs handed in to court. In the course of his judgment Pickering J stated (514 H – 515 A): 'It is clear, in my view, from the definition of "firearm" in Act 60 of 2000, as opposed to the definition of "arm" in Act 75 of 1969, that the legislature no longer intended "firearm" to bear its ordinary meaning as explained in *S v Shezi* supra. In these circumstances it was incumbent on the state to prove that the weapon of which appellant was allegedly in possession was a firearm as defined in the Act. In my view the state has failed to discharge that onus.'

The court then went on and stated (at 515 F – H) in respect of the argument by the state that because the weapon discharged or propelled a missile with enough force for it to be used for offensive purposes, it should fall within the ambit of the definition of a firearm in s 1 of the Act. 'In my view, however, given the increased technical nature of the various definitions of "firearm" contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it. In all circumstances, the appellant was wrongly convicted on count 2 [in respect of the firearm count]. Ms Hendricks conceded that similar conditions would apply to count 3 (possession of ammunition).'

The *Filani* matter should be distinguished from *S v Sehoole* 2015 (2) SACR 196 (SCA). In the *Sehoole* matter, the respondent was convicted in a regional magistrate's court of contravention of ss 3 and 90 of the Act in that he was found in unlawful possession of a firearm and ammunition. He was sentenced, but the High Court set aside the conviction and sentence in respect of the firearm conviction. Regarding the conviction of possession of ammunition, the High Court held that there was no evidence before the court that the items found in the possession of the respondent constituted ammunition. The state appealed against the judgment. For purposes of this article, the focus will be on how the court viewed the appeal in respect of the ammunition issue.

Mbha JA stated: 'The state adduced ballistic evidence in the form of an affidavit in terms of s 212 of the CPA [Criminal Procedure Act 51 of 1977] concerning the firearm in question. It will be recalled that Kladié [who was one of the police officials involved in the arrest] had testified about the ammunition he found in the firearm. Whilst it is undoubtedly so that a ballistics report would provide proof that a specific object is indeed ammunition, there is no authority compelling the state to produce such evidence in every case. Where there is acceptable evidence disclosing that ammunition was found inside a properly working firearm, *it can*, in the absence of countervailing evidence, *be deduced to be ammunition* related to the firearm. Needless to say, each case must be judged on its own particular facts and circumstances. In the light of what I have stated above, it follows that the High Court erred in finding that a ballistics report was the only manner of proving that the offence was committed' (at para 19 and 20) (my italics).

Usually the state resorts to a s 212 affidavit by a ballistic technician in the employ of one of the various forensic laboratories in an attempt to prove that a confiscated firearm and ammunition are indeed such as described in the Act. I submit that the role played by the ballistic technician in this respect, is that of an expert witness.

The expert plays a vital part in court proceedings and an example of how the court views this can be seen in *Jacobs v Transnet Ltd t/a Metrorail* 2015 (1) SA 139 (SCA) where Majiedt JA states (at para 15): 'It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court tests his or her underlying reasoning and is in no worse position than a trial court in that respect. ... "The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him"'.

Discussion and considerations

It is trite law that the prosecution must prove its case beyond a reasonable doubt (see *Bamba v S* (SCA) (unreported case no 20089/14, 11-12-2014) (Mocumie AJA)).

It is also clear that the definition of 'ammunition' (and 'firearm') in terms of the Act has the effect of imparting a technical nature to it. The closed vessel test has already been described as the scientific manner in which a sample is tested to see if it agrees with known propellant characteristics.

I submit that (in my practical experi-

ence), where the issue was whether 'ammunition' complied with the definition contained in the Act, a ballistic technician testified that she 'tested' the matter found inside the cartridge case by pouring it out on paper and setting it alight. She testified that according to her, if the matter burns it is propellant (see *Thinzi (op cit)*). This type of testing holds of course no scientific value and should be disregarded as nonsensical. Another method (of assumption) apparently followed, is that if the primer appears unmarked, the cartridge is assumed to be ammunition. Thus no testing is performed on the primer to establish whether the primer is in fact 'live' and not defective. Still another and more recent method (this time applied by the court) as employed in the *Sehoole* matter, appears to be the deduction that ammunition is in fact ammunition. The deduction method has of course no scientific and technical basis and for that reason it is my view that this method cannot be supported.

I submit that the prosecution can only obtain a conviction on a count of unlawful possession of ammunition if it provides a detailed s 212 affidavit showing very clearly how it arrived at the conclusion. I submit that the expert should not assume or deduct merely by looking at the cartridge or the primer of the cartridge. This is particularly relevant in light of the situation that according to my knowledge, there is no closed vessel test facilities available or in use at the South African Police Services Platteklouf Forensic Laboratory.

Conclusion

The state bears the burden of proof throughout criminal proceedings to obtain conviction on the charge of unlawful possession of ammunition (or firearm for that matter) in respect of the Act beyond a reasonable doubt. Failure to provide the required technical and scientific basis for its expert's conclusion in this respect must lead to an acquittal. It is imperative for legal representatives in these types of cases, to examine the basis of the expert evidence presented by the state.

• Image taken and supplied by Mr Beukes. At the left of the picture are four primers, the purple is a sealant and is not an indication of whether it is 'live' or not. The cases are shown with and without primers and in the foreground there is some propellant.

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THE LAW REPORTS



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April 2016 (2) South African Law Reports (pp 317 – 631);
[2016] 1 All South African Law Reports March (pp 629 – 882);
2016 (2) Butterworths Constitutional Law Reports –
February (pp 157 – 309)

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
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Advocates – admission

LLB degree as a requirement for admission of advocates: Section 3(2) of the Admission of Advocates Act 74 of 1964 (the Act) provides among others that to be admitted as an advocate a person shall have the degree of Bachelor of Laws (LLB), referred to as *Baccalaureus Legum* degree in Latin. In *Pretoria Society of Advocates v Salemane and Another* [2016] 1 All SA 847 (GJ) the first respondent, Salemane, was admitted as an advocate after which he did his

pupillage. However, he did not have the LLB degree. Instead, he had a *Baccalaureus Procuratoris* (BProc) degree, which he completed over a period of five years. The applicant did not oppose the first respondent's admission application as it expected the second respondent, the Society of Advocates, Witwatersrand Local Division (Johannesburg Bar) to oppose it given that the application was made to the GJ. Due to oversight no such opposition was made and as a result the second respondent was admitted.

Rescinding and setting aside with costs the order of Willis J and Kolbe AJ in terms of which, the first respondent had been admitted as an advocate, Moshidi J (Meyer J and Muzi AJ concurring) the court held that the provisions of s 3(2) of the Act made it clear that the academic requirement for admission as an advocate was the LLB degree.

Even if it were to be accepted in the first respondent's favour that he possessed the BProc degree (even though he did not attach the BProc degree certificate to the application but only a statement of examination results), it was common cause that he did not have an LLB degree. The first respondent's contention that a five-year study towards a BProc degree was equivalent to an LLB degree could not be sustained. It could never have been the intention of the legislature in the provisions of s 3(2) to equate a BProc degree to an LLB degree. In short, the first respondent's application as an advocate was erroneously sought and granted as he ought never to have applied for admission as an advocate in the first place.

Civil procedure

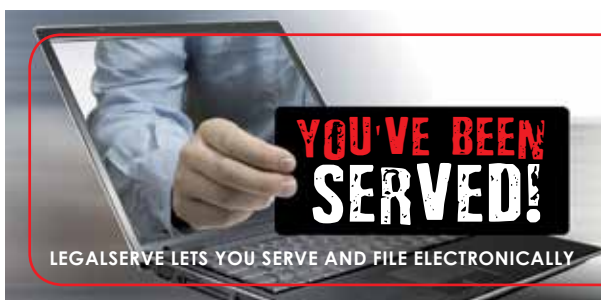
Appeal against execution order: Section 83(b) of the Magistrates' Court Act 32 of 1944

(the Act) provides among others that:

'(A) party to any civil suit or proceedings in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against –

...
(b) any rule or order made in such suit or proceeding and having the effect of a final judgment...'

In *Mathale v Linda and Another* 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC), the applicant, Mathale, was the occupant of Stand No. 8207 in Winnie Mandela Park, Tembisa in Ekurhuleni Metropolitan Municipality (East Rand), the latter being the second respondent in the matter (the municipality). The property in question had been allocated by the Municipality to the first respondent, Linda. However, Linda did not have the title deed, that is, was not the registered owner of the prop-



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erty, nor was he in charge thereof. The magistrate granted the first respondent an eviction order. Because of the difficulty of preparing the appeal record the appeal stalled. As a result, pending finalisation of the appeal the first respondent applied for an order for the execution of the eviction order in the interim. Another magistrate, granted the interim execution order. It was against that order that the applicant appealed to the GP where it was held that the execution order was not appealable, hence the dismissal of the appeal. An application for special leave to appeal to the SCA was also dismissed. That being the case, the applicant applied for leave to appeal to the CC. Such leave was granted and the appeal itself upheld. The applicant having been represented by a public-interest law firm, and not pressing for costs, each party was ordered to pay own costs. The costs orders of the courts *a quo* were set aside.

Reading a unanimous judgment of the court Khampepe J held that ordinarily interim execution orders were considered interlocutory in that they provided parties with interim relief, pending finalisation of the legal action. Generally, it was not in the interests of justice for interlocutory relief to be subject to appeal as that would defeat the very purpose of that relief. In the instant case there was little doubt that, once a court permitted the eviction order to be executed, pending the appeal, the applicant's right to occupy his home would be brought to an abrupt end. When the eviction order was granted he was not afforded alternative accommodation by the municipality. He was a poor individual who resorted to unlawfully occupying land, a choice made out of desperation and destitution. If evicted, he would inevitably have to resort to some similar expedience in order to continue to provide accommodation for his family.

The execution order had an immediate and devastating effect on implementation as it rendered the applicant homeless. The suffering and indignity that were to result

from giving effect to that execution order were immeasurable. It was indubitable that the execution order had the effect of a final judgment and was therefore appealable. Properly interpreted, s 83(b) of the Act meant that all orders, even if they were interlocutory, were appealable if they had the effect of a final judgment. In other words, the section made interlocutory relief appealable provided it was final in effect. The 'final in effect' threshold provided the High Court with the necessary flexibility to dismiss frivolous and vexatious appeals and also avoided the possibility of the High Court being inundated with appeals against execution orders. That approach required the High Court to examine the facts and circumstances of each case to determine whether, in truth, the order was final in effect. If not, it was not appealable.

Service of urgent application: The case of *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ), [2016] 1 All SA 860 (GJ) dealt with two issues, namely service of urgent application on the respondents and protection of confidential information concerning legal advice privilege. The issues arose after the applicant South African Airways (SAA) was granted, in an urgent application, an order preventing the respondents, being three media houses, from publishing the contents of a certain document, which the applicant alleged to be confidential. The document in question was prepared and signed by the applicant's in-house attorney and dealt with the difficult financial position, which the applicant was facing at the time. In the document, the attorney expressed her opinion and advice. The court accepted that by its very nature the information contained in the document was confidential. However, there were two problems. First, the applicant only served the notice of motion on the respondents on 22 November 2015 at 10 pm by way of e-mail in which it was indicated that the matter

would be heard at 10:30 pm, that is, thirty minutes later, but did not indicate where the hearing was to take place such as at the judge's home, in chambers or in open court. Some respondents did not read the e-mails until the following morning. Telephone communication with the respondents reached only one of the three. The order sought was granted just after midnight. However, as it turned out both at the time of 'service' of the notice of motion and granting of the court order the information sought to be protected had already been published in print and online, which made the court order meaningless. Thereafter the respondents applied for a reconsideration, in terms of r 6(12)(c) of the Uniform Rules of Court, of the order granted while the applicant sought that it be made a final court order. The court set aside the order previously granted with costs on attorney and client scale.

Sutherland J held that the purported service of the application by e-mail was, *de facto*, no service at all. Therefore, the order had been granted *ex parte* as the purported service was a farce. The nature of the relief sought was not such that an *ex parte* order could ever have been justified. What the applicant and its legal representatives did,

pursuant to a responsibility to achieve effective service in order to respect the principle of *audi alteram partem*, was not only clumsy, but was also unprofessional. When a litigant contemplated any application in which it was thought necessary to truncate the times for service in the rules of court, care had to be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice was thought to be justifiable, the would-be applicant's attorney had to take all reasonable steps to ameliorate the effect thereof on the would-be respondent. The taking of all reasonable steps was not a collegial courtesy but a mandatory professional responsibility that was central to the condonation necessary to truncate the times for service. When there was a prospect of a hearing before a judge after business hours and, even more so, when there was a prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps was even more important and imperative.

It was incumbent on the attorney of any person who contemplated an urgent application on less than 24 hours' notice, to undertake the following default actions in fulfilment of the duty to ensure effective service:

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- Once the respondents were properly identified, the names and contact details, being the telephone, cellular telephone, e-mail, facsimile and physical addresses of persons who have the authority to address the application should be ascertained.
- At the earliest moment after deciding to bring an urgent application, contact should be made to demand compliance with the relief to be sought and to alert one or more of such persons of the intention to bring the application, stating where it was likely to be heard, when it was likely to be served, and the identity of the judge on urgent duty. Agreement should be reached about who should receive service on behalf of the respondent by e-mail or facsimile or other method.
- The urgent judge should be alerted, and a report made, whether or not the respondents have been alerted.
- When the papers are ready for service, direct contact should again be made with the persons dealing with the matter on behalf of the respondents. Where delays occur, the respondents should be kept informed by interim telephone calls to report progress.
- Sufficient time should be allowed for the respondents to read and digest the papers. It would be appropriate to send a notice of motion in advance of the founding papers to

give the respondents a chance to formulate a view about the relief being sought.

- When the papers were about to be served electronically or otherwise, the urgent judge should be consulted about when and where the hearing will take place, if at all, and how much time should be given, in the context of earlier alerts to the respondents.
- Once served in a manner other than by personal physical delivery, the attorney should immediately call the respondents' representatives directly to confirm actual receipt of all the papers.

As regards the aspect concerning logistics of the service of an urgent application and a failure to properly inform a judge in an *ex parte* application, a failure to properly inform a judge of all material facts, whether inadvertently or deliberately, could lead to a dismissal on such grounds alone.

Costs (security for)

Requiring security for costs does not amount to unfair discrimination and/or violation of constitutional right to equality of *peregrinus*: Section 21(1) of the Arbitration Act 42 of 1965 (the Act) provides in more general terms that in relation to arbitration proceedings before an arbitrator, the court shall have the same power of making orders in respect of amongst others security for

costs. In *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) the applicant, Blastrite, was a South African company while the respondent, Genpaco, was a Nigerian company that did not own immovable property in South Africa. A dispute having arisen between the parties concerning their contract, the matter was referred to arbitration, the respondent being the claimant who sought an interdict against the applicant. The respondent provided security in the amount of some R 120 000 in respect of arbitration proceedings but the applicant wanted the amount to be increased by a further R 250 000, which the respondent declined. As a result the present application was made to court to force the respondent to provide the required additional security. The application was resisted on a number of grounds, including that requiring security to be provided by a plaintiff *peregrinus* was a violation of the constitutional right to equality before the law, was displaying xenophobic attitude to the respondent and also amounted to unfair discrimination.

Schippers J ordered, with costs, the respondent to furnish the required security by a specified date, failing which, the applicant was granted leave to apply for dismissal of arbitration proceedings or have them stayed until such security was furnished. It was held that in deciding whether a party should be required to furnish security, a court had judicial discretion, having regard to the particular circumstances of the case and the considerations of fairness and equity to both the *incola* and the *peregrinus*. The court should not adopt a predisposition in favour of or against security but should carry out a balancing exercise by weighing the injustice to the respondent, if prevented from pursuing a proper claim by an order for security, against the injustice to the applicant, if no security was ordered. In the instant case the consideration that the respondent could be prevented from pursuing its claim did not arise. The respondent was able to

furnish security from its own resources and never complained that the amount required was unreasonable. As against that consideration the applicant, on the other hand, if it obtained a costs order in its favour, would have to proceed against the respondent in a foreign country and incur uncertainty, inconvenience and additional expense associated with the enforcement of that order.

The practice regarding security for costs had nothing to do with xenophobia. It was laid down as far back as 1828 in *Witham v Venables* (1828) 1 Menz 291. The fact that the practice regarding security treated a *peregrinus* plaintiff differently from an *incola* plaintiff was not itself a violation of s 9(1) (the equality clause) of the Constitution as it served a legitimate government purpose of protecting the applicant. Furthermore, the common-law practice, in terms of which a non-resident plaintiff who did not own immovable property in South Africa could be called on to give security for costs of lawsuit was consistent with the Constitution.

Election law

Lack of free and fair municipal elections: In *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC), Kham and seven other applicants were former African National Congress (ANC) and municipal councillors who had been expelled from the party. They sought a court order declaring by-election results in Tlokwe Local Municipality (Potchefstroom) invalid. The Electoral Court per Moshidi J (Mthimunye (chairperson) concurring and Wepener J dissenting) held that as the number of votes involved in irregular registration was small and would not change by-election results, there was no need to set aside the results. For that reason the applicants sought and were granted leave to appeal to the CC, which upheld the appeal with costs. The by-election results were set aside and fresh elections ordered, the date of which was to be determined by the municipi-

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pality in terms of the Local Government: Municipal Structures Act 117 of 1998. The court also gave ancillary relief regarding the requirements for holding future elections and by-elections.

The main thrust of the applicants' complaint was that voters from outside contested wards were registered in those wards and allowed to vote. Furthermore, voters' roll were delivered very late, namely only seven days before the by-elections. That impacted negatively on candidates' ability to canvass for votes. Moreover, the voters' roll did not reflect the residential address of the voters.

Reading a unanimous decision of the court Wallis AJ held that the by-elections were not free and fair. The focus had to be on the impact that irregular registration of voters had on the applicants' right to stand for public office. The issue was not whether the applicants would have won or lost had the arrangements for the by-elections

been different and not suffered from the flaws of which they complained, but whether they were seriously hampered in their participation in the electoral process. As there was no internationally accepted definition of the phrase 'free and fair elections', whether any election could be so characterised fell to be assessed in the context in which it took place. Ultimately that characterisation involved a value judgment. In South Africa that decision had to be made in the context of the Constitution. The phrase highlighted both the freedom to participate in the electoral process and in the ability of political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms, so far as that could be achieved by the first respondent, the Independent Electoral Commission (IEC).

The following considerations were of fundamental importance to the conduct of free and fair elections:

- Every person who was entitled to vote should, if possible, be registered to do so.
- No one who was not entitled to vote should be permitted to do so.
- Insofar as elections had a territorial component, as was the case with municipal elections were candidates were in the first instance elected to represent particular wards, the registration of voters should be undertaken in such a way as to ensure that only voters in that particular area (ward) were registered and permitted to vote.
- The Constitution protected not only the act of voting and the outcome of elections, but also the right to participate in elections as a candidate and to seek public office.

Measuring whether an election was free and fair started by comparing what happened on the conduct of the election against the public standards put in place by legislation and the IEC itself for the conduct of free and fair elections. In the instant case the IEC fell

short of those standards in that amongst others independent candidates (the applicants) were constrained to fight the by-elections under the shadow of uncertainty occasioned by the registration of an unknown number of voters who were not entitled to vote and on inability to identify those who were. The efforts of the applicants were hampered by the late delivery of the segments of the voters' roll and in particular, the absence of voters' addresses when those segments were delivered. The IEC was in breach of its obligations under s 16(3) of the Electoral Act 73 of 1998 in not furnishing segments of the voters' roll with addresses where those were available.

Ensuring that voters were correctly registered in the voting district where they were ordinarily resident was of particular importance in the context of municipal elections as they were conducted on a ward basis. To the extent that in the instant case vot-

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ers' roll and some at least of the wrongly registered voters voted, there was a breach of the principle that only those legally entitled to do should be permitted to vote.

Evidence

Admissibility of unlawfully obtained evidence: Section 86(1) of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) provides that: '[A]nyone who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.' In *Harvey v Niland and Others* 2016 (2) SA 436 (ECG) the applicant, Harvey, and the first respondent, Niland, were members of a close corporation, the second respondent, Huntershill, which was engaged in hunting and safaris business. After a fall out Niland left the employ of the corporation and started working for a rival entity but continued as a member of the corporation. The applicant suspected that Niland was acting in breach of the fiduci-

ary duties, which he owed to the corporation by competing with it and soliciting business from its clients. To confirm the suspicion the applicant hacked Niland's Facebook and unlawfully accessed his communications with various clients. The Facebook communications were copied and printed, after which they formed an annexure in an application for an interdict to restrain him from breaching his fiduciary duties to the corporation. Niland applied for striking out of the annexure or any reference to it or information emanating therefrom. In doing this Niland relied on s 86(1) of ECTA and s 14(d) (right to privacy) of the Constitution. The urgent interdict was granted with costs and the application for striking out was dismissed.

Plasket J held that it had to be accepted that in accessing Niland's Facebook communications the applicant acted unlawfully. Furthermore, it had to be accepted that apart from constituting criminal conduct, that conduct also

constituted a violation of Niland's right to privacy. That right to privacy had, however, to be viewed in its proper context. Far from being a 'game-changer', ECTA, by its silence on the issue, allowed for the admission of unlawfully obtained evidence subject to its exclusion in the discretion of the court. In the exercise of the discretion to exclude unlawfully obtained evidence, all relevant factors had to be considered. Those considerations included the extent to which, and the manner in which, one party's right to privacy (or other rights) had been infringed, the nature and content of the evidence concerned and whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means. In the instant case the evidence thus obtained was critical. Without it the applicant had no case and could neither institute an action nor launch an application. All that the applicant had was a suspicion but no evidence of Niland's wrong doing. There-

fore, the evidence was admissible.

• See "Unlawfully" obtained Facebook communication admissible in Court' 2016 (April) *DR* 38.

Privilege – Confidentiality of legal advice: On the question of confidentiality of legal advice privilege, Sutherland J held in *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* 2016 (2) SA 561 (GJ), [2016] 1 All SA 860 (GJ) (see 'service of urgent application' above) that by invoking such legal advice privilege, no less than litigation privilege, the client would be invoking a 'negative right', meaning that the right entitled a client to refuse disclosure by holding up to the shield of privilege. What the right to refuse to disclose legal advice in proceedings could not be was a 'positive right', that is, a right to protection from the world learning of the advice if such is revealed to the world without authorisation. The client could indeed restrain a legal



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adviser on the grounds of their relationship, and could restrain a thief who took a document evidencing confidential information on delictual grounds.

But if the confidentiality was lost and the world came to know of the information, there was no remedy in law to restrain publication by strangers who learned of it. That was because what the law gave to the client was a 'privilege' to refuse disclosure, not a right to suppress publication if confidentiality was breached. A client should take steps to secure confidentiality and if those steps were ineffective, the quality or attribute of confidentiality in the legal advice was dissipated. The concept of legal advice privilege did not exist to secure confidentiality against misappropriation. It existed solely to legitimise a client in proceedings refusing to divulge the subject-matter of communications with a legal adviser, received in confidence. The vulnerability to loss of the confidentiality of the information over which a claim of privilege could and was made flowed from the nature of the right itself. Once confidentiality was shattered it could not be put back together again.

Township development

Developer is liable for levies as property owner of unsold individual erven reflected on general plan establishing a township: In *Heritage Hill Devco (Pty) Ltd v Heritage Hill Homeowners Association* 2016 (2) SA 387 (GP) the appellant, Heritage Hill, was a company that bought a farm, took transfer and developed it into residential units which were sold to interested persons. The units were created in terms of a general plan designed for the development of a township (residential units) which was registered in terms of the Deeds Registries Act 47 of 1937 (the Deeds Act). The rights and obligations of owners of individual units were governed by the articles of association of the respondent

homeowners association, the Heritage Hill Homeowners Association. The articles had a clause, which provided that any person, including the developer, who was the registered owner of the property, was a member of the respondent. Another clause provided that members of the respondent were liable for any levy determined by the directors from time to time in respect of each property owned by a member. Acting in terms of the articles the respondent charged a levy on the appellant in respect of all the units that had not been sold and therefore still belonged to it. Because there were quite a few such unsold units and in respect of which payment was in arrear the amount demanded was substantial, namely some R 2,5 million. The appellant contended that it was not the owner of unsold units but the original farm which had since been developed into the units. The GP, per Kollapen J held that the appellant was liable for the levy. An appeal to the full Bench was dismissed with costs.

Rabie J (Legodi and Baqwa JJ concurring) held that given the provisions of the Deeds Act and the articles of association of the respondent it was untenable for the appellant to argue that it was not the owner of individual erven (units) situated in the established township. In terms of s 46 of the Deeds Act it was clear that registration of the general plan, setting out the various units in the township, had the effect of creating separate erven, the ownership of which could only have vested in the township developer. In the instant case that developer was the appellant. Therefore, the court *a quo* was correct in its finding that the appellant was the registered owner of the unsold erven within the context of the respondent's articles of association.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained: Dealing with access to informa-

tion held by a public body, apportionment of liability for contributory negligence, apportionment of surplus of pension fund, attachment and seizure of movables already under judicial attachment, base cost of asset when assessing capital gains tax, disposition made in the ordinary course of business, *dolus eventualis*, environmental law, eviction of unlawful occupier, fiscal investigation into municipality's finances, independence of independ-

ent police investigative directorate, interference with contractual relationship, permission to relocate with minor children, ownership of certificated shares, prescription of special notarial bond secured debt, procurement, recognition of foreign trustee, rehabilitation of an insolvent, review of decision of Appeal Board by Registrar of Pension Funds, search warrant, town-planning and zoning schemes, as well as validity of wills. □

On the lighter side

'The late Fred Rodell, a controversial law professor at Yale University, in his early book *Woe unto you, lawyers* (1939) remarked tartly that only the law "insists on making a 'party' out of a single person."

Prof Ellison Kahn 'The Seven lamps of legal humour' 1984 (June) *DR* 251. □



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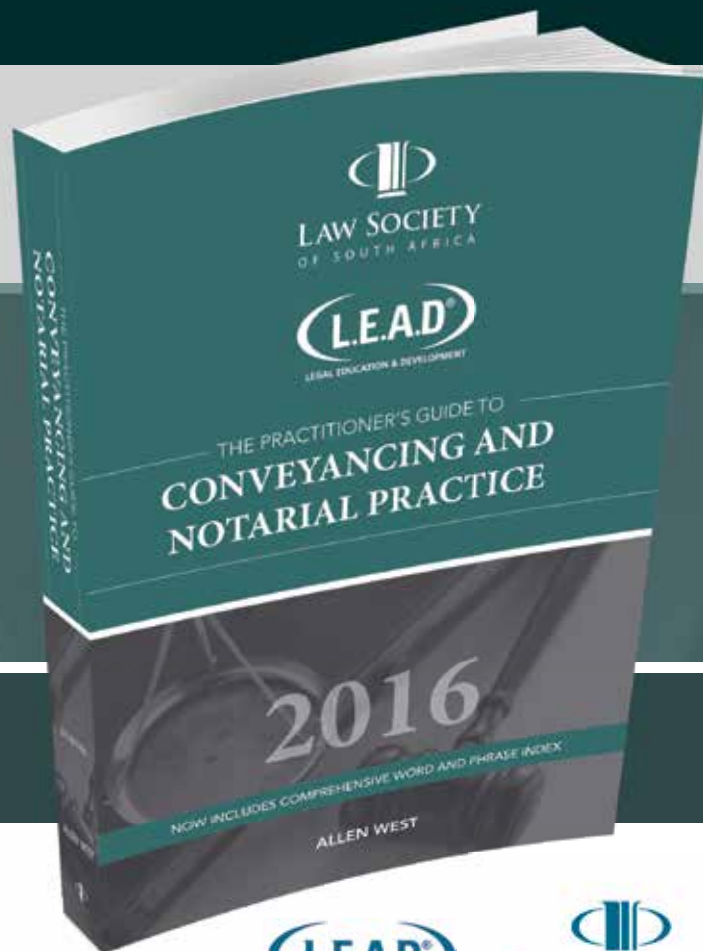
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Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.

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By
Bouwer
van
Niekerk

Reviewing the powers of a magistrate's court in debt review applications

Nedbank Limited v Norris and Others (ECP)
(unreported case no 2978/2015, 1-3-2016) (Goosen J)

The first respondent (the consumer) applied to the applicant – a registered credit provider (the bank) – for an unsecured personal loan facility (the loan). The bank presented the consumer with its quotation and terms and conditions, which the consumer accepted. The parties then entered into an unsecured personal loan agreement (the credit agreement).

Some 21 months later, the consumer applied to a registered debt counsellor (DC) to be declared over-indebted in terms of s 86(1) of the National Credit Act 34 of 2005 (NCA). The DC made a determination of over-indebtedness, and applied to a magistrate's court for a debt restructuring order in terms of s 86(7)(c)(ii)(aa) and (bb) of the NCA. This application was brought in terms of r 55 of the Magistrates' Courts Rules.

The bank's attorneys served and filed a notice of intention to oppose the application, and requested a notice of set down from the DC. No such notice was forthcoming, and an order was granted in the absence of the bank being represented at the hearing of the application.

In this order, the magistrate, among others, re-arranged the interest rate payable by the consumer in terms of the credit agreement to 0%. The magistrate also extended the period over which the outstanding balance in terms of the credit agreement was to be paid, and significantly reduced the monthly payments payable in terms of the credit agreement.

Unhappy with the outcome, the bank applied to have the order rescinded. This application was dismissed. In addition to dismissing the application, the magistrate *mero motu* ordered that: '[T]he interest rates on accounts relating to the Applicant are changed to the contractually agreed rates, effective from the date hereof' (para 7).

Still unhappy, the bank applied for the review of the magistrate's orders.

These were the salient facts that the court was faced with in the above case. This article will analyse the court's judg-

ment, and will make some observational remarks as to the impact of its findings and orders.

The court's critique of the re-arrangement order

The court found many difficulties with the magistrate's re-arrangement order. Among these difficulties was the fact that the magistrate re-arranged the consumer's affairs to the extent that the re-arranged payments '[did] not even meet the requirement to reimburse the applicant for the monthly payment it [was] obliged to make on behalf of the first respondent in respect of credit insurance cover. The order plainly [did] not meet the essential purpose of the NCA as set out in s 3(g) and (i)' (para 42).

In addition to the above, the magistrate ordered that the consumer's contractual obligations in respect of interest in terms of the credit agreement be reduced from a fixed rate (in this case 17,5%) to 0%. On this point, the court held the following: 'Section 86(7)(c)(ii) confers no such power upon the Magistrates Court. A debt re-arrangement order has as its purpose the rescheduling or re-arrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A re-arrangement order, does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of section 86(7). The order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore *ultra vires* the NCA' (para 44).

The court then proceeded to confirm that a magistrate's court is a creature of statute, and the limitations placed on it are dictated by the statute that governs it; it has no inherent jurisdiction and 'can accordingly not adjudicate matters

which fall outside of its expressly conferred jurisdiction and cannot grant orders, other than those it is expressly authorised to grant' (para 45). The court subsequently found that the magistrate acted 'without jurisdiction', and found that 'such an order is null and void'. This being the case, the court did not find it appropriate to order that such an order is *void ab initio* and may be ignored, as it did not find it appropriate given the reach of the declaratory relief sought.

The rescission order was set aside, along with the *mero motu* order. The court (again) found that the magistrate had no jurisdiction to make such an order, as 'the purported order tainted is tainted by gross irregularity in as much it purported to vary the terms of the re-arrangement order previously granted without having regard to the effect that the variation would have upon either the terms of the re-arrangement order or the consumer's obligations to other credit providers' (para 48).

Apart from setting aside the initial re-arrangement order, rescission application and *mero motu* order, the court granted the following declaratory relief:

'It is declared that:

A Magistrate's Court hearing a matter in terms of s 87(1) of the National Credit Act, 34 of 2005 does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement;

A re-arrangement proposal in terms of s 86 (7)(c) of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues to the outstanding balance does not meet the purposes of the Act and a re-arrangement order incorporating such proposal is *ultra vires* the National Credit Act and a Magistrate's Court has no jurisdiction to grant such an order' (para 51).

Observational remarks

I believe it is apposite to point out that a magistrate's court may vary the interest rate applicable to a credit agreement in

a debt review order where both parties consent to such an order.

I have my doubts as to whether any court can find that, by another court acting without jurisdiction, such an order is null and void; I am of the opinion (and believe it to be trite law) that a court order is valid and enforceable until such time as it is either set aside, rescinded or reviewed. However, an in-depth discussion of the merits and demerits of such an order falls outside the ambit of this article.

That being said, I am of the view that the court granted the correct declaratory relief. My opinion is founded in tested judicial findings and in practice. On the one hand, the jurisdiction of a court tasked to hear debt review applications are bound by the jurisdiction afforded to it by statute, and on the other hand practicalities dictate that basic arithmetic should prevail when making (very practical) orders regarding repayments by consumers to credit providers in such applications.

The purpose of debt review is surely not to tie consumers up indefinitely. Rather, it should be a mechanism to ensure that credit providers are paid in full, albeit over an extended period,

while at the same time ensuring that consumers' obligations are relaxed over a finite period. In my view, this process – applying for debt review, and by implication, applying for the relaxation of contractual obligations – was designed and implemented by way of statute to create a balance between the rights of credit providers and the real, practical circumstances of consumers and their ability to repay debts incurred by them. While it should be accepted that no man (or credit provider) is an island, especially in a difficult economy, the contractual rights of credit providers should not be allowed to fall by the wayside. If this should happen, it could have dire consequences, not only for the banking industry, but for all security holders, especially secured creditors. And that can only cause further harm to an industry where it is becoming increasingly difficult to execute (contractually) secured rights against consumers.

Make no mistake: Consumers' rights are important, and should be respected as such, but the rights of credit providers to recoup the very credit granted to consumers are equally (if not more) important. The granting of credit creates the opportunity to create lasting wealth

and credit providers' appetite to supply credit should not be unreasonably spoilt in a time when the encouragement of entrepreneurship and the ancillary creation of employment opportunities are desperately needed. The juxtaposition of consumers' rights and credit providers' ability to sensibly and practically exercise their rights of recouping such credit should, therefore, be delicately balanced. Because without such rights, credit providers will become less and less inclined to grant credit. And that (politics, rumours of state capture and general corruption aside) may very well push an ailing economy fighting off junk status over the proverbial tipping point.

Bouwer van Niekerk BA (Law) LLB (Stell) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (Unisa & LEAD) is an attorney at Smit Sewgoolam Inc in Johannesburg.



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BILLS INTRODUCED

Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill B6 of 2016.
National Land Transport Amendment Bill B7 of 2016.

COMMENCEMENT OF ACTS

Disaster Management Amendment Act 16 of 2015. *Commencement:* 1 May 2016. Proc24 GG39943/22-4-2016.

SELECTED LIST OF DELEGATED LEGISLATION

Architectural Profession Act 44 of 2000
Fees and charges. BN40 GG39900/4-4-2016.

Broad-Based Black Economic Empowerment Act 53 of 2003

Codes of good practice for the marketing, advertising and communications sector. GN387 GG39887/1-4-2016.

Collective Investment Schemes Control Act 45 of 2002

Exemption of a manager of a collective investment scheme in securities from compliance with certain provisions. BN39 GG39887/1-4-2016.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical service providers. GenN192 GG39906/7-4-2016; GenN256 GG39955/26-4-2016; and GenN257 GG39956/26-4-2016.

Increase of the maximum amount of earnings per annum on which the assessment of an employer shall be calculated (R 377 097 from 1 April 2016). GN449 GG39931/15-4-2016.

Amendment of sch 4 (manner of calculating compensation). GN448 GG39931/15-4-2016.

Amendment of return of earnings form (W.As.8). GN444 GG39928/15-4-2016.

New Legislation

Legislation published from
1 – 29 April 2016

Electronic Communications Act 36 of 2005

End-user and Subscriber Service Charter Regulations. GenN189 GG39898/1-4-2016.

Administrative fees in relation to service licences. GenN187 GG39896/1-4-2016.

Health Professions Act 56 of 1974

Rules relating to fees payable the Health Professions Council. GN411 GG39910/8-4-2016.

Income Tax Act 58 of 1962

Activities to which s 12R does not apply. GN446 GG39930/15-4-2016.

Magistrates' Courts Act 32 of 1944

Creation of magisterial districts and establishment of district courts for Limpopo. GN491 GG39961/29-4-2016.

Creation of magisterial districts and establishment of district courts for Mpumalanga. GN492 GG39961/29-4-2016.

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013

Determination of the rate of levy. GenN222 GG39922/15-4-2016.

National Gambling Act 7 of 2004

National Gambling Policy, 2016. GN389 GG39887/1-4-2016.

National Railway Safety Regulator Act 16 of 2002

Determination of permit fees. GN439 GG39922/15-4-2016.

Perishable Products Export Control Act 9 of 1983

Imposition of levies on perishable products. GenN229 GG39943/22-4-2016.

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest: 10,5% from 1 May 2016. GN461 GG39943/22-4-2016.

Public Finance Management Act 1 of 1999

Rate of interest on government loans. GenN259 GG39960/29-4-2016.

Public Service Amendment Act 30 of 2007

Protocol on administration and operation of the National Intellectual Property Management Office. GN487 GG39960/29-4-2016.

Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in respect of claims for loss of income and loss of support. BN51 GG39960/29-4-2016.

Tax Administration Act 28 of 2011

Method of payment prescribed in terms of s 162(2) (electronically or at an approved financial institution). GN437 GG39922/15-4-2016.

Dates by which an employer must render a return (EMP 501). GN436 GG39922/15-4-2016.

DRAFT LEGISLATION

Draft regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001. GN422 GG39919/13-4-2016.

Proposed amendments to the Municipal Electoral Regulations, 2000 in terms of the Local Government: Municipal Electoral Act 27 of 2000. GN452 GG39936/18-4-2016.

Draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003. GN450 GG39933/15-4-2016.

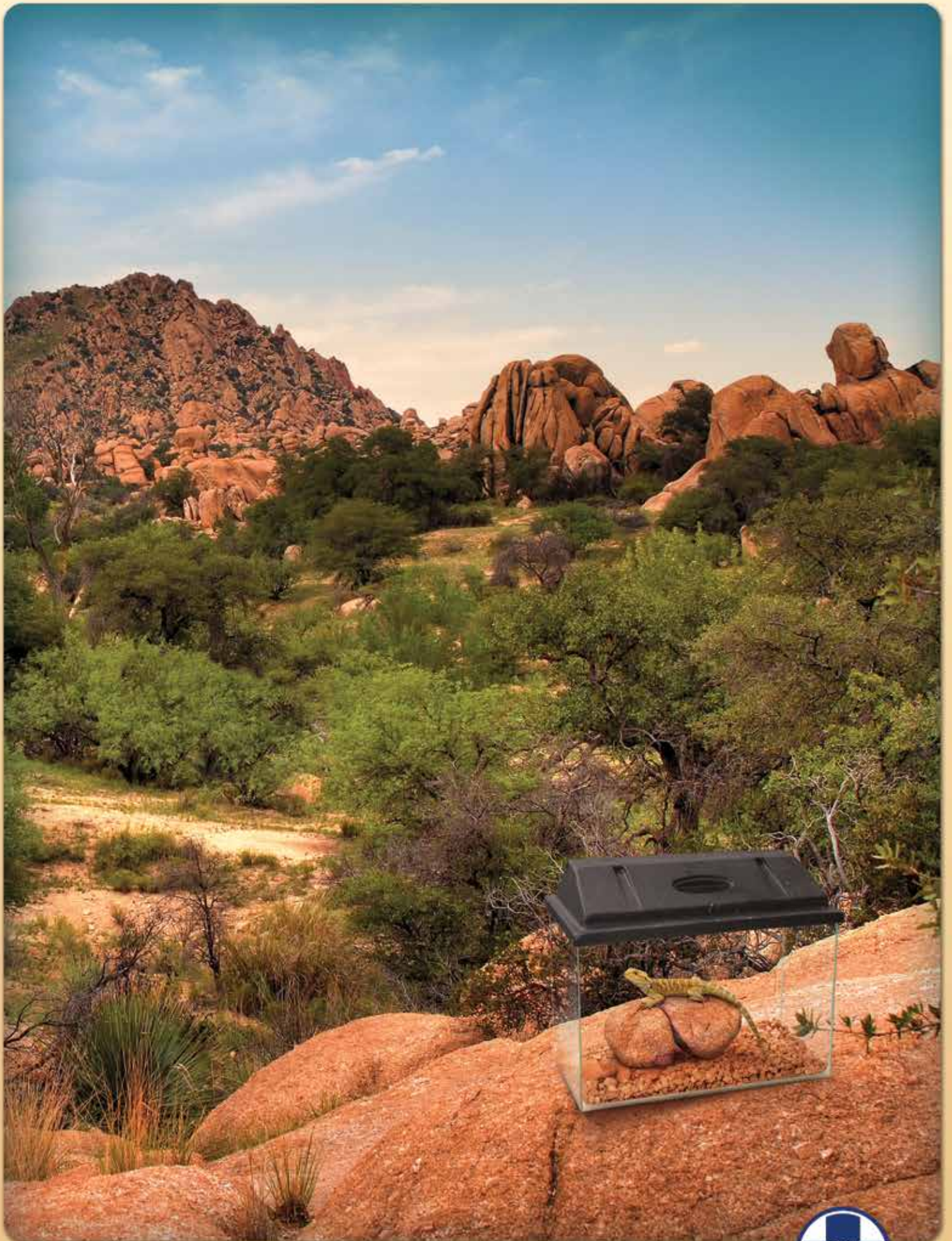
Draft Red Tape Impact Assessment Bill. GenN193 GG39907/7-4-2016.

Draft Communal Property Associations Amendment Bill, 2016. GenN243 GG39943/22-4-2016 and GenN262 GG39960/29-4-2016.

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Employment law update



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



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

Timing of s 197 transfers of employment

In *Senne and Others v Fleet Africa (Pty) Ltd* (LC) (unreported case no J2888/14, 12-2-2016) (Boyce AJ), voluntary retrenchment agreements were entered into prior to the expiry of a second generation outsourcing agreement. Fleet Africa attempted to resile from the agreements on the basis that it was not the employer of the employees when the agreements were concluded. The applicants sought a declaratory order that the voluntary retrenchment agreements are valid and binding. The main issue which the Labour Court (LC) was required to determine was *when* the new employer steps into the shoes of the old employer in accordance with s 197(2) of the Labour Relations Act 66 of 1995 (the LRA).

The applicants were employed by Fleet Africa and were primarily involved in the maintenance and servicing of vehicles for the City of Johannesburg (the city). When this arrangement expired the city continued to service and maintain its own vehicles. The city and Fleet Africa could not reach agreement as to whether or not s 197 of the LRA was triggered by the expiry of the outsourcing arrangement and the matter was accordingly referred by agreement to arbitration.

The outcome of the arbitration was that it was declared that the transfer of Fleet Africa's assets, rights and obligations to the city on expiry of the outsourcing agreement was a transfer of a business as a going concern in terms of s 197. The date of the transfer was declared to be 1 March 2012 and the city was ordered to comply with its obligations in respect of the employees in accordance with s 197.

The city appealed the arbitrator's decision but the appeal was dismissed. In this regard, it was found that the maintaining and servicing of the city's vehicles was an 'identifiable economic entity' and that

the employees who were involved with the servicing and maintenance of the vehicles were automatically transferred in accordance with s 197.

The four applicants had concluded voluntary retrenchment agreements with Fleet Africa in May 2012 but Fleet Africa failed to comply with the terms of these agreements. The voluntary retrenchment agreements provided that they were concluded in full and final settlement of any entitlement to transfer to the city in accordance with s 197. Fleet Africa argued that the voluntary retrenchment agreements were not valid and binding as they had been concluded after the applicants' employment transferred to the city and thus Fleet Africa was no longer the employer of the applicants at the time that the agreements were concluded. It was further argued that the agreements were not enforceable because the applicants waived and/or abandoned their rights to enforce the agreements by accepting the transfer of their employment to the city.

As regards Fleet Africa's argument that it was not the employer when the voluntary retrenchment agreements were concluded, the LC per Boyce AJ found that the existence of an employment relationship is a factual question that must be determined with reference to the evidence and not whether or not there has been a transfer in accordance with s 197. Boyce AJ held the view that while it is trite law that in terms of s 197 the new employer is automatically substituted in the place of the old employer, this does not mean that there is always a simultaneous substitution of the new employer in the place of the old employer. In this regard, it was held that s 197(2)(a) does not expressly state that substitution occurs simultaneously with the transfer although this is often the case. An example of when it does not occur simultaneously is when the new employer and the affected employees agree that the affected employees will

continue rendering services for the old employer for a period of time after the transfer. Another example is when the old employer and the new employer are not in agreement as to whether s 197 applies.

The court held that in this case the old employer and new employer were not in agreement as to whether s 197 applied and thus the old employer continued to be the employer of the employees after the transfer occurred. This argument was supported by the fact that the applicants continued working for Fleet Africa for a period of time after the transfer date of 1 March 2012, namely, until September 2012. It was accordingly held that the applicants were employees of Fleet Africa when they concluded the retrenchment agreements and such agreements were therefore valid and binding.

As regards the argument that the applicants waived and/or abandoned their rights to enforce the retrenchment agreements when their employment transferred to the city, the court found that the applicants did not exercise an 'election' for their employment to continue with the city but rather it was an automatic consequence of s 197. Thus, there was no waiver of their rights under the retrenchment agreements. This was despite the fact that the retrenchment agreements expressly provided that the agreements were in full and final settlement of any entitlement for their employment to transfer to the city.

It was held that the applicants were entitled to enforce the retrenchment agreements. Boyce AJ recorded his dissatisfaction that Fleet Africa tried to avoid complying with the retrenchment agreements when they should have been aware at the time of concluding the agreements that there was a chance that the expiry of the agreement would be found to constitute a s 197 transfer. Fleet Africa was ordered to pay the costs.



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

Negligence or gross negligence

Robor (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others (LC) (unreported case no JR 463/2016, 8-4-2016) (Lagrange J).

Subsequent to finding the third respondent (employee) guilty of negligence, which resulted in the applicant (employer) suffering a financial loss of approximately R 42 000 and being in gross violation of his employer's information technology (IT) e-mail policy, the second respondent (arbitrator) was not persuaded that dismissal was an appropriate sanction and reinstated the employee without any back pay.

The financial loss incurred by the employer was occasioned by the employee having failed in his daily duties to 'pick up' the fact that his subordinates were being paid for work they had already been remunerated for. Prior to being charged for violating the employer's IT e-mail policy the employee had been reprimanded for the same offence sometime in 2012.

In his award the arbitrator rejected the argument that the employee's misconduct was gross in nature and, as a result thereof, held that the sanction of dismissal was too harsh. On this finding the arbitrator concluded that the employee's dismissal was substantively unfair and as stated awarded the employee reinstatement.

The arbitrator's reasoning was primarily premised on his understanding that gross negligence meant that the employee is accused of 'a complete neglect to do things correctly'. Having regard to the fact that the employee received a high performance rating and that the machinery he was responsible for was running at an efficiency rated at 94,7% and 95%, the arbitrator held that the employee's actions could not be categorised as 'gross' as his misconduct was merely confined to his failure to analyse the employer's cost allocations.

In justifying his award the arbitrator held the following:

Despite causing his employer a loss of about R 42 000 the employee's 30 year length of service mitigated against the sanction of dismissal.

The offences were not as serious as argued by the employer and the trust relationship between the parties had not irretrievably broken down.

Dismissal was too harsh a sanction in light of the fact that this was the first time the employee had been found guilty of negligence and only the second time he was found guilty of violating the employer's IT policy.

In an unopposed review application the employer argued that the arbitrator failed to take into account the evidence it led as to why it was of the view the trust relationship between itself and the employee had broken down and the reasons therefore.

With regard to the employee violating the IT policy, the employer argued that having found the employee guilty of this charge the arbitrator accepted that the employee sent 3 495 private e-mails with 12 645 attachments. Despite accepting this fact the arbitrator nevertheless found the employee's conduct was not serious in nature, thus there was a disjoint between the evidence the arbitrator accepted and the conclusion he arrived at. Furthermore, the employee had in the past admitted his wrongdoing when he was disciplined for violating the IT e-mail policy, yet continued to act in the same manner thereafter.

As to the arbitrator's definition of what constitutes gross negligence, the employer argued that the former applied the incorrect test. The correct test, according to the employer was to assess the consequences of an employee's conduct when determining whether their negligence was gross or not.

With reference to various authorities the court first began to set out the test the Labour Court must adopt when hearing an application to review an award. Among these authorities the court quoted the following from the recent Labour Appeal Court judgment in *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC):

'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring

of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

In approaching the application on this basis the court per Lagrange J agreed that the arbitrator simply downplayed the seriousness of the charges without any or proper justification, especially under circumstances where the employee failed to take responsibility for his conduct and where he failed to refute the employer's argument at arbitration that the trust relationship between the parties had irretrievably broken down.

Addressing the arbitrator's findings in respect of the loss suffered by the employer considered against the employee's length of service, the court found:

'There is no basis on which the arbitrator could say that a loss of R 40, 000 was not significant. The implicit reasoning of the arbitrator to the effect that this amount was not significant when compared to 30 years of service is simply illogical.'

Turing to what constitutes gross negligence the court held:

'What is at issue once it is established that an employee was negligent in a respect, is how serious that negligence was. In this case, the negligence relating to the avoidable costs was a result of a course of conduct over a few months on the part of the applicant and the loss was significant. It is difficult to see how anyone could not construe such negligence as gross. As a result of the arbitrator misconstruing the approach, he diminished the seriousness of this charge. Had he not done so he would have found it very difficult to avoid the conclusion that Singh's conduct in relation to the incurring of maintenance costs was an act of gross negligence.'

In its conclusion the court found that the arbitrator's findings were not a reasonable conclusion given all the evidence before him and as such, set aside the award with no order as to costs. □

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By
Yashin
Bridgemohan

Withdrawing a withdrawal of a dispute and re-enrolling arbitration

South African Municipal Workers Union and Others v Zenzeleni Cleaning and Transport Services CC (LC) (unreported case no JR852/13, 23-2-2015) (Molahlehi J).

Section 191(5) of the Labour Relations Act 66 of 1995 (LRA) provides the Commission for Conciliation, Mediation and Arbitration (CCMA) must arbitrate a dispute at the request of the employee party if it has been referred to conciliation and 30 days have passed or a certificate has been issued confirming the dispute has been unresolved.

Notwithstanding the above the LRA, as well as the CCMA Rules, does not make provision for the CCMA to hear an application to enrol an unfair dismissal dispute after such a dispute has been withdrawn by an applicant.

Background

The applicants in this case withdrew their referral to arbitration made to the CCMA (second respondent) after apparently being advised that the proper approach to follow in challenging their dismissal was contractual. This meant instituting action in the High Court.

After withdrawal the applicants then decided to return to the CCMA again and brought an application to have the arbitration proceedings re-enrolled. Said application was rejected by the third respondent (the commissioner) on the ground that the CCMA did not possess jurisdiction to re-enrol a dispute that had been withdrawn before it could have been finalised.

The applicants then made an application to the Labour Court to review and set aside the jurisdictional ruling made by the third respondent.

Labour Court's judgment

The court considered the case of *Shibogde v Minister of Safety and Security and Others* (LC) (unreported case no JR 3307/09, 11-7-2012) (Lagrange J) at para 26, where it was held that: '[T]he fact that a matter is withdrawn is not necessarily a bar to reinstituting proceedings. It seems that the prevailing view is that a claim is not determined by the withdrawal of the claim, but the withdrawal is equivalent to a grant of absolution from the instance. It therefore remains

open for the applicant to reinstitute proceedings as the merits of the claim have not been adjudged.'

The court further noted the judgment of Shai AJ in *Kgobokoe v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 235 (LC) where the approach which was followed in the case *Public Servants Association of South Africa obo Strydom v SARS* [2007] JOL 20040 (LC), where it was held that a withdrawal of an action cannot be withdrawn was based on the doctrine of an election, was rejected. In dismissing that approach the court in *Kgobokoe* held that 'a withdrawal of a matter may be withdrawn.'

In addition the court looked at the judgment of *SAMWU and Others v Commission for Conciliation Mediation and Arbitration and Another* (unreported case no J2448/13, 21-11-2013) (Steenkamp J) where the court confirmed the decision in *Ncaphayi v Commission for Conciliation Mediation and Arbitration and Others* (2011) 32 ILJ 402 (LC) and made a distinction between a withdrawal on the applicant's own accord and where the withdrawal is an intrinsic part of a settlement agreement. The court, in further agreeing with the *Ncaphayi* case, held that a withdrawal of a dispute in labour matters is similar to an order of absolution from the instance in civil procedure. The fact that the applicant withdraws a referral did not in terms of court bar the CCMA of the authority to enrol the arbitration on second referral.

The court held 'the issue which the Commissioner ought to have concerned himself with to ensure that he arrives at a correct decision is whether there had been compliance with the provisions of Section 191(5) of the [LRA], in terms of which it is explicitly provided that the CCMA must arbitrate a dispute at the request of an employee, if the dispute has been referred to conciliation and or 30 days have lapsed or a certificate of outcome has been issued confirming that the dispute remains unresolved. It is common cause that the applicant acquired the right to refer the matter to arbitration once it was confirmed that the

dispute remained unresolved' (at para 13).

In addition the court found the commissioner was 'incorrect in assuming that the withdrawal automatically meant that the applicants were no longer intended on pursuing their claim by virtue of the withdrawal' (at para 14).

The court further held: 'There is no automatic legal consequence that a withdrawal of a dispute means that the withdrawal cannot be withdrawn and the dispute be re-enrolled' (at para 15).

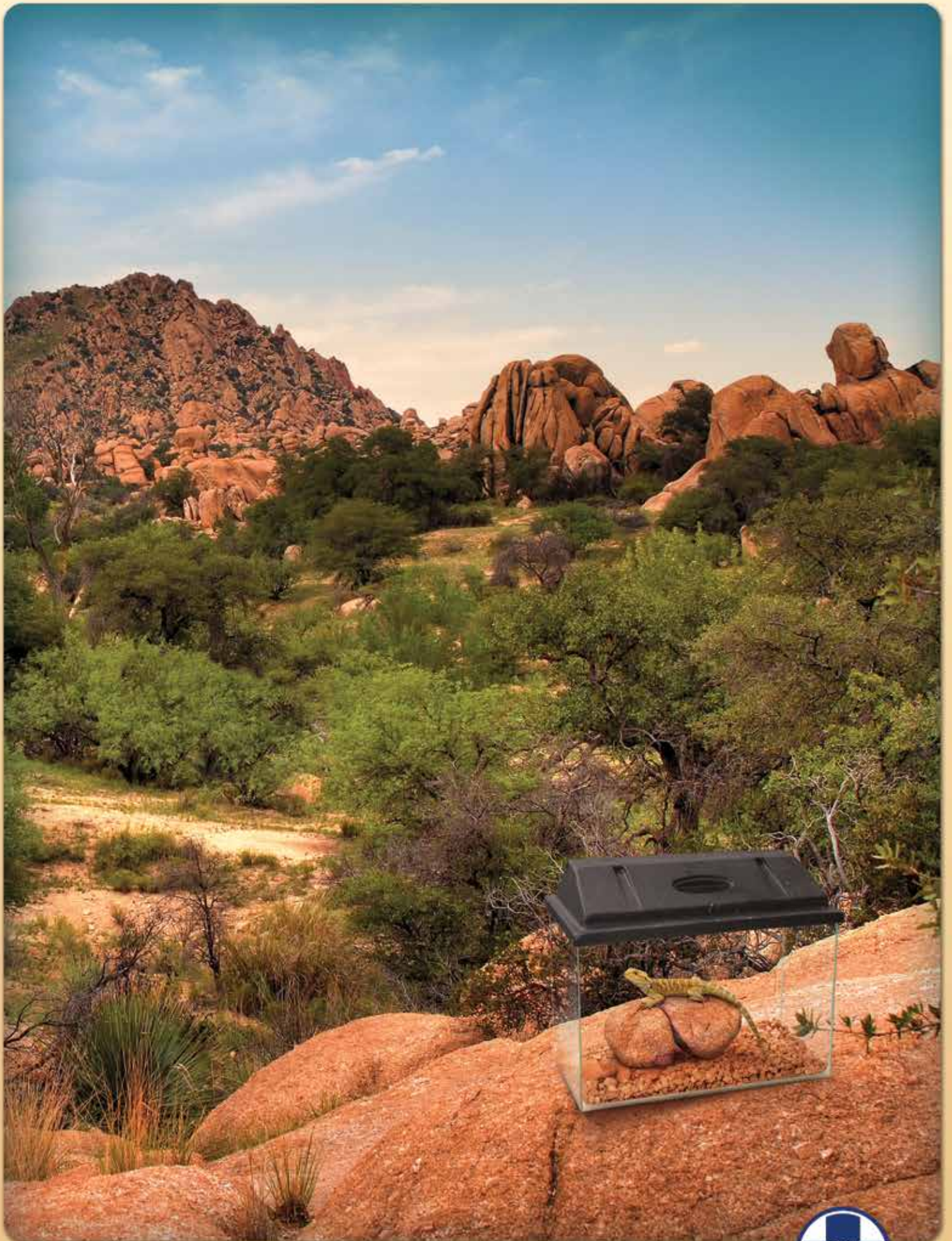
Molahlehi J noted that: 'Once the applicants' application to have the matter re-enrolled was made it was incumbent on the Commissioner to enquire as to whether the withdrawal precluded the applicants from proceeding further with the dispute. It is only where the withdrawal is consequent to the compromise of the dispute, that it cannot be withdrawn' (at para 15).

The court accordingly made an order that the commissioner's ruling – that the CCMA did not have jurisdiction to hear the applicant's dispute – was reviewed and set aside. In addition the court ordered that the CCMA re-enrol the arbitration proceedings and provide a date for same before a commissioner other than the third respondent.

Conclusion

This case is important as it confirms the view that a withdrawal of a referral to arbitration at the CCMA may in itself be withdrawn and arbitration proceedings may be re-enrolled, provided however that in the first instance, the withdrawal of the referral to arbitration was not made as a compromise to the dispute. In said circumstances where the CCMA refuses to re-enrol arbitration proceedings, application may be made to the Labour Court for the review and setting aside of the CCMA's decision.

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The financial loss incurred by the employer was occasioned by the employee having failed in his daily duties to 'pick up' the fact that his subordinates were being paid for work they had already been remunerated for. Prior to being charged for violating the employer's IT e-mail policy the employee had been reprimanded for the same offence sometime in 2012.

In his award the arbitrator rejected the argument that the employee's misconduct was gross in nature and, as a result thereof, held that the sanction of dismissal was too harsh. On this finding the arbitrator concluded that the employee's dismissal was substantively unfair and as stated awarded the employee reinstatement.

The arbitrator's reasoning was primarily premised on his understanding that gross negligence meant that the employee is accused of 'a complete neglect to do things correctly'. Having regard to the fact that the employee received a high performance rating and that the machinery he was responsible for was running at an efficiency rated at 94,7% and 95%, the arbitrator held that the employee's actions could not be categorised as 'gross' as his misconduct was merely confined to his failure to analyse the employer's cost allocations.

In justifying his award the arbitrator held the following:

Despite causing his employer a loss of about R 42 000 the employee's 30 year length of service mitigated against the sanction of dismissal.

The offences were not as serious as argued by the employer and the trust relationship between the parties had not irretrievably broken down.

Dismissal was too harsh a sanction in light of the fact that this was the first time the employee had been found guilty of negligence and only the second time he was found guilty of violating the employer's IT policy.

In an unopposed review application the employer argued that the arbitrator failed to take into account the evidence it led as to why it was of the view the trust relationship between itself and the employee had broken down and the reasons therefore.

With regard to the employee violating the IT policy, the employer argued that having found the employee guilty of this charge the arbitrator accepted that the employee sent 3 495 private e-mails with 12 645 attachments. Despite accepting this fact the arbitrator nevertheless found the employee's conduct was not serious in nature, thus there was a disjoint between the evidence the arbitrator accepted and the conclusion he arrived at. Furthermore, the employee had in the past admitted his wrongdoing when he was disciplined for violating the IT e-mail policy, yet continued to act in the same manner thereafter.

As to the arbitrator's definition of what constitutes gross negligence, the employer argued that the former applied the incorrect test. The correct test, according to the employer was to assess the consequences of an employee's conduct when determining whether their negligence was gross or not.

With reference to various authorities the court first began to set out the test the Labour Court must adopt when hearing an application to review an award. Among these authorities the court quoted the following from the recent Labour Appeal Court judgment in *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC):

'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring

of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

In approaching the application on this basis the court per Lagrange J agreed that the arbitrator simply downplayed the seriousness of the charges without any or proper justification, especially under circumstances where the employee failed to take responsibility for his conduct and where he failed to refute the employer's argument at arbitration that the trust relationship between the parties had irretrievably broken down.

Addressing the arbitrator's findings in respect of the loss suffered by the employer considered against the employee's length of service, the court found:

'There is no basis on which the arbitrator could say that a loss of R 40, 000 was not significant. The implicit reasoning of the arbitrator to the effect that this amount was not significant when compared to 30 years of service is simply illogical.'

Turing to what constitutes gross negligence the court held:

'What is at issue once it is established that an employee was negligent in a respect, is how serious that negligence was. In this case, the negligence relating to the avoidable costs was a result of a course of conduct over a few months on the part of the applicant and the loss was significant. It is difficult to see how anyone could not construe such negligence as gross. As a result of the arbitrator misconstruing the approach, he diminished the seriousness of this charge. Had he not done so he would have found it very difficult to avoid the conclusion that Singh's conduct in relation to the incurrance of maintenance costs was an act of gross negligence.'

In its conclusion the court found that the arbitrator's findings was not a reasonable conclusion given all the evidence before him and as such, set aside the award with no order as to costs.

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By
Yashin
Bridgemohan

Withdrawing a withdrawal of a dispute and re-enrolling arbitration

South African Municipal Workers Union and Others v Zenzeleni Cleaning and Transport Services CC (LC) (unreported case no JR852/13, 23-2-2015) (Molahlehi J).

Section 191(5) of the Labour Relations Act 66 of 1995 (LRA) provides the Commission for Conciliation, Mediation and Arbitration (CCMA) must arbitrate a dispute at the request of the employee party if it has been referred to conciliation and 30 days have passed or a certificate has been issued confirming the dispute has been unresolved.

Notwithstanding the above the LRA, as well as the CCMA Rules, does not make provision for the CCMA to hear an application to enrol an unfair dismissal dispute after such a dispute has been withdrawn by an applicant.

Background

The applicants in this case withdrew their referral to arbitration made to the CCMA (second respondent) after apparently being advised that the proper approach to follow in challenging their dismissal was contractual. This meant instituting action in the High Court.

After withdrawal the applicants then decided to return to the CCMA again and brought an application to have the arbitration proceedings re-enrolled. Said application was rejected by the third respondent (the commissioner) on the ground that the CCMA did not possess jurisdiction to re-enrol a dispute that had been withdrawn before it could have been finalised.

The applicants then made an application to the Labour Court to review and set aside the jurisdictional ruling made by the third respondent.

Labour Court's judgment

The court considered the case of *Shibogde v Minister of Safety and Security and Others* (LC) (unreported case no JR 3307/09, 11-7-2012) (Lagrange J) at para 26, where it was held that: '[T]he fact that a matter is withdrawn is not necessarily a bar to reinstituting proceedings. It seems that the prevailing view is that a claim is not determined by the withdrawal of the claim, but the withdrawal is equivalent to a grant of absolution from the instance. It therefore remains

open for the applicant to reinstitute proceedings as the merits of the claim have not been adjudged.'

The court further noted the judgment of Shai AJ in *Kgobokoe v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 235 (LC) where the approach which was followed in the case *Public Servants Association of South Africa obo Strydom v SARS* [2007] JOL 20040 (LC), where it was held that a withdrawal of an action cannot be withdrawn was based on the doctrine of an election, was rejected. In dismissing that approach the court in *Kgobokoe* held that 'a withdrawal of a matter may be withdrawn.'

In addition the court looked at the judgment of *SAMWU and Others v Commission for Conciliation Mediation and Arbitration and Another* (unreported case no J2448/13, 21-11-2013) (Steenkamp J) where the court confirmed the decision in *Ncaphayi v Commission for Conciliation Mediation and Arbitration and Others* (2011) 32 ILJ 402 (LC) and made a distinction between a withdrawal on the applicant's own accord and where the withdrawal is an intrinsic part of a settlement agreement. The court, in further agreeing with the *Ncaphayi* case, held that a withdrawal of a dispute in labour matters is similar to an order of absolution from the instance in civil procedure. The fact that the applicant withdraws a referral did not in terms of court bar the CCMA of the authority to enrol the arbitration on second referral.

The court held 'the issue which the Commissioner ought to have concerned himself with to ensure that he arrives at a correct decision is whether there had been compliance with the provisions of Section 191(5) of the [LRA], in terms of which it is explicitly provided that the CCMA must arbitrate a dispute at the request of an employee, if the dispute has been referred to conciliation and or 30 days have lapsed or a certificate of outcome has been issued confirming that the dispute remains unresolved. It is common cause that the applicant acquired the right to refer the matter to arbitration once it was confirmed that the

dispute remained unresolved' (at para 13).

In addition the court found the commissioner was 'incorrect in assuming that the withdrawal automatically meant that the applicants were no longer intended on pursuing their claim by virtue of the withdrawal' (at para 14).

The court further held: 'There is no automatic legal consequence that a withdrawal of a dispute means that the withdrawal cannot be withdrawn and the dispute be re-enrolled' (at para 15).

Molahlehi J noted that: 'Once the applicants' application to have the matter re-enrolled was made it was incumbent on the Commissioner to enquire as to whether the withdrawal precluded the applicants from proceeding further with the dispute. It is only where the withdrawal is consequent to the compromise of the dispute, that it cannot be withdrawn' (at para 15).

The court accordingly made an order that the commissioner's ruling – that the CCMA did not have jurisdiction to hear the applicant's dispute – was reviewed and set aside. In addition the court ordered that the CCMA re-enrol the arbitration proceedings and provide a date for same before a commissioner other than the third respondent.

Conclusion

This case is important as it confirms the view that a withdrawal of a referral to arbitration at the CCMA may in itself be withdrawn and arbitration proceedings may be re-enrolled, provided however that in the first instance, the withdrawal of the referral to arbitration was not made as a compromise to the dispute. In said circumstances where the CCMA refuses to re-enrol arbitration proceedings, application may be made to the Labour Court for the review and setting aside of the CCMA's decision.

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By
Meryl
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Abbreviation	Title	Publisher	Volume/issue
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<i>JLSD</i>	Journal of Law Society and Development	Unisa	(2015) 2.1
<i>PLD</i>	Property law Digest	LexisNexis	(2016) March
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By
Carmen
Schubert

Cleaning up the unclaimed benefit industry – the FSB's unclaimed benefit bugbear

The issues within the broader pension fund industry surrounding unclaimed benefits remain a major bugbear for the Financial Services Board (FSB). As such, the regulator continues to look for ways to drive a paradigm shift that will improve compliance with best practices across the industry.

One of the major challenges that the FSB is attempting to tackle is the perception that insurers and administrators lack incentive to trace beneficiaries and pay out unclaimed benefits because it means benefits can remain in the unclaimed fund for longer, incurring admin and investment fees.

At present, the value of the unclaimed benefits 'black hole' across all funds is, according to the FSB, estimated to be in the region of R 20 billion.

The FSB's information circular (PF No. 4 of 2015) (www.fsb.co.za, accessed 3-5-2016), advises that the organisation is currently in the process of conducting an audit to quantify the value and gain deeper insight into the state of unclaimed benefits in the industry. The FSB is gathering data from unclaimed benefit funds across the retirement industry and intends to place this data on its website where it will form a repository for members trying to find out if they have unclaimed benefits in a specific fund.

While unclaimed benefits can remain indefinitely in occupational funds, they are classed as 'unclaimed' by definition as laid out the Pension Funds Act 24 of 1956 (the Act), as amended, after 24 months. Trustees in occupational funds have a fiduciary duty to trace members before their benefits become defined as unclaimed.

However, if beneficiaries are not found, trustees have a duty to continue to trace them after the 24-month period has lapsed or to then transfer them to an unclaimed benefit fund. These duties are often written into the rules of the occupational funds. Having been left to self-regulate in this regard it seems the industry at large has failed to stick to best practices and fulfil their mandate of ensuring that beneficiaries are traced and paid what is rightfully theirs in a timely manner. This inaction has necessitated tougher regulation from the FSB to enforce compliance, which means that

there are now major changes on the horizon for the industry that will have far-reaching implications.

Counting the cost of increased regulation

If a fund is registered as an unclaimed benefit preservation fund, the current administrative requirements for a s 14 transfer from an occupational fund to an unclaimed benefit fund are minimal (as outlined in the Act, as amended) – the transferor fund completes a Form H and sends it to the transferee fund, which issues a Form J. Once those two forms are signed they are simply kept on file with both funds and do not need to be sent to the regulatory authority unless requested by the FSB. In my 15 years' experience, this is something that seldom, if ever, occurs.

While there are admin fees associated with the current s 14 process for elements such as disinvestment and trustee signatures, the costs are minimised because the fees for actuarial and FSB submission are not required in terms of a s 14 transfer.

However, the FSB now plans to take the regulation of these unclaimed benefit funds a step further. In this regard, the FSB has released draft notice no. 2 that pertains to the '[w]ithdrawal of exemption from compliance with section 14(1) of the Pensions Fund Act 1956, for transfers of liabilities in respect of unclaimed benefits' (www.fsb.co.za, accessed 3-5-2016).

Transfers in terms of s 14(1) of the Act require members to be notified of any transfer and to be given the opportunity to object to the transfer if they feel they are being prejudiced by it.

Due to the nature of unclaimed benefits, it is not possible to notify members of these transfers. The FSB is of the opinion that members who are unable to object to such a transfer are not adequately protected, unless the Registrar is able to approve or deny approval to such a transfer. Therefore, in terms of the draft notice, applications for transfers to unclaimed benefit funds have to be lodged with the FSB before the transfer occurs and only after the FSB's approval is obtained.

By imposing greater industry regula-

tion on the administrative and reporting requirements for transfers into these funds, the FSB aims to clamp down on administrators that do not act in the best interest of beneficiaries, to ultimately protect fund members, while also helping to quantify the scale of the unclaimed benefit surplus.

While this is admirable in principle, the application of such a decision will have serious implications from both an administrative and, consequently, a cost perspective.

According to the notice, administrators will in future need to submit s 14 transactions to the FSB for approval prior to any actual transfer taking place between funds. This not only adds to the administrative requirements but also attracts greater direct costs because every time a transfer is done a certificate needs to be signed off by the actuaries of both the transferor and the transferee funds, which can cost between R 2 000 – R 4 000 per certificate. This can equate to as much as R 8 000 per transfer in actuarial fees alone. There will also be a fee for submitting the application to the FSB, which is currently R 210 per member and is capped at R 1 020 for six or more members, according to the amendment of sch L to the regulation of the Act.

Furthermore, if administrators choose to do a blanket transfer by leaving the application open-ended and transferring members over a period of time, then a cost of R 4 100 will be levied by the FSB to review the application.

With these associated costs umbrella funds could be particularly hard hit from a cost perspective, depending on the rules of the fund.

According to the new regulations as outlined in draft notice no. 2, each participating employer will need to submit a s 14 application for its unclaimed members. As participating employers in an umbrella fund generally have fewer members, transfers are normally made for only one or two people at a time. If the rules of the umbrella fund state that unclaimed benefits have to be transferred as they become unclaimed, this may result in the need to do multiple transfers of one or two members at a time.

Another issue requiring attention is that many of the unclaimed benefits are small – under R 5 000 – and the process

of finding someone is slow, and a successful trace is not guaranteed.

The industry's base cost to trace someone is approximately R 400. Administrators also charge up to R 40 per month per member to manage funds, and up to R 300 to affect a payment. The charging of asset-based fees, in addition to the flat rand fees, is also common. These admin costs can therefore quickly erode these small benefits.

In addition, most unclaimed benefits are invested in conservative portfolios where it is more likely that the capital value will be preserved. However, this results in lower investment returns due to the lower risk profiles of these investments.

This not only prevents the benefit from keeping up with inflation, it also effectively means that the fees and costs are not being offset by the returns, and

that the benefit is ultimately being whittled away, which is counter to the aim of these proposed amendments.

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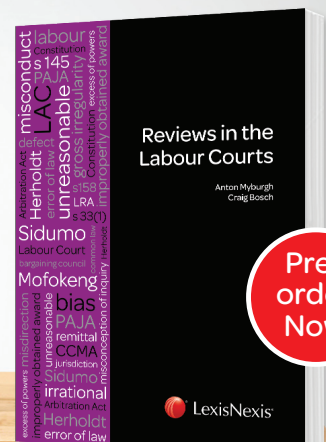
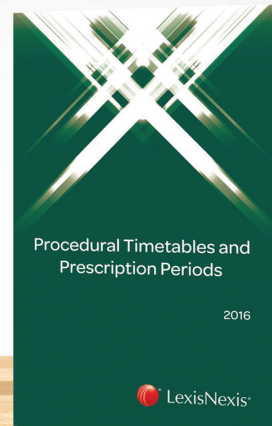
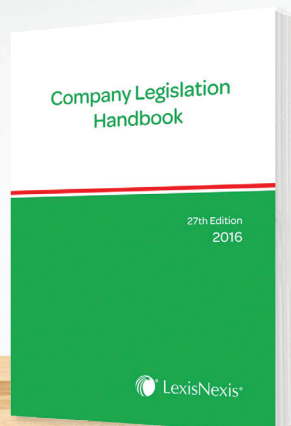
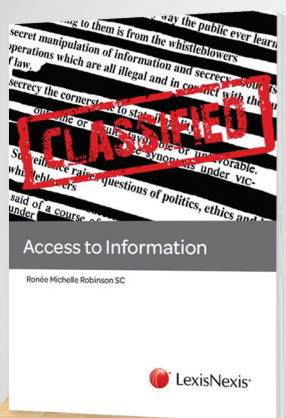
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