

## USE OF INTERNET BASED TECHNOLOGIES IN LEGAL PRACTICE

The role of the *mediator*:  
Umpire or interrogator?

Does a non-member spouse have a claim  
on pension interest?



Running through the maze of tax –  
consequences for corporate restructuring

Effective supervision  
in your legal practice

The transformation debate:  
LSSA to host summit on  
briefing patterns

Trustees: Do these **seven**  
things diligently

## 2015 AGM NEWS



**ENSafrica** | in Africa | for Africa



5



7



9



18



20



30



34



36



38

## Regular columns

Editorial 3

Letters to the editor 4

### AGM news

- KwaZulu-Natal Law Society AGM: Legal Practice Act at the core of deliberations 5
- BLA AGM: Black lawyers can handle complex matters 6
- Justice Minister focuses on transformation at Cape Law Society AGM 8
- South Africa and the ICC: Stay or go? 9
- Background to the ICC Al-Bashir issue 10
- Other CLS AGM news 11
- LSNP AGM: A time to reflect on radical transformation 12
- ProBono.Org promotes pro bono services 14

### News

- The Tax Ombud and the 2014/2015 annual report 15
- National Schools Moot Court competition 16
- Admission examination dates for 2016 16
- Lawyers as peacemakers conference 17
- NADEL holds gender transformation dialogue session in Gauteng 18

### LSSA news

- The transformation debate: LSSA to host summit on briefing patterns 22

People and practices 24

### Practice management

- Effective supervision in your legal practice 26

### Practice note

- Trustees: Do these seven things diligently 28

Book announcement 39

The law reports 40

### Case note

- Subdivision end of the road? Options to purchase subdivision of agricultural land 46
- Considerations for the quantification of damages awards 47

New legislation 49

Employment law update 50

Recent articles and research 52



## FEATURES

### 30 Use of internet based technologies in legal practice

When making use of Internet-based technologies in legal practice, lawyers should exercise due diligence before utilising a third-party service provider for purposes of storing or processing confidential information offsite. In addition, a written agreement should be concluded that requires the service provider to establish and maintain measures that ensure the security of any personal information stored by the service provider as well as the protection and integrity of any confidential or privileged client information. This guideline, written by the **Law Society of South Africa's E-Law Committee** has been compiled to provide background information and to serve as a tool to assist attorneys in South Africa.

### 34 Running through the maze of tax consequences for corporate restructuring

Attorneys are often requested to assist with corporate restructures. A multitude of considerations then arise, specifically those linked to company law and one further important consideration is the tax consequences of the proposed transaction, which is, quite often, not the first consideration on the list of matters that needs to be dealt with. In this article, **Albertus Marais**, writes that the mistake that is often made – and to clients' detriment – is that the tax consequences of a corporate restructure are regarded as being inevitable and that these cannot be mitigated. This, however, is not the case.

### 36 The role of the mediator: Umpire or interrogator?

Mediation has been a valuable tool for several years in the resolution of disputes in the family law and commercial law arenas. The court system is now following this trend, and the magistrates' court rules have recently been supplemented with mediation rules, beginning with r 74. For now, mediation only exists as a pilot project at certain courts, but if all goes well it will soon be rolled out across the country. This article, written by **Michael Crystal** and **Shelly Mackay-Davidson** explores the role of the mediator in mediation proceedings.

### 38 Does a non-member spouse have a claim on pension interest?

The emanating question is whether a pension interest automatically forms part of the spouse's estate or whether it must be claimed by the non-member spouse during divorce? Conflicting judgments on this issue suggest that the courts struggle with the interpretation and application of the relevant statutory provisions. **Merike Pienaar** briefly engages with some of these judgments in the article and propose a way forward for the interpretation of the provisions.

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# Outward retrospection

**A**s we wrap up 2015, this is the opportune time to take stock of the year that has past and look at issues, topics and events that were at the forefront of the legal profession.

Without a doubt, the enactment and partial implementation of the Legal Practice Act 28 of 2014 (LPA), in September 2014, has been one of the most important events for practitioners in 2015. The LPA was once again a prevalent topic at the annual general meetings (AGM) of the KwaZulu-Natal Law Society (KZNLS), Cape Law Society (CLS), Black Lawyers Association (BLA) and the Law Society of the Northern Provinces (see AGM news section in this issue).

By now practitioners should be aware of the developments that have been brought about by the LPA, namely the formation of the National Forum (NF). The NF is a transitional body, which will be in existence for a period not exceeding three years and will deliberate on issues that may arise once the LPA is looked at in detail by those who form the body. Incoming President of the BLA and NF member, Lutendo Sigogo, aptly described the function of the NF by saying that the NF 'is a midwife trying to give birth' to the Legal Practice Council (see 'BLA AGM: Black lawyers can handle complex matters' in this issue).

So far the progress made by NF is by forming committees that will focus on various issues pertaining to the LPA and delivering the first report to the Minister of Justice, Michael Masutha. In his address at the CLS conference, Minister Masutha said that the profession needed to focus on two aspects, namely:

- The regulation of the fee structure in the profession to bring an element

of fairness and improve accessibility. 'The idea is not to starve lawyers, but to make sure that the cost of litigation, which makes the profession inaccessible to the majority of people, is corrected,' he said.

- The need to regulate and regularise the paralegal profession to ensure its sustainability, given its critical contribution and role in access to justice (see 'Justice Minister focuses on transformation at Cape Law Society AGM' in this issue).

Attorneys should note that the main function of the Legal Practice Council, during the LPA dispensation, will be to focus on regulation and on matters of public interest. This then leaves a lacuna in the sense that there would not be a body that will focus on matters of interest to the profession. The solution to this lacuna was discussed at length at all the above AGMs. Co-chairperson of the Law Society of South Africa, Richard Scott, spoke about the solution at the KZNLS AGM. He said: 'The LPC will not protect the interest of the profession; it will rather protect the interest of the public. It was resolved that practitioners should form a voluntary body that will uphold the rule of law and protect legal practitioners. This body must be based on constitutional democracy. There is no doubt that practitioners need such a body' (see KwaZulu-Natal Law Society AGM: Legal Practice Act at the core of deliberations' in this issue).

Other trending topics that were highlighted during the AGMs included, transformation, briefing patterns, s 35 of the LPA (which deals with fees) and South Africa's position regarding the International Criminal Court.



Mapula Thebe - Editor

The *De Rebus* Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year. *De Rebus* will be back in 2016 with its combined January/February edition, which will be sent out at the beginning of February.

## 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](mailto: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](http://www.derebus.org.za)).

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# LETTERS

## TO THE EDITOR

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

### Muslim marriage order *S v S* explained

In 2015 (May) *DR 40* 'Muslim marriages and divorces' refers to *S v S* (GJ) (unreported case no 2014/05928, 26-9-2014). The case was enrolled as an unopposed divorce matter and was heard by me in my capacity as an acting judge of this court.

The report states that my order stated that 'the marriage is dissolved' after a decree of divorce was sought incorporating the terms of a settlement agreement, in a case involving a marriage according to Islamic rites. The parties had never concluded a civil marriage. The writer concludes that the 'court obviously recognised that a marriage between the parties did in fact exist' and 'this judgment seems to infer ... that these types of ... marriages should be recognised.' It goes on to say that this judgment has far reaching implications and 'is clearly yet another step to formally recognise Muslim marriages, and bring them in line with the South African Constitution.' It suggests that the order may afford protection to those members of the Muslim community who are financially prejudiced by being unable to share in their spouse's estates.

The purpose of this letter is to clarify what is in fact a mistake that arose in the transcription of the order given in court on 26 September 2014. The conclusions that are drawn in this article are, therefore, incorrect. *De Rebus* is requested to publish this letter so as to prevent reliance by future litigants on this order, when seeking relief in cases involving

the dissolution of marriages entered into according to Islamic rites.

The litigants were granted an order dissolving their universal partnership. The order incorporated the terms of a settlement agreement entered into between them, but expressly excluded a clause thereof where the plaintiff undertook to approach the court in order to obtain a divorce. This was recorded on the file cover. The order, therefore, expressly avoided providing any relief in relation to the dissolution of the marriage by Islamic rites.

The words 'the marriage is dissolved' were then inserted in the first paragraph of the typed order as a result of a typing error. When this came to my attention the order was amended by an order in terms of r 42(1)(b) of the Uniform Rules of Court, and these words were removed from the order. The order given in court did not dissolve an Islamic marriage and does not serve as a precedent for such relief in the High Court.

**Angela Andrews**, attorney,  
Cape Town

### Response from the author

The respective legal counsel were only informed by Judge Zeenat Carelse on Monday 14 September 2015, that the judgment was the result of a typing error and was thus being recalled. This was some time after the article had been published.

**Megan Harrington-Johnson**,  
attorney, Johannesburg

### The briefing of counsel

I was, yet again, alarmed to have read in the press the prominently posted reports of the row, which has erupted in the ongoing class certification hearing in Silicosis and Tuberculosis case about the paucity of black counsel briefed in this hearing and of the divisions it has caused among members of the profession.

I appreciate that, given our history, the previously disadvantaged attorneys and advocates of whom they and their forbears, were severely prejudiced in being able to practice in Apartheid South Africa, and of their concern at the slow progress of transformation of the profession. I do not wish to debate the issue, nor do I wish to comment on the choice of counsel briefed in this particular matter. However, I wish to state my views, which are mine and mine alone.

My first and most prominent consideration in any matter entrusted to me in which counsel has to be briefed, is that it is my legal duty in executing my client's mandate, to secure as best as I am able, the best possible result for my client. Thus my choice of counsel is based solely on an advocate with whom I can work and in whom I have the confidence and knowledge that he or she is competent to execute the mandate and who will be properly prepared to achieve as far as possible the desired result irrespective of the race, creed, and gender of the advocate concerned.

Although I make no apology for the view expressed above, I will be most interested to hear the views of my colleagues.

**Leslie Kobrin**, attorney,  
Johannesburg



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# KwaZulu-Natal Law Society AGM: Legal Practice Act at the core of deliberations

**T**he KwaZulu-Natal Law Society held its annual general meeting (AGM) on 16 October in Durban.

The keynote address was delivered by nine times Comrades Marathon winner, Bruce Fordyce. Opening his address, Mr Fordyce said that society works because people put in hard work, long hours and dedication. He equated running a marathon with running a law firm by saying that firms compete in the same space with those that have the same genetics to work hard. 'You have to work twice as hard to beat the other law firms. Running Comrades is a tough sport that takes a lot of hours. I would not have won, if it was not for the support of my team. Sometimes I play the role of a leader, and at times I am a member of a team. Rely on your team to get you to the finish line. Being a leader is hard, people are envious of your success, the money you make, the car you drive, but they do not see what comes with it. You have to deliver and produce results. The key thing with success is to persevere, even when everyone else says it cannot be done. I never gave up even though it looked like I should. Lastly, remember you do not always have to be number one to win,' he said.

## Library matters

Thembinkosi Ngcobo, from the Law Society Library, gave a brief presentation about the national library services. He said that the library is a national library that serves all attorneys in the country as a research resource. The library facilitates easy access to the latest up to date legal information especially for sole practices, small law firms and historically disadvantaged members. To access the library visit: [www.lawlibrary.co.za](http://www.lawlibrary.co.za).

## Legal Practice Act matters

Member of the National Forum, Jan Stemmet, made a presentation on the Legal Practice Act 28 of 2014 (LPA). He said the main provision of the LPA is to establish a unified legal profession. He added that attorneys should understand the implications of the LPA, which are –

- the legal profession will no longer regulate itself;
- there will be no law society accountable to members, instead there will be a regulatory authority accountable to the Minister of Justice;
- Bar councils will be stripped of training, examination and disciplinary functions;



*Co-chairperson of the Law Society of South Africa, Richard Scott, spoke on the need for a voluntary body in the Legal Practice Act dispensation.*

- the Legal Practice Council (LPC) will emphasise on regulation and on matters of public interest.

Mr Stemmet said that during the LPA dispensation, advocates will be able to elect to accept briefs directly from the public, provided they have trust accounts. 'Chapter 5 provides for an Ombud for Legal Services. Attorneys should take note of s 35, which deals with fees and states that tariffs are to be prescribed in regulations. The Act also makes provision for mandatory continued practice development and mandatory community service. The new funding regime of the Legal Practice Council will mean that practitioners will pay higher levies,' he added.

Speaking about access to the profession Mr Stemmet said that the LPA calls for –

- uniform admission requirements for attorneys and advocates;
- minimum remuneration for candidate attorneys and pupils;
- uniform registration with LPC;
- easy conversion between the attorneys' and advocates' professions; and
- recognition of foreign qualifications and admission of foreign legal practitioners.

## Law Society of South Africa matters

Co-chairperson of the Law Society of South Africa (LSSA), Richard Scott, highlighted aspects of the 2015 Co-chairpersons' Mid-term Report (the full report is available at [www.LSSA.org.za](http://www.LSSA.org.za)). Opening

his address he said that the National Forum has done tremendous amount of work thus far. 'The working committees of the National Forum have been linked up with committees within the LSSA to ensure that the work of the forum continues even when the forum is not meeting. We have been a self-regulating profession, but that is set to change with the advent of the LPA. The LPA will not protect the interest of the profession; it will rather protect the interest of the public. It was resolved that practitioners should form a voluntary body that will uphold the rule of law and protect legal practitioners. This body must be based on constitutional democracy. There is no doubt that practitioners need such a body. Representatives on the envisaged body will represent attorneys and maintain their mandate from their members, the council of the body will be accountable to its members. Legal practitioners need such a body so that they are seen to be speaking with one voice. Some of the objectives of the body will be to conduct training for legal practitioners, promote access to the profession, conduct all necessary research for the profession, publish a journal, represent and lobby for the profession. Membership of the envisaged body will comprise of practicing and non-practicing attorneys, advocates, candidate attorneys and pupils. In terms of funding, the body can be funded through legal practitioners paying fees towards the body, the Attorneys Fidelity Fund could also fund the body. Elections for council members can be by way of "one person one vote", with an electoral process to ensure compliance with the rules. Undoubtedly legal practitioners need the support of a body that will fulfil a trade union function,' he said.

## Attorneys Fidelity Fund matters

Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa gave an address on the workings of the fund during the year. Giving a brief background of the AFF she said, the AFF is a creature of statute set up to protect members of the public. Adding that its primary objective is to ensure that no member of the public is left out of pocket as a result of misappropriation of trust funds and/or negligent or other conduct arising out of the implementation of client mandates by any attorney in the country. 'The Fund's income, however, is and will always remain the interest rates, which are set by the Reserve

Bank. Because of the low interest rate regime that has been in existence for quite a while worldwide, the traditional income of the fund has in fact shrunk significantly. However, because of the prudent manner in which the Fund Trustees and management have exercised their fiduciary duties, the Fund has nevertheless grown by 5,1% in 2014 and has base assets valued at R 4 229 837 913,' she said.

Speaking about capping of claims, Ms Khanyile-Kheswa said that the AFF is liable for all initial claims paid up to a figure of R 150 million in any insurance year whereupon any excess up to R 475 million is re-insured and to be settled by the insurers. 'It is against this backdrop that the debate regarding capping of claims has to be contextualised with concrete facts, scrutinised in all their dimensions from the perspective of the interest of members of the public in the social strata on one hand, for whom the fund exists, and practitioners in their various categories and layers in their practices on the other. The necessary legislation is now in place but as we move towards the implementation of the Legal Practice Act caution must be exercised that with the capping of claims, the poorest of the poor are not left even worse off through capping,' she said.

Ms Khanyile-Kheswa said that in 2015 the AFF has paid claims amounting to R 80 424 100. 'Various means and activities, as part of the Fund's strategy going forward to assist in halting this kind of behavior are being implemented in line with the new regulatory dispensation,' she said.

Speaking on monthly trust collection, Ms Khanyile-Kheswa said that in terms of reg 8(1), attorneys are under obligation to pay monthly trust interest. 'The provincial law societies are urged to continuously encourage members to pay over trust interest monthly to enable the Fund to aggregate interest inflows at an early stage to improve the Funds investment returns. The Fund has enlisted

cooperation of the four major banks in successfully implementing the system of automated monthly transfer of trust interest and as soon as the provincial law societies succeed in adapting their information technology infrastructures to cope efficiently with the increase in the volume of transactions, the present blanket exemption afforded by the Fund to practitioners will be withdrawn. Notice to this effect has already been furnished and it is envisaged that this system will better address the collection of interest, efficiencies as well as cash flows not only for the Fund but the societies as well,' she said.

Ms Khanyile-Kheswa noted that fraud syndicates have come up with ways to defraud practitioners of monies in their trust accounts by holding themselves out to be representing the AFF. 'These Fraud Syndicates send out communication on what is supposed to be the Fidelity Fund's letterhead that they fraudulently generate to practitioners directing them to effect payments to a preferred account thereby fleecing practitioners. ... Members of the profession are once more advised to be always watchful and cautious,' she said.

### Attorneys Insurance Indemnity Fund matters

General Manager at the Attorneys Insurance Indemnity Fund (AIIF), Thomas Harban, spoke on the changes to the AIIF Master Policy. He said:

'We have written to the respective provincial law society councils giving some background to the reasons for the changes to the Master Policy and also seeking guidance from these bodies (as the regulators and representatives of the profession) on the appropriate form of communication with the profession. ... The new policy wording will be implemented with effect from 1 July 2016.

The AIIF issues one Master Policy annually applicable to all practising attorneys. The policy was first introduced in

1993. In the intervening period, there have been some amendments to the policy wording from time to time, but this is the first major reworking of the policy wording. In redrafting the Master Policy, our aims included:

- Modernising the wording and rewriting it in plain language.
- Redrafting contentious clauses as phrased in the current wording in order to better articulate our intention and thus avoid interpretational disputes.
- The enhancement of the policy as a risk management tool.

The new wording sets out, *inter alia*:

- What the policy covers.
- The rights and obligations of the parties to the insurance relationship.
- What is excluded from the cover.
- The limits of indemnity and deductibles.
- How disputes will be dealt with.
- The applicable limits of indemnity and deductibles.'

### Attorneys Development Fund matters

Manager of the Attorneys Development Fund (ADF), Mackenzie Mukansi, said that attorneys should look out for a comprehensive report that will be contained in the Annual Report to be tabled at the ADF's AGM to be held on 26 November. Speaking on debtors management, Mr Mukansi said that the 'ADF continues to be owed huge sums of money and our credibility and swift resolve on defaulters will help salvage the importance of our mandate and position of the ADF within the profession. Collecting from defaulting attorneys will assist in managing out our most single risk, non-payment. Sadly, we are in the process of handing over the bad debts for collection.'

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## BLA AGM: Black lawyers can handle complex matters

**T**he Black Lawyers Association (BLA) held a two day annual general meeting (AGM) and conference from 23 - 24 October in Johannesburg. Issues discussed at the elective 38th conference included, transformation, briefing patterns and the Legal Practice Act 28 of 2014 (LPA).

Opening proceedings, on the first day of the conference, immediate past Presi-

dent of the BLA and Co-chairperson of the Law Society of South Africa (LSSA), Busani Mabunda, said that practitioners should be aware of the unfolding developments that are flowing from the provisions of the LPA. One such development, he mentioned, was the National Forum (NF). He said that this was an opportunity for legal practitioners to brainstorm and come up with ideas on how certain mandates, the NF are charged with, should be handled. 'The ultimate

consumer of whatever the NF agrees on is practitioners, this will have a bearing and effect on practitioners,' he said.

### Unpacking the LPA from a NF perspective

Incoming President of the BLA and member of the NF, Lutendo Sigogo, gave an address on the overview of the LPA from a NF perspective. Mr Sigogo stressed that the Legal Practice Council (LPC), in





***Outgoing President of the Black Lawyers Association and Co-chairperson of the Law Society of South Africa, Busani Mabunda, welcoming delegates to the 38th elective conference.***

the LPA dispensation, will not be equivalent or perform the same duties as the LSSA. 'The Legal Practice Council will not entertain our interests. The council will not only have legal practitioners, the minister will have a representative in the council; as well as, law deans, a representative from Legal Aid South Africa and the Attorneys Fidelity Fund,' he added.

In terms of the changes brought about by the LPA, Mr Sigogo said that currently the Rules Board has set fee regulations for litigious work. However, the LPA, in terms of s 35(1), empowers the Rules Board – for the time being while the South African Law Reform Commission conducts its investigation on fees (s 35(4)) – to come up with rules for litigious work and non-litigious work. 'If this happens it will affect legal practitioners as lawyers' prices will be capped. Also, practitioners will have to let their clients know that they have a right to a discount on the fee, this must appear on the agreement letter. Another thing to note is that section 35(11) provides that if a client lodges a dispute on the fee with the LPC, the person does not have to pay the fee until the dispute is resolved,' he said.

Commenting on the Council members that will form part of the LPC, Mr Sigogo stressed the need for the Council to correctly reflect the demographics of the country in terms of gender and race. 'Women make approximately 51% of the country's demographics, so this means that the Council of the LPC should have more women than men,' he said.

Mr Sigogo said that the LPA does not make provision for the protection of legal practitioners. 'If we do not have a body such as the LSSA all the rights and privileges we enjoy will be taken away. The LSSA participates in commenting on Bills brought about by government,

if we do not have that forum, this will be taken away. As the LPC stands, attorneys will have the same relationship as taxpayers and the tax collector. We will be forced to pay subscriptions towards the council, but in actual fact we will not be its members. For example, the LSSA can propose amendments to Acts; the LPC will not be bothered by such. Even if the LPC proposes amendments to Acts, where will it get its mandate from? Essentially the LPC will be a body of 21 people who will think for us, decide issues about us while doing all this without us,' he said.

He added that the LPC does not have to hold AGMs and, therefore, practitioners will not have a vehicle to discuss issues of interest to them. 'The solution is to establish a voluntary body, irrespective of name, that will be open to all legal practitioners and must be independent. The body can be funded by members, through subscriptions. Currently the LSSA is subsidised by the Attorneys Fi-



***Incoming President of the Black Lawyers Association and member of the National Forum, Lutendo Sigogo, addressing delegates on the overview of the Legal Practice Act from the perspective of the National Forum.***

delity Fund, in future this subsidy will not be guaranteed. The formation of the voluntary body will not come cheap if it is not subsidised,' he said.

Speaking about the role of the NF, Mr Sigogo said that the NF 'is a midwife trying to give birth to the LPC'. He said that the LPA does not spell out the issue of handing over of the current duties of the law societies to the LPC. According to Mr Sigogo, the LPC should have a meeting with the NF before it is dissolved. 'Perhaps for a period of a month the LSSA, provincial law societies, NF and LPC should co-exist to ensure a smooth transition,' he added.

## **Gala dinner**

On the evening of 23 October, the BLA held a gala dinner, among the dignitaries who attended the occasion were Judge President of both the South and North

Gauteng Division of the High Court, Dunstan Mlambo, Judge President of the Limpopo High Court, Mampuru Makgoba, as well as the Tax Ombud, Judge Bernard Ngoepe, and other members of the judiciary.

The BLA's international associate, the National Bar Association (NBA), representative, Leroy Wilson, was the keynote speaker for the evening. Mr Wilson opened his address by saying that the history of the three decade long relationship between the NBA and the BLA can be read on the BLA's website ([www.blaonline.org.za](http://www.blaonline.org.za)).

Speaking about the remarks made by Richard Spoor, an attorney, Mr Wilson said that Mr Spoor compared briefing black advocates as charity. 'Mr Spoor implied that there is a certain amount of sophistication that black lawyers cannot handle. Black lawyers are not inferior to white lawyers,' he said.

## **BLA's rightful place**

On the second day of the proceedings, Judge President Mlambo delivered the keynote address. He reminded the BLA that it should take its rightful place in the national discourse about issues that focus on the country. 'The BLA has a massive responsibility to ensure that the ideas that come before the organisation remain on track. The organisation has a role to play in the transformation agenda of South Africa. ... I see a dominance of white male lawyers in the courts ever since I took over as Judge President and this remains a continuing trend. I see the same trend at the Supreme Court of Appeal. In the past five years, I remember only two black lawyers who came before me. ... Black lawyers are usually given "look down work" such as judicare work and criminal matters,' he said.

Speaking about the global position of South Africa, Judge President Mlambo



***Judge President Dunstan Mlambo reminded the Black Lawyers Association to take its rightful place in society.***

said that the country has a Constitution that is hailed worldwide as the best, he then asked why Apartheid trends continue to define the country? Why is the country still the same? 'The preamble of the constitution of the BLA sets out its objectives and what the BLA stands for. The BLA is a critical voice in the transformation of the legal society. It is time to take off your suits and wear overalls and tackle the trend that is happening. We rely too much on the goodwill of those who control the capital to bring about change for the better. Have legal consumers, corporates and government, told the BLA why they are not briefing black lawyers,' he asked.

'When asked about their briefing patterns, corporates might site the principle of free choice and state that they have freedom to choose who they want to brief. Deputy Chief Justice Moseneke spelled it out in his Pitje Memorial Lecture, the fight that was started by GM Pitje and others, many years ago, is far

from over. There are still prevalent stereotypes of black lawyers that imply that black lawyers are inadequate and not worthy of attention. Black people still have barriers to conduct their work. Black people are called historically disadvantaged individuals; part of the problem is that we allow these tags. We are South Africans,' Judge President Mlambo reminded delegates.

Speaking about the future of the BLA, Judge President Mlambo said: 'As you continue to go on to 39 years, it is about time that these AGMs are a true transformation portal and do not become circuses. Your mission should be taken serious. All of us have a duty to ensure that young people realise their dreams. Someone said the BLA is no longer relevant. ... The BLA is here to address mediocrity. Do not believe what they say when they say that a black person cannot decipher complex matters. We have proof in this country and other jurisdiction that indeed black lawyers can

handle complex matters. The BLA should lead by example in this regard, and ignore, with contempt, these perceptions,' he concluded.

## Executive Committee

The two-day conference ended with the election of the new National Executive Committee. The following are the newly elected National Executive Committee members –

- Lutendo Sigogo (President);
- Mashudu Kutama (Deputy President);
- Baitseng Rangata (General Secretary);
- Zanele Nkosi (Deputy General Secretary);
- Lulama Lobi (Treasurer);
- Mongezi Mpahlwa (Additional Member); and
- Vuyo Morobane (Additional Member).

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# Justice Minister focuses on transformation at Cape Law Society AGM

Justice Minister, advocate Michael Masutha, was the keynote speaker at the Cape Law Society annual general meeting (AGM) in Kimberley on 30 October, and he deviated from his written address to deal with the debate around skewed briefing patterns that had dominated the media during the month (see also LSSA news of this issue). He noted: 'Going forward, when I appear as litigant in court proceedings, I shall be represented by black female lawyers who are available and capable of doing so.' He added: 'I believe that white females are still experiencing gender stereotypes and prejudices that marginalise them, and significant social exclusion in various fields of human endeavour, including in this profession. We need to address the challenge of discrimination as it presents itself, whether that be race or gender.'

The Minister questioned whether, in attempting to transform the judiciary as a priority, the pool of transformation candidates with the requisite experience had been depleted in the profession. This was a particular problem in the advocates' profession, but the attorneys' profession was not excluded. He cited the example of only five black female silks at the Bar, and said the situation called for 'extraordinary measures'.

He called on the profession to partner with the Department: 'I seek your advice and support in rekindling the momentum and restoring the drive and push in the attainment of transformation in our profession.'

Referring to the role of the state as the biggest consumer of legal services with a litigation account running into billions of rands annually, Minister Masutha said a decision had been taken to further amend the State Attorney Act 56 of 1957 to give the incumbent of the office of the Solicitor-General sufficient authority to champion the desired transformation. 'Often government comes with progressive policies that suit every element of the National Development Plan, but the devil lies in its implementation. I have since commissioned the Department to prepare the desired policy and a comprehensive plan for its implementation,' he said. He added that this issue would be discussed at a colloquium later this year. The Minister undertook to engage with the legal profession regarding the colloquium.

As regards the Legal Practice Act 28 of 2014, Minister Masutha indicated that he had received the first report from and interacted with the leadership of the National Forum on the Legal Profession, which had come into effect in February (see 2015 (Nov) DR 16). He emphasised the need to focus on two aspects:

- The regulation of the fee structure in the profession to bring an element of fairness and improve accessibility. 'The idea is not to starve lawyers, but to make sure that the cost of litigation, which makes the profession inaccessible to the majority of people, is corrected,' he said.
- The need to regulate and regularise the paralegal profession to ensure its sus-

tainability, given its critical contribution and role in access to justice.

The Minister also referred to a number of reforms being considered to the criminal justice system and the focus on the place of the victim in the overall justice system. 'Not enough attention has been given to the way in which the chain of our criminal justice system was designed to function. To what extent does the police ensure that victims of crime play an effective role and are given due consideration in investigating crime? To what extent does the prosecuting authority ensure that victims are kept informed and given the necessary support as their matter progresses through the criminal justice process? To what extent does correctional services, upon committal of an offender to serve with a correctional facility, ensure that as we implement corrective focus, the circumstances of the victim are taken into account, and not 20 years down the line when consideration for parole comes up and they start looking for the victim?' The Minister noted: 'I believe that we are at a point when we need to reflect whether the criminal justice system still enjoys the full confidence of our people. That the system is capable of delivering justice. Because if we do not ensure public confidence in the system, one of the undesirable outcomes is for people to resort to other forms of attaining justice outside the system. And we will end up penalising the victims of crime and letting the perpetrators off the hook.'

## South Africa and the ICC: Stay or go?

Attorneys William Booth and Egon Oswald, as well as attorney and member of the African National Congress (ANC) Legal Research Group, Krish Naidoo, debated the thorny issue of South Africa's position *vis-à-vis* the International Criminal Court (ICC) and our country's commitments made in terms of the Rome Statute and its domestication through the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, particularly as these relate to the debacle earlier this year with the presence of Sudanese President Omar Al-Bashir for the African Union (AU) Summit in Johannesburg. The session was facilitated by Cape Law Society (CLS) president, Ashraf Mahomed.

Mr Booth decried the fact that the profession did not get involved in the *Al-Bashir* matter but left it to a non-governmental organisation (NGO), the Southern African Litigation Centre, to challenge government's position in the Gauteng Division. He noted that President Al-Bashir had not yet been found guilty by the ICC, but that warrants for his arrest pursuant to investigations had been issued and that South Africa was obligated to honour these, as was found by the Gauteng Division: Pretoria, in June this year. As regards the debates around withdrawing from the Rome Statute, he said: 'You do not solve a problem by withdrawing. You try to sort out the problem.' He reminded attorneys that there is a role for them in representing the victims of crimes against humanity before the ICC. 'As lawyers, we have a duty to the people and children of Africa,' he stressed.

Mr Oswald said that with regard to the obligation to prosecute, it is clear that there is a moral and legal imperative to do so. He said as South Africans we talk a

lot, but we are not always good at implementation. However, Mr Oswald said the ICC was one example that went contrary to that. He noted that South Africa had been seminal in setting up the ICC. He noted: 'In those days we walked the walk and talked the talk. Then human rights was big on our agenda as a nation.' In considering how it reflect on us internationally if our government were to withdraw from the ICC, Mr Oswald said: 'It reflects on us poorly. I think it is a shame. We should all be embarrassed about it. I would urge the ANC to reconsider. It is gratifying to hear that the fighting talk has alleviated to some extent and there is talk of reconstituting some aspects of the ICC and how it runs. This is a good message.'

After giving the background to the establishment of the ICC and to explain the ANC's view that the ICC needs to reconstruct and reconstitute itself, Mr Naidoo pointed out two ambiguities: The first is the perceived conflict between arts 27 and 98 in the Rome Statute. He noted: 'On the one hand art 27 takes away all immunity attaching to Heads of State and other government officials such as foreign ministers and diplomats. Article 98, on the other, provides that courts cannot proceed with a request for surrender, which will require the requested State to act inconsistently with its international obligations. The African Union pointed out this contradiction to the ICC. Our government also referred to this ambiguity in relation to the court proceedings in the Gauteng High Court.'

Mr Naidoo added that the United States (US) has been able to exploit the loophole in art 98(2) to protect its service members stationed in different parts of the world. After the Rome Statute came into

operation, the US passed a law which allowed it to withdraw military assistance from a number of non-North Atlantic Treaty Organisation (NATO) states and only restore this aid after those states signed bilateral immunity agreements with the US in terms of art 98(2) that they would not hand over any US national to the ICC without US consent.

This law also empowered the US President to use military force to free American soldiers held by the ICC.

The second ambiguity, according to Mr Naidoo, arises from the dichotomy between peace and justice in the Rome Statute. He explained that the primary objective of the Rome Statute was to maintain peace and security. Article 53 gives the ICC the discretion to make decisions 'in the interest of justice'. 'Some commentators link this phrase to the article dealing with the preservation of peace. In other words, they maintain that in order to close the impunity gap, the ICC can decide to waive the investigation of certain situations if it would be in the interest of justice to do so,' he explained.

Mr Naidoo noted that former South African President, Thabo Mbeki, had set in motion an irreversible peace process in Sudan. By June, when the application to surrender President Al-Bashir was heard in the High Court, Sudan was divided into two states - Sudan and South Sudan. 'If the objective of the Rome Statute is to preserve peace, one could hypothetically ask whether the peace in Sudan was so fragile in June 2015 that the justice element in the peace/justice dichotomy prevailed and warranted the arrest of Al-Bashir for the sake of humanity,' he said.

Mr Naidoo stressed that the inconsistency of member states and the way the ICC functions has also contributed to its loss of legitimacy. Among a number



Attorneys William Booth and Egon Oswald, as well as attorney and member of the African National Congress Krish Naidoo discussing the International Criminal Court and the recent calls for South Africa to withdraw from the Rome Statute at the Cape Law Society annual general meeting in Kimberley at the end of October.



of examples he cited the atrocities perpetrated in Gaza in 2014 as being one ICC situation that required minimal effort to investigate, but which the ICC had not moved on. 'In each case, politics trumped human rights,' he said.

Mr Naidoo explained that the South African government was of the view that the ICC acted in bad faith in the Al-Bashir saga. 'Our government has stated publicly that on 28 May 2015 the ICC invited South Africa to hold consultations with it regarding the execution of the warrant of arrest. South Africa accepted the invitation to consult with the ICC in terms of art 97 and hoped for a constructive discussion on the difficulties experienced in executing the warrant of arrest. The first meeting between South Africa and the ICC took place on 12 June 2015 and a second meeting was scheduled for 15 June 2015. The ICC sought an earlier meeting and that was arranged for Sunday, 14 June 2015. However, late on Saturday night, that is, 13 June, the ICC Prosecutor made an urgent application to the ICC in the following terms: "Prosecutor's Urgent Request for an Order clarifying whether Article 97 consultations with South Africa have concluded and that South Africa is under an obligation to immediately arrest and surrender Omar Al-Bashir".'

Mr Naidoo said the prosecutor made the urgent request to the ICC without giving any notice whatsoever to South Africa. The ICC heard the matter immediately and decided that the art 97 consultations with South Africa had ended and that South Africa was under an obligation to arrest and surrender President Al-Bashir.

'Politics will always be part of the ICC's functioning. Moreover, the interplay between perception and reality is very narrow. It becomes even more pronounced when one is dealing with political actors who guard their state sovereignty jealously. The ICC lost its way when it failed to manage the collision between law and politics thereby allowing perceptions to reinforce the view that it was established and functions for purposes other than the primary purpose of preserving international peace, justice and security,' said Mr Naidoo.

He stressed: 'The ANC has no intention to detract from the country's prioritisation of human rights. In fact, by withdrawing, South Africa would be holding up a mirror to the ICC to give it an opportunity to confront its shortcomings.'

Mr Naidoo listed steps that the ANC believes would restore the legitimacy of the ICC and afford South Africa an op-

portunity to reconsider its decision to withdraw:

- The ambiguities in the Rome Statute need to be removed and the opportunity for some states to blatantly use the ICC for political purposes must end.
- A transparent and objective regulatory framework should be introduced to determine the criteria for the referral of cases for investigation, the ranking of crimes and the establishment of gravity thresholds acceptable to all member states.
- The wide discretion given to the ICC prosecutor should be curtailed.
- The ICC should make a conscious effort to get all states to accept and ratify the Rome Statute.
- Permanent members of the United Nations Security Council, many of whom are not members of the ICC, should either join the ICC or not have the power to refer cases to the ICC for investigation.
- Certainty should be given to the relationship between the functioning and legal framework of the ICC and legal concepts such as customary international law, the immunity of Heads of State, what legal duties are owed to party states and the legal position of non-states *vis-à-vis* the ICC.

## Background to the ICC Al-Bashir issue

**K**rish Naidoo gave the background relating to the International Criminal Court (ICC), the non-arrest of President Al-Bashir and the issue of immunity:

South Africa signed and ratified the Rome Statute in July 1998 and subsequently domesticated the obligations in the Rome Statute into South African law by passing the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

The ICC acts in a complementary relationship with domestic states that are party to the Rome Statute. The principle of complementarity ensures that the ICC operates as a buttress in support of the criminal justice systems of States Parties at a national level and as part of a broader system of international criminal justice.

In terms of the Rome Statute, State Parties are legally obliged to comply with the court such as arresting and transferring indicted persons or providing access to evidence or witnesses. It is only where a State Party is unwilling or unable to investigate and prosecute international crimes committed by its nationals or on its

territory, that the ICC is then seized with jurisdiction.

From inception, the ICC was dogged by the challenge of universal jurisdiction. Major countries such as the United States (US), Russia, China and India did not ratify the Rome Statute and join the ICC. The Peoples Republic of China opposed the ICC on the basis that it goes against the sovereignty of nation-states and the court may be open to political influence. India objected to the broad definition given to crimes against humanity. The US did not trust the neutrality of the Party States to deal with its nationals in a fair manner.

When the ICC was established, many commentators were of the view that the Palestine/Israeli situation could present a major challenge. This scenario is fast becoming a reality after the ICC admitted the Palestinian Authority as a member in April this year. So contentious is the situation that the US and Israel not only challenged the ICC for admitting a non-State member, but the US went further and threatened that it would withdraw its financial support for the Palestinian Authority – estimated to be \$ 400 million per annum – if Palestine instituted war crime allegations against Israel.

The Al-Bashir situation is just as contentious. Before the Gauteng Division, Pretoria ruling in June this year, there were seven cases of non-cooperation by African States to arrest President Al-Bashir.

On 4 March 2009 the ICC issued a warrant of arrest for Omar Al-Bashir for war crimes and crimes against humanity. In the same month the Organisation of Islamic Conference labelled the ICC's pursuit of Al-Bashir as 'void and lacking sound reasoning' and suggested that the ICC activities were a threat to the sovereignty, independence and territorial integrity of Sudan.

On 3 July 2009 the African Union (AU) put forward a proposal that all member states should withdraw from the ICC or refuse to co-operate on the Al-Bashir indictment.

On 12 July 2010 the ICC issued a second warrant for Al-Bashir's arrest for genocide.

At the ICC's First Review Conference in 2010, Malawi, speaking in its capacity as the Chair of the AU, stated that in terms of art 98(1) of the Rome Statute, the indictment of Heads of State could jeopardise Africa's co-operation with the ICC. In 2012, the

AU stated publicly that art 98(1) of the Rome Statute provided immunity to Al-Bashir.

These decisions placed African states in the unenviable position of having to choose between their obligations as member states of the AU, on the one hand, and their obligations as States Party to the Rome Statute on the other. It also raised a number of critical questions about the direction of international law and international law-making from both a normative and an institutional perspective.

From an institutional perspective the decision raised questions about

the relationship between the AU and the UN, the relationship between the AU and its member states *vis-à-vis* broader international issues, and the relationship between international organisations and their African member states *vis-à-vis* AU decisions.

From a normative perspective the decision raised questions about the reality of a new value-based international law centred on the protection of humanity and human rights and whether such a new international law could escape accusations of neo-imperialism.

The AU position also raised questions about the respective roles of peace and

justice. It forced us to confront the question of whether the ICC's pursuit of Al-Bashir threatened the peace process in Sudan. The AU requested the UN Security Council to defer the Al-Bashir indictment for 12 months so as not to undermine the delicate peace process in Sudan and to combat impunity.

In considering why Malawi did not arrest Al-Bashir, the ICC decided that the issue of President Al-Bashir's immunity was separate from Malawi's failure to arrest and surrender President Al-Bashir. The ICC ducked the issue of immunity.

## Minimum salary of R 3 000 agreed for Cape candidate attorneys, unless agreement for less

Attorneys attending the Cape Law Society AGM voted in favour of minimum remuneration for candidate attorneys in terms of the following motion:

'That candidate attorneys be paid a minimum remuneration of R 3 000 per month or such lesser amount as may be agreed between the parties and approved by Council prior to the registration of the contract of articles. Any contravention of this resolution may be regarded as bringing the profession into disrepute and a contravention of CLS r 14.3.14 (new uniform r 40.10).'

In posing the motion, CLS council member and chairperson of its Candidate Attorney Committee, David Geard, noted that candidate attorneys were not always treated as professionals and were often abused by being used as messengers, to attend court for postponements and were, at times, subject to sexual harassment. He noted that, on conducting a survey, the committee had found great disparities in the salaries of candidate attorneys. At the larger, national firms, first-year candidate attorneys were paid between R 18 000 to R 25 000 a month. In cities the salaries ranged from R 9 000 to R 15 000, whereas in the rural areas the range was between R 1 500 and R 4 000. There were also instances of candidate attorneys not receiving any remuneration at all.

In coming to the amount of R 3 000 the Council did not want to make it impossible for some firms to appoint candidate attorneys and thus reducing the number of positions available. Mr Geard noted that in the rural areas, law gradu-

ates were desperate to obtain articles and practitioners could not afford to employ them. The resolution left it open for the attorney and candidate attorney to reach an agreement for a lower salary.

## Seminars and workshops

As part of its conference programme, the CLS presented the following seminars and workshops on 31 October:

- The power relations between the arms of government, particularly the apparent tensions between the judiciary and the executive. Panellists included Daryl Burman, Egon Oswald, Krish Naidoo, Alison Tilley and Paul Hoffman SC.

- Televised and media run trials with presenters William Booth, and journalists John Webb and Karyn Maughan.
- The Legal Practice Act – what are the future implications for attorneys/legal professionals particularly in relation to fees/costs of legal services presented by Ettienne Barnard and Graham Bellairs.
- Arbitration: Matrimonial matters presented by Susan Abro, Zenobia du Toit and Sandra van Staden.

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## Other CLS AGM news



*Cape Law Society council members with Justice Minister Michael Masutha (front, second from left) who was the keynote speaker at the Cape Law Society annual general meeting in Kimberley on 30 October.*

## LSNP AGM: A time to reflect on radical transformation

**T**he Law Society of the Northern Provinces (LSNP) held its annual general meeting (AGM) on 31 October at Sun City. Speakers at the conference included Chief Justice Mogoeng Mogoeng; Deputy Minister of Justice and Constitutional Development, John Jeffery and Judge Thokozile Masipa of the Gauteng Local division of the High Court.

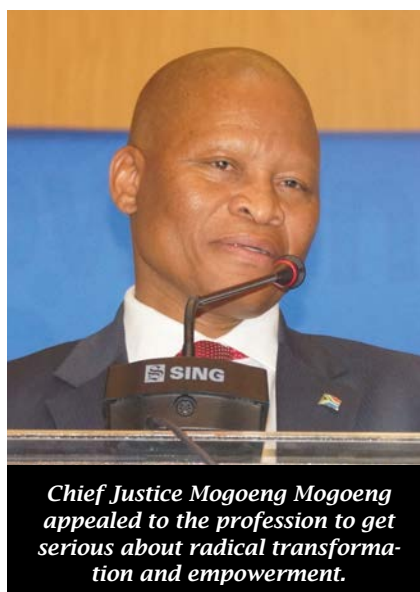
### Transforming the legal environment

Justice Masipa's address, titled 'The Legal Profession in Effectively Transforming the Legal Environment', was an abbreviation of an address she presented at the Johannesburg Attorneys Association AGM held on 9 September (see 'Transformation discussed at JAA AGM' 2015 (Oct) DR 19). Justice Masipa began her address by saying that more than 20 years into democracy, South Africans are still struggling with the concept of transformation. She added that this was surprising because South Africa has one of the most progressive constitutions in the world.

Justice Masipa went on further to say: 'Now, what is transformation? Transformation is different things to different people and perhaps that is where the problem lies. Some people may look at numbers, large numbers of people who previously were not in the profession, and decide that, well, we have made it, there is nothing to worry about. Other people may look at the quality of the people that we have and feel dissatisfied. ... Numbers of university graduates may look impressive but where do these graduates go after they qualify? We do not see enough black people in the High Court, for example. We do not see enough of them in motion court and certainly there is hardly any in commercial matters. Even though there may be a number of previously disadvantaged individuals entering the legal profession, these figures should be viewed with caution.'

Justice Masipa said that transformation and empowerment go together. 'Transformation without empowerment, therefore, is of no value at all. Real transformation must be coupled with a motivation and the willingness to empower,' she said. She demonstrated her point by way of example, namely mergers:

'Over the past few years this country has seen a number of law firms merging across colour lines. ... A merger is like a



*Chief Justice Mogoeng Mogoeng appealed to the profession to get serious about radical transformation and empowerment.*

marriage relationship between two people in the sense that it is a matter of give and take. If one party feels that he is being short-changed, that marriage will not last. Let me give you an example. Firm A, a large commercial firm in Rosebank, merges with firm B, a one-man law firm downtown in Johannesburg in Market Street. The firm is managed by Mr X, a divorce lawyer of many years. Firm A is hoping that through the merger it will increase its revenue and has its eye on lucrative government work. It is confident that if it can prove that it has a BEE partner, such work is guaranteed. On the other hand Mr X from firm B sees the merger as a great opportunity for him to grow in an area that hitherto was not open to him. ... In due course Mr X says goodbye to his humble downtown office and moves to the suburbs of Rosebank. ... He attends all important meetings, his fellow partners are wonderful people and are very helpful, and he settles in quite quickly. But his happiness is short-lived. Six months later Mr X has not worked on a single commercial case nor has he seen any government work, which he knows for sure has reached his new firm. He expresses his dissatisfaction about this to his partners but to no avail. He is told, amongst other things, that the clients have no confidence in him because he has no experience in commercial work and will not have him touch any of their work. It is therefore not surprising that 12 months later the merger is no more. What was lacking in this relationship? Trust, meaningful communication and a lack of common vision; a deadly combi-

nation for any venture. Most importantly, however, what was seriously lacking was a willingness to embrace change and the willingness to take risks.'

Speaking about briefing patterns, Justice Masipa said that briefing patterns have not changed much since she was at the Bar years ago. 'Soon after I joined the Bar I had an opportunity to successfully argue a funeral interdict in the Urgent Court. I was elated therefore when soon thereafter I was given another brief of a similar kind, and then another, and then another. Soon I became an expert in the field. However, what I failed to realise at the time was that the label "funeral interdict expert" had stuck with me and unwittingly disqualified me for any other work, especially meaningful work. I was not the only one with that disadvantage. I saw many of my black colleagues, capable women, being briefed only on unopposed divorce matters. At the same time I saw my white colleagues, irrespective of how many cases they were losing, growing by leaps and bounds simply because they were given an opportunity to do meaningful work. Now, that was then. What about today, 2015? Yes, a small number of black counsel and female counsel are getting varied briefs but I think there is lots of room for improvement. Concerns about skewed briefing patterns are still being shared by advocates throughout the country, just as they did a little more than 20 years ago. ... The Bar may and in fact should assist in transformation by ensuring that



*Deputy Minister of Justice and Constitutional Development, John Jeffery, said annual general meetings are an opportunity for reflection.*



counsel rope in black women, black and women junior counsel. Although this is very helpful as it might expose the junior counsel to potential clients, it ought to be noted that the Bar has a limited role in this regard as it is not a briefing entity. The power to make the policy on fair and equitable briefing patterns workable rests mainly in the hands of attorneys,' she said.

In conclusion Justice Masipa noted that South Africa has adequate resources in the country but 'we must be willing to share them wisely. It does not matter how much we spend on the education and training of lawyers, if we do not follow this up with transfer of skills we are wasting our precious resources. We need a change of heart. We need to change our mind-set and we need commitment. We owe it to ourselves to transform the legal profession and we also owe it to those who will come after us. If we do not, the coming generations will rightly accuse us of dereliction of duty and of cowardice'.

### A time for reflection

Mr Jeffrey said that AGMs bring with them an opportunity for reflection, a time to assess the successes of an organisation and to contemplate areas of possible improvement. He went on to speak about the image of the profession and said that the question we need to ask ourselves is: Why is there this attitude towards the legal profession and what can be done to correct it? 'The conduct of a few rotten apples is largely to blame. Factors such as their behaviour in Road Accident Fund cases and in terms of unlawful contingency fees, their behaviour in terms of certain debt collecting practices are particularly to blame. ... And then there are also perceptions amongst the public that law societies are not able to discipline their own members, and that is something that needs to be in particular addressed,' he said.

Speaking on transformation, Mr Jeffrey said that: 'While transformation has many meanings one key element is that we need a legal profession, both attorneys and advocates, which is reflective of the race and gender composition of the country. Do we have this and are we anywhere close? The answer is no. So, I know that for a lot of people raising issues of race make them uncomfortable. They feel let us forget the past, let us move forward, we now have democracy, etcetera. If we do not have an attorneys' profession, an advocates' profession that reflects the gender and race demographics of the country - we are creating problems in the long term. If you look at the Bar, 70% of the Bar is white but whites are only 8,9% of the population; 18% of the Bar is African but Africans make up 79,2% of the population. From a gender perspective 25% of the Bar are



*Judge Thokozile Masipa delivering her address titled 'The Legal Profession in Effectively Transforming the Legal Environment' at the Law Society of the Northern Provinces annual general meeting.*

women but women are over half of the population, 51,3%. ... When you come to silks, only 7% are African and less than 1% are African women of silks.

But I want to challenge members of the Law Society of the Northern Provinces and ask what you are doing to support the racial and gender transformation of the Bar? Who are you briefing or how many of you are sticking to your comfort zones in an old boys club? Coming to the attorneys' profession, of the country's 23 712 practicing attorneys, 36% are women. So, that is 36 out of 51%. So, women are still very much under-represented. Whites, as I said, are 8,9% of the population but 61,9% of the attorneys' profession. Africans are 79% of the population, as I had said, but only 22% of the attorneys' profession. Breaking that down then into the LSNP, which is the biggest law society in our country, 62,7% male, 37,3% women, 27% African, 1% Coloured, 5% Indians, 64% white and 2,3% identifying themselves as "others". So, not at all reflective of the demographics of the population. Is this changing? Last year 1 577 attorneys were admitted within the area of the LSNP but the majority were still white. 797 White attorneys, 585, or 37% African attorneys. It has changed with the candidate attorneys with 46,5% now being African and 44,5% white. But is that enough? With the LLB graduates, the majority of LLB graduates in South Africa are now African, that's 55%, and women 57%. So, we need to ensure that those graduates have the opportunity to do their articles.'

Mr Jeffrey ended his address by saying: 'Transformation is not just about statistical representivity, it is also about attitudes. And access to justice means access for the public to legal services and our courts, but it also means access to the profession.'

### Radical transformation

Chief Justice Mogoeng, delivering the keynote address, said that one of the most topical issues in South Africa, at the moment, is radical transformation. And added that the broader legal fraternity, including law students, the organised profession and the judiciary have not escaped attention in this connection. 'Transformation is the end product of an elaborate process that is foundationally facilitated by the registration for and completion of a law degree,' he said.

Addressing the issue of adding a year to the LLB degree, Chief Justice Mogoeng said: 'Universities are considering adding one more year to our first law degree, but many are struggling to pay for a four-year law degree already. Expanding the programme to five years, if that will eventuate, is certainly bound to make it more difficult for us to have as many law graduates as we need. ... My challenge to you is this; as stakeholders in the law products or law graduates what are we going to have going forward, is it about duration or quality? If it does not have to take long for it to be a degree of quality then maybe we should look at other jurisdictions. I begin with a very small country, which is a city-state, Singapore. The National University of Singapore, the law school, is counted among the top 25 worldwide, and their law degree takes four years to complete. But there is an even better example; in the whole of Europe it takes only three years to complete a good law degree. From there you can proceed either with your master's degree, depending on your area of interest, but if you want to be a practitioner of the law then there is just one more year. I know in the UK for instance there is a college that you will be required to go to, just so that you familiarise yourself with the practi-



*Outgoing President of the Law Society of the Northern Provinces, Strike Madiba, welcomed delegates to the conference.*

cal side of the law. Now, I know that it is not just a simple matter of "they did it, why can we not do it". What we need to do, as intellectuals gathered here, is this: What is it that makes it possible for Europe to congest a programme, that takes four years in South Africa, into three years and produce lawyers whose ability is beyond reproach, that we are not doing? Is it because of the kind of basic education that is offered to their pupils and, therefore, it becomes easier for them to go through – to move from basic education to higher education? If that be so, what is it about their basic education that our own basic education system does not have, and progressively begin to introduce those elements into our own basic education system. Two, what is it about their equivalent of our LLB programme that helps the graduates to emerge as strong as they do which we do not have in our own?"

To demonstrate the damage apartheid has had on black people, Chief Justice Mogoeng said: 'I will give you a very painful example about the need for a paradigm shift relating to my father. I relate quite seriously with Afrikaners, especially those who are farmers. So, one day while my father was still alive, we went to visit a farmer ... *oom* Fanus Booyesen. He used to be a principal of the High School in Lichtenberg. So, I cautioned my dad, knowing the mind-set, I said "Dad, please, *oom* Fanus is a nice person, please do not say *baas* to him." He said "No, I assure you my boy, I will not." .... Has this prejudice, this negativity not gone too deep that we cannot even see it? So, we got there. "*Oom* Fanus, *hoe gaan dit*, I am greeting you." "*Nee, dit gaan goed, man. Ons moet bid, waar is die reën?*" And then he says, "Who is this?" I said, "That is my dad." He said, "What is his name?" I said, "His name is Setswayo." He said, "Herbert, Herbert, Herbert, my *baas*." And before I knew it my dad had taken off his hat and was squeezing it. Because the thing had gone rather too deep into his system. He cannot get it out. He does not even see anything wrong with it. It is a way of life. I was devastated. ... I was quiet in the car as we were driving back to my house. And then he says to me, "Boy, why are you so..." Oh, he says, "I know what is going through your mind." So, I said, "What is it, Dad?" He says, "You know, this thing is so deep, it is difficult to shake out of my system."

Colleagues, I think we are at that moment. We know what it is that used to divide us in the past as a nation, it was because others were more privileged than the others and they were not prepared to share. But we made an undertaking as a nation that we are going to break free from the world of prejudice. That we have realised that colour is nothing but colour, and anybody who thinks that

there is some superiority, intellectual or otherwise, attached to sheer pigmentation, needs to have his or her head examined. Otherwise, how do you explain Martin Luther King junior, how do you explain Kofi Anan, how do you explain Barack Obama, how do you explain Ben Carson, how do you explain Nelson Mandela? As exceptions? We have got to move away from the prejudice and the refusal to change that is informed by nothing else but colour. For my black compatriots, refuse to be like my father.'

Chief Justice Mogoeng appealed to the profession to get serious about empowerment. 'Let us all make time, black and white, to empower our article clerks. I know of attorneys who do not have time for article clerks, they must make money. Article clerks used to complain to us, some of them were nothing but messengers, and they are supposed to pass exams. Let us make time to empower our article clerks so that they like us can turn out to be the good attorneys that we have turned out to be. ... I have never said black attorneys should never brief white male advocates. I have never said the state or any institution should never brief our white male compatriots. They have a right to be briefed, too. They are South Africans. But I have said, and I will continue to say, when you have a matter that justifies briefing a senior advocate, and at times it is even three seniors and three juniors, remember women, both white and black women. It cannot just be white women all the time, no. Remember black practitioners who are junior. Afford them the opportunity to learn. That is all I am pushing for. It cannot be that the State Attorney briefs everybody except our white compatriots. That is another level of racism,' he said.

## Afternoon sessions

During the afternoon sessions, other speakers addressed delegates on a variety of topics:

- Director for Southern Africa Amnesty International, Deprosa Muchena, spoke on the role the organisation plays on advocating for the rule of law (see 'Perspectives on the role of the profession in promoting the rule of law and democracy' 2015 (Oct) DR 8).
- Co-chairperson of the Law Society of South Africa, Busani Mabunda, gave an address on the 2015 Co-chairperson's Mid-Term Report. He also spoke on the issue of the profession forming a voluntary association for all legal practitioners that will serve trade union functions for the profession (see 'KwaZulu-Natal Law Society AGM: Legal Practice Act at the core of deliberations' in this issue and [www.LSSA.org.za](http://www.LSSA.org.za)).
- Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa, gave a report on behalf of the AFF (see 'KwaZulu-Natal Law Society AGM: Legal Practice Act at the core of deliberations' in this issue).

## Adopted motion

The following motion was adopted: 'Any person who gets admitted to practice as an attorney during the financial year of the society shall pay a portion of the subscription fees calculated pro-rata over the remaining number of months (including the month in which the attorney becomes a member) in that financial year, which shall be paid within one month of becoming admitted' (see 'A tip for candidate attorneys applying to be admitted as an attorney' 2015 (Aug) DR 4).

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## ProBono.Org promotes *pro bono* services

ProBono.Org and the Law Society of the Northern Provinces (LSNP) joint office in Pretoria attended the annual general meeting (AGM) of the LSNP at Sun City on 31 October. The office is located strategically to expand *pro bono* services to Limpopo, North West and Mpumalanga.

Attorneys who attended the AGM were offered the opportunity to join the ProBono.Org panel and to choose ways to get involved in doing *pro bono* work.





# The Tax Ombud and the 2014/2015 annual report

**T**he University of Pretoria's (UP) department of taxation held a discussion on the office of the Tax Ombud titled 'assessing the 2014/2015 annual report to Parliament'. This discussion formed part of the University of Pretoria's Economic Management Sciences Talk Series. The discussion took place in Pretoria on 13 October.

Speakers at the discussion included the Tax Ombud, Judge Bernard Ngoepe; Chief Executive Officer: Office of the Tax Ombud, Eric Mkhawane; Executive Indirect Taxes: South African Revenue Services (Sars), Narcizio Makwakwa; Director of the African Tax Institute: University of Pretoria, Professor Riël Franzsen; and Tax Executive: ENSafrica, Dr Beric Croome.

Programme director, professor Madeleine Stiglingh, head of the department of taxation at UP opened the discussion by giving a brief history into the world of tax and the need for a Tax Ombud. She explained that the word 'Ombud' meant 'agent' or 'representative' in Swedish and that South Africa has a Tax Ombud, who according to the mandate will be looking at the procedural, administrative and service related problems people could have when dealing with the revenue service. The Tax Ombud reports directly to the Minister of Finance and will do this in the form of an annual report every year where the findings, recommendations and actions will be laid out. Professor Stiglingh was pleased to announce that the 2014/2015 annual report by the Tax Ombud has already been tabled in Parliament.

Vice-Chancellor and Principal, UP professor Cheryl de la Rey welcomed delegates to the event, as well as welcoming and introducing the keynote speaker, Judge Ngoepe saying: 'As I think we all



*Tax Ombud, Judge Bernard Ngoepe, gave the keynote speech at the University of Pretoria.*

know, Judge Ngoepe has had a stellar record for his contribution, very broadly in South Africa.' She went on by highlighting the judge's career and achievements before becoming South Africa's first Tax Ombud.

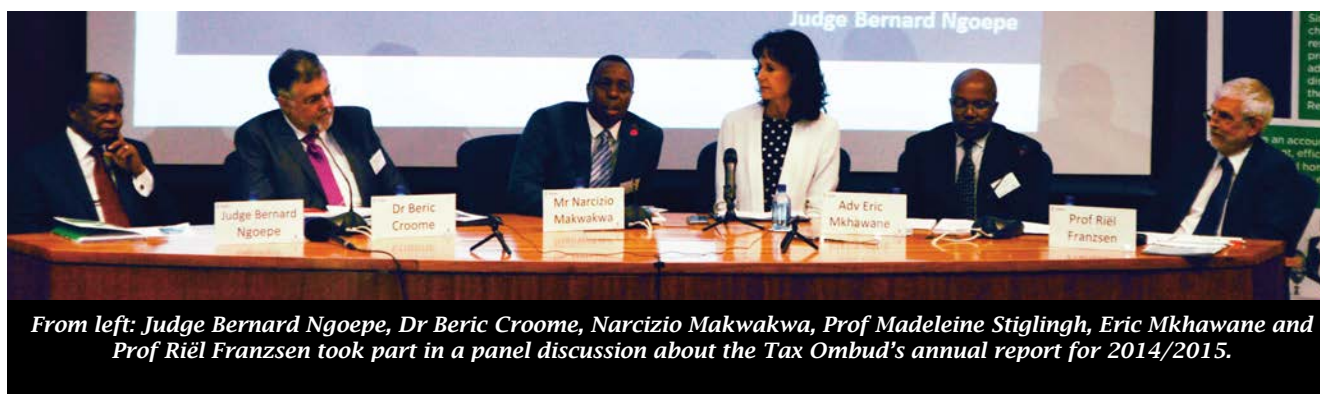
Judge Ngoepe started his address by saying 'We are not launching the report. The report has already been launched and is in fact already with Parliament, but what we seek to do today more than anything else is to hear from the public.' Judge Ngoepe went on to explain that he cannot assess his own work, it is up to the public to judge the work that the office of the Tax Ombud has done. He added that the public needs to tell the office of the Tax Ombud, where they can improve and what more can be done in order to be as effective as the Tax Administration Act 28 of 2011 would the office to be.

Judge Ngoepe stated that he was not planning on explaining exactly what is stated in the Tax Ombud's annual report, because it is already in the report

for everyone to read. Instead he said what he did want to talk about was 'the issue of tax in general and perhaps the philosophy behind the question of tax.' Judge Ngoepe continued by saying that the whole purpose of tax being to benefit the people of the country, and mostly the people who need assistance from the state in the form of service delivery. The judge also mentioned the fact that the office of the Tax Ombud sees itself as a member of a big family and collect tax within the limits of the Act that was created for this purpose.

'Paying tax is not the nicest thing to do and those whose duty it is to collect tax will tell you that it is one of the most difficult things to do,' said Judge Ngoepe. According to the judge, there have been many scholars who have written about how best to facilitate tax collection and how to change a tax payers outlook on paying their taxes. The judge suggested that this could be done by putting measures into place so that paying tax is made as easy as possible. The role that the office of the Tax Ombud, is currently and intends to play in the future, is to expedite and facilitate the collection of tax from the whole country in the best way possible, said Judge Ngoepe and that the office of the Tax Ombud is there to listen to the challenges people face and the complaints they have when dealing with Sars, this in turn helps Sars better facilitate the tax paying process.

Judge Ngoepe said the statement has been made that the best way to make sure that people pay their taxes is by introducing a culture of cooperative compliance. In order to get this done Judge Ngoepe said: 'We, therefore, need to nurture, first perhaps inculcate and then nurture, in tax payers the feeling that they need to cooperate as far as tax compliance is concerned.' The judge went on



*From left: Judge Bernard Ngoepe, Dr Beric Croome, Narcizio Makwakwa, Prof Madeleine Stiglingh, Eric Mkhawane and Prof Riël Franzsen took part in a panel discussion about the Tax Ombud's annual report for 2014/2015.*



to explain that this compliance cannot take place by 'wielding the big stick'.

Judge Ngoepe went on to say that 'we know we cannot do without tax and it is something which simply has to be paid.' He then recounted a story from his youth about a taxi driver who had told him that he did not mind paying his tax because he explained that by doing that he knew that the government would look after him in his old age. The judge then explained that for anyone to be 'inspired' into paying tax they would have to know that the taxes being collected are being used for which it is meant and not to line the pockets of the corrupt. Judge Ngoepe said that he as the Tax Ombud is helping facilitating a process to collect tax from the people and then ensuring that that money is being used to the benefit of the needy. The judge explained that it is always a good thing to ask questions. The office of the Tax Ombud has to ask questions about the use of the money obtained by tax.

Judge Ngoepe concluded his address by thanking UP for all their contributions in the training of people in the field of tax and stated: 'Tax, ladies and gentlemen, has become a very important issue.'

Following Judge Ngoepe's address was a panel discussion led by professor Stiglingh. The panel consisted of Judge Ngoepe, Mr Mkhawane, Mr Makwakwa, Prof Riël Franzsen and Dr Croome.

During the panel discussion the annual report was discussed and opinions were asked of the panellists. Some of the interesting aspects discussed were learning what Mr Makwakwa's reaction was to the annual report on behalf of Sars, to which Mr Makwakwa explained that it is a good thing that the public has a way of raising their issues outside Sars. It helps Sars that the issues are dealt with in a fair and independent manner and Sars appreciates the contributions made by the office of the Tax Ombud, Mr Makwakwa said.

Judge Ngoepe explained that the memorandum of understanding between the office of the Tax Ombud and Sars is there to 'facilitate the interaction between the two institutions' and the independence of the office of the Tax Ombud is governed by the Act.

Some of the statistics from the report we also mentioned in the discussion such as, the office of the Tax Ombud received 1 277 complaints but only 409 fell within the offices' mandate and that more than 75% of the valid complaints received by the office were found in favour of the taxpayer. Only 14% of the contact made with the office of the Tax Ombud were rejected complaints.

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## National Schools Moot Court competition

**O**n 11 October the fifth National Schools Moot Court competition took place at the Constitutional Court. The competition saw over 150 teams enter from all nine provinces.

The judges were Justice Elias Matojane, Justice Johann van der Westhuizen, University of Pretoria Professor Christof Heyns and Human Rights Commission Commissioner Mohamed Ameerma.

The hypothetical facts focused on issues of discrimination on the bases of sexual orientation and were devised by University of Pretoria Centre for Child Law director, Professor Ann Skelton.

Deputy Minister of Justice and Constitutional Development, John Jeffery, delivering the opening remarks said: 'We must enhance access to the Constitution and undertake human rights awareness in constitutional education. The schools moot competition is one of the ways of achieving this as the competition is an exciting way of raising constitutional awareness. If people are not aware of their constitutional rights or are not allowed to exercise these rights in their daily lives then our constitutional rights are only promises on paper'.

Commenting on the issue of gender representation in the judiciary, Deputy Minister Jeffery was pleased to note that all four candidates were female.



**Finalists Shandr  Smith and Katelyn Chetty. Ms Chetty also won best runner-up oralist.**



**Winners Clara-Marie Macheke and Claire Rankin.**

'Moot court competitions have many benefits and allow students to improve their public speaking, learn to structure a legal argument, analyse cases and develop writing skills,' said Deputy Minister Jeffery.

The four finalists were 16-year-old Clara-Marie Macheke and 17-year-old Claire Rankin both in grade 11 from Springfield Convent in Cape Town and 17-year-old Shandr  Smith in grade 12 and 16-year-old Katelyn Chetty in grade 11 from Gibson Pillay Learning Academy in Johannesburg.

Ms Macheke and Ms Rankin were the winners.

Cape Town attorney, Tracey Babb, helped the winning team prepare for the competition.

Ms Macheke described the experience as 'phenominal' and one she would not 'trade for anything'.

Ms Rankin said she wants to study law and become a state advocate.

Jacque Cassette, director and national practice head in the *pro bono* and human rights practice at Cliffe Dekker Hofmeyr announced that Cliffe Dekker Hofmeyr were offering a R 30 000 bursary to each finalist if they were accepted to study law at a South African university.

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### Admission examination dates for 2016

#### Admission examination:

- 9 February
- 10 February
- 16 August
- 17 August

#### Conveyancing examination:

- 11 May
- 7 September

#### Notarial examination

- 8 June
- 19 October

**O**n 14 and 15 October the Lawyers as peacemakers conference took place at Unisa main campus in Pretoria.

The purpose of the conference was to facilitate knowledge exchange on integrative law and to allow those working towards developing this system to network with like-minded attorneys.

### Integrative law movement

Amanda Lamond from the Centre for Integrative Law spoke on the 'Future of law: The integrative law movement'.

'Integrative law' is an umbrella term, which Ms Lamond said emerged as new practices of law to deal with the current unsustainable legal system.

### Restorative justice

Justice Lebotsang Bosielo delivered the keynote address. He spoke on 'Restorative justice as a viable and effective sentence'.

Referring to the judgment *Director of Public Prosecutions v Thabethe* 2011 (2) SACR 567 (SCA) (he formed part of the coram) he noted how he was faced with the dilemma surrounding the debate of restorative justice, namely its 'desirability, viability and effectiveness'.

Justice Bosielo noted that restorative justice had not been 'enthusiastically' embraced by our courts.

He said: 'Although restorative justice has received a somewhat lukewarm reception by the judiciary ... it has in the last years grown in its stature and impact ... I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases.'

He stated that it is a fact that crime, including violent crime, in the country had reached 'alarming and endemic proportions'. Justice Bosielo said: 'Truth be told, our criminal system can no longer cope'.



**Attorney and educational consultant, Amanda Lamond, from the Centre for Integrative Law.**

## Lawyers as peacemakers conference



**Lawyer, author and pioneer of the integrative law movement, Kim Wright, spoke on a new consciousness within the legal profession.**

Prosecutors aim for maximum sentences, our correctional centers are overcrowded and we have a high rate of recidivism among inmates. This tells us that 'the conventional methods of sentencing have failed us', Justice Bosielo said. He added that we, therefore, need to explore alternatives such as restorative justice.

Referencing the *Dikoko v Mokhatla* 2007 (1) BCLR 1 (CC) and *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC), Justice Bosielo said: 'The [Constitutional Court] found that many times an apology might be more effective than a monetary award to bring about a healing of the hurt feelings and restoration of social harmony'.

Justice Bosielo said society needs to see if restorative justice will have the desired effect of 'rehabilitating offenders, reducing the correction centers' population, offering offenders the opportunity to confess, own up to their misdeeds, thereby showing insight into their wayward behavior, giving them an opportunity to converse with their victims, offering healing and reparation/compensation and, ultimately forgiveness and restoration of peace and harmony'.

### Lawyers as peacemakers

Kim Wright, author of *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law* (American Bar Association 2010), spoke on 'Lawyers as Healers, Peacemakers and Change Makers: The Worldwide Integrative Law Movement'.

Ms Wright said she sees the law as evolving and believes we are moving

from the court model to a more peacemaking model such as mediation. 'The [alternative dispute resolution] movement is not the end of the path, I think the integrative law movement is what is next,' she said.

She cites United States Chief Justice Warren Burger who in 1984 said 'lawyers should be healers', suggesting that the legal system was 'broken'.

To deal with the dissatisfaction with the old system, which no longer worked, holistic law was developed, the term 'integrative law' was then coined in 2010, said Ms Wright.

She gave the example of Australian attorney, Michael Bradley, the managing partner of the firm Marque Lawyers, who sought to reshape the way law was practiced and decided to open a firm based on 'happiness'. One of the first things the firm did was to get rid of billable hours as 'they do not make anybody happy'.

Ms Wright said she believes that the new system is a 'consciousness' that can be brought to different ways of practicing law such as: Restorative justice, therapeutic jurisprudence, problem solving courts, collaborative law, proactive law and community law, etcetera.

### Collaborative law

Bev Loubser, a matrimonial and family law practitioner, recounted an incident in her career where an opponent in a divorce matter almost physically assaulted her, she decided that there had to be another way to practise law that was less adversarial.



**Johannesburg attorney, Bev Loubser, spoke on 'Collaborative law in South Africa: Triumphs and challenges'.**



Ms Loubser became a family law mediator in 2008 and saw situations where a passive observer/facilitator just would not work. 'In certain situations individuals needed a lawyer,' she said.

With the fear that this would lead right back into litigation, she was happy to find out that this was not the case, she said.

This is when she came across collaborative law. Ms Loubser then attended a course by Pauline Tesler on collaborative law, and Ms Wright's training on collaborative divorce.

Ms Loubser described collaborative law – also known as collaborative practice – as a 'non-adversarial problem solving approach to resolving legal disputes. Enabling couples who have decided to separate or end their marriage to work with their attorneys and on occasion other family professionals in order to avoid the uncertain outcome of taking the matter to court and to achieve settlement that best fits and meets the specific needs of both parties and their children with the underlying threat of litigation removed'.

Ms Loubser described the collaborative divorce process as one that 'utilises the services of a interdisciplinary team approach that integrates legal, emotional and financial aspects of the divorce'.



**Australian Chamundai (Jackie) Curran, owner of the Laughter Lawyer, teaches spirituality to help those in the legal profession achieve good health, happiness, connection to their spirit and a work life balance.**

## Meditation

Chamundai (Jackie) Curran spoke on 'Lawyers as peacemakers: Mindfulness, compassion and much more'.

Ms Curran, a former lawyer, is a mediator, and Laughter Yoga teacher (laughter-lawyer.com.au), spoke on using meditation to deal with the stress that lawyers

experience; and by way of example, she guided the audience through a variety of different meditation techniques.

Ms Curran said while in the early days of her practice she became disillusioned and felt she was not helping her clients enough. This led her to learn about counselling, alternative dispute resolution and restorative justice. She began to incorporate these into her practice, all the while searching for spirituality and peace in her life.

'As lawyers we have a big focus on our clients and what we need to do in order to look after them, and it can be easy to lose that sense of what is happening within us,' said Ms Curran.

When she started her spiritual learning such as: Yoga, chanting and meditation (which she describes as 'tools for inner peace'), she noticed she started to become a different person.

'I was more settled, confident, more relaxed, did not get so stressed or angry,' she said.

Ms Curran said: 'It was very much in my work as a lawyer I was having a different experience and I was having different solutions to my legal problems because I was different inside.'

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# NADEL holds gender transformation dialogue session in Gauteng

The National Association of Democratic Lawyers (NADEL) Gauteng Branch held a dialogue session and panel discussion on gender transformation within the legal profession at the offices of Webber Wentzel on 24 October.

NADEL has undertaken this research project, which is focused on gender transformation of the legal profession, after research conducted by the Centre for Applied Legal Studies and the Foundation for Human Rights was released in 2014. The research findings, which were from a small sample within the legal profession, point to critical shortcomings and a serious lack of gender transformation within the legal profession.

Through this project, NADEL aims to conduct interviews and have produced an online research questionnaire, from where they will draw insight on the issue of gender transformation. The research findings will be contained in a report, which NADEL will use to advocate for transformation of the profession. The information will also be circulated to relevant government departments, as well as professional bodies.



**Vice-chairperson of National Association of Democratic Lawyers (NADEL) Johannesburg, Zenobia Wadee, welcomed delegates at the NADEL Gauteng dialogue session and panel discussion.**

The aim of the dialogue session is to stimulate debates on the barriers and challenges women face within the legal profession.

Zenobia Wadee, vice-chairperson of NADEL Johannesburg, welcomed delegates, who consisted of judges, advocates, magistrates, attorneys and academics to the event. 'This discussion

takes place in the country where there is a lot of debate on transformation in the judiciary, transformation in the legal profession and a lot of contention about briefing patterns. The legal profession constitutes the pool from where judicial officers are appointed. Therefore, a transformed legal profession is a prerequisite for a transformed judiciary,' Ms Wadee said.

Ms Wadee added that the work environment needs to be conducive to training female lawyers and that there is a vital need to create such an environment but this seems to have been overlooked. 'There is still unofficial bias, which remain and these are unfortunately deeply embedded into society and is one of the hurdles, which undermines transformation. ... Transformation is required by the Constitution. Transformation means change and the change that is desired is change that will improve the circumstances of the people of South Africa and that reflects the values, which is enshrined in the Constitution,' Ms Wadee said.

Rehana Rawat, advocate and NADEL's joint gender coordinator in Johannes-





**NADEL's joint gender coordinator in Johannesburg, Rehana Rawat, delivered the opening address to delegates.**

burg, delivered the opening address. She started her speech by referring to the response of advocate Peter Fischer, at his interview with the Judicial Services Commission, when he was asked: Why does gender equity matter?

'This nephew, of the late great Bram Fischer, responded: "Hell hath no fury like a woman scorned, but sometimes women are more level headed and inclined to be less agitated. While men were egotistical, women bring a balancing and placating atmosphere to that reality. Women bring a soft motherly approach." To an audience such as this, judges, both permanent and acting, advocates of the High Court, attorneys, magistrates, leaders of section nine organisations and human rights practitioners, I ask you, is this patronising, condescending, no-brainer response the exception in a country, 21 years into its new democracy? ... Has 21 years been enough, in itself, to transform the deeply entrenched and systemic bias and prejudice of generations of indoctrination?'

Ms Rawat said the focus is on gender bias in the legal system itself and what the responsibility is of the legal community in neutralising inappropriate gender stereotypes. She added that the legal profession falls within the highest echelon of South African society and that many of the delegates in attendance had made it against all odds. Ms Rawat asked: 'How do we harness this wealth of skill, opportunity and collective power to foster a society, which honestly and truly creates stability on a platter of an equal playing field in which all truly participate?'

Ms Rawat told delegates the most abused group internationally is that of women with disabilities. She said to tackle the genre; we first need to educate ourselves on what disability is. Self-education is important to understand

disability or the differently abled and it can only be done by equipping and sharing the education we have with those around us on a daily basis. 'In South African judicial society, we need only to look at our courts, how do they facilitate and accommodate people with disabilities? How many government or big corporate buildings, even newly built ones, comply with statutory requirements or regulations to accommodate this group? At the most elementary level, each one of us here can contribute to the education on this issue to civil society,' she said.

According to Ms Rawat, Aids, alcohol, drug abuse and poverty are also considered disabilities. All of these conditions are impairments, which limit capacity and the ability to reach one's full potential. 'The scourge of each of these conditions has infiltrated the very fabric of South African society and the most inexcusable ... is the widening ravine between the rich and the poor. ... The term gender is really a misnomer, or perhaps it is, on further reflection, it may be the most correct. ... It encompasses a range of human conditions, which by their very nature, form the essence of any strategy or plan of action to neutralise negative trends and foster healthy, realistic, long-term and uplifting thinking,' Ms Rawat said. She added that the challenge was that it was a real and significant problem and because it was a systemic problem, there is no single answer or solution.

Ms Rawat noted that the law needs to meet its commitment that everyone is equal before the law and that everyone will be treated fairly, justly and similarly. 'As members of the legal fraternity, we ought to hold it dear to our hearts. On a collective level, we should be vocal to gender bias in the legal system itself. ... We should investigate if gender stereotyping is being inculcated through the law taught at law schools. Let us consider the attitude prevalent at the Bar and the Law Society of South Africa. Who and what practices reinforce these attitudes? ... We must know what we are trying to achieve when we appoint people to the Bench,' said Ms Rawat.

Ms Rawat added that if the judiciary wants to attract more women and people with disabilities, then more would have to be done to facilitate initiatives in judicial and legal professional education. 'These groups will bring with them, if well selected, the element of deeper awareness of community realities, values and reservations. ... A reflective judiciary is fundamental for the mainstreaming of a workplace that is in every way possible enabling to support, contentment and empowerment to its judges in order for them to perform their judicial duties to the best of their ability. ... The judiciary has the same, if not a higher, duty of care to its workers who serve on the Bench.

It has to become less daunting, less of a pressure cooker work environment. ... Be the commitment to be the change we want as a society and as a community,' said Ms Rawat.

## Panel discussion

A panel discussion was also held on the morning, the panelists included, Farhana Docrat, advocate at the Johannesburg Bar, Erica Emdon, Director at ProBono.Org, and Princess Magopane, researcher and clerk at the Office of the Chief Justice. The session was about sharing their experiences on being a woman in the legal profession.

## Views from a mini-questionnaire

Ms Emdon said that she saw the plight of women in personal terms. She referred to feminist writings, which focused on women in the home and patriarchy at a personal level and how it would affect a woman's ability to participate in the job market. The writings called it the 'dual shift phenomenon' where women have a dual shift responsibility for childcare, managing the household and also conducting a personal career. 'No matter how much we believe that there are legislative and policy documents that have moved forward in this country, I do still believe that women face this personalised responsibility at the home, which I believe still affects the way we are and our opportunities as professionals. ... I think we also deal with patriarchy in the home and in society, which again is a personally experienced manifestation of



**Director at ProBono.Org, Erica Emdon, created an informal questionnaire with a sample group of ten women at her office and their experience of the legal profession.**

discrimination and we see it in respect of our clients and in respect of our professional life, but I believe there is also a personal element of this, that requires constant confrontation and constant monitoring,' Ms Emdon said.

Ms Emdon said for her part of the discussion, she had done an informal questionnaire with a sample group of ten women at her office. The sample included women who were black and white and consisted over an age range of approximately 25 to 60 years.

She noted that when she asked the group if they had personally experienced obstacles in the legal profession, because they were women, all the women answered yes. Ms Emdon added that in the research sample group, some of the women felt that if they were promoted above their male peers they would be resented by their colleagues. Ms Emdon continued by saying: 'Women were seen to not get jobs because the concept was that they would soon get married and have children, so they would be interviewed on a number of occasions and not get the job, especially if they were young, as the concept is that when you are young you are going to go off and have children.'

Ms Emdon said she asked the group, what they thought the challenges would be in the current legal environment. She said the feeling was that women have to work harder as they felt that they were being watched to see if they would make mistakes. 'One of the younger attorneys, interestingly, felt that there was an assumption that woman lawyers cannot be objective and get too emotionally involved,' she said.

Ms Emdon added that there was a feeling that women in the law sector did not earn as much as their male counterparts, especially in big firms and that the number of women in management in big firms were fewer.

'I asked whether having children impacts on their experience as legal professionals. People said yes, there should be crèches at work, especially in the big firms, where there are gyms at work for the staff, but not crèches. People felt that flexibility was not followed at companies, and often if women do ask for flexible hours, they are paid less, despite the fact that they may be doing a lot of work at home, and actually working more than their eight hours,' she said.

Ms Emdon noted the women expressed that they felt guilty for taking maternity leave and added that the women who were from big firms also said that having children affects profitability of practice and delays women from progressing in terms of earnings and progression of their careers. 'It is hard to rebuild your practice after you come back from maternity leave,' Ms Emdon said, and added



*Researcher and clerk at the Office of the Chief Justice, Princess Magopane, said that she had to run around and make tea, while doing her articles.*

that the group felt that having their own law firm was a much easier option in terms of flexibility; however, it is difficult as they have to find their own work opportunities.

Ms Emdon concluded by saying that over the past few years, she came across the leadership of various institutions and felt that they were very male orientated. 'I find it incredibly disappointing that there are so few women, and I find the attitude still very male dominated, it feels sometimes that I am back in my law firm in 1990 ... I think that there is still a deep disrespect operating at a personal level. ... At the end of the day, I still believe that you can have this legal framework, which is really positive and progressive, and has moved into a progressive period of being, but I feel we still have a lot of work in a personal level. ... Leadership at the legal institutions in our society is the key for all of us,' Ms Emdon said.

### Women against women

After the first part of the presentation, one of the delegates in attendance commented that as far as gender transformation was concerned, her experience was that it did not come necessarily from men, but from female counterparts and until it was researched why women are intimidated by other women, we will not get anywhere.

Ms Docrat agreed with the delegate and said that she experienced the same

when she started her pupillage in 1993. Ms Docrat recalled the first time she walked into her spinster's office. 'A female master is called a spinster, she invited me to walk in and sit down and before [I could sit], she said "I know you are here to find a husband, so I am not going to waste your time and you will not waste mine...". She refused to let me look at briefs. She made me answer her telephone. She would send me to the supermarket to buy her sweets before we went to court. She would make me carry her bag. She would exclude me from consultations and the only brief I was allowed to look at were divorce particulars and rule 43 opposing affidavits. So you are absolutely right ... and the only reason I am sitting here, having practiced continuously for 23 years is because there was an advocate, who for whatever reason, decided I had something. If it was not for judge Jappie, if it was not for the late judge Pius Langa, if it was not for judges Skweyiya and Bakwa, I would not be sitting here,' Ms Docrat said.

The next panelist, Ms Magopane said she was probably the most junior member of the panel and most probably in the room, but she wanted to give the delegates an idea of her experience in the legal profession. Ms Magopane said there was a reason why the word candidate attorney appeared so many times on her CV. She said that after qualifying for her BA degree, she opted to register for the five year articles and complete her LLB simultaneously. She recalled how during the first interview she went to, the first question the lady interviewing her asked was: 'How many children do you have?' Ms Magopane said: 'I was dumbfounded. I could not answer the question because I thought it was wrong on so many levels. Firstly, she was assuming that because I am black, I must have children and I



*Advocate at the Johannesburg Bar, Farhana Docrat, discussed her experiences in the panel discussion held on 24 October.*

must have more than one. I found myself reluctant to go on with the interview.'

Ms Magopane said on the next position she had, she had to run around and make tea, even though there were people appointed to do so. She said that she left the job without legal experience. 'I did not feel as though I would be a competent legal practitioner and I was afraid that had I stayed on and completed my articles and got my degree, I would not be admitted because I knew nothing. All I knew was how to make tea and make people smile,' she said.

Ms Magopane said she did not give up on law and after completing her LLB, she completed her articles at a non-governmental organisation and it was a completely different experience as her opinion mattered. Ms Magopane said a number of her friends who also studied law never went on to practice.

Ms Magopane added that she agreed with the sentiment of the delegate in the audience that the biggest challenges

are from women and that men are more willing to take a chance on women. 'I found that most of the opportunities I received did not come from women, but from men. ... There are women who go through the difficulties and eventually they get to the top then they do not pull other women up. ... I have friends who have done rotations in law firms and every time they work with a senior female partner, they are more miserable than when they work with male partners in the law firm,' she said.

Ms Magopane said her experience as a black woman had also been disheartening. 'I found that black women are still lagging behind and it has nothing to do with competence or skills ... but people are reluctant to give black women a chance over any other race. ... We also have to focus on the racial dynamics in the groups as well,' she said.

In giving her experience, Ms Docrat said: 'I started practice at a time when women were not wanted. There were

four women advocates at the Durban Bar and when I walked into a court room the first reaction was what is this Indian girl doing here? ... There were judges who treated me like I was a school girl.'

## Questionnaire

At the discussion, delegates were asked to complete a questionnaire to assist NADEL with the research project. Questions in the questionnaire included questions on -

- personal aspects;
- legal training and admission;
- work experience; and
- gender transformation.

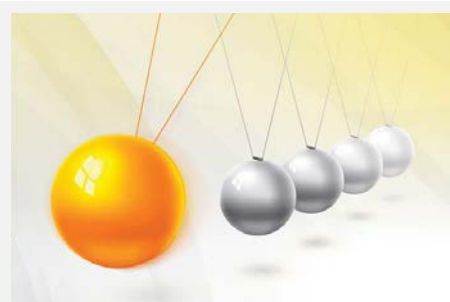
If you would like to complete the questionnaire, e-mail [nadelgenderproject@gmail.com](mailto:nadelgenderproject@gmail.com)

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Compiled by Barbara Whittle, communication manager, Law Society of South Africa, [barbara@lssa.org.za](mailto:barbara@lssa.org.za)

# The transformation debate: LSSA to host summit on briefing patterns

**T**he Law Society of South Africa (LSSA) announced last month that it, together with the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL), would call a national summit early in 2016, together with other stakeholders who are concerned about the negative impact of current briefing patterns by the state and corporate sectors, on the future of the profession. The summit will focus on identifying concrete solutions towards correcting this problem decisively.

Following controversial statements made in October by attorney Richard Spoor on social media and reports in the print media regarding the briefing of counsel, both NADEL and the BLA responded with press releases.

In a press statement on 16 October, NADEL publicity secretary, Gcina Malindi SC said NADEL noted with utter trepidation the statements made by Richard Spoor, an attorney in the class certification hearing in Silicosis and Tuberculosis case in the Gauteng High Court. In response to a statement by advocate Roshnee Mansingh, who had characterised the fact that of the 42 advocates and 100 attorneys involved in the historic class action case as an 'arrogant display of white privilege in a black country' because only two black advocates were in sight at court and that 98% of the attorneys were white men, Mr Spoor stated that the work he does 'doesn't leave much room for charity or experimentation' in reference to briefing black counsel.

NADEL noted that Mr Spoor had also stated that his interest as an attorney 'is winning the case and [he has] no latitude to accommodate unsuitable people' and that colour does not qualify black people if they do not qualify. His requirements for qualification to be briefed by him were being a *summa cum laude* graduate and bordering on genius. In addition, the people he briefed must have an 'avowed and sincere commitment to public interest law'.

NADEL stated: 'We have never sought

or advocated for charity and patronage from the privileged who command our country's economic and social destiny. We shall only continue to agitate for a complete transformation of the legal profession and the socio-economic order of our country. Only such transformation will create a non-racial, non-sexist and democratic society that we have always fought for.'

As for Mr Spoor, NADEL noted that his statements and conduct were further proof that the reconciliation agenda was a mere pipe-dream if the people of South Africa did not take command of the resources, wealth and social order of their own country. NADEL said: 'The 20 years since the advent of democracy have not brought with them the desired change in the economic power relations in the private sector. May we say also that democracy has not brought about any meaningful change in how those who control political power view the competence of blacks, and especially black women's competence when the state and other organs of state litigate in our courts. To steal from the Deputy Chief Justice, Dikgang Moseneke's speech in a recent memorial lecture in honour of the late Godfrey Mokgonane Pitje:

"The power relations within an economy dictate choices of who should provide legal support services. The dominant business class calls the shots on the distribution of legal services to the profession and the acquisition of the required skills. Therefore, the dominant class dishes out patronage as it wishes and chooses. Briefing patterns of commercial or corporate work will always be reflective of the class, gender and race of the dominant decision-makers. So, briefing patterns are not a function of compassion and good-heartedness or a wish list. No amount of pleading will help. They are informed by both the financial interest and prejudices of the moneyed class. Often, all this boils down to them using the legal services of those with whom they share race, class and gender. It is a jolly waste of time to call for a transformation of the profession and, in particular, of equitable distribu-

tion of work without changing the economic power relations in the private sector. Nobody will argue against the need for transformation, not even those who do not support it. But it will simply not happen at the behest of the private sector.'" (See news 'Founding President of the Black Lawyers Association honoured' (2015 (Nov) *DR* 6).)

NADEL was not complaining that black counsel were not briefed in this and other cases. 'We are reiterating our long-held view that until real transformation in the form of total control of both the economic and social formation of our country, the privileged will not surrender power and control of the destiny of our country,' said Mr Malindi.

In a press release on 28 October, the BLA noted the 'unfortunate statement' by Mr Spoor in respect of his attitude towards the briefing of black counsel. The BLA noted that Mr Spoor was recorded to have said that: 'Law is an elitist profession. My interest as an attorney is winning the case and I have no latitude to accommodate unsuitable people. Colour does not qualify you if you do not meet the other requirements. The work I do does not leave much room for charity or experimentation.' He further stated that: 'That means counsel with commitment to public interest law. Second, we only brief exceptional counsel.'

BLA pointed out Mr Spoor was one of the briefing attorneys in the case by former mine workers, in a silicosis class action, against gold mining companies. There are about 40 counsel involved in the matter and three of them are confirmed as a black counsel, while the remaining senior counsel are all white and male. The BLA said: 'The composition of the legal teams is indeed a cause of concern. BLA finds the searing flame of racism in the statement attributed to Mr Spoor as calculated to undermine the basic humanity of black counsel in particular and black people in general, as totally and absolutely intolerable. The statement is both insulting and highly provocative. We believe that such remarks are devoid of any respect towards black legal practitioners. Under the cir-

cumstances it came as no surprise that some legal practitioners found it absolutely appropriate to voice their displeasure in these developments.'

The BLA stated its full and unequivocal support for the actions taken by Advocates for Transformation, the Johannesburg Bar Council and all members of the legal profession who staged a protest march at the Gauteng Local Division: Johannesburg on Friday, 23 October in protest of the statement by Mr Spoor and as a way of disapproval of the current briefing patterns in general. 'We believe that it is now high time that the briefing patterns within the legal profession should be addressed at an accelerated pace. We call upon both private and public sectors to place the briefing pattern subject at the top of their agenda, with the public sector leading in the process.'

The BLA noted: 'We have resolved that should there be no visible efforts to correct the current briefing patterns we shall mount campaigns against unfair briefing patterns in the legal profession against both the public and private sectors. Where necessary we shall bring a class action against the private sector. Further we shall mount campaigns against racism within the legal profession and society in general. We shall collaborate with all other like-minded indi-

viduals and organisations in the struggle to address the skewed briefing patterns.'

The BLA also announced that it would lay a formal complaint with the Law Society of the Northern Provinces that it should investigate whether Mr Spoor's statements brought the legal profession into disrepute; and with the Human Rights Commission for promoting racism in South Africa.

### Far-reaching new rule

At its annual general meeting held on 29 October, the Johannesburg Society of Advocates, also known as the Johannesburg Bar, by an overwhelming majority of over 90% of those in attendance, adopted a far-reaching new rule in terms of which, it shall constitute unprofessional conduct and, therefore, a disciplinary offence for lead counsel to accept or remain on brief where there is a team of three or more counsel on brief in a matter and no member of the team is a black person.

In giving effect to this rule, it shall be the responsibility of the lead counsel in question to take appropriate steps to ensure that black women are identified and given special preference.

The Transformation Committee of the Johannesburg Bar Counsel was tasked with finalising the enforcement in com-

pliance mechanisms in respect of the rule, such as the need for reporting by senior advocates on their implementation of the rule and other transformation initiatives.

The Chairman of the Johannesburg Bar Council, Dali Mpofu SC said: 'In its recent statement, which condemned racism in the justice sector and generally, the Bar Council identified a number of role players who should shoulder and share the blame for the lack of progress in redressing the injustices of the past in the justice sector.'

These included the profession itself, the large and mainly white attorneys' firms, state-owned enterprises and the government. It is, therefore, significant that the Bar has decided that before tackling external role players, it should begin by cleaning its own house.

The journey fundamentally to transform various sectors by peaceful, negotiated and democratic means is engulfing South African society and is irreversible. Our profession is no exception and indeed it ought properly to be the lead in promoting and fulfilling the ideals contained in the transformative Constitution of South Africa and in healing the divisions of our ugly past.'





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# People and practices

Compiled by Shireen Mahomed

**Gildenhuys Malatji** in Pretoria has promotions and new appointments. Erin Carlson has been appointed as an associate in the commercial litigation and public law department. Kanabo Skhosana has been appointed as an associate in the corporate and commercial law department. Jean-Ray Pearson has been appointed as an associate in the general litigation department. Rebokilwe Seepane has been appointed as an associate in the commercial litigation and public law department. Celeste Slatter has been appointed as an associate in the estates department.

Mashudu Rambau has been promoted to a senior associate in the commercial law and public law department. Mine van Zyl has been promoted to a senior associate in the general litigation department. Reham Shamout has been promoted to a senior associate in the commercial litigation and public law



Front, from left: Erin Carlson and Kanabo Skhosana. Back, from left: Jean-Ray Pearson, Rebokilwe Seepane and Celeste Slatter.

department. Tim Vlok has been promoted to a senior associate in the general litigation department.

Zelmaine Shaw has been appointed as a director in the corporate and commercial law department. Jones Ditsela has been appointed as a director in the commercial litigation and public law department.



Front, from left: Mashudu Rambau and Mine van Zyl. Back, from left: Reham Shamout and Tim Vlok.



Zelmaine Shaw



Jones Ditsela



From left: Isa Vorster, Tracy-Erin Duggan, Flora Sibanyoni, Nicole Pagel, Colette Botha, Robyn Haupt, Donald Fischer and Jacqueline Retief.

**Stegmanns Inc** in Pretoria is proud to be celebrating an exceptional milestone of 125 years.

Isaac Edwin Stegmann and Jacobus Nicolas de Jongh founded Stegmanns on 17 July 1890 and practiced under the name of De Jongh & Stegmann. Through the last century, Stegmanns has seen many partners come and go and has experienced various name changes, but over the past 125 years, the various partners of Stegmanns have always retained the name of 'Stegmanns'.

Today the firm is simply known as Stegmanns and was duly incorporated in 2005.

Stegmanns head office remains in Pretoria, with a branch office in Nelspruit, which opened in 2005.

The current directorship of Stegmanns Inc comprises of Nicole Pagel (chairperson), Colette Botha, Flora Sibanyoni and Tracy-Erin Duggan. The directors are assisted by Isa Vorster, Nico Van Der Merwe (Nelspruit), Donald Fischer, Jacqueline Retief and Robyn Haupt.



**Shepstone & Wylie** has appointed Debie Ntombela as a mining specialist in their Johannesburg office. She specialises in mining rights and mining permits.



**Pieter Skein** is now practicing for his own account as Pieter Skein Attorneys in Bloemfontein.

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



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MSc (Medicine) (Bioethics and Health Law) Candidate: Wits University  
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By  
Ann  
Bertelsmann

# Effective supervision in your legal practice

## Who should read this article?

Anyone in a legal practice, who is either responsible for supervising staff or who is being supervised.

By now it is surely common knowledge among South African practitioners that the majority of professional indemnity (PI) claims arise out of two areas of practice – Road Accident Fund claims and conveyancing matters. What is it about these two areas of law that lends itself to such claims?

When we scratch beneath the surface and examine what the majority of these matters have in common, the single most frequent answer is that they are dealt with by staff who have no formal legal qualification – or if they are legally qualified, then they have little experience in practice.

Coupled with this inexperience or absence of legal qualifications, the absence of effective supervision is the most significant factor that leads to these PI claims.

The failure to effectively supervise staff is, in our experience, the single most important reason why claims arise in all areas of law.

According to Frank Maher in his book *Risk Management and the Legal Profession* 3ed (UK: Ark Group) at 9: 'Supervision is one of the most significant people risk issues in law firms, and in the author's experience, it is the area where most variation in standards is found – even in the same firm.'

Remember, you have a fiduciary duty to your client and your practice, to ensure that your client's work is properly carried out.

There are of course, substantial risks in a legal practice when work is delegated by senior professionals to junior staff. There are also significant risks in not delegating work. The answer lies in ensuring that delegation is effectively used in combination with proper supervision.

## Micro-manager, macro-manager or empowering delegator – which are you – or which do you have?

Micro-managers find it difficult to delegate work. Instead of giving general instructions for smaller, routine tasks and

supervising larger issues, they direct, monitor and assess every step of the way. These managers disempower employees, stifling innovation and learning opportunities. Rather than enhancing performance and stimulating a strong independent employee work ethic, they tend to ensure poor performance and unhappy staff. This style of management is inefficient and counterproductive – much of the manager's valuable time is spent unprofitably. Micro-management is mismanagement and it is as bad for business as it is for employees.

Macro-managers (or *laissez-faire* managers) fall at the other end of the spectrum. Employees are not given guidelines, direction, feedback or support and are left to deal with the work on their own, as best they can. But at least they do not feel 'picked on'.

Micro-management can make people less productive – and cause them to resign. Macro-management can also make people less productive – and they often stay on. Either way everyone loses.

Effective managers and empowering delegators ensure that the work gets done as effectively and efficiently as possible by ensuring the following.

The delegated task is clearly defined. The nature of the task is matched to the qualifications and experience of the delegate. The delegate is given a measure of authority and the means to handle the task, as well as responsibility for the outcome – even though the delegator carries ultimate responsibility.

Effective delegation is always coupled with effective supervision and communication. It empowers the delegate while providing broad guidelines, appropriate training, support, review and constructive feedback.

Some of the most important 'softer' traits displayed by effective supervisors are flexibility, inspiration, respect, openness, two-way communication and leading by example.

By delegating basic and routine work to junior staff, senior professionals can free themselves up to do the more complicated and financially rewarding work, while at the same time clients should benefit financially from having lower fee-earners involved in carrying out their mandates.

However, if senior professionals make the mistake of delegating only the most basic routine tasks – so that the delegate is not empowered by participating meaningfully in any matter – there is reduced

opportunity for increasing the profitability of the practice, together with a failure to develop, motivate and retain potential fee-generating junior staff.

The flip-side of delegating only routine tasks is giving the delegate a number of files (often ones that the other professionals do not want and that have been handed on through successive juniors, who have come and gone over the months). The unlucky recipient must sink or swim. The dangers inherent in this type of macro-management are obvious – yet this practice persists.

The ideal lies somewhere between these two extremes.

In the interests of productivity, in addition to fee-targets being set for all fee-earning staff, workloads and time-management need to be monitored. Time spent on training and mentoring in time-management is time well spent in the long term. It goes without saying that quality should never be sacrificed on the altar of productivity.

## What are the benefits of being an effective supervisor and delegator?

You will make a valuable contribution to ensuring that your practice –

- has confidence in client satisfaction levels;
- employs skilled, confident, motivated and efficient staff – staff retention;
- has teams that work together successfully;
- has a minimised risk of errors and resultant PI claims;
- reduces the risk of misappropriation of business and trust money; and
- is efficient, profitable and successful.

## What are the negatives of being an ineffective supervisor and delegator?

Ineffective supervision can lead to –

- claims being made against your practice for professional negligence/breach of mandate, misappropriation of trust money or fraud;
- misappropriation of business money and property;
- disciplinary action by your professional body;
- orders against you for costs *de bonis propriis* (which are excluded from cover in your Attorneys Insurance Indemnity Fund (AIIF) PI policy);
- unhappy, unmotivated disloyal staff and high staff turnover;



- lack of teamwork and a stressful working environment;
- loss of dissatisfied clients; damage to your practice's reputation; and
- decreased efficiency and profitability.

### *How do I implement effective supervision in my practice?*

The practice's Minimum Operating Standards (MOS) (see 'Risk management and Minimum Operating Standards' 5/2015 *Risk Alert Bulletin* 3) need to put in place its own comprehensive and well-coordinated supervision policy and plan. There needs to be a framework of procedures and systems that all employees and principals must comply with. This should be re-assessed and refined from time-to-time and compliance should be monitored regularly.

Supervision skills do not come naturally to most people. Ideally, professional training should be provided to supervisors.

### *How can a supervisor identify and manage risks brought about by delegates and colleagues?*

Some routine procedures that can be put in place for the supervision of both co-principals and employees are –

- correspondence checking: Incoming and outgoing e-mails, faxes and mail;
- file audits/reviews; (see 2/2015 *Risk Alert Bulletin* 3, which can be found on the website [www.aiif.co.za](http://www.aiif.co.za).)
- use of checklists;
- workload and time management;
- integration of legal processes into information technology workflow management programs;
- diary and appointment management;
- regular formal and informal meetings and brainstorming;
- a non-judgmental and solution-focussed approach in providing feedback;
- identification and tracking of the completion of all corrective actions;
- client complaint procedures: To alert you at an early stage where there is any client dissatisfaction;
- checking activity on matters in the practice's financial records and diary system;
- regular accounting for the whereabouts of all client files;
- proper induction, training and development of staff; and
- effective knowledge management.

The above procedures can be incorporated into your practice's MOS and most can be wholly or partly conducted by support and junior staff.

### *What are the risk indicators that might set the alarm bells ringing?*

- negative client feedback;
- matters where the work is not billed for or the bills remain unpaid;
- long periods of file inactivity;
- missing files;
- changes in a colleague's behaviour or demeanour; and
- failure to ask for advice or feedback.

### *Supervision of co-principals and yourself*

This article focused largely on effective supervision of salaried and junior staff. It is no less essential that all other partners and directors undergo some form of supervision. Even single practitioners need to establish methods for self-supervision and self-assessment.

Clearly, the level and methods of supervision will be tailored to the supervisee's level of experience, ability and proven track record.

As some practices have learnt from bitter experience, even your most trusted senior colleagues can let you down. Lately, there has been a marked increase in claims arising out of a lack of mutual supervision among co-principals. Remember that principals are jointly and severally liable for the actions of their co-principals.

Maher (*op cit* 11) expresses the view that effective team work is at the heart of a successful risk management environment and that the key to this is communication at all levels. He aptly sums up the true situation when he writes: 'How many sole practitioners are there in your firm? Most firms have one!'

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By  
Sisteen  
Geyser

# Trustees: Do these seven things diligently

## A practical approach to trusteeship

In light of the recent Davis Tax Committee's first interim report on estate duty and the Draft Taxation Laws Amendment Bill 2015, the proposed amendments to the taxation of trusts seem inevitable. This article discusses some of the ways in which one can ensure that the administrative affairs of a trust are always in order, ensuring proper compliance with both trust – and tax laws.

### 1 Beneficiaries first

Section 9 of the Trust Property Control Act 57 of 1988 (the Act) establishes a higher standard of care than normal for the trustees, because they deal with trust funds.

The main purpose of a trust is to be a vehicle for the efficient management of assets that have been set aside for the benefit of the beneficiaries. The trustees must always act to the advantage of the beneficiaries, including decisions regarding investing in specific assets or products, managing the income stream from the trust, as well as the timing and manner in which assets are distributed and payments to the beneficiaries are made.

### 2 Trustees properly appointed

A trustee cannot act unless he or she has been duly appointed by the Master of the High Court in terms of s 6 of the Act, as set out in *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA). Trustees will also, for Financial Intelligence Centre Act 38 of 2001 (FICA) purposes, need to supply financial institutions with the letters of authority or master's certificate.

In certain circumstances, an appointed trustee can no longer act as such in terms of s 20 of the Act, for example his or her estate is sequestrated, either provisionally or finally. The terms of the trust deed may also disqualify him or her for some reason. If the circumstances of a trustee change, it would accordingly be a good idea to check the terms of the trust deed, in order to confirm that he or she is still authorised/competent to act as trustee.

Where there are any questions regarding the appointment of a specific trustee, or to confirm who the current trustees are, a certified copy of the letters of authority should be obtained from the relevant master of the High Court. The master may request a copy of a resolution by the (other) trustees authorising an agent to apply for the copies, togeth-

er with the application forms ([www.justice.gov.za](http://www.justice.gov.za)).

### 3 Independent trustee

Although neither the Act, nor the trust deed may specifically require or prescribe that an independent trustee be appointed, the master now routinely requests that an independent trustee, who is neither a beneficiary, nor a direct family member of the trustees or the beneficiaries, be appointed. (One of the requirements on the master's JM21, is that the relationship between the trustee to be appointed and the beneficiaries, is to be declared.) The courts have found that there should be a functional separation of ownership and enjoyment (*Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA)).

In practice, an independent trustee need not be a professional person. Should you, as an attorney, however, be appointed as an independent trustee, it is advisable that you are astute in ensuring that all decisions by the trustees are taken, and all acts done, with your knowledge (*Steyn and Others NNO v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB)).

### 4 Changes in trustees need to be recorded promptly

The trust deed normally sets out the procedure to be followed in the event of the resignation or the death of a trustee. The remaining trustees must always ensure that they determine the correct procedure to be followed in such a situation. Sometimes the trust deed provides that when the remaining number of trustees falls below a prescribed minimum, they may only exercise administrative actions pending the appointment of a new trustee (as per *Lupacchini*).

Once the trustees have ascertained what they are authorised to do until a replacement trustee has been appointed, the master's new set of prescribed forms should be completed and appointment procedures followed, to elect the replacement trustee and have updated letters of authority issued ([www.justice.gov.za](http://www.justice.gov.za)).

### 5 Trustee meetings

Trustees should meet as regularly as is necessary to fulfil their duties to the beneficiaries. The trust deed may prescribe when and how trustee meetings are held. The trustees should at the very least meet once a year to discuss the trust matters, and finalise the financial statements of the trust.

The trust deed usually provides for

the manner in which meetings are to be held; what constitutes a quorum, and what happens in case of a deadlock in decisions. Recently registered trusts may even provide for electronic meetings to be held, in which case one should keep the requirements of the Electronic Communications and Transactions Act 25 of 2002 in mind.

### 6 Yearly financial statements

One of the most important duties of trustees is to ensure that proper records of the trust's financial affairs are kept (s 16 of the Act). Depending on the trust deed, this may mean audited financial statements, or statements by an accountant. Whatever the case, once a year these statements should be compiled and signed off by the trustees, and it is a good idea to diarise this accordingly.

### 7 Record keeping

The master can at any time ask for any information regarding the administration of trust assets and distributions thereof, and is also empowered to investigate and impose costs, should the trustees not be able to comply with such a request (s 16 of the Act).

Without proper records, the courts have in a number of cases found that a specific trustee was using a trust as his 'alter ego'. See *First Rand Limited trading, inter alia, as First National Bank v Britz and Others* (GP) (unreported case no 54742/09, 20-7-2011) (Mabuse J), where there were no proper records or proof of the separation of the trust assets.

With the proper records, however, the courts have ruled that the assets of a trust could not be taken into account on divorce, because all trustee decisions and records where shown to be 'above board' (*M v M* [2006] JOL 16569 (T)).

Practically, trustees should keep the following in a safe place for a period of five years after date of the termination of a trust (s 17 of the Act) –

- trust deed, letter of authority, and master's certificates;
- minutes of all trustee meetings;
- FICA Act details of the trustees;
- records of investments and properties, namely title deeds;
- tax records;
- financial statements; and
- bank account statements.

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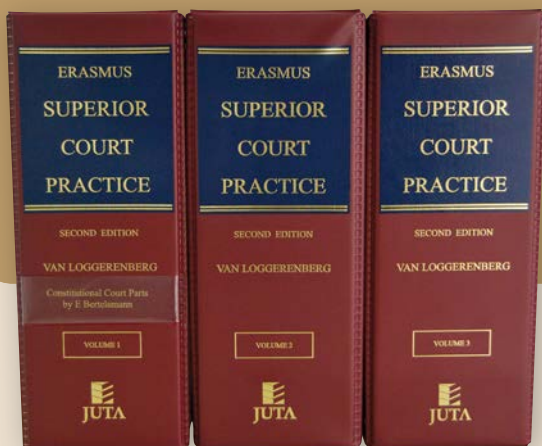
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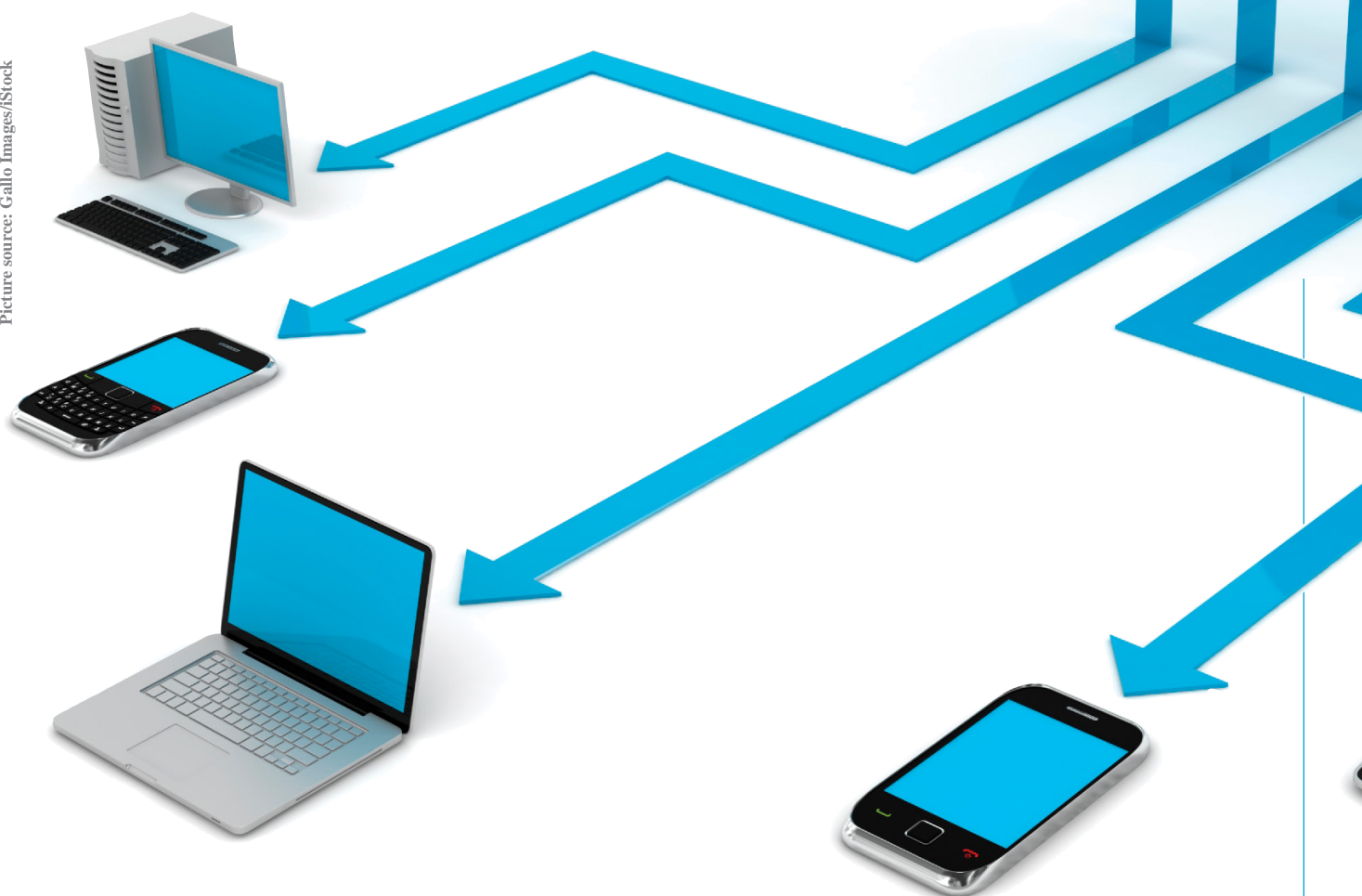


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# Use of internet based technologies in legal practice

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## Law Society of South Africa guidelines

This guideline has been compiled to provide background information and to serve as a tool to assist attorneys in South Africa (SA). The views, conclusions and recommendations contained in this guideline are not to be regarded

or construed as legal advice or as establishing any standard or legal obligation.

Reliance on the contents of this document is at the reader's own will. Neither the Law Society of South Africa (LSSA) or any member of the E-Law Committee shall be liable for any loss or damage arising in any way from use of or reliance on the contents.

## Executive summary

When making use of Internet-based technologies in legal practice, lawyers should exercise due diligence before utilising a third-party service provider for purposes of storing or processing confidential information offsite. In addition, a written agreement should be concluded that requires the service provider to establish and maintain measures that ensure the security of any personal information





‘Cloud computing’ is an expression used to describe a variety of different computing models that involve a number of computers connected via the Internet. The term is generally used to describe third-party hosted services that run server-based software from a remote location.

Cloud computing is not new to the legal field. It has been around for a number of years and many lawyers would already be familiar with a number of cloud

computing service providers, including web-based e-mail service providers. Cloud computing offers flexible, affordable technologies that directly addresses a company’s objectives and goals by providing required functionality, reducing overhead expenditure and increasing mobility and convenience.

While cloud computing offers many benefits, it also introduces several new risks that lawyers must take into consideration since cloud computing often means entrusting data to a third-party.

Many foreign law societies and Bar associations around the world have determined that lawyers may use cloud computing technologies in their law practice without compromising their ethical duties towards their clients, ‘as long as the lawyer takes reasonable steps [or reasonable protective measures] to ensure that sensitive client information remains confidential’ (NHBA Ethics Committee ‘Ethics Committee Advisory Opinion #2012-13/4 The Use of Cloud Computing in the Practice of Law’ [www.nhbar.org](http://www.nhbar.org)).

The general consensus internationally is that the use of cloud computing does not violate any ethical duty (and in many instances may go some way towards upholding them) provided that reasonable care is taken effectively to minimise any risks pertaining to the confidentiality and security of client information and client files (see North Carolina State Bar ‘Proposed 2010 Formal Ethics Opinion 7’ [www.rocketmatter.com](http://www.rocketmatter.com)) with the onus of evaluating a cloud provider’s security infrastructure placed on the law firm or practitioner (see the opinions by the Florida Bar [www.floridabar.org](http://www.floridabar.org) and the New Hampshire Bar Association [www.nhbar.org](http://www.nhbar.org)).

In determining whether or not a lawyer has taken ‘reasonable steps’ or put into place ‘reasonable protective measures’, the facts and circumstances of each case should be taken into account, however guidance can be obtained from the LSSA’s previously published guides on information security and the protection of personal information (LSSA ‘Information Security Guidelines for Law Firms’ [www.lssa.org.za](http://www.lssa.org.za)).

### Ethical duties and responsibilities impacting on the use of cloud computing

A number of ethical duties and responsibilities have been identified internationally that impact on the use of cloud computing technologies. Many of these follow on or support the main duty of a lawyer to take ‘reasonable steps’ to protect confidential client data. A summary of some of these internationally identified duties (and the law society which identified it) is set out below, including

some ethical duties previously identified by the LSSA:

- To understand and guard against the risks inherent in the cloud by remaining aware of how and where data is stored and what the service agreement says, namely the duty of competence (New Hampshire Bar Association) (NHBA Ethics Committee *op cit*).
- To keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology (American Bar Association) (B Ambrogi ‘Latest Ethics Opinion on Cloud Computing Emphasizes Duty of Competence’ [www.catalystseure.com](http://www.catalystseure.com)).
- To have a reasonable understanding of the technology and using it, or by seeking assistance from others who have the necessary proficiency (Canadian Bar Association) (Canadian Bar Association ‘Legal Ethics in a Digital World’ [www.cba.org](http://www.cba.org)).
- To keep abreast of, and understand, any advances in technology that genuinely relate to competent performance of the lawyer’s duties to a client (American Bar Association) (American Bar Association ‘Ethical Challenges on the Horizon; Confidentiality, Competence and Cloud Computing’ [www.americanbar.org](http://www.americanbar.org)).
- To engage in due diligence when using a third-party service provider or technology for data storage and/or processing (Law Society of British Columbia, Canada) (Law Society of British Columbia ‘Report of the Cloud Computing Working Group’ [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)).
- To ensure that the service provider and technology a lawyer uses supports the lawyer’s professional obligations, including compliance with the law society’s regulatory processes (Law Society of British Columbia, Canada and New Hampshire Bar Association) (see American Bar Association *op cit*).
- To conclude an agreement with the provider/operator of the services, where the information to be processed is personal information, to ensure that appropriate security for the protection of personal information is established and maintained (LSSA), once the Protection of Personal Information Act 4 of 2013 (POPI) has been enacted (M Heyink ‘An Introduction to Cloud Computing’ [www.lssa.org.za](http://www.lssa.org.za)).
- To implement and provide appropriate information security for the information and communications processed by the lawyer (LSSA), once POPI has been enacted (see note Heyink *op cit*).

### Duty of competence

Lawyers have access to high volumes of information and what is undeniably an obligation of every lawyer today is the proper governance of such information (see LSSA *op cit*). We have moved from a paper and text environment to one of

electronic records and communications and the proper governance of maintaining confidentiality in electronic records and communications is hugely different to what is necessary in the text and paper environment (see *LSSA op cit*).

In a guidance note written by the Canadian Bar Association entitled 'Information to Supplement the Code of Professional Conduct Guidelines for Practicing Ethically with New Information Technologies' September 2008 at 5 ([www.lawsociety.nu.ca](http://www.lawsociety.nu.ca)), the following comment is pertinently made:

'To meet the ethical obligation for competence in Rule II [i.e. to perform any legal services undertaken on a client's behalf competently] lawyers must be able to recognise when the use of technology may be necessary to perform a legal service on that client's behalf and must use the technology responsibly and ethically.

Lawyers may satisfy this duty by personally having a reasonable understanding of the technology and using it, or by seeking assistance from others who have the necessary proficiency'.

The LSSA has stated that 'attorneys are required to act reasonably and diligently in fulfilling their professional obligations' (see *LSSA op cit*). The LSSA has stated further that 'one of these obligations must be that in using modern technology they do not compromise the rights of their clients arising from the attorney/client relationship' (see *LSSA op cit*).

The LSSA has also clarified that it will likely not only be confidential legal data that is stored in the cloud but personal information too. Therefore, in accordance with the principles and objectives of POPI, there should be a written agreement concluded between the lawyer and the provider of the cloud computing services that requires the service provider to 'establish and maintain measures that ensure that security of the personal information and protect the integrity and confidentiality of information' (s 21(2) of the Protection of Personal Information Bill) (see Heyink *op cit*).

## Hosting information within SA

There are five key points of consideration when contemplating making use of a service provider to store and/or host electronic information.

### 1 Inadvertent waiver of privilege

Discovery for litigation is becoming increasingly more efficient when electronic discovery platforms and service providers are used to manage and review the large numbers of the documents for

pre-trial preparation. It is important to note that placing documents by a service provider on a database system for review does not amount to waiver of privilege, but sharing access to that database with opposing counsel may be a waiver of privilege if privileged documents are disclosed to opposing counsel.

In *ThornCreek Apartments III, LLC et al v Village of Park Forest et al* ND III 2011 the court applied the rules contained in the amended Federal Rule of Evidence Rule 502(b), which states that a disclosure of privileged information does not operate as a waiver if three elements are met: '(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error'. The court found that privilege had been waived where the vendor had produced privileged documents on disclosure to the opposing counsel, and after holding that the attorney's procedures for privileged review were completely ineffective and the court had little confidence in the reasonableness of the attorney's precautions regarding disclosure.

Lawyers need to be aware of the importance of taking reasonable steps to protect against inadvertent disclosure and to perform due diligence on potential service providers to ensure against inadvertent disclosure. A crucial point to take into consideration is that if documents are provided to a third-party service provider who does not have in place the requisite security protocols, then inadvertent disclosure could also lead to an inadvertent waiver of privilege.

### 2 Hosting with a SA service provider

The use of cloud computing technologies is not inconsistent with a lawyers ethical duties provided that lawyers should exercise due diligence before utilising a third-party service provider for confidential data storage or information processing in the cloud. In addition, a written agreement should be concluded that requires the service provider to establish and maintain measures that ensure the security of any personal information stored by the service provider, as well as the protection of the integrity and confidentiality of client information. An SA lawyer should therefore look towards a SA hosted solution when considering the use of cloud computing services, for both their own and their client's needs, due to the advantages of hosting data with an SA headquartered company with SA servers, which can offer clients a solution that avoids the reach of any extra territorial data seizures.

## 3 Foreign jurisdiction (safe harbour - European Union)

When using a cloud service provider not domiciled in SA, it is key to be aware of any foreign law, which may be applicable under the circumstances for the use and storage of information electronically within that jurisdiction and when using a cloud service provider.

For example, the 'European Union Directive on the Protection of Individuals with Regards to the Processing of Personal Data and on the Free Movement of Such Data' (ch 1, Article 4. Hereinafter referred to as the Directive. Found at <http://eur-lex.europa.eu>) acts as a guideline for European Union (EU) member states and requires that these states enact local data protection laws adopting the principles of data protection and privacy, which are laid out in the Directive. As part of this formalised system of data privacy, legislation, companies operating in the EU are not permitted to send personal data to countries outside of the member states (including countries that fall outside of the European Economic Area) unless that state can guarantee that its local laws comply with the levels of data protection laid out in the Directive.

In order to assist the United States (US) in meeting the EU data protection requirements a new framework, called the Safe Harbour Privacy Principles, has been developed and aimed at companies within the EU or US that store customer data, in an attempt to protect such data by preventing accidental disclosure or loss of such personal information (Wikipedia The Free Encyclopaedia 'International Safe Harbour Privacy Principles' <http://en.wikipedia.org>). However, the EU Commission conducted a review of this framework and on the 5 June 2013 adopted Opinion 06/2013 (Drafted by the Working Party on the Protection of Individuals with Regard to the Processing of Personal Data set up by Directive 95/46/EC, having regard to Articles 29 and 30 of that Directive. Found at <http://ec.europa.eu>) on open data and public sector information reuse, which in essence came to the conclusion that the Safe Harbour Privacy Principles may not be in actual fact be safe enough.

Lawyers looking to host data outside of SA should thus take these considerations into account and take note that your company will be subject to that particular country's laws surrounding the storing and monitoring of data. For example, Dropbox received requests for user information from the US government in relation to 164 user accounts in 2012 (L Essers 'Dropbox pushes to publish spy data request details' [www.pcworld.com](http://www.pcworld.com)).

For example, lawyers need to be aware that if they host data anywhere in the world with a US headquartered service provider then irrespective of where the data is hosted, the service provider will be obliged to disclose all data and client information upon the issuing by a federal court of a search warrant for such data in response to US investigations. This is a direct result of the judgment delivered in New York by US District Judge Loretta Preska on 31 July 2014 (see *In re: A Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp*, US District Court, Southern District of New York, No. 13-mj-02814.), whose judgment has been stayed to allow the parties to appeal such ruling, however, the implications are that data hosted with US companies is now subject to seizure by US investigators anywhere in the world.

## 4 South African Revenue Service

Lawyers need to maintain awareness of any relevant South African Revenue Service (Sars) ruling for electronic storage of accounting records.

For example, in GN 787 GG35733/1-10-2012) the Commissioner for Sars prescribed that taxpayers are allowed to keep records, in terms of s 29 of the Tax Administration Act 28 of 2011, in an electronic form, so long as the rules contained in the notice are observed.

Rule 3.2 of the notice defines an 'acceptable electronic form' as a form in which 'the integrity of the electronic record satisfies the standard contained in section 14 of the Electronic Communications and Transactions Act'. In addition, it is required that 'the person required to keep "records" is able to, within a reasonable period when required by Sars -

(i) to provide Sars with an electronic copy of the "records" in a format that Sars is able to readily access, read and correctly analyse; (ii) send the "records" to Sars in an electronic form that is readily accessible by Sars; (iii) or provide Sars with a paper copy of those "records"'. Rule 4 requires that the "records" retained in electronic form must be kept and maintained at a place physically located in South Africa'. Electronic documents may not, therefore, be retained outside of SA without a senior Sars official's authorisation and consent.

Rule 6 places a requirement on persons who keep records in an electronic format to 'ensure that measures are in place for the adequate storage of the "electronic records" for the duration of the period referred to in section 29 of the Act', for a period of not less than five years.

## 5 Conduct vendor due diligence

Due diligence should be conducted on cloud service providers to actively verify the cloud vendors security standards, prior to hosting with such service provider. Such due diligence constitutes reasonable steps, which a lawyer must take to ensure that sensitive client information is protected and remains confidential, and to identify whether or not the service provider and technology they use support the lawyer's professional obligations, including compliance with applicable law societies regulatory processes.



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# Running through the maze of tax consequences for corporate restructuring

By  
Albertus  
Marais

**A**ttorneys are often requested to assist with corporate restructures. A multitude of considerations then arise, specifically those linked to company law (including the necessary company secretarial work that would be required), contracts to be drafted and potentially considerations linked to the transfer of immovable property or share investments, to name but a few. One further important consideration is the tax consequences of the proposed transaction, which is, quite often, not the first consideration on the list of matters that needs to be dealt with. And rightly so, a transaction needs to make commercial sense and be legally feasible, before one should start thinking of its tax consequences. Unfortunately though, the mistake that is often made – and to clients' detriment – is that the tax consequences of a corporate restructure are regarded as being inevitable and that these cannot be mitigated. This, however, is not the case.

Once the desired commercial outcome of a corporate transaction is determined, various provisions predominantly in the Income Tax Act 58 of 1962 (the Act)

provides for relief mechanisms through which to achieve the desired commercial outcome on an income tax beneficial basis. Planning the restructure then becomes a bit like a maze. Once one knows both the point of departure, as well as the destination, it is only a matter of planning the route by which to arrive at that destination (ie how to structure it), and to do so in as tax efficient a manner as possible. Within this framework there is quite a bit of lee-way through which to plan any corporate restructure – whether big or small.

To give an example: Individuals A and B are partners in an unincorporated estate agency business, looking to transfer this business into a company of which they will each hold 50% of the issued shares. This is to ensure that they, in their personal capacities, are adequately protected against creditors of the business. By setting up a company and selling the business to that company will in all likelihood lead to significant tax costs in the form of income tax, capital gains tax, transfer duty and Value Added Tax. Securities Transfer Tax may even arise as part of the process through which the company, which is to hold the business is

being set up, or in the event that the partnership owns share investments, which are also being sold to the company. By simply being aware of the provisions of s 42 of the Act the above transaction could have been structured as a sale of assets to the company in exchange for shares being issued to A and B, all at no tax costs whatsoever. It is, therefore, simply a matter of being aware of the mechanisms created in the Act (and other applicable tax Acts) specifically to allow for tax neutral restructures, and then to arrange one's affairs accordingly. Section 42 utilised in this example is but one of many of the so-called 'group relief provisions' (ss 41 to 47 of the Act) available to provide relief where corporate restructures are involved. As further alluded to above, these group relief provisions go much further than merely to negate income tax effects – it also extends to the other applicable ancillary taxes (see specifically s 8(25) of the Value-Added Tax Act 89 of 1991, s 8(1) of the Securities Transfer Tax Act 25 of 2007 and s 9(1) of the Transfer Duty Act 40 of 1949).

Although the example above deals with a so-called 'asset-for-share trans-

action' (s 42), the same principles (and quite often, requirements) apply for 'amalgamation transactions' carried out in terms of s 44 (ie where the businesses of two companies merge), 'asset-for-asset transactions' in s 45 where assets can be transferred 'tax free' between companies forming part of the same group, s 46 'unbundling transactions' (in terms of which a company distributes an investment in a company to its shareholder as an *in specie* dividend) or in terms of a 'liquidation transaction' as contemplated in s 47.

Referring again to the example of A and B above, in most circumstances the group relief provisions are employed to provide tax relief in relatively simple factual scenarios. However, these are also employed extremely effectively in a staggered fashion where more complex transactions are involved; this often entails, for example, the implementing of more than one group relief transaction in succession to one another. In these circumstances though one should typically be wary of entering into simulated transactions as part of such a staggered approach, or that steps are not inserted into a restructure the main purpose of which being to avoid income tax (in other words steps not necessary to achieve the desired commercial outcome).

Although the provisions above are often referred to as the 'group relief' provisions, this is somewhat of a misnomer. For some of the 'group relief' provisions to apply, it is a requirement that a 'group of companies' (defined in s 41) should exist within which a corporate restructure must be implemented. This generally involves one or more companies whom all share a common company as direct or indirect shareholder owning at least 70% of the effective interest. Non-tax resident companies are specifically precluded from forming part of a 'group of companies'. While the requirement for a group of companies is certainly required for 'asset-for-asset transactions' as well as 'liquidation transactions' (and most 'unbundling transactions'), it is quite possible to carry out an amalgamation or asset-for-share transaction (refer the example of A and B above) without a group of companies being present. The

common misconception among practitioners that the 'group relief' provisions are only available where groups of companies exist is, therefore, misplaced.

It may at times be beneficial from a tax perspective not to utilise the group relief provisions. It is quite possible for example that, through a restructure, tax losses may be realised instead of tax profits. In such instances one would specifically elect out of the provisions of the applicable 'group relief' provision in the Act, even if its requirements are met, in order to realise such losses and not carry out the transaction on a tax neutral basis. The Act specifically allows for taxpayers to elect out of the relief provided, even where the transaction would meet all the requirements necessary for such relief to be utilised. This is one of the many compliance related requirements linked to the group relief provisions, irrespective whether they are utilised or not, wholly or in part. It is not surprising that beneficial tax regimes such as the group relief provisions carry such a high level of compliance requirements, and it is to be expected that South African Revenue Service (Sars) would want to actively monitor that transactions making use of this beneficial tax regime are implemented properly and that the provisions thereof are not abused to achieve tax benefits beyond what is intended to be afforded to taxpayers.

Irrespective of whether transactions are carried out as part of group relief. For any transaction in which companies are involved it is important to also appreciate the dividends tax and donations tax consequences involved with a transaction. For example, donations made between companies of the same 'group' (here less onerously defined than for 'group relief' purposes) are exempt from donations tax, and dividends declared from one South African tax resident company to another is also generally exempt from dividends tax. However, that is not to say that such transactions, although exempt from these taxes, will not attract other taxes (eg capital gains tax). It is further possible that certain transactions, as part of restructures, may constitute 'reportable arrangements' as defined (ss 34 to 39 of the Tax Admin-

istration Act 28 of 2011) and would thus be required to be reported to Sars when completed. Failing to do so carries a penalty ranging between R 50 000 and R 3,6 million (s 212).

Corporate restructures are an increasingly technical area of the law of taxation, with the statutory provisions in the various tax Acts being the subject of annual amendment to refine the applicable provisions. This year will be no exception if one has regard to the provisions of the Draft Taxation Laws Amendment Bill, 2015 released by National Treasury on 22 July 2015 (see [www.treasury.gov.za](http://www.treasury.gov.za)). The group relief provisions are by far the single most referred topic to Sars requesting binding rulings to be issued, and unsurprisingly so, given the high values typically involved in these transactions and the need for taxpayers to obtain certainty regarding the interpretation by Sars too of the tax consequences of a transaction prior to implementation.

Irrespective though, of the simplicity or complexity of the transaction, where transactions with companies are involved two important principles apply: Tax considerations will inevitably arise for any such transaction and while these considerations should admittedly not be the primary purpose behind the proposed transaction, it is a reality that practitioners and clients alike sadly come to realise the onerous tax implications of a transaction at too late a stage, and that it could have been mitigated. The second principle is thus that the group relief regime is potentially available through which to negate tax costs, the ambit of which is by no means limited to those restructures which one reads of in the paper. It is a regime that has been introduced into fiscal legislation to benefit big and small business. The key, however, is to avail oneself of the provisions purposefully made available in the Act.

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

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# The role of the mediator: Umpire or interrogator?

By  
Michael  
Crystal  
and Shelly  
Mackay-  
Davidson



**M**ediation has been a valuable tool for several years in the resolution of disputes in the family law and commercial law arenas. The court system is now following this trend, and the magistrates' court rules have recently been supplemented with mediation rules, beginning with r 74. For now, mediation only exists as a pilot project at certain courts, but if all goes well it will soon be rolled out across the country. This article will explore the role of the mediator in mediation proceedings.

Rule 80 deals with the role and functions of the mediator. At the beginning of the mediation, the mediator must inform the parties of the following:

(a) the purposes of mediation and its objective to facilitate settlement between the parties;

(b) the facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation;

(c) the inquisitorial nature of the mediation proceedings;

(d) the rules applicable to the mediation session;

(e) all discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law;

(h) the mediator will assist to draft a settlement agreement if the dispute is resolved; and

(i) if the dispute is not resolved, the mediator will refer the dispute back to the clerk or registrar of the court, informing him or her that the dispute could not be resolved.'

It is clear that r 80 takes a pragmatic approach, and is focused on the information that the mediator should convey to the parties. A more theoretical question arises as to how much the mediator should intervene in the proceedings? I submit that when r 80 is applied in practice, the considerations that follow should be taken into account.

There are arguments in favour of a more interventionist mediator (JG

Mowatt 'The high price of cheap adjudication' (1992) 109 *SALJ* 77). How is a mediator expected to deal with a party who fails to attend an interview after having agreed to do so, and therefore, hampers the administration of justice? Should the mediator not have a role similar to that of a judge so that he or she can ensure that there are consequences for such a party's actions?

There are, however, arguments against a 'judge-like' mediator (Mowatt at 81 - 84):

First, the mediator's primary function is to facilitate an agreed settlement between the parties rather than to impose a solution on them. So, he or she is not an arbitrator or judge; does not decide issues for the parties; does not determine whose version of the facts is 'true'; and is not concerned with determining right from wrong. The mediator should endeavour to resolve issues by 'engaging disputants as joint problem-solvers' and assisting them in the negotiation process.

Secondly, mediation as a process relies heavily on a non-hierarchical relationship between the mediator and the parties to the dispute. Inherent in this is the fact that a mediator should be representative of the larger community, and should not act as a judge lording over the disputants from above.

Thirdly, although mediation should take into account the values and norms of society, it is generally aimed at establishing what is 'right' for the parties, as opposed to what may be considered 'just' in terms of the prevailing values and laws. Furthermore, the psychological and emotional approach that mediation adopts towards disputants and their disputes means that the procedural technicalities of normal court litigation are downplayed.

Fourthly, viewing a mediator as unobtrusive and non-interventionist assumes that there is a rough equality between the disputants. This is rarely the situation in practice. The parties to a dispute are usually on unequal footing when it comes to social standing, bargaining power, finances, emotions, and physical power (S Moodley 'Mediation - the increasing necessity of incorporating cultural values and systems of empowerment' (1994) 27 *The Comparative and International Law Journal of Southern Africa* 44). If there is inequality between

the parties, it may very well be that a proper outcome will not be achieved if the mediator remains completely at bay.

So it appears that it is undesirable for mediators to be granted judicial powers on a general level. This is a reflection of the voluntary nature of the mediation process. I submit, however, that the mediator should be able to exercise some powers in particular situations, for example, where a party fails to attend a mediation meeting after having agreed to do so. Allowing the mediator to grant judgment for the plaintiff in such a situation would be too extreme an approach. Perhaps the rules should enable the mediator to make a costs order against the party who fails to attend. Alternatively, if the matter reaches the litigation stage, the magistrate could take the failure to attend mediation into account when awarding costs.

A sensible approach to the role of the mediator in redressing the balance of power between parties would be as follows: Within the mediation process itself, it is assumed that there is a degree of equality between the parties, and each party is expected to allow the other to speak. The parties have essentially consented to relinquishing some of the control over the outcome to the mediator. The important thing here is to determine the extent of the control that passes to the mediator (JG Mowatt 'Some thoughts on mediation' (1988) 105 *SALJ* 727). The mediator should be careful not to 'eclipse' the parties, or the essential nature of the mediation process will be lost. However, he or she must assume enough control to achieve a balance of power and, ideally, an equitable outcome.

It is clear that there is a fine balancing act that must take place, and this skill will be fine-tuned by mediators as they gain more experience.

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# Does a non-member spouse have a claim on pension interest?

By  
Merike  
Pienaar

**S**ection 7(7)(a) of the Divorce Act 70 of 1979 (the Act) stipulates that a pension interest of any party to a divorce action shall be deemed to be an asset of such a person's estate.

Section 7(8)(a) of the Act further stipulates that a court granting the divorce order may make an order that any part of the pension interest of such a member spouse is due or assigned to the non-member spouse when such an interest accrues in respect of the member spouse. Section 37D(4) of the Pension Fund's Act 24 of 1956 stipulates that the date of accrual of the pension interest is deemed to be the date of divorce.

The emanating question is whether a pension interest automatically forms part of the spouse's estate or whether it must be claimed by the non-member spouse during divorce? Conflicting judgments on this issue suggest that the courts struggle with the interpretation and application of the relevant statutory provisions. This article will briefly engage with some of these judgments and propose a way forward for the interpretation of the provisions.

## Case law

The parties in *S v S and Another* 2001 (2) SA 306 (O) were divorced and a settlement agreement was entered into, which contained a blanket order that the joint estate of the parties should be divided.

No specific provision was made for the division of the pension fund. Shortly after divorce and prior to the division of the joint estate, it came to the attention of the applicant that the respondent had resigned (at the time of divorce, the respondent was still a member of the pension fund (at para 4)) and that his pension fund had consequently accrued and been paid out.

Picture source: Gallo Images/iStock

Musi J held that a pension interest does not ordinarily form part of the assets but that it must be taken into account on divorce. Further, the court compared s 7(8)(a) of the Act to maintenance relief claimed in a divorce in terms of subs 7(1) and 7(2) of the Act and found that, as in the case of maintenance, the party seeking a share of the other's pension interest must claim so during the course of the divorce proceedings as it does not automatically form part of the estate.

The divorce order in *M v M and Others* 2002 (2) SA 648 (D) did not specifically deal with the division of the joint estate and at the date of the application the joint estate was yet to be divided. The court rejected the view expressed by Musi J in the *S v S* case, that the non-member is forever precluded from claiming a share of the member spouse's pension interest if such a claim is not made at date of divorce. Magid J held that s 7(7)(a) of the Act is applicable even after the divorce order has been granted and no order in terms of s 7(8)(a) of the Act was made at divorce.

In *Fritz v Fundsatwork Umbrella Pension Fund and Others* 2013 (4) SA 492 (ECP) the court was confronted with a scenario where the husband passed away after the joint estate had already been divided and no provisions were made for the division of his pension interest. The court referred to the *M v M*



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case and interpreted the judgment in *M v M* to mean that an order in terms of s 7(8)(a) of the Act can be sought where the joint estate has not yet been divided, even after divorce. Relief was, however, not granted to the applicant in this case as the estate had already been divided.

The divorce order in *YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC) did not specifically make provision for the division of the husband's pension fund. On date of death of the husband, the joint estate had already been divided. The court held that a claim for a part of pension interest can only be granted on divorce.

The joint estate of the parties in *N v N* (GP) (unreported case no 39356/2013, 15-1-2015) (Kgomo J) had not been divided at the time of the application being heard. The court followed a strict interpretation of the words 'the court granting a decree of divorce' in s 7(8)(a) of the Act and found that spousal maintenance and claims for part of the other spouse's pension interest must be dealt with by the court finalising the decree of divorce. The court consequently held that the other party is forever precluded from seeking relief on these issues after the divorce, thus effectively supporting the decisions in the *YG* and *S v S* cases.

## Application

It is clear from the contrasting decisions mentioned above that there is currently no certainty regarding a non-member spouse's entitlement to a pension interest where the issue has not been dealt with in the divorce order. As the Supreme Court of Appeal is yet to make a ruling on this issue, litigants find themselves in the position of being left with only the conflicting decisions of the High Courts. PA van Niekerk *A practical guide to patrimonial litigation in divorce Actions* (Durban: LexisNexis 2011) at para 7.2.4 advocates a practical approach to s 7(7)(a) of the Act and argues that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when

determining the value of the assets of the estate.

The courts in *S v S* and *N v N* – compared the division of a pension interest in terms of s 7(8)(a) of the Act to that of spousal maintenance in terms of subs 7(1) and 7(2) of the Act which, according to Van Schalkwyk, is a questionable comparison. LN van Schalkwyk 'Wanneer vind artikel 7(7) van die Wet op Egskeiding, 70 van 1979, toepassing?' (2013) 46(3) *De Jure* 849 correctly points out that the Act grants the court a discretion to order spousal maintenance in subs 7(1) and 7(2). This discretion is not present in s 7(7)(a) of the Act, where it is clear that a pension interest is deemed to be an asset of the member spouse's estate. The discretion granted to the court in s 7(8)(a) of the Act is not the same as the discretion in subs 7(1) and 7(2) of the Act. The purpose of the discretion in s 7(8)(a) of the Act comes into play where a court may, on the grounds of fairness, order that a party is not entitled to share in the pension interest for whatever reason, which could, *inter alia*, include substantial misconduct on the part of the non-member spouse.

## Conclusion

It seems to be clear from the wording of s 7(7)(a) of the Act that the legislature intended that a member spouse's pension interest should form part of his or her estate on divorce. Although we can only speculate as to the reasons why s 7(7)(a) of the Act was promulgated, one of the reasons could have been an attempt to address the social dynamics characterising the predominant marital arrangement pre-1984. The husband was usually the breadwinner while the wife took on child-rearing and household duties, effectively depriving her of the opportunity to build an estate of her own. The nest egg in the form of the husband's pension interest consequently had to cover both parties' needs in their old age, as per the primary purpose of a pension fund. This is in my opinion the rationale behind the statutory provision. To limit the relief to be claimed by a non-member spouse on

a narrow interpretation of the Act, as in the cases of *S v S*, *N v N* and *YG*, surely cannot be in line with the intention of the legislature.

The unfortunate effect of these judgments is that it is the less fortunate party seeking a divorce and who does not have the financial capacity to employ legal representation who is adversely affected. In the majority of divorces in South Africa the plaintiff will issue a divorce summons in the regional court and obtain a divorce order on *viva voce* evidence. As laymen, these litigants are unaware that they will forever be precluded from seeking a part in the member spouse's pension interest if a specific claim is not instituted at divorce. It needs to be borne in mind that, unlike in the case of maintenance where the presiding magistrates and judges specifically inform the plaintiff that an order (for maintenance) can only be sought at divorce, the plaintiff is not informed accordingly with regards to a pension interest. Thousands of divorce orders are made which contain only a blanket order regarding the division of the joint estate, without any mention regarding the division of the pension interest. These non-member spouses will, according to some of the authority listed above, never be entitled to share in the pension interest of their ex-spouse.

We consequently have to ask whether a non-member spouse who did not obtain an order with specific mention to a pension interest at divorce is now in the same boat as a non-member spouse pre the introduction of s 7(7)(a) of the Act in 1989? If this question is to be answered in the positive, as some authority would seem to support, a serious injustice is being done. This is in my opinion the result of a problematic narrow interpretation by the courts that neither reflects the intention of the legislature, nor affects an equitable outcome.

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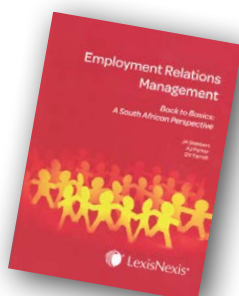


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David Matlala *BProc (University of the North) LLB (Wits) LLM (UCT) LLM (Harvard) LLD (Fort Hare) HDip Tax Law (Wits)* is an adjunct professor of law at the University of Fort Hare.

# THE LAW REPORTS

October 2015 (5) South African Law Reports (pp 317 – 629);  
[2015] 3 All South African Law Reports September no 1 (pp 523 – 664)  
and no 2 (pp 665 – 736); [2015] 4 All South African Law Reports  
November no 1 (pp 255 – 399) and no 2 (pp 401 – 542);  
2015 (6) Butterworths Constitutional Law Reports –  
June (pp 653 – 760); and 2015 (7) July (pp 761 – 885)

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:

**CAC:** Competition Appeal Court  
**CC:** Constitutional Court  
**FB:** Free State Division, Bloemfontein  
**GJ:** Gatueng Local Division, Johannesburg  
**GP:** Gauteng Division, Pretoria  
**KZD:** KwaZulu-Natal Local Division, Durban  
**KZP:** KwaZulu-Natal Division, Pietermaritzburg  
**SCA:** Supreme Court of Appeal  
**WCC:** Western Cape Division, Cape Town

## Children

**Rescission of adoption order:** In *GT v CT and Others* [2015] 3 All SA 631 (GJ) when the first respondent (mother) and the second respondent (father) divorced in 2005 the first respondent was given custody of the minor children, ET and IT. A year later the first respondent married the applicant (adoptive father) who, once again a year later, that is in 2007, adopted ET and IT as his children, both

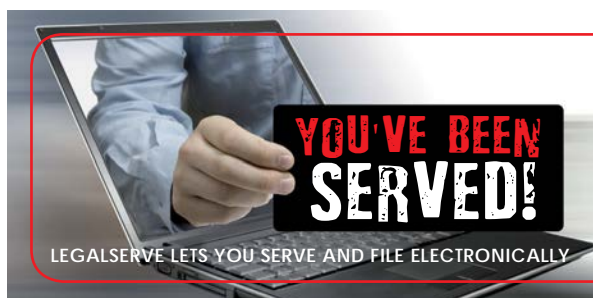
the first and second respondents consenting to the adoption. The pattern of a year later continued as in 2008 the marriage relationship between the applicant and first respondent broke down irretrievably with the result that they divorced, the first respondent being given custody of ET and IT, notwithstanding their adoption by the applicant. Because of the very bad influence of and interference by the first respondent, the relationship between the applicant and the children broke down. Due to the conduct of the first respondent who terminated contact between the applicant and the children, apart from paying maintenance for them the applicant had no say over their lives. Meanwhile, the second respondent continued contact with IT and in fact also paid maintenance for him. In brief, *de jure* the applicant was the adoptive father of ET and IT but in practice he was denied parental rights, duties and responsibilities over them. He accordingly applied for

a rescission of the adoption orders so that the first and second respondents could have full parental rights, obligations and responsibilities over ET and IT. The rescission order was granted with no order as to costs.

Mokgoatlheng J held that in weighing up the children's best interests in adoption matters, the court was obliged to consider the effect that rescission of the adoption order would have on the children, especially where a considerable period had elapsed since the granting of the adoption order and the children had formed a bond with their adoptive parent. In the instant case the adoption of ET and IT was in essence an abstract circumstantial fiction predicated on the applicant's need that ET and IT should have a father figure after the first respondent's divorce. The apparent adoption was in reality a legal fiction because the first respondent did not recognise or accept the legal effect and consequences of the adoption by the applicant

that in law, immediately after such adoption, the parental rights of the first and second respondents regarding the lives of the children were terminated as provided for in s 242(2) of the Children's Act 38 of 2005.

The relationship between the children and the applicant having irretrievably broken down and the applicant having stated in no uncertain terms that he was not interested in rebuilding the bond between him and them, the formality of setting aside the adoption orders would afford the first and second respondents and the children an opportunity to strengthen their already existing parent-child relationship. Moreover, the first respondent always had custody of the children while for the second respondent his legal guardianship over the children would be restored. After all, the *de facto* family unit existing between the children and their biological parents would be lawfully formalised.



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## Company law

**Damages for abusive, malicious or vexatious winding-up of a company:** Section 347(1A) of the Companies Act 61 of 1973 (the Act) provides that: 'Whenever the court is satisfied that an application for the winding-up of a company is an abuse of the court's procedure or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit'. The application of this section was dealt with in *Business Partners Ltd v World Focus 754 CC 2015 (5) SA 525 (KZD)*; [2015] 4 All SA 294 (KZD) where the respondent, World Focus, was granted an order putting the applicant, Business Partners, in provisional winding-up notwithstanding the applicant's opposition. A few months later, the provisional winding-up order was made final. As a result the liquidator sold the company's property in a sale in execution after which the property was transferred to the buyer. The sale and transfer of the property proceeded notwithstanding the request by the applicant that it be stayed pending finalisation of application for leave to appeal against both provisional and final winding-up orders. Leave to appeal had been granted, the full court set aside both provisional and final winding-up orders against the applicant and significantly held that there had been an abuse of the court procedure. As a result the applicant launched the instant application for damages in terms of s 374(1A).

Mnguni J held that the proper course to be followed was to commence an action by way of simple summons and accordingly referred the matter to trial, with costs reserved. The applicant was directed to deliver its declaration within ten days of granting the order, after which the respondent was to file a plea, again within ten days of delivery of the declaration, after which the matter was to

proceed in terms of the normal rules governing action proceedings. It was held that allowing the company 'forthwith' to prove any damages, which it might have sustained did not mean that only the court hearing the winding-up was empowered to apply the section as contended by the respondent. That sophisticated semantic analysis was not the best way to ascertain the intention behind the enactment of the section. An interpretation should not be given to statutory provisions if it led to impractical, unbusinesslike or oppressive consequences or that would stultify the broader operation of the legislation.

## Competition

**Prohibition of excessive pricing:** Section 8(a) of the Competition Act 89 of 1998 (the Act) prohibits a dominant firm in the market from charging an 'excessive price' to the detriment of consumers. Section 1(1) of the Act in turn defined 'excessive price' as a price for goods or service, which bears no reasonable relation to the economic value of that goods or service. In *Sasol Chemical Industries Ltd and Another v Competition Commission 2015 (5) SA 471 (CAC)* the respondent Competition Commission (the commission) filed a complaint with the Competition Tribunal (the tribunal) alleging that the first appellant, Sasol Chemical Industries (SCI), being the dominant firm in the propylene and polypropylene sector was engaged in 'excessive pricing' of its products, which practice was detrimental to consumers. The tribunal found in favour of the commission and meted out penalties against SCI in an amount of some R 534 million, also imposing various administrative remedies.

On appeal to the CAC, the decision of the tribunal was set aside. Nothing was said about the costs. Davis JP (Molemela and Victor AJJA concurring) held that in the instant case the price-cost mark-up was on the average in the region of 16% to slightly less than 19%. On those calculations the changes to the

price-cost mark-up should not vex any court with respect to an excessive pricing dispute. According to s 8(a) of the Act a price was excessive only if it was higher than economic value and bore no reasonable relation thereto. The section did not apply to prohibit any price in excess of economic value. A reasonable assessment of the economic value involved a value judgment in respect of which there was no single, inflexibly clear threshold, which could be applied to determine whether a price was excessive in each and every case.

A review of European jurisprudence indicated that the prices charged had to be substantially higher than the defined economic value before an adverse finding could be made. A price, which was significantly less than 20% of the figure employed to determine economic value, fell short of justifying judicial interference in the otherwise complex area of law. Evidence presented to the tribunal in the present case did not justify a finding that the price bore no reasonable relation to the economic value of the goods involved.

## Constitutional law

**Retrospective operation of order of invalidity:** The facts in *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others 2015 (5) SA 370 (CC)*; 2015 (7) BCLR 761 (CC) were that in March 2011, acting in terms of the Cross-Border Road Transport Agency Act 4 of 1998 (the Act), the Minister of Transport promulgated amendments to the regulations made in terms of the Act. The effect of the amendments was to substantially increase permit fees payable by cross-border road-transport operators. The respondents, the Central African Road Services and others, being road-transport operators, challenged the validity of the amendments on a number of grounds including that no proper consultation on the new tariff increases took place, there was no procedural fairness in the publication and promulgation of the

amendments etcetera. The GP held per Makgoka J the amendments were inconsistent with the Constitution and declared them invalid. The order of invalidity was suspended for six months to give the Minister the opportunity to promulgate new amendments. No such promulgation took place, nor was extension of the suspension sought, this having the result that the invalidity of the amendments came into operation. Thereafter, the respondents obtained a second order before Heaton-Nicholls J declaring that as the suspension period of the order of invalidity had lapsed, the order of invalidity had full retrospective effect and that permit fees had to be paid in terms of the old regulations and not as per the invalid amended regulations.

The SCA having denied the appellant Cross-Border Road Agency leave to appeal, the CC was approached. Leave to appeal was granted but the appeal itself was dismissed with costs. Reading a unanimous decision of the court, Jappie AJ held that the consequences that ordinarily flowed from a declaration of constitutional invalidity included the principle that the law would be invalid from the moment it was promulgated, meaning that the order would have immediate retrospective effect. That was the default position which could, however, be varied by an order of court exercising the express power under s 172(1)(b)(i) of the Constitution, for various reasons pertaining to justice and equity. It was only an order of court that could vary the consequences that flowed from the doctrine of constitutional invalidity. Unless the order of court expressly varied those consequences, retrospectivity would follow. Where a judgment was silent on the issue of variation of the default position, it would be assumed that a judge had taken a decision not to moderate the default position as silence was an indication of full retrospective effect.

A court had the power to extend a suspension period of declaration of invalidity as the decision to suspend was

ultimately premised on facts and circumstances applicable at the time the order was issued. Those facts and circumstances could well change and a court had to be alive to that possibility. However, that power could only be exercised 'before the expiry of the period of suspension'. A court did not have the power to vary a suspension order once the suspension period had lapsed. In brief, the Constitution granted a court the power to suspend an order of constitutional invalidity but not the power to revive a law that had already become invalid as a result of lapsing of the suspension period.

**Unconstitutionality of selective or targeted enforcement of the law:** In *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* 2015 (5) SA 358 (GP), acting in terms of the Medicines and Related Substances Act 101 of 1965 (the Act) the respondents, led by the first respondent, Medicines Control Council, seized a consignment of electronic cigarettes imported into the country by the first applicant, Quick Drink. As a result the first applicant approached the court for an order setting aside the decision of the respondents to seize the consignment. It also sought an order restraining the respondents from enforcing the Act selectively in a manner that targeted the first

applicant and discriminated against it in that whereas there were many manufacturers, importers, distributors, wholesalers and retailers countrywide, the appellant was the only one targeted for seizure, while nothing was done against others. The orders sought were granted with costs.

Kollapen J held that public policy considerations and the efficacy of public administration, as well as the integrity of an effective law-enforcement function, militated against the notion that an individual against whom a law was sought to be enforced could, purely on account of an assertion that the law being enforced against him or her was not being equally or uniformly applied to other wrongdoers, escape liability on that account. It would, however, be a different matter when, beyond being unequally enforced, the law was enforced in a selective manner where no rational basis for selectivity existed. In the instant case it was known to the first respondent that there were many importers, manufacturers, wholesalers and distributors of e-cigarettes in the local market, most of whom were doing business in the public retail space. It was inexplicable why enforcement was chosen against the applicant that had not yet begun retail operations. Clearly the selection made, and the failure by

the first respondent to offer any explanation in support of the selection made, lent itself to the conclusion that not only was it selectively made but also that it was irritational and that it targeted the applicant for no objective reason. It was sufficient for the first applicant to show, as it did, as an importer of e-cigarettes it was being treated differently from all other entities in that class of persons and that the differentiation was unfair in that there existed no rational connection between it and some legitimate governmental objective.

## Contempt of court

### Contempt of court requires wilfulness and *mala fides*:

In an earlier case between the parties, that is, in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), 2012 (4) BCLR 388 (CC) (*Pheko 1*) the CC ordered the respondent municipality, Ekurhuleni Municipality (East Rand) to comply with a reporting obligation in terms of which reports were to be filed with the court detailing progress made in finding alternative land for resettlement of the displaced applicants, Pheko and others. The respondent filed the first report but not the second one. As a result the applicants launched the present application against the municipality for contempt of court in the matter of *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC). Before the hearing of the application an *amicus curiae* sought joinder of the municipal manager and executive mayor of the municipality. At the hearing it turned out that the municipality had not been advised by its attorneys that a compliance order had been granted against it. As a result the court gave instructions calling on the attorneys to show cause why they should not be held in contempt of court and also be ordered to pay costs from their own pocket (*de bonis propriis*). The municipal manager, executive mayor and the MEC for Human Settlements, Gauteng Province were also called to show cause why they should

not be joined in contempt of court proceedings.

Reading a unanimous judgment of the CC, per Nkabinde J, the court held that while there was no doubt that the municipality had not complied with the court's directions and orders, it had been shown that it was not aware of same as it did not receive them from its attorneys. In the circumstances, the inference of wilfulness and *mala fides* could not be drawn against it. It followed that it had shown good cause why it should not be held in contempt. Regarding the attorney who was dealing with the matter, the court found that he did not inform the municipality of the directions and order because he did not receive them as they were transmitted to a facsimile number that was no longer linked to his changed e-mail address. It followed that no inference of wilfulness and *mala fides* could be drawn. Therefore, contempt of court on the part of the attorney had not been established.

While the evidence did not establish wilfulness or *mala fides* on the part of the attorney, it did nevertheless establish gross disregard for his professional responsibilities. At the very least the attorney had an obligation to notify his clients and the registrar of the court of any change of address, something which was not done in the instant case. Failure to notify the registrar of such change constituted gross negligence on his part. For that reason the attorney was ordered to pay the costs from his own pocket to mark the court's displeasure at his conduct.

Given that contempt of court on the part of the municipality had not been established, no purpose would be served by joining the executive mayor, municipal manager and the MEC in contempt proceedings. However, by virtue of their constitutional and statutory responsibilities their joinder in respect of the court's continuing supervision of the implementation of the orders in *Pheko 1* was appropriate.

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## Defamation and *injuria*

**Liability for defamation and *injuria*:** In the case of *Pieterse v Clicks Group Ltd and Another* 2015 (5) SA 317 (GJ) the appellant, Pieterse, sued the respondent, Clicks Group, and its employee, the second respondent, for damages due to alleged defamation and *injuria*. This was after the appellant, a customer, was accused by the employee, the second respondent, of shoplifting and her handbag searched. As it turned out the appellant was not in possession of any stolen items. The magistrate dismissed the appellant's claim, hence the instant appeal to the GJ. The court held that the appellant's claim was based on *injuria*. The appeal based on defamation was dismissed as there was no proof of publication of the incident. However, the appeal based on *injuria* was upheld with costs. The appellant was awarded damages in the amount of R 25 000.

Spilg J (Mlonzi AJ concurring) held that it was not possible to conclude that the probabilities favoured the appellant's version that there was at least one other person who witnessed the incident. Therefore, the magistrate's finding that the appellant failed to prove publication of the incident had to stand, this disposing of the defamation claim. The court proceeded to deal with the alternative claim based on *injuria* on the basis that save for publication required for defamation, the approach to both defamation an *injuria* was the same. The element of *animus injuriandi* required to establish *injuria* involved both intention to injure and knowledge of wrongfulness. Nevertheless, if negligence sufficed in this type of case, a shop owner or employee would still be able to avoid liability if he or she could demonstrate that there were reasonable grounds for suspecting the customer of shoplifting. A genuine mistake would suffice as it would not constitute negligence in delict but would only do so if there was a failure of rea-

sonable care. In the instant case the admitted statements that the second respondent accused the appellant of putting something in the handbag without paying for it, together with the search of the appellant's handbag, amounted to an insult. The second respondent failed to prove the factual basis on which she could have formed a reasonable suspicion that the appellant was shoplifting. Furthermore, she exceeded the bounds of her authority and acted against the express company policy by commencing a search of the appellant's handbag. Therefore, the respondents failed to provide a defence of justification, which would negate the element of wrongfulness. Accordingly, the appellant was entitled to damages on her claim based on *injuria*.

## Insurance

**Duty of disclosure:** In *Jerrier v Outsurance Insurance Co Ltd* 2015 (5) SA 433 (KZP), [2015] 3 All SA 701 (KZP) the appellant, Jerrier, had an insurance contract with the respondent, Outsurance Insurance, in terms of which his motor vehicle and household goods were insured. The contract had bonus points and rewarded non-lodgement of claims. This was done by providing that if no claim for insurance benefits was lodged in the first three years of conclusion of the contract the insured would be entitled to a 10% refund of the premiums paid during that period, in the two years that followed the reward for non-lodgement of claims increased to 20% of the premiums paid during that period and, thereafter, the reward was 25% refund of premiums paid every year in which no claim was lodged. Briefly, the contract encouraged the insured not to lodge claims. It was against that background that in 2009 the appellant preferred not to lodge claims and thus preserved the bonus points, after the occurrence of two incidents in respect of which he could have lodged the claims. However, the damage arising from both incidents was less

than the bonus points that he would have lost had he lodged the claims. The first incident involved damage to the rim of a wheel after the vehicle hit a pothole while the second incident related to damaging the vehicle of a third-party, and his own, when the appellant was reversing his vehicle. In both instances the appellant absorbed the loss by repairing his car and that of the third-party. In 2010 the appellant's vehicle was involved in a collision as a result of which he lodged a claim. The respondent having found out the occurrence of the two incidents of 2009 for which the appellant did not lodge a claim, repudiated liability for non-disclosure. That was so as the contract required the appellant to notify the respondent immediately of any changes to his circumstances that could influence the cover to be given, as well as the conditions and premium thereof. Furthermore, the contract also required the appellant to report his claim or any incident that could lead to a claim as soon as possible but not later than 30 days after the incident. It was common cause that the appellant had not done so in respect of the two incidents of 2009. The KZP held, per Koen J, that the appellant should have disclosed the two incidents of 2009 and accordingly dismissed his claim against the respondent.

On appeal to the full Bench the decision of Koen J was reversed with costs of senior counsel and not two counsel as sought. Chetty J (Vahed and Poyo-Dlwati JJ concurring) held that the obligation of the appellant to report a claim or an incident related to circumstances, where the insured suffered damage to his vehicle and where the vehicle belonging to a third-party was damaged. Such an obligation arose only if the insured wished to enforce the indemnification for loss which the insurer was obliged to honour. If the appellant was involved in an accident and the other party agreed to accept an offer in full and final settlement for the repairs to his

vehicle, there could be no possible reason for the respondent to be informed of the incident. In the instant case the appellant elected to make a conscious decision to absorb the damage and repair his vehicle and that of the third party. His reward for absorbing the loss was the retention of his non-claim status and the preservation of his bonus points. Where the appellant elected not to report the matter to the respondent within 30 days that marked the end of the respondent's liability. The driver of the other vehicle still had a claim against the appellant. However, there was no obligation on the insurer to indemnify the appellant against such a claim. The approach of the court *a quo* conflated the duty to disclose true and correct information at the commencement of the contract and the duty to disclose during the currency of the contract. In the present case, the contract was not one subject to an annual renewal assessment of the risk. Therefore, there could be no contention that failure to disclose the two incidents, which took place in 2009 had a bearing on the conditions of cover or the premiums payable. The policy simply did not provide for the ongoing duty to report after commencement of the contract.

## Intellectual property

**Registration of a domain name does not give the registrant exclusive right to the name:** In the case of *Fairhaven Country Estate (Pty) Ltd v Harris and Another* 2015 (5) SA 540 (WCC), [2015] 3 All SA 618 (WCC) one Wiehahn and the first respondent, Harris, who were both interested in a residential property known as Fairhaven and which belonged to Nedbank, started working together in a business relationship. As an estate agent, the first respondent, was interested in marketing and selling units in the property, while Wiehahn wanted to develop it. To increase the chances of obtaining mandate from Nedbank to

market and sell the units the first respondent registered in his name the domain name (internet address) 'fairhavenestate.co.za' and sometime later he also registered several variations of the domain name being 'fairhaven.co.za', 'fairhavencountryestate.co.za', 'fairhaven-countryestate.co.za' and 'fairhavenestate.co.za' and paid the nominal registration fee. As a property developer, Wiehahn acquired ownership of the property through his company, Proventus, whose name was subsequently changed to the applicant Fairhaven Country Estate (Pty) Ltd. The applicant spent heavily on the domain name by paying the costs for the development and renewal of the domain name as well as for the upgrade and development of the website connected therewith, including e-mail traffic and advertisement. In brief the applicant used the domain to market the Fairhaven property.

After the business relation-

ship between the applicant and the first respondent terminated, the latter requested transfer of the active domain name 'www.fairhavenestate.co.za' to himself so that he could operate it to promote and market his Fairhaven property business interests. Transferring it to him meant terminating control and access to the website and e-mails by the applicant. To protect its interests in the domain name, the applicant applied for an interdict restraining the first respondent from redirecting or transferring the affected domain names to any party other than itself. The interdict also sought transfer of the domain names to the applicant, as well as an order restraining the first respondent from registering further domain names containing the name 'Fairhaven'. The interdict was granted with costs.

Henney J held that it was irrelevant that the domain names were registered and acquired by the first respondent

before the applicant company came into existence. Prior to its association with the applicant, from the perspective of the first respondent, such domain names held no value. It was only after the applicant came into existence and, as new owner of the Fairview property, gave the first respondent the mandate to market and sell residential units in the property, that value became attached to the domain names. Such value attached to the applicant in that the domain names formed part and parcel of the applicant's get up and promotional material.

The applicant clearly established an inextricable link between the domain names and its name, even though the first respondent was responsible for the registration thereof. It was not correct for the first respondent to claim that as the registered owner of the domain names he had the exclusive rights of use thereof and that the applicant's rights in and to its goodwill and intellectual property could not trump his proprietary right in the domain name. Mere registration of the domain name, that was linked to the property, which belonged to someone else, could not result in the registrant having the exclusive right to the use of that domain name. It was irrelevant that the domain names were registered in the name of the first respondent as it was never his intention that such names would be attached to his own name or his own business or services. Moreover, it was well established in law that the owner of an unregistered trademark was entitled to enforce it with a passing-off action if the requirements for passing off were met.

### Magistrate's court

**Consent to jurisdiction not allowed in emoluments attachment:** Section 65J of the Magistrates' Courts Act 32 of 1944 (the Act) provides that only the court of the district in which the employer of the judgment debtor resides, carries on business or, is employed, or if the judgment debtor is employed by the

state, the court of the district in which the judgment debtor is employed, has jurisdiction to issue an emoluments attachment order. The provisions of the section are in line with s 90(2)(k)(vi)(bb) of the National Credit Act 34 of 2005 (the NCA), which state that a provision in a credit agreement is unlawful if it contains a consent to jurisdiction of 'any court seated outside the jurisdiction of the court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept'.

The application of the above and other related provisions was dealt with in *MBD Securitisation (Pty) Ltd v Boo* 2015 (5) SA 450 (FB) where the respondent, Boo, had her emoluments attached in unbelievably peculiar circumstances after she was tricked unawares into consenting to the jurisdiction of a magistrates' court in another province very far away from her home and workplace. There the appellant, MBD Securitisation, was a company with a registered office in Hyde Park, Johannesburg, Gauteng Province, which sued the respondent for goods sold and delivered, which goods were not specified. The respondent was a 61-year-old female who lived and worked in Alice, Eastern Cape. The appellant made use of the legal services of an attorney in Nelspruit, Mpumalanga Province who in turn instituted proceedings by making a request for judgment and attachment of the respondent's emoluments in Hennenman, a small town in the Free State Province. It was not clear why the Hennenman Magistrate's Court was chosen but the High Court suggested that it was because it was either very efficient or that there was a person or persons who did others a favour in return for payment.

As could be expected the result was that the appellant obtained default judgment against the respondent but that was subsequently rescinded. However, the rescission took place in the absence of the appellant in that after two postponements the third



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one was denied after which counsel did not take any further part in the proceedings (and probably left the court). The instant case was an appeal against the rescission of emoluments attachment order, which was dismissed with costs. The court directed the registrar to forward copies of the judgment to the Law Society of the Northern Provinces, the Minister of Justice and Constitutional Development, as well as the National Credit Regulator.

Daffue J (Williams AJ concurring) held that the appellant had not demonstrated that the magistrate's rescission judgment, granted by default, was appealable. The appellant was entitled to apply for rescission of that default judgment but whether or not the rescission application would be successful could not be considered in an appeal. Just in case the court erred on the appealability issue, it proceeded to deal with the attachment of emoluments question and held that in terms of r 12(5) of the magistrates' courts rules the clerk of a magistrate's court was not entitled to grant judgment, that is, to issue an emoluments attachment order by consent, as happened in the instant case. As the cause of action, namely goods sold and delivered, was governed by the NCA, the clerk of the court was obliged to refer the request for judgment and attachment of emoluments to the magistrate for determination. The purpose of r 12(5) was to ensure that the oversight function of the court in respect of credit agreements governed by the NCA was fulfilled.

There was no doubt that the Hennenman Magistrate's Court never had jurisdiction over the respondent. She was not resident or employed in that district while the whole cause of action did not arise there. Section 90(2)(k)(vi)(bb) precluded a credit agreement from including a consent by a consumer to the jurisdiction of a court seated outside the area of jurisdiction in which the consumer resided, worked or where the goods in question, if any, were or-

dinarily kept. Even if it could be found that the respondent validly consented to the jurisdiction of the Hennenman Magistrate's Court, which she did not, such consent could only have been in respect of the institution of proceedings in that court, that is, the issuing of summons up to the stage of the granting of judgment or the request for judgment by consent but not in respect of emoluments attachment as that was prohibited by s 65J.

**Note:** The same issue was also dealt with in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC).

- See also –
- editorial: 'Debt collection system to be changed' (2015 (Aug) DR 3);
- opinion: 'The use of emoluments attachment orders, jurisdiction and forum shopping under the spotlight' (2015 (Oct) DR 59);
- law reports: 'execution' (2015 (Nov) DR 38); and
- case note: 'The use of emoluments attachment orders, jurisdiction and forum shopping under the spotlight' (2015 (Nov) DR 40).

## Property

**Encroacher is not entitled to transfer of encroached upon land:** The case of *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust Collective Investment Scheme in Property* [2015] 3 All SA 523 (SCA) dealt with the dispute between the appellant, Fedgroup, and the respondent, Capital Property Trust (CPT), who were neighbours owning adjacent properties. On the appellant's property was an incomplete structure, which had been erected unlawfully without the approval of the local authority. When it was discovered that the incomplete structure in fact encroached on the respondent's property negotiations started for the acquisition of the encroached on piece of land, as well as additional adjacent land, through sale. Negotiations having failed,

the appellant approached the GJ for an order directing the respondent to transfer the encroached on piece of land, together with adjacent land, to the appellant against payment of compensation and related costs. Victor J held that the court had authority to order the owner of encroached on property to transfer it to the encroacher. However, in the exercise of its discretion and in the circumstances of the instant case such an order could not be made. Aggrieved by the decision the appellant appealed to the SCA which dismissed the appeal with costs.

Navsa ADP and Saldulker JA (Mhlantla, Pillay and Willis JJA concurring) held that the law had always been careful to protect the right of ownership, particularly of immovable property. Leaving aside acquisitive prescription, it was difficult to conceive a basis on which the encroacher could offensively, as of right, claim transfer of ownership into his or her name of another's land. An encroacher would be able to defend an action or an application for removal on the basis that it was unjust and unfair to order demolition and removal. That was a defensive position that could rightly be adopted. The court, in exercising a discretion to award compensation instead of ordering removal, would do so on the basis of policy considerations such as unreasonable delay on the part of the landowner, or on the basis of what could be viewed as acquiescence. Prejudice and the principles

of neighbour law were taken into account. However, an encroacher did not have an independent cause of action. He or she could not offensively compel another to part with rights of ownership. Furthermore, no court had ever gone as far as ordering the transfer of land greater than the area of encroachment. Such an order was just not competent.

## Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with approval of building plans; authority of trustee to institute legal proceedings, business rescue proceedings against company in final liquidation, claim for loss of support suffered as a result of death of foster parent, consecutive contracts of employment, debarment of financial services representative, enquiry into affairs of a company, fraudulent and reckless conduct of company's affairs, inspection order against medical scheme, international abduction of children, irregularities in government procurement, jurisdiction of KwaZulu-Natal High Court over district in the Eastern Cape, liability of principal for acts of agent, lawfulness of tender process, occupational injuries, right of children to be provided with transport to and from school at state's expense, rights and duties of conveyancer and search and seizure warrant in terms of the Insolvency Act 24 of 1936.



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# Subdivision – end of the road?

## Options to purchase subdivision of agricultural land

By  
Adam  
Brink

*Four Arrows Investments 68 v Abigail Construction (SCA)*  
(unreported case no 20470/2014, 17-9-2015) (Swain JA)

**T**he Supreme Court of Appeal (SCA), has resolved an uncertainty with respect to the Subdivision of Agricultural Land Act 70 of 1970 (the Act).

The Act was devised in order to control the subdivision (and, in connection therewith, use) of agricultural land in order to prevent agriculturally useful land being fragmented into uneconomic portions.

It does this by prohibiting the subdivision of agricultural land, save with the consent of the Minister of Agriculture.

The prohibition is not just against physical subdivision of undivided portions. In addition to providing that land shall not be subdivided the Act also provides at s 3(e)(i) that 'no portion of agricultural land ... shall be sold or advertised for sale ...' unless the Minister has already consented in writing to the subdivision of the land into those portions.

From inception, attempts have been made to avoid the provisions of the Act.

An early method was to prepare contracts where the portion of land was sold subject to various suspensive conditions. The argument was that as the agreement is inchoate until the suspensive condition is met there was no 'sale' to speak of, and so the Act was not contravened. In March 1981, to meet the challenge to the Act's purpose that this practice constituted, a definition of 'sale' was inserted, which included 'a sale subject to a suspensive condition'.

Notwithstanding the new definition, contracts continued to be drafted with a specific sort of suspensive condition, which it was argued did not infringe the Act: That the sale was suspensively conditional on the Minister's approval being obtained. This seemed an attractive solution. It seemed to do what the Act wanted, which was to ensure that everyone knew that nothing could happen until the Minister approved. It locked both parties into the agreement. The legislature could never, so the argument went, have meant to include this particular suspensive condition when it broadened the definition of sale. In 2003, however, in *Geue and Another v Van der Lith and*

*Another* 2004 (3) SA 333 (SCA), the SCA found that even conditions of that sort were prescribed by the Act.

Suspensive conditions having been found to be offensive to the Act, lawyers retreated to what may prove to be the last defensive ditch for those wanting to sell portions of land where the Minister's approval has yet to be obtained. As 'sale' was defined merely to include 'a sale subject to a suspensive condition', with no mention of anything else, there was (so the reasoning went) no reason not to give a prospective purchaser a binding option to purchase the land once the approval had been obtained. With such an option at least the prospective purchaser might have something to enforce.

Such options were considered in two unreported decisions, both decided in 2007. In April 2007, in *Westraad NO en 'n Ander v Burger* (O) (unreported case no 5226/06, 13-4-2007) (Van Zyl R) the Orange Free State Provincial Division, having considered the authorities, found unequivocally that the word 'sale' as used in the Act did not include an option. Options were thus not offensive to the Act. Conversely, in October of that year, in *Colchester Zoo SA Investments (Pty) Ltd v Weenen Safaris CC* (N) (unreported case no 2386/07, 16-10-2007) (Moosa AJ), having considered more or less the same authorities – but not the *Westraad* decision – the Natal Provincial Division found unequivocally that the word 'sale' did include an option and thus that such options were not, as it were, an option.

That dispute has now been resolved in the *Four Arrows* decision. In a judgment referring to *Geue*, but not to either of the unreported decisions that caused the controversy, the court considered not just what a 'sale' was, but what the implication was of the Act prohibiting land being 'sold or advertised for sale'. Following the court in *Geue's* finding that 'the target zone of the Act is much wider' than simply preventing alienation of undivided portions, the court found (para10):

'... that the Legislature has prohibited the advertisement of a portion of agricultural land for sale in the absence of

ministerial consent, clearly indicates that the object of the legislation was not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder.'

Having considered the possibility of severing the offending option from the deed of sale (and choosing not to) the court declared the contract null and void.

It is not immediately obvious why it would be necessary to prohibit any precursor to the sale of an undivided portion of agricultural land in order to prevent fragmentation of the land. Fragmentation of land could be prevented simply by preventing actual subdivision (either by transfer or by actual use). Nor is it obvious why an agreement to sell explicitly made suspensively conditional on the minister's consent being obtained, should be prohibited. Obtaining ministerial consent to the subdivision of land is expensive and time-consuming and it is not obvious why it is necessary, in order to prevent fragmentation of land, that it should be done first in circumstances where it is being done for the purpose of selling land to a specific person (a neighbour, for example) in the mere hope that that person will not renege and will buy the portion.

What is clear though is that the SCA has now found that all precursors are prohibited. The court's approach (informed no doubt by the approach to interpretation mandated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)) is broadly purposive following what it believes the legislature's purpose to be.

It appears to have brought to a close any contractual structure seeking to escape the strictures of the Act.

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LLB (UCT) is an advocate in Cape Town. □

# Considerations for the quantification of damages awards

By  
Wim  
Loots

*Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC)*

The recent judgment in *Coughlan NO v Road Accident Fund 2015 (4) SA 1 (CC)* concluded that foster care and child support grants should not be taken into account when an award for loss of support is made. Actuaries that specialise in this field routinely encounter a range of scenarios involving state welfare. In this article, I discuss the potential wider implications of *Coughlan* for damages awards.

## History of litigation on the topic

The deductibility of child support or foster care grants from damages awards has been considered in a number of judgments such as:

- *Makhuvela obo H v Road Accident Fund 2010 (1) SA 29 (GSJ)* – foster care grant is not deductible.
- *Road Accident Fund v Timis* (SCA) (unreported case no 29/09, 26-3-2010) (Mhlantla, JA) – child support grant is deductible.
- *Road Accident Fund v Coughlan 2014 (6) SA 376 (SCA)* – foster care grant is deductible.
- *Coughlan* – foster care and child support grants are not deductible.

## Summary of *Coughlan*

The Constitutional Court (CC) ruled that both foster care and child support grants should not be taken into account when an award for loss of support is made, following the death of a breadwinner.

The judgment addressed the following four key points in reaching a conclusion:

- The state has a constitutional duty to support children in need of care.
- Child and foster care are unrelated to damages for loss of support and hence are different in nature than compensation received. The state acts in the role of caregiver when paying grants, but indemnifies the wrongdoer when paying compensation via the Road Accident Fund (RAF).
- Grants are paid to the caregiver and not to the child, whereas compensation is paid to the child.
- There is not a causal link between the death of the breadwinner and payment of the grant. Payment is rather predi-

cated on a child being in need of care, whatever the cause (by reference to the Social Assistance Act 13 of 2004).

## Broader considerations stemming from the judgment

The *Coughlan* judgment specifically addressed a loss of support award where foster or child support grants commenced following the death. The judgment raises a number of questions, when considered in relation to the broader spectrum of possibilities, such as –

- other forms of state welfare, namely, care dependency, disability or old age grants;
- whether the grant commenced before or after the accident or is expected to commence in future; and
- other categories of loss.

In the discussion that follows I will focus on various types of grants, the situations that typically give rise to these grants and how the key points in *Coughlan* may be of relevance. Note that it is not clear if all four key points must be mutually satisfied, for the judgment to be more universally applied. The first two key points are fairly fundamental arguments, based on the Constitution and role of the state, and are generally true for all types of state grants. If the first two key points are deemed sufficient, it may imply that all types of grants can be ignored when an award is made.

## Grants that commenced prior to the cause of action

Prior to *Coughlan*, it was common practice to –

- deduct the value of child support grants from loss of support awards in accordance with *Timis* (provided the grants were paid as a result of the accident); and
- exclude the value of foster care grants in accordance with *Makhuvela* (for a brief period the grants may have been deducted in accordance with *Coughlan*).

All the judgments referred to above, seem to implicitly consider only grants that commenced after the cause of action. It is, however, common to encounter grants that were already in payment, for example, many poor families receive

child support grants that pre-exist the cause of action. In practice it could have been the deceased or the surviving spouse that was the recipient.

Prior to *Coughlan*, it seemed logical to allow for pre-existing grants as family income in the actuarial calculations, which influenced the support allocated to the dependants. Although the *Coughlan* judgment probably did not have pre-existing grants in mind, one could argue that the first three points addressed in the judgment are satisfied. The fourth point is not applicable since the question of causality does not arise for a pre-existing grant.

Following *Coughlan*, one could conclude that pre-existing grants should also be excluded from calculations. This would generally be in favour of dependants, provided the surviving spouse was the grant recipient. However, where the deceased was the recipient (and the grant did not revert to another family member) this would penalise the dependants. I would argue that this is not intended and a pragmatic approach is to only exclude child or foster grants where this does not deprive the dependants of support.

## Care dependency grant

The care dependency grant is payable to the primary caregiver of a child in need of permanent care due to an impairment. The grant has the same value as the disability grant but is payable to the child's caregiver until the child turns 18. The grant may be converted to a disability grant after age 18.

The grant is often of relevance for injury matters where a young child was in an accident or the victim of medical negligence. The question is whether the value of the care dependency grant should be offset against the award (probably the cost of caregivers or possibly the loss of income component).

It follows that the first three key points in *Coughlan* are satisfied for the care dependency grant. The fourth key point concerns causality and whether the cause of action resulted in the commencement of the grant. One could follow a similar argument to *Coughlan*, namely, the grant is predicated on the

child being in need of permanent care (by reference to the Social Assistance Act), whatever the cause.

The care dependency grant, therefore, seems similar in nature to the foster and child support grants. If this is accepted, it suggests that the grant should be ignored when compensation is calculated.

### Disability grant

The disability grant is payable to a person over the age of 18 that is unable to obtain employment due to an impairment. The grant is usually of relevance for injury matters and the value of past payments is deducted from the loss of income award.

The disability grant satisfies the first two key points of *Coughlan* but not the third, since it is paid directly to the claimant (there are exceptions, eg, mental incapacity). Finally, the causal link with the cause of action seems stronger, but it can still be argued that the grant is predicated on the claimant being in need of financial assistance, regardless of the cause.

There seems to be doubt whether the disability grant is deductible, assuming all four points in *Coughlan* must be mutually satisfied. However, if the first two key points are deemed fundamental and sufficient, the grant is not deductible. Hopefully future judgments will provide

clarity in this regard. Actuaries typically state the value of the disability grant and this can easily be excluded from the award if needed.

Finally, an interesting scenario arises where the care dependency grant was converted to a disability grant. If it is accepted that the care dependency grant is not deductible (refer to previous section) it would seem inconsistent to then deduct the disability grant once converted.

### Old age pension

The old age pension is payable to persons over 60 that satisfy the means test. The fourth key point of *Coughlan* is generally not applicable, since the pension cannot be linked to the cause of action. The first two key points are satisfied but the third not, similar to the disability grant.

The old age pension can be relevant to a wide range of situations. In my view, the treatment of the pension should be considered in conjunction with the specifics of each scenario. The following are two examples involving loss of support calculations:

- Deceased was recipient of the pension: To exclude the pension would deprive the dependants from support they would have received. I would, therefore, argue that the pension should form part of the support calculations.

- Surviving spouse unemployed at date of death, but will qualify for the pension at age 60: Allowing for the pension effectively reduces the support calculated for the surviving spouse. The pension can be excluded if the first two points of *Coughlan* are deemed fundamental and sufficient, else probably not.

### Conclusion

The *Coughlan* judgment specifically deals with the treatment of foster and child support grants that commence following the death of a parent. This article aims to broaden the discussion regarding the treatment of other types of state welfare payments that may impact the actuarial assessment of compensation under a variety of circumstances.

The article is not aimed at expressing a legal opinion, but rather to create awareness of the various complications that may arise. The author welcomes comments or alternative arguments from other practitioners.

Wim Loots *MSC (UJ)* is an actuary and director of Wim Loots Actuarial Consulting in Cape Town. □

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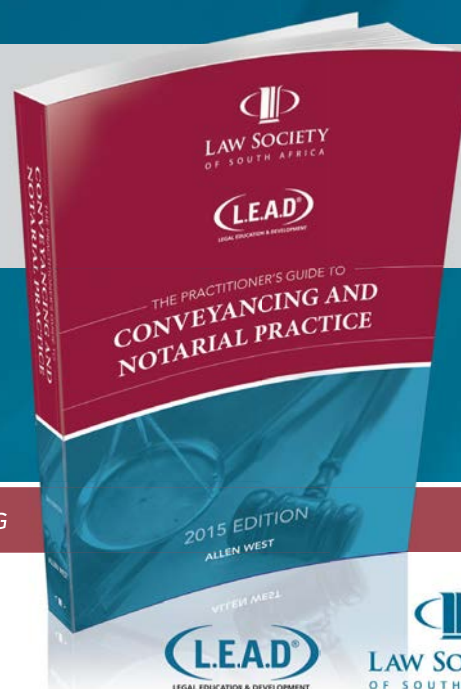
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# NEW LEGISLATION

Legislation published from  
29 September – 23 October 2015

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## Selected list of delegated legislation

### Agricultural Product Standards Act 119 of 1990

Inspection fees on potatoes. GenN968 GG39275/9-10-2015.

Amendment of the standards and requirements regarding control of the export of litchis. GenN1006 GG39324/23-10-2015.

### Attorneys Act 53 of 1979

Amendment of regulations made under the Act (substitution of Annexure A to the regulations: Application for Fidelity Fund certificate). GN R898 GG39239/30-9-2015.

### Financial Markets Act 19 of 2012

Amendments to the Johannesburg Stock Exchange (JSE) listings requirements. BN229 GG39281/9-10-2015.

Amendments to the JSE Derivatives Rules and Directives. BN231 GG39299/16-10-2015.

Amendments to the Strate Rules. BN235 GG39324/23-10-2015.

### Health Professions Act 56 of 1974

Rules on registration of specialists in family medicine. BN230 GG39299/16-10-2015.

### Higher Education Act 101 of 1997

Policy on the minimum norms and standards for student housing at public universities. GN R897 GG39238/29-9-2015.

### Income Tax Act 58 of 1962

Protocol amending the agreement between South Africa and Cyprus for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. GenN970 GG39295/16-10-2015.

### Land Survey Act 8 of 1997

Scale of fees to be charges by the offices of the chief surveyor-general and the surveyors-general for products and services provided. GenN971 GG39296/16-10-2015 and GenN1016 GG39324/23-10-2015.

### Magistrates' Courts Act 32 of 1944

Creation of administrative regions for administrative purposes with effect from 1 October 2015. GN918 GG39256/2-10-2015.

### National Health Act 61 of 2003

Implementation guideline of the Health Workforce Normative Guides and Standards for Fixed Primary Health Care Facilities. GN902 GG39244/2-10-2015.

### National Water Act 36 of 1998

Declaration of the exploration and/or production of onshore naturally occurring hydrocarbons that requires stimulation, including hydraulic fracturing and/or underground gasification, to extract, and any activity incidental thereto that may impact detrimentally on the water resource as a controlled activity. GenN999 GG39299/16-10-2015.

### Prevention and Combatting of Trafficking in Persons Act 7 of 2013

Regulations in terms of s 43(3) of the Act. GN R1006 GG39318/23-10-2015.

### Private Security Industry Regulation Act 56 of 2001

Amendment of the Improper Conduct Regulations. GN R901 GG39242/30-9-2015.

Amendment of the Code of Conduct made under the Act. GN R900 GG39242/30-9-2015.

### Skills Development Act 97 of 1998

Re-establishment of Sector Education and Training Authorities (SETAs). GN920 GG39260/6-10-2015.

### Small Claims Courts Act 61 of 1984

Establishment of small claims courts for the areas of Christiana, Warrenton and Hartswater. GN906 GG39248/2-10-2015.

Establishment of a small claims court for the area of Midvaal. GN905 GG39248/2-10-2015.

Establishment of a small claims court for the area of Albert (Burgersdorp). GN904 GG39248/2-10-2015.

## Draft legislation

Draft regulations relating to Sexual Offences Courts in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. GN899 GG39240/30-9-2015.

Sectional Titles Schemes Management Regulations in terms of the Sectional Titles Schemes Management Act 8 of 2011 for comment. GN R909 GG39247/2-10-2015.

Regulations for Fees and Levies on Community Schemes Ombud Service in terms of the Community Schemes Ombud Service Act 9 of 2011 for comment. GN R908 GG39247/2-10-2015.

Regulations on Community Schemes Ombud Service in terms of the Community Schemes Ombud Service Act 9 of 2011 for comment. GN R907 GG39247/2-10-2015.

Draft Maritime Labour Certificate and Declaration of Compliance Regulations, 2015 in terms of the Merchant Shipping Act 57 of 1951. GN R917 GG39253/2-10-2015.

Biodiversity economy strategy in terms of the National Environmental Management Biodiversity Act 10 of 2004 for comment. GenN965 GG39268/9-10-2015.

Draft amended End-User and Subscriber Service Charter Regulations in terms of the Electronic Communications Act 36 of 2005. GenN966 GG39270/9-10-2015 and GenN1002 GG39309/21-10-2015.

Draft National Environmental Management Laws Bill, 2015. GenN986 GG39287/13-10-2015.

Draft amendments to the regulations issued in terms of s 36 of the Pension Funds Act 24 of 1956. GN965 GG39277/9-10-2015.

Debt Collectors Amendment Bill for comment. GenN988 GG39290/14-10-2015.

Amendment of the Regulations relating to the Specialities and Subspecialities in Medicine and Dentistry in terms of the Health Professions Act 56 of 1974 for comment. GN992 GG39304/20-10-2015.

Draft National Social Infrastructure Guideline in terms of the National Environmental Management Act 107 of 1998. GenN1008 GG39324/23-10-2015.

Proposed amendment to the Strate Rules in terms of the Financial Markets Act 19 of 2012. BN236 GG39324/23-10-2015.

Draft Sector Code of Good Practice on Broad-based Black Economic Empowerment for the property sector in terms of the Broad Based Black Economic Empowerment Act 53 of 2003. GN1008 GG39320/23-10-2015.

Amendment of the Civil Aviation Regulations and Technical Standard, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R999 GG39316/23-10-2015.

# Employment law update



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## Compensation for strike-related damages

In *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu) and Another* [2015] 9 BLLR 952 (LC), the Labour Court (LC) ordered the respondent trade union and respondent-employees to pay the applicant an amount of R 1 406 285,33 as a result of economic loss suffered by applicant during an unprotected strike. The court ordered the union to pay the amount of R 5 280 per month, and the deduction of the amount of R 214,50 from the monthly salaries of each of the employees who embarked on the unprotected strike action, until the total amount was paid off.

The employees embarked on the strike on 23 January 2013 as a response to disciplinary action against certain co-workers who were subsequently dismissed. On 25 January 2013, the applicant obtained an interdict, but despite this, the strike continued until 30 January 2013. The available evidence showed that the union did little, if anything, to discourage its members from participating in the strike or to distance itself from the strike.

The LC, per Lagrange J, held that the disciplinary action that allegedly prompted the unprotected strike was legitimate and should have run its course without the pressure of industrial action. The strike was, therefore, not in response to unjustified conduct on the part of the applicant, neither did it serve any collective bargaining purpose.

The court noted that the union was in a precarious financial position. However, it held that 'the fact that an award for compensation against the union might cause it further financial damage is not in and of itself a reason for not granting relief'. What is, however, relevant, is whether the effect of the award of compensation is likely to seriously compro-

mise its ability to function, bearing in mind that it may have members in other workplaces whose right to effective representation by a functioning union ought not to be seriously compromised by the unlawful conduct of a part of the membership or of a local organiser. This right does not, however, render the union immune from the financial consequences of reckless conduct by its members or office bearers. Considering the conduct of the workers, such as the failure to follow any pre-industrial action procedures, their persistence with the unprotected strike and failure to heed the interdict, the court held that the financial burden of instalment payments was not unduly burdensome. These factors were weighed up against the damages suffered by the applicant, which included lost fares and subsidies for the duration of the strike, which the applicant would never be able to recover. Nevertheless, the court limited the amount of damages to only two-thirds of the losses that were sustained.

## Insubordination

An employer imposes unilateral changes to terms and conditions of employment on its workers. The workers refuse to comply. Does that constitute gross insubordination? This is the question the LC had to consider in *Independent Commercial Hospitality and Allied Workers Union and Others v Commission for Conciliation, Mediation and Arbitration and Others* [2015] 9 BLLR 958 (LC). The nine individual applicants (the employees) worked for the third respondent, Suid-Kaap Stene CC in Mossel Bay. The employer experienced financial difficulties and wanted to introduce short time. The employer consulted with the union and the employees but no agreement was reached, and the employer then introduced the new roster unilaterally. In terms of the new roster, the employees would work four days a week instead of

five. The union referred a dispute to the CCMA in terms of s 64(4) of the Labour Relations Act 66 of 1995 (LRA) requiring the employer to restore the employees' terms and conditions of employment. The employer did not comply. Instead, it instructed the employees to report for duty in terms of the new roster. They refused. The employer issued them with three written warnings over the period of a week for 'disrespect' and 'failure to follow a reasonable instruction'. Following a disciplinary inquiry, it then dismissed eight of the employees on 13 November 2012 and the ninth, a shopsteward, on 12 December 2012.

The applicants referred a dispute to the CCMA. The arbitrator held that the dismissals were fair. The arbitrator accepted that there were 'unresolved mutual interest matters' between the union and the employer, ostensibly referring to the s 64(4) dispute. She also noted that the union did not agree with the implementation of short time and the new operative changes in the roster. Yet she concluded that the managing member of the employer gave a 'valid instruction' to work in accordance with the new roster, that the employees refused to do so, and that such refusal constituted misconduct. She also noted that the employer had followed a progressive discipline and that the employer had consulted prior to the disciplinary process, but that the employees 'did not learn' from the consultations and the written warnings.

The union applied to the LC for the award to be reviewed and set aside. The court, per Steenkamp J, observed that it was common cause that the employees refused to obey an instruction. What it had to determine, was whether the instruction was reasonable. The court held that it was not. Accordingly, the employees' refusal to comply did not amount to insubordination.

The court noted that where an employer unilaterally implements changes to terms and conditions of employment, employees have a number of options available to them -

- they may call on the employer to restore the *status quo* in terms of s 64(4), failing which they may strike;
- they may seek an interdict from the LC; or
- they may resist the change and tender their services on their existing conditions.

The employer's recourse in these circumstances is to lock the employees out until they agree; or, should the change be required for operational reasons, the employer could embark on a retrenchment consultation process in terms of s 189 of

the LRA and offer short time as an alternative to potential retrenchment. If the employees then do not agree, they may be dismissed and such dismissal would be for a fair reason.

In this case, the employer did neither. The applicants did in fact refer a dispute to the CCMA in terms of s 64(4) and the employer refused to restore the *status*

*quo* – it merely unreasonably instructed the employees to work in accordance with the amended working hours.

The court held accordingly that the arbitrator had mistakenly found that all that the employer was required to do was to consult on the proposed changes when in fact the agreement of the employees was required. She also deferred

to the employer on the sanction of dismissal instead of applying her own sense of fairness. In doing so, the arbitrator committed a reviewable irregularity and the award was reviewed and set aside. The court held that the dismissal of the employees was unfair and ordered the payment of 12 months' remuneration as compensation to each of the employees.



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## Fairness of the remedy v fairness of conduct

**Director General: Department of Justice and Constitutional Development v GPSSBC and Others (LC) (unreported case no JR3306/11, 11-9-2015) (Fourie AJ).**

The third respondent, Mr Mbonani applied for the position of Chief Director: Strategy Monitoring and Evaluation, a position he has been acting in for some years. Prior to interviewing the short-listed candidates, the majority of the selection panel held the view that Mbonani was the most suitable person for the post.

In terms of the recruitment policy, the interviewing panel make recommendations to the executing authority, who in this case was the Director General (DG), who ultimately made the final decision whether to appoint the recommended person or not.

Before formally making the panel's recommendation, the chairperson of the panel deliberated their recommendation with the DG. In an informal discussion the DG informed the chairperson that her preference was to appoint the second recommended candidate, Ms Mpahlele as this would have a greater impact on employment equity within the department.

The chairperson consulted the other members of the panel advising them of the DG's preference, which ultimately saw the panel formally recommending Mpahlele to the post. The DG unsurprisingly confirmed the panel's recommendation.

Mbonani referred an unfair labour practice to the bargaining council and arbitration came before the second re-

spondent who found the DG had committed an unfair labour practice and, as a result thereof, held that Mbonani should be permanently placed in the post he applied for, which was occupied by Mpahlele at the time.

Aggrieved by the award the Department of Justice and Constitutional Development brought an application to review and set aside the arbitrator's award.

The court began, firstly, to examine the Department's recruitment policy and found that the policy does not allow for the DG, the executing authority, to interfere or influence the interviewing panel as to whom to recommend. If this was allowed, held the court, then there would be no need for an interviewing panel and the executing authority could independently be allowed to conduct interviews and appoint a person to the post being advertised. For this reason the court held that the arbitrator's reasoning and findings that the DG committed an unfair labour practice could not be faulted.

The next issue before the court was whether the relief granted by the arbitrator was reviewable.

In arriving at its decision to place Mbonani into the position he applied for, the arbitrator found that if the DG did not interfere with the process, the panel would have most likely recommended Mbonani be appointed and the DG would probably have confirmed this recommendation.

While the court did not take issue with the first proposition, it did do so with the second. The DG would have been within her rights not to confirm Mbonani's recommendation especially if she was of the view that Mpahlele's was suitable for the post and would have had a more positive impact on employment equity as compared to Mbonani.

In addition, the arbitrator failed to take into account certain material facts such as:

- The arbitration took place several months after Mpahlele was appointed to the post and the award was delivered more than a year after her appointment.
- Removing Mpahlele from such a senior post and replacing her with Mbonani would have severe disruptions to the functioning of the department.
- There was no indication that Mpahlele was not competent for the position.
- Even though Mbonani was a victim of unfair conduct, the unfairness was one of a procedural nature and not a substantive nature in that the DG would

have been within her rights not to confirm his recommendation for reasons relating to employment equity.

The court held that in failing to consider the above factors the arbitrator failed to apply his mind to the relief granted and in doing so failed to strike a balance between the parties interests and the 'broader interests of fairness and equity'.

For these reasons the court set aside the relief granted by the arbitrator.

Both parties requested the court substitute the arbitrator's findings in respect of the relief granted as opposed to remitting the matter to the bargaining council. In doing so the court held:

'... there needs to be a careful assessment of the disruptive effect to an organisation that is necessarily caused by imposing a promotion and dislodging the successful incumbent from the position. The length of time that has passed between the promotion and the arbitration will always be an important factor in this regard, as the more entrenched the incumbent is, the more disruptive the relief of promotion will be.

.... interests of justice and fairness require that the incumbent (who by now will have occupied the position for almost five years) not be disturbed – the disruption to the department and to Ms Mpahlele would simply be too great and the wrong that was done to Mr Mbonani, was largely procedural in nature; in that it was not decisive of the ultimate outcome of the appointment.

Aside from the question of delay, a further factor that militates strongly against imposing a promotion on an employer is that an arbitrator or court is not well placed to determine which candidate is most suitable for an employer's operational needs – the employer is self-evidently in a far better position to do so. The remedy of ordering a promotion, while within an arbitrator's statutory powers, should in my view be exercised sparingly and with caution and only on the clearest facts.'

Following this reasoning, the court held that compensation as a remedy was more appropriate under these circumstances and awarded Mbonani six month's compensation calculated at the current remuneration scale of the post he applied for. The applicant was ordered to pay Mbonani's costs in the review application. □



By  
Meryl  
Federl

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Abbreviation	Title	Publisher	Volume/issue
<i>APPLJ</i>	African Public Procurement Law Journal	Faculty of Law at Stellenbosch University	(2015) 2.1
<i>EL</i>	Employment law	LexisNexis	2015 October
<i>ILJ</i>	Industrial Law Journal	Juta	(2015) Vol 36 October
	LitNet Akademies (Regte)		2015 September
<i>PLD</i>	Property Law Digest	LexisNexis	2015 September
<i>SLR</i>	Stellenbosch Law Review	Juta	2015 26.2

## Child law

**Boezaart, T** "Wrongful life" – The Constitutional Court paved the way for law reform' (2015) 26 (2) *SLR* 399.

**Doek, JE** 'Article 6 CRC and the views of the CRC Committee' (2015) 26 (2) *SLR* 254.

**Henaghan, M and Ballantyne, R** 'Child poverty in New Zealand: A contravention of articles 6 and 27 of the Convention on the Rights of Child 1989' (2015) 26 (2) *SLR* 380.

**Holness, W** 'The implications of article 6 of the Convention on the Rights of the Child for the State, children of parents with intellectual disabilities who are "at risk of neglect" and their parents' (2015) 26 (2) *SLR* 318.

**Macfarlane, LA Barnes** 'Taking care of the small: Article 6 of the Convention of the Rights of the Child and childhood accidental injury claims in Scotland' (2015) 26 (2) *SLR* 424.

**Sloan, B** 'Fostering and adoption as means of securing article 6 rights in England' (2015) 26 (2) *SLR* 363.

**Sloth-Nielsen, J and Philpott, S** 'The intersection between article 6 of the UN Convention on the Rights of the Child and early development childhood' (2015) 26 (2) *SLR* 295.

**Sutherland, EE** 'The child's right to life, survival and development: Evolution and progress' (2015) 26 (2) *SLR* 272.

## Credit law

**Rautenbach, IM** 'Vonnisbespreking: Die toepassing van die gemeenregtelike

*in duplum*-reël tydens gedingvoering, grondwetlike proporsionaliteit en die skeiding van magte' LitNet Akademies (Regte) 2015-9-22.

## Labour law

**Bassuday, K and Rycroft, A** 'Incapacity or disability? The implications for jurisdiction' (2015) 36 October *ILJ* 2516.

**Collier D and Shaw** 'Gambling with industrial peace: Non-disclosure of business information and the decision in *National Union of Public Service & Allied Workers obo Mani & Others v National Lotteries Board*' (2015) 36 October *ILJ* 2503.

**Dancaster, L and Cohen, T** 'Leave for working fathers in the SADC Region' (2015) 36 October *ILJ* 2474.

**Grogan, J** "Derivative conduct" – not a trap to snare the (apparently) innocent' (2015) October *EL* 4.

**Grogan, J** 'Delayed reinstatement – how do employees recover their losses' (2015) October *EL* 13.

**Idensohn, K** "The Labour Courts" jurisdiction over claims for alleged employee breaches of fiduciary duty' (2015) 36 October *ILJ* 2495.

**Landman, A and Ndou, M** 'Some thoughts on developments regarding the recovery of damages for pure psychiatric or psychological injury sustained in the workplace' (2015) 36 October *ILJ* 2460.

**Robertson, B** 'Does the new code of good practice on "equal pay for equal work" justify its existence?' (2015) 36 October *ILJ* 2522.

**Van Niekerk, A** 'The Labour courts, fairness and the rule of law' (2015) 36 October *ILJ* 2451.

## Procurement law

**Udeh, KT** 'Nigerian National Council on Public Procurement: Addressing the Unresolved Legal Issues' (2015) 2.1 *APPLJ* 1

## Property law

**Botha M** 'The recent amendments to the management rules in the Sectional Titles Act' (2015) September *PLD* 6.

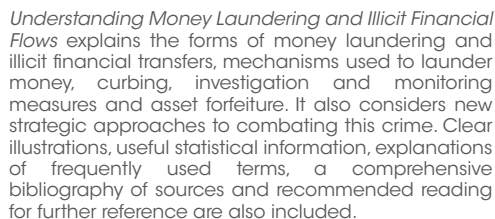
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