

AUGUST 2016

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### 26 A scientist and a lawyer walk into a courtroom ...

**T**he article by Dr Tapiwa Shumba 'Legal forensic education: Crossing the divide between law and science' (2016 (March) *DR* 14) has raised the inevitable question of whether our country's professionals are at all skilled enough to address the scientific needs of the legal system. This article, written in response by **Dr David Klatzow** and **Peter Otzen**, points out several things that many, if not most, criminal cases require a significant scientific component in order to link a suspect to the offence. Less well known and appreciated is the central role that forensic science plays in civil matters.

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**W**e are living in a singular era where we are able to diagnose that which has previously been unknown. Frantz Fanon dedicated his life to defend a more human approach in terms of mental disorders and the treatment of patients and **Saul Leal** writes that the Constitution inherently upholds the principle of empathy and the explicit protection of the right to mental health assures psychological integrity, as well as well-being, welfare, and quality of life.

### 30 Entitlement to pension interest on divorce – a reply

**S**outh African High Courts have, in divorce proceedings, inconsistently applied the concept of pension interest when parties were married either in community of property or out of community of property with the application of the accrual system. This article, written by **Clement Marumoagae**, discusses the conundrum of whether a non-member spouse has a right to claim the pension interest of his or her spouse during divorce.

### 32 Too quick to execute – how does SA's new rules on sale in execution compare internationally

**I**n January, the Rules Board submitted new rules for comment on the execution of immovable properties, an area of law where South Africa's laws badly lag the rest of the world. There is considerable improvement to r 46 (partly through the new r 46A), though there is still a long way to go writes **Douglas Shaw**.

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## Spotlight on summary judgment procedure and rules of sales in execution of immovable property

**T**he Rules Board for Courts of Law has appointed a Superior Courts Task Team to consider the summary judgment procedure as applied in the High Court and Uniform Rule 32. The memorandum issued by the Rules Board states that concerns were raised in light of the constitutional challenges to r 32 – which resulted in the plaintiff abandoning its summary judgment application, irrespective of the merits of its claim and the weakness of the defendant's substantive defence – and the general sentiment that the rule was both ineffective and abused.

The task team thoroughly considered r 32 and concluded that the present summary judgment procedure was unsatisfactory for a number of reasons, in particular:

- Deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit – further affidavits not being permitted).
- Opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for a trial in due course.
- A burden of proof was arguably shifted to the defendant, which was not only unfair but led to the types of constitutional challenges that have emanated in the High Court.

In view of the above, the task team recommended the following, which it envisages would best alleviate and address those problems –

- summary judgment should only be able to be sought after a plea (or exception) has been delivered (and not, as at present, after delivery of a notice of intention to defend); and
- a plaintiff should not depose to a pro forma affidavit, as is now the case, but should instead identify any point of law relied upon and explain briefly why the defence as pleaded does not raise any triable issues.

The Rules Board considered those recommendations of the task team, as did

the High Court Committee of the Rules Board (HCC). Both were of the view that the recommendations of the task team might well have merit, and provide a sensible and pragmatic way of improving the current summary judgment rule. It was, however, thought appropriate to invite comments from role-players on the task team's proposal, before the Rules Board and the HCC made any firm decisions, or reached any more definitive conclusions, as well as before any draft amended rule was prepared. The Law Society of South Africa (LSSA) will be submitting comments on this to the Rules Board. Practitioners are invited to send their comments to Kris Devan at the LSSA at kris@LSSA.org.za before 25 August.

Meanwhile, the Rules Board in conjunction with the Justice College will hold a dialogue to discuss the rules of sales in execution of immovable property in the High Court and the magistrates' courts in early August. The Rules Board has been and is currently engaged with amendments of and streamlining of the rules, conditions of sale and forms regulating execution against immovable property.

The dialogue will be held so that attendees will be able to contribute to the final drafting of the Uniform and Magistrates' Courts Rules Conditions of Sale and Forms, which the Rules Board will approve and in due course submit to the minister for approval. Attendees will also be able to propose amendments to legislation, which may be considered necessary to strengthen the protection of judgment debtors and safeguard execution creditors, to enhance the implementation of the constitutional imperatives and to improve judicial oversight by the courts of the process of execution against residential immovable property, where these aspects cannot be addressed by the rules of court.

In one of the feature articles in this issue, 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' on p 32, Douglas Shaw calls on the Rules Board to look



Mapula Thebe – Editor

into the issue of the execution of immovable properties. Mr Shaw compares South African rules with international rules and raises a pertinent point that South Africa is lagging behind.

### Would you like to write for *De Rebus*?

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

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# LETTERS

## TO THE EDITOR

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

### The frustration of the GEPF and 'divorce debt'

I wish to congratulate Clement Marumoagae on his article "Divorce Debt" created by the Government Employees Pension Fund' (2016 (May) DR 24), which is clearly well-researched and in my view legally sound. It reflects the frustration of many Government Employees Pension Fund (GEPF) members who have to share their pension benefit with a former spouse.

As long as the GEPF does not remove/amend r 14.10.9 of the GEPF rules, or until it is found to be unconstitutional (which I submit it is), I suggest that practitioners acting on behalf of GEPF members insert a clause in a settlement agreement dealing with the pension interest, which reads as follows:

'In terms of Section 7(8) of the Divorce Act, 70 of 1979 (as amended) the Government Employees Pension Fund is ordered to pay the plaintiff's/defendant's portion of the plaintiff's/defendant's pension interest directly from the plaintiff's/defendant's pension benefit and not from any other source or fund.'

If the GEPF then refuses to comply with such an order and proceeds to create a 'divorce debt' an application must be brought against it for a specific order to comply with the divorce order, failing

which it will then be in contempt of the order.

Colleagues are invited to put forward possible alternative suggestions to solve the problem with the GEPF.

**Neels Campher**, attorney,  
Pretoria

See the latest article written by Clement Marumoagae 'Entitlement to pension interest on divorce - a reply' on p 30 of this issue.

- Editor

### The harsh reality of obtaining articles of clerkship

In the first year of the LLB degree, everyone is excited. I am going to be the next Harvey Spector, the next Mike Ross (from the television law series 'Suits'). So I study hard. The sleepless nights, the hours spent perusing case law, legal texts, going through emotionally and physically draining examinations. Finally, four years, or for some five years later, I finally have my LLB degree, I am ready. My career is finally going to begin.

So what next?

I have applied to 15 firms, all of which require experience. Oh wait, I do not

have any, I just completed five years of full-time studying at a university. Okay, so I am unsuccessful in all my applications for articles of clerkship. I am discouraged. I do not stop though.

So what next?

I want to better myself so that I can be an eligible candidate for my articles of clerkship. So I enrol into a law school for Practical Legal Training (PLT). I go through another six months of solid training and examinations. Finally, I have reduced my articles by one year. Surely I can find articles now.

So I apply again. This time I personally hand out my CV. I approach another ten firms. Finally I obtain an interview. I arrive for my interview telling myself that I can do this. I have the necessary skills to serve my articles. I get interviewed by a director of the firm. He says he is very impressed with me. However, it is procedure to interview other candidates and should I not hear from them I should consider my application unsuccessful. I leave with hope and await his response. An hour goes by after my interview and my head is filled with all kinds of thoughts, maybe I should not have said that, I should have said this instead. The torture does not end there. This goes on for the next hour, the next day, the next week, the following week and then it hits



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me, I was unsuccessful. I blame myself, I feel worthless and I am disappointed in myself.

So what next?

I do not despair. I go through this process a few times, months on end. Each time losing a little more of myself. Every time I apply I hope I get a good response. Sometimes, no response.

So what next?

How do I move forward in my career without serving my articles? I cannot. I do not give up because I know that I did not spend five years of my life for it to go in vain.

And then it hits me.

It is not my fault. I have done everything in my power to secure articles. I have two degrees (BSocSci and LLB), I have worked hard, I have sacrificed the partying that others my age were doing, I have sacrificed family time, I passed with good results, even tried to better myself by attending my PLT. It is not my fault. I have the potential.

Yes, hundreds even thousands of law graduates have the same problem I do. We are stuck in our careers because of the demand of securing articles of clerkship. How is it our fault? It is not.

And so the struggle and the harsh journey of obtaining articles of clerkship goes on. I will not give up on my career. I just need an opportunity.

**Dhilshad Hoosen**, student seeking articles, Johannesburg

## LSSA and LexisNexis Survey

I believe the Law Society of South Africa (LSSA) has made an error of judgement in allowing itself to be complicit in the LSSA/LexisNexis survey entitled 'Attorneys' profession in South Africa: 2016 Review - Help us plan to serve the profession better - and stand a chance to win' and circulated by the LSSA to attorneys at the end of May that is supposed to be of such great assistance in providing apparently useful insights into the current legal profession in South Africa.

It slowly becomes clear that this so-called 'survey' has not been designed as the LSSA claims to 'contribute to the knowledge pool and assist the LSSA in making more informed decisions relating to the attorneys' profession and the environment in which practitioners are practising today'.

It does not provide an opportunity to help the LSSA 'plan to serve the profession better', but rather to help LexisNexis maximise the profits it already makes out of the legal profession.

Oh no, the survey is not to be completed for the elevated reasons professed by the LSSA. Instead, members of the profession are urged to complete the survey because those who complete it might

win a prize. Who gives the prize? Why, LexisNexis of course.

This is an unhealthy collaboration between the national representatives of our legal profession and one of the most lucrative commercial providers of legal products to that profession. The potentially venal aspects of this collaboration and its ability to compromise the standing of the flagship of our law societies should, in my view, disturb us all.

Once one begins to respond to the questions of the survey (which is bound to produce distorted results because one is often not permitted to provide more than one response to reflect one's actual position) one slowly begins to realise that the LSSA is being used to lend its (and, therefore, our) name to a market survey of LexisNexis to find out how to pitch their research products to the legal profession and to assess more accurately what price the market will bear for such products. Take, for example, the question as to how much one would be prepared to pay for a legal research service.

This has nothing to do with elevating the legal profession and everything to do with elevating LexisNexis' profits made out of the profession.

There is nothing wrong with a market survey to assess the need for a legal product, as well as the effective market price that should be charged for it.

But then, let LexisNexis initiate and organise it themselves, so that we know what we are about and not have to sift through hypocrisy put out by our own professional leaders before we realise what is going on.

To those who head our national law society: methinks you have succumbed to a prevalent contemporary South African disease - loss of ethical compass.

Because of the alarming implications of the subject of this letter, this letter was sent to the LSSA and I am copying it to the editor of our professional journal with the plea that she publish it in order to provide a clarion call to our members as to the real nature of this seemingly noble, but actually highly questionable, survey.

**Roland Darroll**, attorney, Cape Town

## Response from the Law Society of South Africa

We appreciate the concerns expressed by Roland Darroll. The 'Attorneys' Profession in South Africa 2016 Review' survey was a joint initiative between the Law Society of South Africa (LSSA) and LexisNexis. It is imperative for the LSSA to build its pool of business intelligence on the profession in order to provide context to a number of initiatives that it is

involved in, including the Task Team on Briefing Patterns in the Profession, the committee looking into challenges faced by women in the profession and various other aspects of legal practice. The cost of surveys by independent research companies has become prohibitive for the LSSA. LexisNexis invited the LSSA to participate in a joint survey, building on its 2014 survey of small practices. There were no cost implications for the LSSA as LexisNexis carried the costs of the survey on the basis that the LSSA would include the questions it wanted answered and LexisNexis included some questions from its side. The survey was designed and will be analysed by a professional survey company. This was approved by the LSSA.

We are confident that the results of the survey will be useful to us, as well as of interest to practitioners as a snapshot of the attorneys' profession in 2016. We would like to thank all practitioners who completed the survey and will publish the results in a forthcoming issue of *De Rebus*.

**Nic Swart**, Chief Executive Officer, Law Society of South Africa



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# App to assist attorneys reveals a broken system

**A**ttorneys can now locate Sheriffs and courts in Gauteng via a web application (app) called Jurisfy. The app has a GPS to get you to the destination which is similar to Google Maps.

Jurisfy lists Sheriffs and also shows their physical jurisdictions, on a digital map. The app powered by Google, allows users to search for a specific address and see the Sheriff and courts that have jurisdiction over that address. The app also helps ascertain a correspondent attorney if necessary.

The Jurisfy team consists of Daniel Quibell (28); Lawrence Botha (32); Alison Hugo (29); Cassandra Zamparini (30) and Stanley Bondi (32). Mr Quibell is an attorney at Johannesburg law firm, Frese Moll and Partners, while Mr Botha, Ms Hugo, Ms Zamparini, and Mr Bondi are co-founders of a web application design and development firm, Fixate Web and Design, based in Johannesburg.

Jurisfy is currently investigating ways to provide value to firms who want to list themselves as correspondent firms when a court is selected, as well as directing lay people to those firms as potential clients. The app was launched in April 2015.

*De Rebus* news editor, **Nomfundo Manyathi-Jele** had the opportunity to interview Cassandra Zamparini who spoke on behalf of the founders of Jurisfy.

**Nomfundo Manyathi-Jele (NMJ): Please tell me about the app. What does it do, why is it important and how does it work?**

**Cassandra Zamparini (CZ):** Jurisfy is a web app aimed at providing a one stop service to ascertain the relevant service area of a court or sheriff, and correspondent attorney.

**NMJ: What inspired you to start it?**

**CZ:** Jurisfy was borne out of the frustrations a young attorney experienced when Sheriffs were difficult to get a hold of and were unsure of their jurisdictions. There was also the frustration of dealing with the delay and additional costs for matters where documents were not served by the correct Sheriff.

Frustrated with the lack of a good system, Mr Quibell approached Fixate, realising that there may be an opportunity to improve the situation for law firms and Sheriffs alike.

The whole system was a big surprise to



*The founders of Jurisfy (back from left) Alison Hugo, Cassandra Zamparini (front from left) Lawrence Botha, Stanley Bondi and Daniel Quibell.*

us, as well as the fact that this information was not available digitally. We immediately knew that we could develop a better way to get this information.

**NMJ: How long has it taken to get to this stage?**

**CZ:** Work on Jurisfy began in the last quarter of 2014.

**NMJ: How did you do it?**

**CZ:** From the outset our strategy has been to gather reliable boundary data for all Sheriffs, beginning in Johannesburg, followed by the remainder of Gauteng, and then the rest of the country, and plot our data on a map.

From the beginning, we knew we would have to focus on one province in order to get Jurisfy off the ground. Because we are based in Johannesburg, it made sense to start in Gauteng.

After some research, we discovered that most of the areas that make up the Sheriffs' jurisdictions are listed on the website of the South African Board for Sheriffs. After some research we found that some of the information was incomplete, inaccurate, or absent.

Soon we realised that the data from traditional sources is not only difficult and time-consuming to interpret, but also frequently inaccurate or contradictory. We decided that we needed to develop a new strategy to gather sheriff information, and would have to start almost entirely from scratch. Before

we could begin collecting any jurisdictional information, we needed to build a system that allowed us to capture and edit the data we collated. By integrating with Google Map's solid infrastructure, we were able to build a powerful tool that enabled us to map out and visually represent the jurisdictions of Sheriffs throughout Johannesburg.

Leveraging the 2011 census data, we plotted jurisdictions based on the information available to us in *Hortors* and the Sheriff's Board website. To our dismay, it was not long before we saw that the data was incomplete and unintuitive, and that again we needed a new approach in order to get accurate information. We decided to visit the individuals who would know best – the Sheriffs themselves.

Armed with a large printed map representing the jurisdiction of Soweto East, we visited the office of Hettie Botha, the Soweto East Sheriff. Because she took over the job from her father, she was more than aware of the inadequacies within the system – many of which stemmed from years past. She explained that much of the workday was spent on the phone redirecting callers who had phoned the incorrect Sheriff's office. We were not surprised, as her phone rang throughout our entire meeting.

It became apparent the only reliable data would be first hand data obtained directly from the Sheriffs themselves,



and so we began the task of visiting, speaking with, and collaborating with the Sheriffs to determine their jurisdictions.

From Ga-Rankuwa to Alberton, and Pretoria to Kempton Park, we travelled to almost every Sheriff's office to verify our data (a handful of Sheriffs refused to meet with us). We became more aware of how broken the system was with each visit to a new sheriff. Not only did many Sheriffs claim to serve the same areas, but there were also areas that no one claimed to serve at all.

In order to account for these 'disputed regions', we implemented a system into Jurisfy that allowed us to point out any problem areas to our users. Currently, if a user searches an address that falls within a 'disputed region' (one in which two or more Sheriffs claim to serve), or a 'no man's land region' (where no Sheriffs claim to serve), our system will highlight the area and provide our users with an explanation of the issue. It is then up to the user to phone Sheriffs and determine the relevant Sheriff's office - although, they are likely to encounter the same problem we did when trying to ascertain which Sheriff was relevant. As time goes

by we have been able to eliminate a large amount of 'no man's land' areas with the Sheriffs.

**NMJ: Is it a free service?**

**CZ:** While in beta, Jurisfy is free for users to sign up and locate Sheriffs. This will eventually become a paid service once we have covered the Western Cape, and are confident in our data. We are confident in our data for Gauteng.

**NMJ: What are your future plans for Jurisfy? I see that you plan to monetise it eventually. Will you wait until you reach a certain number of members signed up?**

**CZ:** Currently Jurisfy only serves jurisdictions in Gauteng. To date, we have listed 54 Sheriff jurisdictions on Jurisfy. Jurisfy's primary goal is to -

- become the authority on Sheriff jurisdictions in all provinces in South Africa;
- provide a subscription-based service to access Sheriff jurisdictions; and
- provide a platform for users and firms to easily find correspondent firms for courts.

We are already listing correspondent firms that are within 15km of a court. With national coverage and an increase in traffic to Jurisfy, we can then begin

offering a listing to correspondent firms and counsels at a premium.

Once we have gathered and confirmed data for Sheriffs in the Western Cape, we feel we will have a sufficient offering to open subscriptions for users to pay for access to Sheriff information.

Access to correspondent attorneys and counsels will always remain publicly accessible to maximise those organisations exposure to the public, justifying their premiums.

**NMJ: How many members do you currently have signed up?**

**CZ:** From our current data, we are getting an average of three to four signups per business day. We currently have just over 700 users, with a growth of 15 to 20 new users per week. We have recently hit 9 000 visitors per month in traffic and this is growing steadily. This is data for courts and Sheriffs in Gauteng only.

The app can be found at [www.jurisfy.com](http://www.jurisfy.com).

Nomfundo Manyathi-Jele  
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## Disabled candidate attorney relieved to find a job

**S**abelo Nzuza, 27, a law degree graduate who is diagnosed with cerebral palsy, is relieved to finally be employed.

Mr Nzuza, who is originally from Umlazi Township in Durban, is serving his articles at Legal Aid South Africa's (Legal Aid SA) head office in Johannesburg. He appealed to the media in June when he was struggling to find an opportunity to serve articles.

Mr Nzuza told *De Rebus* that he has always aspired to be an attorney. 'One memory that is particularly vivid though, was when I read the novel *To Kill a Mocking Bird*. The novel had as its main character an attorney named Atticus Finch; I



*Candidate attorney, Sabelo Nzuza, who has cerebral palsy, is relieved to have found a job.*

was particularly fascinated by the manner in which he proved the innocence of his client Tom Robinson and the courage he had in insisting to represent him despite the community hounding and intimidating him and his children for representing a black man. I guess that made me see how noble the profession of being an attorney can be. As I grew up and my interest in the law deepened, I got to know of other types of laws and the various careers that one could do if they studied law at university since it is such a versatile degree to have,' he said.

Mr Nzuza said that one of the challenges he faces is that his writing is illegible. In primary and early high school, he



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had to use an electronic typewriter for written work. 'I had particular difficulty when it came to the changing of classes, when the bell rang and I would have to rely on some of my classmates or friends to help me carry a very heavy typewriter from one class to the next. For homework again, due to the fact that I could not travel to and from school with my typewriter, I would have to get home and have to dictate to my mother, who would help me to write.

'As technology became more advanced, and when my mother had finally saved up enough money, she bought me a desktop computer which helped us both in that, I did not have to wait for

her to come back from work, with her having to do other chores first and only thereafter could we finally sit down and write my homework. It was only upon entering university that my bursary helped in buying me a laptop, as well as a dictaphone for lectures. These were too expensive and my mother did not have the means to get that type of computer and assistive device for me,' he said.

Mr Nzuza said he is loving his job a lot and that he particularly enjoys the research aspect, as well as being one of the first ones to draft or review a contract.

Cerebral palsy is a 'condition marked by impaired muscle coordination (spastic paralysis) and/or other disabilities,

typically caused by damage to the brain before or at birth' ([www.oxforddictionaries.com](http://www.oxforddictionaries.com), accessed 8-7-2016).

Legal Aid SA has established a People with Disabilities Recruitment Programme. The programme was developed in order to promote diversity and equal opportunities for all and invites and encourages job applications from people with disabilities for vacant positions at the organisation.

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## NADEL human trafficking workshop

**O**n 20 June, World Refugee Day, the National Association of Democratic Lawyers (NADEL) held a human trafficking awareness workshop in Pietermaritzburg, KwaZulu-Natal.

Chairperson of the Pietermaritzburg Branch, Vershen Moodley noted that 'trafficking in persons is a real issue and we must be proactive.' National Gender Desk Officer, Harshna Munglee, added the trafficking of men, women and children is a real issue in South Africa as it can happen as close as next door without one's knowledge.

Advocate Dawn Coleman-Malinga, prosecutor and part of the National Trafficking in Persons Task Team for the National



*Umgeni Community Empowerment Centre members with Harshna Munglee, chairperson of the NADEL National Gender Desk, and Vershen Moodley, chairperson of NADEL Pietermaritzburg.*

Prosecuting Authority, presented the workshop and said it was far easier to get into human trafficking than other lucrative crimes, such as drug trafficking and arms and ammunition, as little or no capital input was needed. She outlined the various Acts and relevant sections that are connected with this intricate crime.

The presence of the Umgeni Community Empowerment Centre (UCEC) touched the hearts of those who attended, as they sat at the entrance of the workshop with their mouths and hands bound. The pamphlets held by community members of the UCEC read 'Phone us if you are suspicious about any situation - rather phone and be wrong ... than not phone and be right ...'.

One lawyer, who attended the workshop, said it was 'a brutal awakening'. Another lawyer said 'she was thankful for being made aware'.

Video footage was shown of real victims being captured and rescued and criminals being caught. Ms Coleman-Malinga touched on a sensitive issue of victims having Stockholm syndrome, which makes it difficult to prosecute. Ms Coleman-Malinga stressed the need for attorneys to play an active role in briefs and added that lawyers need skills to identify a person who is trafficked. Ms Coleman-Malinga welcomed lawyers to attend further training in this area.

NADEL will be taking this awareness campaign and training workshop throughout the country, through its National Gender Desk. The next workshop will be in Port Elizabeth on 30 September 2016.

Harshna Munglee, officer of the NADEL Gender Desk,  
hm@hmun-lee.co.za



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# Previously disadvantaged attorneys receive tools to grow their practices

**T**he Attorneys Development Fund in partnership with LexisNexis South Africa and Korbitec have awarded eight historically disadvantaged Mthatha legal professionals with tools to grow their practices.

According to a press release, the four attorneys and four advocates were honoured at a consultative workshop in Mthatha on 27 May. The eight candidates are the latest beneficiaries of LexisNexis' Advocate Advancement Programme and its new Attorney Advancement Programme, which aims to foster and promote entrepreneurship among previously disadvantaged, newly qualified legal professionals.

According to a press release, three attorneys firm - Lesley-Ann Brauns of Lesley-Ann Brauns & Associates Inc; Zuko Tshutshane of Z Tshutshane Attorneys; Zinedile Tiya and Simphiwe Pata of Tiya Pata Attorneys - each received sponsorship valued at over R 56 000, which includes 12 months of free platinum access to the MyLexisNexis online legal research tool, a laptop and a 12 month 3G data contract, including sim card and modem.

Attorney, Qengebe Gcanga of QT Gcanga and Associates received a personal computer and a smartphone from Korbitec, which also includes 12 months' free platinum access to the MyLexisNexis online research tool and a 12 month 3G



*From left: Attorneys Simphiwe Pata; Qengebe Gcanga; Odwa Nyembexi (standing in for Lesley-Ann Brauns); and Zuko Tshutshane, pictured with the Attorney Development Fund's Mackenzie Mukansi (second), were recently awarded with equipment for their law firms.*

data contract, including sim card and modem.

The 2016 LexisNexis Advocate Advancement beneficiaries from the Mthatha branch of the Eastern Cape Society of Advocates received the same package. The beneficiaries are: Mzamo Swana; Zuko Badli; Zandile Ndesi and Lungelwa Mncotsho-Boya. 'Through a programme endorsed by the General Council of the Bar, the four advocates are among 52 nationally this year - and more than 174 nationally since the programme was started in 2012 - who have received

such sponsorships ...', the press release states.

The workshop also served as a networking session and a platform to outline the various programmes, which are assisting previously disadvantaged local advocates and attorneys to develop themselves.

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## Dandala Attorneys

In 2014, the then Board of Directors of the Attorneys' Development Fund (ADF) took a decision to showcase one of its most senior beneficiaries in *De Rebus*, Ivy Dandala, an attorney based in Mthatha in the Eastern Cape ('First ADF hand-over to attorneys' 2013 (Jan/Feb) *DR* 9). The decision was due to the fact that she had been an ADF beneficiary, who paid the bulk of her loan back, even before she was due to repay the same.

The Board decision was taken with the view that the rest of the loan will be repaid, however, shortly thereafter, Ms Dandala's economic viability and circumstances changed due to a car crash that led to her inability to generate desired fees due to her injuries.

Her resilience and integrity though and through constant communication with the ADF office as to her circumstances, gave rise to an interest to assist her further with the remainder of her loan.

In November 2015 at the ADF annual general meeting (AGM), one of the ADF's

## ADF celebrating women in Women's Month



*Digby Vickers from AJS and attorney, Ivy Dandala.*





**From left: Attorneys, Carole Strauss and Karen Towsey with ADF manager Mackenzie Mukansi. Towsey & Strauss is the second firm to pay off their loan with the ADF.**

partners, AJS grabbed the opportunity to assist Ms Dandala with the balance of her loan, also unlocking the 2014 approved project that would see worthy ADF beneficiaries introduced to their colleagues through *De Rebus*.

The ADF looks forward to the relationship with *De Rebus*. It will allow the ADF to communicate with members of the profession that require our services.

With a series of articles about legal practitioners who benefit from the ADF value proposition, the ADF will also publish information regarding products, particularly on the grantable portion of the ADF non-interest bearing loan.

### Towsey and Strauss

Another firm that continues to inspire the ADF is Towsey and Strauss, formerly Towsey and Associates, based outside Hermanus in Cape Town.

In 2003 Carole Strauss took up employment with the firm of De Klerk MacLennan-Smith Inc as a secretary and met Karen Towsey some years later when she joined the firm as a candidate attorney. By 2003 Ms Strauss had a total of 28 years of legal secretarial experience and was, therefore, able to offer assistance to candidate attorneys at the firm who had no practical experience. Ms Strauss' friendship with Ms Towsey commenced at that time and continued after she had left the firm and commenced practising as the sole proprietor of K Towsey & Associates.

In 2008, Ms Strauss requested her employer to article her and she registered with Unisa. As Ms Strauss had a prior degree, the duration of her articles was for three years. 'During the course of my studies, Karen and I spoke of forming a partnership in the future and in October 2012, having completed my articles but not my LLB, I took up employment with Karen and with her encouragement and willingness to allow me the time needed away from work to enable me to complete my degree, attend part-time board lectures and write my board exams, I was admitted as an attorney on 1 August 2014. Our partnership commenced on 1 September 2014,' Ms Strauss said.

During the ADF's visit to the firm, it was a humbling experience to see how much can be achieved by women, particularly when in collaboration with each other in the spirit of empowering one another.

As these firms continue to grow, the ADF will without a doubt be behind each and every one of them as we strive to be a value adding partner to our beneficiaries in a continuous improvement spirit.

We challenge all other practitioners to embrace the spirit in which this month was dubbed Women's Month by invoking the nurturing spirit of women in all that we do.

*Mackenzie Mukansi, Attorneys Development Fund Manager,  
mackenzie.mukansi@adfonline.org.za*

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

# LSSA raises concern about election violence, developments at SABC and death of Kenyan human rights lawyer

**L**ate in June and early in July the Law Society of South Africa (LSSA) raised its serious concern about election-related violence, developments at the South African Broadcasting Corporation (SABC) and the murder of young Kenyan human rights lawyer, Willie Kimani.

## Election violence

In a press release on 22 June following demonstrations and looting in a number of areas in Tshwane, the LSSA urged government and political parties to ensure a safe climate for free and fair local government elections on 3 August.

The LSSA said that members of the public must be able to cast their votes freely without threats of intimidation and violence. Also, although communities must be able to exercise freedom of speech and association, government must urge people to exercise restraint irrespective of their complaints relating to lack of service delivery or differences in political affiliation.

'The ongoing violent protests that we have witnessed in the media ... in the Tshwane area is of major concern. We believe these protests may persist and even intensify between now and the elections date. Threats of violence, as well as allegations that certain parties are not allowed to campaign in certain areas are direct impediments to free and fair elections and to the constitutional right and duty on our citizens to vote freely. The acts of violence also constitute a threat to the rule of law and constitutional democracy in our country. The burning of shops belonging to foreign nationals echoes the xenophobic attacks which left the country bruised and battered not long ago and cannot be tolerated,' said LSSA Co-chairpersons Mvuso Notyesi and Jan van Rensburg.

They added that for lawyers, protecting the rule of law and constitutional democracy was paramount. They stressed that the LSSA would be fielding its team of attorney election observers across the country on 3 August in order to serve as the independent eyes and ears of the public to record and report on any in-

cidents that may threaten these fundamental rights.

## Press freedom

On 28 June the LSSA again expressed its alarm in a press release, this time relating to developments at the SABC, the resignation of Acting Chief Executive Officer, Jimi Matthews, and the fact that senior and respected editors and journalists appeared to be increasingly ventilating their concerns regarding the negative atmosphere in newsrooms. The LSSA urged the SABC Board to create an environment in which journalists can report without fear or favour.

The LSSA said that, like an independent judiciary and an independent legal profession, a free press is a cornerstone of our constitutional democracy. It urged the SABC Board to act decisively to deal with apparent systemic problems and editorial policies that may have led the public broadcaster to the position it is in now. 'Broadcasters and journalists should report the news, not become the news or self-appointed censors. Once this happens it is simply a shame and contrary to the values of an open and democratic society,' said LSSA Co-chairpersons Mvuso Notyesi and Jan van Rensburg.

They added: 'Members of the public are entitled to professional, objective and fair reporting. This can never be compromised, but especially more so during the period leading up to elections. It is not for a broadcaster – especially the national broadcaster – to take upon itself a censorship role and decide what the public may or may not see or hear, and what journalists may or may not report.'

The Co-chairpersons noted that there were press codes that guide reporters, publishers and broadcasters, and if members of the public are dissatisfied with reporting, they have access to the self-regulating Press Council and the Office of the Press Ombud to settle disputes over the editorial content of broadcasts and publications. Ultimately there is also access to the courts. It was, therefore, of paramount importance that the SABC Board should endeavour to cre-

ate an environment in which journalists can report to the general public without fear or favour.

## Murder of Kenyan human rights lawyer

Early in July the LSSA joined the Law Society of Kenya in expressing its shock at the torture and murder of young Kenyan human rights lawyer Willie Kimani, allegedly by members of the Kenyan National Police Service.

'We extend our condolences to our colleagues in Kenya and join the Law Society of Kenya (LSK) in expressing serious concern at what LSK Chairperson Isaac Okero has described as a dark day for the rule of law in Kenya,' said LSSA Co-chairpersons Mvuso Notyesi and Jan van Rensburg. They added that the perpetrators should be seen to be dealt with to the full extent of the law.

At that stage it was understood that Mr Kimani, a human rights lawyer with the United States legal aid group International Justice Mission, which deals with cases of police abuse of power – had focused on defending political prisoners and victims of state abuse. Mr Kimani had been defending a client who had accused local police of harassing and intimidating him in a bid to have him withdraw a complaint against a senior officer with the local Administration Police Unit.

Mr Kimani, his client and a taxi driver disappeared on 23 June and their bodies were found more than a week later in a river near Nairobi with signs of severe torture.

Mr Okero had been quoted as saying that the legal profession's worst fears had been confirmed. Advocates and citizens are at risk of elimination by police death squads. He noted that the rule of law was under a serious threat, where the guardians of the rule of law risk their lives; that every Kenyan should be afraid. He had stressed that failure by those charged with security could not be tolerated.

Although three police officers suspected of being linked to the disappearance of Mr Kimani and his associates were arrested, Kenyan lawyers threat-

ened to strike if senior police officers Inspector-General Joseph Boinnet and Deputy Inspector-General Samuel Achi, as well as Interior Cabinet Secretary Joseph Nkaissery did not resign over the killings.

Mr Notyesi and Mr Van Rensburg stressed: 'Lawyers must be able to carry out their professional duties without fear of harassment or other threats. We

stress the United Nations Basic Principles on the Role of Lawyers, which state that: "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference and that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken

in accordance with recognised professional duties, standards and ethics". They urged the Kenyan government to ensure that all lawyers in their country are treated with the respect and security of person due to them. The Co-chairpersons highlighted the above views in a letter addressed to the Kenyan authorities through the High Commission of the Republic of Kenya in Pretoria.

## Zimbabwean institutional study visit

**T**he Legal Education and Development (LEAD) arm of the Law Society of South Africa held an institutional study visit session with delegates from the Zimbabwean Council for Legal Education (CLE). The CLE is a statutory body established in terms of the Legal Practitioners Act (chapter 27:07) to ensure

the maintenance of high standards in legal education in Zimbabwe. The CLE is in the process of setting up a department that will be responsible for offering professional training programmes for legal practitioners in Zimbabwe.

The aim of the institutional study visit was to advise the Zimbabwean delegates on how LEAD functions and provide

much needed insights, which will help the CLE as it embarks on formulating its training programmes for Zimbabwean practitioners.

*Mapula Thebe,  
mapula@derebus.org.za*



*Back row from left: Senior Manager: Legal Education and Development, Ogilvie Ramoshaba; Chairperson of the Standing Committee Legal Education, Raj Badal; Co-chairperson of the Law Society of South Africa, Mvuso Notyesi; Chairperson of the Board of Control of the Pretoria School for Practical Legal Training, Kabelo Seabi; member of the Committee on Legal Education and Standards of the Council for Legal Education Zimbabwe, James Prince Mutizwa; member of the Committee on Legal Education and Standards of the Council for Legal Education Zimbabwe and the Deputy Chairperson of the Law Development Commission, Joel Zowa; and Chief Executive Officer of the Law Society of South Africa and Director: Legal Education and Development, Nic Swart. Front row from left: Member of the Committee on Legal Education and Standards of the Council for Legal Education Zimbabwe, Lloyd Mhishi; Chairperson of the Committee on Legal Education and Standards of the Council for Legal Education Zimbabwe and Judge of the High Court of Zimbabwe, Justice Happias Zhou; and Assistant Office Administrator of the Council for Legal Education Secretariat, Shorai Mupunga.*



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# Female legal practitioners network

**O**n 27 June the Legal Education and Development arm of the Law Society of South Africa in conjunction with PPS held the Significant Leadership Networking Event for Women Lawyers. Female legal professionals from all fields, including practicing attorneys from small to large firms, advocates, and corporate legal professionals attended the event.

Networking is important for any business endeavour and the legal profession is no exception. It is important to create a networking platform for women lawyers that can enable them to expand their business connections and build on those connections.



Mapula Thebe, [mapula@derebus.org.za](mailto:mapula@derebus.org.za)



## PEOPLE & PRACTICES

# People and practices

Compiled by Shireen Mahomed

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**Anthony Whatmore & Company** has two new appointments.



Byron Whatmore has been appointed as a director in Durban.



Kerry Forbes has been appointed to head its Gillitts branch.

**VDT Attorneys** in Pretoria has two promotions.



PR de Wet has been promoted as an associate director.



Donald Mokgehle has been promoted as an associate director.



**Stegmanns Inc** in Pretoria has appointed Jana Doussy as a professional assistant in the commercial and intellectual property law department.

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





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# Are you in touch with reality ...?

**A**spirant business people can be overwhelmed by the thought of running their own business and they sometimes disconsider realities of running a business. Legal practitioners often fall into this trap as well. While running a business may seem the way to go, and while running a business can be the answer to success, it can also be a roller coaster. There are times when business is booming but there are also times when business is flat or even seems to be buried. For the purpose of this article, reference to legal practitioner also includes aspirant legal practitioners.

Starting a new business requires courage. Late President Nelson Mandela once said: 'I learned that courage was not the absence of fear, but the triumph over it. ... The brave man is not he who does not feel afraid, but he who conquers that fear' (Nelson Mandela *Long Walk to Freedom* (Johannesburg: Macdonald Purnell 1994) at 615). What is clear from this quote is that one should not be stopped by fear in pursuit of success. However, what the quote does not suggest is pursuing success blindly.

Ever heard of an aspirant business person saying: 'I don't want to be employed once I complete my studies but will open and run my own business. Within a year of running my business I will have a fancy car, I will travel overseas, I will do this and that... the list is endless.' Is it always realistic or a fantasy? Expectations such as these build pressure on the legal practitioner.

## What is a business?

There are many definitions of a business, but the definition that captures the essence of what this article seeks to address is from the business dictionary: 'An organisation or economic system where goods and services are exchanged for one another or for money. Every business requires some form of investment and enough customers to whom its output can be sold on a consistent basis in order to make a profit' ([www.businessdictionary.com](http://www.businessdictionary.com), accessed 24-6-2016).

There are four critical elements to this definition, which will be discussed in the following paragraphs:

- **An organisation or economic system** – an economic system is one where there is an exchange of something for another. In the case of legal practice, it is generally an exchange of legal services for a fee. For the exchange to take place though, it is important to determine if there is demand to meet the proposed supply. While an aspirant practitioner could be doing well academically and may see possibilities in running a successful business, sometimes the reality may depict a completely different picture. While outside of the economic system, it may appear that things are going well, but once part of that system, the aspirant practitioner realises that things are only well for a limited time. A mistake that new entrants often make in business is to commit all their money and not invest to cater for difficult days.

- **Every business requires some form of investment** – investment entails a number of activities that need to be taken. These range from acquiring the necessary equipment, having the required skills to run the business, employing the right calibre of human resources, having some start-up capital, being able to set aside some money and not commit everything to immediate use, etcetera.

- **Enough customers** – how many customers is enough? There is no definite answer to this question. However, a proper researched business plan should be able to respond to this question. This, therefore, requires of legal practitioners to research and prepare a proper business plan before opening doors. A legal practitioner without customers/clients is as good as sitting at home and doing nothing. Enough customers are required, as it would be unrealistic to look at a few people and expect them to require legal services over and over again. Customers are key to the economic system as they provide the required demand for services, while the practitioner will meet that demand by providing the service.

- **Consistent basis** – sustainability of the practice is important and should always be at the forefront in the decision making of whether or not to run a legal practice. In order to have a sustainable legal practice, consistency in having customers becomes a necessity. As already mentioned in the foregoing paragraphs,

the absence of customers in a business, spells the absence of a business.

Should a legal practice find itself without customers/clients, and therefore out of business, while there are commitments to be serviced, some practitioners find themselves resorting to unethical means of making up for the shortfall.

## What can go wrong?

Once in an unfavourable position, without business, the ethics of the practitioner gets tested. A number of instances have been seen where some practitioners who find themselves in this position tap into the trust account not for or on behalf of the trust creditor, but for their own benefit. They begin to engage in a practice referred to as rolling of funds, which is known as the misappropriation of funds, wherein they use a trust creditor's money for their own benefit with the hope that funds will flow in and they will be able to replace the used funds. They then replace the utilised funds from the funds of another trust creditor and again await another deposit into the trust account. This may work for a while, but ultimately the practitioner is trapped in a position where at some point they cannot replace the used funds. When this happens, the trust account goes into a deficit, a position where the balance on the trust creditors exceeds the actual cash available, reflecting a shortage in the trust account. This position spells trouble as it effectively means that if the practitioner is called on to refund all trust creditors, he or she will not be able to do so since there is a shortage in the trust account.

Trust creditors who cannot be refunded their money then become disgruntled and may approach the provincial law society and/or the Attorneys Fidelity Fund (the AFF) to lodge a complaint against the practitioner. A lodged complaint leads to an investigation, which if proved to be factual, leads to a disciplinary process, then to a claim against the AFF and finally to suspension and ultimate striking off of the practitioner.

It is important to note that it is not in all cases that practitioners themselves will misappropriate trust funds, but even their employees, in most cases the highly trusted ones.

## Is it always evident if there is a trust shortage?

In cases where trust accounting records are maintained correctly, it may be easy to pick up a trust shortage by deducting the balance of the trust creditors from the balance of the trust funds. If the difference equals zero or is a positive amount, there is no shortage. If the difference is negative, there is a trust shortage which requires an investigation.

There are also cases where trust accounting records are not maintained correctly, and these can be difficult to find. In this case, the perpetrator of the misappropriation, be it the legal practitioner or an employee, may not record all trust creditors as and when they deposit money in the trust account, but engage in the rolling of funds activity, wherein trust creditors are recorded only once the next creditor pays in, and that one is recorded on payment by the next one, and so it continues. Merely looking at the accounting records, without looking at the source documents, namely, the trust receipt books, the bank statement, the record of direct deposits, etcetera, may be misleading and lead to incorrect conclusions about the trust position. Other forms of misappropriating funds may include – writing up of fees prematurely; taking exorbitant fees from customers;

and paying fictitious beneficiaries; etcetera.

## What is required?

There are a number of considerations that legal practitioners should make:

- Legal practitioners should be alive to the fact that legal practices should be founded on a firm foundation and not as a quick money making scheme.
- Legal practitioners should have realistic business expectations. As a general rule, businesses take a lot from the owner before they start generating a profit.
- Legal practitioners should recognise that when things go wrong, as they sometimes will, acting unethically is not the solution as it tarnishes the reputation of the practitioner, the practice and the profession as a whole.
- In reality, a practitioner may not be in a position to do everything and may require the services of other skilled employees, namely, bookkeepers. While the bookkeepers know what they are doing, it is in the practitioner's interest to understand bookkeeping principles and keep an eye on the trust accounting records because the practitioner remains responsible for the trust account.
- Running one's own practice requires close involvement of the legal practitioner in the affairs of the legal practice, it is not for the lazy.

## Conclusion

Doing a reality check should not stop you from pursuing your dream of running a successful legal practice, but should rather awaken you to possibilities of what can happen. Once woken to the possibilities, you will be prepared for a possible eventuality, and plan appropriately.

Sometimes business requires that you act like a tortoise, slowly but focusing on the destination. When storms come, as they sometimes will, just like a tortoise would swirl its feet underneath its shell, roll over with the storm while protecting the vulnerable parts, as soon as the storm is over and they no longer roll but reached a stable position, they release their feet again and continue on their journey. In the same way, you too as a professional and as a business person, grow reserves for your business and protect yourself with the reserves during tough times. Continue to look for opportunities and grow your business when the time is right.

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By  
Moroke  
Phajane

# Why do start-up law firms fail?

**S**tart-up law firms fail as a result of various factors. In 2013, *The Mail and Guardian's Thought Leader* reported that 78 attorneys nationally were struck from the roll in 2012 (William Saunderson-Meyer 'Just trust me I am a lawyer...' [www.thoughtleader.co.za](http://www.thoughtleader.co.za), accessed 4-7-2016). Although these are unofficial statistics and it is not clear what offences were committed by these attorneys, I am certain that most of these disciplinary cases stem from the failure by attorneys to manage sustainable and competitive practices.

But what does managing a sustainable and competitive practice mean? A sustainable and competitive practice, like any other business, is one that is properly positioned to –

- take advantage of the opportunities that present themselves; and
- mitigate against the threats that are posed to it.

Andrew Finlayson, one of the co-founders of a company called Maven Wealth, was asked to reveal the 'secret of being a good entrepreneur' (Carin Smith 'Finlayson brothers tackle wealth management together' [www.fin24.com](http://www.fin24.com), accessed 29-6-2016). He responded by stating that it is '[t]o have the ability to see what the future may hold and translate that vision into a business strategy that you can implement now'. You can only have the ability to see 'what the future holds for the business' if you are properly positioned.

A law firm, like any other business can only be properly positioned if it has a business strategy, which is a plan that sets out how a company will achieve its business objectives. This can be formulated by:

- analysing the firm's current situation in order to determine –
- where the firm wants to be; and
- ascertain how the firm can get to where it wants to be.

## Analysing the firm's current situation

This entails analysing the situation the firm exists or will exist in. This can be achieved by using the analytical tools used by marketers and strategists to conduct a situational analysis, namely, PEST, Competitor analysis, Porter's five forces, and the SWOT analysis, which are discussed below.

- **PEST** is an acronym for political, economical, social and technological factors. Political/legal factors include the regulatory framework the firm operates in. Social factors refer to the demographics of customers (age, geographic location, race and gender mixes) while technological factors refer to the technological advances and innovations, which can have a direct impact on the business.

- **Competitor analysis** involves identifying key competitors, namely, their objectives, strategies, strengths and weaknesses, the fees that they charge, etcetera. It also helps the business to identify gaps in the market for services. The processes followed by the competitors, the technology they use and the people they have hired are also reviewed as part of this exercise.

- **Porter's five forces** is a high level analysis of the competitive rivalry that prevails in the market the firm operates in, the bargaining power of suppliers and buyers and the threat of substitutes. Competitive rivalry can be determined by looking at the number of players in

the market. The more concentrated the market is, the more competitive it would be.

A highly concentrated market may result in customers (buyers) having more bargaining power due to the options available to them. An example of the bargaining power of suppliers is insurance companies that provide legal cover to clients. Such companies have the power to dictate the tariff that will be charged for the services provided by the attorney.

Examples of threats of substitutes include: Companies appointing in-house attorneys to provide legal services in-house instead of briefing external attorneys. In some instances potential clients opt to purchase templates or precedents (namely, wills and lease agreements) that are sold over the counter at some retail outlets instead of procuring the services of an attorney.

- **SWOT** is an acronym for strengths, weaknesses, opportunities and threats. The firm analyses its strengths and identifies opportunities that may be presented by such strengths. By analysing its weaknesses the firm is able to identify the threats that come with such weaknesses and to determine how to mitigate against such threats.

Once a firm conducts a situational analysis, the firm is now in a good position to set out its objectives, determine its marketing strategy and plan how it will achieve such objectives.

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

[www.salvationarmy.org.za](http://www.salvationarmy.org.za)



By  
Siyabonga  
Vusi  
Ntshangase

# CPR for companies failing to convene an annual general meeting: The Companies Tribunal

**T**he Companies Tribunal (the Tribunal) is established in terms of s 193 of the Companies Act 71 of 2008 (the Act) and has been in operation since September 2012. It has jurisdiction throughout South Africa (s 193(1)(a)). It is mandated to adjudicate applications made in terms of the Act (s 195(1)). As part of its adjudication function, the Tribunal adjudicates, among others, applications for an extension of time to convene an annual general meeting (s 61(7)(b)). The Tribunal is empowered by the Act to make any order provided for in terms of the Act in respect of such an application (s 195(1)(a)).

In terms of subs 61(7) of the Act, public companies are required to convene an annual general meeting (AGM). The initial AGM must take place no more than 18 months after the company's date of incorporation (s 61(7)(a)) and thereafter, subsequent AGMs must be convened once in every calendar year, but no more than 15 months after the date of the previous AGM, or within an extended time allowed by the Tribunal, on good cause shown (s 61(7)(a)). All shareholder's meetings (this includes an AGM) of public companies may be held in South Africa or elsewhere, but must be accessible to the company's shareholders for electronic participation as contemplated in subs 63(2), irrespective of the location of the meeting (s 61(10)).

A public company is a profit company that is not a state-owned company, a private company or personal liability company (s 1). Public companies are obliged to convene an AGM (s 61(7)). The AGM provides an opportunity for the Board of Directors to account to shareholders on the overall status and performance of the company. Subsection 61(8) of the Act

requires that among others, the AGM at minimum must provide for presentation of the directors and audit committee reports; audited annual financial statements for the year immediately preceding financial year (s 61(8)(a)(i – iii)); social and ethics committee reports where applicable. Other business that may be conducted at the AGM is the election of directors, as required by law and the Memorandum of Incorporation (MOI); appointment of the auditors and audit committee and matters raised by shareholders (s 61(8)(b), (c), and (d)).

Section 61(7)(b) provides that after the initial AGM, which is in-line with subs 61(7)(a), and on applicant advancing good cause for failure of compliance thus justifying the relief sought. The Act does not define or provide a meaning of the phrase 'good cause'. This requirement is intended to dissuade non-compliance with the Act without substance.

Consequently, s 61(7)(b) of the Act confer powers to the Tribunal to extend the date of a company to convene an AGM. The Act set timeframes that need to be complied with, in regard to the convening of an AGM. However, companies that are required by the Act to convene an AGM within the specified timeframes may apply to the Tribunal for an extension of the time to convene its AGM. The Tribunal will only grant a relief of extension if 'good cause' is shown in line with s 61 of the Act.

It is of utmost importance to note that the Tribunal does not have jurisdiction to extend the time to convene the initial 18 month period from the date of company incorporation to convene an AGM (s 61(7)(a)).

Before filling an application to the Tribunal, an applicant must make sure that the application relates to a matter that

falls within the jurisdiction/authority of the Tribunal. An application must be filed with the Registrar of the Tribunal through registered mail, hand delivery, by facsimile or by e-mail. When applying for an extension of a period to convene an AGM, the documents that should be included in the application are –

- CTR 142;
- a sworn statement of affidavit setting out the facts on which the application for extension of a period for convening an AGM is based;
- a copy of the company's Memorandum of Incorporation as filled with the Companies and Intellectual Property Commission;
- proof of authority to act on behalf of the company; and
- proof of service of the application on interested parties, if any, in any of the methods stated in Table CR3 of Annexure 3 of the Companies Regulations, 2011.

## Conclusion

In summation, AGMs are integral part of company governance. Companies which are required, but fail to convene an annual general meeting are advised to apply to the Tribunal for extension of a period to convene an annual general meeting. Services of the Companies Tribunal are free and there are no fees/costs for filling any application with the Companies Tribunal. For more information, please visit the Companies Tribunal website at [www.companiestribunal.org.za](http://www.companiestribunal.org.za).

Siyabonga Vusi Ntshangase LLB (UKZN) is a research intern at the Companies Tribunal in Pretoria. □

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# Women judges: *Are they doing justice to the cause?*

By  
Diana  
Mabasa

**T**he recent furore in the media caused by the Facebook posts of High Court Judge Mabel Jansen has highlighted the important role of women judges when confronted with issues that affect women. Several organisations such as the Black Lawyers Association, Advocates for Transformation and the South African Women Lawyers Association issued press releases condemning the judge for her perceived racism and bias. Judge Jansen was placed on special leave and a complaint against her was lodged with the Judicial Services Commission (JSC) (see news 'High Court judge granted special leave for Facebook comments' 2016 (June) *DR* 16).

The perception of bias in adjudication

is a cardinal sin. Judges are expected to be impartial. It is one of the essential qualities of a judge. A problem arises when judges are perceived to be biased, as the public outcry in this instance vividly illustrates. The objective of this article is not to discuss whether Judge Jansen is biased or racist. Instead it seeks to shine the spotlight on women judges and their approach to adjudication when deciding issues that particularly affect women such as gender-based violence, femicide and rape.

## Are women judges different?

This question is important considering the endless call for more women on the Bench. So

why do we need more women judges? Do they really make any difference?

If so, what difference? Are they different from male judges?

Gender is the central theme in all these questions. It rests on the as-

sumption that men and women approach adjudication differently. These gender based claims are contested and steeped in controversy. They are based mostly on the views expressed by American psychologist Carol Gilligan in her book, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982). These arguments assume that women follow a different reasoning process and that women approach adjudication in a different manner.

This notion that men and women approach adjudication in a different manner has been discredited by recent studies. Sally Kenney, a prominent feminist political scientist in the field of comparative law makes a compelling case for more female representation on the Bench in her book *Gender & Justice: Why Women in the Judiciary Really Matter* (UK: Routledge 2013).

She argues that the impact of gender on judging does not have to be based on the elusive 'difference.' It can be approached from another angle, which does not simply ask the question whether women judges decide cases differently from men. This approach is too narrow and simplistic because of its focus on essential sex differences. Instead, she constructs a powerful argument that sex as a variable (sex as a biological

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category), can be instructive only if it is coupled with gender as a social process. She emphasises the fact that gender is not a category but a social process that actively differentiates by sex and devalues women and the feminine.

In her research she found that the individual experiences of judges, which include the experience of gender-based exclusions, may cause them to interpret facts differently from judges without those experiences. This implies that when it comes to adjudication, a myriad of other identity characteristics and factors such as class, religion, ethnicity, life experience and affinities (such as one's political party or judicial philosophy) and approach to constitutional interpretation may have a greater influence on adjudication than sex. Her forceful argument is that the gender of the judge is important – not because men and women are inherently different as people but at least sufficiently differently positioned, and as a result there are cases where their perspectives and interests might diverge. This positioning should make a difference when considering gender-based issues.

## Gender and adjudication

This positioning can be instructive when considering disadvantage based on gender as suggested by legal academic, Professor Katharine Bartlett in 'Feminist Legal Methods' (1990) 103 (4) *Harvard Law Review* 829. Prof Bartlett proposes a strategy for feminists to move beyond traditional judicial methods in the process of legal reasoning. Her justification for this approach is that traditional legal methods and existing legal rules often do not take into account the perspectives of women and other excluded groups. She developed a methodology of legal analysis that highlights the critical importance of an awareness of bias for feminists in the methods they apply when 'doing law.'

## Asking the 'woman question'

Prof Bartlett argues that when feminists 'do law' – they do what other lawyers do: They use the full range of methods of legal reasoning to arrive at a conclusion. In addition to these, they use other methods in an attempt to reveal features of legal issues, which more traditional methods tend to overlook or suppress. One of the methods, which she describes as asking the 'woman question' is designed to expose how the substance of law, silently and without justification, submerge the perspectives of women and other excluded groups. The 'woman question', or rather set of questions, is designed to identify the gender implications of rules and practices, which may otherwise appear to be neutral or objective. These are loaded questions which

insist that rules must be applied in a way that does not continue to disadvantage women. The justification for asking the 'woman question' is to expose features in law that are not only non-neutral but distinctly male. Asking the 'woman question' means examining how the law fails to take into account the experiences and values that seem more typical of women, than of men, and how existing legal standards and concepts may disadvantage women. It exposes the hidden discrimination and bias in substantive rules. Without asking the 'woman question', differences associated with women are taken for granted, and unexamined, they may serve as justification for laws that disadvantage women. It reveals how the position of women reflects the organisation of society rather than the inherent characteristics of women. Difference can be located in relationships, social institutions and child rearing patterns, not in women themselves. Social structures may embody norms that implicitly render women different and thereby subordinate.

When an adjudicator takes this approach, it requires an active search for gender bias, reaching a decision that is defensible in the light of that bias. It demands special attention to interests and concerns that may, and historically have been overlooked. The substance of asking the 'woman question' lies in what it seeks to uncover; disadvantage based on gender. Beyond gender it is also useful as a model of inquiry into the consequences of overlapping forms of oppression for other excluded groups.

Prof Bartlett also developed Feminist Practical Reasoning. The idea behind this approach is to expand the traditional notions of legal relevance, and to make legal decision making more sensitive to the features of a case not already reflected in legal doctrine. It demands more than some reasonable basis for a decision. The decision maker must give actual reasons for a decision. Where there are choices to be made the agent who makes them must admit to those choices and defend them.

More importantly, this approach supports the idea advanced in this article that one cannot, and should not, eliminate political and moral factors from legal decision-making. To the contrary, these factors should be brought to the surface and acknowledged. In this process of engagement with those factors, decision makers are forced to think self-consciously about them, and to justify their decisions in the light of facts of the case.

It is critical to expose and open up the debate concerning underlying political and moral considerations. So-called neutral forms of decision-making mask, and do not eliminate political and moral considerations from decision-making. They

tend to drive the bias of the decision-maker underground and these biases do not serve women's interests well. Contextualised methods of reasoning allows for greater understanding and exposure of injustice because it considers not only the legally relevant but also the actual experiences of women and other marginalised groups.

According to Karl E Klare in 'Legal Culture and Transformative Constitutionalism' (1998) 146 *SAJHR* at 163, is now uncontroversial that the political and moral values of judges play a routine, normal, stubbornly persistent, yet unacknowledged role in adjudication. In the evaluation of a legal decision it is perfectly acceptable, perhaps even compelling, to examine the underlying moral and political convictions of the judge.

## Conclusion

The critical insight drawn is that a judge's personal or political values and sensibilities cannot be excluded from the interpretive process or adjudication. Judges should acknowledge the importance of values and experiences on judicial interpretation. This approach is congruent with transformative adjudication without necessarily negating the supreme judicial virtues of neutrality and impartiality. Justice Pius Langa in 'Transformative Constitutionalism' ([www.msu.ac.za](http://www.msu.ac.za), accessed 29-6-2016) confirms this view:

'At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the "personal, intellectual, moral or intellectual preconceptions" on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under Apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.'

In a country such as ours – where violence against women and children has reached pandemic proportions – women judges can and must make a difference. Women judges must acknowledge their unique position and powerful role in exposing injustice and disadvantage based on gender. Women judges must be the progressive voices, who in embracing a transformative approach to interpretation and adjudication can make the world a safer place for all.

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# Understanding parole – *an in-depth discussion continued*

By Dr  
Llewelyn  
Gray  
Curlewis

**T**his article is an attempt to explain and facilitate the basic functioning of the parole system and purports in no way to be comprehensive or without fault.

Any person serving any sentence in a correctional centre and who, based on the written evidence of more than one medical practitioner – of which one must be a specialist treating such person – is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner of the Correctional Supervision Parole Board or the court, as the case may be, to die a consolatory and dignified death.

Placement of medical grounds is always based on set conditions and such an offender is subjected to strict conditions and monitoring until the sentence expires. These conditions must be accepted by the offender before he or she can be placed on medical parole grounds.

As mentioned *supra*, the court also has a role to play in respect of offenders serving life sentences.

Having considered the record of proceeding of the Correctional Supervision and Parole Board and its recommendations in the case of an offender sentenced to life imprisonment, the court may, subject to the provisions of s 73(6)(b)(iv) of the Cor-

rectional Services Act 111 of 1998 (the Act), grant parole or day parole or prescribe the conditions of community corrections in terms of s 52.

Where the court refuses or withdraws parole or day parole the matter must be reconsidered by the court within two years.

Parolees or probationers are subjected to certain parole or supervision conditions throughout their parole or supervision period, in terms of s 52. The parolee or probationer should accept the conditions before placement. These conditions are stipulated in s 52 of the Act, and, *inter alia*, include –

- placement in house detention;
- performing community service;
- seeking employment;
- taking up and remains in employment;
- paying compensation or damages to victims;
- taking part in treatment, development and support programs;
- participating in mediation between victim and offender or family group conferencing;
- contributing financially towards the cost of community corrections to which he or she has been subjected;
- being restricted to one or more magisterial districts;
- living at a fixed address;
- refraining from using or abusing alcohol or drugs;
- refraining from committing a criminal offence;

- refraining from visiting a particular place;
- refraining from making contact with a particular person or persons;
- refraining from threatening a particular person or persons by work or action;
- being subject to monitoring; and
- in the case of a child, being subject to the additional conditions as contained in s 69.

On placement on parole, every parolee is integrated into the parole supervision system where he or she is subject to certain supervisory measures until the expiration of his or her total sentence. A 'Supervision Committee' in terms of s 58 of the Act is responsible to oversee and review such measures from time to time.

If a person subjected to community corrections, has failed to comply with any aspect of the conditions imposed on him or her, the Commissioner of Correctional Services may, in terms of the Act, and depending on the nature and seriousness of such non-compliance:

- Reprimand the person.
- Instruct the person to appear before the court, or Correctional Supervision and Parole Board or other body which imposed the community corrections.
- Issue a warrant for the arrest of such person.
- Must – if he or she is satisfied that the person has a valid excuse for not complying with any such condition or duty – instruct that the community corrections be resumed subject to the same conditions or duties applicable to that person.

The parole or the correctional supervision of the parolee or probationer who did not comply with the conditions may be revoked and the offender may be detained in the correctional centre to serve the unexpired portion of the sentence.

The Parole Board makes the final decisions but there are instances where the minister or the commissioner may refer the matter to the Correctional Supervision and Parole Review Board (the Review Board) for reconsideration. In such cases, the record of the proceedings before the Parole Board must be submitted to the Review Board.

The members of the Review Board are selected from the National Council and consists of –

- a judge as a chairperson;
- a director or a deputy director of Public Prosecutions;
- a member of the Department of Correctional Services;
- a person with special knowledge of the correctional system; and
- two representatives of the public.

On consideration of a record submitted in terms of s 75 of the Act and any submission which the minister or commissioner may wish to place before the Review Board, as well as such other evidence or argument as is allowed, the Review Board must –

- confirm the decision; or
- substitute its own decision and make any other order, which the Correctional Supervision and Parole Board ought to have made.

The Review Board must give reasons for its decision, which are to be made available to the minister, commissioner, the offender and the Correctional Supervision and Parole Board concerned in a specific matter and all other Correctional Supervision and Parole Boards for their information and guidance.

It is important to note that, unlike with Parole Boards, the offender does not have access to the Review Boards.

Another issue, which seems to further complicate the parole debate in the media and between so-called 'legal experts', involve the capturing of different types of dates for placement consideration.

After a sentenced offender with a determinate sentence has been admitted, dates must be calculated, entered on the warrant and captured on computer. These dates are of importance, as it is an indication for the Case Management Committee and the Parole Board when an offender can be considered for possible placement.

Dates	Description
<b>Maximum release date.</b>	This is the date on which the imposed determinate effective sentence expires before amnesty or special remission of sentence is deducted.
<b>Sentence expiry date.</b>	This is the date when the total determinate sentence expires after amnesty and/or special remission of sentence has been deducted from the maximum date.
<b>One-sixth of sentence.</b>	This is the date on which the conversion of the sentence into correctional supervision can be considered, provided that such sentence was imposed in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (CPA).
<b>One-third of sentence.</b>	Half of sentence minus credits, which may not exceed one-third of such sentence. This is the date on which an offender can be considered for possible placement on parole. <b>Note:</b> This is only applicable to those offenders sentenced prior to 1 October 2004.
<b>One-quarter of the sentence.</b>	This is the date on which possible conversion of a sentence of five years and less or where the remaining portion of sentence are not more than five years, can be considered in terms of s 276A(3)(a)(ii) of the CPA and s 42(1)(c) of the Act.
<b>One-half of sentence if the court did not indicate a non-parole or 25 years, whichever is the shortest.</b>	This is the date on which the placement on parole of an offender should be considered. It is known as the minimum detention period (subs 73(6) and 73(7)) of the Act.
<b>Four-fifths of sentence.</b>	The court may make a ruling that two-thirds of a sentence may be served instead of four-fifths. If a sentence was imposed in terms of s 52(2) of the Criminal Law Amendment Act 105 of 1997 for an offence mentioned in sch 2 of the Criminal Law Amendment Act, the offender may then only be considered for parole.

Where the court determined a non-parole period, namely, the parole can only be considered after that date, the non-parole period may not exceed two-thirds of the relevant sentence imposed. The non-parole period may not be specified by the court for sentences less than two years.

An offender sentenced to life imprisonment must serve 25 years' before parole can be considered and referred back to the court *a quo* for approval or disapproval. However, an offender may be considered for parole when he or she has reached the age of 65 and he or she has served at least 15 years' of his or her sentence (only new admissions after implementation of the 1998 Act).

The new release policy and Act is not applicable to those offenders and including offenders serving life imprisonment (lifers) who were in the system before the implementation of Act. The minimum detention of lifers who were in the system prior to the implementation of new legislation remains 20 years of their sentence, and it must be referred to the minister after completion of 20 years' imprisonment, who in turn, will request the National Council to advise him or her.



An offender sentenced in terms of s 286(a) of the CPA, and declared as a dangerous criminal must be referred to the court on the date determined by the court, for example, the full period is served as specified by court.

An offender declared as habitual criminal must serve at least seven years before parole can be considered, but should be released on completion of 15 years of such sentence.

The Parole Board may request recommendations from the South African Police Service (SAPS) and Justice regarding certain categories of offences. Such recommendations must be submitted to the Parole Board in writing within two months of being requested (s 75(1A)(a) of the Act).

The profile submission date must be six months prior to completion of the minimum detention date. On this date a profile report must be submitted to the Correctional Supervision and Parole Board by the Case Management Committee.

The aforementioned is only applicable on those offenders who are serving sentences of longer than two years of imprisonment to allow for:

- Adequate time to request a report from the SAPS and or Justice Department, in terms of s 75(1A)(a) of the Act.
- Adequate time for offenders to undergo a pre-release programme and to seek jobs, prior to being placed out on parole or supervision, immediately after the minimum detention period arise.

The profile submission date for those offenders sentenced to less than two years' imprisonment remain two months before their consideration date.

The abovementioned methods of calculations are only some of the most frequently used and numerous other variations which are applied from time to time. I do not deal with those in this article, but young practitioners should familiarise themselves with those as well (eg, days served before release on bail pending appeal). The *CSPB Manual* (2005) provides, for example, the calculation of 'fractions of days/months/years'. In short, it may sometimes prove to be very difficult to determine

exactly when a person is eligible for parole or correctional supervision.

It must be mentioned that the minister apparently does not have the prerogative to alter 'medical parole' (once granted) into ordinary parole (see *S v Shaik and Others* 2008 (2) SA 208 (CC)). The minister, however, may intervene when a prisoner is still serving life-imprisonment (see *Derby-Lewis v Minister of Justice and Correctional Services and Others* 2015 (2) SACR 412 (GP)). What is even more frustrating is the fact that in many of these matters, no legislation, case-law or guidance exists, since they often represent a 'first of a kind' for the country. Why would anyone being terminally ill even apply for the alteration of medical-parole into ordinary parole? The only real answer seems to be that the last mentioned affords, for example a better opportunity to travel, (ie, greater freedom of movement). Readers will recall that Schabir Shaik served two years and four months of his 15 year sentence of imprisonment before he was granted medical-parole some seven years ago. He was according to the Department of Correctional Services (see Virginia Keppler 'Minister kan nie inmeng by Shaik' *Beeld* 25 Februarie 2015 and 'Jammer, Schabir Shaik, jy't jou eie bed gemaak' *Beeld* 25 Februarie 2015) in his final stages of a terminal illness.

In the light of the abovementioned procedural rules and relevant considerations I leave it up to each reader to decide for himself or herself whether the law was applied correctly in the matters of, for example, Schabir Shaik, Clive Derby-Lewis and Oscar Pistorius.

• See also 'Understanding imprisonment – an in-depth discussion 2016 (June) DR 34 and 'Understanding parole – an in-depth discussion' 2016 (July) DR 34.

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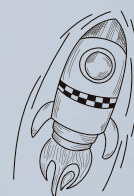
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# A scientist and a lawyer walk into a courtroom ...

By  
Dr David  
Klatzow and  
Peter Otzen



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**'N**o less dangerous are the mistakes of [forensic] expert witnesses. Blind confidence of the court in the authority of expert witnesses is responsible for many a wrongful conviction' – Max Hirschberg (Max Hirschberg 'Wrongful Convictions' (1940) *Rocky Mountain Law Review* 20).

The article by Dr Tapiwa Shumba 'Legal forensic education: Crossing the divide between law and science' (2016 (March) *DR 14*) has raised the inevitable question of whether our country's professionals are at all skilled enough to address the scientific needs of the legal system. Dr Shumba writes that '[t]he invasion of science in our criminal justice system is a global phenomenon' and seemingly indicates a degree of ambivalence towards the scientific fraternity which 'invades' the legal world.

Several things must be pointed out in response to Dr Shumba. Many, if not most, criminal cases require a significant scientific component in order to link a suspect to the offence. Less well known and appreciated is the central role that forensic science plays in civil matters. Many insurance claims ranging from –

- fires (arson);
- fraud (document examination);
- equipment failure (forensic engineering);
- accident reconstruction (forensic physics); and

- more require a proper understanding of forensic science.

There is, therefore, no invasion of science into law; science and law have always existed together, and it is science which gives legal practitioners the power to turn on the lights and to reveal the truth to the courts in many complex matters.

Dr Shumba later states that there is a need to mitigate the effects of the new wave of scientific advancements impacting on the administration of justice. If anything needs to be mitigated, the real need is to mitigate the effects of state-caused incompetence in the forensics departments, and to ensure that justice is neither delayed, nor denied, merely on the grounds of scientific ineptitude among state employees. Such mitigation can only come from a concerted effort by legal practitioners and the courts.

When it comes to matters, which have a scientific aspect, legal practitioners are prone to rely either on their own understanding of science, or defer to the inevitable expert, if the client can afford the cost of the latter. The unfortunate consequence of legal practitioners failing to understand science fully is that they can be only too easily persuaded to accept an expert's point of view, or if the practitioner is acting alone, is personally unable to intertwine law and science for the benefit of their client. What legal practitioners need to know is that science is an

area filled with pitfalls and uncertainty, and that it is a path over which many self-proclaimed experts themselves are subject to stumble over misconceptions and errors.

Although some universities have now started stand-alone forensic science courses, few of these are incorporated into the legal curricula, which in itself presents problems. Much of what passes for forensic science training is an apprentice-like instruction by older practitioners, often with little or no formal scientific education. Much of this has come under severe scrutiny following the publication of the National Academy of Science Report 'Strengthening Forensic Science in the United States – A Path Forward' (National Research Council of the National Academies 2009 ([www.ncjrs.gov](http://www.ncjrs.gov), accessed 29-6-2016)). This followed on from the debacle where the Federal Bureau of Investigation incorrectly identified a fingerprint from the Madrid Bombing belonging to Brian Mayfield, who was a lawyer in the United States and incidentally had not left the country for many years (see commentary by Paul C Giannelli 'The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories' (1997) 4 *Va J Soc. Pol'y & L* 439).

Much of the comparative science used in ballistics, bite mark analysis, fingerprinting and tool mark analysis has been shown to be highly subjective and easily



swayed by irrelevant collateral information. In a 2006 paper by Dr Itiel E Dror and David Charlton 'Why experts make errors' 2006 56(4) *Journal of Forensic Identification* 600 – 615, Dr Dror outlines how he labelled certain prints as having come from the (by now notorious) Mayfield case ('A review of the FBI's handling of the Brandon Mayfield case [www.oig.justice.gov](http://www.oig.justice.gov), accessed 7-7-2016) and sent them, labelled as Mayfield's prints, to five senior fingerprint examiners who had previously linked those prints to a certain suspect in the Mayfield case. Once (falsely) informed that the prints were Mayfield's the examiners were unable to link the prints to the same suspect that they had previously linked them to. This all in a subject which claims complete accuracy and certainty. Similar fingerprint misidentification occurred in the case of Shirley McKie ('Scottish Parliament Justice 1 Committee Report: Inquiry into the Scottish Criminal Record Office and Scottish Fingerprint Service' [www.archive.scottish.parliament.uk](http://www.archive.scottish.parliament.uk), accessed 7-7-2016) in Scotland (David Klatzow *Justice Denied* (Penguin Random House South Africa 2014) at 53).

The advent of forensic DNA analysis has come as a mixed blessing to the forensic science community. It has been able to shine a brilliant light into some

dark corners of forensics, resulting in a discrediting of much 'forensic science', which has convicted many innocent people.

A significant part of the problem derives from forensic scientists who may be incompetent, unquestioning and in some cases, downright fraudulent. Another major factor is the inability of the legal profession (with some exceptions) to penetrate the veil of bogus 'forensic science'. One needs only to read the contemporary literature to see that much cross-examination cuts no deeper than a superficial scratch.

We now know that much of what passed as forensic science, including, eyewitness identifications; confessions; and the material which purports to 'strengthen forensic science' has been shown to have metaphoric feet of clay. A new generation of lawyers, which are prepared and able to understand the deeper workings of science, will find that their ability to cross-examine and get to the ultimate truth is vastly strengthened by a basic understanding of scientific and forensic principles. The first step, however, is for legal practitioners to gain the necessary scientific skills while still at university.

Professor Meintjies van der Walt is a pioneer of this way of thought in South

Africa. Her line of teaching needs to be instituted at every faculty. The purpose is not to make lawyers into scientists but to create an informed fraternity who know when to seek scientific help, and who are able to extract the fullest from such scientific advice.

Our universities should divorce their forensic departments from the state and the police, and should begin to question dogma rather than teach it, particularly when so much of that dogma is plainly wrong.

Rather than shunning the relatively unknown ugly duckling – which is forensics and science – the legal system should encourage the grass root development and use of science and the law, so that the system of precedent and the publication of ground-breaking cases can serve to inform further our legal practitioners and bring justice where it is needed. Only when fully given room to grow, will the ugly duckling of forensic science develop into the swan which it has the potential to be.

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## Mental health in South Africa – a cause for concern?

By  
Saul  
Leal

We are living in a singular era where we are able to diagnose that which has previously been unknown.

Frantz Fanon dedicated his life to defend a more human approach in terms of mental disorders and the treatment of patients, following the breakdown of the prison-like characteristics of old mental hospitals. Fanon followed the African principle of *ubuntu* in his undertaking of treatment, because, he argues, '[w]e are not simply "thrown" into the world; we are propelled toward it and other people. We want "to touch the other, feel the other, discover each other". Our primordial ethical orientation is one of intersubjectivity' (Hudis *Frantz Fanon: Philosopher of the Barricades* 5ed (London: Pluto Press 2015) at 5). He calls for a world of 'reciprocal recognitions' (Hudis *op cit*) at 6).

Fanon exhorted society at large to have respect for the dignity of the human being, including the mentally ill. As Hudis remarks, this 'had clearly been one of the central motifs in Fanon's work since he began thinking about the intersection between philosophy and psychology' (Hudis *op cit*) at 60). Hudis further explains that Fanon 'continued to challenge the prison-like character of mental institutions by embarking on such projects as building a theater and soccer stadium

for inmates, creating a school for nurses, and introducing an open clinic for those suffering from mild cases of mental illness' (Hudis *op cit*) at 65). Fanon tried, as a psychiatrist, to reach the patients' humanity (Hudis *op cit*) at 15).

Joseph Wolpe, like Fanon, is considered to be a hero of the 'psychological revolution'. Wolpe adopted the theory and method of the Russian physiologist Ivan Pavlov, who showed that an animal's fear could be extinguished by gradually exposing the animal to the object of its fear. Wolpe was concerned that this behavioural treatment might be quite stressful, so he turned to 'a modified extinction procedure in which people were taught to relax and [were] then exposed in imagination to the fear-evoking stimuli' (R Layard and DM Clark *Thrive: The Power of Psychological Therapy* (London: Penguin Random House 2014) at 133). According to the experience, when the fear of the imagined object declined, 'people were encouraged to expose themselves to the real thing' (Layard and Clark *op cit*) at 133). This technique led to a therapeutic breakthrough.

Layard and Clark state that by applying this type of behaviour therapy, Wolpe found his patients recovering quickly (Layard and Clark *op cit*) at 9). This breakthrough brought about an incomparable development of cognitive behav-

ioural therapies. They also note that to ensure that the new treatments could have reliable results, Wolpe 'developed manuals of good practice which any well-trained practitioner with enough empathy could apply' (Layard and Clark *op cit*) at 9). Wolpe, alongside Fanon, envisaged empathy as being a trustworthy pathway to the introduction of a new humanism in the treatment of the mentally ill (Layard and Clark *op cit*) at 9).

The Constitution inherently upholds the principle of empathy as promulgated by Fanon and Wolpe. The explicit protection of the right to mental health assures psychological integrity, as well as well-being, welfare, and quality of life. This establishes a manner in which the ideal of a new beginning for future generations could implement Fanon's form of new humanism.

The Constitution granted the opportunity for dialogue regarding people with mental disorders insofar as it is granted the right to mental health (s 28(1)(f)(ii)). Apart from recognising the right to mental health, it is also granted the right to psychological integrity. Section 12(2) of the Constitution states that: 'Everyone has the right to bodily and psychological integrity, which includes the right -

...

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.'

These provisions show an attentive framework related to the medical necessities of the physical and psychological aspect of an individual's life. The text provides for 'psychological integrity' in addition to 'bodily integrity', breaking down the culture which emerged after the World War II according to which people's dilemmas would be solved by meeting material and physical needs.

The Constitution also provides the right to healthcare services (s 27(1)(a)). It repudiates any form of unfair discrimination, directly or indirectly, against people with, among other things, disabilities (s 9(3)). If one were to assume that mental health requires care with a special form of security, it requires a broader protective interpretation to s 198(a), according to which national security must reflect the resolve of South Africans, as individuals and as a nation, 'to be free from fear and want and to seek a better life.' It is a true protector statute to the mental health.

I refer to the right to happiness in terms of the Constitution's assumption of the duty to improve the quality of life of South Africans, as stated in the preamble, as well as its regulations, which render welfare services to fall under the functional areas of concurrent national and provincial legislative competence (sch 4, part A). Furthermore, the Constitution embraces, in five different circumstances, the task of looking after the people's wellbeing.

Quality of life, wellbeing and welfare comprise two dimensions:

- an objective approach, the content of which is based on the realisation of material goods, such as the effective access to socio-economic rights, and
- a subjective perspective, constituted by immaterial goods, things that seem to be intangible or subjective, such as happiness. The quantity of material possessions is not the only means to measure a life; the quality of life is also crucial. Therefore, lives must be qualitatively assessed.

The Constitutional provisions are not empty promises. Layard and Clark assure that different medical systems have different ways of measuring the quality of life, and explain that there is a standard set by the World Health Organisation (Layard and Clark (*op cit*) at 188). This quality of life is tied to the right to happiness, as NJ Udombana explains, '[l]ife is primarily about promoting human dignity, happiness and values' (NJ Udombana 'A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations' (2005) 38 *The John Marshall Law Review* 1153 at 1202).

In sch 2 of s 1, the Constitution pres-

ents the oath or solemn affirmation of the President and Acting President, which contains the following statement: 'I ... devote myself to the wellbeing of the Republic and all of its people' (The same is applicable to the Vice-President (s 2). Likewise, the Niger's Constitution of 2010 states by its article 50 that before entering into his functions, the President of the National Assembly takes an oath by promising 'to work tirelessly for the happiness of the People'. The oath is echoed in Thomas Jefferson's statement that '[t]he care of human life and happiness ... is the ... only legitimate object of good government' (Layard and Clark (*op cit*) at 244).

In South Africa, the substitution of the word 'happiness' for the neutral expression 'wellbeing' it is a product of legislative policy, unable to erase the historical perspective that shows the reference of happiness in past documents. Article 81 of the Constitution of the South African Republic, 1858 stipulated the following oath by the President before the Volksraad: 'I promise and swear solemnly, that I shall ... act according to the Constitution of the Republic, and intend alone the furthering of the happiness and welfare at large of its inhabitants' (see Chapter II of the Constitution of the South African Republic. See also: H Williams & F Charles Hicks (eds) '*Selected Official Documents of South Africa and Great Britain A Documentary perspective of the causes of the War in South Africa*' (1900) *The Annals of the American Academy of Political and Social Science* (www.jstor.org, accessed 23-6-2016) at 27).

The Constitution builds a barrier trying to minimise the inevitable presence of pain in people's life. Pain must not be understood in a narrow way. Psychological pain is no less important than physical pain. They are equally real, and both are experienced 'in exactly the same brain areas ... (the anterior cingulate cortex and anterior insula)' (Layard and Clark (*op cit*) at 34). Additionally, it appears that to be stigmatised, to face prejudice, and to be denied in terms of the right to preserve one's sense of self-esteem are all causes of severe psychological pain.

Mental illness brings about both pain and stigma, as many people are ashamed of being mentally ill. This stigma is what causes mental illness to become 'the biggest single cause of misery in modern societies ... :

- Mental illness causes more of the suffering in our society than physical illness does, or than poverty or unemployment do' (Layard and Clark (*op cit*) at 63). Stigma is also associated with the guilt which is often felt by relatives of the mentally ill (Layard and Clark (*op cit*) at 7).

In the Constitution, the only provision that speaks about 'enjoyment of all rights and freedoms' is that which

reprehends any form of discrimination against people with disabilities. Section 9 provides that: 'Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms'.

But what about mental disability? The question remains whether the state regards mentally ill individuals in the same way in which it regards individuals with physical disabilities. Would an individual who has been diagnosed with depression be treated with the same regard as an individual with a fractured arm, if that individual were admitted to hospital? These questions illuminate the issue of the possibility of a new culture of humanism with regard to mental health.

The Constitution is clear in assuring that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including mental disability (s 9(1)(2)(3)). Therefore, it is necessary to surpass the paradigm of contempt that has been controlling the perverse scenario of discrimination against people with mental disorders before the state.

It is important to note that s 41 of the Constitution, which addresses the principles of cooperative government and intergovernmental relations, provides that: 'All spheres of government and all organs of state within each sphere must –

...

secure the wellbeing of the Republic' (the sole para of s 23 of the Brazilian Constitution provides that supplementary laws will establish the norms for the cooperation between the Federal Government and the States, the Federal District and the municipalities, in view of the equilibrium of the development and of the 'wellbeing' on a national level). This provision has a clear goal, namely, the preservation of the public virtue, implemented through the understanding and the support of the individual's right to the pursuit of happiness.

By embracing wellbeing in strategic points of its Constitution, South Africa recognises mentally ill individuals in order to establish the necessary normative opening for the celebration of the right to happiness. Wellbeing translates concerns about its objective content, such as health care services, as well as the subjective aspects, a sense of self-respect and self-esteem.

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# Entitlement to pension interest on divorce – a reply

By  
Clement  
Marumoagae

**S**outh African High Courts have, in divorce proceedings, inconsistently applied the concept of pension interest when parties were married either in community of property or out of community of property with the application of the accrual system (see Merike Pienaar 'Does a non-member spouse have a claim on pension interest?' 2015 (Dec) DR 38). That in itself does not mean that there is doubt surrounding a claim that a non-member spouse of a member of a pension fund has against the pension interest of such a member. This article discusses the conundrum of whether a non-member spouse has a right to claim the pension interest of his or her spouse during divorce. I will illustrate that the court does not have discretion whether or not to grant the pension interest to the party claiming it, but rather that such a party would be entitled to the pension interest by virtue of the marital regime applicable to his or her marriage as well as the deeming provision of the Divorce Act 70 of 1979 (the Divorce Act).

## Pension interest and the deeming provisions

According to Pienaar (*op cit*) 'It seems to be clear from the wording of s 7(7)(a) of the [Divorce] Act that the legislature intended that a member spouse's pension interest should form part of his or her estate on divorce. Although we can only speculate as to the reasons why s 7(7)(a) of the Act was promulgated, one of the reasons could have been an attempt to address the social dynamics characterising the predominant marital arrangement pre-1984.' Due to women's low earning capacity and the prejudice they experienced before the 1989 amendments to the Divorce Act when they divorced, the South African Law Commission recommended the sharing by the non-member spouse of the member spouse's pension interest in accordance with the marital regime applicable to their marriage (Discussion Paper 77: Project 112 'Sharing of Pension Benefits' 31 July 1998 at 9 ([www.gov.za](http://www.gov.za), accessed 29-6-2016)). It is interesting nonetheless that the commission did not recommend that the pension interest should form part of the joint estate, but rather suggested a mechanism which can be used to allow the

non-member spouse to be able to have a claim to the pension interest of his or her spouse when it accrues. The commission made it clear that the non-member spouse should be entitled to make such a claim, and ultimately recommended that 'the pension interest of a member of a pension fund should, for purposes of the division of the assets of the spouses on divorce, be deemed to be part of the assets of the member spouse' (Discussion Paper (*op cit*) at 9 - 10). This recommendation was implemented when the Divorce Act was amended in 1989 with the incorporation of subss 7(7) and 7(8) to the Divorce Act. Section 7(7)(a) of the Divorce Act states that: 'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, ... be deemed to be part of his assets'. While it is true that our courts have been very inconsistent when interpreting the pension interest, it is not accurate to say that there is doubt as to whether the pension interest falls within the joint estate or not. I submit that the Divorce Act through its deeming provisions provides

able for division and not necessarily that it is part of the joint estate. While it remains unclear as to why the commission recommended the deeming provision rather than treating the pension interest as an ordinary patrimonial benefit, it is important also to realise that s 7(7)(a) deliberately avoids the phrase 'joint estate' and instead uses the phrase 'his estate'. This illustrates that the pension interest is actually deemed to be part of a member's 'personal' estate and not the joint estate. As the law currently stands, the pension interest is not treated the same way as other patrimonial assets, which are due for division when the parties divorce. The rationale behind the current position remains unclear, and neither the courts nor the legislature have provided clarity in this regard.

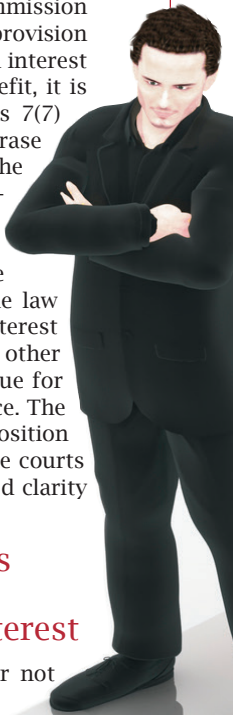
## Non-member spouse's entitlement to the member's pension interest

The issue regarding whether or not



that the pension interest does not ordinarily form part of the joint estate, but it is conveniently shifted into the joint estate when the parties divorce in order to allow the non-member spouse to share therein. My understanding of the deeming provisions is that the pension interest is taken 'as if' it is an asset which is avail-

the pension interest automatically becomes part of the joint estate by operation of law is subject to controversy as a result of inconsistent application of this issue by various divisions of South African High Courts when parties are divorcing (for a thorough discussion on the said inconsistencies see MC Marumoagae 'A non-member spouse's entitlement to the member's pension interest' (2014) 17(6) *PER* at 2503 ([www.nwu.ac.za](http://www.nwu.ac.za), accessed 29-6-2016)). Such inconsistencies have led to a debate relating to the 'entitlement' if any, which non-member spouses have on the pension interest of





their member spouses. According to Pienaar (*op cit*) '[i]t is clear from contrasting decisions ... that there is currently no certainty regarding a non-member spouse's entitlement to a pension interest where the issue has not been dealt with in the divorce order.' Pienaar relying on PA van Niekerk *A practical guide to patrimonial litigation in divorce actions* (Durban: LexisNexis 2011), incorrectly in my view, argues that 'parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate'. I submit that this observation is seriously misleading, firstly, because the value in percentages, which should be accorded to the non-

member spouse should be clearly stipulated in the pleadings and not merely considered by the court. Further, the court should order the pension fund concerned to endorse its records and pay over to the non-member spouse what is due to him or her any time after the order has been made in terms of s 7(8) in accordance with the clean-break principles as provided for in s 37D(4) of the Pension Funds Act 24 of 1956 as amended (see Marumoagae 'Breaking up is hard to do, or is it? The clean-break principle explained' 2013 (Oct) *DR* 38). Secondly, because the commission in its recommendations left the issue of '[t]he non-member's spouse's entitlement to a share of the member spouse's pension interest on divorce ... to be determined by the rules of the matrimonial property dispensation applicable to the marriage' (Discussion Paper (*op cit*) at 10). This simply means that the marital regime of the parties determines whether or not the non-member spouse would be entitled to the pension interest of the member spouse. If parties are married in community of property or with the ap-

plication of the accrual system (unless excluded in the antenuptial contract) then the non-member spouse would be entitled to share in the pension interest of the member spouse as a right. Such a right is established by the marital regime and then consolidated by the

may do so by way of motion proceedings after the divorce decree is granted'.

## Concluding remarks

Pienaar (*op cit*) correctly points out that the discretion which has been awarded to courts in s 7(2) when adjudicating over spousal maintenance disputes is not present in the context of pension interest orders in terms of s 7(7)(a) of the Divorce Act. However, Pienaar seems to suggest that the court has some sort of discretion as far as s 7(8) of the Divorce Act is concerned, which provides that: '... the court granting a decree of divorce of a member of such a fund, may make an order that –

(1) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to that other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member'.

I am of the view that despite using the word 'may', this section does not grant the court a discretion to do or not do anything. Actually, this section guides the court once the non-member spouse has established his or her entitlement to his or her spouse's pension interest in accordance with s 7(7)(a) of the Divorce Act to order payment of what is due to such a non-member spouse. Once such entitlement has been established, then the court does not have a discretion to refuse to grant such an order. In other words, once the non-member spouse has satisfied the court that the deeming provisions are applicable to him or her, he or she automatically acquires a legal entitlement for the court to order payment of whatever percentage of the pension interest has been pleaded and proved before the court to him or her by his or her member spouse's pension fund scheme. As such, the court cannot 'exercise its discretion' and refuse to grant such an order based on what it considers fair or equitable under the circumstances, as Pienaar suggests (*op cit*). Contrary to Pienaar's contention, the court cannot *mero motu* decide that the non-member spouse is not entitled to the pension interest for reasons relating to substantial misconduct, unless the member spouse has pleaded and argued for forfeiture of patrimonial benefits in accordance with s 9(1) of the Divorce Act.

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Picture source: Gallo Images/Stock

# Too quick to execute – *how does SA's new rules on sale in execution compare internationally?*

By  
Douglas  
Shaw

**I**n January, the Rules Board submitted new rules for comment on the execution of immovable properties, an area of law where South Africa's (SA) laws badly lag the rest of the world ([www.justice.gov.za](http://www.justice.gov.za), accessed 30-6-2016). There is considerable improvement to r 46 (partly through the new r 46A), though there is still a long way to go. There are essential two issues:

- When should a property be allowed to be sold?
- If it is to be sold, how can it be sold for the proper, market price?

Most people, including the Rules Board, do not understand just how bad SA banks are compared to other countries. The table on the next page shows the figures which are truly shocking.



Country	Number of bonds	Annual number of executions per 1 000 bonds	
		Average over ten years	Increase of SA over countries
SA	1 800 000	2,4	0%
Spain	6 768 000	2,5	-5%
United States (US)	80 600 000	1,9	28%
South Korea	47 600 000	1,8	34%
France	15 000 000	0,6	298%
Hungary	1 188 000	0,6	329%
Bulgaria	115 200	0,4	512%
United Kingdom (UK)	11 300 000	0,3	800%
Cyprus	255 584	0,1	4261%
Denmark	2 420 000	0,04	5681%
Singapore	792 000	0,01	18820%

As we can see from the table above, only countries that have had major crises in recent years – like Spain and the US – can approach the extreme level of executions in SA where we have not even had a significant financial crisis. European countries who have, in fact, also had something of a crisis in the last ten years still have execution rates an eighth to a quarter of that in SA. This applies to developing Eastern European nations and Western European countries alike. There is no reason we should not, by improving our law, become like Denmark or Singapore though at the current time we, without conscience, currently sell 50 times as many properties per 10 000 bonds as they do in Singapore. (While default rates are a bit higher in SA than in some of these countries, these differences explain very little of the huge differences in execution rates. The difference in the lack of legal restrictions on irresponsible bank practices explain most of it.) Denmark has a comparable number of bonds as we do, yet SA sells 60 times more homes in execution than Denmark. This is an inexcusable difference. In addition, SA banks continue to sell properties for an average of around 60% of the real price in contrast to the rest of the world (in Korea, for example, they get 90%). In the UK, the US, Australia or New Zealand, banks can rightly be sued for the difference if they sell for less than market price. (This may indeed be the case in SA, but this has not yet been tested in the courts. The law of delict will apply and the statutory defence is unlikely to apply in this case.)

The improvements in the rules include a removal (in the January version) of the prohibition of reserve prices that previously applied (which no other country had) and lacked any coherent rationale. Now, in the April version, we have provisions that allow the court to set a reserve price. However, it is not compulsory (see r 46A(9) discussed below) so properties may still be sold without reserve.

The rule also – for the first time – requires in the application for execution, that the market price is provided by the applicant (which will usually be a bank) (r 46A(5)(a)). This is a big improvement as this is a precondition for ensuring properties are normally sold for around that price. South African properties sell for sizably lower percentages of their value than in other countries. Significant numbers are sold for negligible sums, even as low as R 1 000. Many believe that criminal syndicates are involved in these transactions. Unfortunately, our rules have not explicitly outlawed such transactions, and still, sadly, do not.

It is also commendable that the local authority municipal

rates amounts must now be disclosed (r 46A(5)(c)). South Africa's low prices in execution sales are partly due to the inability of buyers to know what the municipal rates account might be. This will solve this problem. There is still the problem of buyers not being able to view the property. Rule 46 allows the Sheriff to enter the property by force for various reasons. If this is to be allowed, then there is no reason why a day should not be allocated where potential buyers could see the property. This would also raise prices. In sub-rule 7A of Form 21, a deposit of 10% is required; this is too much and deters buyers who are otherwise capable of later securing a bond. The Board should consider deposits of 2% with an upper limit of R 10 000 or so. These amounts should only cover the Sheriff's marginal costs of adding a property to a pre-existing auction, which are small. Otherwise they should be kept small to encourage more buyers.

The new rules also make a whole lot of micro improvements that are welcome. However, this may be at the expense of dealing with the 'elephant in the room'. The major failings of SA foreclosure law, compared to its peers in the international arena, have not yet been addressed.

Rule 46(2)(c) integrates into the rule, the judgment of the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) that a registrar cannot issue a writ of execution by himself. There must have been judicial supervision. One wonders why the judgment in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para 59, that execution must only be as a last resort was not also so integrated as that would have been helpful in setting a new and improved mind set into the proceedings.

The rules give a procedure for opposing execution procedures, but there is still not much protection in the rule for the unrepresented and indigent defendant against whom an order will be given in default.

Sub-rule 46A(8)(2) has missed a great opportunity. This rule should require the court not to grant execution when other options are available. The failure to do this in our law, is why our execution rate is greater than that of other countries, developed and developing. Foremost in that list of options would be a requirement to reschedule if the debtor has affordability. This has been the law in England for almost 50 years, and yet we still do not have this law. If the debtor has lost a job and is a year in arrears and then gets a new long term job, there is no reason to execute. Courts in England will not allow execution in these circumstances and will instruct the arrears to be capitalised and the bond contract to continue with a slightly higher premium. We desperately need such a provision in our law. I have seen hundreds of applications for execution against owners in this country who can now afford their mortgage where the banks say 'pay the whole arrears or we will execute', which is often impossible. This is hardly consistent with the Constitutional Court's dictum that it should be a 'last resort'.

The second situation in which execution should not be allowed is where the house is worth more than 20% more than the loan. In my own experience in practice I have seen senior citizen's houses taken from them for a R 100 000 debt when the property is worth R 2 million. This should never happen. Until the debt reaches 80% of the house value, there should be no execution. The bank is not at risk. They will get all the interest back in the end, when the property is eventually sold, as long as it's sold for market value, as it should be. Most times, the people will pay back the arrears long before they reach that point.

Other countries (eg, Scotland and Hungary) also have options to convert properties to rental with the ownership transferring to the bank at market price or slightly lower should the owner so wish. The banks can sell on the properties to investment funds specialising in this kind of situation or the state can arrange its own fund. Redemption rights are possible on a reasonable basis. Allowing for developers to convert the property to smaller units is another option.



Thirdly, although the decision in *Nkata v FirstRand Bank Limited and Others (The Socio-Economic Rights Institute of South Africa as Amicus Curiae)* (CC) (unreported case no CCT73/2015, 21-4-2016) (Moseneke DCJ) was only released a few days before the rules board released these rules, there is a need for the decision therein to be incorporated in these rules. No execution may take place if the arrears (not the accelerated amount) are fully paid up before either the execution judgment or the sale in execution. The court and Sheriff must respectively be required to check this before they grant judgment or sell the property.

What is evident then, from the last three examples, is that the rules, even the new ones, and our current practice, are still not remotely consistent with the decision in the *Jaftha* matter only to use sale in execution as a last resort.

Because our law, including these new rules, fails to constrain the aggressive behaviour of banks, we have a rate of sale in execution vastly higher than the rest of the world. To get the rate into line with the rest of the world and with our Constitution we need to delineate the situations in which execution is not allowed.

Going back to the issue of the price the property should be sold for, sub-rule 9 (r 46A) seems to be trying to do the right thing but never quite gets there. Sub-rule 9(a) provides that a reserve price may be set by the court. But why should a court not have to set a reserve price and why that price should ever not be the market price (nett rates perhaps if we continue with the current legal obligation of the buyer to pay the rates. The alternative is to sell for market price and for the Sheriff to pay the rates from the proceeds before paying the balance to the bank up to the bond and then the remainder to the erstwhile owner.) of the property? A cynic might conclude that the purpose of this section is to allow the banks to set the price at the amount due on the loan, suitably inflated behind the value of an unaccountable certificate of balance without any regard whatsoever to the interest of the ordinary people of SA. Sub-rule 9 may be used to do the right thing, but there is no guarantee. More likely courts will continue with business as usual: Selling properties for next to nothing on the whim of the bank.

Sub-rule 9(c) allows for a sensible process of decreasing price from the market price if the property does not sell but it does not guarantee such as process. It would be much better to put in place a process such as that in Malaysia and South Korea where the property starts at market price and decreases by 10% or 5% each period such as every three months, then al-

low the court to depart from it in exceptional circumstances by application of either party.

Form 21 at 3, incredibly, still allows for bids of R 1 000. I am not sure how long ago this would have been the right minimum price, but it was long before anyone reading this was born. This is vastly outdated. It should read that the minimum price a property can sell for is say 85% of its market value as valued by the relevant rule. This is the rule in Ghana and there are comparable rules in Germany (the rule in Germany appears only to be for the first auction. There are similar rules for the auction of ships in various countries) and around the world. If it is the incremental bid that is intended at this point then this should be said explicitly and an absolute minimum price should be inserted elsewhere. In any case R 1 000 is still too little, R 50 000 would be more appropriate as a minimum increased bid at an auction, and then R 20 000 as the property nears its market price.

The most glaring omission, however, is that while r 46(12) has been subject to major change, the other major egregious r 46(10) has not been touched. Still properties must be sold by Sheriffs, the people least qualified of all, to sell property and, in this country especially, least likely to secure a market price. Why have the Board not incorporated the working models of places like Australia, which is an effective system, where estate agents sell the properties at least in the first instance. This has been put to the Board in January. This has the advantage that buyers do not know the property is in execution and do not expect a discount. Another way to do this is require the court to grant a time to sell order of three to six months to the owner where the owner is ordered to put the property on the market and try and sell it, only if this does not work, will the property be sold by the Sheriff.

The main problem may be that the Rules Board does not understand just how far SA repossession law and the 'gung ho' behaviour of our banks that is the inevitable result, is out of synch with the rest of the world.

The main reason for the difference is that we allow our banks to destroy the lives our citizens with impunity. More than 100 000 lives ruined since the Constitution. Other countries do not. This must not continue. South Africa calls on the Rules Board to address the main issues and seriously reform our law rather than tinkering with minor issues.

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# THE LAW REPORTS



**June 2016 (3) South African Law Reports (pp 317 – 635); [2016] 2 All South African Law Reports May (pp 317 – 631); 2016 (2) Butterworths Constitutional Law Reports – February (pp 157 – 309); 2016 (5) Butterworths Constitutional Law Reports – May (pp 577 – 708); and 2016 (7) Butterworths Constitutional Law Reports – July (pp 839 – 986)**

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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  
**FB:** Free State Division, Bloemfontein  
**GP:** Gauteng Division, Pretoria  
**LCC:** Land Claims Court  
**SCA:** Supreme Court of Appeal  
**TC:** Tax Court  
**WCC:** Western Cape Division, Cape Town

## Constitutional law

**Arrest and removal of members of Parliament during parliamentary sitting:** Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (the Act) provides, among others, that: 'A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker

or Chairperson or a person designated by the Speaker or chairperson, by a staff member or a member of the security services.' In brief, the section makes it a crime for any person to create or take part in any disturbance in the precincts as defined. The constitutionality of the section was dealt with in *Democratic Alliance v Speaker, National Assembly and Others* 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC), where members of the Economic Freedom Fighters (EFF), a political party, had been forcibly removed from the joint session of the two houses of Parliament. That was after members of the EFF, one after another, interjected the President during the State of the Nation address, during which they asked him when he was going to pay back the money, which the Public Protector requested in her report, should be repaid. The attitude of the Speaker

of the House of Assembly was that the State of the Nation address was not the right occasion for questions and as such could be done on a scheduled date. Members of the Democratic Alliance (DA), another political party, left the House voluntarily, obviously in solidarity with the EFF. Thereafter, the DA instituted High Court proceedings for an order declaring the section unconstitutional on the ground that, among others, it violated the freedom of speech right of members of the National Assembly as contained in s 58(1) of the Constitution, which granted them immunity from criminal or civil proceedings, arrest, imprisonment or damages for anything said, produced or submitted to the Assembly or any of its committees. The WCC declared the section inconsistent with the Constitution. As a result, the DA sought a CC order confirm-

ing the unconstitutionality of the section. The respondents, the Speaker of the House and others, appealed against the order, while the DA cross-appealed against certain aspects of the order.

The CC declined to confirm the order as granted. Instead, the court preferred the reading-in approach and added the words 'other than member' after the word 'person'. The result was that the section remained valid but only authorised the arrest and removal from Parliamentary precincts, any person, other than a member of Parliament, who created or took part in any disturbance. The appeal and cross-appeal were dismissed, with the respondents ordered to pay costs.

Reading the majority judgment Madlanga J (Nugent AJ concurring in a separate judgment and Jafta J with Nkabinde J concurring in the dissenting judgment) held that



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s 11 limited the privileges and immunities contained in ss 58(1) (dealing with members of the National Assembly) and 71(1) (dealing with members of the National Council of Provinces) of the Constitution. The creation of or taking part in a disturbance by a member was made a criminal offence. With arrest would come everything associated therewith such as detention in police or prison cells, criminal charges and possibly conviction of an offence. That chilling effect alone constituted an infringement of parliamentary free speech. In addition, the section directly infringed the immunities from criminal proceedings, arrest and imprisonment enjoyed by members of Parliament in terms of ss 58(1)(b) and 71(1)(b) of the Constitution. As a consequence of the application of s 11, a member of Parliament, through removal from the chamber, would be deprived of further participation in the proceedings of Parliament for the duration of the removal. The language of ss 58(1)(a) and 71(1)(a) was plain. It made freedom of speech in the National Assembly and National Council of Provinces subject to the relevant House's rules and orders, and nothing else. Limiting this freedom by an Act of Parliament was at variance with the constitutional stipulation. That was constitutionally impermissible. Therefore, s 11 was constitutionally invalid to the extent that it applied to members of Parliament.

• See law reports 'Parliament' 2015 (Oct) DR 46.

**Duty of the President to uphold, defend and respect the Constitution:** It is the duty of the state to provide security for the President of the Republic. In *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC), in compliance with this obligation the Department of Public Works (DPW), on advice of the South African Police Service (SAPS) effected certain upgrades at the President's private residence in KwaZulu-Natal, commonly known as Nkandla home-

stead. However, the upgrades were fairly extensive and went further than just effecting security features. Due to complaints by members of the public, the Public Protector launched an investigation as a result which she requested the President to take certain remedial action, including:

- Taking steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW that did not relate to security such as a visitors' centre, an amphitheatre, the cattle kraal (cowshed), chicken run and a swimming pool.
  - Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury.
  - Reprimand the ministers involved in the upgrade project.
  - Report to the National Assembly (NA) on his comments and actions on the Public Protector's report within 14 days.
- The President duly reported to the NA but did not respond to the other requests. Far from requesting the President pay the reasonable cost of non-security features of the upgrades, the NA absolved him from liability. As a result the applicant, EFF, approached the CC directly for a number of remedies including an order -
- affirming the legally binding effect of the Public Protector's remedial action;
  - directing the President to comply with the Public Protector's remedial action; and
  - declaring that both the President and the NA acted in breach of their constitutional obligations.

The EFF was joined by another political party, the Democratic Alliance, which initially launched a similar application in the WCC. The application was granted with costs.

Reading a unanimous judgment of the court Mogoeng CJ held that consistent with s 167(4)(e) of the Constitution, which provided that only the CC could decide that Parliament or the President had failed to fulfil a constitutional obligation and, considering the magnitude and vital importance of his re-

sponsibilities, the CC enjoyed the exclusive jurisdiction to decide such an issue. Similarly, the NA was the watchdog of state resources and enforcer of fiscal discipline, as well as cost-effectiveness for the common good of the country. It bore the responsibility to play an oversight role over the executive and state organs and ensure that constitutional and statutory obligations were properly executed. For that reason it fulfilled a pre-eminently unique role of holding the executive accountable for fulfilment of the promises made. The CC, being the highest court in the land and ultimate guardian of the Constitution and its values, had exclusive jurisdiction also insofar as the NA was concerned. The NA was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the findings and remedial action were challenged and set aside by a court, something that had not been done in the instant case. Neither the President nor the NA was entitled to respond to the binding remedial action taken by the Public Protector as if it were of no force or effect or had been set aside through a proper judicial process. Therefore, the NA's resolution exonerating the President from liability was inconsistent with the Constitution and unlawful.

It was inconsistent with the language, context and purpose of ss 181 (creating the office of the Public Protector) and 182 (giving the Public Protector the power to investigate irregularities, conduct or practices, report on investigations and take appropriate remedial action) of the Constitution to conclude that the Public Protector enjoyed power to make only recommendations that could be disregarded, provided there was a rational basis for doing so. When remedial action was binding, compliance with it was not optional, whatever reservations the affected party could have about its fairness, appropriateness or lawfulness. For that reason the remedial ac-

tion taken against those under investigation could not be ignored without legal consequences. The remedial action that was taken by the Public Protector against the President had a binding effect.

By not adhering to the Public Protector's remedial action the President failed to uphold, defend and respect the Constitution. The President was also duty-bound to, but did not, assist and protect the Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action. The President might have been following wrong legal advice and, therefore, acted in good faith. However, that did not detract from the illegality of his conduct, regard being had to its inconsistency with his constitutional obligations in terms of ss 182(1)(e) and 181(3) read with s 83(b) of the Constitution.

• See news 'Public protector findings not legally binding' 2015 (March) DR 6 and LSSA news 'LSSA applauds landmark judgment on the binding nature of the Public Protector's remedial action' 2016 (May) DR 20.

## Consumer credit agreements

**Reckless credit - meaning and remedies:** Section 81(3) of the National Credit Act 34 of 2005 (the NCA) prohibits a reckless credit agreement by providing that: 'A credit provider must not enter into a reckless credit agreement with a prospective consumer'. In terms of s 80 a credit agreement is reckless if, at the time that it was entered into, 'the credit provider failed to conduct an assessment as required by section 81(2)'. The latter section requires the credit provider to take reasonable steps to assess among others the existing financial means, prospects and obligations of the consumer, as well as whether there is a reasonable basis to conclude that any commercial purpose to be undertaken may prove to be successful.

In *Absa Bank Ltd v De Beer and Others* 2016 (3) SA 432 (GP) the credit provider and

plaintiff, Absa Bank, entered into a total of four credit agreements with the first and second defendants, De Beer and his wife, all of which violated the NCA in every respect. The first defendant was a pensioner who used all his pension benefits to buy an undeveloped smallholding to build a residential unit and start small scale farming. As the money was not sufficient for that purpose his wife, the second defendant, retired from her employment and collected pension benefits. Even with her pension fund benefits contribution, the money was not sufficient for farming operations. The two started borrowing from the plaintiff, using the smallholding, which was their primary and only residence, as security. Apart from the first defendant's annuity of some R 647 per month the couple did not have any other source of income. The third defendant, their daughter, stood surety for their indebtedness to the plaintiff. The financial position of all three was never verified by the bank and no financial statements were requested, especially in the case of the third defendant who was self-employed. An employee of the plaintiff indicated that the first two defendants had a monthly income of some R 27 000. However, that was misleading

as their only income was the first defendant's monthly annuity of R 647, while the rest of the money belonged to the third defendant, the surety. Eventually, and after a further loan, all the existing loan agreements were consolidated into one agreement, which amounted to a debt of some R 1,7 million, which the plaintiff sought to recover.

Louw J held that the plaintiff's claim against all the defendants amounted to a reckless credit agreement and accordingly dismissed the claim with costs. The court set aside the rights and obligations of the first and second defendants arising from the loan agreement as consolidated and also ordered cancellation of the mortgage bonds registered to cover the debt. It was held that to take 'reasonable steps' to assess the proposed consumer's existing means, prospects and obligations meant that the assessment had to be done reasonably and not irrationally. Only a reasonable assessment would comply with the preamble to the NCA which stood to promote responsible credit granting and use. It was clearly irrational to have taken the surety's income into account in coming to the conclusion that the first two defendants had financial means to pay the instalments. A surety did not fall within the definition

of a consumer in terms of s 1 of the NCA. Furthermore, the surety remained totally out of the picture until the principal debtors had failed to comply with their obligations.

## Consumer protection

**Duty to exhaust all other available remedies before approaching the court:** Section 69(d) of the Consumer Protection Act 68 of 2008 (the CPA) provides that a consumer seeking to enforce any right in terms of the CPA or in terms of a transaction or agreement or otherwise to resolve any dispute with a supplier, may approach a court having jurisdiction over the matter if 'all other remedies available to that person in terms of national legislation have been exhausted'. In other words, the section makes the court a forum of last, and not first, resort. However, in *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) the applicant close corporation, Joroy, did the opposite of what the section stipulates. Having bought a motor vehicle from a trust, which was under the trusteeship of the respondents Potgieter and another, it approached the High Court for a refund of the full purchase price of the vehicle. The court did not have to deal with the merits of the case but simply disposed of it on a preliminary point of law of lack of jurisdiction. The court did not make a finding on the merits of the application, this leaving the applicant free to utilise any of the dispute resolution mechanisms available in terms of the CPA. The application for refund of the purchase price was refused and each party ordered to pay own costs.

Reinders J held that the wording of the section was clear and unambiguous. It specifically stated that the consumer could approach the court if all the other avenues or redress therein indicated have been exhausted. The legislature was very specific in prescribing the redress that a consumer had in terms of the section, namely, the National Consumer Tribunal, the ap-

plicable ombud with jurisdiction, an accredited industry ombud, a consumer court of the province having jurisdiction, an alternative dispute resolution agent or the National Consumer Commission. In the instant case, as the dispute related to a motor vehicle, there was an accredited motor industry ombud, namely, the Motor Industry Ombudsman of South Africa, which dealt specifically with dispute resolutions between consumers and the motor industry.

## Delict

**Duty to ensure closure of doors for safety:** In *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC) the appellant, Mashongwa, boarded a train at a station in Pretoria. He was the sole passenger in the coach when the train started moving with doors open. A few minutes thereafter a group of three unarmed men entered his coach from an adjacent one and attacked him, dispossessing him of his valuables, kicking him and eventually throwing him out of the moving train through the open doors. He suffered serious leg injuries, which resulted in amputation. As a result of the injuries suffered he instituted a claim against the operator of the train service, the respondent Passenger Rail Agency of South Africa, on the ground that it failed to provide reasonable safety measures to protect him, it failed to provide security guards and further that it allowed the train to move with doors open. The trial proceeded on the merits only. The GP held that the respondent was liable to compensate the appellant for such loss as would be proved. An appeal against that order was upheld by the SCA, which held that the appellant had not shown wrongfulness and negligence on the part of the respondent. Likewise, causation had not been proved.

The CC granted leave to appeal and upheld the appeal with costs, setting aside the decision of the SCA. Reading a unanimous decision of the

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court Mogoeng CJ held that public carriers like the respondent had always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. That duty arose from the existence of the relationship between carrier and passenger, usually but not always, based on a contract. That duty also stemmed from the carrier's public law obligations. That strengthened the contention that a breach of those duties was wrongful in the delictual sense and could attract liability for damages. Safeguarding the physical wellbeing of passengers had to be a central obligation of the respondent. That reflected the ordinary duty resting on public carriers and was reinforced by the specific constitutional obligations to protect passengers' bodily integrity that rested on the respondent, an organ of state. The norms and values derived from the Constitution demanded that a negligent breach of those duties, even by omission, should, absent a suitable non-judicial remedy, attract liability to compensate injured persons in damages. The breach of public duty by the respondent had to be transposed into a private law breach in delict. Therefore, the breach that occurred in the instant case amounted to wrongfulness.

Harm was reasonably foreseeable and the respondent had an actionable legal duty to keep the doors closed while the train was in motion. Keeping the doors of a moving train closed was an essential safety procedure. The appellant would probably not have sustained the injuries that culminated in the amputation of his leg had the respondent ensured that the doors of the coach in which he was were closed while the train was in motion. It was thus negligent of the respondent not to observe a basic safety-critical practice of keeping the coach doors closed while the train was in motion and, therefore, reasonable to impose liability for damages on it, if the other elements were proved.

In all likelihood, the ap-

pellant would not have been thrown out of the train had strict safety regime of closing coach doors, when the train was in motion, been observed. On a preponderance of probabilities the appellant would not have sustained the injuries that led to the amputation of his leg, had the respondent kept the doors closed. The respondent's failure to keep the doors closed while the train was in motion was the kind of conduct that ought to attract liability. More importantly, that preventative step could have been carried out at no extra cost.

- See case note 'Transport utility's duty to prevent harm to passengers' 2016 (May) DR 42.

## Income tax

**Tax benefit use of company motor vehicle:** In *Anglo Platinum Management Services (Pty) Ltd v Commissioner, South African Revenue Service* 2016 (3) SA 406 (SCA), the appellant taxpayer, Anglo Platinum, had a scheme in terms of which its participating employees were each assisted to acquire a motor vehicle of their choice. The appellant would pay the purchase price in cash, register the vehicle in the employees name but the taxpayer owned the vehicle and thereafter paid insurance premiums and other expenses arising from time to time. A participating employee would make a fixed monthly payment into a notional account, which was credited, while monthly payments made by the appellant were debited to the account. The result was that if at the end of the month there was a credit in favour of the employee the money would be withdrawn at the end of each quarter, failing which at the end of the financial year and the tax paid at the full scale. However, if there was a shortfall, the employee would pay it.

The question was whether the scheme amounted to a valid and binding salary sacrifice agreement in terms of which participating employees had forgone (divested) their entitlement to that part of the salary, and which was taxable

as part of gross income at the reduced rate or was a benefit or advantage granted in respect of employment, which was taxable on full scale. (It may be mentioned in passing that the amount involved was substantial, being some R 11,5 million). The Tax Court, Johannesburg held, per Mavundla J, that the scheme used was a sham, which was disguised to conceal its true nature and accordingly held that the amount involved was fully taxable. An appeal against that decision was upheld with costs by the SCA, meaning that tax had to be paid at a reduced scale.

Cachalia JA (Leach, Tshiqi, Pillay and Mbha JJA concurring) held that salary sacrifice arrangements, whereby employees sacrifice or forgo a portion of their cash salaries in return for some *quid pro quo* or fringe benefit from the employer that reduced their tax liability, were perfectly lawful. It was a question of fact in each case whether a salary sacrifice agreement was achieved. In this regard, a court was not concerned with the subjective belief of the parties to the agreement, no matter how genuine that belief could be, but with whether facts, objectively viewed, established that such a result was achieved.

To succeed in the appeal the appellant taxpayer had to establish that a genuine salary sacrifice was concluded as a matter of fact. It would have to show that the employees' remuneration packages were structured in a manner that they received their remuneration partly by way of cash and the balance by way of a fringe benefit, that the taxpayer unconditionally assumed liability for payments and contributions for the motor vehicles that were part of the scheme, thereby releasing its employees from any such obligation. In other words, by forgoing part of their remuneration package in return for the use of a motor vehicle, employees divested themselves of their right to that amount of money. The implication of such divestment was that the amount would not have been received or accrued for

services to be rendered by the employees as contemplated in para (c) of the definition of gross income in s 1 of the Income Tax Act 58 of 1962 (the Act).

In the instant case the parties sought to fund a taxable benefit from a salary sacrifice. They were entitled to do so in accordance with the relevant provisions of the Act. That was achieved through the scheme the parties agreed on and implemented. The following features of the scheme indicated that it was properly designed and implemented, namely:

- The taxpayer purchased the motor vehicles, owned and claimed depreciation on them.
- The recovery of their total cost, including their running expenses, was obtained from the salary sacrifice, not from the employees.
- In return for the amount they had forgone, the employees received a taxable benefit, being the use of the vehicles.

## Insolvency

**Voluntary surrender of insolvent estate should be made in good faith and in the best interest of the creditors:**

The case of *Ex Parte Concato and Similar Cases* 2016 (3) SA 549 (WCC); [2016] 2 All SA 519 (WCC) dealt with applications for voluntary surrender of five estates, all coming from the same law practice and moved by the same counsel. Because of striking similarities with previous applications coming from the same law practice, which had been presented as a 'batch', the court postponed the hearing and requested the attorney involved to provide certain information concerning past applications, covering a specified period. When the report was filed it transpired that in the past by and large the same template, same allegations and valuator had been used and that more or less the same dividend of 16 or 17 cents in the rand had been offered, as was the case in the present applications. Moreover, in the vast majority of the cases (90%) the final result was a 'buy-back' arrangement in terms of which the



insolvent debtor would buy back his assets in terms of an instalment sale agreement, paying paltry instalments over a long period. In short, such voluntary applications were used for the benefit of insolvent debtors rather than the creditors. The court took the view that given the similarities between previous and current applications where the usual dividend of 16 or 17 cents in a rand had been offered, the same outcome, namely a 'buy-back' arrangement was a probable result. For that reason each of the applications for voluntary surrender was refused.

Bozalek J held that it did not appear that the applications were *bona fide* or that the orders of voluntary surrender would be to the advantage of creditors. Having regard to the evidence concerning the outcome of similar applications brought by the same attorney in the past, there was very little reason to doubt that the most likely outcome, should orders of voluntary surrender be granted, would be that the applicants would purchase back their assets at a forced-sale valuation. In all likelihood the result would be for the insolvent to continue to enjoy the possession and use of their assets but they would divest themselves of their creditors. It was most unlikely that such outcome would serve the interests of the creditors.

One of the primary requirements for a voluntary-surrender application to be successful was that it should be made *bona fide*. It was, however, open to any debtor to seek escape from financial difficulties via the route of voluntary surrender, provided he or she was able to make a proper and *bona fide* case in compliance with the Insolvency Act 24 of 1936. The courts have, over the decades, been wary of potential abuse in so-called 'friendly' sequestrations. However, it was increasingly recognised that there was a great, or even greater, risk of abuse and the undermining of the interests of creditors in voluntary-surrender applications. In such applications the need

for full and frank disclosure and well-founded evidence was even more pronounced. Voluntary-surrender applications required an even higher level of disclosure than 'friendly' sequestrations, the need for full and frank disclosure being accentuated by the fact that, despite the practice of such applications being brought on an *ex parte* basis, they did not fulfil the criteria for true *ex parte* applications in that creditors had a very real interest in the outcome of such applications.

As a general rule in the WCC no voluntary-sequestration order would be granted where the projected dividend was less than ten cents in the rand. Nevertheless, even where the dividend was projected to be 16 or 17 cents in the rand, particularly where no fixed property or a major movable asset was involved and achieving the dividend relied solely on the sale of household items, equipment and furniture, considerable doubt often remained as to whether even that level of dividend would be reached.

## Land reform

**Eviction of occupiers must be just and equitable:** In *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) six applicants, being Molusi and five others, each had a contract of lease with the respondents, Voges and others, who were trustees of a trust, which owned a farm. The leases allowed the applicants to live on the farm subject to payment of monthly rental. Alleging that the applicants were in default regarding payment of rental the respondents gave each a notice of termination of the lease in terms of s 9(2) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). The respondent stated in the notices that the reason for termination of the leases was failure to pay the agreed rental. When the matter was taken to the LCC the respondents initially argued that the reason for termination was non-payment of rental but during argument the reason for termination was changed to the need to

develop the property but ultimately relied on the common-law ground of termination on giving reasonable notice, it being argued that the notice of two months thus given was reasonable. The LCC held that the requirements of ESTA regarding eviction had been met and accordingly granted the eviction order. An appeal against that order was dismissed by the SCA, which held that the respondents' cause of action was the owner of property's common-law right to cancel for non-payment of rent, alternatively on reasonable notice. Failure to pay rent was an adequate ground for termination of a lease. As a result in the present case the termination was just and equitable. On further appeal to the CC leave to appeal was granted and the appeal upheld. The orders of the LCC and the SCA were set aside. As the applicants did not ask for costs, no costs order was made.

Reading a unanimous decision of the court Nkabinde J held that the respondents were not entitled to rely, as they did, on the common-law principles as basis for eviction when those grounds were not set out in the termination notice and properly pleaded. The SCA was correct to hold that at common law the landowner would be entitled to the relief sought. However, that common-law claim was subject to the provisions of ESTA whose ss 8, 9, 10 and 11 had the result that the common-law action based merely on ownership and possession was no longer applicable. Reliance on the common law did not exonerate owners from compliance with the provisions of ESTA. The fairness of the eviction would still have to be considered, having regard to all relevant factors. All such relevant factors were not considered in the instant case. As a result reliance on the common-law grounds was, in the circumstances of the case, unfair to the appellants and impermissible.

ESTA required that the two opposing interests of the landowner and the occupier should be taken into account before an order for eviction

was granted. On the one hand there was a traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other hand there was the genuine despair of people who were in dire need of accommodation. Courts were obliged to balance those competing interests. A court making an order for eviction was required to ensure that justice and equity prevailed in relation to all concerned. In the instant case the SCA did not give sufficient weight to the hardship that would eventuate from the termination of the rights of residence and eviction since the applicants would be rendered homeless as there was no suitable alternative accommodation. Nevertheless, that did not mean that where the terms of ESTA have been properly complied with the owner was not entitled to an eviction order.

## Prescription

**Completion of running of extinctive prescription:** Section 13(1)(g) of the Prescription Act 68 of 1969 (the Act) provides, among others, that if a debt is the object of a claim filed against a company in liquidation and the relevant period of prescription would be completed before or within one year after the relevant impediment has ceased to exist, the period of prescription shall be extended for a year. The essence of the section is that in the case of a claim against a company in liquidation, among others, the period of prescription is extended by a year, during which legal proceedings may be instituted against it.

In *Van Deventer and Another v Nedbank Ltd* 2016 (3) SA 622 (WCC) the appellants, Van Deventer and his wife, stood surety for the debts of a close corporation, and not a company, which owed the respondent, Nedbank, certain moneys. After liquidation of the corporation the respondent lodged and proved its claim against it, after which it proceeded to institute a claim against the appellants. The appellants having changed their address in the meantime

did not receive the summons and could not therefore respond to it. As a result default judgment was granted against them. When they became aware of the judgment, they applied for its rescission, citing as a ground therefore the defence of prescription of the claim against them. The magistrate dismissed the rescission application, holding that the claims against the corporation had not prescribed. Nothing was said about the fact that the section dealt with a company and not a close corporation. The High Court dismissed with costs an appeal against the decision of the magistrate.

Rogers J (Nuku AJ concurring) held that it was for the appellants to allege and prove when prescription began to run, something they had not done. The impediment contemplated in s 13(1)(g) concerning a company in liquidation ceased to exist when the filed claim was rejected or, if it was accepted, when the final liquidation and distribution account was confirmed by the Master. In the present case the respondent's claims were duly proved and not rejected. When a summons

was served on 13 July 2012, prescription was interrupted prior to its completion. It was settled law that the timeous interruption of prescription of the principal debt, or a delay in the completion of prescription of the principal debt, also interrupted or delayed prescription in respect of a surety's obligation.

On the question whether the section also applied to close corporations it was held that if close corporations had existed when the Prescription Act was enacted in 1969 (close corporations only came into existence in 1985 in terms of the Close Corporations Act 69 of 1984) there would have been no conceivable reason to treat them differently from sole proprietorships, partnerships, trusts and companies. The policy considerations and purposes underlying s 13(1)(g) would have applied as much to close corporations as to the other forms of organisation. There was no practical or legal reason why close corporations should be treated differently from unincorporated insolvent estates and liquidated companies. If the section did not apply to close corpora-

tions in liquidation but applied to insolvent estates, which could be sequestrated under the Insolvency Act 24 of 1936 and to liquidated entities incorporated under the Companies Acts as they have existed from time to time, the differentiation would be utterly irrational and unrelated to any legitimate government purpose.

The legislature could not rationally have intended to exclude corporate entities such as close corporations from the scope of the section. Therefore, such entities were within the parliamentary intent of s 13(1)(g). The word 'company' as used in the section was capable of being interpreted liberally so as to include a 'close corporation'. There could be no question of intentional omission of a close corporation from the section, or inadvertence, since close corporations did not exist at the time.

### Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Agreement to pay facilitation fee, *Anton*

*Piller* orders, concurrent and exclusive jurisdiction of the Labour Court and the High Court, consumer credit agreements, contemporaneous motion proceedings pending divorce action, determination whether accused was in his sound and sober senses when pleading guilty, effect of plea bargain, failure to publish Acts of Parliament in all 11 official languages, invalidity of Local Government Municipal Systems Amendment Act 7 of 2011 due to procedure followed, legality of steps taken by Judicial Services Commission following complaint against a judge, minimum sentence for possession of automatic or semi-automatic firearm, obligations of state to arrest and surrender persons against whom the International Criminal Court has issued an arrest warrant, possession of child pornography, power of Local Division of High Court, proof of existence of contract, review of decision of minister, taxation of person conducting farming operations, unlawful interference with contractual rights of another person and voidable dispositions and preferences. □

## On the lighter side: A remarkable story

*Limbada v Dwarka* 1957 (3) SA 60 (N)

Holmes, J: 'The applicant unfolds a remarkable story, with an impenitence verging on impertinence. He is a fresh produce dealer in Newcastle, Natal. In 1952 he applied for a general dealer's licence in respect of the same premises. This was refused. Thereafter the respondent who is by avocation a humble truck driver, approached him as the ostensible emissary of the chairman of the licensing board,

conveying an ignoble suggestion to the effect that the payment of a sum of money might achieve favourable licensing results. Later there were persistent requests for further payments to induce and enable the chairman to obtain certain permits and immovable property for the applicant. Nothing loth in falling in with these corrupt solicitations and promises, the applicant paid the respondent in all about £ 3 000 over a period of five years. Recently he found to his chagrin that the chairman was

innocent of the whole affair, and that the respondent had faithlessly converted all this money to his own uses. In keeping with this bizarre infamy he annexes an affidavit from a gaolbird, serving a 15 year sentence for assault and theft, to the effect that the respondent, while himself awaiting trial, had asked the deponent to assist him with ideas for his defence, and incautiously confided to him that he had invested all the money in question in certain property, both movable and immovable. The applicant,

indignant at this evidence of man's inhumanity to man, proposes to sue the respondent for the return of the £ 3 000, his faith in corruption having given way to reliance on a condicio. And, grieved by a well-grounded apprehension of irreparable harm, he confidently asks the court for an interdict, lest the respondent, upon receipt of a summons, should incontinently make away with this his only property.' □



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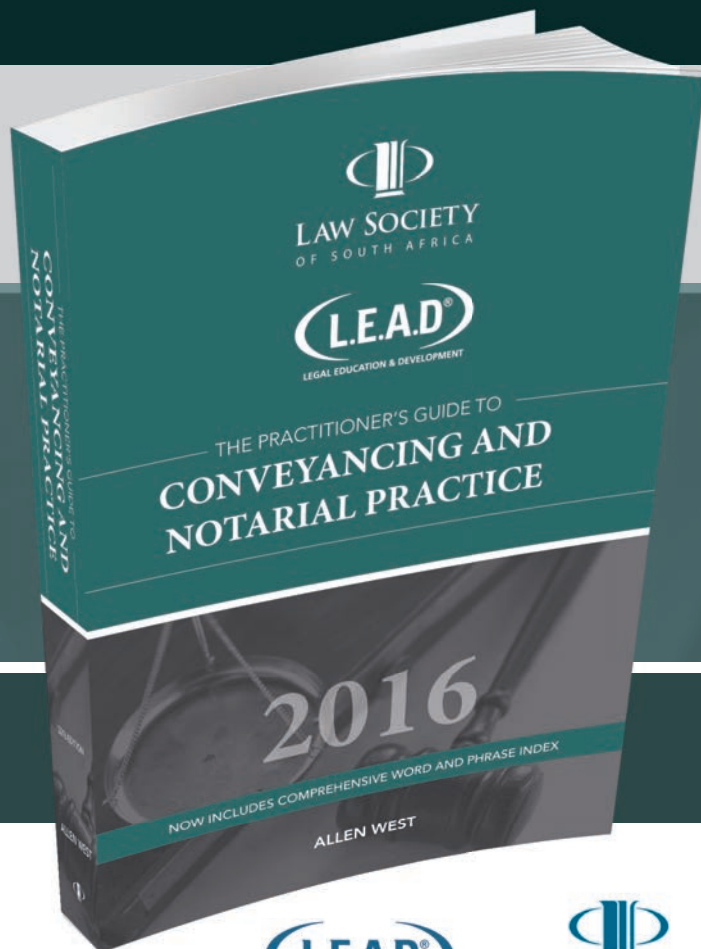
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### ABOUT THE AUTHOR: ALLEN WEST

Allen West was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred articles in leading law journals.

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

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By  
Nico  
Claassen

# Prescription: Commencement, election and written notice

*Standard Bank of South Africa Ltd v Miracle Investments 67 (Pty) Ltd and Another* (SCA) (unreported case no 187/2015, 1-6-2016) (Mbha JA (Leach, Saldulker and Swain JJA and Baartman AJA concurring))

**T**he Prescription Act 68 of 1969 (the Act) stipulates in s 12(1) that prescription commences to run as soon as a 'debt is due'. In a recent judgment handed down by the Supreme Court of Appeal (SCA), the SCA was required to consider the meaning of that provision of the Act. This required the consideration of an instalment agreement containing an acceleration clause that entitled a creditor to claim the full outstanding amount payable in terms thereof on the occurrence of a breach and the giving of written notices.

## Background facts

The facts in the case were, in short, as follows:

- The creditor lent and advanced money to a principal debtor pursuant to a facility.
- The amounts lent and advanced were repayable in 240 monthly instalments.
- As security for the obligations of the principal debtor certain entities executed suretyships in favour of the creditor, which suretyships were in turn secured by mortgage bonds registered over certain immovable properties owned by sureties (the bonds).
- The principal debtor failed to pay the monthly instalments in terms of the facility and the last payment was made by principal debtor on 21 October 2008 (the critical date).
- The sureties contended that the debt of the principal debtor prescribed on 22 October 2011 (ie, three years after the last payment was made by the principal debtor) and as there was no principal debt to secure, they sought an order directing the creditor to consent in writing to the cancellation of the bonds without receiving any payment.

The terms of the facility stipulated

that the creditor could terminate the facility and claim immediate repayment of the outstanding balance by giving written notice to the principal debtor. The written notice as aforesaid could, however, only be given by the creditor if the principal debtor previously failed to pay any instalment due in terms of the facility and not remedy the default within seven days of written notice having been given to him.

In this case, although a written notice was given claiming the arrear instalments, no written notice was given whereby the election was communicated to terminate the facility and thereby accelerate the full amount payable in terms of the facility. This only took place when an action was instituted by the creditor for repayment of the amounts owing to it pursuant to the facility. This action was instituted long after the three year prescriptive period would have lapsed, on the assumption that the prescriptive period commenced on the critical date (ie, on 21 October 2008) as contended by the sureties.

## Meaning of when a 'debt is due'

The phrase 'debt is due' is not defined in the Act. The meaning thereof was accordingly considered by the court *a quo* with reference to jurisprudence. The court *a quo* found that the 'debt is due' on the day the creditor acquired the right to enforce payment of the full amount even though it elected not to do so. This conclusion was reached based on the policy consideration that a creditor should not be able to determine, of its own accord, when prescription will commence to run, by delaying its election to enforce an acceleration clause.

The SCA considered the jurisprudence and case law relied on by the court *a quo* with reference to the following -

- contrary views expressed by various academics;
- the difference in wording in the Act and the previous Prescription Act 18 of 1943 (the old Act) (which contrary to the Act, stipulated that prescription would commence when a creditor's right of action first accrued); and
- the express terms of the agreement, which required certain written notices to be given.

The SCA identified that:

- Certain of the cases relied on by the court *a quo* were decided under the old Act and with reference to the policy consideration referred to above.
- The cases that were decided under the Act found, contrary to the views of the academics, that prescription commenced to run on the (first) default by the debtor and not when the creditor elected to claim the balance outstanding.
- The cases in bullet two above were in any event distinguishable, in that in none of them were the giving of written notice a condition precedent to the creditor's right to claim.

The SCA aligned itself with the academics and found that the claim of the creditor against the principal debtor had not prescribed. It found that the written notice of termination was a condition precedent of the creditor's right to claim the full balance owing under the facility. Only when that written notice was given would the creditor have a complete cause of action to pursue its claim against the principal debtor. If such written notice is not given, the creditor cannot be said to be delaying prescription in respect of an existing claim, as the claim for the full amount owing can only arise once the written notice is given. Prescription will, however, commence to run in respect of each monthly instalment, each of which are in themselves separate causes of action. It was, therefore, not a case where

the creditor was delaying the commencement of prescription by its own inaction.

The decision of the court *a quo* was accordingly set aside and the sureties' application was dismissed.

### Conclusion

The meaning of when a 'debt is due', in the case of an instalment agreement, must be determined with reference to the terms of the agreement. If a written notice is required prior to the full balance owing under the instalment agreement becoming due and payable, it may be that the obligation to pay the full balance will only arise once such written notice is given. This will be the case if a written notice is a condition precedent for a creditor's cause of action to claim

the full balance. However, care must be taken as this does not mean that prescription will not commence in respect of each individual instalment as and when they become due and payable.

The findings made by the SCA are not only relevant for litigating practitioners, but may also need to be considered by commercial practitioners when drafting instalment agreements. The benefit of an automatic acceleration clause (where the creditor elected in advance that the full debt will become due immediately upon the first default) must be weighed against the benefit of protecting a creditor's right to elect (after the fact) when to claim the full balance by giving a written notice to the debtor and thereby communicating its election to do so.

- Ramsey Webber were the instructing attorneys for the appellant.
- See law reports 'Prescription' 2016 (May) DR 38.

**Nico Claassen BCom LLM (Stell)** is an attorney at Ramsay Webber Inc in Johannesburg. □

### Erratum:

Please note that the incorrect bank was cited in the law reports 'Prescription' report of 2016 (May) DR 38. The bank cited should have been Standard Bank of SA. We apologise for any inconvenience caused.

By  
Nomfundo  
Manyathi-  
Jele

## Court orders education MEC to determine public school feeder zones

*Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another (CC)* (unreported case no CCT/209/15, 20-5-2016) (Moseneke DCJ)

**I**n a unanimous decision handed down at the Constitutional Court (CC) on 20 May, outgoing Deputy Chief Justice, Dikgang Moseneke, ordered that Gauteng Education Member of the Executive Council (MEC), Panyaza Lesufi, must determine the feeder zones for public schools in the province within 12 months from the date of the judgment.

This order follows an application to the court by the Federation of Governing Bodies of South African Schools (FEDSAS) in which it appealed last year's Supreme Court of Appeal ruling, which found that the Gauteng Education Department had the final say over schools' admission policies and feeder zones.

In terms of current school admission regulations, pupils living within a 5km radius of a school – or those who have a parent working in the area – have a right to attend that school. These applicants are automatically placed on waiting list A, whereas those from outside the 5km radius are relegated to waiting list B.

### Background

According to the judgment, the dispute is between two stakeholders of the public school system. The applicant, FEDSAS, a national representative organisation

for school governing bodies and the first respondent, the MEC, and the second respondent, the Head of Department for Education, Gauteng (HOD). The dispute drew in Equal Education, a membership-based democratic movement of learners, teachers, parents and community members, as *Amicus Curiae*.

According to the judgment, the CC was tasked to determine whether certain amendments to the Regulations on Admission of Learners to Public Schools published in 2012 were invalid. The central issue was whether the regulations were inconsistent with the South African Schools Act 84 of 1996 (Schools Act) or with the applicable provincial law – s 11(1) of the Gauteng School Education Act 6 of 1995, which states: 'Subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools' – or are invalid because they are irrational or not reasonable nor justifiable.

### Regulations in question

The applicant focused on regs 3(7); 4(2) read with 4(1); 5 read with 8; 11(5) and 16. These regulations speak on the following:

- Regulation 3(7) speaks on unfair discrimination. This regulation disallows

a learner's prospective school from requesting confidential information from his or her current school. The applicant claims that a portion of the definition of 'confidential report' renders the regulation irrational, unreasonable and not justifiable because it prevents the disclosure of 'any other information that may be used to unfairly discriminate against a learner.' In its founding papers, the applicant argued that the definition stood in the way of the school's right to 'discriminate fairly.' The applicant submitted that the problem with the regulation is that the prohibition is very wide, and suggested that the portion of the regulation that talks of 'other information' could be remedied by listing specific information on what is permissible or not permissible information to access. The applicant also illustrated that its need for the confidential report is, among other things, to assess special education needs of learners before their admission.

The CC considered reg 3(7) and held, as the respondents contended, that this regulation properly combats unfair discrimination.

- Regulation 4(1) and 4(2) focuses on feeder zones. It states:

'(1) Subject to the National Education Policy Act No. 27 of 1996 and other ap-

plicable laws the MEC may, by notice in the *Provincial Gazette*, determine the feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted.

(2) Until such time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school will be deemed to have been determined so that a place of residence or work falls within the feeder zone, if:

(a) relative to that place of residence or place of work, the school is the closest school which the learner is eligible to attend; or

(b) that place of residence or place of work for that parent is within a 5 km radius of the school.'

On the issue of feeder zones, the CC held that the default position created by reg 4(1), which determines feeder zones on a geographical basis, is indeed an interim, transitional arrangement. It also found traction in the submission that since the Apartheid residential and workplace lines remain firm, the impact of the default feeder zone position is to prolong and legalise racial exclusion. The CC compelled the MEC to formulate fresh rules for feeder zones as required by reg 4(1), which is a major victory for learners in Gauteng.

- Regulation 5 and 8. Regulation 5 speaks on placing an unplaced learner at any school and reg 8 focuses on declaring a school full. According to the judgment, reg 5(8) provides that despite 'the provisions of any school admission policy', the District Director may, at the end of the admission period, place an unplaced learner 'at any school' that has not been declared full and where there remains no unplaced learners on the

waiting list. In addition, reg 8 provides that '[n]otwithstanding the provisions of the admission policy of a school' and until norms and standards required by the Schools Act are in force, 'the objective entry level learner enrolment capacity of a school shall be determined by the [HOD]' who may also declare the school full if the school has reached its enrolment capacity.

'The applicant complain[ed] that regulations 5 and 8 are irrational and not justifiable because they cannot be read harmoniously with sections 5(1) to (3) of the Schools Act. The regulations oust a vital partner – the school governing body – from the public school model imagined in the Schools Act. The *amicus*' grievance is that these powers are open-ended and are granted without strictures that would banish arbitrariness. The respondents submitted that the powers are narrow, defined and rational as their purpose is to ensure the placement of all unplaced learners as the Constitution and Schools Act require. They added that, in any event the safeguard is that the HOD's decision would amount to administrative action that is open to judicial review,' Justice Mosenke stated.

Justice Mosenke found that reg 5 read with reg 8 is rational, reasonable and justifiable and it is not at odds with s 5(5) of the Schools Act. 'Even if they were, they are plainly reconcilable with the scheme of the statute,' he said.

- Regulation 11(5) speaks on the transfer of learners between schools. The applicant argued that reg 11(5) was vague and inoperable. The regulation empowers a District Director to consider the relative capacity of other schools in a district as a criterion for placing a learner in a particular school. 'Here too, the guiding purpose is to ensure that every learner is

placed in a school. This attack that regulation 11(5) is irrational or unreasonable or unjustifiable has no merit,' stated Justice Mosenke.

- Regulation 16 deals with objections and appeals. The applicant argued that the objection process envisaged by reg 16 impinges on the right of the parent of a learner to appeal directly to the MEC. Regarding this point Justice Mosenke said: 'This observation is prompted by an amendment to the Regulations that inserts an extra layer of objection by a parent first to the HOD. But the HOD's decision is subject to an appeal to the MEC. That process is anticipated by section 5(9) of the Schools Act. I do not think that the extra layer of the appellate process amounts to a delegation of authority by the MEC to the HOD to decide an appeal. Regulation 16(4) preserves the appeal to the MEC in so many words. None of his or her appellate powers are shed in favour of the HOD. It is consequently unnecessary to enquire whether a delegation of this kind is permissible in terms of section 105 of the Gauteng School Education Act that regulates delegation of power and assignment of duties.'

The CC held that there was no conflict between the Schools Act, the regulations and applicable provincial law. Rather, the regulations were held to be legislation authorised by provincial legislation and may be read in harmony with the Schools Act and other national legislation.

Nomfundo Manyathi-Jele *NDip Journ (DUT) BTech Journ (TUT)* is the news editor at *De Rebus*. □

By  
Yashin  
Bridgemohan

## *Res judicata* and re-enrolment of arbitration proceedings

*Mashego v Cellier NO and Others* (2016) 37 ILJ 994 (LC)

**T**he applicant in this case was dismissed for alleged misconduct. He then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter was unresolved at conciliation. The applicant then referred his case to arbitration, which came before the first respondent (the commissioner).

At arbitration, it was not in dispute

that the matter was referred and heard as an unfair dismissal dispute relating to misconduct.

The applicant was represented by a union official at the proceedings. During the course of cross-examining the first witness, the union official, suggested that the employee's dismissal was based on his affiliation to the union.

The first respondent then suspended the proceedings and struck the matter from the roll on the basis that the CCMA

did not possess jurisdiction to continue with arbitration. The applicant then terminated the mandate of his union representative and sought the services of an attorney.

The applicant's attorneys proceeded to make application to the CCMA to have the unfair dismissal dispute re-enrolled for arbitration, which went unopposed.

The applicant provided in his supporting affidavit that:

- His union representative acted with-



out his instructions when he provided that the dismissal was based on his affiliation to the trade union.

- He was advised that the Labour Court (LC) does not possess jurisdiction to hear an unfair dismissal dispute as a result of misconduct.

- The main reason for his dismissal was for alleged misconduct and he did not wish to rely on any other reasons, such as victimisation or the fact that he was part of union activities or that he was a shop steward.

The application was heard by the first respondent who denied the application. The first respondent proceeded to make an order that his previous ruling to strike the matter off the roll was *res judicata*.

The first respondent's reasoning for refusing to re-enrol the dispute for arbitration was that he was not aware of any provision in the Labour Relations Act 66 of 1995 (LRA), which conferred jurisdiction on him to set down and/or re-enrol the matter for arbitration before the CCMA under these circumstances or the circumstances detailed by the employee party.

The applicant then made application to the LC in terms of s 158(1)(g) of the LRA to have the ruling not to re-enrol the arbitration reviewed and set aside.

### Issue before the LC

The main issue before the LC was whether the first respondent should have re-enrolled the dispute of unfair dismissal.

### LC's judgment

Steenkamp J looked at the Constitution which 'guarantees the right to fair labour practices.' The court further provided the LRA 'gives effect to those rights' and one of the LRA's prime objectives is 'to promote the effective resolution of labour disputes' (at para 15).

Steenkamp J provided that for it to

be effective, dispute resolution should be quick and both time and legal costs should be minimised. In this regard Steenkamp J referred to the case of *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) 1 SA (CC) at para 31 where the Constitutional Court confirmed this principle and stated:

'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organise their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily ...'.

Steenkamp J noted that the first respondent when passing his first ruling that the matter be struck off the roll did not make a final ruling. The first respondent merely provided that the matter be struck off the roll (at para 18).

Steenkamp J noted further: 'A ruling that the dispute should be struck from the roll is not final in effect.' The first respondent had committed an error in ruling that the dispute was *res judicata*, which in effect resulted in 'an unreasonable result depriving the employee of having the real dispute – unfair dismissal based on misconduct – arbitrated before the CCMA, which is the forum with jurisdiction to hear that dispute' (at para 21).

Steenkamp J then noted judgment of *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union on behalf of Ngweletsana* (2013) 34 ILJ 1138 (LAC) at para 28 where the Labour Appeal Court confirmed that the *functus officio* doctrine, which closely aligned to that of *res judicata*, was not applicable to CCMA commissioners. However, it does apply when a commissioner makes a ruling that is final in effect (*SA Municipal Workers Union v SA Local Government Bargaining Council and Others* (2014) 35 ILJ 2824 (LAC) at para 19).

Steenkamp J held a party to a dispute before the CCMA may withdraw it before it has been finally decided and re-enrol it. Steenkamp J provided similar considerations are applicable to the present case. Even though the applicant had not withdrawn the dispute, the first respondent struck it off the roll. The first respondent did not finally decide it based on the merits. As such, Steenkamp J concluded he did not see anything that stopped the applicant from re-enrolling it (at para 24).

Steenkamp J further held that when the first respondent struck the matter from the roll when he made his first ruling, he had not dismissed the dispute on the merits and the dispute was not *res judicata*. When the first respondent ruled that it was, after the employee had applied for the unfair dismissal dispute to be re-enrolled, an error of law was made. That led to an incorrect finding, as well as an unreasonable result that needs be reviewed and set aside (at para 25).

The LC accordingly ordered that the ruling of the first respondent be reviewed and set aside and the CCMA is to set down for arbitration, the applicant's dispute for unfair dismissal before a new commissioner.

### Conclusion

This case is important because it highlights the view that when an unfair dismissal dispute is merely struck off the roll at arbitration by a commissioner at the CCMA, without a final ruling been made on the merits of the dispute, it may be re-enrolled for arbitration.

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# New legislation

Legislation published from  
3 – 30 June 2016

## Commencement of Acts

**Local Government: Municipal Electoral Amendment Act 1 of 2016.** *Commencement:* 3 June 2016. GenN335 GG40050/3-6-2016.

**Merchant Shipping Amendment Act 12 of 2015.** *Commencement:* 6 June 2016. Proc35 GG40051/6-6-2016.

**Competition Amendment Act 1 of 2009, s 13.** *Commencement:* 9 June 2016. Proc36 GG40057/9-6-2016.

**Mental Health Care Amendment Act 12 of 2014.** *Commencement:* 1 July 2016. Proc37 GG40107/30-6-2016.

## Selected list of delegated legislation

**Animal Improvement Act 62 of 1998**  
Amendment of regulations. GN690 GG40058/10-6-2016.

**Animal Diseases Act 35 of 1984**  
Revised import requirements for cattle, sheep and goats from Botswana, Lesotho, Namibia and Swaziland. GN714 GG40060/10-6-2016.

**Basic Conditions of Employment Act 75 of 1997**  
Amendment of Sectoral Determination: Hospitality Sector. GN715 GG40061/10-6-2016.

**Broad-Based Black Economic Empowerment Act 53 of 2003**  
Broad-Based Black Economic Empowerment Regulations, 2016. GN R689 GG40053/6-6-2016.

**Dental Technicians Act 19 of 1979**  
Amendment of regulations relating to the registration of dental laboratories and related matters. GN729 GG40077/17-6-2016.

**Hague Convention on the Civil Aspects of International Child Abduction**  
Acceptance of countries that acceded to the Convention in terms of article 38. GN695 GG40058/10-6-2016.

## Income Tax Act 58 of 1962

Agreement between the governments of South Africa and Lesotho for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GN749 GG40088/24-6-2016.

## Labour Relations Act 66 of 1995

List of bargaining councils that have been accredited by the Commission for Conciliation, Mediation and Arbitration. GenN338 GG40058/10-6-2016.

## Medicines and Related Substances Act 101 of 1965

Updating of schedules to the Act on recommendation of the Medicines Control Council. GN620 GG40041/3-6-2016.

Amendment of regulations relating to a transparent pricing system for medicines and scheduled substances. GN761 GG40094/24-6-2016.

## National Environmental Management Act 107 of 1998

Minimum information requirements for submission of an environmental assessment application related to shale gas. GN619 GG40041/3-6-2016.

## National Gambling Act 7 of 2004

Regulations regarding the maximum number of casino licences granted throughout the Republic. GN700 GG40058/10-6-2016.

## Private Security Industry Regulations Act 56 of 2001

Amendment of the Code of Conduct under the Act. GN R757 GG40091/24-6-2016.

## Property Valuers Profession Act 47 of 2000

Fees and charges. GenN346 GG40075/17-6-2016.

## Rules Board for Courts of Law Act 107 of 1985

Amendment of rules relating to the conduct of proceedings of the several provincial and local divisions of the High Court of South Africa (Rule 29). GN R678 GG40045/3-6-2016.

## Safety at Sports and Recreational Events Act 2 of 2010

Exclusion from the operation of s 25 of certain events organised by a national or provincial department. GN731 GG40082/20-6-2016.

## South African Schools Act 84 of 1996

Amended national norms and standards for school funding. GN718 GG40065/10-6-2016.

## Tax Administration Act 28 of 2011

Additional considerations in terms of s 80(2) in respect of which an application for a binding private ruling or a binding class ruling may be rejected. GN748 GG40088/24-6-2016.

## Draft legislation

Civil Aviation Draft Amendment Regulations in terms of the Civil Aviation Act 13 of 2009. GN R686 GG40049/3-6-2016.  
Draft National Greenhouse Gas Emission Reporting Regulations in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN336 GG40054/7-6-2016.

Draft Spatial Data Infrastructure Regulations in terms of the Spatial Data Infrastructure Act 54 of 2003. GN698 GG40058/10-6-2016.

Draft Preferential Procurement Regulations, 2016 in terms of the Preferential Procurement Policy Framework Act 5 of 2000. GN719 GG40067/14-6-2016.

Draft amendments to the Radio Frequency Spectrum Regulations in terms of the Electronic Communications Act 36 of 2005. GenN351 GG40078/17-6-2016.

Draft regulations regarding the minimum training standards, instructions and qualifications for the different categories or classes of security service providers in the private security industry in terms of the Private Security Industry Regulations Act 56 of 2001. GN R756 GG40091/24-6-2016.



# Employment law update



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## Automatic termination clauses in employment contracts

In *National Union of Mineworkers obo Milisa and Others v WBHO Construction (Pty) Ltd* [2016] 6 BLLR 642 (LC), the applicant employees were employed in terms of fixed term contracts of employment that provided that the duration of the contract was 'the skills requirement of the project'. Prior to the completion of the project, the applicant employees were given letters of termination on the basis that their skills were no longer required. The employees argued that their dismissal amounted to an unlawful premature repudiation of the fixed term contracts as the project had not yet been completed. They also alleged that they had been unfairly dismissed and that the employer could not contract out of the unfair dismissal provisions contained in the Labour Relations Act 66 of 1995 (LRA). The employer on the other hand argued that the fixed term contracts had terminated by the effluxion of time as the applicants' skills were no longer required for the project.

The Labour Court (LC) held that the automatic termination provisions in the fixed term contracts were in contravention of the LRA in terms of which employers may not terminate employees' services at will. Furthermore, in terms of the fixed term contract the employer had an unfettered discretion to determine when the applicants' skills were no longer required and there was no evidence led as to how the employer reached this decision. It was held that the employees had been dismissed for operational requirements and thus should have been consulted with in accordance with the LRA. The dismissals were accordingly substantively and procedurally unfair and compensation equal to three months' wages was granted. In deciding

that three months' remuneration was fair and equitable in the circumstances, Lallie J considered the fact that the applicants had only been in the employ of the employer for about a year and were aware from the outset that their employment was not permanent.

## Difference in pay based on geographical location

In *Duma v Minister of Correctional Services and Others* [2016] 6 BLLR 601 (LC) the LC was required to consider whether Ms Duma was unfairly discriminated against on an arbitrary ground as she was paid less than her colleagues who occupied similar positions but were located in a different province. She accordingly alleged that she was discriminated against on the basis of geographical location.

In defence, the employer did not attempt to justify the pay difference but instead argued that Ms Duma's claim had prescribed as she had become aware of the pay difference since 2007. Ms Duma argued that the claim had not prescribed as the alleged discrimination was ongoing in that the difference in pay occurred from 2007 to date. The LC found that unfair discrimination claims under the Employment Equity Act 55 of 1998 do in fact prescribe and thus Ms Duma's claim was limited to the three year period that immediately preceded her referral of the claim.

Given the fact that the employer just made a bald denial of the allegations and did not try and justify the difference in pay, Rabkin-Naicker J held that the discrimination based on geographical location was arbitrary and unfair. The employer was accordingly ordered to pay the employee the difference between the salary that she earned and the salary of those employees in similar positions in a different geographical area from August 2009 to the date of the order, as well as to adjust the employee's salary upwards going forward. Importantly, this claim arose prior to the equal pay for work of equal value provisions being included in the Employment Equity Act.

## Dismissal for racism

In the case of *City of Cape Town v Freddie and Others* [2016] 6 BLLR 568 (LAC), there was an altercation between the respondent employee and his manager following a meeting in which the employee had been provided with guidance on how to fill in reports to account for his time. The employee threatened the manager saying that he would deal with him. He

then bombarded the manager with e-mails accusing him of incompetency and copying certain other employees in the e-mails. The employee continued sending various e-mails culminating in an e-mail in which he accused his manager of being racist and being 'worse than Verwoerd'. After the receipt of this e-mail the manager felt that he could not work with the employee anymore and that the working relationship had been damaged beyond repair. The employee was then charged and dismissed for gross insubordination in that in various e-mail communications and as well as in a one-on-one situation he had acted insolent, provocative, aggressive and intimidatory towards his manager. He was also found guilty of sending a derogatory, insolent, racist, provocative and offensive e-mail in which he compared his manager to Verwoerd.

The employee referred a dispute to the bargaining council alleging that he was unfairly dismissed. The bargaining council was required to consider whether the sanction of dismissal was too harsh in the circumstances and thus whether the dismissal was substantively fair. The employee conceded that the e-mail was wrong but he did not think that the working relationship was damaged beyond repair. The arbitrator found that there was no evidence to support the allegations of racism towards the employee's manager and these views seemed to be the subjective perception of the employee. Nevertheless, the arbitrator found that dismissal was too harsh in the circumstances given the employee's length of service and his remorse. Reinstatement was consequently ordered. The arbitrator also noted that there had been no attempt to try reconcile the relationship and thus it could not be said that the working relationship was irretrievably broken down.

The employer took the award on review to the LC where it was argued that the arbitrator made a decision, which no reasonable decision maker could make especially given the fact that the evidence that the employment relationship had irretrievably broken down was largely disregarded. The LC placed emphasis on mitigating factors such as length of service, remorse, the fact that the employee could be accommodated elsewhere in the organisation and that he had already served three months' suspension for sending the e-mail.

The LC concluded that the arbitrator reached a decision that a reasonable decision maker could make. The LC, however, found that the employee was not



entitled to backpay given the fact that the misconduct was serious. Furthermore, the order of reinstatement was made subject to a final written warning valid for 12 months with effect from the date on which he resumed his duties.

On appeal, the LAC held that referring to someone as worse than Verwoerd was an unacceptable racist slur, which is serious as it constitutes hate speech and is prohibited under the Constitution. The

LAC found that given the serious nature of racism it generally warrants dismissal and thus this was a factor that generally outweighed any mitigating factors such as length of service. The LAC was also of the view that the employee had not shown genuine remorse as he had continued to write offensive e-mails about the manager after the dismissal. This said, even if there had been genuine remorse on the part of an employee it

would not necessarily be enough to save an employee from dismissal where there had been serious misconduct.

It was held that the decision of the arbitrator was not a decision that a reasonable decision maker could make in light of the evidence. The award was therefore set aside and substituted with an order that the dismissal was substantively fair.



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## Ability of the Labour Court to use the rules of the High Court

*South African Post Office SOC Ltd v CCMA and Others* (unreported case no J254/16, 27-5-2016) (Lagrange J).

On the strength of an arbitration award in its favour, the Communication Workers Union (acting on behalf of 35 of its members) obtained a writ of execution against the South African Post Office (SAPO).

SAPO approached the Labour Court on an urgent basis seeking to stay the writ pending the finalisation of an application to review and set aside the arbitration award.

The matter was enrolled for hearing on 11 May 2016. On that particular day SAPO had two matters set down for hearing in two different court rooms.

While waiting in one court room the union's representative was informed by his client that Prinsloo J had delivered a final order in SAPO's favour in another court room. It was only then that the union's representative realised he was sitting in the wrong court room.

The union thereafter made an application in terms of r 8(10) of the Labour Court Rules.

Rule 8(10) reads:

'Unless otherwise ordered a respondent may anticipate the return date of an interim interdict on not less than 48 hours' notice to the applicant and the registrar.'

However, when the application was argued before Lagrange J the union formulated its argument around r 6(12)(c) of the Uniform Rules of the High Court, which reads:

'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

The court firstly considered whether, in the absence of a provision in the Labour Court Rules, which makes for the same or similar provision as r 6(12)(c) of the Uniform Rules of Court, there was any reason why r 6(12)(c) should not be adopted into the Labour Court Rules.

Acting in accordance with r 11(3) of the Labour Court Rules, which allows the court to adopt any procedure it deems appropriate when addressing a situation not contemplated for in the rules, the court held the following:

'There is no equivalent of the High Court rule 6(12)(c) in Rule 8 of the Labour Court [R]ules dealing [with] urgent applications. Clearly, the High Court provision was designed to allow an expeditious rescission of an order granted on an urgent basis to avoid the party against whom it was made from having to bring a rescission application on notice of motion. No doubt, if there is no adequate explanation provided for the party's absence at the original proceedings that will play a part in the deliberations of the court reconsidering the matter.'

In any event, there is no reason why the Labour Court should not entertain applications to reconsider urgent orders on the basis provided for in the High Court rule.'

Having made this point the court turned to the application before it. The union's notice of motion and supporting affidavit made no mention of bringing the matter back to court for reconsideration in terms of r 6(12). In fact the specific relief sought was to 'anticipate the interim order' of 11 May with the view of discharging it.

The legal hurdle for the union was that the order by Prinsloo J was final, which meant there was no return date to anticipate. In addition to this and from a reading of the union's application, SAPO

could not have been expected to argue whether the order should be reconsidered when the papers before it made no mention of such relief. The court held:

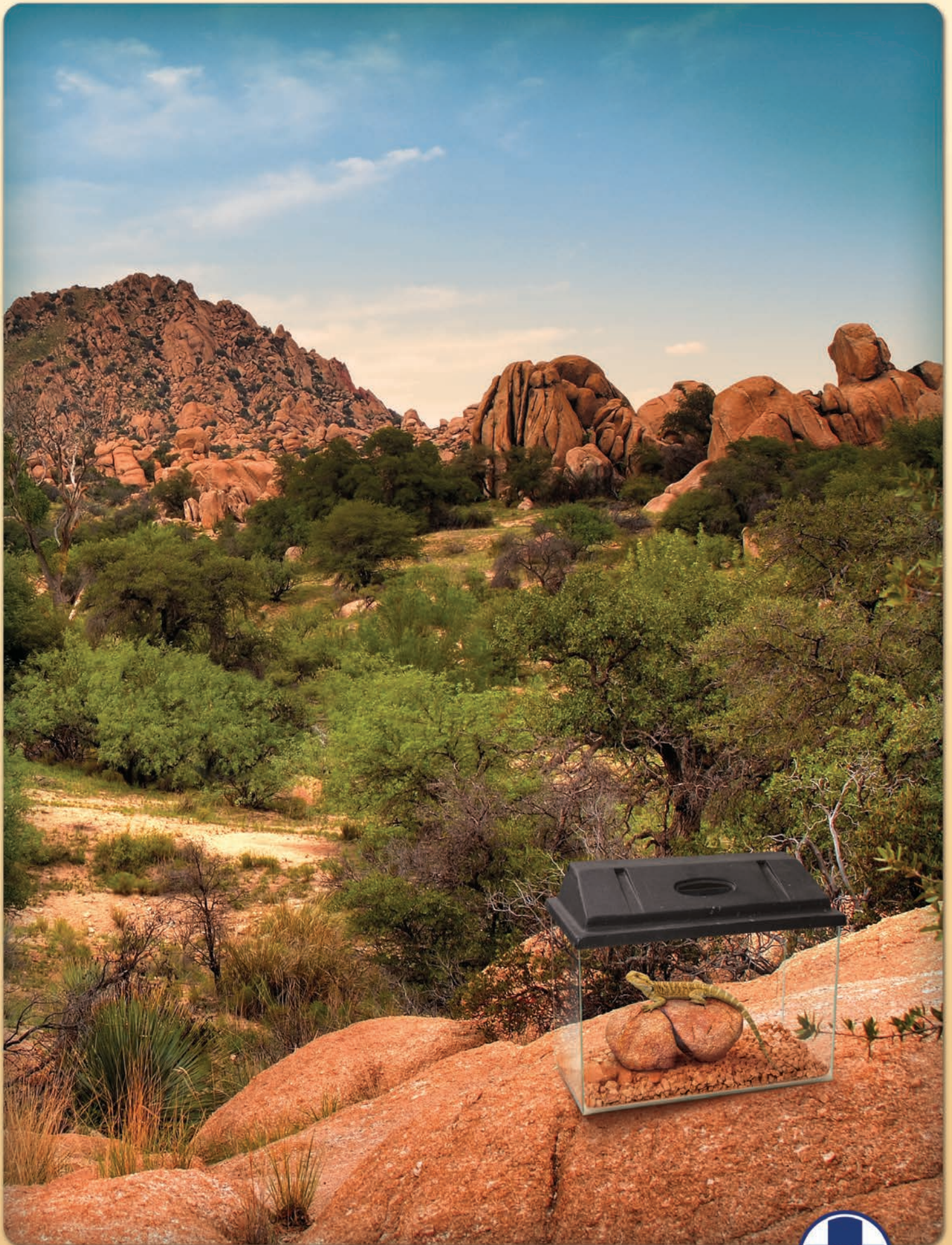
'The purpose of a notice and a supporting affidavit is to set out the basis of the case the respondent party has to meet. When the notice is couched as the anticipation of a non-existent return day, then the application turns out to be a reconsideration of the matter, it is understandable the respondent party should be caught off guard. I am inclined to dismiss the application brought ostensibly under Rule 8(10) because the true legal nature of the application, which was a reconsideration of the matter under a different rule was not disclosed in the third respondent's notice or founding affidavit. It is not simply a question of formality: the nature of an application for anticipation of a return date presupposes that the court made an interim order, whereas an application to reconsider the matter does not.'

The court dismissed the union's application with costs. In doing so and without assessing the substantive merits of the union's argument, the court did, however, find there was nothing preventing the union from bringing an application in terms of r 6(12)(c) to have the final order reconsidered.

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Maree, PJH and Quinot, G 'A decade and a half of deference (part 1)' (2016) 2 *TSAR* 268.

## Child law

Carter, EI and Boezaart, T 'Article 13 of the United Nations Convention on the Rights of People with Disabilities: Does the Children's Act 38 of 2005 support access to justice for children with disabilities?' (2016) 79.2 *THRHR* 248.

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Otto, JM 'Die *condictio ob turpem vel injustam causam* en die Nasionale Kredietwet *Chevron SA (Pty) Ltd v Wilson h/a Wilson's Transport* [2015] 10 BCLR 1158 (KH)' (2016) 2 *TSAR* 369.

## Criminal law

Botha, R and Van Rooyen, M 'Dronkenskap as verweer in die Suid-Afrikaanse strafreg: 'n Sober benadering?' (2016) *LitNet*.

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Stevens, P 'Recent developments in sexual offences against children - a constitutional perspective' (2016) May *PER*.

Watney, M 'Ne bis in idem en procedurele mistastings - *Lelaka v The State* (409/15) 2015 169 (26 Nov 2015)' (2016) 2 *TSAR* 362.

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## Data protection

Naude, A and Papadopoulos, S 'Data protection in South Africa: The Protection of Personal Information Act 4 of 2013 in light of recent international developments (2)' (2016) 79.2 *THRHR* 213.

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Scott, J 'Die grense van middelike staatsaanspreeklikheid vir opsetsdelikte van polisiebeamptes *Morudu v Minister of Safety and Security* saak nr 35474/2002 (ongerapporteer) 5-08-2013; *Minister of Safety and Security v Morudu* (1084/13) 2015 ZASCA 91 (29 Mei 2015)' (2016) 2 *TSAR* 332.

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Watts, S 'Protection of the African lion: A critical analysis of the current international legal regime' (2016) May *PER*.



## Family law

**De Jong, M** 'University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (South African Human Rights Commission as Amicus Curiae) - implications for the issuing of emoluments attachment orders in maintenance matters?' (2016) 79.2 *THRHR* 261.

## Human rights

**Rudman, A** 'The commission as a party before the court - reflections on the complementarity arrangement' (2016) June *PER*.

## Labour law

**Geldenhuys, J** 'The reinstatement and compensation conundrum in South African labour law' (2016) May *PER*.

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**Grogan, J** 'Equal before the law - no escape from the state from section 197 of the LRA' (2016) *EL* June 11.

**Grogan, J** 'Misconduct on high - what if Zuma was a worker?' (2016) *EL* June 14.

**Grogan, J** 'Not invalid but unfair - consequences of non-compliance with section 189A of the LRA' (2016) *EL* June 3.

**Le Roux, R and Cohen, T** 'Understanding the limitations to the right to strike in essential and public services in the SADC region' (2016) May *PER*.

**Papacostantis, H and Mushariwa, M** 'The impact of minority status in the application of Affirmative Action: *Naidoo v Minister of Safety and Security* [2013] 5 BLLR 490 (LC)' (2016) *PER* May.

## Legal education

**Fourie, E** 'Constitutional values, therapeutic jurisprudence and legal education in South Africa: Shaping our legal order' (2016) May *PER*.

## Property law

**Botha, M** 'Illegally constructed buildings: Appeal court sows confusion regarding total or partial demolition order' (2016) *PLD* June 2.

**Botha, M** 'No fidelity fund certificate - no commission? The interaction between sections 26 and 34A of the Estate Agency Affairs Act (part 1)' (2016) *PLD* June 2.

**Nagel, CJ** 'The Subdivision of Agricultural Land Act 70 of 1970, options to purchase and related matters' (2016) 79.2 *THRHR* 276.

**Tuba, MD** 'The legal status of registered home owners' association conditions - *Willow Waters Homeowners Association (Pty) Ltd v Koka*' (2016) 79.2 *THRHR* 339.

**Van der Merwe, CG** 'How far are unanimous resolutions of a sectional title general meeting, in actual fact, unanimous? A critical analysis of the provisions of the Sectional Titles Act with regard to unanimous resolutions' (2016) 79.2 *THRHR* 177.

**Van der Walt, AJ and Sono, NL** 'The law regarding *inaedificatio*: A constitutional analysis' (2016) 79.2 *THRHR* 195.

## Sentencing

**Barrie, GN** 'Mandatory life sentence without parole for juveniles declared unconstitutional by Supreme Court of United States of America - effect retroactive or prospective? *Miller v Alabama* 132 US 2455 (2012)' (2016) 2 *TSAR* 377.

## Succession

**Sonnekus JC** 'Intestate erfreg, terug-

werking van a ongrondwetlik bevonde gemeentregtelike reel en ongegronde verryking' (2016) 2 *TSAR* 312.

## Trade law

**Wethmar-Lemmer, M** 'The Vienna sale convention and party autonomy - article 6 revisited' (2016) 2 *TSAR* 255.

## Unjustified enrichment

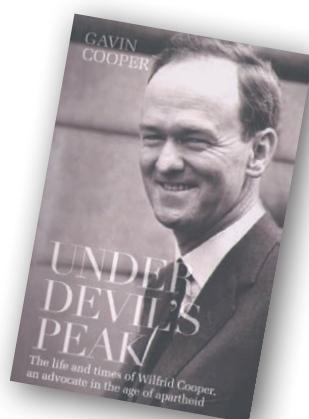
**Du Plessis, J** 'Determining the moment when enrichment liability is quantified: The curious case of *Paschke v Frans*' (2016) 2 *TSAR* 281.

**Jooste, C and Schrage, E** 'Subsidiarity of the general action for unjust enrichment (part 2)' (2016) 2 *TSAR* 220.

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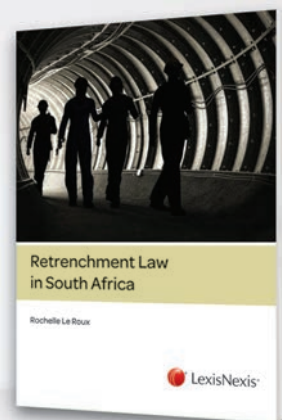
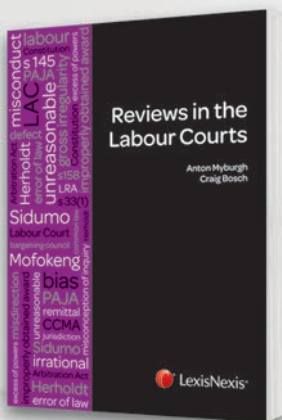
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# RISKALERT

AUGUST 2016 NO 4/2016

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Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.

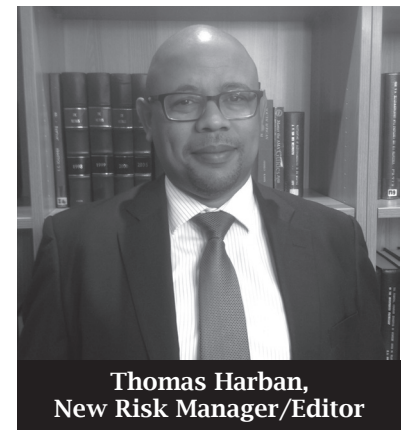
## RISK MANAGER'S COLUMN

### New Risk Manager/Editor

Dear Readers

It is with a mixture of excitement and mild melancholia that I put my final *Bulletin* to bed. By the time it reaches your desk, a new Risk Manager/Editor will be sitting at mine. Thomas Harban will move into this role when I retire at the end of July. Given Thomas's experience and involvement in the Attorneys Insurance Indemnity Fund NPC (AIIF) over the past seven years, I am fortunate to be able to hand over to him without any concerns.

Thomas graduated from the University of the Witwatersrand with BA and LLB degrees. He served articles at Fluxman Rabinowitz - Raphaely Weiner attorneys (now known as Fluxmans Inc.) where he practiced mainly in the area of commercial litigation. He was admitted as an attorney in November 1997 and after practising for a number of years, he took up the position of Legal Adviser at the office of the Auditor General. He joined us as a Claims Manager in 2009 and was



Thomas Harban,  
New Risk Manager/Editor

promoted to General Manager in 2011. He can be contacted via e-mail at [thomas.harban@aiif.co.za](mailto:thomas.harban@aiif.co.za) or on (012) 622 3928.

Many thanks to those of you who have taken the time and trouble to read the *Bulletin* and especially those of you who have written to or called us with your views, comments and queries over the years.

May you all have a claim-free future!

Ann Bertelsmann  
[www.aiif.co.za](http://www.aiif.co.za)

## New scheme policy

The policy for the 2016/2017 insurance scheme year, which came into force on 1 July 2016, was published in the July *Bulletin*. It can also be found on our website ([www.aiif.co.za](http://www.aiif.co.za)). If you have not already done so, please read it carefully to ensure that you are properly informed about your cover. If you have any questions, please contact Thomas Harban who will gladly assist you.



Attorneys Insurance  
Indemnity Fund (NPC)

Est. 1993 by the Attorneys Fidelity Fund



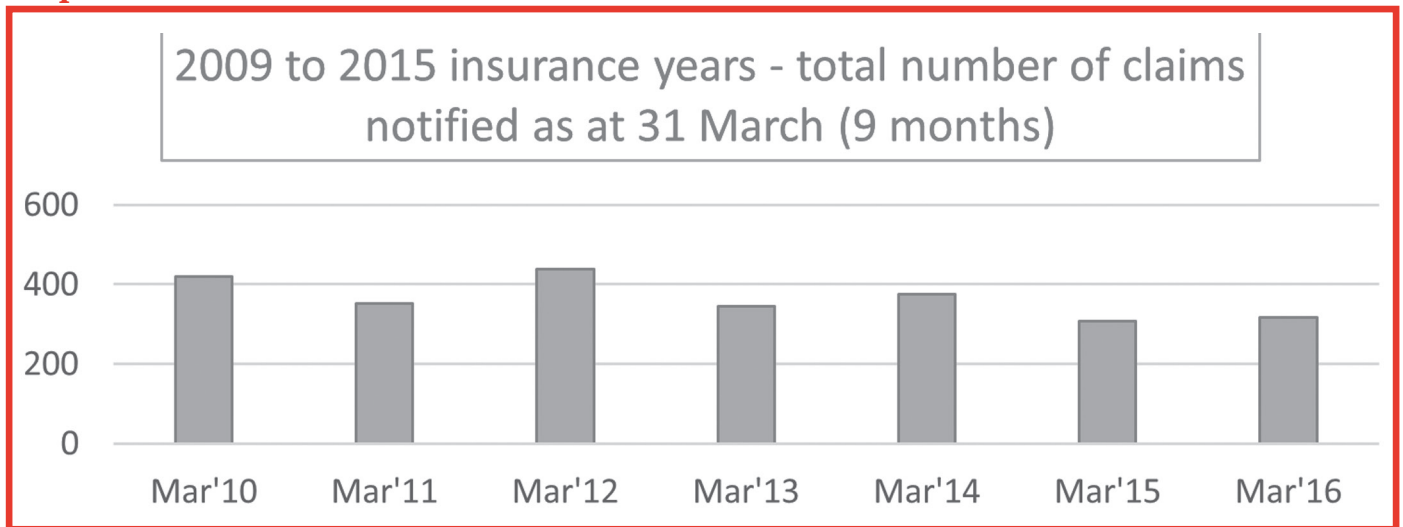
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## RISK MANAGER'S COLUMN continued...

### Claims statistics from the Attorneys Insurance Indemnity Fund NPC (AIIF)

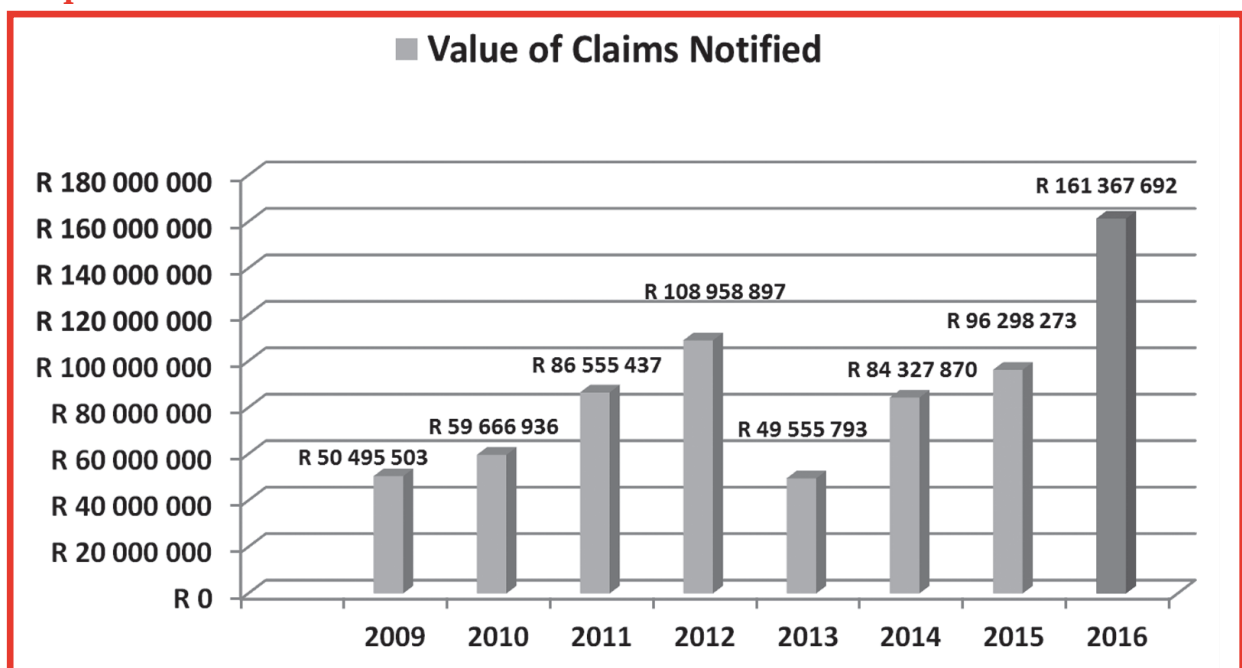
Graph 1



Graph 1 shows that the number of professional indemnity claims against practitioners has stabilised over the past few years. This is pleasing, especially considering the increasing number of practitioners and increasing awareness of their rights on the part of clients. However, the values of these claims are escalating – which is largely unavoidable.

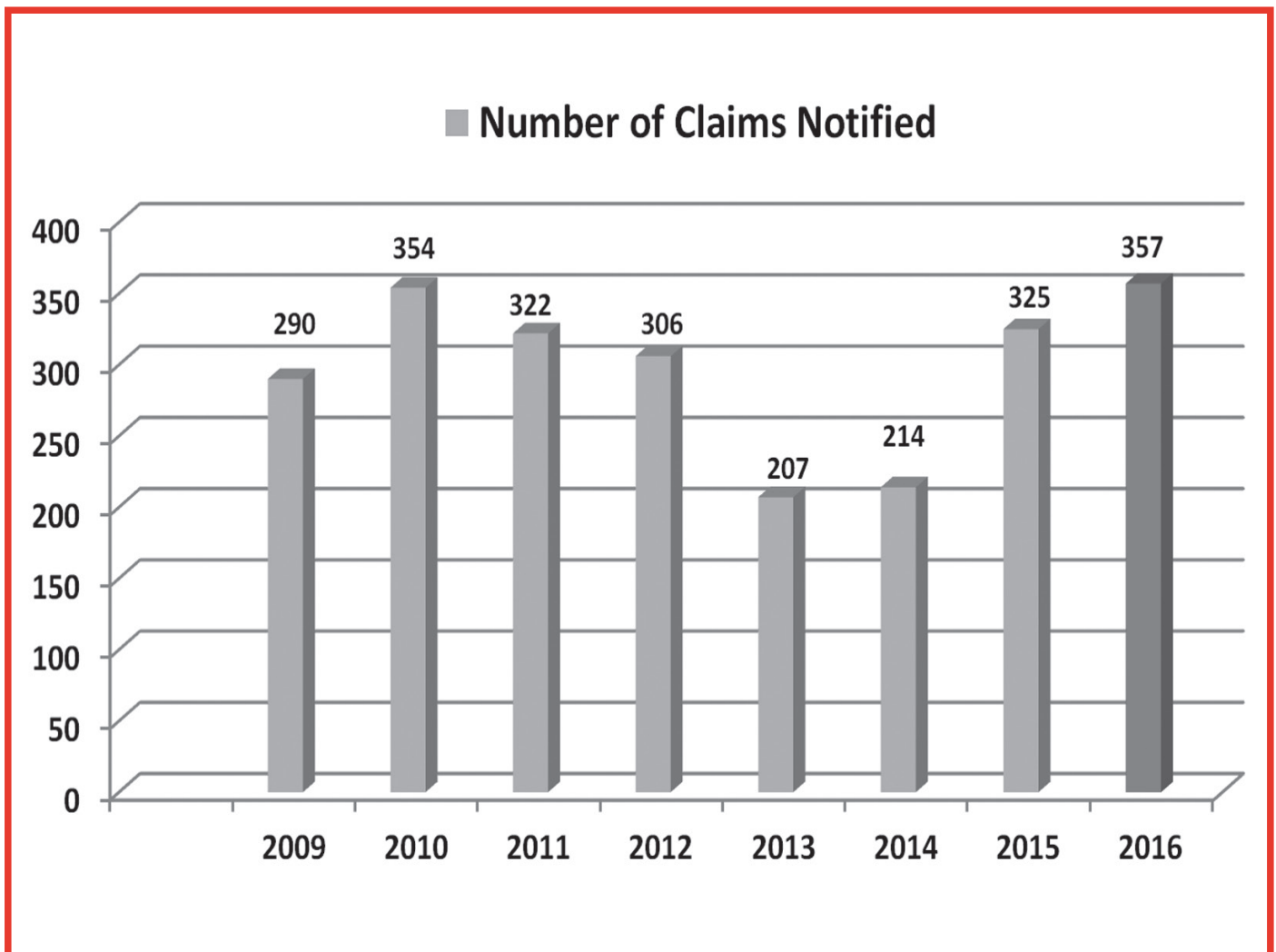
### Claims statistics from the Attorneys Fidelity Fund (AFF)

Graph 2



## RISK MANAGER'S COLUMN continued...

**Graph 3**



As can be seen from Graph 3, claims made against the AFF, arising out of the misappropriation of trust money seem to be on the increase in the past two years. As seen in Graph 2, the value of these claims also continues to grow at an alarming rate, **with conveyancing matters being the source of 45% of the value.**

The Claims Executive of the AFF, Jerome Losper, reports that between 1 January 2016 and 30 April 2016, the AFF paid out 131 claims worth over **R30 million.**



## AIIF RISK MANAGEMENT INTERVENTIONS

**T**he AIIF has been in existence since 1993, but it was only in 2009 that the position of full-time Risk Manager was created to deal specifically with claims-related risks, both internally and externally.

**Internally** we currently have a rigorous process for dealing with claims, to ensure that all compensation paid is justified and fair. Our legal advisers are all admitted attorneys and must comply with strict minimum operating standards (MOS) in dealing with claims and payments. File audits, forensic investigations and several levels of authorisation ensure that there is no room for errors and fraud.

**Externally** things are more complicated. Legal practitioners generally have little insight in to what can go wrong in practice and have little interest in spending precious billable hours learning about, planning and implementing risk and practice management strategies. Working with claims against attorneys has certainly opened my eyes - our challenge is to open theirs!

So firstly, we need to educate and inform the profession. Cover is automatic and we therefore have little or no interface with our insured attorneys - until they have to report a claim to us. Since the AIIF is a non-profit company and does not currently charge a premium to the profession, funds for expensive campaigns and communications are not available.

### How do we communicate with the profession?

As the diagram on page 5 below shows graphically, we communicate with the profession in the following ways:

- By publishing the *Risk Alert Bulletin* five times a year as an



insert in De Rebus. Current and past copies of the Bulletin can be found on our website ([www.aiif.co.za](http://www.aiif.co.za)). There is both a subject and a date index to assist practitioners to find specific articles. We value communication with our insureds and invite you to submit articles or letters for publication in the *Risk Alert Bulletin*.

- Through *Prescription Alert* (PA). This is a computerised back-up diary system, made available to practitioners free of charge. You can register your firm and your individual matters on this diary system. Please contact Lunga Mtiti (021) 422 2830 for more information. PA also offers a risk toolkit, newsflashes on various topics of interest and a helpline. They will also put you on a mailing

list to receive electronic copies of the *Bulletin*.

- Through our *Website*. A lot of work has gone into our site - so please do not forget to use it. There are sections for registering with PA, obtaining information about and forms for executor bonds, obtaining copies of your past and current professional indemnity master policy and contact details for all departments. The Risk Management section gives access to a wide range of information and articles. One such article is "*Risk Management Tips*" which deals with various aspects of risk management. Even though it is lengthy, we believe it is worth reading. Readers will also have access to "*Red Flag Areas in Conveyancing*", "*Litigation do's and Don'ts*", "*Minimum Operating*

## AIIF RISK MANAGEMENT INTERVENTIONS continued...

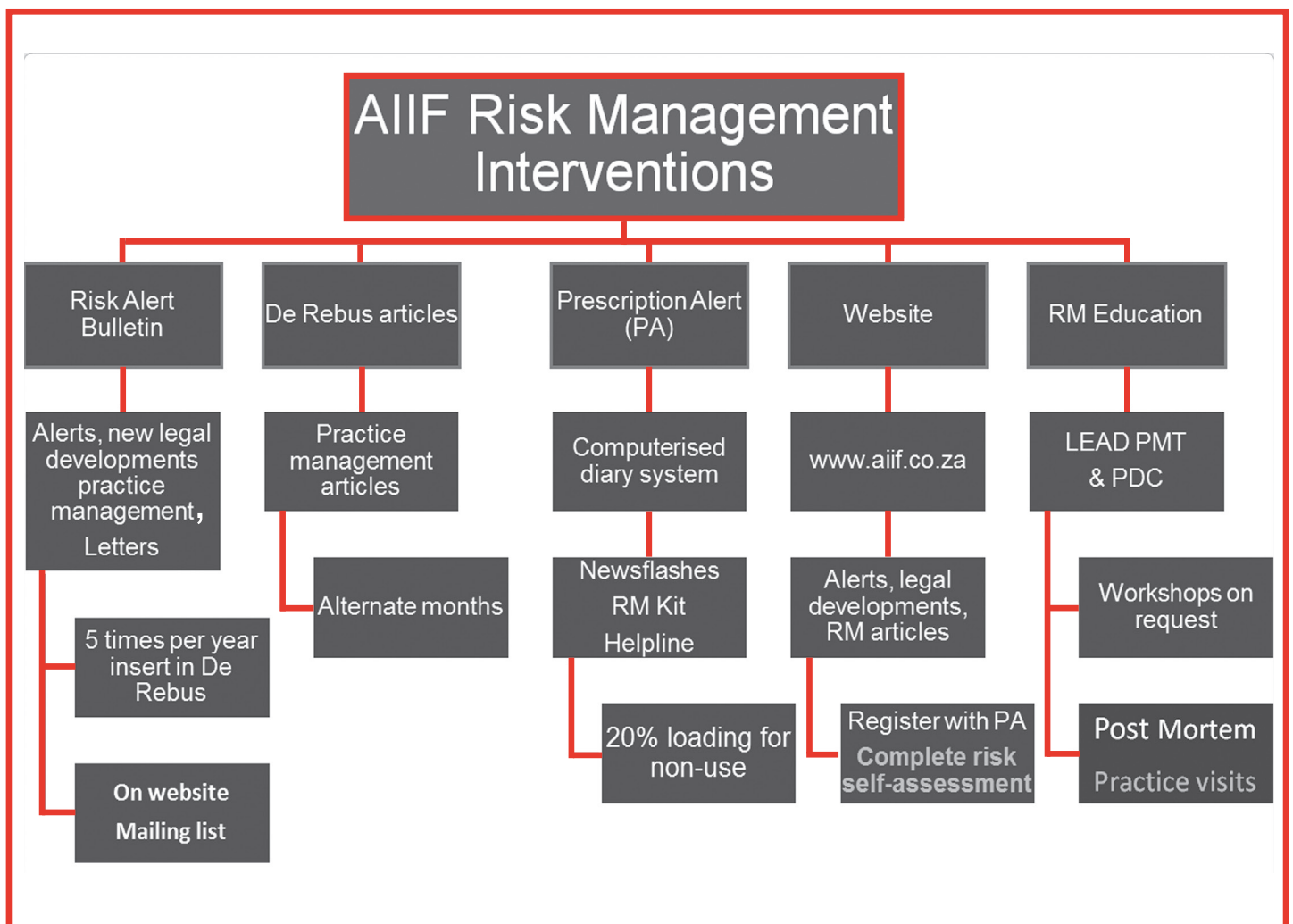
*Standards*", *"File Audits"*, *"General Prescription Tips"* and a prescription table. There is also a sub-section with specific RAF prescription and under-settlement information, legislation and judgments as well as information on current scams that affect the profession. A risk self-assessment questionnaire can be downloaded or completed online. (Annual completion of this questionnaire is obligatory prior to a claim being admitted.)

- We are also committed to further educating the profession on risk management. To this end, we work closely with LEAD in providing workshops for the profession. We draft materials for and run the compulsory Practice Management Training workshops for the module Risk Management and Insurance.
- When requested, we conduct *ad hoc* workshops for individual or groups of firms and law societies.

We are also willing to come out to individual practices to address staff on risk management issues, if required.

Practitioners are most welcome to contact our offices with any queries or requests for risk management advice. Of course we cannot provide any legal advice.

**Ann Bertelsmann**  
[www.aiif.co.za](http://www.aiif.co.za)



## CONVEYANCING

### FICA (Financial Intelligence Centre Act 38 of 2001)

**T**he main objective of FICA is to combat financial crimes like money laundering and tax evasion.

All accountable institutions listed in terms of Schedule 1 must comply with FICA. Attorneys are listed as an accountable institution.

FICA requires attorneys to:

1. Identify and verify the client by comparing the information with the verifying documents provided by the client, such as the green bar coded Identity Document or Identity card;
2. Keep client records for at least 5 years from the date of conclusion of the matter – these records may be kept electronically;
3. Report suspicious and illegal transactions; and
4. Appoint a compliance officer, to implement internal rules and provide training.

If an attorney does not comply with FICA, it is regarded as a criminal offence and severe penalties may be imposed on the responsible employee or the firm. These penalties include imprisonment not exceeding 15 years or a fine not exceeding R100,000,000 (one hundred million rand). The penalty will depend on the seriousness of the non-compliance with the obligation or the crime committed.

All clients must be FICA'ed when assisted in the planning or execution of the following:

1. Buying or selling of immovable property and business undertakings;
2. Representation in financial or



Natasha Lodewyks

3. real estate transactions;
3. Opening or managing bank accounts, investments or securities;
4. Creation, operation or management of a company or close corporation or a similar structure outside the republic;
5. Creation, operation or management of a trust or similar structure outside the republic except in the cases where the trust is established by a testamentary writing (will) or court order;
6. Disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property;
7. A client deposits R100 000 or more over a period of 12 months in respect of attorney fees incurred in the course of litigation.

If the client does not fall into one of these categories, the

client is exempted. However a FICA Exemption Form (drafted in accordance with the firm's internal policies) must be completed.

In order to FICA a client, the attorney must:

1. Obtain information and documents from the client to that verify what the client says is true and correct;
2. Submit the documents to the FICA officer for FICA verification;
3. In the case of repeat clients, the client will have to be FICA'ed the first time, thereafter the FICA officer will only need to confirm verification;
4. Where a correspondent gives instructions, the only requirement is to obtain a letter from the correspondent confirming that their client has been FICA'ed; and
5. All the above documents are to be kept with the FICA officer.

To summarise, if there is certainty that the value of the client's account will never exceed R100,000 **over a 12 month period**, the client is exempted from the FICA process, however an Exemption Form will still need to be completed. If there is any uncertainty regarding the value of the client's account, the client must be FICA'ed. It is the responsibility of each attorney to FICA clients and comply with FICA in order to avoid penalties being imposed.

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## GENERAL PRACTICE

In the age of internet, e-mail and instant messaging, we have become accustomed to instant results. This rings true for business as well as communication. E-mail is more and more the mode of communication in daily business transactions. Our courts are becoming more accepting of these electronic communications. We see the development of case law, where documents are considered to have been properly served and courts will give judgments by default where service through social media is proven. (This electronic service can include service by Facebook and WhatsApp).

As a society we have become so eager to finalise transactions that we seldom, if ever, check whether we have the correct e-mail address. A small change such as a full stop or an extra letter, a “.com” as opposed to “.co.za” may be the difference between sending your email to the right person, or assuming that you have received the mail from the right person.

Furthermore, many managers/ business owners have delegated their communication functions to administrative staff. Often, these members of staff are not permanent or are regularly rotated, therefore not being alive to changes and the inherent risks in the absence of communication management.

It appears that our society's need for instant gratification or its over-eagerness to respond immediately to all e-mail enquiries/communication, pose a threat to our financial well-being and the protection of privacy. One of the main threats in this regard at present is **Spoofing**.

**Spoofing:** In laymen's terms, is where the e-mail address appears at face value to be that of one person, whereas it is in fact a similar e-mail address - but communication is sent to a completely different person.

## Financial transactions and the risk of phishing and spoofing

E-mail **spoofing** is commonly used for spam and phishing emails in order to mislead the recipient as to the origin of the message.

Phishing e-mails contain a link to a website which appears to be that of a service provider often visited by the user, enticing the user to enter personal details into the site, causing the recipient to obtain unfettered access to banking accounts, client information and the like, through the use of the user's username and password information. In some instances the information will be used to gain access to the mailing account of a user and monitor their communications, which a third party then uses to intercept communication, mainly relating to financial transactions.

Other applications that may be sneaked onto a user's devices via the above methods include Malware (this is normally embedded within an attachment to the e-mail received).

### Tips:

- Antivirus: Antivirus programmes assist with detecting known Malware activity as well as specific items that may be residing on your device.
- Always ensure that your antivirus programmes are up to date. This is not an item any company should be saving on - get the best in the market.
- Do not click on links in an e-mail unless you are completely sure of the source.
- Have security measures in place for all financial transactions - ensure that you have a secondary process in place to confirm banking details before any changes are made or any funds paid.

- Do not simply make use of the “reply” button, unless you are satisfied that the mail will be sent to the correct recipients. This is especially true for e-mails requesting personal information from an unusual source.
- Be wary of the “autocomplete” functionality with financial transactions.
- With financial transactions, always cross check e-mailing details carefully.
- Ensure that your in-house IT policies as well as financial processes are in writing and all staff understand and comply with them - especially rotating and new staff.
- Double check the signatures for all financial transactions against the e-mail address utilised.
- The majority of financial institutions will address you by your company or personal name and not a generalised greeting (Dear Sir/ Madam)
- Be suspicious of any e-mail that asks you for personal information such as your username, password or bank details.

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[www.lextrado.co.za](http://www.lextrado.co.za),  
[www.tipoffsatwork.co.za](http://www.tipoffsatwork.co.za)*

## GENERAL PRACTICE continued...

### Settlements : A claim case study:

#### B Bank vs Company X

A attorneys instituted an action out of the High Court, for the recovery of money owing by Company X in respect of six different loan agreements with B bank. The parties entered into negotiations and settlement was eventually reached. The parties agreed that all amounts owing on the six accounts would be paid in full, in two instalments.

A attorneys thereafter attended to the drafting of the settlement agreement which read as follows:

*"Company X shall pay an amount of:*

1. *R..... by close of business on 31 March 2014*

2. *R..... by close of business on 30 April 2014*

*All payments are to be made directly into account number 12345."*

Although the oral settlement agreement included payment of the full amounts owing on all six accounts, it transpired that, when drafting the settlement agreement, A attorneys had only included the amount owing in terms of the one account (account number 12345).

Company X has of course, snatched at the bargain and is refusing to make payment in respect of the other five accounts, as had been agreed verbally.

A attorneys must now apply for rectification and if unsuccessful, they may face a claim.

#### Lesson learnt:

Take care to ensure that the terms of any settlement reached between the parties are accurately reflected in the written agreement – whether the agreement is drafted by you or the representative of the other party

## LETTERS TO THE EDITOR

I write to you under circumstances in which I wish I did not have to. We discovered about a month ago, after a request from our client for an update on a matter that, the file was nowhere to be found and worse still, we have no electronic records of anything being done in the matter but for acknowledging receipt of the instruction to client.

It is a 3<sup>rd</sup> party recovery matter for Company X and the claim, unfortunately for us, prescribed in December last year. We have sent a letter of demand to the 3<sup>rd</sup> party, whose attorneys have responded to advise that the claim has prescribed. I will forward full details when submitting the claim formally.

The reason for my mail is that Company X want us to lodge a claim in respect of this matter with yourselves. I just wanted to know how I go about doing so in circumstances where they have not sued us. Do they need to issue summons or send us a letter of demand or does our admission of fault and their request to lodge the claim suffice?

Please advise on the procedure going forward.

(Name withheld)

#### Our Senior Legal Adviser replies as follows:

In terms of clause 22 of the policy the Insured must give immediate written notice to the Insurer of any circumstance, act, error or omission that may give rise to a **Claim**. There is therefore an obligation on an Insured to notify the Insurer as soon as he/she becomes aware of a possibility of a **Claim** even though the client has not given any intimation that a **Claim** would be made.

The AIIF policy is a claims-made policy. The policy applicable to the **Claim** or a possible **Claim** will depend on the date on which: (1) the AIIF is notified of the possible **Claim**; or (2) a **Claim** is made against the Insured, whichever date is the earliest.

The AIIF policy defines a **Claim** as a written demand for compensation from the Insured, which arises out of the Insured's provision of Legal Services. (For the purposes of this definition, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an Insured) (Clause VI). It is clear from this

definition that no formal summons or letter of demand is needed to activate the policy, a simple written communication from the client intimating his intention to bring a **Claim** will suffice.

This means that, although an Insured has notified the AIIF of only the possibility of a **Claim**, the insurer will register the potential claim in the insurance year in which it has been notified, but will not pay compensation without a **Claim** (as defined) having been made against the insured, by a third party.

It is important to note that the Insured should not, without the prior written consent of the Insurer, admit, deny or settle a **Claim** (clause 24). Should an Insured fail to comply with this clause the Insurer will be entitled to reject the Insured's application for indemnity.

Written notice of any new **Claim** must be given to the AIIF by sending full details of this **Claim** to [claims@aiif.co.za](mailto:claims@aiif.co.za).

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[zelda.olivier@aiif.co.za](mailto:zelda.olivier@aiif.co.za)