

MARCH 2014



FIGHTING OVER BREADCRUMBS

**Cartels and the
Competition Act 89 of 1998**

Facilitative mediation
Seeing more than the tip of the iceberg

Stem cell research
Is South African law locking progress?

Franchise agreements
Does the Consumer Protection Act 68 of 2008 point in the right direction?



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Cartels and the Competition Act 89 of 1998



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Is South African law locking progress?



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Seeing more than the tip of the iceberg



The practice of 'legal' mediation has been accepted widely in the United Kingdom, The United States, Australia and on the European continent, however, it is a new concept in South Africa. Dr Lieselotte Badenhorst discusses mediation in South Africa and why there is more to it than we think.

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CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

De Rebus editorial staff use the **LexisNexis online product:** MyLexisNexis.

Go to www.lexisnexis.co.za for more information.

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

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CIRCULATION: De Rebus, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. It circulates free of charge to all practising attorneys and candidate attorneys and is also available on general subscription.

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All inquiries and notifications by practising attorneys and candidate attorneys should be addressed to the relevant law society which, in turn, will notify the Law Society of SA.

SUBSCRIPTIONS:

General, and non-practising attorneys: R 762 p/a

Retired attorneys and full-time law students: R 586 p/a

Cover price: R 80 each

Subscribers from African Postal Union countries (surface mail): R 1211 (VAT excl)

Overseas subscribers (surface mail): R 1 344.20 (VAT excl)

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

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Law Society of South Africa 021-21-NPO

Tel: (012) 366 8800



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Publishers Association of
South Africa.



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Mapula Sedutla - Acting editor

Legal Practice Bill process underway

at all times by ensuring that the majority of the members of the interim National Forum are legal practitioners.

- The fact that, in opening the practice of law to foreign legal practitioners, the Minister should be cognisant of the saturation of the market

in South Africa and the need to protect the interest of the South African practitioner, while at the same time protecting the public.

- The issue of fees against the context of access to justice; the commitment by the attorneys' profession to engage fully in investigations by the South African Law Reform Commission, and that, in the interim, the National Forum possesses sufficient expertise and practical experience to design fair, just and equitable fee guidelines.

- See also www.LSSA.org.za

Three months to publish

Late last year we reduced the limit on the number of words of articles that can be submitted to 2 000. This was well received by our contributors, which then meant that we could publish more articles in one issue and still keep to our budgeted number of pages. This also meant that the editorial staff can edit and process articles quicker and that articles are published at a faster rate meaning the turnaround time

between the time articles are sent to the journal and the time they are published is shorter. *De Rebus* can now promise that any article sent and approved for publication will be published within three months.



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- Please note that the word limit is now 2000 words.

- Upcoming deadlines for article submissions: 21 October 2013 and 18 November 2013.



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Legal Practice Bill on agenda at KwaZulu-Natal Law Society AGM

The KwaZulu-Natal Law Society (KZNLS) held its annual general meeting (AGM) in Durban late last year. Speakers at the AGM included Deputy Minister of Justice and Constitutional Development, John Jeffery; Manager of the Attorneys Development Fund (ADF), MacKenzie Mukansi; Manager Director of the Attorneys Insurance Indemnity Fund (AIIF), Siphso Mbelle; Chairperson of the Attorneys Fidelity Fund (AFF), CP Fourie and Co-chairperson of the Law Society of South Africa (LSSA), David Bekker.

A necessary Bill

Opening his keynote address, Mr Jeffery said that AGMs were a good time to assess where the law society and the organised profession were in order to look to the future and plan for the following year. He said the legal profession was on a threshold of major changes with the imminent finalisation of the Legal Practice Bill. Speaking on the importance of the Bill he said:

‘There are some who would say that this Bill is unnecessary – that there is nothing wrong with the Legal Profession that needs to be fixed. A few go further to claim that this Bill will destroy the independence of the Legal Profession or that the changes will destroy the professionalism of the attorneys and advocates. But let’s look at some facts.

We come from a British common law system and when it comes to the legal profession, comparisons need to be made with other British Commonwealth countries. Reform of the legal profession is something that has been happening in almost all the larger countries of the Commonwealth. Britain itself – in its component parts of England, Ireland, Scotland and Wales – has been reforming the profession on an on-going basis. In Nigeria, Kenya, Zimbabwe and Namibia the distinction between the Bar and side Bar was abolished on independence. The same situation applies in New Zealand and parts of Australia, so what is wrong if we in South Africa look at the reform of the legal system and why it is so difficult to get any kind of reform implemented?

There are other factors that we need to look at in the [South African] context. I have recently given speeches on the topic of the legal profession and access to justice, more specifically the role of the profession in making justice more ac-



Deputy Minister of Justice and Constitutional Development, John Jeffery discussing the necessity of the Legal Practice Bill.

cessible to all South Africans. The main thrust of my arguments on both those occasions were, firstly, that the majority of our people, not only the poor, but also the middle class, simply cannot afford private legal services or the services of an attorney, thus making it difficult for them to access justice and, secondly, that there is a growing level of disillusion and distrust amongst members of the public in the legal profession.’

Highlighting transformation issues that need to be addressed by the Bill, Mr Jeffery said that the profession needs to ask themselves the following questions: In KwaZulu-Natal for example, is there any large attorneys firm with a majority of African partners? In the large law firms, most of whom will have some black partners, do those black partners have any real power? How many managing directors or CEOs of these firms are black people or women?

Profession vs business

Mr Jeffery said that it was accepted that attorneys need to make a living but that they cannot see themselves as simply running a business in the normal course for the primary aim of increasing a profit margin. He added that this is not what a profession does, since a profession renders a specialised service under a strict code of ethics. He said what differentiates a profession from a business was taught to candidate attorneys as part of their ethics course. He said that there are

generally six common characteristics of a profession, namely:

- It demands possession of a body of specialised knowledge and extended practical training.
- It renders an essential, specialised service and demands continuous in-service training of its members.
- It has a clearly defined membership of a particular group with a view to safeguarding the interests of the profession.
- It involves a code of ethics.
- It sets up its own professional organisation.
- It has a transparency of work.

In closing Mr Jeffery said: ‘Lawyers have the power and the responsibility of restoring society’s faith in the legal system, the rule of law and in democracy. I hope that we can return to what Michael Greco, former President of the American Bar Association, calls the “renaissance of idealism”, a “recommitment to the noblest principles that define our profession: Providing legal assistance to assist the poor, disadvantaged and underprivileged; and performing public service that enhances the common good”.’

Word from the ADF

Mr Mukansi said that the ADF has not had a manager for some time and thanked the board for keeping the organisation afloat during the absence of a manager. He said that since he took the appointment of manager in July 2013, there have been about ten newly established firms applying to the ADF that



Manager of the Attorneys Development Fund, MacKenzie Mukansi, said that the ADF has been on a huge drive to get itself known.

have been approved and assisted as per the mandate of the fund.

He reiterated the importance of the ADF's attendance at the AGM stating that it was an important governance imperative that the ADF's management meet the council of the KZNLS as they are shareholders of the fund. Mr Mukanisi further said 'the first priority of the fund was to identify strategic stakeholders that would ensure the success of the fund, thus talks were held between the ADF and the Legal Education and Development (LEAD) arm of the Law Society of South Africa to ensure that the ADF uses LEAD's mentorship program to allocate mentors for ADF applicants and channel mentors elected by applicants to the LEAD mentorship program. This practice helps us leverage on our strategic partners' capabilities and avoids duplication of effort.'

Mr Mukanisi noted that the ADF has been on a huge drive to get itself known: 'What we would like to know is how can we be relevant to the organised profession; is our mandate talking to what is required on the ground as far as developing the legal profession and the newly admitted attorneys. I would like to put forward the challenge to say talk to us either by e-mail or telephone and let us know. Through these engagements, we are confident that we will remain relevant to the needs of the profession and be able to manage and meet our expectations.'

Word from the AIIF

Giving background on the insurance organisation, Mr Mbelle said that the AIIF is a non-profit organisation 100% funded by the AFF and that Aon, which took over from Glen Rand, has been given a contract until 2015 to manage the insurance organisation. He said that the AIIF is an insurance organisation that provides professional indemnity cover and bonds of securities to a limited extent.

In terms of the performance of the AIIF, Mr Mbelle said that the organisation has been providing free court bonds since 1998. He added that, at that time, the AIIF had a total exposure of about R 9 billion and that exposure continued to grow on an annual basis. He said that by the end of 2013 the insurance organisation would have taken bonds of about R 1,6 billion. He further said that one of the problems the AIIF has is that it still has court bonds that are open since 1998. He said: 'Very often people approach us for the bonds and we ultimately give them the bonds, but when estates have been closed ... there is no communication between us and the profession. It is important to keep the communication open in order to make sure that we do not continue to have unlimited exposure.'



Manager Director of the Attorneys Insurance Indemnity Fund, Siphon Mbelle, said that the AIIF is an insurance organisation that provides professional indemnity cover and bonds of securities to a limited extent.

According to Mr Mbelle professional indemnity claims have continued to increase and, in the past five years, there was a compound growth rate of 16,6%, which is higher than those in other professions; 'the only other profession that has exceeded that compound annual growth rate is the medical fraternity'. He further said there has been a growth in conveyancing and Road Accident Fund claims.

Mr Mbelle said that one of the risks that has increased is the general prescription area; in 2012 alone there has been eight claims associated with general prescription. He said that the AIIF's income statement has been under pressure, 'we have had an underwriting loss for the past five years. ... When you look at the underlying factors behind them it is primarily because the claims have been increasing. The level of the cost escalation of running the AIIF has not escalated at the same rate as what we have seen in terms of the claims that have come across. We have been surviving because of the investment income that we have had, we have a healthy investment but on an annual basis we find ourselves having to dip into that investment in order for us to be able to balance our books. ... It is not the kind of a situation that we want to see continue going forward. ... We need to see ourselves being able to build on the investment assets of the organisation in order to grow it and make sure that we continue to survive and service the profession.'

Word from the AFF

Mr Fourie said that in the present environment of a slow economy with low interest rates, the AFF's growth rate is unfortunately unable to keep pace with

its financial commitments. He said the fund's actuary provided a report on the long-term sustainability in June 2013, indicating that the current trends of income and expenditure point towards the fund becoming potentially unsustainable within five to ten years.

Speaking on the AFF's operational deficit in 2014, Mr Fourie said: 'While it is acceptable to use accumulated reserves to cover short-term operating deficits, it is not acceptable to use reserves to cover ongoing deficits, which threaten long term sustainability. ... As a result of all this we have decided as far as s 46(b) funding to the [LSSA] is concerned we have to cap the funding for the next three years at the current funding levels, [w]ith the exception [of] exceptional circumstances.'

Word from the LSSA

Mr Bekker said that it is sad to say that members of the legal profession were quiet and did not respond to questionnaires or circulars that were sent out by the LSSA to assess some of the problems its members were faced with. He urged attendees to get involved and communicate with their council and put forward their opinions.

Touching briefly on the Legal Practice Bill, Mr Bekker said that interesting issues were raised by the portfolio committee and that the LSSA made submissions, which are available on www.LSSA.org.za. He said the LSSA met with the General Council of the Bar as well as the Independent Association of Advocates of South Africa, which are now known as the National Bar Council of South Africa and, although they tried to reach a consensus on a number of matters, there were some matters where they could not agree and separate submissions were made by the Bar and the attorneys.

He added: 'I think one worrying aspect as far as the regulatory bodies are concerned is the fact that advocates can receive briefs directly, I do not think that it is a threat for us as attorneys, but it might be a threat for the public and I do not know whether the entire issue of the practical implications of taking direct instructions has really been debated and exhausted by all those involved. It will seriously impact on the Attorneys Fidelity Fund and we will have to ensure as a profession, ... that we have the necessary controls in place to ensure that those advocates that choose to take that route are trained and that the necessary controls are in place.'

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Spotlight on changing the legal landscape

– BLA AGM

The Black Lawyers Association (BLA) held its annual general meeting (AGM) late last year in Durban under the theme: 'Changing the legal landscape to respond to current demands.' Proceedings began with a gala dinner dedicated to the late former BLA president, Edward Mvuseneni Ngubane.

Industrial legal eagle

Opening the gala dinner, President of the BLA, Busani Mabunda welcomed delegates to the event. Paying tribute to Mr Ngubane, he said: 'The late Mr Ngubane is one the people who showed fierce independence. He added that, when circumstances warranted, Mr Ngubane was able to break ranks with fellow members in institutions which had authority in the country. 'I am talking of a gentleman who made it ... possible for me to sit as one of the commissioners of the Judicial Services Commission. I am talking of a gentleman who exercised his certificate of right of appearance in the High Court fruitfully and effectively. I am talking of a gentleman who handled high profile cases, one of which ended up at the Constitutional Court after he had participated in laying the foundation to it. I am paying tribute to an industrial legal eagle who has traversed the length and breadth of the dynamics within the profession. I pay homage to a man who possessed high legal prowess ... I pay homage to a man who has given guidance to



President of the Black Lawyers Association, Busani Mabunda paying tribute to the late Edward Mvuseneni Ngubane.

the organisation sometimes in the midst of tense atmosphere. I am talking of a breather of sanity ... a calmer of waters. I remember a man who worked with commitment, vigor and dedication.'

Current demands

Speaking on the theme of the AGM, retired North Gauteng High Court Judge Ntsikelelo Poswa said that the topic covered a very wide field. He said that he identified three alternative ways in which the legal landscape may be changed.

First option

Speaking on the first alternative to changing the legal landscape, Judge Poswa said: 'Broadly speaking, changes in the legal system may be necessary in the context of a branch of the law, for example, the law of contract, criminal law or the law of property, requiring change to meet current demands. There is no doubt, for instance, that the law of contract creates serious problems for, in particular, uneducated or poorly educated Africans. It is highly technical and devoid of fairness. ... Recognising the need to change some oppressive laws, the government, on its own, or in response to judicial comments in courts, or public outcry, has enacted a number of statutes to try to blunt the sharp edges of the contractual and property laws it inherited from the previous regime. They include the Prevention of Illegal Eviction of Unlawful Occupiers Act 19 of 1998 ..., the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008, to mention but a few of them.'

Second option

Judge Poswa said that another way of changing the legal landscape was through legislative enactment in response to popular demand. He added that he believed that the legal profession should be the catalyst to bringing about legal changes and that black lawyers should be in the forefront of such activity.

He added: 'Black judges, with the same type of social background, equally have a special role in the development of our legal system, just as "white" judges have done for many centuries in helping develop what has come to be known as customary law. There is no doubt that there are differences of interpretation of remedial or any other legislation by different



Retired North Gauteng High Court Judge Ntsikelelo Poswa identified three alternative ways in which the legal landscape may be changed.

judges. Such differences are based on a myriad of factors – such as racial belonging, political outlook, class and religious beliefs – and they also result in the differences in interpretation of statutes by different judges.'

Judge Poswa further noted that even where government has yielded to pressure from the legal fraternity, there was no guarantee that legislation will be changed speedily. He said the Legal Practice Bill, for instance, was conceived during the late Minister of Justice, Dullah Omar's period of office, in response to the BLA's approach for his intervention, when the advocates' profession was recalcitrant to calls for transformation. It is still being hotly debated today, towards the end of the term of office of the third Minister of Justice after Mr Omar.

Third option

Judge Poswa said that the third alternative would be creating a pool of appointable black candidates for the Bench. He said: 'I have not checked the statistics, but I believe that, countrywide, there are more black graduates than white produced annually. Yet, the number of qualified black practitioners is evidently much lower than that of their white counterparts. I stand to be corrected in this regard. ... [T]he fact remains that

black law graduates find it very difficult to qualify as attorneys or advocates. Articles of clerkship are very difficult for African law graduates to [obtain], worse so in large firms of attorneys with a variety of legal services and many partners. Consequently very many black law graduates join the ranks of the unemployed. Many who get articulated in small attorneys' (usually) African law firms do not get a variety of training and experience – apart from inadequate salaries. They are often the main victims of the high failure rate – as far as I know – among candidate attorneys and pupils. ...

How is all this, about black, especially African law graduates, fitting into the topic of changing the legal landscape? It relates to the third of the three ways in which I said changes can be effected. It is a long-term option, namely, creating a pool of black lawyers who will have a fair chance of being appointed to the Bench. It is one field in which I believe that black lawyers have a duty and a realistic opportunity to bring about meaningful change.'

BLA's contribution to the struggle

Speaking on behalf of the KwaZulu-Natal Premier, Senzo Mchunu, the Premier's special adviser, Cyril Xaba said that the history of the BLA cannot be separated from the history of the struggle of the African people in South Africa. He added that the BLA understood that law cannot be practiced in a vacuum. 'It is now history that apartheid is behind us ... we could not have achieved this without your contribution as lawyers,' he said.

Mr Xaba said that lawyers have a sacred space in the advancement of de-



The Premier's special adviser, Cyril Xaba, speaking on behalf of the KwaZulu-Natal Premier, Senzo Mchunu.

mocracy and that their role is not limited to simple litigation, but extends to enriching the country's jurisprudence. He added that the BLA had a history of fighting for the underprivileged and the voiceless and this should continue.

The guest speaker on the second day of the conference, who received a standing ovation from the delegates, was Justice Raymond Zondo of the Constitutional Court. His speech focused on the practical challenges that black lawyers faced and looked at the practical solutions that were available to deal with the challenges faced. He also spoke about the state of the judiciary and the legal profession, the road travelled and the road ahead.



The guest speaker on the second day of the conference, who received a standing ovation from the delegates, Justice Raymond Zondo of the Constitutional Court.

Justice Zondo said: 'We cannot talk about the state of the judiciary and the legal profession, the road travelled and the road ahead of us without talking about where we come from, without talking about the society of which we are part and without talking about the kind of society that we aspire to be and the kind of society we seek to create ... as we do all the things that we do, particularly as black lawyers in order to ensure that our society is a better society than it was before.'

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Single judiciary discussed at Judicial Officers Association of South Africa AGM

The Judicial Officers Association of South Africa (JOASA) held its annual general meeting in late January. On the evening preceding the AGM, JOASA held a gala dinner at which Chief Justice Mogoeng Mogoeng and the Deputy Minister of Justice, John Jeffery, were the speakers.

Chief Justice Mogoeng spoke on the topic 'a single judiciary', while Deputy Minister Jeffery spoke on the role of the Justice Department in bringing about a single judiciary.

During his welcome address the President of JOASA and magistrate, Nazeem Joemath, said that JOASA was the only association of judicial officers in South Africa that boasts membership of all judicial grades. 'We hold membership of two international bodies, the International Association of Judges and the Commonwealth Magistrates' and Judges' Association', he said, adding that membership to the two international judicial bodies was granted only when the voluntary association is free from political influences, be it executive or legislative.

Mr Joemath concluded by saying: 'We may have a very young democracy, but we have a judicial system that we can be very proud of.'

Chief Justice calls for single judiciary

Chief Justice Mogoeng said that the judiciary was recognised worldwide as the third arm of the state, and that in many, if not all, jurisdictions, it does bear the hallmarks of oneness or unity, but not quite so in South Africa. 'Over the years, the institutional arrangements around the judiciary were such that, barring normal litigation processes, there really was no structured relationship or form of engagement between various courts,' he said.

Chief Justice Mogoeng said that regional courts and district courts interact because they share infrastructural facilities and because some matters have to be referred to the regional courts by the district courts, as part of the normal adjudication process. Similarly, he said, appeal and review processes were almost the only known way through which courts at different levels would interact.

The Chief Justice said that prior to the Constitution Seventeenth Amendment Act, 2012 and the Superior Courts Act 10 of 2013, which came into operation

on 23 August 2013, the president of the Supreme Court of Appeal and the judges president honoured invitations to meetings convened by the Chief Justice, and programmes organised by him, out of sheer civility and recognition of some moral authority he had over them. He added that the Chief Justice was generally regarded as nothing more than the head of the highest court in the land, with little or no say in the operational matters of all other courts.

'Similarly, magistrates attended meetings convened by a judge president of a division of the High Court out of sheer deference to a senior judicial officer in the province. Some in positions of leadership simply ignored those meetings. I know for a fact that any attempt by a judge president to get remotely involved in the operations of the magistrates' courts was viewed with suspicion and a measure of resentment,' he said.

Chief Justice Mogoeng said that while this was happening, all the other arms of the state have been well aligned and their operations properly coordinated at all levels, nationally and provincially. He said that it was against this background that the concept of a single judiciary must be viewed and understood in South Africa.

Chief Justice Mogoeng said that there is no doubt that a single judiciary is a constitutional injunction that must be realised. He added: 'The provisions of chapter 8 of the Constitution, properly understood, enjoins us to ensure that the magistracy is integrated into the broader judicial system.'

According to Chief Justice Mogoeng, the Superior Courts Act was enacted and the Constitution amended to usher in an unquestionable dispensation of a single judiciary. 'And this is the judiciary led by the Chief Justice who bears the responsibility to establish norms and standards for the operations of all the courts of this country,' he said.

Chief Justice Mogoeng said that to be consistent with the constitutional vision to establish a single judiciary in the country, s 8(4)(c) of the Superior Courts Act gives the judges president the responsibility to coordinate judicial functions of all magistrates' courts falling under their jurisdiction.

'No court and no judicial officer or grouping of judicial officers may, by law, operate as if these constitutional arrangements designed to unify the ju-



Chief Justice Mogoeng Mogoeng delivered the keynote address at the recent Judicial Officers Association of South Africa's annual general meeting.

diary and clothe the Chief Justice with certain responsibilities, do not exist. We all remain independent to take our decisions in relation to cases before us without undue influence, but never free to take as long as we want to finalise cases and deliver reserved judgments. The constitutional values of responsiveness, transparency and accountability, which apply to the judiciary as much as it does to all other organs of state, require that we not only account through our judgments, but also by delivering quality justice to all our people speedily. We therefore owe it to the judiciary as an institution and to the nation to demonstrate our capacity to run our affairs and the willingness to embrace measures that could bring about better performance, if properly implemented. We must look like and in fact operate as a unified front, able and ready to deliver quality justice to all our people,' the Chief Justice stated.

Chief Justice Mogoeng said that judicial officers could not keep hiding behind judicial independence when greater transparency and accountability was called for, adding that the judiciary will never be as effective and efficient as it can be, as long as it is not a single unified unit as is the case in almost all other jurisdictions.

Chief Justice Mogoeng highlighted three points that have been identified as the main features of a single judiciary, namely:

- The establishment of a single governance framework for judicial officers of the superior courts and the lower courts under the Chief Justice as the head of the judiciary.
- The application of a uniform complaint-handling mechanism.
- Streamlining the courts to establish a unitary court system, which consists of superior and lower courts, in accordance with the hierarchy of the courts envisaged by the Constitution.

Chief Justice Mogoeng said that when the judiciary operates as a single entity it bears the collective responsibility for the underperformance of any court, at any level. He added that judicial officers needed to reflect on how they could possibly be undermining the integrity, dignity and independence of and the trust in the judiciary, which could in turn compromise efforts to transform the judiciary into a truly united and single institution.

Chief Justice Mogoeng advised JOASA to recognise and work very closely with the existing statutory leadership of the magistracy to avoid a multiplicity or duplication of engagements and judicial projects. 'The state of being a unified judiciary requires that we shy away from the fragmentation of the judiciary by operating as several independent pockets of judicial structures or leaders. ... [T]o do otherwise, would compromise the efficiency and effectiveness of the judiciary and its leadership,' he said.

The Chief Justice concluded by saying that the Constitution institutionalises a single judiciary and added that so much more needed to be done to address several concerns that affect the magistracy. 'The dignity of magistrates must be enhanced, their remuneration packages



*Justice Department
Deputy Minister John Jeffery,
spoke at the annual general meeting
of the Judicial Officers Association
of South Africa.*

and employment benefits must match the enormous responsibilities they bear and significant improvement is required in the provision of the resources necessary to raise their performance levels.'

Importance of the magistracy in a unified judiciary

Deputy Minister Jeffery said that the importance of magistrates cannot be overstated, adding: 'As we celebrate 20 years of democracy this year, let us reflect on the role of our judicial officers, particularly our magistrates, in bringing about change in our society, upholding the val-

ues of our Constitution and making justice a reality for our people.'

The Deputy Minister explained that to understand the level where the judiciary is today, one needed to understand where it comes from. He said that the role played by judicial officers prior to the advent of democracy was often not a positive one. 'In 1998, former Judge President of the Western Cape, Judge John Friedman, apologised for the judiciary's role in upholding apartheid, saying that the judiciary itself had helped to maintain the *status quo*, whether wittingly or unwittingly, by upholding laws that they knew to be unjust,' he stated, adding that today we can proudly say that South Africa's judicial officers truly reflect and embrace the vision of the Constitution. 'We are well on track in creating a judiciary that does, indeed, broadly reflect the race and gender composition of our country, a judiciary that has brought about much-needed change in the lives of our people through a variety of ground-breaking judgments.'

Deputy Minister Jeffery explained what a single judiciary is by saying: 'The term "single judiciary" would commonly refer to a process through which the magistrates' courts and magistrates are integrated to form part of a unified court system. This is what is envisaged in our Constitution. This unification is informed by the history of the judicial system which provided for a hybrid system in terms which judges enjoyed a larger degree of independence, compared to the magistrates.'

Deputy Minister Jeffery said that freeing the magistracy from executive control has been a gradual process. He said that the Magistrates' Courts Act 32 of 1944 is based on the pre-1993 judicial

finding administration, exchange control dealings and international transfers taking up valuable time?

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dispensation where the magistracy was part of the civil service and magistrates were senior civil servants, who performed both administrative and judicial functions. They were appointed by the then Department of Justice and were predominantly appointed from the ranks of prosecutors and they exercised their powers and functions under the direction and control of the director-general.

According to Deputy Minister Jeffery the Magistrates' Commission was established in 1993, signalling the start of the de-linkage of the magistracy from the executive. Deputy Minister Jeffery said that the removal of magistrates from the public service was necessary for the independence of the judiciary.

New Acts

Deputy Minister Jeffery said that the Constitution Seventeenth Amendment Act and the Superior Courts Act, have brought us closer to realising the goal of a single judiciary. 'The Constitution Seventeenth Amendment Act, in particular, affirms the independence of the courts and acknowledges the Chief Justice as the head of the judiciary who exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. The Superior Courts Act not only rationalises and consolidates the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa, but provides for a uniform framework for the judicial management, by the judiciary, of all courts, including the magistrates' courts.

'In terms of the Superior Courts Act, the judge president of a division is now also responsible for the coordination of judicial functions of all magistrates' courts falling within the jurisdiction of that division. The Act spells out the nature of judicial functions in respect of which judges president exercise judicial oversight over magistrates and this may include any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts, including case-flow management,' he said.

The Deputy Minister said that a complete overhaul of the Magistrates' Courts Act was long overdue, adding that a new Act was necessary to establish fully integrated lower courts as part of the judicial system. The envisaged Act will mirror the Superior Courts Act. 'A concept framework document with a view to facilitate dialogue on this important aspect of our transformation agenda will be finalised soon,' he said.

Court statistics

Deputy Minister Jeffery said that since 2008/9, court hours had declined. In

2008/9 the average hours in the district court were three hours and 52 minutes, which has dropped to three hours and 29 minutes. 'The hours in the regional courts have dropped from three hours and 49 minutes to three hours and 35 minutes and the average hours in the High Courts from three hours and ten minutes to three hours and seven minutes.

This has resulted in a total reduction across all courts from three hours and 50 minutes to three hours and 30 minutes,' he said. '[M]ore needs to be done to improve the overall productivity of courts so that backlogs and delays do not occur and that justice is administered swiftly. We need to collectively look at how to address this,' he added.

Deputy Minister Jeffery stated that optimal court utilisation and full court hours were essential. He said there were large numbers of people in prison pending the finalisation of their cases. As of 21 January 2014 there were more than 2 500 remand detainees who have been incarcerated for more than 21 months, of these, 144's cases have been on the court rolls for more than five years.

'This situation should be noted against the backdrop that we have removed administrative functions from the workload of the presiding officers, we have instituted case backlog courts to assist with capacity at lower court level and the general inflow of cases into the courts have dropped,' he said.

Deputy Minister Jeffery added: 'For example, new criminal cases to courts have continued to drop on an annual basis from 1 058 210 in 2008/9 to 916 917 in 2012/13. One would have expected that courts would thus have performed better as fewer new cases have been coming in, but the fact is that criminal cases disposed of have also declined - from 1 070 435 in 2008/9 to 949 397 in 2012/13. Fortunately, on the positive side, there has been an increase in the number of finalised cases, from 431 819 in 2008/9 to 466 800 in 2012/13.'

Deputy Minister Jeffery said that there were 2 026 magistrates in total, which was significantly more than judges. '[T]o extend the remuneration of judges to magistrates and/or to extend benefits, such as a salary for life, to all magistrates is simply not feasible from a financial point of view.'

Deputy Minister Jeffery urged magistrates to engage with the Public Office Bearers Remuneration Commission. He said that magistrates were no longer civil servants as they, like judges, were not employees. Deputy Minister Jeffery said that any industrial action undertaken by judicial officers was improper and unbecoming the role and position of a judicial officer. 'Strike action does not promote and maintain the rule of law.

Judicial officers are not employees and therefore the Labour Relations Act [66 of 1995] that provides for the protected participation in strikes or industrial action does not apply, making any such strike illegal,' he said.

According to Deputy Minister Jeffery there are 761 magistrates' courts of which 387 are seats of the courts, 103 branch courts and 271 periodical courts. All district magistrates' courts have either a court manager or in smaller courts, such as branch and periodical courts, an office manager per court. He said that in total there are 298 court managers, with 56 vacancies.

Deputy Minister Jeffery said that after job vacancy advertisements in 2012 the selection committee of the Magistrates' Commission noted that the majority of candidates who were short-listed for posts of magistrate and regional magistrate had more than ten years' applicable post-university court experience and it was for this reason that the committee recommended that the experience requirement be raised to seven years' post-university experience in respect of posts of magistrates and to ten years' post-university experience in respect of posts of regional magistrates.

Deputy Minister Jeffery said that they are pleased to note that there is certainly no shortage of suitably qualified candidates who wish to serve as judicial officers; for the 308 positions that were advertised in November 2013, 2 500 applications were received and are currently being considered.

The Deputy Minister said that other issues that are on the table and that are receiving the Justice Department's ongoing attention include matters such as the policy for the appointment of acting magistrates, the remuneration dispensation for the lower court judiciary and the progress and timeframes for the Lower Courts Bill.

He concluded by saying: 'We may not agree on all issues, but what is important is that all parties keep the channels of communication open and that all role-players engage, in good faith, to find solutions that are mutually beneficial. The crux of the matter really is this: There are many issues which affect all of us, all the various role-players, on one level or another. Issues can and should be resolved by way of constructive engagement, not industrial action.'

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Immovable property legislation

The Association Law in Force recently held a conference on benchmarking Angolan and South African immovable property legislation. The conference discussed the legal issues faced with regard to foreign investment in immovable property.

The speakers included Co-chairperson of the Law Society of South Africa (LSSA) Kathleen Matolo-Dlepu; the Chief Executive Officer of the LSSA, Nic Swart; Prof Rui Cruz, a law professor at the Agostinho Neto University in Angola; and Lourdes Fernandes, the President and founder of the Legal Counsel Firm group.

Mr Swart spoke about the South African Constitution. He said that the Constitution was a living document and that it had to be lived and practised for it to become a reality. He then touched on the Legal Practice Bill, saying that one of the challenges that South African lawyers were currently faced with was welcoming the Bill once enacted and the two-year transitional state.

Ms Matolo-Dlepu spoke on the applicable legislation in property acquisition in South Africa. Speaking on land legislation, she said that South African property law ensures -

- harmonisation of individual interests in property;
- the guarantee and protection of individual (and sometimes group) rights with respect to property; and
- the control of proprietary relationships between persons (both natural and juristic), as well as their rights and obligations.



Kathleen Matolo-Dlepu, the Co-chairperson of the Law Society of South Africa delivering her presentation on property acquisition in South Africa.

She said that the most important social function of property law in South Africa was to manage the competing interests of those who acquire property rights and interests.

Ms Matolo-Dlepu outlined the applicable land registration system. She said that the land registration system was governed by the Deeds Registries Act 47 of 1937. She added that this system complied with most of the requirements of a system of registration of title, such as the existence of a scientifically prepared diagram of each parcel of land in order to eradicate any uncertainty as to the identity thereof and the fact that all deeds are thoroughly examined in terms of s 3(1)(b) of the Act.

Ms Matolo-Dlepu said that there were no restrictions in respect of property

ownership by non-residents, save for a prohibition on illegal aliens owning property within South Africa.

She added that there are, however, procedures and requirements that must be complied with in certain circumstances, such as the local registration of entities registered outside South Africa that purchase property in South Africa and the appointment of a South African officer for a local company whose shares are owned by a non-resident.

'In the event of a non-resident residing for longer periods, a residence permit will have to be applied for in terms of the Aliens Control Act 96 of 1991,' she said.

David Green, who is the managing director and founding shareholder of Pro Africa Property Services, said that foreign investment in immovable property in South Africa was on a small scale. He discussed the country's real estate perspective and said that the reason why foreign investment was on a small scale was because the South African property market was so strong that foreigners did not have an opportunity to enter it. He also said that there were a few hurdles that foreigners had difficulty overcoming, such as the fluctuation of the Rand. Mr Green said that Africa was under-resourced with real estate expertise.

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The Johannesburg Attorneys Association (JAA) held its 71st annual general meeting (AGM) late last year. Guest speakers at the AGM were Agang political party leader, Dr Mamphela Ramphele and Judge President of the North and South Gauteng High Courts, Judge Dunstan Mlambo.

The subject of Dr Ramphele's speech was 'The rule of law as a democratic foundation'. She saw this as an opportunity, as a South African citizen, to speak about her understanding of the rule of law and how crucial it was to the health of the country's constitutional democracy. She reminded attendees that s 1 of the Constitution enshrines the rule of law and also of the three key principles of the Constitution, which are human rights, equality and freedom. She added that the three principles cannot exist without the rule of law anchoring them. She believes that the Constitution affords South Africans a wonderful opportunity to have an open society on a continent not known for establishing open societies.

Dr Ramphele said: 'I often visit campuses and ask by a show of hands how many students know the Constitution and it is usually less than 10% of most audiences. That is a problem because if you have a wonderful Constitution that remains a dead letter in the book that only the judges and the lawyers can interpret, then we do not have an effective constitutional democracy and therefore the rule of law is at risk.'

She added: 'We need to ask ourselves, when we reflect on the past 20 years, what is the state of the rule of law in South Africa. If we go back to the definition of the rule of law provided by the World Justice Project, which is committed to promoting the rule of law around the world, ... the rule of law refers to a rules-based system in which the following four universal principles are upheld:

- The government, its officials and its agents are accountable under the law.
- The laws are clear, publicised, stable and fair, and protect the fundamental human rights including security of persons and property.
- The process by which laws are enacted, administered and enforced is accessible fair and efficient.
- Access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.'

According to Dr Ramphele, the process of enacting laws, access to justice and independent and ethical adjudicators are also important parts of the pillars of the rule of law. She believes that the

Rule of law and partnership between the Bench and profession discussed at JAA AGM



Agang political party leader, Dr Mamphela Ramphele accepting a gift from Johannesburg Attorneys Association Chairperson, Nakka de Klerk.

neglect of the socio-economic rights of 80% of South Africans makes the law illegitimate and undermines the legitimacy of the rule of law. She said that 'studies show that inequality is bad for any society, for both rich people and poor people. But when you have a situation that enshrines socio-economic rights and you do very little to ensure that those rights are actually respected and are seen to be accessible ... we are undermining our Constitution every day. ... You and I have a duty to ask ourselves: What is our role as citizens?'

Quoting the former Chief Justice Arthur Chaskalson, in his speech at the first World Justice Forum in Vienna in 2008 when he spoke about the apartheid system, Dr Ramphele said: 'What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair, and the laws themselves were not fair. They institutionalised discrimination, vested broad discretionary powers in the executive and failed to protect the fun-

damental rights.' She added: 'That was then, if we hold that mirror in front of us now what does it tell us? The former Chief Justice's words underscore the importance of the rule of law for our young democracy.'

Bench and the profession

The second speaker of the day, Judge Mlambo delivered a speech on 'The partnership between the Bench and the profession and its influence on access to justice'. He said that access to justice has featured in many discussions but the stark reality was that achievements in that regard were not enough. He added: 'The provision of legal services for the poor is one of the greatest challenges to the legal profession across the world, and even more so in Africa and South Africa where there are enormous problems that require a large output of time and resources to ensure access to justice.'

Judge Mlambo said that the judiciary does not exist in a vacuum as it is an institution founded in society and the pro-

fession is the pool from which judges are drawn. He believes that judges require the respect and faith of the profession and the communities they serve to be effective and that public confidence is therefore critical to the administration of justice.

Speaking on the profession and the Bench working together, Judge Mlambo said: 'I believe in the independence of the judiciary and the legal profession, but that does not mean that the judiciary and the profession cannot work together to give effect to the transformative nature of the Constitution. I am not suggesting in any way that the legal profession should give up the independence to become subservient to the demands of the Bench.'

Context of the judiciary

Judge Mlambo reminded delegates that, in the previous era, the judiciary and courts were very effective tools of oppression and were viewed with apprehension by the majority in the country. However, he added, South Africa has 'come a long way from those dark days, taking account of the strides we gave taken to restore human dignity, equality and compassion for our society'.

Judge Mlambo noted that: 'As judges our job is to adjudicate matters that come before the courts impartially, without fear or favour and in an expeditious and efficient manner. That is the final end of access to justice and it is one of the most critical in instilling confidence



Judge President of the North and South Gauteng High Courts, Judge Dunstan Mlambo, speaking on the partnership between the Bench and the profession and its influence on access to justice.

in society and our justice system and the rule of law. That happens when, as judges, we convict and sentence people accused of crimes should the facts and law justify that conclusion.' He added that political agendas, ideologies, wealth or race should not play any role in how judges preside over cases.

Judge Mlambo believes that a transformed Bench is a necessary prerequisite to true access to justice. He added that transformation is not only neces-

sary regarding the race and gender of the Bench, it is also required in briefing patterns. Judge Mlambo said that 'the attorneys' profession, the Bar and the judiciary have an obligation to transform the current unacceptable situation in line with the transformative demands of our Constitution'.

Reiterating the importance of *pro bono* services, Judge Mlambo said: 'Perhaps the most important role the profession can play in advancing meaningful access to justice is to embrace *pro bono* legal services with more vigour than we have seen. Some 20 years into our democracy we have regressed to the point of becoming one of the most unequal societies in the world with the highest disparity in income levels.'

In closing Judge Mlambo said: 'The issues that really matter to the poor and the vulnerable members of a deeply unequal society deserve much more from us as key stakeholders in the justice system. Our country and the Constitution require us to come together as the profession and the Bench to transform our society so that we have meaningful access to justice for all.'

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Law journal for non-lawyers published

The *People's Law Journal*, a law journal written in plain language that covers issues on social justice and human rights has been launched. Jacques van Heerden, the editor of the journal, told *De Rebus* that the aim of the journal is to educate non-lawyers, especially from poor or working-class communities about the law. He said that it will inform readers on where the law comes from, how it works and how it affects them. 'We believe that people should know how to use the law in their struggle for equality, social justice and human rights,' he said.

He added: 'Law is not just about precedent and legal argument; it is also created and shaped by individuals and communities living under specific conditions. So although we will focus on current and historical case law, articles will also take a look at specific people who were affected in each case and how their legal struggles helped them to change

or improve their lives. It focuses on the way that law and politics intersect and how this affects people's lives. It aims to demystify the law and how it operates, and to make it more transparent and accessible.'

Mr Van Heerden said that all people are affected by the law, but few understand it since lawyers and judges often speak and write using complicated language.

At the moment the journal is published twice a year by Ndifuna Ukwazi, an organisation that promotes understanding, engagement and collaboration on social justice issues. The editorial committee accepts submissions from lawyers, young law students and human rights activists whose work has contributed to legal campaigns. It also particularly welcomes submissions from anyone with the ability to write clearly and simply about legal issues, as the journal is aimed at non-specialists. 'Every arti-

cle should be accessible to people with limited formal education. Additionally, some articles will be written by young researchers who may have had formal or informal legal training,' said Mr Van Heerden.

Mr Van Heerden said that the first edition of the journal was dedicated to former Chief Justices Arthur Chaskalson and Pius Langa since both their legal careers illustrated the kind of concern for and dedication to human rights that the editorial committee would hope for from all members of the judiciary.

Hard copies of the journal can be obtained from the Ndifuna Ukwazi office in Cape Town. The journal is free, although donations are welcome, and electronic copies can be accessed through a link on the Ndifuna Ukwazi website (<http://nu.org.za>).

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South Africa in final of international moot court competition

The participants who excelled in the 2013's third National Schools Moot Court Competition (see 2013 (Oct) DR 8) were invited to participate in the 2014 High School International Moot Court Competition in The Hague, Netherlands.

The competition was held for the second time by the Justice Resource Center, in partnership with the City Hall of The Hague, and provided high school students an opportunity to engage in civic education with other students and judicial leaders from around the world.

Sixteen teams participated in the competition and other countries that participated included the United States, Poland, Russia and Argentina.

Cherryl Botterill, a project manager at the University of Pretoria who accompanied the students to The Hague, said that the competition was an opportunity for students to learn about the rule of law, gain a better understanding of international relations and increase their legal knowledge.

Two teams from South Africa participated in the competition. One team had six members, while the other had seven. Each team was divided into a defence and prosecution side that each had to lead arguments. After both sides had argued, the team's marks were calculated and compared with those of the other teams to determine the finalists.

The students participated in multiple elimination rounds at Leiden University from 21-23 January and Venezuela and South Africa made it to the final round. The members of South Africa's Team 2 had to decide whether the prosecution or defence side of the team would be participating in the final round. They tossed a coin and the members for prosecution and Venezuela's defence team members were in the final round. The South African team in the final was made up of Anri Erasmus of Grens High School in the Eastern Cape; Caton Schutte of Crawford College La Lucia in KwaZulu-Natal and Palesa Ramanamane of Eunice High School in the Free State.

The final round took place on 24 January with judges from the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia presiding. The South African prosecution team took second place. Sam Musker from Redhill High School in Jo-



The two South African teams and their coordinators at the recent 2014 High School International Moot Court Competition at The Hague.

hannesburg was awarded the best oralist award for defence teams.

Palesa Ramanamane told *De Rebus* that she felt honoured and blessed to be part of a competition of this magnitude. She said that she had learnt many things during the competition, but the two lessons that stood out regarded race and unity. 'We need to forget about people's race and rather look at a person's mental capacity. Racism holds us back. I also learnt about unity. We really stuck together and that is how we achieved second place. All 13 of us sat in the boardroom the night before the finals to prepare. Our spirit of togetherness was amazing. We were united', she said.

Her greatest moment of the competition was when they announced that her team had made it to the final round. 'The whole room was singing and dancing to Shosholozza - Brazilians, Americans, everybody,' she said.

Miss Ramanamane said some may perceive the law as 'boring' and just about thick books, reading and theory. 'It does require a lot of research and reading, but it is also very interesting. We must do what we can with our minds. We should challenge ourselves,' she said, adding

that she will be studying towards a BA Law degree next year.

The students in the South African teams were selected from different schools across the country. Team 1 consisted of Danielle Dallas and Olivia Habonimana from Immaculata High School in the Western Cape; Thabisile Mahatlane from Mahonisi Learning in Limpopo; Samuel Musker from Redhill High School in Johannesburg; Matshidiso Legalamitlwa from Tiger Kloof Combined School in the North West; Malefu Mokone from Harrismith Secondary School in the Free State and Ntokozo Magubane from the Drakensberg Comprehensive School in KwaZulu-Natal. Team 2 consisted of Palesa Ramanamane; Anri Erasmus; Savannah Stutchbury of Springfield Convent in the Western Cape; Simphiwe Ntlhabati of Tiger Kloof Combined School in the North West and Tharin Pillay and Caton Schutte of Crawford College La Lucia in KwaZulu-Natal.

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People and practices

Compiled by Shireen Mahomed

Cliffe Dekker Hofmeyr in Cape Town has ten new appointments.



Newly appointed associates, from left: Mongezi Mpahlwa, Taryn Lee Vos, Leigh Lambrechts, Anli Bezuindhout and Jacques Odendaal.

Thomson Wilks in Johannesburg has three new appointments.



Chris Giliomee has been appointed as a director. He specialises in banking law.



Cheryl Loots has been appointed as a consultant.



Anya Audagnotti has been appointed as a consultant.

The specialist environmental and green business law firm, **Cullinan and Associates Inc**, has appointed three associates.



Sarika Ramcharan, senior associate, Durban.



Alison Pienaar, senior associate, Cape Town.



Lia Kleynhans, associate, Cape Town.



Lisa Brunton has been appointed as a senior associate.



Freddie Terblanche has been appointed as a senior associate.



Kendall Keanly has been appointed as a senior associate.



Mariska van Zweel has been appointed as a senior associate.



Tessmerica Moodley has been appointed as a senior associate.



Webber Wentzel in Johannesburg has appointed Ryan Nelson as a partner in the banking and finance department. He specialises in banking and finance law.

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

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The correct interpretation of s 17(4)(c) of the Road Accident Fund Act 56 of 1996

By Ian Morris,
George Schwalb
and
Gregory Whittaker

The ruling by Griesel J in the matter of *Sweatman v Road Accident Fund* (WCC) (unreported case no 17258/11, 3-12-2013) (Griesel J) has resolved a dispute concerning the interpretation and application of s 17(4)(c) of the Road Accident Fund Act 56 of 1996 and more specifically the method of actuarially calculating the annual loss for the purposes of applying the statutory cap.

For accidents occurring after 1 August 2008, s 17(4)(c) of the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act) imposes the following limit on losses:

'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 –
(i) R 160 000 per year in the case of a claim for loss of income; and
(ii) R 160 000 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.'

As to how the 'annual loss' is to be calculated was central to the ruling.

The difference in methodology proposed by the writers as against the methodology proposed by the Road Accident Fund's (RAF's) actuaries can be summarised as follows:

We calculate the annual loss as the present value of the difference between the income had the accident not occurred and the income having regard to the accident for each year (after allowing for income tax, general contingencies, inflation and mortality and then discounted to present day terms). Each year's annual loss is then compared with the cap and thereafter the lesser of the cap (at the date of the accident) and each year's loss is used.

The above approach was also the interpretation of the RAF until earlier in

2013, when it changed its interpretation and instructed its actuaries to use the interpretation outlined below.

The RAF's actuaries' methodology is to project the actual loss for each year in future monetary terms (after income tax, including general contingencies and inflation, but not mortality and not discounted). This amount is then compared with the cap in each year (duly adjusted for inflation for each year in the future) and then the lesser of the actual inflated loss as calculated and the inflated cap value of each year is discounted (with the interest rate and mortality) to present day terms.

In coming to his decision Griesel J agreed with Sutherland J who held in *Sil and Others v Road Accident Fund* 2013 (3) SA 402 (GSJ) that 'the purpose of the cap is to limit merely the sum to be paid, and its purpose is not to interfere in the calculation of the loss' (at para 14): That is, the traditional method of calculation that has existed for many decades in South African courts was not to be disturbed. This judgment therefore clearly agreed with the methodology proposed by us where a discounted loss is compared to the cap at the date of the accident.

By way of example, it is useful to examine the case of a 40-year old male earning R 1 000 000 a year who is injured in an accident on 1 December 2013 and who is now unemployable. Had the accident not occurred, it is assumed that he would have received inflationary increases until retirement at the age of 65. A general contingency deduction of 15% has been applied for illustrative purposes.

Had the claim not been capped, then the present value of the loss (at a net discount rate of 2,5% per annum and an appropriate mortality table) would be R 9 935 860.

Under our approach, the capped loss would be R 5 341 875 (in the example

the cap will have an effect throughout the whole period of the loss and the result is simply the cap of R 213 675 a year multiplied by 25 years). Under the method proposed by the RAF's actuaries the capped loss would be R 3 660 626.

It is to be noted that, in terms of the example set out above, both methods result in a significant reduction in the loss that would ordinarily have applied had there been no cap. In terms of the above example, under our approach, the claimant recovers approximately 53,76% of the award that would otherwise have applied; whereas under the RAF actuaries' approach, the claimant recovers approximately 36,84% of the award that would otherwise have applied.

In summary, in the relatively small percentage of cases where it needs to be established whether or not the claim should be capped, the actual loss must be calculated, using the traditional year-by-year method that makes due allowance for mortality, tax, and contingencies in each year, and discounting to present day value using a net capitalisation rate. The loss in each year must then be compared with the cap and the lesser of the two amounts claimed.

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By
Louis
Rood

Building client relationships

Becoming your client's trusted adviser does not happen overnight. It is a step-by-step process, and it can be an uphill battle. How do you go about climbing this steep and often slippery slope? By using a 'ladder'.

The following process illustrates how a client can be attracted to a law firm, so that the client eventually decides to make use of its services. There are eight rungs to this 'ladder':

- **Awareness.** The potential client gets to know that your firm exists. He or she hears about it or reads about it.
- **Knowledge.** The client learns something about the firm, where it is, what it does and who the people who work there are.
- **Liking.** The client finds your firm attractive, appealing and is interested in knowing more about it.
- **Preference.** The client decides that your firm is better than other firms, that it suits his or her needs, and that he or she would like to use it. It is like selecting an item for dinner from a menu: The client decides what he or she prefers over everything else on offer, based on content, appeal and price.
- **Connection.** The client makes contact with your firm and you react, respond and interact.
- **Purchase.** The client gives your firm an instruction - he or she buys the legal services you offer.
- **Comfort.** The client is happy with the services he or she has bought from your firm and feels good and relaxed about dealing with your firm. He or she has confidence in you, trusts you and finds you reliable and more instructions follow.
- **Advocacy.** This is where your client becomes your firm's agent. By word of mouth he or she does your marketing

for you, telling others how good you are, how happy and satisfied he or she is with your firm and recommends your services to others.

You are now at the top of the 'ladder' and can pick the ripe fruit. The flip side is where you neglect the client, become complacent, take the client for granted, and let your standards slip. The client becomes disillusioned, dissatisfied and feels let down. The client slowly slides down the 'ladder' and eventually departs, leaving you high and dry. That is the end of the relationship - it can and does happen, but you should never allow it to happen.

Focus on the client

Many law firms become overly consumed by their internal dynamics - remuneration systems, managing difficult personalities, recruitment and training, regulatory compliance, budgetary demands - and all too easily take their eyes off the ball: The all-important client.

The task of an attorney, first and foremost, is to serve the interests of the client. It is the best way to ensure that your own interests are served. What does the client expect? The answer is reliable, professional, high-quality service delivering solutions. How can you not only meet but exceed those expectations and do so consistently? You have to constantly strive to improve every aspect of service every day.

Your benchmark should not be what your competitors are doing. Your benchmark should be yourself. How can you improve on how you have previously performed? How can you be the best you can be? And then go one better.

Self-audit

At the end of each year it is a good idea for you to conduct some self-assessment

and evaluate your own performance so that you have a clear vision of how you want to approach the following year. There are three issues you can evaluate:

- **Reputation gains.** Determine in which areas of your practice you have made significant improvements and how can you use these advances to your further advantage, for greater rewards, better insights, and heightened performance.
- **Reputation neutrality.** These are areas where you have remained constant. That means you have been consistent, but perhaps stagnated: You may have maintained standards, but have not improved on them. If you keep to this approach, expect similar returns.
- **Reputation deficit.** You win some, you lose some, but in the game of life significant losses suggest deficiencies. These are areas where you have slipped up, failed to perform to your potential

and lost ground. It may be because things have changed, and you have failed to adapt. Be honest with yourself, identify the areas where there are room for improvement and map out a plan of how you intend turning things around for the better.

It is all about taking charge of your own life and practice, the role you would like to play and how you manage your tasks and challenges, rather than plodding on waiting for something to happen, or for someone else to determine your destiny. The best kind of empowerment is self-empowerment.

Louis Rood BA LLB (UCT)
is chairman of Fairbridges
in Cape Town. □

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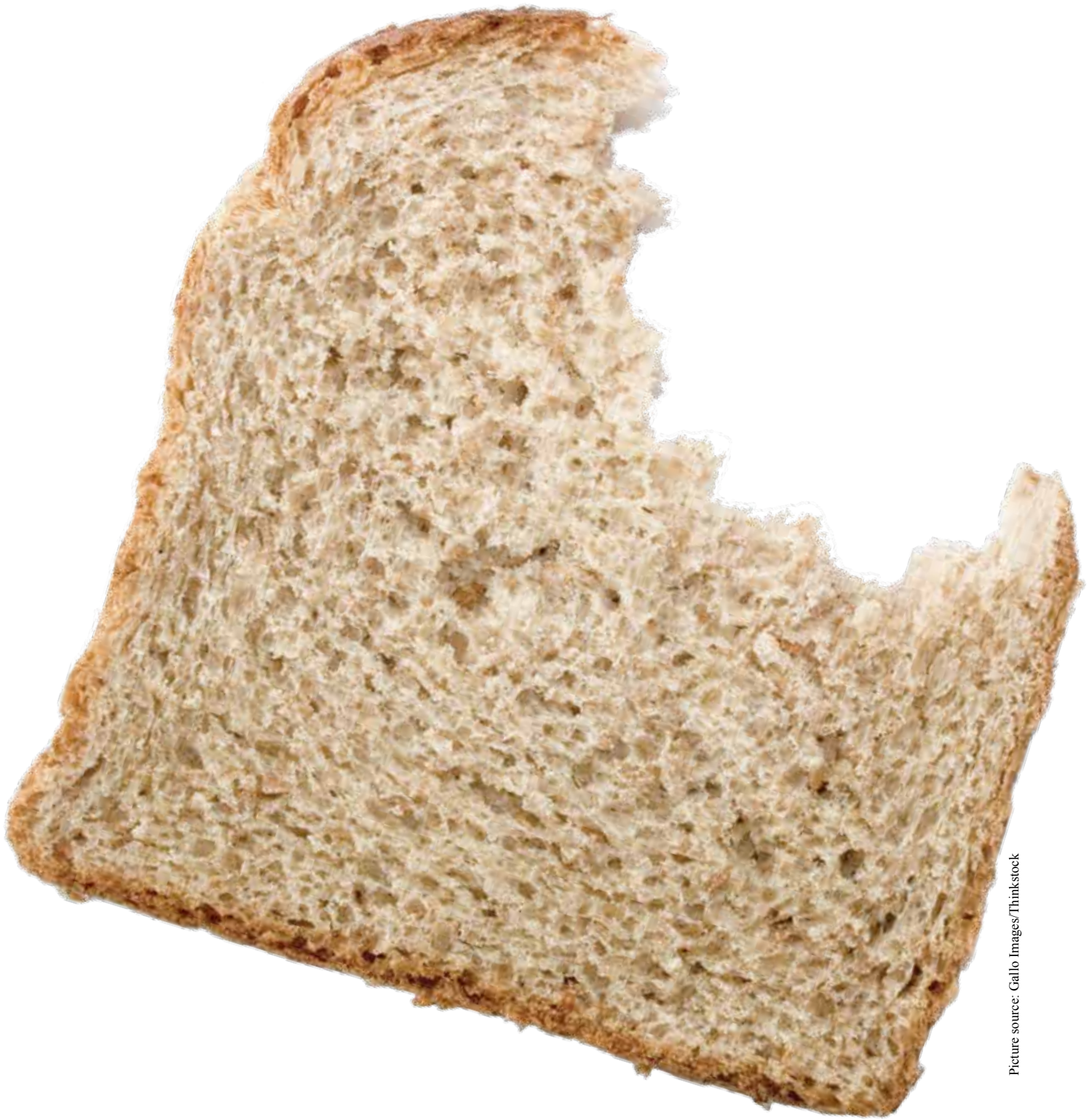
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Fighting over breadcrumbs

Cartels and the Competition Act 89 of 1998

By
Decide
Makhubele

In South Africa there is an increase in cartel activities that are forbidden by s 4(1)(b) of the Competition Act 89 of 1998. This article discusses the consequences of cartels on the market, economic development and consumers. The discussion will also provide the legal position regarding cartels by referring to statutory provisions and the prevailing judicial precedent on the matter. It will also highlight the punishments that are available and can be imposed on the cartel members.

The Competition Act provides that a person who has suffered loss or damage as a result of a prohibited practice, may commence civil action against the cartel firm. The legislature introduced provisions for criminal liability in the Competition Amendment Act 1 of 2009, which is expected to come into operation on a date to be proclaimed by Parliament.

Recent cartel case

The Competition Commission recently reached settlement with 15 construction firms for collusive tendering in contravention of s 4(1) of the Competition Act (*Competition Commission v Murray & Roberts Ltd* (Competition Tribunal) (unreported case no 017277; 2009Feb4279/2009Sep4641) (N Manoim, Y Cassim and T Madima). The settlement was for the amount of R 1,45 billion as a penalty. There were consumers alleging that they suffered harm as a result of this construction cartel and threatened to take civil action against the cartel firms. Should the affected parties commence civil action it would set a judicial precedent.

Purpose of the Competition Act

Before discussing the important provisions regarding cartels it is of paramount importance to lay out the purpose of the Competition Act in as far as it relates to the above matter. The Competition Act was promulgated to promote and maintain competition in South Africa in order to –

- promote the efficiency, adaptability and development of the economy; to provide consumers with competitive prices and product choices;
- promote employment and advance the social and economic welfare of South Africans;
- expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (s 2 of the Act).

Section 4(1)(b) of the Competition Act provides –

‘An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

- (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
- (b) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.’

Why do firms engage in cartel activities?

In general, firms engage in cartel activities to maximise the joint profits of cartel members, which means trying to operate collectively as if they were a monopoly (Tapera G Muzata, Simon Roberts, and Thando Vilakazi (2012) ‘Penalties and settlements for cartels in South Africa seen through an economic lens’ (Working Paper no 9/2012 at p 6).

In *Competition Commission v Pioneer Foods* (Competition Tribunal) (unreported cases nos 15/CR/Feb07 and 15/CR/May/08, 3-2-2010) (Y Cassim, D Lewis Date and N Manoim) the Competition Tribunal found that Premier, Tiger Brands, Pioneer and Foodcorp contravened s 4(1)(b)(i) and (ii) of the Competition Act. In this matter Pioneer contested its participation in a cartel (more especially cartel arrangements nationally and in the Western Cape) despite being implicated by the other major producers. The Tribunal found that there had been collusive conduct from 1999 to 2006, across the country, and in 2006 in the Western Cape. These four bread firms contravened the Competition Act in that:

- During 1999 they concluded an agreement, or engagement in a concerted practice in terms of which they divided markets among themselves in the South Gauteng, Free State, North West and Mpumalanga regions.
- Between 2003 and 2004 they –
 - fixed the selling price of bread and the dates by which the said prices were to be implemented;
 - entered into a ‘gentlemen’s agreement’ in terms of which they resolved that during the period of bread price increases, they would not allow customers to switch suppliers in order to benefit from any differences in the prices provided by each supplier; and

- agreed not to poach one another’s customers.

- During July 2006, Pioneer, Premier and Tiger Brands agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area
- During the last week of November 2006, Pioneer, Premier and Tiger Brands, fixed the selling price of bread by agreeing to increase the said price by 30c per loaf in Gauteng with effect from 18 December 2006.
- None of the firms would supply new distributors.
- other’s former employees.
- None of the firms would make bread deliveries on 25 and 26 December 2006.

Damage as a result of the contravention

The Competition Tribunal in the *Pioneer Foods* case held that the damage to competition by Pioneer’s conduct caused harm to consumers in the form of higher prices, less choice and inferior services. It was further held that the bread market supplies a staple food to millions of South Africans; especially the poor, and that any increases in prices would have a disproportionate impact on this sector. The Tribunal could not quantify the extent of the damage accurately, but concluded that ‘the result of this was that poorest of all South Africans paid more for their bread than any other person’ (at para 160).

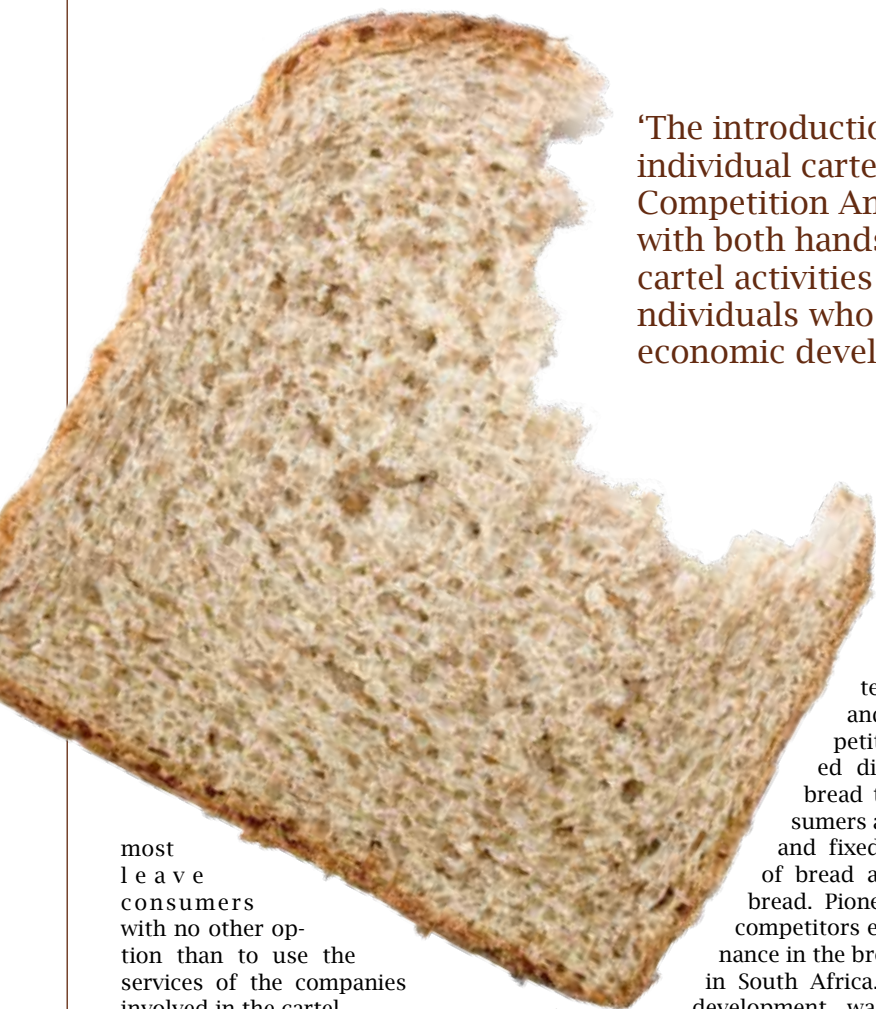
The fixing of agents’ commissions and agreement not to poach agents in the Western Cape led to higher costs of distribution into the informal sector and eliminated the negotiating power, if any, of these agents. The loss and damage to competition caused by the contravention in the inland region was likely to be greater due to the permanent nature of the bakeries’ market division agreement. Moreover, the consequences of closing bakeries were not limited to the urban areas but stretched into the rural areas.

Impact of cartel activities on consumers

Consumers are harmed by both higher price, and by the lower quantities they choose to buy. The loss to consumers occurs because higher cartel prices force consumers to withdraw from buying the cartelised product and to consume inferior substitutes, if any are available (see Mazuta *et al* at p 7).

The overcharge is effectively the difference between the price charged during the cartel period and the prices that would have been charged in a competitive market absent the conduct. In addition, higher prices have the distortionary effect of reducing demand (see Mazuta, *et al* at p 15).

The results of cartel arrangements at



most leave consumers with no other option than to use the services of the companies involved in the cartel.

Gravity and duration of the cartel

The Tribunal in the *Pioneer Foods* matter stated that s 4(1)(b) violations are the most serious violations of the competition law and are condemned across the world. Naked cartel behaviour is not justifiable under our legislation and is presumptively harmful.

In this matter, the offences are more so repugnant because they have affected the poorest of the poor, for whom standard bread is a staple. The cartel conduct was viewed as serious because employees of these four companies had full knowledge of the unlawfulness of their arrangements.

The cartel conduct in the inland region persisted for a much longer period of time. Moreover, the closure of bakeries resulted in a permanent removal of capacity in the territories covered by their agreement to divide markets. This prolonged cartel had a negative effect on economic development in that small bakeries, which were trying to survive in the market closed down. It also had a negative effect on job creation in that people lost their jobs as a result of the bakeries closing.

Impact on economic development

Cartel activities make it difficult for the small companies in the same industry to

'The introduction of criminal liability to individual cartel members in s 73A(3) and (4) of the Competition Amendment Act should be welcomed with both hands. It is common cause that most cartel activities are done deliberately by the individuals who know its effects on consumers, economic development and the market. '

grow. In the *Pioneer Foods* matter, Pioneer and its competitors granted discount for bread to the consumers and agents, and fixed the price of bread and toaster bread. Pioneer and its competitors enjoy dominance in the bread market in South Africa. Economic development was affected in that consumers were channelled by the cartel not to use the services of other bread companies. This resulted in small bread companies closing down.

Civil actions against cartel members

Section 65(6) of the Competition Act provides that:

'A person who has suffered loss or damage as a result of a *prohibited practice* -

(a) may not commence an action in a *civil court* for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed form* -

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.'

In order to succeed in a civil action a party claiming suffered loss or damages must prove its case on the balance of probabilities. This means that the damages suffered must be properly quantified by a party claiming damages. It is difficult to estimate the level of benefits that accrue to firms as a result of engaging in cartel conduct and even more complex to determine the level of harm imposed on society (Mazuta *et al* at p 7). The difficulty in proving the harm suffered by the consumers is most probably the reason there is no record of civil actions instituted.

Conclusion

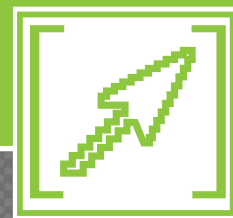
Cartel activities hinder the purpose of the Competition Act. It is seen in the *Pioneer Foods* case, the companies had an agreement not to compete, while one of the purposes of the Act is to promote competition. Small bakeries closed and people lost their jobs as a result of cartel activities. The purpose of the Act to promote economic development and employment was also hindered. Consumers were detrimentally affected in that their choices of products were compromised and were not provided with competitive prices in the bread cartel.

The introduction of criminal liability to individual cartel members in s 73A(3) and (4) of the Competition Amendment Act should be welcomed with both hands. It is common cause that most cartel activities are done deliberately by the individuals who know its effects on consumers, economic development and the market. In my view cartel activities are tantamount to theft, which is a criminal offence. It is unfair to the consumers who suffer financial loss as a result of cartel behaviour and it is impossible for them to be reimbursed for the suffered loss by means of the legal system. A criminal liability provision in the Competition Amendment Act is ideal in order to protect the consumers and to manage the cartel activities.

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Stem cell research

Is South African law locking progress?

By
Yda van
Aartsen



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On 15 April 2013 it was reported that a researcher in the United States of America (USA), Dr Atala, announced that he had made a breakthrough in his research and is now able to grow an entire new organ requiring only a collagen frame filled with stem cells (Harold Maass 'Growing rat kidneys in a lab: Are human organs next?' (<http://theweek.com/article/index/242746>, accessed 31-1-2014)). Although this was achieved using a kidney from a rat, Dr Atala reported that this technique could be used to grow fully functional human organs from scratch. This scientific

breakthrough may result in many lives being saved around the world, since there will, for example, be no need for dialysis patients to wait for a compatible organ to be donated and these organs would not be rejected by the body ('Lab-made rat kidneys raises hope for dialysis patients' *Reuters*, 5-4-2013, www.foxnews.com/health/2013/04/15/lab-made-rat-kidneys-raise-hopes-for-dialysis-patients/, accessed 31-1-2014).

Imperative to this scientific breakthrough is funding and legislation regulating the research and industry. Essential to be noticed is that legislation in South Africa is currently not capable of regulating the organ-growing research industry. The current National Health Act 61 of 2003 is not up to date with international developments and does not enable patients in South Africa to benefit from the advantages of the research.

In this article I will summarise the technique of organ growing, the ethical implications thereof, the formation of regulating legislation, the battle to obtain funding for the research, and the position in the USA and South Africa relating to this type of research and recent developments.

Organ-growth technique

The technique described by Dr Atala involves a rat kidney being washed of all cells, to leave only a residual collagen framework. This framework is then filled with embryonic stem cells (ESCs). ESCs are the fundamental cells in a fertilised embryo that can differentiate and grow into any human tissue (pluripotent ESC). Adult stem cells, however, are multipotent and are only capable of producing cells belonging to the specific tissue type that they form part of. The ESCs then grow inside the collagen framework to form a new functional kidney capable of producing rudimentary urine (see *Reuters* article above).

To have all these advanced developments in the organ-growing field made possible, funding and regulating legislation are needed.

Legislative regulation of the research internationally

Human stem cell research is a very controversial subject as some of the research methods used involve the destruction of human embryonic cells to create a human ESC line. This is also the reason why stem cell research is still a much debated issue, even in the USA where this regenerative research with stem cells has reached an advanced stage. Due to the fact that an embryo is considered an early aged human life, there are groups that are concerned about the ethical implications of the research and that it might be conceived as murder.

The creation of US legislation to patent these existing ESC lines for research and funding was an uphill battle, which was eventually won after ten years in 2012, when judgment was delivered in *JL Sherley and Others v K Sebelius and Others* (Cov. No. 1:09-CV-01575 (DDC)). In this case the appellants were researchers in the field of adult stem cells who opposed the use of federal funding for the development of embryonic stem-cell research, challenging it to be against the restrictions in the Dickey-Wicker amendment. (This amendment prevents federal funding for the creation of new stem cell lines by known methods.)

The defendant-scientists argued that researchers might not be free to create new lines of stem cells with federal funding, but President Obama's policy allows federal funding to be used for research involving existing stem cell lines, as well as any further lines created using private funds or state-level funding (Lucas Mlsna 'Stem cell based treatments and novel considerations for conscience clause legislation' (2010) 8(2) *Indiana Health Law Review* at p 471) (<http://journals.iupui.edu/index.php/ihlr/article/view-File/2020/1894>, accessed 31-1-2014). This funding made the breakthrough in the organ-growing research field possible (Peter Aldhous 'Obama lifts research restrictions on embryonic stem cells' (2009) *New Scientist* (www.newscientist.com/article/dn16728-obama-lifts-research-restrictions-on-embryonic-stem-cells.html, accessed 31-1-2014).

This case was decided on appeal on 24 August 2012, where the appeal court for the district of the Colombia circuit decided that government funding may be used for this stem cell research because it involves the use of existing embryonic stem cell lines, and would not jeopardise or destroy any other embryonic stem cells or human life.

It was during President Bush's term in office that the Stem Cell Research Enhancement Act 2007 was passed. In 2009, President Obama removed the restriction on government funding for stem cell research. President Obama then signed the Omnibus Appropriations Act of 2009, which still contained the long-standing Dickey-Wicker provision of 17 years. Existing stem cell lines may be used for this type of research. This reasoning played a role in the court's decision in the *Sherley* case as well as the order by President Obama in 2009, which read that researchers may 'support and conduct responsible, scientifically worthy human stem cell research, including human ESC research, to the extent permitted by law'.

Further statistics by Kathleen Stassen Berger in *The Developing Person Through the Life Span* 7 ed (New York: Worth Publishers, 2007) show that about a third of zygotes do not implant after

conception. This effectively means that there are many zygotes that are lost, which could then be used for embryonic stem cell research and treatments. A 'cell line' is created when a non-fertilised human ovum is transplanted with a cell nucleus from a mature human cell and thus involves the process of changing the genetic composition of the cell. Before all the debates regarding this research, approximately 21 stem cell lines had been created with this method. These existing stem cell lines are used for any further research. Many articles were written explaining the research and funding issues, for example, James A Baker 'Stem Cell Research in the Courts: *Sherley v Sebelius*' (*Baker Institute Policy Report* - Published III Institute for Public Policy of Rice University (2012) January 50 at pp 1-2). In this article the comprehensive utilisation of existing stem cell lines are described.

The other crucial international case that recently decided whether this type of research can continue is *International Stem Cell Corporation v Comptroller General of Patent* (CH/2012/0488, 2013 EWHC 807 (Ch), 2013 WL 1563061), which was decided on 17 April 2013 in the Court of Justice of the European Union (CJEU). There was a similar question regarding two patent applications for stem cells used in research, and whether it contravenes the 'Biotech Directive' (para 3(d) of sched A2 implementing art 6(2)(c) of Directive 98/44/EC on the Legal Protection of Biotechnological Inventions). The point was made that no part of the human body at any stage may be patented as prescribed in para 6 of this directive. The court found in its conclusion of this matter that the stem cells used was not able to develop into human beings and that these cells should not be excluded from being patented (this refers only to the ESCs that is derived from existing stem cell lines). It was emphasised by the court that this decision will be limited to pluripotent stem cells only.

This battle of more than ten years has led the way to potentially saving millions of lives around the world. These ESCs can be used to grow different organs for transplantation. Although still an expensive procedure, patients will not have to wait for a suitable donor of an organ anymore. In South Africa, the legislature will have to amend the National Health Act and other legislation according to these international developments in order to enable South Africans to also benefit from these scientific breakthroughs and to obtain organs for transplantation.

Legislation in South Africa

Although breakthroughs have been achieved in the US, South Africa is still a long way from using these methods to save the lives of thousands of South Africans who desperately need organs for

transplantation. Not only do we not have the facilities or funding for this human stem cell research and organ-growing methods, South African legislation has a *lacunae* that does not provide for these types of methods to be used.

The Human Tissue Act 65 of 1983 was repealed by the new National Health Act 61 of 2003, which became operational in 2005. Chapters 8 and 9 became functional in 2012, which provides for regulations on blood, blood products and gametes from living and dead persons. The new provisions have widespread implications for doctors assisting patients or their relatives with tissue donations, organ transplants and donations of human bodies or tissues, revocations of donations, and the confidentiality of donations.

'South Africa is still a long way from using these methods to save the lives of thousands of South Africans who desperately need organs for transplantation ...'.

According to s 60 of the National Health Act, it is illegal for any money to be paid for organs to be grown, other than for the physician doing the transplant and transplant costs. Already in November 2003, this dilemma was described in the *South African Medical Journal* in an article by KS Satyapal and AA Heffeeje titled 'Commerce in organs - an ethical dilemma' (2003) 93 (11) *SAMJ* 844. Although this article focused on organ trading on the black market, the same argument can be used with regard to buying organs grown by the new technology. Advanced research methods in the health care system and development of technology have left the National Health Act and also some other South African statutes outdated and out of touch with current medical research.

The most important observation to be made about the National Health Act is the fact that it is outdated when considering the latest research, techniques and developments in the areas of organ growth and stem cell therapy. This effectively means that South Africans will not be able to gain advantage or access to these new developments, techniques, research and methods. For example, s 56 of the National Health Act prohibits the removal of placental stem cells. Manipulation of any genetic material or repro-

ductive cloning of a human being is also prohibited in s 57.

At a conference on 21 August 2012 themed 'Legal aspects relating to the application of Biotechnology', presented by Prof Pepper, director of the Institute for Cellular and Molecular Medicine at the University of Pretoria's Department of Immunology: Faculty of Health Sciences, the *lacunae* in the National Health Act, and the fact that the Act does not make provision for the complex changes and advancements of science and technology were discussed ('Does SA human tissue legislation in South Africa need to be self-regulated' (<http://www.unisa.ac.za/news/index.php/2012/08/does-sa-human-tissue-legislation-need-to-be-self-regulated/>, accessed 31-1-2014). Two totally unregulated areas in the National Health Act are cell therapy and transplantation in South Africa. The legislation in South Africa does not cater for the advances in research and organ-growing technologies, which now provide complete replacement organs being grown for humans.

Prof Pepper emphasised the legal and ethical grey area in the National Health Act and other legislation. Legislation is a very important component of the regulation of the use of the human body or body parts, new medical developments, and research on human subjects. Despite the implications of revolutionary scientific developments, the South African parliament struggled to create a principled framework for biomedicine and research. There are no binding norms, regulations, standards and guidelines from the Department of Health for operational requirements on a daily basis. These were left to professional bodies to cultivate their own norms and standards (Emeka P Amechi 'Regulating developments in embryonic stem cell research in Africa: A third person's perspective' (2007) 15 *African Journal of International Comparative Law* 85).

The future

The waiting time, costs and risks for donated organs can be reduced significantly or even eliminated if patients can grow new organs from their own genetic material. For this, stem cells are necessary. The road is still very long for South Africans to be able to obtain the benefit of this as legislation and regulations need to be adjusted to accommodate new developments in the medical field and keep stride with international trends.

Yda van Aartsen BHS (Wits) LLB (Unisa) is an advocate in Johannesburg.





Picture source: Gallo Images/Thinkstock

Franchise agreements

Does the Consumer Protection Act 68 of 2008 point in the right direction?

By
Ben
Whitelaw

When the Consumer Protection Act 68 of 2008 (CPA) was introduced in 2011 it was welcomed as an overdue step in the regulation of franchise agreements. The perception was that this legislation was going to stimulate the franchise agreement business model by levelling the playing field between franchisors and franchisees. However, almost two years later, the practical consequences of this Act are beginning to provide frustrating results for those wishing to enter into such agreements.

The primary reason for this frustration appears to be the overbearing nature of the legislation and the regulations thereunder on the parties wishing to enter into agreements on their own terms. With particular reference to the disclosure schedule requirement, the purpose of this article is to show that not only are these regulations impractical, but there also seems to be little theoretical justification for their inclusion under the CPA.

Theoretical background

Under the common law there used to be a perception that franchisors dictated the terms to agreements they entered into and that the franchisee had a choice of either agreeing to those terms or looking for opportunities elsewhere. This perceived lack of bargaining power seemed to mark franchise agreements as ideal candidates to be included under the CPA. Issues that arose in the consumer context before the introduction of the CPA were extensive, but primarily involved –

- the issue of bargaining power disparity between suppliers and consumers;
- the need to provide protection for consumers in everyday contracts that they enter into in good faith; and
- the public's lack of understanding of legalese and the terms and conditions that were written in such language, combined with the fact that legal services in South Africa were prohibitively expensive.

Clearly, in the context of consumers, it was imperative to introduce legislation that could prevent suppliers from taking advantage of these situations. However, it seems as though the legislature equated the perceived lack of bargaining power of franchisees with the consumers' inherently vulnerable position and included them under this protection. Not only this, but the protection of franchisees is in certain respects even more extensive.

If this was the reasoning behind the legislature's stance, it would appear flawed for a number of reasons. Although the protection of the franchisee was a necessary and beneficial step, the 'one-size-fits-all' approach that the legislature adopted has provided certain difficulties.

First, in everyday contracts a consumer does not have access to legal representation nor should they have to. Secondly, consumer contracts are generally not strategic business decisions and the economic cost of spending hours ensuring that the terms and conditions of the contract are not unfairly prejudicial, generally outweighs any benefit that might occur in doing so. More simply put, in a consumer context most contracts are reliant on a certain amount of good faith to remain economically efficient. The CPA therefore performs an important economic function in allowing consumers to enter into transactions freely on a *bona fide* basis knowing that they are protected from opportunistic suppliers.

The legislature has, however, correctly identified a number of situations where consumers should not be protected. They have undertaken this in two significant ways: First by excluding private sales between consumers and, secondly, by restricting the CPA's ambit to con-

sumers with an asset value or turnover of below R 2 million.

It would appear that the reason for the first limitation is that parties who enter into private sales with each other are assumed to be on an equal, or close to equal, bargaining level and therefore their freedom to dictate the terms of their arrangement should not be interfered with or dictated by legislation. Similarly, the second limitation seems to be equally well justified on the premise that once the consumer's asset value reaches a certain size, it has certain capabilities and it is adequately equipped to understand the implications of its actions and to contractually allocate the risk associated with any commercial arrangement.

These limitations do not, however, extend to franchise agreements. The logic behind this is unclear, but this stance could be attributed to the notion that the bargaining power in franchise agreements is intrinsically lopsided. At first glance, this position seems easily substantiated as franchisors are generally larger entities and seem to dictate the terms of the contractual arrangements they enter into but, on closer inspection, franchise agreements are vastly different from the example above. They are strategic business decisions in which parties take their time to evaluate the risks and rewards before deciding whether or not to enter into an agreement. Although franchise agreements are seen as generic and offered on a 'take it or leave it' basis, the franchisee still has the option of whether or not to enter into the contract.

Since franchise agreements are strategic business decisions they also differ from consumer agreements in that franchisees are more likely to fully understand the terms and conditions of the agreement that they are entering into. This is because franchisees generally have a lengthy period of time to examine the various terms and conditions of the franchise agreement or, alternatively, have the ability to access legal counsel because the cost associated with it may be considered financially justifiable for such a commercial arrangement.

Apart from a better understanding of the agreement, having more time or access to legal counsel also affects the bargaining power of the two parties. The fact that franchisees are not forced into making time-pressured decisions allows them to fully appraise the offer by the franchisor and search for alternative economic prospects. Thus, the CPA is not needed to promote economic efficiency as an economically rational consumer will choose to enter only into the economic opportunity that offers him or her the best risk adjusted returns. That may be in the franchise market or in any other business model or asset class. Furthermore, it casts doubt as to whether there truly is a significant disparity in

bargaining power between franchisors and franchisees.

Practical issues

Understandably, issues with the theoretical justification of franchise agreements' inclusion in the CPA have translated into practical difficulties. One such example is the disclosure schedule that franchisors are compelled to produce. Regulation 3 provides a detailed list of information that a franchisor must provide in order to be compliant with the CPA.

Importantly, it must be noted that these disclosures are not merely a default position or guideline but are compulsory as reg 3(1) clearly states:

'Every franchisor must provide a prospective franchisee with a disclosure document ...'

There are two primary issues with the legislature forcing franchisors to provide detailed disclosures. The first is the economic cost of compliance and the second is that franchisors are in practice not always able to supply the information required. Both of these concerns provide very real hurdles for parties to overcome in order to enter into franchise agreements that are compliant with the CPA.

The disclosure document requirement does not result in the levelling of the relative bargaining power between the parties, but rather makes entering into franchise agreements more expensive for all parties concerned. The financial cost, combined with the time delay and the opportunity cost associated providing such information, will inevitably be spread between the parties or, if the legislature is correct in its assumption of unequal bargaining power, be transferred to the franchisee.

This is not to say that there is no benefit derived from this additional expenditure. The fact that franchisors have to provide this disclosure schedule means that all parties have more information available to them before entering into the agreement. The availability of more information decreases the unknown variables and thus decreases the risk associated with entering into the agreement. However, a strong argument can be made that, if there is no great discrepancy in bargaining power, parties should be able to regulate the allocation of risk as they please.

Apart from increasing the economic cost of the transaction, the second major problem arising from the compulsory disclosure schedule is the fact that franchisors are not always in a position to provide this information. This is especially true for foreign franchisors who have struggled to meet reg 3(1)(d), which states there must be 'written projections in respect of levels of potential sales, income, gross or net profits or other finan-

cial projections for the franchised business or franchises of a similar nature with particulars of the assumptions upon which these representations are made'.

One can immediately see how this would be problematic for a foreign franchisor wishing to expand into the South African market. They may have an understanding of the prevailing market conditions and the track record of a franchise's performance in other countries, but it would take a significant amount of guesswork to be able to predict the potential sales, income or profits that the franchise could expect. However, to warrant as much would be excessively arduous. It is clear that in this situation it is not possible for the regulations to be complied with.

The current position and alternatives

These two issues currently pose a number of difficulties for parties wishing to enter into franchise agreements and there is uncertainty as to the options available to franchisees and franchisors to overcome them. Simply put, are these requirements compulsory or, alternatively, can they be waived?

On the reading of reg 3 with s 51 of the CPA it would seem that it is not possible to waive these requirements. Regulation 3 clearly states that the disclosure schedule must provide certain disclosures, while s 51 prohibits suppliers from contracting out of their obligations and the rights of the consumer created under the CPA.

Provided the legislature is correct in its assumption of the existence of unequal bargaining power between franchisors and franchisees, this position is congruent with the underlying theoretical justification of including franchise agreements in the CPA. If franchisees were able to waive their rights to certain required information, the reason for the inclusion of franchise agreements under the CPA would be defeated, because the franchisors would merely use their superior bar-

gaining power to force franchisees to waive their rights to any information that they did not want to supply. Thus, it seems as though it must be accepted that these disclosures may not be waived.

This accentuates the difficulties faced by foreign franchisors. These franchisors are unable to supply the requisite information due to no fault of their own, but at the same time they are unable to get the potential franchisee to waive its rights to the undisclosed information. The position in our law currently seems to be that foreign franchisors have to either provide forecasts or predictions reliant on non-existent or unreliable information, or choose not to enter the South African market. This is hardly a wise position for a country attempting to promote the franchise business model and encourage foreign investment.

Conclusion

Theoretically franchise arrangements differ in fundamental ways to the types of transactions that the CPA envisages in a consumer context and it is these divergences that give rise to a number of difficulties when parties attempt to enter into franchise agreements in compliance with the CPA. The inclusion of franchise agreements in the CPA is a well-intentioned attempt by the legislature to promote the franchise business model in a manner that introduces fairness and equity between the parties. However, the effect of this inclusion has created a commercial reality of impracticalities and uncertainty. In conclusion, the intention of this article is to expose certain areas of regulation under the CPA that have provided practical difficulties and to highlight the need to re-evaluate the merits of certain regulations from a more practical and commercially efficient manner.

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Facilitative mediation

Seeing more than the tip of the iceberg

By
Lieselotte
Badenhorst

The practice of 'legal' mediation has – for many years now – been widely accepted in the United Kingdom (UK), on the European continent, the United States (US) and Australia. But court-annexed mediation is a new concept in South Africa. 'The Summary of Mediation Rules' was released by the Department of Justice on 3 May 2013 (www.justice.gov.za/legislation/invitations/invite-mediation.html, accessed 7-2-2014) (www.lssa.org.za/index.php?q=con,244, Court-annexed me-

diation draft rules, accessed 7-2-2014). According to this summary, the following people can be mediators –

- accredited attorneys;
- advocates;
- traditional leaders;
- members of existing mediation forums; and
- any fit and proper person who has undergone appropriate prescribed training.

An attorney's response to mediation may be: What can a mediator do to help this case that I, as an experienced negotiator, cannot do? In this instance, it can

be suggested that the outcome of negotiation or bargaining results in parties realising that some form of compromise has to be made. It often leaves people dissatisfied, because each party is left wondering whether they might have achieved more had they pursued their claim further. F Strasser and P Randolph *Mediation. A Psychological Insight into Conflict Resolution* (London: Continuum, 2004) surmise: 'Where negotiation has failed or left parties to the dispute dissatisfied, because of the perceived "sacrifices" they had to make, mediation can overcome this, since during mediation parties are truly "heard".'

To prevent court-annexed mediation becoming just another 'fad' to free courts from litigation, I would suggest that, in South Africa, we should take the route of facilitative mediation rather than evaluative mediation.

Facilitative and evaluative mediation follow two different pathways. During evaluative mediation, the mediator assumes that participants want or need the mediator to provide direction as to the appropriate ground for settlement, based on law, industry practices or technology. The mediator should also be qualified to give direction by virtue of experience, training and objectivity (L Riskin 'Mediator Orientations, Strategies and Techniques, Alternatives' (1994) 7 *Harvard Negotiation Law Review* at 23-4).

In contrast to evaluative mediation, facilitative mediation does not necessarily presuppose any knowledge of the technical aspects of the dispute or provide direction. It goes deeper than evaluative mediation. According to S Hawker, C Soanes and A Spooner *Oxford Dictionary Thesaurus & Wordpower Guide* (Oxford: Oxford University Press 2001) 'facilitating' means 'to make easier', but facilitation can also be used as a mechanism to uncover underlying issues. Furthermore, facilitative mediation enhances the likelihood for the mediator to remain 'neutral'.

Strasser and Randolph (*op cit*) mention that 'once the mediator embarks on evaluating a claim, he/she surrenders his/her neutrality, and this can hamper the continuity to act impartial and without prejudice'. While evaluative mediation relies on the ability of the mediator to make the central decision based on 'sound judgement', Riskin (*op cit*) asserts 'that facilitative mediation is based on the belief that the opposing parties to the process are intelligent and insightful enough to understand their situations and problems better than their mediator or their attorney'.

Although some form of negotiation takes place during the process of facilitative mediation, this form can be described as 'principle' negotiation rather

than 'positional or strategic' negotiation employed by an attorney. The opinions, belief systems and attitudes of the opposing parties are explored during facilitative mediation and underlying issues are brought to the surface, before any principle negotiation takes place.

This can be illustrated using the iceberg metaphor. Only a small percentage of an iceberg is visible above the water level, while the largest and most powerful part remains unseen below the surface. Our personalities and behaviours can be linked to an iceberg. What we see and hear about an individual is only the tip of the iceberg, while underneath, and not visible and often unconscious to ourselves, rest hidden motives, needs, wants, concerns and fears. A psychologically trained mediator, knowing about these hidden needs, wants, fears and concerns, has the ability to communicate 'under the iceberg' by using facilitative language. Using hard facts to resolve a dispute will be like sailing the Titanic into the iceberg; if you do not anticipate what is underneath the 'water', your efforts to mediate may sink with catastrophic results.

According to Strasser and Randolph (*op cit*), the facilitative form of mediation is based on the humanistic-existential model of the psychologist, Carl Rogers. The model originates in phenomenology and therefore suggests that all of us live in our own subjective world, which can only be known in any complete sense to ourselves.

The self is the central aspect in this paradigm, and seeks protection at all times from 'injury', according to Rogers' theory. Hence, we protect the self by way of how we behave. However, our behaviours are more often than not deeply rooted at the unconscious level. The mediator should therefore act as a catalyst to allow the unconscious to come to the surface.

Two examples of behaviours that serve to protect the self are: During conflict, an individual who continually interprets his or her opponent's behaviour as conspiratorial or politically inspired might have a tendency to project his or her own desire to cheat in some way, by unjustifiably accusing the opponent of cheating or undermining the process.

A person who harbours deep antisocial feelings towards people may develop pleasant mannerisms and good social skills in dealing with opponents during a dispute as a means of keeping his or her feelings in check. If an occasion arises when the mechanism fails to function properly, opponents will be shocked by the individual's outburst of hostility.

Furthermore, individuals strive to maximise rewards and try to minimise sanctions or penalties in their external environment, and hence develop favour-

able attitudes towards objects that satisfy their needs, and unfavourable attitudes towards objects that thwart their needs. These favourable or unfavourable attitudes may be aroused by internal and external threats, by frustrating experiences, or by a build-up of pressures, and are displayed in our behaviours, as mentioned in the above examples (E McKenna *Business Psychology and Organisational Behaviour: A Student's Handbook* 3 ed (Hove: Psychology Press 2000)).

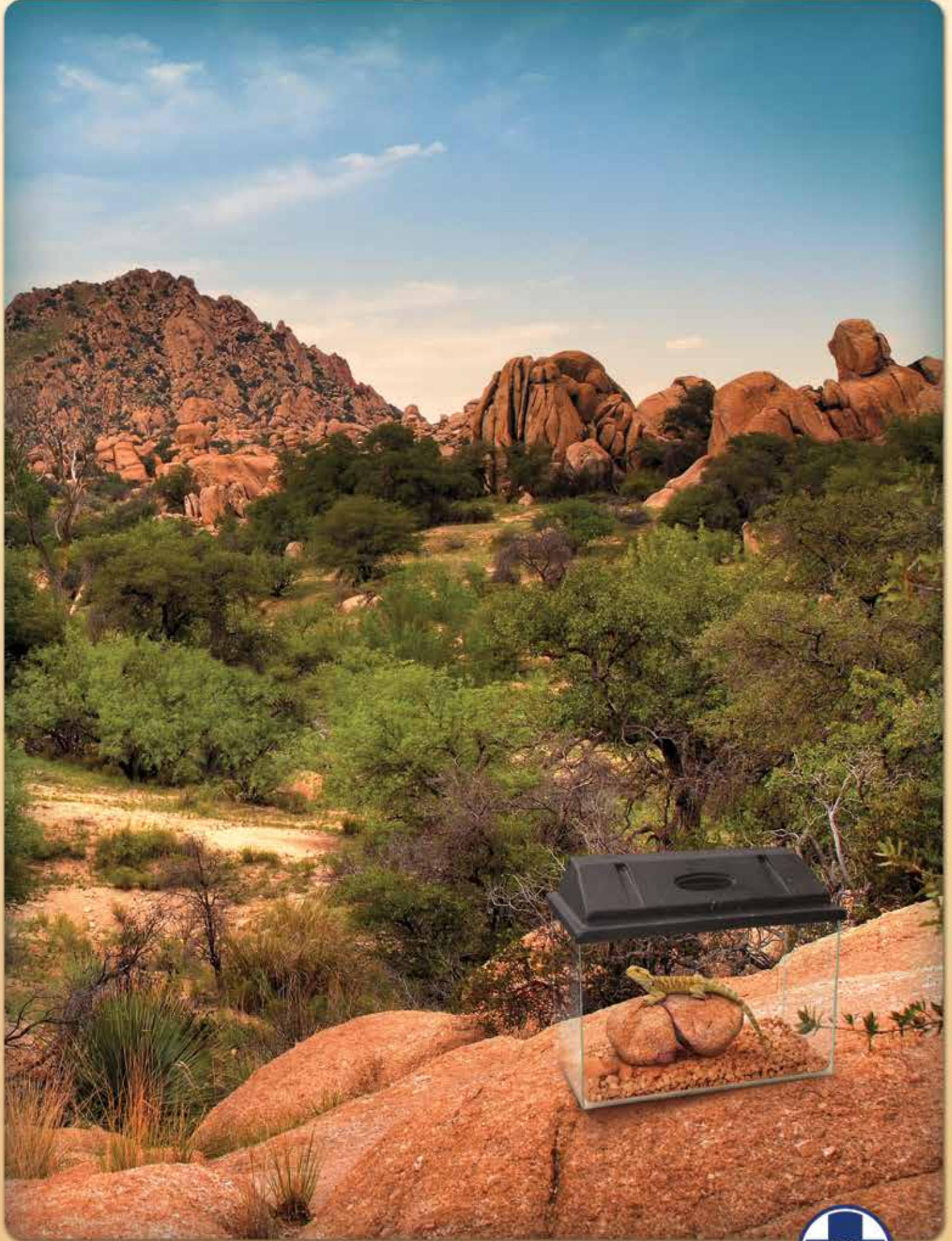
Since our attitudes help us to adopt a stable view of the world that we live in, which contributes to the reduction of uncertainty and discomfort, formed attitudes are difficult to change (Strasser and Randolph (*op cit*)). Nonetheless, the psychologically trained mediator, who employs the facilitative method, has an advantage over the evaluative mediator in changing attitudes that may hamper the mediation process.

Facilitative mediation helps individuals to become cognisant of the root causes of their misdirected attitudes and behaviours. Because facilitative mediation focuses on the individuals as human beings rather than on the facts of the case, individuals feel empowered and a shift in attitude and behaviour is based on new insights gained through the process. This moves participants from conflict to a 'working alliance', and allows the mediator to stay neutral and without prejudice.

Facilitative mediation is non-interventionist. It only assists parties to reach a measure of accord, based on self discovery and insight. It does not presuppose knowledge of any specific law, industry practices or technology. Evaluative mediation, in contrast, is more directive and interventionist. The evaluative mediator provides the parties with an evaluation of the respective merits and demerits, and strengths and weaknesses of the parties' cases, but does not uncover the underlying issues of the conflict. Strasser and Randolph (*op cit*) point out that evaluative mediation 'discourages self-evaluation, prevents self-determination, promotes positioning, results in polarisation and encourages parties to focus on their rights and liabilities rather than interests and needs'.

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THE LAW REPORTS



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January 2014 (1) *The South African Law Reports* (pp 1 – 321);
[2013] 4 *The All South African Law Reports* December no 1 (pp 509 – 638);
and no 2 (pp 639 – 732)

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

ABBREVIATIONS

EC: Electoral Court
ECM: Eastern Cape High Court, Mthatha
FB: Free State High Court, Bloemfontein
GNP: Gauteng North High Court, Pretoria
GSJ: Gauteng South High Court, Johannesburg
KZD: KwaZulu-Natal High Court, Durban
KZP: KwaZulu-Natal High Court, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape High Court, Cape Town

Attorneys

Payment from trust account: In *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another* 2014 (1) SA 46 (SCA) the first respondent (the attorney) erroneously transferred proceeds from a sale of property to Capricorn Beach Home Owners Association (the appellant) instead of to Capricorn Beach Joint Venture (the client). The appellant did not dispute that the payment was made erroneously, but refused to return the funds. The appellant claimed set-off of the amount transferred to its account against certain arrear moneys owed by the client to the appellant.

It was, *inter alia*, contended that, in transferring the

proceeds, the attorney had acted as an agent of its client and that the appellant was therefore entitled to set the amount of the debt off against the payment transferred in error.

Mthiyane AP rejected the appellant's claim to set-off. Set-off operates only where two persons reciprocally owed each other something in their own right. In the present matter the appellant and the attorney were not mutually indebted to each other. Further, in terms of decided authority, an attorney drawing on his or her trust account exercised his or her right to dispose of the amounts standing to the credit of that account, and did so as principal and not in a representative capacity.

Section 78(4) of the Attorneys Act 53 of 1979 obliges the attorney to keep proper accounting records, containing particulars and information of any money received, held or paid by him or her for or on account of any person. In this case the attorney was therefore under an obligation to account to his client concerning the proceeds of the sale, namely R 735 859, received from the purchaser in respect of the sale of the property.

This, therefore, put paid to the submission that the attorney was acting as an agent

when, through his bookkeeper, he made the erroneous transfer of money to the appellant.

The appellant thus failed to show any justification for the retention of the money paid into its account by the attorney's bookkeeper, and the attorney's claim for the recovery of the erroneously transferred money, based on the *condictio indebiti*, was upheld with costs.

Champerty

Costs order against funder: In *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town, and Another, and Four Related Applications* 2014 (1) SA 141 (WCC) the facts were that one Marais was a losing party in arbitration proceedings involving the ownership of land. He concluded an agreement with his attorney (Naidoo) according to which Naidoo would fund review or appeal proceedings in return for part ownership of the property in the event of success in the envisaged litigation. Marais ceded his interest in the litigation to Naidoo so that those proceedings could be pursued by Naidoo in Marais' name. Naidoo was joined as a party to the resulting proceedings, and the issue was whether she would, as funder of the proceedings,

be liable for an adverse costs order.

In deciding the matter Louw J referred to foreign authorities, which held that the court's discretion in respect of costs would not be exercised against 'pure funders' with no personal interest in the litigation. A 'pure funder' is someone who –

- does not stand to benefit from it;
- is not funding it as a matter of business; and
- does not seek to control its course.

In such cases priority is usually given to the public interest in the funded party getting access to justice over that of the unsuccessful unfunded party recovering its costs. But if the non-party not merely funds the proceedings but also substantially controls or benefits from them, justice requires that, if the proceedings fail, the funder must pay the successful party's costs.

The court was of the opinion that the position in our law should be that a non-party funder of litigation such as Naidoo should be potentially liable, at the discretion of the court, for an adverse costs order made against the nominal party.

In reaching its decision the court took heed of the following considerations. First, Naidoo was the 'real party'

to the litigation. She was not merely a funder but had acquired a personal interest in the litigation, was in full control of it, and stood to acquire a share in the immovable property if the nominal party (Marais) was ultimately successful. Secondly, since Naidoo was not a mere commercial funder of litigation, the potential chilling effect of an adverse costs order on commercial third-party funding would not be a factor. Thirdly, in taking over the litigation Naidoo was associating herself with and funding the promotion and defence of conduct, which she knew to be fraudulent and *mala fide*.

Finally, because Naidoo took over the funding of the litigation in total, it was unnecessary for the court to consider whether a funder's exposure to liability for an adverse costs order in respect of litigation funded by him or her should be limited to the extent of his or her funding of (investment in) the litigation.

The court accordingly held that Naidoo should be held jointly and severally liable for any adverse costs order granted against Marais.

Company law

Business rescue plan: In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP) the applicant applied to set aside a board of directors' resolution to commence business rescue proceedings. This raised an anomaly between ss 130(1)(a) and 130(5)(a) of the Companies Act 71 of 2008. Under the former an affected person may apply to set aside a resolution on three grounds; under the latter a court may set aside a resolution on those three grounds, as well as a fourth ground, namely that it is just and equitable to do so.

In identifying the just-and-equitable ground as a fourth ground, Gorven J reasoned that, despite the need to interpret a statute using the plain words, the distinction between s 130(1)(a) and s 130(5)(a) clearly arises from a drafting error. In this regard it was held in *Hatch v Koopoomal* 1936 AD 190 that '[a court is]

entitled ... to interpret [a legislative provision] as to remove [any] absurdity or repugnance and give effect to the intention of the Legislature.' The only sensible meaning that avoids the absurdity that would otherwise result is to construe the just-and-equitable basis as an additional ground to the three listed in s 130(1)(a). This can therefore be relied on as a fourth ground or cause of action for relief in an application brought under that section.

The court accordingly held that s 130(1)(a) has to be read to include the just-and-equitable ground.

Applied to the facts of the present case as to whether it was just and equitable to set aside the resolution, the court pointed out that this entailed evaluating all the evidence, including the business rescue plan. This, in turn, raised further questions.

The first was the consequence of not publishing the plan in the allotted time set by s 150(5). The court held that this terminated the business rescue proceedings. The second question was how creditors could extend the time. The court held that a meeting had to be convened and a vote taken to do so.

A third question concerned the nature of the 'binding offer' that an affected person could make for the voting interests of opponents of the plan. This was provided for in s 153(1)(b)(ii). The court held that a 'binding offer' was one that could not be withdrawn by the offeror and that could be accepted or rejected by an opponent of the plan.

The court set aside the purported resolution and granted a provisional liquidation order.

Winding-up: The decision in *Knipe and Others v Kamelhoeck (Pty) Ltd and Another* 2014 (1) SA 52 (FB) concerned an application for the final winding-up of two farming companies.

The application was originally brought by Mrs Knipe, who was at that stage the companies' sole director, and her daughter Carol. Three of Carol's four siblings (the trio) were opposed to the granting of final relief and filed

answering affidavits to this effect. A fifth child, who was fighting his own battle, applied to intervene in the present proceedings.

All five of Mrs Knipe's children were shareholders in the companies, but the division of shareholding was in dispute. Mrs Knipe was eventually removed as director and replaced by the trio. The result was that the matter was approached on the basis that only Carol had *locus standi* in the present proceedings.

The present litigation was the result of a family feud over the farms and consequently also over control of the companies. In short, the feud was between Mrs Knipe and Carol against the trio. It appeared from the evidence that the trio had made open tenders on behalf of the companies for the purchase of Carol's shares.

The court was asked to decide whether the companies, which were solvent, should nevertheless be wound up under the just-and-equitable provision of s 81(1)(d) of the Companies Act 71 of 2008 (the 2008 Act), or whether the option of relief under the oppressive-conduct provisions in s 163 of the 2008 Act would be preferable.

Daffue J held that the following legal principles were relevant: A solvent company would be wound up on just-and-equitable grounds under s 81(1)(d) for the same reasons as an insolvent company under s 344(h) of the Companies Act 91 of 1973 (the 1973 Act). These reasons included deadlock in the management of the company's affairs, and oppression, both of which were relevant in the *Knipe* case.

The court referred in passing to the fact that, because the present companies were solvent, their winding-up had to be considered in accordance with the provisions of s 81(1)(d) of the 2008 Act, and not in accordance with s 344(h) of the 1973 Act. It further pointed out that the approach in considering whether it is just and equitable to wind up a company in terms of the 2008 Act is in essence not any different to what it is (or was) in accord-

ance with the 1973 Act, which still applies to the winding-up of companies that are not solvent. The legal basis for winding-up remains the same. In this regard it referred with approval to *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) (at paras 5 - 12). The only possible change in attitude is that there is a greater emphasis in the 2008 Act on the rescuing of companies, than in terms of the 1973 Act.

The companies in the present case, being domestic companies (or quasi-partnerships), would be liquidated if there were a complete breakdown of mutual trust and confidence between members.

Although an applicant relying on the just-and-equitable ground for the winding-up of a company had to come to court with clean hands, this requirement had to be weighed against the rights of minority members alleging oppressive or prejudicial conduct by the majority.

The court's powers of protection under s 163 of the 2008 Act were wide, but any alleged unfairness to minority members would vanish if they were offered a fair price for their shares. An otherwise acceptable offer could be refused if it were not genuine.

What the court ultimately had to decide was whether Carol had proved that it was just and equitable that the companies be finally wound up under s 81(1)(d) of the Act. The following factors, *inter alia*, showed that she had:

- She was not, as applicant, the sole cause of the breakdown in trust between the members of the companies.
- The breakdown was clearly irretrievable.
- It was impossible to make a finding in respect of a fair price for her shares.
- The offer made for them by the trio was not genuine.

The court accordingly ordered that the two companies be wound up.

Winding-up: In *Pinfold and Others v Edge to Edge Global Investments Ltd* 2014 (1) SA 206 (KZD) the shareholders

of a company applied for the winding-up of the company. They alleged that the directors of the company acted fraudulently, illegally and misapplied the assets of the company, and failed to account to the shareholders.

Section 81(1)(e) of the Companies Act 71 of 2008 (the Act) provides that a court may order a solvent company to be wound up if:

'a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that –

(i) The directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or

(ii) The company's assets are being misapplied or wasted.'

Steyn J held that s 81(1)(e) of the Act gives a court a broad discretion to grant leave to a shareholder to apply for the winding-up of a solvent company. An applicant bears the onus of placing sufficient evidence before the court of the jurisdictional facts listed in s 81(1)(e) of the Act, and the standard of proof required is *prima facie* proof.

After the court considered all the allegations by the shareholders and the responses of the directors of the company, it was satisfied that in a number of instances misrepresentations were made to the shareholders and that there was a real likelihood that the investors (ie, shareholders) relied on these misrepresentations when they invested in the company.

If the circumstances of this case are taken into account, it is likely that these misrepresentations could have caused prejudice to those acting on them. The court accordingly held that the applicants had shown that they were entitled to an order in terms of s 81(1)(e) of the Act.

Credit agreements

Right of access to credit records: In *Nkume v Transunion Credit Bureau (Pty) Ltd and Another* 2014 (1) SA 134 (ECM) the facts were that the applicant entered into an

agreement with the second respondent in terms of which the second respondent would supply goods to the applicant, which would be paid for by the applicant. Some goods were then supplied by the second respondent to the applicant in terms of the agreement. The second respondent later instituted legal proceedings against the applicant for the recovery of moneys due and owing in respect of goods supplied by it to the applicant.

A default judgment against the applicant and in favour of the second respondent was granted. It is this judgment by default that was later submitted to the first respondent who recorded it in its records. The applicant got to know of this default judgment against him when he applied for a credit facility with the African Bank Ltd.

The applicant later successfully applied for the rescission of the default judgment. After the default judgment was rescinded the applicant communicated with the first respondent (the credit bureau) to expunge the information about the default judgment from its records, but the first respondent did not do so timeously. As a result the applicant had to launch this application.

After the present application was lodged but before it was heard, the credit bureau expunged the information about the default judgment from its records. Although the court's decision primarily turned on an order for costs of the application, the court made an instructive comment regarding the correct interpretation of s 72 of the National Credit Act 34 of 2005 (the NCA).

In this regard Dukada J held that s 72 gives to consumers the right to access and challenge credit records and information. In terms of reg 19 of the regulations promulgated in terms of the NCA, the credit provider must give the consumer concerned notice of its intention to submit adverse information concerning the consumer to the credit bureau. The use of the word 'must' in reg 19(4)

makes that requirement peremptory. Where the credit provider flouts such peremptory legal provision, its conduct is unlawful.

This view is reinforced by court decisions that the NCA was consciously constructed and designed for the protection of consumers. The court correctly pointed out that if the credit provider does not provide the consumer with this information in terms of reg 19(4), how can the consumer challenge the adverse credit information prior to its submission to the credit bureau? This interpretation is in line with earlier case law dealing with the same aspect.

The respondents were accordingly ordered to pay the costs of the application jointly and severally on a party-and-party scale.

Elections

Duties of Electoral Commission: The decision in *Johnson and Others v Electoral Commission and Others* 2014 (1) SA 71 (EC) concerned the recent by-election in the Tlokwe Municipality that enjoyed a high level of media attention. The matter was heard in the EC. The crisp decision of the court was that the Electoral Commission not only has a duty to ensure that the applicable statutory requirements are met, but also to assist prospective applicants to ensure that they comply with these requirements.

The facts were as follows: The applicants were prospective independent candidates in the by-election. They sought an order postponing the election on the ground that the Electoral Commission had erroneously rejected their nominations. It appeared that at least some of the candidates had visited an Electoral Commission official named Makodi (the second respondent) at the Electoral Commission's offices so that he could check that their nominations met statutory requirements.

As it turned out, they did not, but Makodi never told the candidates, or did so only when it was already too late to correct the error. The ap-

plicants had failed to submit a list of the names of 50 supporting voters registered to vote in their wards, as required by s 17 of the Local Government: Municipal Electoral Act 27 of 2000. The result of this was that the applicants' nominations were rejected.

Wepener J (Mthiyane AP and Moshidi J concurring) held that the Electoral Commission had a constitutional duty to facilitate participation in elections, not only by voters, but also by candidates. It therefore had a duty not merely to check the validity of nomination documents after the fact, but also to assist prospective candidates to ensure that they would not be disqualified from taking part in the election on purely technical grounds.

Had Makodi made good on his undertaking to check the documents and advised the applicants timeously of the non-compliance, as he was duty-bound to do, their nominations would not have been rejected. The candidates were severely prejudiced by Makodi's failure to properly assist them, and their disqualification would compromise the free and fair character of the election.

The application for the postponement of the election was accordingly granted and the second to sixth applicants were allowed to register as candidates in their respective wards in the postponed by-election.

International law

Private international law: The decision in *Antares International Ltd and Another v Louw Coetzee & Malan Inc and Another* 2014 (1) SA 172 (WCC) concerned a company that was incorporated in Guernsey, but which was later deregistered and dissolved. In its dissolved state the company applied to the High Court for an order interdicting a firm of attorneys from removing a pair of helicopters from certain premises. The helicopters had been the company's property immediately before its deregis-

tration. In issue was whether the dissolved company could litigate at all; and secondly, whether it had a right in the helicopters that could justify granting the interdict.

As to the first question, the court answered in the affirmative. It pointed out there is authority that a South African company deregistered under s 73 of the Companies Act 61 of 1973 ceased to exist for all purposes and thus could not obtain or be subject to any court order. However, it further pointed out that in the present case it dealt with a Guernsey company and that the law governing the company's incorporation (ie, Guernsey law) was decisive of the issue.

Under Guernsey law a dissolved company could institute interlocutory proceedings in order to protect its interests in a pending legal proceeding, pending its restoration to the register.

The second issue at stake was whether the company had a right justifying the grant of an interdict. This raised further questions. The first was which legal system ought to be used to decide the ownership of the helicopters.

The court held that the matter concerned the devolution of the assets of a dissolved company, which was an incident of the law governing its incorporation and dissolution. Under private international law, matters of incorporation and dissolution were governed by the company's *lex domicilii*, and that ought to apply to the devolution of its assets.

This approach is also in line with recent Australian case law where it was held that relevant New Zealand company legislation should be applied in deciding whether a claim that a deregistered New Zealand company held against an Australian company had been extinguished, or whether it vested in the Crown (as was found to be the case) by virtue of the New Zealand statute.

The *lex domicilii* here was the law of Guernsey under which the property and rights of a company vested as *bona vacantia* in the English Crown on the company's deregis-

tration and dissolution. Accordingly the Crown was the owner of the helicopters, at least until the company was restored to the register and re-vested with its assets.

This raised the question whether a party like the company, which could not demonstrate an extant right in property, could nonetheless apply for an interdict to preserve it. The court held that such a party could apply for an interdict, if it could make out a *prima facie* case that it would receive relief in the future from which a right in the property would flow.

In the present case the company failed to make out a *prima facie* case that it would receive such relief and the court accordingly dismissed the application. The parties were ordered to each pay its own costs.

Lease

Effect of cession of mortgage bond: The facts in *Pangbourne Properties Ltd and Another v Your Life (Pty) Ltd and Another* [2013] 4 All SA 719 (GSJ) were that the first plaintiff (the lessor) and first defendant (the lessee) entered into a lease agreement. The second defendant (the surety), signed a suretyship for the obligations of the lessee to the lessor.

In terms of a mortgage bond passed over the leased premises prior to the conclusion of the lease agreement, the lessor had ceded to the bank all its rights arising out of the lease agreement.

When the lessee failed to pay the agreed rental, the lessor elected to cancel the agreement. The lessee did not vacate the premises until about four months later. It became obliged to pay the lessor arrear rental and damages, including for the period of holding over and the unexpired period of the lease. The lessor (and the subsequent owner of the property) sued the lessee and the surety for payment.

The lessee had become insolvent and the action proceeded only against the surety for the lessee's obligations to the lessor. The salient issue before the court was whether

or not both the lessor and the new owner of the property had a cause of action against the lessee and surety and whether those causes of action had arisen prior to institution of action.

Lamont J held that on cancellation of the lease a single claim arises for the arrear rental and damages. The lessor is required to sue for all its damages in one cause of action. Thus, on the breach of the lease by the lessee and the cancellation thereof, the lessor became entitled to claim the arrear rental and damages.

The consequence of the cession from the lessor to the bank was that the right to sue did not vest in the lessor at the time the action was instituted by the lessor. The bond was cancelled when the property was transferred to the new owner of the property. At that moment, the rights ceded to the bank became vested in the lessor and remained with the lessor until transfer of the property to the new owner. The new owner also ceded its rights to the bank as set out above. The consequence of that cession was that the rights to sue did not vest in the new owner of the property at the time of its joinder to the action.

The court identified which entity was the lessee's landlord at each particular time in respect of the claim due by the lessee to its landlord. It held that after the lessor had sold the property to the new owner, it (the original owner and lessor) had no rights to enforce against the lessee.

The court accordingly held that the new owner was entitled to recover the debt from the surety.

Practice directives

KZN High Court: Readers practising law in KwaZulu-Natal must take cognisance of three new practice directives that were issued by the KwaZulu-Natal Division of the High Court of South Africa.

The first of these directives provides that where a petition to the Judge President for leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977 has

been refused, the unsuccessful petitioner(s) desiring to appeal against such refusal to the SCA is required to obtain leave to do so. The application for leave to appeal must be delivered to the registrar within 21 days after refusal of the petition (see Practice Directive 33 [2013] 4 All SA 730 (KZD)).

The second practice directive deals with the preparation of court papers and provides, *inter alia*, that in all matters the document(s) must be printed on one side of white A4-sized paper with a weight not less than 80g/m². It must further be printed using a uniform regular 12-point font (ie, not in italics) in Arial or Times Roman or Times New Roman in double line-spacing.

Documents must be appropriately bound by staple or other suitable device (paper clips are not suitable devices) at the top left-hand corner (see Practice Directive 34 [2013] 4 All SA 731 (KZD)).

The third practice directive confirms that the Superior Courts Act 10 of 2013 was promulgated on 12 August 2013. It came into operation on 23 August 2012. In terms of this statute a single High Court has been constituted for the entire country, thereby necessitating a change to all court documents. For example, in Pietermaritzburg all court processes, etcetera, must be headed: 'In the High Court of South Africa. KwaZulu-Natal Division, Pietermaritzburg' (see Practice Directive 35 [2013] 4 All SA 732 (KZD)).

Sale of land

Voetstoots clause: In *Havise v Heydricks and Another* 2014 (1) SA 235 (KZP) the appellant (the seller) sold certain immovable property to the respondents (the buyers). After transfer of the property the buyers discovered that there was an illegal structure, a garage, on the property for which no plans had been submitted and for which no approval had been given. The buyers instituted action in a magistrates' court for payment of a sum -

- equal to the cost of demolishing the garage and replac-

ing it with a legal structure; or

- the diminished value of the property.

The seller relied on a *voetstoots* clause in the deed of sale. During the ensuing trial the seller testified that –

- when she bought the property there was already a carport on it;
- the property had at all times thereafter been occupied by her mother; and
- her mother and brother had, without her knowledge or consent, filled in the walls of the carport to change it into a garage.

The magistrate's court held that the seller's failure to tell the buyers that the garage was an illegal structure constituted non-disclosure tantamount to a misrepresentation inducing purchase and that she (ie, the seller) was barred from relying on the *voetstoots* clause.

On appeal Stretch AJ (Chili AJ concurring) held that the absence of statutory authorisation for the garage constituted a latent defect to which the *voetstoots* clause applied.

The purpose of a *voetstoots* clause was to exempt the seller from liability for defects of which he or she was unaware, and, where the seller's statutory non-compliance concerned latent defects in the property, as was the case in the present matter, the seller ought to be entitled to invoke the exemption.

There was nothing before the court to suggest that the seller was aware that building regulations had not been complied with. Although the court *a quo* had erred in not addressing the issue whether the non-disclosure was fraudulent or otherwise, it would, had it addressed this question, have been constrained to conclude that fraud was not proved.

The seller was accordingly protected by the *voetstoots* clause and the appeal was upheld with costs.

Trusts

Duties of outsiders and trustees when dealing with trusts: In *Investec Bank Ltd v Adriaanse and Others NNO* 2014 (1) SA 84 (GNP) the court was asked to consider

the duties of third parties when dealing with a trust.

The facts were as follows. The plaintiff (Investec) issued summons against the defendants (the trustees) in their capacity as trustees of the Kudu Trust in which it sought payment of the sum of R 13 111 286,23 plus interest. The action was based on a suretyship executed by Kudu Trust (the trust) in favour of Investec, in respect of the indebtedness of Scarlet Ibis Investments to Investec, which arose out of a loan granted by Investec to Scarlet Ibis Investments.

The trustees, in turn, argued that the trust was not competent to execute the suretyship, as it fell outside the powers of the trust to do so. Further, even if it did fall within the powers of the trust to execute the suretyship, it was not executed with the consent and the authority of all the trustees and, on account of that, the suretyship was invalid and unenforceable.

For purposes of the present discussion, I will focus on only one of the issues in dispute, namely to what extent an outsider (such as Investec) that deals with a trust, has a duty to act to the advantage of the trust and the beneficiaries. In this regard the trustees argued that Investec was duty-bound to interrogate the transaction with greater diligence to satisfy itself that it would enure for the benefit of the trust and beneficiaries.

Kollapen J held that, in determining the scope of the role that is expected from an outsider in dealing with a trust, one must – on the one hand – ensure that outsiders by their actions are seen to be observing the provisions of the trust deed and that they should not act in flagrant violation of the trust deed. In this regard the court referred to the decision in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) in which it was cautioned that 'this case should consequently serve as a warning to everyone who deals with a trust to be careful' (at para 24).

Conversely, so the court in the *Adriaanse* case reasoned,

it is trite that trustees have the primary responsibility to act in accordance with the dictates of the trust deed and one should guard against the unintended consequence of developing a quantitatively higher standard of diligence and care on the part of outsiders dealing with a trust, than on the part of the trustees themselves. While outsiders have an interest in self-protection, the primary responsibility for compliance with formalities, and for ensuring that contracts lie within the authority conferred by the trust deed, lies with the trustees. It is thus the primary responsibility of the trust to satisfy itself that a contract that it intends concluding is for the benefit of the trust and its beneficiaries.

The trustees were accordingly ordered to pay Investec

the sum of R 13 111 286,23 jointly and severally with the principal debtor, plus interest and costs on the scale as between attorney and client.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administrative law, civil procedure, commissions of inquiry, conveyancing, costs, discovery and inspection, engineering and construction, insolvency, practice, sale of land and trade unions.



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REPUBLIC OF SOUTH AFRICA

MOVING FROM RULES BASED TO RISK-BASED COMPLIANCE

The Financial Intelligence Centre (the FIC) has continuously reviewed the Financial Intelligence Centre Act No. 38 of 2001, as amended to simplify compliance and ensure alignment with the revised Financial Action Task Force (FATF) standards, with which all member countries must comply. Expected reforms will move South Africa towards a more risk-based approach (RBA) to compliance, reducing identification and verification requirements, and allowing reporting institutions greater leeway in designing their own methods to ensure compliance. These steps should, in turn, reduce the administrative burden for low-risk clients and promote financial inclusion.

What is a RBA?

Accountable institutions, such as financial services providers, attorneys, estate agents etc. are required to risk rate their clients and to implement systems and controls that are commensurate with the specific risks to mitigate the risk of money laundering and terror financing (ML/TF) facing them. This will allow resources to be allocated in the most efficient ways. The principle is that resources should be directed in accordance with priorities so that the greatest risks receive the highest attention. Adopting a RBA implies the adoption of a risk management process for dealing with ML/TF which encompasses recognizing the existence of the risk(s), undertaking an assessment of the risk(s) and developing strategies to manage and mitigate the identified risks. As money laundering risks increase, stronger controls are necessary such as:

- Senior management's approval before establishing a business relationship with the client;
- Identify and verify the client's identity using independent source documents, data or information. Establishing accounts in anonymous or obvious fictitious names should be prohibited;
- Identify the beneficial owner and take reasonable steps to verify the identity of the beneficial owner. This includes the ownership and control structure of legal entities;
- Understand, and where appropriate, obtain information on the purpose and nature of the intended business;
- Establish the source of the client's income and the source of funds that the client expects to use in conducting the transactions;
- Conduct on going due diligence on the business relationship.

Why implement a RBA?

If an institution develops effective systems and procedures to detect, monitor and report higher risk customers and transactions, this may lead to a higher level of regulatory compliance with a lower probability of an administrative and criminal sanction being imposed.

Some of the other advantages are:

- **Flexible:** ML/TF risks vary across jurisdictions, customers, products, delivery channels and over time;
- **Effective:** Institutions are better equipped than legislators to effectively assess and mitigate risks they face particularly, ML/TF risks. Institutions should be able to identify and report suspicious transactions easier;
- **Proportionate:** More attention can be given to high risk customers and less attention to low risk customers. Resources can be allocated more effectively.

How do institutions go about in implementing a RBA?

An institution's risk framework needs to be in writing and be regularly updated and supported with documentation. The ML/TF risk should be based on all factors which may be relevant to the combination of a particular client profile such as:

- **Client type:** Political exposed persons, legal entities, non-face-to-face clients etc. are regarded as high risk;
- **Product type:** Internet accounts, private banking, money remittals, stock brokering, annuities, insurance products, offshore services, correspondent banking etc. are regarded as high risk;
- **Geographical location:** Countries listed on terrorism and sanctions lists of governments and international organisations and non-members of the FATF or of a FATF style regional body are regarded as high risk.

According to the FATF's guidance on a RBA issued in June 2007, "regardless of the strength and effectiveness of the anti-money laundering and the combatting of terror financing controls established by financial institutions, criminals will continue to attempt to move illicit funds through the financial sector undetected and will, from time to time, succeed. A reasonably designed and effectively implemented RBA will provide an appropriate and effective control structure to manage identifiable ML/TF risks. However, any reasonably applied controls, including controls implemented as a result of a reasonably implemented RBA will not identify and detect all instances of ML/TF. Therefore, regulators must take into account and give due consideration to a financial institution's well-reasoned RBA. When financial institutions do not effectively mitigate the risks due to a failure to implement an adequate RBA or failure of a risk-based programme that was not adequate in its design, regulators should take necessary action, including imposing penalties, or other appropriate enforcement or regulatory remedies".

10

*a decade of identifying
the proceeds of crime*

Criminal and intentional acts versus COIDA

By
Justice
Finger

*Twalo v The Minister of Safety and Security
and Another* [2009] 2 All SA 491 (E)

Court judgments with far-reaching effect sometimes go unnoticed for many years. A good example of such a case is *Twalo v The Minister of Safety and Security and Another* [2009] 2 All SA 491 (E), delivered by Ebrahim J that changed the law regarding claims for occupational injury or diseases. In South Africa, employees are generally barred from claiming damages against their employer for any occupational injury or disease. This is in terms of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), which makes the Compensation Fund liable for payment. Ebrahim J ruled that there are exceptions to this general rule and that criminal and/or intentional acts in particular fall outside the reach of COIDA, thus entitling the employee to claim directly from the employer. There are indications that the judgment is now starting to have an impact.

In view of the high rate of crime in this country, one has to ask what the implications of the judgment are for the state and private sector and, more importantly, whether the judgment will open the floodgates of litigation. In this article the judgment is analysed in order to determine whether it was decided correctly.

COIDA

Section 1 of COIDA defines 'accident' as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee' and 'occupational injury' as 'a personal injury sustained as a result of an accident'.

Section 35(1) of COIDA states that: 'No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'

Background

The second defendant (an employee of the Minister) shot Twalo, a colleague,

with a firearm at a police station. The plaintiff, Twalo's widow, claimed that the defendant shot Twalo intentionally and she claimed damages in her personal capacity and on behalf of her three minor children from the Minister of Police and the second defendants for loss of support due to the death of her husband.

The first defendant admitted that, at the time of shooting, the second defendant was an employee but, of importance for the purpose of this article, he made a special plea that the plaintiff is barred from claiming damages against it by the provisions of s 35(1) of COIDA.

Judgment

The court was requested to determine the plea first and the issues that had to be determined can be summarised as follows –

- whether intentional acts fall within the definition of an 'accident'; and
- whether the shooting arose out of and in the course of the employee's employment.

Do intentional acts fall within the definition of an 'accident'?:

It is important to note that COIDA attempts to define an accident, but never actually defines the word 'accident'.

The defendant urged the court not to place a restrictive interpretation on the definition of 'accident'. The proper interpretation would be that an accident included both a negligent as well as an intentional act and that it should be interpreted in line with the decision in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC).

The court rejected this argument and stated that it could not find any substantiation for the contention that the definition of 'accident' should be broadened to include not only a negligent act but also the intentional killing by one employee of another, despite the absence of any causal connection with their respective duties.

The court went on to state that, on the agreed facts, it was not in dispute that the second defendant intentionally shot the deceased and pleaded guilty to a charge of murder. Relying on *Nicosia v Workmen's Compensation Commissioner*

1954 (3) SA 897 (T) at 901G, regarding the definition of 'accident', the court concluded that on these facts the shooting was patently not an accident as defined in COIDA. It went on to state that it could be said that the shooting was an 'unexpected occurrence', but it was by no means 'unintended' – the second defendant's actions in shooting the deceased were premeditated and were carried out with the intention to kill him.

Did the shooting arise out of and in the course of employment?

In this instance the plaintiff argued that the test was 'not whether or not the "wrongdoer" was acting within the course and scope of his employment but rather whether the "victim" was acting within the course and scope of his employment at the time when he sustained or contracted the occupational injury' (at para 13).

The court rejected this argument and applied the test of vicarious liability adopted by Zulman AJ in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 372 (SCA) and concluded that the action was not 'about the affairs, or business, or doing the work of, the employer' (at para 5). It remarked that the sole reason for the second defendant shooting the deceased was the existence of a private dispute between them. The fact that it took place while both of them were on duty as policemen and at their workplace was entirely coincidental. The shooting could have occurred at any other place entirely unrelated to their work environment as the motive for the shooting bore no causal relationship with their work (at para 19).

The court rejected both arguments by the defendant on the basis that they created the impression that the right to claim compensation in terms of COIDA would effectively be unqualified, since it would mean that, as long as the employee (ie, the victim) was acting in the course and scope of his or her employment at the time of the incident, it would not be necessary to show that a causal relationship (*Minister of Justice v Khoza* 1966 (1) SA 410 (A) at 417) existed between the nature of the injury and the duties carried out by the employee.

It concluded that, on the facts as presented, the intentional shooting of the

deceased was not an accident and that the deceased did not sustain an occupational injury that resulted in his death and that the provisions of s 35(1) of COIDA were accordingly not applicable.

Other relevant cases

To state that the *Twalo* case was the first judgment that pioneered the position that intentional acts do not fall within the confines of COIDA, will not be correct. One has to go as far back as the *Khoza* case where a policeman on duty played with his revolver and unintentionally shot and injured a fellow policeman. Rumpff JA in the majority judgment concluded that for an accident to arise out of and in the course of employment, there had to be a causal connection between the accident and work. Further, that causal connection is eliminated when a workman (an employee) is deliberately injured by another person and the motive for the attack bears no relationship to the duties of the workman (at 417). Recently the Free State High Court in the matter of *De Necker v MEC for the Department of Health, Free State Province* (FB) (unreported case no 2399/2012, 23-10-2013) (Mocumie J) – about a medical doctor who was raped at work – followed the *Twalo* and *Khoza* judgments. The *De Necker* case is subject to an appeal to the Supreme Court of Appeal.

There are other judgments, however, which differ from the judgments in the *Twalo* and *Khoza* cases. The first is the case of *Ex Parte Workmen's Compensation Commissioner: In re Manthe* [1979] 4 All SA 885 (E). In this case an employee was robbed on the premises of his employer. Addelson J came to the conclusion that Rumpff JA's conclusion about the motive of the attack in the *Khoza* case was *obiter* (at 816G) and declared that the assault occasioned by robbery is an 'accident' and further that it arose out

of the course of employment (at 816F). The second is the case of *Van De Venter v MEC of Education: Free State Province* (unreported case no 3545/2010, 4-10-2012) (Rampai J) in which the court, although dealing with condonation, concluded that a robbery is and remains an occupational injury.

COIDA was implemented for the benefit of employees (the *Jooste* case at 13). It would appear that the reason for claiming outside COIDA is motivated by the desire to get more money. I am of this opinion because the Compensation Fund, in line with the *In re Manthe* judgment, accepts claims caused by intentional acts.

It is my submission that the *Twalo* and *Khoza* decisions (whether *obiter* or not) were wrong in many respects and will only lead to the disadvantage of employees. There is need to extend the definition of 'accident' and to adopt the position in the *In re Manthe* case. Failure to do so will mean that certain employees are barred from claiming under COIDA and will have to apply to court, as opposed to the quick and easy process provided for in COIDA. Furthermore, the concept of 'arising out of and in the course of employment' needs to be properly evaluated. The court in the *Twalo* case, in dealing with this concept, adopted the test in the *Absa Bank* case, which essentially dealt with vicarious liability. It will be interesting to see the effect of the absence of the word 'scope' in the COIDA definition. I submit that there is nothing wrong in interpreting 'arising out of and in the course of employment' to mean while 'at work' executing the employer's obligations.

As to the issue of opening the floodgates; I am of the opinion that, although there may be an increase, there is no evidence that there has been an increase of intentional incidents in workplaces. On

the contrary, recent crime statistics indicate that a home is the most dangerous place to be. However, I submit that certain employers and employees, for example, in the security and protection services, will no doubt be negatively affected by the *Twalo* judgment. After all, these are sectors with employees who are more likely to experience cash in transit robberies or armed robberies. The decision in the *Twalo* case will have a negative effect on these employers as they may, in addition to contributing to the Compensation Fund, also have to take out insurance to cover intentional acts.

Conclusion

There is no merit in the argument in the *Twalo* case that extending the meaning of 'accident' will mean that COIDA is unqualified, thus creating the impression that any employee making an application will be covered. Claimants will still be required to prove that it was an 'accident' and that the injury or disease arose out of and in the course of employment. Applying the judgments in the *Twalo* and *Khoza* cases will be to the disadvantage of employees who will be burdened with applications to court and employers who will now have to face litigation from their own employees. As stated, the Supreme Court of Appeal will finally get the opportunity to give guidance on the matter.

Lastly, there is a scope for the Compensation Fund to review the tariffs and accommodate cases of intentional acts to ensure just compensation.

Justice Finger LLB (UFS) is a legal adviser in Bloemfontein.



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Ordering the selling of motor vehicles in debt re-arrangement orders:

A road not (to be) travelled?

By
Bouwer
van
Niekerk

Motor Finance Corporation (Pty) Ltd v Jan Joubert and Others
(GNP) (unreported case no A629/2013, 19-8-2013)
(Chetty and Ebersohn AJJ).

A potentially far-reaching decision regarding the considerations that magistrates have to keep in mind when making debt relief and re-arrangement orders was handed down in August 2013 in the Gauteng North High Court in *Motor Finance Corporation (Pty) Ltd v Jan Joubert and Others* (GNP) (unreported case no A629/2013, 19-8-2013) (Chetty and Ebersohn AJJ).

In this case the appellant, a credit provider, appealed against a decision by the magistrate's court in terms whereof the second and third respondents, the consumers, were declared over-indebted, their monthly repayment obligations were to be lowered and the period of repayment of those debts were to be extended following an application in terms of s 86(8)(b) of the National Credit Act 34 of 2005 (the NCA) by the first respondent, a debt counsellor.

The appeal was upheld, and the order consisted of, among others, the following:

'The Magistrate is directed to reconsider the application for debt relief and re-arrangement to the debt owed by the second and third respondents to the appellant in terms of sections 86, 87 and 88 of the National Credit Act, 34 of 2005, with due consideration to:

i. Whether the second and third respondents should *be ordered* to return the motor vehicle, being the subject matter of the credit transaction, in order that it may be sold to set off such amounts that are due and payable to the appellant' (my italics) (at para 23).

In considering the argument as to whether the second and third respondents should retain possession of the vehicle and, in making the aforesaid

order, the court considered the judgments in *Pelzer v Nedbank Limited* 2011 (4) SA 388 (GNP) and *Standard Bank of South Africa Ltd v Newman* (WCC) (unreported case no 27771, 15-4-2011) (Binns-Ward J).

I have difficulty with both the reasoning behind making the order, as well as the order that was in fact made.

In the *Newman* judgment, in which the plaintiff (the credit provider) applied for summary judgment in the form of an order directing the defendant (the consumer) to deliver to the plaintiff a motor vehicle, the court had to consider whether the object of debt review and restructuring is to enable a consumer, in terms of an instalment sale agreement, to continue in possession and use of a credit provider's property after the relevant contract has been cancelled. The court found this not to be the case and, among others, directed the defendant to forthwith deliver the vehicle to the plaintiff.

What, in my opinion fundamentally, distinguishes this judgment from the *Motor Finance Corporation* judgment is the fact that the instalment sale agreement in the *Newman* judgment was cancelled prior to the application for debt relief and rearrangement, whereas in the *Motor Finance Corporation* judgment no mention is made of the cancellation of the instalment sale agreement. This is significant, since an application for debt review cannot bring about the reinstatement of a cancelled agreement; the cancellation remains intact and the consumer will have lost the right to possession of the motor vehicle (*BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD)).

However, if the instalment sale agreement has not been cancelled, the court (in particular the magistrate's court) can,

in my opinion, not by its own accord order the return of the motor vehicle in a debt review application in terms of s 86(8) of the NCA.

In the *Pelzer* judgment, which was an application for the rescission of a default judgment, the court had to consider whether a debt review procedure lapses because of non-compliance with the time periods of the National Credit Regulations. What is relevant from this judgment (and this extract was also quoted in the *Motor Finance Corporation* judgment at para 17) was that the court held (at para 6.3) that a consumer's 'liability to repay does not disappear, neither is he [or she] entitled to hang on to the goods which are the subject matter of the agreement, whilst not paying. On the contrary, the goods must be sold to reduce the debt'.

I am of the opinion that this was an *obiter* finding and could not have been used as authority for the court in the *Motor Finance Corporation* judgment in making the order under discussion. The court in the *Pelzer* judgment was not required to decide on a magistrate's court (or any court's) ability, or otherwise, to order the return of goods that is the subject matter of a credit agreement in order to reduce the outstanding debt in terms of that credit agreement when considering an application for debt review in terms of s 86(8) (or ss 83 or 85 for that matter) of the NCA.

That said, my biggest difficulty with the court finding is that it was unable to find any basis to support the reasoning or conclusion reached by the court *a quo* (ie, the magistrate's court) that the consumers ought to retain possession of the motor vehicle.

Section 86(7)(c) of the NCA dictates the orders that a magistrate's court may

make in considering a debt review application. The orders are:

- One or more of the consumer's credit agreements may be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless.
- One or more of the consumer's obligations may be re-arranged by –
 - extending the period of the agreement and reducing the amount of each payment due accordingly;
 - postponing during a specified period the dates on which payments are due under the agreement;
 - extending the period of the agreement and, for a specified period, postponing the dates on which payments are due under the agreement; or
 - recalculating the consumer's obligations because of contraventions of part A or B of chap 5, or part A of chap 6.

The magistrate's court is a creature of statute – it does not have an inherent discretion when it comes to making orders; it has to abide by the legislation that governs its powers to make specific orders.

Section 86(7)(c) of the NCA does not empower the magistrate's court to order the return of the subject matter of a credit agreement (in the above case the motor vehicle) in order for it to be sold to set off such amounts that are due and payable to the credit provider. The court in the *Motor Finance Corporation* judgment therefore had to look no further than s 86(7)(c) of the NCA to find a basis on which the consumers were entitled to retain possession of the motor vehicle. This section simply does not make provision for such an order to be made.

Moreover, the magistrate's court was not asked to consider an application

wherein relief was sought in the form of ordering the return of the motor vehicle. In my opinion the magistrate's court would simply be acting *ultra vires* in making such an order when considering an appropriate order in restructuring the debts of the consumers.

If this order is followed in the magistrate's court, it will be interesting to see how it will be executed.

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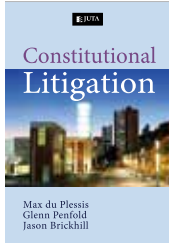
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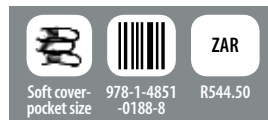
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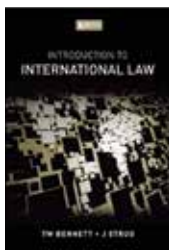
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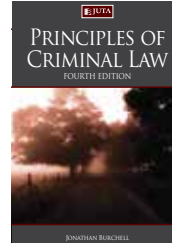
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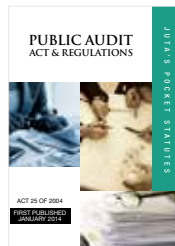
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NEW LEGISLATION

Legislation published from
9 December 2013 – 10 January 2014

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

PROMULGATION OF ACTS

Basic Conditions of Employment Amendment Act 20 of 2013. *Commencement:* To be proclaimed. GN987 GG37139/9-12-2013.

Geomatics Profession Act 19 of 2013. *Commencement:* To be proclaimed. GN990 GG37142/10-12-2013.

African Institute of South Africa Act Repeal Act 21 of 2013. *Commencement:* To be proclaimed. GN991 GG37143/10-12-2013.

Banks Amendment Act 22 of 2013. *Commencement:* 10 December 2013. GN992 GG37144/10-12-2013.

Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013. *Commencement:* To be proclaimed. GN993 GG37145/10-12-2013.

Merchant Shipping (Civil Liability Convention) Act 25 of 2013. *Commencement:* To be proclaimed. GN994 GG37146/10-12-2013.

Adjustments Appropriation Act 27 of 2013. *Commencement:* 10 December 2013. GN995 GG37147/10-12-2013.

Intellectual Property Laws Amendment Act 28 of 2013. *Commencement:* To be proclaimed. GN996 GG37148/10-12-2013.

Taxation Laws Amendment Act 31 of 2013. *Commencement:* Various commencement dates for different sections and parts of the Act are listed in the Act. GN1001 GG37158/12-12-2013.

National Environmental Management Laws Second Amendment Act 30 of 2013. *Commencement:* All the sections of the Act, except for ss 3, 4, 5 and 14 came into operation on 18 December 2013; ss 3, 4, 5 and 14 will take effect on 18 December 2014 or on a date to be proclaimed. GN1019 GG37170/18-12-2013.

Lotteries Amendment Act 32 of 2013. *Commencement:* To be proclaimed. GN1020 GG37171/18-12-2013.

Sectional Titles Amendment Act 33 of 2013. *Commencement:* 18 December 2013. GN1021 GG37172/18-12-2013.

Deeds Registries Amendment Act 34 of 2013. *Commencement:* 15 December 2013. GN1022 GG37173/18-12-2013.

Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act 35 of 2013. *Commencement:* To be proclaimed. GN1023 GG37174/18-12-2013.

Employment Tax Incentive Act 26 of 2013. *Commencement:* Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13 came into operation on 1 January 2014; section 10 will come into operation on a date to be proclaimed. GN1032 GG37185/18-12-2013.

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013. *Commencement:* To be proclaimed. GN2 GG37219/8-1-2014.

COMMENCEMENT OF ACTS

Civilian Secretariat for Police Service Act 2 of 2011, ss 4(2), 4(3) and 14. *Commencement:* 1 April 2014. Proc57 GG37151/13-12-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Pests Act 36 of 1983
Amendment of control measures. GN R1002 GG37154/20-12-2013.

Amendment of regulations. GN R1003 GG37154/20-12-2013.

Airports Company Act 44 of 1993
Airports Company South Africa Limited: Publication of airport charges. GenN1228 GG37186/20-12-2013.

Air Traffic and Navigation Services Company Act 45 of 1993
Publication of air traffic service charges. GenN1237 GG37202/31-12-2013.

Collective Investment Schemes Control Act 45 of 2002

Financial Services Board: Conditions in terms of which foreign collective investment schemes may solicit investments

in the Republic. BN257 GG37123/13-12-2013.

Development Bank of South Africa Act 13 of 1997

Amendment of regulations made in terms of s 17. GN R1026 GG37178/18-12-2013.

Engineering Profession Act 46 of 2000
Rules in relation to the recognition of voluntary associations in terms of s 36(1). BN255 GG37123/13-12-2013.

Rules of conduct for registered persons. BN256 GG37123/13-12-2013.

Financial Advisory and Intermediary Services Act 37 of 2002

Financial Services Board: Amendment of Fit and Proper Requirements and Accompanying Measures, 2013. BN260 GG37164/19-12-2013.

Financial Services Board: Amendment Notice on the Determination of Qualifying Criteria and Qualifications for Financial Services Providers, 2013. BN268 GG37168/20-12-2013.

Financial Services Board: Amendment of the notice on qualifications, experience and criteria for approval as compliance officer. BN269 GG37168/20-12-2013.

Health Professions Act 56 of 1974
Health Professions Council of South Africa: Annual fees payable by registered practitioners. BN1 GG37205/3-1-2013.

Health Professions Council of South Africa: Rules relating to fees payable to Council. BN2 GG37205/3-1-2013.

Income Tax Act 58 of 1962
Regulations on the allowance for Energy efficiency savings in terms of s 12L of the Act. GN R971 GG37136/9-12-2013.

Liquor Act 59 of 2003
African Nations Championship (CHAN) 2014, liquor regulations. GN R1 GG37217/8-1-2014.

Marketing of Agricultural Products Act 47 of 1996

Wine industry: Continuation of statutory measures and determination of guideline prices. GN1013 GG37153/20-12-2013.

Continuation of and amendment to levies on milk and other dairy products and the determination of guideline

prices in respect of milk and other dairy products. GenN1218 GG37153/20-12-2013.

Continuation of and amendment to statutory measure for the registration of persons involved in the secondary dairy industry. GenN1219 GG37153/20-12-2013.

Continuation of and amendment to statutory measure regarding records and returns in respect of milk and other dairy products. GenN1220 GG37153/20-12-2013.

National Road Traffic Act 93 of 1996

Amount payable by a driving licence testing centre in terms of regs 108(1A) and 119(1A) of the National Road Traffic Regulations, 2000. GenN1217 GG37160/17-12-2013.

Pharmacy Act 53 of 1974

The South African Pharmacy Council: Rules relating to good pharmacy practice. BN271 and BN272 GG37193/20-12-2013.

Planning Professional Act 36 of 2002

South African Council for Planners: Rules and code of conduct. GenN1230 GG37189/23-12-2013.

Pension Funds Act 24 of 1956

Assumptions for the determination of minimum individual reserves of members of defined benefit categories of pension funds. BN270 GG37188/20-12-2013.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of the deputy president, ministers and deputy ministers. Proc1 GG37218/9-1-2014.

Determination of salaries and allowances of members of the National Assembly and permanent delegates to the National Council of Provinces. Proc2 GG37218/9-1-2013.

Determination of the upper limit of salaries and allowances of premiers, members of the executive councils and members of the provincial legislatures. Proc4 GG37218/9-1-2013.

South African Civil Aviation Authority Levies Act 41 of 1998

Terms and conditions for payment of aviation fuel levy. GenN1229 GG37187/20-12-2013.

Draft legislation

Draft Financial Sector Regulation Bill, 2013 for comments. GN R988 GG37140/11-12-2013.

Proposed amendments to the Johannesburg Stock Exchange (JSE) interest rate and derivatives rules. BN258 GG37161/13-12-2013.

Proposed amendments to JSE listing and debt listing requirements. BN259 GG37162/13-12-2013 and BN274 GG37209/27-12-2013.

Draft Development Bank of Southern Africa Amendment Bill for comment. GN1012 GG37163/13-12-2013.

Proposed amendments to the regulations relating to the grading, packing and marking of sunflowers intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN R1004 GG37154/20-12-2013.

Proposed amendments to the regulations relating to the grading, packing and marking of soya beans intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN R1005 GG37154/20-12-2013.

Draft Road Traffic Law Enforcement Code (NRTLEC) in terms of the Road Traffic Management Corporation Act 20 of 1999. GenN1 GG37149/10-1-2014.



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Employment law update



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

Section 189A(13) of the Labour Relations Act

In *National Union of Mineworkers v Anglo American Platinum Ltd and Others* [2013] 12 BLLR 1253 (LC) the applicant, NUM, brought an urgent application seeking the reinstatement of its members who were dismissed by the respondent, Amplats, for operational requirements pending Amplats' compliance with ss 189 and 189A of the Labour Relations Act 66 of 1995 (LRA) or an order for compensation. In addition, NUM alleged that Amplats acted unfairly in that it failed to comply with s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which requires notice of potential retrenchments to be submitted to the Minister where it is contemplated that more than 500 employees may potentially be retrenched, and for an investigation to be conducted and recommendations made to the Minister.

Amplats commenced a consultation process with the unions in January 2013 after announcing that it was considering retrenching about 14 000 employees. The process was suspended while Amplats' management, the Department of Mineral and Energy Resources (DMR) and the unions embarked on a tripartite process that lasted for an initial period of 60 days, during which all parties were given access to documentation contained in an electronic data room.

The tripartite process was later converted into a bilateral engagement between Amplats and the DMR during which discussions were held on the proposed restructuring and anticipated retrenchments. After this, the second tripartite process commenced and the information from the bilateral process was shared with the trade unions. The

parties then entered into a written agreement identifying the number of employees potentially affected by the proposed restructuring, which at the time was identified as being potentially 6 000 employees, and also alternatives to retrenchment.

A revised s 189(3) notice was issued to the potentially affected employees reflecting the revised proposals and it was proposed that the consultation process would run for a further 60-day period. Consultation meetings unfolded with facilitation by a Commission for Conciliation Mediation and Arbitration (CCMA) commissioner and proposals were exchanged. During this consultation period a notice of the potential restructuring was sent to the Minister of the DMR as contemplated in s 52 of the MPRDA. The consultation process was completed in the middle of August 2013.

On 29 August 2013 NUM sent a letter to Amplats stating that it had not been engaged with in a meaningful joint consensus-seeking process. It requested that the process be extended and also queried whether notice had been given to the Minister. Amplats did not extend the consultation period and commenced issuing notices of termination to the employees identified for retrenchment. It was at this point that NUM applied to the Labour Court for urgent relief under s 189A(13) of the LRA.

Van Niekerk J considered the provisions of s 189A(13) and found that its purpose was to provide for the adjudication of disputes involving procedural unfairness in retrenchments at an early stage and that the court has wide powers in this regard. A consulting party may, however, not rely on s 189A(13) to raise complaints about substantive fairness. Thus, the purpose of s 189A(13) is to provide employees with a remedy

to approach the Labour Court to set the employer back on track when there is genuine procedural unfairness that goes to the heart of the process.

The purpose is also not for the court to grant a remedy for every complaint about procedural unfairness, since this would open up the process to abuse and serve as a means to thwart the retrenchment process. Van Niekerk J said that he was therefore required to consider the complaints of procedural unfairness holistically to determine whether the overall purpose of the joint consensus-seeking process was achieved by Amplats.

Van Niekerk J considered NUM's allegation that Amplats had not consulted on the selection criteria and severance pay and found that the issue of the selection criteria and severance pay had been on the agenda from the start of the consultation process. Amplats had even agreed to extend the consultation process by one week to consult specifically on these topics. Furthermore, Amplats had tabled proposals relating to severance pay and selection criteria, but NUM had refused to engage with it on these issues as it denied that there was any need to retrench. By the time NUM was willing to engage on selection criteria and severance pay, the lengthy consultation process had already concluded.

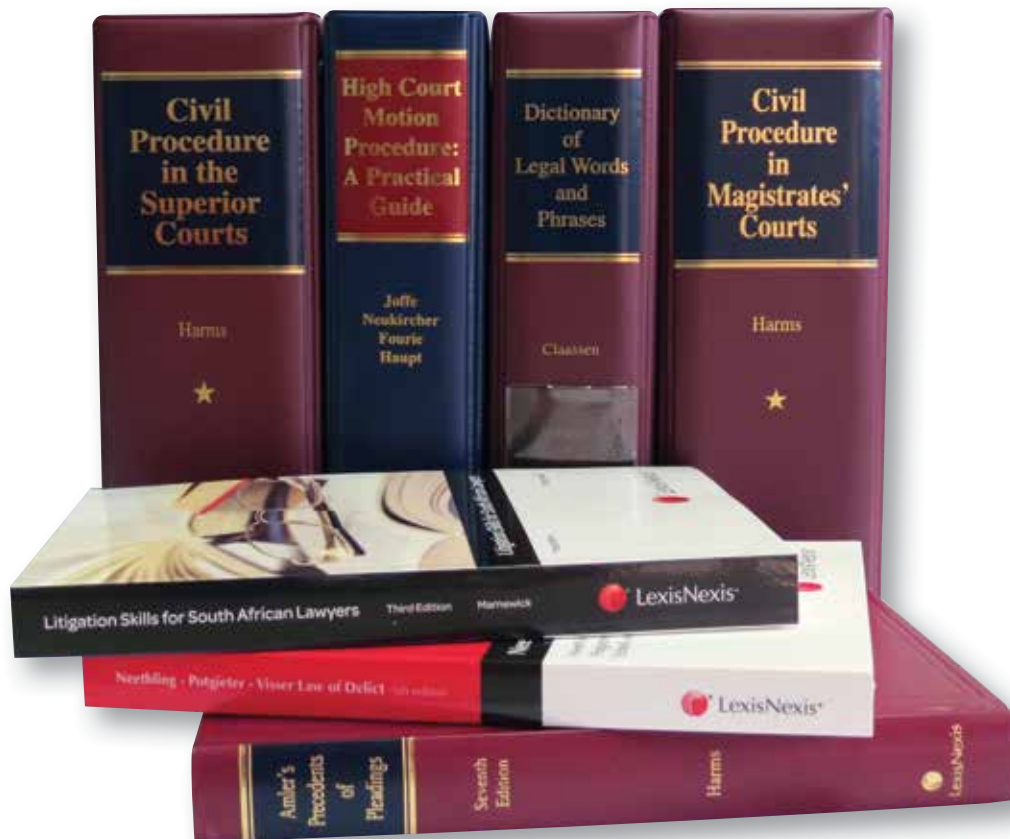
In the circumstances, Van Niekerk J concluded that NUM had frustrated the consultation process and simply wanted to delay the dismissals. He held that the remedies in s 189A may not generally be relied on by a party that has frustrated the consultation process or where the issues are raised after the completion of the consultation process. The court was accordingly satisfied that Amplats had complied with its obligations to consult on all issues required in terms of s 189(3), including selection criteria and severance pay.

The application by NUM was dismissed with no order as to costs.

Forfeiture of severance pay

In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union* [2013] 12 BLLR 1194 (LAC) the Labour Appeal Court (LAC) was required to consider the circumstances under which employees are entitled to severance pay. Astrapak implemented a continuous shift pattern to increase productivity and reduce costs. The union's members did not accept the changes and issued a notice to go on strike.

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Astrapak responded by issuing employees with a letter in terms of ss 189A and 189(3) of the LRA informing them about the possibility of retrenchment and inviting them to consult on its proposals. Facilitated consultation meetings then took place. Those employees who accepted the changes continued working while those who refused to accept alternative employment on the new shift pattern were retrenched without severance pay.

The union referred an unfair dismissal claim in respect of its members who were retrenched. The Labour Court held that there was an operational rationale for retrenchment and thus the dismissals were substantively fair. However, Mokoena AJ found that the refusal of the employees to accept alternative employment on the new shift pattern was not unreasonable and as such the retrenchees were entitled to severance pay. This was because the alternative was to work on the new shift pattern, which would have resulted in the employees'

overtime pay being significantly reduced and the employees earning far less than what they were accustomed to.

The LAC considered that the purpose of s 41(2) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) read with s 41(4) of the BCEA was to promote employment and therefore to discourage employees from rejecting employment, 'simply because they might prefer cash in their pockets in the form of severance pay'. It was also to encourage employers to take the necessary steps to find alternative employment for potential retrenchees.

The LAC considered the fact that all the employees on the new shift system would incur less travelling expenses. It was also considered that, although the employees would receive reduced overtime pay, there was no right to overtime and Astrapak was accordingly not obliged to provide the employees with overtime work.

The LAC found that where employees were offered alternative employment on

the same salary or slightly higher salaries on conditions that were not more onerous than their prior conditions, then the rejection of such alternative employment would be unreasonable and they would forfeit their right to severance pay. However, where employees would face reduced salaries, a refusal to accept the alternative employment would not be unreasonable and the employees would be entitled to refuse the offer of alternative employment and seek employment elsewhere. In such circumstances they would not forfeit their right to severance pay.

Astrapak was accordingly ordered to pay severance pay to those employees who were retrenched after refusing to accept the offer of alternative employment at a reduced salary. Those employees who refused the offer of alternative employment on the same salary or an increased salary were not entitled to severance pay from Astrapak.



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

Adopting a flexible and 'situation sensitive' approach to discrimination claims

***Solidarity obo Barnard v SAPS* (SCA) (unreported case no 165/13, 28-11-2013) (Navsa ADP, Ponnann, Tshiqi, Theron JJA and Zondi AJA)**

On two separate occasions, Barnard, a white female was overlooked for promotion despite the respective interviewing panels considering her the best candidate on each occasion.

Subsequent to her second attempt at promotion, Barnard referred an unfair discrimination claim to the Labour Court (LC). The LC found that the actions of the South African Police Service (SAPS) amounted to unfair discrimination and awarded Barnard compensation. Her victory was short-lived as an appeal to the Labour Appeal Court (LAC) overturned this decision.

Barnard approached the Supreme Court of Appeal (SCA) seeking an order to substitute the findings of the LAC with that of the LC.

The facts

In 2005 Barnard applied for the position of superintendent. She was one of seven applicants who were shortlisted and interviewed. Barnard scored the highest at the interviews and was recommended for the position.

The divisional commissioner took the view that appointing a non-designated person to that position would undermine employment equity and hence he withdrew the position. The following year the position was re-advertised and Barnard was again shortlisted along with seven other candidates. The three recommended candidates were Barnard who scored 85,33%, Mogadima who scored 78% and Ledwaba who achieved a score of 74%.

Even though there was an overrepresentation of white females and an underrepresentation of both African males and females at the level of superintendent, the divisional commissioner on this occasion supported Barnard's recommendation to the national commissioner.

In response the national commissioner addressed a letter to Barnard informing her that, despite being recommended, her appointment to the position would not address representivity. Barnard was also advised that the position she applied for was not considered a 'critical post' and as a result thereof, would be withdrawn and re-advertised the following year. In so doing, according to the

national commissioner, service delivery would not be compromised in any way.

The LC

In his judgment, (*Solidarity obo Barnard v SAPS* [2010] 5 BLLR 561 (LC)), Pretorius AJ found that when a post cannot be filled by a suitable candidate from a designated group, the promotion should not, in the absence of a satisfactory explanation, be denied to a suitably qualified employee from a non-designated group.

Pretorius AJ further found that the SAPS, through its only witness, could not discharge its onus of proving the discrimination was fair.

The LAC

On appeal (*South African Police Service v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC)), Mlambo JP, as he then was, set aside the LC's findings.

First, the LAC took the view that discrimination under these circumstances would involve differential treatment between and among people and that, in the absence of anyone being appointed to the position, no discrimination had taken place.

Secondly (and in contrast to its initial findings), the LAC further held that the discrimination Barnard endured was fair and justified given the objectives of affirmative action as a means of redressing past inequalities.

The SCA

The starting point for the SCA was to consider whether or not the factual

matrix gave rise to any form of discrimination and, if so, whether the SAPS established the fairness thereof.

Navsa ADJP found the LAC's view that, in the absence of the post being filled no discrimination had taken place, was flawed. The court held that if there was an African candidate who had the same skills and achieved the same scores as Barnard, there would have been no doubt that such person would have been appointed. It could therefore not be contested that Barnard was not appointed because she was a white female.

Having come to this conclusion the court, in adopting a flexible and 'situation sensitive' approach to the merits, had to decide whether or not the aforementioned discrimination was fair.

The SCA considered the following: First, as a female, Barnard formed part of a designated group. Secondly, recommendations made by an interviewing panel and subsequently supported by the divisional commissioner, while not binding on the national commissioner, served an important function that could not be taken lightly. Deviation from these recommendations must be justified.

In casu the panel strongly recommended Barnard for the post not only because she had obtained the highest score, with her closest rival scoring nearly 10% below her, but also because she was the only person, in their view, who displayed enthusiasm and passion to deal with members of the community who were dissatisfied with the SAPS' service.

Furthermore, the divisional commissioner endorsed Barnard's recommendation and added that her appointment to the position was in the best interest of service delivery. He further advised the national commissioner that by not appointing the candidate who for the past two years was considered the best person for the position, would negatively affect staff moral within the force.

The national commissioner's failure at legal proceed-

ings to adequately explain his decision as to why he did not support the aforementioned recommendations, led the SCA to conclude that he had not 'grappled' with the reasons for such recommendations.

The SCA further rejected the argument that Barnard's appointment would vitiate the SAPS's employment equity plan. To this the SCA held that the numerical targets and equity were not absolute criteria for appointment. If this were the case then one would be adopting a quota system, which the Employment Equity Act 55 of 1998 expressly prohibits.

The SCA further failed to accept, as justification for the SAPS' conduct, that the position under review was not considered 'critical'. Among the reasons for the court to arrive at this conclusion was the fact that the SAPS could not explain why the position had been advertised three times in the past three years if it was not an important position aimed at enhancing the service of the SAPS.

The court concurred with the findings of Pretorius AJ and, in so doing, upheld the appeal with costs.

Barnard was awarded compensation equivalent to the difference she earned in her current capacity compared to what she would have earned, for a period of two years, had she been appointed to the post.

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

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By
Izette
Knoetze

Ghostwriting: The key that will open courtroom doors?

Most people cannot afford comprehensive legal assistance. Those in need of legal assistance are grateful for any assistance they can get and are willing to pay what they can afford. The demand, particularly for civil legal services, is exceedingly high in South Africa. More and more people are seeking advice from a lawyer in these instances but only to a limited extent (ie, providing advice or the drafting of pleadings). In the United States (US), the practice of ghostwriting to provide anonymous but professionally drafted petitions to appellate courts has not only been limited to civil cases. Legal representatives across the world are currently delivering various unbundled legal services, for example, limited telephone advice or limited representation during mediation.

Ghostwriting and unbundling legal services

The practice of ghostwriting simply entails a legal representative who agrees to prepare a document for his or her client at an agreed cost. The concept of ghostwriting a legal document (ie, authoring a legal document for someone who is presumed to be the actual author), has been a perplexing problem for lawyers, clients, courts and even Bar associations in the US (see J Vincent Aprile II 'Ghostwriter: A new legal superhero?' (2009) vol 26 no 2 *GPSolo* at p 26).

Unbundled legal services are often referred to as 'a la carte' legal services or 'discrete task representation' and involve a legal representative providing a client with specific and limited services rather than the more traditional method of providing the client with full representation in a legal matter.

The scope of unbundled legal services is considerably broader and embraces many other legal services besides pleading preparation. Limited representation involves five types of lawyering, namely -

- giving advice;
- filling out legal forms;
- drafting documents for court filings;
- researching the law; and
- representing the client during trial.

(Peter R Bornstein 'Ghostwriting and the Invisible Lawyer' Summer 2013, vol 39, issue 3 *Litigation* at p 37).

So, what is really new about unbundling? Legal representatives have long provided client consultations, second opinions and answered questions over the telephone. Limited representation

has traditionally existed - an example is the tradition of unbundling in the litigation context where insurance company lawyers tell the company to defend the insured on some claims but not others. Paralegals also often engage in unbundling legal services, where, for example, they are requested not to engage in a full-service takeover of the matter, but simply asked to fill out legal forms.

Both these practices allow middle and low income litigants access to the legal system without engaging the services of a full service lawyer.

Client-lawyer relationship

The client-lawyer relationship is a two-way collaborative process rather than the lawyer being in charge of strategy and tactics. Clients communicate directly with the other party with the lawyer coaching on the sidelines. In this relationship, the lawyers are valued as resources rather than directing client action (Forrest S Mosten 'Unbundling: Current Developments and Future Trends' *Family Court Review* January (2002), vol 40, no 1 at p 16).

Concerns

The practices of unbundling and ghostwriting have raised ethical questions regarding the extent to which legal services and advice may be given to litigants without legal representatives being held accountable for the services or advice. These ethical concerns were highlighted in US case law. A few other concerns are discussed below.

Pleadings: In May 2007 the American Bar Association issued 'Formal Opinion 07-446, Undisclosed Legal Assistance to Pro Se Litigants' (www.americanbar.org/content/dam/aba/migrated/media/youraba/200707/07_446_2007_authcheckdam.pdf, accessed 3-2-2014), which addressed the ethical issues surrounding legal ghostwriting. The opinion equates legal ghostwriting or the ghost reviewing of legal documents as a form of the unbundling of legal services that allows a lawyer to perform specified tasks for a client without handling the entire matter. The ABA Model Rules explicitly authorise both ghostwriting and unbundling.

The following concerns were eminent in US case law. In the case of *Wesley v Don Stein Buick, Inc*, 987 F. Supp. 884 (D.Kan. 1997), the court stated: 'Both the court and the parties, moreover, have a legitimate concern that an attorney who substantially participates in a case at least be identified and recognise the pos-

sibility that he or she may be required to enter appearance as counsel of record and thereby accept accountability for his or her participation, pursuant to Rule 11 and the rules of professional conduct applicable to attorneys.'

As the legal representative does not sign his or her name on the pleadings when ghostwriting, the legal representative who wrote the pleadings cannot be identified and thus cannot be held accountable for any misrepresentation.

Limited representation: It is also contended that a truncated level of work can violate the legal representative's duty to provide competent legal services that advance the client's interests.

Advantages of ghostwriting and unbundling legal services

The unbundling of legal services helps clients to control the cost of litigation as the client can select which services his or her legal representative will actually provide, thus providing greater access to legal assistance for middle income groups.

A further advantage is that an attorney can offer unbundled services to barely literate individuals in criminal law matters. For example, a ghostwritten petition is far better than one that is prepared *pro se*.

Another benefit is that the unbundling of legal services allows a legal practitioner to provide limited assistance to individuals when the legal representative may not have the time to undertake full representation.

Conclusion

As the concept of unbundling legal services expands, there will be ethical and practical considerations for legal representatives and the courts. I submit that for most people ghostwriting and unbundling are what access to justice is all about, namely, the ability to get legal advice at an affordable price. The main objective of ghostwriting should be to assist litigants and to better prepare them for court procedures so that their cases can be heard more efficiently. Unbundling and ghostwriting are undoubtedly the way of the future.

Izette Knoetze LLD (UFS) is an admitted attorney and legal researcher at Legal Aid South Africa at its national office in Johannesburg. □

By
Leslie
Kobrin

The Road Accident Fund Act 56 of 1996 and serious injuries

The Road Accident Fund Amendment Act 19 of 2005 came into effect on 1 August 2008. The provisions discussed in this article affect persons injured in motor vehicle accidents that occurred on or after 1 August 2008 only.

The Amendment Act limits the Road Accident Fund's (RAF's) liability for compensation in respect of claims for non-pecuniary loss (general damages) specifically to instances where a 'serious injury' has been sustained. Although the Amendment Act also abolishes a motor vehicle accident victim's common law right to claim compensation from a wrongdoer for losses that are not claimable under the Road Accident Fund Act 56 of 1996 (RAF Act), and it limits the amount of compensation that the RAF is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a motor vehicle accident, this article deals only with the general damages aspect and not with the other limitations in the RAF Act.

According to the RAF Act a medical practitioner has to determine whether or not the victim has suffered a serious injury by undertaking an assessment prescribed in the regulations to the RAF Act. The practitioner performing the injury assessment has to prepare a RAF 4 report. Preparation of the report requires the completion and signing of the RAF 4 form by the medical practitioner undertaking the assessment and, in many cases, will have attached to it annexures and/or substantiating reports.

The medical practitioner must assess the injury in terms of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 6 ed (the AMA Guides). If the injury is found to have resulted in 30% or more impairment of the whole person, according to the methods stipulated in the AMA Guides, the injury should be assessed as serious.

The final step of the report will follow only where the injury is not listed on the 'non-serious injuries' list, and where the injury is considered to have resulted in less than 30% of whole person impairment. In this case, the medical practitioner should apply what has come to be known as the 'narrative test'.

According to this test the medical practitioner should consider if the injury has resulted in any one, more or all of the following consequences:

- Serious long-term impairment or loss of a body function.
- Permanent serious disfigurement, severe long-term mental or severe long-term behavioural disturbance or disorder.
- The loss of a foetus.

Section 23(3) of the RAF Act reads as follows: 'Notwithstanding subsection (1), no claim which has been lodged in terms of section 17(4)(a) or 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose.' The question to be posed is at what stage the RAF 4 assessment must be submitted?

This position was considered by Satchwell J in the South Gauteng High Court in the case of *Van Zyl v Road Accident Fund* (GSJ) (unreported case no 34299/2009, 11-6-2012) (Satchwell J). In this case:

- The accident occurred on 2 August 2008.
- The claim was lodged with the RAF on 8 January 2009.
- The RAF 4 form was submitted on 6 February 2012.

The serious injury assessment was therefore submitted in excess of the three-year period outlined in s 23(1), but before the expiry of the period referred to in s 23(3). The RAF's complaint was that the RAF 4 form was served outside of the time limit prescribed by s 23(1).

After considering the case law and the provisions of the RAF Act and its regulations, Satchwell J found that the furnishing of the RAF 4 form after the lapse of the three-year period referred to in s 23(1), but before the expiry of the period referred to in s 23(3), did not result in the victim's claim for general damages having become prescribed.

The RAF originally lodged an appeal against this judgement to the Supreme Court of Appeal, but this appeal has not been proceeded with and has been abandoned. Therefore, as matters presently stand, it is permissible to file the RAF 4 form after the expiry of the three-year period set out in s 23(1), but before the expiry of the five-year period referred to in s 23(3).

After the completion of a RAF 4 re-

port, regardless of whether the whole person impairment test or the narrative test was used, it is submitted to the RAF. Peculiarly, members of the administrative staff of the RAF are then required to review the medical report and decide whether or not they accept it. If rejecting it, the RAF is obliged to furnish reasons for its rejection of the serious injury assessment.

The RAF can also request the plaintiff to make himself or herself available for further assessment by a medical practitioner appointed by and at the RAF's expense. In the event that the assessment is rejected, the issue of determining whether or not the victim has sustained a serious injury must be referred to an appeal tribunal set up by the Health Professions Council of South Africa (HPCSA). The prescribed appeal tribunal consists of three independent medical practitioners with expertise in the appropriate areas of medicine appointed by the registrar, who shall designate one of them as the presiding officer. The registrar may also appoint an additional independent health practitioner with expertise to assist the tribunal in an advisory capacity.

Until very recently, as will be described later in this article, the RAF Act and its regulations were silent as to when, after receipt of the RAF 4 form, the RAF was obliged to notify the victim as to whether it accepted or rejected the assessment contained in the RAF 4 form and, if rejected, its reasons therefor. In the absence of a specific time period having been laid down, a reasonable time was expected and what was reasonable depended on the circumstances in each case. In practice this caused much difficulty for the victims' attorneys since the rejection notification is often delivered on the eve of the trial. The receipt of the letter rejecting the assessment, and the reasons therefor, on the eve of the trial obliges the plaintiff to then postpone the trial and refer the rejection to the HPCSA to set up a tribunal, which is costly and delays the ultimate conclusion of the matter to and at the prejudice of the plaintiff.

This issue came up for determination before the Supreme Court of Appeal in *Road Accident Fund v Duma and Three Related Cases* (Health Professions Council of South Africa as amicus curiae) [2013]

1 All SA 543 (SCA). 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?
- What is the remedy when the RAF rejects a RAF 4 form without any and/or proper reasons?

The court found that the remedy when the RAF does not make a decision within a reasonable time 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 RAF 4 form, the claimant can apply to court for an order compelling the RAF to do so within a time period specified by the court and to hold the RAF in contempt of court if it fails to do so within the specified time period.

When the RAF rejects a RAF 4 form without proper reasons, the court held that the decision by the RAF to reject a RAF 4 form clearly constitutes administrative action and therefore such a decision is subject to the provisions of

PAJA. The court further held that the failure to provide appropriate or proper 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. The RAF Act, as amended, provides the remedy of an internal appeal and, in terms of s 7(2) of PAJA, that must first be exhausted 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 RAF 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.

In addition to this useful guide provided by Brand JA in the aforementioned decision the regulations to the Act were amended by a proclamation in *Government Gazette* 36452 in GN 347/15-5-2013. This amendment specified a list of injuries which, in themselves, will not amount to serious injury.

In addition reg 3(e), immediately after (d), was supplemented by the following: 'The Fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand to the Fund or to the agent who in terms

of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment.'

The above amended regulation came into effect on 15 May 2013, being the date of its publication in the *Government Gazette*. I submit that if the RAF does not accept or reject an assessment within 90 days from the date of service on it of the RAF 4 form, it is estopped from rejecting the assessment and is deemed to have accepted the assessment.

This submission is valid in respect of any claim where the serious injury assessment is served on or after 15 May 2013. In cases where the serious injury assessment was delivered prior to 15 May 2013, the RAF must accept or reject the assessment within a reasonable time and, where it fails to do so, then the better view would be to act in terms of the judgment of Brand JA in the *Duma* decision (see 2013 (Aug) DR 55).

Leslie Kobrin *DipJuris (Wits)* *Bus-Man (Dam)* is an attorney at Bove Attorneys in Johannesburg. □

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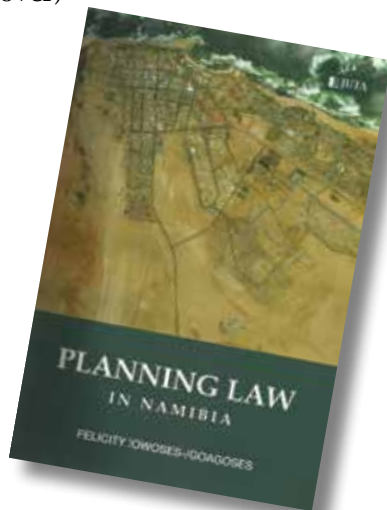
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