

AUGUST 2013

A BALANCING ACT BETWEEN OWNERS AND OCCUPANTS

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**Civil court rules –
open to abuse?**

**Solvency asset
management**

What does it entail and how will
it affect you?

**Life rights for senior citizens in
retirement villages**

A checklist for attorneys

**Finding common ground between
attorneys and state legal advisers**





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Mapula Sedutla - Acting editor

Moving forward

Digital. We will be introducing a guide that will be sent with the digital version, but readers who require assistance on using *De Rebus Digital* can e-mail kathleen@derebus.org.za.

- For a summary of the reader survey see 2013 (July) DR 6.
- For the complete reader survey see [www.derebus.org.za/under Documents or www.lssa.org.za/upload/De%20Rebus%20Reader%20survey%20Final%20Report%2019%20May%202013\(1\).pdf](http://www.derebus.org.za/under Documents or www.lssa.org.za/upload/De%20Rebus%20Reader%20survey%20Final%20Report%2019%20May%202013(1).pdf)

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Legal Practice Bill

The Legal Practice Bill continues to be hotly debated at the Portfolio Committee on Justice and Constitutional Development level and in the profession. We continue to follow these discussions with close interest as does our publisher, the Law Society of South Africa (LSSA). Although submissions on the Bill are closed, the LSSA has made itself available to the Portfolio Committee and the Justice Department to clarify issues that relate directly to the profession where further clarity may expedite the Bill. The LSSA has highlighted the following areas of concern:

- **Fees:** The setting of fees should fall within the mandate of the envisaged National Legal Practice Council (NLPC).
- **Conveyancing:** The conveyancing process is complex and requires a thorough knowledge and understanding of the relevant legislation, therefore the LSSA is of the view that it is in the public's interest that conveyancers must be practising attorneys.
- **Visits to universities by representatives of the NLPC:** This will ensure that law graduates are able to acquire the correct knowledge, skills and values to be properly equipped to serve the public when they enter the profession. This was also highlighted at the recent LLB summit (see 2012 (July) DR 8).
- **Multidisciplinary practices:** The

LSSA is of the view that the current enabling clause in the Bill is sufficient. However, although the LSSA supports, in some aspects, multidisciplinary practices, it is opposed to alternative business structures.

- **Direct briefing of advocates by members of the public provided advocates have Fidelity Fund certificates:** The LSSA is not convinced that, if advocates choose to take briefs direct from the public and have trust accounts for money received from the public as well as the accompanying Fidelity Fund certificate, this will reduce legal fees as advocates will be obliged to acquire the necessary infrastructure to maintain, control and manage trust accounts.

Having worked at *De Rebus* for the past four years, first as production editor and then as deputy editor, taking on the role of acting editor is a welcomed challenge. The *De Rebus* team and I are dedicated to producing a journal that will continue to cover topical important issues in the law profession. Please feel free to contact me at mapula@derebus.org.za with your views or suggestions.

After the reader survey

Results of our 2013 reader survey highlighted readers' need for content that is more practical in nature. In the near future the journal will be implementing some of your suggested changes and we welcome any further suggestions on topics to be covered in the journal, as well as any other changes to make *De Rebus* a more useful tool for you in your practice. Suggestions can be e-mailed to mapula@derebus.org.za.

Readers have also asked for themed issues, that is, issues dedicated to one area of law. Although it may seem like a good idea, themed issues are not feasible as that would mean attorneys that are not practising in an area of law covered in a particular issue, will not find much of relevance in *De Rebus* that month.

We have also noted comments on the difficulty of using *De Rebus*

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).

Upcoming deadlines for article submissions: 19 August and 16 September 2013.

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.

Is everyone equal before the law?

I have noted the comments of Vuyo Tshiki in the letters column of the June issue of *De Rebus* (2013 (June) DR 4) concerning the failure of the Judicial Service Commission (JSC) to appoint white male candidates, save in exceptional circumstances. I submit that such conduct flies in the face of s 9 of the Constitution that states unequivocally that everyone is equal before the law.

Although the Constitution states that adequate measures must be taken to advance persons disadvantaged by unfair legislation, sight must not be lost of the fact that, according to the Constitutional Court, such measures must be fair and not over-hasty and arbitrary. They must ensure equitable representation.

The reality is, due to our troubled past, measures must be taken to empower certain groups and thereby fulfil a laudable social objective. There are two concepts of equality, namely substantive and formal equality. The latter entails merely providing the previously marginalised with the same rights as the previously advantaged. Substantive equality, on the other hand, entails taking positive measures to empower certain groups (C Albertyn and B Goldblatt 'Facing the challenges of transformation of an indigenous of equality' vol 14 part 2 (1998) *SAJHR* at 248 – 276).

The trouble with affirmative action in this country is that, unlike its application in other countries, South Africa is the only country where it works in the favour of the majority. Affirmative action is not always applied fairly in this country. For such measures to be fair, they must not discriminate against the minority by barring them from employment.

It is also disconcerting that black economic empowerment is often exploited by certain white businessmen in order to secure lucrative business deals.

Another sad reality is that, due to the turbulent history of South Africa, racism is sometimes classified as racism when it discriminates against black people only. Should the JSC have opted not to hire black candidates, such conduct would be condemned. In this country there is, furthermore, no such thing as an over-representation of black employees in an organisation.

On the contrary, we continuously hear that an organisation is 100% black owned without any eyebrows being raised. Even an organisation named the Black Lawyers' Association is acceptable. However, I doubt whether anyone would approve of a 'White Lawyers' Association'.

However, on the other hand there are many competent black attorneys who are deemed incompetent solely on the basis of their skin colour. This is because apartheid instilled a false sense of superiority in the minds of some. Many young candidate

attorneys from previously disadvantaged backgrounds struggle to secure meaningful work because they do not own a car or have sufficient computer skills.

I was also on the aspirant prosecutors' programme where it was alleged that my accent was a 'limiting factor to my presentation and oration skills' and that it 'limited understanding in court', despite the fact that no magistrate or attorney ever seemed to have an issue with my 'accent problem'. On the programme there was a young black man who had to be given a book by the tutor to improve his English. I thought we lived in a multi-cultural society in which even our elected officials have accents.

The passing over of competent white judicial candidates certainly is prejudicial to the candidates but foremost to the employer and the public, since these candidates could have provided much needed skills imperative to the administration of justice.

In 2009 I was informed by an administrative manager of a certain institution that I would not be accepted as a professional assistant because I was white.

It will take a long time before South Africa becomes a country that will, according to the preamble of the Constitution, truly 'belong to all who live in it both black and white'. We must all change our mindset.

Constantinos Constantinides,
attorney, Durban



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A poor man's perspective on the LLB degree

The rich and educated often talk and think for the poor and uneducated. This mandate is often self-imposed. This is an ancient practice harbouring back to when riches were measured by the number of wives, ploughing fields, children and stock one had and the social standing these possessions afforded.

Those who had no access to, or possession or ownership of these things were not even allowed to speak. This resulted in decisions being taken (without a mandate) on their behalf by those who were regarded as rich or who had a certain social standing.

The talk about the LLB degree is no different. None or very few people who are directly affected by the degree have spoken up. The decision to change the curricula in consideration of the poor was taken without having heard their views. They do not have access to these discussion forums.

I am not speaking on their behalf, or as an observer, or as an unaffected com-

mentator, but as a poor man for whom the four-year LLB degree was intended. The aim of introducing the new LLB was to improve access to the legal profession. This was done having considered that financial constraints often frustrate the poor's ambitions if the studies would take too long. In South Africa, the majority of the poor is, and have been black.

We are still faced with the same difficulties. Black people are still poor and they are still the minority in the profession. If the study is prolonged, the poor man's desire to join the profession will obviously be thwarted. The noble aim of balancing the historical imbalances will remain a dream for years to come.

The proposition that new LLB graduates are of poor quality is an assumption by the observers, unaffected commentators, the rich and the privileged. It is also an assumption that the poor performance of new LLB graduates is as a result of the length of the programme.

In South Africa, we have always had the BProc degree and I hold a BProc degree only. It is a four-year course and

there had never been an outcry about the quality of the graduates. In fact, some holders of BProc degrees are judges in the highest courts in South Africa. I appear in lower and superior courts with no difficulty at all.

Critics of the LLB degree come up with no scientific measures of quality. I know a number of new LLB graduates who perform very well. There are also issues with regard to the attitudes of the presiding officers, especially towards black practitioners. Their approach is so negative that one may even feel unwelcome. This attitude is rare in superior courts, but rife in lower courts.

The problem may be broader than we think. Let us think out of the box.

I have not exhausted my views but felt I must open the debate by offering a different perspective.

Senzo Lawrence Buthelezi,
attorney, Grahamstown



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The Minister of Justice and Constitutional Development, Jeff Radebe, has appointed 71 sheriffs to fill 76 of the 119 vacant offices of sheriffs countrywide.

Western Cape regional head of the Justice Department, advocate Hishaam Mohamed who also manages sheriff appointments, told *De Rebus* that the newly appointed sheriffs reflect the demographics of the country in respect of race and gender. Of the 71 appointed sheriffs, there are 47 Africans, representing 66%; 11 whites, representing 16%; 6 coloureds, representing 8% and 7 Indians, representing 10%.

In terms of gender, 18 women and 53 men were appointed, representing 25% and 75% respectively. They will take office on 1 October 2013, after completing a mandatory induction training programme.

Mr Mohamed said that although female representation had increased, it was nowhere near where the department would like it to be. He added that the department's ultimate goal is to have female representation at least 50%.

The new appointments bring the total number of permanent sheriffs currently operating in the country from 298 to 365. Of the 365 sheriffs, 175 are white (48%), 139 are African (38%), 27 are Indian (7%) and 24 are coloured (7%). Of the total sheriffs, the 82 female and 283 male sheriffs represent 22% and 78% respectively. This has resulted in a 9% increase in black persons (Africans, Indians and coloureds).

Mr Mohamed told *De Rebus* that a few candidates were appointed at more than one office, especially in cases where the

courts in small towns were in close proximity, hence the appointment of only 71 persons for 76 vacancies.

Mr Mohamed said that not all 119 vacancies could be filled because too few applications were received. He said that the remaining 43 vacant offices were in small towns and that the department would be combining the positions if the proximity of the courts allowed it to do so. The department will also be re-advertising the vacancies by the end of September.

Mr Mohamed added that s 6 of the Sheriffs Amendment Act 14 of 2012 makes provision for Minister Radebe to appoint state officials to act as sheriffs and serve documents for courts where there are no sheriffs. He added that, in the interim, acting sheriffs had been appointed for the remaining 43 vacancies.

According to a press release issued by the department, there were 465 sheriffs operating nationally before 1994. Of the 465, 443 were male, which represented 95,27% and 22 were female. The racial demographics of the 465 sheriffs were:

- 414 whites or 89,03%;
- 44 Africans or 9,46%;
- 5 coloureds or 1,08%; and
- 2 Indians or 0,43%.

A moratorium was placed on the permanent appointment of sheriffs in 2005 to allow time to amend the regulations relating to sheriffs to bring them in line

with constitutional imperatives and to do an audit on the profession. The moratorium was lifted in September 2011.

Mr Mohamed said that when the department conducted an audit of the sheriffs' profession in 2009, the audit showed that of the 546 sheriffs, 76% were white, 24% were black and women comprised only 9%.

During August 2012, after the moratorium on the appointment of sheriffs fell away, Minister Radebe appointed 124 new sheriffs of which:

- 61 (49,2%) were African;
- 44 were white (35,5%);
- 12 were coloured (9,7%); and
- 7 were Indian (5,6%).

With 40 women appointed, women represented 32% of the new appointees and men, after 84 appointments, represented 68%.

Mr Mohamed said that, as of December 2012, there were 418 sheriff offices countrywide but only 298 of these offices were filled with permanent sheriffs. 'Of the 298 sheriffs, only 21% (or 63) were women,' he said.

Mr Mohamed told *De Rebus* that sheriffs have an important role in the criminal justice system as they act as third parties to serve court process and execute warrants and orders of the court.

Nomfundo Manyathi-Jele,
nomfundo@derebus.org.za

Labour law workshop



Some of the delegates who attended the workshop.
Back from left to right: Reshma Maharaj, Preneshan Moodley, Chris Haralambous, Logan Naidu, Pragashinee Pillay, Faaria Ameen, Moses Zwake. Front from left to right: Kathy James, Mohammed AK Ameen, Zaheera Ameen and Arisha Ramkissoon.

The KwaZulu-Natal Law Society together with attorney Chris Haralambous from attorney's firm Cox Yeats, held a labour law workshop on the upcoming proposed legislative amendments to the labour legislation on 25 May. During the workshop, Mr Haralambous shared the following proposed amendments with the delegates, which possibly pose the most significant challenges for employers:

- Limitation on the use of fixed-term contracts beyond six months.
- Restrictive definitions of temporary staff versus permanent staff and the question of equal benefits.
- Increased liability for employers who hire staff from labour brokers.
- Increased liability for employers involved in sham or Labour Relations Act 66 of 1995 avoidance schemes.
- Increased powers of the Commission for Conciliation, Mediation and Arbitration when deciding on trade union rights.

Kathleen Kriel,
kathleen@derebus.org.za

New Deputy Minister of Justice and Constitutional Development

John Jeffery (49) has been appointed as the Deputy Minister of Justice and Constitutional Development.

Mr Jeffery is a former member of the Justice and Constitutional Development Portfolio Committee in the National Assembly. He holds the BA and LLB degrees as well as a postgraduate diploma in environmental law from the University of KwaZulu-Natal.

His first job was as a media trainer at the Midlands Information Centre and Resource Unit in Pietermaritzburg while completing his LLB degree.

In 1988 he was employed as a paralegal at the newly opened Cheadle Thompson & Haysom's (CTH's) Pietermaritzburg branch. This branch was opened at the request of the Congress of South African Trade Unions (Cosatu) to look at legal strategies to deal with the political violence at the time.

Mr Jeffery told *De Rebus* that he was not able to do his articles after graduating because the Transvaal Law Society would not allow him to be articled to Fink Haysom as he was based in the Johannesburg office while Mr Jeffery was based in the Pietermaritzburg one.

His principal in the Pietermaritzburg office had not been practising long



Newly appointed Deputy Minister of Justice and Constitutional Development, John Jeffery.

enough to officially be allowed to take a candidate attorney and Mr Jeffery was only able to commence articles once his principal had been practising the required number of years.

He thus commenced his articles in 1993 at CTH's Pietermaritzburg office. These were later transferred to Von Klemperer and Davis in Pietermaritzburg when the CTH office in Pietermaritzburg

closed. Mr Jeffery served articles from 1993 to 1995. He was admitted as an attorney in December 1995.

Mr Jeffery was a member of the KwaZulu-Natal provincial legislature from 1994 to 1999. He chaired the Environment and Conservation Portfolio Committee and was also a member of the Economic Affairs and the Safety and Security Portfolio Committee. He also led the African National Congress component of the Constitutional Committee in the provincial legislature, which was tasked with drafting a provincial constitution for KwaZulu-Natal.

Mr Jeffery has been a member of the National Assembly of Parliament since 1999 and also served on the Joint Rules and Rules Committees; the National Assembly Programming Committee and the Chief Whips Forum until his recent appointment.

Mr Jeffery is replacing former Deputy Minister Andries Nel who is now the Deputy Minister of Cooperative Governance and Traditional Affairs. The new Ministers were sworn in on 10 July.

*Nomfundo Manyathi-Jele,
nomfundo@derebus.org.za*

Wits Justice Show launched

The Wits Justice Project (WJP), an initiative of the University of the Witwatersrand, has launched a community radio talk show. The 60-minute talk show – The Wits Justice Show – aims to educate people on their rights when facing South Africa's judicial system.

The show was initiated by a member of the WJP, Paul McNally. Mr McNally told *De Rebus* that the WJP saw a 'huge gap in radio content'. He said that legal information was mostly available in English in the print medium. 'Radio reaches a high number of listeners and it is an easily accessible medium – that is why the show was born', he said.

The show is broadcast from a community radio station, Thetha FM, based in Orange Farm in the south of Johannesburg at 1.30 pm every Tuesday.

Mr McNally said that the show is broadcast in English, Sotho and Zulu and cov-

ers topics such as bail, restorative justice and what to expect if one is arrested. He added that they have recently partnered with Legal Aid South Africa and that attorneys from Legal Aid South Africa would become guests on the show.

Mr McNally said that the show was already growing, from August it will also be airing from Alex FM in order to reach a larger audience, he said.

Thetha FM is found on 100,6 FM and is available in Gauteng and parts of the Free State, while Alex FM is available on 89,1 FM and covers the Alexandra community, Sandton, as well as parts of greater Johannesburg and Pretoria. The show is also available on Soundcloud at www.soundcloud.com/witsjusticeproject.

*Nomfundo Manyathi-Jele,
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2013 annual general meetings

The six constituent members of the Law Society of South Africa will have their annual general meetings on the following dates:

- The Cape Law Society: 1 - 2 November at the Pavilion Conference Centre at the V&A Waterfront in Cape Town.
- The Law Society of the Free State: 24 - 25 October at the Kopano Nokeng Conference Centre in Bloemfontein.
- KwaZulu-Natal Law Society: 18 October at Coastlands on the Ridge Hotel in Durban.
- The Law Society of the Northern Provinces: 9 November at Sun City.
- The Black Lawyers Association: 18 - 19 October in Durban (venue to be finalised)
- The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2014.

The Legal Practice Bill and community service

The third annual Public Interest Law Gathering was held from 10 to 12 July at the University of the Witwatersrand's School of Law. Topics discussed at the gathering included the ethics of compulsory community service in the Legal Practice Bill (B20 of 2012), customary law, corporate obligations in respect of human rights and the 'criminal injustice system'.

Speakers included the Deputy Minister of the Justice Department, John Jeffery; the director of the Centre for Applied Legal Studies (CALS), Bonita Meyersfeld; SECTION27 attorney, Umunyana Rugege and Kenyan human rights attorney, Korir Sing'Oei.

The general consensus at the gathering was that South African legislation was progressive and that the country had the best Constitution in the world, but that it only seemed that way on paper and not in reality.

The Legal Practice Bill

The panellists that spoke on the Bill were –

- Mr Jeffery;
- Meetal Jain, who is a senior researcher at CALS and the director of the Constitutional Literacy and Service Initiative, a programme that uses clinical methodology to train LLB and LLM students in the Western, Northern and Eastern Cape to facilitate constitutional literacy workshops with teachers, community-based organisations and high schools; and
- University of Cape Town (UCT) post-graduate LLB student and chairperson and co-founder of the Students for Law and Social Justice (SLSJ) initiative, Liat Davis. SLSJ is a student-led organisation that campaigns for access to justice and whose national campaign is the imposition of compulsory community service for attorneys.

The panellists discussed the Bill, community service, *pro bono* work, and the ethics of legal representation. In introducing the discussion, panel facilitator advocate Jacob van Garderen, who is the National Director of Lawyers for Human Rights said that the Bill provides that requirements regarding community service may be prescribed. He said that a possibility that may be prescribed is



Meetal Jain, senior researcher at the Centre for Applied Legal Studies, discussing the Legal Practice Bill and the LLB degree at the Public Interest Law Gathering.

that law students may have to undertake a certain number of hours of community service in order to qualify as attorneys, adding that such a requirement is laudable in that it is directed at providing countless people, who would otherwise not be able to afford legal advice, with access to justice.

Mr Van Garderen said that the provisions have been the subject of much debate among law students, legal practitioners, law firms and government and added that the Bill provides that regulations will be promulgated regarding community service. However, before such regulations are promulgated, it is necessary to consider the ethics and implications of compulsory community service and how to balance the right to access to justice with the need to ensure quality legal advice for those who need it, he said.

Mr Van Garderen said that the questions that the panellists will be exploring will be:

- Whether the rendering of community service will become an entry requirement for the profession?
- Whether it is ethical to require that law students or graduates, who have not yet qualified as attorneys and who have no practical experience in the field, give legal advice?
- What the mechanisms for 'quality con-

trol' will be when it comes to community service and *pro bono* hours?

- Whether legal community service should be made compulsory for newly admitted attorneys or whether community service or *pro bono* work should be one of the rotations when completing articles?

Ms Davis spoke about the SLSJ and gave a brief background of the initiative. Ms Davis said that the SLSJ was dedicated to protecting human rights and promoting social justice and the rule of law. She said it was formed in partnership with students at the various universities in South Africa with the aim of transforming legal education and facilitating access to justice.

Ms Davis said that SLSJ was formed by six students based at UCT in response to the dominant emphasis in the teaching of law as a tool to get rich and serve the rich. She added that South Africa has a history in which lawyers, often in conjunction with mass movements, use law to resist injustice and to create opportunities for political and social progress, yet this aspect of the protection of the law is confined to constitutional and administrative law lectures and is often undermined by lecturers and students. 'A component of our campaign is the call for the transformation of the LLB degree', she said.

'The SLSJ uses the Constitution and the law as a tool for social justice. There are 11 universities across the country that are part of SLSJ. It has a campaign that advocates for community service for law graduates, which seeks to address two shortcomings', said Ms Davis. The first is the shortcomings in the provision of basic legal services and legal representation, such as access to justice, and the second is providing law students with practical training that they do not obtain in their degree and exposing them to the realities of the operation of the law in the daily lives of people, said Ms Davis. She added that the problem with implementing such a programme was that the current state of legal education in the country needed to be transformed.

Ms Davis said private law was being pushed at universities and that the 'successful attorney' was seen as the one working at a top law firm. She said universities needed to encourage students

to practice street law adding that, given the current state of the LLB degree, it would be a huge injustice to send current graduates out to provide legal advice.

'We are taught the law as an abstract, without much of a practical element', she said. Ms Davis made an example of civil and criminal procedure courses and said: 'It is a very abstract concept; no one knows what to do with it. With contract law, none of us have ever drafted a contract and yet I have done almost two years of contract law'.

Ms Davis said the Constitution was often referred to as an afterthought and the fact that it was treated as a separate course, even though it forms all laws, was highly problematic. She said there was also a huge emphasis on private law as opposed to public law and that students were encouraged to work for corporate firms rather than doing any public interest law work. 'That is why we feel it is so important to have a year of community service', said Ms Davis, adding that the LLB curricula at the various universities were not standardised.

Ms Davis said that the SLSJ believes that, given their legal education, it would be unethical for law students to perform community service, because as it stands they are ill-equipped to give any form of legal advice. She added that students would not necessarily have to give legal advice to fulfil their community service requirements, but that they could be involved in advocacy and education programmes on the content of their rights and how to enforce those rights.

Ms Davis concluded her speech by saying: 'The Bill, as it stands, is ill-defined around community service. It does not explain whether it will be law students who will be required to do community service. SLSJ wholeheartedly believes that we should be required to do community service'.

Ms Jain said there was a critical need for reform in legal education. She said law schools needed to make the law practical and that the proposed Bill, with its reference to community service, was a vehicle to achieving this. She said the structure of community service in the Bill would assist with access to justice and would also improve the standard of legal education.

Ms Jain said in 1998 the late former Chief Justice, Arthur Chaskalson, mentioned that there was a need for mandatory community service, adding that legal education and training were to inextricably linked to making legal services more accessible and effective to citizens.

Ms Jain said there were many gaps in the Bill pertaining to community service, for example, there was no clear definition of what community service would constitute. She said there also needed to be a clear understanding of the point

at which one would be expected to engage in community service, since there was confusion of whether it should be at student level or after admission into the profession. Another issue is the implications on individuals who choose not to practice. 'Would they be required to do community service and what would the conditions of service be?' she queried.

She added that other areas that needed to be looked at were whether community service volunteers would be paid a stipend or a salary, what the period of service would be and whether those deployed in rural areas would be given a rural allowance. She also queried the supervision and training for community service and questioned the implications community service would have on the legal profession if law students were required to do community service. She asked: 'Would there be more resources given to law faculties and clinics in order to meet the requirements necessary to supervise and train students? How would hours be documented and how would the service be administered? Would there be a council to oversee the implementation of this requirement?'

Ms Jain said the Bill suggests that there would be some type of supervisory function by the government in respect of legal education and questioned whether law faculties would still have the ability to decide how to structure their LLB curricula themselves. Ms Jain said there was currently 'an incredible amount' of variation on the LLB curricula across universities. 'Would there be any attempt to harmonise the curricula so that there is at least a base minimum of certain skills, subjects and values that are being taught by all faculties?' she asked. She concluded by saying that these were the issues that needed further discussion.

Mr Jeffery said there was a division between the portfolio committee and parliament on the Bill. He said the portfolio committee had not yet made any amendments to the Bill but was currently working through the provisions clause by clause, adding that they had done one run through the Bill thus far.

At the time of going to print the committee was scheduled to sit again later in July. Mr Jeffery said the intention was to finalise the Bill before the 2014 elections.

Mr Jeffery said that, from practical experience as an attorney, he can relate to the points Ms Davis made of the criminal procedure, civil procedure and evidence courses being very boring subjects. He admitted that he barely passed criminal procedure and evidence, adding that the problem was that one cannot relate it to reality. 'You go out to do your articles as a candidate attorney and suddenly all this theoretical stuff becomes vital. I learnt more evidence and criminal law while practising, than during the course,' he said.

Giving a history of the Bill, Mr Jeffery said that it had been in the pipeline for too long. He said that drafting began more than a decade ago under the first post-apartheid Justice Minister, Dullah Omar, adding that it was reintroduced to parliament in 2012. Mr Jeffery said the reason it is taking so long was because the legal profession is very entrenched in their thinking and that there were huge divisions between the attorneys and advocates. 'That is also why it is so important for this parliament to [finalise] the Bill, otherwise all the work done will have to go to a new parliament and it will have to be redone', he said.

Mr Jeffery said that the changes to a Bill are made by parliament, and not by the minister. He said that the powers of the minister are limited to being able to withdraw the Bill but not to insist on a particular amendment. He added that that is why there is a division between the portfolio committee and the ministry.

Mr Jeffery said the main complaint that lawyers had about the Bill was that they felt it interfered with the independence of the legal profession. Mr Jeffery said South Africa comes from a British Commonwealth heritage and that if one looked at other Commonwealth countries; one would see that they have also undergone a review of their legal profession. He said what was interesting to note was that other Commonwealth countries – such as Nigeria, Zimbabwe, Namibia, New Zealand and parts of Australia – that come from the tradition of having two Bars, have abolished that tradition and now only have one unified profession.

Mr Jeffery said that, at the moment, pupils do not get paid for pupillage, which makes it difficult for aspiring advocates and limited accessibility to the profession. He added that the Bill would change this. Mr Jeffery added that he was surprised that the problem of pupils not being paid has never been raised since South Africa's democracy.

Mr Jeffery said that the community service clause (ch 3(29)) in the Bill reads:

'The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –

(a) community service as a component of practical vocational training by candidate legal practitioners; or

(b) a minimum period of recurring community service by legal practitioners upon which continued registration as a legal practitioner is dependent.

(2) For the purposes of this section, "community service" includes service involving –

(a) the delivery of free legal services to the public in terms of an agreement between the candidate legal practitioner or the legal practitioner with a community-

based organisation, trade union or non-governmental organisation;

(b) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation approved by the Council;

(c) service as a judicial officer, including as a commissioner in the small claims court;

(d) service to the State, approved by the Minister after consultation with the Council;

(e) service on regulatory structures established or recognised in terms of this Act;

(f) any other service as may be determined by the Council in the rules; or

(g) any other service which the candidate legal practitioner or the legal practitioner may want to perform with the approval of the Minister.'

Mr Jeffery said that a 'candidate legal practitioner' was defined as a candidate attorney or pupil and did not include law students at this stage. He added that the list may include law students as it is open. Mr Jeffery said there is therefore some form of definition for the requirements of community service, but that this definition was open. He said that community service was added to the Bill as a regulation.

Mr Jeffery said that community service at universities was not covered in the Bill. He added that there was not much opposition regarding community service for candidate legal practitioners and that opposition was mainly received with regard to recurring community service for existing practitioners, since practitioners felt that it would be punitive. Mr Jeffery said that this was not the Bill's intention; the intention was that lawyers give back by imparting their skills to others.

Mr Jeffery added that other problems with community service work was how the envisioned National Legal Council would monitor it without it costing too much; that it was voluntary, which meant that it would not be remunerated; and that practitioners that are new entrants to the profession usually had limited time, hence them not having time to do community service.

Mr Jeffery noted that the country's legal fees were 'astronomically high', much higher than those in any other part of the world. In conclusion he said that the definitions of community service, still needed to be finalised.

The future of asylum

On the first day of the gathering, a one-day seminar on refugee protection was held, delegates explored the future of asylum seekers in South Africa. The seminar focused on the closure of refugee reception areas in Cape Town and Port Elizabeth.

The closure of these centres meant that refugees found it difficult to file asylum applications. There was also a discussion on xenophobia, which looked at the legal and social challenges faced by refugees and asylum seekers who engaged in informal trading. David Rossouw from the Nelson Mandela Metropolitan University's Refugee Rights Centre said that, despite several judgments declaring the closure of the Port Elizabeth refugee office unlawful and court orders granted to reopen it, the office remained closed.

Southern Africa regional representative at the United Nations High Commissioner for Refugees, Clementine Nkweta-Salami said that South Africa was the recipient of the largest number of refugees in the world, adding that most of the refugees came from Zimbabwe.

Ms Nkweta-Salami said that South Africa had the best refugee legislation in the world, adding that it was the implementation of the rights that was a problem. She said refugees contributed to the economy of the country because they set up small businesses.

She said that government needed to consult extensively with stakeholders before taking 'big decisions' such as closing refugee offices, adding that South Africa needed to place refugee protection on its national agenda, since ad hoc responses cannot resolve issues.

The criminal injustice system: Gatherings in law and practice

In this session the panel explored protests and unprotected strikes, focusing on the Regulations of Gatherings Act 205 of 1993 (the Act).

The moderator for the session, Simon Delaney, of Delaney Attorneys, said that the Act, although passed in the apartheid era, was 'not a bad Act'. He said that the downside of the Act was that it has become a 'permission-seeking' Act, which was never the intention.

Mr Delaney said the reality was that many marches are prohibited because the Act states that marchers must get written permission from the person they are marching against, which impedes their constitutional right to freedom of expression.

Kathleen Hardy who is an attorney at the CALS spoke on her experience with the Act during the march by the women of Marikana in September last year. She discussed the women's march after the Marikana massacre to illustrate how authorities react to protests. Ms Hardy said that a number of women wanted to march about the massacre because they were scared and had seen loved ones being intimidated. She said their experience on giving their notification of the



Southern Africa regional representative at the United Nations High Commissioner for Refugees, Clementine Nkweta-Salami gave the opening address at the seminar on the future of asylum during the recent public interest law gathering.

march just proved that the Act was 'political and nothing else'.

Ms Hardy shared how the women on submission of their notice to march, were kept waiting for a response, and then told that they had not given enough notice of the march. She added that the Act states that notice must be given within seven days of the march, but not less than 48 hours, which the women had done. They were asked to postpone their march by a week, which they obliged to, and reapplied for the notice of the march.

Ms Hardy said the women were then told to decrease the number of demonstrators from 500 to 250, which they agreed to do, only to be told that the purpose of the march did not meet the requirements of the Act, hence their march being unprotected. Ms Hardy said that the women received a court order at 11.15pm a day before their march. She said that they had followed the rules and laws but were still stopped, adding that criminal courts have become decision makers on gatherings, which require lawyers that cost money.

Mr Delaney closed the session by saying that this issue needed constitutional scrutiny. He said the law serves those who have money and those who can afford lawyers, adding that the issue was not unique to South Africa but that it was happening worldwide.

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Attorneys Development Fund under new management

Mackenzie Mukansi has been appointed manager for the Attorneys Development Fund (ADF). He holds a BCom Law degree obtained from the University of Limpopo and has experience in auditing and consulting.

The ADF is an independent section 21 non-profit organisation that was established in 2011 and is a joint venture between the constituent members of the Law Society of South Africa (Cape Law Society, KwaZulu-Natal Law Society, Law Society of the Free State, Law Society of the Northern Provinces, Black Lawyers Association and the National Association of Democratic Lawyers) and the Attorneys Fidelity Fund. The ADF is governed by a board of directors that is made up of representatives from each of the above organisations.

The ADF's primary role, among others, is, to provide assistance to -

- newly established law firms;
- an attorney who is with an existing law firm but wishes to establish his or her own law firm;
- law firms that specialise or intend to specialise in a specific legal field; and

- law firms in areas where there is a shortage of attorneys.

The nature of assistance provided includes -

- infrastructural resources for the establishment or operation of practices;
- business support; and
- training to empower attorneys to establish and properly manage sustainable practices.

Mr Mukansi is in charge of managing the ADF and of applications for assistance from law firms. He told *De Rebus* that he will also be forging new partnerships so that the ADF can provide a more comprehensive service to practitioners.

Mr Mukansi said that the goals for the ADF are -

- to make the ADF known to attorneys;
- revisiting existing stakeholders with a view of reinforcing existing relationships and forming new ones aimed at propelling the vision of the ADF through alignment with the various stakeholders' expectations; and
- to ensure that the ADF is equipped to diversify its services to practitioners by



Newly appointed manager of the Attorneys Development Fund, Mackenzie Mukansi.

keeping abreast with the changes in the legal profession.

Mr Mukansi has called on attorneys of newly established practices to submit applications for assistance. Mr Mukansi can be contacted at -

- tel: (012) 366 8856; or
- e-mail mackenzie@adf.za.

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Magistrates can now act as commissioners

The Department of Justice and Constitutional Development's initiative of establishing a small claims court (SCC) in each of the 393 magisterial districts is well on track. The department's chief director of court services, advocate Pieter du Rand, told *De Rebus* that only 117 new SCCs still needed to be established.

At the time of going to print, the Justice Department was finalising the establishment of SCCs in three locations, namely Atteridgeville in Pretoria, Dzanani in Limpopo and Secunda in Mpumalanga.

Mr Du Rand said that there are currently 277 SCCs. Of these courts -

- 23 were established between 1 April 2011 and 31 March 2012;
- 16 were established between 1 April 2012 and 31 March 2013; and
- 14 new courts have been established since 1 April 2013.

Mr Du Rand said that the breakdown of the SCCs was as follows:

- Eastern Cape - 79 districts and 47 courts.
- Free State - 56 districts and 37 courts.
- Gauteng - 31 districts and 28 courts.

- KwaZulu-Natal - 53 districts and 37 courts.

- Limpopo - 36 districts and 31 courts.

- Mpumalanga - 33 districts and 32 courts.

- Northern Cape - 32 districts and 19 courts.

- North West - 29 districts and 20 courts.

- Western Cape - 44 districts and 26 courts.

Mr Du Rand said that, although there were 277 SCCs, there were also 70 additional places of sitting, which brought the total number of functional SCCs to 333. He added that in total, there were 77 districts in which people had no access to a SCC.

According to Mr Du Rand, there were currently 1 561 commissioners (1 328 male and 233 female). He said: 'There is mainly a shortage of commissioners in the more rural areas (about 117 districts), which do not have SCCs yet, which is the main reason why the [department] has not been able to establish SCCs in these areas'. Mr Du Rand added that a new innovation was that the Magistrate's Commission had approved that magistrates may also become commis-

sioners of SCCs, which he said would assist in areas where the department experienced challenges in appointing new commissioners and establishing SCCs.

Mr Du Rand said that the Limpopo High Court was envisaged to be completed after June 2014, adding that the construction of the Mpumalanga High Court was expected to start this month.

In terms of magistrates' courts, Mr Du Rand said that 43 new courts had been built since 1994. He said that besides the 43 new courts, the Justice Department had revamped and equipped a further 24 branch courts and elevated the courts into full-service courts. Mr Du Rand added that the remaining 65 branch courts and 230 periodical courts have been lined-up for rehabilitation, consistent with the National Development Plan. There are also six new courts planned for construction in the next three-year budget cycle'.

- See 2012 (April) DR 15.

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

LSSA and SAPS roll up their sleeves on joint domestic violence initiative

Representatives of the Law Society of South Africa (LSSA) and the South African Police Service (SAPS) held a workshop in Kempton Park at the end of June 2013 to outline their respective roles in a joint initiative aimed at supporting the victims of domestic violence who report these crimes to the SAPS.

The LSSA approached the SAPS at the end of 2012, through its Family Law and Gender Equality Committees, to identify the challenges being experienced by both attorneys and the SAPS in dealing with the implementation of the Domestic Violence Act 116 of 1998. Several discussions were held and it was agreed that attorneys could play an important role in sensitising police station commanders and the SAPS trainers on the treatment of victims reporting abuse and enforcing the legislation. The June workshop brought together senior SAPS training heads, members of the LSSA committees as well as representatives of non-governmental organisations (NGOs) who assist the victims of domestic violence.

'Fourteen years after the implementation of this Act, parliament has heard that only 12 of the 162 police stations have been found to be compliant with the Act,' said Durban attorney Susan Abro, chairperson of the LSSA Gender Equality Committee in opening the workshop. 'We must prioritise crimes against women and children and we need to change the attitudes of people who deal with victims of these crimes both from a policing side, but also from a public perception side. As a society we are increasingly becoming inured to violent crime,' she noted.

Attorney members of the LSSA committees will be providing their services to assist the SAPS *pro bono* as part of their commitment to breaking the cycle of violence being experienced by the more vulnerable members of society. It is envisaged that this will be the first phase in an ongoing joint project that will include public initiatives during the 16 Days of Activism for No Violence Against Women and Children at the end of this year.

'The initiative stems from the public perception that the victims of domestic and gender-based violence do not get the appropriate assistance and treatment in every matter when they approach the



At the LSSA/SAPS workshop where the joint initiative to deal with the Domestic Violence Act was planned: LSSA Professional Affairs Manager Lizette Burger, Martha Mbhele, chairperson of the LSSA Gender Equality Committee, major-general Susan Pienaar, SAPS Head of Crime Prevention in the Visible Policing Division, and the chairperson of the LSSA Family Law Committee, Susan Abro.

SAPS. Attorneys and police officers are duty-bound to ensure that victims receive sensitive and professional service when reporting domestic violence matters so that the matters can be processed successfully through the criminal justice system. From the LSSA's side we hope to strengthen the message that domestic violence will not be tolerated on the one hand and, on the other, to assist police officers in dealing with the victims of this scourge appropriately,' said Welkom attorney Martha Mbhele, who chairs the LSSA Gender Equality Committee.

The joint initiative envisages attorneys – with the support of relevant NGOs – supplementing and complementing the current training provided to SAPS station commanders, trainers and other senior police officials by offering information sessions on how to deal appropriately with domestic violence matters and with the victims of domestic violence who approach the SAPS to report these matters. Those in leadership positions will then be better placed to sensitise those who deal with domestic violence issues at grass-roots level where these are reported to the SAPS.

Speaking at the June workshop, major-general Susan Pienaar, SAPS Head of Crime Prevention in the Visible Policing Division, said: 'In our initial discussions with the LSSA we agreed that we have the same objectives and concerns in ensuring that we come to a better comprehension of the experiences of domestic violence victims. We need to inculcate an understanding of the importance of dealing correctly with domestic violence matters.'

She added: 'Every case that is reported to the SAPS is an opportunity to intervene. We want a cadre of police leaders and trainers who can guide and assist operational police officers on the ground to deal with what are often difficult situations that require critical decisions to be made even by junior officers on the ground. One of the principle aspects of the National Crime Prevention Strategy is to break the cycle of violence, which often starts at home. This is one of the causal factors for violent crime in South Africa. Any initiative to make inroads into breaking that cycle is welcomed.'

Survey shows attorneys keen on Wills Week

The National Wills Week will be held from 7 to 11 October this year. The deadline for firms to register their participation was 19 July, but late registrations can be accepted until 8 August 2013.

The LSSA conducted an electronic survey among attorneys who participated in the 2012 Wills Week to gauge their views on the initiative and to get an idea of the number of wills that are being drafted by attorneys for free. The survey showed the following:

Material

Generally attorneys are happy with the material provided. There were requests for more space to fill in contact details on posters and flyers. We have updated the design of the material, which now provides more contact information space. We have also left a blank space on the flyers so that firms can include their contact details on those too.

It appears from the survey results that most of the clients respond to the posters put up by participating attorneys.

The PDF versions of posters and flyers will be available to attorneys who wish to e-mail these or print them for their own use. These will be in addition to those provided to participating firms free of charge in the various language options.

• E-mail LSSA@LSSA.org.za for PDF material.

Wills drafted

Most firms that participated reported that they had drafted a number of wills – between 4 and 50 – with some reporting up to 200 wills. If one were to take a conservative average of say 17 wills by the participating practitioners, it could be extrapolated the attorneys' profession drafted some 12 000 free wills for members of the public during Wills Week.

As the prominence of this initiative grows each year, this service provided by the profession will improve. Already parastatals, municipalities and charities are contacting the LSSA requesting information on attorneys in their areas who can prepare wills for their employees or clients.

Publicity

The National Wills Week initiative generates much needed positive publicity for the profession in the print and broadcast media. Community newspapers and radio stations are targeted specifically. Last year, the free publicity generated amounted to some R 400 000 in value had the profession paid for print space and airtime.

NASIONALE TESTAMENTWEEK
KRY 'N TESTAMENT, GRATIS
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BEKE YA NAHA YA LENGOLO LA
THATO YA KABO YA THEPA YA MOFU
FUMANA LENGOLO LA THATO YA MOFU, MAHLALA
La 7 Ho Ya Ho 11 Mphalane 2013

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WHY MUST YOU HAVE A WILL?
By making a will you ensure that your assets are disposed of in accordance with your wishes after your death. This privilege is called "freedom of testation".

Why should an attorney draft your will?
Attorneys are qualified professionals. An attorney can advise you on the legal requirements of a will and ensure that your will is valid.

What happens to your estate if you die without a will?
If you die without leaving a valid will, your assets will be distributed in accordance with the provisions of the Intestate Succession Act. The provisions of the Intestate Succession Act may not be in line with your wishes. BUT, the following problems may arise if you die without a will:

- Your assets may not be left to the person of your choice.
- It can take a long time to have an executor appointed.
- Somebody you may not have chosen you may be appointed executor.
- There can be extra and unnecessary costs.
- There can be unhappiness and conflict between family members.

Many attorneys will write a basic will for you during National Wills Week between 7-11 October 2013.

Conditions:

- Only attorneys participating in the initiative.
- Only from 7-11 October 2013.
- Only a basic will and testament.
- Make an appointment with the attorney or firm below.

Where to find an attorney:
For contact details of an attorney or firm, visit www.LSSA.org.za or call 011 447 3237.

Gauteng, Mpumalanga:
Law Society of the North

Cape provinces:
Cape Law Society

Free State:
Law Society of the Free State

KwaZulu-Natal:
KwaZulu-Natal Law Society

Only from attorneys displaying this poster. Only a basic will and testament will be written. No amendments or redrafting of existing wills.

Attorney: _____
Date: _____
Time: _____
Contact details: _____

www.LSSA.org.za

Online registration for the Wills Week can be done on the LSSA website at www.LSSA.org.za or call your provincial law society.

OECD panel of legal practitioners

Steven Powell, Peter Leon, Metumo Shilongo, Marelise van der Westhuizen and André Vos participated in a review panel facilitated by the Law Society of South Africa for the evaluation of South Africa by the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery under the Anti-Bribery Convention in Sandton last month.

The OECD examiners sought the views of a number of stakeholders on the South African approach to enforcing the offence of foreign bribery in international business transactions. The panel of legal practitioners had ex-



Participants of the review panel, from left to right: Steven Powell, Peter Leon, Metumo Shilongo, Marelise van der Westhuizen and André Vos.

perience in advising companies on anti-corruption mechanisms to be put in place, or acting as defence counsels in criminal proceedings against companies accused of economic crime.

Johannesburg attorney Michael Judin (right) participated in an earlier panel.

The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption

instrument focused on the 'supply side' of the bribery transaction. The 34 OECD member countries and six non-member countries – Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa – have adopted this convention.



TMJ goes the extra mile in Synergy Link empowerment initiative

Pietermaritzburg firm Tomlinson Mnguni James (TMJ) has gone the extra mile and taken on three growing firms to mentor under the auspices of the Law Society of South Africa's Synergy Link empowerment initiative.

In linking with Trishal Sharma Attorneys and T Sibiya & Associates, both of Durban, as well as SM Zwezwe Attorneys of Umzinkulu, TMJ director Daan Steenkamp says: 'Sole practitioners and those in rural areas, like Seraphicus Zwezwe, have difficulty in breaking into commercial and conveyancing work particularly.' He explained: 'Much of the estates conveyancing is handed out by trust companies and TMJ is exploring an initiative with Absa Bank with an understanding that it hands s 18(3) estate transfers to practitioners who are newly qualified as conveyancers to prepare the necessary documents under supervision of an experienced mentor. This will enable the learner con-

veyancers to gain experience on relatively modest matters while protecting the interests of the trust company. The experienced conveyancer acts as guarantor for the quality outcome.'

All three of the growing firms linked to TMJ are keen to expand their practices in the conveyancing, estates and commercial fields.

The Synergy Link between TMJ and SM Zwezwe Attorneys concentrates on empowerment in the fields of estates law, commercial and conveyancing work; that with T Sibiya & Associates will focus on trusts law, estates and commercial work. Both synergies will run from March 2013 until March 2014. With Trishal Sharma, the link runs from December 2012 until April 2014 and will cover conveyancing, wills, trusts and deceased estates, as well as the management aspects of the firm.

The LSSA Synergy Link empowerment initiative was launched last year by former



TMJ director Daan Steenkamp, second from left, with Thobelani Sibiya, Trishal Sharma and Seraphicus Zwezwe.

LSSA co-chairpersons Nano Matlala and Praveen Sham. Currently there are 15 large and medium-sized firms that are offering their services to assist and mentor growing firms in new fields of practice.

For more information on the Synergy Link project and to view the transferring and growing firms, see www.LSSA.org.za



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People and practices

Compiled by
Shireen Mahomed



Webber Wentzel in Johannesburg has appointed Shirleen Ritchie as an associate in the tax department. She specialises in tax dispute resolution and general litigation.

Herold Gie Attorneys in Cape Town has four new appointments.



Nicola van Zyl has been appointed as an associate in the commercial department.



Tshepo Sikupela has been appointed as an associate in the employment and public law department.



Nico Walters has been appointed as an associate in the commercial recoveries department.



Simoné Wolfaardt has been appointed as an associate in the insolvency and pension law department.

Tomlinson Mnguni James opened a new office in Cape Town.



Andre Calitz will manage the Cape Town office.

Cliffe Dekker Hofmeyr in Johannesburg has six new appointments.



Temba Kali has been appointed as a director in the finance and banking department.



Sonia de Vries has been appointed as a director in the dispute resolution department.



Jackwell Feris has been appointed as a director in the dispute resolution department.



Jurg van Dyk has been appointed as a director in the projects and infrastructure department.



Adine Abro has been appointed as a director in the dispute resolution department.



Jay Da Conceição has been appointed as a senior associate in the dispute resolution department.



Fourie Stott in Durban has appointed Eilene Bekker as an associate. She specialises in labour law, wills and estates.

ENS in Johannesburg has six new appointments.



Andries Myburgh has been appointed as a director in the tax department. He specialises in the mining sector and tax dispute resolution.



Katherine Boel has been appointed as a tax manager. She specialises in mining tax.



André Vermeulen has been appointed as an associate in the tax department. He specialises in mineral royalties, and corporate tax matters within the mining and energy industries.



Gerdus van Zyl has been appointed as a tax consultant in the tax department. He specialises in mergers and acquisitions and mining tax.



Niel Coertse has been appointed as a senior associate in the projects department. He specialises in engineering and construction law.



Luke Havemann has been appointed as a senior associate in the projects department. He specialises in oil and gas law.



Fairbridges in Cape Town has appointed Lerato Ngwenya as an associate in the intellectual property department.

Shepstone & Wylie has nine promotions.



Tayne Rankine has been promoted to partner in the corporate and commercial law department in Durban. She specialises in commercial law.



Siobhan Viljoen has been promoted to partner in the employment and pension law department in Johannesburg. She specialises in employment law and health and safety.



Carlyle Field has been promoted to associate partner in the employment and pension law department in Durban. He specialises in pension fund law.



Mia Beavon has been promoted to associate partner in the corporate and commercial law department in Durban. She specialises in the drafting of commercial contracts.



Kelby Robinson has been promoted to associate partner in the employment and pension law department in Johannesburg. She specialises in general and commercial litigation.



Janine Smith has been promoted to associate partner in the litigation department in Durban. She specialises in general and commercial litigation.



Amy Harpur has been promoted to associate partner in the mining, minerals and energy department in Durban. She specialises in mining, minerals, energy law and general litigation.



Wesley Wood has been promoted to associate partner in the international transport, trade and energy department in Durban. He specialises in maritime and international trade law.



Zelna Swart has been promoted to associate partner in the litigation department in Cape Town. She specialises in civil and commercial high court litigation.



Ruan Botha has been appointed in the property law department.



Elize Krause has been appointed in the property law department.



Harrie van Eetveldt has been appointed in the property law department.

Van der Merwe du Toit Inc in Pretoria has appointed four new directors.



Barbara Coetzee has been appointed in the commercial and property law department.

Moroka Attorneys in Bloemfontein has two promotions and one appointment.



Emanuel Ngwane has been promoted to an associate. He specialises in labour law, civil litigation and corporate transactions.



Mosiua Mazibuko has been appointed as an associate. He specialises in criminal litigation, administration of estates and personal injury claims.



Tsholofelo Gaborone has been promoted to an associate. She specialises in criminal litigation, corporate governance and commercial contracts.

Mahons Attorneys in Johannesburg has three new appointments.



Craig Shapiro has been appointed as a senior associate in the intellectual property department. He specialises in prosecution of trademarks.



Helen Geldard has been appointed as an associate in the litigation department. She specialises in commercial law and general litigation.



Sven Laurencik has been appointed as a consultant. He specialises in commercial law and litigation.

Please note: Preference will be given to group photographs where there are a number of featured people from one firm in order to try accommodate everyone.



5 minute met

die Vereniging van Regslui vir Afrikaans

In dié maand se kolom, het *De Rebus* sub-redakteur Kathleen Kriel met die uitvoerende beampte van die Vereniging van Regslui vir Afrikaans (VRA), Kobus Muller oor die vereniging gesels.

Wat is die VRA?

Die VRA is 'n aktiewe vrywillige vereniging van Afrikaanse regslui wat veral konsentreer op die bevordering en uitbou van Afrikaans as regstaal. Die VRA se doelstellings word in sy grondwet, wat op die webwerf beskikbaar is, uiteengesit.

Dit sluit, onder andere, die bevordering van Afrikaanse regsliteratuur, regsopleiding in Afrikaans en regsoptrede waar die belange van Afrikaans in gedrang kom, in. Die VRA ondersteun ook 'n multi-taal benadering en is van mening dat daar ook meer erkenning aan alle inheemse tale verleen behoort te word.

Wat doen die VRA?

Die VRA bedryf verskeie projekte waarvan slegs enkele hier vermeld word. Die vereniging bied seminare in Afrikaans oor tersaaklike regsontwikkelings aan. Dit vertaal ook alle belangrike wetgewing in Afrikaans, en stel dit kosteloos op sy webwerf beskikbaar.

Benewens ander projekte tot voordeel van Afrikaanse regstudente bedryf die VRA ook 'n beursskema vir sodanige regstudente. Die skema het pas, danksy 'n ooreenkoms met die *Rapport Onderwysfonds*, 'n verdere hupstoot gekry.

Die VRA stel gereeld openbare standpunte oor tersaaklike aangeleenthede en bou konstruktiewe betrekkinge met verdienstelike Afrikaanse organisasies en ander liggame uit tot die voordeel van Afrikaans, die Afrikaanse gemeenskap en in die algemene belang.



Professor Steve Cornelius, die huidige voorsitter (links) en Kobus Muller, die uitvoerende beampte van die Vereniging van Regslui vir Afrikaans.

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Enige persoon met regskwalifikasies, wat die doelstellings van die VRA onderskryf, kan 'n lid van die VRA word, asook prokureursfirmas en bona fide regstudente.

Die VRA verteenwoordig 'n noemenswaardige aantal lede, met inbegrip van 'n aantal van die mees vooraanstaande regsliu in die land. Die identiteit van lede word vertroulik hanteer en slegs bekend gemaak indien die betrokke lid daartoe toestem.

As 'n vereniging van regsliu plaas die VRA 'n besonder hoë premie op sy politieke onafhanklikheid en professionele integriteit. Die VRA het landswyd lede uit alle sektore van die regsprofessie en regsakademie.

Die vereniging funksioneer onder sy bestuur wat jaarliks verkies word.

Hoe word 'n persoon lid van die VRA?

Enige persoon wat aan die vereistes vir lidmaatskap voldoen, kan aansluit deur die aansoekvorm op die webwerf, www.vra.co.za te voltooi, of deur die VRA-kantoor te skakel. Die jaarlikse ledegeld is R 450 per jaar.

Kontakbesonderhede

Die VRA se kantore is geleë in Cobhamlaan 1213, Queenswood, Pretoria.

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If you would like to see a specific organisation featured in the '5 minutes with ...' column, please send an e-mail to derebus@derebus.org.za.

De Rebus reserves the right to decide on which organisations will be featured in the column, including taking the initiative to approach organisations to be featured.

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A balancing act between owners and occupants

Is PIE unconstitutional?

By
André
Walters

Sections 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) provides that the court, hearing an eviction application, has a discretion to refuse an eviction order despite the fact that an applicant is the registered owner and the respondent is an unlawful occupier of the property (s 4(1) read with s 4(6) and s 4(7); see also *Arendse v Arendse and Others* 2013 (3) SA 347 (WCC)).

I submit that the constitutionality, or at the least the necessity, of this discretion should be reconsidered and challenged. I am of the opinion that the discretion in s 4(8) and s 4(9) of the PIE Act is sufficient to ensure a just and equitable order.

The PIE Act was introduced to regulate the eviction process and to afford proper judicial oversight. It was enacted to balance the owner's property rights and the occupant's right to access to housing (see the preamble of the Act and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)).

On the one hand, a court may refuse an eviction application if the respondent would be rendered homeless and the granting of the eviction order would not be just and equitable in the circumstances (*Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA)).

On the other hand: 'The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons' (the *Port Elizabeth Municipality* case at para 15).

The court has the task 'to ensure that justice and equity prevailed in relation to all concerned' (the *Port Elizabeth Municipality* case at para 13). 'It is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.' This includes the interest of the owner (the *Port Elizabeth Municipality* case at paras 23 and 33; *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] 4 All SA 410 (SCA) at para 6).

The right contained in s 26 of the Constitution is merely defensive. A 'major feature of this cluster of constitutional provisions is that, through s 26(3), they expressly acknowledge that eviction of people living in informal settlements may take place, even if it results in loss of a home' (the *Port Elizabeth Municipality* case at paras 20 – 21).

The Constitutional Court also confirmed that: '[A] property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted ... An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity inquiry mandate by PIE' (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 40).

Even though the court has to balance the two conflicting rights, I find it difficult to comprehend how the scales of justice could be equally balanced if a court exercises its discretion in favour of an unlawful occupant and dismisses

an eviction application on the mere finding that it is not just and equitable to grant the eviction.

This raises the question: Does a refusal of an eviction order merely temporarily restrict the owner's right to possession of his property?

If the circumstances that were taken into account by the court remain the same, the applicant could be barred from obtaining an eviction order by bringing a new application, since the respondent could simply plead that the matter is *res iudicata*.

If the owner has to wait until new circumstances arise before the owner can (merely) stand a chance of succeeding with a new eviction application, the owner could potentially be deprived of his or her property indefinitely.

Ignoring the abstract and negative property system for a moment, is the owner then not indirectly expropriated? The owner is left with a bare title in the property that is of little or no commercial and social value to him or her.

In *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) the court had to consider the constitutionality of the PIE Act. The court found that a refusal of an eviction order in terms of the PIE Act does not arbitrarily deprive the owner of his or her property as the court must exercise its discretion only once all the relevant circumstances have been considered.

My objection is not as much aimed at the arbitrariness of the process, but



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By AS West Chief: Deeds
Training, Pretoria

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With this as background, I commenced in 1993 with the writing of articles in the *De Rebus* on conveyancing issues which culminated into my first book called "Articles on Conveyancing for the Attorney", and eventually evolved into the "Practitioner's Guide to Conveyancing and Notarial Practice", the latter having been updated on an annual basis.

This book remains a practical guide for the practitioner and student and is not intended or claimed to be a legal treatise, and cannot cater for all facets of conveyancing.

EXCERPT: GUIDE REVIEW BY ANTON THERON

Anton Theron is an admitted attorney, notary and conveyancer. He specialises in all aspects of conveyancing and is the present national convenor for the conveyancing exam.

"The new hard copy is, in my opinion, an improvement on the old loose-leaf format of the book and ensures that the latest developments, in the wide field of conveyancing and notarial practice, are available to practitioners and students. The numerous Chief Registrar's Circulars and Registrars Conference Resolutions are dealt with admirably in the text and this makes it much less complicated to deal with the various requirements applicable to a specific topic.

Many practitioners and students found it difficult to gain access to the details of Circulars and Resolutions and will no doubt welcome the "codification" thereof in the book.

There are many positive aspects to the book of which the following are only a few: It is

- Concise, easy to read and to the point
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rather at the fact that the owner's common law right to possession of the property is stripped from the owner by the very legislation that was intended to balance the owner's rights against that of the unlawful occupier. My objection is aimed against the fact that, by practical implementation, the scale is tipped predominantly in favour of the unlawful occupier and that for a potentially unlimited period.

In considering the question regarding expropriation, the court referred to *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at 315 and *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515A – C as support for a definition of the word 'expropriation', as used in the statutory sense. In short, this definition entails 'the process whereby a public authority takes property for a public purpose and usually against payment of compensation'.

This sounds similar to the wording of s 25(2) of the Constitution, yet the word 'expropriation' in the Constitution must mean something much wider. The Constitution limits, rather than defines, legitimate expropriation to only those which are intended for a legitimate public purpose or in the public interest and for which compensation will be paid.

The *Oxford Dictionaries'* website definition of the word 'expropriation' is to 'take (property) from its owner for public use or benefit' (http://oxforddictionaries.com/definition/english/expropriate?q=expropriation#expropriate_14, accessed 10-7-2013) By exercising a discretion to refuse an eviction order, the PIE Act empowers the court to 'take away property from its owner' by allowing the continued dispossession of the owner.

I concede that it cannot be direct expropriation as actual ownership of the property does not pass to the unlawful occupant. However, I submit that it is nonetheless a form of indirect expropriation in a much wider sense as that allowed by the Constitution.

To properly balance the rights of an owner against that of an unlawful occupant, the discretion contained in s 4(6) and s 4(7) of the PIE Act should be abolished. I propose that a court should not have a discretion to grant or refuse an eviction order, but only retain its discretion created by s 4(8) and s 4(9) of the PIE Act regarding the time afforded to the respondent to vacate the property.

The court could be innovative in the order that it grants, such as:

- Grant the eviction order and grant the respondent sufficient time to obtain alternative accommodation.
- Postpone the eviction application and order the unlawful occupiers to actively seek alternative accommodation themselves and to report in detail to the court on the steps taken.

- Postpone the eviction application in order to receive further relevant evidence.
- Order the city council to file a further detailed report to confirm by when alternative accommodation could be made available (see *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W)).
- Order the city council to pay damages to the applicant for as long as the unlawful occupancy is endured, pending alternative accommodation being made available by the city council (see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA)).

By doing so, the infringement of the owner's property rights are limited and controlled directly by the court process. The unlawful occupier should be forced to be proactive in seeking alternative accommodation versus the very passive attitude the unlawful occupier will adopt if an eviction application is simply refused.

Consider the following hypothetical example: You use your life savings to purchase a holiday home at which your family can spend the June and Christmas holidays. Upon leaving in June, you forgot to lock the back door. The local unemployed, poor and homeless family that lived under the nearby bridge saw the opportunity and made themselves at home. This came to your knowledge only after receiving your electricity bill three months later and after you made a visit to your property a month thereafter. The police refused to assist you because, in their view, it is a civil matter and their policy is not to get involved in civil matters. In your subsequent eviction application the court finds that, seeing that you merely use the house twice a year and the unlawful occupiers have nowhere else to go, it would not be just and equitable to grant an eviction order until the city council has alternative accommodation available. The eviction application is then dismissed because the city council has filed its usual report stating that it is not in a position to provide alternative accommodation.

By now it should be clear, that by refusing eviction orders, the public could lose their confidence in the judiciary, which could lead to some people taking the law into their own hands resulting in unwanted public violence. In some instances (in the words of the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) at para 45) it would be 'a recipe for anarchy'.

I submit that the discretion contained in s 4(6) and s 4(7) of the PIE Act is dan-

gerous and superfluous if the discretion in s 4(8) and s 4(9) and the power of the court to regulate its own procedure is properly applied.

The judgment in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)* 2012 (6) SA 294 (SCA) is of significant importance in PIE Act applications. It deals with various important issues, such as the distinction between evictions sought at the instance of a private owner versus one sought by the city council, the joinder of the city council, the required contents of the city council's report, the city council's obligation to provide temporary alternative accommodation and also the onus in eviction applications.

The judgment at para 19 also deals with the discretion contained in s 4(6) and s 4(7) of the PIE Act. It, however, does not take the issue regarding the discretion any further, other than to state: 'In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order.'

It may be argued that the limitation of an owner's property rights could survive the limitation clause contained in s 36 of the Constitution. The question then is: Is the potentially limitless duration of the infringement of an owner's property rights reasonable and truly justifiable in a democratic society based on human dignity, equality and freedom?

In my opinion, any order dismissing an eviction application merely because it is not regarded as just and equitable ignores the very notion that property rights should be fully respected in our new dispensation. It tips both the scale of justice and the scale of equality predominantly in favour of the unlawful occupant. A society based on freedom should also include the freedom of a property owner to deal with his or her hard-earned property as he or she pleases for his or her benefit to the exclusion of others.

Perhaps it is time to once again challenge the constitutionality of the discretion contained in s 4(6) and s 4(7) of the PIE Act, but this time ask the judges to ask themselves the question: 'What if this was your hard-earned property?'.

André Walters LLB (Stell) is an advocate in Cape Town.



Solvency asset management

What does it entail and how will it affect you?

By
Marietjie
Botes



The solvency asset management (SAM) project, a joint venture of the Financial Services Board (FSB), who is also an active member of the International Association of Insurance Supervisors (IAIS), and the South African insurance industry, will introduce a new risk-based supervisory regime for the prudential regulation of both the long-term and short-term insurance sectors in South Africa. SAM will be implemented in January 2014, with its final implementation due in January 2016.

SAM, which will be adapted to South African circumstances where necessary, is based on the European Directive: Solvency II that codifies and harmonises insurance regulation in the European Union (EU). Solvency II will also be implemented in the EU in January 2014. Solvency II is primarily concerned with the amount of capital the EU insurance companies must hold to reduce the risk of insolvency, while in a South African context the SAM regime will similarly enhance insurers' financial soundness and their participation in the global insurance market due to insurers' global adherence to the same standards and conditions.

Both these regimes, which are somewhat similar to the Basel II banking regulations, aim to –

- reduce the risk that an insurer will be unable to meet claims;
- reduce the losses suffered by policyholders in the event that an insurer is unable to meet all claims fully;
- provide an early warning to insurance supervisors to promptly intervene if capital falls below the required level; and
- promote confidence in the financial stability of the insurance sector.

The South African Minister of Finance will soon table the Insurance Laws Amendment Bill (B16 of 2013) to address current shortcomings in the insurance sector in respect of appropriate requirements on corporate governance, risk management and internal controls to aid the insurance sector in successfully implementing SAM.

Although SAM will be fully implemented only in January 2016, insurers need to be in a position to comply with most of the SAM framework by 2015. For this reason the FSB intends to conduct a mock own risk and solvency assessment exercise during 2015. This assessment exercise will aim to assess the overall insolvency needs related to a specific risk profile of an insurance company for further decision-making and strategic analysis.

Insurers will be required to conduct a full assessment exercise and submit the assessment report to the FSB after the exercise. During this exercise an insurer's risk appetite, the level of risk it wishes to take, as well as its risk toler-

ances and the risk appetite variation on the different risk factors will also be established. In order to maintain the risk profile of any insurer consistent with the risk appetite, four main strategies need to be implemented, namely –

- abandonment of risk;
- reduction of risk;
- transfer of risk; and
- acceptance of risk.

An insurer will therefore have to identify major events, both internal and external, which will have a significant impact on its risk profile and will ultimately lead to the update of its assessment exercise.

In this regard the draft Insurance Laws Amendment Bill provides that every insurer must have an outsourcing policy and further provide for certain conditions under which an insurer may outsource any of its functions or activities, such as the subrogated recovery of monies from delictual wrongdoers. Section 14L(2) of the Bill in essence provides that an insurer may not outsource any aspect of its short-term insurance business if it will materially impair the quality of its governance framework, increase its risk or its ability to manage such a risk, and its ability to meet its legal and regulatory obligations.

Section 14L(4) further provides that any remuneration paid in respect of such outsourcing must be reasonable and commensurate with the actual outsourced service or activity; may not be linked to the monetary value of repudiated claims, claims not paid or partially paid and may not result in the payment of a binder fee or commission, or be structured in a manner that will render the treatment of policy holders unfair.

Prior to entering into any outsourcing agreements the insurer must, in terms of s 14L(6), notify the registrar thereof if such outsourcing has any significant impact on the insurer's ability to manage its risks effectively. The insurer must further furnish the registrar with all the details of the third party to whom the insurer will outsource that function and inform the registrar of any material developments during the course of such outsourcing and, most importantly, of all strategies that will be used to address any identified risks associated with such outsourcing. According to s 14L(8) the registrar may then prescribe any requirements in respect of such outsourcing, remuneration to be paid for it and even any services or activities that may not be outsourced.

But how will all these regulations in respect of risk management affect policy holders and legal practitioners doing outsourced legal work for insurers?

During the first national Insurance Fraud Conference held in Johannesburg in May 2013, the importance of data completeness and data correctness ran

like a golden thread through presentations and discussions as the pivotal point in reducing insurance fraud and, ultimately, improving risk management. Increased pressure will be placed on the recruitment and retention of skilled people who understand these issues. A new degree of sophistication thus needs to be developed. Outsourced service providers, such as lawyers, who can demonstrate an understanding of the constraints the new SAM regime places on insurers, and acquires the tools to respond accordingly, will gain a competitive edge over peers. Such tools will include skilled methods of delivering returns in more innovative ways – such as implementing alternative dispute resolution methods, which might be a cost-effective alternative to standard litigation – and negotiating towards sound economic settlements based on solid legal argument. Lawyers, brokers and policy holders are well placed to help insurers prepare evidence, for example detailed affidavits, etcetera, which can help insurers with their risk and ultimately fraud management, having regard to their above-mentioned need for data completeness and data correctness and will result in insurers' financial stability.

It is foreseen that insurers will enter into more stringent service level agreements with their outsourced service providers (lawyers) with specific terms stringently regulating cost brackets as more pressure will be placed on insurers for capital recovery to maintain the SAM regime required amount of capital to stay solvent. More attention and effort must be given to data investigation and validation to ensure data quality to subsequently prevent fraudulent claims that will, in turn, impact on an insurer's risk management and solvency.

Due to the fact that the outsourcing of, for example legal services, inherently entails a high-risk exposure resulting from the very nature of litigation, less outsourcing of this nature is foreseen, or under more onerous conditions, and insurers will be under pressure to recruit and retain skilled outsourced service providers who understand risk management and the effects of the implementation of SAM and, more importantly, are willing and able to evolve with the needs of the changing times.

Are you ready?

Note: The Insurance Laws Amendment Bill was tabled on 21 June and meetings on this Bill will be scheduled in the third term of 2013.

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By
John
Price

Civil court rules – open to abuse?

The rules of civil
procedure in the
Supreme Court of
Appeal

The rules of civil
procedure in the
High Courts

The rules of civil
procedure in the
magistrates' courts



The law should be fair and the procedures to apply the law must work efficiently and inexpensively.

Much attention has been given to the fairness of the Constitution and the access of ordinary citizens to justice is an important part of this. The Constitution provides, in s 34:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

The purpose of this article is to show that the way in which the civil court rules operate is open to abuse that deprives citizens of their right to proper access to justice in the courts.

Procedure by application (r 6)

The leading authority on application proceedings is still the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), in which Murray AJP stated at 1162: 'It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted inquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply rule 9 [now r 6(5)(g)] to what is essentially the subject of an ordinary trial action.'

Murray AJP referred with approval to the judgment in *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428, in which Watermeyer CJ held that the court must ascertain whether there is a real issue of fact and, if this is not done, '[the defendant] might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of [the plaintiff]'. He further noted that it is always competent to apply for an order directing that a party appear personally in court and submit to cross-examination.

In *R Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd* 1948 (2) SA 626 (T) at 631, Dowling J held that in applications on petition: 'it should, generally speaking, be open to the respondent to record a bare denial on material averments without evidence in support, unless the petitioner is able to show that, on the papers as a whole, such denial is *mala fide* and unsupportable'.

The applicant in this matter was ordered to proceed by way of summons and pleadings, despite the fact that the defendant had put matters in issue with a bare denial.

Notwithstanding these statements, the tendency of the courts has been increasingly to allow more latitude to parties who wish to enforce their legal remedies by way of application rather than trial action. In this regard, reliance can be

placed on the statement by Price JP in *Soffiantini vs Mould* 1956 (4) SA 150 (ED) at 154 G - H, in which the judge held: 'The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

Procedure by trial action (ie, summons and pleadings) (rs 17 - 32)

The basic procedures that have to be applied when a case is brought to court, what Murray AJP referred to as 'ordinary trial action' in the *Room Hire* case, are more or less the same as they have been for the past 100 years and more. These procedures follow the familiar sequence, of summons, particulars of claim (or declaration), plea, exceptions and motions to strike out, particulars, discovery, pre-trial conferences, minutes of meetings, notices to admit certain facts, and so on, all of which today require great legal expertise to avoid pitfalls and punitive costs orders. However, they delay matters and cost enormous sums of money, in addition to the cost incurred by the professional time taken and the delay in resolving the dispute.

The tedious, cumbersome process that the present court rules require provides ample room for evasiveness and scope for relying on technicalities, and the party whose case is doubtful can, and does use them if he or she has the financial means. This has, of course, been recognised and rules for discovery, inspection of documents, expert testimony and pre-trial conferences are intended to avoid this. The net effect, however, has been to introduce technicalities and additional bureaucratic procedures, without achieving any significant improvement.

The proposal being mooted by at present that litigants may have to add compulsory submission to mediation to all this, will be of no assistance. Who will be the mediator, at what stage must mediation take place, how much time will it take, what will it cost, who will pay? Since mediation requires an agreement to be successful, can one ever compel parties to a dispute to agree? The mere fact that such a proposal has been put forward is confirmation that the present practice is seriously defective. Further, mediation is certainly not the solution and adding more bureaucratic procedures will worsen the problem.

The existing rules for 'ordinary trial actions' were derived from an ancient English system. They have become encrusted with procedures that unscrupulous litigators use to grossly abuse the court processes.

The English system is published in IH Jacob, P Adams, JS Neave, KC McGuffie,

and WH Redman *The Annual Practice* (London: Sweet & Maxwell/Stevens & Sons 1965) vol 1 of the 1965 edition, being the latest edition available. Although speaking about a historical situation, it nevertheless suits purpose. A reading of selected passages in *The Annual Practice* confirms that the recognised way of initiating legal actions was by way of a summons, where the case of the plaintiff (and the plea of the defendant) were set out in the form of pleadings where the facts on which the claim (or the defence) were alleged, without evidence, followed by the legal remedy sought. No doubt this position may have been altered in some ways. The procedure for taking legal action to enforce a civil right is one that we have inherited from long-standing English practice.

Preference given to procedure by ordinary trial action

In general terms, the procedure laid down by the rules follows the form of the English court procedure for trial actions. The alternative is an application (or a petition) that contains sworn statements of the evidence in support of the remedy claimed by the applicant. Likewise, the respondent's reply to an application must also take the form of an affidavit.

Taking a general view on readings from *The Annual Practice*, it would appear that there is a difference in the way in which the application procedure is approached in England and in South Africa, namely:

- The English rules tend to specify the types of remedy that may be sought on application and thus restrict the free use of applications, where our law tends to proceed on the basis of general principles, but restricts its use in other ways (see order 5, rs 4 and 5 in the 1965 version of *The Annual Practice*). The English courts are more ready than the South African courts, to accept that where disputes of fact arise these can be resolved by *viva voce* evidence at a special hearing. However, the English system restricts the use of applications by saying that only certain types of claim may be made by this procedure.

- The practice in South African courts is to more readily accept that any kind of right may be enforced by application (especially where there is a degree of urgency), but to threaten to impose a sanction (or simply to dismiss the claim) if the party choosing to proceed by application knows or ought to know that a material dispute of fact is likely to arise. Thus they also place limits on the use of application procedure.

Two interesting inferences can be drawn from this comparison:

- First, that the practical result in both England and in South Africa has been to

give a distinct priority to procedure by trial action.

- Second, there is really no valid reason to look with disfavour on an application brought on affidavit, notwithstanding that a material dispute of fact is known by the parties to exist. Older cases like the *Peterson* case and the *Soffiantini* case indicate acceptance that conflicts of fact on the real issues can readily be referred to evidence. Judges and counsel are quite able to deal with any problems or abuse of the process that may become evident.

To summarise, the preference given to conducting litigation by what Murray AJP described as 'ordinary trial action' is not a requirement of the court rules, but has been repeated so often in judgments that it has produced the undoubtedly malign result of making recourse to litigation inordinately slow and expensive.

I submit that this defect can be cured only by a deliberate amendment of the court rules and trial process needs to be relegated to an option that can, but need not, be used.

Expense and delay of procedure by summons

Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal* (Cape Town: Juta 1997) at 233 contains the following passage:

'There is an "ever-growing practice of launching proceedings by way of motion, which had previously only been initiated by way of action". This is because, first, the scope of the application procedure has been greatly extended and, secondly, *an application is immeasurably less costly and more expeditious than a trial action*' (my emphasis). (The quotation in this passage is from a judgment of Kuper J in *Minister of Native Affairs v Sekukuni* 1958 (4) SA 99 (T) at 101, and the rest of the passage is by the authors. They refer also to an article by G Findlay 'Application versus trial' (1951) 68 SALJ 20.)

Bearing in mind what must be the prime concern of everyone involved in litigation, namely that legal remedies should be just, effective and as inexpensive as reasonably possible, I have not come across a single convincing reason why trial procedure should be given preference by the courts, and why a litigant who elects to have his or her case brought to the court on application, should run the risk of being sanctioned if he or she knows that a dispute of a material fact is likely to arise.

Dowling J in the *R Bakers* case stated that to permit a party to proceed on application when a dispute of fact exists, would be to permit 'fishing expeditions' to take place. But using the process to elicit information is not in itself wrong if the information sought is relevant. Rule 35(3) has exactly this in mind, and the judgment in *Garment Workers' Union v*

De Vries and Others 1949 (1) SA 1110 (W) illustrates how easy it is likely to be to stop unwarranted inquiries.

The rule, expressed in the words 'dismiss the application or' in r 6(5)(g), has been elevated by use into an obstacle that constitutes a serious flaw in legal procedure. The consequence is that litigants have to face trial actions that are immeasurably more costly, and far more time consuming than they need to be. This also places enormous advantages in the hands of wealthy and powerful organisations and individuals, who, with delays and unscrupulous tactics, can put the cost of a civil trial completely out of the reach of ordinary individuals.

It is this defect that I believe should be corrected, and to which I have devoted this article.

Abuse of court procedures

It must be acknowledged that the process of bringing cases on application can be abused and in the *Garment Workers' Union* case at 1132-1133 Price J held:

'It would be deplorable if a litigant were allowed to come to court on vague rumours and hearsay statements and then to claim to have the right to have *viva voce* evidence heard about these rumours so that he [or she] could subject witnesses on the other side to cross-examination on the off-chance that he might be able to show that the vague rumours and hearsay statements were true. There must be a real issue of fact raised in the proper way by real evidence on both sides and that evidence must be such that the court cannot decide the issue except by seeing and hearing the witnesses.'

What this extract shows is not that application procedure is especially open to abuse, but that any such abuse is very easy to identify and to address.

Resolving the problem

The two obstacles in the way of resolving the present problem are, in my view –

- there is no procedure by which proceedings that have been commenced by ordinary summons can be converted to proceedings on application; and
- the present bias in favour of proceedings by summons needs to be removed.

The following amendments of the court rules are suggested:

Rule 6 is the rule in which the procedure for initiating court proceedings on application is set out. At times reference has been made to the provisions of r 6(5)(g) where it is provided that the court may 'grant leave for ... any ... person to be subpoenaed to appear and be examined and cross-examined as a witness'. This wording clearly indicates that it is open to any party to application proceedings to request the court to

order that particular evidence be given *viva voce*. The textbooks are replete with cases from which guidance can be obtained concerning the giving of evidence *viva voce* where action has commenced on application.

In order to give litigants a proper choice in the course they wish to take, I make the following comments, and then suggest the amendments to the rules.

- No doubt more detailed amendments to the rules can be devised but the practice, in opposed applications, of referring disputed issues to oral evidence is well established and familiar. It could safely be left to practitioners to formulate suitable orders in terms of r 6(5)(g), which could eventually be set out fully in the rules. The practice in regard to orders for appointment of *curators bonis* evolved in this way, for example, and is now embodied in r 57.

- There is no need to deny litigants the right to commence action by way of summons, as at present. The purpose of the amendments is to eliminate the rule that imposes a penalty if proceedings are commenced on notice of motion when a factual dispute is known to exist, and also to encourage litigants to proceed on affidavit. Left with the option, the rules would evolve naturally, and if motion proceedings have the advantages claimed, practice will confirm this.

- I would expect motion procedure to be favoured where the action is likely to be defended, largely because it removes some of the purely technical advantages that a litigant in a trial action has at present, and the abuse to which trial procedure lends itself. Where an action is likely to be undefended, a summons in the present form is in fact simpler and would therefore continue to be available, with the option of applying for summary judgment if an appearance to defend is entered purely for purposes of delay.

- As matters stand today, the party with the weaker case, who wants to delay the matter or to conceal evidence, will prefer trial procedure, particularly if he or she has the means to do so, and the party with justice on his or her side will be unafraid of the evidence. Accordingly, justice will be served if either party to an action already commenced by summons has the right to convert the trial action to motion proceedings. This is a vital aspect of this proposal, and is included in the following proposed amendments.

Amendments to the rules of court

The following amendments of rs 6 and 19 are suggested:

- The following passage is inserted as r 6(1)(a), the existing r 6(1) becoming r 6(1)(b):

(a) Every person making a claim against any other person shall have the right to

institute proceedings against such person by application in accordance with these rules, notwithstanding that he [or she] may be aware that disputes of fact are likely to arise concerning the matters at issue.

- Rule 6(5)(g) is amended by the deletion of the words 'dismiss the application or'. This is a right that any court will have in any event if the judge detects an abuse of the process, as appears from the *Garment Workers' Union* case.

- The following sub-paragraph (6) is added to r 19:

(6) Where notice of intention to defend has been given in any action instituted by summons in terms of r 17:

(a) The plaintiff may, by notice delivered to the defendant within ten days of delivery of the notice of intention to defend, or at any later stage in the proceedings, inform the defendant that the proceedings are converted to application proceedings in terms of r 6, and shall with such notice deliver an affidavit supporting his claim which shall take the place of any particulars of claim already filed.

(b) The defendant may, by notice delivered to the plaintiff together with his or her notice of intention to defend, or

at any later stage in the proceedings, inform the plaintiff that the proceedings are converted to application proceedings in terms of r 6, and the plaintiff shall within 21 days of such notice deliver to the defendant an affidavit in place of any particulars of claim filed, or to be filed in the case.

(c) Any pleadings which have already been filed at the time of such conversion, including the summons, may at the request of the party who has filed them, be suitably amended, replaced, or withdrawn from the court record.

On delivery of notice by either party to the other in terms of this sub-rule, the summons shall be deemed to be a notice of motion and the proceedings shall then be deemed to be proceedings commenced in terms of r 6.

Advantages of the amendments

In the article by Findlay (*supra*) he writes that if proceedings are instituted on affidavit the parties will have to surrender their supposed rights of technical pleading, but, says the author, he cannot see it is anything but fit and proper that they should. Rule 37 is an example of a

rule that adds to the procedures to be carried out, without having any real beneficial effect. Adding further procedural requirements to bring a case to trial will benefit nobody.

Abuse of any court process is always possible, but abuse is easy to detect if motion proceedings are undertaken. In general, it is the party who is not afraid of the evidence who will favour conversion of a trial action to an application, and who will be ready to give his or her evidence on oath.

As the court rules currently stand, the expense and delay created by the rules put civil litigation beyond the reach of ordinary citizens. I have little doubt that the change proposed will reduce the enormous wastefulness of trial procedures, promote the interests of justice, and go a long way to reducing the trial backlog that plagues the courts.

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Life rights for senior citizens in retirement villages

A checklist for attorneys

By
Neels
Coertse

The laws applicable to entitlement in respect of immovable property has seen dramatic changes brought about by modern society.

Retirement villages (RVs) are being built in every province and retired people buy into these RVs – some to their financial detriment while others are completely satisfied. Some 24 years ago the Housing Development Schemes for Retired Persons Act 65 of 1988 (the Act) was promulgated. The main purpose of the Act is to regulate the RV industry.

A retired person should look out for a RV that will suit his or her special needs best. Some RVs provide medical care, high security and related facilities and some cater specifically for the elderly who are debilitated.

The retired persons want a safe haven that will care for them in their old age while they can live relatively independently. Such a person is prepared to buy 'life rights' in a RV. It is referred to in the Act as a 'housing interest', which is available exclusively to those who are 50 years or older. 'Life rights' and 'housing interests' should be treated as different names of the same thing.

This section of the commercial sector in South Africa is heavily regulated by about 20 statutes, regulations, municipal by-laws and charters applicable to the elderly. This article will describe in concise terms the applicability of the Act only.

There were some drastic changes and new additions to the statutory laws in the past 24 years. The Act has been amended three times and the regulations were amended once. The Aged Persons Act 81 of 1967 (interlinked with the Act) has been repealed in its entirety and was replaced by the Older Persons Act 13 of 2006 and regulations. The documentation of any home for the aged in operation and registered prior to 1 April 2010 should therefore be inspected closely to bring it in line with the requirements of the Older Persons Act and its regulations.

A housing scheme for retired persons should not be confused with a development scheme in terms of the Sectional Titles Act 95 of 1986 or a share block



Picture source: Gallo Images/Thinkstock

scheme in terms of the Share Blocks Control Act 59 of 1980.

A retired person is someone who is 50 years or older. In other statutes, such as the Older Persons Act, the threshold is 65 years or older for males and 60 years or older for females.

These life rights are normally sold the first time by the developer or by estate agents. A person who sells a housing interest for the first time is also a developer.

The agreement should be in writing (s 2)

It is obligatory that the agreement be reduced to writing and signed by all the parties. If the contract is signed by agents, the agent's authority should be in writing. The law pertaining to contracts entered into by trusts and/or companies to be formed is intact and should be followed implicitly (s 2).

If a client has not signed a written agreement, regard should be had to s 8(2), which might come to the rescue of a seemingly hopeless situation.

Checklist for the contents of the contract (s 4)

Section 4 prescribes the contents of the agreement. Below is a checklist based on s 4:

- The names of the purchaser and the seller and their residential or business addresses.
- What is the legal basis for the housing interest?
- How long will the person have the right of occupation?
- Is the housing interest registrable?
- Has the title deed been endorsed that it is subject to a RV?
- Is the property described properly? In what magisterial district is it located?
- Is the seller the registered owner? If not, who is?
- If someone else is the owner, more information is required, for instance, on what basis does the seller sell the life rights? The contact details of the owner should be available.
- Is the land subject to a mortgage bond? If it is, how much is outstanding? How much of the purchase price will be used by the seller to repay the mortgage bond?
- How much will the life rights cost?
- What is the amount of interest payable annually? What is the rate?
- If payable in instalments, how are the instalments calculated?
- When are these instalments due?
- Have you received a certificate issued by the architect or quantity surveyor that the RV was erected in accordance with the approved plans? If not, when will it be received?
- If there are house rules, where are these kept and when can they be inspected? What kind of services or facilities do

you buy? Are there nursing care and frail care available? Are these services and facilities available to you? Is the RV mainly for debilitated people?

- What official language do you want the contract to be in?
- When will you be able to move in and when will the risk pass?
- Whose responsibility is it to take out insurance?
- Is there an amount payable as endowment, betterment or enhancement levy, a development contribution or anything similar? If yes, to whom and how much is outstanding?
- Who will pay for the contract and the transfer of the life right?
- If the seller is the owner of the land, he or she should assure you that he or she will not take out a further mortgage bond.
- If you are entitled to have the land transferred to you, when and how much will you have to pay? Who will attend to the transfer?
- You should be given an estimate for the next three years what the expenditure for the control, management and administration of the RV and all the services and facilities will be. It must also be clear who will be liable to pay it and assurance must be given that you will not be billed for it over and above your monthly levy.
- The levy should be clearly spelled out for at least two years in advance.
- If you have not received the architect's or quantity surveyor's certificate, you may cancel the agreement and institute a claim, or you may abide by the agreement and not pay any interest.
- Exactly how many life rights are there in the housing development scheme?
- The management structure or proposed management structure should be spelt out.
- The regulations can prescribe anything else that should be included into the contract.

The title deeds should be endorsed (s 4C)

The title deeds of the property should be endorsed that it is subject to a housing development scheme, failing which a person may be fined R 20 000 (maximum) or alternatively sentenced to five years' imprisonment.

Endorsement is prescribed by the regulations relating to the Endorsement of Title Deeds published 31 August 1990. Any developer may request the registrar to endorse the title deeds, even if it is not necessary to have them endorsed.

If the housing interest is sold for the first time (s 6)

If a housing interest is sold for the first time, the developer should give the purchaser the following three documents:

- A certificate by an architect or quantity surveyor that the housing scheme

has been erected substantially in accordance with the approved building plans and not in contravention of any by-laws. This certificate should also state that the building is sufficiently completed for the purposes of the scheme.

- The purchase agreement.
- A certificate that the title deeds to the land have been endorsed that they are subject to the housing scheme.

A developer may not receive any consideration or any part of it, without giving these three documents to the purchaser. If he or she does, and he or she is subsequently found guilty for being in default, in a criminal trial he or she may be fined R 20 000 or alternatively be sentenced to five years' imprisonment.

The deposit may, however, be paid into the trust account of an attorney or an estate agent. If the deposit is paid to the developer, he or she should give the purchaser an irrevocable guarantee issued by a financial institution that the money will be paid back to him or her if the developer fails to perform in terms of the agreement. However, if the developer becomes insolvent, then the money paid becomes immediately due and payable to the purchaser.

RVs exclusively for retired persons (s 7)

The right to occupy this property is reserved exclusively for the retired person or spouse and nobody else. All the owners may grant written consent to someone else than a retired person to occupy the land. Contravention hereof is an offence and liable on conviction with a fine of maximum R 1 000 or six months' imprisonment.

Consequences of contracts that are void or cancelled (s 8)

There are various consequences that flow from contracts that are void or cancelled.

Section 8(1) should be read very carefully because it is rather involved and is best explained in Figure 1.

Consequences of defective contracts (s 8(2))

It is quite clear that a contract should be in writing and signed by the parties, failing which it is of no force or effect. Section 2(1) is unequivocal about this; it is, however, subject to s 8(2).

The legislature made provision for those occasions where there is no written contract. If a purchaser has made full payment and the land has been transferred to him or her, then this alienation is valid from the beginning. The same applies to a housing interest that has been transferred. It is set out in Figure 2.

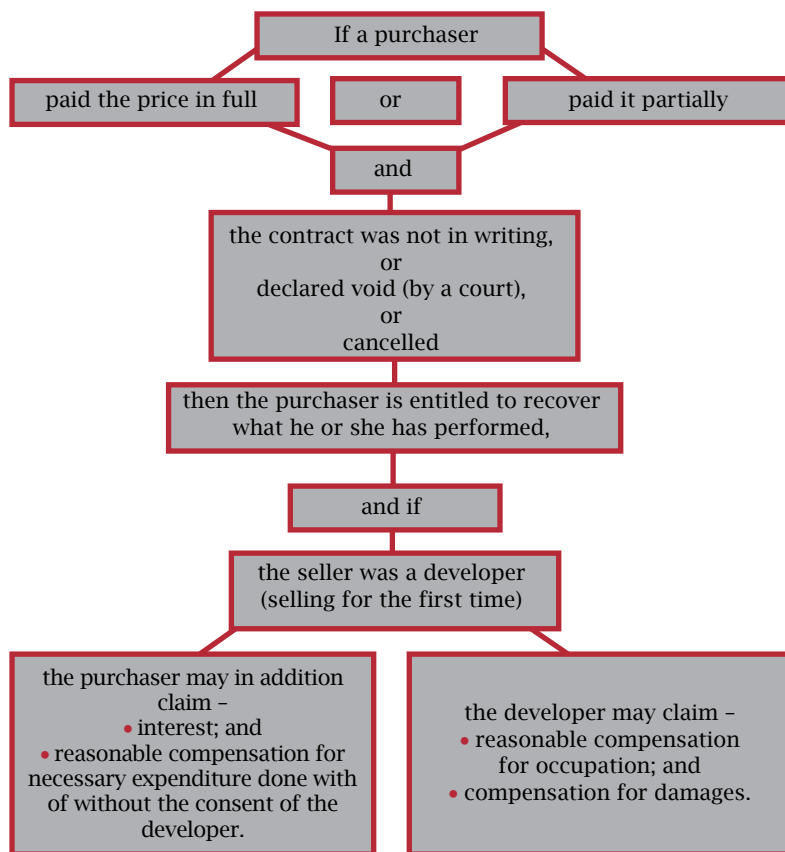


Figure 1

Relief the court may grant (s 9)

This section assists the purchaser first and foremost and sets out the relief a court may grant in respect of disputed contracts.

If a contract does not comply substantially with s 3 (the language the contract has been written in) or s 4 (the contents of the contract), the purchaser has a claim. If the seller has failed to comply with any obligation of the contract or has contravened any provision of a regulation and the purchaser has suffered any prejudice, then litigation might ensue. It is extremely wide and may be abused by

purchasers who are at loggerheads with sellers or developers.

The court retains its wide discretionary powers supplemented by s 9. A court may –

- in addition, reduce the interest rate applicable if it is just and equitable;
- order rectification of the contract; or
- declare it void *ab initio*; or
- grant alternative relief.

The regulations

If a housing development scheme is erected in terms of the Act then these regulations are applicable.

If it is developed in terms of the Sectional Titles Act or as a share block scheme in terms of the Share Blocks

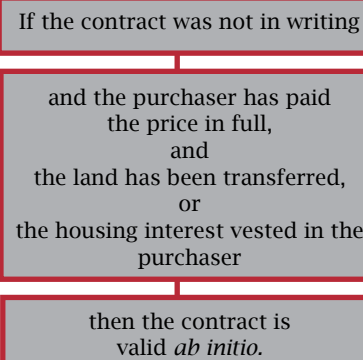


Figure 2

Control Act, then regs 7 to 14 are not applicable.

Definitions such as 'accommodation', 'common property', 'facilities and services', 'the managing agent and the managing agreement' should be looked at carefully.

The developer is under compulsion of the law to have a host of prescribed documents ready to give to an intended purchaser. It is safe to state that the contents of most of these documents were already alluded to in the discussion above about the contents of the contract (s 4).

The penalty for non-compliance is R 6 000 or 3 years' imprisonment.

Conclusion

The Act is not perfect. It is an attempt to regulate the market and to protect the retired person. These housing schemes are very popular and in high demand. If the contract complies substantially with the law as stated above, it might be assumed, all other things being equal, that it is relatively safe to enter into such a contract. If a developer is diligent he or she should consult a lawyer before embarking on such a development scheme.

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Debt collecting against a deregistered close corporation or company

By
Perino
Pama



The process of deregistration

The Companies and Intellectual Properties Commission (CIPC) has placed numerous companies and close corporations (CCs) in the process of deregistration for failing to file their annual returns on time, as is required by the Companies Act 71 of 2008 (the Act).

In terms of s 82(2)(b) of the Act, the CIPC must remove the company's name from the register only if the company has failed to file an annual return for two or more years in succession (see s 33), and in terms of s 82(3)(a)(i) and (ii) (aa) or (bb) has, on demand by the CIPC, failed to give satisfactory reasons for the failure to file the required returns or show satisfactory cause for the company to remain registered.

The registrar must serve a notice on the company or CC that it will be deregistered unless good cause is shown to the contrary. There is no provision made to inform potential creditors of the pending deregistration.

The effect of deregistration

The effect of deregistration is that a company or CC is deprived of its legal existence.

According to PM Meskin, B Galgut, and JA Junst *Henochsberg on the on the Close Corporations Act* (Durban: LexisNexis 1997) vol 3 issue 20 Com 550: '[I]t is sub-

mitted that the effect of deregistration of a corporation is that its existence as a legal person ceases ... and that upon such deregistration all its property, movable and immovable, corporeal and incorporeal, passes automatically (ie, without any necessity for delivery or any order of court) into the ownership of the State as *bona vacantia*' (see also *Miller and Others v Nafcoc Investment Holdings Co Ltd and Others* 2010 (6) SA 390 (SCA) at para 11 and *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) at 549C).

A debt due to a creditor of a company or CC that has been deregistered is not extinguished, but it is rendered unenforceable against the corporation (*Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 295D) and if a creditor of a company or CC wishes to sell in execution any immovable property owned by the company or CC that has been deregistered, the creditor will not be able to do so and will, in effect, lose its security.

Any summons served on a company or CC that has been deregistered, cannot be enforced; similarly a company or CC that has been deregistered cannot issue summons against a defaulting debtor.

Sechaba Mohapi (S Mohapi 'The effects of deregistration of corporate entities during litigation proceedings' www.phfirms.co.za/NewsPublications/NewsArticle.aspx?CategoryID=1&articleId=148#.UdbFQ9UaKUK, acces-

sed 3-7-2013) argues that: 'Where a director or officer of the entity authorises the institution of an action on behalf of a corporation after the date of deregistration, and if the fault lies with him [or her] for taking such action despite knowledge of such deregistration, such director or member will be personally liable for the defendant's legal costs.'

Furthermore, the courts have also been known to grant punitive cost orders against legal practitioners who bring wasteful actions on behalf of deregistered corporations (see, for example, *Barclays National Bank Ltd v Traub*, *Barclays National Bank Ltd v Kalk* at 295; *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 (4) SA 306 (W)).

Deregistration terminates the authority of a person who was a lawful agent of the company or CC prior to deregistration and an attorney who continues to act for the company or CC may be held personally liable for the costs of the action from the date of deregistration.

There is an onerous duty on members and directors of corporate entities, as well as attorneys acting on behalf of such company or CCs, to ensure that the entities are registered at all times when they engage in commercial transactions and in litigation. What this requires is that the aforementioned officers and agents have an obligation to check the 'status' of the corporate entities with the CIPC.

Finally, it must be pointed out that, although liabilities are not enforceable

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against a CC while the deregistration of the corporation subsists, '[i]f a [CC] is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities' (s 26(5) of the Close Corporations Act 69 of 1984). However, this may not be of assistance to a creditor if the deregistered CC owned immovable property against which the creditor wished to execute.

Options available to proceed against a company or CC that is in the process of being deregistered or that has been finally deregistered

The question arises: How does a creditor sue a company or CC that has assets and is in the process of being deregistered or that has been finally deregistered?

Application to court to restore a company or CC

Under the previous Companies Act 61 of 1973 (the 1973 Act), an interested person could apply to a competent court for a restoration order and the court could restore the company if it was satisfied that the company was, at the time of its deregistration, carrying on business or was in operation or, otherwise, that it was just that the company was restored (s 73(6)(a)).

However, in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at para 5, one finds the following *dicta* by Binns-Ward J:

'Furthermore, under the 2008 Companies Act, the reinstatement of the registration of companies deregistered in terms of s 82(3) of the Act falls exclusively within the province of [CIPC]. There is no provision in the 2008 Act for the restoration of the registration of a company by order, on application to a court.'

On 14 November 2012, Henny J delivered a judgment in the Western Cape High Court in *ABSA Bank Limited v Companies and Intellectual Property Commission of South Africa and Others; ABSA Bank Limited v Voigro Investments 19 CC* [2013] 2 All SA 137 (WCC). He held that 'if a close corporation has been deregistered for failing to file its annual returns, the registration thereof can be re-instated only by the commissioner and only in terms of section 82(4) of the Companies Act of 2008. In my view there is no other manner in which reinstatement can occur. No provision is made for the restoration of a deregistered company, or in this case deregistered close corporation, by order, on application to a court' (at para 34).

This case also revolved around s 83(4) of the Act, which permits the liquidator of a company, or other person with an interest in the company, to apply for an order declaring the dissolution to have been void or any other order that is just and equitable in the circumstances.

Henny J disagreed with the contention that s 83(4) is equivalent to s 73(6)(a) of the 1973 Act and said that, in his opinion, s 83(4)(a) only gave a possible remedy to an interested party when a company is dissolved following a winding-up and does not empower a court to reinstate a company that has been deregistered for a failure to lodge annual returns.

This judgment was set aside on appeal before Yekiso, Rogers and Cloete JJ (*ABSA Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC)). The court held that the dissolution of the CC, which occurred on the deregistration of the CC, was declared void in terms of s 26 of the Close Corporations Act, as amended, read with s 83(4) of the Companies Act.

ABSA Bank obtained default judgment against Voigro Investments 19 CC on 7 November 2011. There were other creditors who also obtained default judgment, but all of them were unaware of the fact that Voigro Investments 19 CC had already been deregistered by the registrar on 24 February 2011, due to failure to lodge its annual returns.

The court held that s 83(4) applies as much to a company or corporation dissolved pursuant to an administrative de-

registration as to one dissolved pursuant to its liquidation as a solvent company.

This is an expensive process. Unfortunately, the CIPC has placed seemingly insurmountable obstacles in the path of a creditor wishing to apply to it to restore the company or CC.

Application by a creditor to the CIPC to restore a company

It is perhaps useful to first consider the options that were available to a creditor in terms of the 1973 Act.

In terms of s 73(6)(a) of this Act the court could, on application by any interested person or the registrar, if it was satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it was just that the registration of the company be restored, make an order that the registration be restored accordingly, and thereupon the company would be deemed to have continued in existence as if it had not been deregistered.

Under s 73(6)(b), any such order could contain such directions and make such provision as the court deemed just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

Section 73(6)(a) provided that, notwithstanding subs (6), the registrar could, if a company has been deregistered due to its failure to lodge an annual return in terms of s 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company would be deemed to have continued in existence as if it had not been deregistered.

Reinstatement of a CC before the coming into being of the 2008 Act

Before the promulgation of the 2008 Act, in the case of a CC and in terms of s 26(6) of the Close Corporations Act:

'The Registrar may on application by any interested person, if he [or she] is satisfied that a corporation was at the time of its deregistration carrying on business or was in operation, or that it is otherwise just that the registration of the corporation be restored, restore the said registration: Provided that if a corporation has been deregistered due to its failure to lodge an annual return in compliance with section 15A, the Registrar may only so restore the registration of the corporation after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.'

In the past, any 'interested party', including a creditor, could apply to restore

a company or CC. In *Ex Parte Stubbs NO: In re Wit Extensions Ltd* 1982 (1) SA 526 (W), Slomowitz AJ stated, in relation to the provisions of the s 73(6) of the Act at the time: 'It seems to me that it was intended to widen substantially the class of people who could make the necessary application ... members and creditors are obviously interested persons' (at 529A).

Reinstatement of a CC after the coming into being of the 2008 Act

In terms of s 82(4) of the 2008 Act, any interested person may apply in the prescribed manner and form to the CIPC to reinstate the CC.

One must now read s 26(1) of the Close Corporations Act, with ss 81(f), 81(3) to (4), and 83 of the Act.

The procedure to be followed to apply to the CIPC to reinstate a company or CC

On 17 October 2012, the CIPC issued a notice to customers of the CIPC that they are now required to refer to Practice Note 5 (sic – should be 6) of 2012 for the new requirements for re-instatement applications on form CoR40.5, which took effect on 1 November 2012.

The practical difficulties

With effect from 1 November 2012, one may no longer apply for 'instant' electronic restoration of companies and CCs deregistered due to non-compliance with submission of CIPC annual returns. This facility has been removed from the CIPC website. This means the processing time would therefore increase from one day to approximately 30 days (refer to Practice Note 6 of 2012).

There are several costs involved to process the application, namely the party bringing the application must pay for every annual return not submitted, a restoration fee and penalties (the CIPC have waived until March 2013 the penalty payable for the late filing of annual returns of companies and CCs, which should have been filed since 1 May 2011).

There are practical difficulties. For example, one has to produce a certified copy of the identity documentation of directors/members, which a creditor might not be in possession of.

One of the requirements is that one must submit letters from National Treasury and the Department of Public Works, indicating that such departments have no objection to the reinstatement, if it has immovable property (this seems patently unfair to creditors).

An affidavit must be filed indicating the reasons for non-filing of annual returns. This information is clearly not in the possession of a creditor wishing to

protect his or her interests.

One has to file sufficient documentary proof indicating that the company or CC was in business or that it has outstanding assets or liabilities at the time of deregistration. Once again, this requirement effectively deprives a creditor of the opportunity to apply for the restoration of the company or CC via the CIPC.

The CIPC requires information such as cellphone numbers, e-mail addresses and the signatures of the directors/members.

If a creditor is somehow able to overcome all these hurdles and restore the company or CC, there are usually significant fees to be paid. The only way to recover these fees is to attempt to rely on an enrichment claim against the company or CC, probably in the form of the extended *negotiorum gestio*, which is based on enrichment and applies where the *gestor* is actually acting in his or her own interests.

The effect of reinstatement of a company or CC

Attorney Tony Tshivhase (T Tshivhase 'Holes in the new Companies Act' www.blackignition.co.za/download/files_19/Tony_Tshivhase_June_2012_Newsletter.pdf, accessed 3-7-2013) points out that unfortunately the *Peninsula* case does not confirm whether or not the reinstatement of a deregistered company in terms of the 2008 Act will have retrospective effect. According to him, it is not clear whether or not the CIPC has powers or authority to declare that assets of a deregistered company will revert in a reinstated company on its reinstatement.

In *Mouton v Boland Bank Ltd* [2001] 3 All SA 485 (SCA), it was stated that the 'general effect of the restoration of a company (and, no doubt, also of a corporation) to the "roll": ... is that the company is deemed not to have been deregistered at all' (at para 5).

However, in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at 475C it was pointed out that this is an oversimplification to regard it as being 'no more than a return to "as you were"'.

In the matter between *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ), the deregistration of the applicant was cancelled as opposed to being reinstated. Van Oosten J held that the court retained its inherent jurisdiction, on application or otherwise, to validate anything done by or against an affected company between deregistration and reinstatement.

In the appeal judgment before Yekiso, Rogers and Cloete JJ referred to above, the court held that the order did not validate the default judgment that Absa Bank purported to take against the dis-

solved CC or the liquidation proceedings that were brought against the CC in April 2012. The court regarded the default judgment and liquidation proceedings as a 'nullity'.

An infringement of the creditor's constitutional rights

The rights afforded to the registrar seem to constitute an infringement of creditors' right to equal protection and benefits under the law and just administrative action.

It is almost inconceivable that preferent and/or concurrent creditors should lose their rights when a company or CC is deregistered by the CIPC, without being given an opportunity to protect their interests beforehand. The CIPC should not be permitted to set in motion a procedure that effectively expropriates assets belonging to companies and CCs, without this being advertised properly. There is no doubt that the CIPC should be entitled to implement a remedy that is effective, but the powers afforded to it should be in proportion to the mischief that the legislature is trying to prevent.

Henochsberg (*supra*) writes that: 'Having regard to the rights conferred by sections 9(1) and 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (which guarantee the right to equal protection and benefit under the law and just administrative action), it is submitted that the rights accorded to the Registrar, in terms of subs (6) are constitutionally questionable' (vol 3 issue 20 Com58) (the *Insamcor (Pty) Ltd* case at 314 H - J).

A creditor is not afforded an opportunity to be heard

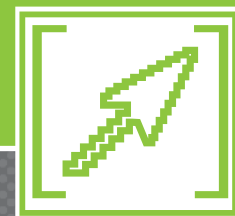
In the latter case, the court concluded that the aim of the relevant provisions of the Constitution could not be achieved where a party whose rights are materially affected by a decision is not afforded an opportunity of being heard before such a decision is made and that the protected constitutional right must be properly taken into account from the outset.

The legislator should be called on to create an appropriate and relatively inexpensive procedure that permits creditors to reinstate a company or CC and to recover the associated costs from the company or CC.

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By
Felix
Majoni

Mine or yours?

A closer look at s 5 of the Mineral and Petroleum Resources Development Act



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The concept of absolute ownership is one that is deeply entrenched in our law. Ownership entails that the holder of a thing has absolute control over that particular thing, although there are limitations imposed by law. In mining law there has always been conflict between the holder of a title deed who, in most cases, is the surface landowner and the mineral right holder

who, in most cases, has the rights to access and sever the minerals beneath the surface by virtue of various licenses granted under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA).

There is a wide spectrum of cases in our jurisdiction that have dealt with these aspects, notably the recent *Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae)* [2012] 3 All SA 266

(SCA) where the court had to, *inter alia*, make a ruling on whether the MPRDA expropriated rights that existed prior to its coming into force as contended by Agri SA. Agri SA had argued that the MPRDA expropriated some existing rights and no provision was made for compensation; rendering the MPRDA unconstitutional for non-compliance with the provisions of s 25(2)(b) of the Constitution, which requires that any expropriation be subject to the payment of compensation. On the other hand, the minister had contended that this is not the position as item 12(1) in sch 2 of the MPRDA gives a wider ambit on the one alleging expropriation to prove it. The court then scrutinised the mining law regime, from the pre-Union legislation to the MPRDA, to come up with a favourable determination.

One of the MPRDA provisions that the court dissected at length in the *Agri SA* matter was s 5. Agri SA had contended that s 5 is the main provision that allowed the minister to expropriate. It is therefore the purpose of this article to take a bird's eye view of s 5 insofar as it allows a mineral right holder to enter the land of another to prospect, mine, explore or produce minerals, provided they have the relevant rights thereto, and leaving the surface landowner with a right to be consulted in the entire process only.

In actual fact, the surface landowner is the real owner of the minerals beneath the surface by virtue of the common law principle of *cuius est solum* ('rights of the owner of immovable property extend up to the heavens and down to the centre of the earth') (the *Agri SA* case at para 32) and the title deed, which is a real right in relation to that particular land compared to a mineral right, which is a limited real right by virtue of s 5(1) of the MPRDA. It is settled in our law that a real right is superior to a limited real right. Other authorities have, however, classified mineral rights as common law rights, with some even classifying mineral rights as real rights, so it becomes questionable whether there is a gap in our mining law when considering the application of s 5(1) to the nature of mineral rights?

Section 5 of the MPRDA qualifies the nature of a prospecting, mining and exploration right. It reads as follows:

'5. Legal nature of prospecting right, mining right, exploration right or production right, and rights or holders thereof -

(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such rights relates.

(2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights re-

ferred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may –

(a) enter the land to which such right relates together with his or her employees and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be;

(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted.

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(d) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.

(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –

(a) an approved environmental management programme or approved environmental management plan, as the case may be;

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) notifying and consulting with the land owner or lawful occupier of the land in question.’

Of particular interest is s 5(3)(a) that allows a prospecting, mineral or exploration right holder to ‘enter the land to which such right relates together with his or her employees and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for

the purposes of prospecting, mining, exploration or production, as the case may be’.

This is *de facto* invasion of private property, because before such right is granted, the surface landowner is merely consulted and does not have further say once the consultation process is concluded by the Department of Mineral Resources, which takes over the entire process subject to other provisions of s 5.

Further s 5(3)(a) is just a legislative rubber stamping exercise from the pre-Union legislation that granted a mineral right holder the right to enter private property to search for minerals on the basis that the nature of mineral rights is separated from the ownership of the land. This was established by Innes CJ in *Van Vuren and Others v Registrar of Deeds* 1907 TS 289 at 294; a mineral right entitles the holder thereof ‘to go upon the property to which they relate to search for minerals, and, if he [the holder] finds any, to sever them and carry them away’.

However, juxtaposing a pre-Union approach to mineral rights in a modern constitutional dispensation is a dangerous exercise as entering the property of another should not be done after a mere consultative and box-ticking process, but should be an inclusive one that is all encompassing taking cognisance of both the interests of the surface landowner and the prospective mineral rights holder.

The court in the *Agri SA* case also had occasion to dissect at length, among others, rights afforded to mineral rights holders insofar as old order rights are concerned and whether extinguishing these rights through the promulgation of the MPRDA, amounted to expropriation. The other critical factor considered by the court was the landowners’ only recourse before mining rights are granted, specifically s 5(4)(c), which makes it mandatory for them to be consulted before the mineral rights can be granted.

The minister had contended that, although there was deprivation of property because all mineral rights under the 1991 Act were extinguished by the MPRDA, the MPRDA did not effect a general deprivation of existing mineral rights because the state did not acquire any rights in consequence of the MPRDA coming into operation.

However, such an argument leaves a *lacuna* in our mining law insofar as mineral rights are concerned, because s 3 of the MPRDA vested all minerals under the custodianship of the minister, leaving the surface landowner with nothing; which is a clear departure from the established *cuius est solum* principle that entitles the surface landowner of ownership of the minerals underneath.

Further, does s 5(1), which classifies mineral rights as limited real rights,

separate the ownership of the minerals beneath the surface from the ownership of the land? This is a contradiction in terms because it was settled in *Hudson v Mann and Another* 1950 (4) SA 485 (T) at 488 E – F that, for as long as minerals remain in the ground, they continue to be the property of the landowner; only when the holder of the right to minerals severs them do they become movables owned by him.

Some have argued that the effect of s 5(1) is that it classifies only prospecting rights, mining rights, exploration rights and production rights as limited real rights, but does not similarly classify reconnaissance permits or permissions, retention permits, mining permits or technical co-operation permits. However, classifying mining rights in the class of limited real rights such as quasi servitudes contradicts the position set down in *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 that mining rights are real rights. It had also been previously confirmed in the *Van Vuren* case that mining rights are ‘real rights and their exercise may conflict with the interests of the landowner’.

This is further confirmed by some who argue that the fact that the real rights extend to the minerals themselves is reflected in s 5(3)(c) in terms whereof the holders are entitled to remove and dispose of any mineral found during the course of prospecting, mining, exploration or production. Yet, the fact that the real right extends to the land is reflected in ss 5(3)(a), (b), (d) and (e). However, the question is: Which rights should rank superior – those of the surface landowner by virtue of being the title deed holder, or those of the mineral right holder, considering that both are real rights and that the real right nature of mineral rights extend to the land itself by virtue of ss 5(3)(a), (b), (d) and (e) of the MPRDA as mentioned above? The MPRDA should therefore reconcile s 5 to accommodate the surface landowner by including a reasonable compensation provision during the acquisition of mineral rights further to the consultative process guaranteed by s 5(4)(c).

The surface landowner is the owner of the minerals under the surface by virtue of the common law. However, some have argued that this common law principle has been further abrogated by s 4(2), which allows the MPRDA to prevail over the common law in the event of any inconsistency, despite mineral rights being classified as common law rights. It is therefore clear that s 5 supersedes the common law rights of the surface landowner in the event of any inconsistency with the mineral right holder as contemplated by s 4(2).

However, the only comfort that the surface landowner has is that the holder of a prospecting, mining or exploration

licence only has a limited real right in respect of the land to which the right relates by virtue of s 5(1). However, does this not conflict with the common law position that classifies a mineral right as a real right and other earlier authorities? It is therefore tempting to classify s 5(3) as a restatement of the common law, although the Act states that the Act prevails over common law in the event of any inconsistency.

Some argue that although a holder of a prospecting, mineral or exploration right may enter the surface landowner's territory, the MPRDA does not confer rights to enter neighbouring or other land, other than the land to which the right relates. However, insofar as use of water is concerned, s 5(3)(d) entitles a holder of a prospecting right, mining right or exploration right to 'use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or any excavation previously made and used for prospecting, mining, exploration'. It is therefore clear that the surface landowner and the mining right holder have competing interests in water use rights subject to the National Water Act.

This is in conflict with the common law position that the surface landowner should have superior rights to those with ancillary rights, such as mining right holders unless they have servitudes. This was confirmed in *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 where it was held that subterranean water not flowing in a known and defined channel, but percolating through private property, may be intercepted and appropriated by the owner and that this position may be modified by servitude.

Section 5(4)(c) is peculiar in that the prospecting, mining and exploration right holder should notify and consult with the landowner or lawful occupier of the land in question. This has led some to conclude that, since the state is the custodian of all mineral resources, consulting with the landowner serves a limited purpose only as the state grants the mining rights anyway. However, consultation with the landowner and or the

lawful occupier before giving away the mining right, as the case may be, only helps to assess whether a balance can be struck between the mining right holder and the landowner insofar as interference with the landowner's or occupier's rights is concerned.

This position was settled in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), where the court held that the MPRDA does not impose agreements as to the outcome of consultation. It therefore should be implied that 'notifying and consulting with' the landowners should be a process where there has to be agreement between the mining right holders and the landowner if the landowner is to have a meaningful benefit from the entire process.

In my view, the consultative process within the ambit of s 5 should impose obligations for an agreement to be concluded between the surface landowner and the mining right holder during the consultative process. The correct approach should therefore be 'in consultation with'. However, notwithstanding whether consultation should be 'in consultation with' or 'after consultation with' the surface landowner, the position set down in *S v Smith* 2008 (1) SA 135 (T) that consultation cannot be a mere formal process and has to be a genuine and effective engagement of minds between the consulting and consulted parties, and not a more formalistic attempt to consult, should prevail if the landowners are to have a say in the entire process.

In conclusion, ss 3 and 5 have eroded the common law principle that minerals are part of the *dominium* of the surface landowner. Further, it also appears that both sections follow an English law approach where separate ownership of strata of the soil under the surface is possible. Such separation was, however, never recognised in Roman Dutch law, which does not recognise the separate ownership of minerals before their extraction from the soil.

It was also highlighted in the *Agri SA* case that, in general, the owners of property are free to do with it what they wish

and, as a matter of common law, the right to mine vests in the owner of the land and is one of the entitlements arising from the ownership of land. Yet in our jurisdiction a *sui generis* type of mineral right has been created that classifies mineral rights as common law rights that do not have their origin in the common law as argued in the *Agri SA* case.

Such rights originate largely from legislation that permitted personal rights obtained under contracts to be registered as rights separate from the ownership of the land to which those rights related. The state has not, however, claimed ownership of minerals separate from the ownership of the land on which they are found, but has left the ownership to remain with the landowner with the state being custodian thereof by virtue of s 3.


However, the court argued in the *Agri SA* case that ownership of minerals without the right to exploit that ownership is of little value, because mere ownership of minerals in the ground was valuable only when owners could control access to their land for the purpose of prospecting and mining for minerals. The value does not lie in the person's ownership of the land but in their being the holder of the mineral rights, so it appears the surface landowner now has inferior rights to his or her land insofar as minerals below the surface are concerned.

It appears that this was an abrupt shift brought by the 1991 Act whereby the presence of minerals on or under the land conferred no value on the owner, unless the right to mine in respect of those minerals was also vested in the owner of the property. However, even then, the value lay not in the person's ownership of the land but in their being the holder of the mineral rights.

• See also 2012 (July) *DR* 44.


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By Justice
Finger

Finding common ground between attorneys and state legal advisers

As many attorneys will know, the institution of legal action against organs of state for recovery of a debt differs from suing any other person, mainly because of the requirement to issue a six-month notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The problem arises when the notice is not issued or is issued but does not comply with the requirements of the Act, in which case consent has to be sought from the organ of state.

Seeking consent has created a number of problems mainly due to a lack of understanding of the role that each party must play. The Act therefore makes it possible for notice disputes to be settled amicably before approaching a court of law. Often the two parties cannot find common ground and the matter ends up in court as an application for condonation. In many instances these applications to court can be avoided, if both

parties understand the purpose of s 3 and its implications clearly.

Section 3 of the Act

Section 3 of the Act states:

'Notice of intended legal proceedings to be given to organ of state. –

3. (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless –

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings –

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must –

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and
(ii) such particulars of such debt as are within the knowledge of the creditor.

(3) ...

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.'

Each party's requirements

It is a requirement of the Act that, before a claim for the recovery of debt is instituted in a court of law, a notice that complies with certain requirements must be sent to the organ of state within six months from the date on which the debt became due. If for one or other reason



the notice does not comply with the Act or has not been issued, consent must be sought from the relevant organ of state.

For the state legal adviser confronted with the request to consent, the Act does not give guidance on how the request must be dealt with. I submit that the state legal adviser must rely on the requirements of s 3(4)(b), which courts are required to consider when adjudicating an application for condonation (this does not suggest that the state legal adviser must deal with the application in the same manner as the court does). The section must be used as a guide to deal with request for consent.

Attorney: It is clear from the provisions of the Act that reasons (ie, good cause) has to be advanced by an attorney or creditor when consent is sought. The extent of reasons depends on each case, for example, more reasons may be required in cases of extreme time delay or failure to serve a notice at all. What tends to happen in practice is that attorneys comply only with the requirements of s 3(2)(b) (facts giving rise to debt and particulars of debt).

In instances where there is knowledge that the notice is outside the required six-month period, there is a tendency to make bald statements such as 'to the extent that the notice issued may be outside six months, the applicant requests consent for non-compliance with the requirements of section 3(2) as there is no prejudice to the state'. Attorneys cannot speculate that the notice is outside the six-month period, because time can be calculated very easily; therefore

the issue as to whether the notice complies with the Act must be factually determined before a notice is issued to the organ of state.

This determination will make it possible for an attorney to know whether there is a need to request consent and to show that 'good cause exists for failure by the creditor'. Speculation and bald statements will complicate the case for an attorney and will increase the chance of the request for consent being rejected.

It is therefore clear that an attorney cannot expect consent to be granted if reasons are not advanced (and good cause is not shown). I do not suggest that the letter of request/notice must contain all the details of an application to court, but it must contain enough facts to place the organ of state in a position to arrive at a just decision. Attorneys who are loath to do this and prefer to rather state the true facts in court through an application for condonation, must bear in mind the burden it places on their clients who will have to incur the costs of the court application.

State legal adviser: The request places a responsibility on the state legal adviser to carefully consider the request and to arrive at a fair decision. In practice what normally occurs is that summons is issued without notice (indicating that some attorneys are not aware of the Act); or the notice is issued but outside the required period and there is failure to request consent. In some instances the notice is sent to the wrong organ of state, that is, to the national minister instead of to the provincial member of the executive council (MEC).

In all instances the request for consent then comes only after a special plea or after the attorney is alerted by the state legal adviser about non-compliance with the Act. As stated above, and using s 3(4)(b) as a guide, the first requirement to be looked at by the state legal adviser is that of prescription. This requires consultation with the Prescription Act 68 of 1969 and, if the matter has prescribed, request for consent must fail.

If the application passes prescription, the second requirement will be whether there is good cause for delay. This can unfortunately only be established if the attorney provides reasons for delay or shows good cause. In this instance, good cause for delay must be interrogated together with the prospect of success (*Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at paras 10 and 12).

The state legal adviser must, in the evaluation of good cause, also be mindful of the personal circumstances of the creditor, that is, illiteracy (*MEC for Education, KwaZulu-Natal v Shange* 2012 (5) 313 (SCA) at paras 11 and 18; *Premier, Western Cape v Lakay* 2012 (2) SA 1 (SCA) at para 19) and the nature of the debt (ie,

damage suffered may be so severe that barring prescription and prejudice, it is only fair to grant consent). Great care must be taken not to become fixated with the amount claimed or the period of delay, all that must be considered is whether the creditor has (with all his or her shortcomings) shown the desire to prosecute his or her case and whether there is a prospect of success.

In cases where the creditor has delayed unreasonably, prejudice must also be investigated (*MEC For Education, KwaZulu-Natal* case at para 22, *Premier Western Cape* case at para 23 and *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at paras 53 and 54). The attorney will not know whether prejudice will be suffered, except to make the allegation that there will be no prejudice suffered. It is important to note that the legislation uses the wording 'unreasonable prejudice' and therefore only prejudice that is unreasonable should be considered.

For the state legal adviser it is therefore crucial at this stage to establish that all critical witnesses and documentation that will assist with the case are available. All the factors explained above must be assessed to arrive at a fair decision, the principle must always be that the provisions of the legislation must not be used to unfairly burden a creditor who has a valid case against the organ of state with the unnecessary legal costs of an application for condonation. In most instances failure to give consent can mean the end of what was a legitimate case against an organ of state as most litigants are destitute.

Conclusion

There is a duty placed on an attorney in that, where consent is required, he or she must show good cause for non-compliance with the requirements of the Act in order to assist the organ of state to arrive at a fair decision when dealing with a request. At the same time, it is a fact that state legal advisers are employed to protect the interests of the state, however, the provisions of the Act cannot be used to frustrate litigants and unreasonably refuse a request for consent (ie, by merely being influenced by the amount claimed). I am of the opinion that if both role players understand their roles in terms of s 3 of the Act, there will be no reason not to settle disputes relating to the notice at departmental (organ of state) level, thereby saving creditors and the state unnecessary legal costs.

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Mind over matter

The art of mindfulness meditation

By Jenny
Canau

What is an article on mindfulness meditation doing in a legal journal? Why are mainstream law firms and law schools worldwide offering courses on mindfulness meditation? What is meditation, and what could it possibly have to do with the practice of law? This article will offer answers to these questions, and show how mindfulness meditation will enhance your legal practice.

Mindfulness meditation is the art of using simple methods to calm and stabilise the mind. It is in essence a mind-training in paying attention, deliberately

in the moment without judgment. It is a secular practice of cultivating our innate human qualities of presence and awareness. This systematic method of paying attention enables us to gain insight into our mental and emotional processes, our habitual reactions and their manifestations in our mind and body.

Mindfulness training is a way of bringing awareness to the moment by moment experience of living, realising that, in each moment, we have a choice as to what we think and how we act. It affords us the skill of standing back from the flow of our thoughts and emotions, thereby enabling us to choose what we

focus our energy on and what we leave alone. Such awareness enables us to understand and deal with our own reactions to inner tensions, stress and conflict. It opens the door to developing ourselves in ways that will enable us to perform better and get more satisfaction from work and life.

Over the past 20 years, mindfulness meditation has made significant contributions in many sectors of Western society, including health care, psychotherapy, education and the legal system. In the United Kingdom (UK), mindfulness-based cognitive therapy has been incorporated into the official guidelines of

the National Health Services and today many countries, including South Africa, have doctors, psychologists and psychiatrists prescribing it for depression, stress and chronic illnesses. Mindfulness-based cognitive therapy has been shown to be more beneficial than antidepressants, particularly for people who have experienced three or more previous episodes of depression. This is now recommended as a treatment modality by the National Institute of Clinical Excellence in the UK (see 'Depression: The treatment and management of depression in adults' at [38 www.nice.org.uk/nicemedia/live/12329/45896/45896.pdf](http://38.www.nice.org.uk/nicemedia/live/12329/45896/45896.pdf), accessed 17-7-2013)).

In education, mindfulness is taught worldwide at many prominent universities, promoting cognitive and academic performance, as well as mental health and wellbeing. Rob Nairn, prominent international mindfulness meditation teacher and former professor of criminology at the University of Cape Town (UCT), currently leads the first three-year master's degree in mindfulness at Aberdeen University in Scotland. The Institute for Mindfulness Interventions South Africa is presently collaborating with the Faculty of Health Science at the University of Stellenbosch to offer the first postgraduate certification in mindfulness-based interventions in South Africa. It is also currently being taught at cutting-edge business schools, including UCT's Graduate School of Business.

The pioneering initiative in the area of law was led by the Centre for Mindfulness in Medicine, Health Care and Society, which offered the first mindfulness programme to trial court judges in the United States (US) in 1989. This was followed in the early 1990s by mediators of the US Court of Appeals, who attended mindfulness workshops held at Spirit Rock Meditation Centre. During this time, the Boston office of the leading law firm Hale and Dorr was the first to offer its lawyers a mindfulness meditation course.

In 1998 the Centre for Contemplative Mind in Massachusetts held its first retreat for Yale law students and faculty members, presented by mindfulness luminary Joseph Goldstein. This resulted in the creation of a law program, led by Charlie Halpern, which sponsors annual retreats and mindfulness gatherings for lawyers, judges, professors and students (see www.contemplativemind.org).

Mindfulness meditation has since made many inroads into legal dispute resolution education and is offered as continuing education programmes for lawyers, judges, mediators and negotiators (LL Riskin 'The Contemplative Lawyer: On the potential contributions of mindfulness meditation to law students' (2002) 7 *Harvard Negotiation Law Review* 1). Some universities in the US,

including the Berkeley law school and the University of Missouri law school, offer mindfulness training to law students, while other universities, such as Monash in Australia, are offering mindfulness training to all first-year students, including offering training to faculty members. In 2010, the University of California at the Berkeley School of Law held a conference entitled 'The Mindful Lawyer: Practices and Prospects for Law School, Bench and Bar'.

This saw 200 lawyers, law students, judges and law professors from the US, Canada and Australia attend the first ever international conference, exploring the integration of mindfulness meditation with legal education and practice (www.mindfullawyerconference.org).

There is a growing interest globally in mindfulness meditation in the legal profession, as evidenced by articles on this subject in mainstream legal journals. It features frequently in newsletters from the American Bar Association, which has shown its support by sponsoring talks, articles and mindfulness programs for the legal fraternity (J Patton Hyman, Esq 'The Mindful Lawyer: Mindfulness and the Law Practice' (2007) Summer *The Vermont Bar Journal*; 'A call for mindfulness in our profession' (2009) *April Massachusetts Bar Association Lawyers Journal* www.massbar.org/publications/lawyers-journal/2009/april/president's-view, accessed 17-7-2013; LL Riskin 'Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation' (2010) January *Nevada Law Review*).

Although traditional legal training still focuses on overcoming external challenges, through mindfulness practice, there are now an increasing number of lawyers worldwide that are training themselves to work on their inner life in an effort to improve their law practice, benefit clients and colleagues, and provide better training for lawyers and, ultimately, yield better justice.

There has also been an explosion of scientific interest worldwide in the neuroscience of meditation, with neuroscientists recording brain waves and taking pictures of brain activity in many thousands of meditators, ranging from novices in urban practice centers to monks in secluded monasteries.

In this way, neuroscience has uncovered how mindfulness meditation transforms not only our behaviour, but also the structure and function of the brain. Benefits of meditation, namely increased calm, decreased stress, and better attention have been traced to actual neural changes in the brain. Meditation practice is associated with changes of specific brain areas that are essential for attention, learning and regulation of emotion.

Harvard neuroscientist Lazar found that enlarged areas of the prefrontal cor-

tex – the area of the brain that is linked to happiness – are activated by meditation. The region of the brain most associated with emotional reactivity and fear, the amygdala, has decreased gray matter density in meditators.

The most surprising finding was that both of these types of structural brain changes were seen after only eight weeks of mindfulness meditation practice.

Recently, Richard J Davidson and colleagues reported their study where high-tech executives (with no previous experience in meditation) were given an eight-week meditation course, which resulted in increased activity in the left prefrontal lobe cortex, which is the part of the brain associated with happiness (see RJ Davidson 'Alterations in the Brain and Immune Function produced by Mindfulness Meditation' (2003) 65 *Psychosomatic Medicine* 564).

The 'Jurisight Program' developed by Scott Rodgers, now brings together groundbreaking work in the field of neuroscience and the contemplative practice of mindfulness in the field of law (www.jurisight.com). Scott Rodgers recently presented a programme at the Florida Bar Convention called 'Mindfulness, Neuroscience and the Law', which focuses on improving effectiveness and reducing stress through understanding how the brain works under certain conditions.

What is evident today is that mindfulness has many benefits for the legal sector, in that it helps to:

- Manage and reduce stress.
- Increase problem-solving and negotiation skills and abilities.
- Improve concentration and generates an inner sense of calm and stability.
- Improve emotional intelligence through developing self-awareness, self-regulation, motivation and empathy.
- Improve equanimity of mind through developing patience and balance (see LL Riskin).

The South African legal profession needs to stay abreast of these developments and, through the newly established Centre for Integrative Law (www.integrativelaw.co.za), such training is now available to lawyers in 2013. In partnership with Mindfulness Africa, an association of mindfulness practitioners founded and developed by international mindfulness meditation teacher Rob Nairn, it will host the first course of Mindfulness for Lawyers in Cape Town over an eight-week period in two-hour evening sessions. For further information, please visit www.mindfulnessafrica.org and www.cil.org

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ABBREVIATIONS:

CC: Constitutional Court

GNP: North Gauteng High Court, Pretoria

GSJ: South Gauteng High Court

SCA: Supreme Court of Appeal

WCC: Western Cape High Court

Administrative law

Access to information held by a public body: In February 2002 the former president of the country, President Mbeki, appointed a Judicial Observer Mission (JOM), consisting of two judges, to observe and report to him personally on whether in the period before, during and shortly after presidential elections in Zimbabwe the constitution, electoral laws and other laws of that country, which were relevant to the elections, could ensure credible or substantially free and fair elections and also whether the elections there had been conducted in substantial compliance with the legislative frame. The JOM duly obliged and reported to the President.

In *M & G Media Ltd v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP), [2013] 2 All SA 316 (GNP) the applicant, M & G Media, made a request for a copy of the report, which was denied. Thereafter the applicant was granted an order in the GNP requiring the respondents, the President and others, to make the report available to the applicant. An appeal against that order was dismissed by the SCA but on

THE LAW REPORTS

June 2013 (3) The South African Law Reports (pp 325 – 645);
[2013] 2 The All South African Law Reports May no 1 (pp 251 – 375);
and no 2 (pp 377 – 499)

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.

further appeal the CC remitted the matter to the High Court to be heard *de novo*.

The respondents resisted the application mainly on the basis of ss 41(1)(b)(i) and 44(1)(a) of the Promotion of Access to Information Act 2 of 2000 (PAIA), contending that the information contained in the report was supplied in confidence by or on behalf of another state or international organisation as contemplated in s 41(1)(b)(i) and further that the report was prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe as contemplated in s 44(1)(a).

The court set aside the refusal by the respondents for access to the report, ordering them to make it available to the applicant within ten days unless an appeal was lodged against the order. The respondents were ordered to pay the costs.

Raulinga J held that the contents of the report did not support the contention that its disclosure would reveal information supplied in confidence by or on behalf of another state or international organisation contrary to s 41(1)(b)(i) of PAIA. There was also no indication that the report was prepared for the purposes of assisting the President to formulate executive policy on Zimbabwe as contemplated in s 44(1)(a).

It was common cause that the report contained the findings of the two judges regarding the conduct of the elections in Zimbabwe, such as whether the legal requirements for the elections were met. That could not be construed as information supplied in confidence by or on behalf of another state. After all, most of the information

was public knowledge.

Furthermore, information provided by individuals who happened to be members of the public service could not be said to be information supplied by or on behalf of another state. Moreover, the information was supplied also by persons who did not qualify as members of another state, as well as by independent lawyers.

NB: Another reported case dealing with the topic was *BHP Billiton plc Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA) where the issue was protection of commercial or confidential information of a third party.

Banking

Ownership of funds deposited into the customer's account: In *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA) Mr Graham Whitehead ran a lucrative investment scheme that was operated in the United Kingdom (UK) and to which he recruited members of the public in South Africa.

A few days after investing some R 3 million in the scheme by way of depositing money into Whitehead's banking account, the first respondent, Dumas, established that the scheme was in fact a 'Ponzi scheme' – that is, an unlawful pyramid scheme – and that Whitehead had been arrested. Whitehead's estates in the UK and South Africa were duly sequestered.

As a result Dumas sought a return of his money from Whitehead's bank, Absa Bank, where the funds lay. The basis of his claim was the *condictio ob turpem vel iniustam causam*, being a remedy that is available to a plaintiff who innocently transfers money to

a defendant under an agreement which, to the knowledge of the defendant, is illegal. However, the problem was that the money had not been transferred to the bank, but to Whitehead who had an account with the bank and into which it had been deposited.

The GNP held, per Makgoba J that the bank would be enriched if it kept the money and accordingly ordered it to repay the money to Dumas. An appeal against the order was upheld with costs.

Cachalia JA (Lewis, Ponnan, Theron and Petse JJA concurring) held that, in general, where money was deposited into a bank account of an account holder (such as Whitehead) it mixed with other money and, by virtue of *commixtio*, became the property of the bank regardless of the circumstances in which the deposit was made or by whom it was made. The account holder had no real right of ownership of the money standing to his credit, but acquired a personal right to payment of that amount from the bank arising from their bank-customer relationship.

This was also the case where no money in its physical form was in issue and the payment by one bank to another, on a client's instructions, was no more than an entry in the receiving bank's account. The bank's obligation, as owner of the funds credited to the customer's account, was to honour the customer's payment instructions. Where the depositor (such as Dumas) was not the account holder, he relinquished any right to the money and could not reverse the transfer without the account holder's concurrence.

As between account holders

no personal rights were transferred. The personal right to the credit of the one account holder was extinguished on transfer and a new personal right created immediately for the other. Therefore, Whitehead, as a customer of Absa Bank, immediately acquired the new right to the money in his account, which was enforceable against the bank when ownership passed to it, despite the absence of a valid *causa*, that is, a valid underlying agreement.

Absa Bank then had both a duty to account and a corresponding liability to its customer, Whitehead, and, on his sequestration, to the trustees of his insolvent estate. Absa Bank was therefore not enriched and no enrichment action lay against it. Dumas had only a delictual claim against Whitehead arising from the fraudulent misrepresentation that induced the transfer of the money and, on the latter's sequestration, a claim against the trustees.

Companies

Liability of directors for reckless or fraudulent conduct of business of a company: Section 424(1) of the repealed Companies Act 61 of 1973 (the Act) provided, among others, that when it appeared that any business of the company was or had been carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the court could, on application, declare that any person who was knowingly a party to the carrying on of the business in that manner was personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court would direct.

In *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA) the directors of a company, Dynasty Textiles (Pty) Ltd – being Robert and Bobby Tsung, father and son – were held personally liable for the debts of their company on the basis of s 424(1).

The proceedings were instituted by two major creditors,

namely the first respondent, Industrial Development Corporation of South Africa Ltd, and its subsidiary, Findevco (Pty) Ltd, after the company failed to repay large sums of money due. It was alleged that the Tsungs had conducted the business of the company in a number of ways that rendered them personally liable for the debts of the company in terms of s 424(1). Such allegations included, among others, that the directors had used the banking account of the company as a conduit to transfer funds to Hong Kong to pay personal debts to a creditor there and also to transfer money to Lio Ho, a company in which they, together with Mrs Tsung, were shareholders and that funds were also transferred to repay shareholders' loans.

Furthermore, it was also alleged that a credit card of the company had been used to pay for personal expenses for items that included, *inter alia*, clothing, golf courses, flights to Australia, school fees for a child, a motor vehicle, and house relocation expenses of Bobby. All these payments occurred at the time when the company was hopelessly insolvent and could not pay its debts.

In the WCC Davis J declared the directors personally liable for the debts of the company. An appeal to the SCA was dismissed with costs.

Lewis JA (Cachalia, Theron, Schoeman JJA and Van der Merwe AJA concurring) held that, in a case where the company was 'hopelessly insolvent', a causal link between the fraudulent or reckless conduct and the company's inability to pay its debt did not have to be established as s 424(1) did not require proof of a causal link between the conduct and the company's inability to pay the debt. It was sufficient that there was some link or connection in time between the conduct complained of and the company's inability to pay.

The carrying on of the business of a company recklessly meant carrying it on by conduct that evinced a lack of any genuine concern for its prosperity. *A fortiori*, if one deliberately depleted the company's

assets or misused its corporate form for one's own purposes, that conduct would fall within the ambit of s 424(1). Ordinarily if a company, while carrying on its business, incurred debts at a time when, to the knowledge of its directors, there was no reasonable prospect of the creditors' ever receiving payment, there was carrying on of its business with the intent to defraud those creditors.

Unconscionable abuse of juristic personality of a company: Section 20(9) of the Companies Act 71 of 2008 (the Act) provides among others that, if on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company or any act by or on behalf of the company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder or of another person specified in the declaration. Furthermore, the court is given power to make any further order it considers appropriate to give effect to the declaration thus made.

The application of the above provisions arose in *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC), [2013] 2 All SA 437 (WCC), a case that dealt with the King group of companies that consisted of 41 companies whose holding company was King Financial Holdings Ltd. The group was established by three King brothers who did not make a distinction between the various companies within the group.

The entire group was operated as one entity through the holding company. Funds solicited from investors were transferred by the controllers of the group, the King brothers, between the various companies in the group at will with no regard to the individual identity of the companies concerned, and with grossly inadequate record-keeping. During investigations into the affairs of the group the King brothers admitted that they

treated the companies as one.

After the collapse of the group the liquidators of the various companies within the group applied for an order in terms of s 20(9) of the Act declaring, among others, that the companies within the group should be regarded as a single entity by ignoring their separate legal existence and treating the holding company, King Financial Holdings, as if it were the only company. The order was granted, the costs of the application being treated as costs in the winding-up of King Financial Holdings.

Binns-Ward J held that the disregard by the King brothers for the separate corporate personalities of the companies in the King Group was so extensive as to impel the conclusion that the group was in fact a sham. There was, in reality, no distinction for practical purposes when it came to dealing with investors' funds between the holding company and its subsidiaries. The improprieties involved included the controllers of the companies treating the group in a way that drew no proper distinction between the separate personalities of the constituent members and using the investors' funds in a manner inconsistent with what had been represented.

The first-mentioned category of impropriety constituted an unconscionable abuse by the controllers of the juristic personalities of the relevant subsidiary companies as separate entities and brought the case within the ambit of the statutory provision. The phrase 'unconscionable abuse of the juristic personality of a company' postulated conduct, in relation to the formation and use of companies, diverse enough to cover all descriptive terms like 'sham', 'device', 'stratagem' and the like used in that connection.

The provision brought about that a remedy could be provided whenever the illegitimate use of the concept of juristic personality adversely affected a third party in a way that reasonably should not be countenanced. Moreover, it would be appropriate to regard s 20(9) as supplementary to the common law rather

than substitutive. The unqualified availability of the remedy in terms of the statutory provision militated against an approach that it should be granted only in the absence of an alternative remedy.

Close corporations

Validity of agreements concluded during deregistration period: Before its amendment in terms of the provisions of the Companies Act 71 of 2008, s 26 of the Close Corporations Act 69 of 1984 (the Act) provided for deregistration of a close corporation on certain specified grounds. The section also made provision for restoration of registration by the Registrar of Close Corporations that was governed by s 26(7). The latter section provided that, if granted, the registrar had to give notice of such restoration of registration and the date thereof in the prescribed manner and as from such date the corporation would continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.

The issue in *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA) was the effect of s 26(7) on contracts concluded by a close corporation during the deregistration period. The respondent, Noble Crest CC (the corporation), entered into a sale and a franchise agreement during the time when, as it later transpired, the corporation was deregistered. However, a month after conclusion of the last agreement the corporation was reregistered. The respondent contended that reregistration of the corporation validated the agreements with retrospective effect so that they could be enforced.

In the WCC, Saba AJ held that the invalidity of the agreements was retroactively cured by the corporation's reregistration and that they remained valid and binding on the parties as they had not been validly cancelled. The SCA dismissed the appeal against the High Court order with costs on attorney-and-own-client scale as provided for in the franchise agreement.

Maya JA (Shongwe, Pillay JJA, Erasmus and Swain AJJA concurring) held that s 26 of the Act unambiguously made provision for an administrative procedure that was entirely controlled by the registrar and required no court intervention. The provisions of s 26(6) were significant. They empowered the registrar to reregister a corporation by the same administrative process on application by any interested person, if he or she was satisfied that a corporation was, at the time of its deregistration, carrying on business or was in operation or that it was otherwise just that the registration of the corporation be restored.

These provisions made it clear that the legislature was not oblivious to the possibility of deregistration not coming to the attention of a corporation or the registrar wrongly assuming that a corporation was not in operation or carrying on business. It was significant that the legislature contemplated restoration precisely in a situation where the corporation was deregistered, despite the fact that it was in operation or carrying on business. That signified an objective to save a corporation's acts, performed in good faith during a period of deregistration, from invalidity.

The plain meaning of the words of s 26(7) was nothing other than what they said, namely that a corporation was deemed to have continued in existence as from the date of its deregistration as if it were never deregistered, and was deemed to have been in existence with legal personality and was capable of performing juristic acts, including entering into valid contracts. The interpretation that the High Court gave to the deeming provisions was therefore correct.

Delict

Condictio furtiva: In *Chetty v Italtile Ceramics Ltd* 2013 (3) SA 374 (SCA) the appellant, Chetty, entered into a joint venture and franchise agreement with the respondent, Italtile, and became manager of a warehouse and retail store. Contrary to the policy

of the respondent, the owner of the stock in the warehouse and the store, the appellant embarked on certain practices that resulted in loss of stock by rolling stock over, which meant taking the stock off the computer system at the beginning of the month only to reverse that entry at the end of the month with the intention to disguise losses that were being suffered. The appellant also sold stock on credit instead of in cash as required by the respondent to benefit certain customers who would pay at the end of the month. After discovering these practices, the respondent terminated the agreements it had with the appellant and sought to recover damages for missing stock on the basis of *condictio furtiva*.

In the GNP, Makgoka J found for the respondent, holding that the appellant's practices of a delivery book (credit) system, false write-offs and reversals of missing stock resulted in the respondent suffering patrimonial loss. The SCA upheld an appeal against the High Court order with costs.

Malan JA (Brand, Pillay, Southwood JJA and Erasmus AJA concurring) held that the question of the respondent suffering patrimonial loss was not the issue, since the question was whether the appellant could be held liable on account of the *furtum usus*. The question required an investigation into whether the requirements for theft of that kind had been met.

The *condictio furtiva* is a remedy the owner of or someone with an interest in a thing has against a thief and his or her heirs for damages and is generally characterised as a delictual action. It is required that the object involved be stolen before the *condictio* can find application.

At common law 'theft' has a wider meaning and includes *furtum usus* or the appropriation of the use of another's thing. Theft or use of another person's thing is no longer a crime. The intention to appropriate the thing permanently, as in the case of criminal theft, is not a requirement of the *condictio* where *furtum usus* is concerned. The *condictio furtiva* is available

where, for example, the defendant withdraws the thing from the possession of another or takes and uses it while intending to restore possession after use and it entitles the owner of the thing to the highest value of the thing between the time it was stolen and *litis contestatio*.

In the instant case the conduct complained of did not constitute the use of the respondent's property. What the appellant did was to post false entries to the accounts to mislead the respondent. That could well have amounted to fraud, but it was not use of the stock. As for the loss suffered by the respondent, that loss arose not directly from the use of the goods, but from the failure of the respondent to take steps to collect the outstanding debts after termination of the agreement with the appellant.

The conduct of the appellant was the factual cause of the loss suffered by the respondent but it could not be said that the appellant's conduct was sufficiently closely or directly linked to the loss for legal liability to ensue. The respondent had the opportunity to collect outstanding debts from the customers but did not do so.

Negligence – security guard opening gate to robber posing as policeman: In the case of *Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 (SCA) the appellant, Imvula, had a contract with the first respondent, Loureiro, in terms of which the appellant provided security services in the form of security guards to the first respondent. The first respondent specifically instructed the security guards not to allow anyone access without his permission.

One evening a police vehicle with a flashing blue light stopped in the driveway. A man in police uniform and wearing a vest marked 'Police' climbed out of the car and produced a police card. A security guard on duty, one Mahlangu, tried to communicate with the policeman using the intercom system, which did not work. As a result Mahlangu went to the pe-

destrian gate and opened it to find out what the policeman was looking for.

As it turned out, the policeman was in fact a robber who pointed a gun at Mahlangu's head. Other robbers climbed out of the vehicle and the first respondent was robbed of valuables amounting to some R 11 million. As a result Loureiro and members of his family sought compensation from Imvula on the basis of breach of contract and delict.

The main issue was whether the conduct of Mahlangu in opening the gate was negligent. To a lesser extent the other issue was also whether Mahlangu's conduct was unlawful. In the GSJ, Satchwell J held the appellant liable for the loss suffered by the respondents as the conduct of Mahlangu was found to have been negligent. The SCA upheld with costs an appeal against the High Court order.

Mhlantla JA (Mthiyane DP, Bosielo JA, Mbha AJA concurring and Cloete JA dissenting) held that Mahlangu intended to open the gate to find out what the policeman wanted, not to allow access to anyone. He thought he could help the police officer who was looking for something. There was nothing suspicious about the person that could and should have put him on his guard. He was not unreasonable in believing that the individual, who was for all intents and purposes dressed like a genuine police officer, was a policeman.

It followed that Mahlangu was not negligent in opening the gate to establish what the police officer wanted and could not be criticised for assuming that he was dealing with a policeman engaged in official patrol. No reasonable person in Mahlangu's position could have believed that he was not dealing with a genuine policeman. Mahlangu was not negligent in being duped by the robbers. A *bonus paterfamilias* would not have foreseen that he was opening the gate to robbers and that he would be overpowered.

Moreover, Mahlangu could not lawfully resist opening the gate to a policeman's demand for entry to the premises if he had legitimate grounds

for doing so. He, at all times, acted in good faith under the impression that he was assisting the police. He could not be held to have acted unlawfully when he opened the gate to speak to a 'policeman'.

Immigration

Unreasonable delay in making decision to grant or deny visa: In *Buthelezi and Another v Minister of Home Affairs and Others* 2013 (3) SA 325 (SCA) on two occasions in the recent past the Dalai Lama, the spiritual leader of the Gelug school of Tibetan Buddhism and his entourage applied for visas to enter South Africa. The first respondent, the Minister of Home Affairs, made no decision to grant or refuse visas and, as a result, the visits were cancelled.

The appellants, Buthelezi and another, both being members of the National Assembly, and who intended inviting the Dalai Lama to the country, sought an order declaring that the conduct of the Minister in failing to make a decision on the granting or refusal of the visas was unlawful and therefore sought an assurance that it would not happen again.

The WCC per Baartman and Davis JJ held that, since the occasions for which the Dalai Lama had been invited to come to the country were a thing of the past, the issue of visas was no longer live. An appeal against the High Court order was upheld with costs.

Nugent JA (Heher, Tshiqi, Wallis JJA and Mbha AJA concurring) held that what was justified by the evidence was an inference that the issue of granting visas was deliberately delayed so as to avoid a decision. It could not be over-emphasised that the Minister was not entitled to deliberately procrastinate. Procrastination by itself established unreasonable delay. The Minister unreasonably delayed her decision whether to grant or withhold the visas, for some four months and, in doing so, acted unlawfully.

Motor vehicle accidents

Limit in respect of annual loss of income or support: Section 17(4)(c) of the Road

Accident Fund Act 56 of 1996 (the Act) provides, among others, that where a claim for compensation includes a claim for loss of income or support, the annual loss – irrespective of the actual loss – shall be proportionately calculated to an amount not exceeding R 160 000 per year in the case of a claim for loss of income and in respect of each deceased breadwinner in the case of a claim for loss of support. In terms of s 4A(a) the Road Accident Fund is required, by notice in the *Government Gazette*, to adjust the amounts referred to above quarterly in order to counter the effect of inflation.

In *Sil and Others v Road Accident Fund* 2013 (3) SA 402 (GSJ) the breadwinner, Mr Brzdek, was killed in a motor vehicle collision in respect of which the defendant, the Road Accident Fund (the fund) initially accepted liability for funeral expenses only, but eventually also accepted liability for loss of support suffered by the widow and her two children. As a result the only outstanding issue was the amount of such loss. The court made an order as to the amount to be given to each defendant and costs.

Sutherland J held that s 17(4)(c) meant firstly that an amount, referred to as 'annual loss', was to be calculated. Secondly, that amount was to be recalculated having regard to the maximum sum as adjusted every quarter of the year. Therefore, if the initial 'annual loss' so calculated was higher than the prescribed sum, the maximum notional 'annual loss' was that maximum; whereas if the initial 'annual loss' was less than the prescribed sum, the notional 'annual loss' was that lesser amount.

Because the purpose of the capping (limiting the annual loss to be paid) was merely to limit the sum to be paid, and its purpose was not to interfere in the calculation of the loss, the contingencies were part of the exercise in calculating actual loss and should therefore already have been dealt with before capping was applied to calculating the

amount of compensation. The artificially set maxima existed to resolve the challenges to the fund in funding the demands made on it and not to prescribe a new methodology of calculating loss. Therefore, the practice of calculating contingencies as it existed for decades did not have to be disturbed.

Practice

Power of the court to set aside referee's report if it is patently unreasonable, irregular or incorrect: Section 19bis(1) of the Supreme Court Act 59 of 1959 (the Act) provides that in any civil proceedings any court may, with the consent of the parties, refer any matter that requires extensive examination of documents which, in the opinion of the court, cannot be conveniently conducted by it; or any matter that relates wholly or in part to accounts for inquiry and report to a referee and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further inquiry or report or consideration by such referee or make such other order in regard thereto as may be necessary or desirable. Subsection (2) provides that such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in civil proceedings in question.

In *Wright v Wright and Another* 2013 (3) SA 360 (GSJ) the court had made an order to the effect that there was a partnership in existence between the applicant William Wright and the first respondent Alec Wright, which partnership had since been dissolved. As a result the first respondent was ordered to provide an accounting of the partnership business to be debated and the amount due to the applicant, if any, to be paid to him. The parties were not able to resolve the dispute and, as a result, agreed that the first respondent's indebtedness to the applicant, if any, be determined by a referee in terms of s 19bis(1).

The referee duly determined that the first respondent was indebted to the applicant in an amount of just over R 1 million. Acting on the basis of the report, the applicant sought an order that the referee's report be adopted and that the first respondent be ordered to pay the amount thus determined, with interest. The first respondent opposed the application and sought, by way of counter-application, an order that the application be referred to trial for a determination of whether the referee's report should be rejected in whole or in part. The counter-application was dismissed with costs, the court adopting the report of the referee without modification and granting the main application with costs.

Kathree-Setiloane J held that the power of the court in terms of s 19bis(1) to make such other order as would be necessary or desirable included the power to set aside the findings of the referee if they were patently unreasonable, irregular or wrong. A court was afforded a wide discretion in terms of s 19bis. It could adopt any one of the courses provided for in the section, such as adopting the report of the referee either in whole or in part and either with or without modifications, or it could remit the report for further inquiry or report or consideration by the referee, or make such other order in regard to the findings of the referee as was necessary or desirable.

The power of the court to make such other report as was considered necessary or desirable included the power to set aside the report if it was patently unreasonable, irregular or incorrect or to refer the report or aspects thereof to oral evidence or trial if a real dispute of fact existed. The court could, however, only refer the question of whether to adopt the report or not to oral evidence or trial if a real dispute of fact was shown to exist in relation to the findings of the referee. In this case the first respondent failed to produce evidence that demonstrated that the referee's report was

unreasonable, irregular or wrong so as to lead to a patently inequitable result.

Unlawful occupation of land

Court to be specially sensitive to rights and needs of children, disabled mothers and woman-headed households: Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act) provides, among others, that if an unlawful occupier of land has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

In *Arendse v Arendse and Others* 2013 (3) SA 347 (WCC) the applicant, Mrs Arendse, and the first respondent, Mr Arendse, were married to each other both in terms of Islamic law and in community of property under the common law. The Islamic law marriage provided that the first respondent would make a gift of a *Mahr* (house) to the applicant, which gift was never made.

The couple had a matrimonial home and three children. A few years later the civil law marriage was terminated through divorce. Eventually the Islamic marriage was also terminated through divorce, but the parties continued living together.

Thereafter the first respondent bought another house to which the parties relocated, the first respondent occupying a separate building in the back while the applicant and the minor children occupied the front part of the property. The first mat-

rimonial home was sold, the bond paid off and the balance taken by the applicant.

After his remarriage the first respondent obtained a magistrate's court order evicting the applicant and minor children from his house on the basis that they were in unlawful occupation of his house after the applicant allegedly failed to pay the agreed R 800 monthly rental. Evidence showed that the applicant was not financially independent as she was not only unemployed but was also unemployable because of health problems; she was epileptic, had bipolar mood disorder and was prone to impulsive behaviour, for example, excessive gambling.

In the present application the applicant sought a High Court order reviewing and setting aside the magistrate's eviction order. The application was granted with costs that were limited to the attorney's disbursements.

Meer J held that the inquiry conducted in the court *a quo* fell far short of the standards prescribed in s 4(6) and s 4(7) of the Act. From the evidence before the magistrate it was clear that the order sought involved an eviction of children by their father and also of a woman who, according to medical evidence, suffered from bipolar mood disorder secondary to a stroke, and of a household headed by such a woman. Yet the magistrate did not consider the right and needs of the children, the disabled applicant and the woman-headed household, as he was specifically enjoined to do by ss 4(6) and 4(7) of the Act. Nor did he consider whether alternative accommodation was available to them, a highly relevant consideration in all the circumstances.

A consideration of such relevant circumstances was specified in s 4 of the Act as a prerequisite to a court arriving at the opinion that it was just and equitable to grant an eviction order. Without considering the rights and needs of the applicant and her children the magistrate could not have formed the opinion that it was just and equitable to

evict them. At the very least the rights and interests of the applicant's children, faced with an eviction at the behest of their father who had parental obligations to them, ought to have loomed large in the extraordinary circumstances of the case.

The court *a quo* failed to consider the glaringly obvious fact that an eviction order would render the applicant and her children homeless, since no alternative accommodation had been provided. The applicant and her children's right of access to adequate housing were infringed and, as a result, she was entitled to a declaration to that effect.

• See also p 22 of this issue.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with actual and commercial insolvency, affirmative action that is inconsistent with equality, appeal against part of court order, approach to hearsay evidence, attorney's role in sale of property agreement, condonation for late filing of appeal, consumer credit agreement, costs against public official, defamation, detention of illegal foreigner, doctrine of common purpose, educator post establishment, enforceability of restraint of trade agreement, exclusive jurisdiction of the Labour Court, lien for necessary or useful expenses, liability of conveyancer for late transfer of property, medical negligence, ownership of bunkers, procedural fairness of administrative action, property rates clearance certificate, property zoning, recusal of presiding officer on basis of bias, *rei vindicatio*, rescission of judgment based on consent, review of tender award, social grants, stay of civil proceedings due to pending criminal prosecution, and subdivision of agricultural land.



By
Alfred
Selman

Much ado about *Duma*?

Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae) [2013] 1 All SA 543 (SCA) (Brand JA)

The judgment in the recent case of *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as amicus curiae)* [2013] 1 All SA 543 (SCA) presents a fascinating example of the thin gray line that exists between appropriate judicial activism and the necessary deference that our courts are required to give to legislative intention. At first glance, the judgment would seem to have wide-ranging implications on the manner in which the courts will entertain judicial reviews of the Road Accident Fund's (RAF's) administrative conduct. The following is a brief summary of the relevant issues before the court and its findings on them:

Legal issues before the Supreme Court of Appeal

The legal issues before the court were, *inter alia*: What is the remedy when the RAF does not make a decision within a reasonable time; and what is the remedy when the RAF rejects a RAF4 form without proper reasons?

Remedy when the RAF does not make a decision within a reasonable time: The court held that the remedy is to be found in s 6(2)(g) read with s 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In terms of these sections, if an administrative authority unreasonably delays in taking a decision in circumstances where there is no period prescribed for that decision, an application can be brought 'for judicial review of the failure to take the decision'. Should the RAF therefore fail to make a decision regarding the acceptability of an RAF4 form, the claimant can apply to court for an order forcing them to do so.

Remedy when the RAF rejects a RAF4 form without proper reasons: The court held that the decision of the RAF to reject a RAF4 form clearly constitutes administrative action and therefore such a decision is subject to the provisions of PAJA. The court held further that a failure to provide appropriate reasons, does

not render a decision by the RAF invalid *per se* as such a decision remains valid unless invalidated by a court or appropriate tribunal. Since the Road Accident Fund Act 56 of 1996 provides the remedy of an internal appeal, that must first be exhausted in terms of s 7(2) of PAJA, before a judicial review of any of its administrative decisions can take place. The court held further that the internal remedy provided for in the Road Accident Fund Act may, however, be circumvented on application for condonation of non-exhaustion of internal remedies, by the aggrieved party, in 'exceptional circumstances' and if it is the 'interests of justice' to do so.

It is the court's handling of the second of these issues that is the focus of this case note. The immediate impression when one first reads this judgment, is that it seems to present a very strong interpretation of s 7(2) of PAJA and basically prescribes that, where administrative action by the RAF is contested, all internal remedies must first be exhausted before a court may be approached, no matter how obstructive the RAF may be and regardless of the sufficiency of the reasons that they give for the rejection of a RAF4 assessment, unless there are exceptional circumstances present.

An extreme hypothetical example of this could be that the RAF rejects the claim because it is not satisfied with the font the assessment is typed in. Furthermore, such a reason would remain valid until overturned by an appeals tribunal or unless the third party can prove to a court that his or her case contains sufficiently exceptional circumstances for direct judicial intervention. Thus, the RAF can stymie claims by forcing parties to approach the appeals tribunal for even the most dubious of reasons.

However, such a reading of the judgment would overlook the seemingly deft hand played by Brand JA, in balancing the practical, legal and political implications of the decision of the court in this particular case.

At this juncture, it might be necessary to look at the actual internal remedy pre-

scribed by the Road Accident Fund Act and regulations.

In terms of reg 4, an aggrieved third party may appeal the RAF's rejection of a RAF4 assessment with the Health Professions Council of South Africa (HPCSA) and, furthermore, the RAF has the responsibility of bearing the reasonable costs of such an application. It is in this proviso that we can see that the legislative scheme and intention are patently clear in two respects. First, s 7(2) of PAJA was created with the obvious intention of attempting to resolve disputes in alternative fora, while using the courts as a final means of arbitration should the parties fail to resolve a matter. Secondly, by prescribing that the RAF bear the cost of any appeal of its decision regarding a serious injury assessment, the administration of the RAF was clearly envisaged to act in a rational manner that protects the interests of the RAF against fraudulent claims and does not merely use the appeals process to enforce an obstructionist agenda, as there are in all likelihood prohibitive financial consequences if the RAF engages in such behaviour.

The question remains: Did Brand JA and the Supreme Court of Appeal (SCA) miss an opportunity to protect third parties from being subjected to actions by the RAF that are in some cases clearly undertaken merely to frustrate their claims? The answer it would seem is a resounding no. Had the SCA gone the other way, the ruling may have had the opposite and equally undesirable effect of leaving the HPCSA appeals process redundant. This judgment is therefore neither a carte blanche for the RAF to redirect all their claims to the HPCSA nor has it changed the current jurisprudence. Indeed it would seem that all the potentially raised heartbeats may be much ado about *Duma*.

• See also 2013 (June) DR 51.

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BILLS INTRODUCED

Special Investigating Units and Special Tribunals Amendment Bill (Private Member Bill) B500P of 2013.

Rates and Monetary Amounts and Amendment of Revenue Laws Bill B12 of 2013.

South African Language Practitioners' Council Bill B14 of 2013.

Business Interests of Government Employees Bill (Private Member Bill) B400P of 2013.

National Environmental Management Laws Second Amendment Bill B13 of 2013.

Insurance Laws Amendment Bill B16 of 2013.

• See also p 26 of this issue.

COMMENCEMENT OF ACTS

Financial Markets Act 19 of 2012. *Commencement:* 3 June 2013. Proc12 GG36485/31-5-2013.

Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (with certain exceptions). *Commencement:* 7 June 2013. Proc14 GG36512/31-5-2013 and Proc 17 GG36541/6-6-2013.

Public Service Amendment Act 30 of 2007. Sections 19, 20, 22 and 36. *Commencement:* 1 May 2013. Proc20 GG36543/14-6-2013.

PROMULGATION OF ACTS

Division of Revenue Act 2 of 2013. *Commencement:* 10 June 2013. GN417 GG36555/10-6-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990

Regulations relating to the grading, packing and marking of fresh vegetables intended for sale in the Republic of South Africa. GN R364 GG36480/24-5-2013.

Amendment of regulations relating to the classification, packing and marking of fruit juice and drink intended for sale in the Republic of South Africa. GN R411 GG36544/14-6-2013.

Attorneys Act 53 of 1979

The Law Society of the Northern Provinces: Amendment of the Rules (r 65) framed in terms of s 74(1). GG36543/14-6-2013.

Amendment of the Practice Rules of the Free State Provincial Division (rs 7.4, 9.4.1, 13.3, 16.5 and 17.4). GN414 GG36543/14-6-2013.

Auditing Profession Act 26 of 2005

Independent Regulatory Board for Auditors (IRBA): Inspection fees payable to the IRBA with effect from 1 April 2013. BN118 GG36514/7-6-2013.

Civil Aviation Act 13 of 2009

Civil aviation regulations, 2011. GN R419 GG36560/14-6-2013.

Collective Investment Schemes Control Act 45 of 2002

Fees payable in terms of the Act. BN88 GG36485/31-5-2013.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN604 GG36553/12-6-2013.

Debt Collectors Act 114 of 1998

Amendment of regulations relating to debt collectors, 2003. GN R381 GG36515/7-6-2013.

Engineering Profession Act 46 of 2000

Engineering Council of South Africa: Guideline for services and processes for estimating fees for persons registered in terms of the Act. BN117 GG36529/3-6-2013.

Financial Advisory and Intermediary Services Act 37 of 2002

Compliance report for a category I financial services provider without a compliance officer, 2013. BN105 GG36496/29-5-2013.

Compliance report for a category I financial services provider with a compliance officer, 2013. BN106 GG36497/29-5-2013.

Bi-annual compliance report for category II and IIA financial services provider, 2013. BN107 GG36498/29-5-2013.

Bi-annual compliance report for category III financial services providers, 2013. BN108 GG36499/29-5-2013.

Compliance report for category IV financial services providers, 2013. BN109 GG36500/29-5-2013.

Compliance report for foreign financial services providers, 2013. BN110 GG36501/29-5-2013.

Compliance report for a financial services provider substituting or removing a compliance officer during the reporting period, 2013. BN111 GG36502/29-5-2013.

Compliance report for a financial services provider who has appointed a compliance officer during the reporting period, 2013. BN112 GG36503/29-5-2013.

Conditions and requirements for general exemption: First level regulatory examination. BN119 GG36530/5-6-2013.

Conditions and requirements for general exemption: Second level regulatory examination. BN120 GG36530/5-6-2013.

Financial Markets Act 19 of 2012

Financial Services Board: Conditions applicable to the demutualisation of an exchange, central securities depository or independent clearing house. BN94 GG36494/31-5-2013.

Financial Services Board: Conditions applicable to the inclusion by an exchange of securities issued by it in its own list. BN95 GG36494/31-5-2013.

Financial Services Board: Accounting records to be maintained by a regulated person. BN96 GG36494/31-5-2013.

Financial Services Board: Determination of fit and proper requirements for market infrastructures. BN97 GG36494/31-5-2013.

Financial Services Board: Prescribed fees. BN98 GG36494/31-5-2013.

Financial Services Board: Penalties to be imposed by the registrar. BN99 GG36494/31-5-2013.

Financial Services Board: Matters to be reported on by auditor of a regulated person. BN100 GG36494/31-5-2013.

Financial Services Board: Report by a market infrastructure to the registrar. BN101 GG36494/31-5-2013.

Financial Services Board: Reporting of transactions in listed securities. BN102 GG36494/31-5-2013.

Financial Services Board: Conditions applicable to the amalgamation, merger, transfer or disposal of market infrastructures. BN103 GG36494/31-5-2013.

Financial Services Board: Requirements applicable to the granting of a

market infrastructure licence. BN104 GG36494/31-5-2013.

Financial Services Board Act 97 of 1990
Levies on financial institutions. BN121 GG36531/5-6-2013.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Amendment of regulations governing irradiated foodstuffs. GN R366 GG36484/24-5-2013.

Labour Relations Act 66 of 1995

List of bargaining councils that have been accredited by the Commission for Conciliation, Mediation and Arbitration for conciliation and/or arbitration and/or pre-dismissal arbitrations, with the terms of accreditation attached for the period 1 June 2013 to the 31 May 2017. GenN575 GG36533/5-6-2013.

Measurement Units and Measurement Standards Act 18 of 2006

National Measurement Standards. GN R368 GG36486/31-5-2013.

Medicines and Related Substances Act 101 of 1965

Exclusion of certain medicines from the operation of certain provisions of the Act. GN377 GG36507/29-5-2013 and GN R409 GG36551/10-6-2013.

National Health Act 61 of 2003

Regulations relating to the management of human remains. GN R363 GG36473/22-5-2013.

Regulations relating to research on human subjects. GN R378 GG36508/29-5-2013.

Natural Scientific Professions Act 27 of 2003

South African Council for Natural Scientific Professions: Recommended consultation fees and fees structure for 2013/2014. BN123 and BN124 GG36543/14-6-2013.

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Draft publication of tolls for the Gauteng Freeway Improvement Project (GFIP) in terms of the South African National Roads Agency Limited and National Roads Act 7 of 1998 for comment. GenN534 GG36479/24-5-2013.

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Employment law update



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Non-disclosure of previous dismissal

In *Eskom Holdings Ltd v Fipaza and Others* [2013] 4 BLLR 327 (LAC) the Labour Appeal Court considered whether it was fair for Eskom to have dismissed Ms Fipaza because she had failed to disclose that she was previously dismissed for misconduct.

Ms Fipaza commenced employment with Eskom in 1994. In July 2003, it was agreed that she would go on a sabbatical in order to further her post-graduate studies in the United Kingdom. Her sabbatical leave was to expire on 5 July 2006, but this was subsequently extended to 5 September 2006. Ms Fipaza did not, however, report for duty on 5 September 2006 and she was called to attend a disciplinary inquiry on 29 September 2006 on the charge of absence from duty without leave.

Ms Fipaza acknowledged receipt of the notice to attend the inquiry, but she failed to attend it. The inquiry thus proceeded in her absence and she was summarily dismissed. Her appeal against the outcome of the inquiry was unsuccessful, but in the outcome of appeal, she was informed, *inter alia*, that should a vacancy arise for which her skills were required, she could follow the normal recruitment processes.

Two years later, in April 2008, Ms Fipaza applied for a position at Eskom. She was interviewed and offered the position, which she accepted. She was due to commence employment on 1 June 2008, and consequently tendered the required notice of resignation to her then employer.

However, on 27 May 2008, Eskom advised Ms Fipaza that it intended to withdraw the offer of employment on the basis that she had failed to inform the interview panel that she was previously dismissed from Eskom for misconduct. Ms Fipaza was invited to make representations as to why the offer of employ-

ment should not be withdrawn, which she did.

In this regard, she explained, *inter alia*, that she had disclosed that she was previously employed by Eskom; her dismissal in 2006 was for absence without leave, and not for dishonesty that could have resulted in a breakdown in the trust relationship; and, in her appeal outcome, she was informed that she could apply for suitable vacancies using the normal recruitment processes, and this is what she did. She reported for work on 2 June 2008. At about 10 am she was asked to leave the premises. On 4 June, Eskom informed her that the offer of her employment was withdrawn.

Ms Fipaza then referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Eskom led the evidence of two witnesses, a recruitment practitioner and the line manager. The line manager testified that Ms Fipaza's failure to disclose the reasons for the 2006 termination caused him not to have confidence and trust in her and this had rendered the continued employment relationship intolerable. Ms Fipaza testified that her curriculum vitae (CV) clearly indicated that she previously worked for Eskom; that she answered all questions during the interview fully and honestly; and that she had no duty to disclose in her CV why she previously left Eskom's employ.

The commissioner held that Ms Fipaza's dismissal was substantively fair. He said, *inter alia*, that she misrepresented the true facts and that this misrepresentation was wilful and material and that, in the circumstances, Eskom had a fair reason to terminate her employment. As regards procedural fairness, the commissioner took note of Eskom's concession that it had failed to follow a fair process and it awarded Ms Fipaza three months' remuneration in compensation.

Ms Fipaza took the award on review to the Labour Court. She argued that the award was reviewable, among others, on

the basis that there was no evidence that she had misrepresented facts, namely –

- she had reflected in her CV that she was previously employed by Eskom;
- she had provided the interview panel with her clock number, which gave them access to her full employment history; and
- she was informed that she could in future apply for vacancies.

She also argued that there was no evidence that the trust relationship had broken down.

Eskom, on the other hand, argued that even though Ms Fipaza was not pertinently asked about the reason for the termination of her services in 2006, she had a duty to disclose the reasons, because Eskom required a certain level of integrity and trust from employees.

The Labour Court, per Lagrange AJ (as he then was) held that the commissioner did not give proper consideration to the principle that there is no general duty on a contracting party to tell the other all he or she knows about anything that may be material, nor to the fact that Ms Fipaza's dismissal was not a matter that fell within her exclusive knowledge. Consequently, the commissioner failed to consider Eskom's own ability to ascertain the reason for the 2006 termination. The review accordingly succeeded and the dismissal was held to be substantively unfair. The court remitted the matter to the CCMA to determine the appropriate remedy.

Eskom appealed and argued that the court *a quo* erred in finding that there was no contractual duty to disclose the reasons for the 2006 termination and that the commissioner applied the wrong test to determine Ms Fipaza's obligation to disclose. In this regard it relied, among others, on the recruitment form Ms Fipaza signed when she applied for the post in 2008. In terms of this form she confirmed that 'false or incomplete information may constitute grounds for dismissal and an investigation may be made of my background and used relative to my employment status'.

Considering all the facts of the matter, the Labour Appeal Court (LAC), per Ndlovu JA (Zondi and Molemela AJJA concurring) held that the contemplated grounds of dismissal as set out in the recruitment form pertained to false or inaccurate information that Fipaza would have wilfully, through a positive act on her part, provided to the interview panel. There was no such material non-disclosure.

There was, furthermore, no legal or contractual duty on Ms Fipaza to have disclosed the circumstances surrounding the 2006 termination. In any event, Eskom had full knowledge of the reasons and circumstances of the 2006 termination, and it was therefore 'unreasonable, ludicrous and disingenuous' to claim that Eskom was not aware that she was

previously dismissed for misconduct. Therefore, the fact that the interview panel, 'through ... ignorance, incompetence or negligence' failed to question Fipaza

concerning the reasons for the 2006 termination, did not entitle it to a defense that it was unaware of these facts.

In the circumstances, the LAC con-

firmed that Ms Fipaza's dismissal was substantively unfair and the appeal was dismissed.

No order as to costs was granted.



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Settlement agreements

Greeff v Consol Glass (Pty) Ltd CA (LAC) (unreported case no 02/12, 21-5-2013) Coppin AJA (Waglay JP and Tlaletsi JA concurring).

Can an employee who is dismissed and subsequently enters into a settlement agreement with his or her employer, prior to referring his or her dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or Labour Court (LC), seek recourse in terms of s 158(1)(c) of the Labour Relations Act (LRA) 66 of 1995?

Section 158(1)(c) gives the LC the authority to make an arbitration award or settlement agreement an order of court and reads: 'The Labour Court may make any arbitration award or any settlement agreement an order of the court'.

Relevant to this matter is s 158(1A) which reads: 'For the purposes of subsection (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7)'.

In answering the above question, the LC held that, in the absence of a dispute being referred to the court for adjudication, it could not exercise its discretion in making the agreement an order of court. Put differently, the court took the view that s 158(1)(c) is applicable only to settlement agreements that were concluded after an initial dispute has been referred either to the CCMA or to the Labour Court and hence it was not open for an employee to rely on this section if the settlement agreement in question was concluded at an earlier stage.

Background

The appellant (the employee) and the respondent (the employer) entered into a voluntary retrenchment agreement. A term of the agreement was that, if the employee's 'hand over' to another

employee had been done, she was not required to work her notice period. After signing the agreement, her manager informed her that she was not required to work during her notice period. A few weeks later she received a letter from her employer advising her that her indication to start a new job during her notice period was taken as a resignation, in which case the agreement entered into was cancelled. The employee disputed that she resigned and maintained she was advised not to work during her notice period and hence was not in breach of the agreement.

Intending to make the settlement agreement an order of court, the employee sought recourse in terms of s 158(1)(c). As mentioned Steenkamp J, in *Greeff v Consol Glass (Pty) Ltd* (2012) 33 ILJ 1167 (LC) dismissed the employee's application on the grounds that the settlement agreement was entered into before any dispute had been referred for adjudication.

On appeal to the Labour Appeal Court (LAC), the employee argued that the court *a quo* erred in having found that s 158(1)(c) only envisaged settlement agreements that were concluded after a dispute had been referred to the CCMA or Labour Court.

The LAC began by finding the narrow approach adopted by the court *a quo* failed to take into account s 158(1A), which sets out the criteria for a settlement agreement being made an order under s 158(1)(c).

Coppin AJA held the following on this point: 'It is thus clear from a reading of s 158(1A) that s 158(1)(c) must be read with and subject to s 158(1A). Even though s 158(1)(c) refers to "any settlement agreement" this cannot be taken to mean, literally, "any" settlement agreement. Section 158(1A) describes what settlement agreements are being referred to in s 158(1)(c).

So properly interpreted, in terms of s 158(1)(c), read with s 158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in s 158(1A), orders of court. A settlement agreement that may be made an order of court by the Labour Court in terms of s 158(1)(c), must (i) be in writing; (ii) be in settlement of a dispute (ie, it must have as its genesis a dispute); (iii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to

refer to arbitration in terms of s 22(4), or s 74(4) or s 75(7). Those kinds of dispute are excluded.'

Therefore, should a settlement agreement not comply to the above criteria, the LC cannot make it an order of court; however, if all the criteria are met then the court has a discretion, taking into account all relevant factors, of whether or not to make the agreement an order of court.

With reference to the third criterion, that is, the dispute must be one that the party has a right to refer to arbitration or to the LC, the LAC held that an interpretation of the term 'a right to refer', which only refers or relates to agreements concluded after an initial dispute has been referred to the CCMA or LC, will be contrary to the objectives of the LRA, which is speedy and cost-effective dispute resolution.

On this point the LAC held: 'Giving a strict meaning to the word "right" in s 158(1A) would have the effect of differentiating between those settlements concluded before and those concluded after the statutory events pertaining to conciliation had occurred. Other than purporting to limit the potential number of applications to make settlements orders of court, there appears to be no rational basis for such differentiation. Moreover, any retardation, or discouragement of the early settlement of disputes is not consistent with the objects of the LRA, namely, the resolution of disputes as speedily as possible, in an efficient and cost effective manner. Lingering, unsettled disputes are not conducive to stability in the workplace and militate against the principle aims of the LRA in that respect.'

The LAC held that the LC ought to have found the agreement *in casu* met the criteria required for the application of s 158(1)(c) and therefore it should have considered all relevant factors in deciding whether or not to exercise its discretion in making the agreement an order of court or not. In exercising its discretion the court had to have dealt with the factual dispute, that being whether there was a repudiation of the agreement and, if so, whether the agreement was lawfully cancelled or not. This according to the LAC may require oral evidence, which the LC, in a hearing afresh, could do.

The appeal was upheld and remitted to the LC.

Note: Unreported cases at date of publication may have subsequently been reported. □

By
Henk
Delpont

Recent articles and research

ABBREVIATIONS:

SALJ: *The South African Law Journal* (Juta)
SA Merc LJ: *South African Mercantile Law Journal* (Juta)
THRHR: *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (LexisNexis)

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