

OCTOBER 2013

PUZZLING LEGISLATION

Scrap or re-write the Older Persons Act

Hiding behind the veil

Breaking up is hard to do, or is it?

The clean-break principle explained

Business valuations

**Ensure all the valuer's ducks
are in a row**

*Wills week
feature:*

Valid or not?

*General principles for
challenging
a will*



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Mapula Sedutla - Acting editor

So ... have things really changed for women in the profession?

are women not progressing to and remaining in sufficient numbers in the senior ranks in the profession, and very importantly, why are they not adequately present on decision-making bodies, particularly those relating to the organised profession? Why don't they want to make them-

selves available to be interviewed for vacancies on the Bench?

In 1995 in the article titled 'Women lawyers need to find their voices' we noted that the challenges faced by women in the profession 'demand[s] the urgent creation of a strong, united, national women lawyers' lobby. This group should scrutinise statistics, trends, barriers and perceptions.' That was 18 years ago. The questions remain unanswered and the perceptions remain.

The profession must engage urgently with the representation and role of women within it. The new dispensation being ushered in by the Legal Practice Bill will require it to put forward demographically representative nominees on the National Consultative Forum (the transitional body that will be tasked to thrash out the hard issues still to be settled once the Bill is passed) and, following that, on the National Legal Practice Council. The voices of female practitioners must be heard on those bodies.

The admission supplements that accompany *De Rebus* twice a year record the names of many women completing articles and being admitted to practise as attorneys. The pages of this journal - in the 'People and Practices' section - depict an increasing number of women practitioners becoming, professional assistants, associates and senior associates at their firms. There are noticeably fewer photographs of women becoming partners or directors.

At the Women's Conference hosted by the Law Society of the Northern Provinces in August this year - on which we report on p 11 of this issue - Minister Lindiwe Sisulu noted that '[t]he questions that then must be asked are: What specific challenges do women in particular face in the legal profession that constitute a barrier to their advancement in the same way that men advance?'

Johannesburg High Court Judge Margaret Victor asked why, 19 years into democracy, there are still only two female judges on the Constitutional Court Bench? Johannesburg attorney Thina Siwendu went further to outline the difficult and uncomfortable instances of 'entrenched racism, patriarchy, misogynist behaviour and thinking, and sometimes outright insults and instances of sexual harassment ranging from references to physicality to things that are profoundly painful to women and that this happens behind closed doors.'

These questions and issues are repeated in numerous forums. Why

End of an era

Sadly, the 'Recent articles and research' column on p 64 will be the last Professor Henk Delpont writes for *De Rebus*. On behalf of the profession, we would like to thank Professor Delpont for his 38 years of writing a dependable and valuable column. For Professor Delpont's view on contributing to the journal see p 17.



Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 21 October 2013 and 18 November 2013.

Tell us

What do you think? Do we require a survey or study into the challenges being faced by female legal practitioners? Or do you agree with the school of thought that believes female practitioners do not require a specific lobby or separate consideration, and that women can compete on the same level playing field as their male colleagues? Let us know by e-mailing derebus@derebus.org.za.

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.

BProc degree can set standard

I am replying to the letter 'A poor man's perspective on the LLB' by Senzo Lawrence Buthelezi in the August issue of *De Rebus* (2013 (Aug) DR 5). I am of the opinion that it is not a question of rich or poor, but of the standard of the degree course offered by universities. I am in possession of a BProc degree, which was preceded by a Diplur. In the curriculum of my BProc degree, Latin and accountancy were compulsory subjects. Students also had other compulsory subjects, which were not offered by other universities, such as professional practice for attorneys and notaries and professional practice for conveyancers, which were prescribed as annual subjects for the fourth year of study.

In addition to the official languages, there were compulsory subjects such as constitutional and administrative law and political science, which were prescribed for the second and third year of the degree. Apart from these subjects, the majority of subjects prescribed for the Blur and LLB degrees were also compulsory and prescribed for the BProc degree. The BProc remained a four-year degree, irrespective of whether you obtained any other degree, for example, a BSc, BA or BCom, provided that the BA or BCom were not taken with law subjects. On the other hand, with these degrees as predecessors, an LLB degree could be obtained within three years.

I fully agree with Mr Buthelezi that there has never been an outcry about the quality of the graduates in possession of

a BProc degree. I submit that the decision to do away with the BProc degree as an entry to the attorneys profession, marked a sad day in our legal history. This degree was introduced by way of legislation in 1971 after certain three-year courses like the DipProc, Diplur and Blur, for which three years of clerkship were required, became obsolete.

Rather upgrade the LLB degree to the standard of the BProc degree, with the inclusion of Latin and accountancy in the curriculum.

André Muller,
attorney, notary
and conveyancer, Bellville

Road Accident Fund Act: Are its objectives promoted?

The Road Accident Fund (RAF) is a juristic person established by an Act of parliament, namely, the Road Accident Fund Act 56 of 1996 as amended (RAF Act). The RAF is responsible –

- for providing compulsory social insurance cover to all users of South African roads;
- to rehabilitate and compensate persons injured as a result of the negligent driving of motor vehicles in a timely and caring manner; and
- to promote the safe use of all South African roads actively.

The vision of the RAF is 'to provide the highest standard of care to road accident victims to restore balance in the

social system' (www.raf.co.za/about-us/pages/profile.aspx, accessed 9-9-2013). To restore this balance, especially in loss of support claims where claimants have suffered immensely as a result of losing a loved one who was also the breadwinner, claimants need to be compensated as soon as practically possible. Speedy compensation is important in order to put the claimants in the position they would have been in had the breadwinner not passed on.

I am of the opinion that the aforementioned vision is not promoted by the RAF and/or its panel of attorneys. I have recently represented clients in a loss of support claim where the mother and the two daughters claimed support resulting from the death of her husband and their father. A claim was lodged and since there was no offer made, I proceeded to issue and serve summons, which was defended. I then went through the entire litigation process and applied for a trial date that was nine months away.

Merits were not in dispute and only the issue of quantum had to be agreed on. I provided the RAF with all the required documentation, including the actuarial report and when I requested to be provided with an offer, I was told that my clients' claim would not be entertained as the trial date is only next year. My clients could not request an interim payment as the merits of this matter were not settled. The RAF did not take into account that my clients had, since the deceased's death on 10 September 2009 to date, suffered loss of support and that the deceased's eldest daughter could not complete her studies as a result of the fi-



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nancial challenges they were facing due to her father's death.

A further delay in settling the matter was not benefiting my clients or the RAF as the legal costs were escalating and some financial adjustments would have to be made to the actuarial calculations, which would result in a higher amount than what was initially claimed.

In an attempt to resolve these issues and since I was not receiving any cooperation from its panel attorneys, I contacted the RAF directly and highlighted the fact that a speedy settlement would curb unnecessary escalating costs. More importantly, it would be beneficial to my clients, thereby promoting the vision of the RAF Act. In response, the RAF informed me that it would contact its panel attorneys in order to hear what their views on a possible out of court settlement were. The question that I want to raise is: Shouldn't the RAF, as the client in this case, give its panel attorneys instructions to assist in settling the matter sooner?

I have come to the realisation that the objective and mission of the RAF Act are not promoted by the RAF as an institution or by its panel of attorneys. It is the responsibility and duty of the RAF to promote and implement this objective and mission. Should claims be entertained only when the trial date is close? In recent years this has created a situation where the RAF ended up paying more than what it was supposed to on claims, which could lead to a depletion of funds as was the case in August 2006.

An effective way of guarding against this is to simply attend to matters that are amenable to settlement out of court. The failure to settle claims speedily is, in a way, hampering the objective of the RAF Act in that it ends up not restoring the required balance in the social system. For example, in my clients' case, the daughter will not be able to complete her studies on time or will have to drop out of college/university due to the unnecessary delay on the part of the RAF

and its attorneys. This may lead to a situation where she might not find suitable work, taking into account her level of education.

I therefore urge the RAF and all its stakeholders to take the objective and mission of the RAF into account when assessing claims; more importantly, they must put the claimants' interests first in promoting its vision and mission statements.

Bogosibotsile Mogajane,
attorney, Pretoria

What are funeral expenses according to RAF?

In the Xhosa community, and most South African indigenous communities, whenever a member of the family dies, the remaining members, regardless of their financial status, have to incur funeral expenses. The expenses will be incurred before the funeral takes place, on the day of the funeral and after the funeral. These expenses are also linked to customs and rituals that have to be performed during the mourning period.

Before the funeral takes place, meals have to be prepared for family members, friends, community members and church members who visit the family to comfort them until the day of funeral. This period usually lasts a week or more. Also, a sheep has to be slaughtered in preparation for the people who come to dig the grave and for those who help with the preparation of the food.

On the funeral day, an ox has to be slaughtered in order to accompany the deceased into his or her ancestral home as well as to cleanse the remaining family members. If the deceased is a man, the widow has to wear certain mourning clothing, called *izila*, before and after the funeral, which is sewn at a price.

After the funeral, traditional beer has to be brewed in order to cleanse the picks and spades that were used to dig the grave. If the deceased is a man, another ox has to be slaughtered after 12 months, for a ritual called *ukuzila* (pleading with the ancestors to accept his arrival in their land). After 12 months the mourning clothes will be removed by another ritual called *ukukhulula izila* (wherein new clothes should be bought, sheep slaughtered, and traditional beer brewed).

The Road Accident Fund (RAF) only pays for the mortuary costs and the above expenses are not covered.

But for the death of the deceased in a road accident, these families would not have incurred all these funeral expenses. There is no way that a grieving family can bypass these above expenses. Why does the RAF think these are not necessary funeral expenses? Is it disrespectful of other people's culture?

South Africa is a sovereign and democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The Constitution recognises cultural, religious and linguistic communities, therefore they may not be denied the right to enjoy their culture or to practise their religion.

Further, the Constitution provides that everyone has inherent dignity and the right to have his or her dignity respected and protected. My question is: Does the RAF's non-payment of the above-mentioned funeral expenses symbolise the RAF's failure to respect and recognise these rights?

Cebo Chaza, attorney,
Pretoria



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how can we help you?

Q&A with Deputy Minister John Jeffery

Deputy Minister of the Department of Justice and Constitutional Development, John Jeffery took office on 9 July 2013. Deputy Minister Jeffery was born in Mauritius and spent most of his childhood in George. He did not always want to become an attorney as he was interested in nature conservation. However, during high school he decided to study law. *De Rebus* news editor Nomfundo Manyathi-Jele met up with the deputy minister a month after his appointment to talk to him about life, his career and the Legal Practice Bill.

Nomfundo Manyathi (NM): What is an average day like for you as deputy minister, and how does this differ from your role as Member of Parliament (MP)?

John Jeffery (JJ): My days vary; a day in parliament as an MP meant committee meetings and a series of political or community meetings. As deputy minister I must also attend structured meetings such as cabinet meetings that are relevant to my portfolio.

The difference between being a deputy minister and an MP is that there are far more public engagements now. I also want to put days aside when I will go out and visit the courts and see for myself how things are working.

NM: What is your office responsible for?

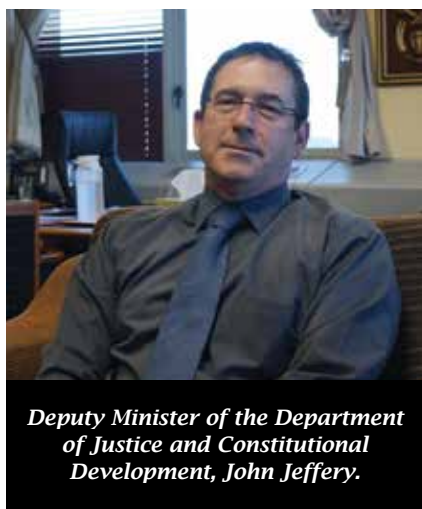
JJ: I have specific delegations from the Justice Minister and those include the sheriffs, magistrates and the Magistrates' Commission. I appoint acting magistrates and the minister makes the permanent appointments. I am also responsible for the small claims courts; I appoint the commissioners. I also look at and comment on most memoranda going to the minister. Legal Aid South Africa and the Law Commission are also part of my responsibilities and so are the two Chapter Nine institutions, the Office of the Public Protector and the South African Human Rights Commission.

NM: What is your ambition for the office of deputy minister and personally?

JJ: It is a short appointment until the next elections in April/May 2014. I want to do my best to ensure that the administration of justice is improved.

NM: Can you tell me a little bit about yourself: Who are you, where were you born, where did you grow up, etcetera – something that is not outlined in your CV?

JJ: I did not always want to be a lawyer, I was quite interested in nature conservation but, when I was in grade 10, I decided that I would rather study law. I went to the University of Natal in Pietermaritz-



Deputy Minister of the Department of Justice and Constitutional Development, John Jeffery.

burg, everyone that was in high school in George was either going to the universities of Cape Town, Rhodes or Stellenbosch and I wanted to be different and also wanted to see more of the country. Because I was from a small town, Johannesburg and Durban were a little scary so I chose something a bit smaller.

I matriculated in 1981. My parents were not political, but growing up as a white South African in the country in the late 70s and seeing all the things that were banned, made me want to know more about the liberation struggle. It was not logical to me that people who were not white were treated differently. I became more actively engaged in politics when I started university.

NM: Did you practise as an attorney?

JJ: I practised, but briefly.

NM: Why did you not remain an attorney for longer?

JJ: I did not practise longer because I was in the provincial legislature in Kwa-Zulu-Natal and I liked litigation. I would have loved to have done a trial a month but things were a bit chaotic in the legislature in those days.

I would agree to a matter being set for trial and then there would be a meeting I had to go to. The magistrates were all supportive and sympathetic, but I reckoned I cannot keep doing this; it is not fair on the court or my clients, so I stopped practising.

NM: How can reporting on legal issues/court matters be improved to assist the public to understand the legal system better?

JJ: I think part of the problem with the law is that lawyers like trying to make things as complicated as possible. I suspect it is because they want members of the public to feel that this thing is so complicated they cannot handle it themselves,

they need to pay for lawyers. A lot of what goes on in court, I think, is unnecessarily complicated and it could be simplified.

The use of Latin complicates things further. Why do you have to go around throwing the term '*sui generis*' when you can just use the word 'unique'?

I think more access to the courts and live coverage would be useful. I think there is also a need for the training of journalists because often you read an account about a trial in the media and what the journalist finds interesting and relevant is not necessarily what the court finds relevant. The public therefore often has the wrong understanding of what is happening in a trial and people are then shocked when the person is acquitted or found guilty. The problem with trials is that you have to sit there for the whole duration of the hearing. You cannot just pop in to see what is happening, and that is when journalists miss out on a lot of things.

Another question is whether judges or magistrates should be involved more in explaining their judgments. At this stage, a judgment is like what 'God gave to Moses on the top of Mount Sinai', this is it, the ten commandments, take it and use it. If court judgments were explained a little bit better, that might make things easier.

NM: You waited to do your articles for five years with a specific firm. Readers who read your CV in *De Rebus* may have asked why you did not do your articles under a different principal?

JJ: Basically, the work I was doing was important at that point. It was during the time of vigilante groups killing people and the justice system was doing nothing. The police were not doing anything either. What the law firm I was working at was doing, at the request of the Congress of South African Trade Unions, was to try and look at ways of getting the law to work.

If I had chosen to do articles with a different principal I would have had to do normal articles of commercial work, whereas this was cutting-edge stuff that was affecting people's lives at that time.

NM: What inspired you to choose a career in law?

JJ: Law is very empowering. In the context of an apartheid South Africa, I studied it to learn how I could use of all the rules and laws to improve people's lives.

NM: You come from parliament where there is a substantial representation of women. What do you think are the most common challenges faced by women in the legal profession?

JJ: One of the challenges is attitude. Lawyers are basically 'hired guns' as they

take on a case because they have been instructed and are paid to do it. They do not necessarily feel any particular relationship with the client. Male attorneys and advocates tend to be quite macho, aggressive and assertive. So I think that could be one problem – the culture.

There is also the preconceived idea that men and women cannot equally raise a child. The assumption is that the woman will do it and that it would be her primary responsibility.

I think there is also the attitude from men that if you employ a younger woman she will get pregnant, she will go on maternity leave and will have to look after the baby. These are the challenges that women face in the legal profession, I do not know how conducive to child care the legal profession is.

NM: How do these differ from challenges in the past?

JJ: It has obviously improved and there are far more women in the legal profession. When I was at university there were very few women law students. I think now, at some universities, more than half the law students are women, so there are far more women going into the profession. Also, when I was at law school there was one white woman judge. This has changed significantly. There is a lot of improvement but there is a long way to go.

NM: How far is South Africa from reaching the ideal of gender transformation in the legal profession?

JJ: It is on the way, but it has a long way to go.

NM: What still needs to happen to achieve this?

JJ: There will be gender transformation when the number of women on the Bench proportionally is around 50% or more as I think, statistically, there are more women than men, and when it is reflective of the demographics of the population. It would be when the majority or at least half of the senior managers of a big law firm are women and when senior positions in law firms are also occupied by women and where women feel that they are not discriminated against. The lack of gender transformation also relates to the attitudes of clients. There are some clients who do not want to be represented by women and that is not correct.

NM: You served on the Justice and Constitutional Development Portfolio Committee. What were some of the interesting trends that you observed in your discussions on various pieces of important legislation?

JJ: The Bills I found most rewarding were the Child Justice Act [75 of 2008], the Prevention and Combating of Trafficking in Persons Act [7 of 2013], the Protection from Harassment Act [17 of 2011], the Superior Courts Act [10 of 2013] and the Protection of Personal

Information Bill [B9B of 2009]. The challenges were basically to ensure that we pass legislation that was implementable by government, rather than having a whole lot of grand ideals. I enjoyed working on legislation that made a difference, that improved the rights of people and addressed needs in society.

NM: What challenges are there for the rule of law in a country with huge economic disparities and where access to the courts or the legal system is still difficult for the majority? What role can your office play in easing the situation?

JJ: We have two justice systems in the country, one for the rich and one for the poor. One of the challenges is trying to ensure that poor people can get access to justice, primarily through Legal Aid South Africa and their extension of work. That is also where the small claims courts come in, as well as trying to get systems in place so that you do not need a lawyer.

Another challenge is how to use the law to address the problems of disadvantaged people and that is where socioeconomic rights are also important.

NM: How do you think the public's perception of the justice system being mainly for the rich can be changed?

JJ: By ensuring that poor people have access to justice in whatever form, for example, if a poor person is accused in a criminal matter, that he or she has access to good quality lawyers. We must also ensure that they are able to approach the courts for civil relief.

At one point it seemed that a large number of the Constitutional Court judgments were about the rights of the privileged rather than the underprivileged, but I think that has changed to some extent.

So the perception can be changed by ensuring that disadvantaged people, poorer people, have access to courts.

NM: Do you think that there is enough information to inform people that there is help for them at the courts?

JJ: No, there is a lot more that needs to be done.

NM: How do you think that will happen? Is it through the media?

JJ: It would be in a variety of ways, such as through moot court competitions, human rights day, communication from the Justice Department and community radio talk shows. Soap operas on television also sometimes pick on some issues – although some of the ones that I have seen have mangled the court processes quite substantially and had people being sued when they actually should have been charged criminally, for example.

NM: Do you feel that the role of courts through their jurisprudence is to help shape society or vice versa?

JJ: Both. The courts, in their judgments, change the common law and in-

terpret the meaning of statutes. They are influenced by sections in society. If you look at the whole issue of the evidence of rape and the cautionary rule, it was societal changes and attitudes to women that resulted in the Supreme Court of Appeal abolishing the cautionary rule.

Coming from a more patriarchal society made the cautionary rule necessary because women could not be trusted. A woman victim of rape could not be trusted if she was the sole witness, but the changing attitude to the position and role of women led to that judgment.

If you look at the death penalty, which was specifically outlawed, that was the courts saying, in terms of society, or in terms of the Constitution, that the death penalty is unconstitutional. That is an example of the law having an impact on society.

Regarding same-sex marriages in terms of the Bill of Rights and the equality clause, it is discriminatory for same-sex couples not to be allowed to form a union to get married, but we live in a society that is quite conservative on those issues so, that is why I am saying, it is both.

NM: What are your views about government's plan to regulate both branches of the practising profession by means of the Legal Practice Bill?

JJ: The profession will regulate itself through the legal practice council, but we will have one council representing both attorneys and advocates. There is a lot of transformation that needs to take place in the legal profession. There are issues around government's duty to ensure that people have access to quality legal services. It is a very important Bill.

NM: Why has it taken so long to get the Bill passed?

JJ: It has taken long because lawyers are so argumentative and disagree with one another. Government was waiting for, and trying to get the lawyers to agree.

There has been a fair amount of hysteria over the Bill from certain quarters, but if you look at reform in other countries, I think the question that should be asked is if we can afford, in a country where so many people are poor, to have this split profession of attorneys and advocates.

It is interesting that Namibia, on independence, abolished the split Bar; Zimbabwe and Nigeria did the same, I think New Zealand is abolishing it too. South Africa is not doing that now, but what we are providing for is for the branches of the profession to get closer; for advocates to take briefs direct from the public but subject to certain conditions, and for attorneys to appear in the higher courts, again subject to certain conditions.

One of my issues with advocates is the process of pupillage, which I think is appalling. Advocates have to do pupillage

for a year during which time they are not paid. Once they are admitted as an advocate they then have to set up their practices, which also takes time and money. I do not know how any person who is not from a rich family or already has money can go into that profession. It is quite shocking that the profession has not looked at that issue.

I was even more shocked to find that pupils in England are paid. Why was this issue never brought up in all our transformation discussions. It basically would have been affecting black people and women and people from poorer backgrounds. It is shocking that 19 years into democracy, the advocates' profession was not dealing with that. Some of the independent counsel brought it up, but the General Council of the Bar never did, and that is something that the Bill is trying to address.

NM: What are the implications of unifying the two professions? Should we have gone for fusion?

JJ: I think the whole unification thing is a non-argument. I think that even if the profession were unified that you would have court specialists and general practitioners and that is generally what has happened in the countries that have gone for fusion. So you will *de facto* still have people known as 'advocates'.

We did not have fusion this time because there was too much opposition to it. I think having one statutory council for both advocates and attorneys will be a good start.

I do not support the two-chamber argument [separate chambers for attorneys and advocates]. I think if advocates want to form their own non-statutory grouping, if they want to continue with the Bar council, it is up to them. But the statutory functions of the profession would be exercised by the council.

NM: How has the Bill generally been received by the advocates, attorneys, the General Council of the Bar, law societies and the public?

JJ: I will put it as to when I was on the committee. We are trying to be as inclusive as possible through the coverage of the committee's deliberations and the Parliamentary Monitoring Group minutes, which can be accessed online. There seems to be quite a large number of people following the debates and the arguments.

The problem is that there are vested interests in the profession and I think this is where some of the opposition comes from. But generally, because of the inclusive process, I would hope that there is a lot less opposition than there was before.

NM: Where was the most opposition coming from?

JJ: Opposition was coming mostly from the profession. Public involvement was not really that much. The Competition Commission was involved over the whole issue of fees, but there was actually disturbingly little input from members of the public.

NM: Do you think the National Council of Provinces will allow public hearings on the Legal Practice Bill as they did for the Protection of State Information Bill?

JJ: It is currently a s 76 Bill and if it remains a s 76 Bill, which looks like it will have to, then there will have to be public hearings if people want them.

The council will have to advertise for public comment and if people come forward and say they would like to make a submission to the provincial legislature then they will have to have a hearing.

NM: What message do you have at this point for the attorneys' profession in particular?

JJ: Do not see it just as a job with your

main goal being that of making money. You are officers of the court. You have ethics, you have duties to uphold. Think of the people that are being affected by the work that you do.

NM: Can you give me an update on the courts? How is the construction of the Limpopo High Court going? Has the construction of the Mpumalanga High Court commenced?

JJ: With regard the Limpopo High Court, the completion date of the building is August/September 2014. The anticipated commencement date of the operation of the court is October/November 2014.

The construction of the Mpumalanga High Court is expected to commence in January 2014 with completion targeted for March 2016.

NM: Do you think having a seat of the High Court in these two provinces will encourage practitioners to practise there, rather than move to the more densely populated provinces?

JJ: Yes. There was a big debate on moving the seat of the Eastern Cape High Court from Grahamstown to Bhisho. People in Grahamstown were extremely worried that, if the court was moved, lawyers would leave and it would damage the economy of the area. So, obviously if you have a High Court in Polokwane and in Nelspruit, you are going to have more lawyers there.

It is an issue of access to justice. Why must people in Limpopo travel all the way to Pretoria to have a case heard? The same with people in Mpumalanga. The two High Courts currently being built are crucial in terms of ensuring better geographical access to justice.

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Redhill High School wins moot court competition

Redhill High School from Johannesburg has won this year's National Schools Moot Court Competition. The annual competition, which is in its third year, was held from 9 to 11 August. The semi-final round was held at the University of Pretoria (UP) and the finals were held at the Constitutional Court.

The final round was presided over by Deputy Chief Justice of the Constitutional Court, Dikgang Moseneke; Justices of

the Constitutional Court Edwin Cameron and Johann van der Westhuizen; Director of the Foundation for Human Rights, Yasmin Sooka and Professor of law and Director of the Centre for Child Law at UP, Ann Skelton.

All secondary schools in the country were invited to enter a team of two learners who were given a case study involving a constitutional issue, since the competition is aimed at creating greater awareness of the Constitution. This year's case study was of a learner from

Egoli High School, Nadia September, who fell pregnant. The school's policy stipulates that she can be allowed back at school only a year after her pregnancy. The father of her child is also a learner at the school and was allowed to continue with his education.

Learners from participating schools originally wrote two short essays setting out the opposing sides of the case. The essays were sent for evaluation and the best essay writers participated in the provincial rounds.

This year, 290 teams entered the essay round. Nine teams from each province participated in the provincial oral rounds (in total 81 teams), with 37 of them making it to the semi-finals. Redhill High School's Samuel Musker (17) and Kate Dewey (16) who were the applicants, went up against Crawford College La Lucia's Caton Schutte (16) and Tharin Pillay (16) to win the title.

Ms Schutte, who is in grade 11, told *De Rebus* that she was very honoured to have made it to the final round as her team had had tough competitors. She said that she was definitely going to study law after matric. 'I have learnt a lot about the Constitution, South African law and also about myself and other people. I have grown so much through this competition,' she said.

Mr Musker who is also in grade 11, told *De Rebus* that the competition was a 'fantastic experience'. 'There are many advocates who have never presented in front of such a calibre of judges like we have,' he said. Mr Musker said that the reason he entered the competition was because he has always been interested in this kind of competition and that, since he was an avid debater, the moot court competition was a great way to extend his debating skills.

He added that he was considering studying law after high school. Mr Musker said that he has learnt a lot about law during the competition. He said: 'Essentially everything I know about South African law I learnt through this competition. I started off with basically no knowledge [of law] so it has been a real learning curve.'

Grade 10 pupil Kate Dewey said that she enjoyed the experience. She said that she has a passion for debating, hence her joining the competition. 'I have gained a lot more faith in the justice system of South Africa [through the competition],' she said.

Mr Pillay, who is also in grade 11, stated that it was an honour to present argument at the Constitutional Court. He said that his love of debating inspired him to enter the competition. 'I have learnt just how deep the law runs and also, although we live in a country rife with crime and corruption, how just our Constitution is,' he said.

In deciding the winners, Deputy Chief Justice Moseneke said that there was a split decision on the Bench. He said four justices said the policy was unconstitutional and should therefore be struck down, while one of the justices said that the policy should be kept.

After the announcement of the winners Ms Dewey said that she was excited to have won. 'We are very honoured to have been judged by people of such stature and to have spoken against such a challenging opposition,' she said.



Crawford College La Lucia's Tharin Pillay and Caton Schutte went up against Redhill High School's Kate Dewey and Samuel Musker at the final round of the National Schools Moot Court Competition at the Constitutional Court in August.

Mr Musker said that he was 'very happy' to have won. He said: 'I feel great. We went into a lot of depth in terms of discussing the issues involved. He added that the competition was very important to South Africa as a whole as there was no point in having a great Constitution on paper and never seeing that Constitution in real life. 'I think it is up to us, as young people in the country, to value the Constitution and to create that transition from paper to reality and to pay attention to problems and issues facing us children because the case we were talking about today was something that really affect us. This competition is a great platform for allowing that kind of thought and dialogue. It has been a really fantastic experience,' he said.

The Justice Department's Deputy Minister John Jeffery delivered a speech at the end of the competition. He said he was very impressed with the quality of arguments and confidence of the participants.

Deputy Minister Jeffery noted that the bedrock of South Africa's democracy was the Constitution that was informed by the values of social interdependence and *ubuntu*. 'It takes cognisance of our divided past and it is viewed as one of the most progressive constitutions in the world,' he said.

Deputy Minister Jeffery said that the Constitutional Court had the final say on the interpretation of the Constitution. 'The reason we have so many levels of courts is - as you have seen from the split decision in the moot court judgment today - because judges can hold different views on a matter. The Constitutional Court hears a case and takes a decision *en banc*, which means all of them, or at least nine of the 11 judges, sitting together,' he said.

Deputy Minister Jeffery said that Constitutional Court judgments have been far-reaching and have made a significant impact on various aspects of the daily

lives of ordinary South Africans. He added that if socio-economic rights are not accessible to people, then the better life for all people, envisaged in the Constitution, will simply not be achievable. 'In our present society where poverty and inequality is a reality, the inclusion and enforcement of socio-economic rights is vital,' he said.

According to Deputy Minister Jeffery human rights law is a vibrant, ever-changing field of study and not simply a list of empty promises on paper. He added that it is a real and practical subject that has a direct impact on the way people live their day-to-day lives. 'It is dynamic and adapts to meet the ever-changing needs and demands of our society,' he said.

In conclusion, Deputy Minister Jeffery said: 'I wish to take this opportunity in congratulating the winners of this competition and all of you who have participated. I hope to one day see you on the Bench of the Constitutional Court, perhaps as the future chief justice of South Africa, or as legislative drafters in the Department of Justice and Constitutional Development, state prosecutors, state law advisers or human rights lawyers.'

The moot court competition is an initiative by the universities of Venda, Western Cape and Pretoria, as well as the Constitutional Literacy and Service Initiative and the South African Human Rights Commission in partnership with the Departments of Justice and Constitutional Development and Basic Education and the Foundation for Human Rights.

The best speaker was Tharin Pillay and the best essays were received from Elmé Ravenscroft and Sunelda Erasmus from Hoërskool Rustenburg and Astrid Roman and Kudzanai Mavetera from Sol Plaatje Secondary School. Both these schools are in the North-West province.

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The gender committee of the Law Society of the Northern Provinces (LSNP) held a women's conference in Pretoria at the end of August. Under the theme 'Women

in modern society: Towards the future', delegates discussed the under-representation of women in the judicial system, legal 'Monopoly', how men are coping in the changing world of women and ways women are branding themselves and boosting their careers.

The keynote addresses were delivered by the Minister of Public Service and Administration, Lindiwe Sisulu and Judge of the South Gauteng High Court, Margaret Victor. Other speakers at the conference included the newly appointed Commissioner of the South African Law Reform Commission and Director for the corporate and commercial section at DLA Cliffe Dekker Hofmeyr, Thina Siwendu; Commissioner at the Judicial Service Commission and acting Judge, CP Fourie and the Vice-President of the LSNP and Chairperson of the gender committee, Dr Llewellyn Curlewis.

Justice and equality for women not yet achieved

Minister Sisulu said that it was pleasing to have the current level of female representation in the legal profession. She said it was an undisputed fact that women have always been at the forefront of the struggle for freedom and the struggle for justice, 'from the time when they marched to the Union Buildings, the ultimate seat of power of government at the time, to the time they occupied some of those buildings to represent you and make sure that your voice and your concerns are heard'. She added that their presence at the conference was testimony to the fact that justice and equality for women had not yet been achieved.

Minister Sisulu said she understood that women make up more than a third of practitioners in the legal profession. 'I am informed further that there are 12 187 attorneys admitted to practice law and who are members of the Law Society of the Northern Provinces. Out of these, 7 784 are male and 4 403 are female. Universities produce a large number of female legal graduates but only a small number enters the legal profession and remain. I am advised that, of those that remain in the legal profession, a large number does not progress to swell the ranks of the High Court judiciary, despite the pioneering work of those women before them. The questions that must then be asked are: What specific challenges do women in particular face in the legal profession that constitutes a barrier to their advancement in the same way that men advance? Is government

Women, the judiciary and transformation



The Minister of Public Service and Administration, Lindiwe Sisulu gave the keynote address at the Law Society of the Northern Provinces' Women's Conference.

perhaps not doing enough to eliminate any barriers that may exist?'

The Minister added that law must have a more profound meaning to lawyers and that this purpose can be nothing else but justice for the people of the country. 'We depend on you to use the law as a tool to dig up the roots of injustice from all corners of our country. ... In your hands the law must be our liberator as women, not an instrument of oppression. It must also not be used to shackle our bodies and our minds by its insistence on precedent and tradition, when the circumstances of today demand change,' she said.

She noted that, despite South Africa's Constitution, justice continues to elude some people, especially women. 'How then can we use the law to advance the course of justice for women? What role must women lawyers play?' she probed.

She said the Constitution was a product of the struggle and that it was also about the transformation of society. 'You should ask yourselves as lawyers whether or not our laws are aiding the transformation of society in the way they are interpreted and applied to circumstances that face our people daily? Is this not a new struggle, the fight for the correct interpretation of the Constitution in order to ensure that we get the intended outcomes of our struggle', she challenged.

Minister Sisulu urged women not to give up and seek an easier path. 'You must find strength in the knowledge that you have come this far and have to strive to achieve more. You must find strength

in the knowledge that your presence alone in the practice of law is a fountain from which the generations coming after you will quench their thirst. There is still a lot to be said about how the law in the past and today, impacts on the lives of women. The women's version of what the law represents to women, must still be told. Only women can tell their own stories and if that is to happen, the women's voice must be heard louder than before', she said.

Minister Sisulu said government had passed many laws that open opportunities for people from all walks of life to pursue their careers, adding that women get preferential consideration. 'This is allowed because of the recognition that women have, for many years, faced unfair discrimination and unequal treatment solely on account of being women. This preferential treatment of women is permitted by the Constitution in section 9 where it states as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" '.

The Minister said that, with the Constitution mandating that equality should be strived for, and taking special legislative measures to achieve it, women were better placed now than ever to realise their own dreams, adding that the legal profession was no exception.

Create opportunities for other women

Minister Sisulu urged the female lawyers present to create opportunities for other women to enter the profession through guidance and mentorship. 'As women you have the power in you to rise above all challenges and find your rightful place amongst your peers. I say this to all of you, but more importantly to the black women in this profession because you remain fewest in representation as practitioners and as judicial officers. Government will do its part, but you must do just as much if not more, for only you know your needs and the environment better', she said.

Minister Sisulu said one of the purposes of law must be to solve problems that face society, adding that it must offer practical and implementable solutions for citizens. She further stated that, if the law failed to do this, then what is it good for?

Minister Sisulu said government passed good laws and policies but it had been criticised for poor implementation. 'Quite clearly the laws do not always work well for us. As lawyers, should you not then find ways and means through which you can use your skills and expertise differently', she challenged the audience.

Minister Sisulu said that the law can be an important tool to effect social transformation. 'There are many fora in which your influence can be felt on issues that have an impact in the lives of our people. Being a lawyer cannot be an end in itself. It must be a means to a greater course and destination. You must be part of the discourse in the public space on issues that affect us all. You can take up causes for ordinary people that can never afford paying lawyers' fees but have burning issues to resolve. If you look critically at important events in our country, many directly and negatively affect women in ways we only imagine. Marikana is one example and yet the fight for justice for those involved is mostly led and driven by male lawyers,' she said.

Minister Sisulu concluded by saying that there would be no justice unless the arm of the law and the face of justice reaches out to all women, rich or poor, and pleaded to female attorneys to reach out to the less fortunate women in order to give them access to justice and to their rights, adding that justice and equality were some of the rights that female lawyers must make real.



Judge of the South Gauteng High Court, Margaret Victor, addressed delegates at the Law Society of the Northern Provinces' Women's Conference.

Judge Victor spoke about South African women in law and where their future lies. Judge Victor spoke about the women's march to the Union Building in Pretoria in 1956 and said that, 38 years after the march, two women justices were appointed to the Constitutional Court: Justices Yvonne Mokgoro and Kate O'Regan. She added that it was unfortunate that, 19 years into democracy, there are still only two female justices at the court.

Speaking about the Supreme Court of Appeal, Justice Victor said that with seven women on the Bench, female representation at this court was growing. She noted that there was a record 30% level of permanent and acting female judges at the North and South Gauteng High Courts and she added that this was a magnificent stride for which these divisions needed to be applauded.

Justice Victor said that when she joined the Bar, female lawyers were assigned only divorce cases. She added that to ensure equality and transformation of the legal profession, women needed to incorporate men into the debate as 'we cannot do it without them'. She advised the senior attorneys and firm owners present to engage younger women in their firms and to encourage candidate attorneys to attend court cases and to mentor them.

Judge Victor concluded by saying that the challenges for female equality were international and that it was not only a South African based problem.

The President of the LSNP and of the Black Lawyers Association, Busani Mabunda, delivered the opening address in which he gave a brief background of the LSNP. He said the first female councillor of the LSNP had been Professor Esmé du Plessis who served on the council from 1992 and served as its first female president from 1995 to 1996.

Mr Mabunda said that the LSNP's first black female councillor was Kathleen Matolo-Dlepu, who is currently one of the Law Society of South Africa's (LSSA) co-chairpersons. She was also the first black female vice-president from 2006 to 2007. Sheila Mphahlele served as vice-president from 2007 to 2008 and Peppy Kekana served in the same capacity from 2009 to 2010. Mr Mabunda noted that, since the establishment of the LSNP in 1892, there has been only one female president, adding that it was a record that the LSNP was not proud of.

Mr Mabunda also mentioned that it was encouraging to note that statistics indicate that there had been a substantial increase in the number of women entering all levels of the legal profession. 'This includes studies in law at academic institutions, attendance of legal courses presented by the LSSA's Legal Education and Development department, serving articles of clerkship and even admission statistics of attorneys confirm this development,' he said.

He added, however, that it was disappointing that black women represent less than 1% of the total number of senior counsel in South Africa. He said this reflected badly on the profession and added that attorneys must not be complacent.

Mr Mabunda said the LSNP was concerned about the slow pace of gender transformation in the profession, but

that, through its gender committee, it would ensure that every possible opportunity is used to encourage meaningful participation of women in the legal profession. He said: 'We should not feel defeated, but be proactive in ensuring meaningful female representation in our profession.'



The President of the Law Society of the Northern Provinces and of the Black Lawyers Association, Busani Mabunda delivered the opening address at the recent LSNP Women's Conference.

Mr Mabunda concluded by saying: 'It is encouraging to note that there are many prominent women serving in the judiciary, such as in the Constitutional Court and the Supreme Court of Appeal and the latest interviews conducted by the Judicial Service Commission for the North and South Gauteng High Courts resulted in no less than three female attorneys from our jurisdiction being appointed as judges of the High Court. We commend Judge President Dunstan Mlambo for his visionary leadership and commitment to this noble cause.'

Ms Siwendu gave a speech on 'Legal Monopoly - what is required to get out of the legal gender transformation jail scot-free?', in which she investigated what needed to be done to get that 'Monopoly' ticket.

Ms Siwendu said she was fortunate because she was supported by incredible men, black and white, throughout her career. She said that these men had the foresight of understanding that the place of women was not only in the kitchen and that race or gender did not define what happens to you and who you are.

Ms Siwendu grew up in the Eastern Cape. She said the contradictions of growing up in this part of the world was that one grew up in a bubble thinking that, as a woman, you can be and do anything you want. She added that she had not engaged with the gender dynamics of society, particularly the racial dynamic, until law school.

Ms Siwendu spoke about what was happening in law firms. She said there

was entrenched racism, patriarchy, misogyny behaviour and thinking and sometimes outright insults and instances of sexual harassment ranging from references to physicality to things that are profoundly painful for women and that this happened behind closed doors. She questioned: 'How do we explain this reversal of our fortunes as women 20 years after democracy?'



Newly appointed Commissioner of the South African Law Reform Commission and Director for the corporate and commercial section at DLA Cliffe Dekker Hofmeyr, Thina Siwendu spoke on transformation at a women's conference held in Pretoria recently.

Ms Siwendu said that everyone seemed to single out education as the consequence of the lack of representation, particularly of black women. 'I beg to differ ... because, if you look at the recruitment patterns of those firms, they tend to recruit from top schools and it cannot be the sole lens through which we look,' she said.

Ms Siwendu said that South Africa has a history of a very oppressive regime and that it was not surprising to her that there was a conspiracy of silence among lawyers because they are repeating exactly the same patterns of the past.

Ms Siwendu said that a study was conducted in the United Kingdom on this issue in 2010 showed that the issues were similar to those experienced by South African women. She said that collective action, team work, collaboration and diversity were needed to tackle the problem.

She said law was evolving and women attorneys needed to be able to take time to reflect on the impact of these things on the jurisprudence and to advance the discipline.

In conclusion, Ms Siwendu looked at what needed to be done. 'We know what the issues are, what are we as women going to do to deal with these things?' she questioned. She said that women needed to expand their circle of influence around these issues and outlined the

following seven points that could help remedy the situation:

- Women need to activate the thinkers among them, and in each of them.
- Women need to break the conspiracy of silence and speak out; it always seems impossible until it is done.
- Women need to have their own 'never-never-and-never-again convictions' and moments, like former President Nelson Mandela had when he was inaugurated. There needs to be dialogue among female attorneys to formulate convictions for the profession and to sound their own firm convictions of what they are going to tolerate in the name of the practice of law. As an example, she said that her 'first "never-never-and-never-again conviction" was to never hear a story of how our children are humiliated in law firms in the name of the practice of law, the very instrument that is supposed to liberate us'.
- Women need to invite their male colleagues into this conversation because they cannot do it alone; men still hold the economic power.
- Women need to explain their needs.
- Women need to approach the LSNP to conduct comprehensive research, if not already available, on existing practices that hinder them and, from that, they can design a protocol and guidelines for law firms on how to set up conditions that enable women to work effectively and deal with the discrimination they suffer.
- The LSNP has enormous power to monitor law firms, it does so in relation to trust accounts. It should therefore also be able to do so in relation to gender issues and women should demand that they do so.

Ms Siwendu concluded by saying: 'If we meet here next year to celebrate, we should be able to state that the Monopoly card to get out of jail is firmly in our hands'. She added that women were not going to retire from these issues, and that the preparation for the 20-year democracy celebration was a great opportunity for attorneys to stand with one another, men and women, as a profession and as individual firms to tell their stories without devaluing each other.

A 'fair' judicial system: With or without women?

Mr Fourie tackled the topic of whether any judicial system can be fair and just if women are under-represented within it. 'I must immediately say yes, a judicial system can be fair and just if women are under-represented within it, but let me immediately clarify to say that the opposite is also true. A judicial system can also be fair and just if men are under-represented within it,' he said.

Mr Fourie said that the reason why he believes this is true is because the



Commissioner at the Judicial Service Commission and acting Judge, CP Fourie spoke on the judicial system and female under-representation.

measures for judging whether a judicial system is fair have different yard sticks than that of gender. He said that the fairness and justness depend, among other things, on the quality of justice dispensed, which includes dispensing justice fairly, speedily and without fear or favour by fit, proper and suitably qualified judicial officers. He added that, in a constitutional state like South Africa, the application of the Bill of Rights enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.

He said when it comes to the perception of legitimacy of a judicial system, the issues of gender and race, particularly in a diverse society as South Africa, become important; adding that it was therefore no surprise that s 174(2) of the Constitution provides: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

Mr Fourie said that this was not only a South African requirement but a worldwide one. He said it was necessary that the judiciary broadly reflected the racial and gender composition of a country. 'To achieve this, however, is a tedious process and not an instant event, particularly taking our history into consideration,' he said.

He noted that s 174(1) provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. He highlighted that 'appropriately qualified person' and 'fit and proper' were the imperatives, adding that only once such candidates were identified and nominated, can the consideration of gender come into play.

Mr Fourie said that if appropriately qualified judicial officers who are fit and proper are not appointed, the fairness and justness of the judicial system

would be compromised and that a weak judicial system would deny citizens proper access to justice.

He said that, when it comes to the weighting of the provisions of ss 174(1) and 174(2) of the Constitution, a debate has been raging for years and was still unresolved. He said that there were two schools of thought: First, when you have to weigh two candidates, for example a man and a woman, and the man is more appropriately qualified, fit and proper than the woman, but the woman has potential to develop, then the woman should be appointed ahead of the man in order to give effect to s 174(2). The other school of thought advocates that this should not be done since it compromises standards, which cannot be afforded and that a more appropriate approach would be that, if a man and woman are equally appropriately qualified, fit and proper, then the woman should be preferred in order to give effect to s 174(2).

Mr Fourie noted that to refer to the last school of thought as anti-transformation, may be a simplistic view. He added that, in a certain respect, it may be a good thing that the Helen Suzman Foundation was taking the Judicial Service Commission (JSC) to court on this issue as it might result in the highest court in the land pronouncing on it. 'At least, whichever way it goes, it will create more clarity on how to approach this,' he said.

Mr Fourie said that from 2003 to date, the JSC has recommended 271 candi-

dates for appointment to the Bench. Of those 84 had been females. He said although this was less than a third, it was a significant improvement as compared to the past. However, he said, the improvement was not sufficient.

Mr Fourie said that the pool of women from which the judiciary draws, must be wider. He added that the JSC regularly discussed the problem and that it has made numerous public calls for nominations, but that the response has been largely reactive. 'For example, for the vacancy on the Constitutional Court Bench, no women were nominated. There was an outcry when the shortlist went out and a call for the interviews to be cancelled and for the position to be re-advertised. Why did those who cried out not ensure that they nominated enough women to begin with?' he asked. 'That would have been proactive. Imagine the precedent this would have set if the calls were adhered to?' he said.

Mr Fourie pointed out that of the attorneys under the jurisprudence of the LSNP, only 36% were female. Mr Fourie said that this was worrisome as statistics show that women make up 53% of candidate attorneys, which seemed to be in line with the percentage of graduates. 'Somewhere they disappear. What happens after university and/or articles? How do we proactively widen the pool to draw from? If we have no answer, we will never be able to meet the demographics of the gender composition of the coun-

try because the JSC does not know the answers.'

Mr Fourie said that the shortage of female lawyers may be a reflection of a problem that goes deeper than just the fact that women do not readily avail themselves for judicial appointment or that it may be that fewer women choose to make a career in the practice of law, which has previously been considered a logical career path to the Bench, or that it may also be that most of them proceed to commerce with more women entering the legal academia.

Mr Fourie opened the topic up to the floor. He asked the female attorneys present to help him find solutions.

Some of the problems highlighted by the female attorneys were:

- The lack of proper mentorship and equal power.
- The fact that women were not willing to go through the nomination process again when they were unsuccessful the first time; with others saying that they were not yet ready or willing to pursue it.
- Women were not given the opportunity to practise because of a lack of opportunity.
- The need for work in order to mentor others.
- The LLB degree not equipping them with sufficient skills.

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Superior Courts Act signed into law

President Jacob Zuma has signed the Superior Courts Bill 7 of 2001 into law. In a press release, the presidency states that the new Superior Courts Act 10 of 2013 will restructure the judiciary and integrate the courts, while enhancing equal access to justice.

'The Superior Courts Bill aims to consolidate all the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court into a single piece of legislation.' The press release goes on to state that the Act would establish a single High Court of South Africa.

The Bill was approved by cabinet in December 2010. Until now, the country's superior courts were largely structured in accordance with the Supreme Court Act 59 of 1959, which was passed during apartheid rule.

The press release states: 'Through the Act's implementation, the current 13 High Courts, which include High Courts inherited from the former "self-governing" apartheid homelands of Transkei, Bophuthatswana, Ciskei and Venda, will be rationalised into a single High Court with a fully functional Division of the Court established in each province.'

In the statement President Zuma said: 'The communities who live in the now Mpumalanga and Limpopo provinces have endured the hardship of accessing the High Court in the North Gauteng High Court in Pretoria since the formation of the Union of South Africa for a period of more than a century. Legally, they can now have the benefit of having their own division of the High Court right at their doorstep.'

President Zuma went on to say that the construction of the Limpopo High Court should be completed by June 2014

and added that the construction of the Mpumalanga High Court was expected to commence before the end of this year.

The Superior Courts Act is intertwined with the Constitution Seventeenth Amendment Act, 2012 which the President signed early in February this year. The Constitution Seventeenth Amendment Act, together with a host of apartheid legislation, including the Natives' Land Act 27 of 1913 and the Group Areas Act 41 of 1950 formed the bastion of the separate administration based on racial segregation.

- See also 59 of this issue.

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Durban attorney appointed as national director of Public Prosecutions

President Jacob Zuma appointed the national director of Public Prosecutions, the head of the Special Investigating Unit, and the director of Public Prosecutions of the jurisdictional area of the KwaZulu-Natal Division of the High Court at the end of August 2013.

Practising attorney Mxolisi Nxasana is the new national director of Public Prosecutions. In a press release, the presidency said that Mr Nxasana has a wealth of experience in criminal litigation. He obtained his LLB degree in 1995 and served articles at Durban law firm Ngubane & Partners from 1994 to 1996. Mr Nxasana was admitted as an attorney in 1997. After admission, he has been practicing as a sole proprietor under the name John Majola, Nxasana & Partners.

Mr Nxasana has occupied senior positions in the legal profession including that of the president of the KwaZulu-Natal Law Society from 2011 to 2012. He was also the chairperson of the Durban branch of the Black Lawyers Association.

Advocate Vasantraj Soni (SC) has been appointed as head of the Special Investigating Unit. Mr Soni is a senior counsel with approximately 25 years of experience. The former journalist obtained his LLB degree in 1985, was admitted as an advocate in 1987 and has been in private practice ever since. He was appointed as senior counsel in 2002.

Mr Soni has been appointed as an acting judge of the Labour Court and the High Court on various occasions. In the Labour Court he sat in all the major centres where the court is located. In the High Court, he sat in Durban and Johannesburg. He sometimes serves as an arbitrator and is currently a member of the Judicial Service Committee.

The National Association of Democratic Lawyers (NADEL) has welcomed the appointment of Mr Nxasana and Mr Soni. 'We congratulate Mxolisi Nxasana on his appointment to the all important position of national director of Public Pros-

ecutions. The country has gone too long without certainty on the leadership of the prosecuting arm of the criminal justice system. We have every confidence that he will excel at his new responsibilities,' it said in a press release.

NADEL also congratulated Mr Soni and said that his experience in the legal profession and previous contributions to the criminal justice system's administration through the Jali Commission stand as testimony to his readiness for the daunting task ahead.

The Law Society of South Africa (LSSA) has also welcomed the fact that the critical positions of national director of Public Prosecutions and head of the Special Investigating Unit have been filled by the president. 'The LSSA particularly welcomes the appointment of Durban attorney Mxolisi Nxasana as national director of Public Prosecutions,' it said in a press release.

LSSA Co-chairpersons Kathleen Matolo-Dlepu and David Bekker said: 'Mr Nxasana brings with him relevant experience as a seasoned criminal law practitioner, and leadership experience gleaned from serving on the council of the KwaZulu-Natal Law Society, particularly as its president in 2012. He has also served on the Criminal Law Committee of the LSSA and participated in LSSA council meetings *ex officio* in his capacity as president of the KwaZulu-Natal Law Society.'

The third appointment is that of advocate Sophy Noko. She has been appointed as director of Public Prosecutions of the jurisdictional area of the KwaZulu-Natal Division of the High Court.

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New commissioners for the SALRC

Five commissioners have been appointed to the South African Law Reform Commission (SALRC). The new commissioners who have been appointed for a period of five years are:

- Dean of the Faculty of Law at the University of Cape Town, Pamela Schwickard.
- Professor and head of school at the University of the Witwatersrand School of Law, Vinodh Jaichand.
- Practising advocate Mahlape Sello.
- Practising attorney and director at Edward Nathan Sonnenbergs, Irvin Lawrence.
- Director of the corporate and commercial section at DLA Cliffe Dekker Hofmeyr, Thina Siwendu.

In a press release, President Jacob Zuma said that Ms Schwickard and Ms Sello were both returning mem-


bers of the SALRC and that they bring with them a wealth of experience and knowledge.

The SALRC does research with reference to all branches of South African law. It also studies and investigates the law in order to make recommendations to government for the development, improvement, modernisation or reform of the law. The field of experience of the members range from human rights law, administrative law and corporate governance law.

In July President Zuma appointed Judge Mandisa Maya as the chairperson of the commission and Judge Jody Kollapen as the vice-chairperson.

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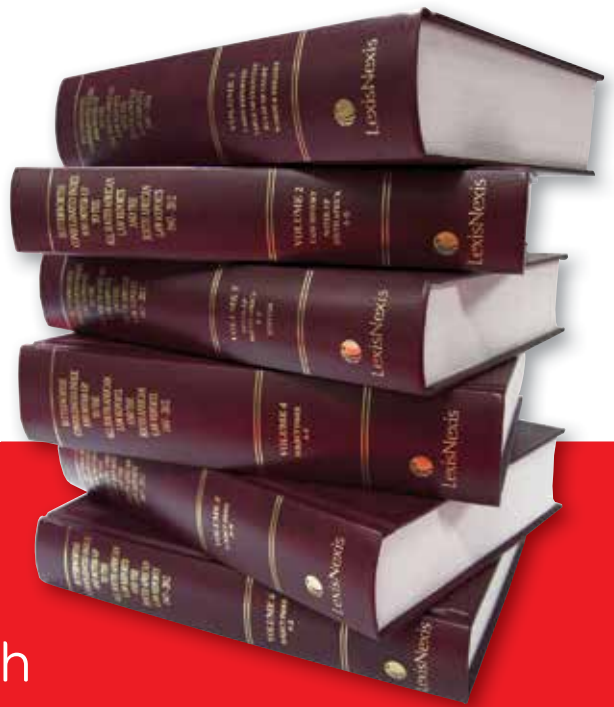
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ProBono.Org recently held its fifth annual Women's Day Focus event at the Women's Jail at Constitution Hill where attorneys, advocates and mediators assisted women with their legal problems by offering free legal services.

The head: staff attorney at ProBono.Org, Sharon Pillay, told *De Rebus* that this year has been its best year yet. She said that a total of 24 volunteers had offered their services for the day, adding that it was the biggest number of volunteers they had seen. At this year's event a total of 91 women were assisted.

Ms Pillay said that the matters are taken on by the attorneys if further representation is required and this year 15 matters were taken back to firms by attorneys.

'We have seen cases that range from deceased estates to housing matters. With the housing matters it is particularly people that have been on the waiting list for reconstruction and development programme (RDP) houses from as far back as 1996 and who have not yet heard anything from government regarding the allocation of a house', she told *De Rebus*.

Women's Day Focus event



Three of the 91 women who attended ProBono.Org's Women Day Focus event receiving legal advice from the volunteers.

Ms Pillay noted that this year they also saw a lot of cases of fraudulent transfer of properties, where the owners were told that they no longer owned the house and were being evicted from the property.

This year's address was by Johannesburg attorney, Sherie Grayman, who spoke on the rights of unmarried fathers. Ms Grayman gave an overview of

the rights of unmarried fathers. She said that, previously, unmarried fathers had no rights but that the Children's Act 38 of 2005 had changed that.

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De Rebus contributor retires after 38 years



Professor Henk Delpont has been a contributing author to De Rebus for the past 38 years.

After 38 years of contributing to the 'Recent articles and research' column in *De Rebus*, Professor Henk Delpont has decided that it is time to retire as author of the feature.

Professor Delpont started writing the column when he was 24 years old with Professor JCW van Rooyen. 'He was professor of criminal law at the University of Pretoria. He later withdrew as co-author because of other work commitments and I continued on my own,' Professor Delpont said.

The 'Recent articles' column was first published in July 1975, when *De Rebus* was still known as *De Rebus Procuratoris* and printed in A5 format. 'There were not many law journals in those years, and putting together the column was relatively easy, except that everything had to be done by hand. There were no dictaphones, scanners, e-mail or word-processing. Initially the column concentrated on local law journals, including LLM dissertations and LLD theses. Later I was asked by the editor to also cover foreign journals and incorporate articles of interest to South African practitioners. However, a few years after that I had to revert to local journals only due to space considerations, but by then the South African legal landscape had changed substantially; there were 16 law journals and the volume of articles had grown exponentially.'

According to Professor Delpont, compiling the column was a wonderful way for him to keep up to date with new publications and research, covering all fields in law. 'Busy practitioners simply do not have the time to do that, and I enjoyed knowing that the column made it a bit easier for them to stay abreast of new developments,' he said.

'Over the years I was regularly contacted by practitioners requesting copies of journal articles they had seen in the column. That confirmed my belief

not only that academics do have a role to play, but also that there is a real desire among practitioners to keep up to date and stay informed. Regrettably, I had to decline each such request due to copyright considerations and lack of resources on my part. Access to justice is a problem, but so is access to knowledge for many practitioners, especially those in rural areas. Perhaps one day it will be possible to click on the title of an article in the column and then download a copy there and then. That will really elevate the column to a different level,' he said.

Professor Delpont is currently employed at the Nelson Mandela Metropolitan University in Port Elizabeth, from where he will retire in about three years' time. 'I enjoy lecturing, engaging in research activities, and supervising post-graduate students' he said.

When asked what he will miss of contributing to *De Rebus*, Professor Delpont said: 'Strangely, I'll miss the monthly deadline for submission of the contribution. It was part of my life for so long, almost a way of life.'

• The last 'Recent articles and research' column written by Professor Delpont can be read on p 64.

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Developments in environmental law

ELA 2013 annual conference

The Environmental Law Association (ELA) held its annual conference at Salt Rock, KwaZulu-Natal in July. Approximately 80 people attended the event that was partially sponsored by publishers Juta and LexisNexis. The aim of the conference was to provide a platform for the discussion of a number of proposed legislative amendments, recent court decisions, policy changes, administrative procedures and new developments on international and regional level that may have potential implications for the direction and future of environmental law development and decision-making. These issues were addressed by an array of presenters representative of the academic fraternity and legal practice across South Africa.

The papers presented were divided into six sessions, namely –

- environmental law and the judiciary;
- biodiversity protection;
- protected areas and genetically modified organisms;
- planning and local government;
- climate change and energy law;
- implementation of environmental management instruments in practice; and
- sustainable development.

The keynote address was delivered by former Chief Justice Sandile Ngcobo who reflected on the role of the judiciary in interpreting environmental law. In his address, Justice Ngcobo reiterated that the s 24 environmental right in the Constitution is a justiciable right and that the protection thereof should be one of the foremost concerns of the judiciary and legal society. He stated that the entire judiciary is a crucial partner in promoting compliance with environmental law. In examining the role of the judiciary with regard to environmental decision-making, Justice Ngcobo referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) and explained that the courts' task are not to determine whether a decision-maker has reached a correct decision but rather to determine whether the decision reached is one that promotes an equilibrium between socio-economic and environmental considerations.

He further explained that the courts must not attribute themselves superior wisdom to complex environmental decisions but should give due weight to the integrity of such decision-makers. However, Justice Ngcobo pointed out that

deference to environmental decision-makers does not mean that courts must rubber stamp a decision because of its complexity. The role of the courts is to determine whether decisions achieve the goal of protecting the environment while balancing socio-economic considerations, he said.

He concluded that there is still some way to go and that the courts are faced with the challenge of creating a new vision for developing an understanding of environmental law and development problems in the South African context.

In the presentations that followed, Andrew Muir from Austen Smith Attorneys discussed issues revolving on the determination of a buffer zone around the uKhahlamba Drakensberg Park World Heritage Site and the formulation of general policy to integrate the protection of cultural and natural heritage into comprehensive planning programmes within the buffer zone. Mr Muir highlighted that the determination of the buffer zone is complex as it will expand over a large area, covering two countries and at least three provinces.

Dr Odile Lim Tung, a post-doctoral fellow at the Faculty of Law of the North-West University and the University of Mauritius discussed issues regarding the labelling of genetically modified (GM) food products in South Africa. She argued that adequate monitoring of labelling obligations for GM food products placed on the market or released in the environment, is important to respect consumers' right of access to information as well as to facilitate the withdrawal of unsafe products by producers, importers, distributors and retailers in case of scientific uncertainty on the adverse impacts of these products.

Professor Warren Freedman from the University of KwaZulu-Natal discussed the extent to which a municipal council can pass by-laws that aim to conserve and protect the environment. He referred to *Le Sueur and Another v eThekweni Municipality and Others* (KZP) (unreported case no 9714/11, 30-1-2013) (Gyanda J) where the court argued that the functional area of 'municipal planning' includes responsibility over some environmental affairs.

Further considering issues pertaining to local government, Themba Mathebula, lecturer at the University of Limpopo, presented a paper on the role and duties of municipalities in the enforcement of environmental law and emphasised the

importance of competence, skills development and education.

Peter Kantor, chairperson of the ELA, critically discussed the recently approved Spatial Planning and Land Use Management Bill B14B of 2012. He, *inter alia*, argued that, despite inter-government cooperation being regarded as a firm constitutional value, in practice it has been a slow starter.

Professor Stephen de la Harpe from the North-West University presented a paper on the influence of environmental and similar rights on the balance of convenience in the granting of interim interdicts. He emphasised that these interdicts, *inter alia*, have consequences on the environment and discussed the recently decided case of *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another* (KZD) (unreported case no 4139/2013, 6-5-2013) (Lopes J).

Professor Werner Scholtz from the University of the Western Cape presented a paper on extraterritorial human rights and climate change. He highlighted that it is important to recognise the linkages in international environmental law and that parties should fully respect human rights in all climate change related actions. Professor Scholtz argued that the international community is not state centric and that the effects of climate change on humankind exceeds state boundaries and territorial sovereignty.

Mr Kamlesh Pillay, lecturer at the University of KwaZulu Natal, discussed the need for defined leadership hierarchies in environmental governance strategies on energy between the European Union (EU) and the emerging national economies of Brazil, Russia, India, China and South Africa (BRICS). In comparing the EU with BRICS, he suggested that there is a need for defined leadership hierarchies in environmental governance strategies for energy between the EU and BRICS because the EU seems to focus on sustainable development and BRICS on economic growth.

Professor Anél du Plessis from the North-West University and Reece Alberts, junior environmental legal specialist at the Centre for Environmental Management at this university, critically reflected on the increased tension with respect to uncooperative government that may arise against the background of the country's pursuit of climate resilient development and South Africa's recently adopted Infrastructure Development Bill, 2013.

Sibonelo Ndlovu from Smith Ndlovu & Summers Attorneys presented on recent case law on s 24G of the National Environmental Management Act 107 of 1998 (NEMA) and posed the question as to whether the recent case law may be regarded as 'dismal jurisprudence'. In considering this question, he referred to the recently decided cases of *Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and Another* (GNP) (unreported case no 70853/2011, 11-4-2013) (Fabricius J) and *Interwaste (Pty) Ltd and Others v Coetzee and Others* (GSJ) (unreported case no 23921/2012, 22-4-2013) (Horn J).

Further presenting on the implementation of environmental management instruments, Professor Ed Couzens from the University of KwaZulu-Natal, shared his concerns regarding innovative sanctions with regard to s 34 of NEMA. He highlighted that s 34 of NEMA provides for a number of innovative sanctions that could be used to improve enforcement of and compliance with environmental statutes.

Mr Alberts, in a second presentation, discussed some of the practical challenges expected to emanate from the future implementation of the Mineral and Petroleum Resources Development

Amendment Act 49 of 2008. He indicated that the Amendment Act provides for a number of changes concerning discard dumps, sequential lodging, consultation, environmental considerations such as transitional arrangements and financial provision, the amendment of timeframes with respect to granting and refusing rights, closure, mining permits and the extension of ministerial powers to include certain amendments, for example. He further highlighted that some of the amended provisions may be cause for concern and confusion as the effect thereof is, *inter alia*, that an approved environmental plan or environmental management programme is now no longer required to commence prospecting or mining operations, and that it is no longer a criminal offence to prospect or mine without an approved environmental management plan or environmental management programme.

In his presentation Professor Johan Nel, executive head of the Centre for Environmental Management at the North-West University considered whether a number of recent ISO reforms are significant or superficial therapies for the credibility crisis of the voluntary and certified compliance assurance movement. He explained that compliance enforcers around the world had great expecta-

tions that the flagship environmental management system standard – ISO 14001 – would be a reliable alternative to command and control measures and an ally to drive enforcement by assuring compliance. However, in determining whether the ISO standards do indeed ensure compliance with environmental laws, Professor Nel argued that ISO 41001 does not directly and explicitly require legal compliance and instead requires top management to merely make a policy commitment to comply with applicable legal requirements.

In his presentation Professor Louis Kotzé from the North-West University concluded the conference by discussing the topic of sustainability through the lens of the so-called rule of law for nature.

The ELA's 2013 annual conference offered a good opportunity for networking and engagement on developments and changes in environmental law of relevance to scholars and practitioners in South Africa – the ELA secretariat described the conference as a success.

Angela van der Berg LLB (NWU) is an LLM student at the North-West University.

Free online legislation project launched

The Oliver R Tambo Law Library at the University of Pretoria, in partnership with the South African Legal Information Institute (SAFLII) and the Constitutional Court Trust recently launched a project to consolidate all South African legislation on one website. The website will supply all information free of charge to the public.

According to Shirley Gilmore, head of the Oliver R Tambo Law Library, the project is based on the idea that all South Africans should have free and easy access to reliable information. 'There is a world-wide trend to provide open access to legal information in order to support an open and democratic society,' she said.

The database of legislation is a work in progress and does not yet contain all Acts, however, Ms Gilmore said that there is a sufficient number of Acts for the database to be made available to the public.

The database will include historical versions of Acts as well. The website can be found at www.lawofsouthafrica.up.ac.za.

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

LSSA raises problems experienced by foreign nationals with banking sector

Earlier this year the LSSA's Immigration and Refugee Law Committee raised areas of concern with the Banking Association of South Africa relating to problems being experienced by various 'categories' of foreign nationals with the banking sector generally.

The issues raised by the LSSA fall into two broad areas, which cover –

- the freezing of clients' bank accounts where the client's permit has lapsed; and
- the position of the person whose status as a South African citizen or permanent resident has been withdrawn or amended, in consequence of having false identity documentation.

The LSSA clarified the legal position of refugees and asylum seekers, on the one hand, versus other foreign nationals on the other. The asylum seekers' 'interface' with the Immigration Act 13 of 2002 is usually a very narrow and limited window of no more than 14 days. Once the person has a s 22 asylum seeker permit issued in terms of the Refugees Act 130 of 1998, the person falls to be dealt with in terms of the Refugees Act and not the Immigration Act. The latter comes with presumptions of being a refugee and assorted protections. The LSSA stressed the importance of dealing separately with refugees and asylum seekers, and with the handling of their permits.

As regards persons who hold permits issued in terms of the Immigration Act, the LSSA set out the issues ranging from where persons had allowed their permits

to expire, for whatever reason, to those situations where the expired permit 'status' was solely the doing of the Department of Home Affairs.

Two different scenarios were raised in terms of the legislation: On the one hand, s 10(8) of the Immigration Act provides expressly and clearly that 'an application for a change in status does not provide a status and does not entitle the applicant to any benefit under the Act'. The *de facto* legalisation occurs, therefore as a matter of practice or reality rather than legality. The s 10(8) injunction did not address applications for the extension of an existing permit or for the re-issue of or for a change in the conditions of an existing permit (which would be the case where, for example, a company name had been changed or the department erred in the wording of the permit it issued).

In terms of the canons of statutory interpretation, the silence of the Act speaks volumes in the face of the express wording of s 10(8). The LSSA noted that it would be invaluable to hear from the department on the above and the consequences of this as the legal basis for the freezing of bank accounts.

False identity documentation

As regards bank products and foreign nationals, the LSSA inquired whether this related to the position, principally, of persons who took advantage of the

Zimbabwean amnesty in 2010, and specifically those persons who were in possession of false South African identity documents and who had handed those over and had been issued with temporary residence permits. At the time, and because the department did not promulgate the rules or terms or even the fact of the amnesty, some people had been arrested and prosecuted.

The LSSA committee had raised this with the department and had been assured that, whereas the amnesty was a cabinet decision; all organs of state at every level were bound by the decision. Therefore, the state was not going to prosecute any Zimbabwean who had applied for relief in terms of the amnesty for having a false identity document.

The LSSA pointed out that this meant that the banks may now have clients who, for example, hold a 20-year bond or other bank product, in the name of a purported SA citizen or permanent resident, which person now holds a three-year temporary residence permit.

The LSSA indicated that these persons were so 'embedded' that there was no effective way of purging the population register without there being an amnesty that offered a complete solution to them.

In addition, the LSSA also noted the further category of persons with false identity documentation who had voluntarily and successfully approached the department to correct their status. This raised the question of how their relationships with the banks could be set right.

LLB Task Team: Five years the way to go

Representatives of the university law deans, law teachers, advocates and attorneys attended the first meeting of the LLB Task Team in Johannesburg on 23 August 2013. Chaired by Law Society of South Africa (LSSA) council member, Krish Govender, the LLB Task Team was established at the LLB summit in May this year (see 2013 July DR 8).

At its first meeting the task team resolved –

- to monitor LLB standard setting by the Council for Higher Education (CHE); a process that the LLB summit had indicated should be completed by the CHE by 30 June 2014;
- to invite the judiciary to attend the task team meetings and endeavour to include the departments of Justice and Higher Education;
- that the LSSA's Legal Education and Development division (LEAD) would participate in the national conference of the Society of Law Teachers of Southern Africa in January 2014, to elaborate on

the profession's needs pertaining to the LLB; and that

- the South African Law Deans Association and LEAD would arrange a workshop where law teachers would be guided in the integration of information technology-related law in legal subjects.

The LLB Task Team agreed that the summit had expressed substantial consensus on the extension of the LLB degree. The duration of the degree should be five years; however, the structure and content required further research and debate.

Aviation focussed Synergy Link takes off

Johannesburg firms Christodoulou & Mavrikis Inc and Madhlopa Inc have been linked as part of the Law Society of South Africa's (LSSA) Synergy Link empowerment initiative, where Christodoulou & Mavrikis Inc will provide skills transfer and other support to Madhlopa Inc in the field of aviation law. They will focus on the relevant legislation, aircraft finance, aviation insurance, growth opportunities and challenges for African airlines, as well as how to develop and market an aviation practice.

Mashudu Thenga, director at Madhlopa Inc said: 'We are very excited about the programme. At its completion, we will definitely venture into the aviation industry knowing that we have acquired the requisite skills needed to make our business viable.'

'This is the kind of programme South Africa needs to empower young and upcoming legal practitioners through skills transfer. An attorney with skills and expertise is an empowered attorney. We would like to take this opportunity to thank the LSSA for coming up with this

excellent programme and for the opportunity afforded to our firm in participating in it. We would like to also thank Christodoulou & Mavrikis Inc for their time and effort in transferring their knowledge and skills to us,' says Sello Matsepene, associate at Madhlopa Inc.

Chris Christodoulou of Christodoulou & Mavrikis Inc - the 'transferring' firm - notes that aviation law is an area of immense interest to practitioners. 'However, the acquisition of skills is made difficult due to a lack of focused academic training and dedicated resource materials. We hope that by participating in the LSSA's Synergy Link programme together with Madhlopa Inc and others in time, we will fill a small gap that will encourage universities and other course providers to focus on this area of law. In the meantime, if our participation results in the facilitation of meaningful aviation work being directed to our partners in the programme, then we will be able to say that the LSSA and its participants have succeeded in this process,' says Mr Christodoulou.



The teams cooperating in the LSSA Synergy Link initiative between Madhlopa Inc and Christodoulou & Mavrikis Inc include directors Mashudu Thenga and Chris Christodoulou seated, and standing, Sello Matsepene of Madhlopa Inc (centre) with Jaili Nicolaou and Alex Protulis of Christodoulou & Mavrikis Inc.

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During 2012 the Labour Law Committee of the Law Society of South Africa (LSSA) resolved that one of its focus areas would be to network with other similar organisations, institutions and relevant stakeholders in the field of labour law and to foster closer relations with such parties. As a result of this resolution, the committee met with the national director of the Commission for Conciliation, Mediation and Arbitration (CCMA), Nerine Kahn, and her staff in November 2012.

On 20 June 2013, a similar meeting was arranged with the Judge President of the Labour Court, Justice Basheer Waglay and acting Deputy Judge President, Justice Pule Tlaetsi. The delegation was led by the committee chairperson Jerome Mthembu and included Melatong Ramushu, Jan Stemmett, Lloyd Fortuin, Vuyo Morobane and Lizette Burger.

The delegation was warmly welcomed by Judge President Waglay and his deputy and he said that the meeting was long overdue. Mr Mthembu congratulated Judge President Waglay on his appointment and wished him well with the many challenges he faced and assured him of the committee's support.

Judge President Waglay raised concerns regarding the training of attorneys in the field of labour law and Labour Court practices. He urged the committee to include Labour Court practice in the training syllabus for aspirant attorneys. As a gesture of goodwill, he indicated that the Labour Court would be prepared to make a judge available to assist with training. The committee welcomed the offer and undertook to engage with the LSSA's Legal Education and Development (LEAD) department so that it could prepare a manual on Labour Court practice and include it in its training syllabus. Judge President Waglay also offered to assist with the development of the material.

The meeting also dealt with the new Labour Court Practice Manual that was recently distributed. Judge President Waglay spoke at length about the manual and why it was important that attorneys have the manual and understand the practice and procedure in the Labour Court. He assured the committee that he will ensure that any updates to the practice directives of the Labour Court will be distributed to practitioners. The committee informed Judge President Waglay that the manual had been published in *De Rebus* in May 2013 (2013 (May) DR 8), placed on the LSSA website and forwarded to its constituents and their members.

The fact that the Labour Court had four seats in the country was also discussed and Judge President Waglay said that he will endeavor to bring the courts nearer to the people. He raised the possibility that matters could be heard in other courts outside the usual seats of the Labour Court. He said that where there were a sufficient number of Labour Court matters in a specific area, the court would be prepared to hear the cases in those areas. This would be subject to there be-

LSSA Labour Law Committee meets with Labour Court Judge President



Seated from left to right: Justice Pule Tlaetsi, Melatong Ramushu, Justice Basheer Waglay and Jerome Mthembu. Standing from left to right: Vuyo Morobane, Lloyd Fortuin and Jan Stemmett.

ing a High Court or a circuit court in the specific area. He cautioned that it might take a while longer for the matters to be enrolled and it might necessitate that the court will have to sit during recess. However, he did not see this as a stumbling block.

Judge President Waglay agreed that proper accommodation for the Labour Court continued to be a challenge and, in particular, the state of the Labour Court premises in Cape Town left much to be desired. The matter was, however, being addressed by the Department of Public Works, which is in the process of acquiring suitable accommodation for the Labour Court in Cape Town.

Another concern was the major backlog that exists in respect of reviews. Judge President Waglay said that the Labour Court did not have sufficient judges to carry the workload. The Labour Court has only ten permanent judges and more judges cannot be appointed, even in an acting capacity, because of the lack of court rooms. However, the problem of reviews in Johannesburg is being addressed with the assistance of attorneys and advocates. These attorneys and advocates are asked to act on a *pro bono* basis in the Labour Court for one week only, during the long recesses. About 60 acting appointments are made in the Johannesburg Labour Court during the long recesses.

Judge President Waglay requested the committee to consider whether the various law societies would recommend attorneys to act on a *pro bono* basis to assist with the backlogs of reviews. Attorneys who are interested in assisting with the reviews can forward their CVs to the committee. As stated above, these attorneys will be required to work on a *pro bono* basis for one week and during the long recesses only. Such persons must comply with the minimum requirements, which are that he or she is an expert in labour law and have appeared fairly often in the Labour Court.

The committee was made aware that discussions were under way to separate

the Labour Court from the Labour Appeals Court. The importance thereof is that – since the Labour Appeal Court has the same status as the Supreme Court of Appeal, particularly in view of the fact that it was now a final court of appeal in respect of all labour matters – the Labour Appeal Court should have its own Judge President, Deputy Judge President and judges and it should be at an arm's length in its relationship with the Labour Court. This aspect was debated at great length and the delegation expressed their support for this view.

The committee informed Judge President Waglay of the CCMA r 25(1)(c) court challenge by the Law Society of the Northern Provinces (LSNP). The LSNP has challenged the constitutionality and validity of CCMA r 25(1)(c) in the North Gauteng High Court. The court had subsequently declared the rule inconsistent with the Constitution and invalid. The CCMA had taken the matter on appeal and it was heard by the Supreme Court of Appeal on 6 September 2013.

Judge President Waglay expressed his concern about the fact that more and more matters were being brought before the Labour Court on an urgent basis without merit. Although the Labour Court is careful not to award cost orders, it might be forced to do so, which might include cost orders *de bonis propriis*, if this trend continues.

The delegation was informed of instances of unprofessional conduct. Judge President Waglay expressed the view that law societies should investigate such cases more vigorously. The committee urged Judge President Waglay to refer instances of unprofessional conduct by attorneys to the relevant provincial law society, if he becomes aware of it.

The meeting concluded with Judge President Waglay and his deputy and the committee expressing their satisfaction with the fruitful first interaction. Both parties committed themselves to such engagements in future.

The 'Trustline' campaign: Promoting trust and ethics in our profession

The Council of the Law Society of South Africa (LSSA) and the Board of Control of the Attorneys Fidelity Fund (AFF) recently launched the Trustline campaign for the attorneys' profession. 'The campaign has arisen from the knowledge that we are a proud, service-oriented and ethical profession, but also the acknowledgement that there are members of our profession - very few in the overall scheme - who fall short of the ethical norms that define us as a profession,' said LSSA Co-chairpersons Kathleen Matolo-Dlepu and David Bekker.

The LSSA Council took seriously the increasing indications of unethical, unprofessional and fraudulent conduct by attorneys in court judgments, media reports - often sensationalist - and complaints to the law societies, as well as the alarming escalation of claims being settled by the AFF for misappropriation of moneys by attorneys.

The Trustline campaign has been designed to function on two levels -

- on the one hand the campaign invites trust in attorneys and their services; and

- on the other, it urges anyone to report suspected theft from trust accounts and other unethical behaviour by an attorney through Trustline.

The message is a positive one, inviting trust, rather than focusing solely on the 'whistle-blower' aspect.

'We trust our colleagues because we are confident of their genuine commitment to serve the public as properly trained professionals. However, dishonesty within the profession will not be tolerated because, as attorneys, we are in a position of trust towards our clients and the money and information they entrust to us. Integrity is central to that trust,' said Ms Matolo-Dlepu and Mr Bekker.

They added: 'The current regulatory framework ensures that complaints by members of the public are investigated by the relevant provincial law society and appropriate action is taken. In 2012, 72 attorneys were struck from the roll by the High Court. This is 72 of 21 400 attorneys - or only 0,03% of all practising attorneys. However, even 0,03% is too many. We want the public to be able to trust attorneys. If they have any reason not to do so, we want them to tell us.'

About Trustline

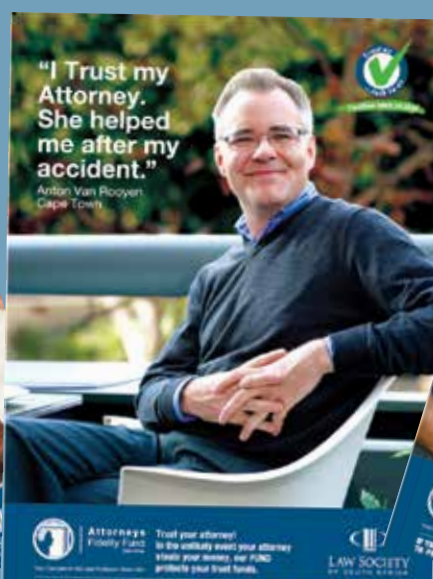


Trustline provides a complaints line and tip-off service for members of the public and others who may wish to report alleged and suspected unethical, fraudulent, corrupt or dishonest behavior by attorneys or their staff members, even confidentially. Trustline is operated independently as part of the Deloitte Tip-Offs Anonymous system that allows for confidentiality and anonymity where appropriate. Calls are screened and analysed by professional agents and report analysts trained to differentiate between genuine and malicious calls and identify these as such when reports are made to the relevant statutory provincial law society.

The AFF will receive reports as part of its risk-aversion strategy so that the fund can be secure for its core function of protecting the public against misappropriation by attorneys in the years ahead. From the LSSA's side, reports will be used to analyse trends and, hopefully, use these to respond appropriately to the negative publicity about the attorneys' profession.

The Trustline campaign is supported by the six constituent members of the LSSA: (the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers), and funded by the AFF.

- More information on the Trustline campaign, and examples of the campaign concept, can be viewed on the website of the LSSA (www.LSSA.org.za), the AFF and those of the four provincial law societies by clicking on the Trustline icon.



People and practices

Compiled by Shireen Mahomed

Routledge Modise Inc in Johannesburg has three new appointments.



Sibongile Sikhakhane has been appointed as an associate in the litigation department. She specialises in competition law, mergers and acquisitions, and corporate commercial law.



David Donaldson has been appointed as an associate in the commercial department. He specialises in mergers and acquisitions, and corporate commercial matters.



Silindile Mbuli has been appointed as an associate in the commercial department. She specialises in mergers and acquisitions, and general corporate governance.

Bisset Boehmke McBlain in Cape Town has appointed two new partners.



Rifqah Omar



Erlise Kruger

Wertheim Becker Inc in Johannesburg has three new appointments.



Estee Maman has been appointed as an associate.



Jayson Rebelo has been appointed as an associate.



Mmoledi Malokane has been appointed as a senior associate.

Adams & Adams in Pretoria has two promotions and one new appointment.



Jeanette Weideman has been promoted to professional assistant in the trade mark department. She specialises in matrimonial law litigation.



Kareema Shaik has been promoted to professional assistant in the trade marks department. She specialises in trade marks and intellectual property law.



Farzanah Manjoo has been appointed as a professional assistant in the patents department. She specialises in the preparation and filing of South African patent and design applications.

Tomlinson Mnguni James Attorneys has three new appointments.



Andrew Eastes has been appointed as an associate in the litigation department in Umhlanga. He specialises in medical negligence and personal injury matters.



Keshia Pillay has been appointed as a professional assistant in the litigation department in Pietermaritzburg.



Paul Baldocchi has been appointed as a professional assistant in the litigation department in Umhlanga.



Charles Geel is practising for his own account as Charles Geel & Associates in Somerset West. He specialises in consumer law, general and commercial litigation.

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



By
Robert
Gentle

Writing for the media

It is many lawyers' dream to see their names printed in the byline of an article holding forth on some relevant topic and making a name for themselves and their law firm.

But for most lawyers, the mere thought of penning such an article is a nightmare. What will I write about? Where will I find the time?

This is a pity, since the mainstream press is a great publicity vehicle for law firms. A steady stream of articles keeps firms top of mind among the chief executive officers, directors and executives who often play a bigger role than we realise in appointing and keeping law firms. Sure, it is useful – indeed, desirable – to write for the specialist legal press too, but one could be forgiven for thinking that these publications are merely exalted platforms for lawyers to write specialist pieces for other lawyers. You need a different set of skills when writing for the mainstream media.

What you need know in order to get published:

Avoid opinion pieces

A widespread assumption is that to write an article for the mainstream press means writing a 950-word think-piece for the opinion pages. The average newspaper permits maybe two opinion pieces per day from the hundreds of outside contributors. It makes far more sense to try and get a shorter piece into the rest of the paper. Opinion pieces can only be sent out on an exclusive basis, which further limits your chances of coverage; shorter news pieces, on the other hand, can be sent out to several publications at the same time.

Come up with an interesting topic

Newspapers want what is unusual, what prompts debate, what affects people, what is controversial. You might think that the law does not lend itself to this kind of 'sensationalism', but you would be wrong.

The trick is to look at your area of specialisation, ask yourself what is topical, and simply take a view on it. For example, if there has been an amendment to existing legislation, ask yourself: Is it a good amendment or a bad one? What are the likely effects? Are there any perverse incentives or unintended consequences?

What are the regulatory implications?

Express your idea in a simple sentence, for example: 'The amendment to legislation ABC is likely to create more problems than it will solve'. If it is not immediately understandable by a non-expert, it will not be by a newspaper editor either.

Flesh it out in three short points

Once you have an interesting subject, expressed in a simple sentence, flesh it out in three short points or paragraphs. This forces you to focus, instead of trying to say it all. If this does not seem like much, it is not supposed to be much. The average length of a newspaper article is 250-300 words. If your piece is too long, it will be cut, or not used at all.

Keep your writing short and simple

You are not arguing the finer points of law; you are just making a series of pertinent points for the lay reader, in plain English. So rather say: 'Companies will probably take on more part-time workers to get around the increased costs imposed by the new legislation', instead of saying: 'Companies are likely to seek to fill their employment needs through greater utilisation of temporary workers on fixed-time contracts, in order to circumvent the more onerous cost burden of employing full-time staff imposed by the latest amendment to s 38 of the Act.'

Your work is now done. Your firm's marketing department will polish your article and send it to the relevant newspapers. It might be used in its entirety, in part or not at all – it all depends on what is topical on a given day. You should aim to write an article at least every two months in order to maximise your chances of getting coverage and building a media profile.

Robert Gentle BSc (University of Zambia); Post-graduate Diploma Airframes and Propulsion Systems (Institut Universitaire de Technologie de Ville d'Avray) is a communication consultant and corporate trainer at Wordwright in Bedford.



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Puzzling legislation

Scrap or re-write the Older Persons Act

Picture source: Gallo Images/Thinkstock



By
Neels
Coertse

The Older Persons Act 13 of 2006 (the Act), regulations, forms and national norms and standards (NN&S) commenced on 1 April 2010 replacing the Aged Persons Act 81 of 1967 as amended. The aim of the Act is laudable, since it recognises the plight of the elderly and that they should be empowered and protected and that their status, well-being, safety, health and general well-being should be looked after. An older person is, in the case of a male, when he is older than 65 years of age and, in the case of a female, when she is older than 60 years of age.

The Act, regulations, forms and NN&S appear to be disjointed, fragmentary and haphazardly constructed and not capable of being interpreted properly. In some instances it is almost impossible to attempt a proper reading of it. I submit that it is beyond repair and recommend that the Department of Social Development should consider rewriting the legislation in its entirety. I intend to discuss only certain aspects of the Act; to prepare a commentary on the entire Act is beyond the scope of this article.

Interpretation of statutes

The statute, inclusive of the regulations, forms and NN&S, should be interpreted according to the intention of those who drafted it. However, in this case the question is what to do with it, since it is drafted so badly, to the extent that it does not make sense or is without foundation.

Solomon JA said: 'Now *prima facie* the intention of the Legislature is to be deduced from the words which it has used. It is true that owing to the elasticity which is inherent in language it is admissible for a court in construing a statute to have regard not only to the language of the Legislature, but also to its object and policy as *gathered from a comparison of its several parts*, as well as from the history of the law and from the circumstances applicable to its subject-matter. And if, on considerations of this nature, a court is satisfied that to accept a literal sense of the words would obviously defeat the intention of the Legislature, it would be justified in not strictly adhering to that sense, but in putting upon the words such other signification as they are capable of bearing' (*Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 554 – 555) (my italics).

The 'golden rule' of interpretation of statutes was referred to and quoted with approval by De Villiers JA in *Principal Immigration Officer v Hawabu and Another* 1936 AD 26 at 31: 'We are to take the whole statute together and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency ... so as to justify the Court in placing on them some other signification, which, though less proper, is one which the Court thinks the words will bear' (my italics).

Is it possible to apply these *dicta* to the wording and still make sense of the legislation? I submit not.

Definitions

I submit that the following definitions are rather pivotal in understanding the Act, regulations and the NN&S. The definitions appear to be loosely and carelessly drafted. When one reads the definitions, one should be mindful of the *dicta* of the quoted cases in that we have to look at the statutes and regulations as a whole and not piecemeal. It should be interpreted altogether.

- 'Care' means physical, psychological, social or material assistance to an older person, and includes services aimed at promoting the quality of life and general well-being of an older person.
- 'Caregiver' means any person who provides care.
- 'Community-based care and support services' mean any programme contemplated in s 11. This is a problem definition.
- 'Frail older person' means an older person in need of 24-hour care due to a physical or mental condition that renders him or her incapable of caring for himself or herself.
- 'Health care provider' means a health care provider defined in s 1 of the National Health Act 61 of 2003. This is a problem definition.
- 'Home-based care' means care provided or services rendered at the place where a frail older person resides, excluding at a residential facility, by a caregiver in order to maintain such frail older person's maximum level of comfort, including care towards a dignified death. This is a problem definition.
- 'Older person' means a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.
- 'Older person in need of care and protection' means an older person contemplated in s 25 (5).
- 'Operator' means a person who operates a residential facility.
- 'Residential facility' means a building of other structure used primarily for the purposes of providing accommodation and providing a 24-hour service to older persons. This is a problem definition.
- 'Respite care' means a service offered specifically to a frail older person and to a caregiver and which is aimed at the provision of temporary care and relief.
- 'Service' means any activity or programme designed to meet the needs of an older person.
- 'Shelter' means any building or premises maintained or used for the reception, protection and temporary care of an older person in need of care and protection.

Problem definitions

Caregiver: A caregiver is defined along-

side that of a health-care provider, an operator, residential facilities, respite care, shelters and social workers. Singularly and collectively all of these are inextricably linked to the office of 'caregiver'. When reading this definition in isolation it seems to be fine, however '... a comparison of its several parts ...' (*Dadoo* case) reveals the muddled thinking of the draftsman. Sadly it is symptomatic of the entire piece of legislation.

In the *Principal Immigration Officer* case De Villiers J stated that: 'We are to take the whole statute together and construe it altogether ...'. All of these different offices relate to each other and have an influence on the definition of caregiver, but they were mixed up with one another.

Community-based care and support service: Mean any programme contemplated in s 11. Section 11 however, makes it clear that 'service' is not a service but a community-based programme and that it might fall into two categories, namely prevention and promotion programmes on the one hand and home-based care on the other. I submit that home-based care and community-based care and support services are mixed together. In subsequent subsections, there are attempts to separate them.

Once again the Department of Social Development should be lauded for having compassion for the plight the older person finds himself or herself in and it is clear that it really wanted to make a difference through this legislation.

The programmes in terms of s 11(2) are carefully constructed and aimed at the economic empowerment of the elderly, information, education and counselling services, provision of nutritionally balanced meals, and so on. Those in s 11(3) refer to 'home-based care programmes directed at frail older persons within the community.' It seems as if the aims of the programmes created in terms of s 11(2) and (3) are at loggerheads with one another, while the older person in need of care is neatly excised from these programmes. It is my contention that a frail older person and an older person in need of care and protection in terms of the statute's definition are, essentially, exactly the same.

Health-care provider: The Act's definition makes s 1 of the National Health Act 61 of 2003 (the NHA) applicable. The NHA defines a 'health-care provider' as 'a person providing health services in terms of any law, including in terms of the -

(a) Allied Health Professions Act, 1982 (Act 63 of 1982); [an ayurveda practitioner, therapeutic massage therapist or a phytotherapist are just some of the allied health practitioners].

(b) Health Professions Act, 1974 (Act 56 of 1974);

(c) Nursing Act, 1978 (Act 50 of 1978) [this Act has been repealed in its entirety by the Nursing Act 33 of 2005];

(d) Pharmacy Act, 1974 (Act 53 of 1974); and
(e) Dental Technicians Act, 1979 (Act 19 of 1979).

Home-based care, community-based care and residential facility: When one compares the definitions for 'home-based care', 'community-based care' and 'residential facility' one is left with a sense of bewilderment. They are not clearly distinguished.

These aspects are, I submit, essentially and materially the same – I further submit that these definitions should be re-visited and re-drafted to make it very clear what the differences are, if any. These definitions create insurmountable problems to understand and to apply chs 3 and 4 of Act and the relevant chapters of the regulations.

Chapter 3 creates community-based care and support services, while ch 4 creates residential facilities. It seems as if two separate types of facilities are created, but it is mixed in the Act.

Community-based care and support services as well as residential facilities should apply to be registered (ss 13 and 18 respectively). A person who provides home-based care does not have to register; such a person should ensure that caregivers receive prescribed training (s 14).

Home-based care is completely mixed up with community-based care, as well as with residential facilities. The defini-

tions are vague, convoluted and incomprehensible to interpret. It is not possible to put 'upon the words such other signification as they are capable of bearing' (*Dadoo* case).

Section 14 mixes a number of things that should be kept separately and therefore creates enormous confusion. It refers to a person who provides home-based care, caregivers, social workers and health-care providers. Some of which have to be registered, others are bound by a code of conduct while others should be trained in terms of a prescribed training programme (reg 10).

Why did the department not entertain these aspects in separate sections and maybe even separate chapters?

The Act (ch 2) requires that community-based care and support services should register (s 13). Neither the Act nor the regulations differentiate between category A, B, C or D services at all. The prescribed registration certificate (form 3) that is issued to the entity on registration, also does not differentiate between any services.

All of a sudden, and therefore without a legal base, the NN&S introduces no less than seven different categories of services. In para 1.1 of the NN&S, the first four different categories are listed under Part I of the heading 'Delivery of service' as –

- A: Basic services – luncheon/service clubs informal/temporary accommodation (rural).

- B: Basic services (formal).
- C: Intermediate services – service centre.
- D: Tertiary services – comprehensive service, which could include assisted living/respite services.

Then another three different categories come to light in para 1.3.13 –

- A: Basic services – primary support.
- B: Intermediate services.
- C: Tertiary services.

There is no explanation of these categories of services to be found anywhere in the legislation.

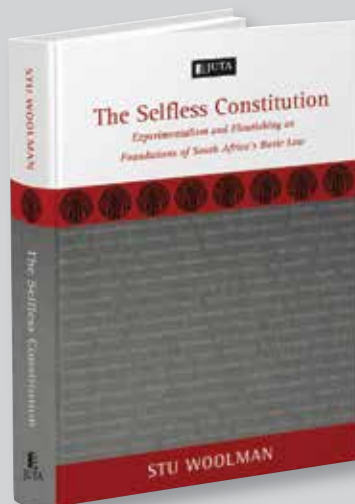
Conclusion

The question can be asked, and it is a valid question, what can be done to this statute, regulations and annexures? I am of the opinion that there are two things that should be done:

- Scrap it.
- Re-write it.

It is totally beyond repair. I further suggest that a proper think tank be convened with knowledgeable and capable people to re-draft a proper piece of legislation.

Neels Coertse *Blur LLB (UJ)* is an attorney at RCJ Coertse Attorneys in Johannesburg. □



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Valid or not?

General principles for challenging a will

By Johann
Jacobs
and
Leigh
Lambrechts

It is not uncommon for a client to approach an attorney with the challenge that a will is invalid. The reasons for such a challenge may vary from a formal shortcoming to claims of foul play. This article provides a framework for practitioners by providing an overview of the possible reasons why a will may be challenged and a summary of the general principles.

Given that a will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established, the onus is on the person al-

leging invalidity to prove such allegation (see *Kunzs v Swart and Others* 1924 AD 618). The standard of proof is the same as that which applies in all civil cases – proof on a balance of probabilities. As a rule, it is difficult to meet the requisite proof. Unless the testators' wishes are recorded in written testamentary form they come to nought and it is very difficult for a client to dispute.

There are various reasons why interested parties want to challenge a will. It may be as a result of the relationship they had with the deceased, where they claim that the deceased promised

to leave them a particular item or sum of money. They may insist that the will as it stands could not conceivably have been the deceased wishes, it could be caused by their suspicions regarding the persons who are set to benefit, or it may stem from bitterness as a result of being disinherited, feeling that they were overlooked or that they were entitled to inherit.

No person, in terms of South African law, has a right to inherit. Civil law jurisdictions recognise the legitimate portion concept that entitles recognised heirs of the deceased to a portion of the estate

irrespective of the will. This notion of a legitimate portion is not part of modern law in South Africa as the provisions in force that allowed for this have long been abolished. However, the freedom of a testator to dispose of his or her estate as he or she wishes is not absolute and although a testator is permitted to disinherit his or her spouse and his or her children, there are instances where, based on public policy, the law restrains testators in the exercise of their testamentary freedom.

Therefore a will may be challenged and the testator's freedom limited by a claim for maintenance and education of the testator's minor children – and the fact that the child was disinherited does not deprive him or her of this claim – as well as by a similar maintenance claim against the estate by a testator's surviving spouse. In terms of the Maintenance of Surviving Spouses Act 27 of 1990, if a marriage is dissolved by death, the survivor will have a claim against the deceased spouse's estate for the provision of his or her reasonable maintenance needs until death or remarriage, insofar as he or she is unable to provide for such needs himself or herself. These changes may be made against the estate of the testator despite the provisions of his or her will and accordingly allow interested and affected parties to challenge a will on specific grounds.

Lack of requisite formalities

Historically the courts have strictly interpreted s 2 of the Wills Act 7 of 1953 (the Act) regarding the formalities for the validity of a will and they had no recourse provisions allowing for any deviation. This sometimes resulted in adversity for the beneficiaries. The Law of Succession Amendment Act 43 of 1992 has moderated this state of affairs to an extent by introducing provisions that allow for the possibility that a court may recognise as valid a will that does not comply with all the formalities. In terms of s 2(3) of the Act, if a court is satisfied that a document or an amendment, drafted or executed by a person who has since died, was intended to be that person's will or an amendment thereto, the court shall order that the master accept that document as a will, in spite of the fact that it does not comply with the prescribed formalities.

MM Corbett, G Hofmeyr and E Kahn (*The Law of Succession in South Africa* 2ed (Cape Town: Juta 2001) at 58) note that the court does not, however, have a general discretion to condone non-compliance with the prescribed formalities. The wording of s 2(3) makes it clear that only in the event that the specific requirements are met and the court is satisfied that the document was intended to

be the will of the testator, must the court then grant an order directing the master to accept the document as a will.

The requirement that the document purporting to be a will must have been drafted or executed by the testator has caused interpretation issues regarding the intended meaning of the word 'drafted' and has resulted in conflicting legal views. Some decisions have favoured the literal interpretation that the document must have been drafted by the testator personally, while other decisions have favoured a more generous interpretation of s 2(3).

The position has been settled in *Bekker v Naude en Andere* 2003 (5) SA 173 (SCA) where Olivier JA clarified the correct interpretation of the word 'drafted', following the literal approach. The court held that the document must have been prepared personally by the deceased, and a document could not be accepted as a will if it had been prepared by a third party. The court based its reasoning on the principle of interpretation that effect must be given to the ordinary, grammatical meaning of words, unless this would lead to absurdity, inconsistency or hardship.

The second definitive case on the interpretation of s 2(3) is *Van Wetten and Another v Bosch and Others* [2003] JOL 11581 (SCA). In this case the issue on appeal was whether the deceased had intended a document that he had written to be his final will or simply instructions to his attorney to draft one. The court held that s 2(3) clearly states that a court must direct the master to accept the document as a will once certain requirements are satisfied. The court accordingly held that – because the document had been created by the deceased personally and considering the surrounding circumstances, including the deceased's conduct at the time of drafting the document – it was clear that the deceased intended it to be his will.

Although an electronic will, stored on a computer hard drive for example, which has not been printed or executed is invalid due to the fact that as it is not in writing nor validly executed, it can be saved by s 2(3). In *Van der Merwe v Master of the High Court and Another* [2010] JOL 26090 (SCA) an appeal was brought to have an unsigned document accepted as the will of the deceased. The court noted that the lack of a signature had never, in terms of s 2(3), been held to be a complete bar to a document being declared a will. The court considered whether the document was drafted by the deceased and whether the deceased intended it to be his will. The appellant provided proof that the document had been sent to him by the deceased, giving the document an authentic quality. It was not contested that the document still existed and had not been amended or deleted; and from

the title of the document the court held it to be clear that the deceased intended the document to be his will. The court upheld the appeal, declaring the will to be valid.

Forgery

A will can be challenged on the ground that the document was forged or that, despite the will being genuine, the signature appended, intended to be accepted as the testator's signature, is forged. Where the authenticity of the will is in question or it is attacked on the basis that it is a forgery, evidence such as statements made by the testator, the testator's instructions and statements of testamentary intention are also admissible (*Corbett et al (op cit)* at 90)).

Pillay and Others v Nagan and Others 2001 (1) SA 410 (D) involved a challenge to the validity of a will on the grounds of forgery. The plaintiff challenged the signature of the testator in the will, alleging that it was not the testator's. The plaintiffs bore the onus of proving that the will was invalid, which the court accepted had been successfully done. The plaintiffs argued that, because of the forgery involved, the first defendant should be disqualified from receiving any benefit from the estate. The court concluded that, through such forgery, the defendant had sought to deprive his siblings of their share of the estate and therefore was considered unworthy of inheriting.

In doing so the court showed that the persons to be disqualified from benefiting from a will may include those deemed unworthy for reasons other than that they contributed or caused the persons death or did some wrong to the deceased's property. The recognised Roman-Dutch law maxim of '*de bloedige hand neemt geen erf*' provides that a person who unlawfully causes the death of a person cannot take a benefit under the person's will or through intestate succession. Where a beneficiary is disqualified, no rights vest in the beneficiary and the bequest is accordingly not transmitted to the beneficiary's heirs.

The admissibility of the evidence of handwriting experts and the usefulness of such evidence where forgery has been alleged should not be overlooked. In a recent decision in *Molefi v Nhlapo and Others* [2013] JOL 30227 (GSJ) the court had to determine whether a contested will was valid. The deceased had revoked her first will, in which the first defendant had been sole heir, and made a second will in which the plaintiff was appointed the sole heir. It was alleged by the defendant that the deceased had subsequently made another will naming him as sole heir. To support the contention that the will was a forgery the plaintiff adduced the evidence of a handwriting expert.

The handwriting expert's opinion was that the signature on the contested will was a forgery and his reasons included that he noted differences between the deceased's signatures on the acknowledged wills and the contested will. The expert's evidence was left undisputed and his conclusions were not contested in cross-examination. This led the court to conclude that the defendant's version and the circumstances under which the disputed will was signed were so improbable that the credibility had been impugned and the court accordingly rejected the first defendant's evidence. The court held, in light of the undisputed evidence of the handwriting expert, that the signature of the contested will was not the deceased's and that the plaintiff had discharged the onus in proving the will was a forgery.

In terms of s 4A of the Act, any person who is a witness to a will, who signs on behalf of the testator, or who writes out the will or any part in his or her own handwriting, as well as the spouse of any person involved in such a capacity, is disqualified from inheriting or receiving any benefit in terms of the will. Certain notable exceptions, in terms of which a person may inherit despite their involvement in the execution of the will, are provided for. A court may declare a person, or his or her spouse referred to in subs (1), to be competent to receive a benefit from a will if the court is satisfied that that person or his or her spouse did not defraud or unduly influence the testator in the execution of the will.

In *Blom and Another v Brown and Others* [2011] 3 All SA 223 (SCA) the interpretation of s 4A was in dispute. The appellants' submission was that the qualification and exception in s 4A(2)(a) applies to persons who are not related to the testator and that s 4A(2)(b) applied to persons who are family members. The court disagreed and held that any person, including the spouse, who writes out a will shall be disqualified from receiving any benefit from that will, subject to the qualification and exception. The court noted that what s 4A(1) seeks to achieve, consistent with the common law, is to permit beneficiaries who would otherwise be disqualified from inheriting, to satisfy the court that they or their spouses did not defraud or unduly influence the testator in the execution of the will.

Testamentary capacity

Section 4 of the Act governs testamentary capacity. In addition to the requirement that the testator must have reached the specified age, the testator must have sufficient mental capacity to understand the nature and effect of the testamentary act; understand and recollect the nature and situation of his or her property; and remember his or her relations and

those whose interests are affected by the will. The question is whether, as a consequence of the disturbance or impairment, the person is mentally incapable of understanding the nature and effect of his or her act. In *Thirion v Die Meester en Andere* 2001 (4) SA 1078 (T) the court declared that the consumption of alcohol cannot in itself invalidate juristic acts, such as drawing up a will.

In the minority judgment in *Tregea and Another v Godart and Another* 1939 AD 16 Tindall JA held that, in cases where a testator has impaired intelligence caused by physical infirmity, although the testator's mental powers may be reduced below the ordinary standard, the power to make a will remains, if the testator had sufficient intelligence to understand and appreciate the testamentary act in its different bearings. Where the question arises as to whether a person had the capacity to make a will, the mere fact of old age or illness does not necessarily mean that a person is incapable of appreciating the effect of the will he or she is executing, as stated in *Essop v Mustapha and Essop NNO and Others* 1988 (4) SA 213 (D).

In the *Essop* case, the court confirmed that the decisive moment for establishing the competence of the testator is the time when the will was made and not, for example, when the deceased had issued instructions for drawing up the will. As a general test for testamentary capacity, the test quoted in *Banks v Goodfellow* 1870 LR 5 QB, as relied on in the *Tregea* case, remains the law:

'The testator must ... be possessed of sound and disposing mind and memory ... But his memory may be very imperfect ... and yet his understanding may be sufficiently sound for many of the ordinary transactions ... were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?'

Undue influence

The expression of a testator's last wishes must be the result of the exercise of his or her own volition. Any impairment to the free expression of the testator's wishes at the time the will is made may result in a will being declared invalid. In *Spies NO v Smith en Andere* 1957 (1) SA 539 (A) Steyn JA pointed out that acts such as flattery, professions of extraordinary love or respect, meek tolerance of continual humiliation, direct requests or unusual affection do not necessarily constitute undue influence.

To have a will declared invalid on this ground certain principle factors must be considered and conduct akin to coercion or fraud is required. The question in the *Spies* case was whether a person who was 'mentally retarded' was unduly influenced by his uncle, who was also his

curator bonis, in the making of a will in which the uncle's children benefited. The court commented as to what constituted undue influence, by holding that '... a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated ... to the exercise of coercion or fraud to make a bequest that he would not otherwise have made and which therefore expresses another person's will ...'. In such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition ...'.

The key question therefore is whether there has been a displacement of volition and thus whether the will contains the wishes of someone other than the testator. The testator's mental state, his or her ability to resist prompting and instigation; and the relationship between the people concerned, are all factors to be taken into account. The mere existence of a relationship of a particular kind does not give rise to a presumption that the will of another has been substituted for the testator's will.

In *Katz and Another v Katz and Others* [2004] 4 All SA 545 (C), it was alleged that the testator had been improperly influenced by his second wife to make a new will. The court emphasised that an allegation that one or more of the factors was present had to be supported with evidence and that unfounded suspicion and speculation were not sufficient. The fact that the testator was dependent on his wife after his stroke was not sufficient proof of undue influence. Further, the amount of pressure resulting in invalidity may vary from case to case. In the *Katz* case it was held that if, after the execution of a will, a period of time elapses during which the testator could have altered the will should he or she have wished to do so, the failure to take advantage of this opportunity is a circumstance from which it may be inferred that the will was not made against the testator's wishes.

Conclusion

While legislation implemented by the courts has brought relief for technical and other procedural failures, oral promises or intentions not recorded cannot be saved or given effect to. To challenge a will, which on the face of it appears to be valid, based on lack of testamentary capacity or undue influence, remains for the challenger an evidentiary burden.

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By
Rehana
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Hiding behind the veil

The vexed topic of piercing the corporate veil under s 20(9) of the Companies Act 71 of 2008 (the Act) was discussed by the author in *De Rebus* in August 2012 (2012 (Aug)

DR 22). Section 20(9) of the Act gives the courts a general statutory discretion to pierce the corporate veil. It was submitted in that article that there are some uncertainties regarding the interpretation and the scope of s 20(9) of the Act, such as –

- the meaning of the term ‘unconscionable abuse’;
- whether s 20(9) overrides the common law instances of piercing the corporate veil;
- whether piercing of the veil is still to be regarded as an exceptional remedy that may be used only as a last resort; and
- who an ‘interested person’ would be under s 20(9).

In the recent case of *Ex parte Gore NO and Others NNO (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries)* [2013] 2 All SA 437 (WCC) the Western Cape High Court handed down the first judgment on s 20(9) of the Act. This judgment gives valuable insight into the questions raised above, concerning the interpretation of s 20(9) of the Act. The issue in *Gore* was whether the court should pierce the corporate veil in a group of companies. This article will discuss the *Gore* case, as well as the court’s approach to piercing the corporate veil in company groups and, finally, will examine the court’s *dicta* on the interpretation of s 20(9) of the Act.

Section 20(9) of the Act states:

‘If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).’

The *Gore* case

In the *Gore* case the applicants were the liquidators of 41 companies that had formed part of a group of companies, referred to as ‘the King Group’. The holding company was King Financial Holdings Limited (KFH), which was also in liquidation. The three King brothers were directors of KFH and most of its subsidiaries, and held a majority of the KFH shares, which enabled them to exercise control of the King Group.

The companies in the King Group provided financial services by way of marketing investments in commercial and residential immovable properties. Investments solicited by the King Group were structured in the form of a purchase by an investor of shares in a member of the group. The acquisition of the shares was coupled with an extension of a loan by the investor concerned to the company of which he was to be a shareholder.

The affairs of the King Group had been conducted in a manner that did not maintain any distinguishable corporate identity between the various companies in the group. Some examples of how the group’s affairs were conducted are as follows:

- The documentation purporting to evidence an investment was ineptly prepared and failed to identify the company in which the particular investment was being made. The invested funds were in fact ‘allocated’ by the management of the King Group into whichever company it saw fit, and this had occurred without any properly kept accounting record. The court described the record keeping

of the companies as 'grossly inadequate' (at para 8).

- Funds solicited from investors were transferred at will by the controllers of the holding company between the various companies in the group, with no regard to the individual identity of the companies concerned.
- The flow of funds within the King Group appeared to have been materially determined by the need of the King brothers to sustain their scheme by finding money to pay existing investors who wished to withdraw their investments.
- Shares in KFH were marketed and sold directly to the public even though, at the relevant time, the company had not been converted from a private company into a public company and could consequently not issue shares to the public.
- A greater number of shares were issued than had been authorised.

As a consequence of the dishonest and chaotic administration of the affairs of the King Group, the liquidators of the constituent companies were unable to identify the relevant corporate entities against which the individual investor-creditors had claims. The question before the court was whether it should in these circumstances pierce the corporate veil and disregard the separate corporate personality of the various subsidiary companies, so that the assets of the subsidiary companies could be regarded as the assets of the holding company for purposes of the investors' claims. The application was brought under the common law, alternatively in terms of s 20(9) of the Act.

Court's findings

The court found that the entire group had in effect operated as one entity through the holding company, and that the King brothers had 'treated all their companies as one' (at para 8). It found that there was no distinction for practical purposes when it came to dealing with investors' funds between KFH and the subsidiary companies. The court found that the disregard by the King brothers of the separate corporate personalities of the companies in the King Group was so extensive as to impel the conclusion that the group was in fact a 'sham' (at para 15).

The court appears to have decided that there was an unconscionable abuse by the controllers of the juristic personalities of the subsidiary companies as separate entities and that this had brought the case within the ambit of s 20(9) of the Act.

Court's decision

The court declared that, in terms of s 20(9) of the Act, the subsidiary companies, with the exception of KFH, be deemed not to be juristic persons in

respect of any obligation by such companies to the individuals or entities that had invested in the King companies. It held further that the King companies were to be regarded as a single entity. Their separate legal existence was ignored and the holding company, KFH, was treated as the only company.

Under s 20(9)(b) of the Act a court may declare that a company is deemed not to be a juristic person in respect of any right, obligation or liability of the company. The court in *Gore* stated that an order made in terms of s 20(9)(b) will always have the effect of fixing the right, obligation or liability in issue of the company somewhere else (at para 34). The court found that the right involved in this case was the property held by the subsidiary companies in the King Group and the obligation was that which any of them might actually have to account to and make payment to the investors (at para 34).

'... the corporate veil will be pierced where unconscionable abuse of the juristic personality of the company is found, including in company groups ...'

The applicants (other than the liquidators of KFH) were directed to transfer all monies that might remain in each of the King companies after payment of all liquidation costs, bondholders' claims and claims other than claims by investors to the liquidators of KFH to be administered as a single pool of assets available for distribution to the investors.

The approach adopted by the court to piercing the corporate veil in company groups

The Act defines a 'group of companies' as meaning a holding company and all its subsidiaries (s 1). Each company in a group of companies is in law a separate legal entity with its own separate legal personality and its own rights, privileges, duties and liabilities separate and distinct from those of the other subsidiary companies. The fact that a group of companies effectively forms one economic unit does not necessarily mean that the separate identity of each com-

pany is ignored and that the group is treated as one entity. It follows that the acts of a holding company are not per se the acts of its subsidiary companies, or conversely, since the holding company is a separate legal entity from its subsidiary.

The court in *Gore*, referring to *Contemporary Company Law* with approval, acquiesced in the point made there that courts have struggled with the correct approach to adopt in determining whether or not to pierce the corporate veil (see para 21 of the judgment and FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* 2ed (Cape Town: Juta 2012) at 42). This difficulty is more acute in the context of groups of companies, where the courts have been divided in their approach whether, and in what circumstances, the corporate veil may be pierced so that the group is in fact treated as a single entity as opposed to a collection of different corporate entities.

The courts have adopted either a liberal approach (see, eg, *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462 and *Ritz Hotel Ltd v Charles of The Ritz Ltd and Another* 1988 (3) SA 290 (A)) or a conservative approach to piercing the veil in company groups. The stricter, conservative view holds that courts are not entitled to disregard the separate legal personality of a company in a group simply because it is just to do so. This was spelt out in *Adams and Others v Cape Industries Plc and Another* [1991] 1 All ER 929 (CA) as follows:

'... save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon and Co Ltd* [1897] AC 22, [1895-9] All ER Rep 33, merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

This dictum was approved in *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) and *Macadamia Finance BK en 'n Ander v De Wet en Andere* NO 1993 (2) SA 743 (A) where both courts adopted the conservative view. They refused to pierce the corporate veil and to view the companies in the group as a single economic entity. It thus seems that, while South African jurisprudence had initially adopted the liberal approach, in recent years there has been a trend in South Africa leaning towards the conservative approach. The approach of the courts is nevertheless unpredictable.

Even though the court pierced the corporate veil in *Gore*, the court seemed to have adopted the conservative approach, since it pierced the corporate veil on the basis that the King Group was a sham, and found that this had brought the activities of the group within the meaning of 'unconscionable abuse' in s 20(9). The court drew attention to the recent case of *VTB Capital Plc v Nutritek International* [2013] UKSC 5 where the UK Supreme Court, in declining to pierce the corporate veil, implied that the existence of pertinent statutory provisions could determine a different conclusion on the question of whether, and in what circumstances, a court could pierce the corporate veil (see para 130).

In *Gore*, Binns-Ward J commented that the UK Supreme Court in *VTB Capital* may not have refrained from piercing the corporate veil if a statutory provision such as s 20(9) of the Act had been applicable (para 24). It seems that the applicability of a statutory provision on piercing the corporate veil may counter the judicial hesitancy to pierce the corporate veil, including in instances of company groups.

The court's interpretation of s 20(9) of the Act

The court's *dicta* on the interpretation of s 20(9) of the Act is set out below. These *dicta* answer some of the questions raised by the author in the previous article (*supra*).

What is 'unconscionable abuse'?

The phrase 'unconscionable abuse' is not defined in s 20(9) and the section fails to provide any guidance on the facts or circumstances that would constitute an 'unconscionable abuse' of the juristic personality of the company as a separate entity (see 2012 (Aug) *DR* 23).

In *Gore* the court stated that the words 'unconscionable abuse' are less extreme than the words 'gross abuse', which are used in s 65 of the Close Corporations Act 69 of 1984 in a similarly worded provision to s 20(9) of the Act (see 2012 (Aug) *DR* 23 for a discussion of the conduct that may constitute 'gross abuse'). The court asserted that the words 'unconscionable abuse of the juristic personality of a company' used in s 20(9) postulate conduct in relation to the formation and use of companies that is diverse enough to cover all the descriptive terms such as 'sham', 'device', 'stratagem', and conceivably much more. The court stated that this indicates that the remedy may be used whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced (at para 34).

Does s 20(9) override the common law?

The question was raised whether s 20(9) of the Act overrides the common law instances of piercing the corporate veil (2012 (Aug) *DR* 24). It was contended that s 20(9) did not override the common law instances of piercing the corporate veil, and that the principles developed at common law with regard to piercing the corporate veil would serve as useful guidelines in interpreting s 20(9) of the Act.

In *Gore* the court found that the language of s 20(9) is very wide, which it stated indicates an appreciation by the legislature that s 20(9) would apply in widely varying factual circumstances (para 32). The section broadens the bases on which the South African courts have till now been prepared to pierce the corporate veil (at para 33). The court noted that s 5 of the Act enjoins a court to interpret the Act and apply it in a manner that gives effect to the purposes of the Act set out in s 7 and to the extent appropriate, to consider foreign law.

Approaching the interpretation of s 20(9) of the Act from this perspective, the court stated that it was unable to identify any discord between s 20(9) and the approach to piercing the corporate veil evinced in cases decided before it came into operation (at para 32). In light of the fact that there are no set categories of instances when a court will pierce the corporate veil at common law (*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A)), the court held that it is appropriate to regard s 20(9) as supplemental to the common law, rather than substitutive (at para 34).

Is s 20(9) a remedy of last resort?

At common law, piercing the corporate veil is regarded as a drastic remedy that must be resorted to sparingly and as a last resort in circumstances where justice will not otherwise be done (see for example *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para 23 and *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C) at para 23). The question was raised whether the same principle would apply to s 20(9) of the Act and whether reliance could be placed on s 20(9) despite other remedies being available (2012 (Aug) *DR* 24). It was suggested that reliance may well be placed on s 20(9) despite other remedies being available.

In *Gore*, the court stated that s 20(9) introduces a firm and flexible basis for piercing the veil, and that it will erode the foundation of the philosophy that piercing the corporate veil should be approached with 'a priori diffidence' (at

para 34). The court stated that the unqualified availability of the remedy in terms of s 20(9) militates against an approach that the remedy should be granted only in the absence of any alternative remedy. Section 20(9) is available as a remedy simply when the facts of a case justify it, which detracts from the notion that the remedy should be regarded as exceptional or drastic to be used only as a last resort (at para 34).

Who is an interested person under s 20(9)?

Section 20(9) of the Act permits any 'interested person' to bring an application to court requesting the court to deem a company not to be a juristic person, but the section does not define the term 'interested person'.

The court stated in *Gore* that no mystique attaches to the meaning of the term 'interested person'. The standing of any person to seek a remedy in terms of s 20(9) of the Act should be determined on the basis of well-established principles (see *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533 - 534) and, if the facts implicate a right in the Bill of Rights, s 38 (enforcement of rights) of the Constitution (at para 35). The court found that the liquidators had a direct and sufficient interest in the relief sought so as to qualify as 'interested persons'.

Conclusion

The judgment in the *Gore* case is highly significant not only because it is the first case in which the statutory remedy of piercing the corporate veil was considered, but also because of the useful and thorough analysis of the authorities on piercing the corporate veil. The judgment sends a clear warning to directors, shareholders and controllers of company groups that the corporate veil will be pierced where unconscionable abuse of the juristic personality of the company is found, including in company groups and that the remedy will not be regarded as an exceptional one to be used only as a last resort. It appears that the statutory remedy of piercing the corporate veil would be applied by the courts with less reticence than the common law remedy of piercing the corporate veil. It remains to be seen how this statutory remedy will be further developed by the courts in the future.

• See also 2013 (Sept) *DR* 51.

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By
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Breaking up is hard to do, or is it?

The clean-break principle explained

This article discusses how spouses married in community of property deal with their pension benefits on divorce. It will be shown that, initially, the pension interest of a member of a pension fund was not regarded as an asset in the joint estate, but the position was changed by the 1989 amendment to the Divorce Act 70 of 1979 (the Act). The 2007 amendments to the Pension Funds Act 24 of 1956 (PFA), which brought about the 'clean-

break principle' when spouses divorce, will also be discussed to show that these amendments did not apply to all pension funds in South Africa; hence members of the excluded pension funds have approached the courts in order to force their funds to implement the clean-break principle.

1989 amendments to the Act

The clean-break principle can be described as a right or, at the very least,

the entitlement of the non-member spouse who is married in community of property to receive immediate payment or transfer of the portion of the other spouse's pension interest allocated to him or her when the couple divorces. Initially, pension interest that non-member spouses would be entitled to on divorce was not regarded as part of the joint estate of spouses married in community of property. As a result, prior to August 1989, the amount held by a fund as provision for its future liability towards a member could not be taken into account in deter-



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mining the value of the member's estate on divorce because the provision comprised assets that belonged to the fund rather than to the member (*R Hunter, J Esterhuizen, T Jithoo and S Kumalo The Pension Funds Act: A Commentary on the Act, Regulations, Selected Notices, Directives and Circulars* (Johannesburg: Hunter Employee Benefits Law (Pty) Ltd 2010) at 725).

It was held in *Old Mutual Life Assurance Co (SA) (Pty) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) that '[i]t would appear that, prior to 1 August 1989, the "in-

terest" which a spouse who was a member of a pension fund had in respect of pension benefits which had not yet accrued was generally not regarded as an asset in his or her estate or, where the marriage was in community of property, as an asset in the joint estate. This meant that, in determining the patrimonial benefits to which the parties to a divorce action were entitled, the "pension expectations" of the member spouse were not taken into account' (at para 17).

However, this position was changed by the amendments to the Act through the Divorce Amendment Act 7 of 1989. These amendments allowed some relief to a spouse from whom the member was divorced who might otherwise receive nothing from the marriage. In 1989, subs 7(7) and (8) were inserted into the Act to allow the member spouse's pension interest to be regarded as an asset in his or her estate that can be taken into account when dividing the joint estate on divorce.

Section 7(7)(a) of the Act provides that: 'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.' The Act now entitles 'the court granting a decree of divorce' in respect of a member of a pension fund, to make an order that 'any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member' (s 7(8)(a)(i)).

Labe J in *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) (at 349G - H) held that 'there was no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to their divorce'. He further argued that there was no logical reason why both the components of the pension right should not form part of the joint estate (at 350G).

It is worth noting that these provisions envisage an award to the non-member spouse of any part of the member spouse's 'interest' calculated as at the date of the divorce, but with effect from some time in the future when the pension benefit accrues to the member spouse. As such, once the pension benefit has accrued, the provisions of s 7(7) and (8) are no longer applicable (the *De Kock* case at 349F - G).

It is important to note that, once the benefit has accrued to the member before the spouses divorce and the member defers the pension benefit in the fund, thus becoming a deferred member of the fund, the provisions of the Act will

not apply. This is because, as a deferred member, such a spouse no longer has a pension interest in the fund. In *Eskom Pension and Provident Fund v Krugel* 2012 (6) SA 143 (SCA) the Supreme Court of Appeal held that the non-member spouse could claim her share of the deferred benefit when the deferred member spouse turned 55 and the benefit accrued to him (at para 55).

However, even though the legislature tried to resolve the matter through the amendment, this issue is still a major cause of conflict between divorcing and divorced spouses. Nonetheless, the courts 'have made strides' in the interpretation of this difficult issue (*C v C* (GNP) (unreported case no 27836/06, 7-9-2007) (Raulinga AJ). Accordingly, as the law stands today, a pension interest is an asset of the joint estate of spouses in a marriage in community of property (the *C* case). This entails that the pension interest of a member of a fund automatically falls into the joint estate of that member and his or her spouse if they are married in community of property.

The same applies if the spouses are married out of community of property subject to the accrual system, if the pension benefits were not expressly excluded in the antenuptial contract before the marriage. This means that either spouse has a claim against the pension fund of his or her spouse on divorce. The court granting a decree of divorce is empowered to order that the non-member spouse be paid out a portion of his or her spouse's pension fund (*Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 9).

In order for the court to make such an order, the party claiming a 50% share in the other party's pension fund must indicate the name of the member spouse's pension fund clearly in the pleadings. It is important that it becomes one of the prayers sought in the pleadings, failing which the fund will not pay out.

Introduction of the clean-break principle

The clean-break principle for private sector retirement fund benefits on divorce was introduced by an amendment to the PFA, which took effect on 1 November 2008. However, the PFA does not apply holistically and most public pension funds do not fall in its ambit. As such, the clean-break amendments to the PFA did not apply to public pension funds such as the Government Employees Pension Fund (GEPF), Transnet Pension Fund, Telkom Pension Fund and Post Office Pension Fund as well as the Temporary Employees Pension Fund, Associated Institutions Pension Fund (AIPF), and the Associated Institutions Provident Fund. Most of these funds are

regulated by their own legislation (ie, the Post and Telecommunication-related Matters Act 44 of 1958 and the Government Employees Pension Law Proclamation 21 of 1996).

Section 4(1) of the PFA provides that every pension fund shall apply to the registrar for it to be registered under the PFA. Section 4A of the PFA further makes provision for those funds to which the state contributes financially to apply to be registered in terms of the PFA. Before such funds can seek registration, the Minister of Finance must first by regulation provide for a management board for the pension fund. Secondly, the Minister must consent to the pension fund making application for registration in terms of s 4.

However, s 4A (3) makes it clear that if these conditions are not met, the provisions of the PFA, shall not apply to pension funds to which the state contributes financially (*The Retired University of Natal Staff Association v The Associated Institutions Pension Fund and Another* (unreported case no PFA/KZN/27/98, 11-11-1998) at 9).

It is therefore evident that the PFA does not prohibit any pension fund from registering; it actually invites pension funds to register with it in terms of s 4. However, certain funds choose not to register, even though their specific statutes make provision for registration in terms of the PFA. For instance, s 13(1) of the Transnet Pension Fund Act 62 of 1990 provides that 'the Registrar of Pension Funds may, on request by the fund, register the fund in terms of section 4 of the Pension Funds Act, 1956, and may, for the purposes of such request, regard the Transport Pension Fund as a "pension fund organisation" as defined in section 1(1) of that Act'. After such registration the whole of the PFA shall become applicable to the fund. It is not entirely clear why pension funds regulated by their own statutes, especially public pension funds, do not register in terms of the PFA. It might be argued however, that the reason might be historical more than anything else or to serve some governmental purpose.

The clean-break principle was therefore initially restricted to funds governed by the PFA, which sparked controversy and raised constitutional concerns. The matter was brought before the Western Cape High Court in *Wiese v Government Employees Pension Fund and Others* [2011] 4 All SA 280 (WCC), where the difficulties previously experienced by non-member spouses of members of the GEFP who are married in community of property on divorce were highlighted. The GEFP law, as it was, did not give effect to the clean-break principle and it was challenged on the basis of the equal provision of the Constitution on the

ground that it did not afford non-member spouses of members of the GEFP the same advantages afforded by the PFA's clean-break principle provisions to non-member spouses of members of funds subject to the PFA. However, the court was advised that the legislature was in the process of amending the GEFP law in order to introduce, among others, the clean-break principle.

Even though the court found the challenged GEFP law provisions to be unconstitutional, it did not read the clean-break principle provisions of the PFA into the GEFP as was requested by the applicant, but instead gave the legislature 12 months to remedy the defect. This decision was then taken to the Constitutional Court for confirmation of a declaration of constitutional invalidity. However, the court held that it was not in the interests of justice to pronounce on the validity of the GEFP or the appropriate constitutional remedy on appeal because substantive cause of the complaint by the applicant had been removed by legislative intervention.

'It is high time that all public pension funds that have not yet considered having their specific legislation that do not make provision for the clean-break principle amended, to submit them to parliament for them to be amended accordingly.'

The resolution of the validity of the GEFP and the appeal after that intervention will therefore have no practical effect on the parties. The substantive issues between the parties have thus become moot (*Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC) at paras 23 and 24). The legislature then promulgated the Government Employees Pension Law Amendment Act 19 of 2011, which amended the GEFP law and s 3 of the amended Act introduced, among others, the clean-break principle to the non-member spouses of members of the GEFP who were divorcing, making it possible for them to be allocated their portion of the pension interest immediately on divorce.

However, even though the GEFP law was amended, there are some public pension funds that did not amend their own legislation by introducing the clean-break principle. The same matter arose

in *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC), in which the court was called on to address the anomaly arising from the failure to afford divorcees of members of the Post Office Retirement Fund similar rights and advantages afforded to former spouses of members of funds subject to the PFA and the Government Employees Pension Law Amendment Act. The court found the provisions of the Post Office Act dealing with the administrative and financial matters of the fund to be unconstitutional to the effect that they omitted the clean-break principle. However, the declaration of invalidity was suspended for eight months to allow the legislature to cure the defect.

The assigned portion of the pension benefit is deemed to accrue, subject to certain provisos, on the date of the divorce order. At that time, the non-member spouse can choose to be paid the assigned amount directly or to have it transferred to an approved pension fund.

Conclusion

It is high time that all public pension funds that have not yet considered having their specific legislation that do not make provision for the clean-break principle amended, to submit them to parliament for them to be amended accordingly. Expensive litigation can be avoided in this regard because the Constitutional Court has shown that if a particular statute is not in line with s 9 of the Constitution it will be declared unconstitutional and invalid.

I am of the opinion that the *Ngewu* case should not have been taken to court in the first place, if after the *Wiese* case, the Post Office Retirement Fund caused its law to be amended accordingly to follow the lead of the GEFP. The Post Office Retirement Fund did not have a case and the best they could do was to settle at the Constitutional Court. Van der Westhuizen J in the *Ngewu* case held that 'at the hearing, the legal representatives of the parties indicated that they were able to reach an agreement and submitted a proposed order to the court. This order included a suspended declaration of invalidity of the omission of the clean-break principle from the Post Office Act. In addition, an extensive reading-in of s 24A of the GEFP embodying the clean-break principle into the Post Office Act was proposed' (see para 15).

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Business valuations

By
Christiaan
Vorster

Ensuring all the valuer's ducks are in a row

An attorney often needs to liaise with or refer his or her clients to an independent valuer to determine the value of a business, whether owned by a legal entity, an individual or a partnership. This may be to assist a client wishing to sell a business to determine the value thereof, to determine value for purposes of resolving shareholders' disputes, to comply with the Companies Act 71 of 2008, for objecting to property valuations, or for a myriad other reasons.

Valuations have increasingly become a specialised field and care should be taken when appointing a valuer to ensure that he or she will be capable of defending his or her valuation if it becomes necessary to do so, whether in the course of negotiations, legal proceedings or at any other time. This increased specialisation is due mainly to technical developments that have taken place in regard to various valuation methodologies coupled with arguments that have developed around the applicability of different methodologies, the correct application of different models and the underlying assumptions

used in connection with the valuation.

Accordingly, whenever a party scrutinises a valuation, a range of areas should be probed to ensure that the value can be defended, including –

- the reason for having chosen the particular valuation methodology;
- the applicability of the methodology;
- whether the valuation model has been correctly applied;
- the quality and reliability of the information used; and
- the underlying assumptions applied in connection with the valuation.

This article elaborates on some of these aspects.

Areas that need to be probed when scrutinising a valuation

Below are brief commentaries on some of the areas that need to be probed when scrutinising a valuation.

General principles

First and foremost, the underlying principles applied by the valuer must be sound, particularly if the valuation may need to be defended. These include:

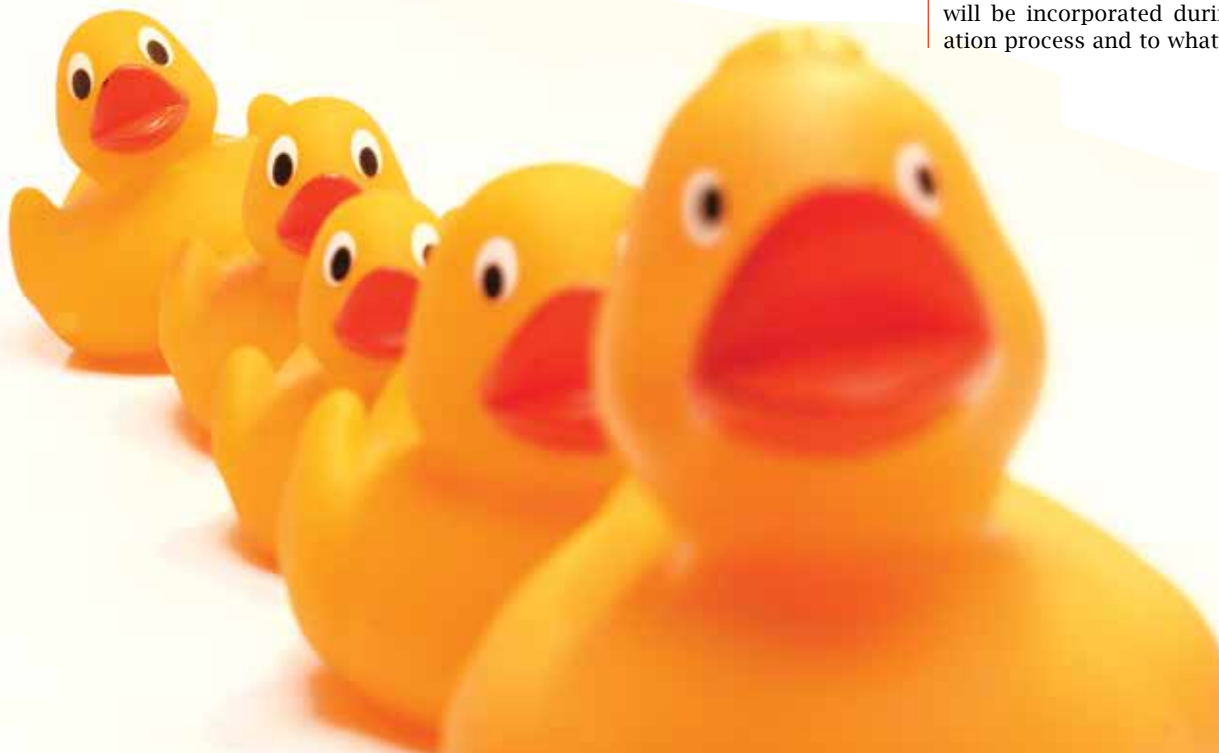
Frameworks and standards: All valuations should be based on a sound framework and an acceptable standard. For instance, the International Valuation Standard Council's international valuation framework (IVF) and valuation standards are recognised as international generally accepted standards for supporting valuations (also by various professional bodies in South Africa).

The definition of 'market value': According to the IVF, the definition of 'market value' is: 'The estimated amount for which an asset should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeable, prudently and without compulsion'.

This definition should form the basis of any valuation of market value.

Judgements and assumptions

Whatever the valuation model applied, the valuation process will entail estimates, scenarios, judgements and assumptions by the valuer. It is up to the valuer to decide how these elements will be incorporated during the valuation process and to what degree they



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will influence the value. More often than not, a financial forecast will also form part of the valuation and here too different forecasting techniques can be used. Consequently, there is scope for differences of opinion on numerous levels.

The valuer must be able to justify his or her estimations and assumptions and be able to demonstrate their influence on value under different scenarios. This will give clarity on how the valuation will change when possible differences of opinion are applied to the model or where circumstances change significantly.

Importance of information used

The information furnished to a valuer for purposes of the valuation determines the valuation methodology that will be applied and the underlying assumptions that will be made, and will show up potential areas requiring more research or additional information. The reliability of information is of critical importance.

It should be clear from the valuation itself that the valuer has applied his or her mind to the quality and applicability of the information used. In this regard, independent verification always remains an option.

Impact of different degrees of ownership on valuations

The value of an interest in a business is significantly influenced not only by the weight of the shareholding being valued but also by the actual rights that attach to the shareholding.

In theory, the more influence a shareholder has on the business, the higher the value (control premium) and vice versa (minority discount), assuming that the shareholder has the best interests of the business at heart and is a competent decision-maker.

The factors influencing a value and the degree to which those factors influence the value form part of the valuer's judgement. A clear understanding of the valuer's thought process and reasoning is thus essential when scrutinising a valuation.

Exposure to risks

Different businesses are exposed to different risks. Consequently, these risks first need to be identified and, secondly, the impact of the risks needs to be factored into the value. The principle is that the higher the risk, the higher the required return, which in turn influences the value, since a higher required return will lead to a lower value.

Risks can be categorised as systematic risks (all businesses are exposed to these risks although on different levels, eg, inflation risk, interest rate risk, foreign exchange risk, etc) or specific risks (specific to the business, eg, dependence on key management, one key customer or supplier, start-ups, etc). Technically, these risks are dealt with differently in different valuation models.

In addition, the marketability of shares in an unlisted company should be taken into account.

Again, it is in the discretion of the valuer to determine the applicability of the risks influencing value and the degree to which those risks do so. Once more, a clear understanding of the valuer's thought process and reasoning is essential when scrutinising the valuation.

Applicability of valuation methodologies

The choice of valuation model will most probably have the biggest influence on the final value determined by the valuer.

There are several theoretical valuation methodologies available to value a

business. These include Gordon's dividend growth model, market approaches, income approaches, for example, discounted cash-flow models (free-cash-flow-to-firm and free-cash-flow-to-equity models), the net asset value approach and the economic value-added (EVA) approach.

As the application of a particular model is in the discretion of the valuer, the reasons for having chosen a particular model and the applicability thereof should also be apparent from the valuation itself.

Conclusion

The calculation of the value of an interest in a business is a process in which various building blocks are used, information is analysed and different methodologies are available for application.

The credibility of a valuation ultimately lies in the ability to support the value and to be able to substantiate and verify the reasoning behind the chosen methodology and the underlying assumptions. This is, more often than not, dependent on a complete theoretical understanding of the various valuation methodologies, an ability to apply financial modelling techniques (eg, forecasting and discounting techniques), experience in incorporating assumptions, being abreast of market conditions and the ability to evaluate applicable risk factors.

To ensure that a valuation is able to withstand scrutiny, a party to the valuation must ensure that, at the very least, the matters raised in this article have been dealt with.

Christiaan Vorster CA (SA) is a business adviser at Business Growth Africa in Cape Town. 

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EQUALITY

By
Angela
Newman

Enabling the disabled

Complying with the BBBEE Act

All things being equal, the workforce should reflect the employable part of the population. Employing people with disabilities is not only the right thing to do, but is also a good thing to do, or vice versa. However, not everyone does what is right and good and so the government stepped in in the form of, *inter alia*, the Constitution, the Employment Equity Act 55 of 1998 (EE Act) and the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act).

This legislation encourages certain businesses to employ people who have disabilities and sets targets for businesses for the employment of black people with disabilities. Businesses that comply are rewarded with broad-based black economic empowerment (BBBEE) points. The more BBBEE points a business has, the higher their BBBEE rating, and the more enticing that business is as a service provider or supplier, because this in turn enables the procurer to secure more BBBEE points.

Who are persons with disabilities?

As set out in the Integrated National Disability Strategy White Paper (1997) (www.info.gov.za/whitepapers/1997/disability.htm, accessed 26-8-2013) (White Paper, 1997), which uses the definition set in the International Labour Organisation (ILO) Convention 159, a person with disabilities is: 'An individual whose prospects of securing and retaining suitable employment are substantially reduced as a result of physical or mental impairment' (ILO: No 159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention (1983), part 1, art 1, www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100INSTRUMENT_ID:312304, accessed 26-8-2013).

The overarching legislation in this regard is, however, the United Nations Convention on the Rights of Persons with Disabilities 2007 (to which South Africa is a signatory). The preamble states that: 'Recognising that disability is an evolving concept and that disability results from the interaction between persons with im-

pairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others' (www.un.org/disabilities/convention/conventionfull.shtml, accessed 26-8-2013).

The EE Act defines 'people with disabilities' as: '[P]eople who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.'

There is a range of disabilities and persons with disabilities range from moderate to severe disabilities, as well as temporary and permanent disabilities.

What is the percentage of persons with disabilities?

The White Paper (1997) states that 'there is a serious lack of reliable information about the nature and prevalence of disability in South Africa' and records the Central Statistical Service's finding that '[a] 1995 estimate puts disability prevalence in our society at 5% of the population'.

This percentage is the percentage of all people with disabilities. The Association of Persons with Disabilities in Port Elizabeth estimates the employable population of persons with disabilities (age and ability wise) to be at approximately 50%; this estimates the employable percentage to be approximately 2,5% of the population. Why then is the number of people with disabilities employed only 1,4%? (13th Commission for Employment Equity Annual Report, 2012 - 2013) (13th report).

The EE Act

In terms of ch 3, which deals with affirmative action, the EE Act states: 'Every designated employer must in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.'

One such designated group is people with disabilities and the employment equity that the EE Act aims to achieve is equitable representation in all occupational categories and levels in the workforce. Further to this, and in terms of s 54(1)(a) of the EE Act, the Minister of Labour issued, on the advice of the Employment Equity

Commission, the Code of Good Practice: Key Aspects on the Employment of People with Disabilities.

The BBBEE Act

Without considering the complexities of BBBEE but simply looking at the generic scorecard of the BBBEE Act, focusing on employment equity and skills development, the targets set to be achieved by year five and then again by year ten are notable with reference to black people with disabilities.

For employment equity in terms of the BBBEE Act, the relevant measure is black people with disabilities. To be awarded full BBBEE points for the zero-to-five-year period, the measured entity needs to have employed 2% of its total workforce as black people with disabilities. To be awarded full BBBEE points for the six-to-ten-year period, the measured entity needs to have employed 3% of its total workforce as black people with disabilities. The value of reaching these targets is two BBBEE points.

For skills development in terms of the BBBEE Act, the skills development expenditure on learning programmes, as specified for black employees with disabilities as a percentage of the leviable amount, is 0,3%. This, in effect, means that to receive maximum BBBEE points here, the measured entity must use 0,3% of its leviable amount on (so specified) learning programmes for black employees who have disabilities. The value of reaching these targets is three BBBEE points.

Putting these points into perspective, table 1 on the next page, sets out where all of the BBBEE points are allocated.

Non-compliance

In terms of enforcement of the EE Act, as set out by Ivan Israelstam, ('Why employers cannot ignore equity laws', www.labourguide.co.za/employment-equity/why-employers-cannot-ignore-equity-laws-756, accessed 26-8-2013) 'the penalties for non-compliance are extremely harsh and include a maximum fine of R 500 000'.

Failure to meet the targets/compliance of the BBBEE Act simply means that points are not achieved. BBBEE points are very valuable in the procurement

Table 1

Ownership	20 points
Management control	10 points
Employment equity	15 points
Skills development	15 points
Preferential procurement	20 points
Enterprise development	15 points
Socio-economic development	5 points

Table 2

Level	Percentage representation of people with disabilities
Top management	1,8%
Senior management	1,6%
Professionally qualified	1,6%
Skilled level	2,3%

Table 3

2002	2004	2006	2008	2010	2012
1%	0,6%	0,7%	0,7%	0,8%	1,4%

process, because the higher the BBBEE points, the more enticing a procurement partner is, as the buyer will then earn more points from doing business with it.

The effect of this legislation

The 13th report reflects on the status of employment equity in the country covering the period from 1 April 2012 to 31 March 2013. The final part of the trend analysis, s 4 following table 3 of the report, focuses specifically on the workforce profile of employees who are people with disabilities. It states the following:

'People with disabilities accounted for 86 481 or 1,4% (total disability/total workforce) of the total number of employees (6 153 334) reported by all employers in 2012.'

The levels at which persons with disabilities are employed, according to the 13th report, are shown in table 2 above.

Is this an improvement?

The 13th report shows the trends for workforce profile of people with disabilities from 2002 to 2012 for all employers (see table 3 above).

To the end of this period the effects of the above-mentioned legislation had not been felt. There has been little increase in representation of people with disabilities in the workforce. The 13th report poignantly refers to it as the 'minuscule increase of 0,4% from 1% in 2002 to 1,4%

in 2012'. It does, however, go on to say that: 'This jump in the representation of people with disabilities is very encouraging and could be very promising if we continue in the manner at which employers were able to achieve in the 2012 reporting period.'

This, however, must be viewed in light of what was stated in the 12th Commission for Employment Equity Annual Report 2011 – 2012 (12th report), and reiterated in the 13th report, being that: 'It is critical to note that Government initially set the target of 2% representation for people with disabilities in the Public Service to be reached by 2005, which was subsequently changed to 2010 and 2015 respectively because of under achievement.'

It should also be kept in mind that the targets set in the BBBEE Act (albeit for the zero-to-five-year period) is 2% of the entity's total workforce as black people with disabilities.

The way forward

The two proposals for the future of employment for people with disabilities, as contained in the 12th report, are simple and remain applicable:

- Much more has to be done to increase the representation of people with disabilities in the workforce.
- Employers should prioritise employment of people with disabilities at the level of skilled worker. As stated in the 13th report, when looking at the work-

force profile at the skilled level, the representation of workers with disabilities is 2,3%: 'Very good progress is being made at this level, which should serve as a feeder to all the other upper levels.' This must be continued.

The Labour Minister's response to the report states (here with reference to people with disability only) that: 'The report called for early interventions to capacitate people with disabilities to enter and progress in the job market. These should include recognition of prior learning, experience training, vocational rehabilitation, reasonable accommodation and any other training interventions, including learnerships' (Lloyd Ramutloa 'Oliphant laments slow pace of workplace equity' (2011), www.labour.gov.za/media-desk/media-statements/2011/oliphant-laments-slow-pace-of-workplace-equity, accessed 23-8-2013).

According to the White Paper (1997) '[o]ne of the greatest hurdles disabled people face when trying to access mainstream programmes is negative attitudes. It is these attitudes that lead to the social exclusion and marginalisation of people with disabilities'.

The proposed Employment Equity Amendment Bill (as introduced in the National Assembly (proposed s 75); explanatory summary of the Bill, GG35799/19-10-2012) contains far harsher penalties for non-compliance than those contained in the existing EE Act. As set out in the proposed sch 1, the maximum permissible fines that may be imposed for contravening certain provisions of the proposed Act – currently R 500 000 – could be as much as 'the greater of R 1 500 000 or 2% of the employer's turnover'.

The White Paper (1997) implores that 'we must stop seeing disabled people as objects of pity but as capable individuals who are contributing immensely to the development of society'. To this end it states that what is required is, *inter alia*, public education and awareness raising and it states that '[p]ublic education and awareness are central to the changing of attitudes'.

We need to train and be trained so that we are more understanding of the situation of people with disabilities, as well as how to interact with people with disabilities.

But does all of this mean that employers will do what is right and good? If they had any intention to do so, there would be no need for any of the legislation.

Angela Newman BA (Rhodes) LLB (NMMU) is a legal adviser and training officer in Port Elizabeth.



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Contextualising intellectual property

By
Robyn-Leigh
Merry
and
Muhammed
Vally

Intellectual property (IP) comprises intangible property that is the result of creativity. It is the subject of a real right and IP law is that branch of law that deals with the establishment and enforcement of these rights. This article represents an appetiser to a short series of feature articles that will demonstrate the interplay between various aspects of IP law with other disciplines of law, including the laws of taxation, estates, insolvency, employment and jurisdiction.

IP as a *genus* encompasses a number of *species* rights that are either registerable or unregistrable and are all territorial in nature (see *Gallo Africa (Ltd) and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at 15 – 17). The registerable bundle of rights includes –

- patents;
- trade marks;
- registered designs;
- plant breeders' rights;
- rights to and in cinematograph films;
- domain names; and
- applications for the aforementioned rights.

Unregistrable rights include –

- copyright;
- know-how;
- confidential information; and
- trade secrets.

Patents

A patent is a right granted in favour of an inventor or assignee of an invention, to an exclusive monopoly for a period of 20 years from the date of filing of an application for the patent with respect to the invention. A patent protects the concept of the invention in broad terms. This right is framed negatively, in that the effect of a patent is to grant to the patentee in South Africa, for the duration of the patent, the right to exclude other persons from making, using, exercising, disposing or offering to dispose of, or importing the invention so that he or she shall have and enjoy the whole profit and advantage accruing by reason of the invention.

Registered designs

Registered designs are often used in a complementary manner with patent rights, the latter protecting the idea in broad terms, while the former functions to protect the aesthetic nature of the product.

Two categories of registered designs exist in South Africa, namely aesthetic designs and functional designs. Aesthetic designs, which subsist for a period of 15 years from the date of registration, focus on protecting features of an article, whether for the pattern and/or shape and/or configuration and/or ornamentation thereof as applied to an article, and which features are judged solely by the

eye, irrespective of the aesthetic quality thereof. Functional designs, which subsist for a period of ten years from the date of registration, focus on protecting features, whether for the pattern and/or shape and/or the configuration of an article to which the design is applied, the aesthetic nature of the features which are necessitated by the function that the article to which the design is applied is to perform.

Trade marks

Trade marks relate to the branding and reputation of products and are therefore the most obvious and prominent rights associated with a product or service. These are used for the purpose of distinguishing the products or services in relation to which the mark is used, or proposed to be used, from the same kind of goods or services connected in the course of trade with any other person.

'IP as a *genus* encompasses a number of *species* rights that are either registerable or unregistrable and are all territorial in nature.'

Domain names

In the electronic era many businesses promote their products using the internet. Thus, in addition to any other existing IP rights registered with respect to the product, domain name registrations prominently feature on the list of essential IP rights that have to be secured. A domain name is a web address that allows internet users to locate and access certain web pages, such as those belonging to a company or its products. While securing a domain name registration does not secure a 'right' as such, it does secure the use of that domain name, to the exclusion of third parties, for a renewable period of time. Ultimately, businesses rely on reputations, one portal of which is accessible on the internet. The misuse of domain names, such as cybersquatting, may translate into harm for a business.

Patents, designs, domain names and trade marks may form part of a bundle of IP rights held in respect of a single product, each having determinable intrinsic promotional and monetary value. These rights are the class of registerable rights that work in concert with the class of unregistrable rights of copyright, know-how and confidential information, the collective of which represents individual staves in the IP rights bundle.

Copyright

Copyright is 'the exclusive right in relation to work embodying intellectual

content to do or to authorise others to do certain acts in relation to that work, which acts represent in the case of each type of work the manners in which that work can be exploited for personal gain or profit' (OH Dean *Handbook of South African Copyright Law* (Cape Town: Juta 2006) at 1-1). Although copyright is most commonly associated with literary works, these are not the only works protected by this right. Further, there is no requirement for creative merit in order for these rights to arise.

Know-how and confidential information

Know-how (or trade-secrets) and confidential information are probably understood most clearly in terms of industrial processes, but are not limited to such processes. Know-how comprises expertise with respect to products and/or processes of a confidential nature. Confidential information is secret information that is proprietary to the holder of such information. These rights represent a different level of IP rights that assist a company to maintain a competitive edge ahead of its competitors.

Some examples of the mentioned interplay between IP and other specialities of law include the fact that IP rights can be used as –

- a means to found or confirm jurisdiction in litigious matters;
- a form of security; or
- a trading instrument with respect to various commercial transactions.

It may also form part of deceased or insolvent estates and, in this regard, there are IP-specific provisions that deal with its devolution. There are spin-offs in the law of taxation and the need to obtain exchange control approval for certain IP transactions.

IP permeates both the commercial and the legal world and it is therefore fundamental that legal practitioners are aware of the important role that IP plays both in business as an asset, and in law in general, in terms of its net worth and the legal manipulation thereof.

Our aim is to demystify the bridge between IP rights and that of other areas of law. Its consideration within the realm of general practice is fundamental, where its establishment and/or enforcement should be carefully considered and, in some instances, may even be used to the strategic advantage of a client. In our next article, a focussed discussion of some of the mentioned examples will be presented.

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Human rights for all!

Picture source: Gallo Images/Thinkstock



By
Chiedza
Simbo

Living the dream or fighting reality?

Can the rights-based approach really tackle all forms of exclusion?

Human rights-based approaches to development put the poor at the centre of development thereby giving them opportunities to act as agencies that identify their problems. The identification process empowers the poor to challenge the structures that work to their disadvantage. With rights-based approaches,

human rights become yardsticks to formulate legal and moral arguments on how disadvantaged individuals ought to be treated. By equipping people with entitlements that they can claim, rights-based approaches divert focus from top-down approaches to development to bottom-up approaches.

With rights-based approaches, advocacy organisations have found bases to push governments to be active by assessing and monitoring situations in countries in a visible, professional and

authoritarian manner and submitting reports to organisations like the United Nations. However, the questions remain: First, can rights really tackle all forms of exclusion either socially, economically or religiously, by age, gender or otherwise? Secondly, facing under-development and poverty, especially in developing countries, do rights practically do anything for the poor?

Despite the fact that people have rights, the Constitutional Court has noted resource constraints on the govern-

ment's budget and stated that the government can only do what it can afford. In other developing countries, despite having civil and political rights on paper, there is political and religious intolerance, people are beaten, tortured and sometimes charged with serious crimes for airing their views.

Rights-based approaches seem to appear more useful in societies that promote liberal ideas, than in conservative societies where conservative cultures like paternalism weaken the impact of rights, especially for women and children. Rights also tend to resonate more with international than national ways of achieving justice. Following a rights-based approach, the international community prefers all nations to comply with international covenants and treaties, yet those demands sometimes trump reasonableness and prove too demanding on states, leading to non-compliance.

In South Africa, the Constitutional Court refused the 'minimum core standard' stated by international law, upholding the need to use reasonableness in interpreting the Constitution. What was notable was that, while international standards were useful as benchmarks of what the state should achieve, the court held that the state could not focus on compliance with international laws without giving regard to reasonableness.

Indeed, it is commendable that, owing to rights-based approaches, various issues that affect human rights are now covered by human rights discourses. Conventions like the Convention on the Rights of the Child give children entitlements, politically, economically and socially. Stating that children have a right to free education is empowering and forms bases of claim rather than a mere reliance on service-delivery by the state.

However, the problem arises when the socially excluded have 'multiple deprivations' and are often forced by the lack of resources on the part of governments, to choose the right to claim first, while the truth is: All rights are equally relevant and interdependent. Claiming rights also require the poor to have resources and to be mobilised, which is not an easy process. Deprived people often fail to see their deprivations as their mentalities adjust to their situations making constitutions futile. More so, with the overwhelming demands for socio-economic rights it is not clear whose rights should be heard first, whether it is the most deprived, who are mostly women and children, the loudest voice or international pressure.

Sad but true, rights-based approaches derive strength from the law sending messages that successful claims in court are synonymous with redress of the conditions of the poor, which is not entirely correct. In *Government of the Republic of South Africa and Others v Grootboom*

and Others 2000 (11) BCLR 1169 (CC), the Constitutional Court stated that Mrs Grootboom had a right to access to adequate housing from the government but, in fact, she died without a house. What she had was just 'access to the right' not the house itself.

Rights in theory are therefore different from rights in practice. Ratification of international laws has never led to a dramatic change in situations of poor countries but usually states merely reform their laws to meet international standards. In that case, conformity with international laws might look synonymous to development, but it is not transformation.

Also, rights-based approaches are weak in protecting the rights of migrants who do not have citizenship status as they are not often understood to be covered by a bill of rights. Young adults are usually depicted as a threat against the human rights of others and abused on such basis. Young people are executed by the police and nothing is done, even by international bodies. Poor people are misconceived to be lazy so their rights, which are often seriously protected, are only those that command sympathy, like rape and trafficking of children. It is therefore important for lawyers to realise that rights-based approaches are useful in pointing out issues that need redress but they need to be complemented by other development approaches as they do not completely solve the problems they identify.

Ways in which the rights-based theory can accommodate its criticisms

Challenging 'invisible power'

Abuse or total negation of rights is usually due to structural and relational factors that marginalise people, either economically, socially, culturally or otherwise. Embedded power relations become a source of injustice. What is needed is for development agents to challenge the power relations and not to merely focus on goals.

The 'invisible power' affects the way individuals regard their dignity and self-worth. Those who feel excluded shun from asserting their rights. What is needed is a paradigm shift that challenges 'invisible power' and the advances 'power within'. With the recognition of the problems of the balance of power, social movements have the goal to challenge the distribution and conceptions about power rather than to seize power.

This is explained by programmes that promote education, leadership development, common goals, awareness and action both politically and legally. To help governments meet their obligations, it is necessary to socially and morally em-

power the excluded so that they are confident to investigate why governments fail to deliver their legal rights and to ask governments for their future plans.

Advancing participation strategies

Issues of domestic violence and the rights of woman have shown that the law on its own cannot guarantee individual freedom. Courts, the police or the amendment of substantive law cannot do much without challenging cultural and religious inequalities. What is needed in the process of development is participation of those deprived with one of the outcomes as their empowerment. It is often noted that, due to powerlessness, woman blame themselves for their abuse, and therefore, to create change for excluded populations, participation and rights strategies need to be grounded in broad visions and processes of empowerment that is both an individual personal (private) process, collective (organisational) and political (public) process. Individuals need to be empowered to confront and solve their problems as individuals and communities. Legal education through legal aid clinics is important with a mixture of rights and participatory methods that focus on developing leadership skills, transforming personal self-esteem, influencing policy and political change.

Demanding accountability

The marginalised should be educated on how to demand accountability from those with the obligation to deliver. Depending on context people should be able to approach the government to ensure that rights are realised. Capacity building will help in educating people about complaint mechanisms, and remedies even at international level.

Conclusion

Rights-based approaches to development inform the socially excluded about their entitlements. The state is given the primary obligation to alleviate deprivations through devising methods to realise the rights of excluded people.

The state is also obliged to respect the rule of law and good governance. However, enhancing participation with the object to promote empowerment is essential for the success of rights-based approaches.

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THE LAW REPORTS

August 2013 (4) The South African Law Reports (pp 319 – 639);
[2013] 3 The All South African Law Reports July no 1 (pp 1 – 110)
and no 2 (pp 111 – 225)

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
ECP: Eastern Cape High Court, Port Elizabeth
GNP: North Gauteng High Court
GSJ: South Gauteng High Court
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Children

Caregiver with duty to support a child may be appointed its foster-parent: Section 156(1) of the Children's Act 38 of 2005 (the Act) provides, among others, that if a child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, such a child may be placed in foster care with a suitable foster-parent.

In *NM v Presiding Officer of Children's Court, Krugersdorp and Others* 2013 (4) SA 379 (GSJ) the appellant, Ms Manana, was the maternal grandmother and caregiver of three minor children whose mother, her daughter, had died. As the children's biological father was unknown, they were orphans.

The appellant was the recipient of a monthly disability grant of R 1 010, as well as a child support grant of R 750 for the three children (R 250 per child) and a R 710 foster grant for another grandchild, totalling an income of R 2 470 per month. However, her total monthly expenses were R 2 850, leaving her with a shortfall.

When she applied to the children's court to be appointed as the three children's foster-parent and receive a foster

grant, the commissioner (the first respondent) rejected the application on the basis that she was already taking care of the children and, as a result, they were not in need of care and protection.

On appeal, the High Court reversed the decision of the commissioner, holding that the children were in need of care and protection. She was appointed their foster-parent and they were declared to be entitled to a foster care grant.

Carelse J (Mathopo J concurring) held that it was trite law that grandparents, like parents, had a common-law duty of support towards their grandchildren, which position was consistent with the Constitution.

However, s 156(1) of the Act specifically provided for caregivers to become foster-parents, whether or not they owed the children a duty of support. In this matter, having regard to the fact that the children were orphans, that the appellant had applied for them to be placed in her foster care and that they had been living with her for some time and, further, that their father was unknown, it was in the children's best interest that the court should find them to be in need of care and protection. However, since the appellant did not have the financial means to support the children, the court ordered that a foster grant must be paid to her. The appeal was upheld and the decision of the children's court was set aside.

Companies

Abuse of business rescue process: In *Absa Bank Limited v Newcity Group (Pty) Ltd and Another Related Matter* [2013] 3 All SA 146 (GSJ) two conflicting applications were heard together. The first one was by the applicant, Absa Bank, for the winding-up of the respondent, Newcity. The second was lodged by the sole shareholder and only director of Newcity for it to be placed under supervision and commencement of business rescue proceedings in terms of the provisions of s 131(1) of the Companies Act 71 of 2008 (the Act).

The question before the court was whether it should grant a winding-up or a business rescue proceedings order. The court granted neither of them. The provisional winding-up order that had been granted was discharged, the court granting an order in terms of which the company had to make certain payments to the applicant bank according to a programme that would result in a full settlement of the company's indebtedness to the bank, failure of which the bank could apply for its winding-up.

On the issue of business rescue proceedings, Sutherland J held that there was considerable evidence from which to draw an inference that such proceedings were not genuine. The frank admission by the company's sole shareholder and director, Mr Cohen, that his first rescue application, which he had

withdrawn, was a ruse and that the second application, launched a day before the hearing of a final winding-up application, would be withdrawn if the provisional winding-up order was discharged, was sufficient to establish the feigned character of the invocation of the device of business rescue.

Moreover, various incidents of non-disclosure of transactions in terms of which company property was sold, as well as diversion of the company's revenue stream, also not candidly revealed, were damaging to the efforts being seen as *bona fide*. As the object of the planned business rescue was to paralyse the liquidation application, it could properly be inferred that its sole purpose was to block liquidation proceedings and that it had no objective beyond that outcome. Therefore, the business rescue application had to be branded an abuse and refused.

The court reiterated the following general principles applicable to business rescue applications, namely:

- The threshold standard for deciding that a business rescue order is appropriate is whether there is a 'reasonable prospect or reasonable possibility' of achieving a rescue through the statutory objectives stated in s 128(1)(b) of the Act. In this regard the point of departure is that it is preferable to rescue a company than to let it drift, or sometimes plummet, into extinction.
- Close scrutiny of the factual platform presented and the

rationale mounted on that platform are required in order to decide if the threshold standard has been met. The assessment has to be made on solid information presented to the court, not on conjecture.

- The risk of abuse or manipulation of the rescue application process through 'un-genuine' applications to procure an illegitimate immunity must be guarded against.

'Reasonable prospect' of business rescue is required: In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) a creditor – the second respondent, Nedbank, which also held shares in the company concerned, namely the first respondent Farm Bothasfontein – obtained summary judgment against the latter and sought to have a sale in execution. To avoid the sale, another creditor of the company – the first appellant Oakdene, together with a shareholder, the second appellant Educated Risk – applied for an order placing the company under supervision and commencing business rescue proceedings in terms of the provisions of the Companies Act 71 of 2008 (the Act).

As it was common cause that the company would not be able to continue on a solvent basis, the purpose of the business rescue proceedings was to enable the shareholders and creditors to get a better return than would be the case if a sale in execution proceeded. The business rescue proceedings were opposed by the first and second respondents.

Thereafter, Nedbank changed its stance from a sale in execution to a liquidation application, which was opposed on the ground that liquidation would be more expensive and render less return as, in business rescue proceedings, the practitioner would raise more funds in selling the property of the company than a liquidator if the company were to be wound up. In the GSJ Claassen J refused the business rescue application and granted a liquidation order. An appeal to the SCA against

the order was dismissed with costs.

Brand JA (Cachalia JA, Van der Merwe, Zondi and Meyer AJJA concurring) held that, according to s 128(1)(h) of the Act, 'rescuing the company' meant 'achieving the goals set out in the definition of business rescue.' The potential business rescue plan that s 128(1) contemplated had two goals, namely a primary goal, which was to facilitate the continued existence of the company in a state of solvency and, a secondary goal, which was provided in the alternative in the event that the achievement of the primary goal proved not to be viable, namely to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.

It followed that the achievement of any one of the two goals referred to in s 128(1) would qualify as 'business rescue'. The 'reasonable prospect' test for achieving any of the required goals was generally accepted to be a lesser requirement than the 'reasonable probability', which was the yardstick for placing a company under judicial management in terms of s 427(1) of the Companies Act 61 of 1973. However, 'reasonable prospect' required more than a mere *prima facie* case or an arguable possibility. 'Reasonable prospect' should be based on reasonable grounds. A mere speculative suggestion would not be enough.

In this matter the appellants' business rescue proposal consisted of no more than an alternative winding-up and could therefore not be sustained. Moreover, it was intended to avoid the investigative powers of the liquidator to look into transactions and circumstances under which the company had been stripped of all its income and virtually all its assets under the management of its director.

Customary marriages

Consent of first wife is required to conclude a subsequent customary marriage: In *MM v MN and Another* 2013 (4) SA 415 (CC) the ap-

pellant, Ms M, was married to a Mr Moyana in terms of Xitsonga customary law. After the death of her husband in 2009 she sought to register her marriage in terms of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act). The problem was, however, that another woman, the first respondent Ms N, also sought to register her marriage with Moyana, alleging that they were married in 2008, while the marriage between M and Moyana took place in 1984. Each woman disputed the validity of the other's marriage.

As a result M sought a High Court order declaring her marriage valid and that of N null and void as she, as the first wife, had not consented to it. The GNP granted M both orders. However, in an appeal to the SCA, the court upheld the validity of both marriages. As a result M made a further appeal to the CC for an order upholding the validity of her marriage and another declaring the marriage of N null and void. The orders sought were granted with no order as to costs.

The main judgment was delivered by Froneman, Khampepe and Skweyiya JJ (Mosenke DCJ, Cameron and Yacoob JJ concurring), while Zondo J and Jafta J (Mogeng CJ and Nkabinde J concurring) delivered dissenting judgments. The court held that Xitsonga customary law had to be developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.

The finding that the consent of the first wife was a necessary dignity-and-equality component of a further customary marriage in terms of s 3(1) of the Recognition Act meant that, from the date of judgment and its publication and distribution by the House of Traditional Leaders and the Minister for Home Affairs in a way that they deemed appropriate, further customary marriages had to comply with that consent requirement. Therefore, a subsequent customary marriage would be invalid if consent from the first wife was not obtained.

The court emphasised that its order operated prospectively to customary marriages entered into after delivery of the judgment and its publication as indicated above so as to avoid inequitable consequences for women who entered into a subsequent customary marriage without knowledge that the consent of the first wife was a requirement for the validity of that subsequent marriage.

The first wife's rights to equality and human dignity were not compatible with allowing her husband to marry another woman without her consent. The potential for infringement of the dignity and equality rights of wives in polygamous marriages was undoubtedly present. While the court had to accord customary law the respect it deserved, it could not shy away from its obligation to ensure that it developed in accordance with the normative framework of the Constitution. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.

Divorce

No further division of joint estate after finalisation of divorce and division of estate: Section 7(7) of the Divorce Act 70 of 1979 (the Act) provides, among others, that in the determination of patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets.

In *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP) the parties were married in community of property. When the marriage was dissolved by a decree of divorce the parties entered into a settlement agreement relating to division of the joint estate that dealt with movable and immovable assets but was silent on pension benefits.

After the death of the husband some years later, the wife applied for a declaratory order in terms of which she would be entitled to half

of the pension interest of the deceased in the first respondent fund, namely Fundsat-work. As it turned out, at the time of divorce the deceased was not a member of the first respondent although, when he joined it later, a transfer of pension benefits from some pension fund took place. The details of such fund and the amount transferred were not forthcoming.

Goosen J dismissed the application with costs, holding that once a joint estate had, as a matter of fact, been divided, whether by agreement or otherwise, a court could not thereafter grant an order in terms of s 7(7) of the Act. Where there was no longer a joint estate to be divided an order the effect of which was to 'deem' a pension interest to be part of the joint estate was not competent.

The court added *obiter* that it did not have to consider what the effect would be of a challenge to the terms of an agreement regarding the manner of division of a joint estate on the basis of an alleged fraud or some other cognisable legal basis for avoiding such agreement, since that was not the issue in the instant case. Nor did the court have to consider whether division of a joint estate could be revisited on the basis of the failure, for whatever reason, to include certain assets in the division that ought to have been included.

In any action or application brought on such basis the erstwhile spouse and party to the division of the joint estate would of necessity have to be joined as a necessary party. Where that party was deceased, the executor would be a necessary party. Failure to join such necessary party would be an insuperable obstacle to the grant of the relief sought.

• See also p 38 of this issue.
Redistribution order not competent where marriage is already dissolved: Section 7(3) of the Divorce Act 70 of 1979 provides, among others, that a court granting a decree of divorce in respect of a marriage out of community of property may, on application by one of the parties to the marriage and in the absence of any agree-

ment between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party. For present purposes this section should be read together with r 15(1) of the Uniform Rules of Court, which provides that no proceedings shall terminate solely by reason of the death, marriage or other change of status of any party unless the cause of such proceedings is thereby extinguished.

In *YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC) the parties were married out of community of property. Some years later the plaintiff (the wife) instituted divorce proceedings in which she sought a decree of divorce, redistribution of property in terms of s 7(3) of the Divorce Act and personal maintenance.

After *litis contestatio* was reached, but before the hearing of the matter, the husband died whereupon the plaintiff amended her papers to proceed with the claim for distribution of the assets only; the death of the husband having dissolved the marriage. The question before the court was whether her redistribution claim had been extinguished by the death of the husband.

Gangen AJ held that the claim for distribution had been extinguished by the death of the husband and dismissed the action with costs. The court held that it was not competent for a party to a divorce action to pursue a claim for ancillary relief where the marriage was already dissolved, irrespective of whether *litis contestatio* had taken place. Only a court granting a divorce order could grant ancillary relief such as the redistribution of assets.

Moreover, divorce was a personal action that came to an end automatically when one of the spouses died before a divorce order was granted. Similarly, a claim for redistribution was a personal right between the parties that only a court granting an order of divorce had a discretion to entertain having regard to other ancillary relief to be granted in terms of s 7 of the Act.

Labour law

Automatically unfair dismissal based on gender, religion and culture: Section 187(1)(f) of the Labour Relations Act 66 of 1995 (the LRA) provides, among others, that the dismissal of an employee shall be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, political opinion or culture.

In *Department of Correctional Services and Another v Police and Prisons Civil Rights Union (Popcru) and Others* [2013] 3 All SA 1 (SCA) the respondents, employees of the appellant, the Department of Correctional Services, and members of the first appellant trade union, Popcru, were dismissed from their employment for keeping and refusing to shave their dreadlocks. It was the contention of some of them that their hairstyle was kept as part of their Rastafarian religion. In the case of others, it was contended that it was part of their culture, and the Xhosa culture in particular, and that the dreadlocks would eventually be shaved, but only after observance of certain rituals.

The employer contended that the dreadlocks had to be shaved to ensure uniformity of appearance, neatness, discipline and also to reduce a security risk as they could easily be grabbed by a prison inmate in order to disarm an employee.

The Labour Court, per Cele J, held that the dismissal of the employees was automatically unfair and ordered reinstatement for those who wanted it and compensation for those who were not prepared to go back to work. It was held that there had been gender discrimination as insistence on shaving dreadlocks was confined to male employees, while their female colleagues were allowed to wear the dreadlocks.

An appeal to the Labour Appeal Court (LAC) was dis-

missed. Murphy AJA (Waglay DJP and Davis JA concurring) held that the employer had discriminated against the employees on the basis of gender, culture and religion. A further appeal to the SCA was dismissed with costs.

Maya JA (Nugent, Pillay JJA, Mbha and Plasket AJJA concurring) held that, but for their religious and cultural beliefs, the employees would not have worn dreadlocks and, but for that fact and their male gender, they would not have been dismissed.

A policy that effectively punished the practice of a religion and culture degraded and devalued the followers of that religion and culture in society. It was a palpable invasion of their dignity, which implied that their religion or culture was not worthy of protection.

Moreover, no evidence had been led to prove that the employees' hair, worn that way for many years before they were ordered to shave it, detracted in any way from the performance of their duties or rendered them vulnerable to manipulation or corruption. Therefore, it was not established that short hair, not worn in dreadlocks, was an inherent requirement of their jobs.

A policy was not justified if it restricted the practice of a religious belief – and by necessary extension, a cultural belief – that did not affect an employee's ability to perform his or her duties nor jeopardised the safety of the public or other employees or caused undue hardship to the employer in a practical sense.

No rational connection had been established between the purported purpose of the discrimination and the measure taken. Neither had it been established that the employer would suffer an unreasonable burden if it exempted the employees concerned.

Local government

Unwarranted withholding of municipal clearance certificate: In order to assist municipalities in the collection of money due to them in respect of municipal services, property rates and taxes, the



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WEALTH & LEGACY MANAGEMENT



Local Government Municipal Systems Act 32 of 2000 (the Systems Act) uses two methods. First, in terms of s 118(1), the registrar of deeds may not register the transfer of the property unless the municipality concerned certifies that all debts have been settled in respect thereof for two years preceding the date of application for the certificate.

Secondly, in terms of s 118(3), a municipality has security for payment of the debt in that it is given a 'charge' (security) on the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property. The effect of these provisions is that, in respect of the two-year period debt preceding the registration of the transfer request, the municipality has a right to decline issuing a clearance certificate; whereas for any period before that (the historical debt) the municipality has a preference claim against the mortgagee bank, but is not empowered to withhold a clearance certificate.

In *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) the appellant, the City of Tshwane, withheld a clearance certificate not only for non-payment of a debt covered by the s 118(1) two-year period but also for a prior period and, in respect of the latter historical debt period, it demanded that the transferring attorney should provide an undertaking that payment would be made at the time of registration or within 48 hours thereafter.

The respondents – Mathabathe, and the mortgagee bank, Nedbank – obtained a GNP order in which Goodey AJ held that the respondent was not allowed to demand the undertaking. The SCA dismissed the appeal against the High Court order with costs.

Ponnan JA (Majiedt JA, Erasmus, Swain and Zondi AJJA concurring) held that municipalities were obliged to collect money that became payable to them for property rates and taxes and for the provision of municipal services. They were assisted to fulfil that obligation in two ways:

First, they were given security for repayment of the debt in that it was given a charge on the property concerned (s 118(3)); and, secondly, they were in certain circumstances given the capacity to block the transfer of ownership of the property until debts had been paid (s 118(1)).

The principal elements of s 118 were accordingly a veto or embargo provision (s 118(1)) and a security provision without a time limit (s 118(3)). Section 118(3) was an independent, self-contained provision providing security amounting to a lien having the effect of a tacit statutory hypothec with no time limit placed on its duration outside of insolvency. Its effect was to create, in favour of a municipality, security for payment of the prescribed debts so that a municipality enjoyed preference over a registered mortgage bond on the proceeds of the property.

Unlike s 118(1), s 118(3) was not an embargo provision but a security provision. In the instant case the appellant municipality failed to draw that distinction and thus confused the two distinct remedies available to it. Having misconstrued the section, the appellant sought, in addition to the security that it enjoyed for the historical debt to which no limit in duration existed, the postulated understanding that payment be made within 48 hours. In that it had to fail.

• See also 2013 (Sept) DR 46.

Prevention of organised crime

Restraint order in respect of 'realisable property' and 'affected gift': Section 12 of the Prevention of Organised Crime Act 121 of 1998 (POCA) defines an 'affected gift' as, among others, any gift made by the defendant concerned not more than seven years before the fixed date, or made at any time if it was a gift of property by that defendant in connection with an offence committed by him or her or any other person. Such a gift also includes property or any part thereof that directly or indirectly represented in that defendant's hands property

received by him or her in that connection.

'Realisable property' is defined in s 14 to mean any property held by the defendant concerned and any property held by a person to whom that defendant has directly or indirectly made any affected gift.

In *National Director of Public Prosecutions v Cunningham and Others* [2013] All SA 97 (WCC) a provisional restraint order having been granted against the first respondent Cunningham (C), the issue was whether two mortgage bonds registered by him in favour of the first respondent, one D, as well as cash payment made in favour of D, were 'affected gifts' and 'realisable property'. D contended that they were not as the transactions resulted from a settlement agreement that had been made an order of court.

The settlement agreement was the result of a delictual claim that D instituted against C, the latter having committed fraud against Fidentia (F) when selling shares and a loan account to F, which sale was based on falsified financial statements and inflated the value of the shares. Thereafter C committed another fraud, this time against D and other minority shareholders by misleading them as to the total value of the shares in the company, Webworks, which he misrepresented as being R 35 million instead of the R 160 million for which the shares had been sold to F. On discovery of the price paid by F to C, D and the other minority shareholders demanded a bigger share of the R 160 million.

In terms of the agreement, the claim of D and the others was settled in the amount of R 16 million, R 13 million of which was secured by two mortgage bonds registered over C's properties, while the remaining R 3 million was paid in cash of over R 1 million and the balance in monthly instalments. C's mortgaged properties were in fact also proceeds of crime. On the return day of the provisional restraint order the issue was whether the two mortgage bonds and cash payment were 'realisable

property' and 'affected gifts' so as to make it possible for a final restraint order to be granted over them.

Henny J held that that was indeed the case and granted a final restraint order. The court held that, although as between C, D and other respondents, the settlement agreement, which had been made an order of court, was *res iudicata*, that did not mean that any realisable property that had been transferred as a result of such agreement and formed part of the proceeds of crime within the meaning of POCA was insulated from a restraint order.

The settlement agreement was between C, D and the other respondents. It did not bind a third party like the authorities and could not exclude the operation of POCA and the ability of the authorities to restrain or gain control of the realisable property if such property were either the proceeds of crime or the realisable property of C.

The property transferred in terms of the settlement agreement was the realisable property of C. Whether D or any recipient of such property or payment received it innocently was, for the purposes of POCA, not relevant. What was relevant was whether the recipient was entitled to it. Where it was shown that such property was the proceeds of crime, the transfer thereof to an innocent party could not protect it from the effect or consequences of that crime. If it was the realisable property of C, D was in terms of s 14 of POCA not entitled to it as it was an 'affected gift'.

Having regard to the wide reach and purpose of POCA, any transfer of realisable property of the defendant to any person who would also not be entitled to such property, whether willing or not, such property would be regarded as a 'gift'. Accordingly, there was transfer of property by C to D when the mortgage bonds were registered in favour of D as security for payment in terms of the settlement agreement as well as when cash payment was made, which property was a 'realisable property' and 'affected gift'.

State tenders

Inconsequential irregularities do not invalidate public contracts: The issue in *All-Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2013 (4) SA 557 (SCA) was the validity of a tender contract awarded by a public entity, the South African Social Security Agency (SASSA), being an entity in charge of payment of social grants in the country, after having invited tenders for payment of social grants.

A very important aspect of the provision of such service was indicated in the tender documents as biometric verification such as by way of fingerprint or voice identification of the beneficiary of a grant at pay point, which verification was intended to counter fraud and theft of grants as well as payment to beneficiaries who had died, this being an aspect of fraud.

Apart from assessment of tenders on written presentation it was indicated that bidders could be invited to oral presentation for clarification of their proposals. The documents required a bidder to achieve a minimum of score of 70%. After assessment of the tenders the first

appellant, AllPay, secured a score of 70,42% overall while its competitor, CPS, scored 79,79%, which scores were provisional results. The other bidders were eliminated. Both AllPay and CPS were invited to oral presentation, albeit at a somewhat short notice of one day in the case of AllPay and a few hours in the case of CPS. Thereafter the final score was given and showed that AllPay did not do well as it achieved 58%, while CPS improved to 82,44%. The reason was obvious: AllPay was not able to provide biometric verification at pay points and could only do so once a year, while CPS was able to do the required verification and was accordingly awarded the contract.

The GNP held, per Matojane J, that the tender process was illegal and invalid but declined to set aside the award of the tender to CPS. AllPay appealed against that decision, while CPS cross-appealed against the illegality and invalidity decision of the High Court. The SCA dismissed the appeal and upheld the cross-appeal, both with costs.

Nugent JA (Ponnan, Theron, Petse JJA and Southwood AJA concurring) held that there would be few cases in which flaws in the process of public

procurement (state tenders) could not be found, particularly where the process was scrutinised intensely with the objective of doing so.

However, a fair process did not demand perfection and not every flaw was fatal. It would be gravely prejudicial to the public interest if the law were to invalidate public contracts for inconsequential irregularities. An act was not irregular for the purposes of law simply because one chose to call it that. An irregularity that led to invalidity was one that was in conflict with the law. If it was in conflict with the law it would not be able to produce a legally valid result.

Other cases

Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with appointment of a legal representative for a minor child in divorce proceedings; collective agreement in labour law; concurrent jurisdiction of the High Court and the Labour Court; contempt of magistrates' court order to be enforced by magistrates' court; conversion of winding-up proceedings into business rescue proceedings; deferment of implementation of sections of the Consumer Protection Act 68 of 2008;

dispute of fact; failure to convert old order mining right into new order mining right; guarantee and counter-guarantee contract; holding over on termination of lease; *huur gaat voor koop* rule; irrevocable standby letter of credit; liquidation and distribution account for company in winding-up; non-joinder of necessary party to proceedings; notice to consumer in terms of s 129 of the National Credit Act 34 of 2005; proceedings by liquidator for company in winding-up; prohibition of financial assistance in connection with acquisition of shares; reinstatement of registration of a company or close corporation; relief from oppressive or unfairly prejudicial act or omission; remedies for infringement of patent right; requirements for final sequestration; right of shareholder to enforce articles of association; stay of application for striking off of attorney from the roll; town-planning and zoning scheme; unconstitutionality of entry, search and inspection in terms of the Customs and Excise Act 91 of 1964 and zero-rated supplies in terms of the Value-Added Tax Act 89 of 1991.



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NEW LEGISLATION

Legislation published during the period
22 July 2013 – 16 August 2013

* Items marked with an asterisk will be discussed later in the column.

BILLS INTRODUCED

National Environmental Management: Protected Areas Amendment Bill B28 of 2013.

National Environmental Management Laws Amendment Bill B26 of 2013.

National Environmental Management: Air Quality Amendment Bill B27 of 2013. Constitution Nineteenth Amendment Bill (Private Member Bill) PMB7 of 2013.

South African Post Office Soc Ltd Amendment Bill B24 of 2013.

South African Postbank Limited Amendment Bill B25 of 2013.

Constitution Eighteenth Amendment Bill (Private Member Bill) PMB6 of 2013.

COMMENCEMENT OF ACTS

General Intelligence Laws Amendment Act 11 of 2013. *Commencement date:* To be proclaimed. Proc32 GG36714/29-7-2013.

***Superior Courts Act 10 of 2013.** *Commencement date:* 23 August 2013; except ss 29, 37 and 45 and item 11 of sch 1 insofar as it repeals s 16 of the Constitutional Court Complementary Act 13 of 1995. Proc R36 GG36774/22-8-2013.

• See also p 14 of this issue.

PROMULGATION OF ACTS

Appropriation Act 9 of 2013. *Commencement date:* 22 July 2013. GN526 GG36692/22-7-2013.

Co-operatives Amendment Act 6 of 2013. *Commencement date:* To be proclaimed. GN558 GG36729/5-8-2013.

Criminal Procedure Amendment Act 8 of 2013. *Commencement date:* 10 September 2010. GN525 GG36691/22-7-2013.

Dangerous Weapons Act 15 of 2013. *Commencement date:* To be proclaimed. GN531 GG36704/24-7-2013.

General Intelligence Laws Amendment Act 11 of 2013. *Commencement date:* To be proclaimed. GN528 GG36695/23-7-2013.

Local Government: Municipal Demarcation Act 27 of 1998

Re-determination of outer boundaries of municipalities. GenN805 GG36732/8-8-2013.

National Environmental Management

Laws Amendment Act 14 of 2013. *Commencement date:* To be proclaimed. GN530 GG36703/24-7-2013.

National Health Amendment Act 12 of 2013. *Commencement date:* To be proclaimed. GN529 GG36702/24-7-2013.

Prevention of Combating of Trafficking in Persons Act 7 of 2013. *Commencement date:* To be proclaimed. GN544 GG36715/29-7-2013.

Prevention of Combating and Torture of Persons Act 13 of 2013. *Commencement date:* 29 July 2013. GN545 GG36716/29-7-2013.

Spatial Planning and Land Use Management Act 16 of 2013. *Commencement date:* To be proclaimed. GN559 GG36730/5-8-2013.

***Superior Courts Act 10 of 2013.** *Commencement date:* 23 August 2013 (see above). GN615 GG36743/12-8-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Civil Aviation Act 13 of 2009

Amendment of the Civil Aviation Regulations, 2011. GN R532 – GN R535 GG36712/30-7-2013.

Credit Rating Services Act 24 of 2012 Applications for registration as credit rating agency, international code of conduct, fit and proper requirements, requirements for approval of a compliance unite, reporting obligations, prescribed fees, annual reports, administrative penalties and related matters. BN164 – BN171 GG36720/2-8-2013.

Health Professions Act 56 of 1974 Health Professions Council of South Africa: Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications. BN163 GG36707/2-8-2013.

Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001

Alteration of the area of jurisdiction of the North West High, Mahikeng and Northern Cape High Court, Kimberley. GN547 GG36718/31-7-2013.

International Trade Administration Act 71 of 2002

Export control guidelines on the exportation of ferrous and non-ferrous waste and scrap. GN R543 GG36708/2-8-2013.

Magistrates' Courts Act 32 of 1944

Amendment of areas of jurisdiction of certain regional divisions. GN548 GG36718/31-7-2013.

Merchant Shipping Act 57 of 1951

Merchant shipping regulations, 2013. GN R510 and GN R511 GG36688/23-7-2013.

Natural Scientific Professions Act 27 of 2003

Fields of practice. GenN802 GG36724/8-8-2013.

Project and Construction Management Professions Act 84 of 2000

South African Council for the Project and Construction Management Professions: Fees for construction health and safety managers and officers. BN172 GG36741/13-8-2013.

Road Accident Fund 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN148 GG36682/26-7-2013.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Atteridgeville. GN540 GG36707/2-8-2013.

Establishment of a small claims court for the area of Kimberley. GN541 GG36707/2-8-2013.

South African Schools Act 84 of 1996

National norms and standards for school funding (NNSSF). GenN792 GG36719/2-8-2013.

DRAFT LEGISLATION

Proposed amendments to the Strate rules in terms of the Financial Markets Act 19 of 2012. BN147 GG36682/26-7-2013.

Proposed amendments to the Johannesburg Stock Exchange (JSE) equities rules in terms of the Financial Markets Act 19 of 2012. BN150 GG36682/26-7-2013.

Draft biodiversity management plan for *Gypaetus Barbatus Meridionalis* in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN763 GG36697/26-7-2013.

Proposed 2014 draft guideline for services and processes for estimating fees for persons registered in terms of the Engineering Profession Act 46 of 2000. BN157 GG36707/2-8-2013.

Draft Agricultural Research Amendment

Bill, 2013. GenN770 GG36707/2-8-2013. Proposed amendments to the regulations relating to the grading, packing and marking of tomatoes intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GN R536 GG36708/2-8-2013. Draft bitstream and shared/full access regulations in terms of the Electronic Communications Act 36 of 2005. GenN768 GG36705/7-8-2013.

Proposed amendments to the JSE listing requirements. BN173 GG36736/16-8-2013. Draft Agricultural Product Standards Amendment Bill, 2013. GenN810 GG36736/16-8-2013. Draft regulations for the registration of professional hunters, hunting outfitters and trainers in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN809 GG36743/12-8-2013 and GenN846 GG36744/13-8-2013.

Proposed regulations to phase-out the use of polychlorinated biphenyls (PCB) materials and PCB-contaminated materials in terms of the National Environmental Management Act 107 of 1998. GenN849 GG36749/15-8-2013. Proposed regulations regarding the phasing-out and management of ozone-depleting substances in terms of the National Environmental Management: Air Quality Act 93 of 2004. GenN850 GG36750/15-8-2013.

Selected aspects of the Superior Courts Act

The Superior Courts Act 10 of 2013 was published in GN615 GG36743/12-8-2013. This Act came in to operation on 23 August 2013, with the exception of ss 29, 37 and 45 and item 11 of sch 1 insofar as it repeals s 16 of the Constitutional Court Complementary Act 13 of 1995.

What is a superior court? (s 1)

Superior court means the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court.

Objectives of the Superior Courts Act (s 2)

The Superior Courts Act has the following objectives –

- to consolidate and rationalise the laws pertaining to Superior Courts as contemplated in item 16(6) of sch 6 to the Constitution;
- to bring the structure of the superior courts in line with the provisions of ch 8 and the transformation imperatives of the Constitution; and
- to make provision for the administration of the judicial functions of all courts, including governance issues, over which the Chief Justice exercises responsibility.

Constitutional Court (ss 4 and 12)

The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges. The seat of the Constitutional Court is in

Johannesburg, but if it appears to the Chief Justice that it is expedient or in the interest of justice to hold its sitting at a place elsewhere than Johannesburg, it may hold such sitting elsewhere. Any matter before the Constitutional Court must be heard by at least eight judges.

Supreme Court of Appeal (ss 5 and 13)

The Supreme Court of Appeal consists of the President of the Supreme Court of Appeal, the Deputy President of the Supreme Court of Appeal and as many judges as may be determined in accordance with the prescribed criteria, and approved by the President. The seat of the Supreme Court of Appeal is in Bloemfontein, but if it appears to the President of the Supreme Court of Appeal that it is expedient or in the interest of justice to hold its sitting at a place elsewhere than Bloemfontein, it may hold such sitting elsewhere.

Proceedings of the Supreme Court of Appeal must ordinarily be presided over by five judges, but the President of the Supreme Court of Appeal may direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges; or whenever it appears to him or her that any matter should in view of its importance be heard before a court consisting of a larger number of judges, direct that the matter be heard before a court consisting of as many judges as he or she may determine.

High Court of South Africa (ss 6 and 14)

The High Court of South Africa has several divisions. They are:

- Eastern Cape Division, with its main seat in Grahamstown.
- Free State Division, with its main seat in Bloemfontein.
- Gauteng Division, with its main seat in Pretoria.
- KwaZulu-Natal Division, with its main seat in Pietermaritzburg.
- Limpopo Division, with its main seat in Polokwane.
- Mpumalanga Division, with its main seat in Nelspruit.
- Northern Cape Division, with its main seat in Kimberley.
- North-West Division, with its main seat in Mahikeng.
- Western Cape Division, with its main seat in Cape Town.

Each division consists of a Judge President and one or more Deputy Judge Presidents, each with specified headquarters within the area under the jurisdiction of that division. Furthermore, each division consists of so many judges as may be determined in accordance with the prescribed criteria, and approved by the President.

A court of a division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge Pres-

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ident and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.

A single judge of a division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter that is being heard before him or her and refer it for hearing to the full court of that division.

For the hearing of any criminal case as a court of first instance, a court of a division must be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.

Except where it is in terms of any law required or permitted to be otherwise constituted, a court of a division must be constituted before two judges for the hearing of any civil or criminal appeal: Provided that the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may in the event of the judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third judge be added to hear that appeal.

Jurisdiction of a division of the High Court of South Africa (s 6)

The Minister of Justice must, after consultation with the Judicial Service Commission, determine, by notice in the *Government Gazette*, the area under the jurisdiction of a division; and may in the same manner amend or withdraw such a notice. The area under the jurisdiction of a division may comprise any part of one or more provinces.

The Minister may also, in the same manner, establish one or more local seats of a division in additions to the main seats. However, such notice published in the *Government Gazette* will not affect any proceedings that are pending at the time of publication of such notice.

If a division has one or more local seats, the main seat has

concurrent appeal jurisdiction over the jurisdiction of any local seat of that division. The Judge President of the division may direct that an appeal against a decision of a single judge or of a magistrates' court within that area of jurisdiction may be heard at the main seat of that division. Furthermore, the Judge President of the division must compile a single court roll for a division and he or she may assign all the judges of that division within the division as he or she deems fit.

When it appears to the Judge President of a division that it is expedient or in the interest of justice to hold its sitting at a place elsewhere than at the seat or local seat of a division, it may hold such sitting elsewhere.

Circuit courts (s 7)

A Judge President of a division may, by notice in the *Government Gazette*, within the area under the jurisdiction of that division, establish circuit districts for the adjudication of civil or criminal law matters, and may by notice alter the boundaries of any such district.

A court must be held in each circuit district of a division at least twice a year. A judge of a division must preside over such circuit court of the division in question.

Access to courts, recess periods and attendance of courts

All superior courts must be open to the public every business day and may perform the functions of a court on any Saturday, Sunday or public holiday as may be required from time to time.

Superior courts may have recess periods as may be determined by the Chief Justice in consultation with the heads of court and the Minister of Justice in order to enable judges to do research and to attend to outstanding or prospective judicial functions. During recess periods an adequate number of judges must be available in a court to deal with any judicial functions that be may be required, in the interest of justice to be dealt with.



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Employment law update



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Independent contractors v employees

In *Kambule v Commission for Conciliation, Mediation and Arbitration and Others* [2013] 7 BLLR 682 (LC), the applicant referred an unfair dismissal dispute after his services as a radio presenter were terminated by the third respondent, Kaya FM 95.9. The Commission for Conciliation, Mediation and Arbitration (CCMA) found that Kambule had failed to prove that he was an employee of the station and accordingly dismissed the matter.

Kambule then took the matter on review to the Labour Court where Lagrange J was required to determine whether Kambule was an employee or an independent contractor. Lagrange J found that the ruling on a person's employment status is a jurisdictional question and as such, if a party takes the ruling on review, it can be set aside on the grounds that the ruling was wrong as opposed to applying the normal review test, namely that it was a ruling that a reasonable arbitrator could not make.

Kambule was engaged as a radio personality in terms of an 18-month contract. The contract was terminated after there had been concerns by management about the manner in which Kambule handled certain political issues on the show. In this regard, the respondent had issued Kambule with a letter stating that he was required to handle political issues more 'even-handedly'. The letter stated expressly that, had Kambule been an employee, the letter would have been tantamount to a final warning but, given the fact that Kambule was a contractor, the letter served to put him on terms and record that a further material breach of the same or similar nature could result in the termination or non-renewal of the contract.

Kambule raised no objection to being referred to as an independent contractor in the letter and instead responded by requesting that the concerns in the letter be formally withdrawn. He also refused to handle political issues more even-handedly in the future. His contract was accordingly terminated. The respondent

argued that the letter was issued to Kambule not because of his failure to obey instructions, but rather because he had exceeded the boundaries in exercising his discretion over the content of the show.

In considering the terms of the contract, the court noted that certain terms were indicative of an employment relationship:

- The contract made reference to a 'total cost to company salary' paid monthly as consideration for Kambule's services.
- It suggested that the station would develop a relationship with the applicant for up to five years with annual 'salary reviews'.
- The station reserved the right to deduct employee taxes and other applicable statutory deductions from the amounts paid to Kambule.
- However, in the event that the respondent was exempt from making deductions in respect of tax then the tax liability would fall on Kambule.
- The station also undertook to reimburse Kambule for all expenses, disbursements and costs incurred in discharging his duties and he was further entitled, but not obliged, to join the station's medical aid scheme at his own expense.

There were, however, other terms that weighed against the finding of an employment relationship. For example, the contract expressly stated that Kambule was self-employed and was not an employee of the station and would not represent himself as being an employee. He was also entitled to pursue other lawful business interests at the same time, provided that he did not perform work for direct competitors of the radio station.

Lagrange J found that one cannot determine whether an individual is an employee or not simply by considering the number of factors determinative of an employment relationship and comparing them with those factors that are against the existence of an employment relationship. Instead, the test is qualitative rather than quantitative and some factors may suggest a lot more about the substance of the relationship than others and thus more weight should be attached to such

factors. A critical element when determining whether an individual is an employee is the extent to which the individual is economically independent from the employer. In addition, the extent of the employer's supervision and control over the individual as well as whether the individual is integrated into the employer's organisation are important.

Kambule argued that he was under the supervision and control of the station in that he had fixed working hours, was required to ask permission to take time off broadcasting, the content of his show was vetoed by the station and he had been disciplined by the station about the content of his show. He also pointed out that he was subject to a restraint in terms of which he was restrained from performing work for other radio stations in southern Africa and any other businesses competing with the station. He pointed out that he was provided with a workstation as well as broadcasting equipment and technical support for the production of the program, and also business cards and branded clothing.

Kambule had furthermore entered into an arrangement with the station where, in exchange for advertising, he was provided with free accommodation and use of a Cadillac. He alleged that these benefits constituted company benefits. He further alleged that he worked exclusively for the station and was totally economically dependent on it.

The respondent's case, on the other hand, was that Kambule was not under its supervision and control. Although the respondent had the right to veto the content of the show, this was to ensure that the applicant did not exceed the bounds of his mandate in the contract. Furthermore, any changes to the content of the show would be made in conjunction with Kambule and thus he was not subject to direct orders from the respondent insofar as the content was concerned.

In addition, Kambule was the sole member of a close corporation that submitted invoices to the respondent for the services that he rendered. These invoices contained value-added tax and the applicant had declared to the South African Revenue Service that the close corporation did not receive more than 80% of its income from the station. The close corporation also employed three other people who assisted in developing the content for the show but were not paid by the station. Furthermore, Kambule was free to do as he wished outside the broadcasting hours, save for being available to attend a few meetings and functions at the station for marketing purposes.

Lagrange J found that, while Kambule was an integral part of the programme team, he was free to pursue his interests independently and was not required to be entirely economically dependent on the respondent. The fact that he had

chosen not to pursue other commercial activities was not because he was prohibited from doing so. As regards the fact that Kambule had to work fixed hours determined by the respondent, the court found that this was the nature of live programming and the hours spent on preparation for the programme were instead under Kambule's own control.

Kambule furthermore exercised considerable discretion over the content and manner of the programme subject only to broad parameters and the regulatory constraints of broadcasting. Any fundamental changes were done in conjunction with him and the request to tone

down the manner in which he handled political issues was not because of the radio station's right to supervise and control him, but rather because he was not acting within the constraints of his brief. Thus, Lagrange J found that Kambule was not under the supervision and control of the respondent.

The court then considered the fact that invoices in respect of Kambule's services were submitted in the name of the close corporation and found that this was indicative of an independent contractor arrangement. The fact that the station provided technical infrastructure and assistance to enable the applicant to con-

duct the show was furthermore understandable given the nature of the work. As regards the business cards and branded clothing, the court held that this was to enable Kambule to market himself and the show and was not a factor indicative of an employment relationship.

The court therefore concluded that Kambule was an independent contractor as he had brought his services to the station and not his creative and commercial capacity. Furthermore, he had the right to pursue other work at the same time.

In the circumstances, the review application was dismissed and no order was made as to costs.



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Challenging trade union's right to represent its member at arbitration based on its own constitution

NUM obo Mabote v Commission for Conciliation, Mediation and Arbitration and Others (LC) (unreported case no C1010/12, 21-6-2013) (Steenkamp J).

The third respondent, Kalahari Country Club (Kalahari) dismissed Mabote who, in turn, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). At arbitration Mabote was represented by an official from the trade union, the National Union of Mineworkers (NUM).

Kalahari challenged the *locus standi* of the NUM official on the following grounds:

- In terms of NUM's constitution, clause 1.3 states that the union will operate in the mining, energy, construction and allied industries. Clause 2.1 states that membership is open for employees working within the above-mentioned industries. Further to this, its constitution defines mining, energy, construction and allied industries as industries engaged in mining, extracting, processing or refining minerals, including those workplaces, services and operations that are ancillary or incidental to the mining industry.
- Kalahari forms part of the hospitality industry in that it operates as a restaurant and bar.
- As NUM's constitution does not include in its scope the hospitality industry, it does not have the necessary *locus standi*

to represent those employed in such an industry, more particularly Mabote in this matter.

At the proceedings Kalahari's constitution was also presented and it recorded the following:

- 'Kalahari Country Club' is defined as 'the Kalahari Country Club of Sishen Iron Ore Mine'.
- The chairman of the club is the general manager of Sishen Iron Ore Mine.
- Sishen Iron Ore Mine's aim with regard to Kalahari is for the latter to provide, among other services, an environment that is conducive to promote health and good relationships outside the workplace.

In his award the arbitrator accepted that NUM does not operate in, nor was a part of the hospitality industry that Kalahari fell within and as such, lacked the necessary *locus standi* to represent Mabote at the proceedings.

On review, NUM argued that the arbitrator exceeded his powers by enquiring into the scope of the union.

The court considered s 4(1)(b) of the Labour Relations Act 66 of 1995, under the heading 'Employees' right to freedom of association' that states:

'(1) Every *employee* has the right - (a) to participate in forming a *trade union* or federation of *trade unions*; and (b) to join a *trade union*, **subject to its constitution** (my bold text).

The court went on to examine CCMA r 25 dealing with representation at the CCMA and s 200 of the LRA.

The relevant portion of r 25 (1)(b)(iii) reads: 'In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by: ... (iii) any *member*, *office bearer* or official of that party's registered *trade union* or a registered *employers' organisation*.'

Section 200 reads: 'Representation of employees or employers - (1) A registered *trade union* or registered *employers' organisation* may act in any one or more of the following capacities in any *dispute* to which any of its members is a party - (a) in its own interest; (b) on behalf of any of its members; (c) in the interest of any of its members.'

(2) A registered *trade union* or a registered *employers' organisation* is entitled to be a party to any proceedings in terms of *this Act* if one or more of its members is a party to those proceedings.'

With regard to s 4(1)(b) and with specific reference to the phrase 'subject to its constitution' the court held that such a restriction could only have been intended to speak to the trade union's prerogative to allow an employee membership into the union and not to be interpreted as a third party denying an employee the right to be represented by a trade union based on the union's own constitution.

Continuing on this point Steenkamp J held the following: 'The NUM constitution makes it clear that eligibility for membership is "subject to the approval of the branch committee which has jurisdiction". It is up to the union and its branch committee to deal with any challenge to membership. It is not for an employer to interfere with the internal decisions of a trade union as to whom to allow to become a member.'

The court further held: 'A purposive approach to the interpretation of the LRA is mandated by section 1, read with section 3(a) of the LRA. The Labour Appeal Court has emphasised the link between the purposes of the Act and section 23 of the Constitution, adding that if the LRA is to achieve its constitutional goals, courts have to be vigilant to safeguard those employees who are particularly vulnerable to exploitation. In holding that the employee could not be represented by the NUM, the commissioner exceeded his powers. The employee was entitled to be represented by an official of the NUM, his registered trade union, in terms of CCMA rule 25(1)(b)(iii).'

The ruling was set aside and substituted with a finding that Mabote was entitled to be represented by a NUM official. The matter was remitted to the CCMA to appoint another commissioner to hear the merits of the dispute.

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

By
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Recent articles and research

ABBREVIATIONS:

EL: *Employment Law* (LexisNexis)

ITR: *Income Tax Reporter* (Juta)

PLD: *Property Law Digest* (LexisNexis)

TSAR: *Tydskrif vir die Suid-Afrikaanse Reg* (Juta)

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