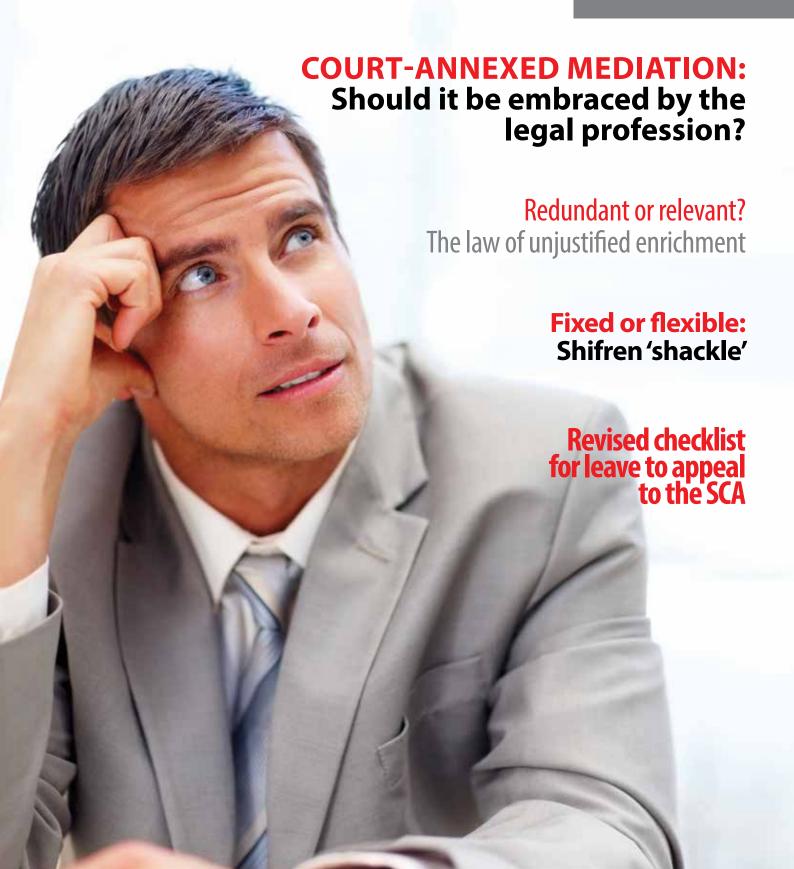


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THE SA ATTORNEYS' JOURNAL

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t first glance, the legal practitioner might view courtannexed mediation with scepticism, if not finding the idea questionable that the intended mediation may prove to be beneficial to all concerned. Indeed many may feel mediation is a waste of time and rarely utilised successfully and the process of mediation can become a legal ornament if people do not buy into the process. In this article, **Benjamin Charles van der Berg** explores the nature of mediation and the potential benefits thereof.

28 Mediation: A perfect solution to health care disputes

outh African health care disputes resulting in litigation are dramatically increasing. Not only the number, but also the sizes of medical malpractice claims have increased. Health care disputes and following litigation do not only pose huge financial risks, but are usually emotionally loaded as patients feel humiliated, angry, frustrated and hurt, over and above the financial damages they might have suffered. In her article, Marietjie Botes discusses why mediation is tailor made for health care disputes.

32 Fixed or flexible: Shifren 'shackle'

The Shifren principle came about in the Appellate decision of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A). There are various arguments for and against the Shifren principle. Recent developments in the law has seen courts loosening the Shifren 'shackle' on some agreements through the application of public policy. In her article, **Anye Jansen van Rensburg** discusses the three most recent cases where the courts have refused to enforce a non-variation clause on the basis that it was against public policy.

36 Redundant or relevant? The law of unjustified enrichment

Injustified enrichment and the action of the unauthorised administrator are legal principles that have become redundant in our law, as opposed to legal doctrines capable of survival. Nokubonga Fakude discusses how unjustified enrichment, for practical purposes, should not be recognised as an independent cause of action, separate from the law of contract and the law delict and, in certain circumstances, criminal law and property law and why the actio negotiorum gestio has no place in South African law.

EDITOR:

Mapula Thebe
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:

Kathleen Kriel – BTech (Journ) (TUT)

NEWS EDITOR: Nomfundo Manyathi-Jele –

NDip Journ (DUT) BTech (Journ)(TUT)

SUB-EDITOR:

Kevin O'Reilly – MA (NMMU)

Isabel Janse van Vuren – BIS Publishing (Hons) (UP)

SUB-EDITOR:

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Danie Olivier (Chairperson), Peter Horn, Mohamed Randera, Lutendo Sigogo

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria. Tel
(012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

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Contact: lan Wright • Tel (011) 305 7340 • Fax (011) 241 3040 Cell: 082 574 6979 • E-mail: lanW@ince.co.za

Classifieds supplement: Contact: Isabel Janse van Vuren Tel (012) 366 8800 • Fax (012) 362 0969 PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela Tel (012) 366 8800 E-mail: david@lssa.org.za

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Exciting times ahead

pulsory

n the next few months, De Rebus will be embarking on a process of redesigning its website so that it can be accessible on all platforms including tablets and smartphones. Readers will be able to bookmark the website on their devices to access it as an application. De Rebus wants to have frequent and current interaction with its readers: therefore the website will be updated regularly to give readers up-to-date information on the happenings of the legal profession.

The new website will have a powerful search functionality where readers can search for key phrases and have access to a database of articles published in the journal that dates back to 1998. Articles on our new website will also be searchable via any search engine, which is not the case on our current website.

The website will be user friendly as we want to encourage readers to visit the website frequently. Readers will be asked to register on the website so that they can update their information and be able to save articles they want to read at a later stage on the website's dashboard. This exiting digital move will also assist *De Rebus* in future so that it can be used as a tool for continuing professional development (CPD).

Chapter 2 s 6(5)(*e*) and (*h*) of the Legal Practice Act 28 of 2014 (LPA) states that:

'6 (5) The Council, with regard to education in law and legal practice generally – (e) may determine, after consultation with relevant roleplayers and legal practitioners in general, conditions relating to the nature and extent of continuing education and training, including com-

... (h) must report annually to the Minister on –

professional development;

post-qualification

(iii) measures adopted to enhance entry into the profession, including the remuneration of candidate legal practitioners and continuing legal education to develop skills of legal practitioners.'

During the LPA era, CPD as a form of continuing legal education and training will form part of the mandate of the Legal Practice Council. Legal practitioners will be able to use De Rebus as a platform to accumulate CPD points. For example, practitioners can meet their CPD requirements by sending articles to the journal or reading articles and being tested on the articles they have read. That is where the importance of the new website comes in, practitioners will be able to send and read articles on the website, which will be tracked. De Rebus questionnaires on articles can also be available on the website.



NOTICE:

De Rebus experienced server difficulties over the past month and would like to apologise for any inconvenience caused during this time.

If you did contact us and did not receive a reply from the staff, please resend the e-mail to us at derebus@derebus.org. za

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 April and 18 May 2015.

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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.

The challenge is not on one

An alarm has been raised on the quality, or lack thereof, of newly qualified legal practitioners. The general consensus among experienced legal practitioners seems to suggest that the current LLB degree is not working. Hence the need to have the curriculum revised. Wits University became the first institution to 'rectify the defect' by restructuring the curriculum. I did not hear any reaction to this from the already qualified and practicing legal practitioners. For a person to qualify for an admission to an LLB degree, he or she should first complete an undergraduate degree. The LLB degree is now a postgraduate degree and takes two years to complete. The duration for both BCom Law and BA Law degrees is three years. Understandably, Wits listened to the concerns from members of the profession. Considering the provisions of s 26 of the Legal Practice Act 28 of 2014 a person aspiring to become a legal practitioner will (at Wits) first have to spend five years studying (ie, three years for BCom Law or BA Law and two years for an LLB), six months at the School for Legal Practice (which is optional) and one or two years of serving articles.

The lengthening of the period to qual-

ify as a legal practitioner will definitely have financial implications. It will now be more expensive to become a legal practitioner, which some are not going to afford. Unlike qualifications in other fields of practice, there might not be many bursaries available for law students. If all institutions were to follow the same route as Wits, the likelihood is that there will be less people from historically disadvantaged backgrounds qualifying as legal practitioners. It was for this reason that the degree was shortened in the first instance.

One wonders if there are any other cheaper options out there to improve the quality of newly qualified legal practitioners. How about law firms and members of the Bar suggesting a uniform curriculum for the LLB degree for all institutions? Will it make a difference if law firms and members of the Bar were to make it part of their social responsibility to dedicate part of their time to having workshops with law students and lecturers at the institutions with the objective of closing the gap between the theory taught at the institutions and how things are actually done in the practice of law? It surely cannot be left entirely to the institutions to determine a proper way of improving the quality of Legal Practitioners. All stakeholders involved should not be silent on this issue. The situation should be treated with the urgency it deserves.

Matimba Hlungwane, attorney, Johannesburg

Response from Legal Education and Development

I understand the concern of the writer. Access to the profession and a high standard of tuition to all are priorities for consideration of a new dispensation. In 2014, the Council on Higher Education (CHE) launched a review of the standards for the LLB. Consultation took place widely and the attorneys' profession made substantial input. In addition, the profession is actively involved in a task team with law deans, lecturers and other stakeholders who are looking at the issues that are raised by the writer.

The draft that serves before the CHE at the moment sets clear expectations with regard to the future curriculum.

No decision has been made with regard to the structure of the LLB, in fact I am aware that there are different views on the issue. The debate will continue, the impact on accessibility, financial in particular, will be a crucial factor.



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The profession responded to the Wits decision, in fact, it engaged at national level with stakeholders and participated in a television debate on the issue.

The Wits degree, to the best of my knowledge, will not be a post-graduate degree. It is intended as a second degree. I am advised that the roll out is under consideration, *inter alia*, the issue of accessibility and the position of current students. Continuation must obviously take place in accordance with requirements of the Department of Higher Education.

In terms of the Legal Practice Act 28 of 2014 (LPA), the future Legal Practice Council will have the power to contribute to the quality of the degree, on the same basis as currently allowed in terms Higher Education Act 101 of 1997.

The writer is correct in his plea for practitioners to be more involved. This will depend on faculty needs and practitioners' availability and keenness to participate in academic programmes.

I am not of the view that the LPA is prescribing a longer academic programme. However, if a person has another, appropriate degree, then the LLB must be completed in not less than two years. It does not require another 'first' degree before or in addition to the LLB.

The elements for vocational practical training (s 26) must still be determined during the transitional process.

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

How the RAF settles claims – the issue is broader than we may assume

I cannot help but agree with my colleague Leslie Kobrin (How the RAF settles claims 2015 (Jan/Feb) DR 5) on the manner in which the Road Accident Fund (RAF) tends to settle claims at the very last moment. This waste of taxpayers' money also extends to other tax funded institutions that, by lack of timeous resolution of matters under litigation, tend to wait until the very last moment before conceding to certain obvious legal principles and facts.

This practice unfortunately also extends to the office of the State Attorney and other similar institutions. In my

view the practice emanates from lack of intensive training in assessment of legal issues and laxity in applying ones legal mind to the facts in issue. These institutions employ qualified professionals who are expected to be versed in legal intricacies. Secondly, the panel of attorneys who represent these institutions cannot hide behind the veil of lack of instructions.

With the recent introduction of courtannexed mediation in the magistrate's courts, I am waiting expectantly to see if these institutions will take the bait and be the first to utilise this progressive process.

Since these concerns have arisen on a number of occasions from time immemorial, as a way forward, I would suggest that a forum constituting, among others, practising attorneys, costs consultants, the RAF, the office of the State Attorney, the Passenger Rail Agency of South Africa, etcetera be convened to which concerns of this nature can be forwarded and addressed.

Andries Nthebe, attorney, Leondale

Book announcements

Employment Rights
By John Grogan
Cape Town: Juta
(2014) 2nd edition
Price: R 545 (incl VAT)
376 pages (soft cover)



General Principles of Commercial Law

By Heinrich Schulze, Roshana Kelbrick, Tukishi Manamela, Philip Stoop, Ernest Manamela, Eddie Hurter, Boaz Masuku and Chrizell Stoop Cape Town: Juta (2015) 8th edition Price: R 520 (incl VAT) 554 pages (soft cover)



Perspectives on the Law of Partnership in South
Africa

By JJ Henning Cape Town: Juta (2014) 1st edition Price: R 495 (incl VAT) 294 pages (soft cover)



For further inquiries regarding the books on the book announcements page, please contact the publisher of the book.

All the books on this page are available to purchase from the publisher.

Gumede, Fischer and Omar fondly remembered at NADEL AGM

he National Association of Democratic Lawyers (NA-DEL) held its national conference and annual general meeting (AGM) at the end of February. The AGM was held in Cape Town from 27 February to 1 March.

Delegates at the AGM included chairperson of the portfolio committee on Justice and Correctional Services, Doctor Mathole Motshekga, retired Justice of the Constitutional Court, Zak Yacoob, Judge in the Western Cape High Court, Vincent Saldanha, Cuban Ambassador to South Africa, Carlos Cossio and NADEL honorary member, Silas Nkanunu, who has only missed one NADEL conference since 1988 to date.

The theme for this year's AGM was 'NADEL being part of civil society is separate from state and business institutions – A crisis of conscience within its ranks'. The ninth annual Dullah Omar Memorial Lecture Dinner was also held on 28 February.

In his opening address NADEL President, Max Boqwana, spoke about NADEL's relationship with Cuba. He also made a special call to the Swaziland courts and government on the matter involving the arrests of human rights lawyer, Thulani Maseko, and the editor of monthly publication, *The Nation* magazine, Bheki Makhubu, for articles published in the February and March 2014 editions of the magazine (see 2014 (May) *DR* 15; 2014 (Aug) *DR* 16; and 2014 (Sept) *DR* 15).

The two were arrested after the magazine published a report questioning the detention of a government vehicle inspector, Bhantshana Gwebu, who was detained for nine days without being charged. The articles criticised the arrest as an abuse of authority and a lack of impartiality of the Swazi judicial system. The article written by Mr Makhubu appeared in the February issue of *The Nation*, which did not receive much attention, and the one by Mr Maseko, which dealt with the same issue but provided a breakdown of the legal issues involved and was published in March.

Mr Maseko and Mr Makhubu are still in jail, their matter will go on appeal soon.

Mr Boqwana noted that South Africa has achieved much to be proud of. He added that the legal constitutional system was stable, but that the country had become more divided. 'There is a great divide between the haves and the havenots,' he said. He asked what needed to be done and said that NADEL's immedi-



NADEL honorarium member, Silas Nkanunu and retired state attorney and national executive committee member of NADEL, Krish Govender, gave a dialogue on the life and times of NADEL co-founder and former Justice Minister, Dullah Omar, at the ninth annual Dullah Omar Memorial Lecture Dinner held in Cape Town during the NADEL AGM.

ate tasks were many but that one of them was to renew and build the organisation.

'What has become our mission as lawvers and NADEL today and what has become our immediate task?' asked Mr Boqwana. He said that as lawyers, the first answer to this question stems from the preamble of the Constitution, which states that our duty is to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

According to Mr Boqwana, NADEL needed to renew and rebuild itself. He said that at age 27, Nadel was wobbly and was not sure whether or not it had come of age.

Mr Boqwana said that there was a need to engage with government. He said that the Legal Practice Act 28 of 2014 (LPA) has been promulgated adding that the LPA still had more questions than answers. 'It has more issues that are not so clear than where we are supposed to be going. It is one of those issues where we have not been provided with leadership

from government. We have been tethering alone as the legal profession and being confused amongst ourselves and there has not been proper direction as to where this country is going in terms of the legal profession,' he said.

According to Mr Boqwana, 90 years later South Africa is still operating purely on the Peace Treaty of Vereeniging of 1902 adding that the current Constitution was being ignored. This treaty was the peace treaty, signed on 31 May 1902. The treaty ended the Second Boer War between the South African Republic and the Republic of the Orange Free State, on the one side, and the British Empire on the other.

This settlement provided for the end of hostilities and eventual self-government to the Transvaal (South African Republic) and the Orange Free State as colonies of the British Empire. The Boer republics agreed to come under the sovereignty of the British Crown and the British government agreed on various details. 'It is a horrible indictment to us as South Africans and it is urgent that we must take this matter forward,' he said.

Mr Boqwana said that NADEL understands the complaint of the lack of pool of black and women lawyers. He said NADEL must do something radical about that. He suggested that NADEL should identify eight women lawyers and every Saturday it avails judges to train them.

'We have done this in the past and it is amazing that from that core, four of them are now justices of the Supreme Court of Appeal. We need to keep this project and progress because there is no longer an excuse why we do not have a pool of black and women lawyers. It is our responsibility as NADEL, together with judge presidents to do this. The training of young lawyers is also important that is why it is inexcusable that we do not have a training coordinator but have training funds,' he said.

Mr Boqwana concluded by saying that the Attorneys Development Fund (ADF) is there to assist young lawyers to start up their practice. He added that failure of them to not contact the ADF to start up their practices is purely because of their own lack of will. He added that lawyers should work side by side and not against one another.

Doctor Motshekga, who is one of the founding members of NADEL, said that while there is NADEL, that South Africa still had unfinished business as it had to create a national democratic lawyers movement that incorporates all lawyers in the country regardless of race. He added that there were many great Afrikaners that were part of our struggle and made an example of Bram Fischer, adding that there were some progressive, enlightened Afrikaner lawyers that NADEL should identify and form a new lawyer's movement with. 'The type of society we want to see is not a different society there is call for the creation of a united democratic nonracial, nonsexist democratic society that represents every citizen of the country,' he said.

Dr Motshekga said that the Constitution recognises common law, Roman Dutch law, indigenous African law/customary law but that when one goes to the universities, one finds that all lawyers are taught on Roman Dutch law. English common law and are not taught in African law. He added that this did not make sense as most of the people to whom the law apprise are indigenous African people, 'The judges that handle the cases will have information on Roman Dutch law but will not take into account the living law of the majority of African people. There is something wrong with the legal education in the country,' he said.

Dr Motshekga concluded by saying that lawyers cannot act alone in fighting racism, and inequality. He said that NADEL was too quiet where its voice is required.

Retired state attorney and national executive committee member of NADEL, Krish Govender, spoke on the route of NADEL to this point. He said that lawyers cannot say that society has to abide by the rule of law and leave it like that and think the rule of law is going to guide at-



Farieda Omar, wife of the former NADEL co-founder and former Justice Minister, Dullah Omar at the ninth annual Dullah Omar Memorial Lecture Dinner held in Cape Town during the NADEL AGM.

torneys in doing the right thing.

He added that the rule of law is something that attorneys must subscribe to. 'If we live it in all the things that we do, then it will be easy to follow,' he said.

There was a common view from Doctor Motshekga, Mr Boqwana and Mr Mabunda that there is no need for NADEL and the BLA to continue to operate as two distinct organisations.

Mr Govender noted that when we say we should make changes to the Constitution that we should do it and feel free to do so. 'I know it is not easy to amend the Constitution and no one is saying we should amend the Constitution according to whichever president is in power but the Constitution is a document that we can mould out and make a living document when there are problems experienced and mistakes that we see happen. If under one president nothing seriously goes wrong we will not know how the Constitution can work for or against us but it takes another person who could be abusing the Constitution and then we will say no hold up, let us change the Constitution,' he said.

Mr Govender said that where there is the ability to manipulate a Constitution or exploit a situation against what is best for the country then the Constitution needed to be looked at. 'The issue of land is a classic example. The land clause in the Bill of Rights was a compromise of the worse kind. It was a compromise to accommodate the economic status quo after 1994,' he said.

Mr Govender said that a true and honest lawyer who acts ethically should never have a relationship with any minister, Member of the Executive Council or the President. 'You cannot have any lawyer who is in business with their family members, or someone in government or the president and at the sametime want to give them advice. How are they going to be pleasing their so called client when they have a relationship with them? It is not unusual to see so many wrong decisions being taken. Cases are being lost. Government officials usually just tell you okay bye bye, I will get me the lawyer who will tell me what I want to hear. That is the culture that is plaguing institutions of government and I speak as a former state attorney,' he said.

Mr Govender said that there were many times that his office, through his actions, was fired as state attorneys and replaced by private lawyers. He added that all the person in power wants is to run a case the way that they want to and probably reduce someone to poverty. He concluded by saying that it was the lawyer's duty to stop this practice.

Justice Yacoob gave a tribute to lawyers and anti-apartheid activists Bram Fischer and Archie Gumede. In his tribute, he reflected on the lessons that NADEL can learn from the two. Justice Yacoob said that both teach that one cannot be a lawyer in a vacuum and that lawyers cannot live by law alone.

Justice Yacoob said that their story tells us that both advocates and attorneys can work together. It tells us that the separation of the bar and side bar is not necessarily a very good thing and that all legal practitioners can be united and should always work together. 'Nadel in a sense of having advocates and attorneys in it and all legal practitioners in a sense embraces what Bram Fischer and Archie Gumede stood for,' he said.

Justice Yacoob said that they both be-



Retired Justice Zak Yacoob giving a tribute to Bram Fischer and Archie Gumede at the recently held NADEL AGM held in Cape Town.

lieved that the law was not necessarily about making money but more importantly about the reality of the relatively poor people in society today.

Justice Yacoob said that both teach that the law can be used for proper purposes and that laws which are not right should not be obeyed. He added that both would have valued the South African Constitution, and that both of them thrived, not as lawyers but thrived in making a contribution to the political arena. They teach us that lawyers cannot live by law alone.

Justice Yacoob said that there is political reality out there and unless lawyers are prepared to get their hands dirty and are prepared to make their contribution in changing that political reality lawyers in the country are not going to go anywhere.

Mr Saldanha reflected on national discourse that NADEL should be dealing with. He recited a poem about being a Somalian and asked why NADEL was not vocal about condemning xenophobia.

Ambassador Cossio gave the latest developments in Cuba. He said that the

release of all of the Cuban Five was a victory for justice and for international solidarity.

The Cuban Five will be visiting South Africa on 26 June 2015. Their itinerary will be finalised in the next month. Before going to print, all arrangements for the visit were due to be finalised by the end of March.

Nomfundo Manyathi-Jele nomfundo@derebus.org.za

New Sheriff's Board appointed

he Minister of Justice and Constitutional Development, Michael Masutha, has appointed 11 members to serve on the newly constituted South African Board of Sheriffs. The term of office of the new board commenced on 2 March 2015 and it is for a period of three years.

According to the Justice Department, the new board is broadly representative in respect of race, gender and geographical composition. The board comprises six male and five female members from various provinces in the country. The new board members are:

Thamsanga Tembe

Mr Tembe is a practicing attorney and holds a BProc degree from the University of KwaZulu-Natal. He was admitted as an attorney in 1998 and as a conveyancer in 2001. Mr Tembe is a member of the outgoing board and has been nominated by the Law Society of South Africa to continue to serve as its representative.

Lesiba Mashapa

Mr Mashapa has 14 years' experience in the legal profession, which includes, *inter alia*, lecturing, practising for his own account and working as a legal adviser with the National Credit Regulator. He holds a BProc (*cum laude*) and LLB degree from the University of Pretoria.

Professor Lovell Fernandez

Professor Fernandez is a professor in the Department of Criminal Justice at the University of the Western Cape (UWC). He holds Bachelor of Arts and Bachelor of Laws degrees from UWC, a Masters in Comparative Law from New York University and a Doctorate in Philosophy (Law) from the University of Witwatersrand. He is currently the UWC director of the LLM programme on Transitional Criminal Justice and Crime Prevention. During 1996 he was the legal adviser to the then Minister of Justice, Dullah Omar.

Meko Magida

Mr Magida holds BProc (University of the Western Cape) and LLB (University of South Africa (Unisa)) degrees and is completing his final year in LLM (Unisa) this year. He served as a commissioner for Employment Equity (appointed to advise the Minister of Labour) and was a member of a Statutory Commission appointed to investigate allegations of poor service delivery and maladministration at the Oudtshoorn Municipality.

Nomakhosi Skosana

Ms Skosana holds a BCom in accounting. She has extensive information and communications technology industry experience at strategic and operational general management in Africa, having also ventured into the banking and broadcasting space. She has finance, governance, strategy and general management expertise

Charmaine Mabuza

Ms Mabuza is the chairperson of the board. She was one of the first black woman sheriffs appointed during 2002 as the sheriff for the Nelspruit High Court (Mpumalanga) and subsequently thereafter as sheriff for the lower court. She was first appointed to the South African Board for Sheriffs in 2006 and for a second term in 2009, when she served as deputy chairperson of the board. She was appointed in 2012 as the chairperson of the board.

Petro Roodt

Ms Roodt is a member of the outgoing board and was nominated by the South African Sheriff Society. She has been involved with the sheriffs' profession since 1992. Ms Roodt was previously the office manager and deputy sheriff in the office of the sheriff for Vereeniging. Thereafter, she was appointed as the sheriff for Sasolburg during July 2005 and is cur-

rently the sheriff for Bloemfontein East High and lower courts in the Free State. She holds a National Diploma in Civil Law Administration from the University of South Africa and various certificates for courses in sheriffing.

NomaJwara Victoria Soga

Ms Soga has been in the profession since 1993 when she started off as a messenger in the King Williams Town Sheriff Office and later as a deputy sheriff. She was appointed as the sheriff for Alice during November 2002 and, with effect from 1 December 2012, she was appointed as the sheriff of Port Elizabeth West. She was also an acting sheriff for Fort Beaufort, Seymour, Adelaide, Middledrift and Keiskammahoek.

Mmathoto Lephadi

Ms Lephadi has BProc and LLB degrees and was a lecturer at the University of Bophuthatswana for one year. She was previously employed as a state advocate, legal adviser, a family advocate with the Department of Justice and Constitutional Development, Corporate Legal Consultant and later Corporate Legal Secretary for Eskom, Group Company Secretary for Denel (Pty) Ltd, and as the Group Company Secretary at Telkom SA Limited. She has 27 years' experience in the legal field and was appointed as the sheriff for Randburg South West since 1 December 2012.

Ignatius Klynsmith

Mr Klynsmith is a practising attorney at Van Velden – Duffey Attorneys and was appointed as the Sheriff for the Rustenburg High Court Office since 1 July 1981. He has over 30 years' experience in the sheriff profession. Mr Klynsmith was an acting judge in the Gauteng North High Court during 1996, as well as a Member of the Goldstone Commission that investigated the prevention of violence during the 1994 election.

Advocate Hisamodien Mohamed

Advocate Mohamed is the Regional Head of the Department of Justice and Constitutional Development in the Western Cape. He represents the Minister on the current Board for the South African Board for Sheriffs and he is also responsible for the sheriffs' administration at the Justice Department. He holds Blur and LLB degrees and has a Master's in

Public Administration. He was admitted as an advocate in the Western Cape High Court in 1995.

Minister Masutha commended the outgoing board, whose term expired on 28 February, for the significant contribution that it has made in the professionalisation and transformation of the sheriff's industry. Notable achievements include the implementation of the new sheriff's Pledge and Code of Conduct applicable to the industry, which the Justice Depart-

ment said are vital for improving service delivery and renewing public faith in the profession.

Top of the new board's priorities is the publication of the new *Sheriffs Guide: Practice and Procedure*, which is intended to lay the foundation for a uniform approach to service delivery in the sheriff's industry.

• See 2014 (May) DR 11.

Nomfundo Manyathi-Jele nomfundo@derebus.org.za

LSNP to have elections for councillors

he Law Society of the Northern Provinces (LSNP) has rescinded the suspension of r 30.2 and 31 to 43, which relate to the election of councillors. This decision came about after the LSNP convened a special meeting to deal with a number of proposed resolutions. The meeting was held on 26 February in Sandton.

Johannesburg attorney, Anthony Millar, brought three motions for adoption before members of the LSNP.

Motion one

The first motion was a motion to rescind the suspension of rs 30.2 and 31 to 43 and that the LSNP strictly adhere to the rules relating to the elections of councillors and in order to give effect to this motion, that the following consequential amendments are made to the rules –

(a)(i) The deletion of the post-amble to r 20.1.6.2 being the sentence, 'the effect of Rules 31 up to and including Rule 42 is suspended indefinitely';

(ii) the deletion of the reference to the phrase 'Rule 30.1' wherever it appears in rs 31 to 42 (both inclusive) and r 47.3 and its replacement with a reference to 'Rule 30A.1': and

(iii) the amendment of the word 'fourteen' wherever it appears in rs 31 to 42 (both inclusive) to 'twenty-four'.

(b) That the present r 30.2 be amended to substitute the expression – '[An election shall be held in the manner in these rules prescribed] in the year first following upon the year in which these rules are promulgated and in every third year after the year in which the first such election is held provided however that such elections relate only to the 12 council members appointed in terms of Rules 30A.1.1 to 30A1.4 (both inclusive) specifically excluding the Black Lawyers Association and the National Association of Democratic Lawyers council members'.



Pretoria attorney, Anthony Millar, brought three motions before members of the Law Society of the Northern Provinces recently relating to the election of councillors.

With the expression: '[B]y no later than 30 May 2015, in the third year following such general election and thereafter in every third year.'

Mr Millar motivated this motion by saying that the statutory constituent of the LSNP, unlike the Black Lawyers Association (BLA) the National Association of Democratic Lawyers (NADEL) constituents, has had approximately one election in the last 20 years. He added that this was not democratic and did not allow new ideas and a more energetic approach by the council to its affairs. 'It cannot be said that in the absence of regular elections, that the views of the council represent those of the members', he said.

Motion two

That the LSNP -

(i) removes the indefinite suspension of the existing r 47.3; and

(ii) adopts the following new r 47.4:

'47.4 In the event of a vacancy arising in the Council on the statutory component of the Society, the position shall be filled firstly with reference to the election results of unsuccessful candidates during the election immediately preceding such vacancy who are then still available and eligible in descending order of votes obtained. In the absence of such candidates, the statutory component of the Council, sitting as a caucus, shall fill such vacancy in consultation with any active attorneys association in the area, in the manner determined by it'.

To motivate this motion Mr Millar said that the current rule provides that the council may select replacements. He said that this was undemocratic as it ignores the will of the LSNP members. Mr Millar said that he saw this way as the most appropriate one to deal with this matter.

Motion three

That the following rules be amended as stated below:

(i) Rule 30A.1.1 by replacing the word 'three' with the word 'five'.

(ii) Rule 30A.1.2 by replacing the word 'two' with the word 'three'.

(iii) Rule 30A.1.4 by replacing the word 'two' with the word 'one'.

And in order to give effect to this motion, as well as the motions 3(i) and 3(ii), that the following consequential amendments are made to the rules:

 $3.1\,$ by amending the word 'eight' in r~33.5.1 to 'nine'.

3.2 by amending the word 'six' in r 33.5.1 to 'seven'.

3.3 by amending the words 'two names' in r 33.5.1 to 'one name'.

 $3.4\,$ by amending the word 'eight' in r 33.5.7 to 'nine'.

3.5 by amending the word 'six' in $r\ 33.5.7$ to 'seven'.

 $3.6\,$ by amending the word 'two' in r 33.5.7 to 'one'.

3.7 by amending the word 'eight' in r 38.1 to 'nine'.

3.8 by amending the word 'two' in r 38.2 to 'one'.

3.9 by amending the word 'eight' in $r\ 38.4$ to 'nine'.

3.10 by amending the word 'four' in $r\ 38.4$ to 'three'.

To motivate this motion, Mr Millar said that the biggest number of non-BLA and non-NADEL members forming the statutory component of the LSNP practice in Johannesburg and Pretoria. He said that in terms of the current dispensation, councillors practicing in these areas effectively represent approximately 1 000 attorneys each, whereas statutory component attorneys practicing in the three smaller provinces represent approximately five attorneys each. 'This skewing of law society representation is not democratic and accordingly we propose that the figures must be adapted to more accurately reflect the demographics of the profession and to allow those areas, with a far greater concentration of attorneys, more representation and input in the affairs of the LSNP,' he said.

Although most of the members were for the motions, Mr Millar was faced with some strong opposition. Some members said that the motion could not go through because one could not just change the rules of the law society while others argued that bringing back elections was going against the rules of the LSNP. One of the council members said that members had no right to just summon up members and demand for rules to be changed.

The president of the LSNP, Strike Madiba said that council cannot just shun its members. He said that council had a duty to comply and listen to its members.

Mr Millar said that BLA and NADEL choose their representatives on a regular basis, and questioned why other members could not do so as well. 'What about those members who joined the profession after this agreement was made? They did not agree to this,' he said. 'The composition of the profession has changed significantly since 1994 and at



Law Society of the Northern Provinces (LSNP) president, Strike Madiba, at a special meeting of the LSNP held in Sandton recently where members voted to rescind the suspension of rules 30 (2) and 31 to 43 which relate to the election of councillors.

least half of the members who are currently practicing were admitted after that date. This means that at least 50% of the members have never had the privilege of participating in a vote ... It is a shame that none of them can claim to represent or to have been chosen to represent the members who are practicing today,' he said.

One member said that the decision to suspend elections was never meant to be a position for life. He said that it is time to move on, the law changes, practice changes. 'The statutory members must have a voice and must elect those people that they feel will best represent them, it is called democracy. It has been accommodated before, in 2003 elections took place, a vote against elections shames us,' he said.

BLA president, Busani Mabunda said that LSNP members are being denied a right to voice out their views. He said that there is currently a lack of internal democracy. 'The decision to do away with elections was for political reasons. The KwaZulu-Natal Law Society, Law

Society of the Free State and the Cape Law Society all have elections. The LSNP is the only law society without. Council members are supposed to represent the aspirations and will of the people and LSNP members are being aggrieved by not being heard,' he said.

One member argued that the reason why elections were suspended was so that the current council members stay in power to negotiate the Legal Practice Act 28 of 2014 (LPA). He argued that the LPA had now been passed so the basis of the council members staying as is, has fallen away. This was met with a counter argument as another member said that the LPA negotiations are still ongoing and that this warranted that the council stays the same.

One of the younger attorneys urged members not to make an emotional decision but to think it through. He said that if members are allowed to vote for all council members including the statutory members, there would be no black attorneys on council. 'There are 12 711 attorneys of which 8 000 and something are white. The white votes will overpower the vote for black council members,' he said.

Another member said that this council took a decision 20 years ago to suspend the rules. So, this council can take a decision to uplift that suspension. 'We are not asking for anything that is not provided for in the rules or that has not happened before or has not been accommodated before,' he said.

The final results were as follows:

	In favour	Against
Motion one	311	25
Motion two	307	14
Motion three	297	23

Nomfundo Manyathi-Jele nomfundo@derebus.org.za

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he Justice Department officially launched the court-annexed mediation in Mahikeng on 16 February.

The mediation service provides an alternative dispute resolution mechanism that allows for negotiated settlement between parties and alleviates litigation costs. When there is a dispute between parties, a mediator will facilitate discussions between them, assist in identifying issues and explore areas of compromise at a cheaper and fixed tariff.

At the launch, Justice Minister Michael Masutha explained that during the pilot phase of the programme, the focus will mainly be on civil and family disputes. Over time, the Justice Department will develop a legislative framework for the effective use of alternative dispute resolution for the resolution of certain criminal cases where appropriate.

During the pilot phase, mediation will be voluntary and the focus will be on disputes that fall under the jurisdiction of the district and regional courts, which are up to R 200 000 and R 400 000 respectively. However, the Magistrates' Courts Act 32 of 1944 permits that parties may consent to a higher jurisdiction beyond the prescribed limits. 'It is our hope that the pilot will culminate into a more rigid process whereby mediation could be compulsory and may extend to the disputes that fall within the jurisdiction of the High Courts,' Minister Masutha said.

'The overly regulated civil justice system coupled with the challenges facing the case flow management system contributes to the clogging of the court system. The average period for the finalisation of an opposed civil matter is two and a half years. In respect of Mahikeng districts it implies that the courts will only be able to process an average of 650 of the 2 576 civil and family law disputes registered between April and December 2014, thus leaving a balance of over 1 900 of the case backlog. The situation is dire in courts such as Johannesburg where on average 60 000 cases are registered on the court rolls every year,' said Minister Masutha.

Minister Masutha said that the courtannexed mediation will also enable government to cut its 'huge litigation bill by diverting claims against the state to mediation.' He added that he will soon submit to Cabinet, a policy framework to facilitate the diversion of claims against the state to mediation across all spheres of government.

Mediators can be chosen from a panel of accredited mediators appointed by Minister Masutha. As of 6 March 2015, there was a total of 233 mediators. The names of the accredited mediators across various sectors, including the level of accreditation is available at www.justice. gov.za/mediation/MediatorsList.pdf.

Court-annexed mediation officially launched

Further names will be added as the advisory committee approves new applications. Applications from mediators in other provinces will be considered at a later stage, as the project is rolled out.

Court-annexed mediation step by step procedure

1 Go to the office of the mediation clerk at the court. Explain your problem to the clerk.

 $2 \hbox{ If mediation is possible, the clerk will } \\ assist you to fill in an application \\ form.$

3 The clerk will invite you and the other party to come to a meeting to discuss an agreement to mediate. At this meeting, the clerk will explain mediation. The parties sign a written agreement to mediate. The clerk will assist the parties to choose a mediator. The date and time of mediation will be agreed and fees paid according to a fixed tariff and shared equally by both parties.

The mediator and parties meet on a suitable date for a mediation session. The mediator explains the mediation rules and procedures. Each party tells their story. The mediator may ask questions. The mediator suggests solutions. Parties discuss what the best solution is.

An agreement is reached by the parties. The mediator helps parties to write an agreement. The agreement may be made an order of court if the parties

wish to do so.

According to *Government Gazette* (GN 854 *GG*38163/31-10-2014), the mediator's tariff of fees is as follows:

Perusal of documents, per page R 22 for a level 1 mediator and R 22 for level 2.

2 For every half hour or part thereof spent in mediation with parties or litigants to the dispute: Or any necessary witness R 225 and R 300 respectively.

3 Preparation of a report in terms of r 80(2), per hour R 450 and R 600.

4 Travelling from usual place of business to the mediation venue, per kilometre R 3 for both levels.

(a) The fee in item (2) above for a single mediation shall be subject to a maximum fee per day of:

(i) R 4 500 for a level 1 mediator; and (ii) R 6 000 for a level 2 mediator.

(b) The fee in item (3) above shall be subject to a maximum fee of:

(i) R 1 350 for a level 1 mediator; and (ii) R 1 800 for a level 2 mediator. According to the Justice Department, the following are frequently asked questions among others:

Will the mediator be a lawyer?

Not necessarily. Many mediators are lawyers, which has the advantage that both parties can be informed what the law is relative to their dispute. Often mediators are experts from other professions, for instance engineers are often mediators in building construction disputes. Family disputes are often mediated by social workers or psychologists.

Will the mediator tell the parties who is right and who is wrong?

No, a mediator does not judge the parties or tell them what the solution to their dispute is. It is for them to find a solution that meets their needs and interests. The task of the mediator is to assist them to do this. The mediator will help them to identify the real issues and explore different options for resolving those issues. The mediator assists them, using skills acquired through training and experience, to diffuse conflict and explore options for settlement. If the parties reach an agreement the mediator will assist them to draft a settlement agreement. The settlement agreement is enforceable in law as a contract. It can be given additional strength by having it made an order of court, if the parties agree to this. If the parties are unable to settle their dispute through mediation then they may still resort to litigation and adjudication.

Can mediation be used where litigation has already commenced?

Yes, mediation can take place prior to litigation being commenced or during litigation, at any time before a judgment has been given. The parties can agree to refer to mediation or one party can request the clerk or registrar of the court to convene a meeting for the purpose of determining whether the matter should be submitted to mediation. The courtannexed mediation rules also provide that during the hearing of a matter a judicial officer can enquire whether the matter should be referred to mediation and give the parties an opportunity to consider this in consultation with the clerk or registrar.

How long does the process of mediation take?

Simple disputes can often be resolved

within a few days. More complex disputes may take a few weeks.

What happens in an event where mediation has resulted in a positive outcome, but one of the parties later fails to comply with their agreement?

If the agreement has been made an order of the court then it can be enforced

through the Sheriff of the court in the same way as any order of a civil court. If it has not been made an order of the court, then it is enforceable in the law in the same way as any other legal binding agreement.

Mediation is voluntary and a party may withdraw at any stage.

For more information contact the

court-annexed mediation Project Office at –

- Tel: (012) 315 4615/6
- E-mail: mediation@justice.gov.za
- See 24 and 28.

Nomfundo Manyathi-Jele nomfundo@derebus.org.za

Combatting corruption in the SADC

The Southern Africa Development Community (SADC) is made up of Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The SADC Lawyers' Association is a regional voluntary lawyers' association tasked with advancing and promoting human rights, the rule of law, democracy and good governance in the SADC region and beyond. For more information on how to become an individual member and get involved in our crucial work, please visit www.sadcla.org

he SADC Lawyers' Association hosted a workshop late last year to highlight and discuss research into the implementation of the SADC Protocol against corruption by member states. Participants included lawyers from all over southern Africa and representatives from trade unions and non-governmental organisations. Corruption was described as a 'chronic disease' in the region by one of the participants and no country had been spared its negative impact, with corruption causing problems such as denying school children text books to presidents benefitting from multi-million dollar business deals. The problem of corruption persists despite numerous initiatives at the international, regional and domestic level to combat the problem. The purpose of the study was to determine the state of implementation of compliance with the Protocol including the implementation of legislation and policy at the domestic level, the efficacy of national anti-corruption institutions and the effectiveness of the Protocol in curbing challenges such as illicit financial flows. A point was made during the workshop that lawyers have the 'inclination to want to change the law', however, at present there are many treaties and mechanisms available and there is the possibility to work within the framework, which already exists. It is the duty of lawyers, to familiarise themselves with these treaties and mechanisms and hold their leaders and institutions accountable.

The Protocol was adopted by the SADC in 2001 amidst concerns of the adverse and destabilising effects of corruption throughout the world on the culture, economic, social and political foundations of society. The Protocol emphasised that member states have the responsibility to hold corrupt persons in the public and private sectors accountable and to take appropriate actions against those who commit acts of corruption. The Protocol also hopes to promote cooperation among states in fighting corruption and greater regional integration. The Protocol has been ratified by 13 member states and the only two states not to have ratified the Protocol are Madagascar and the Seychelles. However, ratification has not necessarily resulted in domestication and implementation of the Protocol.

One of the purposes of the Protocol is the prevention, detection and prosecution of corruption in the public and private sector. This needs to be done through legislative and other measures in which acts of corruption are criminalised, investigated and prosecuted, as well as setting out the mandate and authority of anti-corruption institutions. Of the 13 member states examined, all of them, to a large degree, have legislation that defines and criminalises acts of corruption, calls for the investigation and prosecution of corruption in their jurisdictions. However, Mozambique fails to address issues such as embezzlement. money laundering and illicit enrichment. The Protocol also provides that each state party undertakes to adopt measures that will protect individuals, who in good faith, report acts of corruption. Legislation in Mozambique, Namibia and Swaziland fails to protect whistle blowers, however, other jurisdictions like South Africa guarantee the protection of whistle blowers through witness protection programmes.

State parties are also required to set up anti-corruption institutions for implementing mechanisms to prevent, detect and eradicate corruption. All states examined have a body tasked to investigate acts of corruption, in fact most have multiple bodies tasked to tackle corruption. This has created problems with replication of functions and conflict among the different institutions. For example in South Africa, the Special Investigating Unit was of the view that there was a lack of communication between the different bodies tasked to tackle corruption. Further problems with the anti-corruption bodies include a lack of independence in carrying out their functions. Notable concerns were those anti-corruption institutions that function within the ministry of the presidency as is the case in Botswana. Political interference is also a problem especially in the appointment process of the head of the anti-corruption institution as in most jurisdictions the head is a President appointee. Other issues include the lack of capacity for institutions to carry out the necessary investigations and day-to-day operations. This included problems such as a lack of funding and technical expertise as institutions were understaffed and poorly trained. Most of the anti-corruption institutions do not have the prosecutorial authority to pursue corruption matters and the decision to prosecute is usually left with the Director of Public Prosecutions (DPP). The concern with relying on the discretion of the DPP is that its independence is often questionable as he or she is usually appointed by the president. Many people in the SADC region are of the view that there has not

been enough effort in the prosecution of those in office or of the influential and powerful and that efforts have usually only resulted in the prosecution of 'small fish'. These factors all point to a lack of political will by state members to effectively and efficiently combat corruption.

The Protocol also requires states to adopt mechanisms that encourage wider sectors of society such as the media and civil society to participate in preventing corruption. Most member states had some sort of mechanism to allow for public participation, for example, in Tanzania there is active engagement by the state with local communities, religious leaders and musicians through activities such as public seminars, talk shows, exhibitions and anti-corruption club activities. Other activities include public awareness through the inclusion of the understanding and combatting of corruption in the school curriculum that can be found in Swaziland and Zambia. However, in other countries such as Angola and the Democratic Republic of the Congo, there is a clampdown by the state on any anti-corruption activities by the public such as detaining and harassing journalists.

Lastly, states agreed to promote and facilitate cooperation among state parties in support of the prevention, detection and prosecution of corruption in all sectors and development and harmonisation of anti-corruption policies and domestic legislation of the state parties. One of the bodies tasked with strengthening and enhancing co-operation among states is the Southern African Forum against Corruption (SAFAC). Although all of the state members are party to SAFAC, the difficulty in achieving cooperation among state parties is the inability of the members to develop their internal capacity and therefore be in a position to co-operate with states on issues such as extradition, judicial cooperation and the harmonising of policies and domestic legislation. A further problem that is hampering cooperation among member states is the creation of tax havens in the SADC as we find in Mauritius. This has encouraged illicit financial flows from major economies in Europe, Asia and Africa and is denying States to essential tax revenue. However, the SADC Protocol is silent on the action to be taken in this regard.

The study pointed out that generally, there is a legal and institutional framework to combat corruption as well as mechanisms for the public to become involved in anti-corruption activities. Issues remain such as the independence of anti-corruption institutions and their financial and resource capacity. However, underpinning the challenges that

are present in each of the jurisdictions examined is the lack of true political will among the leadership in all SADC countries to address the problems that exist. The preamble of the Protocol, it explicitly recognises that demonstrable 'political will and leadership are essential ingredients to wage an effective war against the scourge of corruption'. However, the responsibility does not lie solely at the feet of our leadership; the Protocol expressly recognises the importance of the public getting involved in the fight against corruption. It is with this responsibility in mind that the participants wish to further get involved in tackling corruption and work in collaboration with other organisations from across the region. It is the responsibility of every individual in the SADC to avoid engaging in corrupt practices and also to report corruption to the authorities and even the media. Lawyers play a special role in this, as they have the knowledge and skills to raise public awareness on issues of corruption and actively hold the leadership of the SADC accountable.

> Chantelle de Sousa is the Programmes Officer at the SADCLA chantelle@sadcla.org



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LSSA and IEC celebrate their partnership for the 2016 municipal elections

hank you very much for this opportunity to join you in the road to entrenching democracy in our country,' then Law Society of South Africa (LSSA) Co-chairperson, Max Boqwana, said to Electoral Commission dignitaries at a gala dinner hosted in Pretoria early in February. The dinner was held by the Independent Electoral Commission (IEC) to celebrate the beginning of the LSSA's electoral project to train observers for the 2016 municipal elections. Mr Boqwana referred to the electoral process as 'the only true exercise where rich and poor find equality, young and old find common space, and the illiterate and those that are learned have the ability to participate equally ... it is an occasion to put a badge of dignity on all South Africans; a clear demonstration of denouncing our recent past of disenfranchisement.' Mr Boqwana added: 'We have the resources, capacity and intellect to render a hand in this to ensure that our country moves forward in the correct direction with integrity and credibility.'

The LSSA's 2016 municipal election monitoring initiative follows the successful monitoring of the 2014 national and provincial elections by attorneys and candidate attorneys as part of the LSSA's observer team (see 2014 (June) *DR* 12 and 2014 (July) *DR* 15). Mr Boqwana explained: 'It is important that as South Africans and Africans we begin to

own this process as ours. The number of election observer missions from outside the borders of the continent has reduced dramatically. We, therefore, as Africans have to deal with our own problems and have to act with integrity.'

Referring to the LSSA's report on its observer mission, he noted that it had become clear that a large number of young people were not enthusiastic about voting: 'It is important that we, as a society, participate in all the efforts to redress this state of affairs. It is not a cliché to say young people are the future of our country. If indeed that is the case, it would be suicidal to ignore them in voter education projects.'

Expressing the IEC's delight at the partnership with the LSSA, Acting Chief Executive Officer of the IEC, Sy Mamabolo, said he hoped that other professions in South Africa would follow the example set by the attorneys' profession.

He added: 'It is our view that legal expertise around electoral law is not at the level where it should be. We, therefore, believe that this partnership must plant seeds of interest in this branch of constitutional law. The participants in this year's training programme must, in the future, represent an array of stakeholders to vindicate their rights and interests through the judicial forums of our country.'

Mr Mamabolo said our country was in the process of preparing for general elections of municipal councils next year. He noted that municipal council elections often bring an array of complex legal and operational issues that are not to be found in the elections of the National Assembly and provincial legislatures. 'Such complexity partly arises due to the number of different elections held concurrently. There are over 4 000 different elections conducted during municipal elections compared to ten different elections during national and provincial elections,' he explained. He added: 'Furthermore, ward elections imply a smaller geographic constituency election whereas the smallest constituency is a province in a national and provincial election. Ward elections bring with them a different and unique electoral dynamic, which in certain circumstances brings about undesired proclivities on the part of those desperate to win.'

Mr Boqwana said that the LSSA had demonstrated its commitment by introducing electoral democracy as a subject for candidate attorneys at its School for Legal Practice. 'This will assist not only to engender interest in participatory democracy, but to create a reservoir of electoral observers, mediators, arbitrators in electoral disputes and a new breed of practitioners in this area of law,' he noted.

Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.ore.za



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Electoral democracy and voter education: New subject introduced to LEAD curriculum

n May 2014 the Law Society of South Africa (LSSA) successfully launched its first election observer mission, deploying approximately 490 attorneys across South Africa to observe elections at their local voting stations.

On drafting its final observer report to the Independent Electoral Commission (IEC), the LSSA realised that only an approximate 5,6 million voters between the ages of 20 and 29 registered to vote ('IEC Registration Statistics as at 10 March 2015 www.elections.org.za/content/ Voters-Roll/Registration-statistics/, accessed 10-3-2015) for the 2014 national elections, even though there were an estimated 9,8 million eligible voters in this age group ('Mid-year population estimates' Statistics South Africa 31 July 2014 at 9 available at http://beta2.statssa.gov. za/publications/P0302/P03022014.pdf, accessed 10-3-2015). Therefore, only 57,5% of eligible voters between the ages of 20 and 29 registered to vote (whether they actually voted is another matter entirely, and therefore the number of young voters between the ages of 20 and 29 that actually voted may be even less than the estimated 5,6 million that registered to vote). Except for the 18 to 19 age group, this age group had the lowest rate of registration in relation to the amount of eligible voters.

This made it clear to the LSSA that there is a marked lack of interest and voter education for voters between 20 and 29. This age group represents the youth entering the workforce for the first time; attending higher education institutions; and occupying junior positions with the intent of furthering their professional careers.

Therefore, they have a significant interest in the social, democratic and economic development of South Africa. Not only are their votes crucial to our society founded on the principles of democracy

and the respect for the rule of law, but their interest in the process is also of paramount importance.

In order to promote interest and participation in the voting process the LSSA would like to place more emphasis on voter education for this specific age demographic. Therefore, the LSSA and Legal Education and Development (LEAD) endeavoured to form a partnership with the IEC to support this initiative. The target demographic is young legal professionals between the ages of 20 and 29.

It is against this backdrop that the LSSA and LEAD, in proud partnership with the IEC, launches an education initiative aimed at young law graduates. This partnership is cemented on the premise that these individuals, as future legal professionals or young legal professionals, will be tasked with upholding the democracy and respecting the rule of law. Through provision of voter education to this target demographic these voters will be enabled to spread information and knowledge to others.

The IEC trained all LEAD School Directors during an intensive train-the-trainers workshop on 10 and 11 February 2015. New material for this subject was drafted by LEAD, in partnership with the IEC, and the new compulsory subject to the LEAD curriculum: Electoral democracy and voter education, will be implemented at LEAD School across South Africa from March 2015. This will be a permanent addition to the LEAD learning activities and will continue to run in the lead up to the 2016 local government elections and the 2019 national elections.

There are currently nine residential Schools for Legal Practice across South Africa and one distance school run in association with Unisa. Therefore, there is significant national reach in this particular target demographic as LEAD and the LSSA are the primary providers of

practical legal education and continued legal development in the legal profession. The current reach is an estimated 4 900 candidates within the specific target demographic and these numbers are increasing annually. Approximately 5 000 attorneys also attend LEAD seminars each year and a voter education course can later be added to the seminar department as well.

The goal is to reach as many young legal professionals through a respected primary legal education provider. This will promote a young legal society with proper knowledge of one of the core human rights on which a democracy is built: The right to vote.

Once the ground-work is done and the initiative has been properly implemented LEAD, in partnership with the IEC, aims to focus on expanding this project.

In order to ensure quality education the new LEAD subject will currently only be provided by school directors and properly qualified legal practitioners with extensive practical experience who have been properly trained in electoral democracy and voter education. This will ensure consistent quality education and the consistent transfer of valuable knowledge.

LEAD believes that the voter education initiative can be of great value especially in providing quality assistance to the IEC in regard to voter education. Furthermore, it will promote respect for the rule of law and our democracy while providing a clear understanding of the IEC's role as a Chapter 9 institution.

LEAD is proud to state that it has formed a solid working partnership with the IEC that will be beneficial to young voters in South Africa.

Jeanne-Mari Retief is a facilitator at Legal Education and Development (LEAD) Jeanne-mari@lssa.org.za

Significant leadership: A programme for senior women lawyers

Ithough an increasing number of women graduate and comply with the School for Legal Practice programme, the profession does not retain a sufficient number of women in leadership positions, or women involved in education or other initiatives of the profession.

The Law Society of South Africa (LSSA) supports growth in the number of women heading firm management and women in the judiciary. Therefore, Legal Education and Development (LEAD) (in association with the Nelson Mandela Metropolitan University), launched a pilot project in November 2014 aimed at

equipping, and empowering female attorneys to understand certain key concepts to demonstrating significant leadership in the legal profession.

This is an intensive programme that goes further than a mere seminar or one-day course. The women participating in the programme must demonstrate

LSSA NEWS

potential for leadership and be committed to participating in all facets of this programme. After an initial application process that includes a letter of motivation, the women are accepted to this inter-active programme.

The programme is currently aimed at senior women lawyers (with at least eight years' practical experience) who are interested in growing their leadership skills. However, due to the lack of female mentorship in the profession, and recognising the needs of young female attorneys, the LSSA is considering expanding this initiative to include young women lawyers.

The programme deals with the following topics:

- understanding 'branding' and how to develop your own brand;
- leadership styles and how to apply your own style;
- managing professional power, relationships and politics;
- understanding personal mastery;
- how to think and act strategically;
- powerful legal writing;
- leadership presence; and
- the challenges/obstacles for women leaders and how to overcome these.

The programme runs over two sessions of three days each and experienced, dynamic presenters in their areas of specialisation have been called on to facilitate the discussions.

The women are required to submit various assignments before the first ses-

sion and further assignments between sessions. These assignments add value to the course and assist in growing their leadership skills and potential.

The first assignment to be completed is additional reading on leadership styles, followed by a Belbin Self-Perception Inventory. Belbin is a means of measuring the candidate's preferred behaviour when working in a team and is designed to pinpoint the candidate's unique leadership style. It further assists the candidate in understanding the different leadership styles and how to communicate, and work with different types of leaders.

The women are also required to complete an emotional intelligence questionnaire. The outcome is discussed during the first session and lessons learnt are carried over to the follow-up session.

Between sessions the women are encouraged to apply what they have learnt and to reflect on:

- where they improved;
- where they feel there is further room for improvement;
- challenges they faced and how they handled them; and
- goals for continuing on this path in future.

The second session of this programme concluded on 5 February 2015. A gala dinner was held, on request from the women, to celebrate the launch of the programme and the significant impact it will have on the legal profession.

Apart from learning valuable skills

and building a support structure for themselves, the women also had the opportunity to network and cement new business relationships.

Women travelled from across South Africa to attend the programme and confirmed that the programme did not disappoint. Here are some comments from the women who attended:

Krishni Naidu said 'Today I walked into my office as an inspired, empowered leader with a totally different approach and it felt good!'

'I have learnt a lot and most importantly I feel not only empowered, but also inspired to work even harder towards my goals. I look forward to using the tools I gained during the past three days,' said Daphne Mahosi.

Khanyisa Mogale said 'I am convinced that we are destined for greater things in our profession. This is only the beginning.'

There will be a follow up session with the women in six months to track their progress and give support where necessary.

• The LSSA invites all women lawyers interested in attending this programme to contact Jeanne-Mari Retief at jeanne-mari@lssa.org.za

Jeanne-Mari Retief is a facilitator at Legal Education and Development (LEAD) Jeanne-mari@lssa.org.za

2015 examination dates

Admission examination

The admission examination dates for 2015 are:

- 18 August
- 19 August

Conveyancing examination

While the conveyancing examination dates are:

- 13 May
- 9 September

Notarial examination

And the notarial examination dates are:

- 10 June
- 21 October.

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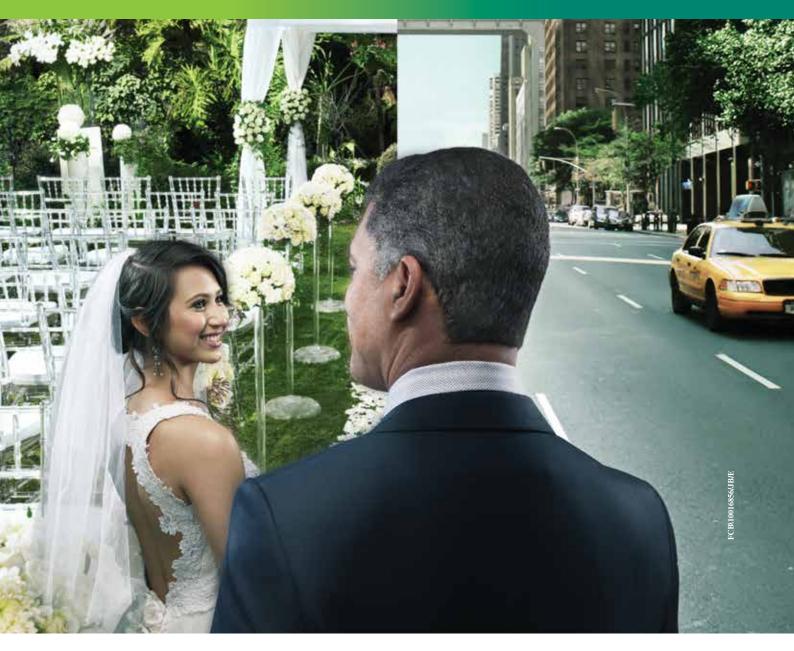
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People and practices

Compiled by Shireen Mahomed

Phukubje Pierce Masithela Attorneys in Johannesburg has three new appointments and one promotion.



Manyani Maseko has been promoted to a partner. She specialises in information, communication and technology law, intellectual property law, media law and general commercial law.



Diana Schwarz has been appointed as a senior associate. She specialises in labour law, litigation and commercial law.



Mathando Likhanya has been appointed as an associate. She specialises in commercial law, technology, media and telecommunications law.



Bronwyn Ross has been appointed as an associate. She specialises in commercial litigation, intellectual property and technology, media and telecommunications law. Greyvensteins Attorneys in Port Elizabeth has three new appointments.



Tiaan Labuschagne has been appointed as a director in the litigation department.



Rohan Greyvenstein Jnr has been appointed as a director in the conveyancing department.



Cor van Deventer has been appointed as a director in the conveyancing department.



Lovius Block Attorneys in Bloemfontein has appointed Duncan Murray as a partner. He specialises in high and magistrates court litigation and supreme court of appeals.



Prinsloo Tindle and Andropoulos Inc has appointed Howard Pelkowitz as a director.

Cox Yeats in Durban has two new appointments.



Thys Scheepers has been appointed as a partner and heads up the insolvency law team. He specialises in insolvency, business rescue and debt recovery.



Philip Thompson has been appointed as an associate in the construction, engineering and infrastructure law department. He specialises in construction litigation and alternative dispute resolution.



Fourie Stott in Durban has appointed Chris Salmon as a senior associate. He specialises in sectional title litigation, property law, debt collection, evictions, commercial and general litigation.

Cliffe Dekker Hofmeyr has appointed 11 new senior associates.

Johannesburg: From left – Neil Comte, Lauren Salt, Yusuf Dockrat, Tamarin Tosen, Matthew Ward, Mukelo Ngobese.





Cape Town: From left - Nkcubeko Mbambisa, Inge Schneider, Pride Jani, Nazeera Mia, Ashley Pillay. Savage Jooste & Adam Inc in Pretoria has five new appointments.

Natalie Marshall has been appointed as a director. She specialises in general litigation, medical negligence, general liability, insurance law and family law.

Candice Louw has been appointed as an associate. She specialises in personal injury litigation.

Dian van der Walt has been appointed as an associate.

He specialises in insurance and personal injury litigation.

Florette Storm has been appointed as an associate. She specialises in general and correspondent litigation, administrative, labour and commercial law.

Magdel van Biljon has been appointed as an associate. She specialises in commercial and corporate law and litigation trusts, aviation law and notarial services.



From left: Natalie Marshall, Candice Louw, Dian van der Walt, Florette Storm and Magdel van Biljon.

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

By Russel Luck

Is using your wearable technology while driving a traffic offence?

oogle Glass (a type of wearable technology with an optical head-mounted display. Google Glass displays information in a smartphone-like hands-free format (http://en.wikipedia.org/wiki/Google_Glass, accessed 10-3-2015)) and Smart Watches (wearable technology or wearables) became available to South African consumers for the first time in 2014. Since then consumers have wanted to know if they could be fined by traffic services for using these wearables while driving.

The short answer is that no official view has been expressed by South African traffic services but this does not mean consumers are in the clear.

Section 308 (1)(*c*) of the National Road Traffic Act 93 of 1996 places a duty on drivers in general to have complete 'control' of their vehicle and 'full view' of the roadway and traffic ahead while driving.

In addition Road Traffic Ordinance Regulation 308A (1)(a) deals specifically with mobile communication technology while driving. It prohibits a driver from 'holding' a mobile phone or communication device in one or both hands or with any other part of their body while driving. Section 1(b) provides an exception where a driver uses 'headgear' that enables them to operate their vehicle so they are not in contravention of the above prohibition.

This regulation is strict and penalises the driver not only when they talk on their phone or mobile communication device but when they hold this device while driving.

Google Glass is most probably a 'communication device' because it has mobile phone capabilities. The fact that it is voice operated and allows a driver to have both hands on the steering wheel and their eyes on the road means that it could fall within the definition of 'headgear'. If so, the driver would be allowed to use Google Glass while driving. However, one of the concerns about using Google Glass is that it may obscure a driver's vision even though it is voice operated and essentially 'hands free'. If the latter position is taken then drivers would not be able to use Google Glass while driving.

Smart Watches are also troubling from a legal perspective. They pair with the user's mobile phone and provide communication features like e-mail and text messaging. In order to use these features drivers would have to take their eyes off the road and use at least one hand to operate their Smart Watch. This may be in conflict with reg 308A above or the general National Road Traffic Act provisions for drivers to have 'control' of their vehicle and full view of the roadway while driving. It becomes even more problematic to decide if wearing a wrist watch would be considered 'holding' a mobile communication device contemplated by reg 308A (1)(a).

The decisive factor will be how South African traffic services enforce these provisions practically. For example, a woman applying her make-up in a traffic jam has a hand (or both hands) off the steering wheel and her eyes diverted from the road. She could not be said to be in 'control' of her vehicle in terms of the National Road Traffic Act 308 of 1996. In general, South African traffic services do not seem to penalise female drivers for this conduct even though they are entitled to.

Traffic laws and regulations vary from place-to-place. Reuters published an article on 16 January 2014: 'California woman who drove with Google Glass beats traffic ticket' (www.reuters.com/article/2014/01/17/us-usa-googleglass-trial-dismissal-dUSBREA0F1XR20140117, accessed 10-3-2015). It reported that a Californian woman who received a ticket for wearing Google Glass while driving had the offence dismissed on technical grounds. The court held that it could not be proved if her Google Glass was switched on while she was driving (or switched off). It left open (but clearly implied) that if the Google Glass was switched on while driving that driver would be penalised for contravening traffic laws. In the United Kingdom (UK) the use of a smart watch is not banned outright but the UK Department of trade and industry has issued a statement that improper use while driving could result in heavy penalties. These issues are undecided in South Africa but affect a great deal of citizens going forward. There is a good chance that South African traffic services will enforce regulations in line with overseas trends.

Russel Luck BA LLB (UC) LLM (Technology Law) (Unisa) is an attorney at SwiftTechLaw in Cape Town. \square

By Sechaba Mohapi

Revised checklist for leave to appeal to the SCA

his contribution is a revision of an earlier contribution in 2012 (Aug) *DR* 20, made necessary by the subsequent promulgation of the Superior Courts Act 10 of 2013 (the Act) that came in to effect on 23 August 2013 as well as the consequent Supreme Court of Appeal (SCA) Practice Direction 2014 (the direction). More importantly, this revision is necessary due to persistent problems experienced at the SCA with applications for leave to appeal and criminal petitions.

Practice in the SCA is still generally regulated by the Act, the rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa of 1998 (the rules) and the SCA direction. However, despite the availability of these prescripts, problem areas remain. It is, therefore, worthwhile to have a basic checklist highlighting the important and often overlooked aspects of SCA practice.

Changes brought by the Act

For purposes of this article, the most important change brought about by the Act is that the timeframe for lodging applications for leave to appeal or petitions has been changed from the old 21 days to one month after refusal of leave by the court a quo. Previously, applications had to be brought within 21 calendar days and the now replaced SCA Practice Direction of 2011 provides, in para 2, that where applications for leave to appeal were brought within 21 'court days' as opposed to calendar days, it was not necessary to apply for condonation. The change brought by the Act is, therefore, a welcome one as it brings into uniformity with the rest the timeframes in the rules that of lodging applications for leave to appeal or petitions. Obviously, this also necessitated a change in the SCA practice directions that have essentially remained the same, save to omit the previous provision that accommodated applications lodged within 21 court days.

SCA leave to appeal checklist

This checklist is not intended to be a comprehensive guide to SCA practice, and it does not deal with issues pertaining to the merits or demerits of applications for leave to appeal, as this is regarded as falling within counsel's province in the division of legal practice. The checklist is concerned more with points of practical procedure relating to applications for leave to appeal to the SCA. Nevertheless. this does not detract from attorneys and their duties and responsibilities towards their clients of knowing something of the test formulated, crystallized and applied by the courts in determining whether or not to grant leave to appeal. For the attorney, this is a simple matter of looking at the relevant commentary on what is appealable in DE van Loggerenberg and PBJ Farlam (eds) Erasmus: Supreme Court Practice at A1-42 - A1-52B, or in DR Harms Civil Procedure in the Superior Courts para C1.7 - C1.33, and for criminal petitions E du Toit et al Du Toit: Commentary on the Criminal Procedure Act at ch 31-11 - ch 31-12.

Applications for leave to appeal in general

Applications for leave to appeal to the SCA are brought on notice of motion supported by affidavit (r 1(1) of the rules). With regards to the form of the application for leave to appeal, answer and reply, the rules prescribe that they must be 'clear, succinct and to the point'; and that they must fairly furnish all information necessary to enable the court to decide on the application, and they must deal with the merits only insofar as is necessary for purposes of explaining and supporting the grounds on which leave to appeal is sought or opposed (r 6(5) of the rules).

It is important to note on the question of the form of applications for leave to appeal to the SCA that they are not to be treated in the same manner as applications for leave to appeal in the High Court or with ordinary motions for that matter.

No other annexures other than those mentioned in r 6

Of particular concern to the judges of appeal is that far too often it is the case that to most applications for leave to appeal lodged at the court, is usually attached unnecessary annexures other than the only essential annexures thereto, namely the judgments and orders of the court *a quo* on the merits and refusing leave to appeal.

From the experience of a Bloemfontein attorney and the Office of the SCA Registrar, applications with unnecessary annexures are accepted under protest because of the explanation usually submitted by the instructing attorneys that such applications have been drawn by counsel, the assumption being that the greatest care has been taken in drawing such applications. So persistent is the problem with applications that offend the sub-rule that the judges of appeal are considering to make a direction that a certificate of compliance with r 6 be signed and lodged together with applications for leave by the attorneys who lodge them (similarly to the certificate of compliance that is lodged together with the Practice Note and Heads of Argument in terms of r 10A for appeals).

Since 2006 when the letter was circulated, the SCA has seen a further increase of applications for leave to appeal, which has further added to the 'extra-forensic workload' of the judges of appeal. For instance, over 1 000 applications and petitions were registered for the first time in 2013 and this has been the average number of applications for leave to appeal registered at the SCA ever since then. For the aforementioned reasons, it is hoped that this contribution assists more practitioners to ensure that applications lodged at the SCA do not offend r 6.

Checklist

Applications for leave to appeal		Provision			
Must be brought within one month after re	efusal of leave by <i>court a quo</i> (date of judg-	s 17(2)(<i>b</i>)			
ment or order refusing leave).					
NB: Dies non (16 December – 15 January) are not applicable to applications as period for lodging is not governed					
by rules (see r 1(2)(b) referring to 'period on terms of these rules').					
Must be served on respondent(s) and option	onally on Registrar of <i>court a quo</i> .	Uniform Rules r 4			
Must be lodged with Registrar of SCA in tr	iplicate (original plus two copies).	r 6(1)			
If longer than ten pages, must be printed a	and copied double-sided.	direction para 3(a)			
Should not exceed 30 pages in length.	hould not exceed 30 pages in length.				
Annexure of judgment and court order of	Provided that Registrar may extend the	r 6(2)			
court a quo appealed against (in criminal	period for the filing of a copy of the judg-				
cases the judgment must include on con-	ment or judgments for a period not ex-				
viction and sentence).	ceeding one month on written request.				
Annexure of judgment and court order re-		r 6(2)			
fusing leave to appeal.					
Binding by plastic ring-binder is appreciate	-	Practice			
Where judgment and order refusing leave cannot be obtained, a letter from Registrar of <i>court a quo</i> certifying date of such Order will be sufficient.		direction para 1			
Where it is not possible to lodge original ap	plication on last day, copy is sufficient, but	r 4(1)(b)			
the original must be lodged within ten day	rs thereafter.				
	of application on last day for lodging, ap-	r 12(6)			
plication for condonation must be done, fa	ailing which application lapses.				
Answer					
Must be served and lodged within one more	nth after service of the application.	r 6(3)			
Lodged in triplicate (original plus two copi	r 6(3)				
If longer than ten pages, must be printed a	direction para 3(a)				
Should not exceed 30 pages in length.	r 6(5)(b)(iii)				
Binding by plastic ring-binder is appreciate	Practice				
Where it is not possible to lodge original a the original must be lodged within ten day	r 4(1)(b)				
Where it is not possible to lodge copy of a	ffidavit on last day for lodging, application	r 12(6)			
for condonation must be done for non-com					
nation may be made in the absence of the					
Reply					
Must be served lodged within ten days after	er service of answer.	r 6(4)			
Must strictly deal with new matters raised	r 6(4)				
Lodged in triplicate (original plus two copi	r 6(3)				
Should not exceed ten pages in length.	r 6(5)(b)(iii)				
Binding by plastic ring-binder is appreciate	Practice				
Where it is not possible to lodge original	r 4(1)(b)				
the original must be lodged within ten day					
Where it is not possible to lodge copy of a	r 12(6)				
tion for condonation must be done for n	tion for condonation must be done for non-compliance with rules, failing which a determination may be made in the absence of the reply.				
determination may be made in the al	o of the reply				

Sechaba Mohapi *LLB (NWU)* is a law researcher at the Supreme Court of Appeal in Bloemfontein.

By Ann Bertelsmann

Is your client a ticking bomb?

s Viljoen (V) owned a boutique in a large shopping mall. She alleged that her landlord had wrongfully evicted her from the premises, causing her to lose her thriving business and her only source of income. She wished to claim several million rand for future loss of profits and emotional stress. She approached attorneys at Firm 1 to assist her. The landlord's version differed from hers and Firm 1 managed to reach a commercial settlement for a nuisance payment of R 50 000.

V subsequently approached Firm 2, complaining that Firm 1 had substantially under-settled the claim, without her agreement. Firm 2, believing her version, brought an action on her behalf against Firm 1. When she was unsuccessful, she approached Firm 3 to bring an action against Firm 2. And so it went on

A happy, satisfied client will return and recommend you to others ... But an unhappy or dissatisfied client is a potential plaintiff in a civil claim for breach of mandate, a complaint to your law society or at the very least, a fee dispute!

Before taking on a potentially dissatisfied client, you need to be sure that this is a client that you will not later regret taking on. The firms in the case study above certainly did.

There is a lot of talk about Client Protection – which should of course be one of our profession's major goals – but there is seldom any mention of Practice Protection (in relation to the client).

Looking at the claim statistics that we previously published in 2014 (May) *DR* 26 it is clear that practitioners need to consider how to avoid claims being made against them. One way is to avoid taking on a client, who may be more likely than others, to make a claim against them. There are some clients who will be dissatisfied however hard we try. I am sure that many of you have experienced a client like this.

How can you identify such a client?

In the first place, be wary if you are not the first firm that the prospective client has been to with this matter. It may be well worth your while to make further enquiries. This could be a very difficult client like V. Over the years, this has proved to be the case in many professional indemnity claims.

Gut feel? Your instincts and first impressions are usually correct. Perhaps the potential client shows signs, like running down a previous attorney, telling you what the law is on the subject and how you should run the matter or quibbling over your fee structure? Be alert for signs.

It is best to politely refuse to take the instruction, but if you decide to accept the mandate you will need to apply as many of the following precautions as possible:

Thirteen golden rules to protect your practice against a potentially dissatisfied client (once you have decided to act for him or her).

The protections discussed below should ideally be dealt with in your firm's Minimum Operating Standards (MOS) or Standard Operating Procedures (SOP) document. See 2014 (July) *DR* 20

In the beginning ...

It is essential to establish exactly who the prospective client is. This seems obvious, but failure to do so has led to many successful claims against practitioners. Your practice needs very firm rules on compliance with Financial Intelligence Centre Act 38 of 2001 (FICA) and sanctions for those who fail to comply. Know your client. (See Hirshowitz Flionis v Bartlett & Another [2006] 3 All SA 95 (SCA).)

2 You need to know whether your prospective client is acting individually, together with or on behalf of someone else or another entity. Does he or she

have the authority to act? Obtain proof of this. Many claims have resulted from this simple failure.

- In one such claim, the attorney had been unaware (or had lost sight of the fact) that his client was, in fact, instructing him in his capacity as the sole director of a company. He instituted action in the name of the client and the claim had become prescribed before he could re-issue the summons in the name of the company.

- In another claim, a client signed a contract on behalf of a trust in the presence of his attorney. The attorney had neglected to ascertain whether or not the client was authorised to sign. The trust (and ultimately the court) declared the contract null and void.

Failure to do either one or two above could result in a fraud being perpetrated by your client. You are likely to be held liable.

Clients move, go overseas or back to rural villages without thinking of warning you. Insist on being given all possible contact details and even those of client's next of kin, friends and employers – especially if you think that the client might prove uncontactable at any stage in the future. (See *Mazibuko v Singer* 1979 (3) SA 258 (W) and *Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB)).

Have the client sign a power of attorney, in case you need it. Some practitioners also recommend including a domicilium citandi et executandi in the letter of engagement. You would need to carefully explain the implications of this to the client. (I am not sure what approach the courts would take to a defence along these lines.) It is a good idea to advise the client in advance, of the date when the claim will prescribe. If you have requested documents or information, explain by when you need this and why. (This can go into your engagement letter - see 9 below.) We have dealt with numerous claims where, at the eleventh hour, the client could not be contacted.

4 Conduct conflict of interest checks. In this regard, you will also need to obtain enough information regarding other potential parties to a matter.

5 Be wary of acting on behalf of friends, family or colleagues. They can be problem clients. We have many claims to prove this.

6 Ensure that you have the necessary expertise and capacity in your practice to take on the matter. In cases where the firm takes on any such matters because they need the work or feel sorry for the client because the claim is about to prescribe, a claim inevitably follows.

Beware of a client with unrealistic expectations.

Get all relevant facts and documents from your prospective client and make sure that you understand precisely what his or her expectations are – and manage these expectations from the beginning. Make sure that you put the client in touch with reality as far as achievable outcomes are concerned. Put details of this in your engagement letter (see 9 below).

It happens quite often, for example with Road Accident Fund (RAF) claims, that a client has been advised by someone else to see an attorney in order to lodge a claim with the RAF. That person either has received a large payout from the RAF or knows someone who has. The client then arrives with huge money signs in his or her eyes and needs to be brought firmly down to earth about the prospects of his or her claim.

It is a mistake to deliberately or inadvertently raise your client's expectations about what the outcome of the matter will be.

Avoid promising a substantial payout or that the transfer will be registered within a certain time-frame. Instead, properly advise the client that difficulties might occur – such as possible problems in obtaining the title deeds or clearance certificate or a possible apportionment of blame. Then keep the client informed of any difficulties as they emerge, rather than waiting for the client to make the enquiry.

Beware, claiming an unrealistic quantum in a summons, could well raise your client's expectations of the outcome of the matter.

Ensure that you take a realistic deposit and agree your billing rates and policies up front, so that you are never put in the position where you have to sue the client for fees. (A summons for fees inevitably leads to a counterclaim for breach of mandate.)

Make sure that you and your client have signed a comprehensive letter of engagement/retainer/mandate before or at least within a reasonable period after you proceed with the matter.

In this document, reflecting the contract between you and your client, you have the perfect opportunity to set out exactly what you and your client can expect from one another and the work to

be covered (or not covered) by the mandate. You can deal with the proposed course of action to be taken and even the reasons for this. You can stipulate the method of communication to be used and the envisaged frequency of communications. (This should deter those clients who contact you incessantly, since they believe that they are your only client.) In fact any important aspects of the mandate and instructions can be confirmed.

And later ...

1 Ocommunicate with client regularly and effectively. The importance of this cannot be stressed enough. Many unpleasant interactions and claims could have been avoided if the practitioner concerned had only done so. Keep client informed in plain language. Taking regular instructions will make the client feel more involved in the process and less likely to question your actions or make unnecessary complaints.

1 1 Vary the terms of the letter of engagement. If there are changes in the proposed course of action or mandate, make sure that these are recorded in an amended (and signed) letter of engagement.

1 2 In the course of carrying out your mandate, avoid giving non-legal advice or advice in respect of any area of law in which you have little or no knowledge. This is asking for trouble.

13 Where there are any contractual or settlement negotiations, ensure that you give client detailed advice (in plain, understandable language) on all relevant issues – and then be sure to record this in writing to cover yourself should there be any dispute at a later date

We deal with many claims where there is an alleged under-settlement of a claim or failure to give advice during contractual or other negotiations.

Look out for clients like V - there are more of them than you can imagine. For safety sake, treat all clients as if they could potentially behave like V.

Ann Bertelsmann *BA* (*FA*) *HED* (*Unisa*) *LLB* (*Wits*) is the legal risk manager for the Attorneys Insurance Indemnity Fund in Johannesburg.



Court-annexed mediation:



December 2014 marked the advent of court-annexed mediation in magistrates' courts. The magistrates' courts involved in this pilot project are seated at Johannesburg, Soweto, Randburg, Krugersdorp, Kagiso, Pretoria North, Soshanguve, Palmridge, Sebokeng, Mmabatho, Temba and Potchefstroom (GN 855 GG 38164, No 855, 31-10-2014). The rules of court governing such mediation and the qualifications, standards and prescribed tariffs for mediators have been promulgated. With the aforementioned the government had set the stage (although it being a humble one) for court-annexed mediation to commence. The only further required element is the political will of all concerned to participate in the process. The primary focus of this article will therefore not be on the process of such mediation, which might see changes as the process matures, but motivational aspects will be highlighted and therefore the focus will be on the question: Why mediate?

At first glance, the legal practitioner might view court-annexed mediation with scepticism, if not finding the idea questionable that the intended mediation may prove to be beneficial, if not invaluable, to all concerned. Indeed many may feel mediation is a waste of time and rarely utilised successfully. Indeed the process of mediation can become a legal ornament if people do not buy into the process.

As we explore the nature of mediation the potential benefits will become selfevident and will prove invaluable to the judicial process, to society in general and to legal practitioners and their clients.

What is mediation?

Rule 73 of the Magistrates' Court Rules adequately defines 'mediation' as 'the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute'. It is further emphasised in r 72 of the Magistrates' Court Rules that mediation is a voluntary process. In mediation a dispute is resolved by the disputants reaching a settlement agreement.

Why mediate?

There has been a tremendous increase in mediations over the last decade or so. This can be attributed to the successes mediation has delivered as well as the benefits it provides. Not only does mediation present legal practitioners and

disputants with a carrot, but in the event of our courts following some international precedents it also presents a stick as failure or refusal to mediate might lead to adverse or punitive cost orders being granted.

Mediation is generally highly effective as a dispute resolution process

Mediators are unanimous that mediation has a success rate of 80% to 90%. For example, British Columbia reported that 80% of about 30 000 motor vehicle accident cases were successfully resolved as a result of mediation (www.ag.gov.bc.ca/dro/publications/bulletins/why-mediate.htm, accessed 27/2/2015). In the year 2000 Singapore's statistics boasted with a success rate of 95% out of 3 943 cases (www.legco.gov.hk/yr01-02/english/panels/ajls/papers/aj0422-1574-1e-scan.pdf, accessed 27-2-2015).

Mediation comes natural to people and promotes harmonious relationships

Mediation is in essence not complex and indeed comes quite naturally. To many it is a familiar sight to recall a mother or a teacher resolving a dispute by standing between two rival siblings or learners holding their wrists in each hand while resolving a dispute. Indeed the word 'mediation' is etymologically derived from the Medieval Latin mediatonem (nominative mediatio), meaning 'the division in the middle'. Although mediation models taught to mediators greatly refined the process, mediation at its core is about a caring person being in the midst of two disputants, aiming to resolve the dispute between them in such a manner that they can live in harmony with one another. As opposed to this, litigation can be described as an adversarial process with a winner and a looser. Indeed many of us will frown on an adult teaching children to settle disputes by way of competitions. In terms of r 71 (b) and (c) of the Magistrates' Court Rules some main purposes of mediation are to 'promote restorative justice' and 'preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation'. This aspect may prove invaluable where the disputants were in a close relationship or from a customer care perspective or even where a general business relationship is sought to be preserved. South African society is in need of restorative justice and harmonious relationships to counter conflicts resulting in the polarisation of people, which in turn may result in protests, violence and/or litigation.

Mediation empowers people to resolve their own disputes

Often litigants perceive litigation as a power struggle. People often threaten with legal action or their attorneys. After threats have been made they then seek the advices of their attorneys and so litigation ensues with the heading of court documents pronouncing the combatants. Though, in the mind of the litigants, they might think that they are 'enforcing' their rights, what in actual fact happens is that they are disempowering themselves and handing over the control of resolving their dispute to their legal representatives and the court, which is governed by the laws and rules of court. With mediation, the disputants remain in control of the process of resolving their dispute and may even agree on the mediator they are comfortable with. Disputants are encouraged to work together in finding a solution to their problem. Neither party is disempowered nor is the element of enforcement present at the mediation proceedings. This aspect of self-determination is of great value for certain individuals and entrepreneurs.

Mediation provides a confidential platform for disputants to properly vent issues and is conducive to effective communication

As a result of the informal process and atmosphere of mediation, disputants can better communicate their interests and concerns and many of the stresses of the adversarial court processes are avoided. In this regard legal practitioners as mediators must caution themselves not to be too formal while mediating.

Disputants are encouraged by mediation to negotiate openly with one another in order to reach a settlement. In this regard clause 12 of the Agreement to Mediate (Form MED-6 of Annex 3 to the Magistrates' Court Rules) stipulates that the mediation will be strictly confidential and without prejudice. This aspect can be of great value if one of the disputants wants to save face and not proceed with litigation, which takes place in open court, especially if the dispute might attract attention in the media because of a scandalous aspect.

Disputants can freely present their side of the dispute. They are not restricted by the question-answer format followed in court. They are not restrained by the law of evidence and may address aspects, which would not have been addressed if the matter went to court. Disputants are also not limited to legal remedies. Many disputes are indeed not

FEATURE

of a legal nature and are caused by personal aspects such as personal feelings, strained relations and finances, which ordinarily will not see the light of day in court. So, for instance, capacity to pay may be safely addressed during mediation. Often litigants realise with shock that 'having your day in court' does not mean 'having your say' in court. Usually the parties as co-authors of a settlement view the outcome of mediation as fair and they leave with the feeling that they have been heard.

Mediation is less costly to the client and less time consuming

Though the subheading will need little motivation for attorneys, the following quote is offered:

'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser; in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good man' – Abraham Lincoln (http://jskemper.org/blog/2012/11/the-importance-of-mediation-and-peacemaking-a-kemperscholars-alum-guest-blog/, accessed 10-3-2015).

Mediation offers legal practitioners with a career alternative

The prescribed low fees and qualification standards perhaps necessitates some criticism. Legal practitioners are qualified individuals who primarily render their services for compensation. Mediation does not require less skill and expertise than litigation, though it requires different skills and expertise. The prescribed hourly rate for mediation for a level 1 mediator amounts to R 500 and for a level 2 mediator it amounts to

R 600. These rates do not make mediation more attractive for the legal practitioner. There is no reason why legal practitioners should not be able to charge fees comparative to litigation fees. Mediation will still be less costly than litigation because of the simplicity of the mediation process and duration compared to litigation. Mediation is also an excellent opportunity for legal practitioners to meet their annual *pro bono* obligations and thereby promoting access to justice.

Mediation (notwithstanding the above criticism) is good for business

Quite often clients have a litigious mindset and with that also unrealistic expectations as to what litigation entails. Therefore clients might be surprised when you advise them to mediate and they may even be against the idea. Few businesses are faced with the challenges attorneys face with the alignment of delivering legal services with the expectations of clients. In essence clients usually need the effective and efficient resolutions of their disputes and this is what mediation usually achieves. When the needs and expectations of clients are met, the result is customer satisfaction, which in turn will result in more referrals and instructions.

Mediation and case load

Presiding officers need to manage their case load and as is evident from the court rolls, your matter is one among many. Mediation is conducive to lessening the case load at courts and so promoting the ends of justice.

Ethical duty on advising clients on mediation

In most instances it is in the client's best interests to mediate and clients should at least be advised on the option of mediation and the potential benefits. In *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 this obligation was entrenched in English jurisprudence as follows:

'All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR' (at para 11).

Punitive and adverse costs orders for not advising on mediation

Rule 33 of the Magistrates' Court Rules gives magistrates a wide discretion in awarding costs and stipulates that a court 'may award such costs as it deems fit'. Unreasonable failure to mediate may result in an adverse cost order (compare the *Halsey* case cited above for guiding factors). Failure to advise a client might be grounds for a *de bonis propriis* cost order in appropriate circumstances.

Conclusion

Mediation, though not a panacea for every dispute, should be embraced and promoted by legal practitioners for the better of all South Africans. Notwithstanding the risks of adverse and punitive cost orders, we are reminded of the words of John F. Kennedy during his inaugural address, 20 January 1961: 'Let us never negotiate out of fear. But let us never fear to negotiate.'

See 11.

Benjamin Charles van der Berg *LLB* (*UJ*) is an attorney at Borman Duma Zitha Attorneys and court-annexed mediator in Randburg.

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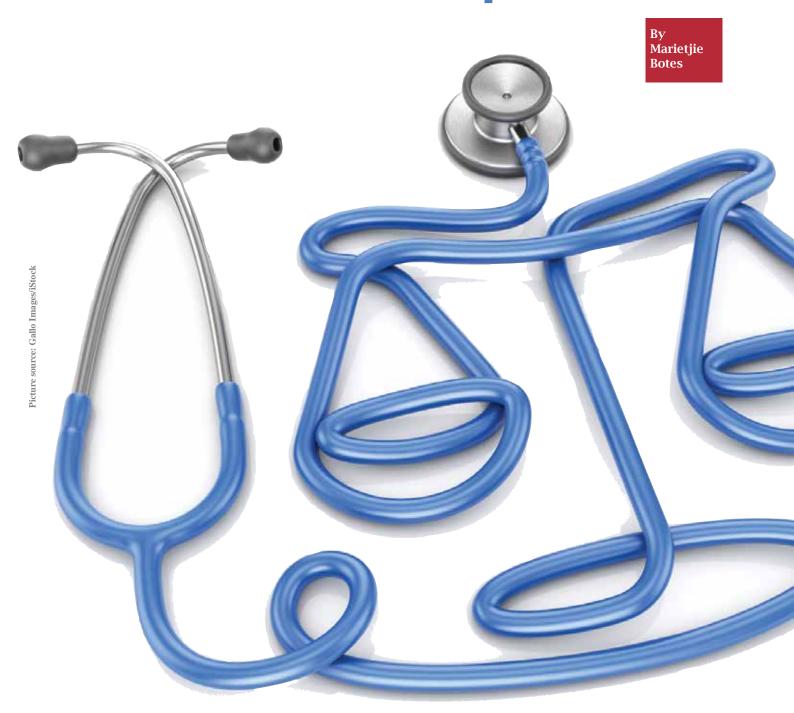


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Mediation: A perfect solution to health care disputes



ediation as an alternative form of dispute resolution received renewed attention with the court-annexed mediation rules being piloted at various magistrates' courts around South Africa and already provided for in r 37 of the Uniform Rules of Court

governing the proceedings in the High Courts of South Africa. Being a voluntary process that allows the participants to control the course and outcome of their dispute, in a private and confidential setting, it seems to be the perfect solution to health care disputes for reasons that I will discuss below.

The challenge

South African health care disputes resulting in litigation are dramatically increasing. Not only the number, but also the sizes of medical malpractice claims have increased. The Medical Protection Society confirmed an increase of medical

malpractice claims against their members of nearly 550% in comparison with ten years ago and an increase in the number of claims exceeding R 5 million of approximately 900% during the past five years, with several of these claims exceeding R 30 million (Sherlock C Letter to members of the Medical Protection Society re membership renewal and subscription rates, 2010 & 2011 in MS Pepper and MN Slabbert 'Is South Africa on the verge of a medical malpractice litigation storm?' (2011) 4 *SAJBL* 29).

In MS Pepper and MN Slabbert's paper (*op cit*) they argue that this state of affairs could be attributed to –

- patients being better informed of their rights and legal options;
- the further deterioration of an overburdened and under resourced public health care system as a result of increasing large medical malpractice payouts by the State;
- the faultless liability regime created by s 61 of the Consumer Protection Act 68 of 2008; and
- an increase in advertising material regarding legal services offered when medical malpractice is suspected.

The ripple effect is that insurance premiums for medical practitioners such as obstetricians and

gynaecologists, who are most affected by the litigation increase, became so expensive that very few practitioners can afford it (E Coetzee *Obstetrics: the changing face of litigation* Africa Casebook 2010; 18:7–9 in Pepper and Slabbert (*op cit*)). Subsequently fewer

practitioners are sufficiently insured or insured at all. Practitioners, fearing claims against them, also practice more defensively by ordering more, often unnecessary, medical tests to confirm their diagnoses, which not only results in increased medical costs for patients, but ironically also give rise to further possible scenarios for malpractice claims – and so the increase in litigation cycles on.

Health care disputes and following litigation do not only pose huge financial risks, but are usually emotionally loaded disputes. Patients feel humiliated, angry, frustrated and hurt, over and above the financial damages they might have suffered, while the doctor may fear the effects a 'trial by media' may have on his or her professional reputation and future of his or her practice, over and above the often enormous claim he or she may be facing. While litigation will primarily focus on the rights and wrongs and calculations based thereon, the whole process and its inherent adversity might never get to the true root of the initial problem and in the meantime destroy a career, bankrupt a person notwithstanding the outcome of a trial, exacerbate an already hostile relationship and drag on for years. Mediation, on the other hand, preserves relationships, maintains privacy and confidentiality, give everyone a voice and put control of the process back in the hands of the disputing parties to enable them to determine their own outcome.

The standard and the alternative

To call mediation a form of Alternative Dispute Resolution (ADR) is a misnomer because the majority of litigious matters are settled before proceeding to trial. It would then be more accurate to call litigation the alternative method of dispute resolution and mediation the norm.

The main difference between these two methods of dispute resolution is the subjective resolution imposed by a judicial officer during litigation and mediation's client centred approach, during which disputing parties control their own outcome by participating in one of three styles of mediation (or any combination thereof):

- Evaluative mediation where the mediator evaluates the strengths and weaknesses of each side's story and predicts the possible outcome, should the participants still decide to go to court;
- Facilitative mediation where the mediator merely acts as guardian of the mediation process; and
- Transformative mediation where the mediator supports empowerment, encourage deliberation, decision making and perspective taking.

Why mediation is tailor made for health care disputes

Bridging the communication gap

The breakdown of any doctor-patient relationship is characterised by poor communication. Doctors' consultations with patients are often plagued with medical jargon that leaves patients confused when they need to make important decisions about their health and future treatment, which can eventually lead to arguments and disputes.

A mediator will clear away both the medical and legal jargon to make crucial information available to both parties in plain language. Once both parties are empowered with information to enable them to understand the other's position, disputes due to miscommunication often resolve quickly and cost effectively.

Balancing inequalities and power

In M Gladwell's book *Blink* (New York: Little, Brown and Company 2005), he says that patients often seeks retaliation or vindication of their moral position in addition to money. However, in a doctor-

patient relationship the patient usually feels overpowered by the more knowledgeable and important doctor and far from being able to vindicate his or her moral position.

One of mediation's strengths is to neutralise any power imbalances by allowing a 'weaker' party, like the patient, to air his or her feelings in confidentiality, during private caucus sessions with the mediator, where he or she might otherwise not have been comfortable in doing so in the presence of the doctor, let alone in a public hearing. Through this mechanism, the actual root of a dispute can be exposed and dealt with by giving a 'weaker' party the opportunity to be heard and listened to.

The zero-sum game

The perception that when one party wins, the other party loses inevitably leads to parties withholding information from each other, which makes it impossible to resolve any dispute because the nature and extent of the issues at hand cannot be fully established. Due to its very nature medical decisions are often very complex, for instance how much Morphine to administer or when to resuscitate a patient or not. It is thus easy to see that information that sketches a full picture of the events leading to the dispute between the parties is crucial to its resolution and that withholding information will further drag out and negatively charge an already unpleasant or hostile situation.

Because mediation takes place in a fully confidential and private setting parties can exchange information safely and freely via the mediator without fear that the opposing party is merely fishing for facts to be used against the other. Even if the mediation should fail, the parties can still proceed with litigation without confidential information being exposed.

Resolving moral dilemmas

Overburdened and under resource public health care facilities are breeding grounds for moral dilemmas such as decisions regarding the continuance of life support when there seems to be no hope of recovery or whether to proceed to provide renal dialyses to a habitual noncompliant patient. Solutions to these dilemmas are complex and governed not only by health care law, but also by various similarly complex bio-ethical principles and internal guidelines. In the matter of Soobramoney v Minister of Health, Kwazulu-Natal 1997 (12) BCLR 1696 (CC) the Constitutional Court, determining whether a patient is entitled to receive further renal dialysis from a state hospital after depletion of his private medical aid and having regard to the hospital's internal guidelines in this regard specifically held that:

'A court [would] be slow to interfere

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with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it [was] to deal with such matters'.

Considering the court's stance under these circumstances it is hard to find a more befitting method to resolve these disputes than through mediation. In the United States and Canada disputes between pro-life and pro-choice factions have been successfully resolved to the extent that violence between factions has dissipated even though their differences in opinion still remain (www.mediate.com, accessed 3-3-2015).

Overcoming cognitive barriers

People often unconsciously develop certain mental blocks preventing them to reach agreement purely because they are involved in a certain process.

• Perspective bias

The author Anais Nin (*Seduction of the Minotaur* (Ohio: Swallow Press 1961)) said: 'We don't see things as they are; we see things as we are'. Humans by nature are egocentric and blinded by self-interest, which affliction can seldom be overcome without outside help. In a health care dispute a mediator can help the doctor and patient to see the problem from each other's perspective, which often leads to insight into any situation and a clearer view of a possible common solution.

• Positive illusions

When confronted with the version of events of only one party to a dispute it is easy to overestimate one's ability to control the outcome of the dispute even if it is determined by factors not necessarily within one's own control. A legal team that consulted with only one of the disputing parties often conjures up an unrealistic optimism in a client or an ex-

aggerated perception of control over the case because the full extent of the other party's version of events is unknown as well as the court's view of the matter. Based on such illusions parties can then set extreme reservation points that can merely lead to dragging out or escalating the dispute.

Especially in medical malpractice disputes, a mediator can draw both parties' attention to very real risks and the strengths and weaknesses of their cases by means of an evaluative mediation. Faced with a more balanced view of the matter the parties can then make an informed choice about accepting certain risks without having to incur massive legal costs, only to be confronted with the same risks or weaknesses at a much later stage.

• Reactive devaluation

A settlement proposal made by an adversary is often refused or rated as less favourable merely because an opponent offered it. During litigation, when parties only pass on selective information it is understandable that the initial settlement proposals might be considered with circumspection. However, due to the transparent and confidential nature of mediation parties can rest assured that settlement proposals are exchanged in good faith.

Anchoring bias

Some times when a legal opinion is drafted for a specific client, narrow focus is placed on the beneficial case law, whereas the detrimental case law might be down played or selectively quoted from. Under these circumstances a biased view of a party's case might be presented with a huge difference between the expected value of the client's case as opposed to the real value thereof.

During specifically evaluative mediation the mediator will present both the beneficial, as well as the detrimental aspects of each party's case to enable the parties to fully comprehend their risks and strengths so that they can make informed choices.

• Structural barriers

Every now and again clients differ with their own legal team about their legal advice or the direction their matter is taking. Clients might not wish to follow good advice to settle a matter or might think that their legal team is dragging the matter on for their own financial gain. Often, after a legal team gathered the necessary information from their client, further negotiations are conducted exclusively by the legal team which leaves the client without a 'voice' of his own or control over the direction of the matter.

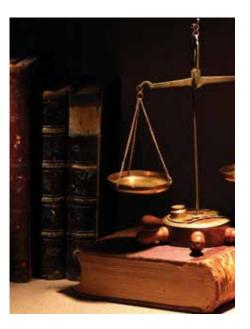
Mediation is specifically structured to empower participating parties to voice their own concerns and interests and in full control of the direction and duration of the whole process without ever being side lined.

Conclusion

Considering the complex, delicate nature of health care disputes, imminent power imbalances, financial risks and the adversarial nature of litigation, mediation offers a much needed and very productive alternative method of dispute resolution.

• See 11.

Marietjie Botes *BProc LLB (UP) LLM* (*Intellectual Property) (Unisa)* is an attorney at Dyason Inc in Pretoria.





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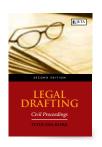




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Fixed or flexible: Shifren 'shackle'

Jansen van Rensburg

he Shifren principle came about in the Appellate decision of SA Sentrale Koop Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A). This principle is set out in Brisley v Drotsky 2002 (4) SA 1 (SCA) as follows: 'contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing'. This principle more commonly known as the enforcement of non-variation clauses on parties namely, binding parties to non-variation clauses (entrenchment clauses).

There are various arguments for and against the Shifren principle. Arguments for the principle entails, that when parties have agreed to the terms of an agreement, they avoid further disputes by including a non-variation clause that entails that the parties will be bound to the written terms on the agreement and that any oral variations will not be valid, thus eliminating disputes caused by oral variations. Arguments against the principle are that freedom of contract of the paries to an agreement are hampered when parties included a non-variation clause, because parties should be allowed to change their minds and alter/vary the agreement orally.

Recent developments in the law has seen courts loosening the Shifren 'shackle' on some agreements through the application of public policy. Below are the three most recent cases where the courts have refused to enforce a non-variation clause on the basis that it was against public policy.

Nyandeni Local Municipality v Hlazo 2010 (4) SA 261 (ECM)

The facts of the matter are briefly as follows: Mr Hlazo was employed by the municipality. It was discovered through forensic accounting that Mr Hlazo was involved in fraudulent activities by pocketing certain funds. The municipality suspended him pending an investigation into the fraud. A hearing was held and Mr Hlazo was found guilty. Mr Hlazo then tendered his resignation, which was denied by the municipality. He then tried to enforce his resignation (this would buy him more time and escaping the financial implications of being dismissed rather than resigning) by relying on a clause in the employment agreement that prescribed arbitration as mandatory procedure for resolution of disputes read with an entrenchment clause. This clause provided that no variation, modification or waiver of any provision of the agreement would be of force or effect unless confirmed in writing and signed by both parties. Thus he argued that the disciplinary procedure followed was defective as it did not comply with the agreement and that the parties tacitly agreed to a different procedure. This clause prevented them from doing so.

The court held that the general rule, that stems from the common law, is that an agreement may not be enforced if under the circumstances it offends public policy. This general rule has been applied throughout various court decisions. The Constitutional Court case of Barkhuizen v Napier 2007 (5) SA 323 (CC) confirmed this: 'But the general rule that agreements must be honoured cannot apply to immoral agreements that violate public policy'. The essential question that

Thus the Shifren principle was invoked. the court had to consider was 'does the enforcement of the entrenchment clause, as required by Shifren, in the circumstances of this case offend public policy?' To answer this question the court had to consider the concept of public policy. Alkema J, then went on to discuss the guidelines when looking at public policy that have



developed through the • it must be determined whether the contract or term

public policy (para 81);

• determination of fairness under the constitutional setting is not dependent on the personal views of both the judge and parties to the contract (para 85);

• public policy requires parties to comply with contractual obligations that are freely and voluntarily entered. Pacta sunt servanda (para 91);

ple that informs public policy and which is said to be offended. This principle is then balanced and measured against the challenged contractual term (para 94). Applying the abovementioned the court ruled that

• identify the constitutional princi-

nance settlement agreement. The parties made changes to the residency and maintenance arrangements after the agreement was made an order of court. S wanted to enforce the agreement with regards to the maintenance and G objected that the agreement had been varied by the parties. S then relied on the Shifren principle that there is a nonvariation clause in the settlement agreement and thus the agreement could not be changed/varied. The court held that the

agreement in question could be distinguished from other agreement where Shifren normally applies in that this agreement was not a commercial agreement. thus other considerations would have to be taken into account. In this instance the best interest of the child would play a paramount role in deciding whether the Shifren principle should be applied or not. The court held that in this instance public policy demanded that the Shifren principle not be applied.

This case has been appealed and the Supreme Court of Appeal (see SH v GF 2013 (6) SA 621 (SCA)) has taken a different approach to the amendment made and rules that the parties never intended that the variation in fact be a variation of the agreement and thus Shifren would play no part. The court held that both parties were aware of the non-variation clause and that in order for the maintenance agreement to be varied it needed to be in writing and signed by both parties. Thus the arrangement made between the parties did not constitute a variation, but was merely a trial period. If the new arrangement was successful in this trial period then a formal variation of the agreement would take place.

Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another (GSJ) (unreported case no 2009/45448, 30-11-2011) (Peter AJ)

In this case the agreement in question was a commercial agreement, a sale of a business agreement. The Steyns were farm owners and Karee Kloof wanted to buy the farm and the business on the farm. The agreement contained a nonvariation clause. There were numerous

the entrenchment clause is per se contrary to public policy. The operation on the fact of the case does offend public policy. The contractual term is the entrenchment clause which is protected by pacta sunt servanda and right to freedom and dignity entrenched in the Constitution.

The court moves on and does in actual fact not apply the abovementioned guidelines to the facts on hand, but holds that Hlazo does not have a bona fide defence as he is trying to use the Shifren principle not for a legitimate purpose, but for an ulterior purpose of delaying his dismissal to his financial benefit. Alkema J makes reference to s 34 of the Constitution, which deals with access to court. This right also includes the right to be protected against the abuse of the process of law. In the end the court rules that the: 'Public policy, as expressed by the constitutional values and norms, does not tolerate the abuse of the process of law' and thus the facts and circumstances of this case justifies the departure from the Shifren principle.

GH v SH 2011 (3) SA 25

This case concerned a written mainte-

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complications with the transaction and in essence to resolve some of the disputes two settlement agreements were entered into. A year after the last settlement agreement was entered into the Steyns instituted an action for payment of an arrear amount for the sale of the business in terms of the sales of business agreement. Karee Kloof pleaded that the parties agreed to a settlement and the settlement agreement was adhered to and thus they owed nothing to the Stevns. The Stevns relied on Shifren and that the settlement agreements could not have been seen as variations of the original agreements. The question before the court was 'whether or not the second settlement agreement should enjoy efficacy and primacy over the original agreement and defeat the claim'. Thus in short if the Shifren principle should be enforced.

The court assessed what would occur if the settlement agreement was enforced. It would lead to a conclusion of the litigation process currently pending in the magistrate's court and other disputes that could arise. The second settlement agreement was not confined only to the sale agreement, but dealt with other disputes between the parties too. The court ruled that three public policy considerations warranted that the Shifren principle be relaxed and not applied. First, that public interest demands that there be an end to litigation and thus the settlement agreement cannot be ignored, as this would bring an end to the pending litigation. Secondly, public policy demand that parties to a dispute avoid litigation and resolve their differences amicably. Thirdly, pacta sunt servanda would be violated if the settlement agreement was ignored as it related not only to the original agreement, but to the other collateral agreements/disputes. Thus the court held that upholding the Shifren principle would be against public policy.

Conclusion

Abovementioned case law displays the notion that when public policy demands the Shifren principle will not be applied and effectively a variation to an agreement done contrary to the requirements of the non-variation clause will be effective. A party will thus be able to escape from the shackles of Shifren when public policy demands.

Anye Jansen van Rensburg *LLM* (Stell) is an attorney at Schoeman Tshaka attorneys in Cape Town.



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Redundant or relevant? The law of unjustified enrichment

WO HUNDRED RAND

By Nokubonga Fakude

njustified enrichment and the action of the unauthorised administrator are legal principles that have become redundant in our law, as opposed to legal doctrines capable of survival

In this article, I will discuss:

How unjustified enrichment, for practical purposes, should not be recognised as an independent cause of action, separate from the law of contract and the law delict and, in certain circumstances, criminal law and property law.

 The Roman Dutch Condictiones as infiltrated into our law of unjustified enrichment, in light of the fact that there is no general enrichment action recognised in our law.

• Why the *actio negotiorum gestio* (action of the unauthorised administrator) has no place in South African law.

Justice is a concept of moral rightness based on rationality and fairness. Its aim is to balance the interests of individuals and provide restitution where necessary. Aristotle makes a distinction between distributive justice and cumulative justice. Distributive justice assigns wealth and benefits to individuals, it is then left to cumulative justice to remedy any interference with such fair distribution of wealth. Therefore, breach of contract, delict, crime and 'unjustified enrichment' are interferences sought to be remedied through cumulative justice.

Unjustified enrichment

Unjustified enrichment is where one person receives a benefit or value from another at the expense of the latter without any legal cause for such receipt or retention of the value or benefit by the former. Therefore the elements that should be present before liability can be found under unjustified enrichment are –

- enrichment of the defendant;
- impoverishment of the plaintiff;
- a connection between such enrichment and impoverishment;
- no legal justification for such enrichment and impoverishment; and
- 'absence of any other remedy in law'.

With reference to the averments of Ernest J Weinrib in his book *Corrective Justice* (Oxford: Oxford University Press 2012) at 11, the transfer of value or a benefit under unjustified enrichment with regard to the enrichment and expense requirement, establishes the required relationship between the transferor and transferee (ie, enrichment has been moved from the plaintiff to the defendant). These requirements are dependent

on each other in order to establish liability and are structured by immediacy in the ambit of liability; immediacy in the transfer and in the relationship between the parties involved, preventing liability from being too remote or too restrictive. It is on this remoteness that I submit that liability under unjustified enrichment is not a clear and practical cause of action.

The condictio indebiti

This action applies in the case of payments made under duress and payments or transfers made erroneously. The requirements for this action are –

- transfer must have taken place;
- transfer must have taken place without any legal obligation for the transfer;
- transfer was made in the belief that the transfer was due, or it must have been made under duress or by a person of limited legal capacity;
- this action is only available against the recipient of value or transfer only and no one else.

In my opinion, this action is not necessary in our law. Any person who attains and retains value in the manner set out above should be guilty of the criminal offences of intimidation and theft. Intimidation is defined in s 1(1)(a) – (b) of the Intimidation Act 72 of 1982, as amended, and includes acts of unlawfully compelling or inducing any person of a particular nature, class, kind or persons in general to do or abstain from doing any act or to assume or to abandon a particular stand point. Theft consists of unlawfully appropriating moveable corporeal property belonging to another with the intent to deprive the owner permanently of the property. Therefore, the rules of criminal law should apply in the recovery of the property or value in question.

The condictio causa data causa non secuta

This action is used where property has been transferred and the purpose of the transfer has fallen away. This occurs in instances where the transfer was subject to a modus and then the modus is later disregarded. Alternatively, where transfer took place on the basis of an assumption that a particular event will take place in future, and that event does not take place. With this in mind, I make the following two submissions:

• Firstly, in the case of the modus, where the claim is based on a transfer that took place following the cancellation of a contract, it seems to be generally accepted that the claim should be brought by way of contract and not unjustified enrichment. (Louis F van Huyssteem *Contract law in South Africa* (Netherlands: Kluwer Law International BV 2010) at 76 – 79). In *Baker v Probert* [1985] 2 All SA 263 (A) at para 12 the court held that 'cancellation of a contract for breach *is not a condictio* ... that the claim is to be regarded as a

distinct contractual remedy' (my italics).
Secondly, the conception of an assumption of a future event appears to be a suspensive condition in terms of a con-

sumption of a future event appears to be a suspensive condition in terms of a contract and, therefore, should be regulated by the law of contract and not the law of unjustified enrichment.

The condictio ob turpem vel iniustam causam

This action is used when performance was rendered in terms of an illegal agreement in that its conclusion, performance or object is contrary to the law or against good morals and public policy. The aim of this action is to allow the aggrieved party who is barred by the void agreement to bring a claim on the basis of the 'void agreement'. With this in mind, it is worth mentioning that the law will not usually assist an individual who has been engaged in an illegality, except in cases where public policy dictates otherwise – this is also in terms of *par delictum rule*.

In *Henry v Branfield* 1996 (1) SA 244 (D), a case concerned with the conclusion of an oral contract in contravention of s 2(1) of the South African Exchange Control Regulation 1961, the court held that payment in terms of this agreement could not be reclaimed in that the court ought not enforce a contract that perpetrates illegal acts. Furthermore, the *par delictum* rule should not be relaxed where such relaxation will signal any encouragement to break the law.

In addition, there is doubt within the law of unjustified enrichment, as to the necessity of such an action particularly pertaining to the restitution of value that was transferred in terms of an illegal agreement. If the illegal agreement is void, it cannot give rise to any obligations. Therefore, the transfer failed to fulfil an obligation, as there was no obligation to begin with, on which the transfer was made. Therefore, this falls within the sphere of the *condictio indebiti*, making the *condictio ob turpem vel iniustam causam* redundant.

As for those transfers made under duress or undue influence which, under the law of unjustified enrichment, should be brought through this action:

- Where such undue influence or duress is aimed at eliciting the other party into entering into a contract in terms of which performance or value is to be transferred, then a claim based on this should be brought on the basis of law of contract, (ie, rescission of the contract). This was recognised as a ground for rescission by the Supreme Court of Appeal in *Plaaslike Boeredienste (edms) BPK v Chemfos BPK* 1986 (1) SA 819 (A).
- Where undue influence or duress was aimed at eliciting transfer, not by way of a contract, then a claim based on this ground must be brought by way of the law of delict, as this is wrongful and

blameworthy conduct with resultant loss causally linked to the conduct of the defendant (*Broodryk v Smuts No* 1942 TPD 47)

The condictio sine causa specialis

According to Wille's Principles of South African law 9th ed (Juta: Cape Town 2007) at 1055, this action is mainly applied in circumstances where none of the other above mentioned condictiones can find application. It is also used where value is transferred for a valid cause, which cause later falls away. In South African law, there are three instances under which this action will find application:

- Where a party performs in terms of a contract and a supervening impossibility makes it such that the other party's obligation is extinguished. A feasible solution in this case would be for the inclusion of a force majeure clause in every contract that parties conclude. With such inclusion in the contract, the parties cannot claim that the event was entirely unforeseen or avoidable. Therefore, rules of contract law apply. Alternatively an arbitration clause can give an arbitrator the power of amiable compositeur. As amiable compositeur, the arbitrator has the power to handle the particular circumstances by judicious departure from the strict law without creating a precedent.
- Where the property of the plaintiff has been consumed or alienated by someone else, here the laws of property apply; the plaintiff may make use of the *rei vindicatio*. To succeed with the *rei vindicatio*, in terms of *Chetty v Naidoo* 1974 (3) SA 13 (A), the plaintiff must prove that he or she was in lawful control of the thing at the time of the institution of the action.
- Where the bank made payment in terms of a countermanded or forged cheque. These cases should be treated as forgery, uttering or fraud respectively. Also taking into account whether the bank in these cases has been indemnified or not.

A general enrichment action

One of the most problematic areas of the law of unjustified enrichment is the absence of a general enrichment action. This principle was reiterated in *Nortje en* 'n Ander v Pool NO 1966 (3) SA 96 (A) where the majority of the court held that there is no general enrichment action, and that there is no evidence of the existence of a general enrichment action under Roman Dutch law. In McCarthy Retail LTD v Shortdistance Carriers CC 2001 (3) SA 482 (SCA), the court held that when a general enrichment action is finally recognised in South African law it should be subsidiary to the traditional enrichment actions (as discussed above). What appears to be a problem here is the lack of legal certainty caused by the absence of such general enrichment action, which is

CANDIDATE ATTORNEYFEATURE

one of the reasons I submit that unjustified enrichment has no place in our law and is not a solid doctrine on which remedies should be sought.

Action of the unauthorised administrator

The gist of this principle is that the Gestor (administrator) administers the affairs of the *Dominus* (owner) without the latter's consent but in the interest of the latter. This is, however, not an enrichment action, it is an independent source of obligations. Ernest J Weinrib in his abstract Corrective Justice (op cit) at 11 submits that for value to move, the enriching action must be directed at what belongs to the defendant, if the purpose of the action is directed at what belongs to the plaintiff, value remains with the plaintiff although the action brought a benefit to the defendant. In other words value has been entangled with the entitlements of the defendant.

Lord Chief Baron Pollock stated: 'One cleans another's shoes; what can the other do but put them on? ...' Therefore service cannot be rejected without rejecting the thing owned in its entirety (Weinrib at 17). Thus in these circumstances demanding restitution of a benefit or value would mean compelling the owner to make restitution for the value of shoes he owns whose condition were changed without his consent. Entanglement in

this case means that the benefit has been integrated into the entitlements of the defendant and just like the cleanliness in the shoes in the above example, cannot be severed from the shoes, so will a benefit that has been entangled with the entitlements of the defendant.

Therefore, the only instance that the defendant can be held liable with regard to an entangled benefit is when he has accepted it as non-donative. In opinion, 'non-donative' requires conduct: (a) Commission (in that the defendant knowingly accepts a benefit that he is neither entitled to neither receive nor retain). Proving the presence of conduct by commission in this regard will be a question of fact, taking into account all surrounding circumstances. Therefore acting (b) wrongfully and (c) causing loss or 'damage' to the plaintiff, this satisfies the requirements for a delict, and a claim should be brought by way of a delictual claim. Where the benefit remains disintegrated with the entitlements, the defendant must make restitution in terms of public policy, failure of which will result in a delict.

Section 39 of the Constitution provides that: 'When interpreting the rights in the Bill of Rights, a court, tribunal or forum -

(a) ...

(b) must consider international law; and

(c) may consider foreign law'.

With this is mind, it is worth taking into account that English law, which influences South Africa's procedural law, does not recognise the *actio negotiorum gestio* as part of its legal system. In the English case of *Nicholson v Chapman Eyre* (1793) 2 H BI 254 (Court of the Common Pleas) the court stated that a general right of recovery under this action will encourage 'willful attempts of ill-designing people to turn floats and vessels adrift, in order that they may be paid for finding them'. It is by these submissions that I tender that the *actio negotiorum gestio* does not have a place in our law.

Conclusion

The law of unjustified enrichment and the action of the unauthorised administrator are unnecessary remedies in our law. From what I have submitted above, the two actions lack legal certainty. Our current laws of property, delict, contract and criminal law are sufficient to provide legal remedies for the circumstances illustrated above.

Nokubonga Fakude *LLB (UJ)* is a candidate attorney at Mauritz Breytenbach Attorneys in Johannesburg.



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THE LAW REPORTS



February 2015 (1) South African Law Reports (pp 315 - 627); [2015] 1 All South African Law Reports January no 1 (pp 1 - 119) and no 2 (pp 121 - 259); 2014 (12) Butterworths Constitutional Law Reports - December (pp 1397 - 1513)

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

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Abbreviations:

CC: Constitutional Court

EqC: Equality Court, Western

Cape Division **GJ**: Gauteng Local Division, Johannesburg GP: Gauteng Division, Pretoria ICC: International Crime Court NWM: North West Division, Mahikheng SCA: Supreme Court of Appeal WCC: Western Cape Division,

Consumer credit agreements

Cape Town

A once-off credit agreement does not require the credit provider to register: Section 40(1) of the National Credit Act 34 of 2005 provides among others that a person must register as a credit provider if that person is a credit provider under at least 100 credit agreements or the total principal debt owed to the credit provider under 'all outstanding credit agreements' exceeds the threshold prescribed in terms of s 42(1), being the amount of R 500 000. The consequences of failure to register where such is required are, as provided for in s 89, that the agreement would be unlawful and void and as a result the credit provider would be required to refund the consumer payments received in terms of the agreement, together with interest.

In Friend v Sendal 2015 (1) SA 395 (GP) the appellant, Friend, signed an acknowledgment of debt in terms of which he admitted his indebtedness to the respondent, Sendal, in the amount of some R 1,2 million. He further undertook to repay the capital amount, together with interest, in instalments within a period of 12 months. When he defaulted in payment the respondent instituted proceedings for recovery of the balance outstanding, being the amount of R 620 000 and interest. The appellant contended that the acknowledgment of debt was a credit agreement and further that the respondent was a credit provider who was required to register but had not done so. Therefore, it was agreed that, the agreement was unlawful and void. The GP per Kollapen AJ granted judgment in favour of the respondent. An appeal to the full Bench was dismissed with costs.

Legodi J (Fabricius and Kubushi JJ concurring) held that the acknowledgment of debt in question was a credit agreement that did not automatically make the respondent a credit provider who was required to register in terms of s 40. Section 40(1) envisaged registration of a credit provider in a situation where a person frequently concluded credit agreements as defined. The subsection contemplated a situation where a credit provider, either alone or in conjunction with any associated person, would

conclude credit agreements of under at least 100 in number. It did not refer to a single principal debt or a single credit agreement in respect of which the amount exceeded the threshold. It was the total principal debt under 'all outstanding credit agreements' that triggered an obligation to register as a credit provider. It was the credit provider's frequency of providing credit that was envisaged. The section had to be seen as being directed at those persons who were in the credit market or intended participating in it. The respondent's onceoff transaction could not be seen as participating in that market.

Criminal law

Dolus eventualis: In S v Humphreys 2015 (1) SA 491 (SCA) the appellant, Humphreys, was charged with and found guilty on ten counts of murder and four of attempted murder and sentenced to 20 years of imprisonment by

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Henney I in the WCC. That was after a minibus taxi carrying school children collided with a train at a level crossing. As the driver of the minibus, the appellant, overtook a queue of vehicles waiting for the train to pass, ignored the red flashing lights and passed through boom gates by manoeuvring around them as they were staggered on either side of the road. Evidence showed that on two previous occasions he successfully negotiated that deadly manoeuvring but that was not to be so on the third occasion.

His appeal to the SCA was partially successful. The convictions of murder were changed to culpable homicide and those of attempted murder set aside as there was no offence of attempted culpable homicide in South African law. The sentence was reduced to eight years of imprisonment, effective from the date when he started serving the High Court sentence. Brand JA (Cachalia, Leach JJA, Erasmus and Van der Merwe AJA concurring) held that the test for dolus eventualis was twofold namely -

- did the accused, being the appellant in the instant case, subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- did he reconcile himself with that possibility?

Regarding the first leg of the enquiry it was held that the WCC was correct in finding that in the circumstances of the case the appellant foresaw the death of his passengers as a possible consequence of his conduct. No person in his or her right mind would avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train would have fatal consequences for the passengers in the vehicle. Regarding the second leg of the enquiry the test was whether the appellant took the consequences that he foresaw into bargain, namely whether it could be inferred that it was immaterial to him whether those consequences would flow from his actions. Conversely stated, the principle was that if it could reasonably be inferred that the appellant could have thought that the possible collision he subjectively foresaw would not actually occur, the second requirement of dolus eventualis would not have been established. In the instant case the inference that the appellant foresaw that the possible collision would not occur was not only a reasonable one but was indeed the most probable one. In short, the appellant foresaw the possibility of the collision but thought that it would not happen, as was the case on two previous occasions. Therefore, he took a risk, which he thought would not materialise.

NB. It should be noted that the approach of the SCA to the second leg of the inquiry is not convincing at all as it looks at the conduct of the appellant with hindsight rather than foresight. Surely the appellant foresaw the collision as a possibility. The question is - what did he do to ensure it did not occur? He reconciled himself with the possibility of that eventuality materialising and took a great gamble with the life of his passengers in the hope that as he got away with it on two previous occasions that would be the case once more. Accordingly he reconciled himself with the possible occurrence of the collision were anything to go amiss, and it did.

Equality legislation

No constitutional or statutory duty on Parliament to publish legislation in all 11 official languages: Section 137 of the South Africa Act. 1909, being British legislation which created the Union of South Africa in 1910, provided that both English and Dutch languages were the official languages of South Africa and had to be treated on a footing equality, possessing and enjoying equal freedom, rights and privileges. All records, journals and proceedings of Parliament were required to be kept in both languages as were all Bills, Acts and notices of general importance or interest issued by the government. Save to say that the Afrikaans

language took the place of the Dutch language, the Constitution of 1961 (Republic of South Africa Constitution Act 32 of 1961, s 119) and that of 1983 (Republic of South Africa Constitution Act 110 of 1983, s 99(2)) contained similar provisions. However, this is not the case under the present Constitution which in s 6(1) provides for 11 official languages being Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Significantly, there is a catch here since s 6(4) provides that all official languages must enjoy parity of esteem and must be treated 'equitably'. It cannot be over-emphasised that they are required to be treated 'equitably' and not 'equally'.

In Lourens v Speaker of the National Assembly and Others 2015 (1) SA 618 (EqC) the applicant, Lourens, sought among others a court order declaring that Parliament was unfairly discriminating against official languages other than English, which he alleged was treated as 'super official language', by not publishing all national legislation in all 11 official languages. He also sought an order to the effect that after publication in all 11 languages, legislation should be certified as correct for use in courts. The application was dismissed, with no order as to costs as none of the respondents sought an order for costs against the applicant.

The EqC held, per Griesel J, that the Constitution did not provide that because there were 11 official languages, all of them should always and for all purposes be treated equally. If equal treatment of all 11 official languages for all purposes were intended, one would have expected to find a clear provision to that effect, similar in content to the emphatic and unambiguous provisions of s 137 of the South Africa Act. 1909, Instead s 6(4) of the Constitution simply provided that all official languages should enjoy parity of esteem and be treated 'equitably'. Furthermore, the Constitution did not require the simultaneous and equal use of all 11 languages for all purposes. On the contrary in s 6(3)(a) the Constitution permitted the use by the national and provincial governments of any particular official languages for the 'purposes of government', provided that they should use at least two official languages. The fact was that the Constitution expressly permitted the use of only two official languages for certain purposes, thereby sanctioning by necessary implic ation discrimination against the other official languages. The inevitable conclusion was that to the extent that the practice of publishing national legislation in only two official languages could be considered discriminatory, such discrimination was fair.

Fundamental rights

Freedom of expression: Bylaw 9(h) of the Outdoor Advertising Bylaws of the City of Johannesburg Metropolitan Municipality (the City), promulgated in the Provincial Gazette Extraordinary 277 on 18 December 2009 provides among others that 'no person may erect, maintain or display any advertising sign that is indecent or suggestive of indecency, prejudicial to public morals, or is insensitive to the public or any portion thereof or to any religious or cultural group'. In BDS South Africa and Another v Continental Outdoor Media (Pty) Ltd and Others 2015 (1) SA 462 (GJ); Boycott, Divestment and Sanctions South Africa and Another v Continental Outdoor Media (Pty) Ltd and Others [2014] 4 All SA 347 (GJ) a part only, and not the whole of the bylaw, was challenged. That part was the one dealing with prohibition of advertising that was 'insensitive to the public ... or to any religious or cultural group'. The constitutional challenge arose after an advertisement put up by the applicant, Boycott, Divestment and Sanctions South Africa (BDSSA) on an outdoor billboard owned and operated by the first respondent, Continental, was removed during the currency of its flight. The advertisement was pro-Palestine and

anti-Israel and complained about alleged illegal occupation by Israel of Palestinian territory. As a result of complaints by members of the Jewish community, and because of the provisions of bylaw 9(h) the advertisement was removed. The applicant approached the GJ for an order declaring the impugned provisions of the bylaw inconsistent with the Constitution and therefore invalid as they infringed its right to freedom of expression. The applicant also sought reinstatement of the advertisement against payment as provided for in the rental agreement between the parties. The application was granted with costs, the court suspending the period of invalidity of the bylaw for 12 months. In the meantime the bylaw had to be read as not containing the impugned provision. Furthermore, if the City were to fail to remove the offending provisions, same would automatically be removed, as per the court order, after the elapse of the 12 month period.

Mayat J held that the words 'or is insensitive to the public ... or to any religious or cultural group' as contained in bylaw 9(h) went beyond the limitation of permitted free speech in the Constitution and were, therefore, inconsistent with it. Those words set a far lower boundary than any of the specific limitations contained in s 16(2) of the Constitution. In other words the limitations in ss 16(2) and 36(1) of the Constitution went far beyond the notion of 'insensitivity' towards a portion of a religious or cultural group. Unlike the limitations to free speech contained in s 16(2), which included propaganda for war, incitement of imminent violence or advocacy of violence against a particular race or religion, and unlike the other limitations in bylaw 9(h) suggestive of indecency or prejudice to morals, 'insensitivity' was a manifestly subjective feeling. It had the result that some members of a particular religious or cultural group could subjectively feel or not feel that certain expressions of speech were 'insensitive'. An expression had to reach the level of one of the categories in s 16(2) of the Constitution (or the unchallenged portions of bylaw 9(h) of the bylaws), before it could be prohibited by legislation or bylaw. Accordingly, even if the advertisement was 'controversial' it could only be prohibited on the basis of one of the constitutional limitations.

Individuals and private enti-

ties do not have constitutional duty to provide right of access to adequate housing: Section 26(1) of the Constitution provides that 'everyone has the right of access to adequate housing' while subs (2) provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of that right'. The main issue in the City of Cape Town v Khaya Projects (Pty) Ltd and Others 2015 (1) SA 421 (WCC); City of Cape Town v Khaya Projects (Pty) Ltd and Others [2015] 1 All SA 81 (WCC) was whether the duty of the state to provide adequate housing also extended to private parties. The applicant, City of Cape Town, through the erstwhile Blaauwberg Municipality, commissioned the second respondent, a consultant, to develop a low-cost housing project for homeless residents. After completing its work, the second respondent entered into a contract with the first respondent, Khaya Projects, to build the required residential units. However, the first respondent did an unsatisfactory job with the result that the units were full of defects ranging from poor foundations, leaking roofs to fire hazards. As provided for in the contract, the dispute about the quality of work done, as well as payment to be made was referred to arbitration. However, arbitration proceedings, which should have been completed within four months, dragged on for years. As an interested person, and in order to be able to blacklist in the future contractors who did not do a good job, the applicant approached the High Court for two declarators, one to the effect that private parties had a constitutional duty to provide access to adequate housing and the other to the effect that arbitration proceedings had lapsed due to inordinate delay in finalising them. The application was dismissed with costs.

Mantame J held that nowhere in s 26 did the legislature attempt to delegate the state's constitutional obligation to individuals or private parties. For the court to be asked by the applicant to impose additional constitutional obligations on the first respondent would be tantamount to over-regulating a building industry that had been well regulated. The burden imposed by the Constitution, particularly s 26(1), could not be extended to individuals or private parties. The court could not make a finding that it was an implied term of the first and second respondents' contract that the units to be built would constitute 'adequate housing' in terms of s 26(1). Since the state had a constitutional obligation to deliver service to the people in the form of low-cost housing, it had to tighten the screws to ensure that houses built by contractors were suitable for dignified human habitation and that they passed the muster. If they did not the applicant should not issue occupational certificates for occupation by

the residents. If the contractor transgressed, the state could claim damages or specific performance against same.

Insolvency

Irregular valuation of assets done without doing physical inspection: In Ex Parte Erasmus and Another 2015 (1) SA 540 (GP) the applicants, Mr and Mrs Erasmus who were married in community of property, made an application for voluntary surrender of their joint estate. However, their application had a number of unsatisfactory features particularly in respect of the conduct of their attorney and valuator. For example, the attorney alleged in the papers that his costs had been 'taxed' even though taxation thereof was only to follow in due course. When confronted with the issue he explained that the allegation was a 'typing error'. The valuator did valuation of the applicants' movables, which prima facie appeared to have been done without physical inspection. He subsequently explained that he did his valuation on the basis of a list of assets prepared by the applicants who indicated the condition of each item, its age and a photograph and expressly confirmed that he did not do physical inspection of the assets.

The application for sur-

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ABOUT THE AUTHOR: ALLEN WEST

Allen West was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist

at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred articles in leading law journals.

Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.



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Law Society of South Africa (LSSA) | Tel: +27 (0)12 366 8800 | Fax: +27 (0)12 362 0969 | Email: LSSA@LSSA.org.za Website: www.LSSA.org.za | Address: PO Box 36626 Menlo Park 0102 | Docex 82 Pretoria | 304 Brooks Street, Menlo Park, Pretoria render of the estate was dismissed, the court describing the conduct of both the attorney and valuator as unprofessional. The attorney was ordered to repay all fees and other moneys received from the applicants immediately, proof of which was to be presented to the Registrar of the court within five days. The application was referred to the law society having jurisdiction with a request that the attorney's conduct be investigated. The valuator was also ordered to repay all fees and moneys received from the applicants or the attorney and thereafter provide proof thereof to the Registrar of the court within five days.

Bertelsmann J held that practitioners who launched applications for voluntary surrender had been warned repeatedly against dubious practices. In the instant case, it was self-evident that the valuation was completely unacceptable. It lacked any semblance of an independent confirmation that the assets existed. No professional assessment of the assets' alleged value had taken place. A valuator's contribution to an application for voluntary surrender, and indeed any forensic exercise, depended on for its admissibility as opinion evidence on the indisputable independence of the expert. The applicant who purportedly provided the list of assets and other information was no expert and was hardly able to provide information regarding the age and condition of the assets for purposes of valuation thereof. It had always been an obvious principle, albeit unwritten, that the valuator should personally inspect assets that were required to be valued.

The Deputy Judge President of the GP, having given approval, the court laid down as a formal rule of practice that a valuator in application for voluntary surrender should confirm under oath that he or she had personally inspected the assets that were referred to in the valuation. In such affidavit the date, time and locality at which the assets were inspected had to be set out and the applicant or his

or her proxy had to confirm in the affidavit that he or she was present when the assets were viewed and that he or she pointed out the assets to the valuator.

No waiver of protection given to certain property: In terms of the Insolvency Act 24 of 1936 (the Act) in s 82 (1) the main task of the trustee of an insolvent estate is to collect assets, sell them and pay creditors a dividend. However, in terms of s 82(6) of the Act certain property of the insolvent is protected and is therefore not permitted to be sold. Very briefly the section provides among others that from the sale of the movable property of the insolvent 'shall be excepted wearing apparel and bedding ... and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors or the Master may determine and the insolvent is allowed to retain, for his own use, any property so excepted from the sale'.

In Ex Parte Kroese and Another 2015 (1) SA 405 (NWM) the applicants, Mr and Mrs Kroese who were married in community of property, applied for surrender of their joint estate. They waived the protection afforded by the section with the result that if the surrender were to be accepted, the trustee would sell all their movable assets including household furniture and other appliances. The purpose was to increase the dividend available to creditors to 20 cents per rand owing whereas without that waiver the dividend would be 14 cents per rand. The application for surrender of the estate was dismissed.

Landman J held that the purpose of s 82(6) was clear. It included measures that were intended to preserve the right to life and dignity of an insolvent and his or her dependants and to place them in a position to rebuild their lives. The right to dignity was one of the human rights that were inalienable. The Act and other legislation that provided for the protection of debtors were enacted for

the benefit of such persons and the well-being of society. Since the advent of democracy and a society founded on human rights as well as a concern for the welfare of its citizens generally, it was not in the interest of the state that citizens should renounce their assets and become a burden to society. Taking into account the vital importance of the inalienable right to human dignity of the applicants and indeed whatever dependants they could be having as well as the right to work or trade, coupled with the purpose of excepting basic necessities, the applicants were not allowed to waive their entitlement. There was also the practical inference that if the applicants for voluntary surrender should waive the entitlement in question that was in indication that the advantage to creditors was borderline. In general a dividend of 20 cents in the rand was required. In the instant case if the waiver was left aside the applicants would not have made out a case that the surrender of their estate, offering a dividend of 14 cents in the rand, would be to the advantage of the creditors.

International criminal law

Duty to investigate international crimes against humanity of torture committed beyond the borders of **South Africa:** Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Act) provides among others that any person who commits a crime contemplated in the Act outside the territory of South Africa is deemed to have committed it in this country if such person, after commission of the crime, is present in the country. The application of the section fell to be determined in National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1) SA 315 (CC); National Commissioner of the South African Police v Southern African Human Rights Litigation Centre and Another (Dugard and Oth-

ers as Amici Curiae) 2014 (12) BCLR 1428 (CC) where in March 2007 Zimbabwean police raided the headquarters of the main opposition party, the Movement for Democratic Change (MDC) in Harare, Zimbabwe. In that raid more than 100 people were taken into custody and during their detention were subjected to severe torture, which included beating with iron bars and baseball bats, waterboarding, forced removal of their clothing and the like. After some of them came to South Africa the first respondent, the Southern African Human Rights Litigation Centre and the second respondent, Zimbabwe Exiles' Forum did some investigating, gathered information and prepared a torture docket that was presented to the applicant, the National Commissioner of the South African Police Service (the National Commissioner) requesting that allegations of crimes against humanity of torture which took place in Zimbabwe be investigated. If successful the investigations could result in prosecution of alleged transgressors if they happen to be in South Africa or their extradition if they were not. The National Commissioner declined to investigate, mainly because of the policy of non-intervention in Zimbabwe's internal affairs but also because the alleged transgressors who included six cabinet ministers, directors-general and high ranking official of Zimbabwe's ruling party, the Zimbabwe African National Union, Patriotic Front (Zanu PF) were not present in South Africa. As a result the respondents approached the GP and obtained an order reviewing and setting aside the decision of the National Commissioner not to investigate. An appeal to the SCA was unsuccessful as that court held that the National Commissioner was empowered to investigate and accordingly ordered him to do so. In a further appeal to the CC leave to appeal was granted and the appeal dismissed with costs.

Reading a unanimous judgment of the court Majiedt AJ held that a primary purpose

of the Act was to enable the prosecution, in South African courts or the International Criminal Court (ICC), of persons accused of having committed atrocities, such as torture, beyond the borders of South Africa. Torture, whether on the scale of crimes against humanity or not, was a crime in South Africa in terms of s 232 of the Constitution as the customary international law prohibition against torture had the status of a peremptory norm. The contention that the National Commissioner had no duty to investigate as the suspects were not present in South Africa was correct only in relation to prosecution. Section 35(3)(e) of the Constitution required an accused person to be present during his or her trial but did not require a person's presence during investigation. Accordingly, the exercise of universal jurisdiction for the purposes of the investigation of

an international crime committed outside the country's territory could occur in the absence of a suspect without offending the Constitution or international law. Requiring the presence of suspects in South Africa for an investigation would render nugatory the object of combating crimes against humanity. Furthermore, any possible next step that could arise as a result of an investigation, such as prosecution or an extradition request, required an assessment of information that could only be attained through investigation. In the case of Zimbabwe, as it shared a border with South Africa, the possible presence of the suspects in the future could not be discounted.

Practice

Refusal of postponement is not gross irregularity: In Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA); Pangarker v Botha and

(SCA) the parties, AB the husband and CB the wife, were married out of community of property. Thereafter AB, the first respondent, instituted divorce proceedings against CB. The hearing of the matter was postponed a total five times, three of which were at the instance of AB who needed legal representation. On the other two occasions postponement was granted to give AB's legal representatives the opportunity to familiarise themselves with the facts of the case. On the fifth occasion when the hearing was postponed to a specific date the magistrate, the appellant Pangarker, warned AB that on the next occasion, the sixth, the hearing would proceed without him having a legal representative if he did not solve the problem in time. AB secured the services of an attorney, one D, who was double-briefed as he had commitment elsewhere on the same date. As a result, but without communicating with CB's legal representatives. D wrote the appellant a letter asking for postponement because of his other commitment on the scheduled date. The appellant replied that she could only see legal representatives for both sides at the same time if arrangements could be made for such a meeting. No such meeting was arranged. At the hearing of the matter on the sixth occasion AB appeared without his attorney D. He informed the court that D instructed him to read into the record an application for recusal of the appellant as the presiding officer and thereafter leave the court. The appellant advised AB that the hearing would proceed in his absence if he left and the recusal application were to fail whereas if it were granted the hearing would be postponed. Thereafter, AB read the recusal application into the record and left the court. The refusal application was successfully opposed by CB's legal representative. As a result the trial proceeded in the absence of AB, a decree of divorce was granted with costs and AB ordered to forfeit a part of the marriage benefits.

Another [2014] 3 All SA 538

AB applied to the WCC, Cape Town for a review and setting aside of the court order on the grounds that the magistrate committed 'gross irregularity' by not postponing the hearing *mero motu* and proceeding in his absence. Goliath J and Cloete AJ granted the review application with costs against AB and the magistrate. An appeal against the WCC order was upheld with costs by the SCA.

Mhlantla IA (Mthivane DP. Lewis, Wallis JJA and Legodi AIA concurring) held that the finding of the High Court in finding that the failure to postpone the trial constituted a gross irregularity was disturbing as it was not supported by the facts. Furthermore, the High Court failed to appreciate the principles applicable in respect of postponement and recusal applications. In the instant case there was one application before the magistrate, which was recusal, and it was properly dismissed. When AB left on his own volition he elected not to participate in the proceedings. There could have been no doubt that he knew of the consequences of doing so as they had been explained to him. The unavailability of a legal representative was not necessarily a basis for postponement of a matter. On the facts of the present case there was no basis for the magistrate to postpone the trial in vacuo. Also the High Court failed to consider CB's competing right to have the dispute settled swiftly. It was evident that AB had ample opportunity to obtain a legal representative and prepare for trial. Accordingly, his lack of legal representation could not be a basis for a finding of any 'gross irregularity' on the part of the magistrate.

The court added that the conduct of the attorney D was improper in that he directed a letter seeking postponement to the magistrate and also took instructions in two matters in different courts, which were to be heard on the same date. As D had in the meantime been appointed as a magistrate, it was directed that a copy of the judgment



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should be sent to the Magistrates' Commission for information.

Servitudes

Cancellation of praedial servitude due to cessation of its utility or abandonment: In Pickard v Stein and Others 2015 (1) SA 439 (GJ); Pickard v Stein and Others [2014] 3 All SA 631 (GJ) the applicant, Pickard, and the respondent, Stein, were owners of adjacent properties in a hilly area. As the applicant's property was on higher ground the parties registered a servitude of light in favour of the respondent in terms of which the applicant was not allowed to erect structures or grow trees or shrubs that would prevent light reaching the respondent's property. Thereafter the applicant subdivided his property and sold a portion thereof to a third party B who started building a house. Because of the new house, and for the sake of security and privacy, all three parties agreed that B should build another boundary wall on top of the existing one, which was done. Subsequently the applicant sought cancellation of the servitude while the respondent wanted demolition of part of the new building as well as reduction of the height of the boundary wall as both interfered with the servitude of light. The question before the court was whether the servitude of light came to an end when the second boundary wall was built on top of the first or had been abandoned so as to justify cancellation of its registration against the title deed. The court granted with costs an order declaring that the servitude could be cancelled because of its abandonment by the respondent. The applicant was to bear cancellation costs of the servitude.

Dodson AJ held *obiter* that applying s 173 of the Constitution which required development of the common law by the court taking into account the interests of justice, if the utility that a praedial servitude previously provided to a dominant tenement had

permanently ceased, the servitude itself would become extinguished. However, in the instant case the court was able to find either on the evidence presented or on the basis of judicial notice, that the preference or need for security and privacy was so pervasive that the servitude of light had for those reasons permanently lost its utility. Furthermore, a servitude could be cancelled as a result of abandonment. By giving the applicant and B the right to build the second wall on top of the first the respondent had abandoned her servitudinal right of light. The fact that it later emerged from the land surveyor's report that the wall was inadvertently built slightly inside the respondent's property and not on the boundary as thought, did not detract from the inference to be drawn from her conduct. particularly given that the wall necessarily and naturally obstructed the servitude in all its component.

Trademarks

Expungement of a trademark that is not distinctive: Section 10(2)(a) of the Trade Marks Act 194 of 1993 (the Act) provides among others that a trademark is liable to be removed from the trademark register if it is not capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered generally or, if registration or proposed registration is subject to limitations in relation to use within those limitations. In Discoverv Holdinas Ltd v Sanlam Ltd and Others 2015 (1) SA 365 (WCC) the applicant, Discovery, was the registered owner of the trademark 'Escalator Funds'. It subsequently found out that after registration of its trademark its direct competitor, the respondent Sanlam, made application for registration of the trademark 'Sanlam Escalating Fund' and that it had in fact commenced using the trademark 'Escalating Fund/Sanlam Escalating Fund'. Alleging that usage of the trademarks 'Escalating Fund' and 'Sanlam Escalating

Fund' in relation to financial products violated its trademark 'Escalator Funds' the applicant sought an interdict prohibiting the respondent from using a trademark that was confusingly similar to its own. In a counter-application the respondent sought expungement of the applicant's trademark on the ground that 'Escalator Funds' was not distinctive but only descriptive of the product that was being offered. Accordingly, its registration as a trademark was wrong and ought not to have been done in the first place. The interdict application was dismissed and the counterapplication granted, both with costs.

Goliath J held that the phrases 'escalator funds' or 'escalating fund' were not distinctive enough on their own to distinguish products from their competitors. The phrase 'escalator funds' was entirely descriptive. Derivatives of the word 'escalate' and even the word 'escalator' were already common in the financial services sector and 'escalator' for financial services or products was not a word or concept that the applicant first coined or could claim exclusive rights to. The word 'escalator' had been in use in other countries in respect of financial services products. The words 'escalating', 'escalator' and 'fund' were common English words. The word 'escalator' was coined in the early 1920s when escalators were new. Confusion was not likely to arise in the market place because Discovery's 'Escalator Funds' trademark was not confusingly similar to Sanlam's 'Escalating Fund' trademark when the two were appreciated in their entirety. The phrases 'escalator funds' and 'escalating fund' were not distinctive but merely descriptive of the financial services products, more particularly the risk nature of the product being offered.

Other cases

Apart from the cases and material referred to above the material under review also contained cases dealing with access to information held by a private body, asylum application, adopted child's loss of support claim after the death of natural father, child justice, claim for compensation to doctor raped on duty at hospital, claim for constitutional damages that were never expressed or implied in contract, duty of presiding officer to explain the right to legal representation, findings or remedial action by Public Protector not binding on persons and organs of state, income tax search-and-seizure warrants, international arbitration, invalidity of foreign exchange regulations, lapsing of grocers' wine licences, reluctance of court to enforce arbitration agreement concerning disputes of a religious nature, right of preemption established through a testamentary disposition, setting aside decision of Independent Communications Authority of South Africa, tax implications of share option scheme, tender bid having to comply for prescribed formalities, test for removal of prosecutor and unlawful arrest and detention.

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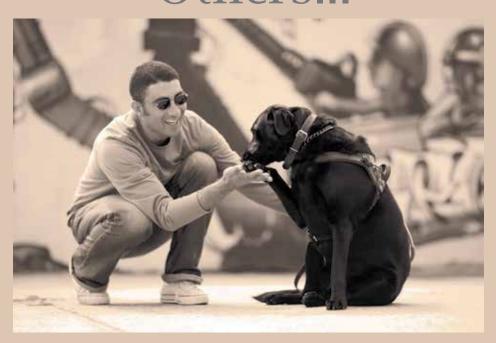
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Dally for a day: *Spatium deliberandi* and the importance of timing

By Emma Powell and Merlita Kennedy

Phillips NO obo Makheta v Beukes (GSJ) (unreported case no 2013/27925, 27-11-2014) (Sutherland J)

n anticipation of trial, it is common practice for the defendant to place the plaintiff on risk by offering a tender in terms of r 34 of the Uniform Rules of Court. In considering an appropriate costs order, there are three salient factors that will guide the court in exercising its discretion:

- the timing of the tender;
- the time taken to consider and uplift or reject the tender (the *spatium deliberandi*); and
- the conduct of the parties in the interim.

The point of controversy in this matter was specifically what amount of time should be considered reasonable for the plaintiff to accept the 'without prejudice' offer. In short, was the *spatium deliberandi* taken reasonable in the circumstances?

The Beukes decision

The plaintiff, a curator acting on behalf of Musoliwa Makheta, instituted action for payment in the region of R 35 million against the defendant. The trial proceeded only in respect of quantum and the argument that was to be heard related to the future medical and related expenses, being the only remaining head of damage in dispute.

The defendant in this case served his tender on the first day of trial, after due consideration of the plaintiff's articulated case. The tender was uplifted after six days of trial. Sutherland J noted that the turning point in the eyes of the plaintiff, which caused the tender to be swiftly uplifted, was confirmation of the patient's neurological state by way of an EEG depicting little regenerative ability. This prognosis was critical to the degree of care and treatment, which the patient required and therefore directly relevant to the amount to be awarded for future medical and related expenses.

The purpose of r 34 is to limit the costs incurred by a defendant at trial. Ordinarily, the court will order the defendant to the pay the plaintiff's costs incurred up to the date of the offer, and the plaintiff to pay the defendant's costs thereafter. This general proposition does not, however, cater for the scenario, as in this case, where the tender is served

just before or at the commencement of trial and the plaintiff continues to rake up costs while he considers the offer. In such an instance, the extent of the *spatium deliberandi* allowed will depend on the particular circumstance of the case, the stage at which the offer is made and the reasonableness of the plaintiff's conduct thereafter, especially where the plaintiff's conduct is such that he delays unreasonably in accepting or rejecting the tender.

It is noteworthy that the plaintiff raised the argument that all relevant factors should be taken into account when determining what constitutes a reasonable period of consideration. In the view of the plaintiff, all relevant factors include the defendant's conduct prior to and during trial. To this argument, the court acknowledged that while there is no temporal limit to what factors are to be considered when it makes its decision, the important consideration is relevance. Sutherland J held that 'the question of costs of litigation must self-evidently be related to the conduct of litigation and not concern itself with considerations outside of that realm'.

The defendant acknowledged that while the plaintiff is entitled to a spatium deliberandi to consider the offer made in settlement of the matter, r 34 does not permit the plaintiff to keep the defendant waiting to an extent where costs continue to be incurred. The defendant argued, using the judgment of Henry v AA Mutual Insurance Association Ltd 1979 (1) SA 105 (C), that where the trial has progressed there should be no reason for the plaintiff to 'dally for more than a day' before accepting or rejecting a tender. In light of this, the defendant argued that waiting six days to accept the tender was protracted and a more appropriate time to consider the tender would be two days. The defendant contended that the plaintiff should therefore be awarded costs up to two days after the tender was served and the defendant should be awarded costs for the four days thereafter.

In contrast, the plaintiff argued that he ought to be awarded costs for the full duration of trial, taking into account all relevant factors. The court, however, found that arguments such as the defendant being a metaphorical Goliath and those relating to the conduct of the defendant prior to trial did not bear any weight. Sutherland J further noted that the late appearance of the EEG was not a tactical move by the defendant, but rather a confirmation of the defendant's case, to which the plaintiff was privy.

While Sutherland J did express disapproval for the tender only being made on the first day of trial he ordered an 'equal division of the spoils', where each party is awarded costs for three days of trial.

The judgment handed down by the court clearly brings to the fore that the most important consideration that a court must take into account when determining a cost order is timing, not only of acceptance or rejection of a tender, but also the timing of the tender itself. In the same train of thought, the conduct of the parties during the interim period is the important factor in relation to a costs order, and not the conduct outside of the bounds of trial, which is more relevant to a determination on liability. The decision made is, however, a fact-specific inquiry.

It is, therefore, clear from this case that the strategy related to serving a tender extends beyond considerations on the part of the defendant. Not only does the defendant want to place the plaintiff on risk in an attempt to settle the matter, but the plaintiff too has a duty to timeously consider the tender and not dally in making a decision. The time taken to deliberate a tender must be reasonable in the given circumstances. A tender offered by the defendant is not a proverbial safety net that the plaintiff can hold onto until such point that he realises the trial is not going as anticipated but rather it is an offer that must be given the appropriate consideration.

Emma Powell *BA LLB (Wits)* is a candidate attorney and Merlita Kennedy *BA LLB (Stell)* is an attorney at Webber Wentzel in Johannesburg.

• Ms Kennedy acted for the defendant in the above matter.



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

NEW LEGISLATION

Legislation published from 2 February – 27 February 2015

BILLS INTRODUCED

Agrément South Africa Bill B3 of 2015. Judicial Matters Amendment Bill B2 of 2015.

COMMENCEMENT OF ACTS

Legal Aid South Africa Act 39 of 2014. *Commencement:* 1 March 2015. Proc R7 *GG*38512/27-2-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990

Amendment of standards and requirements regarding control of the export of citrus fruits. GenN132 GG38478/20-2-2015.

Amendment of standards and requirements regarding control of export of fruit, excluding citrus and certain deciduous fruits. GenN133 GG38478/20-2-2015.

Amendment of regulations regarding inspections and appeals: Local. GN R124 GG38493/27-2-2015.

Amendment of regulations regarding inspections and appeals: Export. GN R123 *GG*38493/27-2-2015.

Collective Investment Schemes Control Act 45 of 2002

Declaration of hedge fund business as a collective investment scheme from 1 April 2015. GN141 *GG*38503/25-2-2015.

Co-operative Banks Act 40 of 2007

Co-operative Banks Act Rules for Representative Bodies and Support Organisations. GN72 *GG*38441/6-2-2015.

Financial Markets Act 19 of 2012

Amendments to the Johannesburg Stock Exchange (JSE) Listing Requirements. BN38 *GG*38452/5-2-2015.

Amendments to the JSE Equities, Derivatives and Interest Rate and Currency Rules. BN43 *GG*38478/20-2-2015.

Genetically Modified Organisms Act 15 of 1997

Amendment of Regulations (fees payable). GN87A *GG*38458/13-2-2015. Tariffs for service from 1 April 2015. GN87 *GG*38458/13-2-2015.

Income Tax Act 58 of 1962

Protocol amending the agreement between South Africa and India for avoidance of double taxation and prevention of fiscal evasion of taxes on income. $GN60\ GG38440/3-2-2015$.

Agreement between South Africa and the United States of America to improve international tax compliance and to implement Foreign Account Tax Compliance Act. GN93 GG38466/13-2-2015.

Agreement between South Africa and Barbados for the exchange of information relating to tax matters. GN97 GG38475/17-2-2015.

Determination of daily amount in respect of meals and incidental costs. GN98 GG38476/25-2-2015.

Persons or entities that may administer financial instruments or policies as tax free investments. GN171 GG38508/25-2-2015.

Regulations on the requirements for tax free investments. GN R172 *GG*38509/25-2-2015

Fixing of rate per kilometre in respect of motor vehicles. GN175 *GG*38516/27-2-2015

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Annual adjustment of single exit prices of medicines and scheduled substances for 2015. GN R74 *GG*38451/4-2-2015.

Information to be furnished by manufacturers and importers of medicines and scheduled substances when applying for single exit price adjustment in 2015. GN R75 GG38451/4-2-2015.

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Municipal Tariff Guideline for 2015/2016. GenN134 *GG*38478/20-2-2015.

National Qualifications Framework Act 67 of 2008

Revised policy on minimum requirements for teacher education. GN111 GG38487/20-2-2015.

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Amendment to the compulsory specification for protective helmets for drivers and passengers of motor cycles and mopeds. GN R100 *GG*38479/20-2-2015.

Plant Breeders' Rights Act 15 of 1976

Amendment of regulations relating to plant breeders' rights (amendment of fees payable). GN R82 *GG*38459/13-2-2015.

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Amendment of regulations relating to establishment, varieties, plants and

propagating material (amendment of fees payable). GN R81 GG38459/13-2-2015.

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Fees and charges to be implemented on 1 April 2015. GenN87 GG38449/2-2-2015.

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Tax Administration Act 28 of 2011

Persons required to submit returns. GN169 GG38506/27-2-2015.

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Draft National Pricing Strategy for Waste Management Charges in terms of the National Environmental Management: Waste Act 59 of 2008. GenN84 GG38438/2-2-2015.

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Draft Regulations regarding Procedural Requirements for Licence Applications in terms of the National Water Act 36 of 1998. GenN126 GG38465/12-2-2015.

Draft National Register of Artisans Regulations in terms of the Skills Development Act 97 of 1998. GenN104 GG38458/13-2-2015.

Draft Amendment to the list of waste management activities that have or are likely to have a detrimental effect on the environment in terms of the National Environmental Management: Waste Act 59 of 2008. GN130 GG38472/13-2-2015.

Regulations relating to the constitution of the professional board for emergency care practitioners in terms of the Health Professions Act 56 of 1974 for comment. GN R108 GG38485/17-2-2015.

Procedural regulations pertaining to the functioning of the office of health standards compliance and its board in terms of the National Health Act 61 of 2003 for comment. GN R110 GG38486/18-2-2015.

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A Practical Guide to Media Law

By Dario Milo and Pamela Stein

Durban: LexisNexis (2013) 1st edition Price: R 513 (incl VAT) 237 pages (soft cover)



n 1990, when the last definitive guide for journalists was published in the form of Kelsey Stewart's 'Newspaperman's Guide to the Law' (Durban: Butterworths 1990), Nelson Mandela had just been released and emergency regulations were still in place. There were only four television channels available in South Africa and the internet was in its infancy.

Much has changed since 1990. Emergency regulations are no longer; South Africa now has a Constitution that guarantees freedom of expression, this has impacted the law of defamation and the realms of privacy; and legislation has been introduced entitling members of the public access to information. Additionally, the internet has fundamentally changed the way we think. Citizen journalism and blogging are now matters of course. The number of television channels has mushroomed well beyond the four that were available in 1990.

With all these changes, there was clearly a need for lawyers and journalists alike to have a definitive guide to media law. No longer could this be limited to the 'newspaperman'. Step in, Dario Milo and Pamela Stein. They have now written what is, in essence, a replacement to the 'Newspaperman's Guide to the Law'. This book details advances that have been made in 1990 arising from the changed political dispensation and the tremendous advances in technology. In the sphere of communications and media law, the book is everything that the title says it is – a 'practical guide to media law'. It is well structured, well written and accessible to all – not only lawyers practising in the field.

The book not only deals extensively with the significant developments that have taken place in defamation law but also the impact of the protection of freedom of speech as contained in the Constitution, legislation dealing with access to information and the concept of hate speech. Detailed chapters outline the impact that the Constitution has had on freedom of expression and hate speech, as well as recent developments in the law of defamation. There is sufficient guidance not only for 'newspaper journalists' but broadcasters as well. Sufficient guidance exists in the book dealing with the practicalities of court reporting and, importantly, the protection of sources and contempt of court.

In short, the book is a must have for journalists and fledgling media lawyers and a good starting point for those well-seasoned in the field.

Dan Rosengarten is a media lawyer at Rosin Wright Rosengarten in Johannesburg.



Fig. 59 Hely

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Employment law update



Talita Laubscher Blur LLB (UFS) LLM (Emory University USA) is an attorney at Bowman Gilfillan in Johannesburg.



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

Re-employment on different terms and conditions

In Kukard v GKD Delkor (Pty) Ltd [2015] 1 BLLR 63 (LAC), Mr Kukard was initially employed on an indefinite basis as a technical sales representative by GKD Delkor (Pty) Limited (Delkor) and then resigned and joined one of Delkor's competitors. Kukard was bound by a restraint of trade agreement and thus Delkor threatened to take action to enforce the restraint. Delkor, Kukard and the new employer entered into negotiations and eventually concluded a settlement agreement in terms of which Delkor agreed to reemploy Kukard on the same conditions with the same benefits. However, when he reported for duty he was presented with a fixed term contract for a different position. He was also not provided with his company laptop and other company resources that he had used prior to his resignation. He refused to sign the agreement and was issued with a letter stating that the offer of employment was withdrawn. He also alleged that he was instructed to leave the premises and return his company cellphone. Kukard contended that Delkor was in breach of the settlement agreement and in addition he referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that the dismissal was unfair and ordered seven months' remuneration as compensation.

On review, the Labour Court found that an employment relationship had come into existence between Delkor and Kukard but that the withdrawal of the offer of employment did not in itself constitute a dismissal as the offer was never accepted by Kukard. Thus, the Labour Court concluded that the CCMA did not

have jurisdiction as Kukard had failed to prove that he was dismissed by Delkor. Delkor alleged that the proximate cause of the termination was that Kukard had refused to finalise the terms and conditions of his employment.

The Labour Appeal Court (LAC) held that an employment relationship had, in fact, come into being between Delkor and Kukard as a result of the settlement agreement and the fact that Kukard reported for duty to tender his services. It found further that Delkor had refused to comply with the provisions of the settlement agreement. Delkor alleged that it was necessary to change Kukard's job description because there had been a restructuring but the evidence did not support this. Delkor also denied instructing Kukard to leave the premises but the LAC found that the most probable version was that Delkor had done so especially because Kukard was instructed to return his company cellphone.

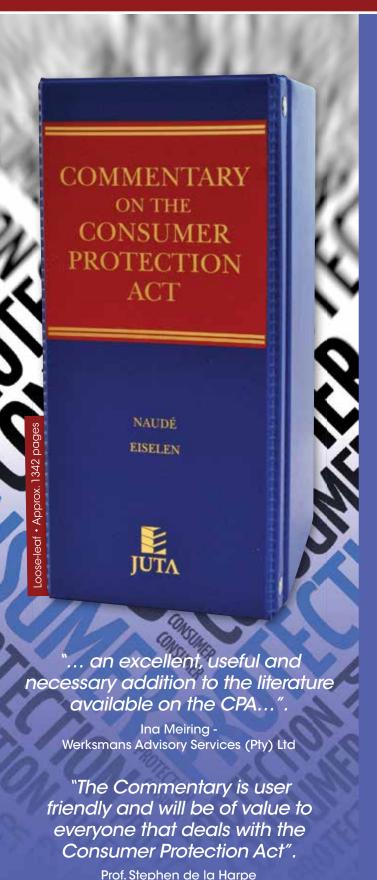
The LAC concluded that the decision of the arbitrator was one that a reasonable decision maker could make as Kukard was an employee by virtue of the fact that he had been re-employed in terms of the settlement agreement and had reported for duty. Thus, any dismissal had to be substantively and procedurally fair.

As regards compensation, the arbitrator had a wide discretion to award compensation provided that it was just and equitable. When exercising this discretion, the arbitrator must determine the nature of the unfair dismissal and the scope of the wrongful act on the part of the employer. Compensation can only be interfered with if the arbitrator exercises discretion on a wrong principle, or with bias or without reason or if the arbitrator adopts a wrong approach. The LAC found that the order of compensation was reasonable as regard had been had to Kukard's length of service prior to

his resignation, the way in which he had been treated when he reported for duty, and the fact that he had been unable to secure alternative employment as he was bound by restraint of trade undertakings. It was noted that where an unconditional offer of reinstatement is made to an unfairly dismissed employee, the employee's unreasonable rejection of such offer may mean that the employee is not entitled to compensation. This was, however, not the case here. When Kukard reported for duty, Delkor did not reinstate him as per the settlement agreement but instead tried to renegotiate the terms of his employment. The offer of employment was accordingly not a genuine reasonable unconditional offer to re-employ on the same terms and conditions and the refusal to accept the offer of employment on the new terms and conditions was not unreasonable. The appeal was accordingly upheld.

Team misconduct

In True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v CCMA and Others (LC) (unreported case no D441/11, 28-11-2014) (Shai AJ), Kentucky Fried Chicken (KFC) found that it was suffering severe stock losses and it accordingly improved its security measures by changing locks and employing more security guards to conduct patrols and searches. There were also CCTV cameras. KFC communicated to the employees that it was introducing a system of zero tolerance as regards stock losses and theft. It informed the employees that it was part of their duties to avoid stock losses and report acts of misappropriation and that if such significant stock losses continued, disciplinary action would be taken. Given the extremely large number of losses, (for example, 518 cans of juice went missing during one shift), KFC was of the view that it would not have been possible for



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theft to be carried out without all the team members being aware. Significant stock losses nevertheless continued and a disciplinary process was instituted. All the employees who had worked during the shifts when the stock losses occurred were subjected to a disciplinary inquiry and were found guilty on the basis of 'team misconduct' and were dismissed. After their dismissal there were no further stock losses.

The employees referred the matter to the CCMA as they alleged that KFC had not proved that they were involved in the stock losses or that they knew about it or were responsible for it. The CCMA found the dismissals unfair and ordered six months' remuneration as compensation to each of the employees.

On review, the Labour Court, per Shai AJ, considered the concept of team misconduct and found that in team misconduct a group of employees are dismissed because the collective conduct of the group is indivisible. It is not necessary to prove individual culpability, derivative misconduct or common purpose but rather that each of the individuals has culpably failed to ensure that the group complies with a rule. Where stock losses are so significant that it could not have escaped the knowledge of all the employees, then a dismissal is justifiable.

Shai AJ concluded that in cases of team

misconduct what suffices is for the employee to be a member of a team that has failed to ensure that the team meets its obligations. In this case there were significant losses, the stock loss had continued notwithstanding the measures that KFC had taken to try and curb the stock losses and the employees had been warned of the consequences should the stock losses continue. It was found that the arbitrator's finding was unreasonable as he had erroneously found that individual culpability had to be proven in the case of team misconduct. Thus, the review succeeded and the arbitration award was substituted with an order that the dismissals were substantively fair.



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

The Commission and not the Commissioner can confer jurisdiction on the CCMA in terms of s 147.

Qibe v Joy Global Africa (Pty) Ltd and Others (LAC) (unreported case no JA119/13, 15-1-2015) (Setiloane AJA).

This appeal turned on the question of whether a Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner, can on his or her own accord, assume jurisdiction over parties who fall under the jurisdiction of a bargaining council or where one such party falls under the scope of a bargaining council.

The appellant employee referred an unfair dismissal dispute to the CCMA. On receipt of the notice of set down, the first respondent employer e-mailed the case manager officer at the CCMA and advised that it fell within the jurisdiction of the Metal and Engineering Industries Bargaining Council (MEIBC) and as such the CCMA does not have jurisdiction over the dispute.

On the day of the arbitration only the employee attended. Seemingly unaware of the aforementioned e-mail, the commissioner continued in the absence of the employer and delivered a default award. The employer launched a rescission application alleging that as a party to the MEIBC, the CCMA was deprived of any jurisdiction to deal with the dispute.

The rescission application came before the same commissioner who delivered the default award. In his rescission ruling the commissioner found that in the absence of any party challenging the CCMA's jurisdiction at the onset of the process (conciliation or arbitration), the CCMA can assume jurisdiction despite the fact that one or both parties fell under the jurisdiction of a bargaining council.

It was this ruling that formed the subject matter of legal proceedings.

On review, the Labour Court per Benjamin AJ, found that the CCMA did not have jurisdiction to hear the dispute as both parties fell with the jurisdiction of the MEIBC and as such set aside the commissioner's rescission ruling.

In turn the employee approached the Labour Appeal Court (LAC).

As a starting point the LAC was alive to the fact that as a creature of statute the CCMA could not determine its own jurisdiction. However, s 147 of the Labour Relations Amendment Act 6 of 2014 (the Act) was the statutory exception to this principle.

The relevant subsections of s 147

'(2)(a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the Commission may –

(i) refer the dispute to the council for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

(3)(*a*) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute fall within the registered scope of a council and that one or more parties to the dispute are not parties to the council, the Commission may –

(i) refer the dispute to the council for resolution; or

(ii) appoint a commissioner or, if one

has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.'

In keeping with the purpose of the Act (that being to resolve labour disputes in a speedy effective manner) the LAC confirmed the view that s 147 was designed to avoid delays arising out of jurisdictional challenges by giving the CCMA the choice of dealing with a dispute where the parties fell within the ambit of a bargaining council or by referring these disputes to the relevant bargaining council.

As to who has the mandate to exercise this choice, the LAC referred to its recent judgment wherein it held the following:

'[W]here a dispute is referred to the CCMA, the matter may not proceed before the CCMA once it is ascertained that the parties are parties to a bargaining council or fall within the registered scope of a bargaining council, until the options set out in s 147(2) and (3) have been exercised by the CCMA.

... [O]nce that is ascertained, it is then for the CCMA or its delegate (and not the commissioner hearing the matter when this was ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or if one has already been appointed, to confirm his or her appointment'

Following this approach the LAC *in casu* held:

'... in the current matter, once the respondent had placed its founding affidavit before the Commissioner, in the rescission application, contending that the it was a member of the MEIBC and that the appellant fell within its registered scope, he was required in terms of s 147(3)(a) of the LRA to request the CCMA management to make a ruling on whether to refer the dispute to the MEIBC for resolution, or whether he could continue to determine the dispute. This was not a decision for the Commissioner to make'.

The employee further argued that the choice afforded to the CCMA in terms of

OPINION

s 147, could only be exercised from the time the disputed was first referred to the CCMA until such time as the default award was delivered. Therefore according to the employee, it was incorrect to apply the provisions of s 147 in a rescission application, which was filed subsequent to and in response to the default award.

The LAC dismissed this argument. It held that the provisions of s 147(2)

(a) and (3)(a) finds application from the time a disputed has been referred to the CCMA until such time as the dispute has been resolved by way of an award, which is final. While a default award will have full effect until set aside, it is not final for purposes of review on the ground that it can be revisited by way of a rescission application.

The appeal was dismissed with costs.

• Moksha will be conducting a one day labour law seminars on behalf of the Legal Education and Development arm of the Law Society of South African at various provinces in June 2015. For more information and to register please visit www. lssalead.org.za and click on labour law seminar.

By Danie Pienaar

Can I protect my mobile app idea?

he current boom in the development of smart device technologies and mobile applications (apps) during the last few years has created an amazing platform for entrepreneurs to develop new mobile apps, that provide users with unique services which, before the development of smart devices, were not possible.

By developing a popular mobile app, entrepreneurs are able to generate earnings in a variety of ways. One of the more popular ways is to make use of so-called in-app purchases. For example, the app can be made available free-of-charge but with only limited features. In order to gain access to additional features, the user can make an in-app purchase, which then generates income to the owner of the app. A good example is the popular game Clash of Clans that allows users to purchase so-called 'gems', which is a type of currency in the game, that can be used to buy resources or conduct upgrades, thereby helping players to progress in the game.

Now the question is, can one protect the unique functionality of a mobile app in order to help prevent others from creating apps that work in the same way? Although copyright automatically protects the actual computer code from the moment it is programmed (ie, the moment it is reduced to material form), it only protects against the unauthorised copying of the code and not the actual functionality of the app. Copyright will therefore not prevent others from re-

verse engineering your app and then programming their own app that functions in the exact same way.

If you want to protect the unique functionality of an app, the only way is to apply for a patent. Generally speaking, the patenting of software-implemented inventions is quite a controversial topic, with many 'pro open source' people believing that it should not be allowed, since it curbs innovation rather than promoting it. However, that said, the patenting of mobile apps has received a lot of attention in recent years, especially in countries such as the United States (US).

The two main requirements for patent protection in South Africa, as well as most other countries in the world, are that the invention should be novel and should not be obvious to a person skilled in the field of the invention. Therefore, if a mobile app functions in a unique way, then it may well be patentable. In this regard it is important to bear in mind that in order for an invention to be novel it should, among others, be kept secret until a patent application has been filed.

The patentability of software-implemented inventions, such as mobile apps, varies from country to country, since the national patent legislation of each country differs. The patent system in the US (as well as in some other countries like Australia) generally have quite a favourable outlook on software-implemented inventions, which is the reason why the US Patent Office has received quite a large number of patent applications that relate to mobile apps. Some other coun-

tries or regions like Europe tend to take a stricter approach to the patentability of software-implemented inventions, and generally requires that the invention should solve a technical problem. If an app therefore solves some technical problem, then it may well be patentable in Europe.

There has unfortunately not been any case law to provide us with guidance regarding the patentability of softwareimplemented inventions in South Africa. Our patent law is, however, mirrored on European and United Kingdom patent law and the approach taken in Europe may therefore be a good guideline for South Africa. However, that said, the South African Patent Office is a non-examining Patent Office, which means that if a complete patent application is filed and all the formalities are complied with, a patent will be granted. If another party then wishes to invalidate the patent, the onus will be on them to prove it.

To conclude, although software patents may be considered by some as controversial, the fact of the matter is that if you decide not to apply for a patent for your mobile app, even though it may have a unique functionality, you will need to be content with the fact that the market will effectively be a free-for-all for others to create similar apps.

Danie Pienaar BEng (*UP*) *LLB* (*Unisa*) is a patent attorney at Spoor & Fisher in Pretoria.

By Meryl Federl

Recent articles and research

Note: From this issue forward, where articles are available on an open access platform, articles will be hyperlinked on *De Rebus Digital*.

ABBREVIATIONS

CCR: Constitutional Court Review (Juta)
ILJ: Industrial Law Journal (Juta)
PER: Potchefstroom Electronic Law Journal (North West University)

SAJHR: SA Journal Human Rights (Juta)

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Water law

Chamberlain, L 'Standing in the Water Tribunal: Access to justice down the plughole?' (2014) 30.3 *SAHJR* 543.

Meryl Federl *BA Higher Dipl Librarianship (Wits)* is an archivist at the Johannesburg Society of Advocates library. E-mail: merylfederl@yahoo.co.uk

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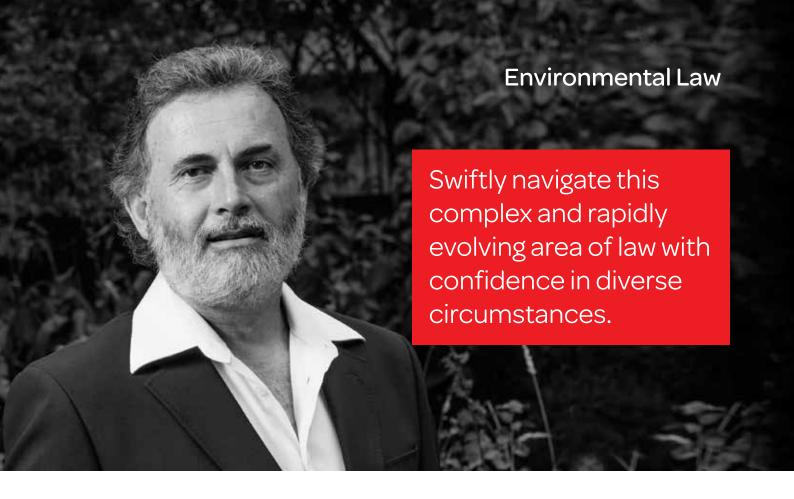
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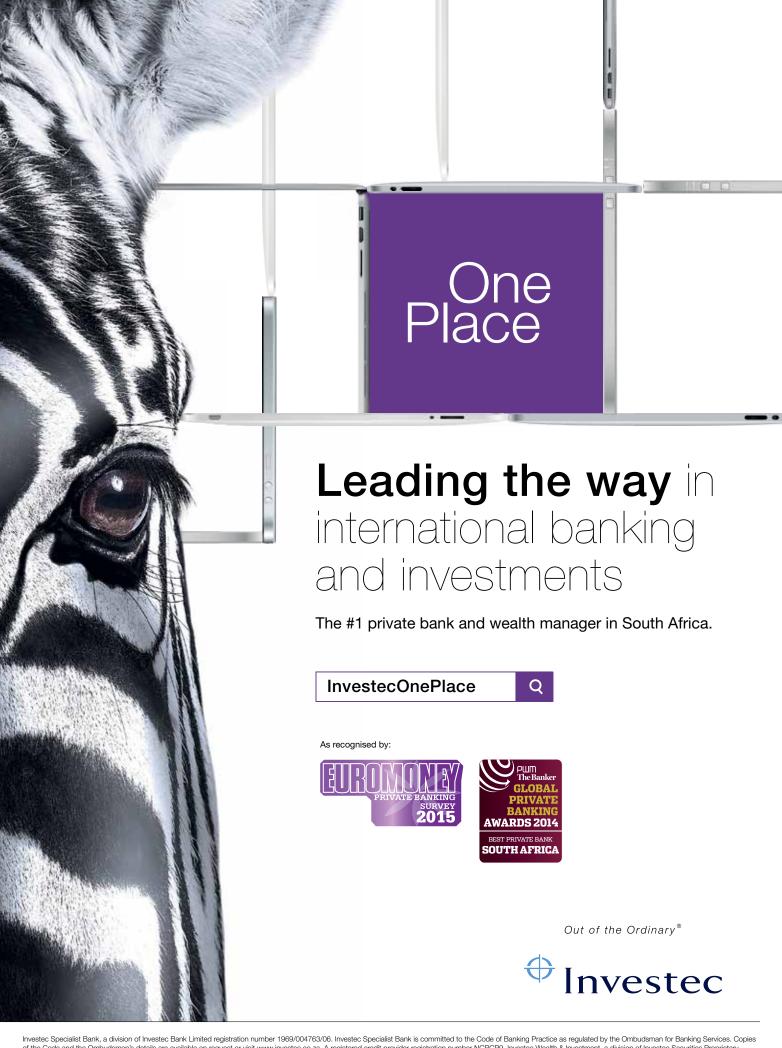
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