

AUGUST 2014



DOES ESTA STILL PROTECT OCCUPIERS OF FARM LAND IN SOUTH AFRICA?

ConCourt upholds **dignity**
of informal traders

**Jurisdiction of the SCA
in labour matters –
the new s 168(3) of
the Constitution**

**The rise of the machines –
understanding
electronic evidence**



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Regular columns

Editorial	3
• Ethics: A code to navigate the tensions of modern practice	

Letters to the editor	4
-----------------------	---

News	
• The LPB, costs and fees scrutinised at LSNP workshop	6
• The RABS Bill – a move to a social security system	10
• KZNLS goes back to work	12
• One-Child-a-Year campaign – Lawyers called to commit	13

LSSA news	
• LSSA submissions on court-annexed mediation: Qualifications, standards and mediator levels	14
• Fairbridges and C De Cerff & Associates confirm skills initiative as part of LSSA Synergy Link	15

SADC news	
• Developments in the SADC region: A summary of selected electoral, legal and constitutional aspects	16
• 2014: Election year in SADC	16
• Swaziland: Thulani Maseko and Bheki Makhubu remain in detention	16
• Zimbabwe: Alignment of the country's laws with the new Constitution	17
• Mozambique: The RENAMO threat ahead of elections	17
• Zambia: The Constitution-making process has stalled	17
• Tanzania: Constitution-making process in progress	18
• SADC Bar leaders meet in Johannesburg	18

People and practices	19
----------------------	----

Practice management	
• Accounting to clients: How transparent are you?	20

The law reports	35
-----------------	----

New legislation	43
-----------------	----

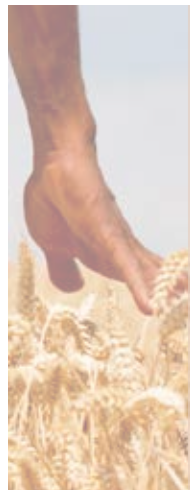
Employment law update	45
-----------------------	----

Recent articles and research	48
------------------------------	----

FEATURES

22 Does ESTA still protect occupiers of farm land in South Africa?

Is para (c) of the definition of 'occupier' under the Extension of Security of Tenure Act 62 of 1997 (ESTA) consistent with the provisions of the Constitution? Thabiso Mbhense discusses that as the law stands, a person who has an income in excess of R 5000 per month does not enjoy any rights and protection in terms of ESTA. He asks if that is fair in 2014?



25 ConCourt upholds dignity of informal traders

In what has become known as 'Operation Clean Sweep', the Johannesburg Metropolitan Police Department enforced a decision taken by the city to remove illegal informal traders. Michel Johnson and Tarryn Paterson discuss the case and the ConCourt's order to hear the case on an urgent basis.



28 Jurisdiction of the SCA in labour matters – the new s 168(3) of the Constitution

Vuyo Mkwibiso discusses the recent case of *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC) in respect of the Supreme Court of Appeal's jurisdiction in labour matters, against the background of the new s 168 (s) of the Constitution.

32 The rise of the machines – understanding electronic evidence

In recent years, technology has revolutionised the way we communicate and the way lawyers practise law. In this article, Michel Takombe discusses the key role electronic evidence plays in law.



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Ethics:

A code to navigate the tensions of modern practice

The recent synergy between the profession and the law deans regarding the vital importance of inculcating ethics into future legal practitioners is a welcome one. In fact, some law academics are of the view that ethics should be infused into every course in the LLB curriculum, and should not be confined to a specific, brief module.

This was one of the outcomes of the Ethics Summit held under the auspices of the Law Society of South Africa earlier this year and bodes well for future practitioners. The public will be the greater beneficiary of a renewed focus on ethics, and the profession too will benefit from a reputational aspect.

However, the question as to how to rejuvenate and promote the culture of ethics among practising attorneys has come up often over the years in letters and articles in this journal. In fact, exactly three years ago in this column in the August 2011 issue, we asked the question 'Is the attorneys' profession still relevant?' In concluding that it is, we quoted Lord Hunt who noted that a profession is defined, among other things, by a commitment by its members to standards of behaviour that are founded in ethics and best practice. These standards go beyond the general law of the land, in terms of which members of trades, as opposed to professions, are held accountable.

So as attorneys – and as officers of the court – we must continue to be held accountable to higher values than the average businessman, tradesman or politician.

But in striving for those higher values, what happens to practitioners faced with choices or decisions that need to be benchmarked against the rules of professional conduct of the profession?

The *International Principles on Conduct for the Legal Profession* by the International Bar Association open as follows:

'Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often tension.'

It is precisely in that grey area where the rules of professional conduct, the demands of practice and the need to earn a living meet, that attorneys may, at times, need assistance in navigating the 'tension'. This becomes critical when the attorney is a sole practitioner, with little or none of the peer support that may be available in a larger firm. Of the current 10 959 attorneys' firms, 6 745 are one-person firms – and a good number of these are new practitioners who may have had no other option but to practise on their own.

It is, of course, possible for practitioners to turn to the ethics committees of their provincial law societies for advice. However, in today's fast-paced profession, practitioners need an open, immediate and confidential channel that can provide real-time responses to ethical dilemmas.

An option could be an ethics telephone or e-mail hotline that can be directed to a panel of experts – even experienced, retired attorneys – readily available and committed to providing guidance on a confidential basis. This can be backed up by an online, categorised database of questions and answers that is updated and accessible, and hyperlinked to the relevant rules and rulings of the law societies.

The database would have the dual purpose of providing immediate information and also serving as a resource to monitor trends and practice requirements.

Ethics, like morals, are intangible and many will say, cannot be taught. But the impact of immoral or unethical actions in the profession is very real and far-reaching for the practitioner, his or her client and for the profession as a whole.

The rejuvenation and promotion of a culture of ethics requires the commitment of the entire profession – for it to remain a profession.

Tell us what ethics support system would work for you or send us your views in a letter for publication to 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 2000 words
- Next submission dates: 18 August and 22 September 2014.

LETTERS

TO THE EDITOR

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

Free access to judgments

In the modern-day practice, knowledge of the law relates in a large degree to access to up-to-date law reports and legislation.

The harsh reality is that many a young attorney who starts his or her own practice does not have the financial resources to establish a law library and, had it not been for the Southern African Legal Information Institute (SAFLII), those young attorneys, who need knowledge the most, would have literally, been left clueless.

SAFLII is a member of the Free Access to Law movement, an organisation that strives to provide free online access to legal information, including case law. The movement began in 1992 with the creation of the Cornell Law School Legal Information Institute by Tom Bruce and Peter Martin. The name Legal Information Institute (and abbreviation LII) has been widely adopted by other projects. It is usually prefixed by a country or region identifier.

SAFLII is accessible at www.saflii.org and acts as a repository of judgments that are sourced through a network of

court officials based at the respective courts. SAFLII is currently managed and operated by the Democratic Governance and Rights Unit of the University of Cape Town. The website is accessed by some 3 500 visitors a day and gives access to nearly 20 000 judgments from South Africa alone.

New judgments are published on SAFLII on a continuous basis, and in most cases, long before such judgments are published in the subscription-based law reports. Point in case is the judgment of *Ferris and Another v FirstRand Bank Limited and Another* (CCT 52/13), handed down by the Constitutional Court on 12 December 2013 and published on SAFLII the following day using the citation [2013] ZACC 46. The aforesaid matter was published in the *South African Law Reports* in only its third volume of 2014 with the citation 2014 (3) SA 39 (CC).

Citation on SAFLII starts with the year in which judgment has been handed down, followed by the prefix ZA + an abbreviation for the relevant court followed by a number. Judgments from local and provincial divisions start with ZA followed by an abbreviation for the

specific province and finally an abbreviation for the specific court. To illustrate this, a Pretoria High Court judgment will be indicated as ZAGPPHC with the 'PHC' denoting the Pretoria High Court, whereas a Johannesburg judgment will be indicated as ZAGPJHC with the 'JHC' at the end identifying a judgment by the Johannesburg High Court.

SAFLII, apart from publishing judgments from the Constitutional Court, Supreme Court of Appeal and the High Court divisions, also publishes judgments from most of the specialised divisions of the Supreme Court, namely the Labour Court, Tax Court, etcetera. Certain legislation and law journals like *De Rebus* and *De Jure* are also published on SAFLII.

Finding case law on a specific matter is simple and straightforward. The SAFLII website has a search function similar to the subscription-based law reports. The SAFLII search function also has the ability to sort the search results by court, date or relevance. In addition, SAFLII also has a function called 'Noteup' which gives you the ability to see whether a specific judgment has been cited in subsequent judgments. This is helpful in de-



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termining whether there are conflicting decisions in respect of a specific judgment.

The methodology I use to find case law is to initiate a search on a specific topic, whereafter I filter the results further by concentrating on the most recent judgments in the Supreme Court of Appeal and Constitutional Court, this because of the *stare decisis* principle. The aforesaid can be illustrated by performing a search on the phrase 'suspensive condition', which would give you 566 results, consisting of all judgments and articles published on SAFLII. Because we follow the *stare decisis* principle in South Africa, the obvious thing to do after that would be to refine your search further by looking only at the Supreme Court of Appeal and Constitutional Court data bases, which will reduce the number of search results to 86. Your final step will then be to sort the decisions by date whereafter common sense dictates that you should start reading the more recent decisions first.

I must admit that although I cannot see our firm cancelling our subscription

to the mainstream law reports any time soon, www.saflii.org is usually my first port of call to find legal authority.

Francois Greeff,
attorney, Pretoria

• *De Rebus* is conscious of the importance of providing up-to-date information through case notes, as well as the 'Law reports' and the 'New legislation' columns. These are standing monthly columns in the journal and they are consistently rated as among the highest-read columns by readers in reader surveys – *Issue Editor*.

Heard at the Polokwane Magistrate's Court

Plaintiff witness: Your Worship, I was driving in Church Street in a northerly direction. There was an oncoming car travelling, which at the last moment, swerved to the right. This caused a collision with my car.

Defendant witness: Your Worship, it is true that I swerved to the right but before doing so I activated my right-turn indicator. The oncoming driver could have foreseen that I was about to swerve to the right, and accordingly, should have swerved to the left to avoid the collision.

Harun Ebrahim,
attorney, Polokwane

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INSPIRING GREATNESS

The LPB, costs and fees scrutinised at LSNP workshop

The Law Society of the Northern Provinces (LSNP) held a free workshop for its members on the Legal Practice Bill (the Bill), costs and fees in Pretoria on 1 July where delegates discussed the Bill, the regulation of legal practitioners, the Legal Practitioner's Fidelity Fund as well as the issues of costs and contingency fee agreements.

Speakers at the workshop included the president of the LSNP, Dr Llewelyn Curlewis; LSNP councillor, Jan Stemmett and Chairperson of the Attorneys Fidelity Fund, CP Fourie.

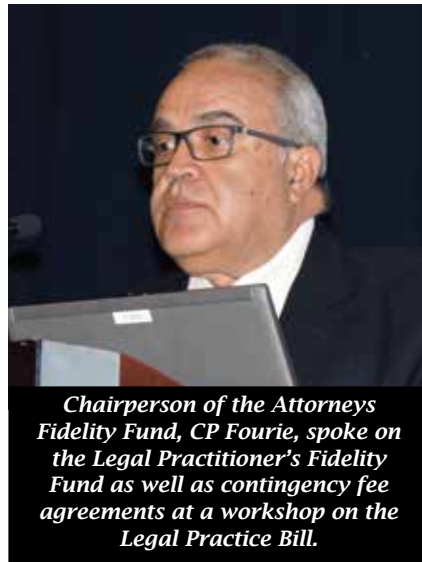
Dr Curlewis gave an introduction on the Bill. He said that the final version of the Bill, which was draft eight, had been approved and passed by the National Assembly on 12 November 2013. Dr Curlewis said that 227 members of the National Assembly voted in favour of the Bill, 81 opposed it and one member abstained. At the time of the workshop, the Bill was with the President for assent.

In his welcome address Dr Curlewis said that the topics for discussion indicated a clear sign of transformation in the justice system and in the traditional manner in which attorneys are used to practising law. He said that numerous teething problems would be encountered with the new legal dispensation, but hopefully eventually there would be success.

Dr Curlewis said that the Bill creates challenges and opportunities, adding that he would focus only on the key issues he deemed to be of paramount importance to practitioners in the future. According to Dr Curlewis, the future of the profession is both radical and progressive and it provides huge opportunities for those who open themselves up to the possibilities.

The Bill

Dr Curlewis said that as far as fees were concerned, there was a slight improvement on the final version in clause 35(3) which now provides that in the case of litigious and non-litigious work, the client can on his or her own initiative, agree on a higher or lower fee than a prescribed fee. Dr Curlewis said that in the previous draft, this applied only to non-litigious



Chairperson of the Attorneys Fidelity Fund, CP Fourie, spoke on the Legal Practitioner's Fidelity Fund as well as contingency fee agreements at a workshop on the Legal Practice Bill.

work. 'However', he added, 'clause 35 as a whole must still be a problem because the determination of prescribed fees has now been taken out of the hands of the profession'.

'The much debated ministerial powers in terms of s 14 have been retained and it is suggested that mechanisms are incorporated in the Bill to safeguard against powers to be exercised capriciously or arbitrarily. Section 24 suggests the establishment of provincial councils in every province,' he said.

Dr Curlewis said that one of the major changes that have been agreed to by the Portfolio Committee is that advocates can accept instructions direct from the public provided they have trust accounts. He added that to allow advocates to be briefed directly may not necessarily reduce costs for the public as has been envisaged by the Portfolio Committee, since advocates taking direct instructions would be obligated to have fidelity fund certificates. 'This implies that they would then require the practice and staff infrastructure necessary to operate and monitor trust accounts. They would also require training in bookkeeping, which advocates are not traditionally required to obtain. The Bill will nonetheless place South Africa on the threshold of a complete renewal of the legal system, according to our previous Minister of Justice,

Jeff Radebe. It will probably bring an end to the long tradition of self-regulation by the legal fraternity,' said Dr Curlewis. He added that the government insists however, that the 120-clause Bill is vital for transformation and improving access to justice, and added that the search for agreement on the Bill could not continue forever.

Regulation of legal practitioners

Speaking on the regulation of legal practitioners, Mr Stemmett said that the Bill would come into operation in three stages. First, the National Forum for Legal Practice would be established, then the Legal Practice Council would come into operation, then the rest of the Bill would come into effect.

Mr Stemmett said that there would be three kinds of legal practitioners:

- Attorneys, who are admitted by the High Court, enrolled by the Legal Practice Council (LPC) and can appear in any court but need a certificate for the High Court, the Supreme Court of Appeal and the Constitutional Court. The attorneys may be briefed by the public and must be in possession of trust accounts and fidelity fund certificates.
- The second type of practitioner will be what he called the 'advocates +', who will be admitted by the High Court and enrolled by the LPC. They can appear in any court and may be briefed by the public as well as justice centres. They must also have trust accounts as well as fidelity fund certificates. Mr Stemmett said that this type of advocate was new.

"... the committee may order the fidelity fund certificate to be withdrawn. ... My question is, does this not amount to automatic suspension?"

- The third type of practitioner is the advocate as we know it. They will be admitted by the High Court and enrolled by the LPC. They can also appear in any court and can only be briefed by attorneys and justice centres. They cannot be briefed direct by the public.

Mr Stemmett said that the LPC would make rules to determine the conditions and procedures for the registration for practical vocational training of candidate legal practitioners. The LPC would also decide on the remuneration of candidate legal practitioners as well as the assessment for admission. Candidate legal practitioners will be able to appear in any court or tribunal on behalf of their principals, except for the High Court, SCA and Constitutional Court. They will only be able to appear in the Regional Courts after one year's practical training or practising as an advocate for a year.

Professional conduct and disciplinary bodies

Jaco Fourie, from the LSNP disciplinary department, spoke on professional conduct and the establishment of disciplinary bodies. He analysed chapter four of the Bill which deals with professional conduct and disciplinary bodies, s 36 provides for a code of conduct and s 37 deals with the establishment of disciplinary bodies.

Mr Fourie said that complainants, mainly the public, require an easy to understand, fast and transparent disciplinary process and added that he has doubts whether the system in the Bill will accomplish this. 'I have concerns that it will be an expensive and anything but a quick procedure. Currently, we have the investigating committee considering the complaints, then we have the disciplinary committee dealing with the charges and then there is the council and the court. When we look at the Bill, we will have the investigating committee and if the complainant is not satisfied with the decision made by the investigating committee, for instance that there is no unprofessional conduct, he may appeal to the appeals tribunal. If the tribunal then decides that the matter should go to a disciplinary committee, it goes to the disciplinary committee and they deal with the matter. The attorney, in all probability, will then not be happy and he, again, may appeal to the tribunal. Then, we have the council and the Ombud, which will function completely independently. So, any aggrieved complainant or attorney can go to the Ombud and then there are the courts. So, this whole process has the potential of being very drawn out and taking a lot of time,' he said.

'All complaints must serve before an investigative committee; it has to investigate every single complaint. Depending

on the volume of complaints received by the LPC, this has the potential of creating a huge bottleneck in the finalisation of complaints. It can also be a very expensive exercise to have enough committees available to deal with the volume of complaints. This investigating committee can then recommend the matter be referred to a disciplinary committee or alternately that the complaint be dismissed,' said Mr Fourie.

Mr Fourie noted that the Bill provides that the complainant will be able to apply for an appeal in terms of s 41 regarding the manner or outcome of the investigating committee, adding that he foresees that the appeals tribunal will be flooded with appeals from members of the public.

Mr Fourie stated that s 38 outlines the rules and procedures to be followed in a disciplinary hearing. He pointed out that currently proceedings are closed to the public. After the Bill is enacted, proceedings will be open to the public unless the chairperson directs otherwise. 'The second difference is that the outcome of these hearings must be published and updated monthly by the council and it must be available for inspection by the public. So in essence, when a complainant lodges a complaint, he waives his right to privacy,' he said.

According to Mr Fourie, the disciplinary hearings procedure outlined in s 39 will remain the same.

'Section 40 deals with the procedure after the hearing. The committee has 30 days to reach a decision regarding the hearing and must inform the practitioner of its findings and the right to appeal. Here we find some very big changes as to what we currently have. Once a disciplinary committee finds that the legal practitioner is guilty of misconduct it may, firstly, order the practitioner to pay compensation to the complainant, which order is subject to confirmation by any court with jurisdiction. I can only foresee a lot of problems with this section. In my view it lends itself to abuse,' he said.

Mr Fourie added that the second difference is that the disciplinary committee can order temporary suspension of the practitioner. 'I again foresee some problems here. ... How will this be enforced?' he queried. 'Thirdly, the committee may order the fidelity fund certificate to be withdrawn. ... My question is, does this not amount to automatic suspension?' he asked.

Legal Practitioners' Fidelity Fund

CP Fourie spoke on the Legal Practitioners' Fidelity Fund and its Board of Control. He explained that since only chapter ten of the Bill would come into immediate effect after the promulgation date; chapter two would be in operation three



The president of the Law Society of the Northern Provinces, Dr Llewelyn Curlewis, chaired the Legal Practice Bill workshop for LSNP members in July.

years after chapter ten and the remaining provisions would come into operation by promulgation, for at least the next three years the legal profession would operate as it does currently, under the Attorneys Act 53 of 1979 and that nothing would change.

Next Mr Fourie touched on how attorneys would be affected by the Bill. He said that he did not foresee a huge difference in the day-to-day practice at a law firm. He added that the main focus of the Bill was a regulatory structure at national level for both attorneys and advocates. 'Advocates are against the Bill because they are more or less self-regulated and attorneys think that they are currently over-regulated,' he said.

According to Mr Fourie, it will be a nightmare for the Legal Practitioner's Fidelity Fund to get advocates that will be taking briefs directly from the public to comply with the requirements of the fund as they are not used to the extra infrastructure required such as bookkeepers etcetera. 'Advocates do not usually have offices. I am yet to be convinced and given proper answers as to why it is necessary,' he said. He noted: 'If you want to take instructions directly from the public and you need a Fidelity Fund certificate, why not practise as an attorney?'

Mr Fourie said that the fund's board of control will change to nine members - five of whom must be legal practitioners. It would operate how it is currently operating, except that it will be able to inspect any trust account records. Also, Mr Fourie added that the claim value will be capped at R 5 million, which he said was reasonable as a R 5 million cap can cater for 99% of all the current claims.

Cost and fees at the Bar

Speaking on cost and fees at the Bar, Advocate Quintus Pelser SC quoted what he deemed as the most important subpara-

graphs of r 7 of the Rules of Professional Conduct of the General Council of the Bar, which deals with fees. He said that he needed to quote the subparagraphs in order to present views on the way forward under the new dispensation. Rule 7 deals with the reasonableness of fees, fees payable only by attorneys and contingency fee agreements. Mr Pelser said that r 7.1.1. states:

'Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his lack of means may require a lower charge, or even none at all. In determining the amount of the fee, it is proper to consider:

(a) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;

(b) the customary charges by counsel of comparable standing for similar services; and

(c) the amount involved in the controversy and its importance to the client.

No one of the above considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.'

Mr Pelser said that it is probable that most, if not all advocates will continue to deal with costs and fees as close as possible to the present dispensation. He added that in all probability, there will be more interaction between the advocate, the attorney and the client in respect of fees.

He added that it was not possible to give any indication in respect of an advocate who plans to practise with a trust account referred to in s 34(2)(b) on the Bill.

Mr Pelser said that with regards to the capping of fees, the advocates' profession felt that the Justice Minister should not be involved in the determination of a fee structure for legal practitioners as this is viewed as a diminution of the independence of the professions. He added that in terms of the Bar Rules, advocates' fees must be reasonable and the final determination of the reasonableness should continue to be the prerogative of the courts. 'When a party cannot afford the fees charged by an advocate, that advocate may reduce his fees. This has been frequently done,' he said.

Mr Pelser noted that advocates charge on a per hour, per appearance or per day basis. He said that the impact of costs for travelling is minimal. He added that this structure should be retained.

Mr Pelser pointed out that the chal-

If you want to take instructions directly from the public and you need a Fidelity Fund certificate, why not practise as an attorney?'

lenge that advocates will face is the financing of overheads from a lower fee structure, but added that it will be less of a challenge for the Bar than the attorneys, as the attorneys' profession has higher overheads than advocates.

Mr Pelser said that one of the benefits of the new dispensation is that the GCB will not have to discipline the advocates that work from the boot of their car, take money from clients without the intervention of any attorney and often do not deliver any services or deliver services of a low standard.

Costs and fees in the attorneys' profession

Jan Janse van Rensburg spoke on costs and fees in the attorneys' profession. He said that in general, the attorneys' profession can live with the Legal Practice Act once enacted, but that he cannot say the same about s 35. Mr Janse van Rensburg said that s 69(d) of the Attorneys Act states: 'The council may prescribe the tariff and fees payable to any practitioner in respect of professional services rendered by him in cases where no tariff is prescribed by any other law'.

He added that it was strange that this section was rarely used by the law societies. Mr Janse van Rensburg said that it would not be possible to prescribe a fixed tariff right across the country. He made an example by quoting the amended r 58 (7) and (8) of the magistrate's court rules which states:

'(7) No attorney or advocate appearing in a case under this rule shall charge a fee of more than R 404 if the claim is undefended of R 929 if it is defended, unless the court in an exceptional case otherwise directs.

(8) No instructing attorney in cases under this rule shall charge a fee of more than R 1 414 if the claim is undefended or R 2 020 if it is defended, unless the court in an exceptional cases otherwise directs.'

Mr Janse van Rensburg said that it would be difficult to find a 'one fit all' fee. He added that one cannot expect an attorney in Sandton to charge the same as the one in a one-room office in Brits charges, as the two were not comparable. He asked how all would be taken into account to come up with a fee that would be used by everyone across the country.

According to Mr Janse van Rensburg, when s 35 eventually comes into effect,

he would like to see how they will approach the task of implementing fees. Section 35 states: 'Until the investigation [by the Law Commission] contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics or Legal Aid South Africa referred to in section 34 must be in accordance with the tariffs made by the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985).'

Mr Janse van Rensburg noted that the Rules Board will take into account the complexity and expertise of the legal services rendered, the seniority of the legal practitioner, the volume of work required and the financial implications of the matter when setting the tariffs.

He concluded by saying that he did not see the prescription of fees working, but that some were positive about it.

Contingency fee agreements

Speaking on contingency fee agreements CP Fourie started with what is allowed in terms of case law and what the LSNP had done in respect of contingency fees.

Mr Fourie said that the issue on contingency fees had raised a lot of emotion over the past few years. On 13 February 2013 judgment in two matters, namely, *De la Guerre v Ronald Bobroff & Partners Inc and Others* (GNP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J) and *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) dealt with contingency fees.

• See 2014 (May) DR 52.

According to Mr Fourie, in the *De la Guerre* matter the following was said: 'It is clear in my view, that contingency fee agreements between a litigant and his attorney were unlawful at common law. At common law a legal practitioner was only entitled to a reasonable fee for work actually done ... There is no doubt that the agreement entered into between the Applicant and the First Respondent does not comply with the Act for the reasons set out in the founding affidavit. The agreement is accordingly invalid.'

'Do you bill those hours; if not, why not? My biggest problem with this method is that it rewards inefficiency - the longer you work, the more you get,'

Mr Fourie said that in the *South African Association of Personal Injury Lawyers* matter, the court held that the South African Law Reform Commission had highlighted the conflict of interests introduced by a contingency fees agreement – the legal practitioner owed a responsibility to the client and a duty to the court, and the practitioner enjoyed a financial interest in the outcome of the matter. The court added that these conflicts had to be managed very carefully.

Mr Fourie said that the court held that ‘the Act leaves no room for lawful contingency fees agreements which do not comply with these limitations and requirements’.

‘In respect of both these full Bench judgments, leave to appeal was sought but refused. Leave by the Supreme Court of Appeal was refused and then leave was applied to appeal at the Constitutional Court. The SCA refused leave on 11 September 2013 and on 20 February 2014 the application to the Constitutional Court was dismissed with costs,’ he said.

According to Mr Fourie, in the *De La Guerre* matter the Constitutional Court said: ‘At issue are contingency fees. Under the common law, legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the clients might be awarded in litigation. The Act changed this. It makes provision for these fees to be charged in regulated instances and at set percentages. Certain law societies made rulings allowing their members to charge in excess of the percentages set in the Act. Uncertainty reigned in the attorneys’ profession about the correct legal position in relation to contingency fees. Could these fees be charged only under the Act, or also outside its provisions?... Bobroff was one of the firms which charged more than allowed for in the Act, as the rules of its professional association allowed. Ms De La Guerre was charged 30% as a contingency fee, instead of the maximum of 25% allowed under the Act.’

Mr Fourie noted: ‘Now where does that leave us? That leaves us with a simple answer: There is no such thing in our law called common law contingency fees. The only way and only basis on which you can charge any contingency fees is in terms of the Contingency Fees Act 66 of 1997. Unfortunately this Act, which is a very short Act, is not very consumer friendly. A lot of questions arise from the Act. A lot of difficulties arise from the understanding and interpretation of the Act’.

Mr Fourie said that s 3(1)(a) of the Act provides that contingency fees agreements shall be in writing and in the form prescribed by the Justice Minister, which shall be published in the *Government Gazette*, after consultation with the advocates’ and attorneys’ professions.

‘Now this prescribed fee agreement was in fact published by the Minister and somehow it appears as if not many practitioners are aware of it. This is the only agreement that can be used in terms of the Act. Not a changed one. If that agreement is not complied with, then it is not a valid contingency fees agreement,’ he said.

Mr Fourie pointed out that contingency fees, as a principle, was a way to facilitate access to justice. He said that contingency fees needed to be structured in a way which clients were comfortable with and which they could afford.

‘If we do not charge contingency fees, we charge on a time basis, but is it the right way? Would you engage the services of someone who cannot tell you what something is going to cost you because they do not know how long it will take? You too would be afraid, because you do not know what it will cost you. Furthermore, when do you charge for your time spent? When you sit behind your desk working on the matter or when you wake up at two in the morning worrying about the matter and you cannot fall asleep until five? Do you bill those hours; if not, why not? My biggest problem with this method is that it rewards inefficiency – the longer you work, the more you get,’ he said.

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The RABS Bill – a move to a social security system

The Department of Transport and the Road Accident Fund (RAF) held a workshop on the Road Accident Benefit Scheme Bill (RABS Bill) in Centurion in June. The workshop formed part of the public consultation process on the Bill that was published in GenN337 GG37612/9-5-2014.

Cabinet approved the publication of the draft RABS policy on 18 November 2009 and the draft policy was published on 12 February 2010 for public comment. The policy was revised and approved by cabinet on 7 September 2011 and the final policy was published on 21 November 2011. Draft legislation was completed during 2012 and the draft legislation for RABS was initially published in the *Government Gazette* on 8 February 2013 for public comment for an extended period of 90 days. Based on comments received the draft legislation was reworked and published in the *Government Gazette* together with draft regulations for public comment for a period of 60 days. At the time of going to print, stakeholders and the public were to provide written comment on the proposals contained in the legislation before 8 July 2014 but on this day, the RAF issued a press release stating that due to huge public interest, the Department of Transport had extended the period for public consultation on the Bill by a further 90 days.

Social security

The deputy director-general of governance counsel at the Department of Transport, Dr Maria du Toit delivered the keynote address at the workshop. Dr du Toit said the RAF currently provides a safety net to the country by making compulsory third-party insurance cover available to all users of South African roads. This cover provides protection against injuries sustained or death arising from road crashes. Dr du Toit said that the cover is in the form of indemnity insurance to persons who cause an accident, as well as personal injury and death insurance to victims of crashes and their families.

According to Dr du Toit, when the RAF was established it displayed the symptoms of an undemocratic, unrepresentative and oppressive state, adding that in spite of various legislative changes the RAF system remained an unsustainable,



The Chief Executive Officer of the Road Accident Fund, Dr Eugene Watson, highlighted the need for the Road Accident Benefit Scheme Bill at a workshop on the Bill in June.

unaffordable and unequal system of third-party insurance. 'The RAF system is still underpinned by a legal dispensation that favours the rich, a system for which all South Africans should qualify equally,' she said.

Dr du Toit said that all victims of car accidents needed to be treated in an equitable manner. 'This is why we are transforming the existing insurance-based system of the RAF to the social security system of RABS,' she noted.

According to Dr du Toit, the RAF has made huge strides towards providing a better and more efficient service to victims of road crashes but that there are certain underlying systemic problems that ultimately limit the effectiveness of the current scheme. She said that these systemic problems would be addressed through the RABS Bill which aims to provide for a new no-fault benefit scheme based on social security principles.

Dr du Toit said that the principle that underpins social security is that the government should look after you when you cannot do so. She explained that members of the public would not be allowed to double dip in government, so victims who had claimed from the South African Social Security Agency or the compensation fund would not be able to claim from RABS as well. Another change will be that those earning above the capped

amount are perceived to be among the 4% of the population in the country that are defined as rich and will have to make provision through private insurance for losses more than the capped amount that RABS will be paying as income benefit.

Dr du Toit said that one of the systemic problems of the existing system was that presently, in order to claim from the RAF, victims of road crashes need to prove fault on the part of another driver of a motor vehicle. She noted: 'In other words, although you are a citizen of this country, although you pay fuel levy like all other road users, you will not qualify for any benefits of a medical nature or other if you were at fault in the accident.' Dr du Toit added that this requirement to prove fault delays the delivery of compensation to the innocent victim until the questions about the existence and extent of fault are resolved to the satisfaction of the RAF.

'In difficult instances the question of fault may require claimants to approach the courts to provide a ruling to state who was at fault and to what extent. This further delays the delivery of compensation. The finding of fault is then reduced to percentages which can reduce the extent of the claim to which the crash victim is entitled,' she said.

Another problem, she stated, was that the innocent victim presently needed to prove the quantum of dynamics with reference to the law. The law determines the appropriate compensation for the particular losses.

Dr du Toit noted that RABS will ensure that victims of motor vehicle accidents receive all the necessary medical interventions and treatment in order to rehabilitate to the extent that no victim should lose out on work or education opportunities, especially the youth.

To achieve this objective, she said, the following changes were envisaged:

- All victims of motor vehicle accidents will be eligible to claim from RABS irrespective of whether or not they are at fault in the accident. If the victim qualifies for any of the set benefits he or she will receive such benefit without having to prove fault on the side of another driver. These benefits include medical support, income support for the victim or dependents and a funeral benefit.
- General damages will no longer be compensated. Pain and suffering claims for non-pecuniary loss have already

been limited to serious injuries. With the RABS system these kinds of claims will not be accommodated, but all medical bills will be met.

- Payments will be done differently. There will no longer be a lump sum payment. 'RABS will not be creating immediate millionaires anymore, but we will support victims in their rehabilitation process all the way until it is done,' she said.

Dr du Toit indicated that payment would work as follows:

- Income support will happen monthly. The amount will be capped.
- Medical support benefits will be paid for directly by the Road Accident Benefit Scheme Administrator (RABSA) – which will replace the RAF – to the medical service provider in accordance with the treatment plan for each victim; there will be no payment responsibility for the victim.
- The funeral benefit will be a fixed amount that will be paid to the dependants or relatives without any cultural prejudice.

According to Dr du Toit by introducing a no-fault system of benefits the delays currently experienced by claimants will be eliminated, crash victims will immediately be able to receive benefits, service providers who currently wait until the claims of crash victims are finalised will be able to submit claims directly and be paid within reasonable periods.

The RAF: Fuel levy insufficient

The chief executive officer of the RAF, Dr Eugene Watson, provided a brief background on the RAF. He also presented an update of where the fund is currently and highlighted the need for RABS. Dr Watson said that the Fund's core business was to pay compensation in accordance with the Act for loss or damage wrongfully caused by driving.

He added that the Act also provides compulsory cover to all users of South African roads – even if the users are not South African citizens – for injuries sustained or death arising from motor vehicle accidents within South Africa.

Dr Watson said that there have been various Constitutional Court and legal precedents which have shaped the RAF's mandate.

According to Dr Watson, the RAF is funded by the fuel levy. In the 2013/14 financial year, the levy was 96c/l which equated to almost R 1, 9 billion a month and totaled R 20, 6 billion for the financial year. He said that the amount of claims processed totaled R 22, 2 billion, meaning that the levy was not enough. Dr Watson said that the expenditure exceeded the net fuel levy by R 1, 9 billion due to a higher number of claims settled.



The deputy director-general of governance counsel at the Department of Transport, Dr Maria du Toit delivering the keynote address at a recent workshop on the Road Accident Benefit Scheme Bill held in Centurion in June.

'Our expenditure is shaped by the number of vehicles and the number of road users,' he said. Dr Watson added that claims processed increased by 47%, to R 22 billion, which is almost double what it was two years ago.

Dr Watson said that the fuel levy was large and that it was a substantial amount of money but was insufficient to address the RAF's statutory obligations. 'You begin to see the need for social security and assistance by our government to citizens,' he noted. Dr Watson said that over 90% of the fund's claims come from the court process. 'Many however continue to be excluded and this really is where the social significance or execution comes into play. There are many road crash victims and their families who are not eligible under our lawful assistance and support, especially those who have no income to have lost,' he said. Dr Watson added that RAF claimants are often not the primary beneficiaries and compensation is not always used for rehabilitation.

Still speaking on the highlights from the 2013/14 financial year, Dr Watson said that the RAF call centre had answered 220 000 calls and that the RAF had seen over 20 000 accident victims in the past 12 months.

'In the last year we received 147 000 new claims. The number continues to reduce. The year before it was 160 000 the year before that it was 172 000. It is really because of the Amendment Act now coming into play and certain injuries being excluded. We finalised 240

000 claims and reduced our backlog to 183 000 claims, which is well under half of what it was five years ago,' he said.

Dr Watson also spoke on the challenges faced by the RAF and why the legislation needed to be changed. He said that the first big category of challenges related to the fault-based system. 'It has restricted access and long settlement periods. It can take up to five and a half years for a represented claim to be paid finally and there are spiraling costs; and most of these costs are all for the RAF's account. There are multiple, complex and legalistic hurdles and uncertainty as to where the compensation is used. A lot of us here would have seen a "lotto" effect ... you get a claimant they received a lump sum of one, two million rand and the first thing they do is buy a nice car, a nice house and some nice clothing and six to nine months down the line the money is finished and the claimant no longer has the resources needed to rehabilitate themselves,' he said.

Dr Watson added that the second big challenge relates to the compensation for loss of support and loss of earnings. He said that there is also an increase in prevalence for future loss of earning claims; minimal proof is often required and that industrial psychologist reports basically forecast career rejection. Thirdly, Dr Watson said that one fifth of all the money being paid relates to legal fees. The fourth and the most significant challenge is financial sustainability. He said: 'If you think about your medical scheme coverage, your contribution determines the benefit you will get, but if you look at the RAF the funding has absolutely nothing to do with how many cars are on the road, how far they travel, who travels in the car and how many other people are on the side of the road exposed to the car which is travelling. The beneficiary base is not constituted by contributors so you literally could be a person who has actually never had a car and never bought petrol, you never contributed to the fuelling but if you are injured in a crash, you can claim from the RAF.'

Dr Watson concluded by saying that the current system was not sustainable.

The RABS Bill: Towards a comprehensive social security system

RAF project manager at the Transport Department, Terence Gow gave a presentation on the Bill. He said that the Bill was a move towards a comprehensive social security system. It was needed because the current system was not only inefficient, but the RAF was also technically bankrupt. He added that the social security system was also used in other countries, adding that it would help with international benchmarking.

Mr Gow said that some of the changes that have been made to the RABS Bill include the following:

- A revision of the provisions related to foreigners. Foreigners that are legally in South Africa will receive emergency health-care services but they will not receive other further health care. They will be stabilised and then they will return to their country. Mr Gow said this mirrors the arrangement between other countries, where one will purchase insurance at the border to cover your passage for the time that you spend in that country.
- Average national income and the maximum income benefit have been stipulated in the regulations. Previously that was not stipulated.
- The term 'beneficiary' has been amended in order to ensure consistency.

Mr Gow said that RABS would provide for health-care services, income and family support benefits as well as funeral benefits.

Questions from the floor

The audience was given an opportunity to ask questions on the Bill. These ranged from how RABS would ensure that the money claimed reached the

beneficiaries because in most cases the beneficiaries did not receive anything after the money is claimed. Some alluded to the fact that many legal practitioners would close offices because some of them relied on RAF matters to operate. Advocate Johan de Waal, who has been assisting the Transport Department in the drafting of the Bill, responded by saying that nothing in the new Bill excludes an attorney from assisting a beneficiary to lodge a claim, but added that whether there will be a requirement for such services is a different question. 'It is not something that will need to be addressed in the legislation or in parliament. A beneficiary would be required to lodge his claim for benefits directly with an administrator and there is a positive duty placed on the administrator to assist claimants proactively with those claims. There is also provision in the Bill that would assist the administrator, at a very early stage, to have the necessary information and documentation to provide that assistance, which is currently not available at the RAF. So in terms of the RABS scheme, the RAF will be playing the role ... an attorney would have done in the past. The RAF will assist the

claimant to bring the claim. The RAF will source the necessary documentation for the beneficiary. The RAF would take the hand of the beneficiary from the day that the claim was lodged right through until he is rehabilitated or until he dies,' he said.

Most of the other questions involved clarifying certain sections of the Bill, and concerns that some of the comments submitted last year were not taken into account or considered in the redrafting of the Bill.

- Written comments on the Bill can be submitted via e-mail to rabsbill@dot.gov.za.

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KZNLS goes back to work

In July, at a meeting of its Management Committee (Manco), the Law Society of South Africa (LSSA) resolved that the council of the KwaZulu-Natal Law Society (KZNLS) should resume its functions immediately. This came after the director of the KZNLS, Gavin John, issued a notice to members informing them that due to a dispute between members of the KZNLS council, the society had become 'dysfunctional' pending resolution of the dispute by the LSSA.

In the notice, Mr John said that with effect from 20 June, members of the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL) on the KZNLS council had suspended their participation in all matters. He added that the dispute related to the allocation of funds to constituent members (the BLA, NADEL and 'statutory' component) during discussions on the KZNLS 2014/2015 budget.

Before the LSSA resolved that the council 'immediately resume its statutory obligations to protect the public and to carry out the regulation of its members', matters such as admissions, re-admissions, suspensions and striking off which were before the court, were put on hold as the KZNLS council was not in a position to deal with these matters.

The LSSA Manco met on 10 July and resolved that –

- there should be recognition for provincial law societies' councilors outside the NADEL and the BLA to meet from time to time to consider issues of interest to the law societies, their councils and the profession;
- societies should make funding available for travel and accommodation in attending such meetings;
- law societies will ensure that there is a budget provision in the provincial law societies' budgets for such purposes; and
- such funding shall not be used in the pursuance of the interests of the South African Attorneys Association (see 2013 (Jul) DR 23), its promotion, its agenda or any sectarian political interests.

At the time of going to print, Mr John, told *De Rebus* that the KZNLS council was operating as normal following the resolution of the matter by the LSSA. He said that the society's meetings, including the council meeting on 22 July, would be held as normal.

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One-Child-a-Year campaign – Lawyers called to commit

ProBono.Org recently held an information-sharing seminar to launch its One-Child-a-Year campaign. Through the campaign, ProBono.Org aims to secure legal representation for children in need and to get attorneys and advocates to oversee and monitor the entire process of ensuring the child's wellbeing. Volunteers are asked to make at least one-year's commitment to a matter involving one child. The lawyer will be tasked to ensure that he or she represents the child at court and that the case is properly finalised in the interests of the child.

According to ProBono.Org's head of staff attorney, Annelie du Plessis, children are one group in particular that needs protection, support and proper care, but they often face abuse, neglect or maltreatment. She said that they are the members of society that most frequently have no voice within the legal system.

Speakers at the seminar were child development and protection consultant at the Johannesburg Child Advocacy Forum, Luke Lamprecht, who spoke on the issues related to the handling of child clients; attorney at the Centre for Child Law, Carina du Toit, who spoke on curatorship in the High Court; senior associate in the *pro bono* department of Hogan Lovells, Michal Johnson, who discussed legal representation involving children; and a magistrate from a Children's Court who asked not to be named. She discussed the need for *pro bono* services in children's matters.

The magistrate highlighted how the court where she works deals with as many as 40 cases per day. She said that the cases range from abuse, abandonment and trafficking, to the removal of children from unsafe or violent conflict situations. In one instance she said that a mother was said to have been sexually advertising her minor children online. The magistrate said that they have heard of reports of social workers selling babies, of children being placed back in very abusive or violent situations, of children being repeatedly raped or sexually exploited and abused, due to a lack of prosecution, and children abandoned to fend for themselves without any proper support or alternative placement. She said that sometimes the places of safety where children should be protected, are places filled with neglect and danger, and added that this is where attorneys can play a role as they would help make



Senior associate in the pro bono department of Hogan Lovells, Michal Johnson, and attorney at the Centre for Child Law, Carina du Toit, were part of the panel at ProBono.Org's information sharing seminar at the launch of its One-Child-a-Year campaign.

sure that the children are placed in a safe place, when seeing the case through from beginning to end.

Ms du Toit said that lawyers should apply to become curators in situations where children are orphaned or for various other reasons, have no one to look after their financial, educational and social interests. She said that a curator is usually appointed for a specific purpose, adding that this appointment is usually not permanent and does not have the same broad powers as a *curator bonis* to manage the child's life.

Ms Johnson said that mediators must ensure that children have their own representatives so that their voices are heard in family conflict situations. She said that in all circumstances where children are involved in legal proceedings, they must have their own independent legal representatives.

Ms Johnson said that s 28 of the Constitution provides that every child has the right to have a legal practitioner assigned to them by the state, at the expense of the state, in civil proceedings affecting the child, if substantial injustice would otherwise result.

Ms Johnson stressed that 'this child' included children who are not South African citizens.

In quoting s 14 of the Children's Act 38 of 2005 Ms Johnson said that the section provides that 'every child has the right to bring and to be assisted in bringing, a matter to a court, provided that the matter falls within the jurisdiction of that court'.

Ms Johnson added that there are different kinds of legal representation of-

ferred to a child. This is representation by -

- Legal Aid South Africa – Legal Aid SA has the power in terms of s 3 of the Legal Aid Act 22 of 1969 to render legal assistance to a minor at the state's expense. She added that the Legal Aid SA is not constrained by the need to obtain the parent's consent or a court order;

- attorneys or advocates as legal representatives for the child;

Ms Johnson stressed that this cannot be undertaken where a child cannot or will not give instructions. She said that the practitioner's duty is to ascertain the child's views, present the child's views logically, argue the standpoint of the child and provide the child with a voice; and

- legal representatives as *curators ad litem*.

In conclusion Ms Johnson said that there is a growing realisation that children need to be represented. She added that the Office of the Family Advocate does not function in this capacity as it has a different role.

According to Mr Lamprecht, the implementation and interpretation of the law has become a barrier to children accessing rights. He added that the law was meant to open a 'basket of services' to children, but that those involved are often not adequately trained and are under-resourced. Mr Lamprecht added that he believes that some rights are not met and that some are even regressive. He concluded by saying that there was a crisis in child protection and development.

Ms du Plessis said that ProBono.Org undertakes to secure cases for the volunteer attorneys and advocates through its close association with the children's courts, non-governmental organisations – particularly those that work with children – social workers and health care practitioners. She said that ProBono.Org will be tasked to obtain proper instructions, background information and supporting documents and to ensure that these cases where children are in need of legal support are taken up by *pro bono* lawyers.

At the time of going to print Ms du Plessis told *De Rebus* that six advocates and ten attorneys had volunteered to be involved in the project.

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LSSA submissions on court-annexed mediation: Qualifications, standards and mediator levels

In his budget speech last month, Minister of Justice and Correctional Services, Michael Masutha, announced that the date for the implementation of the court-annexed mediation rules had been shifted to 1 December 2014 to synchronise the implementation with the impending reorganisation of magisterial districts. Earlier this year, the Law Society of South Africa (LSSA) submitted proposals to the Justice Minister's Advisory Committee regarding the qualification, standards and levels of mediators who will conduct mediation under the court-annexed mediation rules. The LSSA has supported the concept of mediation to the extent that it may lead to greater and efficient access to justice.

At the time of this issue of *De Rebus* going to press, the standards were still to be published by the Department of Justice and Correctional Services.

In its submissions, the LSSA stressed that it was important for the Justice Department to ensure that there are sufficient numbers of trained mediators available in most parts of the country so that the project is sustainable. To this end, and in order to assist the department with the smooth implementation of the pilot project, the LSSA provided an initial list of potential attorney mediators.

Training of mediators

The LSSA outlined the requirements for the training of mediators as follows:

- Aspirant mediators must complete an accredited training course in court mediation. The LSSA suggested that a 40-hour course would be appropriate. Alternatively, mediators should submit proof of other suitable training and/or experience, that can be regarded as adequate prior learning.
- Training should be affordable and accessible.
- The course content should include a basic grounding in conflict management, dispute resolution, understanding the negotiation process, the use and benefits of appropriate dispute resolution,

mediation process, mediator skills and an understanding of the legal framework (the court-annexed mediation rules and judicial activism).

- As mediation is a practical skill, the course should include the development of effective skills of the participant as a mediator through role-playing demonstrations, coaching and assessments. The coaching and assessments should be conducted by experienced mediators and allow for the personal development of the skills in the individual participant. Training participants must be assessed as competent by experienced assessors. The assessment would have to include a practical element, such as the candidate being able to draft the documents required in terms of the rules.

Code of conduct and complaints process

The LSSA noted that it was imperative that mediators should be subject to a code of ethics applied by a recognised organisation. The LSSA stressed, however, that attorneys are subject to the supervision and disciplinary jurisdiction of the statutory law societies and as such complaints would be dealt with by the law societies.

The LSSA pointed out that it was essential that the Justice Department should provide a guide and code of conduct to mediators who are not subject to the supervision of recognised organisations.

Qualifications

The LSSA suggested levels of entry for mediators, but for complex matters, legal knowledge should be a requirement. The LSSA suggested:

- Semi-skilled – grade 12 or equivalent plus completion of an accredited training course.
- Skilled – four years' relevant tertiary qualification plus completion of an accredited training course.
- Highly-skilled – four years' relevant tertiary qualification, plus completion of an accredited training course, plus five years' mediation experience.

Dispute resolution officer

The LSSA stressed the critical role of the dispute resolution officer and pointed out that he or she needed to have a sound grasp of matters in order to refer them to the most appropriate level of mediator. The LSSA suggested that the possibility could be explored that attorneys, as part of their compulsory 24 hours per year *pro bono* services, could assist the resolution officer with reviewing and referring matters.

Equal distribution (no bias)

The LSSA submitted that equal distribution of mediation work must be a principle of the process and must be applied strictly by the department. Appointments must not depend on the membership or affiliation of a mediator to any institution associated with mediation work.

LEAD court-annexed mediation five-day workshop

The LSSA's Legal Education and Development department (LEAD) offers a 40-hour (five-day) court-annexed mediation training workshop. The workshop is interactive and includes assessment in simulated mediation. The workshop will be offered in Pietermaritzburg, Pretoria, Bloemfontein, Port Alfred and Midrand during the latter part of the year. Please consult the 'Seminars/workshops' sections on the LEAD website at www.LSSALEAD.org.za or e-mail seminars@LSSALEAD.org.za for further information.

The Law Society of South Africa (LSSA) Synergy Link skills transfer initiative has been embraced in the Western Cape between Fairbridges' Cape Town office as the transferring firm and C De Cerff & Associates of Mitchell's Plain as the growing firm.

After fruitful exploratory meetings, the initial primary areas of cooperation on which the link partners will be concentrating will be commercial conveyancing, as well as marketing and business practice systems.

Senior partner of the growing firm Carol De Cerff, explains: 'Our firm is extremely service driven and we believe that we have been providing an effective service to our clients over the years. However, due to the nature of our firm's practice, the attorneys at our firm do not always get exposure to and experience in other fields of law which are of a commercial and corporate nature despite our qualifications in certain of these fields. We believe that skills transfer is an important component in practice generally because it will allow the "growing" firm to gain invaluable knowledge and practical experience from the "transferring" attorneys.'

Fairbridges director Adela Petersen is equally enthusiastic: 'We are fortunate as a firm to have a deep reservoir of experience, knowledge and resources, not only in our fields of expertise but also in respect of law firm management and marketing. Training and mentoring of our professionals, paralegals and support staff is a crucial aspect of our structure. To be able to extend this beyond the confines of Fairbridges to a "growing" firm is an opportunity to share that

Fairbridges and C De Cerff & Associates confirm skills initiative as part of LSSA Synergy Link



*Members of the Synergy Link transferring firm Fairbridges and the growing firm C De Cerff & Associates (C De C).
Front: Adela Petersen of Fairbridges and Carol De Cerff of C De C.
Back: Jennifer Lumka (C De C), Melanie Killian, Bob Groeneveld (Fairbridges), Brumilda Phanaliphi, Janice Coetzee (C De C) and Zunaid Mohamed (Fairbridges).*

we welcome. We also believe that we can learn from the experience and insights of C De Cerff & Associates, and that the interaction between our respective practitioners will be mutually beneficial.'

Ms De Cerff adds: 'We believe that the Synergy Link initiative by the LSSA is a unique opportunity for our firm and for practice in general.'

LSSA property law committee meets with Chief Master of the High Court



Hussan Goga (left), Chairperson of the Property Law Committee of the Law Society of South Africa and Lester Basson, Chief Master of the High Court at a meeting of the LSSA Property Law Committee with the Chief Master in Kempton Park in June 2014. The meeting addressed matters of mutual interest.

Sri Lanka lawyers visit LSSA

A round-table discussion was held in Pretoria in June 2014 between the Law Society of South Africa (LSSA) and a group of Sri Lankan lawyers. The LSSA was represented by Co-chairperson Ettienne Barnard and Council member Krish Govender. Discussions

covered recent developments in the profession in both South Africa and Sri Lanka, particularly the independence of the profession; court-annexed mediation, as well as the role of civil society organisations and legal aid institutions in providing access to the courts.



Sri Lankan lawyers who visited the LSSA: From left, Upul Jayasurya, President of the Bar Association of Sri Lanka; Rohan Sahabandu, Chairman of the Legal Aid Commission of Sri Lanka; Kalyananda Tirangama from the Sri Lankan Lawyers for Human Rights and Development; and Arandara Kankanamlage DonDimal Arandara from the Ministry of Justice.

Developments in the SADC region

A summary of selected electoral, legal and constitutional aspects



Compiled by Mekanatsa Makonese,
Executive Secretary of the SADC
Lawyers' Association.

2014: Election year in SADC

South Africa and Malawi were the first of five Southern Africa Development Community (SADC) countries to hold elections in the SADC region in 2014, with their elections held on 7 and 20 May 2014 respectively. The conduct of the elections was a tale of two contrasts with South Africa running a largely smooth election, whereas Malawi's election was marred by administrative challenges and allegations of rigging that had the effect of denting the credibility and integrity of the elections. In both cases, however, it was reassuring to note that the judicial and electoral institutions held their own and were able to address all electoral issues and chal-

lenges in accordance with their legal mandates.

In South Africa the Electoral Court handled a significant case relating to the suitability of the Electoral Commission (IEC) Chairperson, Advocate Pansy Tlakula, to continue holding office following allegations of impropriety in the procurement of the IEC offices in Centurion. In the same vein other electoral institutions also played their part, with the Independent Communications Authority of South Africa (ICASA) managing to deal with communication and media-related disputes that were filed by the various political parties in the country against media houses such as the South African Broadcasting Corporation.

In Malawi, despite the chaotic manner in which the elections were held, allegations of rigging by the ruling party and the pronouncement by the then State President Joyce Banda 'annulling' the elections. The electoral institutions were not deterred but proceeded with their work until the final election result was announced. The courts were able to handle election-related challenges and deliver rulings within reasonable periods of time while the Malawi Electoral Commission handled the electoral-related challenges in a way that showed its strength and impartiality as an electoral institution. Above all, the people of Malawi showed maturity and patience as they waited for the final election result without resorting to violence or other illegal acts.

Three more countries in the region will hold their elections in 2014. Mozambique will have elections on 15 October, and Botswana and Namibia will have elections in October and November respectively. It is hoped that the elections in these three SADC countries will be free and fair, and that citizens will have an opportunity to choose their leaders without fear, and in an environment that is free of violence or intimidation.

• See 2014 (July) DR 15.

Swaziland: Thulani Maseko and Bheki Makhubu remain in detention

In Swaziland the trial of human rights lawyer, Thulani Maseko and newspaper editor, Bheki Makhubu, for contempt of court continues. At the time of writing, the two were found guilty and remained in prison where they have been detained since March 2014. Their trial has once again put the spotlight on the independence of the judiciary in Swaziland and the role of the country's Chief Justice in undermining public confidence in the justice delivery system, as the Chief Justice was alleged to be behind the arrest and detention of the two on the alleged contempt of court charges. The charges arose from the publication of three allegedly contemptuous opinion editorials in *The Nation* magazine of which Makhubu is the editor, two of which were authored by Maseko. On 27 May 2014, the SADC Lawyers' Association (SADC LA) launched a financial appeal towards the welfare of the fami-

lies of the two human rights defenders as their continued incarceration has resulted in serious financial challenges for their families. This is in addition to other forms of support, such as attending court sessions and providing technical legal assistance that the SADC LA and other human rights and rule of law institutions throughout the world have been providing to the two. Unfortunately despite such support and the pressure that has been piled on the Swazi judiciary and government, the two human rights defenders are yet to secure their freedom. Human rights defenders, activists and lawyers in the SADC region are being urged to continue showing their support to the two so that they and other human rights defenders are not deterred from taking up human rights issues of concern in individual SADC countries and in the SADC region as a whole.

• See 2014 (May) DR 15

Zimbabwe: Alignment of the country's laws with the new Constitution

In Zimbabwe, the government announced a programme to align more than 450 pieces of legislation with the country's 2013 Constitution. However, despite the public pronouncements about the programme, there is scepticism over the government's willingness to ensure that the laws are indeed aligned with the Constitution. Government has been dragging its feet with regard to the actual implementation of the programme, with civil society actors and opposition political parties arguing that the ruling ZANU PF government's interests are served better when the

laws are not aligned with the Constitution. Legal experts have, however, called on civil society organisations and lawyers in the country to raise awareness about the supremacy of the Constitution and urge citizens to claim their rights as provided for in the Constitution even without the necessary alignment of the relevant laws. Section 2(1) of the Constitution of Zimbabwe provides that:

'This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'.

As such, the alignment of the laws with the Constitution is only meant to create

certainty and improve administrative implementation. The fact that the laws are not aligned with the Constitution should not be used by any entity – whether State or otherwise – to deny citizens their constitutional rights. The continuous talk by the government on the need to align the laws with the Constitution while dragging its feet on the actual implementation is meant to pass a wrong message to the citizens that they cannot enjoy the rights and protection provided by the Constitution before the alignment, when in fact such rights and protection can be claimed by citizens.

Mozambique: The RENAMO threat ahead of elections

As Mozambique prepares for elections later this year, the country continues reeling under the threat of violence and instability following the decision by the Resistência Nacional Moçambicana/Mozambique National Resistance (RENAMO) to end cooperation with the ruling party Frente de Libertação de Moçambique/Mozambique Liberation Front (FRELIMO) and go back to the bush to rekindle a civil war that ran from 1975 when the country gained independence until 1992 when RENAMO and the FRELIMO-led Government signed a ceasefire agreement. RENAMO has launched a number of ambushes, attacked infrastructure and killed soldiers, police officers and civilians in a low-level insurgency since decamping to its old military base in the Gorongosa mountains in October 2012.

Among the many demands that RENAMO has been making have been those related to electoral law reforms ahead of the 15 October 2014 elections. In February 2014, the Parliament of Mozambique, made up of parliamentarians from both FRELIMO and RENAMO, adopted changes to the country's electoral laws with

the hope of ending the RENAMO-led violence. The focus of the changes were on reforming the body that is tasked with running elections in the country, the Comissão Nacional de Eleições/National Elections Commission (CNE).

In line with these changes in March 2014, RENAMO representatives in the new 17-member CNE were increased from two to four. Other members of the commission are from FRELIMO (five members), civil society (seven members) and another political party, the Movimento Democrático de Moçambique/Mozambique Democratic Movement (one member). However, despite these reforms, RENAMO has not ended the violence particularly along the main North-South highway in the Sofala Province. In June 2014, the chairperson of the Mozambique Human Rights Commission, Custodio Duma, met with members of RENAMO to urge them to stop the attacks, but no undertakings were made. A spokesperson for RENAMO, Antonio Muchanga, after the meeting with the Human Rights Commission said: 'I cannot lie to the people and say that because the National Human Rights Commission

has met with us there will be a ceasefire. What we are telling Mozambicans is that there is still danger.' (AIM 'Human, Rights Commission urges RENAMO to renew truce' www.clubofmozambique.com/solutions1/sectionnews.php?secao=mozambique&id=32808&tipo=one, accessed 10-7-2014) (see statement by the SADC Lawyers' Association on 9 January 2014 titled 'SADC Lawyers Concerned with Undue Delays to the Constitution Making Process in Zambia' (www.sadcla.org/?q=node/144, accessed 10-7-2014)).

Mozambicans from different walks of life have urged RENAMO to renounce violence and commit itself to negotiations while also urging the ruling party to commit to the talks in an effort to end the unnecessary loss of life and damage to property that is being caused by the insurgency. As the elections in Mozambique grow closer, it is hoped that both RENAMO and the ruling FRELIMO Government will agree to inclusive reforms that do not only address the concerns of these two main political parties but the wishes of the smaller political parties and the people of Mozambique as a whole.

Zambia: The Constitution-making process has stalled

The constitution-making process in Zambia has stalled despite significant investments in terms of finances, time and human resources by the country in its efforts to create a new people-driven supreme law for the country. This followed pronouncements by the State President, Michael Chilufya Sata, to the effect that the country does not need a new constitution but mere amendments to the existing one. This is a clear departure from the government's earlier position, which led to the appointment of a twenty-person technical committee to draft a new republican constitution on 16 November 2011. It must also be re-

called that when Mr Sata assumed power in September 2011, he rode on the promise of a new constitution for Zambians as one of his campaign points.

The constitution-making process required the Constitutional Technical Committee to release the final draft to the President and to the public concurrently but this was stopped by the President, who wanted the draft to be scrutinised by his cabinet first before it could be released publicly. The result is that several months after the Technical Committee delivered on its mandate, the people of Zambia are still waiting to see the final draft Constitution.

Tanzania: Constitution-making process in progress

The process of developing a new constitution in Tanzania started off on a high note with the State President at one point indicating that the new supreme law would be passed in 2014 (S Mtwewe 'Tanzania will have new Katiba in 2014: Kikwete' www.thecitizen.co.tz/News/Tanzania-will-have-new-Katiba-in-2014--Kikwete/-/1840392/2142974/-/11m0qaaz/-/index.html, accessed 10-7-2014). The country's Constitutional Review Commission's term ended in March 2014 in terms of the provisions of s 31 of the Constitutional Review Act, chapter 3, after the commission had handed over the constitutional draft to the Constituent Assembly (CA) and to the State President. The CA has been debating the Constitutional Bill, although there are now concerns with delays in finalising the new supreme law. The CA went on recess in April and was only expected to resume its sitting in August after Parliament concludes debating on and approving the national budget. This is because all members of the National Parliament, which is supposed to be

debating the national budget are also members of the CA.

As part of the development of the new Constitution, Tanzanians are expected to participate in a referendum that may end up focussing more on deciding the issue of the union - which currently comprises of the Island of Zanzibar and mainland Tanganyika which came together to form the United Republic of Tanzania in 1964. The referendum will, among other things, seek citizens' views on whether the union should be maintained in its current form or whether there should be three levels of government (one for Tanganyika, one for Zanzibar and a federal one). This has been an issue of serious contention both within the CA and among ordinary Tanzanians as debates on the draft constitution continue.

Hopefully the new constitution will be finalised in time for the citizens of Tanzania to familiarise themselves with the constitution ahead of national elections expected to be held in 2015.

SADC Bar leaders meet in Johannesburg

The SADC Lawyers Association (SADC LA) brought together 15 Bar and law society leaders - including SADC LA President Kondwa Sakala-Chibiya - representing 13 SADC countries at the first-ever SADC Bar Leaders' Conference in Johannesburg in July 2014. Various issues of common interest and concern were discussed including the drafting of a *pro bono* and legal aid framework in the SADC region. The Law Society of South Africa (LSSA) was represented by its Co-chairpersons, Ettienne Barnard and Max Boqwana, and by its Chief Executive Officer, Nic Swart.



Attendees of the first-ever SADC Bar Leaders' Conference held in Johannesburg.

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People and practices

Compiled by Shireen Mahomed

Herold Gie Attorneys in Cape Town celebrates its 120th anniversary

Founded in 1894 in the historic heart of Cape Town, Herold Gie Attorneys celebrates its 120th anniversary this year.

The firm's name is derived from its founding partners, Charles Willoughby Herold and George Gerhard Gie, who joined the firm in 1902. Early records of the company depict its operation against the backdrop of apartheid, industrialisation and the important developmental phases of many of Cape Town's key regional areas. One of the seminal matters handled by the firm in its earlier days, after the end of the First World War, was the legal work pertaining to the sub-division of the

entire Fish Hoek area of the Cape. Last year, the firm moved to new offices in Wembley (below) from its Darling Street offices which it had occupied since the 1940s.



Shepstone & Wylie Attorneys in Durban has appointed Daniel Robb as an associate in its corporate and commercial law department. He specialises in commercial law.

Rooth & Wessels Inc of Pretoria marks its 125th anniversary

Pretoria firm Rooth & Wessels Inc marks its 125th anniversary this year. The firm's continuing journey is the legacy of two prominent lawyers: Edward Rooth was a multilingual lawyer, who spoke Dutch, English and French and gained the confidence of statesmen of his time such as Paul Kruger, Jan Smuts, WJ Leyds, Sammy Marks

and Rev Bosman. Among his contributions was the creation of a municipality for Pretoria. Marthinus Laurentius Wessels was a lawyer and partner in the firm Redelinghuys & Wessels in Cape Town who moved to the then Zuid-Afrikaansche Republiek (ZAR) in 1889 and later returned to the Cape. After the death of Mr Rooth, the reigns were taken by his colleague, Mr Malherbe. Under the

stewardship of Mr Malherbe the firm assisted in the drafting of the South African Reserve Bank Act in 1920. The firm has witnessed a number of important international and local events including the Anglo-Boer War, as well as the the First and Second World Wars and the advent of democracy in South Africa.



The directors of Rooth & Wessels in its 125th year: Marianne van Rooyen; Joseph Leotlela; Hannelie Basson; Faathima Asmall; André Bloem (Managing Director); and Joseph Maluleke (Chairman).

Adams & Adams in Pretoria has appointed Shani van der Bergh as a professional assistant in the commercial, property and litigation department. She specialises in personal injury law, medical negligence actions, third party claims, matrimonial disputes and family law.



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.



Accounting to clients: How transparent are you?

By the Forensic
Investigation
Team of the
Attorneys
Fidelity Fund

In terms of the rules of the various law societies, there is a requirement on the part of all practitioners to account to their clients (see: Cape Law Society – r 13.11 and r 13.12; Law Society of the Free State – r 16.8 and r 16.9; KwaZulu-Natal Law Society – r 20(7) and r 20(8); and Law Society of the Northern Provinces – r 68.7 and r 68.8). The rules can be paraphrased as follows:

Every firm shall within a reasonable time after the performance or earlier termination of any mandate account to its client in writing; each account shall contain –

- details of all amounts received by it in connection with the matter concerned appropriately explained;
- particulars of all disbursements and other payments made by it in connection with the matter;
- fees and disbursements raised against the client and, where any fee represents an agreed fee, a statement that such fee was charged and the amount so agreed;
- the amount due to or by the client; and
- the firm shall retain a copy of each such account for not less than five years.

A firm, unless otherwise instructed, shall pay any amount due to a client within a reasonable time.

Why it is crucial for practitioners to account to their clients?

The word ‘account’ has several meanings including –

- a record or narrative description of past events;
- a statement of recent transactions; and
- the resulting balance.

Accounting goes beyond just maintaining proper records of accounts, but also focuses significantly on relationship management through the provision of a record of events. A firm’s clients are

important stakeholders who have great influence on the continued existence and sustainability of the firm. Without clients, no practice can exist.

It is imperative for practitioners to keep their clients abreast of activities and events surrounding the use of their funds. Needless to say, the money in the trust account does not belong to the attorney but to the client. Practitioners should pay only to or on behalf of their clients from trust funds. It is prudent to disclose to the owners of those funds where and how their funds were applied, as they have the right to know if their funds were applied appropriately. This ensures transparency on the part of the practice towards its clients and, therefore, enhances its reputation and engenders trust from the clients and the broader public. It also provides an opportunity for clients to follow up and inquire on unclear issues, thus managing possible false and improper reporting against the practice. Reputation is about beliefs and opinions that are generally held about someone or something and can be perceived.

It is well known that some practitioners appoint bookkeepers or accountants to write up and balance the books of the practice. The bookkeepers or accountants will also, as part of their duties, prepare accounting statements to clients. In such instances, where the accounting statements are prepared by bookkeepers or accountants, the process of preparing statements also provides practitioners with an opportunity to review transactions on the various clients’ accounts and to identify and follow-up on irregular transactions and misrepresentations made to clients.

These trusted ‘resources’ – bookkeepers and accountants – can commit fraud. Fraud occurs where the following elements exist, referred to as ‘GONE’:

- **Greed** – An excessive desire to acquire or possess more than what one needs or deserves, especially with respect to material wealth.

- **Opportunity** – Circumstances that allow you do to something you would like to do.

- **Need** – A motivating force that compels action for its satisfaction.

- **Lack of Ethics** – The basic concepts and fundamental principles of decent human conduct.

Considering the tough competition in the legal industry and with many new entrants joining the profession every year, it is difficult for firms to compete without a solid reputation, hence the need for practitioners to build and maintain solid relationships and a favourable reputation with their clients.

What can happen?

No matter how well-intentioned your staff may be, or how organised your business is, mistakes are inevitable, and even when there is nothing apparently wrong, not all clients will always be totally satisfied. When you are dealing with reasonable, rational people, most issues can be handled with a personal, sincere response and immediate remedial action. This should, at the very least, leave the client feeling satisfied that you care and that you are prepared to make things right.

Many clients will not immediately make their grievances known. Some may prefer to discuss the matter with friends or relatives before bringing it to your attention. Others may not say a word to you at all – for any number of reasons. Some people say nothing to avoid confrontation at all costs while others may be mum because they are planning something more vindictive.

Besides that, one may be dealing with a client that is not reasonable or rational.

One tweet, one Facebook status update or one short comment on a web page is all it takes, and what took a few cents and a few minutes to create will not be cheap or quick to remove. Organised reputational harm caused by a vindictive client, disgruntled ex-employee or a competitor can be extensive and devastating. You could find page after page of believable (but false) complaints, damaging comments and harmful fabrications in the most popular and trusted media spaces. This can be done at relatively little cost, in a very short space of time and from anywhere, with dire consequences for the firm.

Cases of lack of accounting to clients have been reported to the regulatory law societies from time to time. As soon as such reports are filed, an immediate suspicion arises that the firm could be hiding something from the client and scrutiny of the firm's records may be required. This scrutiny of records can cause discomfort for the employees and practitioners in a firm and it can give a sense of not being trusted. Needless to say, the reason clients report these to the regulators stems from the perception that the firm could be misappropriating their funds. Relationships between firms and their clients are ruined due to lack of accounting to clients and can have long-term consequences for the firm and practitioners involved.

Furthermore, it is important for practitioners to strive for favourable audit and/or inspection reports by complying with laws, rules and regulations, prescribed practices and accounting standards on proper accounting for trust monies. Failure to comply can lead to reputational damage, limited business opportunities, reduced expansion potential and an inability to attract new work. Good audit and inspection reports enhance the positive views about the firm. If it is perceived to be conducting business ethically and transparently, it has a good chance of being rated as low-risk. This sends a strong and positive message about the firm. Credibility is not only about the firm, but it extends to credibility of the individuals behind that firm, and *vice versa*.

Prevention is better than cure

Based on the above, accounting to clients can serve as a deterrent to false reports that may harm the reputation and therefore the sustainability of a firm. This is possible because as the harmful news flourishes, clients can refer to the transparency with which the firm has deals with them and ignore the rumours or allegations. Clients that recognise and appreciate the firm's transparency may even stand up for and protect the firm against destructive publicity. Practition-

ers should always ensure that they disclose transparently to the owners of the funds, what they did with and how they applied their funds. In this way the risk of an appearance of improper behaviour by an attorney is properly managed and possibly prevented.

Practitioners should, therefore, strive for positive publicity and ensure that their prospective clients are seeing positive information when they conduct a search on a practice. As already alluded to above, word of mouth can still be the top driver of success or failure in business. Word of mouth now also encompasses online reviews. By taking control of your firm's branding you can minimise negative connotation and increase your trust factor, which results in gaining more clients.

What to do?

Practitioners should always consider the costs of not accounting transparently to their clients. Lack of transparency and accountability can and will cost the practice dearly, and can lead to closure of the firm. With the ever-changing business environment – even in the legal profession – client relationship management has become critically important. Practitioners need to take a long-term view and outlook on their businesses. It is important for firms to strive towards building solid relationships with their clients, which relationships are enhanced by transparency.

Reputation management may all too often be considered an intangible benefit by practitioners, but if left unmanaged, its shockwaves leave tangible terror.

It is in your best interest to account to your clients. Reputation is all you have to keep you in business.

Forensic Investigation Team of the Attorneys Fidelity Fund in Centurion.

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Does ESTA still protect occupiers of farm land in South Africa?

By
Thabiso
Mbhense

Is para (c) of the definition of 'occupier' under the Extension of Security of Tenure Act 62 of 1997 (ESTA) consistent with the provisions of the Constitution, especially ss 9, 10, 22, 25, 29, 30 and 31?

ESTA came into force on 28 November 1997. According to its long title, the purpose of ESTA is to 'provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected therewith'.

The preamble of ESTA recognises that 'many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction'. According to the preamble, 'it is desirable [to ensure] that the law should promote the achievement of long-term security of tenure for occupiers of land, where possible through the joint efforts of occupiers, land owners, and government bodies; that the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners; that the law should regulate the eviction of vulnerable occupiers from land in a fair manner, while recognising the right of land owners to apply to court for an eviction order in appropriate circumstances; to ensure that occupiers are not further prejudiced'.

As the title and the preamble demonstrate, ESTA is an Act of Parliament envisaged in s 25(6) of the Constitution to improve security of tenure for those 'whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices'.

ESTA has a definition of an 'occupier' that limits the potential scope of the Act's protection. To qualify as an 'occupier' a person must be 'residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding -

(a) ...

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount'.

On 18 December 1998, the ESTA Regulations were published in GN R1632 GG19587/18-12-1998. In terms of clause 2(1) of the regulations 'the prescribed amount for the purposes of paragraph (c) of the definition of "occupier" in section 1(1) of the Act shall be an income of R 5 000 per month'.

ESTA protects the rights of occupiers in two ways. Firstly, Chapter III protects their right to occupy and use land. Secondly, Chapter IV limits the ability of the owner to evict them from the land.

It is clear from Chapter III, especially s 6(1) of ESTA, that a person has the 'right to reside on and use the land' only if he or she qualifies to be an 'occupier' as defined in s 1 of ESTA.

It is evident from the above that, as the law stands, a person who has an income in excess of R 5 000 per month does not enjoy any rights and protection in terms of ESTA. I submit that this is not consistent with the provisions of s 25(6) of the Constitution, which inspired the enactment of ESTA.

As a result, it is likely that para (c) of the definition of 'occupier' is inconsistent with the provisions of the Constitution, especially, ss 9, 10, 22, 25, 29, 30 and 31.

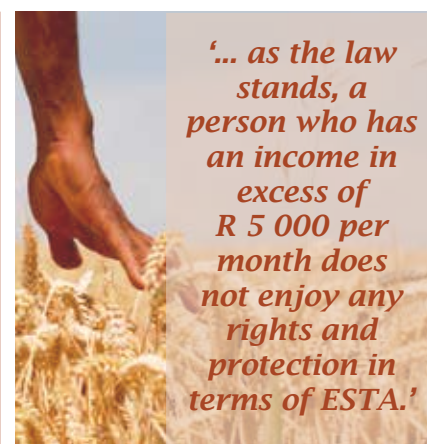
Security of tenure is vital for the exercise and enjoyment of a number of other constitutional rights. Occupiers' rights to equality (s 9) and to human dignity (s 10) are violated by the continued denial of their right to more secure tenure and the perpetuation of their current tenuous position.

The perverse outcome of the impugned provision is that if an occupier seeks a living wage in excess of the prescribed amount, and secures it, then he or she will lose his or her status as an occupier. That produces an undesirable outcome: It makes occupiers reluctant to attempt any form of bargain for higher wages with their employers. If they do engage in a bargain and in fact receive the higher wages, they can be evicted without the protection of the statute.

This dynamic - where one cannot ask for higher wages without the risk of losing statutory protection - entrenches the vulnerability of farmworkers, whose tenure is in any event insecure.

Right to culture

Occupiers' insecure tenure also affects their right to culture. For instance, to some cattle are a vital part of the culture of the majority of occupiers. They represent wealth and property and are used for a variety of ceremonies. Should they lose the right to use land which is linked to right of residence, they will also lose their cattle. This would not be the case if they had stronger rights in the land and their security of tenure was protected.



'... as the law stands, a person who has an income in excess of R 5 000 per month does not enjoy any rights and protection in terms of ESTA.'

The Constitution protects the right to culture in ss 30 and 31. Section 30 grants everyone 'the right ... to participate in the cultural life of their choice'. In terms of s 31 persons who, like occupiers, belong to a cultural community 'may not be denied the right, with other members of that community ... to enjoy their culture'. They cannot fully participate or enjoy their culture when their access to land, and, therefore, their right to use land for keeping their cattle, is lost.

Right to access to food

Occupiers' insecure tenure also affects their right to access to food. The Constitution protects the right to food in s 27(1)(b). The occupiers depend on their rights to own cattle and produce other food. Cattle are not only an important cultural asset - they are a source of nutrition. The continued insecure tenure of the occupiers affects the security of their access to food. Once evicted, occupiers lose their access to food.

Right to freedom of occupation, profession and education

This situation symbolises the plight of occupiers in South Africa. When ESTA was promulgated in 1997, many occupiers were earning less than R 5 000. They are possibly earning above this amount because of annual escalations of salaries, and as a result, they are no longer protected by ESTA. There may be occupiers who are reluctant to pursue their careers because of the risk of losing the protection conferred by the Act.

Conclusion

I submit that para (c) of the definition of 'occupier' is inconsistent with the provisions of the Constitution, especially, ss 9, 10, 22, 25, 27(1)(b) 29, 30 and 31.

Thabiso Mbhense *Blur LLB (UKZN)* is an attorney at the Legal Resources Centre in Johannesburg.





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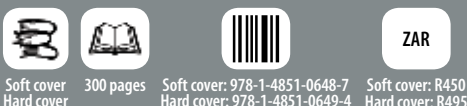
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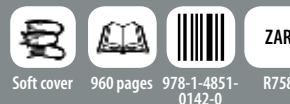
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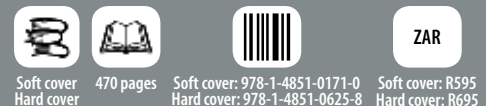
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ConCourt upholds dignity of informal traders

Picture source: Gallo Images/Thinkstock

By
Michal
Johnson
and Tarryn
Paterson

On 5 December 2013 the Constitutional Court heard urgent applications brought by two informal trader organisations for urgent relief. The South African National Retail Traders Association (SANTRA) and the South African Informal Traders Forum (SAITF) approached the Constitutional Court as a result of a judgment handed down in the High Court, Gauteng Local Division, by Monama J.

The urgent application was brought to the High Court as a result of the City of Johannesburg (the city) having taken the decision to relocate informal traders to an unknown destination in an unspecified time-period; and to prohibit or restrict trading in areas in the Central Business District (CBD) that are currently demarcated for informal trading.

In what has become known as 'Operation Clean Sweep', the Johannesburg Metropolitan Police Department (JMPD)

enforced the decisions taken by the city. The city attempted to justify its decisions outside of the court papers by reasoning that illegal informal traders gave rise to disorder and criminality. However, the members of SANTRA and SAITF were in possession of written permission from the city to trade. The city did not deny the existence of the operators. The effect of the operation was that thousands of informal traders were displaced, their ability to earn an income

was interrupted and in some instances their stock was taken.

The relief sought in the High Court was framed in a two-part application; the relief that was sought urgently and immediately was interdictory in nature. SANTRA sought to –

- interdict the city from demolishing any further stalls from which the informal traders had been trading;
- compel the city to allow informal traders who were lawfully entitled to trade to return to the areas previously allocated to them so that they could continue trading;
- compel the city to re-erect the stalls that had been demolished, alternatively to allow those affected informal traders to trade from the sites where their stalls had stood;
- interdict the city and the JMPD from interfering with the informal traders' right to trade; and
- compel the city to give reasons for its decisions to relocate the informal traders and prohibit trading in the CBD.

The second part of the application was a review of the decisions taken by the city to –

- demolish existing stalls erected by the city for the use of informal traders and which had been leased by SANTRA's members for that purpose;
- relocate informal traders from the CBD; and
- declare certain areas in the CBD restricted or prohibited for the purposes of informal trading.

While the matter was heard as an urgent application in the Johannesburg High Court and extensive argument was led, Monama J, in line with the view taken in the city's answering affidavit, ruled that the matter was not urgent and dismissed the matter from the urgent roll. Interestingly the court did grant leave to an intervening party to join the proceedings, their application having also been brought on an urgent basis.

SANTRA immediately requested reasons from the court and sought leave to appeal.

Subsequent to the order handed down in the High Court, SANTRA and SAITF approached the Constitutional Court on an urgent basis (see *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC)). SANTRA approached the Constitutional Court seeking an order on the following terms:

- The matter should be dealt with as one of urgency in terms of r 12 of the Rules of this Court.
- SANTRA should be granted leave to appeal to the Constitutional Court against

'The court went on to say that there was no general rule that disallowed it from hearing the appeal of an interim order, as long as it was in the interests of justice to do so, and an urgent appeal against an interim order would be permitted only as a "last resort".'

the High Court's judgment and, pending the determination of the appeal, SANTRA members be permitted to trade in a manner consistent with ss 9 and 10 of the informal trading by-laws at the places where they traded prior to 'Operation Clean Sweep'.

- In the alternative, pending the determination of SANTRA's application for leave to appeal to a full Bench, that its members be permitted to trade in a manner consistent with ss 9 and 10 of the informal trading by-laws at the places where they traded prior to 'Operation Clean Sweep'.

While it is unusual for a matter to be heard directly after an urgent hearing in a High Court, both the Constitution and the Rules of the Constitutional Court make provision for this. Section 167(6) of the Constitution provides that:

'National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –

- (a) to bring a matter directly to the Constitutional Court; or
- (b) appeal directly to the Constitutional Court from any other court.'

Similarly r 18 of the Constitutional Court Rules which relates to direct access provides that:

'(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.

(2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out –

(a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;

(b) the nature of the relief sought and the grounds upon which such relief is based...';

In a unanimous judgment, the Constitutional Court paid tribute to Nelson Mandela in quoting the following from his address to the seventh International Ombudsman Institute World conference in 2000 held in Durban –

'Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order'.

In the High Court and in the Constitutional Court the city did not outrightly dispute the facts put forward by the two traders organisations but remained fixated on the issue of urgency, alleging that there was no urgency or that the supposed urgency had been created by the traders. The city did not even dispute the unlawfulness of their officials' actions.

The issues the Constitutional Court was primarily faced with were whether –

- the appeal against the interlocutory order should be heard;
- the Constitutional Court should grant interim relief pending the outcome of Part B of the High Court application; and
- the appeal should be heard on an urgent basis.

In considering the first of these issues the court found that, regardless of the fact that the relief was couched as 'interlocutory' relief, the refusal by the High Court to grant the interim relief sought in Part B of the trader's application was final in effect and as such, they could hear such an appeal. Consideration was given to the facts of the matter and the effect that such a decision would have on the people involved.

In terms of s 167(6), the court has the requisite jurisdiction to hear an appeal, when it is in the interests of justice to do so. The court went on to say that there was no general rule that disallowed it from hearing the appeal of an interim order, as long as it was in the interests of justice to do so, and an urgent appeal

against an interim order would be permitted only as a 'last resort'. The court found that it was in the interests of justice to hear the appeal as the applicants would otherwise have suffered irreparable harm.

As above, the city did not dispute the majority of the evidence put forward by the traders. The court noted that the city had not, at any stage during the proceedings, alleged that the applicants and their members were trading illegally. Such undisputed evidence spoke of the conduct of the city and the JMPD in carrying out 'Operation Clean Sweep'. Therefore, the act of removing traders who were legally permitted to trade from the streets had a dire effect on the traders and their families, who numbered in the thousands and, as was noted by the Constitutional Court, these persons were rendered destitute and unable to provide for their families. It was further noted that this situation would have continued until February 2014 given the course that matters have to follow in the High Court for enrolment and hearing purposes on the ordinary motion roll.

The court, in considering the facts before it, decided that the traders would suffer 'severe irreparable harm' if it did not hear the appeal on an urgent basis

and further that if the appeal was not granted the effect would be that there would be no real relief in terms of Part B. In support of this was the concession by the city during the hearing that it had not followed the Businesses Act 71 of 1991 which prescribes the manner in which the city is to act in such circumstances. The court purposefully commented that by the city's concession and the undisputed facts, the city had achieved its own objectives with 'flagrant disregard' for the rights of the traders.

The court said that the removal of the traders from the City of Johannesburg in terms of 'Operation Clean Sweep' involved significant constitutional issues stating that: 'The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced "humiliation and degradation". The city did not dispute this. The city's conduct has a direct and on-going bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health services. The harm the traders were facing was immediate and irreversible'. Furthermore, the city may not unlawfully evict traders from their trading posts without following the by-laws.

The Constitutional Court granted an order on the following terms:

- Leave to appeal directly to the court on an urgent basis was granted.
- The appeal was upheld.
- The order of the South Gauteng High Court, Johannesburg, made on 27 November 2013, under case number 43427/13, was set aside.
- In terms of the order, the city was interdicted from interfering with the trading of the informal traders pending a review of the city's decision to relocate the traders and declare certain areas restricted from informal trading.

Michal Johnson BA LLB (Rhodes) and Tarryn Paterson BCom (Law) (UP) are attorneys at Hogan Lovells in Johannesburg. □



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Jurisdiction of the SCA in labour matters – *the new s 168(3) of the Constitution*

By
Vuyo
Mkwibiso

In footnote 26 to the minority judgment by Froneman J in the recent case of *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC), the court held that '[a]s a result of the Constitution Seventeenth Amendment Act of 2012, this right of appeal to the Supreme Court of Appeal no longer exists'. In the same footnote, the court went on to say that '[s]ection 168(3)(a) of the Constitution now reads: "The Supreme Court of Appeal may decide appeals in any matters arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament"'.



It must be stressed that Froneman J's judgment in the *National Lotteries Board* case was a minority judgment. The majority judgment of Zondo J said nothing of the Supreme Court of Appeal's jurisdiction to hear labour matters in light of the amended s 168(3) of the Constitution. That issue was simply not properly put before the Constitutional Court for a decision. In my view, the majority judgment of Zondo J was correct and the employees were rightfully reinstated. No more need be said here of the merits of that specific case.

This article focusses on the accuracy of Froneman J's statement, *obiter* though it was, in respect of the Supreme Court of Appeal's jurisdiction in labour matters. Consideration is given to the old legislative framework, the Supreme Court of Appeal's jurisprudence on the subject of its jurisdiction in labour matters, the new s 168(3) of the Constitution, and the provisions of the new Superior Courts Act 10 of 2013 (the Superior Courts Act).

Before its amendment by the Constitution Seventeenth Amendment Act of 2012 (the Seventeenth Amendment), s 168(3) of the Constitution provided that 'the Supreme Court of Appeal may decide appeals in any matter'. The section further provided that the Supreme Court of Appeal (the SCA) was the highest court of appeal except in constitutional matters.

Section 183 of the Labour Relations Act 66 of 1995 (the LRA) provides that, subject to the Constitution and despite any other law, no appeal shall lie against a decision, judgment or order of the Labour Appeal Court envisaged in ss 173(1) and 175 of the LRA.

Section 210 of the LRA provides that where there is a conflict between the LRA and any other law, other than the Constitution or an Act expressly amending the LRA, in respect of matters dealt with in the LRA, the provisions of the LRA will prevail.

In *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA), the SCA had to consider whether it had any appellate jurisdiction in respect of appeals from the Labour Appeal Court, in light of s 183 of the LRA read with s 168(3) of the Constitution prior to its amendment. The SCA held that the starting point was that the LRA's provisions conferring finality on the Labour Appeal Court had to be read in conjunction with the appellate powers created by the Constitution. It was held that the Constitution in s 168(3) vested the SCA with the power to hear appeals from the Labour Appeal Court in both constitutional and non-constitutional matters, and the provisions of the LRA, which conferred final appellate power on the Labour Appeal Court, must be read subject to the appellate hierarchy created by the Constitution itself. This, the SCA held, did not entail that any provisions of the LRA were unconstitutional as the LRA had to be interpreted subject to the Constitution. As a result, the SCA held that it had jurisdiction to hear the matter. The SCA then went on to determine whether special circumstances existed to warrant the hearing of a further appeal from the Labour Appeal Court. It held that there were no special circumstances that warranted the hearing of the appeal and as a result dismissed the application for special leave to appeal.

Subsequent to the amendment of s 168(3) of the Constitution, the legislature enacted the Superior Courts Act. In its preamble, the Superior Courts Act notes that with the advent of democracy we inherited a fragmented court structure and infrastructure largely derived from our colonial history. It is also noted that it is desirable to provide for a uniform framework for judicial man-

agement of the judicial functions of all courts. The Superior Courts Act defines 'appeal' to exclude criminal law appeals, and defines 'Superior Court' to mean the Constitutional Court, SCA, the High Court and any court of a status similar to the High Court. Section 16(1)(c) of the Superior Courts Act provides that an appeal against any decision of a court of a status similar to the High Court lies with the SCA on leave to appeal having been granted by the SCA. By contrast, s 16(1)(b) of the Superior Courts Act provides that an appeal against a decision of a Division of the High Court lies with the SCA on special leave having been granted by the SCA. Section 17 of the Superior Courts Act governs the manner in which an application for leave to appeal may be dealt with by the court hearing such an application. Section 19 of the Superior Courts Act deals with the powers of the SCA and the High Courts when determining appeals. The Superior Courts Act, in schedule 2, amended ss 151, 154 and 170 of the LRA.

The issue is whether, in light of the amendment of s 168(3) of the Constitution and the enactment of the Superior Courts Act, the SCA still has jurisdiction to hear appeals in respect of labour matters. The following questions arise:

- Does the new s 168(3) of the Constitution take away the SCA's jurisdiction in labour matters?
- If not, does s 183 of the LRA exclude the SCA's jurisdiction to hear appeals in respect of labour matters from the Labour Appeal Court?
- If so, is there a conflict between s 183 of the LRA and the Superior Courts Act in respect of the SCA's jurisdiction to hear appeals from the Labour Appeal Court?
- If so, is the Superior Courts Act an Act expressly amending the LRA as envisaged in s 210 of the LRA?
- If it is not, can the Superior Courts Act nevertheless be considered to have amended s 183 of the LRA?

'The Superior Courts Act defines "appeal" to exclude criminal law appeals, and defines "Superior Court" to mean the Constitutional Court, SCA, the High Court and any court of a status similar to the High Court.'

In my view, the new s 168(3) of the Constitution does not take away the SCA's jurisdiction to hear appeals in respect of labour matters. The effect of the section is that the jurisdiction of the SCA in labour matters shall be limited to such extent as may be determined by an Act of Parliament. Thus, Parliament is given power to determine the extent of the SCA's jurisdiction to hear appeals in labour matters. Parliament may make such a determination in any Act of Parliament and it is not restricted to making such a determination in the LRA.

As was stated in the *Fry's Metals* case, s 183 of the LRA must be read in conjunction with the powers created by the Constitution because the LRA itself stipulates that it is subject to the Constitution. A proper understanding of the powers and jurisdictional hierarchy established by s 168(3) of the Constitution is important. Had Parliament's hands been tied to determining the SCA's jurisdiction only in the LRA as amended expressly by an Act of Parliament, it would be easy to conclude that despite the Superior Courts Act, the Labour Appeal Court remained the final court of appeal in respect of labour matters which it is entitled to determine. However, s 168(3) of the Constitution empowers Parliament to determine the SCA's jurisdiction in labour matters in any Act of Parliament. The words 'despite any other law' in s 183 of the LRA must, thus, be interpreted subject to the constitutional power of Parliament to determine the SCA's jurisdiction in labour matters in any Act of Parliament. That constitutional power, as exercised by Parliament when it enacted the Superior Courts Act, must prevail over the provisions of the LRA. Therefore, s 183 of the LRA does not exclude the SCA's jurisdiction when it is interpreted subject to the constitutional power created in s 168(3) of the Constitution.

Although s 210 of the LRA states that the provisions of the LRA shall prevail unless there is an Act expressly amending

the LRA, the words 'any Act expressly amending this Act' too are subject to the Constitution which allows Parliament to determine the jurisdiction of the SCA in any Act of Parliament. The Superior Courts Act expressly amends certain sections of the LRA, but does not expressly amend s 183 of the LRA. In my view, it can be said that the new s 168(3) of the Constitution gives Parliament the power to amend the jurisdictional setting created by the LRA by enacting any Act of Parliament. This constitutional power overrides the provisions of s 210 of the LRA, which require the LRA to be amended only by an Act that amends it expressly. Parliament has exercised this constitutional power by enacting the Superior Courts Act which, though not expressly amending s 183 of the LRA, can be said to have amended the section by necessary implication.

Thus, in my view Parliament has amended s 183 of the LRA by necessary implication, which amendment Parliament was empowered by the Constitution to effect and which constitutional power overrides any limitation in the LRA.

Parliament could easily have exercised its constitutional power to exclude the SCA's jurisdiction in labour matters in the Superior Courts Act. It chose not to do so. Instead, Parliament chose to give the SCA the same extent of jurisdiction it had prior to the amendment of s 168(3) of the Constitution. What Parliament did do, in addition, was to remove the requirement of special leave to appeal in respect of labour matters emanating from the labour courts. This was done in s 16(1)(c) of the Superior Courts Act, which only requires appeals from courts of a status similar to that of the High Court to lie with the SCA upon leave having been granted.

It would not make sense to deprive the SCA of jurisdiction in labour matters emanating from the labour courts, whilst retaining its jurisdiction in labour matters emanating from the High Court. That would be the consequence of a finding that s 16(1)(c) of the Superior Courts Act does not amend s 183 of the LRA. The SCA would rely on s 16(1)(b) of the Superior Courts Act to hear appeals in respect of labour matters that emanate from a Division of the High Court. The result would be the probable development of divergent jurisprudence between the SCA and the Labour Appeal Court in respect of the application of legal principles to similar facts and issues. This would probably result in forum shopping, which has been said to be undesirable.

It remains to be seen how the courts will interpret the new s 168(3) of the Constitution, the new Superior Courts Act and the LRA in respect of the SCA's jurisdiction in labour matters. I would disagree with the *obiter* view expressed by Froneman J in this regard in the *National Lotteries* case. In my view, the SCA still has jurisdiction to hear appeals from the Labour Appeal Court. The new s 168(3) of the Constitution has not taken away the SCA's jurisdiction to hear labour matters emanating from the Labour Appeal Court. Although s 183 of the LRA sought to make the Labour Appeal Court the final court of appeal in respect of the enforcement of rights created in the LRA, that section must be interpreted subject to the Constitution, which has empowered Parliament to determine the SCA's jurisdiction in any Act. Section 183 of the LRA has been amended by necessary implication by the Superior Courts Act. Section 210 of the LRA, which requires the LRA to be amended expressly, does not apply as it must give way to the constitutional power created in the new s 168(3) of the Constitution.

• See also page 41 in this issue.

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The rise of the machines – *understanding electronic evidence*

By
Michel O
Takombe

In recent years, technology has revolutionised the way we communicate, the way business is transacted and ultimately the way lawyers practise law. The advancement of technology has created an entirely new source of evidence: Electronic evidence. The rising importance of this new brand of evidence has vastly outpaced the rate at which lawyers have adapted to this new reality.

Relevance of electronic evidence for lawyers

One reason the electronic evidence explosion is affecting virtually every lawyer, regardless of practice area, is that the world is experiencing a revolution on a massive scale, leaving no person untouched. It is difficult to identify any business transaction that is not created or passed through a computer. All of this activity creates a mountain of information that has to be identified, collected, searched, reviewed, and produced in the event of civil litigation. In addition, electronic evidence plays a key role in criminal law – either as the instrumentality of the crime or the primary source of evidence relating to a more traditional charge (M CS Lange and KM Nimsger 'Electronic Evidence: Law and Practice' (Chicago: ABA Publishing, 2004) 2).

Sources of law of electronic evidence

The Civil Proceedings Evidence Act 25 of 1965 (CPEA)

In terms of s 28 of the CPEA, records of the bank shall be admissible as *prima facie* evidence of the matters, transactions and accounts recorded therein. This is subject to proof by affidavit that such records are or have been the ordinary books of such bank; they have been made in the usual and ordinary course of business; and they are in or come immediately from the custody or control of such bank.

In addition, s 34(1) of the CPEA states where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact provided certain conditions are met, such as personal knowledge by the person who made the statement; statement made in the performance of a duty to record information; and impossibility for the person to attend as a witness for valid reasons.

Under particular conditions the presiding officer has an overriding discretion to admit a statement (s 34(2)) and

to decide exactly how much evidential weight should be attached to the statement concerned (s 35(1)).

In *Narlis v South African Bank of Athens* 1976 (2) SA 573 (A) the Appeal Court examined the trial court's decision that computer printouts were admissible as *prima facie* evidence of the statements contained therein under s 34(2) of the CPEA. The Appeal Court correctly pointed out that although s 34(2) gives the presiding officer discretion to admit certain statements as evidence, that discretion can be exercised only with reference to s 34(1) which clearly refers only to 'any statement made by a person in a document'. The court held thus that there was no basis for any discretionary admissibility of the computerised statements under s 34(2) of the CPEA.

The Computer Evidence Act 57 of 1983 (CEA)

In terms of s 3(1) of the CEA, 'in any civil proceedings an authenticated computer print-out shall be admissible on its production as evidence of any fact recorded in it of which direct oral evidence would be admissible'.

Overall, comment on the CEA was negative. Staniland, French, Skeen, Delpoit, Ebden and Van der Merwe, among others, criticised this legislation (Van der Merwe 'Information and Communications Technology Law 2008: 108). Its repeal by the Electronic Communications and Transactions Act 25 of 2002 was, therefore, welcomed.

Law of Evidence Amendment Act 45 of 1988

This piece of legislation, *inter alia*, lays down general requirements for the admissibility of hearsay evidence.

An interesting question one may ask is whether electronic evidence can fall under the definition of hearsay evidence in terms of the Law of Evidence Amendment Act and, therefore, be admissible under this Act. This question was answered in *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) where a distinction was made between two scenarios:

- Where the probative value of the information contained in the electronic evidence depends on the credibility of a natural person, that electronic evidence would be hearsay and admissible in evidence in criminal or civil proceedings only if the requirements of the Law of Evidence Amendment Act are met.
- Where the probative value of the electronic evidence depends on the 'credibility' of the computer (because information was processed by the computer), that evidence will not qualify as hearsay evidence.

'In assessing the evidential weight of a data message, regard must be had to the reliability of the process of generation, storage and communication of the data, of the preservation of integrity, of the identification of the originator (proof of authenticity) and any other relevant factor.'

Van Zyl J in *S v Ndiki* [2007] 2 All SA 185 (Ck) (in a dissenting opinion at para 7) distinguishes between computer evidence that falls within the definition of hearsay evidence in s 3 of the Law of Evidence Amendment Act and admissible under that Act, and evidence that depends solely on the reliability and accuracy of the computer itself and its operating systems or programs, which constitutes real evidence.

Criminal Procedure Act 51 of 1977 (CPA)

Section 221 provides that if direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon the production of the document, be admissible as evidence of that fact provided certain conditions are met, such as the document is or forms part of a record to a trade or business established from information supplied by a person with personal knowledge but who is not in a position to attend as a witness.

In *S v Harper and Another* 1981 (1) SA 88 (D) the court found that the definition of 'document' in terms of s 221(5) was too narrow in scope to accommodate a computer, because a computer does not only record and store information but also sorts and collates information. However, the court was able to admit the electronic evidence on other grounds (s 221(1)).

Electronic Communications and Transactions Act 25 of 2002 (ECT Act)

Section 11(1) of the ECT Act recognises information in electronic form and not

simply computer printouts, as done by most of its predecessors.

• Admissibility of data messages

Section 15(1) of the ECT Act provides:

'In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence –

(a) on the mere grounds that it is constituted by a data message; or
(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.'

As pointed out in the *Ndlovu* case, this subsection facilitates admissibility by excluding evidence rules that deny the admissibility of electronic evidence purely because of its electronic origin. Section 15 places electronic information on the same footing as traditional paper-based transactions, and thus does not do away with the requirements governing the admissibility of documentary evidence which are relevance, authenticity and originality.

It is important to note that the 'best evidence' rule can be useful in overcoming the difficulty of determining whether a data message is in its original form or not as it was the case in *S v Koralev and Another* 2006 2 SACR 298 (N) where photographic images found on the appellant's computer were held not to be original images since they had been either downloaded from the Internet or transferred from a digital camera.

• Evidential weight of data messages

Once a data message is admitted in evidence, it must be given due evidential weight in terms of s 15(2) of the ECT Act. In assessing the evidential weight of a data message, regard must be had to the reliability of the process of generation, storage and communication of the data, of the preservation of integrity, of the identification of the originator (proof of authenticity) and any other relevant factor (s 15(3)).

• The 'shopbook' exception

Section 15(4) provides an exception to the manner of proof and evidential weight ordinarily to be accorded to a data message. In *Ndlovu's* case the court held that s 15(4) does not require a qualitative inquiry to be made in terms of s 15(2) or (3) in regard to the weight to be attached thereto (173). It provides for its own weight, namely that the facts contained therein will be rebuttable proof – namely if not rebutted, then they will stand as evidence.

In *Trend Finance (Pty) Ltd and Another v Commissioner of SARS and Another* [2005] 4 All SA 657 (C) the electronic evi-

dence adduced was rejected because it did not satisfy the definitional requirements of a 'printout' in terms of s 15(4).

Conclusion

Information and communication technologies have changed the world in which we live and along with it, the way we communicate, transact and work. This has given rise to electronic evidence. It is important for lawyers to acquaint themselves with this entirely new source of evidence and know and understand it with all its unique technical and legal features in order to discharge their duties to their clients.

Know your jargon – Electronic evidence definitions

Data: Data comprises of the output of analogue devices or data in digital format. It is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system.

Metadata: This refers to data providing information about one or more aspects of the data. Metadata constitutes very useful information in the analysis of an electronic document.

Where to find electronic evidence?

With the constant development of new technologies, storage locations for electronic evidence are virtually endless. Electronic evidence can be found in or on –

- networks and workstations;
- removable disks;
- temporary files;
- swap files;
- mirror disks;
- program files;
- websites;
- cookies;
- e-mails;
- laptops and home computers; and
- smart phones, etcetera.

'Shopbook' exception:

The 'shopbook exception' is a rule of evidence inherited from British law which make documents produced in the course of trade or business (or copies thereof) admissible with a rebuttable presumption for their correctness. It is a general exception to the hearsay rule.

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THE LAW REPORTS

June 2014 (3) *The South African Law Reports* (pp 323 – 635);
[2014] 2 *The All South African Law Reports* May no 1 (pp 251 – 362)
and no 2 (pp 363 – 492)

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

Abbreviations:

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
ECM: Eastern Cape Local Division, Mthatha
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative action

Contested administrative action should be set aside and not withdrawn or treated as non-existent: In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) the respondent, Kirland, was a health service provider that applied for permits to establish two private hospitals in the Eastern Cape province. The second applicant, the Superintendent-General, Department of Health, Eastern Cape (S-G), declined the permits but his refusal was not communicated to the respondent.

During his sick leave the acting superintendent-general, under political pressure from the first applicant, the MEC for Health, granted the permits. As a result, the respondent started making preparations for the establishment of the hospitals. After his return from leave the

S-G found out about the approval but did nothing. Only after some seven months, did he communicate with the respondent informing it that the approval had been withdrawn.

As a result, the respondent sought a High Court order reviewing and setting aside the withdrawal. The ECG held that the withdrawal was unlawful and set it aside. The court went further to hold that approval of the permits by the acting superintendent-general, given the circumstances in which it was granted, was also unlawful and had to be set aside. Accordingly, the approval was remitted to the S-G for reconsideration. However, a ruling on the approval of the permits was made, notwithstanding the fact that nobody had asked for it and it had not been canvassed in the papers, the applicant also not having made a counter-application for it. On appeal to the SCA it was held that the approval was invalid but, as it was not the subject of review, its setting aside was overturned. The applicants sought leave of the CC to appeal against the decision of the SCA. Such leave was granted but the appeal itself was dismissed with costs.

In a majority judgment Cameron J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J concurring while Madlanga and Zondo JJ con-

curred in Jafta J's dissenting judgment), held that even where a decision of a state official was defective – and in the instant matter evidence suggested that to be the case – the government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of a proper process. The government should apply formally for a court order to set aside the defective decision so that the court could properly consider its effect on those subject to it. When government erred by issuing a defective decision, the subject affected by it was entitled to proper notice and to be afforded a proper hearing on whether the decision should be set aside. The government could not be allowed to take shortcuts. Generally that meant that the government had to apply formally to set aside the decision. Once the subject had relied on a decision, the government could not, in the absence of specific statutory authority, simply ignore or withdraw what had been done. The decision, despite being defective, could have consequences that made it undesirable or even impossible to set aside. That demanded a proper process in which all the factors, for and against, were properly weighed.

That had not happened in the present case. The government took the attitude that

it could simply withdraw or ignore the approval as a defective decision that did not exist. That was a fundamental error as the decision did exist and continued to exist until, in due process, it was properly considered by the court and set aside. The government ought to have instituted review proceedings or launched a counter-application for setting aside the contested approval. An invalid administrative action could not simply be ignored as it remained valid and effective and would continue to have legal consequences until it was set aside by proper process.

Children

Retrospective confirmation of surrogate motherhood agreement concluded after fertilisation: Surrogate motherhood agreements are governed by the Children's Act 38 of 2005 (the Act). Section 292 requires such an agreement to be in writing, signed by all the parties and confirmed by the High Court.

Section 296(1)(a) provides: 'No artificial fertilisation of the surrogate mother may take place ... before the surrogate motherhood agreement is confirmed by the court'. Furthermore, there is also s 303(1) which provides: 'No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render

assistance in such artificial fertilisation, unless that fertilisation is authorised by a court in terms of the provisions of the Act'. In terms of s 305 (1)(b) read with 305(6) – (7) carrying out an artificial fertilisation contrary to the provisions of the Act is a punishable offence.

In *Ex parte MS and Others* 2014 (3) SA 415 (GP), [2014] 2 All SA 312 (GP) the parties entered into a surrogate motherhood agreement which was well and truly contrary to the provisions of the Act. That was so as the parties entered into an oral agreement, artificial fertilisation was performed in terms thereof and only when the surrogate mother was some eight months pregnant did they approach the court for retrospective confirmation of the agreement. The correct approach which they should have followed was to have obtained confirmation before and not after fertilisation of the surrogate mother. The issue before the court was whether it could confirm the agreement under those circumstances. The court held that it could, and accordingly confirmed the agreement.

Keightley AJ held that the Act did not preclude a court from confirming a surrogate motherhood agreement subsequent to artificial fertilisation of the surrogate mother in circumstances where she was already pregnant with the child to be born under the agreement. It would be contrary to s 28(2) (best interests of a child) of the Constitution to hold that a court had no discretion to confirm a surrogacy agreement in circumstances where confirmation was sought after fertilisation. The court had to retain discretion to do so if it was satisfied that doing so would be in the best interest of the child to be born. However, that did not mean that the parties were free to ignore the general requirement that a surrogacy agreement should be confirmed by a court before artificial fertilisation of the surrogate mother took place. Furthermore, the parties should not assume that the

court would rush to their aid if they neglected to follow the prescripts of the Act.

Conveyancing

Duty of seller to return deposit and transfer duty upon cancellation of sale: In *Royal Anthem Investments 129 (Pty) Ltd v Lau and Another* 2014 (3) SA 626 (SCA) the appellant, Royal Anthem, sold immovable property to the respondent spouses, Lau and Liang. The respondents duly paid the deposit and transfer duty to the appellant's conveyancing attorneys. Although the respondents were not able to raise a mortgage bond within the stipulated time, they were nevertheless able to do so eventually. Because of that late provision of the required financing the appellant demanded unreasonably substantial interest. For that reason the sale fell through, resulting in the respondents demanding repayment of the deposit and transfer duty paid.

The appellant instructed its conveyancing attorneys to withhold repayment on the basis of a clause in the sale agreement, which provided that on cancellation of the contract, the appellant was entitled to 'keep any other amounts payable'. The GP held per Kruger AJ that the appellant had to repay the deposit and transfer duty paid by the respondents. An appeal to the SCA was dismissed with costs on attorney-and-client scale as provided for in the contract.

Leach JA (Ponnan, Mhlantla JJA, Mathopo and Mocomie AJJA concurring) held that the general rule was that failure of the agreement obliged the parties to restore each other to the position they were in immediately before the conclusion of the agreement. Therefore, a purchaser who had paid a portion of a purchase price as a deposit was generally entitled to be repaid that sum. However, the duty to restore was not immutable and could be excluded by agreement such as in the case of a penalty clause. In the present case the amount

that the appellant could keep in terms of the agreement was one received and held by it and not the amount paid to its conveyancing attorneys to be held in trust pending registration of the transfer. The transfer never took place and the amount was never paid to the appellant. Regarding transfer duty the court held that the amount was never payable to, paid over, nor held by or on behalf of the appellant. It could thus never have been an amount the appellant was entitled to keep as it was payable to the South African Revenue Service.

Copyright

Rate of 'needletime' royalties payable by commercial and public radio stations to copyright owners for broadcast of sound recordings:

Section 9A(1)(a) of the Copyright Act 98 of 1978 (the Act) provides: 'In the absence of an agreement to the contrary, no person may broadcast, cause the transmission of or play a sound recording as contemplated in section 9 (c), (d) or (e) without payment of a royalty to the owner of the relevant copyright'. Section 9A(2)(a) takes the issue a step further by providing: 'The owner of the copyright who receives payment of a royalty ... shall share such royalty with any performer whose performance is featured on the sound recording in question and who would have been entitled to receive a royalty in that regard ...'.

The problem with the Act though is that, whereas it requires radio stations to pay copyright owners (ie, recording studios) who in turn are required to share the royalties with performers (musicians), it does not prescribe how much should be paid or the formula to be used in making such determination. In terms of s 9A(2)(c) the legislature left it to the parties to determine, by agreement, the amount to be paid. In the absence of agreement the parties can agree on arbitration, failing which the issue could be taken to the Copyright Tribunal for adjudication.

In *National Association of Broadcasters v South African Music Performance Rights Association and Another* 2014 (3) SA 525 (SCA), [2014] 2 All SA 263 (SCA) the parties could not agree on the rate of royalties to be paid by some 31 commercial and public radio stations that were represented by the appellant National Association of Broadcasters (NAB). The matter was accordingly referred to the Copyright Tribunal where Sapire AJ held that the radio stations concerned had to pay copyright owners 7% of their revenue as 'needletime' royalties. In reaching that rate the tribunal disregarded all evidence provided by the parties and instead exercised its unfettered discretion to arrive at a decision that was considered reasonable in the circumstances.

On appeal to the SCA it was held that the tribunal wrongly discounted evidence of both parties and accordingly the appeal was upheld and the cross-appeal dismissed with no order as to costs as the parties had made substantial contribution to the court's determination of the matter.

Navsa JA (Shongwe JA, Swain, Legodi and Mathopo AJJA concurring) held that a principle that applied universally was that broadcasters paid royalties in relation to the time that music was played on their radio stations. Put differently, the principle was pay for play. Another rule was that rates were based on a correlation between time and revenue generated. Some countries applied rates that increased in relation to bands of increasing revenue. The imposition of too high a royalty rate was not desirable as it had negative financial implications for the country in the form of excessive currency outflow. That was so as most of the money collected by the respondent association found its way to America and other countries which were main exporters of music. In addition, consideration had to be given to perverse consequences for the music industry by too prohibitive a rate that would drive broadcasters

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to the alternative of using session musicians and the like. A reasonable 'needletime' royalty rate was 3% of the revenue generated by a radio station, which rate was exclusive of advertising revenue. The revenue to be considered was as reflected in a radio station's financial statement as certified by its accountants and verified by way of audited financial statements after the end of the financial year. That was a simple formula to be preferred.

Delict

Compensation for psychiatric injury, emotional shock and loss of support: In *Hing and Others v Road Accident Fund* 2014 (3) SA 350 (WCC) six sisters were involved in a motor vehicle collision in which they suffered personal injuries from which one of them died. As a result, proceedings were instituted against the respondent Road Accident Fund (RAF) to recover compensation. One of the claims was settled while others proceeded to trial where the various actions were consolidated and heard together. A number of the claims were dismissed by Klopper AJ in the WCC, hence the appeals to the full Bench. The present discussion will be confined to the appeals of the first, second and third appellants.

The claim of the first appellant was for compensation for loss of income resulting from 'psychiatric injury' after having sustained injuries that were described as 'some bruising to her chest'. The trial court awarded her R20 000 in general damages but dismissed the claim for loss of income resulting from 'psychiatric injury'. The appeal was dismissed with costs by Binns-Ward J (Griesel and Ndita JJ concurring). It was held that whether 'psychiatric injury' had been sustained by a claimant was a question that fell to be answered through the expert evidence of psychiatrists. Psychiatric evidence adduced to support the claim should be clear, cogently reasoned and preceded by summaries that properly fulfil the requirements of r

36(9)(b) of the Uniform Rules of Court.

In the instant case there was no evidence of cognitive or memory impairment or depressed mood. The claimant was not impaired at all, only that she had symptoms of unresolved grief and loss for her late sister who had died as a result of injuries suffered in the same collision. The trial judge was justified in holding that manifesting some symptoms of post-traumatic stress syndrome did not equate to a diagnosis that the first appellant was suffering from post-traumatic stress disorder itself. Damages were not recoverable in delict for normal grief and sorrow following bereavement.

The second appellant's appeal was also dismissed with costs. His claim for loss of support could not be sustained since at the time of the death of his wife as a result of the collision, not only was he working but he was, in fact, earning more than her. Moreover, his financial need only arose some two years after her death when he was retrenched because his employer 'ran into financial difficulties' as the economy of his country, Canada, was facing a slump. Therefore, the second appellant's loss arose in the context of an intervening event, namely his retrenchment, which was entirely unconnected to any wrongdoing by the insured driver. That being the case the second respondent had not satisfied the requirement of establishing legal causation.

The third appellant's appeal succeeded under the sub-heading 'emotional shock' but was dismissed as far as loss of support was sought, the court holding that her studies were not interrupted by the death of her mother for she progressed well in the year that her mother was injured and died. Evidence showed that her studies were affected by extraneous factors which were never explained, the appellant herself not having testified.

On the issue of 'emotional shock' the court held that the relationship between a par-

ent and child was plainly one that would make it readily foreseeable that either could suffer psychiatric injury as a result of the traumatic and violent death of the other. In the present case, the interval between the collision and the ensuing death of the third appellant's mother was relatively short, this having the result that it could not be said that the connection between the insured driver's wrongdoing and the ensuing death was so tenuous as to call into question whether negligence was legally causal of the resultant damage.

• **To note: Costs:** Another interesting issue, which was dealt with in the case, was the taxation of costs. At the trial the respondent sought and was granted a declaration to the effect that the costs of foreign travel and attendances would not be recoverable.

The issue in contention was costs and expenses incurred by the appellants' attorney, counsel and industrial psychologist who travelled to Mauritius, Australia and Canada to collect evidence. The question was whether the industrial psychologist, if he needed to undertake those travels in the first place, had to be accompanied by legal representatives. Moreover, there were other, cost-effective modern means of communication that could have been used.

The full Bench held that the trial court erred in principle in granting the declaration. It was for the taxing master to determine what attendances and expenses to allow as being reasonably necessary for the conduct of litigation. While it was permissible, and indeed often useful, for the court in its judgment to express its views on costs-related issues for assistance or guidance of the taxing master, judges should nevertheless not usurp the taxing master's role and functions.

Liability in delict and contract: The case of *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) dealt with the issue of liability in both contract and delict emanat-

ing from the same conduct. The applicant, Loureiro, had a contract with the respondent, iMvula, a private security company, for the protection of his family and property. After an incident of security lapse the applicant specifically instructed the respondent not to allow anybody entry onto his property without his permission or that of his wife.

In breach of that specific instruction one evening, an employee of the respondent, one Mr Mahlangu, allowed a 'policeman' access to the property who immediately produced a gun and was joined by accomplices to effect a robbery. The applicant, his family and domestic staff were traumatised and property to the value of some R 11 million was taken away. The circumstances under which Mahlangu, a qualified and experienced security officer, allowed the 'policeman' access to the property were that the 'policeman' arrived at the gate driving an unmarked motor vehicle, which had a flashing blue light on the dashboard; the 'policeman' wore a vest marked 'police' and quickly flashed an identification card which Mahlangu did not have the chance to verify. Mahlangu did not ask for the purpose of the visit, that being precisely the reason for opening the gate, did not speak to him over the intercom and did not call the applicant, his wife or the respondent to find out if they were expecting a visit by the police. Briefly, Mahlangu innocently and in good faith thought that he was assisting the police in the performance of their duties and did not suspect that there was a robbery about to occur. In other words he assumed, without verifying, that he was dealing with a policeman.

The applicant sued the respondent for breach of contract while his wife and children sued in delict for pain and suffering. The parties agreed for a separation of merits from the quantum and that the trial would proceed on the merits only, the quantum to be attended to later once liability had been established.

The GJ per Satchwell J held that the respondent was liable in contract to the applicant and in delict to his wife and minor children as Mahlangu had acted negligently. That decision was reversed on appeal to the SCA where it was held that the contract term prohibiting access to the property did not impose strict liability. In other words, liability would arise only if there was fault on the part of Mahlangu in opening the gate. There being no fault on his part, liability could not arise. After all, the clause prohibiting unauthorised entry to the property did not apply to police officers performing official duties. Furthermore, Mahlangu did not act negligently in opening the gate or unreasonably in believing that the impostor was a police officer as the impostor had all the appearance of the former. Mahlangu could not lawfully resist opening the gate to a policeman's legitimate demand for entry. At all times he had acted in good faith, believing that he was helping the police.

On further appeal to the CC leave to appeal was granted and the appeal upheld with costs. The decision of the SCA was set aside and the respondent held liable to the applicant for breach of contract, and to his family, in delict. Delivering a unanimous decision of the court Van der Westhuizen J held that the law of contract did not require fault, even in the form of negligence, for breach. In the instant case, the parties expressly agreed to a strict-liability prohibition. The express prohibition of entry to the property could not be said to impose a reasonableness proviso, tacitly or otherwise.

On the issue of delictual liability, the court held that Mahlangu had acted negligently. A reasonable person would have taken steps to ascertain the identity of the man at the gate, including for example, determining whether the card flashed was a legitimate police identity card and at least inquiring why the man sought access to the

premises. Even if the man was a police officer, a reasonable person would have checked that he was making a lawful demand. A reasonable person would have attempted to make contact with the main house or the respondent to find out if the police were expected. In other words Mahlangu failed to take any of the fairly easy precautions which should have been taken.

It should be noted, however, that in respect of the wrongfulness of Mahlangu's conduct, the court held that it could not agree with the SCA that Mahlangu was obliged to open the gate because of his duty to cooperate with the police. The intruders were as a matter of fact robbers and not police officers. The community expected security guards not to give criminals access to guarded property. It was, therefore, wrongful for Mahlangu to give them access. The problem here is that all along the visitor was a 'policeman' and only turned into a robber after gaining access, had Mahlangu known or at least suspected that the man was not a policeman, he would not have granted him access.

Education

Right to education – immediate realisation of duty of state to provide school furniture: In *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM), [2014] 2 All SA 339 (ECM) the applicants, Madzodzo and others, were parents whose children attended junior and senior public schools in the Eastern Cape. Although the application was initially about children attending three public schools in the province, other parents joined the proceedings and eventually the remedy sought was in respect of the whole of the province.

The allegation was that the respondents, the national Minister of Basic Education, and her Eastern Cape Province counterpart, had failed to provide essential school furniture in the form of desks and chairs to public schools throughout the province and

in particular in impoverished rural areas. This had the result that the affected children did not have reading and writing space at schools and this affected their learning. As it turned out the court had already ordered the respondents on two occasions to provide the required furniture but there had been no compliance. The provincial Department of Education indicated that its budget for the financial year 2013/2014 was limited to R 30 million whereas the cost of providing the required furniture was an estimated R 360 million. That meant that the need could be met only in the 2014/2015 financial year. In other words, the position of the provincial Department of Education was that it would be in a position to meet its obligations only in the future.

Goosen J held that the respondents were in breach of the constitutional right of learners in public schools in the province as provided for

in s 29 of the Constitution by failing to provide adequate age-and-grade-appropriate furniture that would enable each child to have his or her own reading and writing space. A structural interdict was issued in terms of which the respondents were ordered to file at court and provide the applicants' attorneys by a specified date with a copy of the audit of all learner furniture needs at public schools in the province. The respondents were further required to provide the required furniture within 90 days (three months) of receipt of the audit report. If more time was required to comply with the order the respondents were to approach the court for such authorisation, at which stage they would have to give details of progress made, what was outstanding, how and when same was to be provided.

The court held that the state's obligation to provide basic education as guaranteed by the Constitution was

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not confined to making places available at schools. It necessarily required the provision of a range of educational resources such as schools, classrooms, teachers, teaching material and appropriate facilities for learners. In the instant case, the respondents had been well aware for a considerable time that proactive steps had to be taken to address the shortage and to fulfil the right to basic education as required by ss 7 and 29 of the Constitution. As a result it was not good enough to state that inadequate funds had been budgeted to meet the needs and that the respondents could therefore not be put on terms to deliver the identified needs of schools within a fixed period. Nor was it good enough to state that the full extent of the needs was unknown.

Learners were entitled, as of right, to have immediate access to basic education as well as to be treated equally and with dignity. Lack of adequate age-and-grade-appropriate furniture in public schools, particularly by schools located in deep rural and impoverished areas, undermined the right to basic education while the persistent failure to deliver such appropriate furniture to public schools constituted an ongoing violation of the right to basic education. The court, in the exercise of its discretion, was obliged to give effect to the fundamental right enshrined in the Constitution and give appropriate orders to vindicate those rights where such orders were required.

Income tax

Preservation order in terms of Tax Administration Act 28 of 2011: Section 185(1)(a) of the Tax Administration Act 28 of 2011 (the Act) provides among others that: '[i]f the SARS [South African Revenue Service] has, in accordance with an international tax agreement, received ... a request for conservancy of an amount alleged to be due by a person under the tax laws of the other country where there is a risk of dissipation

or concealment of the assets by the person, ... SARS... may apply for a preservation order under section 163 [of the Act] as if the amount were a tax payable by the person under a Tax Act; ...'.

In *Commissioner, South African Revenue Service v Krok and Another* 2014 (3) SA 453 (GP) the applicant Commissioner received a request from the Australian Tax Office (ATO) to seek a conservation order over the South African assets of the first respondent, Krok. It was alleged that the first respondent owed ATO a substantial amount of tax, inclusive of interest and penalties, being some R 235 million. ATO further alleged that the first respondent's tax liability had been duly assessed, that objection was made and rejected as a result of which the assessment became final. Necessary documentation in support of ATO allegations was attached. Although the first respondent purportedly sold all his South African income and assets to a third party, that was only on paper as he remained the beneficial owner and user of the income and assets that he dealt with for his own benefit.

On the extended return date, confirmation of the preservation order was granted with costs. Fabricius J held that the question was whether the applicant had shown that there was *prima facie* proof of the risk of dissipation or concealment of assets by the first respondent. In the present case the relevant request for assistance in collection and/or conservancy gave the necessary information and details pertaining to the amount due and the background relating to the taxes owed by the first respondent to the Australian Government. It stated what amount was due to it and that such revenue claim was enforceable under the tax laws of Australia. It further stated that the first respondent had lodged an objection against the tax assessment and administrative penalties but that the objection had been disallowed in full. As a result of the determination of the objection the

tax debt was no longer in dispute. Section 163 of the Act provided for preservation of the first respondent's assets if such order was required to secure payment of taxes. The Act also provided, in s 185(3), that the certificate accompanying the request was conclusive proof of the existence of the tax debt and *prima facie* proof of the other statements contained therein. In view of the provisions of ss 163 and 185 of the Act confirmation of the provisional preservation order was justified.

Labour law

Automatically unfair dismissal: The Labour Relations Act 66 of 1995 (the LRA) gives employees and employers a number of rights, and of course also obligations. To guarantee those rights it has a number of sections that do not allow the employer to prevent, discourage or penalise his or her employees from exercising any of the rights granted.

For example, s 4(2)(a) provides that every member of a trade union has the right, subject to the constitution of the trade union, to participate in its lawful activities. Section 5(2) provides that no person may do or threaten to prevent an employee from exercising any right conferred by the LRA or from participating in any proceedings in terms thereof. Significantly in terms of s 187(1)(d) dismissal of an employee is automatically unfair if the employer, in dismissing the employee, acts contrary to s 5 or if the reason for the dismissal is that the employee took action or indicated an intention to take action against the employer by exercising any right conferred by the LRA. Also, s 8(b) provides that every trade union and every employers' organisation has the right to plan and organise its administration and lawful activities.

The application of ss 4(2)(a) and 187(1)(d) arose for consideration in *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC) where a number of members of the

applicant trade union, the National Union of Public Service and Allied Workers (NUPSAW), were dismissed at a disciplinary hearing. The dismissal was confirmed by the Labour Court and the SCA. This was after the trade union complained about the leadership style and *modus operandi* of the Chief Executive Officer (CEO) of the employer, the respondent National Lotteries Board. To substantiate the complaints the applicant asked for a copy of the CEO's contract of employment, which was denied. Thereafter, the trade union sought disclosure of that contract in terms of the Commission for Conciliation, Mediation and Arbitration (CCMA) procedure and the conciliation process started. The parties were given extended time for conciliation.

In the meantime, the applicant wrote a letter to the respondent, in which it 'urged' it to terminate the services of the CEO by a specified date as its members were no longer prepared to work with him as they had lost confidence in him. A copy of the letter was thereafter leaked to the media where it was published. The respondent, after writing the trade union a letter indicating that its members would be subjected to a disciplinary hearing unless they disassociated themselves from the letter and its leakage to the media, duly charged them with insubordination, disrespectful conduct and bringing its name into disrepute, found them guilty and, as already indicated, dismissed them.

The CC granted the applicant leave to appeal, upheld the appeal with costs and ordered retrospective reinstatement of the affected employees on terms and conditions of service no less favourable to them than those that applied at the time of dismissal. This was after the court found that, in terms of s 187(1)(d), the dismissal was automatically unfair. The minority judgment was read by Froneman J (Skweyiya ADCJ and Cameron J concurring) who held that the dismissal was fair. In a separate dis-

sentencing judgment Dambuza AJ held that the dismissal was substantively unfair and, therefore, called for reinstatement of the employees concerned.

In the majority judgment, Zondo J held that in forwarding a letter to the respondent concerning the CEO, the applicant was taking forward the conciliation process already underway. Its members, the employees, were taking part in a lawful trade-union activity in terms of the LRA as provided for in s 4(2)(a) read with s 187(1)(d). The articulation by the trade union and the employees of their proposed solution to the issue of the CEO was part of collective bargaining and was, therefore, a lawful activity of the trade union in which the employees were entitled to

participate in terms of s 4(2)(a). It was also participation in proceedings in terms of s 5(2)(b), namely conciliation proceedings aimed at resolving the disclosure of the CEO contract dispute. The employees were entitled, as members of the trade union, to participate in those proceedings. The dismissal of employees for that conduct constituted an automatically unfair dismissal in terms of s 187(1)(d)(i) and (ii). The dismissal of employees for associating themselves with the contents of a letter concerning the CEO was a dismissal of union members for participating in a lawful activity of their trade union as provided for in s 4(2)(a) and amounted to a dismissal of employees for the reason of exercising their right as contemplated in s 187(1)(d)

(i). Such dismissal would also be a dismissal for participating in proceedings as contemplated in s 187(1)(d)(i). The proceedings in this context were conciliation proceedings that had been adjourned to enable the parties to make efforts to resolve the dispute. Dismissing employees for associating themselves with that conciliation process was automatically unfair.

• See also page 30.

Other cases

Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with administration of traffic fines, appointment as relief magistrate, broadcast of court proceedings by media, complaints about

electoral irregularities, consumer credit agreement, copy of contract to be attached to pleadings, declaration of identity of trustees of a trust, defamation, delaying completion of running of prescription, delictual liability in contractual context, infringement of copyright, lessor's tacit hypothec over movables, municipal property valuation and rates, passing off, proceedings by a company during winding-up, recognition of traditional leaders, search and seizure, stock exchange and written authorisation for a prosecution before a person could be charged.



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Children's Act 38 of 2005 and Divorce Litigation

Presenter: Riani Ferreira

East London: 2 October
Cape Town: 13 October
Durban: 14 October
Bloemfontein: 16 October
Midrand: 17 October

Deceased Estates Update

Presenter: Ceris Field

East London: 28, 29 August
Bloemfontein: 30, 31 October
Johannesburg: 24, 25 November
Pretoria: 27, 28 November

Divorce Orders and Retirement Funds

Presenter: Andrew Mothibi (Liberty Life)

Durban: 22 September
Cape Town: 29 September
Bloemfontein: 6 October
East London: 20 October

Drafting of Contracts (Advanced Content)

Presenter: Coenraad Snyman

Cape Town: 1 - 3 September
Bloemfontein: 1 - 3 October
Durban: 3 - 5 November

Education Law

Presenters: Paul Colditz and Jaco Deacon

Midrand: 16 September
Bloemfontein: 17 September
Cape Town: 25 September
East London: 14 October
Durban: 15 October

Grow Your Practice

Presenter: Vincent Faris

Polokwane: 26 August
Mbombela: 28 August
Mthatha: 1 September
East London: 2 September
Pretoria: 4 September
Johannesburg: 5 September
Kimberley: 8 September

Bloemfontein: 9 September
Paarl: 11 September
George: 12 September
Klerksdorp: 15 September
Durban: 22 September
Pietermaritzburg: 23 September

Lease Agreements, Eviction and Rental Recovery

Presenter: Cilna Steyn

East London: 9 September
Port Elizabeth: 10 September
Bloemfontein: 23 September

Legal Costs

Presenter: Alet Lubbe

Bloemfontein: 22 August
Port Elizabeth: 1 September
East London: 2 September
Durban: 1 October
Cape Town: 3 October

National Credit Act Amendments

Presenter: Frans Haupt

Port Elizabeth: 11 August
East London: 12 August
Cape Town: 15 August
Durban: 20 August
Pretoria: 25 August
Johannesburg: 26 August
Bloemfontein: 5 September

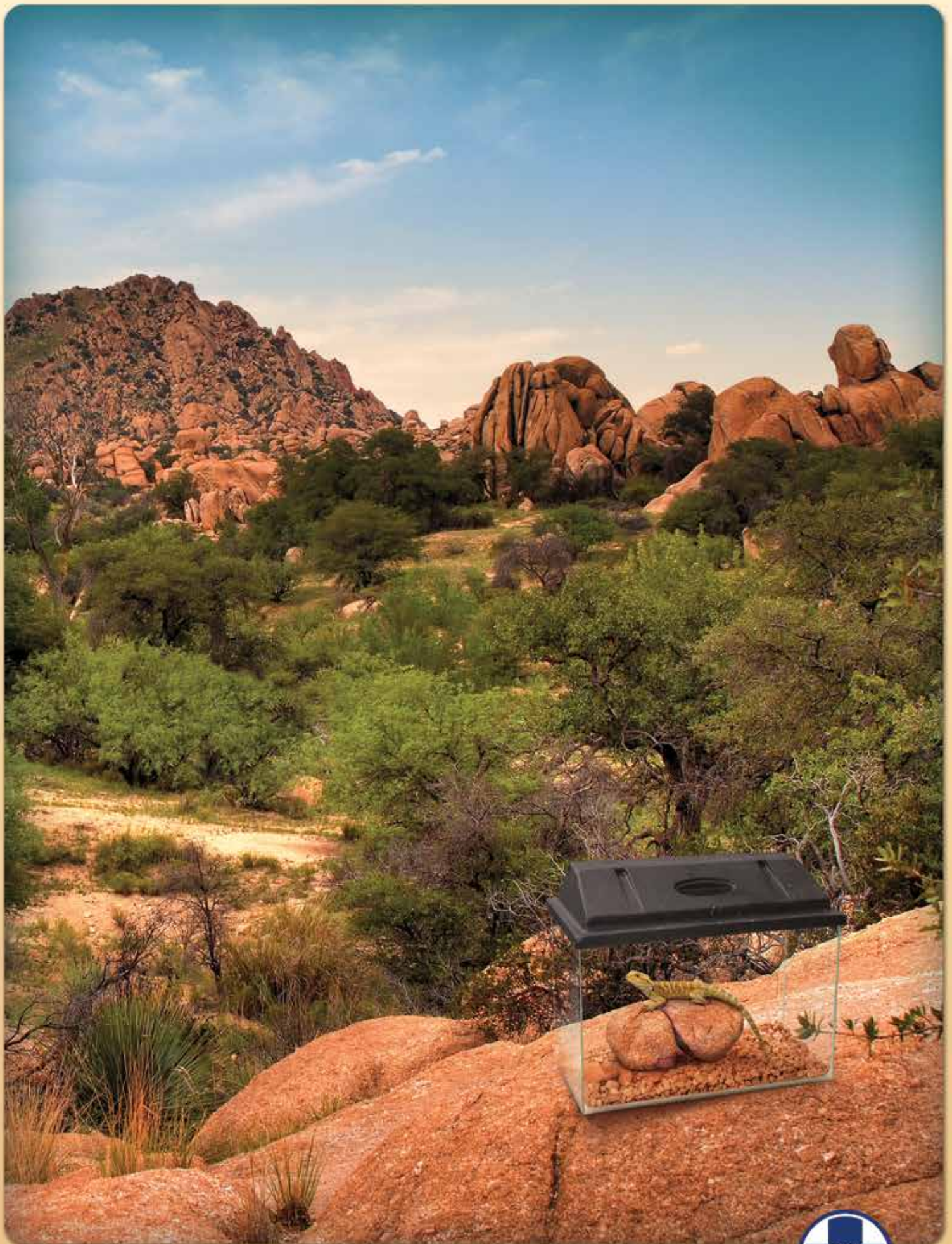
New Case Management Procedures

Presenter: Ismail Hussain SC

Polokwane: 22, 23 August
Bloemfontein: 29, 30 August
Pretoria: 26, 27 September
Durban: 24, 25 October

Special Briefing Session by Labour Court Judges

Bloemfontein: 9 September
Polokwane: 16 September
East London: 23 September
Mbombela: 30 September



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NEW LEGISLATION

Legislation published from
26 May to 20 June 2014

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

PROMULGATION OF ACTS

Mental Health Care Amendment Act 12 of 2014. *Commencement:* To be proclaimed. GN427 GG37693/28-5-2014.

National Environmental Management: Protected Areas Amendment Act 21 of 2014. *Commencement:* 2 June 2014. GN445 GG37710/2-6-2014.

Determination of Remuneration of Office-Bearers of Independent Constitutional Institutions Laws Amendment Act 22 of 2014. *Commencement:* To be proclaimed. GN446 GG37711/2-6-2014.

Infrastructure Development Act 23 of 2014. *Commencement:* To be proclaimed. GN447 GG37712/2-6-2014.

National Environmental Management Laws Amendment Act 25 of 2014. *Commencement:* 2 September 2014. GN448 GG37713/2-6-2014.

National Environmental Management: Waste Amendment Act 26 of 2014. *Commencement:* 2 June 2014. GN449 GG37714/2-6-2014.

National Water Amendment Act 27 of 2014. *Commencement:* 2 September 2014. GN450 GG37715/2-6-2014.

COMMENCEMENT OF ACTS

Merchant Shipping (Civil Liability Convention) Act 25 of 2013. *Commencement:* 30 May 2014. Proc34 GG37687/26-5-2014.

Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013. *Commencement:* 30 May 2014. Proc35 GG37696/29-5-2014.

Tourism Act 3 of 2014. *Commencement:* 16 June 2014. Proc37 GG37719/6-6-2014.

National Health Amendment Act 12 of 2013, ss 2 and 3. *Commencement:* 2 September 2014. Proc38 GG37730/10-6-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Pests Act 36 of 1983
Amendment of Control Measures. GN R442 GG37702/6-6-2014.

Agricultural Product Standards Act 119 of 1990

Regulations relating to the grading, packing and marking of sunflower seed intended for sale in the Republic of South Africa. GN R477 GG37741/20-6-2014.

Regulations relating to the grading, packing and marking of soya beans intended for sale in the Republic of South Africa. GN R478 GG37741/20-6-2014.

Auditing Profession Act 26 of 2005

Inspection fees payable to the Independent Regulatory Board for Auditors (IRBA) with effect from 1 April 2014. BN60 GG37721/13-6-2014.

Collective Investment Schemes Control Act 45 of 2002

Exemption of a manager of a collective investment scheme in securities from certain provisions of Board Notice 80 of 2012. BN57 GG37697/30-5-2014.

Rules for the administration of a collective investment scheme in participation bonds. BN65 GG37740/20-6-2014.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011. GN R474 GG37737/13-6-2014.

Compensation Injuries and Diseases Act 130 of 1993

Increase of maximum amount of earnings on which the assessment of an employer shall be calculated. GN471 GG37735/12-6-2014.

Increase in monthly pensions. GN472 GG37735/12-6-2014.

Amendment of schedule 4 of the Act. GN473 GG37735/12-6-2014.

Financial Services Board Act 97 of 1990

Levies on financial institutions. BN62 GG37734/13-6-2014.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Amendment of regulations relating to the labelling and advertising of foods. GN R429 GG37695/29-5-2014.

Higher Education Act 101 of 1997

Regulations for reporting by public higher education institution. GN R464 GG37726/9-6-2014.

Immigration Act 13 of 2002

Minimum amounts as payments per month from pension or irrevocable annuity or retirement account in relation to retired person visa or permanent residence permit. GN451 GG37716/3-6-2014.

Financial guarantees to be posted by corporate applicant to defray deportation and other related costs in relation to corporate visa. GN452 GG37716/3-6-2014.

Proof of sufficient financial means. GN453 GG37716/3-6-2014.

Minimum net worth in respect of application for permanent residence permit. GN454 GG37716/3-6-2014.

Administrative fines. GN455 GG37716/3-6-2014.

Financial assurance in relation to relative's visa. GN456 GG37716/3-6-2014.

Costs of detention and maintenance. GN457 GG37716/3-6-2014.

Amount to be forfeited by person in charge or owner of conveyance. GN458 GG37716/3-6-2014.

Skills or qualifications determined to be critical for the Republic of South Africa in relation to an application for critical skills visa or permanent residence permit. GN459 GG37716/3-6-2014.

International Trade Administration Act 71 of 2002

Automotive Production and Development Programme Regulations. GN R481 GG37741/20-6-2014.

Justices of the Peace and Commissioners of Oaths Act 16 of 1963

Designation of Commissioners of Oaths under s 6: Southern African Institute for Business Accountants: Business accountants in practice. GN R421 GG37683/30-5-2014.

Health Professions Act 56 of 1974

Withdrawal of Regulations relating to qualifications for basic ambulance assistants, ambulance emergency assistants, operational emergency care orderly and paramedics. GN R414 GG37688/26-5-2014.

Regulations relating to the registration of audiology students. GN R443 GG37706/2-6-2014.

Local Government: Municipal Finance Management Act 56 of 2003

Municipal regulations on financial misconduct procedures and criminal proceedings. GN425 GG37682/30-5-2013 and GN R430 GG37699/30-5-2014.

Magistrates' Courts Act 32 of 1994

Determination of conditions of authorisation in terms of s 15(2A). GN R465 GG37722/13-6-2014.

Medicines and Related Substances Act 101 of 1965

Amendment of regulations relating to a transparent pricing system for medicines and scheduled substances. GN R476 GG37746/13-6-2014.

National Environmental Management: Biodiversity Act 10 of 2004

International trade in listed threatened or protected species (white rhinoceros): Applications to be submitted to the Department of Environmental Affairs. GenN431 GG37736/13-6-2014.

National Railway Safety Regulator Act 16 of 2002

Determination of safety permit fees under s 23(2)(a). GenN388 GG37691/28-5-2014.

Pension Funds Act 24 of 1956

Conditions for exemption from the provisions of ss 9A and 16 of the Act. BN59 GG37720/6-6-2014.

Plant Breeders' Rights Act 15 of 1976

Amendment of regulations relating to Plant Breeder's Rights. GN R416 GG37683/30-5-2014.

Project and Construction Management Professions Act 48 of 2000

Rules and requirements for the recognition of voluntary associations in terms of s 14(d) and 25(1). BN58 GG37708/3-6-2014 and BN62 GG37732/10-6-2014.

Small Claims Courts Act 61 of 1984

Establishment of small claim court for the area of Bergville. GN422 GG37682/30-5-2014.

Establishment of small claims courts for the areas of Vredendal, Vanrhynsdorp and Clanwilliam. GN423 GG37682/30-5-2014.

Establishment of a small claims court for the area of Herschel. GN433 GG37701/6-6-2014.

Establishment of small claims courts for the areas of Bethlehem, Reitz and Foursburg. GN434 GG37701/6-6-2014.

Establishment of small claims courts for the areas of Kimberley and Boshof. GN435 GG37701/6-6-2014.

Establishment of a small claims court for the area of Polela. GN436 GG37701/6-6-2014.

Alteration of the area for which the small claims court for Pietermaritzburg was established. GN437 GG37701/6-6-2014.

South African Schools Act 84 of 1996

National norms and standards for school funding. GN475 GG37738/17-6-2014.

Tax Administration Act 28 of 2011

Method of payment of tax prescribed in terms of s 162(2) of the Act. GN415 GG37690/30-5-2014.

Draft legislation

Draft National Coastal Management Programme in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GenN383 GG37682/30-5-2014.

Regulations for Registration of student child and youth care workers and the holding of disciplinary inquiries: Registration of child and youth care workers; and fees payable by child and youth care workers, auxiliary child in terms of the social service professions Act 110 of 1978 for comments. BN56 GG37689/29-5-2014.

Proposed amendment of the compulsory specification for protective helmets and of their visors for drivers and passengers of motor cycles and mopeds in terms of the National Regulator for Compulsory Specifications Act 5 of 2008. GN441 GG37701/6-6-2014.

Draft amendment regulations pertaining to the conduct, administration and management of the National Senior Certificate examination in terms of the South African Schools Act 84 of 1996. GN493 GG37753/18-6-2014 and GN494-495 GG37754/18-6-2014.



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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.

Appeals

In *Police and Prisons Civil Rights Union v Minister of Correctional Services and Another* [2014] 5 BLLR 481 (LC) the second respondent, a minority trade union, was granted the organisational right of access to the workplace by the Department of Correctional Services. This right entitled the second respondent to convene meetings, gatherings and other activities, as well as the right to represent its members in grievance procedures and disciplinary hearings.

The applicant union complained about this and argued that the department's conduct in granting the second respondent organisational rights was in breach of collective agreements. It accordingly referred a dispute to the bargaining council on the basis that the second respondent was not entitled to the organisational rights granted to it. The arbitrator disagreed, and the applicant union then applied for a review of the arbitration award. On 5 September 2013 the Labour Court, per Snyman AJ, reviewed and set aside the arbitration award and substituted it with an order denying the second respondent the organisational rights the department had granted it. On 19 September, the second respondent applied for leave to appeal against the judgment.

On 7 November 2013, the department confirmed in a circular that it had granted organisational rights to the second respondent union. The applicant union became aware of this on 22 November. It thereupon launched an urgent application to enforce the Labour Court order pending the finalisation of the appeal process on 3 December.

The Labour Court, per Lallie J, held that when the second respondent filed

its application for leave to appeal on 19 September 2013, the judgment of the Labour Court denying the second respondent the organisational rights it had been granted was suspended. This meant that the arbitration award came into operation on that date. Considering the alleged urgency of the application, the court held that any urgency that existed was self-created – the Labour Court order was suspended on 19 September; the applicant union only applied to have the Labour Court order enforced on 3 December, about two and a half months later. The fact that the department's circular was dated 7 November did not change the fact that the order of the Labour Court was in fact suspended already on 19 September and if the applicant union wanted to enforce the Labour Court's order, it had to launch its application shortly after 19 September.

In the circumstances, the application was dismissed for lack of urgency and the application was struck off the roll with costs.

Reinstatement

On 29 November 2012, the Supreme Court reinstated Myers, the applicant in *Myers v National Commissioner of the South African Police Service and Another* [2014] 5 BLLR 461 (LC), into the position he had held before his dismissal. This retrospective reinstatement followed a lengthy court battle since Myers' dismissal in July 2007. The South African Police Service (SAPS) argued, however, that it could not reinstate him into that position because the position no longer existed. So, Myers instituted this application arguing that the SAPS was in contempt of court.

Myers was the commander of the Maitland Dog Unit in Cape Town. He was dis-

missed after 28 years of service with the SAPS after he had blown the whistle in *Die Burger* about the condition of police dogs in his unit. The Labour Court reviewed and set aside his dismissal. The SAPS appealed. The Labour Appeal Court (LAC) upheld the appeal. Myers obtained special leave to appeal to the Supreme Court of Appeal (SCA), and in a unanimous judgment, the SCA overturned the judgment of the LAC and held that Myers' dismissal had been substantively unfair. It ordered the SAPS to reinstate Myers retrospectively into the position he had held before his dismissal and to give him a final written warning valid for 12 months from the date of the SCA order.

At the time of his dismissal, Myers was employed at the level of a superintendent as unit commander, at salary level 10. At that stage, the SAPS operated two dog units, one at Maitland and one at Faure. After Myers' dismissal but before the SCA judgment, the SAPS merged the two units. The amalgamated unit was now called the Cape Town K9 unit. It still operated from Maitland, but it now covered a bigger geographical area with greater responsibilities. The commander post of the amalgamated unit was upgraded to salary level 12 at the rank of Colonel (as opposed to the rank of lieutenant-colonel at salary level 10 that Myers occupied at the date of his dismissal). The SAPS argued that Myers was not entitled to be appointed to the post of commander of the combined K9 unit. Myers argued, on the other hand, that the post still existed, but that it was now the bigger post of commander of the combined K9 unit.

Considering the contempt application, the court, per Steenkamp J, held that it had to be determined whether the SAPS had failed to comply with the SCA's or-

der and whether such non-compliance was wilful and *mala fide*. Taking account of the restructuring that happened after Myers' dismissal, the court held that the combined unit was established in 2009. It was headed by a superintendent at salary level 10. On 1 March 2010, a new commander was appointed after the post became vacant. The new commander, a captain at the time, was promoted to superintendent at level 10. This post was then upgraded to that of colonel at salary level 12. The upgrading was to be implemented during the second phase of

the restructuring process and at the time of the contempt application, the incumbent was accordingly still employed at salary level 10.

The court held that, had Myers not been unfairly dismissed, he would have continued in his post of commander of the K9 unit. The SCA order must, therefore, be interpreted to mean that Myers had to be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that the role attracted, coupled with retrospective back-pay.

Revisiting the contempt question, the court held that the SAPS' conduct had not been wilful or *mala fide*. It genuinely believed that it had to place Myers in a position that attracted the same salary that Myers earned at the date of this dismissal. In an effort to achieve finality, the court accordingly dismissed the contempt application but ordered that Myers be reinstated into the role of commander of the Cape Town Dog Unit at Maitland, with retrospective effect to the date of his dismissal.



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

Question:

I am an attorney employed as a professional assistant since 2 May 2007. My employment agreement stipulates that I am 'entitled to a bonus (13th cheque) which is equivalent to one month's basic salary which is payable in their birth month'.

However, money was deducted from my bonus (13th cheque) in August 2013. After inquiries I was informed: 'The new method of calculating a 13th cheque was introduced following adverse finding by external auditors. With this new method employees' 13th cheque was effectively from 1 July 2013, calculated based on the 1/12th of the basic salaries earned during the bonus cycle.'

Because this is a unilateral amendment of my employment agreement, I filed grievances and was told to approach the Commission for Conciliation, Mediation and Arbitration (CCMA) if not satisfied.

Answer:

I am assuming that with the new method of calculating your bonus, the financial amount you receive is less as compared to what you previously received.

In your circumstances referring an unfair labour practice dispute to the CCMA is one of the options open to you.

In terms of s 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA), an unfair labour practice is defined as -

'any unfair act or omission that arises between an employer and an employee involving -

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee' (my emphasis).

In *Trans-Caledon Tunnel Authority v Commission for Conciliation, Mediation and Arbitration and Others* [2013] 9 BLLR 934 (LC) the Labour Court, per Marcus AJ, held that an employee who received a bonus less than what he was contractually entitled to, could refer an unfair labour practice dispute, in terms of 'benefits' to the CCMA. The fact that the employee's claim was in fact one involving remuneration, did not deprive the CCMA of jurisdiction to hear the matter. Around the same time as this judgment was delivered, the Labour Appeal Court in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2013] 5 BLLR 434 (LAC), also held that the CCMA has jurisdiction to hear disputes over benefits irrespective of whether the claim in dispute falls within the definition of remuneration.

In both judgments, the courts held that the issue before the arbitrator is whether the employer's actions were fair or not. If the employer has a justifiable reason for not acting in terms of an employment contract or past practice, then an arbitrator would find the employee has not suffered an unfair labour practice. Thus, in your matter, the employer would have to explain what adverse findings any external auditor made and why it became necessary to change the calculations in relation to bonuses.

As an alternate you could refer a breach of contract claim to the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), wherein you would seek specific performance. This section reads:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

However the CCMA will not only deal with your matter far sooner than the Labour Court, but this route will also prove more cost effective for you.

If your colleagues have also received a lower bonus and also want to pursue legal recourse, then an additional option would be for you and your colleagues collectively to refer a matter of mutual interest to the CCMA in terms of s 64(4) of the LRA. At the centre of your claim would be that the employer unilaterally changed your terms and conditions of employment by reducing your bonuses. The matter would be conciliated and, if unresolved, you and your colleagues could embark on protected strike action in an attempt to force the employer to revert to the previous method of calculating bonuses. This option would be available only if there is more than one employee referring the dispute. A strike, as defined in s 213 of the LRA, requires a 'concerted' refusal to work, which means that a single employee cannot embark on strike action. (It would be important to understand that if the employer has changed the method of calculating bonuses in terms of any applicable legislation or collective agreement which it previously had not complied with, then any changes in compliance with the law or collective agreement would not be seen as a matter of mutual interest thus preventing you and others to pursue the option of strike action.)

Question:

My letter of appointment stipulates my basic salary. It then continues to stipulate that my medical contribution and annuity payment shall be included in my basic salary. When I asked for a dummy payslip to see what my nett pay would

be, I was provided with a payslip stipulating a basic salary plus medical plus annuity. The total amount was named 'gross earnings' on my payslip and was almost the same as the basic salary on my letter of appointment. I received two payslips in this order, but then it was changed and my basic salary is now indicated as my total package.

I am confused. What is the proper definition of a basic salary? How do our courts interpret a basic salary? Should one's basic salary not include your benefits? I always thought that my total package or gross earnings would be calculated by adding my benefits to my basic salary?

Answer:

The term 'basic salary' is not defined in the Basic Conditions of Employment Act 75 of 1997 (BCEA). The BCEA does, however, define 'remuneration' in s 1 as 'any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any person, including the State'.

My understanding of basic salary is the remuneration you receive for the ordinary hours of work tendered, excluding any overtime. To this, you include your overtime, if any, together with any other benefits you may receive (excluding employer's contributions) which then gives you your 'gross pay'.

The term 'earning' was defined in the Ministerial Determination GN356 GG25012/14-3-2003 (wherein the Minister of Labour set out the earning threshold to which employees earning above the annual threshold cannot lay legal claim to certain rights in the BCEA), as gross pay generated before deductions but excluding the employer's contributions for example medical aid, retirement etcetera. (The current Ministerial Determination GN456 GG36620/1-7-2013, does not mention the term 'gross pay' but defines earning in the same or similar manner as before.)

A pro forma wage register as provided in the BCEA can be found alongside.

The first 'total' in the register indicates the employee's gross earnings, which is made up of your basic salary and other benefits.

The term 'total package' or 'cost to company' refers to the total cost the employee presents to the employer and includes the employer's contributions to medical aid, retirement etcetera.

Do you have a labour law-related question that you would like answered?

Please send your question to derebus@derebus.org.za



WAGES REGISTER

Name of employee:

Identity no: Employee number:

Pay period: Basic wage:

Occupation:

Manner of payment: ☐ Per hour ☐ Per day ☐ Per week
☐ Per fortnight ☐ Per month

CALCULATION OF WAGES	
Ordinary hours worked Amount due	R
Overtime worked Amount due	R
Hours worked on Sundays Amount due	R
Hours worked on Public holidays Amount due	R
Allowances: Shift	
Housing	
Transport	
Medical	
Other: (specify)	
Total	R
Authorised deductions: P.A.Y.E	
UIF	
Union	
Medical	
Retirement	
Other: (Full details)	
Total	R
TOTAL AMOUNT DUE	R

Signature of employee:

Date:

By
Meryl
Federl

Recent articles and research

Abbreviations:

AHRLJ: *African Human Rights Law Journal* (Juta)

EL: *Employment Law Journal* (LexisNexis)

PLD: *Property Law Digest* (LexisNexis)

SACJ: *South African Journal of Criminal Justice* (Juta)

Business and human rights

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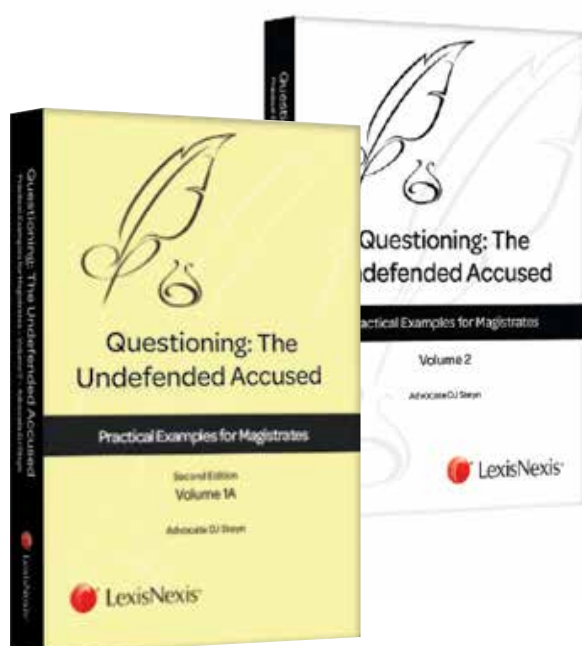
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