

NOVEMBER 2015

## LAW AND HUMAN DIGNITY AT ODDS OVER ASSISTED SUICIDE

Out with the old and in with the new –  
*understanding* the Legal Practice Act

National forum meets for the third  
time to continue Legal Practice  
Act work

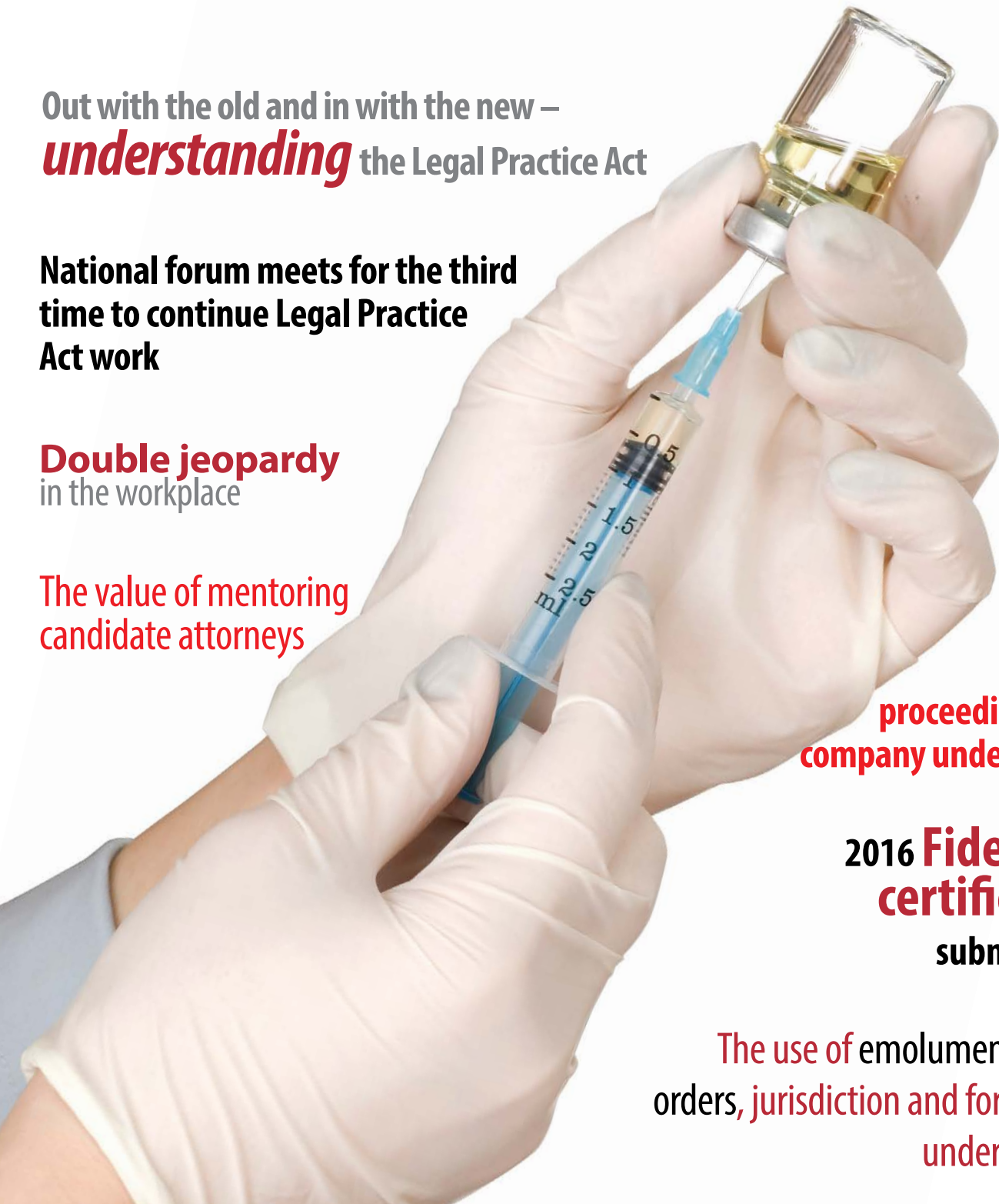
**Double jeopardy**  
in the workplace

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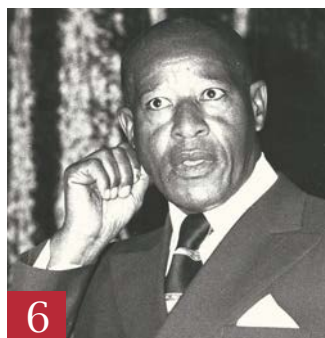
**2016 Fidelity Fund  
certificates to be  
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The use of emolument attachment  
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**R**espect for and protection of each individual's inherent human dignity as envisaged by s 10 of the Constitution is a foundational principle in our law. It has, therefore, come as no surprise that Fabricius J recently found in *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP) that the common law sanction against assisted suicide, infringes the right to human dignity of patients who find themselves in a state of constant, unbearable pain as a result of a terminal illness. **Rinie Steinmann** discusses this brave and ground-breaking judgment, which may be the first step in paving the way for the legalisation of assisted suicide.

### 28 Out with the old and in with the new – understanding the Legal Practice Act

**T**he Legal Practice Act 28 of 2014, which came into partial operation in February is the product of society changes and input over time. It is the formal beginning of the end for fragmented legislation under which attorneys and advocates currently practice. **Ettienne Barnard** discusses the change and asks is this change just for the sake of change or much needed change for the better?

### 32 Instituting proceedings against a company under supervision



**D**oes s 133(1)(b) of the Companies Act 71 of 2008 mean that a prospective litigant must bring a separate application in which it exclusively asks leave from the court to institute legal proceedings, before it in fact institutes the envisaged legal proceedings? **Bouwer van Niekerk and Werner Hattingh** ask if this was the question that was posed and answered in *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others* 2015 (4) SA 485 (KZD).

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# Bill to deal with debt collection issues

**T**he flagrant abuses prevalent in the collection of debts have been widely reported in the media with recent cases highlighting attorneys' involvement in such matters. These issues have plagued the debt collecting industry.

Government believes the existing legislative framework is inadequate in ensuring that debts are recovered in a fair and efficient manner where there is proper control and oversight. It also believes there is a disparity in the tariffs charged by debt collectors and attorneys conducting debt collection.

The draft Debt Collectors Amendment Bill 2015 has been tabled for commenting. Comments are to be submitted to the Justice Department by 30 November. The Bill, *inter alia*, seeks to amend the Debt Collectors Act 114 of 1998 (the Act), so as to insert certain definitions and make the Act applicable to attorneys who conduct debt collecting.

In terms of registration of attorneys as debt collectors s 8A will be inserted in the Act, which states:

'(1) Subject to subsection (2), as from a date fixed by the Minister by notice in the *Gazette*, published at least 180 days before the date referred to therein, no attorney, employee of an attorney, or agent of an attorney, shall act as a debt collector unless he or she is registered as a debt collector in terms of this Act.

(2) The provisions of this Act shall, in addition to the provisions of the Attorneys Act, 1979 (Act No. 53 of 1979), where applicable, apply to an attorney contemplated in subsection (1).'

The amendment Bill addresses

issues of dishonesty by amending s 10 of the Act by the addition in subs (1) of the following paragraph:

'(c) in the case of an attorney if he or she has been found guilty of unprofessional or dishonourable or unworthy conduct in terms of section 72 of the Attorneys Act, 1979 (Act No. 53 of 1979).'

Further s 15 of the Act is substituted with the following section:

'...

(5) If an attorney contemplated in section 8A, is found guilty of improper conduct, the Council shall, within five working days of the finding, in writing, inform the law society having jurisdiction of such finding and penalty.

(6) The law society must cause further steps to be taken to determine whether the attorney is still a fit and proper person to continue practising as such.'

On the issue of paying an admission of guilt fine, a number of sections are inserted after s 15, s 15A(6) and (7) pertaining to attorneys states:

'(6) If an attorney contemplated in section 8A pays an admission of guilt fine, the Council shall, within five working days of the admission of guilt, in writing, inform the law society having jurisdiction of such admission of guilt and penalty imposed.

(7) The law society must cause further steps to be taken to determine whether the attorney is still a fit and proper person to continue practising as such.'

The fact remains; there will always be a need for debt to be collected in society and attorneys play an important role in facilitating this service.

Debt Collecting attorneys should take note of this Bill and ensure



Mapula Thebe - Editor

that their debt collecting practice is in line with the Bill.

The full Bill is available at <http://www.justice.gov.za/legislation/investigations/DebtColBill-Oct2015.pdf>

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# LETTERS

## TO THE EDITOR

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

### Filing of court documents in the magistrate's courts

The magistrate's court rules of court are to be applied 'so as to facilitate the expeditious handling of disputes and the minimisation of costs involved', or so r 1(2) states. Rule 3(12) provides that 'the offices of the registrar or clerk of the court shall be open from 08:00 to 13:00 and from 14:00 to 15:00' to issue process or to file any documents. A notice of intention to defend can be filed until 16:00.

Many magistrate's courts have resorted to a type of basket-filing system, where the attorney drops the original and his copy of the document in a basket in an office (when that office door is not locked). The attorney must then return the next day and hope that his court-stamped copy will be placed in a pigeon hole from where he can hopefully find it among all the other documents from other attorneys in the same region. This filing system is reprehensible because the attorney does not have any proof that he filed a document or on which day this document was filed.

The number of documents that we

have lost due to this system being used in different courts are evident of the unsuitability of this system. It frustrates the timeous delivery of documents and increases travelling expenses to the courts.

In many cases, the court stamp is also not affixed to the document on the day that the attorney actually filed the document in court. One also now has to make at least two trips to the court to file a document and ensure proper delivery in terms of the court rules. Not all firms have the luxury of messengers who can attend the courts on a daily basis.

The Rules Board should consider to specifically clarify the duties of the registrars and clerks relating to the filing of documents until such time as the Department of Justice implements an electronic filing system. An attorney who goes to court to file a document, should at least return to his office with a court stamped copy of that document. My experience these days is that every court has its own internal rules on the filing of documents, as well as the times and days that they are open to issue process and file documents. This results in uncertainty, delays in the process and quite

a substantial increase in travel time and travel and parking costs.

**Elize Radley**, attorney,  
Johannesburg

### Concern about Legal Practice Act

In response to the request made by the editor in the editorial titled 'Legal Practice Act: What's happening now?' (2015 (Sept) *DR* 3) as to clarification on any matter in the Legal Practice Act 28 of 2014, I have the following concern.

I am a final semester law student studying through Unisa. In order to be admitted as an attorney, I must complete articles. I know of the various ways articles can be completed namely the standard two years, or a reduced or increased amount of time under various circumstances, as listed in the Attorneys Act 53 of 1979.

However, my concern lies in that a graduate is forced to complete articles in order to be admitted, but no practitioner is forced to take on a candidate attorney. I believe this creates a gap where graduates search for articles and are stuck and cannot proceed if no one wishes



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to hire them. I speak from experience. I have been applying for articles at, literally, hundreds of law firms. From large multinational firms to sole practitioners. While I have items counting against me, that is, I am a mature student, I also have items that count in my favour, such as a good academic record and more than 20 years' office experience.

No other response is given to my applications other than that there is no position currently available. So, I am at a crossroads. How do I proceed to become an admitted attorney and start my career, if no one wants to hire me? I do realise that being an admitted attorney is not the only option for an LLB graduate. But, this is what I want and it is the direction I wish to go, since I would like to be a conveyancer and notary public.

This is a gap that needs addressing. Can the Legal Practice Act provide some relief in this regard?

**Shannon Nelmes**, law student,  
Kempton Park

### Reply from LEAD

We understand the frustration of the writer.

'Workplace training' in preparation for admission, is a well-established and necessary requirement. It will, however, be practically and economically impossible to force a law firm to appoint a candi-

date attorney. Many factors are taken into consideration when a firm creates and fills a position for a candidate attorney.

This certainly does not mean that one should be insensitive about the desire of graduates for an opportunity to qualify as a legal practitioner.

The Legal Practice Act 28 of 2014 states that increased opportunity for access to the profession is an aspiration. This will definitely be a critical issue on the agenda of the legal education committee of the National Forum, when it deliberates on new rules for admission to practice.

**Nic Swart**, Chief Executive Officer  
Law Society of South Africa  
and Director: Legal Education  
and Development

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- Editor. 

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# Founding President of the Black Lawyers Association honoured

**T**he Black Lawyers Association (BLA) held an inaugural memorial lecture and gala dinner in honour of Godfrey Mokgonane Pitje. The memorial lecture, attended by 35 judges, was held at Constitution Hill on 9 October.

In a press statement issued by the president of the BLA, Busani Mabunda, before the memorial lecture, the BLA stated that it received blessings from the Pitje family to use the name of Mr Pitje for various key programmes. One such key identified programme is the Godfrey Pitje Annual Memorial Lecture. The memorial lecture is part of honouring the late Mr Pitje, as he dedicated part of his life to political liberation fighting against the apartheid system.

## Background

Mr Pitje was born in 1917, in the northern Transvaal, the son of semiliterate Bapedi parents. In 1944 he graduated with a BA degree, later obtaining advanced degrees in anthropology, education, and law from Fort Hare. In 1948 he was invited to lecture in anthropology at Fort Hare and was encouraged by Ashby Peter Mda, a friend and fellow teacher, to join politically minded students in establishing a Fort Hare branch of the African National Congress (ANC) Youth League. In 1949 Mr Pitje took over from Mr Mda as the ANC Youth League's president. He was also elected to the ANC National Executive Committee in the same year. In 1951 he was succeeded as president of the Youth League by Nelson Mandela and retired from active politics. With the introduction of Bantu Education, teaching lost its appeal as a profession to Mr Pitje, he took up law and served articles in the firm of Mandela and Tambo, qualifying as an attorney in 1959. He was subject to bans from 1963 until 1975.

## Memorial lecture

Delivering the inaugural memorial lecture, Deputy Chief Justice, Dikgang Moseneke, said that he was privileged to sing the praises of Mr Pitje, the founding President of the BLA. Justice Moseneke added: 'There is another good reason why I am here. In 1963, when I was 15 years of age and stood in the Synagogue



*File picture of Godfrey Mokgonane Pitje.*

for trial facing charges of a conspiracy to overthrow the state by violent means, Mokgonane Pitje was right there as our instructing attorney. He has been my father, as I fondly called him "Papa".'

## Legal career

Justice Moseneke said that Mr Pitje is a legend in the legal profession, a freedom fighter and a distinguished leader. 'After joining Mandela and Tambo, Pitje was asked by his principals to stop his political activities so that he would retain his freedom of movement; as Mr Mandela and Mr Tambo were banned and their freedom of movement restricted. It was useful that Pitje was able to go to areas they could not reach. Much to the worry of OR Tambo, however, Mokgonane was irrepressible. He accepted several invitations to address ANC gatherings,' he said.

Justice Moseneke noted that: 'During this period, African attorneys faced extreme challenges and indignity. It was an offence to practise within "white" towns or cities. Black lawyers were not permitted to enter a courthouse through the main front entrance. They were not allowed to address the court from the same desk as their white colleagues. This issue formed the background for the notable case of *R v Pitje* [1960 (4) SA 709 (A)]. On 20 March 1958, while still an articled clerk, Mr Pitje went to Boksburg Magistrate's Court to represent a client on a charge of trading without a licence.

He was unaware that his senior, Mr Tambo, had previously withdrawn as an attorney of record in the same matter after the magistrate had ordered him to take a seat at a different desk than the one occupied by white attorneys and articled clerks. Upon arrival at the court, a court interpreter pointed Mr Pitje to a seat in a corner between the public gallery and the bench. Mr Pitje ignored him and took a seat at the desk that was normally occupied by white lawyers. The magistrate ordered Mr Pitje to go sit in the corner designated for black attorneys. Mokgonane refused to obey. A verbal exchange ensued between him and the magistrate. Pitje chose to withdraw as the attorney of record rather than to submit to the racial scam. Mr Pitje was summarily charged with contempt of court and sentenced to a fine or ten days imprisonment. He refused to pay the fine and was detained. An unknown person paid his fine and Mr Pitje was released on the same day. He appealed the sentence and conviction to the Appellate Division, the highest court in the land at the time. That court confirmed both the conviction and sentence.'

Justice Moseneke said that in 1959, Mr Pitje started his own practice. 'Not long thereafter Ms Desiree Finca, a former domestic worker, from the Transkei, became the first African woman to be admitted as an attorney. She joined GM Pitje's practice as a partner. Shortly thereafter, there was a relative flourish as a number of African practitioners were admitted within the old Transvaal during the 1960s through to mid-1970s.'

## Involvement with the BLA

'In 1977, Mr Pitje became a founding member of the Black Lawyers Association, initially called the Black Lawyers Discussion Group. The establishment of the Discussion Group was sparked by the obstacles that black lawyers were faced with daily in the legal field during Apartheid. ... Black lawyers moved around daily with their admission certificates, much like pass books. Magistrates simply did not believe that they were attorneys. They had to prove their status. ... And it was not uncommon for black lawyers to lose a case not on per-

formance or merit, but because of the deep racial prejudice that pervaded the judiciary of the time. ... In the same year that the Discussion Group was formed, it assisted me with my application to be admitted as an attorney, which had been opposed by the law society. We took this matter to court and prevailed, and I was enrolled as an attorney in 1978. At this point, the Discussion Group changed its name and became the Black Lawyers Association,' said Justice Moseneke.

Justice Moseneke mentioned that Mr Pitje left practice in 1984 to become the Director of the Black Lawyers Association's Legal Education Centre. 'We established it to advance a set of well-defined objectives. The first was the skills enhancement of black lawyers who were victims of structural exclusions of apartheid and colonialism. The most prominent of this programme was advocacy training – it ran successfully for nearly 20 years. The second was the increase of black attorneys. This we did by creating and managing a placement scheme for black candidate attorneys in law firms. The third object was to litigate in public interest matters. ... The fourth object was to produce the African Law Review in which oppressed lawyers would find a voice distinct and separate from formal law journals that were propping the apartheid order and its jurisprudence. Think again, those were truly revolutionary days. We set on a path to liberate ourselves,' he said.

### **Never forgotten**

Justice Moseneke said that Mr Pitje passed away on 23 April 1997 from illness. 'Tragically, this was only three years after our nation's first democratic elections. I am confident that Mokgonane Pitje would have been proud of how far we have come. He would have saluted the gains that South Africa has made and our constitutional commitment to pursuing a more just and equal society. His contributions deserve honour and admiration by all in this country from lawyers to academics to politicians to lay persons,' he said.

Justice Moseneke noted that the first lesson the life of Mr Pitje teaches attorneys is a lesson of courage and gritty determination. 'He broke the barriers of his limiting rural socialisation to become what he yearned to be. Phokoane was too small a pond for a man who seemed to think that not even the sky was a ceiling. When he had to re-invent himself from a Master's degree academic to a practising attorney, he did. He did this despite structural obstacles. ... Good lawyers need courage and steadfastness. If you are a timorous soul you do not belong to the profession,' he said.

Speaking about the intersection between legal practice and social justice, Justice Moseneke said: 'You see, a man



*Delivering the inaugural memorial lecture, Deputy Chief Justice, Dikgang Moseneke, said that he was privileged to sing the praises of Godfrey Mokgonane Pitje, the founding President of the Black Lawyers Association.*

called Thomas Hobbs, an English Philosopher, many years ago, warned that life without a social contract would be "short, brutish and nasty". The obvious implication is that we need an agreement or arrangement not to harm each other, not to oppress each other and to regulate our lives in a way that affords us a full realisation of our human potential. So, laws must be good. By that I mean we need laws to advance both individual and public good. Put simply, law is an agent or an instrument to regulate the achievement of public good. That explains why we need a representative body of people to make the laws that will serve best those who are governed.

'It further explains why an executive government is bound to give effect to the will of the people by formulating beneficial policies and by implementing laws. To complete this pursuit of public good, it is necessary to have adjudicators who would resolve disputes. As they do, they interpret the law and ensure that it is observed and complied with. And lawyers in turn, are required to assist courts in the adjudication process and to support citizens as they assert their rights. So, lawyers must be in collective pursuit of individual and public good. That is why we train young people in the science of law – both the substance and process of the law. This means that lawyers are, in effect, the protagonists of what is good for the individual and the collectives in society. Lawyers should not keep a professional distance from projects that seek to refine or advance social justice. The law is more than a set of rules. It is a powerful instrument for social fairness,' he said.

Justice Moseneke said that another tutorial from Mr Pitje's life is that for lawyers to accomplish their task, they

must act ethically. 'They must be honest beings in their professional and public posture. ... Lawyers must relate ethically to those who seek their help and to the world at large. Lawyers must not steal from their clients or from anyone else. They must not overreach when they set their fee. Practitioners must never lie in advancing their cause or that of their client. They must join, and not mislead, the court in the search for the truth. They must remain honourable in their professional disposition. After all, lawyers are indeed members of the honourable profession, despite some public misgivings,' he said.

### **Transformation**

'Another lesson from the Pitje legacy is how we should approach issues of transformation. Pitje practised at a time when there was no democratic and empathetic government to look up to. There was no burgeoning business and middle class who could possibly brief him and other black lawyers. Even if he had screamed about unfair briefing patterns, no one would have listened. Thanks to that, he had no wild expectations that the government of that day might brief him. It would not and did not. He knew that his earnings were likely to be depressed because he served by and large poor people living on the edges of society.

'The power relations within an economy dictate choices of who should provide legal support services. The dominant business class calls the shots on the distribution of legal services to the profession and the acquisition of the required skills. Therefore, the dominant class dishes out patronage as it wishes and chooses. Briefing patterns of commercial or corporate work will always be reflective of the class, gender and race of the dominant decision makers. So, briefing patterns are not a function of compassion and good-heartedness or a wish list. No amount of pleading will help. They are informed by both the financial interest and prejudices of the moneyed class. Often, all this boils down to them using the legal services of those with whom they share race, class and gender. It is a jolly waste of time to call for a transformation of the profession and, in particular, of equitable distribution of work without changing the economic power relations in the private sector. Nobody will argue against the need for transformation, not even those who do not support it. But it will simply not happen at the behest of the private sector. So again, as when the Black Lawyers Association was formed, and as Bantu Biko also famously observed, we are on our own,' Justice Moseneke said.

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# Colloquium on the African Court on Human and People's Rights

**T**he Law Society of South Africa (LSSA) held a colloquium on the African Court on Human and People's Rights (AC) on 8 October. The colloquium was held because the LSSA recognised the need to raise public awareness about the existence, functions and accessibility of the AC. The LSSA further recognises the importance of depositing the art 34(6) declaration, especially since South Africa is yet to make such a declaration and its citizens, therefore, cannot approach the AC at this stage.

## Facts about the AC

The AC was established by virtue of art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). The organisation, jurisdiction and functioning of the AC are governed by the Protocol. The AC officially started operating in November 2006.

One of the objectives of the AC is to complement the protective mandate of the African Commission of Human and Peoples' Rights (the Commission).

## Protocol and declaration

Since its adoption in 1998, only 27 of the 54 member states of the African Union (AU) have ratified the Protocol, South Africa being one of them. However, in addition to ratification of the Protocol, states have to make a declaration in terms of art 34(6) of the Protocol to allow individuals and non-governmental organisations (NGOs) to bring cases to the AC. Without the declaration the court will have no jurisdiction over cases brought by individuals and NGOs. Only seven states have made the declaration. South Africa has not yet made the declaration. Article 34(6) provides: 'At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under article 5(3) of this Protocol. The court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.'

## Summary of salient provisions relating to the AC

- Jurisdiction (art 3 of the Protocol):



*President of the African Court, Justice Augustino Ramadhani, speaking at the colloquium on the African Court on Human and Peoples' Rights held by the Law Society of South Africa.*

- All cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights (the Charter), the Protocol and any other relevant Human Rights instrument ratified by the states concerned, the AC decides whether it has jurisdiction.

- Access to AC (art 5 of the Protocol):
  - The following may submit cases -
    - a. the Commission;
    - b. a state party, which had lodged a complaint to the Commission;
    - c. a state party against which a complaint had been lodged at the Commission; and
    - d. a state party whose citizen is a victim of human rights violations.
  - A state party can ask to be joined where it has an interest in a case.
  - The AC may allow NGOs, with observer status, before the Commission and individuals (art 5(3)). However, the AC may not receive petition from an NGO or individual involving a state party, which has not made a declaration (art 34(6)).
- Admissibility (art 6 of the Protocol):
  - The AC will ask for the Commission's opinion when deciding on the admissibility of a case instituted under art 5(3) (NGOs and individuals).
  - The AC shall rule on admissibility taking into account art 56 of the Charter.
  - The AC may hear a matter or refer it to the Commission.

- Communications to the Commission (art 56 of Charter) can be considered if, *inter alia* -

- all local remedies, if any, have been exhausted, unless it is obvious that the procedure is unduly prolonged;
- submitted within reasonable time from exhaustion of remedies; and
- the matter is not yet settled by states.

- Composition of AC (art 11 of the Protocol) -

- 11 judges, elected by Assembly of Heads of State and Government of the African Union (the Assembly). The term of office is six years with only one re-election.

- Sittings: Quorum of at least seven (art 23 of the Protocol).

- Proceedings and hearings (art 10, 25 of the Protocol):

- The AC may hold hearings in public, but may also hold hearings in camera if it is in interest of public morality, safety or order.

- Any party entitled to representative of his or her choice may attend a hearing.

- The AC will hear submissions by all parties and, if necessary hold an inquiry.

- During hearings, the states concerned shall give facilities.

- Written and oral evidence, including expert testimony are permitted during hearings.

- Findings of AC (art 27 of the Protocol):

- If the AC thinks there is a violation, it will issue an appropriate order to remedy the violation.

- The AC can include fair and adequate compensation or reparation.

- If urgent, or when necessary, the AC can adopt provisional measures (eg, where there is imminent execution).

- Judgments of AC (art 28 of the Protocol):

- Judgments are legally binding.

- The AC must give judgment within 90 days of having completed deliberations.

- Judgments are decided on majority.

- Judgments are final and not subject to appeal.

- However, where there is new evidence that a party did not know about at the time the judgment was delivered, the matter can be reviewed.

- Reasons for judgment shall be given.

- Any judge can give dissenting opinion.

- Execution of judgment (arts 30, 31 of the Protocol):

- State parties undertake to comply with judgment.

- The AC shall submit report to assembly.

- The Executive Council of the Organisation of African Unity (OAU) must monitor the implementation of the judgment on behalf of the Assembly.

• **Advisory opinions:**

- The AC will provide an opinion on any legal matter relating to the Charter or other human rights instrument at the request of a member of the OAU, any of its organs, or any African organisation recognised by the OAU (art 4 of the Protocol).

- The subject matter may not be related to a matter that is being examined by the Commission.

- The AC must give reasons for its opinion.

- Every judge may give dissenting decision.

• **Rules of Court:**

- The AC has its own rules dealing with procedure.

## Word from the LSSA

Immediate past Co-chairperson of the LSSA, Etienne Barnard, gave the opening address on behalf of the other immediate past Co-chairperson, Max Boqwana, who could not attend the colloquium.

Mr Barnard said that the colloquium comes at a time when international law and international human rights are occupying both national and continental discourse. 'In many instances, the debates around these issues seem to generate more heat than light. This discussion, in one's view, tend to reflect the conflict or collision of politics and the law. The great debate in this country and the rest of the continent is whether or not to leave the International Criminal Court (ICC). Whatever the outcome of this debate, one thing clear is that the legitimacy and credibility of the ICC is totally undermined'.

Speaking about the ICC, Mr Barnard said: 'There are a couple of issues that calls the credibility of the court into question -

- the funding of the court gives powers to those who finance it to dictate its agenda;

- the appointment of its judges still remains a mystery;

- the exclusive focus on prosecution of Africans, despite whatever justification, is becoming difficult to countenance;

- the behavior of the court itself has undermined its own credibility, the latest being its authorisation for the continued detention of Laurent Gbagbo without

trial and as an exercise in "pre-emptive justice".

Quoting Mr Boqwana, Mr Barnard said that there can never be any reason for Africans to walk away from justice. 'There can never be a justification for impunity, genocide, war crime, mass murder and ethnic cleansing. We need to ensure that the masses of Africans have protection from impunity and abuse of human rights. We know that too often many African countries are too weak to deal with these matters individually,' he said.

Mr Barnard went on to say that thankfully leaders on the continent have options when dealing with the ICC matter. 'One option is to engage the rest of the Assembly of States that signed the Rome Statute and propose a review of the way the ICC works and treat the continent. In the same vain, relook at the court's finance model and vigorously argue for the court to be released from the clutches of the Western politics and influence, in particular by those that refuse to sign the statute. If it can then be proved that the court subscribe to the principles of fairness, justice and even-handedness, independence in all accounts then all of us will be behind this court. Then alternatively, and what is really possible, is

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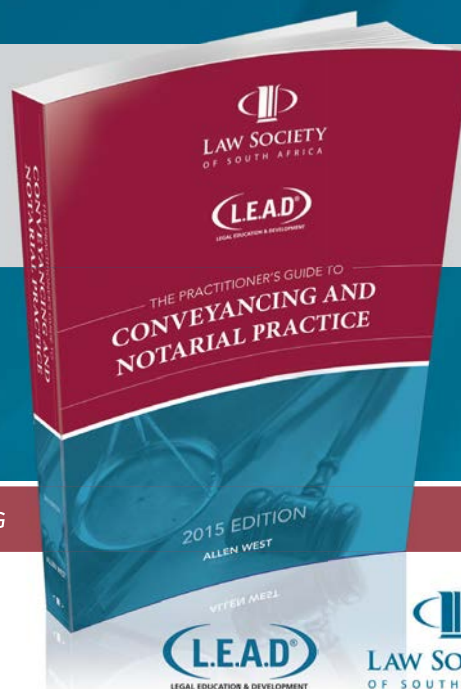
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for Africa to capacitate and strengthen the African Court on Human and People's Rights,' he said.

### Word from the court

President of the African Court, Justice Augustino Ramadhani, gave a brief overview of the AC. Justice Ramadhani said that South Africans cannot approach the AC as the government has not signed the declaration. He said that it is important

for attorneys to engage with government and other stakeholders to ensure that the declaration is signed. 'Some government officials are afraid that their dirty laundry will be washed at the court. But, before an individual or NGO approaches the court they would have had to exhaust all local remedies, their dirty laundry would have already been washed in their countries,' he said.

Deputy Registrar of the African Court,

Nouhou Diallo, said that if South Africa signs the declaration, this will encourage southern African countries to do the same.

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## State Attorney office towards better litigation service

**O**n 30 September the office of the State Attorney held a service delivery symposium in Johannesburg. The symposium, which was organised under the theme 'Beyond Challenges: Towards a Better Litigation Service', was an opportunity for government to interact with stakeholders and identify mechanisms to reduce litigation against the state. In addition, the purpose of the symposium was to improve service delivery, and improve the work of state attorneys.

### Keynote address

Minister of Justice, Michael Masutha, delivered the keynote address. He opened his address by saying that the state was the largest consumer of legal services. He highlighted that policy governing such acquisition was critical. 'One of the issues that government has to deal with as a constitutional imperative, is transformation of the society and address historical imbalances of those who were left out and continue to be left out. Government has come with practical strategies on how to address this,' he said.

Mr Masutha said that he prefers that all litigation that he is involved in as Minister should be handled by black, preferably African, senior counsel regardless of what the result is. Mr Masutha does not believe that transformation should be equated with mediocracy and indolence. He added that transformation does not translate into receiving inferior service. He cautioned lawyers against having an attitude that says that 'the state will pay even if we fail, it does not matter'.

Mr Masutha noted that the state needs to be firm when procuring services as he has seen instances when black lawyers have been removed from a case because the briefing party believed that the matter was important and they needed to win. 'The judiciary, on numerous oc-



*Minister of Justice, Michael Masutha, delivered the keynote address at the service delivery symposium in Johannesburg.*

casions, has chastised the state on not doing enough to ensure transformation. Judges in their courts see white legal teams before them; this is not an isolated situation. The onus is on yourselves to ensure that transformation happens. I am not a practitioner I do not have the answers, you know the answers,' he said.

### Attorneys and ethics

Co-chairperson of the Law Society of South Africa, Richard Scott, addressed delegates on the topic of attorneys and ethics. He said that attorneys have an ethical obligation to improve the situation of their clients while maintaining high standards. 'Justice must be accessible without compromising on quality,' he said.

Mr Scott said that the Legal Practice Act 28 of 2014 seeks to address issues of transformation since one of its



*Co-chairperson of the Law Society of South Africa, Richard Scott, addressed delegates on the topic of attorneys and ethics.*

objectives is to 'provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.'

Mr Scott reminded delegates that there is no substitute for proper preparation. 'Lawyers cannot prepare for a matter if the client is not part of the litigation process. Information must be provided when the matter is handed over to the practitioner. If this is not done, a practitioner may lose a matter while the matter could have been won,' he said.

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# Quarter century celebration for School for Legal Practice

**T**he School for Legal Practice, which forms part of the Legal Education and Development (LEAD) arm of the Law Society of South Africa (LSSA), celebrated its 25 year anniversary with a dinner held in Johannesburg in September. The event was attended by judges, stakeholders, as well as instructors and former students of the school.

Welcoming delegates, Co-chairperson of the LSSA, Busani Mabunda, said that the LSSA saw it fit to note the contribution the school has made to the legal profession in the past 25 years by hosting the gala dinner. He added that the dinner served as an opportunity for all to reflect on the good work and the role the school has played in shaping the legal profession. Mr Mabunda also pointed out that the achievements of the school would not have materialised if it was not for the vision of the Chief Executive Officer of the LSSA and Director of LEAD, Nic Swart. Mr Mabunda went on to thank everyone who played a role in enabling the school to become a success, because he recognised that its success was a collective effort.

Speaking of himself as an example, Mr Mabunda said as a past student of the school, who is now the Co-chairperson of the LSSA and President of the Black Lawyers Association, this is a clear demonstration of the role the school has played and will continue to play in society. He said that there were many other examples of past students who now hold positions of power and have ascended to the judiciary, therefore, emphasising the importance of the school and highlighting the caliber of people it produces.

The Chairperson of the Board of Control of the Attorneys Fidelity Fund (AFF)



*Chief Executive Officer of the Law Society of South Africa and Director of Legal Education and Development, Nic Swart, thanked all those who contributed to the school in the past 25 years.*

and former student at LEAD, Nonduduzo Kheswa, said, during her keynote address, that the AFF has been involved with legal education in the country by granting bursaries for students to complete their degrees. Ms Kheswa added that the AFF's involvement with LEAD is by affording it funding for its operations, which has benefitted attorneys. She added that the school has assisted in achieving the goal of producing better attorneys for the country and this achievement should never be underestimated.

Ms Kheswa explained that the objective of the AFF is to protect the public against loss as a result of the theft of

trust funds by attorneys, the school has assisted in achieving this goal by producing credible attorneys, which the public can use with confidence.

Former student of the school and Chairperson of the Board of Control at the school, Kabelo Seabi, said that he was one of the first students that attended the school. Mr Seabi noted and appreciated Mr Swart's sacrifice over the years. Mr Seabi added that the importance of the school can be seen by the quality of students who have come through the school.

Mr Swart thanked all the people with a passion for education that he has encountered during the years.



*Busani Mabunda said as a past student of the school, who is the Co-chairperson of the LSSA and President of the Black Lawyers Association, this is a clear demonstration of the role the school has played and will continue to play in society.*

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# Child Law Moot Court competition

**T**he Centre for Child Law held its sixth annual Child Law Moot Court competition on 18 and 19 September.

The final round was held at the Gauteng Division, Pretoria. The preliminary and semi-final rounds took place at University of Pretoria.

The judges were Judge Jody Kollapen, Chris McConnachie an advocate in Johannesburg and Melanie Murcott an attorney and lecturer at the Faculty of Law at the University of Pretoria.

The hypothetical facts dealt with the question of whether children can be charged with the manufacturing and distribution of child pornography if they



*From left: University of Pretoria Centre for Child Law director Professor Ann Skelton, and Best Team winners, Stanley Malematja and Jessica Odendaal from the University of Johannesburg.*

year LLB student, Stanley Malematja, and second year LLB student, Jessica Odendaal from UJ.

Mr Malematja said: 'It was a thrilling experience to participate in the sixth annual Child Law Moot Court competition. It took a lot of preparation, which would not have been possible without my partner Jessica Odendaal and my remarkable coaches and finally the legal knowledge I acquired from the lecturers of the law faculty of my university. It takes hard-work and dedication to be the best or achieve a goal, I worked hard and committed myself to the competition and the results are evident.'

Ms Odendaal said: 'Winning the child law moot court competition 2015 was both, a rewarding and motivating experience.

'During our time spent preparing for the competition, there were many tears shed, long hours and late nights working towards winning the competition. Our coaches pushed us beyond our limits and in doing so, taught us that we are only confined by the limits that we set for ourselves.

'I have definitely gained so much from this experience and I would like to say thank you again to my coaches and especially team partner Stanley Malematja. Winning this competition would not have been possible without their support, hard work and dedication.

Finally, I would like to thank my university for giving me this incredible opportunity. It has been an honour to have been selected and to represent the University of Johannesburg throughout the competition.'

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*From left: Tebogo Nsibande and Sally-Anne Hungwe, both third year LLB students from University of the Witwatersrand, won Best Heads of Argument. Ms Nsibande also won Best Speaker.*

take and send 'naked selfies' of themselves.

The winning team came from University of Johannesburg (UJ). University of the Witwatersrand took home the prize of Best Heads of Argument.

Other universities that entered were Rhodes University, the University of the Western Cape, North West University (Potchefstroom Campus), the University of Pretoria, the University of Venda and the University of the Witwatersrand.

'The idea behind the competition is to expose students to the idea behind child law and to learn about the complexity behind child law. We are concerned sometimes that people think child law is some kind of junior area of the law, an area of the law that you could cope with if you were less skilled. We do not believe that to be true. We believe it requires a very high level of skill,' said University of Pretoria Centre for Child Law director, Professor Ann Skelton.

The winning team comprised fourth

**T**he Law Society of South Africa (LSSA) was invited to take part in the Tax Indaba 2015. The indaba, has been a result of the collaboration between a number of the Recognised Controlling Bodies (RCBs), as defined in the Tax Administration Act 28 of 2011 (TAA). The indaba was held over five days and reportedly attended by over 600 delegates and covered a wide range of tax-related topics, including -

- eFiling;
- VAT;
- international taxation;
- tax risk management;
- recent amendments to exchange control policy;

- portfolio investment tax; and
- the TAA.

## Keynote address

The Tax Ombud, Judge Bernard Ngoepe, gave the keynote address and provided more insights into the mandate of the Tax Ombud which is set out in s 16 of the TAA, being; '... to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the ap-

plication of the provisions of a Tax Act by South African Revenue Service [Sars]'. Judge Ngoepe also informed delegates that the Tax Ombud is in the process of 'motivating for the amendment of the Tax Administration Act on issues that negatively affect the independence of the Office of the Tax Ombud.' He further stated that: 'We believe that this office must enjoy full legal status in order to operate and act independently without relying on Sars for financial and human

# Tax indaba 2015

capital. In other words, institutional independence.'

## Davis Tax Committee

Chairperson of the Davis Tax Committee, Judge Dennis Davis, provided an overview of the Davis Tax Committee and commented on the challenges of an increasing fiscal gap. He emphasised the need to increase revenue and introduce a tax system that is not regressive and negatively impacting on a vulnerable sector of society.

## Panel discussions

A panel consisting of, among others, accountants and lawyers discussed tax within the context of day-to-day practices. It revealed interesting reflections on various issues, including, the different approaches that accountants and lawyers may have when dealing with tax matters. One panelist, for example, commented that accountants would usually interpret and approach a tax matter on

the basis of what will be acceptable to Sars, whereas attorneys will approach a matter on what will be acceptable by a court of law.

A further panel discussion consisting of journalists discussed 'Relationships beyond the advisory', which deliberated on public perceptions of tax within South Africa. The South African public appears to be generally appreciative of the need for taxes. Panelists did, however, reflect on the public's response to the e-tolls in Gauteng, as a form of taxation.

## Attorneys as tax practitioners

The focus of the indaba was largely on tax practitioners, which naturally include legal practitioners. Law firms that specialise in tax matters were also present at the indaba and presented on various topics. The presentations by lawyers dealt with, among others, international tax and corporate tax.

The LSSA participated in the event to

emphasise the valuable contribution that attorneys make as tax practitioners. Provincial law societies are automatically recognised as RCBs pursuant to the TAA. This means that provincial law societies are not required to comply with any additional requirements to be recognised by Sars as RCBs.

It is, however, important to note that practicing attorneys who provide advice to another person with respect to the application of a tax Act or completes or assists in completing a return, as defined, must also register with Sars as a practitioner in the prescribed manner. Attorneys who provide such advice as an incidental or subordinate part of providing good or other services to another person are not required to register with Sars as tax practitioners.

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**P**roBono.Org recently held its second annual *Pro Bono* awards ceremony on 17 September at Constitutional Hill in Johannesburg.

The event celebrates the valuable role that legal practitioners play in providing *pro bono* legal services and access to justice for disadvantaged people in South Africa.

Keynote speaker, Public Protector, Thuli Madonsela, congratulated the nominees and winners who provide legal services to those who cannot afford them. Ms Madonsela said the celebration coincided with Access to Justice week, an initiative which extends legal services to the disadvantaged. 'Your role as providers of free legal advice and representation to those who cannot afford can never be underestimated. Access to justice, incorporating access to legal advice and or representation, is one of the essentials of the rule of law,' she said.

## Link between access to justice and legal assistance

Ms Madonsela referred to s 34 of the Constitution, which states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' Ms Madonsela said the essence to access to justice is the opportunity for a victim of injustice, or person involved in a dispute, to readily access a forum that can listen to his or her grievance and/or resolve their dispute in a fair and expeditious manner that leads to redress where



*Public Protector, advocate Thuli Madonsela, was the keynote speaker at the second annual Pro Bono Awards on 17 September at Constitutional Hill in Johannesburg.*

deserved. 'I hope you will also agree with me that without a chance to understand or to be understood at whatever forum that deals with your grievance or dispute, there is no access to justice. That is where *pro bono* legal services come in. In an utopically just world, none of us would ever be judged on the basis of laws we have never heard of, or do not understand and in proceedings we do not understand. But it happens,' she said.

# Attorneys shine at Pro Bono awards

## Why is it important that all experience access to justice?

Ms Madonsela referred to the World Justice Forum, which places the rule of law at the centre of societal peace and progress, regards access to justice, incorporating legal empowerment of the poor, as an essential part of the rule of law. 'Part of it relates to the legitimacy of the state. I prefer to see it as our collective insurance for peace and stability. At the core of it is accountability. You will agree with me that democracy, progress and sustainable peace to be experienced by any society, its citizens should have mechanisms to have their grievances resolved fairly and wrongs redressed,' she said.

Ms Madonsela added that if citizens feel that their grievances or disputes are not being treated fairly, they are likely to take the law into their own hands. 'They may not do it today or tomorrow but they will eventually do it. ... Where people believe they have been wronged, there must be a readily available independent platform to resolve the grievance or dispute fairly,' said Ms Madonsela.

Ms Madonsela said knowing the law and related regulatory frameworks empowers all to participate meaningfully in





**Public Protector, advocate Thuli Madonsela, (middle back) and National Director of ProBono.Org, Erica Emdon (back right), with the Pro Bono Awards winners at the second annual Pro Bono Awards.**

democracy, development and other societal processes. 'It further fosters respect for the rule of law,' she said.

### Partnership between the Public Protector and the *pro bono* community

Ms Madonsela said no legal assistance is required when citizens approach her office, however, there were a few occasions when disadvantaged persons were assisted by lawyers and in some of those cases, everyone benefitted from the added insights. She added by saying that in this regard, the opposite also happens. 'Some of the cases that come to my office are not *pro bono* matters, but simple cases of poor treatment of the disadvantaged who have paid for legal services. Key among the trends we have picked up, is violation of people's agency, mostly through the lawyer proceeding to approach a case without input from the cli-

ent and even settling it without consent. It is important to remember that just because a person is not a lawyer, it does not mean they are not smart, insightful nor have a view on a matter that involves their lives,' she said.

In conclusion, Ms Madonsela thanked attorneys for their contribution to an inclusive, socially just and fair society. 'I am certain your work is taking us in the direction of the South Africa we want, the Africa we want and the world we all yearn for. ... Our collective efforts are also contributing to a society where there is accountability, integrity and responsiveness,' she said.

### Pro Bono award winners

The winners were announced by master of ceremonies and executive director of Corruption Watch, David Lewis.

Law firm, Webber Wentzel scooped three of the seven awards on the night. Moray Hathorn, partner and head of

Webber Wentzel's *Pro Bono* department and winner of the individual attorney award said: 'We are committed to equal justice for all members of South Africa's society by providing these essential legal services to individuals and communities on issues such as enterprise development, land reform, housing, education, healthcare, children's rights, gender equality and service provision. It is an absolute honour to be recognised for the *pro bono* work which we do. We are exceedingly proud to be acknowledged as a responsible citizen who can be a voice for those who have none.'

The winners were announced in the following categories:

- **Most impactful case award:** Webber Wentzel – emolument attachment orders case (*University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC)).
- **Individual attorney award:** Moray Hathorn – partner at Webber Wentzel.
- **Children's rights award:** Hogan Lovells – court preparation training for Teddy Bear Clinic.
- **Law clinic student award:** Danelle Prinsloo – Pretoria University's Law Clinic.
- **Human rights champion award:** Southern African Litigation Centre – Zimbabwe torture case (*Southern African Litigation Centre and Another v National Department of Public Prosecutions and Others* [2012] 3 All SA 198 (GNP)).
- **Advocate award:** Steven Budlender.
- **National Director's special mentions:**
  - Albert Makwela
  - Norman Moabi
  - Lesley Maman
  - Professor Peter Jordi

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## National Forum meets for third time to continue Legal Practice Act work

**T**he National Forum on the Legal Profession (NF) held its third meeting for the year in Centurion on 19 September. In terms of s 105(1) of the Legal Practice Act 28 of 2014, the NF must hold at least four meetings a year. The September meeting was its third meeting including the launch of the NF in March this year. The NF will hold its fourth meeting on 23 January 2016. Kgomotso Moroka SC and Max Boqwana – the NF chairperson and deputy chairperson respectively – drafted a first report on the NF's activities and submitted the report to Justice Minister, Michael Masutha, as required by the Act. They then met with the Minister on 21 September to report to the Minister on developments and on the work undertaken by the NF to pave the way for 'the effective and efficient implementation of the Act' by the Legal Practice Council (LPC) once it comes into effect.

At the NF meeting in September, the General Council of the Bar recorded the replacement of one of its member, Ismail Jamie SC, with Durban advocate Anna Annandale SC from the KwaZulu-Natal Bar. Also, the four working committees set up at its meeting in July (see 2015 (Sept) *DR* 18) reported on their activities to date, which included drafting terms of reference, work plans and initial discussions on critical issues.

The four NF committees are –

- Admin and Human Resources Committee;
- Governance Committee;
- Rules and Code of Conduct Committee; and
- Education, Standards and Accreditation Committee.

The Admin and Human Resources Committee shortlisted and interviewed candidates for the position of Executive Officer of the NF. An announcement was due at the time of this issue going to print. The committee is also focusing on developing a strategy and plan for the transfer of the staff and assets of the statutory provincial law societies to the LPC. The transfer will also include all records, databases and work in progress relating to both the attorneys' and advocates' professions. Welkom attorney, Martha Mbhele, had been appointed chairperson of this committee, but as Ms Mbhele has been nominated by the Judicial Service Commission for a position on the Free State High Court Bench, she will need to be replaced on the NF as one of the Law Society of South Africa's (LSSA) nominees nominated by the Black Lawyers Association.

Polokwane attorney, Jan Stemmet, has been appointed chairperson of both the Governance and Rules and Code of Conduct committees. The first committee is dealing with the structure and functions

of the LPC and the provincial councils, as well as their areas of jurisdiction and delegation of powers from national to provincial level. The second committee is tackling the rules and code of conduct that will regulate all legal practitioners under the new dispensation.

The Education, Standards and Accreditation Committee is chaired by Bloemfontein attorney, Jan Maree, and is dealing with a range of issues relating to vocational training, examinations and legal education service providers.

As at the September meeting, the work of the committees is being carried by the committee members – who are all legal practitioners – as the NF was yet to appoint staff and researchers.

Although the full NF will meet again only in January 2016, the above working committees have meetings scheduled throughout October and November – mostly on Saturdays – to ensure progress is made within the tight timeframes prescribed in the Act.

Once firm position papers emerge from the working committees, these will be communicated to practitioners and input will be invited at the appropriate stages. Also, at the most appropriate time, the LSSA will undertake road shows across the country to inform practitioners of developments.

**O**n 1 October the Law Society of South Africa (LSSA) issued a press release noting its serious concern with media reports relating to the Road Accident Fund (RAF) 'suing itself' to halt prescription in cases where road accident victims had lodged claims direct with the RAF. The LSSA was of the view that the RAF had placed the victims in a position where their claim could prescribe in the hands of the Fund.

'The media reports indicate the problems that can arise when an insurance company – which the RAF is – tries to represent both itself and the victim. It is inappropriate as it can lead to various undesirable outcomes such as prescription, under settlement of claims, delays and additional costs, none of which the RAF can afford and all of which prejudice road accident victims' said LSSA Co-chairpersons Busani Mabunda and Richard Scott.

## LSSA expresses serious concern at reports of irregularities relating to prescribed direct claims by road accident victims

They added that, as regards the principle of the RAF using its panel attorneys to sue itself, there is a *lacuna* in that there is no provision in the Act or regulations for the RAF to condone or extend prescription, so the only way to interrupt prescription where claimants have claimed direct from the RAF and their claims have not been settled in time, is to issue and serve summons. 'We assume that the RAF has a mandate – actual or implied – from the claimant to ensure that their claims are processed without prescription setting in. However, in cases where it becomes clear that the claimant is not aware or has not given a

mandate, then all the parties concerned must be held accountable,' said Mr Mabunda and Mr Scott.

They added that, if fraud has been perpetrated on the claimants or the dependants of deceased breadwinners by the parties involved in the system, then this must be addressed through the appropriate channels, whether that be the appropriate disciplinary steps and/or criminal prosecutions.

The Co-chairpersons pointed out that the public is best advised to consult an attorney when considering claiming from the RAF. Attorneys have a strict code of professional conduct through

which they are held accountable by their relevant law society. 'The public is still better off using knowledgeable

and skilled attorneys to institute claims against the RAF as the accountability of attorneys carries a greater standard of

care and diligence towards their clients than the RAF,' said Mr Mabunda and Mr Scott.

## 2016 Fidelity Fund certificates to be submitted online

**T**he new 2016 Attorneys Fidelity Fund Certificate Application Form was gazetted on 30 September in GN R898 GG39239/30-9-2015. To assist practitioners, the new application form has been automated and applications will be accepted only through the online process.

In order to submit Fidelity Fund certificates using the new online application, based on the new application form regulations, practitioners have been urged to ensure that they have the following ready:

- Trust account/s balances for the previous four quarters ended 31 December 2014; 31 March; 30 June and 30 September 2015 for the following accounts:

- s 78(1) - to be reported individually for each s 78(1) account held by the firm;

- s 78(2)(a) - to be reported individually for each s 78(2)(a) account held by the firm;

- s 78(2A) - total balances to be reported per financial institution;

- estates - total balances to be reported per financial institution; and

- properties (other entrusted assets) - total balances to be reported per category as indicated on the online application. These categories are: Movable assets; immovable assets; financial instruments and other.

- Service charge formulae for the trust accounts.

- FICA registration number.

- Financial Services Provider number (if running an investment practice).

- Firm's registration number (for incorporated practices).

In addition to the above, attorneys were urged to ensure that -

- their statutory provincial law society

is in receipt of their unqualified audit reports;

- practice management training, where applicable, has been completed; and

- all interest as well as any other monies due to the statutory provincial law societies has been paid over.

If attorneys are in a firm with more than one member, the firm should identify a firm's representative who will capture the financial information of the firm on the online application. A member of the firm will be required to create that representative on the online application at member's login.

- Full information - including a 'Frequently Asked Questions' section - relating to the online Fidelity Fund certificate submission is available on the Fidelity Fund website at [www.fidfund.co.za](http://www.fidfund.co.za)

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**For more information please contact:**

Dr A du Plessis

051 401 9337 or [duplessisA@ufs.ac.za](mailto:duplessisA@ufs.ac.za)



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# People and practices

Compiled by Shireen Mahomed

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



**Kekana Hlatshwayo Radebe Inc** in Johannesburg has four new appointments and one promotion.

Left to right: Lethabo Motime has been appointed as a professional assistant, Ntombifikile Ndamase has been promoted to a manager in the recoveries department, Mbalenhle Sikhosana has been appointed as a professional assistant, and Simon John Naicker has been appointed as a professional assistant.



Khotso Mlungisi Mcanyana has been appointed as a professional assistant and conveyancer.

**Hogan Lovells** in Johannesburg has three new appointments.



Philip van Rensburg has been appointed as a partner in the construction and litigation department. He specialises in construction engineering law and commercial litigation.



Laurie Hammond has been appointed as a partner in the finance department. She specialises in cross-border transaction in Africa.



Waseeqah Makadam has been appointed as a senior associate in the litigation department. She specialises in mining, commercial administrative law and construction litigation.

**Bowman Gilfillan** in Johannesburg has appointed two new partners.



John Bellew



James Westgate



**Mkhabela Huntley Adekeye Inc** in Johannesburg has appointed Godwin Motlanthe as an associate in the competition law department.

**Livingston Leandy Inc** in Durban has two new appointments.



Sonya Stewart has been appointed as a director.



Peter Andrew has been appointed as an executive consultant.



**Lucian Companie**  
Director  
Appeals division  
051 400 4175



**Madalene Olivier**  
Senior Associate  
Appeals division  
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ATTORNEYS

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

# The value of mentoring candidate attorneys

**T**he purpose of this article is to reinforce the need for mentoring of candidate attorneys. Attorneys, like any other profession, go through a set of assessments and training in order to be admitted as attorneys and to practice for their own account. One of the training interventions that they go through is serving articles of clerkship, where they obtain practical exposure to practice of law. This exposure is obtained under the guidance or supervision of a principal attorney at the law firm where the articles are served. An alternative though, is available where the training takes place at the law clinics under the supervision of clinicians who are lawyers within those law clinics. Readers are encouraged to read this article together with the following articles:

- 'Preparing for the future University law clinics training candidate attorneys' (2013 (Sept) DR 34).
- 'The role of candidate attorneys in the legal profession' (2014 (July) DR 54).

The future success of the legal fraternity lies on the good foundation that ensures that knowledge and practical experience is rightfully cascaded to candidate attorneys. While this knowledge and practical experience is cascaded, it should also ensure that the character of the candidate attorney is enhanced in the process. The production of highly competent and skilled candidate attorneys is a shared responsibility among various stakeholders in the legal profession. There are many ways that

can be pursued to train and prepare candidate attorneys for the practice of law. Mentoring is one of the most critical and effective ways of preparing candidate attorneys for a tough and challenging legal industry.

Entering practice in any profession offers a major challenge to newly qualified practitioners. It is a formative period where the knowledge, skills and attitudes acquired during a programme of education are applied in practice. It is a transition period that can be stressful, as well as challenging, as new demands are made on individuals who are seeking to consolidate their skills. It is therefore a period when a candidate attorney is in need of guidance and support in order to develop confidence and competence.

The concept of continuing support for a period after qualification through mentoring or other methods is well-established in many professions and is being introduced by more and more organisations. Mentoring relationships range from loosely defined, informal collegial associations in which a mentee learns by observation and example to structured, formal agreements between expert and novice co-mentors where each develops professionally through the two-way transfer of experience and perspective. It is for this reason that we devote this article to mentoring of candidate attorneys.

There are a number of definitions for mentoring out there. D Clutterbuck, and D Megginson *Mentoring Executives and Directives* (Oxford: Butterworth-Heinemann 1999) at 3 defines men-

**Make a difference – become a mentor to a newly qualified or deserving attorney**

## LSSA/LEAD's Mentoring in Legal Practice Programme



*Accelerating the professional development of attorneys*



LEAD is looking to expand its mentors' base of experienced attorneys to transfer legal skills to mentee attorneys.

A mentor attorney has at least eight years' experience in a specific area who provides professional guidance and shares his/her practical knowledge and skills with a mentee. A mentee is an attorney who is newly-qualified or who has not had the opportunity to gain the skills required to practise in an area of law in which he/she has shown a keen interest.

### Contacts

Tel: +27 (0)12 441 4600  
Fax: +27 (0)86 550 7161  
E-mail: mentorship@LSSALEAD.org.za  
Website: www.LSSALEAD.org.za

**Both mentors and mentees can register online at [www.LSSALEAD.org.za](http://www.LSSALEAD.org.za)**



toring as an 'off line help by one person to another in making significant transitions in knowledge, work or thinking'. Another definition by Suzanne Faure, which captures the essence of what we wish to cover in this article says: 'Mentoring is a supportive learning relationship between a caring individual who shares knowledge, experience and wisdom with another individual who is ready and willing to benefit from this exchange, to enrich their professional journey' ([www.coachingnetwork.org.uk](http://www.coachingnetwork.org.uk)).

We now look at the various elements contained in this definition:

• **A supportive learning relationship** – this effectively requires that the mentee and the mentor should establish a relationship. It is important that this relationship is founded on trust. A mentee should be mentored by a person that he or she can trust, looks up to, and believes he or she can learn from over a long period, even beyond the training period.

• **A caring individual** – a mentor should not just be an academic or focused on the job alone. It should be someone who has an interest in the overall development of the mentee, beyond just practice. The mentor should be caring enough to want to see the mentee not only becoming a competent and skilful attorney but also being successful in life.

• **Shares knowledge, experience and wisdom** – the mentor should be willing to share knowledge that the mentor possesses, share experiences encountered (good and bad) and impart wisdom to the mentee. Knowledge-sharing will help the mentee with the technical development. Good experiences shared will help the mentee want to assimilate that which is good, while bad experiences will warn the mentee on things to avoid that could bring the mentee down. Sharing of wisdom is a critical area as it will put the mentee in a position to differentiate between right and wrong as he or she goes on in the practice of law. These put together will ensure future sustainable growth of the mentee as they begin to practice for their own account.

• **Ready and willing to benefit from this exchange** – as the saying goes 'you can lead a horse to water, but you cannot make it drink'. It is important that the mentee is both ready and willing to benefit from the exchange. Readiness means that the mentee is mentally ready to receive what is imparted to him or her. Willingness means where there are areas of improvement, the mentee is willing to change for the better. However, this is an exchange, meaning the mentor also benefits from the relationship. Willingness of the mentee will ensure openness in terms of inquiring, which in turn may assist the mentor in areas that may not have been considered before.

• **Enrich their professional journey** – this again talks to both parties benefiting from the relationship.

An essential step in a successful mentoring relationship is for both the mentor and mentee to individually identify, define, and honestly articulate their goals and motives. It is important to note that in a mentoring relationship there is no superiority of one to the other, but a relationship of mutual interest. It is a long-term relationship of openness, it is futuristic, and of mutual benefit.

While a principal attorney in a law firm or a clinician in a law clinic may not necessarily be officially the mentor to a candidate attorney that he or she is supervising, they should strive for a relationship that will build the candidate. In big and small law firms, a candidate attorney may be assigned a specific mentor and this person will be vital to their growth and personal development. In sole proprietary firms, by default, the sole proprietor assumes the role of a mentor to the candidate attorney. Unfortunately, often some attorneys with the responsibility to mentor do not recognise that they are bestowed an important and great responsibility, not only to the mentee but to the profession and to the nation as a whole. These mentors have a huge responsibility in ensuring that the mentee acquires knowledge, a lot of experience in areas such as –

- the day-to-day operations of the practice;
- preparation and review of trust accounting records;
- financial management for the business;
- identification and mitigation of risks to the firm;
- client relationship management;
- strategic business management; and
- business development, above and beyond developing their legal skills and/or practising same.

Mentors should lead by example as they are seen as role models and they should always be cognisant of their actions as these create the most lasting impressions. Candidate attorneys will hold on to and remember the behaviour and actions of the practising attorneys-in-charge of their mentoring and will assimilate what they see and learn.

Principal attorneys responsible for mentoring must be credible, honest and uphold high values at all times so as to make a significant impact in the lives of their mentees. It is often seen that new attorneys in the field may have unrealistic expectations. These expectations range, from among others, making it to the top in no time, acquiring assets within a short space of time, going on expensive holidays, etcetera. It is the duty of the mentors to openly share with their mentees, within this relationship, the realities of running a business and thus manage the expectations. Candidate attorneys need to take into cognisance that there are no guarantees in business, there will be good and bad times. The economy in which a business is run changes. Mentors should, therefore, warn the candidate attorneys to always create reserves during good times to cater for the bad times when the business is not doing well. This should, to a large extent, eliminate theft of trust monies. A high number of theft claims is experienced by the Attorneys Fidelity Fund (AFF).

## Benefits from good mentoring relationships

There are major benefits to be derived from good mentoring relationships and these are outlined by Judy McKimm, Carol Jollie and Mark Hatter 'Mentoring: Theory and Practice' 2007 ([www.faculty.londondeanery.ac.uk](http://www.faculty.londondeanery.ac.uk)) in the table below:

Mentor	Mentee
<ul style="list-style-type: none"> <li>• Improves awareness of own learning gaps.</li> <li>• Develops ability to give and take criticism.</li> <li>• Develops up-to-date organisational and professional knowledge.</li> <li>• Offers networking opportunities.</li> <li>• Improves leadership, organisational and communication skills.</li> <li>• Develops ability to challenge, stimulate and reflect.</li> <li>• Raises profile within organisation.</li> <li>• Increases job satisfaction.</li> <li>• Offers opportunity to pass on knowledge and experience.</li> <li>• Provides stimulation.</li> <li>• May offer career advancement opportunities.</li> </ul>	<ul style="list-style-type: none"> <li>• Develops legal, critical analytical and reflective skills.</li> <li>• Develops organisational and professional knowledge.</li> <li>• Develops own practice.</li> <li>• Develops or reinforces self-confidence and willingness to take risks.</li> <li>• Develops ability to accept criticism.</li> <li>• Develop professional ethics and practice same.</li> <li>• Supports through transition.</li> <li>• May accelerate professional development.</li> <li>• Develops autonomy and independence.</li> <li>• Increases maturity.</li> <li>• Broadens horizons.</li> <li>• Increases job satisfaction.</li> <li>• Reduces reality shock.</li> <li>• Offers opportunities for effective role modelling.</li> </ul>



## SADC LAWYERS' ASSOCIATION

Join the SADC Lawyers' Association as an Individual Member

### About The SADC Lawyers' Association:

The Southern African Development Community (SADC) Lawyers' Association (SADC LA) was established in 1999 in Maputo, Mozambique and is an independent and voluntary association comprising the law societies and bar associations from the 15 member states of Southern Africa called the Southern African Development Community (SADC).

The SADC LA works to promote human rights and the rule of law without fear or favour in the SADC region as well as promote the practice of law and the development of the legal profession. It is the only existing association of all the law societies, law associations and bar associations in the SADC Region. It is, therefore, the authoritative collective voice of the legal profession in Southern Africa and is best placed to lead, coordinate and implement advocacy, litigation and training activities for and with SADC legal professionals.

The SADC LA has implemented several advocacy activities around the suspension of the SADC Tribunal, promoted topical legal issues at high-profile annual conferences, conducted a series of in-country and regional trainings for lawyers to build their capacity in the promotion and protection of human rights, law firm management and contract negotiation, developed and popularized SADC prison guidelines, and conducted training and observation exercises around elections observation to name a few activities. Each legal professional is therefore guaranteed to find something of interest and relevance within the SADC LA programmatic areas.

### Individual Membership to the SADC LA:

Individual Membership to the SADC LA is only open to SADC legal practitioners in good standing with their national law societies/bar associations. The cost for individual membership is One Hundred United States Dollars (US\$ 100) per annum.

To add value to SADC LA individual membership, the benefits of being an individual member of the SADC LA include:

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#### (2) Increased Access:

- Opportunity (ies) to participate in SADC LA mid-year meetings and workshops;
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- Preferred seating during the Annual Conference and General Meeting Opening Ceremony; and
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The membership application form can be obtained from the SADC LA website at <http://www.sadcla.org/new1/node/75> or you can email [prudence@sadcla.org](mailto:prudence@sadcla.org) to get the application form.

### Mentor

- Transfer of legal skills.
- Analyse and develop trends affecting practical legal training and legal practice.

### Mentee

- Encourages ongoing learning and developing and identifying learning opportunities.
- Develops increased reflective practitioner skills.
- Offers individualised one-to-one teaching and opportunities for experiential learning.
- Offers help with problem solving.
- Practical and thorough understanding of attorneys' trust account environment.

## Risks and impact to various stakeholders where no mentoring has been provided

If candidate attorneys are not properly mentored while serving articles, it may give rise to a lot of risks in future and these might have a devastating impact on a number of stakeholders in the legal profession and the nation as a whole. Some of the risks and consequences include, but are not limited to:

- Inexperienced, incompetent and non-credible attorneys may be deployed to the legal profession due to lack of proper guidance and mentoring.
- Inability to successfully operate practising firms in a financially sound manner.
- Increased number of qualified audit reports that may be received by law societies due to lack of understanding and appreciation for the preparation and review of trust accounting records.
- Increased number of unemployed law practitioners and severe pressure on the economy.
- Increased theft claims to the AFF denting the reputation for the profession.
- Increased negligence claims to the Attorneys Insurance Indemnity Fund.
- Increased number of defaulting attorneys in the country.
- Reduced number of credible attorneys in the profession resulting in reputation risks for the profession.
- Being suspended from practice because of failure to comply with rules of the law societies.
- Being criminally charged for theft of trust money, etcetera.

## Conclusion

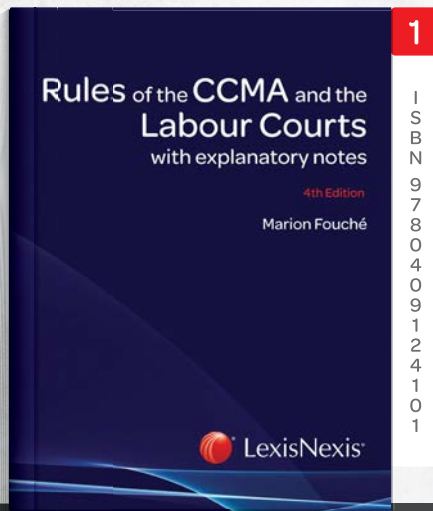
It is of utmost importance for mentoring of candidate attorneys to be taken seriously, and where possible formalised. As already alluded to in foregoing paragraphs, this will assist the attorneys themselves, the profession and the nation as a whole. Mentorship of candidate attorneys should not be optional but mandatory to all candidate attorneys under articles of clerkship. Legal Education and Development (LEAD) has taken the initiative to register attorneys who wish to provide mentorship to others. Practitioners who wish to register as mentors are therefore encouraged to register with LEAD, and candidate attorneys looking for mentors are equally encouraged to make use of that database of mentors in legal practice.

Make the best of the relationship, and watch yourself making strides.

The prosecutions and the financial forensic units of the Attorneys Fidelity Fund in Centurion. □

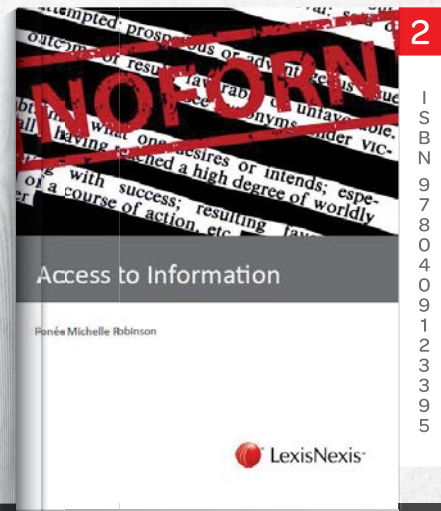


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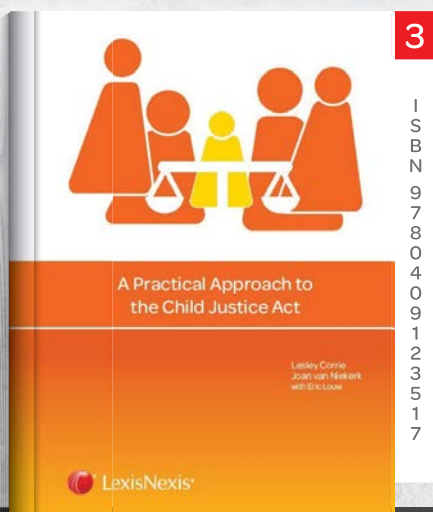
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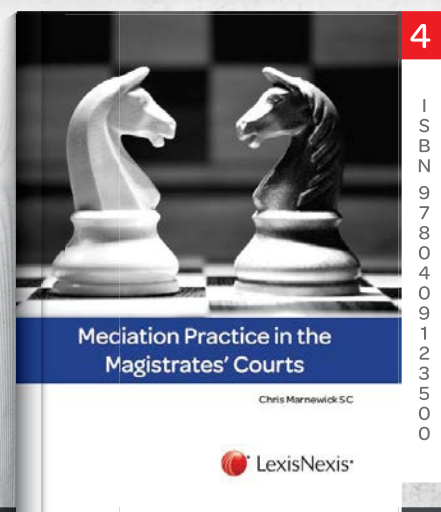
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# Law and human dignity at odds over assisted suicide

By  
Rinie  
Steinmann

**R**espect for and protection of each individual's inherent human dignity as envisaged by s 10 of the Constitution is a foundational principle in our law. It has, therefore, come as no surprise that Fabricius J recently found in *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP) that the common law sanction against assisted suicide, infringes the right to human dignity of patients who find themselves in a state of constant, unbearable pain as a result of a terminal illness. This brave and ground-breaking judgment may be the first step in paving the way for the legalisation of assisted suicide in our law.

## Background

In April Robert James Stransham-Ford, who suffered from phase 4 prostate cancer and was left with but a few weeks to live, approached the court for an urgent order to direct a medical practitioner to lawfully end his life by the administration of a lethal agent. Mr Stransham-Ford relied, *inter alia*, on s 39 of the Constitution (the 'interpretation clause'); s 10 (human dignity) and s 12 (freedom and

security of the person) and the provisions of a living will that he executed previously. The four respondents, being the Minister of Justice and Correctional Services, the Minister of Health, the Health Professional Council of South Africa and the National Director of Public Prosecution, collectively argued that Mr Stransham-Ford's human dignity was not compromised as a result of his illness, that his experience of pain was not only subjective but



'Genadedood: Bevel leef voort' *Beeld* 5-5-2015 at 7). The respondents subsequently filed an application for leave to appeal against the judgment to the Supreme Court of Appeal (SCA).

### Legal aspects of human dignity

In South African constitutional law, human dignity functions both as a value (ss 1(a) and 39(1)(a)) and as a human right (s 10). These constitutional injunctions played a foundational role in the court's reasoning in the *Stransham-Ford* matter that to experience unbearable pain and suffering as a result of a terminal illness, and not being able to request assisted suicide, result in an infringement of dignity as a value and a right. Therefore, it is applicable to discuss the root meaning of human dignity and how it manifests in legalised assisted suicide.

Human dignity, in its most basic form, refers to an inherent attribute of humanity that every human being possesses, in equal measure. The universal idea that everybody has inherent human dignity is, in essence, the very antithesis of the concept of *dignitas* in private law, which is rooted in the idea that dignity refers to a person's status in society as applied in Roman law. In the aftermath of the Second World War and its atrocities, the *Universal Declaration of Human Rights* (1948) proclaims in its preamble and art 1 that each individual has inherent and equal human dignity. Thereafter, the notion of inherent human dignity was received in many international documents and national constitutions.

In constitutional use, three basic elements of the concept have crystallised and form part and parcel of the generic legal concept of human dignity and are applied as such across jurisdictions. They are:

- the ontological element, which holds that each individual has inherent human dignity;
- the relational claim that refers to the idea that each individual is entitled to recognition and respect of his inherent dignity, with regards to types of treatment by others that are inconsistent with a dignified existence; and
- the requirement that a state is progressively obliged to provide minimum living conditions for its inhabitants in the context of socio-economic rights.

(C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19.4 *European Journal of International Law* at 679.) These elements refer to the totality of what it means to be a human being and embody the value of human dignity in constitutional context.

The three basic elements as referred

to above have not been specifically identified by the judges of the Constitutional Court (CC), but have been consistently applied in their rulings, as is evidenced by the *dictum* of O'Regan J in *S v Makwanyane and Another* 1995 (3) SA 391 at para 328:

'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is the acknowledgement of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched....'

The basic elements of human dignity are embodied in s 10 of the Constitution, which proclaims that:

'Everyone has inherent human dignity and the right to have their dignity respected and protected.'

Section 7(2) amplifies this instruction by mandating that the state must 'respect, protect promote and fulfil the rights in the Bill of Rights.' Former CC judge, Laurie Ackermann, explains that the first component of s 10, which refers to the ontological element, is enacted as an imperative based on a preconceived aspect of humanity that is inherent in everybody (Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* 1ed (Cape Town: Juta 2012) at 95). As such, the ontological element is not subject to limitation and balancing in terms of s 36, whereas the right to respect and protection of dignity, as all other constitutional rights, is subject to limitation.

The right to dignity forms the basis of the remaining constitutional rights (*Makwanyane* at para 328), therefore, dignity overlaps with rights such as equality and autonomy. In cases of complimentary overlapping, the right to dignity serves to strengthen the overlapping rights. Dignity as a right can also conflict with other constitutional rights, such as with the right to life in cases of the death penalty, euthanasia and abortion. In cases of conflicting overlapping, the principles of balancing and proportionality as prescribed by s 36 of the Constitution are to be applied (Aharon Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 1ed (Cambridge: Cambridge University Press 2015) at 157).

Furthermore, the judges of the CC employed dignity as a rights-generating mechanism to find constitutional rights that were not specifically included in the Bill of Rights, as a derivative (or 'daughter-right') from the primary 'mother-right', being human dignity (*Barak op cit*), such as family rights as in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas*

a natural process of life and that the state's duty to uphold life, trumps any purported undignified suffering and resulting death (at para 21).

Fabricius J granted the urgent application on 30 April, without knowing that the applicant had died peacefully some two hours earlier, and reasons for the judgment were delivered on 4 May, when the respondents presented oral argument for annulment of the order, as the applicant died prematurely and, therefore, no personal rights vested resulting from the ruling. Although the court was faced with the unique situation that the judgment was not enforceable, Fabricius J held that it was not moot because the ruling is based on development of the common law regarding legalisation of assisted suicide as a cause of action and, therefore, the judgment would not be rescinded (Jeanne-Marié Versluis



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*and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) and *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* [2014] (4) All SA 51 (GJ).

## Human dignity and assisted suicide

The first and second elements of the concept of human dignity as discussed above are applicable to Mr Stransham-Ford's claim that his dignity was infringed (this being not a case pertaining to socio-economic rights). Fabricius J applied the first element of s 10 that everyone has inherent dignity, as well as the second element that the state (in this instance) has to respect and protect dignity (para 12) to Mr Stransham-Ford's claim. Contrary to the respondents' contentions, however, the court held that the suffering endured by Mr Stransham-Ford constitutes an infringement of his right to dignity in terms of the second element, because it impacted on his quality of life (para 14). The court conceptualised the idea of undignified suffering by holding, at para 15, 'that there is no dignity in:

15.1 Having severe pain all over one's body;

15.2 being dulled with opioid medication;

15.3 being unaware of your surroundings and loved ones;

15.4 being confused and dissociative;

15.5 being unable to care for one's own hygiene;

15.6 dying in a hospital or hospice away from the familiarity of one's own home;

15.7 dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye'.

Mr Stransham-Ford's right to dignity forms the basis of and overlaps with the right to freedom and security of the person (s 12). This right underscores the common law principle, which endorses a patient's autonomous decisions in the framework of informed consent to choose or refuse treatment. Fabricius J held that a person's decision on when to end life is a manifestation of their own sense of dignity and personal integrity (para 18). Yet a directive to hasten death is not acknowledged in terms of the common law, in light of the state's obligations to guarantee life in terms of s 11. Consequently, the anomalous position arises that not only may an expectant mother terminate her pregnancy under the provisions of the Choice of Termination of Pregnancy Act 92 of 1996, but capital punishment is an unconstitutional and unjustifiable limitation on the right to life. In the abortion cases, the mother's right to bodily and physical integrity trumps the right to life. However, dignity as the basis of fundamental

rights is mutually supportive of the right to life, and not mutually exclusive. In this respect Fabricius J (para 12) referred to the *dictum* of O'Regan J in *Makwanyane* at para 326:

'The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: Without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

The court did not specifically deal with the conflict between the rights to dignity and the state's duty to protect life, but held that the current constitutional framework with its emphasis on the value of human dignity (among others) supports euthanasia (para 14). Although the court did not formulate a daughter 'right to die' as a derivative of the 'mother-right' to human dignity (in the absence of legislation that regulates euthanasia) Fabricius J gave effect to a 'once-off' development of the common law in accordance with the injunction of s 39(2) that courts must develop the common law to reflect the principles and values of the Constitution. This decision is in accordance with the maxim *iudicis est ius dicere non dare* (it is the task of a judge to interpret the law not to make it).

## Conclusion

A terminally ill patient has inherent human dignity as posited by the first component of s 10 being a preconceived value of humanity. The second component of this section provides that such a patient's dignity is to be respected and protected by everyone, including the state, by allowing the patient to choose the mechanism of assisted suicide. Dignity is infringed when a terminally ill patient cannot choose to have his life terminated as a result of the indignity of his suffering. It is hoped that the Supreme Court of Appeal (or CC if applicable) would develop the common law to endorse the right to die with dignity as a derivative of the mother right to dignity and direct Parliament to regulate this right through legislation. In the interim, attorneys are advised to discuss the possibility of executing living wills, and their prospective legal effect, with their clients.

**Rinie Steinmann *Blur LLB (NWU) Certificate in Medicine and Law (Unisa)* is an attorney at Steinmann Attorneys in Johannesburg.**





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# Out with the old and in with the new – understanding the Legal Practice Act

By  
Ettienne  
Barnard

## The analogy

The Legal Practice Act 28 of 2014 (LPA), which came into partial operation in February is the product of society changes and input over time. It is the formal beginning of the end for fragmented legislation under which attorneys and advocates currently practice. One such Act dates as far back as 1926. Although it might overlap with recent repealing amendments, s 119 LPA read with its schedule, repeals the whole of the Natal Conveyancers Act 24 of 1926, the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941, the Admission of Advocates Acts 74 of 1964 of South Africa and the former Transkei, Bophuthatswana, Venda and Ciskei states, the Attorneys Acts of South Africa and Ciskei 53 of 1979 and Venda 42 of 1987, the Attorneys, Notaries and Conveyancers Act of Bophuthatswana 29 of 1984, the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993 and the Right of Appearance in Courts Act 62 of 1995.

Is this change just for the sake of change or much needed change for the better? In order to understand what is happening to legal practice it helps to compare it with change introduced via computer operating systems. Although some readers might feel slightly threatened by such an analogy, even those readers should benefit from a few observations that one could make to place the LPA changes into perspective.

**Observation 1: How operating systems change**  
Information Technology (IT) in the infor-

mation age can teach us lessons about life. Recently the IT departments or service providers of many South Africans and South African firms (including law firms and individual legal practitioners)

began to update their operating systems. There are many operating systems but this article will use just two of the widely known brands – namely Windows 10 and IOS9 – to make a few observations about





how change is introduced. To completely understand the LPA one should think of it as a modern operating system for lawyers.

### Observation 2: The difference between a major and a minor change

IT users will notice that Windows 10 and IOS9 are not the first updates. There have been major upgrades in the past such as Windows 8 or IOS8. Each major upgrade is given

a new name and usually has many new features. However, as we are so often reminded, the operating systems are never perfect. In fact after launching, users start discovering the problems. The minor updates in between the major ones. These fix the little (or bigger than expected) niggles.

This process can be likened to the Acts that have regulated our professions. Decades ago there was the Attorneys Notaries and Conveyancers Admission Act 23 of 1934. Then in 1979 the Attorneys' profession received a major overhaul with the Attorneys Act 53 of 1979. Where niggles crept in, they were addressed (as in most legislation) by the amendment Acts. A cursory perusal of the history of those Acts indicate that there were many amendments. The

1934 Act was amended at least in 1938, 1941, 1949, 1956, 1964, 1965, 1967 and 1970 long before it was decided to introduce the major new operating system of 1979. The 1979 Act was amended as soon as 1980. In fact the 1979 Act was amended at least once every year for the six years following its introduction. All in all the 1979 Act was amended more than 20 times and the Admission of Advocates Act 74 of 1964 more than ten times before the new legal practitioners' operating system (LPA) was introduced. What is the point of all this? That operating systems will change. Practical application usually dictates the necessity for adaptations. When a *lacuna* or amendment need is discovered, one should be careful to judgmentally pronounce that current legislation is drafted worse than previous legislation. More than 30 amendments to the previous operating legislation is a clear indicator that things were not perfectly drafted first time round in 1934, 1964 or 1979. Situations, understanding and perspectives change and as they do new operating systems are explored and adapted where necessary. Already, shortly after the LPA has become law, the need for minor amendments have been noticed. Participants have pointed to certain practical challenges which need to be dealt with. The National Forum (NF) was recently (19 September) addressed by a member of its Rules and Code of Conduct and Governance Committees, Jan Stemmet, on the need for legislative changes to provide for smooth transition from the existing statutory law societies to the new Legal Practice Council and Provincial Councils. These new structures are not yet formed and it is the responsible task of the NF to work towards smooth creation and implementation of the councils that are to take up the cudgels in future.

### Observation 3: The more things change the more they stay the same, or not?

On the operating systems I referred to in the first observation many users will not initially notice many of the changes



or improvements and yet they will use the systems regularly. The adage 'the more things change, the more they stay the same', comes to mind. It is true that much might stay the same under the new Act. However, the LPA introduces some major changes. Let us list just ten practical changes.

- Country demographics will play a role in shaping the legal profession.
- The provincial approach to regulation will be replaced by a national approach in that the four current law societies are to be replaced by a national Legal Practice Council (LPC) probably with nine Provincial Councils or at some Provincial Councils with service points in provinces where Provincial Councils are not immediately created.
- After decades of self-regulation, non-attorneys will serve on the regulatory structure (LPC).
- The absolute distinction and separation between the various arms of government will be blurred in that the executive via the Minister of Justice and Correctional Services will nominate representatives to serve on the LPC, which regulates the practitioners that will feed the judiciary.
- Currently statutory law societies fulfil a dual role in that they, on the one hand, regulated and, on the other, represented attorneys. The LPC will focus on regulation and discipline and in doing so will probably leave the representative function to others.
- There is a merging of legislation governing at least two legal professions into one Act and one national governing structure for both professions.
- For the first time in modern years, certain advocates will be able to legally take instructions directly from non-attorney members of the public. As part of this, the new concept of advocates managing trust accounts is introduced.
- The LPA introduces a Legal Services Ombud. The powers of the ombud are additional to the other disciplinary mechanisms of the Act.
- Disciplinary committees until now, had purely disciplinary functions that entailed making finding and recommending sanctions to the statutory councils. For any further relief, the complainant had to pursue civil remedies. In terms of s 40 LPA the disciplinary committee may order a legal practitioner to pay compensation and interest to the complainant.
- The name and governance of the Attorneys Fidelity Fund will change. This is a fund that was initially created by parliament on the request of attorneys (then member of Parliament, Mr Nel, as quoted in Hansard 11 March 1941 at 4268, refers to the four law societies as the 'promoters of the Bill', which introduced the concept of the fund.) In future the attorneys' profession will play a smaller role on its board with five legal practitioners

(of which, one must be an advocate) and four others (not necessarily legal practitioners) added to form the Board of the Legal Practitioners Fidelity Fund.

These changes are by no means a closed list. There are many others, some fundamental (see s 35 on fees and pre-mandate quotations) and some subtle. These will be explored in further articles.

### Observation 4: A move to uniformity but still two platforms?

Software developers often try to get their software to function on different operating systems. In earlier versions of the LPA, one got the sense that the legislature considered getting rid of the distinction between the attorneys' and advocates' professions by using the reference to legal practitioner. The LPA, however, retains the distinction (unlike, for example, s 92 of the comparable Namibian Legal Practitioners Act 15 of 1995, which determines that reference in other Namibian laws to advocate, counsel or attorney, must be construed as a reference to legal practitioner).

#### *A legal practitioner wearing half a hat?*

The LPA also goes some way to expand the legal operating system platform. Advocates pre-LPA were not supposed to accept instructions directly from the public while attorneys could do so. Attorneys firms had to have trust accounts while advocates were not required to do so.

Wildenboer 'The origins of the division of the legal profession in South Africa: A brief overview' (2010) 16(2) *Fundamina* 199 points out that according to the Statutes of Batavia attorneys appearing at court in the Cape during the 17th to 19th centuries had to appear bare headed while advocates were allowed to keep their hats on. If that were the case under the LPA, one would see some advocates appearing with half a hat as s 34(2)(a)(ii) of the LPA provides for a class of advocates that may accept instructions directly from the public. In terms of s 34(2)(b)(i) of the LPA they are required to have trust accounts. The question has no doubt been asked as to what the difference is between an attorney and an advocate who may take direct instructions. If there is no difference, why does the Act make the distinction? More importantly to those involved in building practices or legal teams, can an attorney and advocate form a legal practice partnership? In visiting law society circles, one is sometimes confronted with this question. The very fact that it is being asked, indicates some anticipation by certain attorneys of joint attorney/advocate practices. The LPA does not go that

far. Legal partnerships essentially share fees but s 34(5)(b) of the LPA prohibits attorneys to make over, share or divide any portion of their professional fees whether by way of partnership, commission, allowance or otherwise with a non-attorney. Further s 34(6)(a) only allows advocates to practice for own account and prohibits professional fee sharing. (Both categories of practitioners may form part of a law clinic, Legal Aid South Africa or be employed permanently by the state or The South African Human Rights Commission).

### Observation 5: The operating system does not immediately enable one to do everything - it requires more

Modern operating systems are amazing but they do not empower the user enough to function effectively. They need software applications, which provide for the details of everyday use. Similarly, the LPA does not focus on the detail needed to implement the Act in a user friendly way. It needs regulations, codes of conduct, input from the Fidelity Fund, the Rules Board, Law Reform Commission and more. This process has commenced. The NF will bear the brunt of the responsibility and it seems to be gaining momentum. Practitioners, whether with the whole, half or without the hat, will do well to monitor the functioning of the NF closely so as not to be caught lacking some other essential clothing.

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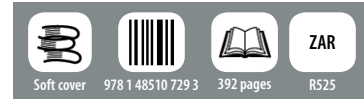
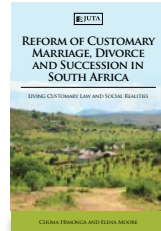
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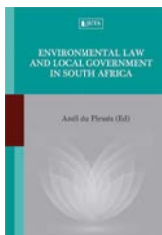
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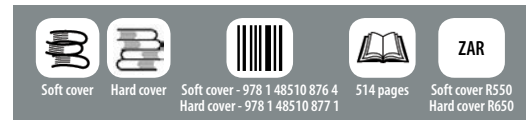
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**S**ection 133(1)(b) of the Companies Act 71 of 2008 (the Act) provides that: '(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

(a) ...

(b) *with the leave of the court and in accordance with any terms the court considers suitable; ...*' (our italics).

Does this mean that a prospective litigant must bring a separate application in which it exclusively asks leave from the court to institute legal proceedings, before it in fact institutes the envisaged legal proceedings? This was the question that was posed and answered in the case under discussion. This article is confined to the rationale applied by the court in answering that question.

In this case, the applicant sought an order for the production of certain documents from a joint venture it concluded with the first and second respondents. At the time of launching the application, both the first and second respondents were in business rescue as contemplated by s 128 of the Act. Subsequent to launching the application, the business rescue proceedings in respect of the first respondent ended. The second respondent remained in business rescue at the time of hearing of the application. In argument, the applicant confined the relief that it sought to the first respondent.

Before deciding on the merits of the matter, the court found that it needed to consider the general moratorium imposed on legal proceedings against a company during business rescue proceedings. On the facts, the applicant did not obtain leave to launch the application before it was so launched; it incorporated an application for such leave in the main application before court, arguing that there was no reason why such leave could not be sought in the same application. The respondents disagreed; they argued that such leave should have been obtained before launching the main application. The court found that the answer lied in a proper interpretation on s 133(1)(b).

After considering the concept of business rescue proceedings in the context of the moratorium, coupled with the interpretation of the Act as envisaged in s 7(k) read with s 5(1), it proceeded with its interpretation of s 133(1)(b). The court found the language to be unambiguous; '[d]uring business rescue proceedings no legal proceeding may be commenced or proceeded with except with

By  
**Bouwer van  
Niekerk and  
Werner  
Hattingh**

# Instituting proceedings against a company under supervision



the leave of the court and in accordance with any terms the court considers suitable' (at para 9). This, according to the court, meant that the issuing of an application by the registrar (or service on the respondent) may not have been done without the leave of the court.

In considering whether such leave may be sought as part of the relief sought in the main application, the court found that such a construction would be inconsistent with the wording of the section. 'It will also defeat one of the purposes of the moratorium, which is to give the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. The practitioner will in each such proceeding have to deal not only with the application for the court's leave in terms of s 133(1)(b), but also with the merits of the claim, because it is all part of one application,' (at para 11).

The court also found that there are other indications that do not support the applicant's construction of the section. 'Firstly, it will result in the court being asked, when the matter is argued, for leave for the proceeding to be commenced with, at a time when it had already commenced. Secondly, the leave of the court is also required to proceed with a legal proceeding against a company during business rescue proceedings ... [proceedings that] may only proceed with the leave of the court ... Thirdly, it is significant that in granting leave for the legal proceeding to be commenced or proceeded with the court may impose such terms as it considers suitable. This suggests to me that the court's leave must be obtained before the proceeding is commenced or proceeded with, as that will be the time to impose the terms contemplated in the section,' (at para 12).

Although the court's reasoning may be logically sound, we submit that it is not

the only feasible construction, and is far from being pragmatic in the swift execution of justice. Surely the purpose of a moratorium is to limit the amount of litigation that a business rescue practitioner should be involved in, not increase it? Does the effect of ordering that issues that could easily be dealt with in a single application be dealt with in multiple applications not defeat the purpose of giving 'the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors', thereby necessarily prolonging the business rescue proceedings?

For purposes of our argument, we assume that the applicant requested leave from the business rescue practitioner to launch its application, and that this leave was refused. (The judgment is silent on this issue.) Faced with this refusal, the applicant approached the court to obtain the requisite leave required. On the court's construction of s 133(1)(b) in the case under discussion, the applicant must first bring an application for leave to launch an application for the (ultimate) relief it requests. It is here that our difficulty with the court's reasoning lies.

In bringing its (initial) application, the applicant will by necessity have to explain what application it (eventually) wants to bring. By necessity, it will have to set forth the facts and questions of law that it will rely on in the (eventual) application. Having regard to the doctrine of *audi alteram partem*, the applicant will necessarily have to give notice to the business rescue practitioner of the application, and likewise necessarily afford the business rescue practitioner to answer to its founding papers. This will necessarily place the business rescue practitioner in the position where he or she will have to, in answering, deal with the merits of the applicant's case. The applicant will then necessarily have

the opportunity to reply to the business rescue practitioner's submissions. The court, in turn, will necessarily have to consider the merits of the matter in order to rule on this (initial) application. It is, therefore, we submit, far more pragmatic to deal with these issues in a singular application, in which (such as the case under discussion) the first prayer asks for leave of the court to launch the application. Should the court then wish to impose such terms as it considers suitable pertaining to the main relief sought, it may do so by way of instructing the parties to file additional affidavits pertaining to such terms.

Such a construction will, in our opinion, alleviate the parties' burden from dealing with the facts of the matter in separate applications (thereby causing the business rescue practitioner to deal with the facts just once, leaving him or her with more time to tend to the affairs of the company under supervision), which will in turn curtail legal costs (thereby possibly securing a greater dividend to creditors of the distressed company, as opposed to spending the company's money on legal costs), which will in turn result in a more expedient conclusion to the litigation (thereby providing for the efficient recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders as contemplated in s 7(k) read with s 5(1) of the Act).

**Bouwer van Niekerk BA (Law) LLB (SU) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (Unisa & LEAD) is an attorney and Werner Hattingh BCom (Law) LLB (NWU) is a candidate attorney at Smit Sewgoolam Inc.**



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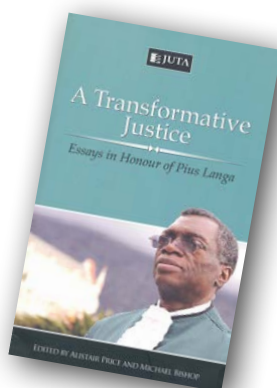
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# THE LAW REPORTS



Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

September 2015 (5) *South African Law Reports* (pp 1 – 316); [2015] 3 *All South African Law Reports* July no 1 (pp 1 – 129) and no 2 (pp 131 – 254); August no 1 (pp 255 – 386) and no 2 (pp 387 – 521); September no 1 (pp 523 – 664) and no 2 (pp 665 – 736); 2015 (8) *Butterworths Constitutional Law Reports* – August (pp 887 – 1001); and 2015 (9) September (pp 1003 – 1128)

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

## Abbreviations:

CC: Constitutional Court  
GJ: Gauteng Local Division, Johannesburg  
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SCA: Supreme Court of Appeal  
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## Arbitration

**Review application:** The facts in *Eskom Holdings Soc Ltd v Khum MK Investments & Bie Joint Venture (Pty) Ltd and Others* [2015] 3 All SA 439 (GJ) were as follows. In terms of s 33(1) of the Arbitration Act 42 of 1965, the applicant, Eskom, sought to review and set aside a partial award made by the third respondent, the arbitrator. The dispute referred to arbitration was of a contractual nature.

Moshidi J referred to earlier case law and held that South African law governing the review of arbitration awards has been underpinned and applied so as to provide only narrow grounds for review

and these have been restrictively interpreted. Although the courts have demonstrated a willingness to assist parties deprived of a fair hearing by procedural wrongs, they have limited their reviews to those alone. Our courts have refused jurisdiction in cases that requested their reviews of the arbitrator's legitimate exercise of discretion. The courts have, therefore, maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by arbitrators on the evidence before them. Consequently, the integrity of the arbitration process is preserved except where the arbitrator himself has discredited it through *mala fides*, gross irregularity or the exercise of powers not conferred on him.

The court concluded that Eskom's allegations of gross irregularity, misconduct, bias and incompetence against the arbitrator were exceedingly exaggerated without any basis. The somewhat robust exchanges between the arbitrator and one of Eskom's

witnesses, and on the odd occasion with Eskom's counsel, did not constitute sufficient grounds for intervention.

The arbitrator's finding against Eskom on the issue of estoppel was found to be in keeping with the legal principles on that issue. Eskom, as employer, was estopped from denying a tender contract involving the first respondent. The arbitrator was found to have correctly rejected the defences raised by the applicant.

The review application was thus dismissed with costs.

## Company law

The material under review features no less than six cases that deal with company law. Four of these cases deal with business rescue proceedings: See the three cases which are discussed immediately below, as well as the decision in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA).

The decisions in *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA) and *Chater Developments (Pty) Ltd (in Liquidation) v Waterkloof Marina Estates (Pty) Ltd and Another* 2015 (5) SA 138 (SCA) deal with the winding-up of companies.

**Business rescue:** The facts in *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) were that one month after a final liquidation order had been granted against a close corporation, Bloempro, Richter, who was employed as general manager by Bloempro, applied for an order placing Bloempro in business rescue. Absa obtained a default judgment granting it leave to intervene and dismissing the business rescue application because Richter appeared to have withdrawn his opposition to the application. Richter then applied for the rescission of the order on the grounds that he had only withdrawn his opposition to the application for leave to intervene.

The court *a quo* dismissed



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the application for rescission on the grounds that at the time of the application for business rescue, a final liquidation order had already been issued against Bloempro.

On appeal Dambuzza AJA pointed out that s 131(1) of the Companies Act 71 of 2008 (the Act) provides that an affected person may apply to court for an order commencing business rescue proceedings 'at any time' and the use of these words is significant. The same words are used in s 131(7) allowing a court to make such an order during liquidation proceedings or proceedings to enforce any security against the company (or corporation).

The court further held that the term 'liquidation proceedings' does not refer only to a pending application for a liquidation order but includes the process of winding-up of a company after a final liquidation order has been granted. Liquidation refers to the entire process by which a company's existence is brought to an end by its deregistration after its assets have been redistributed. The court *a quo* erred in its reasoning that a company's existence is terminated by a final liquidation order because the correct position is that the company continues to exist, but control of its affairs are transferred to the liquidator.

There is no sensible justification for drawing the proverbial 'line in the sand' between pre- and post-final liquidation in circumstances where prospects of success of business rescue exist. A company's circumstances could change radically after a final liquidation order had been issued resulting in the company being able to become profitable again if allowed to trade.

The court concluded that an application for commencement of business rescue proceedings may also be brought after a final winding-up order has been issued against the company or corporation, up to the time it is deregistered at the end of the liquidation process. Such an application will then suspend the liquidation proceedings as provided in s 131(6) of the Act.

In passing the court alluded to the fact that its interpretation of s 131(6) of the Act created opportunities for abuse because any affected person can now halt liquidation proceedings at any time with a completely baseless and *mala fide* application.

The appeal was accordingly upheld with costs.

• See also case note 'Launching business rescue applications in liquidation proceedings – (successfully) flogging a dead horse' 2015 (Sept) DR 50.

**Business rescue:** In *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) the sole shareholder of Panamo Properties (Panamo) was the Jan Nel Trust. The two trustees, Mr and Mrs Nel, were also the directors of Panamo. Panamo owned a large commercial property in Roodepoort. The property was mortgaged to Firststrand Bank. Judgment was taken against Panamo for amounts totalling R 3,3 million when it fell into arrears on its mortgage payments. The property was declared executable.

In an effort to prevent the sale of the property in execution, the directors resolved to place the company in business rescue. A business rescue practitioner was appointed, a business rescue plan adopted and the property was sold as stipulated in the business rescue plan. The trust then obtained a declaratory order from the court *a quo* that in terms of s 129(5)(a) of the Companies Act 71 of 2008 (the Act), the business rescue resolution had lapsed and had become a nullity because of non-compliance with several procedural requirements prescribed by s 129(3) and (4) of the Act. As a result, the whole business rescue process was a nullity.

Wallis JA held that there is an apparent anomaly between s 129(5)(a) providing that the rescue resolution lapses and becomes a nullity on non-compliance with the procedural requirements, and s 130(5)(a)(i) providing that a court may set aside the resolu-

tion based on failure by the company to satisfy the procedural requirements. This anomaly can only be reconciled by reference to s 132(2) dealing with the termination of business rescue proceedings.

Section 132(2)(a)(i) requires the court to set aside the resolution that started the business rescue proceedings in order to terminate the proceedings. There is no provision for automatic termination of business rescue as a result of non-compliance with the procedural requirements.

The sensible interpretation of these provisions would be that the court may, at its discretion, set aside the resolution and terminate the process. In this regard, the word 'or' between s 130(5)(a)(i) and (ii) should be read as 'and'. The court may therefore set aside a rescue resolution based on any of the three grounds stipulated in s 130(1)(a) if the court also considers it otherwise just and equitable. The 'just and equitable' requirement does not on its own constitute a further (fourth) ground for setting aside a business rescue resolution.

The court concluded that failure to comply with the prescribed procedural requirements for a board resolution to commence business rescue proceedings does not automatically result in the

termination of the business rescue proceedings.

The appeal was accordingly upheld with costs.

**Business rescue:** In *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) the respondent, Golden Dividend, was placed in voluntary business rescue by a resolution of its board on 27 August 2013. On 21 November 2013, one day before the meeting of creditors, at which the rescue plan was approved by the majority creditor, Absa launched an application for an order that the business rescue plan was invalid. Absa argued that the business rescue plan had not been published within the prescribed period and/or did not substantially comply with the requirements of s 150(4) – (6) of the Companies Act 71 of 2008 (the Act) and/or was not validly adopted at the meeting of creditors.

Absa also applied for the board resolution placing the company in business rescue to be set aside on the grounds that there was no reasonable prospect for rescuing the company or, alternatively, having regard to all the evidence, it was otherwise just and equitable to do so.

Absa furthermore applied for an order that the agreement between the company and the business rescue practitioner providing for additional remuneration pay-

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able to the practitioner was invalid because it was not approved at meetings of the creditors and shareholders as prescribed.

Golden Dividend argued that the application had to be dismissed because the failure by Absa to join the creditors constituted a material non-joinder, since the creditors would be prejudiced if the business rescue plan was set aside and it (Absa), therefore, had a direct and substantial interest in the application.

Lazarus AJ held that s 130(3) of the Act makes a clear distinction between the requirement that an application has to be served on the company and the Companies and Intellectual Property Commission and merely requiring that each affected person must be notified as prescribed. Creditors are given an express statutory right to participate in such an application and need not be formally joined to participate. Since Absa notified the creditors by e-mail of this application as allowed by the Act, no joinder was required.

Section 150(5) of the Act allows the majority creditor or creditors to grant permission for the business rescue plan to be published outside the prescribed time limit (25 business days after appointment of the practitioner) but does not require this resolution to be taken at a meeting. Even if the meeting was unlawful for any reason, it would not affect the validity of the extension. In this respect the court differed from the opposite view expressed in *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZN) (see feature article, 'Business Rescue: The position of secured creditors' (2014 (Sept) DR 35) and law reports 'Company law' (2014 (March) DR 34)).

The court referred with approval to the interpretation of the words 'reasonable prospect' in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) (see law reports 'Companies' (2012 (June) DR 44)). The cause of the company's problems should be ad-

ressed and a remedy offered that had a reasonable prospect of being sustainable. In this case, the facts disclosed and the significant shortcomings of the plan did not meet that requirement. Accordingly, there was no reasonable prospect of rescuing the company and the resolution was set aside, thereby terminating the business rescue proceedings.

**Proceedings by and against security for costs:** In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] 3 All SA 255 (SCA); 2015 (5) 38 (SCA) the court was asked to consider the question whether it may, in terms of the new company law regime introduced by the Companies Act 71 of 2008 (the 2008 Act), during litigation still order an applicant or plaintiff company to provide security for payment of the costs of a potentially successful defendant.

Section 13 of the Companies Act 61 of 1973 (the 1973 Act) provided a statutory exception to the general rule under common law that an *incola* plaintiff cannot be compelled to furnish security for costs. It vested a court with a discretion to order a company, that had instituted action, to furnish security for costs if there were reason to believe that it would be unable to pay the costs of its opponent. The rationale behind s 13 was to serve as a disincentive to companies to institute actions they could not afford and have little chance of winning.

The crisp facts in *Boost Sports Africa* were as follows. The appellant, Boost Sports, instituted action against the respondent, South African Breweries (SAB) based on alleged breach of contract. Boost Sports had no assets or office and was not trading but refused to provide evidence that it would be able to pay should an adverse costs order be made against it.

SAB then served a formal notice in terms of r 47(1) of the Uniform Rules of Court on Boost Sports claiming security for its costs. On behalf of Boost Sports, it was stated

that the litigation was funded by the four shareholders who did not have the means to provide security as claimed by SAB. The court *a quo* granted the application by SAB and ordered Boost Sports to furnish security for SAB's legal costs in the action.

The issue on appeal was whether, absent an equivalent provision to s 13 in the 2008 Act, an *incola* company could be ordered to furnish security for costs.

Ponnan and Mbha JJA pointed out r 47 merely prescribes the procedure for claiming security for costs in an action and not the substantive law on whether a defendant has the right to do so. The latter must be found in the common law or relevant statute. Section 13 of the 1973 Act contained such a provision but the 2008 Act does not and this has caused conflicting judgments by the courts.

Section 173 of the Constitution confirms the power of the courts to protect and regulate their own process and to develop the common law. Since the common law provides for exceptions to the general rule that a resident (*incola*) should not be required to provide security for costs, these principles must now apply to resident companies as well, in the absence of a statutory provision.

The court may, therefore, compel a resident company to furnish security for costs but, in terms of the common law, it cannot be done merely because the chances of recovering costs from the plaintiff appear remote. The court also had to be satisfied that the action or application by the plaintiff was vexatious or reckless or otherwise amounted to an abuse. However, this did not mean that the court had to undertake a detailed investigation of the merits or facts of the case.

The court held that there were inconsistencies in Boost Sports' pleadings and also found it telling that the shareholders were prepared to fund the action from which they could benefit if successful, but not to put up security for SAB's costs. They were

therefore shielding behind the company (which clearly was 'an empty shell') to avoid liability for costs should the claim not succeed. This meant that they had everything to gain but nothing to lose through this action and this was one of the mischiefs which s 13 of the 1973 Act was intended to curb.

The court also took into consideration that Boost Sports failed to show that it would be forced to terminate its claim if compelled to furnish security.

The appeal was dismissed with costs.

• See law reports 'Companies' (2014 (Oct) DR 44).

## Constitutional law

**Exchange control:** The decision in *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) 146 SA (CC); 2015 (8) BCLR 959 (CC) brought to an end a lengthy and protracted legal battle between the South African Reserve Bank (SARB) and the multi-billionaire, Mark Shuttleworth, regarding the validity of the so-called 'exit levy', which is levied when one exports capital from South Africa.

During 2009 the SARB imposed a 10% exit levy (the levy) on Shuttleworth when he took his assets out of South Africa. Shuttleworth paid the levy under protest. The levy amounted to more than R 250 million. The levy was imposed in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act); read with various Exchange Control Regulations, specifically reg 10(1)(c); and Exchange Control Circulars.

In the GP Shuttleworth argued that these legislative measures were unconstitutional and, therefore, invalid. By introducing reg 10(1)(c) the SARB and the Minister of Finance did not comply with the enabling legislation, in particular s 9(5)(a) of the Act, which empowered a person to make orders and rules by regulation. The court dismissed Shuttleworth's application.

The SCA upheld Shuttleworth's appeal and decided that the imposition of the

levy was inconsistent with ss 75 and 77 of the Constitution and thus invalid.

On appeal to the CC the question was whether the levy, as Shuttleworth contended, was a tax imposed for the purpose of raising revenue for the state or, as the SARB argued, a regulatory charge, the main object of which was to disincentivise the export of capital. If the levy was a tax, that is, a revenue-raising mechanism, then the regulation that authorised the levy would be invalid because it had not been enacted in accordance with prescribed constitutional and statutory strictures.

Mosenek DCJ, in a majority judgment, held that a 'law', other than a 'money Bill', may authorise the executive arm of government to impose regulatory charges in order to pursue a legitimate government purpose. Section 77 of the Constitution provides that a so-called money Bill appropriates money, or imposes taxes, levies, duties and surcharges.

The question is how does one distinguish a regulatory charge from a tax that may be procured only through a money Bill? The test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge, rather than a tax. But if the dominant purpose is to raise revenue, then the charge would ordinarily be a tax.

The court held that the purpose of the legislation in question was to curb or regulate the export of capital from the country. The levy was, therefore, not directed at raising revenue. The levy was charged as part of the regulation easing in the dismantling of exchange controls that were in place before 2003. The dominant purpose of the levy was to slow down the extent and the frequency of capital externalisation.

The court concluded that the levy was, therefore, not one which attracted the definition of 'money Bill', and as a result, did not need to comply

with s 73(2) of the Constitution, which provides that only the Minister of Finance may introduce a money Bill in Parliament. The controversial reg 10(1)(c) that provided for an exit levy of 10% in the past on the export of capital from South Africa was thus constitutional and valid.

The appeal was accordingly allowed with costs.

• See law reports 'Exchange control' (2013 (Dec) DR 36).

## Credit agreements sequestration

**Debt re-arrangement:** In *FirstRand Bank Ltd v Kona and Another* 2015 (5) SA 237 (SCA) the appellant, FirstRand, had a liquidated claim against the respondents, Mr and Mrs Kona (the Konas), for an amount of R 953 903 plus interest based on an overdraft facility subject to the National Credit Act 34 of 2005 (the Act) and secured by a mortgage bond.

During 2008 the Konas applied for debt review and eventually a debt rearrangement order was granted by the magistrate's court. However, the Konas again defaulted on the reduced amount they had to pay in terms of the order. FirstRand then issued summons against the Konas claiming payment of the debt and an order declaring the immovable properties executable. The Konas defended the action and successfully resisted summary judgment.

FirstRand then launched an application for the sequestration of the Konas and a provisional sequestration order was issued but that order was later set aside. The court *a quo* held that an application for sequestration included 'other judicial process' in terms of s 88(3) of the Act by which the credit provider exercises or enforces a right under the credit agreement between itself and the consumer. It also held that a debt re-arrangement order contemplated in s 86(7)(c)(ii) of the Act, unless and until set aside by a competent court, constitutes a bar to the compulsory sequestration of a consumer's estate.

On appeal, Meyer AJA held, that a credit provider's mo-

tive is irrelevant in deciding whether sequestration proceedings are proceedings to 'exercise or enforce by litigation or other judicial process any right or security' as provided in s 88(3) of the Act.

In *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA) the court held that 'sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of s 129(1)(b)'. The existence or validity of a debt rearrangement order did not constitute a bar to the lodging of sequestration proceedings.

Circumstances that would have justified the High Court to have exercised the discretion vested in it in terms of s 12(1) of the Insolvency Act 24 of 1936 in favour of the respondents are absent.

The appeal was accordingly granted and the estate of the Konas placed under final sequestration.

## Delict

**Adultery:** In *DE v RH* 2015

(5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) the CC was asked to pronounce on the justification for the continued existence of the delictual action for adultery (ie, *contumelia* and loss of consortium).

Mr DE, successfully sued the respondent, Mr RH, in the GP for damages after Mr RH had an adulterous affair with the former's wife. In the court *a quo* (*RH v DE* 2014 (6) SA 436 (SCA) see law reports 'Delict' (2015 (Jan/Feb) DR 53)) the SCA held that the time had come to rid our legal system of the delictual action for adultery.

On appeal to the CC, Madlana J held that the innocent spouse's delictual action for adultery (*contumelia* and loss of consortium) against the third party is obsolete and unconstitutional.

After referring to developments in foreign jurisdictions, the court held that internationally the general trend is towards the abrogation of a civil claim for adultery.

It further held that the Consti-



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tution does not support such a claim either. In the light of changing public policy the element of wrongfulness too, is lacking. It concluded: 'That is, what public policy dictates. In this day and age it just seems mistaken to assess marital fidelity in terms of money'. The appeal was accordingly dismissed. No order as to costs was given because at the time when Mr DE instituted action the law still acknowledged the delictual claim for adultery.

**Wrongfulness:** The facts in *Za v Smith and Another* [2015] 3 All SA 288 (SCA) were as follows: In operating a private nature reserve on his farm, the first respondent, Mr André Smith, invited and allowed members of the public, for a fee, to make use of the recreational facilities available in the reserve.

The present appeal originated from an incident in June 2009 when the late Pier Alberto Za (the deceased) slipped on a snow covered mountain slope and fell over

a 150m sheer precipice to his death. The incident occurred at Conical Peak, one of the highest mountain peaks in the Western Cape. It is situated on Mr Smith's farm.

The appellant (Za) is the widow of the deceased, and mother of the deceased's three minor children. In her personal capacity and in her capacity as mother and natural guardian of her three children, Za sued Mr Smith for damages representing the loss of support they had suffered through the death of her husband. Her claim was based on delictual liability arising from the wrongful and negligent failure by Mr Smith to take reasonable steps to avoid the incident that led to the death of the deceased.

The court *a quo* held that Za had failed to discharge the onus of proving a causal connection between the alleged wrongful and negligent omission of Mr Smith, on the one hand, and the death of the deceased, on the other hand. It dismissed Za's claims.

On appeal, Mr Smith denied

wrongfulness. He argued that owners and others in control of property are under a duty to warn and protect those who visit the property against hidden dangers of which the latter are unaware, but not against dangers which are clear and apparent.

Brand JA held that the concept of a clear and apparent danger, on which Mr Smith relied for his line of defence, had nothing to do with wrongfulness. The court pointed to the often-confused concepts of wrongfulness and negligence in delictual liability. It also confirmed that the correct test for negligence is that of the *diligens paterfamilias* (ie, the 'reasonable man'), and involves whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable.

The court was satisfied that the element of wrongfulness had been established by Za. In determining wrongfulness, the other elements of delictual liability are usually

assumed. Hence the enquiry was whether, on the assumption that Mr Smith in this case could have prevented the deceased from slipping and falling to his death and that he had died because of Mr Smith's negligent failure to do so, it would be reasonable to impose delictual liability on Mr Smith.

Mr Smith was in control of a property, which held a risk of danger for visitors. Mr Smith allowed members of the public, for a fee, to make use of the property. He should have warned and protected the unwary visitor against the danger of slipping and sliding over the precipice. The failure in that regard was negligent.

In its application of the test for causation, the court held but for Mr Smith's wrongful and negligent failure to take reasonable steps, the harm that befell the deceased would not have occurred.

The appeal was thus upheld with costs.

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decision in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC) is an important milestone in the protection of low income money borrowers.

The first applicant, a public interest organisation, assisted 15 of its low-income clients (the debtors) in bringing an application to set aside salary attachment orders issued in terms of s 65J(2)(a) of the Magistrates' Courts Act 32 of 1944 (the MCA) in favour of various micro-lenders (respondents four to 11 and 13 to 16). Although the debtors had consented to the orders, there had been no enquiry as to affordability or whether the orders were 'just and equitable' as provided for in s 65A of the MCA. Most of the orders had also been obtained on written consent (s 45 of the MCA) in jurisdictions located far from where they lived and worked. The applicants challenged the constitutionality of s 65J(2)(a) and ss 65J(2)(b)(i) and (ii) on grounds that it made no provision for judicial oversight.

Desai J held that for debtors such as the applicants, who worked in low paid and vulnerable occupations, their salaries were invariably their only asset and means of survival. Any court order or legislation, which deprived them of their means of support or ability to access their socioeconomic rights accordingly constituted a limitation of their right to dignity. Since the micro-lenders obtained judgments and attachment orders against the applicants in courts far away from their homes and places of work, and in places which they could not hope to reach, the right of the debtors to approach the courts was seriously jeopardised, if not effectively denied. The use of s 45 to bypass the courts in areas in which the debtors or their employers resided amounted to forum shopping.

The state had to protect its citizens against human rights abuses by business enterprises by providing victims with a remedy. The attachment order system established by

the MCA failed to do this by allowing orders to be issued without the involvement of a judicial officer or the opportunity for representations. Where debtors were vulnerable and over indebted, and at real risk of abuse by unscrupulous creditors, there was a strong argument for judicial oversight in the issue of the orders. This was also in accordance with general principles that there should be judicial oversight where an applicant sought an order to execute or seize the property of another. Accordingly when attachment orders were issued, judicial oversight was to be mandatory and occur when the execution order was issued.

As to s 45 of the MCA, properly interpreted, the broader approach to jurisdiction of s 45 could not be reconciled with the more restrictive approach in ss 65J, 90 and 91 of the National Credit Act 34 of 2005 (the NCA), especially in the light of the consumer protection rationale underlying the NCA. The court accordingly declared that the attachment orders were invalid and unlawful; that s 65J(2)(a) and s 65J(2)(b) were unconstitutional and invalid to the extent that they failed to provide for judicial oversight. The court also directed that a copy of the proceedings be forwarded to the relevant law society to determine whether the micro-lenders' attorneys were in breach of their ethical duties, particularly with regard to forum shopping, to secure salary attachment orders.

- See Editorial 'Debt collection system to be changed' (2015 (Aug) DR 3) and Opinion 'The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight' (2015 (Oct) DR 59).

## International law

**International Criminal Court:** The decision in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] 3 All SA 505 (GP) enjoyed a lot of media attention. At stake were the duties and obligations of South Africa in the context of the Implementation of the Rome Statute

of the International Criminal Court Act 27 of 2002 (the Rome Statute). The question was whether a Cabinet Resolution coupled with a Ministerial Notice were capable of suspending South Africa's duty to arrest a head of state against whom the International Criminal Court (ICC) had issued arrest warrants for war crimes, crimes against humanity and genocide.

The court had issued an order declaring the respondents' (the Minister's) failure to take steps to arrest and/or detain the President of the Republic of Sudan, Omar Hassan Ahmad Al-Bashir (Al-Bashir) to be unconstitutional and invalid. The court directed the Minister to take all reasonable steps to prepare to arrest Al-Bashir without a warrant in terms of s 40(1)(k) of the Criminal Procedure Act 51 of 1977. Al-Bashir was to be detained, pending a formal request for his surrender from the ICC.

The court per Mlambo JP, Ledwaba DJP and Fabricius J, held that as a ratifying State of the Rome Statute, South Africa was enjoined to co-operate with the ICC, for example, to effect the arrest and provisional arrest of persons suspected of war crimes, genocide and crimes against humanity. The Minister's assertion that Al-Bashir would be protected by diplomatic immunity was shown to be without merit.

The court further confirmed that despite its order for the arrest and detention of Al-Bashir, he was allowed to leave South Africa. His departure, in full awareness of the order demonstrated non-compliance with the order. For that reason, the court invited the National Director of Public Prosecutions to consider whether criminal proceedings were appropriate.

- See News 'Court criticised over Al-Bashir judgment' (2015 (Aug) DR 6) and LSSA News 'Profession stands behind Chief Justice and judiciary in raising concern on the attacks on judiciary and the rule of law' (2015 (Aug) DR 14).

## Trusts

**Description of parties:** In

*Standard Bank of South Africa Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA) Swanepoel (the trustee) was the sole trustee of a trust. He borrowed money on behalf of the trust from Standard Bank (the bank). The crisp question was whether a duly registered trust could be named as a party to a contract, concluded by the sole trustee on its behalf. If not, the trustee claimed that he was not bound by two transactions: A contract of loan (for agricultural production) and a business banking overdraft facility.

The agreement between the bank and the trustee provided that the 'borrower' was the Harne Trust, and set out its registration number. It was signed by the trustee 'on behalf of the [trust]'.

When the trust defaulted, the bank instituted action against Swanepoel as trustee. He expected and contended that the loan agreement was invalid. He argued that the loan had been concluded between the bank and the trust (as opposed to its trustee). He further argued that trusts were not legal persons and had no contractual capacity. As a result, a valid agreement had not been concluded. The High Court upheld the exception. On appeal Lewis JA held that the naming of the trust as the party to the agreement was sufficient. Where the trustee signed the agreement on behalf of the trust he clearly did so in the capacity of trustee.

A trust is a 'legal institution *sui generis*'. It is a legal entity, though it does not have legal personality.

The appeal was upheld, and the order of the court *a quo* set aside and replaced with an order dismissing the trustee's exception.

## 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, appeals, broadcasting, civil procedure, constitutional law, construction guarantees, contracts, education, immigration, intellectual property, land rights, media freedom, mines and minerals, ownership and tax. □

By  
Bouwer van  
Niekerk and  
Amy Parker

# The use of EAOs, jurisdiction and forum shopping under the spotlight

*MBD Securitisation (Pty) Ltd v Booï (FB)*  
(unreported case no A263/2014, 2-7-2015) (Daffue J)

A lot has been written about the recent judgment of Desai J in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC). It has, among others, been labelled a victory for the poor, vulnerable and marginalised by the South African Human Rights Commission (Jenna Etheridge 'Garnishee judgment "victory" for poor - Commission' www.fin24.com, 9-7-2015). No doubt much more will still be written about the social implications of the use of emolument attachment orders (EAOs), and whether the use (abuse) thereof can pass Constitutional muster.

However, this case note will not focus on those issues. Rather, it will firstly consider a judgment that dealt with substantially the same legal issues as the *Stellenbosch* judgment, this one delivered in the Free State High Court. Not as publicised, the judgment of *MBD Securitisation (Pty) Ltd v Booï* (FB) (unreported case no A263/2014, 2-7-2015) (Daffue J) (delivered six days before the *Stellenbosch* judgment) focuses on, among others, the proverbial nuts and bolts of the prerequisites of vesting jurisdiction in a specific court in the issuing of EAOs. Although the facts are equally bizarre and the findings against the credit provider are as damning as in the *Stellenbosch* judgment, this article will concentrate on the court's rationale in considering a court's jurisdiction in the issuing of EAOs. It will then evaluate the rationale of the court in comparison to the rationale applied in the *Stellenbosch* judgment, and consider whether this judgment may or may not answer the questions posed by the *Stellenbosch* judgment to the Constitutional Court.

In attempting to go on this confined legal sojourn, one cannot but give a broad outline of the extraordinary facts surrounding this judgment, as they are (in the words of the court) 'unbelievably peculiar':

'This is an appeal which has to be adjudicated by judges of the Free State High Court in Bloemfontein. The judgment of a magistrate in Henneman, a small Free State town some 180 km to the north of Bloemfontein, is the subject of the appeal. The appellant and plaintiff in the court *a quo*, is a company with its

head and/or registered office apparently in Johannesburg. ... The respondent, and defendant in the court *a quo*, is resident and employed in the small town of Alice close to East London in the Eastern Cape, approximately 620 km to the southeast of Bloemfontein and some 800 km from Henneman. The cause of action, whatever it may, did not arise in Henneman or the Free State Province for that matter. There is no indication in the papers where it had arisen, if at all' (para 1).

The respondent, it is told, signed two documents, albeit ostensibly in ignorance. The first document was a notice, as embodied in s 129 of the National Credit Act 34 of 2005 (NCA), which incorporated a letter of demand envisaged in ss 56 and 58 of the Magistrate's Court Act 32 of 1944 (the Act). The second document signed was a consent to judgment in terms of ss 45, 58 and 65J of the Act. The appellant's attorneys, situated in Nelspruit, sent a request for judgment in terms of s 58 of the Act accompanied by the aforementioned signed documents to the Henneman Magistrate's Court. Judgment was subsequently granted by an unknown party at the Henneman Magistrate's Court. The judgment included an order that the respondent make payments of R 300 per month following the service of an EAO granted pursuant to the judgment by consent. The EAO was subsequently issued out of the same court a few months later at the request of the appellant's attorneys.

In the court *a quo*, the respondent obtained an order rescinding the judgment taken against her in terms of magistrate's court rule 49(8). The court *a quo* set aside the EAO and confirmed that the appellant was not entitled to such an order, nor the benefits derived therefrom.

The appellants saw it fit to appeal the order granted in the court *a quo*.

That being the case, let us now return to the confines of the topics to be considered.

In evaluating the relevant legislation applicable to a court's jurisdiction in issuing EAOs, the court focuses its attention on the interpretation of magistrate's court r 4(4), read with magistrate's court r 12(5), read in conjunction with s 58(1) of the Act, while simultaneously considering the impact of the NCA thereon. We deduce the following from the court's rationale:

- Section 58 of the Act allows for the clerk of the court to enter judgment in favour of a plaintiff if the written request for judgment is accompanied by a letter of demand, if there is one, and the defendant's written consent to the judgment.

- Magistrate's court r 4(4) expressly refers to magistrate's court r 12(5).

- Thus, magistrate's court r 12(5) applies to a request for judgment in terms of s 58 of the Act.

- Magistrate's court r 12(5) stipulates that the 'registrar or clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the [NCA] ... and the court shall thereupon make such order or give such judgment as it may deem fit' (our italics).

- Accordingly, the clerk of the court cannot grant judgments by consent, which are based on a cause of action based on the NCA; it must refer such a request for judgment in terms of the NCA to a magistrate for determination.

- In terms of s 90(2)(k)(vi)(bb) of the NCA, a provision in a credit agreement is unlawful if it contains a consent to jurisdiction of 'any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept.' This prohibition is extended to supplementary agreements in terms of s 91(2) of the NCA.

- Section 91(2) of the NCA in turn prohibits: 'A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in the credit agreement'.

- In such circumstances, s 28 of the Act does not vest jurisdiction over the consumer insofar as the issuing of EAOs are concerned, as the consumer neither resides nor is employed in the district of jurisdiction.

- Section 29 of the Act also does not apply to the court's discretion to issue EAOs, as the whole cause of action did not arise in the jurisdiction of the court.

- Also (having regard to s 65J of the Act), the judgment creditor is duty-bound to refer the matter to the magistrate's court

where the consumer resides for the EAO to be issued there.

• Section 45(1) of the Act likewise does not apply in the issuing of EAOs, as the legislature had in mind to make it as convenient as possible for parties to approach a court in order to obtain speedy resolution of a dispute (para 24 – 26, 28, 30 – 32, 34 – 35 and 46 of the judgment).

If what is deduced above is correct, then the conclusion is clear: In circumstances where the cause of action of a debt is founded in an agreement governed by the NCA, and application is made for the enforcement of such a debt, then application for an EAO in enforcement of the debt must be made within the parameters set by the NCA; a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any)

are ordinarily kept. In addition, and taking cognisance of the impact of magistrate's court r 12(5), a court (ie, a magistrate) shall make such order or give such judgment as it may deem fit.

In the *Stellenbosch* judgment it was declared that the words 'the judgment debtor has consented thereto in writing' in s 65J(2)(a) and s 65J(2)(b)(i) and s 65J(2)(b)(ii) of the Act, are inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of an EAO against a judgment debtor.

However, if what is deduced above is indeed the correct manner in which to interpret all the applicable sections and rules pertaining to the issuing of EAOs, then (at least insofar as all debts governed by the NCA are concerned) Constitutional oversight will be superfluous, as

judicial oversight is already catered for in terms of magistrate's court rule 12(5). *Cadit quaestio?*

• See 'Debt collection system to be changed' 2015 (Aug) *DR* 3 and 'The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight' 2015 (Oct) *DR* 59.

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By  
Faith  
Tigere

## The right to a name and nationality: The issue of undocumented migrant children

*SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ)

Children are the soul of our society. If we fail them, then we have failed as a society.' These are the words of Saldulker J in the case of *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ). The aftermath of the 2015 xenophobic attacks is closely tied to the government initiative – Operation Fiela. The initiative, on the face of it, was aimed at cleaning up crime-ridden areas. However, the enforcement of the initiative resulted in the displacement of many undocumented foreign nationals. Affected in the process were children that accompany the undocumented parents. In most cases, these undocumented migrant children were born in the Republic and, in terms of South African law, children take the status of their parents. When they are born, they are not issued with birth certificates. Section 28(1)(a) of the Constitution states that all children have a right to a name and identity.

According to the Children's Act 38 of 2005, undocumented migrant children may be processed, but not issued with South African birth certificates. In the case of refugee undocumented children, they may be assisted with application for asylum. However, the challenge lies with undocumented migrant children whose parents are not refugees – most of them reach the age of majority without any documentation. When they attain the age of 18, they become undocumented and may be deported in their

capacity as adults. The status of these undocumented immigrant children is a growing challenge.

### Current position

Legislation, case law and the Constitution state that the police cannot arrest and detain children unless it is a measure of last resort, and detention for the purposes of deportation without due process would be unlawful. Therefore, children are not arrested with their parents and are in some cases left behind, often with no one to take care of them.

### Regulatory framework

Relevant legislation dealing with children's rights (documented and undocumented) include the Constitution (Bill of Rights), Children's Act, Births and Deaths Registration Act 51 of 1992, South African Citizenship Act 88 of 1995 and the South African Schools Act 84 of 1996. This list is not conclusive as there are other pieces of legislation that deal with children not mentioned in this article.

Section 28(2) of the Constitution requires that a child's best interests have paramount importance in every matter concerning the child. This was enunciated in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) where the court held that the paramount principle, read with the right to family care, requires that the interests of the children who stand to be affected receive due consideration. In terms of the *African Charter on the Rights and Welfare*

of the Child (www.au.int, accessed 5-10-2015) and art 9 of the *Convention on the Rights of the Child*, (www.ohchr.org, accessed 5-10-2015) South Africa is legally bound by these instruments through ratification. The four principal values of the Convention are –

- non-discrimination;
- best interests of the child standard (incorporated in the Children's Act);
- right to life;
- survival and development; and
- respect for the views of the child.

Thus the ratification of the international instrument shows South Africa's commitment to protecting and ensuring children's rights. The Convention further provides that no child shall be separated from his or her parents against his or her will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interests of the child.

The challenge of undocumented migrant children is that they have no claim to asylum as their parents had no legal status in the Republic. As such, they remain undocumented and become prone to different risks and qualify as children in need of care and protection. Chapter 9 of the Children's Act regulates the treatment of children deemed to be in need of care and protection. This need was reiterated in the case of *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T). As a result, these children must be cared for and taken to a place of safety. Section



151(1) empowers the court to remove a child that is in need of care and protection and to place that child in temporary safe care. The court will issue an order to a social worker to investigate the matter and report back to the court within 90 days.

In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the court held that the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. Currently there are no measures in place by the government to alleviate this problem and to put these children in places of safety. It has fallen to non-governmental organisations (NGOs) to step in and rescue the children whose plight comes to their attention.

The Citizenship Act regulates the status of children born to foreign nationals. Section 2(2) of the same Act provides that any person born in the Republic and who is not a South African citizen by virtue of the provisions of subs (1) shall be a South African citizen by birth if:

‘(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the

Republic in accordance with the Births and Deaths Registration Act.’

The Department of Home Affairs requires foreign nationals to produce identification in a form of a passport and immigration permit to register the birth of a child. Thus undocumented foreign nationals cannot register the births of their children.

Accordingly undocumented migrant children become vulnerable and become exposed to human trafficking, child labour, neglect, exploitation and abuse without any adult supervision or parental care. Undocumented migrant children are children in need of care and protection by the state.

### Available options

With regard to undocumented migrant children who do not qualify for asylum under the Refugee’s Act 130 of 1998, the documentation process can be achieved through repatriation to the country of origin (highly unlikely), where they can be reunited with the family or for social welfare officials in that country to process them according to their respective laws. Repatriation in cases where parents have been deported will be challenging as this will require the assistance of family members or communication with the deported parents. Where repa-

triation fails, the other solution may be in the form of intervention by the South African government. The Department of Social Development will have to synchronise their efforts with the Department of Home Affairs and bridge the communication gap between them to cater for the best interests of the child – that is to legalise immigrant children. The second option will be issuing the undocumented migrant children with birth certificates under the Children’s Act (s 48(2) and the Constitution (s 28(1)(a)). This can be achieved through the late registration of births process as regulated by the Births and Deaths Registration Act.

The provisions as entrenched in the Constitution, particularly the Bill of Rights, promotes and protects the rights of all children. All children have the right to social protection. The lack of access to identification documentation infringes on that right. In my opinion, this issue needs to be addressed as the number of undocumented immigrants is not a small one and when all the undocumented migrant children grow up, they will need documentation.

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By  
Rudie  
Kok

## Do arbitration proceedings fall within the general moratorium on legal proceedings against a company under business rescue?

*Chetty v Hart (SCA)* (unreported case no 20323/2014, 4-9-2015) (Cachalia JA)

Chapter 6 of the Companies Act 71 of 2008, on business rescue proceedings (BRP), has undergone considerable refinement in 2015. The case was the same with the Supreme Court of Appeal (SCA) judgment that was delivered on 4 September, in which the court was called on to interpret s 133(1). The question before the court was whether arbitration proceedings falls within the general moratorium on legal proceedings against a company under business rescue in s 133(1). The phrase 'legal proceedings' is not defined in the Act and courts are required to evolve its interpretation.

The facts briefly stated are that Ms Chetty (the appellant), trading as Nationwide Electrical and TBP Building and Civils (Pty) Ltd agreed to refer their contractual dispute to arbitration. Arbitration proceedings started before the company placed itself under BRP, and when the arbitration award was made, the company had already placed itself under business rescue. The appellant did not know that the company was under business rescue and therefore did not seek the business rescue practitioner's consent to pursue the suit against TBP. The appellant was dissatisfied with the entirety of the award made in terms of arbitration and sought to invalidate the award in the KwaZulu-Natal Local Division, Durban. When litigation commenced, TBP was no longer in business rescue but in liquidation. In liquidation, the liquidators stepped into the shoes of TBP to oppose the relief sought by the appellant. Effectively, the High Court had to decide whether the phrase 'legal proceedings' was capable of including arbitration proceedings. The court held that arbitration proceedings should not be included in the interpretation of 'legal proceedings'. The SCA was called on to give finality on this point.

The appellant argued for the interpretation to include arbitration proceedings, but it was the respondents' submissions that the court was interested in.

The respondents, in support of their submissions that 'legal proceedings' relates to formal proceedings, and thus excluding private tribunals such as arbitration, cited *Cloete Murray* and *Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA). The court rejected the respondents' submissions because

the *Cloete Murray* matter did not deal with the term 'legal proceeding' but with whether the cancellation of a contract by a creditor was enforcement action, having its origin in legal proceedings. The respondents also cited *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) and *Lister Garment Corporation (Pty) Ltd v Wallace NO* 1992 (2) SA 772 (D) where the courts held that 'legal proceeding' is 'not ... susceptible to any other meaning than (its) ordinary every-day literal one'. The court rejected this line as well, because these cases dealt with access to courts principles in relation to security for costs.

Furthermore, the respondents contended that the reference to forum means public forum. The court rejected this by utilising *Cloete Murray* wherein it was held that 'forum' usually refers to a court or a tribunal and thus does not bear a single meaning, namely, formal court proceeding. If the drafters had aimed at confining proceedings to court proceedings, they would have used the word 'court' instead of 'forum'.

The court's reasons so far dealt with the examination of 'legal proceedings' in its immediate context in s 133(1). In the wider context, the court examined s 142(3)(b), which is relevant as the section obliges directors of a company to assist the business rescue practitioner with 'any court, arbitration or administrative proceedings ... involving the company'. The court was curious as to why the lawmaker would want a company to provide details of all proceedings, including arbitration proceedings, but exclude arbitration from the ambit of s 133(1). To answer this question, one must look at the purpose of BRP and its consequences. Section 7(k) stipulates that one of the purposes of the Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. Having regard to this provision, together with the definition of business rescue in s 128(1)(b), the purpose of business rescue becomes apparent. Business rescue is to provide for breathing space so that the affairs of the company may be assessed and restructured in a manner that allows its return to financial viability. The practitioner has to evaluate how claims will impact on the well-being of a company, and then decide whether

the claim should be settled or continue to litigation, hence the general moratorium to achieve this purpose. Excluding arbitration from the moratorium on legal proceedings would significantly hinder this purpose. It is only then when arbitration is included in the interpretation of s 133(1) that it can be read harmoniously with s 142(3)(b). This is in line with statutory construction, which is that where two can be made compatible, not contradictory, that interpretation should be followed. There can thus be no reason why details of arbitration proceedings should be provided to the practitioner other than because they are legal proceedings, as contemplated in s 133(1), which may have a bearing on the company's financial viability.

The court further had regard to s 5 of the Arbitration Act 42 of 1965, which treats arbitration proceedings as legal proceedings for purposes of sequestration, liquidation and judicial management. This was rejected because the Arbitration Act has a different statutory purpose.

To conclude, the court was in favour of a broader interpretation of s 133(1) to include proceedings before other tribunals, including arbitral tribunals. The language is suggestive of this interpretation, as well as contextual indications in s 142(3)(b). It is also in line with providing breathing space to the practitioner to get the company's affairs in order. Arbitration, like court proceedings, also involve time and money resources that may hinder the effectiveness of BRP. Including arbitration proceedings is also in line with *Black's Law Dictionary* (Bryan A Garner *Black's Law Dictionary* 9ed (West 2009)) and *International Arbitration Law* (Mauro Rubino-Sommartano *International Arbitration Law and Practice* 3ed (New York: Juris Publishing, Inc 2014) at 42) definitions where they include arbitration proceedings in the definition of legal proceedings.

The appellant was, however, unsuccessful in her appeal on other grounds and the appeal was dismissed with costs.

• See feature article 'Instituting proceedings against a company under supervision' in this issue.

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# NEW LEGISLATION

Legislation published from  
1 – 25 September 2015

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## Bills introduced

Traditional and Khoi-San Leadership Bill B23 of 2015.

Local Government: Municipal Electoral Amendment Bill B22 of 2015.

## Selected list of delegated legislation

### Allied Health Professions Act 63 of 1982

Use of professional titles and designations. BN138 GG39220/18-9-2015.

### Basic Conditions of Employment Act 75 of 1997

Amendment of sectoral determination 6: Private security sector. GN786 GG39156/1-9-2015.

### Civil Aviation Act 13 of 2009

Ninth amendment of the Civil Aviation Regulations, 2015. GN R783 GG39151/1-9-2015.

### Collective Investment Schemes Control Act 45 of 2002

Exemption of a certain category of persons conducting the business of a hedge fund from certain provisions of the Act. BN140 GG39220/18-9-2015.

### Construction Industry Development Board Act 38 of 2000

Standard for uniformity in construction procurement. BN187 GG39204/11-9-2015.

Implementation of the CIDB Best Practice Contractor Recognition Scheme. GN841 GG39204/11-9-2015.

### Independent Communications Authority of South Africa Act 13 of 2000

Revised official list of regulated standards for technical equipment and electronic communications equipment regulations. GenN896 GG39182/9-9-2015. Regulations in terms of s 4C(2)(a) and (b). GN852 GG39225/21-9-2015.

### Magistrates' Courts Act 32 of 1944

Changing the name of the magisterial district Tabankulu to Ntabankulu. GN601 GG39221/18-9-2015.

### Medicines and Related Substances Act 101 of 1965

Fees payable. GN784 GG39154/1-9-2015.

### National Environmental Management Act: Air Quality Act 39 of 2004

Declaration of a small-scale char and charcoal plants as controlled emitters and establishment of emission standards. GN602 GG39220/18-9-2015.

### National Railway Safety Regulator Act 16 of 2002

Determination of fees to be paid for services rendered in terms of s 17(1)(bB) of the Act. GenN915 GG39205/15-9-2015.

### National Regulator for Compulsory Specifications Act 5 of 2008

Amendment to the compulsory specification for motor vehicles of category M2/3. GN611 and GN613 GG39220/18-9-2015.

### Occupational Diseases in Mines and Works Act 78 of 1973

Increase of levies. GN604 GG39220/18-9-2015.

### Plant Improvement Act 53 of 1976

Amendment of regulations relating to the application of the Act. GN797 GG39172/4-9-2015.

### Public Finance Management Act 1 of 1999

Standard interest rate applicable to loans granted by the State out of a revenue fund (9,5% pa). GenN906 GG39201/11-9-2015.

### Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Maclear. GN829 GG39199/11-9-2015.

Establishment of a small claims court for the area of Jan Kempdorp. GN828 GG39199/11-9-2015.

Establishment of a small claims court for the area of Itsoseng. GN827 GG39199/11-9-2015.

Establishment of a small claims court for the area of Groblershoop. GN826 GG39199/11-9-2015.

Establishment of a small claims court for the Hottentots Holland Basin and Strand areas. GN851 GG39223/21-9-2015.

Establishment of a small claims court for the Richmond area. GN849 GG39223/21-9-2015.

Establishment of a small claims court for the New Brighton area. GN848 GG39223/21-9-2015.

Establishment of a small claims court for the Tsheseng area. GN847 GG39223/21-9-2015.

Establishment of a small claims court for the Kentani area. GN846 GG39223/21-9-2015.

Establishment of a small claims court for the Keimoes area. GN845 GG39223/21-9-2015.

Establishment of a small claims court for the Venterstad area. GN844 GG39223/21-9-2015.

## Draft legislation

Draft Cybercrimes and Cybersecurity Bill. GN878 GG39161/2-9-2015.

Amendment of regulations in terms of the Medical Schemes Act 131 of 1998 for comment. GN794 GG39165/3-9-2015.

Draft Merchant Shipping (Radio Installations) Amendment Regulations, 2015 in terms of the Merchant Shipping Act 57 of 1951. GN R795 GG39169/4-9-2015.

Draft Veterinary Procedural Notice for Buffalo Disease Risk Management in South Africa or 'Buffalo VPN' the Animal Diseases Act 35 of 1984. GN798 GG39172/4-9-2015.

Proposed amendments to the Johannesburg Stock Exchange (JSE) derivatives rules in terms of the Financial Markets Act 19 of 2012. BN180 GG39172/4-9-2015.

Draft amendment Regulations Relating to the Transparent Pricing System for Medicines and Related Substances Act 101 of 1965. GenN899 GG39190/10-9-2015.

Cross-Border Road Transport Amendment Regulations, 2015 in terms of the Cross-Border Road Transport Act 4 of 1998 for comment. GN R822 GG39184/10-9-2015.

Proposed amendments to the JSE listing requirements in terms of the Financial Markets Act. BN186 GG39201/11-9-2015.

Amendment of the Estate Agency Affairs Board Regulations in terms of the Estate Agency Affairs Act 112 of 1976 for comment. GN R825 GG39195/11-9-2015.

Proposed levy on the piped-gas and petroleum pipelines industries for 2016/17



in terms of the Gas Regulator Levies Act 75 of 2002 and the Petroleum Pipeline Levies Act 28 of 2004 for comment. GN823 GG39187/11-9-2015.

Advertising, canvassing and marketing rules in terms of s 24(1) of the Credit Rating Services Act 24 of 2012 for comment. GN603 GG39220/18-9-2015.

Draft regulations on party election broadcasts, political advertisements,

the equitable treatment of political parties by broadcasting licences an related matters in respect of municipal elections broadcasting in terms of the Electronic Communications Act 36 of 2005. GN896 GG39237/25-9-2015.

Draft Merchant Shipping (Seafarer Recruitment and Placement) Amendment Regulations. GN R892 GG39233/25-9-2015.

Merchant Shipping (Seafarer Accident Insurance) Regulations, 2015 for comment. GN942 GG39232/25-9-2015.

Constitution Eighteenth Amendment Bill. GenN917 GG39224/21-9-2015.

Draft Foreign Service Bill. GN601 GG39211/17-9-2015.



## EMPLOYMENT LAW

# Employment law update



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## Automatic termination provisions in contracts of employment

In *South African Transport and Allied Workers Union obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] 8 BLLR 837 (LC), Mosime AJ was required to consider the employment consequences of a service provider terminating the employment of certain employees on the cancellation of a service level agreement at the request of the client.

In this case, the employees were employed by a cleaning company, Fidelity Supercare, who had entered into a service level agreement with the University of Witwatersrand (Wits University). The employees were assigned to perform the services for Wits University in terms of an employment contract with Fidelity Supercare, which provided that the employees' employment would terminate on the date on which Wits University terminated its service level agreement with Fidelity Supercare and the employee would have no entitlement to severance pay. Upon Wits University giving notice of its intention to terminate the con-

tract, the employer informed all the employees, who were assigned to perform cleaning services for Wits University, that their employment would automatically terminate at the end of the month. The employees were not consulted with as the employer was of the view that this did not constitute a dismissal but instead was an automatic termination of employment by virtue of the contractual provisions in the employment contracts.

Thereafter, Wits University informed Fidelity Supercare that it required it to continue to perform cleaning services but on a significantly reduced basis. A new service level agreement was consequently entered into. The employer then invited all the employees to apply for available positions in terms of the new service level agreement, which the majority of the employees did. The applicants who did not apply for these positions consequently had their employment terminated and they were not paid severance pay.

The applicants alleged that they were dismissed for operational requirements and were accordingly entitled to severance pay. The applicants further argued that their dismissals were unfair as there was no valid reason for the dismissal.

This was because the contract with Wits University continued and a number of the other employees continued to be assigned to the Wits University contract after the termination of the applicants' employment.

Mosime AJ considered whether the employer was entitled to rely on the contractual provisions in the employment contract to bring the employment relationship to an end. He held that where an employment contract provides that it will automatically terminate on the occurrence of an event, the employer may rely on that event to bring the employment relationship to an end. What is more complicated is where that event is triggered by a decision of a third party and thus Mosime AJ was required to consider how broadly an occurrence of an event should be interpreted.

There has been a body of case law, which has held that where the event is triggered by a third party it is not a dismissal because the employer is not the proximate cause of the termination of employment. In this regard, reference was made to the case of *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC) in which a client scaled down its contract with a labour broker and the labour broker in turn terminated the employment of one of its employees on the basis that the labour broker's contract with the client insofar as it related to that employee was terminated by the client. The employee had contractually agreed that his employment would automatically terminate on the termination of the labour broker's contract with the client. This was found to not constitute a dismissal by the employer.

However, recent case law has held that automatic termination provisions in an employment contract do not trump the Labour Relations Act 66 of 1995 (the Act) and are accordingly unenforceable if they are unfair and against public policy. For example, in *SA Post Office*

*Ltd v Mampeule* [2010] 10 BLLR 1052 (LAC), it was held by the Labour Appeal Court that an employee cannot contract out of the right to a fair dismissal even when the employment contract provides for automatic termination of employment. Subsequent cases also held that automatic termination provisions must be interpreted purposively to determine whether it is permissible in the circumstances to contract out of the right not to be unfairly dismissed.

The recent amendments to the Act expressly provide the circumstances in which it is permissible for a fixed-term contract to provide for automatic termination, which are as follows –

- on the occurrence of a specified event;
- on the completion of a specified task or project; or
- on a fixed date.

While fixed-term contracts may automatically expire on the occurrence of an event, Mosime AJ held that the term 'event' must be given a narrow interpretation to maximise protection of job security and the Constitutional right to fair labour practices. Mosime AJ held further that a contractual provision that provides for automatic termination at the behest of a third party undermines the employee's right to fair labour practices and is contrary to public policy and unenforceable. Thus, labour brokers may

no longer simply let their employees' employment 'expire' in the event that the client terminates its contract with the labour broker.

It was held that in this case the employees were dismissed for operational requirements. However, it was found that procedural fairness did not need to be considered because the employees were offered alternative employment and thus could have avoided their retrenchment, as did the majority of the employees. Furthermore, the employees were not entitled to severance pay because they unreasonably refused an offer of reasonable alternative employment.



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## One employee serving two employers

***Assign Services (Pty) Ltd v CCMSA and Others* (LC) (unreported case no JR1230/15, 18-9-2015) (Brassey AJ).**

Section 198A was introduced into the Labour Relations Act 66 of 1995 (LRA) in January 2015 and governs the relationship between an employee, earning below the prescribed threshold, a labour broker (referred to as a temporary employment service or TES) and the labour broker's client.

Section 198A(3) reads:

'(3) For the purposes of this Act, an employee –

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or

(b) not performing such temporary service for the client is –

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.'

Once the deeming provision, that being s 198A(3)(b)(i), is triggered, does the employee relinquish its employment relationship with the TES and become the

sole employee of the client or does the employee have a concurrent employment relationship with both the TES and client?

A dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) asking it to pronounce on the relationship between the third respondent's members National Union of Metalworkers of South Africa (NUMSA), the applicant, the TES and its client.

The TES argued that pursuant to the operation of the deeming provision, the workers remain employees of the TES for all intents and purposes and are also deemed employees of the client for purposes of the LRA. Thus, according to the TES the legal position is one of dual employment – while the workers are deemed to be the employees of the client, the employment contract between the worker and the TES nevertheless remains in force. NUMSA argued that in accordance with the deeming provision, the client of the TES becomes the sole employer for purposes of the LRA.

On the commissioner's interpretation of the deeming provision, NUMSA's argument found favour and he held that the client was deemed the sole employer of the workers.

On review, the parties advanced the same arguments made before the commissioner but made certain concessions.

NUMSA conceded that the deeming provision did not bring to an end the contractual relationship between the TES and worker and as a result thereof, neither party was deprived of their respective rights and obligations embodied in the employment contract concluded between the TES and worker.

The TES conceded that the provision does not mean the client, on being deemed the employer, shares the same contractual rights and obligations that the TES has with the worker in terms of their contractual relationship.

Having clarified the parties arguments, in particular the fact that it was

not in dispute that the contractual relationship between the TES and worker remained alive after the deeming provision came into effect; the court held that the only issue to determine was whether the TES continued to be the employer of the workers, post application of the provision and if so, whether it (the TES) was concurrently vested with the 'statutory rights/obligations and powers/duties' assigned to an employer in terms of the LRA.

On this question, the court per Brassey AJ, held:

'There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA's transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES.'

The court further held that its construction supported the 'general architecture of the new provisions' in particular the new sections which sought to 'upgrade' the joint and severable liability between TES and its client. This included s 198(4A)(b) which enabled the Basic Conditions of Employment Act 75 of 1997 to be enforced against the TES or the client as if it were the employer.

In arriving at his conclusion Brassey AJ found the commissioner, who held the client to be the sole employer, erred in law. The question, thereafter was, whether the error rendered the award reviewable. In adopting the 'but for' test (ie, but for the error committed would the outcome be different?), the court

held that the commissioner's error was a material one and as such set aside the award with no order as to costs.

The court declined to substitute the commissioner's award with a finding that the placed employees are 'employed dually' for purposes of the LRA, as prayed for by the TES. Brassey AJ found this expression to be a source of confusion set out in too broad a term.

### Question:

What recourse do employees earning below threshold have in dismissal cases? Where should their case be referred to?

### Answer:

Any dismissed employee, irrespective whether they earned above or below the prescribed threshold should refer their dismissal disputes either to the CCMA or the relevant bargaining council. Their dispute will always be conciliated and depending on the employee's claim, either be referred to arbitration or to the Labour Court for adjudication. Put differently, the recourse available to an employee described above would be the same recourse open to an employee earning above the threshold.

There had been a proposal that em-

ployees earning over a certain amount per annum be prevented from referring their dismissal disputes to the CCMA or bargaining councils but this proposal was not included in the final amendments.

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By  
Deon  
Mouton

## Double jeopardy in the workplace

**T**he employee in this matter received a final written warning for misconduct relating to the breaching of safety regulations on the employer's Wonderkop Ferrochrome Smelter. Not satisfied with the outcome, the employer instituted a second inquiry hearing against the employee and dismissed the employee. The employer held the second inquiry hearing because the employee was already on a final written warning for a similar misconduct at the time of the initial disciplinary inquiry. The employer was of the view that the chairperson of the initial disciplinary inquiry erred by not taking the existing final written warning into account.

Following the dismissal, the employee referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). The parties agreed during the pre-arbitration conference not to lead evidence and only argue as to whether the employer committed an act of double jeopardy or not. The commissioner found in favour of the employer and the employee took the matter on review to the Labour Court (LC). The LC set aside the arbitration award and referred the matter back to the MEIBC for a hearing *de novo*. The discussion herein is based on the hearing *de novo*.

### Double jeopardy

In instances where an employee was found not guilty during a disciplinary inquiry or where an employee was issued with a sanction short of a dismissal, the employer is not as a rule allowed to hold a second inquiry hearing relating to the

same transgression (J Grogan *Workplace Law* 10ed (Cape Town: Juta 2009) at 245). As a matter of fact the majority of companies' disciplinary procedures do not make provision for such. In *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) the Supreme Court of Appeal held as follows with regard to assessing fairness when considering an employment relationship:

'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances ... . And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act'.

In *BMW (South Africa) (Pty) Ltd v Van der Walt* [2000] 2 BLLR 121 (LAC) the Labour Appeal Court (LAC) held as follows with regard to determining whether or not it would be fair for the employer to subject an employee to a second disciplinary inquiry:

'Whether or not a second disciplinary inquiry may be opened against an employee would, I consider, depend on whether it is, in all the circumstances, fair to do so. ... In labour law fairness and fairness alone is the yardstick.'

The above matter was followed in *Branford v Metrorail Services (Durban) and Others* [2004] 3 BLLR 199 (LAC) the LAC held that:

'The true legal position as pronounced in *Van der Walt* is that a second inquiry would be justified if it would be fair to institute it'.

The question that arises is, what remedy does an employer have for a flawed disciplinary inquiry, which was patently unfair and grossly prejudicial towards the employer? This question was answered in a recent arbitration award in the MEIBC in the matter of *NUMSA obo Percy Montshiwagae v Glencore Wonderkop Smelter* (unreported METS 2539, 23-2-2015). The arbitration award is dated 23 February 2015.

The applicant argued that it was unfair to discipline him twice for the same misconduct. He submitted that no new evidence was presented at the second disciplinary hearing. He argued that the respondent could only interfere with the chairperson's decision if the chairperson's decision was prompted by improper motives of the chairperson.

The respondent argued that the fairness of the second disciplinary inquiry depends on the yardstick of labour fairness. It was argued that the fairness of the matter turned on the mistake of the first disciplinary chairperson who did not take into consideration that the applicant was already on a final written warning for a safety related incident. It was submitted that fairness and equity as well the objectives of the Labour Relations Act 66 of 1995 should be taken into account.

The commissioner held that double jeopardy is intuitively unfair but not intrinsically unfair. He found that the second disciplinary hearing emanated from a flawed decision by the chairperson on the sanction. He further held that the applicant conceded under cross-examination that a dismissal was appropriate in his case in view of his final written warning that was tantamount to agreeing that



the decision was flawed. The commissioner held that the decision of the first hearing was grossly flawed. He held that the applicant's safety record was appalling and the misconduct he committed was inexcusable.

The commissioner acknowledged that the respondent's disciplinary procedures make no provision for an appeal by the company. He held that finality is paramount in civil and criminal cases, but does not enjoy the same sanctity in labour law. That is why the *autrefois acquit/convict* rule was not incorporated into labour law. The commissioner opined that wider equitable considerations are at play. More specifically the sustainability of the employment relationship between the parties. The commissioner held that the respondent could not file a judicial review and had no other option but to rehear the matter. The commissioner declared the second disciplinary inquiry fair and reasonable and dismissed the matter.

## Conclusion

It is customary to hold only one disciplinary inquiry in accordance with the employer's disciplinary code and procedure. Only in exceptional circumstances may an employer be required to hold more than one disciplinary inquiry. There are two types of instances where the employer requires a second disciplinary in-

quiry. Firstly, the employer may view the sanction meted out by the chairperson unsatisfactory. Secondly, the employer may regard the process followed in the disciplinary inquiry flawed or irregular. It has crystallised through a number of cases that employers are allowed to revisit disciplinary enquiries. But there are no clear guidelines under which circumstances an employer can hold a second disciplinary inquiry.

The circumstances under which a second disciplinary can be conducted will obviously differ from case to case. It appears that it is easier for an employer to accept a sanction or to hold another disciplinary hearing in instances where the first disciplinary chairperson only recommends a specific sanction. It would, however, be more difficult for an employer to change a disciplinary outcome in instances where the chairperson makes a binding decision. In the matter of *Solidarity obo Van Rensburg v Rustenburg Base Metal Refineries (Pty) Ltd* [2007] 9 BALR 874 (P) it was held that the sanction was shockingly inappropriate and the employee should not get away with a bargain. Mischke is of the view that a revisiting of a disciplinary inquiry would be fair if it falls within the parameters of fairness and fairness should be applied to both the employer and the employee (C Mischke 'On second thoughts' *Contemporary Labour Law* (2009) vol 19 no 2 (Sept) 11).

Fairness for an employee is to have an adequate opportunity to respond to the allegations. Similarly, fairness to the employer is to have an adequate opportunity to present the employee with the allegations and to have a reasonable, just, coherent and appropriate sanction. It will not be fair towards an employee if an employer simply repeats the disciplinary process until it gets the desired result.

Accordingly, in light of the above, I submit that in determining whether it would be fair for an employer to subject an employee to a second inquiry hearing based on the same allegations levelled against him or her at the first disciplinary inquiry, the only test that must be applied is whether in all circumstances, it is fair to subject an employee to a second disciplinary inquiry.

Fairness is determined based on the facts of each case, and there is no particular set of factors that ought to be considered in determining fairness in the circumstances.

- The employer was represented by the writer of this article who is employed as a Senior Business Partner Employee Relations by the respondent.

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By  
Meryl  
Federl

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By  
Brenda  
Wardle

# Cabinet approval of s 100 intervention by the department of human settlements in the Nelson Mandela Bay Metropolitan Municipality

**T**his article is primarily aimed at examining whether the s 100 intervention approved by Cabinet earlier this year, and confirmed among others, by the Department of Cooperative Governance and National Treasury, is indeed an intervention as envisaged in s 100 of the Constitution.

It is trite and need not be restated that the Constitution is the supreme law of the land and that any law or conduct, which is inconsistent with it is invalid. It is further trite that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. Further, everyone, in terms of s 33 of the Constitution, has a right to administrative action which is lawful, reasonable and procedurally fair.

The doctrine of *ultra vires* is now commonly expressed as the constitutional principle of legality. So while the government of the Republic of South Africa, in terms of s 40 of the Constitution, is constituted of the national, provincial and local spheres, these spheres, which are distinctive, interdependent and interrelated, must observe and adhere to the principles enshrined in the Constitution and conduct any and all activities in line with the parameters set out in, among others, ch 10 thereof.

Section 154(1) of the Constitution requires national and provincial governments to support and strengthen the capacity of municipalities to manage their own affairs. This support can be by way of legislative or other appropriate means. Section 41(f) of the Constitution further provides that all spheres of government (and organs of state) must respect the status, powers and functions of other spheres and that they shall 'not assume any power or function except those conferred on them in terms of the Constitution'.

Section 100 of the Constitution, which is at the heart of this matter, deals with national supervision of provincial administration and ought to be relied on when a province cannot or does not fulfil an executive obligation in terms of legisla-

tion or the Constitution. In such instances, the national executive may intervene by taking any of the prescribed appropriate steps to ensure fulfilment of the obligation. Section 100 then further sets out both the substantive and procedural requirements to be met prior to, during and post the intervention. I submit that the intervention as approved by cabinet cannot possibly be an intervention in line with this section of the Constitution.

Another Constitutional provision dealing with intervention is s 139 and this section refers to the provincial sphere supervising local government. The provisions of this section mirror those in s 100 with concomitant substantive and procedural requirements. It is clear that these provisions too, are inapplicable.

Section 217 of the Constitution deals with procurement. The Public Finance Management Act 1 of 1999 and treasury regulations regulate procurement at national and provincial levels and the Local Government: Municipal Finance Management Act 56 of 2003 (among others) regulates procurement at local level. The values on which public sector procurement are based are, fairness, equity, transparency, competitiveness and cost effectiveness. However, nothing prevents an organ of state (including a sphere of government) from implementing procurement policies providing for categories of preference in the allocation of contracts, as well as the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

It is important now, given the fact that the said intervention does not appear to be sanctioned by the Constitution, to examine the other legislative provisions which the Minister might have been alluding to.

The Housing Development Agency (the Agency), was established in terms of the Housing Development Agency Act 23 of 2008 effective 31 October 2008.

The purpose of the establishment of the Agency was to respond to the requirements of the comprehensive plan, by identifying, acquiring, developing

land: And the disposal of land and land properties. It provides project management expertise. Schedule 4 of the Constitution, which is expanded on below, thus finds applicability.

Another provision that finds applicability is s 3(4)(h) of the Housing Act 107 of 1997, which states that the Minister of Human Settlements may establish and finance institutions for purposes of housing development and supervise the execution of their mandate. The operative words here being 'supervise execution' as opposed to pure 'execution' which is envisaged by the announced intervention.

In terms of sch 4 of the Constitution, housing is a functional area of national and provincial legislative competence. In terms of the Housing Development Agency Act, there is a need to accelerate the delivery of housing, and there is an urgent need for government to address the increasing backlog in respect of housing delivery together with the critical shortage of skills to provide housing in some provinces and municipalities. It thus becomes clear that the Housing Development Agency Act does envisage a situation where national government (in this instance) can play a critical role in order to ensure that effect is given to rights enshrined in s 26 of the Constitution.

Section 4 of the Act states:

'The objects of the Agency are to -

(a) identify, acquire, hold, develop and release state, communal and privately owned land for residential and community purposes and for the creation of sustainable human settlements;

(b) project manage housing development services for the purposes of the creation of sustainable human settlements;

(c) ensure and monitor that there is centrally coordinated planning and budgeting of all infrastructure required for housing development; and

(d) monitor the provision of all infrastructure required for housing development.'

Section 5 - role of the Agency:

(1) The Agency must, in consultation with the relevant owner, identify, acquire, hold, develop and release state, privately and communal owned land for residential and community purposes for the creation of sustainable human settlements.

(2) The Agency must ensure that there is funding for the provision of all infrastructure that is required for housing development in which it is involved.

(3) The Minister may, in consultation with the relevant MEC, where there is lack of capacity in any organ of state to identify, acquire, hold, develop and release land for residential and community purposes for the creation of sustainable human settlements –

(a) advise the organ of state to conclude an agreement with the Agency to offer assistance in terms of the Agency's skill and expertise; or

(b) direct the Agency to engage with organ of state with a view to conclude the agreement contemplated in paragraph (a).

(4) Nothing in this Act detracts from the power of a province and municipality to identify, acquire, hold, develop and re-

lease land for residential or community development without recourse to the Agency, in terms of their functions under the Housing Act 1997 (107 of 1997).'

Both the functions and the role of the Agency, as set out above, are critical when trying to decipher the meaning and extent of the approved intervention. It is pertinently clear that in instances, for example, where there is insufficient capacity, the Agency may offer assistance and that this assistance must end up in the conclusion of an agreement. If one has regard to the Level 2 Accreditation granted to the Nelson Mandela Bay Metropolitan Municipality in 2011 by then Minister Tokyo Sexwale, it thus becomes clear that the Metro indeed does have the requisite capacity.

Under the functions of the Agency in s 7 is reference to the Agency enhancing the capacity of organs of state in order to enable them to meet the demand for housing delivery and the Agency may, in terms of the same section, assist with housing developments which have not been completed within the anticipated project period.

The R 4,6 billion to be utilised in this

intervention is quite a staggering sum. Assistance by the Agency, if carried out in line with the Housing Development Agency Act, would be legal, however, it is doubtful that an intervention that usurps the entire human settlements function, together with the control over a R 4,6 billion budget, derived mainly from government grants, would pass Constitutional muster and it is because of that, that I argue that the Minister of Human Settlements, and all those who concurred with and approved the decision, acted outside the prescripts of the law. The fact that an incorrect categorisation was afforded to the intervention, may merely be the tip of what appears to be an iceberg.

What does remain pertinently clear, as has been highlighted above, is that there was no s 100 intervention by the Department of Human Settlements in the Nelson Mandela Bay Metropolitan Municipality.

Brenda Wardle, LL.M (Unisa).





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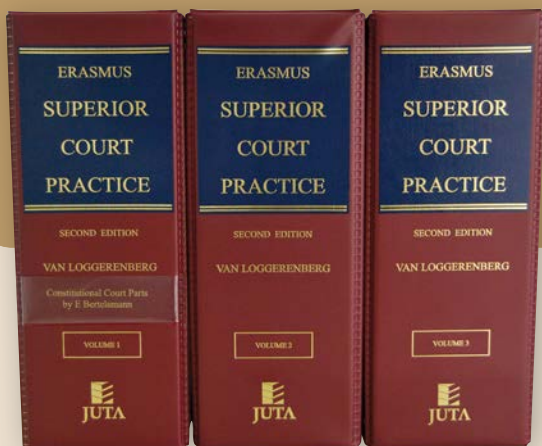
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