



THE SA ATTORNEYS' JOURNAL

JULY 2015





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THE SA ATTORNEYS' JOURNAL

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JULY 2015 | Issue 554

ISSN 0250-0329



















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FEATURES

32 **Inference of negligence** – is it time to jettison the maxim *res ipsa loquitur?*

ome accidents occur in circumstances where the evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is, or should be, to the defendant. This article, written by Pat van den Heever and Natalie Lawrenson, focusses on the maxim of *res ipsa loquitur*, which is generally considered to be no more than a convenient label to describe situations where the plaintiff's inability to establish the exact cause of the accident is sufficient to justify the conclusion that the defendant was probably negligent and in the absence of an explanation by the defendant to the contrary that such negligence caused the injury to the plaintiff.

36 The beginning of the end – dissolution of marriage under accrual system

Then entering into marriage, most people are not aware of the laws that have direct effect on their estates and only get to be conscious of them when they divorce. In this article, Clement Marumoagae highlights different matrimonial regimes in South Africa and discusses an option available to those whose marriage is subject to an accrual system as far as protecting their claim to the growth of their spouses' estates is concerned.

38 Beware of undertakings: The irrevocable instruction that was revoked

ommercial realities demand that conveyancing attorneys provide guarantees and undertakings in order to fulfil their mandates to transfer immovable property. What then is the legal effect of these undertakings and to what extent do practitioners unwittingly expose themselves to personal liability by giving them? Jacques F Rossouw discusses *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA) where the court recently ruled on this suit.

40 Biodiversity law and the weeding out of alien species

t took the threat of a court order, the Minister of Environmental Affairs has finally given effect to ch 5 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) and published the alien and invasive species lists and regulations. In this article, Ian Cox, Ilan Lax and Peter Britz take a critical look at ch 5 of NEMBA and ask: Are the alien and invasive species lists and regulations lawful?

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

De Rebus editorial staff use online products from:

- LexisNexis online product: MyLexisNexis. Go to: www.lexisnexis.co.za;
 and
- Juta. Go to: www.jutalaw.co.za.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

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

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

SUBSCRIPTIONS:

General, and non-practising attorneys: R 838 p/a Retired attorneys and full-time law students: R 644 p/a Cover price: R 88 each

Subscribers from African Postal Union countries (surface mail): R 1 332 (VATexcl)

Overseas subscribers (surface mail): R 1 626 (VAT excl)

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela Tel: (012) 366 8800 • E-mail: david@lssa.org.za



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Solicitor-general to head Office of the State Attorney

he then Minister of Justice, Jeff Radebe, introduced the idea of appointing the country's first solicitor-general in 2012. At the time, Minister Radebe said: 'The solicitor-general will be the state's chief legal adviser in all civil litigation, similar to the role of the National Director of Public Prosecutions in criminal matters'. The solicitor-general will also manage the offices of state attorneys in the interests of effective legal services. The office will take over litigation by government departments and parastatals, and make sure that the work contracted out to lawyers and advocates in private practice is distributed fairly.

In May this year, in a media briefing ahead of his budget speech in the National Assembly, the current Minister of Justice, Michael Masutha, said the planned appointment of the solicitor-general is almost complete on a draft policy with a purpose of turning the State Attorney's Office into 'a legal firm of choice' within the public sector. Minister Masutha added that the policy will change 'the practice of briefing patterns' in all state institutions. The policy also aims to institutionalise the use of alternative dispute resolution in handling claims against the state.

The department aims to reduce the litigation bill and the ever-increasing exposure of the state to civil liability resulting from a variety of causes including, but not limited to adminis-

trative inefficiencies in the provision of various government services. Excluding amounts spent by other government departments, the Justice Department spent R 124 million in litigation.

According to Mr Masutha 'the position of solicitor-general will drive transformation in the legal profession and the judiciary, and ensure that the Office of the State Attorney has the necessary power, authority and influence'. The solicitor-general will have the same status of a judge. The minister has also criticised the tendency of the state and the private sector to use white, male advocates or legal teams instead of affording previously disadvantaged legal practitioners the opportunity. Consequently, this stifles the transformation of the Bench, because black lawyers struggle to acquire the necessary experience to be appointed as judges.

Currently, Mr Masutha said, the Justice Department is not in the position to ensure that state litigation is awarded fairly to promote transformation. The appointment of the solicitor-general would enable the department to monitor the situation properly.

Mr Masutha said that the department wants 'to consolidate state litigation, build skills and raise the level of professionalism in [the State Attorney's Office] and ensure all other entities providing legal support to the state work closely with that institution'.

The Justice Department will



table amendments to the State Attorney Act 56 of 1957 in order to make the appointment of a solicitor-general possible.

NOTICE:

The *De Rebus* Admission to the Professions supplement is available electronically on the *De Rebus Digital*. E-mail kathleen@derebus.org.za to be added to the mailing list.

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 20 July and 17 August 2015.

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.

To what extent has the xenophobic attacks on foreign nationals damaged personal and professional relations around the continent?

I have personal and professional relations with a variety of brothers and sisters in various parts of the continent. In particular, I have close relations in the following countries: Kenya; Democratic Republic of Congo; Nigeria; Uganda; Malawi and Mozambique, as a friend and colleague. A Kenyan friend intended to take me to his village, to meet his family and friends. The practice of being taken to one's village is very important in the continent, as it is regarded as one of the most important gestures to seal the relationship and to become one family.

In light of the barbaric xenophobic/ afrophobic attacks, I do not even know what to expect, should I visit some of the African countries, as aforesaid. I, however, called my non-South African friends and apologised for this unjustified behavior.

I also assured them that South Africa is a caring society, founded on important constitutional values such as human dignity, equality, and right to life. The recent attacks, though committed by few South Africans, does not represent what South Africa stands for.

There is no justification, whatsoever, for this kind of conduct, as it is un-African and also impairs the dignity of both the perpetrator and the victim. I am encouraged by the fact that our government has taken some positive steps to addressing the root causes of this behavioral pattern from South Africans and making sure that it does not recur.

It may also be important for our government to educate ordinary South Africans on the importance of the values enshrined in our Constitution, in order to make sure that our people understand that everyone in the Republic is protected by law, irrespective of their country of origin or immigration status.

Ivan Ka-Mbonane, attorney, Johannesburg

Attorney: Embrace mediation

As litigation attorney and mediator I feel that we as attorneys must embrace mediation.

Litigation attorneys will know that it is nothing strange to have more than a hundred cases on the roll each and every day in the Gauteng Division, Pretoria. For all these cases there are normally about six to eight judges available to resolve all these matters.

Third party claims take at least two to three years to finalise. Because of the problems that they experience state attorneys find it very difficult to settle their matters.

Due to cases taking so long to settle, many of my clients have passed away before their claims could be settled. The pressure that is put on our court system cannot be resolved through litigation alone.

We as attorneys have an obligation to always act in the best interest of our clients. For that reason we have to start looking for faster and less expensive ways to resolve disputes.

There are many disputes where litigation will always be required, but internationally it has been proven that mediation has more advantages than litigation.

In our court system, mediation is not an alien concept, r 37(6)(d) of the High Court Rules makes provision for mediation and we should start using mediation in the best interests of our clients because of its many advantages.

Mediation is here to stay and the faster we start using it for our clients and the court system as a whole, the better.

Pieter Nel, attorney/mediator, Nelspruit



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Lethal injection

The recent South African court decision that a terminally ill person could be killed by a lethal injection (the American method of executing 'death row' instates), is a cause for grave concern for the following reason. There will without a doubt be more similar court applications, which may well succeed, in terms of our 'stare decisis' (the decision stands) legal precept, although the judge in this case stated that his ruling was only applicable in this instance. Certain media reports stated that government was opposed to this decision because of its very serious implications. This indicates the abyss of moral degeneration into which our nation appears to be rapidly sinking.

JDM McLeish, Johannesburg

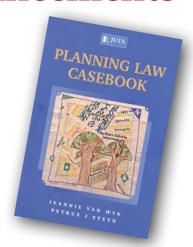
• See 2015 (June) DR 4.

Book announcements

Planning Law Casebook

By Jeannie van Wyk and Petrus J Steyn Cape Town: Juta (2015) 1st edition Price: R 445 (incl VAT)

232 pages (soft cover)





LOOKING FOR A CANDIDATE ATTORNEY?

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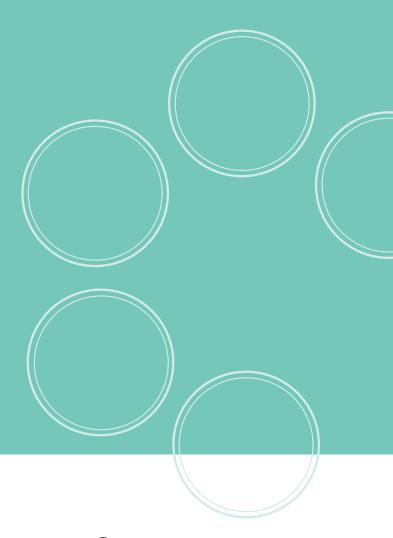
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he International Bar Association recently celebrated the 800th anniversary of the Magna Carta by holding a conference in Cape Town in May.

The Magna Carta, also known as the Great Charter, was signed at Runnymede in 1215 between King John of England and the Barons who were disgruntled by the King's arbitrary behaviour. This charter has been viewed as a milestone in the development of human rights and the rule of law in England and common law countries.

Topics discussed at the celebratory event included the role of lawyers in upholding democracy and upholding the rights of individuals; challenges to judicial independence; maintaining limits on government power in modern states; and the recognition and application of equality

Speakers included Chief Justice, Mogoeng Mogoeng who delivered the keynote address; retired Constitutional Court Justice, Kate O'Regan; and Deputy Governor Administration at the Bank of Zambia, Doctor Tukiya Kankasa-Mabula.

Role of lawyers in upholding democracy and rights

The first panel discussion was titled 'The role of lawyers in upholding democracy and the rights of individuals'. The panel consisted of director at Bingham Centre for the Rule of Law in London, Sir Jeffery Jowell; ENSafrica chairman, Michael Katz; lawyer at Mossadek Law Firm in Casablanca, Tarik Mossadek and Alpha Media Holdings chairperson in Zimbabwe, Trevor Ncube.

Mr Ncube described the Magna Carta as 'one of history's greatest and most enduring documents' adding 'that it originated from a group of leading noblemen and not from ordinary people does not dilute its appeal, and indeed, its lasting significance to the citizens of the world.'

Mr Ncube spoke on what the Magna Carta means to him, both as a Zimbabwean and as a citizen of the world. He spoke about its enduring effect but also raised important questions over the promotion and protection of civil rights, the core of which are traceable to the Magna Carta.

In this regard, he spoke about the role of the legal profession as well as its role in promoting and protecting human rights.

Mr Ncube said the Magna Carta did two important things. Firstly, it was the first proclamation that recognised the legal rights of subjects under the crown and secondly, it recognised that the monarch, which was essentially the state, was also capable of being bound by the law.

IBA celebrates the Magna Carta

'In this way, the Magna Carta established an important contractual relationship between the state and the citizen, with the state having power over the citizen but also being bound by the law and the citizen being entitled to legal rights. It is this relationship, between the state and the citizen that forms the basis of the modern nation-state. The state is limited to the extent that it must uphold and respect the rights of citizens which are granted by the law. This means the law is an important element in this relationship and it must be respected and enforced,' he said.

Mr Ncube said the Magna Carta was the first legal instrument to provide for the right of *Habeas Corpus*. He then went on to tell delegates about an incident in Zimbabwe where this law was used, many years after it was signed.

'On 9 March 2015, a young Zimbabwean journalist and human rights activist called Itai Dzamara was allegedly abducted by an armed group of unknown individuals. This happened in broad daylight ... A few days later, his family and lawyers approached the courts.

The application they were making was based on the right of *Habeas Corpus*, which I understand means "show the body", a remedy, I am told, which is often sought where a person is suspected of being in the custody of the state. The demand is for the person to be produced and for the state to justify why he should be kept in custody. The roots of this important remedy are to be found directly in the Magna Carta,' he said.

According to Mr Ncube, in this particular case, the court granted the order and compelled the law enforcement authorities, including the police and intelligence services to convene a search for Mr Dzamara, on the basis that the state has a duty to protect. But, to date, his whereabouts have still not been accounted for.

Mr Ncube mentioned how lawyers have been harassed in Zimbabwe and how lawyers are 'politically captured' by political organs of the state.

Harsh operating environment

Mr Ncube said human rights lawyers sometimes have to operate in harsh working environments, adding that sometimes they become victims while trying to assist victims of human rights violations.



Chief Justice, Mogoeng Mogoeng, delivered the keynote address at the International Bar Association's 800th anniversary celebration of the Magna Carta in Cape Town in May.

'For example, in November 2014, Kennedy Masiye, a lawyer working for the Zimbabwe Lawyers for Human Rights was severely assaulted by members of the police at a police station where he had attended to represent his client who had been arrested while exercising his right to demonstrate,' he said.

Mr Ncube added that many other lawyers have been subjected to assault and harassment of a similar nature. He said these abuses of power cause fear and intimidation among lawyers. 'It is a harsh operating environment which means only the brave, and some might even say the reckless lawyers, are prepared to take up work in defence of political activists. 'These are the heroes who with no regard to their own safety commit themselves to help others who need legal assistance,' he said.

Mr Ncube said there are also other factors that affect lawyer's work in the field of human rights and democracy such as 'political capture'.

He said: 'By "political capture" I refer to a situation where political actors subject the legal profession, or significant parts of it, to persistent and disproportionate influence, which affects the manner in which they carry out their functions. In order to promote the rule of law, the legal profession ought to carry out its functions independently, and without undue influence from or bias towards political actors, however powerful they might be. It is the hallmark of

the profession's independence that even the most reviled alleged criminal is able to find legal representation. Nevertheless, this independence is lost when the legal profession or significant parts of it become "captured" by political actors and this invariably affects their ability to carry out their professional mandate.'

Mr Ncube said since most of the victims of human rights injustices are usually supporters of the opposition or civil society activists, the lawyers who represent them have often been branded 'opposition lawyers', by their detractors in the state media, adding that in this way, they are regarded by the state and ruling party as helping the cause of the opposition.

He said a senior politician recently fell out of favour with the ruling party and was expelled. The politician disclosed that it was very difficult to find lawyers that were prepared to take up his case. Mr Ncube added that these pejorative characterisations are not reserved for lawyers acting on behalf of the traditional opposition parties.

According to Mr Ncube, the ruling party has a group of lawyers who are always ready to defend it in the media. Every report that has legal implications often has lawyers, presented as 'legal experts' who back the state and give legal justification to the conduct of the state, even when such conduct is patently unjustifiable or unreasonable.

Mr Ncube said political capture derails the effectiveness of the legal profession in supporting the rule of law and promoting a democratic culture. He said it promotes a culture of impunity and a sense among the political leadership that they are above the law and beyond public criticism.

Judicial capture

Mr Ncube said the greatest concern over the capture of the legal profession is the capture of the judiciary. 'The role of the judiciary is to interpret the law and to act as the adjudicator of disputes between individuals and between the state and individuals. In order to perform this role effectively, the judiciary must be independent. These principles are enshrined in the new constitution of Zimbabwe,' he said. The new constitution was adopted in March 2013.

According to Mr Ncube having principles in a constitution is one thing and the actual practice is a different matter altogether. He said the great fear in Zimbabwe has been that the independence of the judiciary has been compromised, largely because of political interference. He added that when Zimbabwe adopted a new constitution, there was hope that there would be transformation of the judiciary, as had happened in Kenya, which had followed a similar process. Kenya



Alpha Media Holdings chairperson in Zimbabwe, Trevor Ncube, was part of a panel discussing the role of lawyers in upholding democracy and the rights of individuals at an IBA conference in Cape Town in May.

had undertaken a serious overhaul of the judiciary, ensuring that there would be a transformed judiciary to administer the new constitution.

However, in Zimbabwe, despite complaints over many years that the judiciary was compromised, there was no such transformation. The judiciary has remained exactly as it was before the new constitution. 'For example, many members of the judiciary who benefitted from the land reform programme are expected to pass judgment on the same disputes over land,' he said.

Mr Ncube said two years since the new constitution was adopted, it is disappointing that there has been very little progress in its implementation. He said the government has dragged its feet and failed to ensure that the various national laws and policies are realigned with the new constitution. 'The government blames a lack of resources for the slow speed in implementation but most Zimbabweans believe the real problem is the lack of political will. Already, there is talk from government ministers that the new constitution will be amended. It would be a sad day for the people of Zimbabwe if the new constitution is amended before any serious attempts have been made to fully implement it.

'The problem, however, is that even two years since its adoption, very few are aware of the contents and effect of the new constitution. There has been little effort from government to promote awareness of the constitution,' he said.

Mr Ncube said there is little continuing professional development among lawyers in Zimbabwe. He added that there has not been effective education among practising lawyers, prosecutors and judicial officers regarding the requirements of the new constitution, which has resulted in the failure by lawyers to challenge laws that are patently unconstitutional.

He said: 'For example, the new constitution has new guarantees for the right to life. It effectively bans the death penalty for all except men aged between 21 and 70 and only then when it is aggravated murder. However, the criminal legislation which currently exists has not been amended to conform to this new system. The result is that convicts are still being sentenced to death regardless of the changes in the new constitution, itself a travesty of justice.

In conclusion Mr Ncube said lawyers need to rise above the politically demarcated lines to ensure their independence, both from the ruling party and the state and from the opposition forces. He said they have to resist the temptation to toe the political line and that they have to be critical of government, just as they have to be critical of the opposition, too. 'In this way, there is greater scope to promote accountability across the board and to minimise the problem of "political capture". Overall, the great influence of the legendary Magna Carta will be guaranteed to be an enduring force for more centuries to come,' he said.

Sir Jowell raised the question of the debate about the lack of reference to the Rule of Law in the United Nations (UN) development goals post 2015 for countries. He said many countries support the idea that the rule of law should be included in the UN Millennium Goals.

Sir Jowell asked whether socioeconomic rights matter more than the rule of law and foreign direct investment impact on the rule of law.

Mr Katz asked many questions of the IBA such as:

- What is the role of a corporate or tax lawyer in relation to the rule of law?
- What is the role of business in upholding the rule of law?
- What are the needs of business today when promoting human rights and social justice?
- How can capitalism promote the idea of corporate lawyers having a social conscience?

He reminded the delegates that corporate lawyers have influence over the drafting of laws, in their influence over clients. He also said they can help in issues such as due diligence, preventing cartels, etcetera. He also reminded the delegates that South Africa is threatened by massive inequality and poverty.

Mr Mossadek spoke on the Moroccan experience. He said the independence of the Bar association has been confirmed over half a century ago, adding that Morocco was a country where lawyers have been able to actively fight for a demo-

cratic process and the establishment of the universal values of individual rights.

He said the challenges faced in Morocco were people's attitudes; the abuse of power; corruption; a lack of judicial skills for the judiciary, as well as a lack of financial and human resources. Mr Mossadek said there were 4 000 judges, 12 000 lawyers and over four million cases per year.

Challenges to judicial independence

Under the topic 'challenges to judicial independence', professor of public law at the University of Cape Town, Hugh Corder said there can be no rule of law in substance without judicial independence in both form and substance, adding that this is frequently easier said than achieved. According to Professor Corder, the superior court judiciary in this country has always enjoyed constitutional independence, and there is only one recorded instance of a judge being dismissed from office, that occurred in 1897, when President Kruger dismissed Chief Justice Kotze, before the formation of the Union of South Africa.

Professor Corder said under the Constitution, the rule of law and the independence of the judiciary are emphatically and repeatedly protected: Through ss 1(*c*); 2; 165; and various other allied means. He added: 'Yet one of the basic tenets of our Constitution, indeed any such constitution, I would hazard to guess, is that those who "exercise public power or perform a public function" must be accountable through the law for their exercise of such authority, and this is naturally where the idea of accountability enters the picture.'

Professor Corder said society would normally accept that Parliament is subject to certain rules and restrictions in the making of laws and the conduct of its affairs. 'We would equally and more strictly require the members of the executive branch of government, cabinet ministers and public officials at every level, to be subject to review at an ever



Deputy Governor in charge of administration at the Bank of Zambia, Doctor Tukiya Kankasa-Mabula, who was awarded the IBA 2014 Outstanding Woman Lawyer Award, speaking on the recognition and application of equality at an IBA conference in Cape Town in May.

more onerous level, as their direct political accountability and their discretionary authority decline in scope. This is typically achieved through the well-tried mechanisms of administrative law, increasingly the broader avenues to achieve administrative justice, and ultimately through judicial review of administrative action,' he said.

He then asked what about the judiciary? He added that judges and other judicial officers exercise public power and perform a public function, but equally, the extent of their accountability must be tempered by their independence, guaranteed by the Constitution, an idea at least as ancient as Magna Carta.

Professor Corder said there are methods under common law that are well known to most legal systems that provide as a means of accountability. Among these are:

• Justiciable disputes were almost always heard in open court, so that any member of the public could observe the judicial authority at work and criticise it.

- Court judgments, which were made available to those who request it.
- Important judgments were likely to be published in official sets of law reports, a vital resource in a legal system that relied on the doctrine of precedent.
- The courts were served by an organised legal profession, which was independent and adhered to a strong code of professional ethics.
- Strong peer pressure was exerted on judges by fellow judges as well as by the legal profession, so that those who failed properly to adhere to ethical standards or acted dishonourably or unlawfully would experience collegial censure.
- The possibility of review by or appeal to a higher court existed in respect of every judicial decision, except of course those of the highest court in the hierarchy
- The admittedly remote possibility of disciplinary measures, or even more unusually, removal from judicial office, existed in law. However, this result was difficult to achieve and the process required the participation of all three branches of government.
- The mechanism for the appointment of judges and their elevation to higher courts, or to presiding positions within the court hierarchy, provided a means by which the judiciary as an institutional whole could be called to account.

Professor Corder added that these mechanisms are used to hold the judiciary accountable. 'Among the further factors, which impact on judicial independence conditions of service, including salary and pension; how judges are disciplined; the existence of a code of conduct for judges; the rules relating to bias and recusal etcetera,' he said.

Professor Corder said in many countries of the world, regrettably, judges at all levels are subject to direct influence either by threats to their safety from the executive, or through corrupt practices. He then spoke on three aspects where judicial independence faces challenges because of the need to be accountable.

He said the first potential danger ex-



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ists through party political influence in the appointment of judges. He added that the natural temptation for any executive is to have judges who do not unduly upset the applecart, or are seen to frustrate Parliament.

Professor Corder said the area of judicial appointments is a critical moment at which judicial independence and the rule of law can be affected, either negatively or positively.

'The second area, which necessarily needs great vigilance, is that of judicial discipline, both leading to dismissal and to steps short of dismissal. While the former process is relatively rare in most countries, and usually involves extensive investigation followed by approval of such dismissal by a heightened majority of the legislature, I am more interested in the processes which have been established for discipline short of dismissal,' he said.

Professor Corder added that judges are human beings, they sometimes lose their temper, behave inappropriately or badly in public, accept gifts from those who may someday appear before them in court, or worse those who are actually on trial before them. He added that disciplinary mechanisms are necessary to preserve the credibility and legitimacy of the courts.

Professor Corder said formal processes for registering and handling complaints about judges were needed. He added that this task is often allocated to the Judicial Service Commission (JSC), adding that South Africa now had a Judicial Conduct Committee, which can appoint Judicial Conduct Tribunals to determine particularly serious incidents of alleged judicial misconduct, which reports to the JSC for ratification.

He added that there is also a Judicial Code of Conduct (based on the Bangalore Principles and similar declarations), which includes the necessity for the confidential disclosure of financial and other fiduciary interest of all serving judges and their immediate families.

'This system has only recently been put in place, and it is too early to assess its effectiveness, but it is certainly in principle a move in the right direction, especially because of the judicial dominance of the processes and structures,' he said.

Professor Corder said the third issue vital to the health of any system of public governance is the establishment and maintenance of an appropriate level of openness, such as to instill public confidence, and the respect of those in other branches of government.

Adding to this point he said judicial appointment and discipline, the processes in court, the extent of accountability to the profession and the public, need a strong measure of vigilance.



Retired Constitutional Court Justice, Kate O'Regan, spoke on challenges to judicial independence at the 800th anniversary celebrations of the Magna Carta by the IBA in Cape Town.

'Here the existence of an independent media and a critical-minded academy and practising profession is vital. Respectfully expressed criticism of the courts and judicial activities must contribute to a better administration of justice and thus the establishment and maintenance of the rule of law. I am particularly concerned about the damaging effects of often intemperate, usually uninformed, and sometimes mischievous reactions to judgments from senior politicians of every hue, for they tend to take root in the public mind, mostly unfairly. It is difficult for the judge himself or herself to respond, certainly not in kind, and it is then that the senior leadership of the judiciary and those who value the rule of law must step in to defend the judicial institution as a whole and the targeted judge in particular, provided of course that there is good cause for such defence,' he said.

In defining what judicial independence is, Justice O'Regan said it was the ability to make decisions on cases without undue interference from the executive or any arm of government, the parties, or judicial colleagues. She added that it was also the implementation of judgments and orders made by courts and adequate institutional features, including secure tenure, protection of salaries and pensions, budgetary autonomy, that will support independence of the judiciary.

Justice O'Regan said judicial independence matters because it ensures power is exercised, and is seen to be exercised, in accordance with the law and because it maintains the rule of law. Justice O'Regan added that judicial independence also ensures equality before the law and fair and public hearings by competent, independent and impartial tribunals.

Justice O'Regan said some matters of concern regarding judicial independ-

ence included resourcing of the judiciary in terms of weak budgetary provisions, understaffing, poor libraries and judicial numeration. She added that there was also a shortage of judges as judges are often appointed on ad hoc temporary appointments to the appellant court. These positions are often renewed regularly over long periods.

Justice O'Regan concluded by saying that the principle of judicial independence is of central importance to the rule of law, adding that the independence of the judiciary, and the separation of powers, are principles, which often give rise to tension and contestation in democracies.

Justice O'Regan also said that the existence of tension and contestation does not destroy judicial independence but they can create a threatening environment. She added that the legal profession has a duty to assert and protect judicial independence.

'The suspension of the SADC Tribunal, and the Protocol of 2014, which seeks to remove the right of individuals to approach it, constitutes a worrying demonstration of a lack of commitment to judicial independence at regional level in southern Africa,' she said.

Maintaining limits on government power in modern states

Speaking under the topic 'maintaining limits on government power in modern states', Professor Charles Fombad of the International and Comparative Law in Africa at the University of Pretoria said that no matter how good the text of a constitution or the limitations that it places on government to prevent abuse of powers and dictatorship, this will count for nothing if these limitations cannot be enforced. He added that constitutional safeguards against abuse of power by rulers will mean nothing unless the people are ready to defend these safeguards. 'Ultimately, a constitution is only as good as the people who are ready and willing to defend it,' he said.

Professor Fombad also said that standing firmly between the people and the rulers, is the judiciary generally and judges in particular. For the process of constitutionalism, good governance and accountability to take root, African judges need to adopt a bold, imaginative and judicially activists approach similar to that which has been manifested by the South African Constitutional Court in many of its decisions. 'Ultimately, the existence of constitutional limits might not guarantee good governance. Nevertheless, when this is combined with the will of the people to defend them, they will deter potential tyrants and considerably reduce the prospects of a country backsliding into anarchy or dictatorship,' he concluded.

General Counsel to the Governor of Lagos, Oyinkansola Badejo-Okusanya, said that 800 years on, she believes the Magna Carta's best days on the African continent loom large on the horizon. As an idea of freedom, democracy and the rule of law, the Magna Carta is gradually eating away at the edges of despotism across Africa. It is no longer as easy or as 'fashionable' for political leaders to have their way no matter what. They may have their say but the rule of law will eventually have its way. It has never been so clear that power does indeed belong to the people.

She said the power of the people is the greatest limitation on the powers of government. And that we have the Magna Carta to thank for that.

Speaking on the recognition and application of equality, Deputy Governor at the Administration Bank of Zambia, Doctor Tukiya Kankasa-Mabula said although the principle of gender equality is generally recognised, application has been the problem. She said there is almost universal acceptance that despite all the efforts at global, regional and national level, gender equality has not been

attained and that more needs to be done.

'Law is a powerful catalyst for change especially when it is accompanied by an enforcement framework that enjoys political will. Legal reforms have not worked as well as possible. However, even in the absence of political will, what can the legal profession do to advance the cause of gender equality?' she asked.

She urged lawyers to make a difference in their communities. 'Lawyers are parents, husbands, wives, brothers and sisters, sons and daughters. What are we doing in our public and private spaces to advance gender equality? By our very training and calling, we are advocates that can advocate for this cause. We all need to challenge ourselves on how we can make a difference for a better society,' she said.

The keynote address was delivered by Chief Justice Mogoeng. He stated that the Magna Carta offered peace between the king and the nobles during very troubled times. The Magna Carta contributed to the UN and the European Convention on Human Rights and the constitutions of many countries.

With reference to the breaches in the rule of law in Africa, the Chief Justice referred to the matter of the arrest of judg-

es in Swaziland and corruption there. He said there is nothing being done to address the constitutional crisis in that country. Chief Justice Mogoeng challenged the IBA to do something about the situation in Swaziland. He said: 'How can you come all the way to South Africa but across the border such a crisis is happening in Swaziland? We must not be seen to just be doing lip service.'

In addition, the Chief Justice spoke about the crisis in Burundi. He said the Vice President and four judges there had to leave the country under duress as there were reports of judges being forced to rule in favour of the President's third term. How do we find solutions to this? He asked, while reminding delegates that at the heart of the Magna Carta was the desire to resolve crisis.

Chief Justice Mogoeng said it is easy to manipulate or buy off the judiciary if it is not fully independent institutionally and resources wise. He added that justice should never be sold and that no one should ever be denied justice.

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Lack of advancement of black and female lawyers in the spotlight

he National Bar Association (NBA) held an international affiliates' meeting with the Law Society of South Africa (LSSA) and the Black Lawyers Association (BLA) in Sandton in May.

The NBA is the United States' (US) oldest and largest national association of predominantly african-american lawyers, judges, educators and law students. It has 84 affiliate chapters throughout the US, Canada, the United Kingdom, Africa and the Caribbean. It represents a professional network of more than 65 000 people.

The theme of the symposium was 'South Africa: Twenty-one-years after Apartheid ended and democracy for all commenced'. Speakers at the conference included Justice Minister, Michael Masutha; Los Angeles Superior Court Judge, Marguerite Downing; Judicial Service Commission (JSC) member and spokesperson, advocate Dumisa Ntsebeza SC and attorney and acting judge, Diana Mabasa. LSSA co-chairperson Busani Mabunda and NBA president Lorraine Meanes gave the welcome address.

The symposium consisted of two panels covering two topics, namely, human trafficking and the barriers and solutions to the advancement of black and female lawyers.

Human trafficking

Doctor Monique Emser, a counter trafficking researcher and activist who compiled the latest LexisNexis Human Trafficking Awareness Index spoke on the key findings of the report (see 2015 (June) *DR* 7 for the analysis of the index).

Dr Emser said the list of human rights violations is long, but one of the most heinous crimes that has, in recent years, recaptured the world's attention is the buying and selling of people for profit, otherwise known as human trafficking.

Dr Emser explained what human trafficking is, saying that trafficking in persons is internationally defined in art 3, para (a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving



National Bar Association President, Lorraine Meanes, giving the welcome address at a symposium in Sandton in May.

of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

She added that exploitation includes the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In her concluding remarks, Dr Emser said the index highlighted that human trafficking in Africa is a problem that is exacerbated by conflict, undocumented and forced migration, and intraregional and transnational criminal networks. She said various forms of child trafficking, which include child labour, child soldiers, forced marriage, forced pregnancy and illegal adoptions, when grouped together, exceeded trafficking for commercial sexual exploitation over the January to December 2014 period.

Dr Emser said children throughout Africa remain the most vulnerable and exploited subpopulation.

Political specialist at the US Embassy in Pretoria, Sanjiva Reddy, spoke on the responses and challenges of human trafficking in South Africa. He spoke of the US legislation, the Trafficking Victims Protection Act of 2000 (TVPA) and said the TVPA requires the US Secretary of State to submit an annual report on human trafficking to congress. He added that the goal of the report was to stimulate action and to create partnerships around the world in the fight against modern-day slavery.

Mr Reddy said the TVPA defines 'severe forms of trafficking' in persons as 'sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act is under the age of 18 years; or the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery'. Mr Reddy highlighted the fact that 'a victim need not be physically transported from one location to another in order for the crime to fall within those definitions' as a lot of trafficking can occur within one country.

Mr Reddy went on to speak about South African legislation pertaining to human trafficking. He said among South Africa's laws to help combat trafficking were the following –

• The Prevention and Combatting of Trafficking in Persons Act 7 of 2013. He said although this law was signed in July 2013, it remained pending finalisation of implementing regulations. Mr Reddy said this leaves South Africa without adequate anti-trafficking prohibitions and impeding overall efforts to combat the crime. He added that the Act has a provision for a maximum fine of R 100 million or life imprisonment (or both) and that



LSSA Co-chairperson and BLA president, Busani Mabunda, gave the welcome address at a symposium by the National Bar Association, the Law Society of South Africa and the Black Lawyers Association in Sandton in May.

it requires annual reports from implementing departments once activated.

- The Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007, which prohibits the sex trafficking of children and adults and prescribes penalties of up to 20 years' imprisonment. Mr Reddy said this Act is sufficiently stringent and commensurate with those prescribed for other serious offenses such as rape.
- The Basic Conditions of Employment Act 75 of 1997 prohibits forced labour. The Act carries between three to six years imprisonment penalties for forced labour for children under 15 years of age.

Mr Reddy said all child labour is trafficking. He also said it is not only foreigners that are trafficked and added that South Africans constitute the largest number of human trafficking victims, saying that the majority of victims are labour traffic victims.

Mr Reddy noted that Nigerian syndicates dominate the commercial sex trade in several provinces adding that Chinese, Russian and Bulgarian syndicates were also active. He also said Thai women constituted the largest identified foreign victim group in the country.

Mr Reddy said for the past three years about ten to 15 foreign male forced labour victims are discovered aboard fishing vessels in South African territorial waters a month.

Barriers and solutions to the advancement of black and female lawyers

There were five panellists in the panel discussion on barriers and solutions to the advancement of black and female lawyers, namely, Judge Downing; Esq Lorraine McGowen; former LSSA cochairperson and former president of the BLA and Law Society of the Northern Provinces (LSNP), Nano Matlala; Mr Ntsebeza; and Ms Mabasa.

Ms Mabasa's speech was based on the survey on the transformation of women in the legal profession done and released by the Centre for Applied Legal Studies



Counter trafficking researcher and activist, Dr Monique Emser, spoke on human trafficking at a symposium held in Sandton.

(CALS) late last year. She said the report revealed that black women were treated differently and that they received double prejudice because they are women and they are black. Ms Mabasa said black women often face challenges of presumed incompetency and that as a result, they have to work harder than their white counterparts, as well as harder than men, in order to prove themselves. She added that practicing for black women was even harder as they also have to deal with issues of motherhood, which requires them to take some time off work which 'leaves them behind'. (See 2014 (Nov) DR 18 for a full report on the survey).

Ms Mabasa said a particular kind of intervention was needed to deal with this kind of harm. She said an intersectional approach combining the effects of race and gender discrimination to assist in the removal of barriers for black women in the legal profession was needed.

Ms Mabasa posed the question whether the Legal Practice Act 28 of 2014 would make a difference and continued to say if the voices of women are included maybe the Act will make a difference but added that thus far, the Act is silent on gender issues.

Mr Matlala said the major law firms in South Africa are, white law firms. 'It has to be conceded that these white law firms employ more black lawyers than one can find in a single black law firm. One may ask how is this possible when whites constitutes 8,9% of the South African population while in Apartheid South Africa these firms did not take into their employment black lawyers after completing articles? Two main reasons among many: (a) to attract government business in accordance with its BEE policy (whereas prior to democracy the opposite prevailed as none of their clients would agree to be served by a black lawyer meaning that the firm would lose business) and (b) Employment Equity Act biased in favour of black persons while in the old order the employment laws solely protected white employees,' he

Mr Matlala said it cannot be denied that the black lawyers in white law firms benefit indirectly as 'the holders of instructions are white firms invariably in meaningful and lucrative legal work'. Mr Matlala added: 'These white law firms monopolise all legal work in all South African courts and tribunals. No South African judicial officer, government minister and parliamentarian can gainsay this fact. This has contributed to the exponential growth of white law firms resulting in some such firms being targets of take overs by international law firms. Some have made alliances with international law firms. The number of lawyers found in some of these law firms exceeds 600 when no one black law firm has more than 50 lawyers. The sad story is that currently white law firms have double the number of black lawyers in their midst.'

Mr Matlala said the merger of his firm, Maluleke Seriti Makume Matlala Inc (MSMM Inc) 'in 2002 produced the largest black law firm with over 25 attorneys and ten candidate attorneys.' He added that the firm 'had all the expertise that one can think of in a large white law firm.' Sadly, the merger could not be sustained because all banks refused to give MSMM Inc work and financing. Mr



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Matlala said the public and private sector also refused to give them business. 'We could not pay competitive salaries to our professionals and general staff and lost them to white law firms and the public sector. I could be speaking of an MSMM Inc of over 150 lawyers today if the firm was financed and attracted meaningful and lucrative work. Today we have less than ten lawyers. What a shame given the fact that the firm has produced more black judges than any other firm in South Africa,' he said.

Mr Matlala said that today, there is not a single black firm that he is aware of that has access to lucrative and meaningful legal work from the private and public sector. 'I am ashamed to state that such meaningful and lucrative legal work is offered to major white law firms. For so long as this state of affairs prevails we should forget about growth and profitability of black law firms. It is not an understatement to say this is the end of the supply chain of the judiciary from black law firms and a denial of opportunities to black law firms as espoused in the preamble to our Constitution and a contravention of section 9(2) of the Bill of rights,' he said. He added that the preamble to the Constitution is rendered meaningless and a dream to black law firms as a result of the persistent and consistent continuation of doing business under Apartheid conditions.

Regarding the Legal Practice Act, Mr Matlala said the Act is aimed at regulating the profession and the provision of legal services. He added that its main aim is the protection of the public and the profession and that it does not cover economic issues.

Mr Matlala said Apartheid damaged South African citizens, both white and black, psychologically, making society believe that white people are better than black people.

Mr Ntsebeza spoke about statistics pertaining to the Bench. He compared the number of black and female judges on the Bench in 1994 to the latest statistics and said progress had been made, albeit not in the right pace.

Mr Ntsebeza said in 1994 there were 167 judges, of these, two were women – who were both white – one was in the appellant division while the other was in the Cape Town High Court. He added that there were three black judges and the rest were all white male. 'Black in South Africa means African, Coloured and Indian. Although a subsequent judgment in the labour Court found that Asians and Chinese also fall under black,' he said.

Mr Ntsebeza said those judges were appointed from the ranks of advocate. 'These silks were usually white and male hence the judiciary was predominantly white male. The JSC had a duty to trans-



Judicial Service Commission member and spokesperson, advocate Dumisa Ntsebeza SC and attorney and acting judge, Diana Mabasa were part of a panel discussion at a symposium held in Sandton in May.

form the judiciary. Government then decided that judges could be appointed from academics and attorneys,' he said, adding that the pool is now drying up or has already dried up again.

Mr Ntsebeza said the situation regarding black people on the Bench has not changed much. He said the JSC exhausted what it had in the academics. He posed a question as to why the pool was drying up and said it is a vicious cycle that starts with education. 'Those lawyers from whom we would expect to get practitioners, if they are black female, they are likely to have gone to the worst universities in the country. There is a more likely chance for the black students to go to these kind of universities. Although we have all the well-known universities, we still find students going to universities where they live. So the solution starts at proper legal education and getting government to provide resources towards legal education,' he said.

Mr Ntsebeza added: 'There was a time when we thought we could speed up the process of getting law students qualified. We moved from the usual five-year LLB to four years. But everyone was complaining about the calibre of education and skills students were equipped with. The reason for this is because the best LLB graduates came from traditional white universities. Government must commit more resources in assisting legal education especially in the black universities so that they can also compete with the others when it comes to legal education.'

Mr Ntsebeza said the training of attorneys via their candidate attorney clerk-

ship was also not the same for everyone. He said that work coming in at law firms must be shared with the candidate attorneys and that they must also get a chance to work on cases. He added that they must not just be hired to make tea.

Mr Ntsebeza said as a member of the JSC, he is asked why the JSC always recommends white people. He said: 'Well, I tell them it is because they are properly qualified and are fit and proper I tell them that we are not going to push people simply because they are black or female.'

He concluded his speech by urging attorneys to take on a number of junior female lawyers and train them and also offer them mentorship.

The legal system in the United States

Ms McGowen and Judge Downing spoke on achieving parity in the legal profession. Ms McGowen provided statistics on the number of women in law firms in the US. She spoke about the struggles for diversity and inclusion particularly for black women in the legal profession. She said many of the struggles experienced by South African black lawyers were also experienced in the US adding that the ones in the US have been longer lasting than those in South Africa. Ms McGowen said today less than 1% of partners throughout the US are africanamerican women and less than 2% are african-american (males included). She added that the minority population of partners generally is about 5%. This number includes Hispanics. She added

that the problem starts at tertiary level as the population for african-americans attending law school is decreasing.

Speaking on some of the solutions, Ms McGowen gave an example of negativity towards black lawyers. She said that two of the same documents were circulated with spelling errors to approximately 100 partners at major firms. The only difference between the documents was that the one indicated that it was written by a black person, 'Leroy Smith' while the other was written by a 'John Smith' who was presumed to be white. The comments against the white person were motivational and welcomed him to the profession and recommended some reading to improve his language while the comments against the black person included that practice was not for him and that he should rather leave the profession as poor writing was unacceptable. She said that this was a rude awakening

Ms McGowen said a study by the American Bar Association done in the 1980's revealed that 80% of female attorneys leave the profession within the first eight years of their legal career. The study was repeated in 2000, which revealed that 50% of female attorneys leave the profession within the first five years.

Ms McGowen said the best solution



was partnerships. 'Partnerships of three groups of people within the law firms. The leadership of the firms need to have an aggressive stand and not only look at the numbers but also at addressing the retention of the lawyers. You can do that by establishing real practical sponsorship programmes of the women and black attorneys one on one. Having a senior attorney in the room helping with development and engaging with them

throughout their career and also playing a mentorship role and telling the juniors about what it takes to succeed in that area of law. They must also look at who is doing the work and get the younger attorneys to assist actively in all the matters,' she said.

Ms McGowen said symposiums such as this one with all the different key players in the profession were needed so that members of the profession can meet and resolve issues and to share ideas being developed and implemented within their firms.

Judge Downing said 54% of the women in California graduate from law school but only 38% of them pass through the Californian State Bar.

She added that there are approximately two million practising lawyers in the state of California and each year approximately 4 000 to 5 000 new lawyers start practising. 'There are about 23% women judicial officers in California and about 13 to 14% of those judges are black women,' she said.

Judge Downing said black women were not sufficiently represented in the judiciary in California. She added that because of the misrepresentation, a California Young Lawyers Association was established. Its role is to train young lawyers who are 35 years or younger or who have been in the profession for less



than five years. She said they also have mentorship programmes where they start mentoring law students to make sure that they make it out of law school.

Judge Downing said another factor that is seen to slow down women in the profession is the fact that women become mothers and often have to step off the partnership track while they give birth and care for their children. 'When we talk about multiple children, we take ourselves out of competition for eight to ten years depending on the path we take. So what happens is that women go into solo firms so that they can control when they work and don't work, or they become government lawyers or they practice for non-profit or legal aid services where they are given leeway instead of at big law firms where they would have to make the firm a lot of money and bill a lot of hours,' she said.

She added that what happens is that when they are ready to become judges, all the time that they spent out of practice and spent not doing the traditional thing such as trying cases, works against them.

Judge Downing said in her state, all the black judges, 23 of them, meet once a month for dinner where they talk about the politics involved in being in a minority. She said they also contact lawyers who have applied for the Bench and talk to and encourage them to go through with the interview. They ask them how far their application is and where they are in the process. Judge Downing said part of the problem was that they believe that sometimes lawyers select themselves out and urged black lawyers, especially women, to stop undermining themselves and thinking that they will never make it as a judge. 'We have found that when we reach out personally to the lawyers, they start to see themselves. They believe that "if she is a judge, and she thinks that I can become a judge, then maybe she is right and I can be a judge." When we say we would like to see you apply, it inspires them, she said.

One of the female delegates raised sexual harassment as a common trend that was faced by women in legal practice and suggested that there should be a law dealing with this including a possible sanction of being barred from practice when found guilty of this nature of misconduct. She said sexual harassment needed to be defined in the Legal Practice Act and added that female practitioners were usually victims of sexual harassment right through the court process from the court registrars right through to the judges. The other delegates, both male and female strongly agreed with her view.

Another delegate suggested that the

government should devise procurement policies and ensure that there was equal and fair distribution of government work to all sexes in legal practice.

The Justice Department's view

Minister Masutha gave the keynote address. He said South Africa had come a long way in just two decades from having only one black judge post 1994. Minister Masutha said according to statistics, the state attorney has exceeded the 75% target in terms of awarding legal work to previously disadvantaged individuals but added that word from other legal practitioners is that the courts are filled by the 'white boys club'. Minister Masutha said the contradicting views were concerning and added that he would do his own investigation and get the real picture. Minister Masutha said the question was why change is happening so slowly, and if it was happening at all in some instances.

Minister Masutha said a woman's organisation approached him soon after Judge Masipa delivered judgment in the Oscar Pistorious case. The organisation wanted to mount scathing criticism on the judge but Minister Masutha cautioned it against acting in haste and suggested that even if they choose to criticise on the judgment itself, they should do so in a proper way and avoid the risk of perpetuating assumption that black female judges are incompetent.

'I told them that I can list many court judgments where white males have done far worse, that is if people think the judgment was not what they expected,' he said. He then indicated the Justice Department's intention to appeal the euthanasia decision as Judge Fabricius indicated that the ruling only applied to the deceased (see 2014 (June) DR 4). Minister Masutha said his concern was that the decision was, inter alia, against the principle of precedent. 'The judge decided that he is developing a common law and therefore what is also strange is that in his own order he says that the order is limited to this particular case and should not set precedent for others in similar situations in the future. Do judges have a prerogative to decide whether judgment should or should not pursue precedent? Because from what I have learnt from past experience is that judges just deliver their judgments and the rule of precedence takes its natural course. Do not get me wrong, I do not want to come across as being critical of members of the Bench,' he said.

Minister Masutha added that there is 'this fallacy' that to be white, especially white male, you are possessed with these 'holy powers of knowing it all because

you were born to be a better person and born to possess all talents'. He added that this was a socio-political construct that is used as a tool for racial and general political domination.

Minister Masutha said the Justice Department holds a position of influence in the justice system and it should reflect on how best it can harness the advantage position in addressing a number of challenges, with transformation being one of the critical challenges. He said that the state has decided that it firstly needs to consolidate the state litigation account by making sure that the entity established to manage that account is the state attorneys office.

Minister Masutha said legislation has been passed that establishes the position of Solicitor-General. 'We think that that office should be elevated to a status of significance and we are looking at an appropriate status such as that of the National Director of Public Prosecutions and of the Public Protector's. We think that it is a very critical role that office needs to play and depending on how effective the office becomes, it could become a game changer,' he said. The Solicitor-General will be the state's chief legal adviser in all civil litigation, similar to the role of the National Director of Public Prosecutions in criminal matters (see 3).

According to Minister Masutha, there was also a need to address the issue of gender and race transformation in briefing patterns. 'We need to ensure that whatever work is there, starting with the public sector, gets to be evenly and fairly distributed across the profession,' he said.

The Minister also indicated government's displeasure at the high rate in which they were losing court cases. He said that one of the reasons was that senior advocates take work even though they do not have the capacity to do it. They then abandon brief and leave the work for junior counsel. Minister Masutha added that in some instances, counsel appear in court unprepared, he added that counsel should rather pass on work to others who have the time and who need the opportunity to deal with these matters.

• Judge Fabricius who gave the ruling in the assisted suicide case has since granted leave to appeal his ruling. The matter will go before the Supreme Court of Appeal. See page 23 of this issue.

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Democracy centre launched

he Kutlwanong Democracy Centre was launched at the end of May. The centre is located at 357 Visagie Street in Pretoria.

The national director of Lawyers for Human Rights, Jacob van Garderen told *De Rebus* that the centre is a unique hub for civil society in Pretoria. He said it brings together a range of organisations working in human rights, social assistance and development.

Services offered at the centre include free legal assistance and litigation, community advice, social assistance and social work, health services for farm workers and rural occupiers, as well as trauma and psycho-social counselling.

Mr van Garderen said: 'The building has become a landmark, reflecting the recent political history of South Africa and its transformation. Symbolism and design incorporates these elements throughout the building and garden, including the democracy wall and the memorial rock from the Robben Island quarry to commemorate the struggle for democracy in South Africa. The Truth and Reconciliation Commission's amnesty hearings, for example, were also hosted at the centre.'



The Kutlwanong Democracy Centre was launched on 29 May.

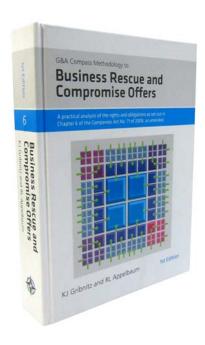
The centre is currently home to organisations such as –

• Lawyers for Human Rights, a South African human rights organisation devoted to social justice activism and public interest litigation. It provides a full range of free legal services to social movements and marginalised communities through targeted advocacy and strategic litigation, including refugee and migrant rights, land and tenure reform, rural and urban evictions, environmental rights, socio-economic rights and international justice.

- Centre for the Study of Violence and Reconciliation (CSVR), which is an organisation that works in the field of trauma and focuses on clinical, research and advocacy interventions that address the challenges faced by societies in transition. CSVR offers trauma and psychosocial assistance to refugees.
- Zimbabwe Exiles Forum, a non-political, non-profit and non-partisan human rights organisation with an eye on the future of Zimbabwe. It is engaged in research, documentation, advocacy, lobbying and litigation around issues of human rights in Zimbabwe and the rights of Zimbabweans in South Africa.
- International Federation for Human Rights, an international non-governmental organisation defending all civil, political, economic, social and cultural rights set out in the Universal Declaration of Human Rights. It acts in the legal and political field for the creation and reinforcement of international instruments for the protection of human rights and for their implementation; and more recently, ProBono.Org (see 2015 (June) *DR* 7).

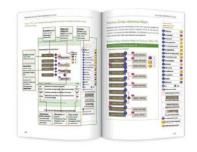
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Discussion paper on the expungement of criminal records

he South African Law Reform Commission (SALRC) has completed its discussion paper on the review of the law relating to the expungement of certain criminal records. The request for the investigation of the expungement of previous convictions follows from the enactment of the Criminal Procedure Amendment Act 65 of 2009. The Act, inter alia, deals with the expungement of certain minor criminal records. The Portfolio Committee concluded that the expungement of criminal records is a complex matter that requires a balance between the rights of citizens to be protected against criminals and the recognition that having a criminal record can cause undue hardship for an individual.

According to the commission, the Justice Minister, Michael Masutha, requested it to conduct research on the different systems followed in the keeping of criminal records and the expungement of such records. He requested that the research must draw, among others, on international best practices and must include consultation with the relevant stakeholders and the public.

The commission's analysis of the rel-

evant legislative provisions included the legislative provisions specifically dealing with expungement, namely expungement in terms of the Child Justice Act 75 of 2008 (CJA) and the Criminal Procedure Act 51 of 1977 (CPA).

It includes an analysis of specific legislation directly impacting on expungement in that the provisions of these Acts are included in the expungement legislative scheme in that it is a conditional requirement for an approval of an expungement that the names of applicants included in the National Child Protection Register and the National Sex Offender Register be removed from these registers.

The paper contains an evaluation of other relevant provisions in national legislation creating disqualifications with regard to employment opportunities following a conviction and sentence and how these disqualifications impact on the approval of expungements. The discussion paper also includes an evaluation of expungement of criminal records in foreign jurisdictions and lessons to be learned from these legislative schemes.

The discussion paper looks at the right of the community to be protected versus the rights of applicants applying for the expungement of criminal records to equality and dignity.

In the press release the commission said it concluded that the justification for the legislation enabling expungement of criminal records centres on two issues. On the one hand, the state's duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, an individual's right to equality and the constitutional duty on the state to free the potential of each person. These constitutional issues guided the content of the commission's provisional recommendations in the discussion paper.

After looking at all the provisions, the SALRC concluded that:

• The provisions in the CPA and the CJA dealing with expungement, are not aligned, and use different qualifying criteria for the approval of the expungement of criminal records. The expungement of convictions based on the sentence imposed and the lapsing of a time frame of ten years for adult offenders, according to the CPA, and expungement of convictions based on lists of offences combined with a time frame of five and ten years depending on the schedules containing the listed offence for juvenile



LEGAL WORK FOR THE LAW SOCIETY LAW SOCIETY OF SOUTH AFRICA (LSSA)

Firms around the country are invited to apply to be on the panel of legal service providers for the LSSA. The type of work envisaged includes: litigation matters, legal opinions, tax, e-law and general work.

Established firms with the necessary capacity and experience, with attorneys who have been practising for at least eight years and who have the right of appearance in the High Court, may apply.

Firms must also be BEE compliant.

Interested firms can complete the application form on the LSSA website (www.LSSA.org.za)

The selection of firms to be placed on the panel is the prerogative of the Management Committee of the LSSA.

offenders as per the CJA. In practice, the different criteria make expungements in terms of the CJA more limited for juveniles than expungements for adults in terms of the CPA.

- The justification for legislation enabling the expungement of previous convictions is the same for juvenile and adult offenders and does not justify the application of different qualifying criteria.
- Both the CPA and the CJA provides for the mandatory expungement of the criminal records concerned once the criteria set out in the Acts have been, are, and do not provide for a discretion to the approving authority.
- Both the CPA and the CJA provide for an administrative application process for the approval of expungements based on the qualifying criteria listed in the legislation.
- Applying the relevant constitutional principles to the enabling legislation for expungements, the commission concluded that the provisions in the existing legislation, in both the CPA and CJA are overbroad in respect of both the prescribed process and the listed qualifying criteria, therefore rendering the provisions unconstitutional.

The commission concluded that the constitutionality of the enabling legislation needs to be considered against the right of the community to be protected against crime versus the right of an individual to equality and not to be unfairly discriminated and the extent to which a limitation of the right to equality could be justified having due regard to the state's duties and responsibilities as outlined in the Constitution and other legislation.

In applying the above constitutional principles to the relevant legislation, the SALRC proposes that:

- The provisions in the CJA and the CPA dealing with the qualifying criteria and process in expungements should be aligned where justified.
- The existing prescribed administrative application process should be replaced by a motivated motion application process to a court having jurisdiction.
- The qualifying criteria for an expungement in respect of both adult and juvenile offenders should be broadened to include additional criteria, namely –
- participation and input by the prosecution in the process, consideration of the relevant constitutional rights, consideration of national legislation, which

inhibits employment opportunities (disqualifications imposed by national legislation);

- the extent to which an applicant has rehabilitated;
- an application for expungement should only be viable after serving of the sentences concerned; and
- a limitation to the number of times an application for expungement could be made.
- Providing for an application for expungement to be viable after a period of five and ten years in respect of both juvenile and adult offenders.
- The legislation should provide for the inclusion of a provision outlining the consequences resulting from an approval of an expungement.

The full discussion paper is available at www.doj.gov.za/salrc/index.htm and the public is welcome to make comments or suggestions to the SALRC. The closing date for comment is 31 August 2015.

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ormer Constitutional Court Justice, Richard Goldstone, spoke at the Africa Legal Aid (AFLA) symposium in Sandton in May.

AFLA held a symposium titled 'Universalising the Rome Statute of the International Criminal Court' (ICC). The event was attended by participants from more than 30 countries including Kenya, Nigeria, Uganda, Zimbabwe, Botswana, Burundi, Malawi, the Democratic Republic of Congo, Tanzania, Zambia, Libya and South Africa, to engage with officials of ICC state parties and representatives of international and intergovernmental organisations.

The topics covered included 'implementing the Rome Statute', 'criminalising the illegal use of force: Has Africa lost its voice?', 'the politics of international criminal justice: Can it be avoided?' and 're-engaging Africa in the ICC'.

Speakers at the symposium included Prosecutor of the ICC, Fatou Bensouda; President of the Appeals Division of the ICC, Judge Sanji Monageng; former Constitutional Court Justice, Richard Goldstone; and immediate past Chairperson of the United Nations Commission of Enquiry into Gaza, Professor William Schabas.

Justice Goldstone spoke on the politics of international criminal justice. He said the politics of international criminal justice cannot be avoided. Justice Goldstone also discussed his role as a prosecutor in the International Criminal Tri-

Rome Statute in the spotlight at AFLA Symposium



Former Constitutional Court Justice, Richard Goldstone, spoke at the Africa Legal Aid symposium in Sandton in May.

bunal for the Former Yugoslavia (ICTY) and the ongoing war in Bosnia. He also discussed the politics associated with indicting those accused of war crimes in the ICTY.

Judge Monageng gave the keynote address. He spoke on the Rome Statute and universal human rights. Judge Monageng said the creation of the ICC was the finest moment in history, adding that the protection of human rights is a collective

goal as is putting an end to impunity.

Judge Monageng said the ICC is complementary to national courts in respect of human rights violations. He said the protection of human rights is the duty of the ICC and national courts.

Ms Fatou Bensouda gave a speech on challenging the culture of impunity for sexual and gender based violence. She said the ICC Statute has expansive protection for sexual and gender based crimes and persecution based on gender.

Ms Bensouda said sexual and gender based crimes have a lasting impact long after conflict, for both, the victims and their families, adding that she believes that ending impunity for sexual and gender based crimes requires collective action through national and international mechanisms.

The ICC alone cannot end the scourge of sexual and gender based crimes, and that mechanisms for collective and universal action must be established, said Ms Bensouda.

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Oscar Pistorius trial declared as Newsmaker of the Year

he National Press Club and North-West University declared the Oscar Pistorius trial as the Newsmaker of the Year for 2014. The award was handed over to Deputy Chief Justice of the Constitutional Court, Justice Dikgang Moseneke on 15 May at the CSIR International Conference Centre in Pretoria.

In his opening statement, the National Press Club Chairperson, Jos Charle, said the award included the roles played in the trial by Oscar Pistorius himself, Judge Thokozile Masipa, prosecutor Advocate Gerrie Nel and defence lawyer, Advocate Barry Roux. Mr Charle said: 'For the first time in the history of South Africa, most of any trial's court proceedings were broadcast live on a dedicated TV channel.'

In his address to media delegates, Justice Moseneke said he was proud of the manner in which all of those who were a part of the trial allowed the nation and

the world into the courts to see how justice was dispensed. 'It has changed irreversibly the manner in which the media and the justice system of our country converge,' he said.

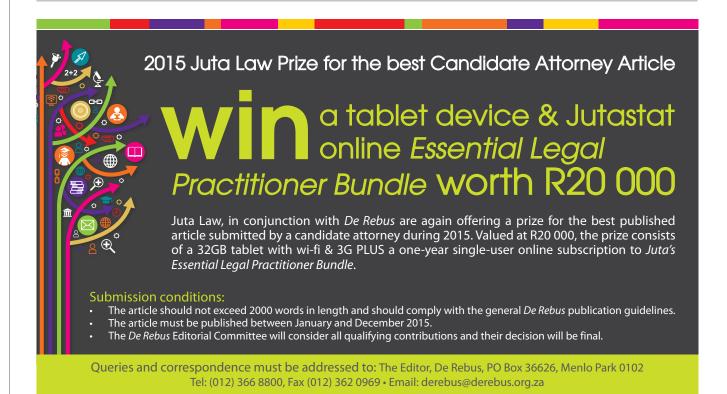
Justice Moseneke said: 'Everything about the trial – the judge's rulings, the witnesses that gave evidence, and especially the verdict – clogged social media newsfeeds in our laptops and other devices for months on end.' He added that the Constitutional Court became the first court in Africa to have an active presence on Twitter. 'We are becoming a part of that elite team of apex courts adapting to the modern age. Our presence on Twitter is symptomatic of that change.'

The Constitution and open justice

Justice Moseneke referred to the decision of Mlambo JP in *Multichoice (Proprietary) Limited and Others v National*

Prosecuting Authority and Another, In re: S v Pistorius, In re: Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others [2014] 2 All SA 446 (GP) in which media houses made a 'big ask' from the courts. 'They posed serious questions about how our courts could better ensure the hallowed principle of open justice. The questions were many and complex, but even more intriguing, they were new to the judicial system,' he said.

Justice Moseneke said the public is entitled to have access to the courts and to obtain information pertaining to them. He said with the new age we live in and the advancement of technology, our society is no longer one in which citizens must, or should have to wander into courtrooms to find out what is happening. 'People can now see and hear, all in the confines of their own homes, offices, villages or indeed in any other open spaces, so long as they have an active internet connection.'



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He added: 'The principle of open justice is an incident of the values of openness, accountability and the rule of law, as well as a core part of the notion of a participatory democracy. All these are foundational values entrenched in the Constitution. The preamble of the Constitution contemplates "a democratic and open society in which government is based on the will of the people", and the text requires that our democracy shall ensure accountability, responsiveness and openness.'

According to Justice Moseneke, courts play an important role to solve conflicts in all areas of life and that is promised in the Constitution. He added: 'For open justice alone, the Constitution guarantees the freedom of the press, the freedom of the media, and the right of the public to receive and discuss information and ideas [s 16(1) of the Constitution]. It provides for all criminal accused the right of a fair and public trial [s 35(3) (c) of the Constitution]. And for all others, a fair and public hearing [s 34 of the Constitution].'

The public are entitled to have access to courts, and to obtain information about them, Justice Moseneke said. He added 'Besides the obvious space limitation of there not being enough room in the courtroom to always fit everyone, and the distance limitation of court proceedings taking place in all four corners of our country, there is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want a system in which the judicial system is "shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone" [South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC) at para 331.'

Justice Moseneke said the Pistorius trial broke boundaries that were previously unbroken as international journalists flocked to the country. Media and social media were flooded with information and even a 24-hour television channel was created with the sole purpose of televising and discussing the proceedings. 'All of this was made possible because, before the trial even began, Judge Mlambo did what no South African court had before dared to do: Media organisations were given permission to broadcast, live and in full Technicolour, a criminal trial.'

Technology in the court room

Justice Moseneke said the question of technology in the court room is a twopronged one, namely:

• What technology should the court itself use?

• What technology should the court allow others to use?

He said the Constitutional Court was investigating the possibility of evolving into a paperless court. 'We are truly proud of the strides our Constitutional Court has taken to become substantially digital. It is compulsory for litigants to file court records in digital form alongside hard copies. ... In fact our website is visited extensively and reflects thousands of hits from all over the world This has helped courts of other countries to draw from our judicial experience,' he said.

'As to the second question, of what technology people should be allowed to use in court, was the question Judge Masipa had to grapple with in the course of the Pistorius trial. Before one of the witnesses gave evidence, the judge prohibited reporters from tweeting or blogging about the witness' evidence. ... [S]he changed her mind and allowed all nonparticipants in court to Tweet and blog to their heart's content,' he said.

Justice Moseneke referred to the 2010 bail hearings of Wikileaks founder, Julian Assange, where reporters were permitted to Tweet in the courtroom and a year later, the United Kingdom Supreme Court issued a directions permitting 'live text-based communications' such as e-mail and social media in the courtroom, in order to promote open justice (see www.judiciary.gov.uk/wp-content/ uploads/JCO/Documents/Guidance/ ltbc-guidance-dec-2011.pdf. accessed 3-6-2015). 'The message remains clear: Delayed information is as good as denied information. There is no reason not to, as a default position, permit live tweeting and whatever else from the courtroom. There is no logic in asking the media to step outside of the courtroom to press "send".

Media presence in the courtroom

Speaking on open justice. Justice Moseneke said the challenge for open justice is the effect of media presence on a witness in court and is something that must be guarded very carefully. 'The media's presence subjects witnesses to potential intimidation, both from others and from within themselves. ... But these concerns are not enough to warrant closing the courtroom doors to reporters and cameras. To prevent the possibility of witness intimidation, we would guite literally need to bar everyone from the courtroom except the litigants Open justice demands quite the opposite,' he added. Justice Moseneke referred to some measures available to protect witnesses and the options ranged from:

- anonymity orders to protect vulnerable witnesses' identities;
- allowing witnesses to testify through

intermediaries or with the help of a support person;

- closing the courtroom so that only certain people are present; or
- allowing a witness to testify from a remote location via closed-circuit television

'Other measures might include suppression orders such as that ordered in *Multichoice* when Judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr Pistorius or his witnesses ...' said Justice Moseneke.

The *sub judice* rule

In his address, Justice Moseneke referred to the potential pitfalls of media presence in the courtroom and where justice systems around the world have created exceptions to the rule of open justice, for example, where parties are prevented from using documents discovered in litigation for any purpose other than the purpose for which they were provided.

'What may still operate in South Africa, though, is the principle of *sub judice*, which literally translates as "under judgment". It refers to a prohibition on publically discussing what happens in a case until the case is finalised. ... the *sub judice* rule, and its relevance in South Africa, is, at the very least, on the verge of extinction. ... Let it be enough to observe that the social and other media blasts and immediacy make the *sub judice* rule nearly impossible to hold and to keep, ... [w]hat is more it will be near impossible for the courts to police the rule.'

Accuracy

Justice Moseneke added that one of the challenges for open justice is the role of the media as it is the media's responsibility to report on events that happen in a courtroom and convey the events as accurately as possible. 'Open justice is all for nought if the media does not accurately convey what happens in the courtroom. ... The media must also be careful not to sensationalise cases and turn them into media circuses,' he said. In conclusion, Justice Moseneke said: 'We, the media and the courts, share a common goal. We want the public to know. Indeed, it is our shared responsibility to ensure that they do. The trial against Oscar Pistorius may have attracted great media attention, but it is the decision in Multichoice that will set the trend for many years to come. It has paved the way for us to begin reassessing how to achieve open justice in a technological age.'

> Kathleen Kriel Kathleen@derebus.org.za

Additional R 3 million boost for SCCs

ustice Minister, Michael Masutha, signed a R 3 million extension agreement with the Swiss Confederation on the re-engineering of small claims courts (SCCs) in May. The agreement, which has been implemented in two phases from 2007 to 2011 is aimed at improving the functioning and efficiency of SCCs.

According to the Justice Department, government entered into an agreement with the government of the Swiss Confederation to implement the re-engineering project of the SCCs through donor funding.

Phase 1 of the project started in March 2007 and came to an end in February 2011, with a total contribution of R 4,5 million. An independent evaluation was done and due to positive assessment results, phase 2 was subsequently approved and ran from March 2011 to February 2015, with a further contribution of R 10 million.

The Justice Department said towards the end of the second phase, the Swiss Confederation offered to extend the agreement by a further period of ten months, ending in December 2015, with an additional contribution of R 3 million.

In a press release the Justice Department said the project has significantly contributed to the following successes:

- The establishment of 331 SCCs to date, with only 46 more still to be established countrywide. Since 2009, the Department has established 142 new SCCs.
- The training of 270 clerks and 487 commissioners.
- The promotion of legislative amendments to the Small Claims Courts Act 61 of 1984.
- Improved SCC functional operations.

In these courts, claims are resolved speedily, inexpensively, informally and litigants conduct their own cases without legal representation. Before 2010, SCCs could deal with cases involving small civil claims of R 7 000 and below. The jurisdiction of SCCs was increased to R 12 000 in 2010 and a further increase was gazetted in April 2014. This means that claimants involved in civil disputes can now claim for amounts of up to R 15 000. If the amount under dispute is more than R 15 000 the person claiming can lessen their claim to R 15 000.

It is free to resolve cases at SCCs, all one has to pay are the sheriff's fees. These courts are used to settle minor civil disputes and claims between parties. The plaintiff must prove that the defendant has done something that makes him or her liable for damages. Examples of this would be that the defendant has failed to pay rent owed, caused an accident resulting in damage to the plaintiff's property or ordered and received goods without paying for them. Other claims may relate to money lent, promissory notes and credit agreements.

Commissioners who preside in these courts are drawn from a pool of experienced legal professionals and academics, who provide their services free of charge.

• See 2011 (June) DR 12.

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- The article must be published between 1 January 2015 and 31 December 2015.
- The Editorial Committee of De Rebus will consider contributions for the prize and make the award. All contributions that $qualify, with the exception of those attached to the Editorial Committee or staff of \textit{De Rebus}, will be considered. \\ The Editorial Committee's decision will be final. \\$

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LPO report launched

he Department of Trade and Industry (DTI) and the Law Society of South Africa have launched the legal process outsourcing (LPO) report. The report was launched in Sandton on 27 May.

The comprehensive report is split into two parts. The first part involves an analysis of the shared service centres (SSCs) and LPO subsectors; and the second part looks at a provincial analysis of business process services (BPS) opportunities and competencies in six of South Africa's provinces, namely, Eastern Cape, Free State, Limpopo, Mpumalanga, Northern Cape and North West.

In the report, an SSC is described as the centralisation of support functions (such as human resources, finance, information technology and procurement) for a particular company, which may have branches in various regions. The SSC takes over certain non-core functions of the organisation, allowing the various business units of the firm to focus on their core business functions.

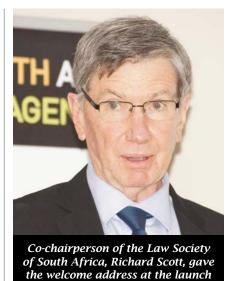
At the launch, director of business process services at the DTI, Ntokozo Mthabela, said India is a global business process outsourcing (BPO) hub with South Africa among the top three global locations that can support the English language on a large scale.

Mr Mthabela said South Africa has established itself as a credible and value offering BPO destination supported by an accessible talent pool, domain skills and cultural affinity with the United Kingdom, United States, Australia and New Zealand markets. He said South Africa offers a range of outsourcing services from basic customer service voice work to high level back office processes.

'The offshore business process services industry in South Africa is growing at more than 40% each year and has recently witnessed the entry of several leading global investors,' he said.

The report is available for the public and can be found at www.LSSA.org.za.

• See also: 2014 (July) *DR* 34; 2012 (May) *DR* 20; 2011 (Nov) *DR* 18; and 2011 (May) *DR* 24.



of the legal process outsourcing

report in Sandton in May.

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Update on assisted suicide case

Stransham-Ford v Minister of Justice and Correctional Services and Others (GP) (unreported case no 27401/15, 4-5-2015) (Fabricius J)

he High Court in Pretoria has granted leave to appeal its 30 April judgment regarding the assisted suicide case.

In the appeal application, Judge Hans Fabricius granted the government and the Health Professions Council of South Africa leave to appeal his earlier ruling in which he gave Cape Town advocate, Robin Stransham-Ford, who was terminally ill, permission to have a doctor assist him in dying. Mr Stransham-Ford (65) died of prostate cancer hours before the judgment was delivered.

Leave to appeal was granted in terms of s 17(1)(*a*)(ii) of the Superior Court Act 10 of 2013, which states: 'Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)(i) ...

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

According to Judge Fabricius, the compelling reason is 'the necessity to develop the common law'.

Mr Stransham-Ford's lawyer, Sally Buitendag told *De Rebus* that her team welcomes the appeal. She said: 'We think it is the right step for the matter to be decided by a higher court due to the high public interest grounds involved in this case.'

The spokesperson for the Justice Department, Mthunzi Mhaga said this ruling was most welcome. He said: 'We made it clear when the judgment was delivered that it has far reaching implications and how it is to be interpreted and possibly abused by others and, therefore, in the

absence of a legislative framework that regulates assisted suicide, it is important that the Supreme Court of Appeal makes a pronouncement on it, which is why we felt the judgment engrossed on legislative powers of parliament because parliament makes the laws, not the courts especially on matters of this nature.'

Leave to appeal was granted on 2 June and the debate regarding assisted suicide will now move to the Supreme Court of Appeal in Bloemfontein.

• See 2015 (June) DR 4.

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

LSSA Environmental Affairs Committee offers assistance in fight against rhino poaching

lhe Environmental Affairs Committee of the Law Society of South Africa (LSSA), chaired by Johannesburg attorney Catherine Warburton, has offered its support to the Department of Environmental Affairs (DEA) and the National Prosecuting Authority (NPA) in the fight against rhino poaching. The LSSA indicated that certain specialised criminal and environmental legal services of its committee members could possibly be of value to the organisations. The LSSA said it has been following the rhino poaching epidemic in South Africa with shock and concern, and the outcomes of the fight against the poaching of rhino's in South Africa are increasingly critical to civil society, the conservation community and also to the LSSA.

The LSSA indicated that it appreciates the extremely confidential nature of the anti-poaching initiatives but wished to offer the DEA and the NPA its support and assistance, where it is necessary and to provide such support without compromising the success and effectiveness of any initiatives.

The LSSA recognised and applauded the efforts of the specialist teams set up to address the matter, as well as the various other interventions coordinated by the DEA. The LSSA noted that these interventions have significantly contributed to the increase in arrests and convictions of poaching perpetrators.

The LSSA stressed that 2015 will be a

pivotal year in the battle to deter the illegal killing of South Africa's rhino.



The Law Society of South Africa's Environmental Affairs Committee has offered their assistance in the fight against rhino poaching.

Commonwealth Lawyers Association appoints new president



David Bekker (right), who represents the Law Society of South Africa on the council of the Commonwealth Lawyers Association (CLA), together with Upul Jayasuriya, President of the Bar Association of Sri Lanka, who was awarded the Second Commonwealth Law Conference Rule of Law Award at the CLA conference in Glasgow, Scotland in April this year. With them is Alex Ward (left), who was elected President of the CLA for the next two years.

2015 examination dates

Admission examination:

• 18 August and 19 August

Conveyancing examination

• 9 September

Notarial examination

• 21 October.

FIDH delegation visits the LSSA

aw Society of South Africa (LSSA) Cochairperson Busani Mabunda, met with a delegation from the International Federation for Human Rights (FIDH) in Pretoria at the end of May. The FIDH delegation, which was led by its president – exiled Iranian human rights lawyer, Advocate Karim Lahidji – paid a courtesy vis-

it to the LSSA and other government institutions and civil society organisations to introduce the organisation's new office in South Africa. FIDH inaugurated its office which is based with the Lawyers for Human Rights' (LHR) new office in Pretoria. LHR is the South African member of FIDH.



Photographed with Mr Mabunda (front right) and Mr Lahidji (centre) are Tchérina Jerolon, FIDH Africa Desk Deputy Director and (back) LSSA Professional Affairs Manager Lizette Burger; Clément Phebe Mavungu, FIDH African Court Programme Coordinator; and LSSA Chief Executive Officer, Nic Swart.

People and practices

Compiled by Shireen Mahomed

Eversheds has promotions and new appointments.



Gregory Shapiro has been promoted as a partner in the commercial and corporate department in Johannesburg.



Nicole Stigling has been promoted to a senior associate in the litigation department in Johannesburg.



Laura Schlebusch has been appointed as an attorney in the litigation department in Johannesburg.



Robyn Downs has been appointed as a senior associate in the conveyancing and property department in Durban.



Samantha Gramoney has been appointed as an associate in the commercial and corporate department in Durban. **Hogan Lovells** in Johannesburg has four new promotions as associates.



Palesa Letsaba



Gwen Mathebula



Megan Nicholas



Eben van Zyl



Fasken Martineau in Johannesburg has appointed Sarvani Morgan as an associate in the labour, employment and human rights department.



Bisset Boehmke McBlain Attorneys in Cape Town has appointed Carina de Jongh as a senior associate in the corporate and commercial department.



Shepstone & Wylie has appointed Johan Kotze as a tax executive consultant in Johannesburg. He specialises in tax dispute resolution.

Rooth & Wessels Attorneys in Pretoria has two new appointments.



Joelene Moodley has been appointed as a director in the commercial department.



Pieter Smith has been appointed as a director in the High Court litigation and appearances department.

Please note in future issues five or more people featured from one firm, in the same area, will have to submit a group photo.

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Sectional title: Sale of units prior to Township Proclamation and Erf 441 Robertsville Property CC and Another v New Market Developments (Pty) Ltd 2007 (2) SA 179 (W)

Neels Engelbrecht

he question whether units in a sectional title scheme may be validly sold where the development was situated on land in respect of which a township application was lodged with the relevant local authority but was not yet proclaimed was decided in the Robertsville matter.

The facts

The developer of a certain sectional title development, New Market Developments (Pty) Ltd, sold several properties in a mixed development consisting of freehold stands and sectional title units. The township application in respect of the land on which the properties (freehold erven and sectional title schemes) were situated was lodged with the Johannesburg City Council but the township was not vet proclaimed.

The sale of the freehold

properties were, therefore, void in terms of s 67 of the Town-planning and Township Ordinance 15 of 1986 (Transvaal) (the ordinance). Section 67 of the ordinance provides as follows:

'(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 -

(a) enter into any contract for the sale, exchange or alienation or disposal in any other matter of an erf in the township:

(b) grant an option to purchase or otherwise acquire an erf in the township, until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon declaration of the township as an approved township, one or

more of the erven therein will be transferred to the seller.

- (2) Any contract entered into conflict with the provisions of subsection (1) shall be of no force and effect.
- (3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.
- (4) For the purpose of subsection (1) -
- (a) "steps" includes steps preceding an application in terms of section 69(1) or 96(1):
- (b) "any contract" includes a contract which is subject to any condition, including a suspensive condition.'

It has been decided in several Appeal Court decisions that a sale entered into in contravention of s 67 of the ordinance is of no force and effect, namely, void ab initio.

In an application to enforce the transfer of a sectional title unit in a sectional title scheme situated on an unproclaimed stand that was sold prior to the proclamation of the township, the question arose whether the sale is similarly void, namely, because of the application of s 67 of the ordinance.

The respondent (Newmarket) took the point that a sectional title unit is an erf or a portion of an erf as defined in the definition of 'erf' in the ordinance, and that s 67 is, therefore, applicable.

The judgment

Goldstein J in the Gauteng Local Division, Johannesburg, found that it could be argued that a unit could possibly be regarded as an erf as defined in the definition of erf, but because what was actually sold consists of a 'section' being the unit plus an undivided share in the common property in the scheme, the merx sold could not be an erf or a portion of an erf as defined in the ordinance and, therefore, s 67 was not applicable.

(I do not deal with the portion of the judgment in respect of the description of the *merx* as it is trite law).

Practical implication

The case is of tremendous importance for developers and the public alike in instances, as is often the case, where units (or rather 'sections') are sold in unproclaimed townships.

It is particularly important for the public as it means that pre-proclamation contracts for the sale of sectional title sections are valid and enforceable in our courts.

It often happened in the past that developers sold stands in new developments prior to proclamation (as was the case in the Robertsville matter), and then voided the transaction by relying on s 67 of the ordinance. The problem with s 67 is that, although it is a criminal offence to sell stands prior to proclamation, the penalty is a relatively small fine and is seldom enforced. This door has now been closed in respect of sectional title properties.

I am of the view that the legislator should review the provisions of s 67 of the ordinance, with regard to the penalties imposed.

Neels Engelbrecht BLC LLB (UP) is an attorney at Neels Engelbrecht attorneys in Randburg.



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- the fixing of security for costs; or
- any advice regarding aspects of costs and charges.





financial intelligence centre REPUBLIC OF SOUTH AFRICA

UPDATE NOTICE TO ALL ATTORNEYS IN SOUTH AFRICA

THE AMENDMENT BILL

The Financial Intelligence Centre (the FIC) is in the process of amending the Financial Intelligence Centre Act No. 38 of 2001 as amended (the FIC Act) to align with the most recent International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (AML/CFT) which were adopted by the Financial Action Task Force (FATF) in February 2012. The Amendment Bill to the Financial the FIC Act, was published for public comment on 21 April 2015.

The Bill seeks to enhance South Africa's ability to combat financial crimes by proposing measures to address threats to the stability of South Africa's financial system posed by money laundering and terrorism financing. The Bill also addresses regulatory gaps identified from the 2009 FATF mutual evaluation and the 2014 International Monetary Fund (IMF) South Africa Financial Sector Assessment Programme Technical Note on AML/CFT.

The Bill enhances South Africa's AML and CFT regulatory regime by

- Providing for the implementation of the United Nations Security Council Resolutions relating to the freezing of assets;
- Enhancing the supervisory powers of the FIC and extending its functions in relation to suspicious transactions;
- Providing for the adoption of a risk-based approach to customer due diligence measures;
- Introducing the concepts of beneficial ownership, on-going due diligence, and foreign and domestic prominent influential persons;
- Enhancing the customer due diligence requirements;
- Dissolving the Counter-Money Laundering Advisory Council; and
- Enhancing certain administrative and enforcements mechanisms.

Additions to the Bill include:

Enhancing the customer due diligence requirements of ac-**■** countable institutions

The Amendment Bill broadens and enhances the elements of customer due diligence requirements which includes the determination of the customer's identity, the duty to keep records, identifying the beneficial owner and understanding the purpose and the intended nature of the business relationship. On-going due diligence of the customer's transaction records and the enhanced measures for persons entrusted with prominent public or private sector functions was

Providing for the adoption of a Risk-Based Approach (RBA) 2 to customer due diligence

RBA entails that an accountable institution should identify, assess, and understand its AML/CFT risks by developing, documenting, maintaining and implementing AML/CFT Risk Management and Compliance Programmes.

Risk Management and Compliance Programs

3 Risk Management and Compilation 1.15.

The Amendment Bill requires accountable institutions to develop, document, maintain and implement a Risk Management and Compliance Programme. The customer due diligence measures mentioned above are linked with an accountable institution's application of a risk based approach through the institution's AML/CFT compliance and risk management programme.

4 Providing for the implementation of the United Nations Security Council Resolutions relating to the freezing of assets The Bill empowers the Financial Intelligence Centre to administer the measures adopted by the United Nations Security Council in its Resolutions. The acquisition, collection or use of the property of persons or an entities whose names appear in the sanctions list shall be prohibited, including the provision of financial services and products to those persons or entities.

Prominent Influential Persons

5 The Bill introduces the concept of domestic and foreign Prominent Influential Persons (PIPs). These classifications are meant to aid accountable institutions in properly identifying their clients, and thereby enabling them to apply appropriate standards of due diligence.

REGISTRATION WITH THE CENTRE

Accountable institutions are reminded that it is a requirement to register with the FIC in terms of section 43B of the FIC Act. The FIC will be engaging supervisory bodies to take administrative action against unregistered accountable institutions.

ICT ENHANCEMENTS AND REPORTING **OBLIGATIONS**

The FIC Act requires all accountable and reporting institutions to submit:

- Cash threshold reports in terms of section 28;
- · Suspicious and unusual transaction reports to the FIC in terms of section 29: and
- Terrorist property reports (TPR) to the FIC in terms of section 28A of the FIC Act.

The FIC has embarked on a programme to enhance its information and communications technology (ICT) systems to strengthen and broaden the FIC's capability to meet and discharge its legislative objectives and functions as set out in sections 3 and 4 of the FIC Act. These enhancements will ensure that the FIC stays relevant and effective in the fight against money laundering and terror financing globally, and that South Africa will be able to continue to be a role player in the global fight against crime and terror financing.

The programme solution is envisaged to be an integrated system that will advance the system capability of the FIC to manage the core processes as mandated:

- The registration of accountable and reporting institutions;
- Receiving of all intelligence reports submitted by reporters;
- Analysis of submitted intelligence data; and
- Case management and provision of intelligence products to law enforcement and supervisory bodies in a seamless and secure way.

New reporting formats for reporting in terms of section 28, 28A and 29 will be communicated with accountable institutions in due course.

Queries on this and other compliance matters can be directed to fic_feedback@fic.gov.za or call 0860 222 200.



Interim measures brought about through Attorneys Amendment Act

he Attorneys Amendment Act 40 of 2014 was promulgated in *GG*38821/27-5-2015 in December 2014 and came into operation on 29 May 2015.

Its aim is to amend the Attorneys Act 53 of 1979 as an interim measure.

Below is a summary of the sections practitioners should take note of.

Section 3

A candidate attorney may do their articles at a law clinic if that law clinic has been certified by the law society having jurisdiction in that area.

Section 4 and 4A

Prior to entering into articles or starting community service, a candidate attorney must submit the required documents to the secretary of the law society having jurisdiction in that area.

Section 5

Within two months of date of contract, the principal to the candidate attorney must lodge the original contract of articles or service with the secretary of the law society that has jurisdiction in that area.

Section 8

An article clerk may only appear in a magistrate's court and not the High Court, Supreme Court of Appeal or the Constitutional Court. An article clerk can appear instead of his or her principal and charge the same fee. An article clerk may only appear in the regional court, as per s 2 of the Magistrates' Court Act 32 of 1944, once the requirements of the principal Act have been complied with, namely, the article clerk practiced as an advocate for six months or has served one year of the contract of articles or previously acted as a state advocate, magistrate or state prosecutor for one year. An article clerk may request a certificate from the law society having jurisdiction to issue a certificate to confirm that he or she meets the requirements to appear in the regional court.

The society has discretion to issue such certificate. Should the principal re-

quest such certificate from the society, the society must provide same on receipt of the prescribed fee.

Section 9

Unless the article clerk has received written consent from the law society having jurisdiction in the area, an article clerk may not have any other occupation. Further, he or she may not have interest in the company, therefore, they cannot profit share.

Section 10

One may cede one's articles within two months of starting one's articles. This requires one to notify the law society of the cession and provide affidavits.

Section 19

To be admitted or readmitted one must send his or her application along with supporting documents to the relevant law society –

- at least one month (admission); or
- at least three months for readmission before the date of his or her application.

Section 20

If one was admitted as an attorney, including those admitted in former Republics of Transkei, Bophuthatswana, Venda and Ciskei (TBVC), then to have ones name placed on the roll of attorneys one needs to obtain a certificate stating one has not been struck off the roll and that there are no pending cases against one.

Section 23

This section allows a firm to have a name of its choice provided it has been approved by the law society.

Section 49

One may bring an application against the Fidelity Fund in the magstrate's court. Section 19 states: 'Section 49 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection: "(4) Any action against the fund may, subject to the provisions of this Act [and the regulations made thereunder], be brought in [any provincial or local division of the Supreme

[Court]] the High Court or a magistrate's court having jurisdiction within the area of jurisdiction of which the cause of action arose."

Section 55 and 77

The sections dealing with the TBVC areas have been repealed in its entirety due to the dissolution of the law societies in those areas.

Section 71

Allows a law society to investigate unprofessional/dishonest and unworthy conduct of a practitioner on the roll, if the practitioner falls within its jurisdiction. This applies irrespective of whether that person is a member of that society. The society may take steps against such a person regardless of when or where such conduct took place, or when the person may or may not have become a member of the society.

Section 78

The section highlights that only the law society with jurisdiction may inspect a practitioner's books or bring an application to have a *curator bonis* appointed over the trust account of a practice.

Section 86

This section addresses the practitioners and persons who were admitted or obtained degrees in the TBVC areas will be recognised and be allowed to continue practicing or commence articles, as long as such person has complied with the requirements of the law society having jurisdiction.

Section 86A

This section was included to confirm that the amendment applies to the entire Republic of South Africa.

In conclusion, the Amendment Act has brought about uniformity in the profession that can be seen by the dissolving of the old TBVC law societies.

Kevin O'Reilly *MA (NMMU)* is a subeditor at *De Rebus*.

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By the Financial Forensic Investigation Team of the Attorneys Fidelity Fund

Find the problem before it finds you

llowing events to destroy the vision you have of your firm can be managed and limited, but how?

When you decide to open

When you decide to open a firm, irrespective of size, you have taken a decision to run a business. Wikipedia defines a business as 'an organisation involved in the trade of goods, services, or both to consumers [or clients]' (http://en.wikipedia.org/wiki/business, accessed 25-5-2015). Legal firms are mainly involved in providing professional services to clients. While you may have thought through what you would like to achieve in running a business, there could be opportunistic events that may affect the realisation of your goals.

Before getting excited about owning and running a business, and before counting the chickens before they hatch, take a step back and ask the following questions:

- Have you taken the time to find the problem before it finds you?
- Do you know and are you keeping watch of what can destroy your vision?
- Do you know and are you conversant with challenges that may be posed by Information Technology (IT) in your firm?
- Do you keep abreast of developments in the industry?

- Are you employing the right calibre of staff?
- Are you compliant with the legislative and regulatory environment?
- Have you identified your stakeholders whose expectations you need to fulfil?

These are some of the areas you need to visit and understand, and the list is not exhaustive, in order for you to find the problem before it finds you.

Figure 1 below depicts some of the stakeholders that a firm may have to consider, as well as how they overlap, which requires a balanced response to their needs and interests.

This article seeks to address Enterprise Wide Risk Management (ERM) and revealing its benefits for business, a concept that should be at the forefront of each practitioner's mind. This process should involve everyone in the firm irrespective of their position.

What is ERM?

ERM is sometimes viewed as a way of aggregating, managing and reporting on all of the risks facing an organisation – a way to consolidate the information within the individual risk silos. That is a necessary and desirable goal, but it is not specifically ERM. There are many definitions of ERM, but the definition

provided by The Committee of Sponsoring Organizations of the Treadway Commission (COSO) (the five sponsporing organisations are: American Accounting Association; American Institute of Certified Public Accountants; Institute of Internal Auditors; Institute of Management Acounts; and Financial Executives International) as outlined in COSO's Enterprise Risk Management – Integrated Framework, published in 2004 (www.coso.org/documents/COSO_ERM_ExecutiveSummary.pdf, accessed 25-5-2015) has gained prominence and acceptance by many organisations.

COSO defines ERM as 'a process, effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives'.

This definition reflects certain fundamental concepts. ERM is:

- 'A process, ongoing and flowing through an entity
- Effected by people at every level of an organisation
- Applied in strategy setting
- Applied across the enterprise, at every level and unit, and includes taking an entity level portfolio view of risk
- Designed to identify potential events that, if they occur, will affect the entity and to manage risk within its risk appetite
- Able to provide reasonable assurance to an entity's management and board of directors
- Geared to achievement of objectives in one or more separate but overlapping categories' (see COSO Enterprise Risk Management Integrated Framework *op cit*).

According to the framework (*op cit*): 'This definition is purposefully broad. It captures key concepts fundamental to how companies and organisations manage risk, providing a basis for application across organisations, industries, and sectors. It focuses directly on achievement of objectives established by a particular entity and provides a basis for defining ERM effectiveness.'

Although risk management is a business process, it is not a process that



Figure 1: Overlapping stakeholders

functions in isolation. Risk management is also not a once-off activity but is performed on a daily basis as part of ongoing operations. For risk management to be effective, it needs to be linked and integrated with all business processes, from strategic planning to operational processes. There are eight key components of the ERM process and these are discussed below:

1. Internal environment

This encompasses the tone at the top and sets the basis for how risk is viewed and addressed by the organisation's people. It would include defining the risk appetite of the organisation, integrity and ethical values, and the environment in which they operate. Practitioners should always keep in mind that their stakeholders, both internal and external, want to know what the firm stands for - its ethics, values and intentions. They want to know that it can be trusted to do the right things in view of increasing concerns about - among other issues - bribery, corruption, fraud, failures in data security, etcetera. An example of how a practitioner could set a tone around its lack of tolerance for fraud perpetrated by staff against the firm could be by exposing such individuals through various forms, including, laying criminal charges against such employees.

2. Objective setting

It is important and necessary to define the direction that the firm should take. There should be a process to set objectives of the firm, which objectives should support and be aligned with the firm's vision and mission and consistent with its risk appetite. It is also important to document the objectives that the firm should achieve. Documenting the set objectives assists in keeping watch throughout risk management to ensure that whatever processes/interventions take place they remain in line with the set objectives. Objectives may be set at various levels of the firm. The diagram that follows depicts the four main types of objectives:

Strategic objectives -

• relate to the way the firm intends to fulfil its mission and achieve its vision.

Operational objectives -

• relate to the effective and efficient deployment of resources in achieving the strategic objectives.

Reporting objectives -

• relate to the communication of information both internally and externally.

Compliance objectives -

• relate to those activities designed to align actual firm with regulatory and contractual requirements and organisatonal policy. These would include the legislative environment and rules applicable to a firm.

3. Event identification

Once the objectives have been set, internal and external events that could potentially affect the achievement of those objectives should be identified. These could arise from sources such as key business processes, technology, people, economic factors and client demographics and behaviours. Potential events with a negative effect on the firm represent a risk to the firm and these should be managed, while events with a positive effect represent opportunities, which should be channelled back to the strategic objectives. This step is crucial as proper identification can protect a firm from possible downfall, while poor event identification can leave room for a downfall. Of importance is that risks are identified at different levels in the organisation, at both strategic and operational levels. Risks identified at strategic level should be taken down to operational level as the actual management takes place through day-to-day activities at operational level.

4. Risk assessment

The identified risks need to be assessed for their impact and likelihood in the achievement of the objectives. In assessing the risks, both the inherent and residual risks should be assessed. The inherent risk refers to that risk that exists with the mere existence of the business and/or activity, before any controls are put in place. The residual risk refers to the risk that remains (residue) after controls have been put in place, and this is the risk that the practitioner should mainly be concerned with. The risk remaining after the controls (residual) should not be greater than the defined risk appetite of the firm. The outcomes of the risk assessments should be documented in a risk register, which should be reviewed and updated as frequently as required by the firm.

5. Risk response

Once risks have been assessed, the practitioner should evaluate various strategies to respond to the assessed risks. Below are the various strategies that the practitioner can decide on:

- *Tolerate* the risk is known and accepted by the firm.
- *Transfer* the risk continues to exist, but it is passed on to a third party to manage, for example an insurer or outsourcer.

- *Terminate* the firm has no appetite for the risk and will, therefore, stop the process, activity, etcetera.
- *Treat* introduce controls and continuity strategies in order to reduce the impact and likelihood of the risk materialising.

These response strategies are at times referred to as the 4T's. Value creation is one of the principles in ERM. It is, therefore, important that in responding to a risk, the cost involved should not exceed the benefit to be derived.

6. Control activities

These are part of the process by which a firm strives to achieve its business objectives. They are policies and procedures that help ensure risk responses are properly executed. It is best practise to have both the policies and procedures documented. The Business Dictionary defines 'policies and procedures' as 'a set of principles, rules, and guidelines formulated or adopted by an organisation to reach its long-term goals and typically published in a booklet or other form that is widely accessible' (www. businessdictionary.com/definition/policies-and-procedures.html. accessed 25-5-2015). It is common for small firms not to have documented policies and procedures, and practitioners are encouraged to have and maintain these documents irrespective of the size of the firm.

7. Information and communication

Information is needed at all levels of an entity to identify, assess and respond to risks, including emerging risks. Information can be obtained in various forms from various sources, in qualitative or quantitative form. The information obtained allows ERM to respond to changing conditions in real time. Without information around developments in, for example, the legal fraternity, the tax legislation, the basic conditions of employment, the economic conditions, etcetera, the firm may find itself exposed to a number of risks that it did not anticipate. Should you be caught off guard. you may find yourself out of business. Communication should raise awareness about the importance and relevance of effective ERM.

8. Monitoring

Monitoring of ERM involves the assessment of both the presence and effectiveness of its components and the quality of their performance over time. It can take place through ongoing activities or separate evaluations.

An example of a risk that a firm may face could be stakeholder dissatisfaction. The likelihood and impact of this risk for the firm could be catastrophic as it could lead to a collapse of the firm. The risk could be managed by the firm under-

standing the expectations of its various stakeholders and ensuring that there are measures in place to address these. As a measure, the firm may explore ways to involve some of the stakeholders in the development of the risk management processes and keeping people informed. Putting these measures in place should reduce the residual risk. Ensuring that measures remain effective throughout the life of the firm would further require ongoing monitoring, obtaining feedback and reviewing those measures so as to ensure they remain relevant in managing the risk.

Conclusion

The eight components of ERM are summarised in the diagram below:

Internal environment

• Define a tone that is reflective of how risk is perceived in the firm and define the risk appetite for the firm.

Objective setting

 Set objectives before indentifying potential events that may affect their achievement.

Events identification

 Identify internal and external events that may affect the achievement of objectives, distinguishing between risks and opportunities.

Risk assessment

 Analyse risks, considering the likelihood of them materialising and the impact it would have on the firm. Assess on an inherent and residual basis.

Risk response

• Select risk responses - whether to tolerate, transfer, terminate of treat the risk.

Risk response

• Select risk responses – whether to tolerate, transfer, terminate of treat the risk.

Control activities

 Implement policies and procedures to ensure risk responses are effectively carried out.

Information and communication

Identify relevant information, capture it and communicate it in a form that enables people to carry out their responsibilities.

Monitoring

Monitor ERM and modify as necessary.

The risk identification and assessment activity can happen as often as the firm deems necessary, but it is advisable to conduct it at least on an annual basis. It may be costly, time consuming, frustrating and probably impossible to reverse the damage that may be caused by a problem if it finds you.

So, go on and find the problem before it finds you and enjoy the rewards of that investment.

The Financial Forensic Investigation Team of the Attorneys Fidelity Fund in Centurion.

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Inference of negligence – is it time to jettison the maxim res ipsa loquitur?

Picture source: Gallo Images/iStock

By Pat van den Heever and Natalie Lawrenson

or should be, to the defendant. The maxim of res ipsa loquitur is generally considered to be no more than a convenient label to describe situations where notwithstanding the plaintiff's inability to establish the exact cause of the accident the fact of the accident by itself is sufficient to justify the conclusion that the defendant was probably negligent, and in the absence of an explanation by the defendant to the contrary that such negligence caused the injury to the plaintiff (P van den Heever and P Carstens Res Ipsa Loquitur & Medical Negligence: A Comparative Survey (Cape Town: Juta 2011) at 2). In Horner v Northern Pacific Benefitial Association Hospitals Inc (1963) 382 P.2d 518 at 523 Hale J expressed the following instructive thoughts on the maxim: 'The rule is a good one, and it ought not to be muddled with over-refinement and the casuistry so frequently the by-product of overwriting and overtalking about the same subject'. In Goliath v MEC for Health, Eastern Cape 2015 (2) SA 97 (SCA) Ponnan JA, writing for an undivided Bench (Leach JA, Saldulker JA, Mbha JA and Mathopo AJA concurring) referred to the judgment in Buthelezi v Ndaba 2013 (5) SA 437 (SCA) where Brand JA, after referring to the seminal case of Van Wyk v Lewis 1924 AD 438 pointed out that the maxim of res ipsa loquitur 'could, rarely, if ever, find application to a case based on alleged medical negligence.' Ponnan JA explained that the evident reluctance of our courts to apply the maxim in cases of this nature is the fact that things do sometimes go wrong in surgical operations and medical treatment due to misadventure. To hold a medical practitioner negligent simply because something went wrong would be to 'impermissibly reason backwards from effect to

ome accidents occur in circumstances where the evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is,

DE REBUS - JULY 2015

cause' (para 9).

The court then provided the following exposition of the maxim with reference to relevant authorities (which authorities are trite and therefore not repeated here): 'The maxim is no magic formula It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself ... - where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading ... - it being trite that the onus resting upon a plaintiff never shifts Nothing about its invocation or application, I dare say, ... is intended to displace common sense' (para 10). The court also pointed out that it is inappropriate to resort to piecemeal processes of reasoning and to split up the inquiry regarding proof of negligence into two stages. The court does not adopt the piecemeal approach of first drawing the inference of negligence from the occurrence itself (regarding this as prima facie evidence) and then considers whether this inference has been rebutted by the defendant's explanation. There is only one inquiry, namely whether the plaintiff, having regard to all the evidence in the case, has discharged the onus of proving, on a balance of probabilities, the negligence averred against the defendant. In this regard, Ponnan JA opined that it would be better to leave the question in the realm of inference than to 'become enmeshed in the evolved mystique of the maxim'

The defendant against whom the inference of negligence is sought to be drawn may produce evidence in order to explain that the occurrence was unrelated to any negligence on her part. The defendant's explanation will be tested by considerations such as probability and credibility. At the end of the case, the court has to decide whether, on all the evidence, probabilities and inferences, the plaintiff has discharged the onus of proof on the pleadings, on a preponderance of probability, just as the court would do in any case concerning negligence. The court then concluded that in every case, including one where the maxim of res ipsa loquitur is applicable, the inquiry at the end of the case is whether the plaintiff has discharged the onus resting on her in connection with the issue of negligence. In this regard, the court suggested that the time may well have come for our courts to jettison the maxim from our legal lexicon.

Although medical negligence cases sometimes involve questions of factual complexity and difficulty, possibly requiring evaluation of technical and conflicting expert evidence, the trial procedure, which is essentially the same as in other cases, is designed to accommodate those issues and thus no special difficulty ought to be encountered to deal with them. When an inference of negligence would be justified and to what extent expert evidence would be required would depend on the facts of the particular case. A court is not called on to decide the issue of negligence until all of the evidence is concluded (see Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 573 H). Any explanation offered by the defendant will thus form part of the evidential material to be considered in deciding whether a plaintiff has proved the allegation that the injury was caused by the negligence of the defendant (see Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd 1982 (4) SA 890 (A) 897 G - H).

In the Goliath matter Ponnan JA found that the court of first instance allowed itself to be diverted away from the inference of negligence displayed by the evidence in this case from its 'heightened focus on the applicability of the maxim res ipsa loquitur to cases based on alleged medical negligence'. In this regard the court held that the important destinction between onus of proof and an obligation to produce evidence had become blurred. At the close of the plaintiff's case in Goliath the plaintiff had produced sufficient evidence to support an inference of negligence on the part of one or more of the medical staff in the employ of the defendant who treated the plaintiff. The court pointed out that it was important to bear in mind that in a civil case it was not necessary to prove that the inference she requests the court to draw is the only reasonable inference. It would suffice for her to persuade the court that the inference that she advocates is 'the most readily apparent and acceptable inference from a number of possible inferences' (see AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) and Cooper and Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)). In Goliath the defendant, in failing to produce any evidence whatsoever, took the risk of judgment had been at liberty to adduce evidence to show that reasonable care had been exercised towards the plaintiff by the defendant's employees intra-operatively, which it declined to do. No version was put during cross-examination to either the plaintiff or her expert witness. No reasons were offered by the defendant to explain why the medical staff who treated the plaintiff were not called as witnesses (para 19). In Ratcliffe v Plymouth and Torbay Health Authority [1998] EWCA Civ 2000 (11 February 1998) Lord Justice Brooke observed that: 'It is likely to be a very rare medical negligence case in which the defendants take the risk of calling no factual evidence, when such evidence is available to them, of circumstances surrounding a procedure which led to an unexpected outcome for a patient. If such a case should arise, the judge should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence: The defendants' hypothesis must have the ring of plausibility about it' (para 48).

The Goliath judgment provides authority for the proposition that a plaintiff in a medical negligence action is now at liberty to allege that the facts, as known to the plaintiff at the time he or she pleads his or her case, give rise in themselves to a *prima facie* case of negligence. This may or may not be upheld at the end of the trial, but at the pleading stage it has the effect of compelling the defendant to provide an exculpatory explanation or run the risk of judgment being granted against him. Once the defendant has produced an explanation the question will be whether the court has been satisfied that in the light of all the evidence at the trial that negligence and causation have been proved. In the course of reaching that conclusion the judge may or may not be prepared to draw the inference originally invited by the plaintiff (see Hussain v King Edward VII Hospital [2012] EWHC 3441 (QB) and Thomas v Curley [2013] EWCA Civ 117).

(3) SA 1009 (SCA)). In *Goliath* the defendant, in failing to produce any evidence whatsoever, took the risk of judgment being granted against it. The defendant

'The Goliath judgment provides authority for the proposition that a plaintiff in a medical negligence action is now at liberty to allege that the facts, as known to the plaintiff at the time he or she pleads his or her case, give rise in themselves to a prima facie case of negligence'.

FEATURE

gence. The inference of negligence must be derived from the facts of the occurrence alone. The inference of negligence is only permissible while the cause remains unknown. The instrumentality that causes the harm or damage must be within the exclusive control of the defendant or of someone for whom the responsibility or right to control exists. The *prima facie* inference of negligence may call for some degree of proof in rebuttal of the inference. In general the explanation must comply with the following principles:

• In cases where the taking of a precaution by the defendant is the initial and essential factor in the explanation of the occurrence, and the explanation is accessible to the defendant but not the

plaintiff, the defendant must produce evidence sufficient to displace the inference that the precaution was not taken. The nature of the defendant's reply is, therefore, dependent on the relative ability of the parties to contribute evidence on the issue.

- The degree of persuasiveness required by the defendant will vary according to the general probability or improbability of the explanation. If the explanation is regarded as rare and exceptional in the ordinary course of human experience, much more would be required by way of supporting facts.
- Probability and credibility are considerations that the court will employ to test the explanation.
- There is no onus on the defendant to

prove his explanation. (See P van den Heever and P Carstens *op cit* 34-35 and the authorities referred to.)

'Lawyers are often accused of using Latin tags to befuddle the public and demonstrates that the law is far too difficult to be left to mere laymen. Some Latin phrases, seem to befuddle the lawyers themselves. *Res ipsa loquitur* is a case in point' (see van den Heever and Carstens *op cit* at 183).

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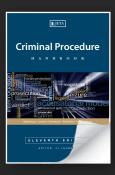
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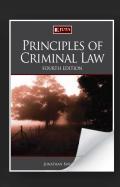


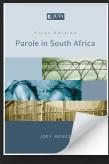
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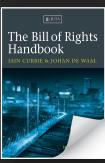


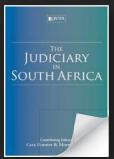


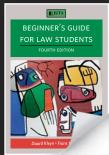












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The beginning of the end —

dissolution of marriage under accrual system

By Clement Marumoagae

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s a family law practitioner, I have realised that when entering into marriage, most people are not aware of the laws that have direct effect on their estates and only get to be conscious of them when they divorce. The aim of this article is to highlight different matrimonial regimes in South Africa, but more particularly to discuss an option available to those whose marriage is subject to an accrual system as far as protecting their claim to the growth of their spouses' estates is concerned. I will show that the Matrimonial Property Act 88 of 1984 (the Act) does provide for the division of the growth of the marriage without the parties thereto actually instituting divorce pro-

Marital regimes and the accrual system

In practice, parties to a marriage often enter into a marriage without deciding the marital regime that will be applicable to their marriage. On divorce, parties are faced with consequences that they did not prepare themselves for when they married. It is trite that: '[i]n the absence of an antenuptial contract providing otherwise, marriage *ex lege* creates community of property and of profit and loss – *communio bonorum*. Community comes into being by operation of law as soon as the marriage is solemnised. It can be described as a universal economic partnership of the spouses in which all their as-

sets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions hold equal shares' (JA Robinson 'Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution' (2007) 10 3 *PER* 70 at 71). Unless excluded by a will, the general rule is that all the assets that the spouses had before the marriage, as well as assets they accumulate after entering into the marriage fall into the joint estate. Nonetheless, spouses may retain a separate estate in that certain exceptions do exist where assets do not fall into the joint estate (see s 7(7) of the Divorce Act 70 of 1979).

It is well documented that in terms of South African Family Law, people can either marry in community of property, out of community of property with or without the application of the accrual system. The marital regime choice that prospective spouses make will determine their proprietary rights both during the subsistence of their marriage and when their marriage is dissolved either by death or divorce.

In order for a prospective spouse to marry in any re-

gime other than community of property, they have to conclude an antenuptial contract (ANC). An ANC may be referred to as a contract that is concluded by prospective spouses before the marriage, which details the terms and conditions of the union and thus exclude community of property. This contract can, among others, ensure that spouses are not held liable for each other's debts and do not share in each other's profits arising from the marriage. It further enables parties to transact without each other's consent where consent would ordinarily be required if they were married in community of property. In terms of s 87(1) of the Deeds Registries Act 47 of 1937 '[a]n antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow'. As such, I submit that it is imperative that such a contract is drafted by a practising notary public, because vaguely drawn antenuptial contracts

can result in costly litigation when parties divorce, as was the case in $B \ v \ B$ (SCA) (unreported case no 952/12, 24-3-2014) (Lewis JA). In $B \ v \ B$ the court held that:

'It is clear to me that the parties did intend to exclude community of property and profit and loss and to adopt the system of accrual: But it is far from clear how they intended to do that. If the contract had included only the first three clauses they would effectively have achieved a contract out of community of property, subject to the accrual system regulated by the Act. But the clauses that followed are so contradictory and incoherent that in my view they vitiate the contract as a whole. No certainty has been achieved as to what the contract meant – what the parties intended to achieve. The contract does

not embody terms that enable this court to give effect to what their intention might have been' (para 19).

In this case, the terms of the ANC were inconsistent and incoherent and the context did not clarify precisely what the parties intended to achieve. As such, the contract was held to be void for vagueness and the marriage was regarded to be in community of property (see the headnote of the case). Badly drawn ANCs may lead to spouses being unable to prevent their assets being part of the accrual of the marriage, and thus be subject to division when parties divorce.

The Act introduced into South African Law the system of accrual, which could be made applicable to marriages contracted out of community of property and of profit and loss by way of an ANC (See B v B (SCA) (unreported case no 700/2013, 25-9-2014) (Gorven J) para 4). In terms of s 2 of the Act all marriages out of community of property, in terms of an ANC are subject to the accrual system 'except insofar as that system is expressly excluded by the [ANC]'. This simply entails that if spouses do not wish an accrual system to be applicable to their marriage they need to expressly exclude it from their ANC. Nonetheless, if parties decide to marry out of community of property subject to the accrual system, they still have a choice to list their individual assets, which they wish not to be part of the accrual, which will effectively be excluded when the accrual is calculated should they divorce. However, it must be borne in mind that there are certain assets that are automatically excluded from forming part of an individual spouse's estate. In terms of s 5(1) of the Act '[a]n inheritance, a legacy or a donation which accrues to a spouse during the subsistence of his marriage, as well as any other asset which he acquired by virtue of his possession or former possession of such inheritance, legacy or donation, does not form part of the accrual of his estate, except in so far as the spouses may agree otherwise in their antenuptial contract or in so far as the testator or donor may stipulate otherwise'.

Furthermore, 'a donation between spouses, other than a donation mortis causa, is not taken into account either as part of the estate of the donor or as part of the estate of the donee' in the determination of the accrual of the estate of a spouse (see s 5(2) of the Act). It is important to note that 'an asset which has been excluded from the accrual system in terms of the [ANC] of the spouses, as well as any other asset which he acquired by virtue of his possession or former possession of the first-mentioned asset, is not taken into account as part of that estate at the commencement or the dissolution of his marriage' (s 4(1)(b)(ii) of the Act).

Division of accrual during the subsistence of the marriage

The accrual system can be thought of as a deferred community of gains (HR Hahlo The South African Law of Husband and Wife 5ed (Cape Town: Juta 1985) at 304). 'During the subsistence of the marriage, it is out of community of property and community of profit and loss. Each spouse retains and controls his or her estate, but on dissolution of the marriage the spouses share equally in the accrual or growth their estates have shown during the subsistence of the marriage' (J Heaton South African Family Law 3ed (Durban: LexisNexis 2010) at 94). The practical implication of the accrual system is outlined in s 3(1) of the Act, which provides that '[a]t the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference'. It was held in Reeder vSoftline Ltd and Another 2001 (2) SA 844 (W) at 849, that 'a spouse who alleges that her estate has shown no accrual or a smaller accrual than the estate of the other spouse, and who ... claims half the difference of the accrual between the two estates, has a contingent right and not a vested right.' This simply means that no spouse has a claim to a specific asset in the estate of the other, but has a future claim that could arise when parties divorce or in terms of s 8 of the Act to the accrual in the other spouse's estate.

Even though it is rare and case law is not particularly clear in this regard, it nonetheless appears that if the estates of parties to a marriage subject to an accrual system are substantially the same, there can be no sharing. The accrual system was designed to protect the spouse whose estate during the marriage could not grow substantially the same as compared to that of his or her spouse thus allowing a spouse with a smaller estate to claim a share in his or her spouse's estate, which showed greater or substantial growth. The accrual system often becomes a reality when the spouses divorce or in death because in terms of s 3(2) of the Act a spouse with a smaller accrual can only claim on the dissolution of the marriage.

Every spouse who is married subject to an accrual system has an interest on how the estate of the other is doing. As such, it is in the interest of both spouses that their separate independent estates are not handled in such a manner as to prejudice the potential claim that the one has on the other's estate. I submit that

either spouse has a right to ensure that he or she protects his or her potential claim to the growth of the other spouses' estate. Fortunately, the law provides relief to one spouse if his or her spouse is doing anything that might prejudice his or her claim to that spouse's estate. Section 8(1) of the Act provides that:

'A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just.'

This is a remarkable provision in our family law, which has not yet been tested by our courts, simply because we are not advising our client of this possibility. With this provision, spouses need not institute divorce proceedings in order to protect their share in the accrual of the estate of their spouses. If one spouse has acquired any financial benefit that grew his or her estate, namely, shares, and subsequently negligently disposes of such shares with 'a view of prejudicing' the potential share the other spouse on his or her estate, then the spouse who is likely to be prejudiced may launch an application to the High Court for the division of the accrual in terms of s 8(1) without first having to institute divorce proceedings. In terms of s 8(2) of the Act if the court orders immediate division, it may also order that the marriage will no longer be subject to the accrual system and will from the date of the order be subject to complete separation of propertv.

Conclusion

The discussion regarding calculation of the accrual is beyond the scope of this article, which has shown that it is possible for spouses who are married, subject to an accrual system, to apply during the marriage for the division of growth of the estate of the other spouse. Basically as far as the accrual system is concerned, spouses have independent estates, which they are individually responsible for and on the dissolution of the marriage, the growth in the value of such estates, which was accumulated during the subsistence of the marriage will be shared equally between the parties.

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Beware of undertakings: The irrevocable instruction that was revoked

ommercial realities demand that conveyancing attorneys provide guarantees and undertakings in order to fulfil their mandates to transfer immovable property.

What then is the legal effect of these undertakings and to what extent do practitioners unwittingly expose themselves to personal liability by giving them?

The Supreme Court of Appeal (SCA) recently had to rule on this suit. The case turned on the legitimacy of a client's purported irrevocable instructions, and more specifically the answer to the question of when an attorney may disregard such instructions.

This SCA's judgment was delivered under the citation of *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* 2015 (3) SA 36 (SCA).

Factual background

The appellant, Stupel & Berman Inc, was appointed by the seller to transfer an immovable property sold at auction.

Pending transfer, the client obtained two bridging finance loans (the discounting agreements) from the respondent, Rodel Financial Services, in the amount of R 1,4 million.

The agreements consisted of two parts, the discounting schedule and separate terms and conditions.

Each schedule was signed by the client, the respondent and the appellant, in its capacity, as conveyancer. In each schedule the client purported to cede to the respondent its right, title and interest in the nett proceeds of the sale.

Each schedule contained a section titled 'Undertaking by Conveyancer',

which later formed the basis of the respondent's cause of action against the appellant.

The appellant gave undertakings that it was attending to the transfer, that the respondent had purchased the sale proceeds (the cession which formed the basis for the undertaking) and that it had received 'irrevocable instructions' from the client to pay the loan amount to the respondent on transfer 'unless prevented by interdict or operation of law'. The undertakings further obligated the appellant to keep the respondent advised of all material developments in the sale and to advise in the event that the client terminated or attempted to terminate its mandate.

Pursuant to a transfer duty dispute, the client cancelled the sale agreement, whereupon the purchaser obtained an interim interdict to prevent the client from disposing of the property. This dispute became settled and the parties agreed to proceed with the sale and transfer. The respondent was informed of these developments by both the client and the appellant, although the client misinformed the respondent about the settlement in an attempt to pay the respondent a reduced amount.

The respondent then elected to cancel the discounting agreements, presumably on the basis of the client's misrepresentation and proceeded with legal action against the client for payment of the full amount owing.

The client accepted the cancellation and instructed the appellant to withdraw from 'any and all undertakings' provided by the appellant to the respondent on the client's behalf. The client thus revoked what purported to be its irrevocable instructions.

The appellant consequently advised the respondent that its mandate (to provide the undertakings) had been terminated and it therefore withdrew its undertakings. The respondent failed to lay claim to the proceeds, object or even reply to the appellant at all.

Approximately five weeks later, the transfer of the property was registered in the name of the purchaser and the nett proceeds of the sale were paid to the client. The respondent proceeded to obtain civil judgment against the client and its surety, whereafter it attempted to execute without success. Approximately five months after the withdrawal, the respondent demanded payment (including substantial discounting fees) from the appellant.

Litigation

The appellant denied liability and the respondent instituted legal action against it on the basis of the appellant's supposedly irrevocable undertakings. Protracted litigation followed.

The appellant raised various defences including:

- Agency, in that the appellant, as agent, was obliged to withdraw from its undertakings.
- Invalid cession, in that there was a prior cession to the mortgagee, the purchaser did not consent to the cession of a portion of the sale proceeds and also that the cession reverted on cancellation of the discounting agreements.
- Waiver and estoppel, in that the respondent only disputed the validity of the appellant's revocation of its mandate after the property had been transferred.

Agency – the irrevocable undertaking and instruction

This article will focus on the agency aspect of the appellant's defence, but prac-

titioners are well advised to take note of the other defences.

The court *a auo* was not persuaded and awarded judgment against the appellant. It applied a (rather perplexed) hybrid of legal principles involving agency, tripartite agreement, stipulatio alteri and adjectus solutionis causa, and thereby concluded that the appellant was not entitled to withdraw its undertakings (see the court a quo judgment at Rodel Financial Services (Pty) Ltd v Stupel & Berman Inc and Another (GJ) (unreported case no 2011/43229, 28-10-2013) (Claassen I)). It did, however, provide leave to appeal directly to the SCA, stating that the relevant principles were of national importance to practitioners.

The SCA found that the undertakings provided by the appellant did not constitute irrevocable undertakings binding the appellant personally. The very terms of the undertakings foresaw the possibility of the client withdrawing the appellant's mandate, and had the undertakings been personal, termination of the mandate would have been inconsequential to the respondent.

In terms of the law of agency instructions to an agent are generally revocable at the instance of the principal. The fact that instructions are described as 'irrevocable' does not detract from this principle (*Ward v Barrett NO and Another* 1962 (4) SA 732 (N) at 737 D - E).

The converse is also true – even if an undertaking makes reference to agency or is not described as irrevocable, it may nonetheless bind the agent personally (*Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121(C)).

In determining whether an undertaking is truly irrevocable and thus personally binding on the agent, context is everything. Regard should be had to the true import of the undertaking within the full context of the circumstances in which it is given (*Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13). Practitioners should be sure to categorically and unequivocally record the context within which they give an undertaking, to avoid being personally bound. Rather overemphasise than underscore this fact.

The question then arises as to whether a client can ever provide an attorney with a truly irrevocable instruction, in the absence of the attorney binding himself personally. The answer is 'yes', but only if the agent has a real interest in the mandate. This constitutes an exception to the general rule of agency ($Consolidated\ Frame\ Cotton\ Corporation\ Ltd\ v\ Sithole\ and\ Others\ 1985\ (2)\ SA\ 18\ (N)\ at\ 22J\ -\ 23C).$

An example of an agent vested with a real interest in the mandate of the principal is that of a finance bank (agent) making a loan to a client (principal). As

security for repayment, the client provides the bank with a power of attorney to register a mortgage bond over the client's immovable property. After advancement of the loan, but before the mortgage bond is registered, the client withdraws the bank's mandate to act. Since the bank has a real interest in the mandate it may regard the instruction as truly irrevocable and may thus proceed to register the mortgage bond notwithstanding the purported withdrawal of the mandate (Natal Bank Ltd v Natorp and Registrar of Deeds 1908 T.S. 1016).

Revoking the irrevocable instruction

A third party will never obtain a right to bind an agent to a mandate revoked by the principal, even if the exception to the general rule of agency applies. The mandate may be regarded as irrevocable only at the agent's instance and for its benefit only.

It follows that in the case under discussion the respondent could not rely on the exception to the general rule of agency. It was found that the appellant's interest in its fees for the conveyancing transaction was derived from the sale agreement and it had no real interest in the discounting agreements. Even if the appellant had a real interest in the discounting agreements, the right to regard the mandate as irrevocable vested in the appellant and not in the respondent.

The SCA further found that the respondent's predicament had resulted from its own failure to protect its interests by taking appropriate action. Had the respondent claimed a right to the proceeds at the time of the appellant's withdrawal of the undertakings, interpleader proceedings would have resulted. At that stage the respondent was also in a position to interdict the client and/or the appellant but failed to do so.

Consequently, the SCA upheld the appeal and found that the appellant was not merely entitled, but indeed obliged, to act on the client's termination of its mandate, thereby precluding the appellant, by the operation of law, from paying the respondent from the sale proceeds.

To recapitulate, when an attorney acts as agent for his client and has no real interest in the matter at hand, there is no such thing as an 'irrevocable instruction'.

- See 47.
- Mr Rossouw's firm was the appellant in the above matter.

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t took the threat of a court order but the Minister of Environmental Affairs (Minister) has finally given effect to ch 5 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) and published the alien and invasive species (AIS) lists and regulations. Rushed through on 1 August 2014, nearly eight years out of time, in order to beat the judgment in the matter of Kloof Conservancy v Government of the Republic of South Africa and Others (KZD) (unreported case no 12667/2012, 22-10-2014) (Vahed J), the lists proclaim 559 invasive species in terms of what is a bewildering matrix of areas, categories and exemptions.

The purpose of this article is to look critically at ch 5 of NEMBA and ask: Are the AIS lists and regulations lawful?

NEMA

NEMBA is one of the laws built around the framework that is the National Environmental Management Act 107 of 1998 (NEMA). NEMA is a human rights-based law that is intended to give effect to the environmental right contained in s 24 of the Constitution.

The Constitutional Court described the environmental right in these terms in Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC).

'The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24(b)(iii), which provides that the environment will be protected by securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.'

NEMA gives effect to this purpose. It seeks to encourage sustainable development by integrating the environmental principles set out in s 2 of NEMA into development planning and implementation but always on the basis that people and their needs must be placed at the forefront of a decision maker's concern.

It should not be surprising given the human rights perspective of the environmental right that NEMA defines the environment anthropocentrically (human centred). The environment is thus not just the physical world we live in. It incorporates a human, people first perspective of the environment by including as an essential attribute of the environment, 'the physical, chemical, aesthetic and cultural properties and conditions' of that physical world insofar they 'influence human health and well-being'.

NEMBA and NEMA

NEMBA was enacted to provide for the management and conservation of South Africa's biodiversity. Sections 6 and 7 of NEMBA require it to be read in conjunction with NEMA and applied in conformity with the NEMA principles. Thus NEMBA must also be interpreted and applied so that the needs of human beings are placed uppermost and references to the environment must be consistent with the NEMA definition.

Chapter 5 of NEMBA

Chapter 5 of NEMBA deals with the management of alien species and the control of species that are to be listed as invasive. Alien species are dealt with in part 1 of ch 5 and invasive species in part 2. Chapter 5 also deals with genetically modified organisms in part 3 (that falls outside the scope of this article).

Alien species and NEMBA

NEMBA defines alien species as any species introduced deliberately or accidentally into South Africa by human beings at any time during human existence. Alien species cannot become naturalised under NEMBA. The principle is: Once alien always alien. Consequently many species that have been present in South Africa for centuries and which hugely benefit human health and wellbeing must nonetheless be managed under NEMBA because they are alien. For example, most species used in agriculture are alien.

Indigenous species can also become alien if they are introduced into areas within South Africa where they did not originally occur. These are called extralimital indigenous species. It also follows that most so-called indigenous gardens in fact contain such alien plant species because those plants are not endemic to the area where the garden is located.

NEMBA legislates for the management of alien species including extra-limital indigenous species by prohibiting a wide range of restricted activities, unless the species is exempted by the Minister or the activity is authorised by a permit. The penalties for noncompliance are severe and could result in a fine of up to R 10 million or up to ten years' imprisonment or both.

No other country in the world has attempted such an ambitious or draconian scheme for defining or managing alien species. Yet, neither NEMBA nor NEMA, contains any policies, norms or standards that assist the Minister in deciding which alien species should be exempted or how permits should be issued. It is not surprising, therefore, that the Minister has abrogated most of part 1 of ch 5 by exempting all alien species lawfully introduced into South Africa.

Invasive species

Invasive species must be listed as such by the Minister before they are regarded as invasive. 'Invasive species' are defined as species 'whose establishment and spread outside of its natural distribution range –

(a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and

(*b*) may result in economic or environmental harm or harm to human health.'

Section 73(2)(b) of NEMBA states that 'A person who is the owner of land on which a listed invasive species occurs ... must take steps to control and eradicate the listed invasive species and to prevent it from spreading.' 'Control' is defined in NEMBA as meaning 'to combat or eradicate ... or ... where such eradication is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species.'

Like alien species, the use of invasive species is strictly circumscribed through a process of permitting and exempting restricted activities. The same criminal sanctions apply. Unlike alien species, the issue of permits is limited in terms of s 91 to cases where the impact on biodiversity is negligible. Exemptions only apply to restricted activities as invasive species themselves cannot be exempted.

What is invasive?

There are no policies or norms and standards that assist the Minister in deciding what is invasive or inform the public how this decision is made. Department of Environmental Affairs (DEA) says that it lacks the capacity to give reasons for listing each of the 559 listed invasive species, which makes it difficult to identify the reasons underlying the Minister's decision to do this. This difficulty is compounded by the fact that many socially and economically useful species have been listed as invasive despite the legislated obligation to control such species by a process of eradication or prevention.

It is suggested that one reason why socially and economically useful species have been listed as invasive is that the definitions used in science for determining what is invasive are not the same as the legal definition. The science, which studies the impact of alien species on in-

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digenous or native species is known as invasion biology. Invasion biology is a relatively new field of study with the result that there is still uncertainty among invasion biologists regarding the scope and nature of the science and even what is an invasion. For example, invasion biologists define invasive species either in terms of the capacity of self-sustaining alien species to spread over long distances or in terms of the capacity of those species to harm indigenous species (DM Richardson (ed) Fifty Years of Invasion Ecology (New Jersey: Wiley Blackwell 2011) at 413 (www.leg.ufpr.br/~eder/ebooksclub.org__Fifty_Years_of_Invasion_ Ecology__The_Legacy_of_Charles_Elton. pdf, accessed 2-6-2015).

These scientific definitions of invasiveness are much wider than the definition contained in NEMBA. They are also wider than the legal definition of invasiveness as it is applied elsewhere in the world. Thus, for example, the recently promulgated European Union Invasive Species Regulations (Regulation of the European Parliament and the Council on the prevention and management of the introduction and spread of invasive alien species 2013/0307 (COD)) also define invasiveness in relation to the harm a species causes to human health and wellbeing.

The DEA's approach

The DEA adopts what it calls a science based approach to managing biodiversity. It relies heavily on invasion biologists to assist and advise it in the implementation of this approach.

The DEA does not accept that there is any difference between the scientific definition of invasive and the definition of invasive in NEMBA. In particular, it is of the view that its approach to listed invasive species is not limited to merely controlling these species, but includes the general management of invasive species even for the purposes of propagation for beneficial use. The Minister has thus introduced a scheme in the AIS list

and regulations that allows for the continued use and propagation of socially and economically useful listed invasive species by listing them under four different categories (1(a), 1(b), 2 and 3).

Are the AIS lists and regulations lawful?

We do not think the AIS list and regulations are lawful. We see them as an invention of the DEA designed to try and fit a science based definition of invasive species in a legal scheme that defines invasive species in much narrower terms.

We contend that the DEA's 'sciencebased' approach ignores the anthropocentric nature of constitutional legislation and the balancing act that is required in the implementation of such laws through consultation and in particular the cooperative governance mechanisms set out in NEMA. We are concerned that the misalignment between this approach and the rightsbased principles enshrined in the Constitution and carried through into NEMA not only poses a threat to human rights, but it has created a governance problem which can be seen, inter alia, in the huge delay in publishing the Environmental Impact Assessment Lists and Regulations.

At a technical level this approach also ignores the definition of control as it is applied to invasive species and the meaning of environment as it is used in that definition. Legal canons of interpretation demand the precise interpretation of words in order to ascertain the purpose and meaning of statutes. The SCA held in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) that:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more

than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

Laws having penal consequences must also be interpreted narrowly (see, for example, *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC)). NEMBA is such a law.

We therefore submit that when the definition of invasive refers to environmental harm one is not dealing only with harm to the physical world we live in. The harm to that physical world must also be sufficiently severe to harm human health and wellbeing. Likewise one cannot ignore the definition of control. Control in NEMBA means to eradicate and, if that is not possible, to prevent the propagation or spread of the species. This clear and plain meaning of control is, we argue, not compatible with the propagation of an invasive species for beneficial use such as would happen, for example, if the species is used in agriculture.

The application of this narrow legal definition of invasive would result in a much shorter list of invasive species than the 559 species that are currently declared invasive. This would result in a much more practical and cost effective approach to the implementation of NEMBA.

Conclusion

We, therefore, question the validity of the present AIS lists and regulations. We suggest that the DEA has misunderstood the anthropocentric nature of the environmental right. The intended implementation also disregards the meaning of control as it is used in ch 5 of NEMBA and the application of the constitutional principles of good governance and sustainable development articulated in NEMA. The root of the problem appears inherent in DEA's science-based approach. A solution may lie in a more integrated, balanced and constitutional approach, which admits the rights-based governance imperatives that exist outside of science and which concentrate on how South Africa can protect its biodiversity while at the same time sustaining the health and wellbeing of present and future generations of South Africans.

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May 2015 (1) South African Law Reports (pp 1 - 312); [2015] 2 All South African Law Reports April no 1 (pp 1 - 126); and no 2 (pp 127 - 250); 2015 (3) Butterworths Constitutional **Law Reports - March (pp 243 - 376)**

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

Abbreviations:

CC: Constitutional Court ECP: Eastern Cape Local Division, Port Elizabeth

GJ: Gauteng Local Division, Johannesburg

GP: Gauteng Division, Pretoria SCA: Supreme Court of Ap-

WCC: Western Cape Division, Cape Town

Attorneys

Actions against attorneys: In Fourie v Ronald Bobroff & Partners Incorporated [2015] 2 All SA 210 (GJ) Fourie, the plaintiff, was an erstwhile client of Ronald Bobroff Attorneys, the defendant. The plaintiff sued the defendant for damages allegedly suffered in her personal capacity and on behalf of her minor son, as a result of the alleged under-settlement on 1 August 2011 of her and her son's claims against the Road Accident Fund (RAF). The plaintiff's claim was based on the alleged negligent breach by the defendant of the mandate given to it to institute and pursue the claim against the RAF with the standard of diligence, care and skill, which could reasonably be expected of a practising attorney. Essentially, the plaintiff contended that the defendant should have pursued both a claim for loss of support and a claim for loss of earning potential as they were not mutually excluding.

The crisp question before the court was whether the defendant was negligent in assessing that the plaintiff was still able to work and that her income earning capacity was only diminished by 10%.

Weiner J held that the question whether the defendant acted negligently, involved ascertaining whether the defendant, in choosing to pursue the loss of support claim as opposed to the loss of earning capacity claim, acted negligently. That turned on the question whether the defendant's assessment of the

plaintiff's ability to work was totally compromised. The court had to place itself in the defendant's position in August 2011 and ascertain the plaintiff's condition as assessed by the defendantattorney at that time. If the court found that there had been negligence as described, the plaintiff had to prove damages, which required proof of the likelihood of success in the action and that the damages were within the contemplation of the parties when the contract was concluded.

In applying these legal principles to the facts, the court pointed out that an actuarial report established that the defendant had accepted a settlement significantly in excess of the actuarial assessment of the total value of plaintiff's loss of support and loss of earnings claims. The defendant could, therefore, not be held to have been negligent in settling as it did. The same applied for the plaintiff's claim for general damages. The plaintiff's claim was thus dismissed with costs.

However, the court referred to the attorney and client bill of costs prepared by the defendant and held that the amount of hours and days charged for in the attorney and client bill were substantially higher than those reflected in the party and party bill of costs. The inference was inescapable that the attorney and client bill was manipulated in order to obtain a higher fee from the plaintiff. The court accordingly ordered that the matter be investigated by the provincial law society.

Company law

Intervention and postponement of winding-up: In Absa Bank Ltd v Africa's Best Minerals 146 Ltd; In re: Sekhukhune NO v Absa Bank Ltd [2015] 2 All SA 8 (GJ) the facts were as follows: In September 2010 the applicant, ABSA, and the respondent, African Best Min-

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erals Ltd (ABM), entered into a written loan agreement in terms of which ABSA advanced an amount of R 9,55 million to ABM. ABM had to repay the loan over a period of 83 months. One of the terms of the loan agreement was that, should ABM fail to make any monthly payment due, the full outstanding amount became due and payable. The loan agreement also contained the usual 'no indulgence and full agreement' clause in the agreement. ABM defaulted by failing to make payment as required. As a result, ABSA applied for a final winding-up order against ABM. The court was also asked to pronounce on the merits of an application by the Honourable King KK Sekhukhune (King Sekhukhune) who sought leave to intervene in the matter on a number of grounds, and an application by ABM for postponement, linked to the intervention application.

Vally J held that a party that wishes to intervene must demonstrate an interest in the proceedings that is not just a mere financial interest. An application to intervene solely as a shareholder or solely as a creditor is insufficient. The intervener must demonstrate that he has a legal interest to protect and not just a financial interest in the matter. The legal interest must also be material enough to affect the outcome of the winding-up application. Those requirements were not met in the application to intervene, and the application was accordingly dismissed.

ABM's application to postpone the matter was said to be to allow ABM to file an application for direct access to the Constitutional Court. No steps had yet been taken in that regard, and there was no explanation for that from ABM. The application for postponement was thus denied.

Regarding the winding-up application, the court noted that ABM was indebted to ABSA, had failed to pay the amount due and owing, and was commercially insolvent. The only remaining issue before the court was whether

it should grant a winding-up order. Section 344(f) of the Companies Act 61 of 1973 (the Act) provides that a company may be wound-up if it is unable to pay its debts in terms of s 345 of the Act. Section 345 is a deeming provision. In terms of that provision, a company is deemed unable to pay its debts if a debt exceeding R 100 is due, the creditor has served a demand for payment and the company has for three weeks thereafter failed to meet the demand.

ABSA had made out a case for the relief it sought, and the court granted the winding-up order.

Contract law

Consensus: In Spenmac (Pty) Ltd v Tatrim CC 2015 (3) SA 46 (SCA); [2014] 2 All SA 549 (SCA) the appellant, Spenmac, was the owner of a unit in a sectional title scheme. Spenmac innocently misrepresented to the respondent, Tatrim, that the unit was one of only two in the scheme, and that the owner of the unit had a right to veto any subdivision of the other unit. The misrepresentation induced Tatrim to enter into an agreement to buy the unit. One of the provisions of the contract was an acknowledgement by Tatrim that it had not been induced by any representation to enter into the agreement; and that it waived any rights it might have acquired as a result of such a representation (the so-called 'representation clause').

Tatrim later became aware of the true position and it applied successfully to the ECP for a declaration that the agreement was void.

On appeal by Spenmac to the SCA, Mthiyane DP explained that at the heart of the dispute between the parties is whether a misrepresentation on the part of Spenmac's representative, at the time of the conclusion of the agreement, resulted in a fundamental mistake.

The court held that the agreement had been void from the outset. Spenmac's misrepresentation had induced Tatrim to make a material mistake about the nature

of the unit, and consequently there had never been consensus as to the subject of the sale. Tatrim's mistake was also reasonable. As for the 'representation clause', it, along with the rest of the agreement, had been void from the start. In this regard the court held as follows: '[T] he [misrepresentation] taints consent to the whole contract, including the exemption clause. All the terms of the contract together regulate the contract's object, and it is difficult to see how the consent can but stand or fall as a whole. It seems impermissible to find a separate untainted consent to the exemption clause.'

The appeal was dismissed with costs.

Legality of acceleration clause: The facts in *Combined Developers v Arun Holdings and Others* 2015 (3) SA 215 (WCC) were as follows: The parties concluded a loan contract containing an acceleration clause in terms of which Combined Developers

(CD) were entitled to claim payment of the entire debt forthwith if Arun Holdings defaulted and failed to correct the default within four days of receiving a written notification by CD.

Arun Holdings failed to make payment of an instalment of R 42 133 and was duly notified by CD by e-mail. Arun Holdings made payment within the period allowed, but failed to pay an additional amount of R 87 in default interest. The e-mail demand made no mention of the default interest.

After a disagreement about an unrelated event, CD claimed payment of the full outstanding amount of R 7,6 million and execution on the security (cession of shares) provided by Arun Holdings.

Arun Holdings contended that the e-mail notification from CD did not constitute a demand as contemplated in the contract. It read as follows:

'Please see below and attachment, we have not yet received payment. Will you



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please rectify it and if payment has already been made, forward proof payment of the same' (own translation).

Davis J held that there is nothing inherently wrong with an acceleration clause which requires constitutional scrutiny. However, the interpretation and enforcement of contract clauses must not go against public policy, which must accord with the norms of the Constitution. The court pointed out that this was the legal position also in the pre-Constitutional era (see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)).

The court was at pains in emphasising that courts should be careful to invoke public policy, it does not mean that public policy has no role to play in this context. A creditor who implements a contract in a manner which is unconscionable, illegal or immoral will find that a court will refuse to give effect to such implementation even though the contract remains binding. In this regard the court referred with approval to the decision in *Juglal* NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004 (5) SA 248 (SCA); [2004] 2 All SA 268 (SCA)).

The court reasoned that an objective standard to determine unconscionability can be found in the normative framework of the Constitution. Relying on the concept of ubuntu, there is a requirement in contract that parties should interact with each other in good faith. It concluded that implementation of the acceleration clause in this case is so startlingly draconian and unfair that this particular construction of the clause must be in breach of public policy.

The court accordingly dismissed the claim with costs. It based its decision on two grounds. First, the demand in the e-mail was ambiguous and not a proper demand as required in terms of the contract. The demand should under the circumstances at least have specified the amount claimed. Secondly, a strict enforcement of the acceleration clause under the circum-

stances would be against public policy.

Nature of on demand guarantee: In State Bank of India and Another v Denel Soc Limited and Others [2015] 2 All SA 152 (SCA) the court was asked to pronounce on the nature of 'on demand guarantees'. In doing so it confirmed the position as laid down in a long line of earlier decisions, including those in Loomcraft Fabrics CC v Nedbank and Another 1996 (1) SA 812 (A); [1996] 1 All SA 51; Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others 2010 (2) SA 86 (SCA); [2009] 4 All SA 322; and Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd [2014] 1 All SA 307 (SCA).

The salient facts were that the first respondent, Denel, and the third respondent, Union of India (UOI), concluded four written contracts in terms of which Denel undertook to supply the UOI with defence-related equipment. As security for the due performance of its contractual obligations, Denel

was required to furnish one performance and seven warranty guarantees (the principal guarantees) to the UOI. Denel instructed the second respondent, ABSA, to attend to the issuing of the principal guarantees. ABSA instructed the appellants, the Indian banks, to issue the eight principal guarantees in favour of the UOI. In turn, ABSA issued eight counter-guarantees in favour of the Indian banks in consideration for the eight principal guarantees issued by the Indian banks.

When the UOI contended that Denel had breached its contractual obligations and called on the Indian banks to pay the amounts of the principal guarantees to it, the Indian banks duly complied and then called on ABSA to pay the corresponding amounts due in terms of the counterguarantees. ABSA advised Denel that it intended making payment to the Indian banks of the amounts due in terms of the eight counterguarantees and to recover the aggregate payments from Denel. Denel argued that the



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UOI was entitled to call up the principal guarantees. As a result, so Denel argued, ABSA was not lawfully bound to honour the counter-guarantees. It obtained an interim interdict restraining ABSA from making payment to the Indian banks on the counterguarantees. The interim order was confirmed. The Indian banks appealed the decision to confirm the interim order.

Fourie AJA confirmed the trite principle that banks should honour the obligations they have assumed in terms of guarantees issued by them.

An "on demand" guarantee' such as the principal and counter-guarantees in the present case is not unlike an irrevocable letter of credit. A guarantee establishes a contractual obligation on the part of the guarantor to pay the beneficiary on the occurrence of a specified event. Both 'first demand' 'counter' guarantees, such as those present here, are independent of the underlying contract, which gives rise to the guarantee. Therefore, regardless of a dispute between the parties to the underlying contract, the guarantee must be paid on demand. The only exception to this rule, is where there is fraud on the part of the beneficiary. The party alleging fraud has to establish it clearly on a balance of probabilities.

A bank issuing an on demand guarantee is only obliged to pay where a demand meets the terms of the guarantee. Thus, the beneficiary in the case of an on demand guarantee should comply with the requirements stipulated in the guarantee.

Examining each of the guarantees in this case, the court found that save for one of the ABSA counter-guarantees, the court correctly held that the requirements were met for the granting of prohibitory interdictory relief to Denel.

Because of this finding by the court, it was unnecessary for it to pronounce on the alleged fraud of the Indian banks.

The appeal was upheld solely in respect of the single ABSA counter-guarantee referred to above.

Repudiation: In B Braun Medical (Pty) Ltd v Ambasaam CC 2015 (3) SA 22 (SCA) the court was asked to pronounce whether a demand for performance, linked to a right of cancellation of the contract in the event of non-adherence to the demand, constitutes breach of contract in the form of repudiation.

At the heart of the dispute, between the appellant, Braun, and the respondent, Ambasaam, were two letters of demand written by Braun's attorney to Ambasaam dated, 9 March 2011 and 14 March 2011 respectively. The letter dated 9 March 2011 concluded 'our client shall proceed to cancel the [contract of carriage] without further notice to Ambasaam CC and to claim damages from Ambasaam, in the event that Ambasaam does not timeously adhere to the aforementioned demands'.

The sole issue for determination in the appeal was whether this demand for performance by Braun directed to Ambasaam, constituted a repudiation by the former of its obligations in terms of a contract of carriage, which entitled Ambasaam to cancel the agreement and claim damages from Braun. The GP held that Braun had repudiated the agreement, which Ambasaam had subsequently validly cancelled.

Swain JA held that contractual repudiation depends on perception, not intention, and a reasonable person would not understand a demand for performance to be an indication of repudiation.

The interpretation of a contract is a matter for the court and not for witnesses, and extraneous evidence must, to the extent that it is admissible, be used as conservatively as possible.

The court thus held that Braun's demand for performance did not constitute a repudiation of the contract. The appeal was thus allowed with costs.

Conveyancing

Agent of seller: In Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd 2015 (3) SA 36 (SCA) the appellant, Stupel, was instructed to act as

conveyancer in the registration and transfer of certain immovable property. The property was sold by one Amber Falcon Properties 3 (Pty) Ltd (Amber). While awaiting transfer of the property, Amber obtained bridging finance from the respondent, Rodel, in terms of two discounting agreements (the agreements). In terms of the agreements Stupel was appointed as conveyancer and Amber undertook not to withdraw Stupel's mandate to act as such.

Both agreements contained a section entitled 'Undertaking by Conveyancer', which was signed by Stupel. In terms of the undertaking Stupel commited itself 'irrevocably' to pay the nett proceeds of the sale of the property to Rodel on transfer of the property. After Amber received the money it had borrowed from Rodel in terms of the agreements, it instructed Stupel to withdraw the undertakings provided to Rodel. Stupel obliged with Amber's instruction. Rodel cancelled the discounting agreements and proceeded to claim the proceeds from the sale from Stupel.

The court a quo held that Rodel was in the position of an adjectus solitionus causa (adjectus), and as a result, Amber could not withdraw its instruction to Stupel to pay Rodel. Stupel was ordered to pay the proceeds to Rodel.

On appeal Brand JA pointed out that an adjectus is an entity, other than the creditor, to whom, by agreement between the debtor and the creditor, the debtor is entitled to pay what is due to the creditor and so discharge the creditor's obligations to the adiectus.

The court held that Rodel could not be regarded as an adjectus because the undertaking relied on by Rodel was not part of a tripartite agreement involving the debtor, creditor and adjectus. The undertaking by Stupel was a 'stand-alone' agreement between it and Rodel; and secondly, Stupel was never in the position of a debtor, nor was Amber in the position of Stupel's creditor.

In terms of the agreement



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between Amber and Stupel, the latter, as agent, had to do two things:

- transfer the property to the purchaser; and
- pay the nett proceeds to Rodel.

If Rodel was truly an adjectus, it would have no claim against Stupel at all. Because Stupel gave the undertakings to Rodel in its capacity as an agent, on the instructions of his principal (Amber), the law of agency provided that, as a general rule, those instructions could be terminated. The fact that the instructions were described as 'irrevocable' in the undertaking by Stupel, did not detract from the general principle. Amber could thus withdraw Stupel's mandate and Stupel had no option but to act on Amber's instructions. Because Rodel cancelled the agreements, it left Amber free of its contractual undertaking towards Rodel not to terminate Stupel's mandate.

The law of agency provides for an exception to the general rule that instructions given to an agent can be terminated by the principal. The exception to the general rule is where the authority of the agent to act on behalf of the principal can be 'coupled with an interest'. In terms of this exception, the interest to be protected by irrevocability, must be that of the agent (Stupel), as opposed to that of the third party or adjectus (Rodel).

The court mentioned in passing that the correct remedy for money-lenders who find themselves in Rodel's shoes, is to keep the money-lending agreement intact and rather seek an interdict against the principal (Amber), joining the agent (Stupel) as an interested party, to prevent the agent from giving effect to the termination of the mandate by the principal.

Finally, the court held that whether or not Amber was

acting in breach of its obligation in terms of the discounting agreements, to which Stupel was not a party, is of no consequence. The appeal was allowed with costs.

• See 38.

Insolvency

Notification of insolvent's employees: In *Stratford and Others v Investec Bank* 2015 (3) SA 1 (CC); 2015 (3) BCLR 358 (CC) the facts were as follows: The appellants were a married couple and had three domestic employees. The couple's joint estate was placed in final sequestration despite the objection of the employees that they had not been properly notified of the application for provisional sequestration.

In 2002 the Insolvency Act 24 of 1936 (the Act) was amended by the insertion of s 9(4A), which requires a petition for sequestration to be 'furnished' to the debtor's employees. The copy must be put on any notice board accessible to employees inside the debtor's premises or otherwise affixed to the front gate or front door of the premises from which the debtor conducted any business at the time.

The candidate attorney serving the initial application in the present case had asked the employers whether they had any domestic employees. They said they had a domestic worker, but they did not mention the gardener and handyman they employed. A copy of the application was left on the kitchen table for the domestic worker.

In 2012, on the day after the provisional order in this matter was granted, the SCA held in another matter (Gungudoo & Another v Hannover Reinsurance Group Africa (Pty) Ltd & Another 2012 (6) SA 537 (SCA)) that s 9(4A) applied only in respect of an insolvent's business employees and that domestic employees did not have to be notified. This interpretation relied, among other things, on the reference to the business premises of the debtor.

In addition to raising an ap-

peal on the merits of the final order, the appellants argued that the restrictive interpretation by the SCA in Gunaudoo of the word 'employees' in s 9(4A) rendered the provision unconstitutional for discriminating against domestic employees, infringing their rights to dignity, fair labour practices and access to courts. The court also had to indicate whether notification was peremptory or not. The sequestration order was handed down in the WCC. The SCA refused leave to appeal.

On appeal to the CC, Leeuw AJ held that s 9(4A) of the Act must be interpreted in conformity with the Constitution. This means that in cases of doubt, a reasonable interpretation that promotes the spirit, purport and objectives of the Bill of Rights must be preferred. The decision in *Gungudoo* did not deal with the constitutional arguments raised in the *Stratford* case.

The court further held that despite the indicators relied on by the SCA in Gungudoo, the word 'employees' in s 9(4A) is indeed capable of including non-business employees. In this regard the court reasoned that the link between work and the right to dignity is well established. Notification serves to alert employees to the financial difficulties of their employer. It enables them to seek alternative employment and could avoid the situation where they turn up for work only to find that their services have been suspended and they will not be paid.

An inclusive interpretation of 'employees' in the notification provision will thus better promote the objectives of the Bill of Rights. In view of the finding that domestic employees are indeed included in s 9(4A), the challenge to the constitutional validity of this provision falls away.

As to the question whether compliance with s 9(4A) is peremptory or not, the court held that it is significant that it does not require a notice to be 'served' on employees, but rather that it be 'furnished' to them. This means that the no-



tice must be made available in a manner reasonably likely to make it accessible to employees. The effort made by the candidate attorney in this matter was sufficient to meet this standard.

The insolvent debtor may not oppose a sequestration order by relying on a failure to inform his or her employees, as that would be a technical defence invoked to avoid or postpone sequestration. In some exceptional circumstances a provisional order may be granted on an urgent basis despite non-compliance with s 9(4A), for example to avoid the concealment of assets.

The court confirmed that the declaration of the meaning of 'employees' as including domestic employees does not have retrospective effect, except in relation to matters where domestic employees were not notified and a provisional order has been made.

Finally, it held that a copy of the application must be furnished to domestic employees before a final order can be granted. In the light of the potential impeachable transactions listed by the bank, it was clear that sequestration would be to the advantage of the couple's creditors. Hence the CC refrained from interfering with the High Court's final sequestration order.

Insurance

Misrepresentation: In Visser v 1 Life Direct Insurance Ltd 2015 (3) SA 69 (SCA) the appellant, the beneficiary, took out life insurance cover on the life of one of her employees, the employee. The beneficiary lent money to the employee to start her own business. Fourteen months after the policy was issued the employee died from unnatural causes. The respondent, the insurer, rejected the beneficiary's claim in terms of the policy. It argued that the employee had misrepresented and failed to disclose to the insurer certain details of her pre-existing medical condition, which materially affected the assessment of the risk.

Section 59(1) of the Longterm Insurance Act 52 of 1998 provides that an insurer may avoid liability on the ground of misrepresentation. That is, a representation that was not true or amounted to non-disclosure of information, 'if [it were] ... likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue'.

The insurer relied on two sources of evidence in proving the misrepresentation/ non-disclosure by the employee. First, the transcript of a telephone conversation between the insurer and the employee during which the latter was asked certain questions relating to her state of health. Secondly, records of the hospital that the employee visited that contain details of the employee's medical complaints. The court a quo held in favour of the insurer.

On appeal, Swain JA, held that the insurer bears the onus of proving that the employee had misrepresented to it that she had never had any episodes of anxiety or stress, and that she had never received medical advice or treatment for fainting and chest pains. The admissibility of the telephonic conversation and hospital records must be distinguished from the evidential status of their contents. The records are admissible.

However, because the doctor who conducted the interview with the employee at the hospital was not called to testify about the correctness of the hospital records, the evidential value and status of these records had not been proved.

Only once the correctness of these records was proved, could the further issues of misrepresentation or non-disclosure by the employee arise. The expert witness on behalf of the beneficiary testified that the hospital records were incomplete and that one had to speculate concerning the causes of the symptoms of the employee.

Finally, the SCA held that the court *a quo* erred in finding that 'it is not in dispute that the illnesses [of the employee] are noted, correctly, in the hospital records'. The insurer therefore failed to



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discharge the onus of proving the trust and accuracy of the contents of the hospital records and the appeal was upheld with costs.

In a separate concurring judgment, Willis JA, agreed that the issue of materiality did not arise but considered that it nevertheless had to be dealt with, to give the unsuccessful litigant who failed for lack of evidence an indication of what it might have been expected to prove.

Non-disclosure: The facts in Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop 2015 (3) SA 85 (SCA); [2015] 2 All SA 137 (SCA) were as follows: On 16 March 2010 the parties concluded a contract of insurance in respect of which the appellant, the insurer, insured the premises of the respondent, the insured, against certain risks, which included fire damage. The insured premises burnt down in May 2010. The insured claimed the cost of repairs and payment in respect of rental income lost, from the insurer. The insurer rejected the claim, alleging a material non-disclosure by the insured when applying for insurance cover in respect of the premises. The non-disclosure, so the insurer reasoned, lay in

failing to advise the insurer that the premises was occupied by a tenant who manufactured truck and trailer bodies using fibre glass and resin. Both are highly flammable materials. This constituted a risk that the insurer argued it would not have undertaken had it known of the nature of the business. The fire was caused by employees of the tenant in the course of manufacturing.

The High Court found that the insurer was liable to pay the sum claimed on the basis that it was estopped from relying on the defence of nondisclosure. It reasoned that, when the insurance broker for the insured had procured the insurance cover, he had asked the insurer to do an urgent survey of the premises. The High Court held that the insured had been misled into believing that the survey had been done, and had accordingly paid the premiums on the assumption that the insurance covered the prem-

The relevant issues on appeal were the following –

- what was in fact disclosed by the insured to the insurer about the premises;
- whether the insurer established a material non-disclosure in terms of s 53(1) of the Short-Term Insurance Act 53

of 1998, which induced it to enter into the contract; and

• if there was a material nondisclosure, whether the insured established either estoppel or waiver of reliance by the insurer on non-disclosures.

Lewis JA held that at common law, an insured, when requesting insurance cover, must make a full and complete disclosure of all matters material to the insurer's assessment of the risk. Failure to do so will entitle the insurer to reject a claim under a policy and to treat it as void. Legislation has been enacted, however, to preclude insurers from relying on trivial misrepresentations and nondisclosures to avoid liability under an insurance contract.

The test in respect of both misrepresentations and nondisclosures is an objective one. The question is thus whether the reasonable person would have considered the fact not disclosed as relevant to the risk and its assessment by an insurer. The onus rests on the insurer to prove materiality. The insurer must prove that the nondisclosure or representation induced it to conclude the contract. Thus, the insurer must show that the representation or non-disclosure caused it to issue the policy and assume the risk. Once materiality has been proved it would be difficult for the insured to overcome the hurdle of showing no causation. The test for inducement is subjective.

In considering whether there was a failure to disclose the nature of the risk in the present case, the court held that the presence of the tenant in the building, and the fact that it occupied a substantial portion of the building, made a material difference to the risk. The reasonable person would have regarded that fact as material and disclosed it to the insurer. The request for the survey did not relieve the insured of the duty to make a full disclosure as to the use of the premises

The insurer was thus entitled to reject the claim. The appeal was upheld with costs.

Other cases

Apart from the cases and topics that were discussed above, the material under review also contained cases dealing with administrative law, civil procedure, company law, constitutional law, criminal law, disciplinary bodies, intellectual property, land, local authorities, marriage, medical aids, parent responsibilities, practice, prescription, shipping and wild animals.

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Interpretation of s 133(1) of the Companies Act 71 of 2008 – the principle of *moratorium* re-defined under business rescue

By Romeo Tsusi

Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA)

he enactment of the Companies Act 71 of 2008 (the Act) brought about s 7, envisaging the purpose and application of the Act, *inter alia*, subs k 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders, and introduces business rescue proceedings for financially distressed companies.

The Act entrenched these provisions under ch 6 of the Act – ss 128 to 156. Section 128(1)(*b*) defines business rescue as 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

Section 133(1) of the Act – temporary moratorium

For the purposes of this article, focus will be on s 128(1)(*b*)(ii) of the Act - the temporary moratorium on the rights of claimants against the company or in respect of property in its possession during business rescue proceedings.

The temporary moratorium against a company under business rescue is effective on commencement of business rescue proceedings. There is an automatic and general moratorium (or stay) on legal proceedings or executions against the company, its property, assets and on the exercise of the rights of creditors of the company (FHI Cassim (managing ed) *Contemporary Company Law* 2ed (Cape Town: Juta 2012) at 878).

The Supreme Court of Appeal (SCA) in the recent judgment of *Cloete Murry* at para 14, Fourie AJA held that it is generally accepted that a moratorium on legal proceedings against a company under business rescue, is of cardinal importance since it provides the crucial breathing space or a period of respite to enable a company to restructure its affairs and that, it was aptly described moratorium is a cornerstone of all business rescue procedures.

The temporary moratorium referred to above in terms of s 128(1)(b)(ii) has been enacted by means of s 133(1). Section 133(1)(a) – (b) under the heading '[g] eneral moratorium on legal proceedings against company' provides that – '[d]uring business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –

(a) with the written consent of the practitioner;

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

Interpretation of s 133(1) as held in the *Cloete Murry* matter

The appeal was heard by Fourie AJA (Navsa ADP, Ponnan and Zondi JJA and Schoeman AJA concurring) dealing with the interpretation of s 133(1), whether once business rescue proceedings under the Act have commenced, the creditor of a company under business rescue can unilaterally cancel an extant instalment sale agreement (agreement) that it had concluded with the company prior to the company being placed under business rescue. FirstRand Bank Ltd t/a Wesbank (Wesbank) entered into an agreement with Skyline Crane Hire (Pty) Ltd (Skyline) in terms of which Wesbank sold and delivered movable goods to Skyline, Wesbank retaining ownership in the goods until the purchase price had been

Skyline was placed under business rescue, and had already been in arrears in respect of the monthly instalments payable to Wesbank under the agreement.

Wesbank, subsequently dispatched a letter of cancellation of the agreement to Skyline due to failure to pay the monthly instalments, and advised it would repossess the goods; it would value and sell same; and credit the proceeds to the relevant accounts and to claim damages. The business rescue practitioner appointed in terms of the Act to oversee the proceedings consented to the repossession and selling of the goods.

The business rescue, by order of court was discontinued and Skyline was placed in liquidation. The liquidators challenged Wesbank's cancellation of the agreement and alleged that it was contrary to the provision of s 133(1), and of no force or effect. The application was dismissed in the court *a quo* (Gauteng Local Division, Pretoria, Jordaan J sitting as court of first instance).

The SCA was faced with the issue of determining the proper meaning of s 133(1), particularly the correct interpretation of the term '... no legal proceeding, including enforcement action, against a company [under business rescue] may be commenced.'

Therefore, the cancellation of the agreement by Wesbank was alleged to be interpreted to constitute an 'enforcement action' as meant in s 133(1) by the liquidators and thus the absence of the written consent by the business practitioner or leave of the court in terms of subs (1)(a) and (b) meant that the cancellation was of no force or effect. In contrast, Wesbank submitted that the cancellation did not constitute 'enforcement action' as envisaged by the section, thus no consent or leave by the court was required to cancel the agreement.

Fourie AJA, held that an interpretation of s 133(1) called for, the crisp issue being whether the cancellation of the agreement constituted 'enforcement action' as meant in s 133(1) of the Act?

The Act places a moratorium on 'legal proceedings' and 'enforcement action', which definition of the said terms is not contained in the Act.

'Legal proceeding'

It was held at para 31 that this term is well-known in South Africa legal parlance and usually bears the meaning of a lawsuit or 'hofsaak', in the Afrikaans translation. Therefore cancellation of an

agreement does not constitute a legal proceeding in terms of s 133(1).

'Enforcement action'

Fourie AJA at para 32 accepted that in our legal parlance, 'enforce' or 'enforcement', usually refers to the enforcement of obligations. Evaluating the context of s 133(1), reference is made to 'no legal proceeding, including enforcement action' as such, inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding' was held to indicate that:

- 'enforcement action' is considered to be a species of 'legal proceeding'; or,
- at least, is meant to have its origin in the legal proceedings.

This conclusion was further held to be strengthened by the wording of s 133(1), which 'provides that no legal proceed-

ing, including enforcement action, "may be commenced or proceeded with *in any forum*" (my emphasis). A "forum" is normally defined as a court or tribunal (see the *Concise Oxford Dictionary 12 ed* (2011)) and its employment in s 133(1) conveys the notion that "enforcement action" relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment'.

Therefore, Fourie AJA held at para 33 that the concepts of 'enforcement' and 'cancellation' are traditionally regarded as mutually exclusive. 'Cancellation' connotes the termination of obligations between parties to an agreement and cannot be interpreted to mean enforcement action as envisaged under s 133(1), as such the correct interpretation of

s 133(1) was held to contextually be understood to refer to enforcement action by way of legal proceedings.

Conclusion

Therefore, a creditor of a company under business rescue proceedings may cancel a contract if such company is in breach of the agreement, this cannot, according to s 133(1) be regarded as an enforcement action falling under the notion of moratorium. The court concluded that ch 6 of the Act provides for safeguard provisions to prevent the disastrous result foreshadowed by the liquidators (ss 136(2); 154(2) of the Act).

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NEW LEGISLATION



NEW LEGISLATION

Legislation published from 5 May - 29 May 2015

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COMMENCEMENT OF ACTS

Spatial Planning and Land Use Management Act 16 of 2013. *Commencement*: 1 July 2015. Proc26 *GG*38828/27-5-2015.

Attorneys Amendment Act 40 of 2014. *Commencement*: 29 May 2015. Proc R24 *GG*38821/27-5-2015. • See 28

Spatial Data Infrastructure Act 54 of 2003, ss 12 and 14-18. *Commencement:* 29 June 2015. Proc25 *GG*38822/29-5-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990

Regulations regarding the control of the export of animal products. GN R422 GG38804/22-5-2015.

Regulations regarding the control of the export of processed goods. GN R423 GG38804/22-5-2015.

Broad-Based Black Economic Empowerment Act 53 of 2003

Clarification notice: Amended Codes of Good Practice. GenN396 *GG*38764/5-5-2015 and GenN444 *GG*38799/15-5-2015. Amendment of the amended Codes of Good Practice. GenN407 *GG*38765/6-5-2015.

Codes of Good Practice: Amended guidelines for developing and gazetting of sector codes. GenN408 *GG*38766/6-5-2015.

Civil Aviation Act 13 of 2009

Eighth amendment of the Civil Aviation Regulations, 2015. GN R444 GG38830/27-5-2015.

Collective Investment Schemes Control Act 45 of 2002

Exemption of managers of collective investment schemes in securities from the duty to maintain seed capital in exchange traded portfolios. BN104 GG38782/15-5-2015.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical service providers. GenN409

*GG*38767/11-5-2015 and GenN415 *GG*38790/15-5-2015.

Rules, forms and particulars which shall be furnished. GN385 GG38769/15-5-2015.

Financial Services Board Act 97 of 1990 Levies on financial institutions. BN101 *GG*38768/8-5-2015.

Health Professions Act 56 of 1974

Regulations defining the scope of practice of clinical associates. GN R433 GG38816/25-5-2015.

Magistrates' Courts Act 32 of 1944

Appointment of one or more places within each district for the holding of a court (Hermanus, George and Stellenbosch). GN412 *GG*38774/8-5-2015 and GN415 *GG*38777/8-5-2015.

National Environmental Management: Biodiversity Act 10 of 2004

Amendments to the regulations on bioprospecting, access and benefit-sharing. GenN447 *GG*38809/19-5-2015.

National Health Act 61 of 2003

Health infrastructure norms and standards guidelines. GN R414 *GG*38776/8-5-2015.

Emergency Medical Services Regulations. GN R413 *GG*38775/8-5-2015.

Road Accident Fund Act 56 of 1996 Adjustment of tariffs. BN107 *GG*38803/22-5-2015.

Skills Development Act 97 of 1998 Trade Test Regulations. GN R376 GG38758/8-5-2015.

Small Claims Courts Act 61 of 1984 Establishment of a small claims court for the area of Middelburg. GN407 *GG*38792/15-5-2015.

Establishment of a small claims court for the areas of Wynberg, Mitchells Plain and Simon's Town. GN406 *GG*38792/15-5-2015.

Establishment of a small claims court for the area of Qumbu. GN405 *GG*38792/15-5-2015.

Establishment of a small claims court for the area of Tsolo. GN404 GG38792/15-5-2015.

Establishment of a small claims court for the area of Indwe. GN403 *GG*38792/15-5-2015.

Establishment of a small claims court for the area of Wodehouse. GN402 *GG*38792/15-5-2015.

Establishment of a small claims court for the area of Tabankulu. GN401 *GG*38792/15-5-2015.

Establishment of a small claims court for the area of Libode. GN400 GG38792/15-5-2015.

Establishment of a small claims court for the area of Babanango. GN399 *GG*38792/15-5-2015.

Traditional Leadership and Governance Framework Act 41 of 2003

Guidelines for determination of the number of members of traditional councils. GN397 *GG*38782/15-5-2015.

Value-Added Tax Act 89 of 1991

Regulations regarding requirements for the registration as a vendor in terms of

s 23(3)(*b*)(ii). GN R447 *GG*38836/29-5-2015.

Regulations regarding the continuous and regular activities in terms of s 23(3) (*d*). GN R446 *GG*38836/29-5-2015.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Amendment of regulations. GN R388-390 *GG*38783/15-5-2015.

Draft legislation

Draft National Policy of the Department of Basic Education on HIV, STIs and TB in terms of the National Education Policy Act 27 of 1996. GenN395 *GG*38763/5-5-2015.

Draft Amendment Regulations regarding the grading, packing and marking of sunflower seed intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN399 *GG*38757/8-5-2015 and GN R380 *GG*38758/8-5-2015.

Draft Amendment Regulations regarding the grading, packing and marking of durum wheat intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GN R372 and GN R375 GG38758/8-5-2015.

Draft Amendment Regulations regarding the grading, packing and marking of soft wheat intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN397 GG38757/8-5-2015 and GN R374 GG38758/8-5-2015.

Draft Amendment Regulations regarding the grading, packing and marking of bread wheat intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN398 GG38757/8-5-2015 and GN R373 GG38758/8-5-2015.

Draft Amendment Regulations regarding the grading, packing and marking of sorghum products intended for sale in South Africa in terms of the Agricul-

tural Product Standards Act 119 of 1990. GenN401 GG38757/8-5-2015.

Draft rules for investigations, disciplinary hearings and appeals in terms of the Council for the Built Environment Act 43 of 2000. BN100 GG38757/8-5-2015.

Draft National Greenhouse Gas Emission Reporting Regulations in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN411 GG38779/11-5-2015.

Draft National Road Traffic Regulations in terms of the National Road Traffic Act 93 of 1996. GN411 GG38772/11-5-2015. Draft Regulations relating to the classification, packing and marking of fruit and vegetable juices, nectars, drinks and related products intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN417 GG38782/15-5-2015.

Draft amendment of the Electricity Regulations on New Generation Capacity, 2011 in terms of the Electricity Regulation Act 4 of 2006. GN R419 GG38801/19-5-2015. Proposed National Liquor Policy in terms of the Liquor Act 59 of 2003. GenN446 GG38808/20-5-2015.

Draft Policy on the Customary Practice of Initiation in South Africa. GenN471 GG38814/22-5-2015.

Draft Appeal Regulations in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GenN450 GG38803/22-5-2015.

Draft Amendment Regulations pertaining to the conduct, administration and management of the senior certificate examination in terms of the South African Schools Act 84 of 1996. GN R420 GG38810/25-5-2015.

Proposed amendments to the Johannesburg Stock Exchange Debt Listing Requirements in terms of the Financial Markets Act 19 of 2012. BN112 GG38822/29-5-2015.



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Employment law update



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Dismissals for operational requirements

In Ketse v Telkom SA Soc Ltd and Others [2015] 4 BLLR 436 (LC), Mr Ketse approached the Labour Court in terms of s 189A(13) of the Labour Relations Act 66 of 1995 (LRA) to apply for an urgent order that his notice of termination was of no force and effect and that he be reinstated until the employer complies with a fair retrenchment procedure. He also sought an order interdicting the employer from appointing any other employees to his position pending his reinstatement. In the event that the court found that an order in terms of s 189A(13) was not appropriate, he sought just and equitable compensation.

The employer opposed the application alleging that Mr Ketse did not have *locus standi* to bring the application as he had not been a consulting party as contemplated in s 189A(13) of the LRA. In this regard, the employer alleged that the various trade unions who had participated in the consultation process were the consulting parties who had the *locus standi* to bring the s 189A(13) application

The employer further alleged that the dispute relating to alleged non-compliance with the procedural requirements of the LRA was *res judicata* as Solidarity had already brought an application to this effect and an agreement had been reached as to the consultation process and the appointment of a facilitator, which agreement was made an order of court. It was also argued that the termination of Mr Ketse's employment was lawful as more than 120 days had lapsed since the s 189(3) letter had been issued.

The employer argued that Mr Ketse was not a consulting party as defined in s 189(1) of the LRA and referred to a number of cases that recognised a hierarchy of consulting parties in a consulta-

tion process. In this regard, an employer is first required to consult with any person with whom it is required to consult in terms of a collective agreement. In the absence of a collective agreement the employer is required to consult with a workplace forum and registered trade union. Only if there is no trade union is the employer then required to consult with the individual employees. Mr Ketse on the other hand argued that s 189(1) of the LRA should be purposively interpreted and to recognise a hierarchy of consulting parties would mean that non-unionised employees would not be consulted with and would be denied recourse to procedural fairness in terms of s 189A(13).

Lallie J considered the arguments by both the employer and Mr Ketse as regards locus standi and followed the cases where it had been found that there is a hierarchy in s 189(1) governing the consultation process. He found that in cases where a failure to consult with individual employees was found to constitute procedural unfairness, there had not been a collective agreement in place that required consultation with a particular body. This was distinguishable from the present case where the employer had consulted with the unions, which it was required to consult with in terms of recognition agreements. Lallie J accordingly held that Mr Ketse was not a consulting party as defined in s 189(1). Furthermore, Lallie J found that Mr Ketse was not able to show that he was a de facto consulting party as he had not been present at the facilitated meetings and although he had been provided with certain information by the employer, he had adopted a passive role and had not engaged with the employer on this information. It was accordingly held that he did not have locus standi to bring the application in terms of s 189A(13).

As regards the issue of res judicata,

Lallie J found that there was no legal basis for a finding of *res judicata* as each consulting party may experience procedural unfairness in different ways and thus the agreement reached between Solidarity and the employer regarding procedural unfairness as perceived by Solidarity did not preclude other consulting parties from approaching the court in terms of s 189A(13).

Mr Ketse argued that the termination of his employment was unlawful as the parties had not consulted for the prescribed time period. A facilitator had been appointed and thus the parties were required to consult for a minimum of 60 days. The consultation period had been 120 days and thus Lallie J found that the termination was not unlawful. Lallie J dismissed Mr Ketse's argument that the employer had breached s 189A as it had not appointed a Commission for Conciliation, Mediation and Arbitration facilitator but instead a private facilitator. Thus, the termination of employment was found to be lawful.

In Vermeulen v Investgold CC and Another [2015] 4 BLLR 447 (LC), a stock controller, Ms Vermeulen, was issued with a s 189(3) letter on 6 December 2012 and told to pack her bags and remain at home until attending a meeting on 12 December 2012. During the meeting the employer rushed through all the topics required for consultation such as the operational rationale, selection criteria, proposed alternatives, timing and severance pay. Ms Vermeulen's representative proposed that she be trained so that she could occupy a vacant position of assistant accountant. A second proposal was that she be offered an enhanced severance package. Ms Vermeulen was requested to put her proposal in writing, which she then did. On 14 December 2012 Ms Vermeulen was issued with a retrenchment notice and given details of her retrenchment package.

As regards substantive fairness, Ms Vermeulen did not directly challenge the operational rationale for her dismissal but alleged that the dismissal was substantively unfair as she was not appointed to available positions as an alternative to retrenchment. In this regard, there were two vacant positions that she was suitably qualified for but would require her to undergo a pay cut. There was also the role of assistant accountant, which she would have been able to perform if she received adequate training. Van Niekerk J held that it was not

unreasonable for the employer to not offer Ms Vermeulen the role of assistant accountant as she would require about eight to 12 months training and the business could not be expected to delay the appointment for such a long period of time. As regards the other positions, Van Niekerk J found that given the fact that Ms Vermeulen had indicated that she would not accept a lower salary, the employer did not act unfairly in failing to consider Ms Vermeulen for the other two positions that would require a sub-

stantial salary cut. It was held that the dismissal was substantively fair.

As regards procedural fairness, Van Niekerk J held that it is not appropriate to simply apply a checklist approach to retrenchments and that the employer must engage openly and honestly in a manner that allows both parties to express their views and proposals. Procedural fairness also requires an employer to seriously consider any proposals made by the employees. In this case the consultation process took only two hours. Van

Niekerk J commented that there may be circumstances where a truncated consultation process may be justified. This may be the case if the survival of a business is at stake but this was not the case in these circumstances. Van Niekerk J concluded that the employer should have engaged further with the employee and thus the employer failed to engage in a joint consensus seeking manner. The dismissal was accordingly procedurally unfair and compensation equal to three months' pay was ordered.



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

Numerical targets v quotas – national demographics v regional demographics

Solidarity and Others v Department of Correctional Services and Others (LAC) (unreported case no CA23/13, 10-4-2015) (Waglay JP, Davis JA et Mngqibisa – Thusi AJA).

Ten of the appellant's members, cited as the second to 11 appellants (the employees) applied for various promotions while working for the Department of Correctional Services (DCS) in the Western Cape.

Save for one employee, the remaining employees were unsuccessful in their respective applications, prompting the appellant to refer an unfair discrimination dispute to the Labour Court. The appellant's claim centred on the allegation that the DCS's employment equity plan (the plan) contravened the Employment Equity Act 55 of 1998 (EEA) in that it firstly, required a rigid application of quotas based on demographic representation; and secondly, failed to take into account regional demographics of the Western Cape (nine of the ten employees were members of the Coloured community residing in the Western Cape.)

In terms of relief, the employees wanted to be placed into the posts they applied for and which remained vacant, alternatively that they be constructively promoted (ie, be given the same remuneration and benefits associated with the post they applied for).

Rabkin-Naicker J, in Solidarity and Others v Department of Correctional Services and Others (Police and Prisons Civil Rights Union as amicus curiae) (2014) 35 ILJ 504 (LC), found the DCS's plan unfair in that it failed to take into consideration regional demographics. In failing to do so, the court found that the DCS recruitment and selection process amounted to discrimination, which was not protected by either the EEA or the Constitution. The judge ordered that when setting numerical targets, the DCS must consider both national as well as regional demographics. The remaining relief sought by the employees was dismissed with no order as to costs.

At the LAC the appellant's appeal lay against the decision of the court *a quo* refusing to grant the relief sought. The respondents cross-appeal was limited to the finding that the DCS's plan did not take into account regional demographics

The LAC began by examining the DCS plan.

The plan created numerical targets by race and gender; these targets were informed by the national demographics estimated in 2005. Material to the judgment is the fact that the plan allowed the National Commissioner of the DCS to deviate from the plan when considering business delivery, critical positions or when an employee from underrepresented groups was not available. Similarly the DCS affirmative action plan also affords the Commissioner the discretion to deviate from the affirmative action plan in consideration of certain factors and circumstances.

Did the plan embody a quota system that was impermissible in terms of the EEA or did the plan set numerical targets contemplated in the EEA?

The appellant argued that the DCS's plan embodied a quota system whereby appointments, transfers and promotions were done in strict accordance to national demographics without taking into account the individual circumstances of those applying for promotions, transfers etcetera. As a result thereof, according

to the appellant, the plan was based on 'race and gender norming' without any proper regard to the individual's circumstances and past disadvantages.

In addressing this argument the LAC held:

'Much of the debate before this court turned on the distinction between a quota, which in terms of the EEA, is an impermissible mechanism, and the permissible concept of numerical targets. The key distinguishing factor between these two concepts turns, it appears, on the flexibility of the mechanism. An inflexible set of numbers with which the designated employer is required to comply, "come what may" constitutes a quota and would therefore be in breach of s 15(3) of the EEA. By contrast, a plan based on designated groups filling specified percentages of the workforce, but which allowed for deviations therefrom so that there was no absolute bar to present or continued employment or advancement of people who do not fall within a designated group (s 15(4)) would pass legal muster. Similarly, a plan which provides that the numbers provided for in the plan constitute a goal to be achieved over a defined period would be congruent with the EEA.'

Relating this to the merits at hand, the LAC observed that from 2010 to 2013 the DCS had deviated from its plan 13 times in the Western Cape. This fact supported the view that the DCS was not inflexible when implementing the plan and that there was no absolute bar to promotions and appointments as argued by the appellant.

In addressing the argument that the plan violated the right to equity, the court adopted the Constitutional Court test used to decide whether a restitution measure, *in casu* the DCS's plan, violated the equality provision contained in s 9(2) of the Constitution. The test is a three-fold inquiry, which seeks to evaluate whether the measure –

• targets persons or categories of persons who have been disadvantaged by unfair discrimination;

EMPLOYMENT LAW

- is designed to protect or advance such persons or categories of persons; and
- promotes the achievement of equity.

The court was satisfied that the DCS's plan met the first two requirements. In dealing with the third requirement the court acknowledged that it is at this stage that the rights of individuals can be protected and a court is required to balance an individual's right to dignity against the substantive nature of the right to equity. The measure must not 'impose disproportionate burdens ... or impose substantial and undue harm' against those who do not benefit from such measures.

In keeping with the third requirement of the inquiry the court upheld the finding that the failure of the DCS to take into account the regional demographics of the Western Cape meant the plan was not compliant with the EEA and hence unfairly discriminated against the appellants

Section 42 of the EEA obliged the DCS to take into consideration both regional as well as national demographics when implementing an employment equity plan.

The coloured community in the Western Cape made up 50% of the economically active population yet the DCS's plan only allowed 8,8% of its workforce in the Western Cape to be employed from the coloured community. Therefore the implementation of the plan would result in a 'clear infringement on dignity to those who were the very target of Apartheid's racist policies'.

Prior to making this point the court did, however, say that the mere fact that one person from a designated group is advantaged over another person also from a designated group does not in itself lend to an equity plan being contrary to the EEA nor was it axiomatic that under such circumstances, the designated person excluded from the measure would be successful in a claim for unfair discrimination.

The court also rejected the DCS's argument that under the 2014 amendments to the EEA, there was no longer an obligation to consider regional demographics when developing an equity plan (s 42 of the amended EEA replaced the word 'must' with 'may'). In justifying its deci-

sion the court held that it would be difficult to envisage how a plan could pass legal muster without taking into account regional demographics and that a failure to do so would substantively reduce the contribution of restitution towards substantive equality.

On the issue of remedy, given the lack of certain evidence, in particular that certain employees would have been promoted had the DCS's plan taken account of regional demographics, as well as having regard to the lapse in time from when the dispute arose to when the appeal was heard; the court did not grant the relief the employees sought.

Both the appeal and cross appeal were dismissed with no order as to costs.

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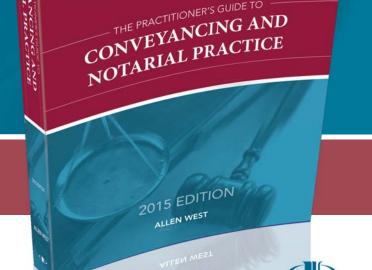


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By Meryl Federl

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Abbreviations:

EL: Employment Law (LexisNexis)
PER: Potchefstroom Electronic Law Journal (North West University)

PLD: Property Law Digest (LexisNexis) SAPL: Southern African Public Law (Unisa)

THRHR: *Tydskrif vir Hedendaagse-Hollandse Reg* (LexisNexis)

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Lawack, VA and Pretorius, JT 'The "sale" of a bank account' (2015) 78.1 *THRHR* 104.

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Sonnekus, JC 'Gebrek aan wetenskap vervlak regspraak tot kasuïstiek' (2015) 2 *TSAR* 405.

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Religious and cultural rights

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Security law

Sonnekus, JC and Schlemmer, EC 'Sameloop van 'n *pactum de non cedendo* sessie in *securitatem debiti* en retensieregte (deel 1)' (2015) 2 *TSAR* 239.

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By Tobie Jordaan

Business rescue plan not published timeously

ection 150(5) of the Companies Act 71 of 2008 (the Act) requires a business rescue practitioner to publish a business rescue plan within 25 days after the date of his or her appointment, or such longer time as may be allowed by the court or the holders of the majority of the creditors voting interests.

Sections 151 and 152 of the Act require the business rescue plan to then be considered, and possibly adopted, by creditors and holders of recognised voting interests at a meeting convened for such purpose. The further implementation and success or otherwise of a company's business rescue proceedings are dependent on the approval or rejection of the business rescue plan.

What happens, however, when a business rescue plan is not published timeously? This question is particularly pertinent as the Act does not specify the consequence of a failure to publish a business rescue plan timeously.

Until recently, the leading case dealing with the consequences of a failure to publish a business rescue plan within the prescribed or allowed time period was that of Gorven J in the *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* [2014] 1 All SA 173 (KZP). Gorven J held that the Act's silence on this score constituted 'yet another drafting *lacuna*'.

After considering the trespass on creditor's rights when a company places itself under voluntary business rescue, Gorven J was of the opinion that the failure to publish a plan within the given or extended period resulted in the termination of the business rescue proceedings. He stated that even if he was wrong, one of three further consequences followed:

- a practitioner could file a notice of termination of the business rescue proceedings in terms of s 132(2)(*b*):
- an 'affected person' would be entitled to bring an application under s 130(1) on the basis that it would be just and equitable for the resolution placing the

company under business rescue to be set aside; or

• application could be made for the setting aside of the resolution under s 130(2)(*a*).

In terms of s 132(2) of the Act, business rescue proceedings end when the court sets aside a resolution or court order commencing business rescue proceedings, converted the proceedings to liquidation proceedings, the practitioner has filed a notice of termination of proceedings or where a business rescue plan has been adopted.

Gorven J's decision was, however, not followed in the recent decision of *Shoprite Checkers (Pty) Ltd v Berry Plum Retailers CC and Others* (GNP) (unreported case no 47327/2014, 11-3-2015) (Tuchten J).

In the *Shoprite Checkers* matter, Tuchten J found that failure to publish a business rescue plan within the prescribed or allowed period did not result in an automatic termination of the business rescue process.

Tuchten J further found that if the legislator's intention was to provide for a termination of the business rescue process on the failure to timeously publish a business rescue plan, an express provision to that effect would have been included in the Act. Tuchten J held that creditors are not left entirely without remedy as the Act provides for the consent by the holders of the majority of the creditors voting interests to be obtained for an extension of the time frames in which to publish the business rescue plan. The extension must be approved or allowed by the holders of the majority of the creditors voting interests.

As an aside, in *DH Brothers*, Gorven J held that such an extension could only be granted on due notice of a request for the extension and then at a formal meeting of creditors and other affected persons. Lazarus AJ, in the recent decision of *Absa Bank Ltd v Golden Dividend* 339 (*Pty*) *Ltd* (GNP) (unreported case no

70637/13, 19-12-2015) (Lazarus AJ), disagreed. Lazarus AJ found that the Act does not expressly require a meeting to be held to extend the time periods for the publication of the business rescue plan.

It appears that despite the introduction of 'business rescue' to the South African corporate landscape years ago, even more loopholes are being discovered and creditors are left with more questions than answers. It unfortunately, furthermore appears that judicial harmony is still to be reached in respect of certain key aspects of the Act, pertaining to business rescue; most particularly those pertaining to the consequences of a failure to timeously publish a business rescue plan and the manner and form in which the prescribed publication period can be extended. It is hoped that an appeal court can settle these uncertainties sooner rather than later.

Creditors are advised to protect themselves in the interim by being diligent and vigilant in protecting their rights by ensuring that the business rescue practitioner timeously meets his or her obligations. If creditors believe that a company's placing itself under voluntary business rescue is simply a strategy to delay and frustrate creditors or that the prescribed time periods for the publication of a business rescue plan have not been met, creditors can and should approach a court to set aside the resolution placing the company under business rescue. Consideration should at the same time be given to seeking an order for winding-up the company. As an alternative to winding-up the company, and if a creditor holds security over the assets of the company, the creditor may wish to first exercise its rights, and secure its position, in this regard.

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