

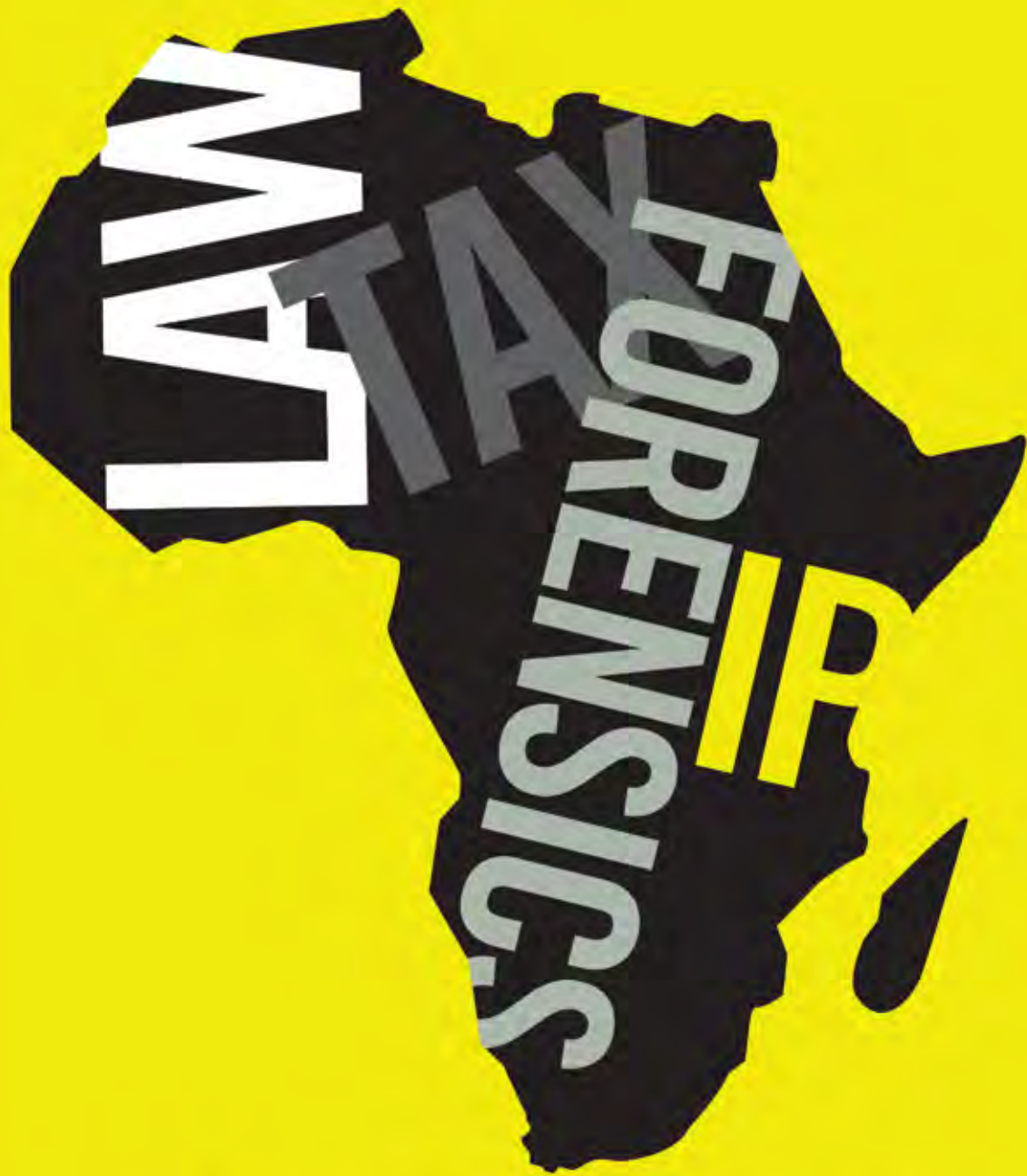
## PERSONAL DATA ON THE INTERNET –

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disadvantage to the  
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Navigating the Consumer Protection Act



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What happens when you enter your name on an Internet search engine and some personal undesirable information appears under or linked to your name? What legal recourse is available to ensure that the undesirable personal information is removed or ‘forgotten’? **Nthupang Magolego** discusses the landmark judgment recently handed down in Spain and discusses the impact the Personal Information Act 4 of 2013 has on Google South Africa.

### 25 Does s 14 of the CPA create an unreasonable disadvantage to the owner?

The Consumer Protection Act 68 of 2008 (CPA) has had a substantial impact on the rental property market since its commencement. Section 14, specifically applies to all fixed term agreements and has substantial impact thereon. **Cilna Steyn** discusses why it is vital for property owners and their attorneys to be aware of this effect to enable them to comply with the Act and have measures in place to mitigate the potential burden placed on property owners by the Act.

### 27 Navigating the Consumer Protection Act 68 of 2008

The Consumer Protection Act 68 of 2008 came into force on 1 April 2011. It regulates the relationship between a supplier of goods and/or services to a consumer. It therefore applies to services rendered by attorneys. **Neels Coertse** discusses the impact of the CPA and assists readers to navigate their way through the chapters and sections.

### 29 Are business rescue practitioners adequately regulated?



Tremendous strides have been made towards the regulation of business rescue practitioners. The Companies and Intellectual Property Commission currently issues conditional licences to business rescue practitioners and the experience of the applicant as well as the size of the company are factors taken into account. In this article, **Rezen Papaya** discusses the present system and says the need for better regulation stems from the complex task that a business rescue practitioner undertakes.

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# SCA clears practitioners in the *Motswai* decision

In the January/February 2013 edition of *De Rebus*, we published an editorial which set out the High Court's damning judgment in the case of *Motswai v Road Accident Fund* 2013 (3) SA (GSJ).

The case involved a claim against the Road Accident Fund (RAF) for almost R400 000, including an amount for general damages, plus costs, based on the claimant's alleged 'severe bodily injuries'.

In her judgment handed down in December 2013, Judge Satchwell found that the claimant's attorney, who had signed the particulars of a claim, had fabricated the claim, misrepresented facts to the court and fraudulently set out to enrich himself and his firm from the funds intended to compensate road accident victims. Judge Satchwell also criticised the conduct of the attorneys acting for the Road Accident Fund and the medical professionals who provided medico-legal reports in the matter on the basis that they were effectively complicit in permitting the claim to proceed, and ultimately reaching a settlement, when the claim had no legal or factual basis.

In a recent judgment handed down on 29 August 2014, the Supreme Court of Appeal (SCA) overturned Judge Satchwell's decision. The SCA found that Judge Satchwell's judgment had been prepared on the basis of inferences, which she had drawn from the documents in the court file and informal discussions with the parties' legal representatives. However, she had not followed the cor-

rect procedure by not allowing a public hearing of the matter and not giving the claimant's attorney an opportunity to deal with all the issues.

The SCA noted that the claimant's attorney had reasonable explanations regarding the issues for which he was criticised in the judgment.

In addition, the SCA found that Judge Satchwell's judgment had resulted in a grave injustice to the claimant's attorney and that the criticism levelled against him and the other professionals involved in the matter was unwarranted.

Commenting on the powers exercised by judges, the SCA said that, '[t]hrough the authority vested in the courts by s 165(1) of the Constitution, judges wield tremendous power. Their findings often have serious repercussions for the

persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process, did serious harm to several parties.'

In the result, the appeal was upheld and the High Court judgment in *Motswai* was set aside.

The *De Rebus* Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.

*De Rebus* will be back in 2015 with its combined January/February edition, which will be sent out at the beginning of February.



From left to right: Kathleen Kriel (production editor), Nomfundo Manyathi-Jele (news editor), Mapula Thebe (editor), Kevin O'Reilly (sub-editor) and Shireen Mahomed (editorial secretary).

# 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.

### Evicting unlawful occupants in state-owned housing

*Pacta sunt servanda*, the sanctity of contractual terms agreed to between parties, is a fundamental principle in South African common law, ensuring that the obligations on parties concerned are not undermined by factors outside the four corners of the agreement (*Ndlovu v Ngcobo; Bekker and Another v Jika* [2002] 4 All SA 384 (SCA)).

It is for exactly these purposes that the majority judgment in *Malan v City of Cape Town* (CC) (unreported case no CCT143/13, 18-9-2014) (Dambuzza AJ) gave clarification to a necessary contention between the right to housing and sanctity of contract. The majority judgment confirmed that if proper cancellation took place by means of notice, the necessary steps were followed in accordance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (ie, s 4(2) *Ex Parte* judgments and stipulated time periods) and cancellation could be justified by breach of contract, there would be no need to further deny the lessor of its eviction order. Concerning, however,

was the minority judgment of Zondo J, who failed to see the breach of contract while it was clearly shown that rental arrears was due and various complaints of drug trafficking on the property were reported to the South African Police Service. Zondo J went further to state that a fair balance must be struck between the city's right to terminate the lease and its obligation under the Constitution and PIE to take certain procedural steps before cancellation. This, in my view, erroneously brings the Constitution into play, when it was not necessary. If any constitutional relevance exists it is merely in s 36 of the Constitution and the limitation to the right to housing.

The abovementioned difference in views has resulted in a blurring of the lines being painted in our courts, who entertain the right to housing and social inequalities in South Africa, when PIE provides us with clear and occupant-friendly procedures to carry out evictions justly and fairly. The unwillingness to approach lease agreements between the public and state-owned housing, whether it is as a direct relationship as municipal/provincial ownership or even as state-owned companies (SOC) such as Transnet, in the same manner as private residential lease agreements merely de-

prives the lessor of his or her use and enjoyment of the property and forgets the limitations on our municipal resources. When litigating on behalf of a SOC the matter is clear, the municipality in question is cited as a second respondent/defendant and directs the occupant to the housing report, which allows for an application by the occupant to various forms of alternative housing. If the local municipality is the applicant/plaintiff then the eviction should once again be approached in accordance with PIE, and the municipality will provide alternative housing solutions only if their means allow them to do so.

This successfully deals with the obligations placed on our local authorities in regards to the right of housing and requires no further insight by the courts in these matters. It is on this note that the necessity exists for the courts to merely concern themselves with the sanctity of contract and PIE procedures. The primary focus now lies on the protection of the lessors' rights and whether the eviction is lawful and procedurally sound.

**Renand Pretorius,**  
candidate attorney,  
Johannesburg

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# The law – 20 years into democracy – discussed at BLA AGM

**T**he Black Lawyers Association (BLA) held its 37th annual general meeting (AGM) in Milnerton, Cape Town on 17 to 18 October. The theme of the AGM was: 'The right to legal representation – 20 years into democracy – where are we?' Guests at the gala dinner and AGM included Justice Minister Michael Masutha; Judge President of the North and South Gauteng High Courts, Dunstan Mlambo; Deputy Justice Minister, John Jeffery; National Director of Public Prosecutions, Mxolisi Nxasana; Western Cape Premiere, Helen Zille; Tax Ombudsman and retired Judge Bernard Ngoepe; chief executive officer of the Attorneys Fidelity Fund, Motlatsi Molefe and senior judges from various divisions of the courts.

Topics discussed included the impact of the Legal Practice Act 28 of 2014 (LPA), the relevance of the BLA 20 years into democracy and the right to legal representation.

Ms Zille, who spoke at the gala dinner on the night preceding the AGM, welcomed delegates to Cape Town. She said that South Africa is well on its way to shortcutting history as achievements have been remarkable in the 20 years of post-democracy. '... [A]ll of the literature I have read agrees on three things; for democracy to be sustainable you have to have constitutionalism of the rule of law, we have to have an inbuilt culture of accountability and you have to have a competent state. Those three things, when they work together are good for sustainability,' she said.

Ms Zille added that nothing is more important than constitutionalism and the rule of law. She said that South Africa knows of the work the BLA has done in battling for the right to practice and for black lawyers to procure articles of clerkship and securing finance to set up law practices.

## Should the BLA still exist?

Judge Bernard Ngoepe who is one of the founding member of the BLA spoke on why the BLA still exists after 20 years of democracy.

He said that he was admitted as an attorney on 16 June 1976. Thereafter he encountered a number of problems such as not being able to find premises to practice as he was kicked out of properties because he was black.



*Western Cape Premiere, Helen Zille, welcoming BLA members to Cape Town at the BLA AGM, which was held in Cape Town in October.*

'A number of black lawyers came together and we decided to approach the law society and tell them that we want to meet with the justice minister. It was agreed and we were told to go to Cape Town to meet the then Justice Minister [James] Kruger. A few days before our meeting we were told that Justice Kruger could not see us because we were a multi-racial delegation. His suggestion was that members of the executive of the law society, who were all white go see him. The law society said to tell them our grievances, which they will take to Cape Town. We refused and instead formed the BLA,' he said.

Looking at the question of whether there was still a need for the BLA to exist, Justice Ngoepe said that when a common past is shared between people, a common past of poverty, hunger, illiteracy, then by virtue of a deep understanding of the poor people's position, the BLA is better placed to understand their needs. He added that it was important to understand the present in order to understand the past, while at the same time, it is important to prepare for and to look into the future.

Justice Ngoepe said that he has had the privilege to be appointed chair of a number of institutions since his retirement. He has noticed that in all those institutions where he chairs, there are very few black practitioners that appear before those bodies. 'I am beginning to notice that with regards to tax issues, there

are very few black practitioners involved in those. When is this tendency going to end? I hope that tax law will become one of those fields, which more black lawyers embark in,' he said.

Justice Ngoepe believes that members of the BLA are well poised to ensure that there is legal representation for the poorer people. He said that there is a need for the BLA to ensure that justice is done adding that BLA members are better qualified than anyone else to understand the challenges because they share a common past with many people who are in dire need of legal representation but cannot afford to pay for lawyers from their own pockets.

'Is it, therefore, not the reason why the BLA should continue to exist? Not just to exist for the purpose of existing, but exist for the purpose of seeing to it that the imperfections of the past are corrected,' he said.

Justice Ngoepe said that there was always an issue of briefing patterns, adding that the constant issue is that previously disadvantaged individuals are left out when it comes to proper meaningful briefing. 'Shouldn't you continue to exist so that you can tackle head on some of these issues? I think as long as we have these kind of issues, so indeed, even 20 years into democracy, people still hear about the BLA,' he said.

Justice Ngoepe said that people from previously disadvantaged backgrounds should be given the opportunity to be briefed. He highlighted the fact that they too must also work just as hard to earn their stripes. Justice Ngoepe said that it is not fair to say that since you come from a previously disadvantaged background, you are entitled to briefs. He said: 'The issue of entitlement is important. I have a problem with an unwarranted and unhealthy culture of entitlement from people from previously disadvantaged backgrounds. We need to cut against that because we may end up not delivering the kind of quality service that we need to deliver. South African citizens deserve better and they are entitled to get good service from you as members of the BLA.'

According to Justice Ngoepe, no organisation can out-live its need to exist.

In conclusion, Justice Ngoepe urged members of the BLA to bear in mind that at the end of the day the people that they seek to serve need to receive good service because they deserve nothing less.

## The impact of the Legal Practice Act on the Attorneys Fidelity Fund

Mr Molefe spoke on the impact of the LPA that the Attorneys Fidelity Fund (AFF) has envisioned on the profession and in particular on the fund.

Mr Molefe first spoke about claims against the fund. He said that some attorneys have painted the rest of the profession with a black brush that has negative connotations and that says attorneys are not good people as legal professionals. He said that what bothers him is that it does not stop there. 'We even find these negative connotations even in our own meetings. When we meet, people make jokes about sharks, we laugh at these jokes but what we do not understand in all of that is that it is an insult in reference to how people perceive the profession and it is purely because of those few individuals that we are seen in a negative sense. That is something we have to arrest and deal with robustly in order to restore the profession to the kind of respect and status it had previously in the public eye,' he said.

Looking at the LPA, Mr Molefe gave a synopsis of the 2014 claims and explained why the 'shark jokes' must stop. He said that the AFF currently has claims sitting at just under R 427 million, which are claims that people have indicated that is money that could have been misappropriated by attorneys. Mr Molefe added that 53% of the almost R 430 million represents conveyancing claims, 14% deals with estate claims, which is misappropriation from widows and orphans, 12% are commercial claims and 10% deals with road accident fund misappropriation.

He said that this year alone, the AFF has paid R 77,7 million, adding that R 61,3 million, which is 80%, deals with conveyancing claims. 'The picture has always been the same over the years, conveyancing has been the biggest area of risk for the fund and the profession,' he said.

Mr Molefe said that these figures were alarming because looking at the numbers in terms of the people that default on trust monies, the numbers remain fairly constant but the quantum of theft is increasing drastically, which he says indicates that people do not misappropriate purely as a matter of accident, or need, but do so out of greed.

Mr Molefe said that the fund does not seek and has never sought to be a regulator, which he says is one thing that attorneys do not understand. He added that the fund is the risk taker so it has to take the necessary action required. Mr Molefe said that the control of the trust accounts, in terms of the LPA, is nothing more than ensuring that there is a cura-



*National Director of Public Prosecutions, Mxolisi Nxasana, and Chief Executive Officer of the Attorneys Fidelity Fund, Motlatsi Molefe, were among those invited to the BLA AGM held in Cape Town recently.*

tor appointed who will continue to look after the trust account.

Mr Molefe said that s 22(1)(b) of the LPA makes provision for an annual appropriation that the fund will make to the legal practice council. He said that this section, which never existed in any form in the Attorneys Act 53 of 1979 is for the first time guaranteeing the fact that the profession will receive support from the fund.

Mr Molefe said that one element that concerns him regarding the LPA and that he believes the profession and the fund need to work together to address in order to find a solution, is the absence of a provision that is similar to s 46(b) of the Attorneys Act. This section allows the fund to provide for support for legal education in the country. Mr Molefe said that this is important especially to previously disadvantaged communities. Mr Molefe said that in terms of the training of lawyers going forward, if this issue is not addressed, it is going to become difficult to practice as a lawyer let alone to access the profession if the fund is not there to support that element. 'So we have a duty together to go back to the legislators and say this is where we see a specific problem. I also see it as a risk management issue for the fund and not just as a problem aimed at previously disadvantaged individuals and access to justice. If there is not sufficient resources to be able to train lawyers into capable and able practitioners that will not place members of the public in jeopardy, then the fund is at risk and the profession's reputation will suffer as a result,' he said.

According to Mr Molefe, another important element that the fund has been looking at in the past few years is the provision of professional indemnity

insurance by the Attorneys Insurance Indemnity Fund (AIIF), which is wholly funded by the AFF. Mr Molefe said that in the four years that he has been at the fund, when he first arrived, the premium that the fund was paying was R 40 million per annum. In the past two years the premium has been deliberately capped at R 94,7 million. Mr Molefe highlighted that the premium had doubled in a matter of four years. 'It would even be higher had we not capped it. This tells us that that model of the AIIF is not sustainable because each year we would actually give more. The reality of why it is unsustainable is because of a lack of accountability and training of practitioners,' he said.

Mr Molefe added that accountability did not exist. He said: 'We see instances where professionals in the office leave professional work to do unprofessional work and when they get sued they use this cover because they know that it is for free.'

Mr Molefe said that sooner or later practitioners will have to raise money as part as personal indemnity cover. 'It will become part of your compliance for the need to practice in the future. In terms of the LPA, the Legal Practice Council will not issue you with a fidelity fund certificate unless you have paid the determined amount by the board of trustees of the AFF. That is two or three years down the line. So it will be a bit more expensive to practice so you need to start preparing yourself for that,' he said.

Mr Molefe warned members of the BLA that personal indemnity cover is very expensive adding that members must not make the mistake of believing that it is not. He also stressed its importance and added: 'If you ask a gynaecologist how much he is paying he could tell you as much as R 40 000 a month, so you must



start thinking about that.'

Mr Molefe said that it was not all gloom and doom. He said that the AFF will set up a unit called the Compliance Support Unit, which will assist newly admitted entrants into the profession who are setting up practice in terms of supplying them with information around what it is that they need to be compliant with. This unit will kick off in the beginning of January 2015.

He concluded by urging practitioners not to be scared by change. 'Change is difficult for people to accept but do not go looking for a tiger where there is no forest', he said.

## The right to legal representation

Speaking on legal representation Deputy Minister Jeffery said that most people in our country still cannot afford the services of a private legal practitioner. He added that this, however, does not mean that we have not made significant inroads since 1994.

According to Deputy Minister Jeffery, while the Legal Aid Board was established in 1969, legal services and the legal aid offered to the majority of our people were either non-existing or completely inadequate. For example, in criminal matters, in 1992, two years before the dawn of our democracy, 150 890 convicted persons were sentenced to imprisonment without any legal representation.

Deputy Minister Jeffery said legal aid only encompasses one aspect of legal representation. He noted that far more people require the services of private legal practitioners and queried whether they can afford it.

'It is no secret that the costs of private legal services are out of reach of most South Africans. Our country may have enough legal practitioners to meet the demand, but the costs involved put it out of reach of most,' he said.

Deputy Minister Jeffery made reference to Professor at the University of KwaZulu-Natal, David McQuoid-Mason who wrote that the South African legal profession consists of approximately 20 000 practising attorneys and 2 000 practising advocates who serve about 50 million people. This yields a ratio of lawyers to the general population of one lawyer for every 2 273 people. Professor McQuoid-Mason notes that this is a high ratio of lawyers to ordinary people for an African country.

'But, he argues, it is most unlikely that more than 30% of the population, or about 15 million people, can afford the services of lawyers. This then means that for the affordable part of our society there is a ratio of one lawyer for approximately 682 people. This ratio of



*Tax Ombudsman and retired Judge, Bernard Ngoepe, delivered the keynote address at the BLA AGM gala dinner in Cape Town in October.*

people to lawyers – in respect of those estimated to be able to afford lawyers – is higher than that in several European countries as well as the United States, Brazil and New Zealand.

'So although it appears that there are enough lawyers to provide legal services, this is only the case for those who can afford it,' he said.

Speaking on legal costs, Deputy Minister Jeffery said that while the very poor and indigent fall within the means test of Legal Aid SA and therefore qualify for legal aid, the working and middle classes are effectively falling through the cracks when it comes to legal representation. He added that this was one of the main considerations behind the LPA. 'At the very heart of the Legal Practice Act lies the desire to ensure that all our people have access to affordable legal services of a high standard,' he enthused.

Deputy Minister Jeffery highlighted a few aspects of the LPA. He spoke about the Legal Practice Council, as well as about the Legal Services Ombud who will be a retired judge appointed by the President. Deputy Minister Jeffery noted that under the LPA, disciplinary proceedings will now be open to public scrutiny and a non-lawyer has to be part of a disciplinary panel.

## Black lawyers as agents of change

Human rights lawyer, theologian and rector of the College of the Transfiguration in Grahamstown, Barney Pityana, spoke on black lawyers as agents of change. He said that the Constitution sets a value system as glue that holds society together on the basis of those shared values. It is a framework of a life with a glorious purpose.

Mr Pityana said that lawyers are there

to regulate human affairs, to prepare for when frictions occur and more importantly to place human affairs in a sound footing. He added that at its best the law comes to the defence of the powerless, protects the weak and corrects the wrongs of society. By doing so the law helps to bring society back to its highest ideals as a self-correcting mechanism.

Mr Pityana reminisced about Bram Fischer Memorial Lecture he presented last year at University of Free State. He said that quoted scholars were of the view that we need to understand that our human rights culture is a double-edged sword. It may inspire us to uphold values that are necessary for peace, and human dignity, but also may lead many into a state of expectation and entitlement, waiting for something to happen to correct what is wrong.

He said: 'Having studied to be a lawyer during the worst times of the apartheid system, I remain perhaps with what may be considered a romantic view that at its best lawyers are those who stand in defence of the poor, weak, vulnerable and powerless against the power of the state and the hegemony of the class society. Law is never neutral. It takes sides with justice even against all odds. As a lawyer I am instinctively uncomfortable with lawyers who make it their business to be apologists of wrongdoing in society, or to use their skills to defend the indefensible or to aid in the dismantling of the fabric of society. Yes, whatever William Shakespeare may tell us in *Merchant of Venice* there does remain a compelling ethical creed in being a lawyer that we ought never to compromise.'

Mr Pityana concluded by saying that lawyers need to recognise their historic duty of being the voice of the silent, weak, powerless, vulnerable and oppressed.

Speaking about black lawyers, Mr Masutha said that black lawyers should not strive to be as good as their white counterparts, but should focus on being the best lawyers in the world. He said that the legal profession is one of the most pivotal fraternities to work in.

He encouraged practitioners to think global and act local and added that there was no room for mediocrity. 'You cannot target to get a 50% pass, your target must be 100%. We must become globally competitive, collectively, both black and white. But within that we must tackle the challenges that are faced that are stopping us from reaching that higher level,' he said. He said that transformation remains a challenge in the South African legal profession.

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# Legal Practice Act top of agenda at FSLS AGM

**T**he Law Society of the Free State (FSLS) held its annual general meeting (AGM) in Welkom from 30 to 31 October where its members discussed the Legal Practice Act 28 of 2014 (LPA); uniform rules and the Attorney's Fidelity Fund.

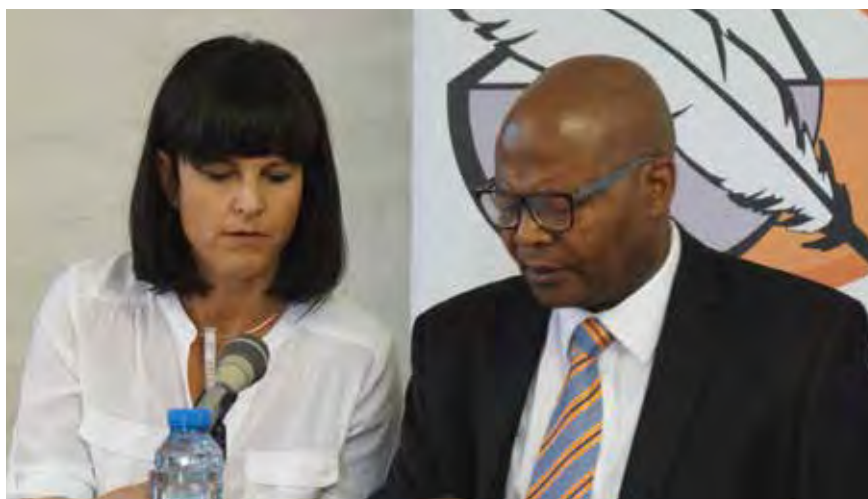
Former Law Society of South Africa (LSSA) Co-chairperson and FSLS councillor, David Bekker, spoke on the LPA. He highlighted a number of sections of the LPA that he thought members of the law society should be aware of.

Mr Bekker explained that the main aim of the LPA is to –

- provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives in order to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of South Africa;
- provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards;
- provide for the admission and enrolment of legal practitioners;
- regulate the professional conduct of legal practitioners so as to ensure accountable conduct;
- provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud;
- provide for a Legal Practitioners' Fidelity Fund and a Board of Control for the Fidelity Fund;
- provide for the establishment, powers and functions of a National Forum on the Legal Profession; and
- provide for matters connected therewith.

Mr Bekker highlighted s 120 of the LPA, which states that chapter 10 comes into operation after a promulgation date and that chapter 2 will only be in operation three years after chapter 10, adding that the legal profession should not be in a panic as there will be a smooth transition and time to adjust.

Mr Bekker spoke on s 96 of the LPA that speaks about the National Forum and transitional provisions. He spoke about the composition of the forum and said the forum will determine issues not yet determined such as making recommendations to the Justice Minister on



*Law Society of the Free State Chief Executive Officer, Christina Marais, and outgoing President, Joseph Mhlambi, at the society's AGM held in Welkom at the end of October.*

the establishment composition, powers and functions of the provincial councils and their areas of jurisdiction and practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as legal practitioners.

Mr Bekker went over a few more chapters of the LPA and urged members to read the Act in order to familiarise themselves with it and appreciate its importance.

He also noted that there would not be law societies anymore, but that there would be a regulatory body such as those that the doctors and auditors currently have.

Mr Bekker said that s 14 talks about the minister's powers and the Minister being able to dissolve the Legal Practice Council (LPC). He added that the Minister has to first approach the ombud to investigate and if the Minister is still unhappy, then he or she can take the matter to the High Court.

Mr Bekker said that s 23 deals with the establishment of provincial councils. He said that this section states that the LPC must, at the commencement of chapter 2, establish at least four provincial councils. He added that the section goes on to say that there may not be more than one provincial council per province. 'At the LSSA strategic planning session, it was suggested that some provincial councils should be combined in some provinces so that there are sufficient members to ensure that a council can be afforded'.

He said that the LSSA would apply to get the clause not allowing more than one provincial council in a province removed.

Mr Bekker said that since advocates will be allowed to accept briefs directly from clients, they will need to have fidelity fund certificates and trust accounts. He said that this means that they will have to go for bookkeeping training and have bookkeeping systems in place.

Mr Bekker said that s 35 of the LPA states that fees regarding legal services must be in accordance with the tariffs made by the Rules Board. He added that there must be a cost estimate in writing.

## Uniform rules

Law Society of the Free State council member, Jan Maree, spoke on uniform rules for the provincial law societies. He said that the process started two or three



*The former and present presidents of the Law Society of the Free State, Joseph Mhlambi and Vuyo Morobane respectively.*

years ago and that at last year's AGM the FLS members approved the rules. Mr Maree added that the rules were supposed to be approved by the four provincial law societies last year but one of the law societies did not approve them.

He highlighted some aspects of the amendments that he felt needed to be mentioned. Mr Maree said that there were a few rules that members had suggested should be changed. These rules included:

- Rule 2.60 that deals with voting by proxy. Mr Maree explained that currently, members can carry more than five proxies in the bigger law societies such as the Law Society of the Northern Provinces and the Cape Law Society. He said that voting by proxy is a long standing practice. 'The view is that due to the large number of members who are unable to attend the AGM, one should not exclude those members from voting by proxy. Rule 2.60 that was approved last year, states that no member is able to carry more than five proxies. There is a view that the limitation of five [proxies] is too small a number, and that the number should be increased,' he said. The proposed rule is that the law society council will from time to time determine the number of proxies a member can carry. The rule will also make provision for the larger law societies to allow their members to carry more than five prox-



*Former Law Society of South Africa co-chairperson and FLS councilor, David Bekker, speaking on the Legal Practice Act at the FLS AGM in Welkom on 31 October.*

ies.

- Mr Maree said that in terms of r 2.66, which provides that voting for the removal of a council member cannot be done by proxy, members were of the view that this 'protection' of council members is not warranted and that it should be removed.

- Speaking on r 32, Mr Maree said that the former rule speaks about law society councils and the assessment of fees. He

added that it provides that council can recommend a refund of certain overpayments. 'There is a view expressed by members that council does not have the power to recommend a refund, so rule 32 was deleted in its entirety,' he said.

The amendments to the rules were unanimously approved and adopted.

## The new council of the FLS is:

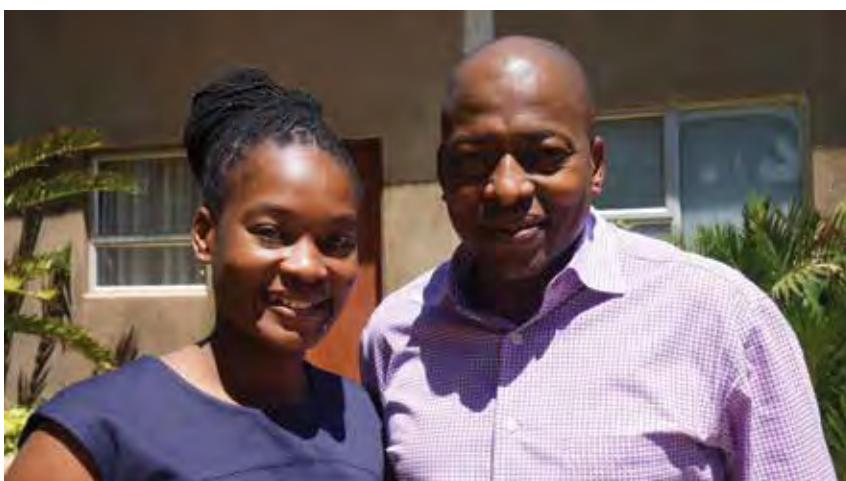
- Vuyo Morobane – President
- Deidre Milton – Vice President
- Christina Marais – Chief Executive Officer
- David Bekker
- Johannes Fouché
- Etienne Horn
- Nolutha Jali
- Sizane Jonase
- Jan Maree
- Tsiu Matsepe
- Martha Mbhele
- Joseph Mhlambi
- Adila Obbes
- Henri van Rooyen.

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## Law runs in the family

Father and daughter team, Mpho and Anthony Sefo were also among those that attended the Law Society of the Free State AGM in Welkom at the end of October. Ms Sefo obtained her LLB degree at the University of the Free State and is currently serving her articles at her father's law firm, AG Sefo Attorneys, which offers services in various fields of law in Welkom. Ms Sefo's future plans are to go abroad to study towards Masters in international human rights and then to work for the African Union and then ultimately the United Nations.

Ms Sefo chose a career in law because she wanted to be a voice to those whose voices had been taken away due to their race, gender, poverty, education or whatever crippling factor, 'so a career in law seemed like the best way to equip myself to protect society,' she said. While Mr Sefo was greatly influenced by the political situation of the time when he had to choose a profession. 'I fell in love with the law because I saw it as the perfect vehicle to fight the injustices of the past. This was the



*Mpho Sefo and Anthony Sefo were among the attendees at the Law Society of the Free State AGM.*

best decision for me as a young man because not only did I go into a field which equipped me to fight the injustices of the time, but it added immeasurable value to not only my life, but my mind as well. I still believe that practising law

is still of great relevance in addressing the many present inequalities,' he said.

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## Over 447 000 SA citizens given free legal representation in 2013/14 financial year

**L**egal Aid South Africa served 776 301 people in the 2013/14 financial year. This is according to Legal Aid SA chief executive officer, Vidhu Vedalankar's, report to parliament's Portfolio Committee on Justice and Correctional Services in Cape Town. The report was delivered on 17 October.

In a press release, Legal Aid SA stated that the organisation assisted 390 118 people in criminal legal aid matters, 57 183 in civil legal aid matters, 328 979 with legal advice and dealt with 21 impact litigation matters.

Impact litigation cases are cases that Legal Aid SA takes on or funds that have the potential to positively affect the lives of a far greater number of indigent persons than the person or persons to whom legal services are rendered directly.

According to Legal Aid SA, it handled 447 301 criminal and civil legal aid matters dealing with poor and vulnerable people. Ninety five percent of these legal aid matters were handled by legal practitioners in its 128 justice centres and satellite offices across the country. Pri-

vate judicare practitioners were briefed to handle 4% of the legal matters and a further 1% were funded by Legal Aid SA, and were handled by their co-operation partners and agency agreements (with private law firms).

The press release states that the 328 979 legal advice matters were handled by paralegals at Legal Aid SA offices as well through its national legal aid advice line that offers free telephone legal advice in five official languages to South African residents who may find it difficult to travel to Legal Aid SA justice centres for assistance.

'In the 57 183 civil legal aid matters that were handled in the last financial year, Legal Aid SA assisted women in 56% of the matters and children in 9% of the matters ... Assistance was also provided in other family, land and housing, as well as labour matters ... Legal Aid SA assisted children in 16 858 matters with 69% (11 689) being legal aid to children in conflict with the law and 31% being children in civil matters', Legal Aid SA stated.

According to Legal Aid SA, the 100%

success rate in impact litigation matters for the eight matters finalised by the organisation in the past financial year supported vulnerable clients to change interpretation of laws, establish new legal principles and realise the rights enshrined in the Constitution.

According to the press release, Ms Vedalankar said that the delivery of legal aid is not without its own challenges, which relate to budget constraints, adequate legal practitioner relief capacity in courts and pending legal matters, which for various reasons delay the finalisation times of legal matters. Legal Aid SA's budget for the 2013/14 financial year was R 1,5 billion.

The delivery of legal aid was funded with a grant received from government, which constituted the main source of the organisation's budget of R 1,5 billion for the 2013/14 financial year.

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### Attorney wins Sacci Woman in Business award

**G**auteng attorney, Jolène Leeuwner-Maritz, who is a partner at Leeuwner Maritz Attorneys, has won the 6th annual South African Chamber of Commerce and Industry (Sacci) Woman in Business award. The award was given on 22 October at Sacci's gala dinner.

Ms Leeuwner-Maritz (32) was admitted as an attorney, conveyancer and notary public in 2005. She told *De Rebus* that she is 'humbled, inspired and extremely grateful' to have won the award. She was nominated for the award by the Business Chamber.

Albert Wadi, who is responsible for all of Sacci's awards, told *De Rebus* that the award is designed to recognise and celebrate a special businesswoman within the Sacci membership who has shown integrity; entrepreneurial spirit; originality and business acumen; and who has contributed towards the development of entrepreneurship and economic development.

Mr Wadi added that six people were



*Jolène Leeuwner-Maritz of Leeuwner Maritz Attorneys won the South African Chamber of Commerce and Industry Woman in Business award 2014.*

nominated for the award this year. The winner received a trophy and the honour of holding the title for a year.

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nomfundo@derebus.org.za

### 2015 examination dates

#### Admission examination

The admission examination dates for 2015 are:

- 10 February
- 11 February
- 18 August
- 19 August

#### Conveyancing examination

While the conveyancing examination dates are:

- 13 May
- 9 September

#### Notarial examination

And the notarial examination dates are:

- 10 June
- 21 October.

# Pro bono attorneys acknowledged

**P**robono.Org held its inaugural Pro Bono Awards in Johannesburg on 7 October to highlight and acknowledge the work done by individuals and firms in the private legal profession; to raise the awareness of *pro bono* work; and to encourage more lawyers and firms to participate.

The guest speaker at the event was judge of the Gauteng Division of the High Court (formerly the North Gauteng High Court), Kathleen Satchwell, who said that there is value in working for others, in helping others when they cannot help themselves but added: '... we all know the Mao story about teaching a man to fish for himself. And where you show people there is a way out of a problem ... when you share knowledge and skills and people realise things can be done - and by them - then you are empowering others.'

Judge Satchwell said that empowerment is on many levels. She said that tackling an obstructionist or rude or careless civil servant shows your client that civil servants are meant to be working for him or her and all of us, which empowers the citizen. Judge Satchwell made another example by saying that holding government, an employer or service provider accountable reminds your client that dishonesty or incompetence can be challenged and that citizens do not have to put up with it, adding that this is empowering the citizen.

Judge Satchwell noted that none of this is easy. 'I know that there is a lot of waiting, a lot of sitting in cold rooms, a lot of listening, and much heartache when there is no help to be offered. The victories are very few. I worked as an attorney for 18 years in Johannesburg. Many of my clients had no access to telephones, transport, documents and records. Somehow injustices done to the poor and the marginalised were always exacerbated by their lack of access to facilities such as a photocopy machine and my lack of time and energy,' she said.

Judge Satchwell applauded everyone who has worked with ProBono.Org. She added that this kind of work is seen as 'extra' or 'on top of' or 'additional to' a real legal practice because 'a real legal practice' has to pay rent, salaries, buy stationary, repair equipment etcetera. She said: 'We all have to work out how to keep legal practices alive and profitable. But to do *pro bono* work is either to earn less or to work harder. Whichever happens - it is a sacrifice of sorts - of money or time or energy.'



*Judge of the Gauteng Division of the High Court, Kathleen Satchwell, delivering the keynote address at a recent Pro Bono awards ceremony held in Johannesburg.*

Judge Satchwell said that the Constitution is wonderful piece of paper that proclaims ideals and rights for all of us - rich and poor, of every race and creed. 'But it means very little if we cannot enforce those rights. I have had occasion to enforce my rights before the Constitutional Court - I could not possibly have afforded so to do - but I had an attorney and an advocate who worked *pro bono*,' she said.

Judge Satchwell said that often constitutional principles can only be brought into the real world through the law and that for that, one needs to be able to use the law, which means that they need to be able to access the courts. 'For that, one needs to be literate, have a computer and paper, access to e-mail, know the jargon and feel bigger and stronger than ones opponent. For all of that one needs *pro bono* and its teams,' she said.

Judge Satchwell concluded by saying that although the older generation may feel despondent at the state of the nation, it can be happy that things are better in this country. 'No longer is race and language and gender the basis upon which people participate in this society. No longer are there pass laws and unequal facilities. No longer is there censorship and no political debate. We do have a demanding press, we do have courts which know they are accountable to the Constitution, and we do have politicians and civil servants who can be forced to respond to society's needs,' she said.

Director at ProBono.Org, Erica Emdon, told *De Rebus* that they did not receive as many entries as they had hoped, but

believed that as people become more aware of the awards they will enter.

Awards were given to law firms or individuals who contributed in *pro bono* work in 2013. The winners were:

In the category of -

- The most *pro bono* hours by a law firm with:
  - Over 50 professionals: International law firm, Faskin Martineau Attorneys.
  - Between ten and 50 practitioners: Johannesburg law firm, Mervyn Taback Inc.
  - Firm with less than ten practitioners: Johannesburg law firm, Mabaso Attorneys.
- Full time *pro bono* attorney that undertook the most *pro bono* hours: Tricia Erasmus of DLA Cliffe Dekker Hofmeyr.
- Part time *pro bono* attorney: Elze Lamprecht of Norton Rose Fulbright South Africa.
- Advocate that undertook the most hours: Nadine Fourie.
- Journalist that gave *pro bono* work the most coverage: Victoria John of the *Mail and Guardian*.

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nomfundo@derebus.org.za

## New AIIF contact details

**T**he Attorneys Insurance Indemnity Fund (AIIF) has moved out of the Aon building in Sandton and is now based in Centurion at the Attorneys Fidelity Fund's new office.

### Physical address:

1256 Heuvel Avenue,  
Centurion.

### Postal address:

PO Box 12189,  
Die Hoewes,  
0163

### Docex:

Docex 24 Centurion.

### Telephone number:

The AIIF's new switchboard number is  
(012) 622 3900.

## SAULCA winter workshop

The South African University Law Clinics Association (SAULCA), (formerly known as Association of University Legal Aid Institution (AULAI)), held a winter workshop in Muldersdrift earlier this year.

SAULCA is a voluntary association for all South African university law clinics to promote and protect the interests, values and goals of its members. Until 2013, it used to be known as the AULAI, which was established in 1986. These law clinics are one of the major providers of *pro bono* legal aid and civil and human rights assistance in the country. The law clinics employ advocates, practicing attorneys, candidate attorneys and in some instances paralegals. They are attached to faculties of law and law schools at all major universities in the country. As opposed to the normal theory-based lecture hall pedagogy, law clinics apply a clinical skills-developing methodology whereby students learn through doing. This experiential learning model allows students to consult with actual clients, open files, assist with the drafting of legal documents and attend court appearances as observers, all under the close supervision of qualified attorneys at the law clinic. Community engagement is used as a vehicle to provide free legal services to those people who cannot afford legal representation. SAULCA's vision is to be a professional and efficient organisation, committed to democratic values and human rights, and dedicated to promoting excellence in clinical legal education and access to justice. Skills deficits is one of the primary concerns relating to the product delivered by the current LLB, and it is envisaged that law clinics will in future have to play an even more prominent role to remedy this.

Delegates from 18 university law clinics in South Africa attended the workshop. The represented universities were Nelson Mandela Metropolitan University, Rhodes University, University of the Free State, University of Pretoria, University



*Delegates show their enthusiasm at the South African University Law Clinics Association Winter Workshop held at Muldersdrift.*

of Johannesburg, University of South Africa, University of Witwatersrand, University of KwaZulu-Natal, Durban Campus (Howard College), North West University (Potchefstroom Campus), North West University (Mafikeng Campus), University of Limpopo, University of Venda, University of Cape Town, University of Stellenbosch, University of the Western Cape and Walter Sisulu University.

The theme of the workshop was 'Developing Best Practices for Clinical Law Programmes at Law Clinics in South Africa' and built on the success of the 2013 Winter Bosberaad held in Port Elizabeth. Professor Vivienne Lawack, Executive Dean of Law at the Nelson Mandela Metropolitan University, in her capacity as the chairperson of the South African Law Deans Association and Mr Nic Swart, Chief Executive Officer of the Law Society of South Africa (LSSA) and Director of Legal Education and Development of the LSSA, opened the workshop with inspiring messages relating to the -

- importance of university law clinics;
- need for university-funding of law clinics; and
- need of practical training of law students in the university law clinic-environment.

The workshop was structured as plenary sessions, supplemented by group discussions. SAULCA members Abraham Klaasen (North West University, Potchefstroom Campus), Jobst Bodenstein (Rhodes University), Daven Dass (University of the Witwatersrand) and Eddie Hanekom (University of Johannesburg) delivered informative plenary sessions on the topics of alignment of teaching objectives and outcomes, teaching methodologies, different teaching methods and assessment. As far as the group discussions were concerned, the groups consisted of delegates from different university law clinics and the discussions focused on various aspects of best practices at law clinics relating to the abovementioned topics.

The President of SAULCA, Professor Jobst Bodenstein, also facilitated a discussion on the ever-present funding issues related to law clinics.

The delegates agreed that they had learned valuable lessons from the various discussions with regard to teaching methods, assessments, etcetera at their own law clinics, which could be improved on and strengthened.

*Marc Welgemoed,*

Principal attorney: NMMU Law Clinic

## NADEL delegation attends X Colloquium for the release of the Cuban Five

A National Association of Democratic Lawyers (NADEL) delegation attended the X Colloquium on the release of the Cuban Five in Havana, Cuba during September.

The conference was attended by 166 delegates representing some 50 countries. The South African delegation consisted of the African National

Congress, National Union of Mineworkers, National Education Health and Allied Workers' Union, Police and Prisons Civil Rights Union, Friends of Cuba Society and NADEL.

The delegations proposal to host an inquiry and international conference on the arrest, detention, trial, conviction and continued incarceration of the five next year was received with enthusiasm by the conference. The trial and conviction of the Cuban Five has been characterised by bias, manipulation of the process and the disregard of the rights of the five for the purposes of political expediency.

The campaign for the release of the Cuban Five has come to represent the fight for human rights internationally.





# Elections in Mozambique

The SADC Lawyers' Association (SADC LA) together with the Bar Association of Mozambique (OAM) jointly observed the general elections held in Mozambique on 15 October. These were one of the most anticipated elections in southern Africa given the unrest and conflict, which began in 2012 and subsequent withdrawal of the main opposition party, Resistência Nacional Moçambicana/Mozambique National Resistance (RENAMO), from the 1992 peace agreement. Overall, the elections took place peacefully but a number of issues of concern were noted by the observation mission that questioned the credibility of the elections.

The joint mission was made up of 30 lawyers and civil society actors from Mozambique, Botswana, South Africa, Tanzania, Zambia and Zimbabwe and was led by a former Mozambican judge, João Carlos Trindade. The mission deployed a short-term mission and observed the voting process on the day of elections in four provinces of Mozambique and 285 polling stations, some of which had been identified as hotspots for political violence and unrest, as well as the most populous regions of the country.

Mozambique is a young democracy and these were the 5th general elections since they first took place in 1994. This was after the end of the 16-year civil war that transitioned the country to multi-party democracy based on a presidential system of governance. It was against this backdrop that the opposition party, RENAMO threatened to return to hostilities, which saw a number of acts of violence prior to elections and they initially refused to run in the 2014 elections. However, following protracted agreements between the government (made up of the ruling party Frente de Libertação de Moçambique/Mozambique Liberation Front (FRELIMO)) a political agreement was signed to cease all military hostilities, give greater representation to opposition parties on the National Elections



*The SADC Lawyers' Association together with the Bar Association of Mozambique jointly observed the general elections held in Mozambique on 15 October.*

Commission (CNE) and grant RENAMO amnesties for any crimes committed during the hostilities.

The objective of the election observation mission was to determine whether the electoral process took place within the legal framework governing elections at the national, regional and international level, as well as to promote an understanding of democracy and electoral legislation and process. Election observers could also promote confidence and credibility in the electoral process and the election results and prevent conflict from ensuing following the announcement of results.

Generally, the elections occurred peacefully and within the ambit of the law. However, there were a number of specific incidents that questioned the credibility of the electoral processes and offer room for improvement.

The campaigning period, which ran from 31 August to 12 October, witnessed a number of isolated incidences of violence and intimidation among party supporters from the major political parties, FRELIMO, RENAMO and Movimento Democrático de Moçambique/Mozambique Democratic Movement (MDM) and at times, the police. A number of these

confrontations turned bloody resulting in three deaths. However, parties were generally allowed access to voters and were able to communicate their manifestoes and policies. The media played a pivotal role in creating an enabling environment for free and fair elections. However, the state-run media favoured the ruling party, FRELIMO and dedicated most of their coverage to their campaigns. The privately run media, on the other hand, appeared to pay more attention to the opposition parties. The OAM-SADC LA Mission encouraged the media to report in an impartial and objective manner.

Some general observations from the voting process included the forming of long queues as the electoral administration staff were slow, poorly-trained and unable to solve administration problems and/or adequately assist voters. A further problem was that some party agents had not been properly accredited and were, therefore, unable to witness the voting and counting process; it will therefore be difficult for a party to challenge election results if their party agents were not present. The vote counting was also a laborious and time-consuming procedure, with some counting stations finish-

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ing only at 5am. Electoral administration staff and party agents were noticeably fatigued and this opened the procedure up to human error.

Although the voting process proceeded smoothly with most polling stations opening on time with the necessary materials, problems began to unearth at the time of the vote counting in Nampula and Beira. This was as a result of power cuts right at the moment of the closing of polling stations, which caused the local voters to become riotous and invade the polling stations to insist on

observing the counting of the ballots. The National Police Force were unable to handle the situation reasonably and this resulted in a number of injured people and loss of life. The SADC LA-OAM observers were committed to their cause and remained inside the polling stations despite imminent danger and fear.

In general, the elections occurred peacefully and to a large extent within the existing legal framework. However, the reported incidences compromised the voting process in some polling stations and questioned the transparency

and credibility of the voting process.

- A full report and the final verdict of the observation mission will be released in the coming months and will be available on the website of the SADC LA.

- For more information, please feel free to contact Chantelle de Sousa, the Programmes Officer at SADC LA at [chantelle@sadcla.org](mailto:chantelle@sadcla.org)

- See 2014 (Aug) DR 17.

Chantelle de Sousa,  
[chantelle@sadcla.org](mailto:chantelle@sadcla.org)

## PEOPLE & PRACTICES

# People and practices

Compiled by Shireen Mahomed

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

**Hooyberg Attorneys** in Johannesburg has three new appointments.



Hazel de Souza has been appointed as an associate in the Illovo office. She specialises in litigation and administration of trusts and estates.



Lauren Murray has been appointed as an associate in the Illovo office in the conveyancing department.



Mari Koekemoer has been appointed as an associate to head the litigation department in Bedfordview.

**Fasken Martineau** in Johannesburg has three new appointments.



Stimela Mokoena has been appointed as an associate in the corporate commercial department.



Mmueleli Mokubung has been appointed as an associate in the tax department.



Sara Keller has been appointed as an associate in the *pro bono* department.

## DE REBUS digital

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The Co-Chairpersons,  
Chief Executive Officer,  
Management and staff  
of the Law Society  
of South Africa  
thank all attorneys and  
candidate attorneys who  
have participated in the  
initiatives of the LSSA,  
including all the  
specialist committees  
of the LSSA,  
throughout the year.

*We wish all  
legal practitioners  
and other readers  
a peaceful festive  
season and a happy  
and prosperous  
New Year.*



**LAW SOCIETY**  
OF SOUTH AFRICA



By  
Albert  
Reinecke

# The recovery of body corporates' legal costs

**I**t happens every day: A body corporate (or home owners' association) institutes action against one of its members for account arrears, and simply levies the attorney's presented costs onto the defendant's account, often despite vehement protestation on the part of the defaulter.

The argument is that it is pre-agreed – in terms of the Sectional Titles Act 95 of 1986 Management Rule 31.5 (or an equivalent provision in a home owners' association's constitution) – that the legal costs incurred by the body corporate will be for the account of the defaulter. Compounding this notion, the body corporate's attorney may often settle the controversy's costs with the defaulter on terms that he or she agrees to pay all the legal costs incurred; why should the other owners be out of pocket?

However, this is a fortunate result for the body corporate, as the legal costs incurred by it – in general terms – is never wholly recoverable from the defaulter. The liability of a losing litigant is limited, and cannot exceed a fairly complex threshold. Although Management Rule 31.5 provides that:

'An owner shall be liable for and pay all legal costs; including costs as between attorney and client ...'

The Appellate Division has held in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) 498 (SCA) para 13 that:

'... a provision in a contract must be interpreted not only in context of the contract as a whole, but also to give it a commercially sensible meaning ...'

The 'commercially sensible' context of the consent to costs requires, firstly, that we should bear in mind that where costs are statutorily regulated, the court must apply such provision. However, Management Rule 31.5 is not so much a peremptory statutory provision, as really only a default, contractual position that can be amended by agreement between the parties.

Secondly, we should distinguish between the various types of costs, as:

- Costs of remuneration: As costs properly incurred by a practitioner, and presented as 'attorney and own client' costs payable by the body corporate to its own legal team.
- Costs of contribution: As costs recoverable from an opponent intended as an

indemnification towards the (remunerative) costs incurred by the client, which can take one of two forms –

– 'party and party' costs, being the typical scale of costs ordered on contribution. These costs are limited to the reasonably necessary attendances and formal exchanges between the parties, and is carved from precedent and promulgated tariff; or

– 'punitive costs', being a more generous, fuller indemnity of contribution. These are 'attorney and client' costs, that will include more of the attendances by the attorney on his client, and can even warrant departure from tariff. Punitive costs are considered 'intermediate' costs, being more than party and party, but less than attorney and own client costs. Punitive costs are reserved for circumstances where the court feels the need to express its displeasure with the conduct of a litigant, albeit that – as a general approach – they lean away from it.

Thirdly, it must be noted that even where punitive costs are ordered on the 'attorney and own client' scale, it is trite (as per *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 92) that such an order must be interpreted as intermediate 'attorney and client' costs. Thus, it really does not matter whether Management Rule 31.5 intended to refer to a contribution of 'attorney and client' (intermediary) costs, or 'attorney and own client' costs (of remuneration); the contribution to a body corporate's incurred expenses remains capped (at best) to constitute 'intermediate', attorney and client (punitive) costs on contribution.

Although a consent to costs is not prohibited by the common law, the court (both the presiding officer and taxing official) retains a residual discretion to enforce such agreement, and parties cannot by agreement deprive a court of the discretion it has in regard to costs, because (according to *Intercontinental Exports (Pty) Ltd v Fowles* [1999] 2 All SA 304 (A) para 26) –

'... a court ... would normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached in relation to costs. But good grounds may exist ... in a party being deprived of agreed costs, or being awarded something less ... than that agreed upon.'

As per *Ben McDonald Inc and Another*

*v Rudolph and Another* 1997 (4) SA 252 (T) at 258H – a taxing official: '... is still empowered to enquire into the reasonableness of such agreement.'

Thus, in the light of the above, any consent to costs –

- cannot really exceed the intermediate threshold inherent to punitive costs;
- remains in the discretion of both the court and its taxing official; although
- costs should be awarded (insofar it has been agreed) in the absence of cogent reasons not too (according to *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 14).

Body corporates are not privileged litigants; they must also pay for their legal representation – albeit collectively – whereupon they can recover from the defaulting owner an adequate indemnification as agreed, or ordered, and forum precedent will dictate what that amounts to. It simply means that:

- defaulting owners are in the same position as any other litigant;
- any consent to costs remains subject to the normal principles of contribution; and
- there is no real magic contained in Management Rule 31.5 (or its derivatives), because it has since the *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 (AD) 597 decision been the case that when one party is ordered to pay the costs of another taxed as between attorney and own client, those costs remain to be taxed on the intermediate basis.

A taxing official is obliged to act on an order that one party is to pay the costs of another taxed as between attorney and own client in exactly the same way as to pay the costs of another taxed as between attorney and client; there is no difference between them (as per *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W) para 116).

This threshold of contribution is a cornerstone of the principle of access to justice, for a very simple reason: If losing litigants were to be liable for all costs incurred against them, opponents could recklessly litigate from each others' wallets, and thereby create a risk of losing 'with costs' so disproportionately large, nobody but the super-wealthy could risk it.

Because body corporates are so often

litigants in their own right, one would think that it is reasonable for them to budget for the difference between what can be recovered (on contribution) from what it will actually cost them (on remuneration) to litigate, *via* provision in the annual levies. Not unlike gardening and security, the legal team is just another

service provider to the body corporate, and the bulk of their costs will have to be shared by all owners. What can be recovered from a specific defaulter – typically on the intermediate, punitive scale when Management Rule 31.5 applies – can go back into the communal fund, but such contribution will rarely be a full indem-

nification, because of what has been set out above.

**Albert Reinecke BA LLB (UJ)** is an attorney and costs consultant in Johannesburg and author of *The Legal Practitioner's Handbook on Costs* 2ed (2011). □

By  
Dale  
Verster

## International law firms and the South African legal job market

### Influx of international law firms

Over the past few years there has been a surge of international law firms opening offices in South Africa. Global firms such as Dentons, Hogan Lovells, Clyde & Co, Norton Rose Fulbright and Linklaters are among the many law firms that have recently launched a presence in Johannesburg, Cape Town and Durban – either in their own right or as a tie-up with a local player, and more often than not, driven by a client's need to have a credible presence in the market.

While the international investment in South Africa is an enormously positive development to the local and the broader African markets and economies, new players in the country stand to have a significant impact on the legal job market landscape for local lawyers.

### Law industry in South Africa

With the influx of international firms will also come best practices, offering an invaluable opportunity for local lawyers to learn from the best and draw from their skill sets, knowledge capital and resources.

The appetite of these firms to open shop reflects the demands and needs of their global clients. This will translate into growing investment opportunities, increasing available finance for African businesses, providing access to new markets and products, improved infrastructure, lowering transaction costs, greater employment and entrepreneurial opportunities as well as a host of other mutually beneficial outcomes.

It is also possible that over time it could level the landscape as big firms

are targeted for their specialist teams. We are increasingly seeing new entrants poach entire teams from local firms to start up boutique practices into specialist areas. The former continues their practice area despite the loss and the space becomes more competitive.

If the market shows signs of becoming more fragmented, it will in turn lead to an increase in the number of boutique firms launching into specialist areas.

### Job market

While the influx of established global players will most certainly offer local lawyers a wider choice and potentially more attractive career options, it could very well also make the job market more volatile. Enticed by the allure of a new, fresh challenge, senior team leaders may choose to move and entice an entire team to move with them.

At a more junior level, more work will mean an increased demand for fresh juniors and support staff. In turn these people will benefit from richer career development opportunities in the form of possible secondments to other international offices and exposure to their best practice regime.

While salaries and bonuses at levels below partner or director are unlikely to be heavily influenced, industry leaders will likely find themselves in high demand to head up new offices. Consequently packages could rise as current firms clamour to hang onto their star performers. Commercial areas of law like banking and finance are the most affected, already showing big moves and signs of more to come.

International law firms typically go after lawyers with a reliable book of business, proven leadership skills and

experience running a practice semi-autonomously. South Africa is a small market and having a respected name in the market goes a long way, especially considering such a person has to be able to attract a competent team of professionals to service client needs.

### Expat and international lawyers

An increased international presence could possibly open up more avenues for expat South African lawyers to return home into a new South African office. In order to attract the top talent, however, firms will have to be prepared to negotiate as expat lawyers from Commonwealth countries are already in high demand, especially in the fields of banking and finance, project finance and energy.

Conversely international firms may look to relocate foreign lawyers into a director's position in the short- to medium-term, as it may be beneficial for operational requirements. However, from a business development perspective, foreign lawyers in high positions may struggle, as it is unlikely they will be able to bring a client base with them.

### Conclusion

South Africa is the gateway to Africa on many fronts but it is still a country with unique challenges. It would be foolhardy to try and establish a presence without acquiring professionals with local knowledge – both in terms of legal professionals and operational requirements.

**Dale Verster BSc (Polymer Chemistry) LLB (Stellenbosch)** is a director at GRMSearch in Johannesburg. □

By the Forensic  
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# How do you make your money?

**A**s part of remaining transparent and accountable to their clients, practitioners are required by their rules to account to their clients at the end or termination of the mandate. This accounting to clients must include the reflection of interest earned on s 78(2A) investment and administration fees taken from that interest, inclusive of VAT where the firm charges VAT.

While we take full cognisance of the fact that the administration fees taken from interest earned on s 78(2A) are not the only source of income for the practitioners, this article seeks to address the shortfalls that have been identified around the administration fees on s 78(2A) investments.

## Section 78(2A) investments

Clients entrust their monies with practitioners by paying it into the practitioner's s 78(1) trust accounts. When an attorney invests in s 78(2A) on behalf of a client, an interest-bearing account is opened with a bank or building society, he or she makes reference to the section and the name of the client on whose behalf the investment is opened. Funds are then transferred from the s 78(1) account into the s 78(2A) account, and the firm will make accounting entries to reflect this transaction. Money in s 78(2A) will earn interest, which should be posted to the accounting records on a regular basis. On withdrawal of the invested money, that money, together with the interest earned, must flow from the investment account back to the s 78(1) trust account before payments are effected. The practitioner is entitled to a reasonable administration fee on interest earned on these investments. The fee taken by the practitioner is income for the firm and must be transferred from trust account to business account of the firm. For VAT registered firms, VAT will be charged on this fee. The fee then forms part of the income disclosure by the firm to South African Revenue Service (SARS) in order to comply with SARS's regulations.

## What happens in reality?

A number of instances have been noted where some firms do not treat the administration fees as they should:

- While practitioners are entitled to a reasonable fee for administering the investments, instances have been noted where practitioners do not take a reasonable fee but prejudice their clients of their money by taking an unreasonable fee. Although reasonable fee has not been defined, it stands to reason that a practitioner taking an amount that exceeds that paid to the client is not taking a reasonable fee, and such cases have been noted. To reflect this unfair scenario, let us take a hypothetical example:

- An investment of R 100 000 earns interest of R 8 000 (being 8% of the capital invested) from the bank. The practitioner takes R 5 000 (being 5% of the capital invested or 62,5% of interest earned) as administration fees and gives the client R 3 000 (being 3% of the capital invested or 37,5% of interest earned).

Should the practitioner have properly levied the administration fee on the investment, the scenario would have been different:

- Interest earned on the R 100 000 investment is R 8 000 (8% of the capital invested), practitioner levies 0,4% fee on investment, which equals R 400 (5% of 8% interest earned on investment) and client gets R 7 600.

- We have noted instances, especially in smalls firms with sole practitioners or partners, where administration fees are not transferred from trust to business accounts, instead trust cheques are written out in the practitioner(s)' personal names and cashed. This results in income that should have been disclosed as such not being disclosed to the relevant authorities like SARS and taxes due on such money not paid, and this is fraud.

- Other instances have been noted where firms do not transfer the fees but open other s 78(2A) investment accounts wherein they reinvest the administration fees for the firm. Not only does this give rise to non-disclosure to relevant authorities like SARS, but it also opens up misuse of the s 78(2A) investment vehicle as there is no underlying transaction. Notwithstanding this, nothing precludes firms from using their income generated, including that generated from administration fees, from generating more money, but it should happen outside of s 78(2A), under business.

- Further instances have been noted where portions of administration fees earned on these investments are credited to fraudulently-created trust creditors under the pretence that these are monies paid in by trust creditors and payments are then made out of those matters.

All these instances that have been articulated in the foregoing section amount to fraud and can lead to prosecution of practitioners when found. This in turn can have very negative effects on the firm that may even lead to business failure and therefore closure.

## Are they all s 78(2A)?

As it has already been highlighted above, s 78(2A) is used where there is an underlying transaction pending. We have noted on numerous occasions instances where practitioners have opened s 78(2A) accounts with no underlying transactions pending. This amounts to misuse of this investment vehicle. Such investments should be opened as pure investments as the client specifically paid in the money to be purely invested on their behalf. While the practitioner may charge an administration fee on such investments, these should be opened in terms of pure investments as anticipated in the various law societies' rules.

## Does your client know?

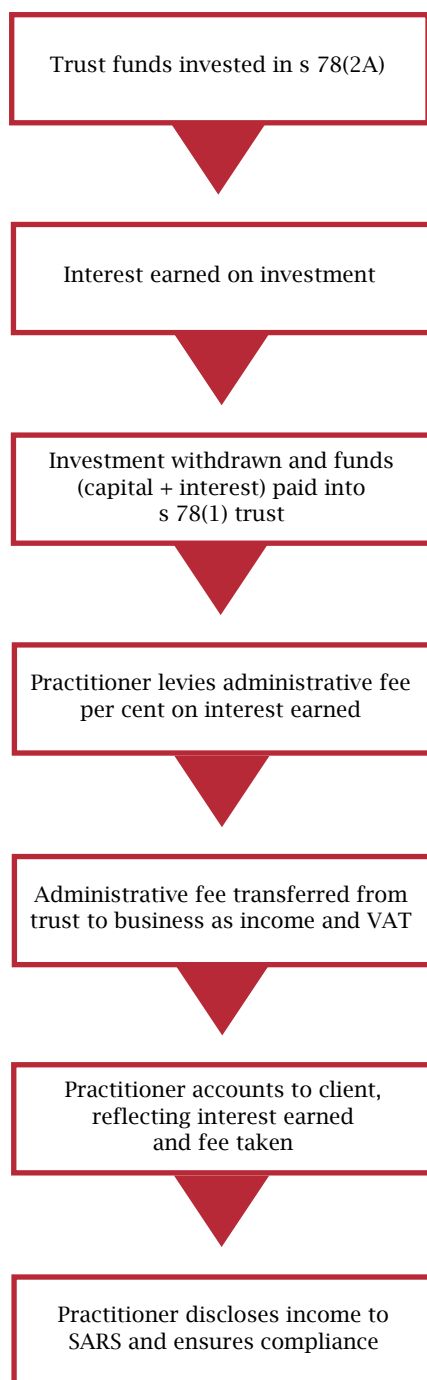
Practitioners are required in terms of the rules of the various law societies to account to their clients on termination or completion of the mandate. In their accounting statements, they must explicitly reflect the interest earned in the investment and the administration fee taken by the practitioner/firm. A number of instances have been noted wherein the practitioners do not explicitly disclose this information to their clients. Where clients have given written instructions prior to the investment being made, it is prudent to clearly reflect in the mandate form what administration fee the practitioner will levy. This ensures transparency and prepares the client upfront of what to expect.

## Conclusion

In conclusion, here is the flow that ad-



ministration fees on s 78(2A) should follow:



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# Personal data on the Internet –

*can POPI protect you?*

Search

By  
Nthupang  
Magolego

**I**t is a general practice of many Internet users to enter their names on Internet search engines in order to see what appears or is stored under their names on the Internet. In fact in one of the seminars I recently attended, on the subject of personal image and branding, attendees were advised to manage their online or Internet image by being careful about what they put or publish on the Internet under their names, and by also occasionally searching their names on Internet search engines in order to stay informed about what is stored under their names.

What happens then when you enter your name on an Internet search engine and some personal undesirable information appears under or linked to your name? What legal recourse is available to ensure that the undesirable personal in-

formation is removed or 'forgotten'? On 13 May 2014, in a matter between *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEP)* Mario Costeja González (case no C-131/12, 13-5-2014), the Court of Justice of the European Union (the EU Court) handed down what could be termed as a landmark judgment on the right to privacy in relation to personal data on the Internet. The judgment involved the processing of personal data or information by the Internet search engine, Google. Incidentally the judgment came amid the promulgation in South Africa of the Protection of Personal Information Act 4 of 2013 (POPI) into law.

Even though the application of the above EU Court decision is territorially confined to the European Union States, it may serve as a basis in South Africa for purposes of determining whether POPI

can be interpreted in a manner in which Google or other Internet search engines may be requested to remove personal data from their database or indexes.

## Internet search engines

In order for the EU Court decision to be construed in the correct context, it is necessary to understand how Internet search engines operate. An Internet or web search engine is a software system that is designed to search for information on the World Wide Web. The search results are generally presented in a line of results and may be a mix of web pages, images, and other types of files. The search engines work by storing information about many web pages and the information is then analysed in order to determine how it should be indexed. Data about web pages are then stored in an index database for use in later que-

ries. The index database is then used to respond to a query from a user. When a user enters a query into a search engine (typically by using keywords), the engine examines its index database and provides a listing of best-matching web pages according to its criteria, usually with a short summary containing the document's title and sometimes parts of the text. (en.wikipedia.org/wiki/Web\_search\_engine, accessed 4-11-2014).

## The AEPD case

During 2010, Costeja González, a Spanish national, lodged a complaint with the Spanish Data Protection Agency (*Agencia Española De Protección De Datos*) (AEPD) against a local daily newspaper as well as against Google Spain and Google Inc. The complaint centred around the fact that when an Internet user entered González's name into the Google search engine, the user would obtain links to web pages of the daily newspaper, wherein an announcement appeared mentioning or involving González in a real-estate auction for the recovery of certain debts.

González firstly requested the newspaper to either remove or alter the personal data relating to him on their web page. Secondly, he requested that Google Spain or Google Inc be instructed to remove the personal data relating to him so that the personal data ceased to be included in the search results.

The complaint against the newspaper was dismissed as the AEPD viewed the publication by the newspaper to be legally justified as it took place in terms of the law, and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.

The complaint against Google Spain and Google Inc was upheld. The AEPD held that operators of Internet search engines are subject to data protection laws because they are involved in the activity of data processing. The AEPD ruled that it has the power to require operators of Internet search engines to delete data if the dissemination of the data infringes on the fundamental right to privacy and dignity of individuals. The AEPD held that the obligation to delete personal data may be imposed directly to Google, without it being necessary to delete the data from the website where the data originally appears (ie, the newspaper web page), including when retention of the information on that originating web page is justified by law.

Google Spain and Google Inc brought separate actions against that decision before the National High Court. The court stated that its deliberation on the matter depended on the way in which the Directive of the European Parliament and Council of 24 October 1995 on the Protection of Individuals with regard to

the Processing of Personal Data (Directive 95/46/EC) is interpreted.

The court then decided to stay the proceedings and to refer various questions relating to the interpretation of Directive 95/46/EC to the EU Court for a preliminary ruling, the relevant questions being:

- Google's activity of locating personal information published on the Internet by third parties, indexing it automatically, storing it temporarily and finally making it available to Internet users according to a particular order of preference, whether such an activity can be interpreted as falling within the concept of 'processing of data'?

- If the activity is regarded as data processing - whether Google can be regarded as the 'controller' of the personal data contained in the web pages that it indexes?

- If Google is a controller as defined - whether Google can delete from its indexes information published by third parties, without addressing this with the third party on whose web page that information is located?

- Would Google be obliged to delete personal data if the personal data has been lawfully published by third parties and is kept on those third parties' web pages?

- What are the rights of data subjects in relation to the processed and disseminated data?

The EU Court considered the provisions of Directive 95/46/EC, including the conditions that a controller must comply with when processing personal data, these conditions being that:

- Data must be processed fairly and lawfully.

- Data must be collected for specified, explicit and legitimate purposes.

- Data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

- Data must be accurate and, where necessary, kept up-to-date.

- Reasonable steps must be taken to ensure that data that is inaccurate or incomplete is erased or rectified.

Considering the above, the EU Court decided that:

- The operations of Google involves data processing as defined in Directive 95/46/EC, that is, any operation or set of operations (by automatic means or not) performed on personal data (any information relating to an identified or identifiable natural person), and such operations can either be the collection, recording, organisation, storage, adaptation or alteration, use, disclosure by transmission, or dissemination of data.

- Google is responsible as a controller, for the processing of data, a controller being defined as a natural or legal person, public authority, agency or any oth-

er body, which alone or jointly with others determines the purposes and means of the processing of personal data.

- Google can be required to remove information collected from third party websites, also in a case where that personal information is not erased beforehand or simultaneously from the third party web pages.

- Google can be required to remove information collected from third party websites, also in a case where that publication from the third party web pages is lawful.

- A data subject has a right to oppose to the dissemination of the processed data through the search engine if the dissemination is prejudicial to him or her and his or her fundamental right to privacy, and that this right overrides the legitimate interests of Google and the general interest in freedom of information.

## The impact of POPI on Google South Africa

In South Africa, Google (including other Internet search engines) may face similar (or possibly far reaching) consequences due to the provisions in POPI that are analogous to those of Directive 95/46/EC.

The provisions of POPI are applicable to data processing by an entity that is domiciled in South Africa, or if not domiciled in South Africa, the entity must use automated or non-automated data processing means in South Africa.

POPI defines 'personal information' as 'information relating to an identifiable, living, natural person ... including, but not limited -

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health ... of the person ...'.

'Processing' is then defined as 'any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including -

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use ...'.

POPI has determined who is accountable for data processing and accordingly states that a 'responsible party' is accountable. A 'responsible party' is then defined as 'a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.'

Furthermore, chapter 3 of POPI prescribes conditions that a responsible party must comply with when processing data and these conditions are that:

- Data must be processed lawfully and reasonably in a way that it does not





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fringe the data subject's privacy.

- Data must be processed for a specific purpose, and the data must be adequate, relevant and not excessive to the purpose for which it is processed.
- The responsible party must obtain consent from the data subject when processing personal data. (This in my view will have stringent consequences for Internet search engines because the implication is that Internet search engines may now be expected to obtain consent from everyone whose personal data is to be processed a practically impossible task).
- The responsible party must (with certain exceptions) collect personal information directly from the data subject.

Regarding the rights of data subjects, POPI has granted data subjects various rights in relation to the processing of their personal data, including the right

to request the correction, destruction or deletion of that data subject's personal information. A data subject can request that personal data be deleted if the data is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully.

The effect of the above mentioned provisions is that Google South Africa, which is domiciled in South Africa or uses automated or non-automated data processing means in South Africa, may have to comply with the provisions of POPI. This is because the activities of Google can be regarded as data processing, and if the processed data involves information relating to an identifiable, living, natural person, these activities will be regarded as the processing of personal data. Furthermore Google will be the responsible party for such processing, seeing that it is the one that de-

termines the purpose of and means for processing the personal information.

## Conclusion

The provisions of POPI are to a large degree, a replica of the provisions of Directive 95/46/EC. The EU Court's interpretation of this Directive as alluded above, presupposes that Google South Africa (or other Internet search engines) may have to comply with POPI in their business of processing personal data. It is my submission that South Africans, just like their European counterparts, may also have a right to be forgotten by Google under the provisions of POPI.

**Nthupang Magolego Blur LLB (UP) LLM (Unisa) is a Manager: Investigations and Enforcement at the National Credit Regulator in Midrand.** □

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#### Author

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He has been an instructor for LEAD and is also a lecturer at the University of Pretoria and a moderator and consultant of conveyancing subjects at Unisa

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## Does s 14 of the CPA create an unreasonable disadvantage to the owner?

By  
Cilna  
Steyn

**T**he Consumer Protection Act 68 of 2008 (CPA) has had a substantial impact on the rental property market since its commencement on 31 March 2011. More specifically s 14, which applies to all fixed term agreements, unless entered into between juristic persons, regardless of their asset value or annual turnover. In the majority of cases, lease agreements would be entered into for a fixed term. Considering the above, it is apparent that s 14 would be applicable to many, if not the majority of lease agreements relating to immovable property, especially lease agreements concerning residential property.

The Act does not refer to specific agreements to which s 14 applies, apart

from that the agreement must fall within the definition of a consumer agreement, which is entered into for a fixed term. From this we can only infer that the legislature intended to leave this open in order to encapsulate a wide array of fixed-term agreements, which would include lease agreements relating to immovable property. The Act does not distinguish between leases for residential, commercial, retail or industrial properties; in fact, the Act does not refer to lease agreements of immovable property *per se*. However, from the definitions and the purpose of the Act it is clear that it was the intention of the legislature to have lease agreements fall within the ambit of the Act. The nature of the transaction being established between the lessor and the lessee is one of subservience

and therefore in need of regulation and protection. It is therefore only prudent to assume that the section is intended to apply to all lease agreements regardless of the specific property type.

In order to assess and interpret the CPA properly, one must take cognisance of the ambit, intention and purpose for which the Act was passed. The CPA aims to:

‘... promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative

and enforcement framework relating to consumer transactions and agreements, [and] to establish the National Consumer Commission ...’.

The Act should be interpreted in a manner that promotes and advances the social and economic welfare of consumers in South Africa. Considering the somewhat vulnerable position that a lessee finds himself or herself in, relative to the lessor, it is clear that the lessee, as a consumer would require the protection of the CPA. This would be the position of the lessee regardless of the type of property the lease agreement relates to namely, residential, commercial, etcetera.

### Fixed-term agreements

Section 14 relates to fixed-term agreements only, meaning that the agreement is concluded for a specific term. Hence lease agreements entered into on a month-to-month basis would not fall within the ambit of this section. It is important to appreciate that s 14(2)(d) determines that on expiry of the fixed term, the agreement would automatically continue on a month-to-month basis. Even though the agreement was governed by s 14 during the fixed term, after the expiry date the agreement will continue on a month-to-month basis and no longer be regulated by this section. For this reason, it is prudent to make provision for both situations in the lease agreement, with specific reference to the breach clause of the lease agreement.

Section 14(1) states the following:

‘Expiry and renewal of fixed-term agreements –

(1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.’

According to the definitions of the CPA, a juristic person includes a body corporate, a partnership, an association and a trust. This broader definition of juristic persons would be very relevant, especially in commercial, industrial and retail properties where a natural person would enter into a lease agreement, but where he or she is in fact, acting in his or her capacity as a partner. Assuming that the lessor is a juristic person, on face value it would seem as if s 14 would apply to the agreement. However, since the lessee is in fact a partnership and according to the CPA a juristic person, the agreement would be entered into between juristic persons and s 14 would not apply to the agreement.

On plain reading of the above subsection, it is clear that transactions between juristic persons, regardless of their asset value or annual turnover, would automatically be excluded from the provisions of s 14 in its entirety. It would be logical to construe that in a situation where the lessor is a juristic person and the lessee a natural person, that s 14

would apply to the agreement between the parties. What would the position be where the lessor is a natural person, but the lessee a juristic person? In this relationship it would seem as if the lessee, as a juristic person, does not require the protection of the CPA. However, the wording of the subsection is very clear – ‘[t]his section does not apply to transactions between juristic persons’. The word ‘between’ would imply that both parties would have to be juristic persons for the agreement to be excluded from the provisions of this section.

It can, therefore, be concluded that s 14 would apply to all fixed-term lease agreements, regardless of the property type, unless the agreement is entered into between juristic persons.

According to s 14(2)(a) read with reg 5(1) of the Consumer Protection Act Regulations, a fixed term agreement may not exceed a period of 24 months, ‘unless such longer period is expressly agreed with the consumer and the supplier can show demonstrable financial benefit to the consumer’ (reg 5(1)(a) GG34180/1-4-2011). This limitation on the duration of a fixed term agreement could possibly create a level of apprehension for lessors. Especially with regards to commercial, industrial and retail properties since lessees of these types of properties would very likely desire an extended term. In the case of lease agreements an extended term would be to the financial benefit of the lessee, provided that the lease agreement does not contain, for instance, unreasonable rental escalations. The financial benefit to the lessee could be – among others – the lessee would not have to pay another deposit at a new premises. The lessee does not have to move and attend to the removal of tenant installations and re-installations at the new premises. The lessee does not run the risk of losing clients or customers as a result of their inability to locate the new business premises. There are many more examples of demonstrable financial benefit to the lessee. It would be essential to indicate specifically, as part of the lease agreement that the lessee desires to enter into a term exceeding 24 months. In order to avoid a situation where the lessor would have to prove the financial benefit, the parties may wish to include this in the lease agreement.

### Cancellation

Section 14(2)(b) ‘despite the provisions of the consumer agreement to the contrary –

...

(ii) the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time.’

This subsection has the effect that the

lessor will not be in a position to cancel the lease agreement during the term of the agreement, unless the lessee is in breach of a material term of the agreement and fails to remedy such breach within the allowed time after receiving written notice to that effect. This would imply, that should the lessor wish to take occupation of the premises or sell the property that he would not be permitted to cancel the agreement.

In order to be in a position to cancel the agreement in a situation where the lessee is in breach of a material term of the agreement, the lessor must give the lessee written notice in which the breach is described and the lessee should be allowed 20 business days to remedy such breach in full. The lessor would have to indicate in the notice that the failure of the lessee to remedy the breach within the allowed time would result in cancellation of the agreement. This subsection is particularly cumbersome. It effectively has the result that the lessee would be in a position where the rent can be paid one month in arrears instead of one month in advance. Many lessors have attempted to resolve this problem by requesting a higher rental deposit, instead of a one month deposit, lessors tend to require two months’ rental and some up to six months deposit. This is in return, places a probably unintended, heavy financial burden on lessees.

In conclusion, the CPA has substantial impact on fixed-term lease agreements. It is vital to be aware of its effect on lease agreements. It is vital for property owners and their attorneys to be aware of this effect to enable them to comply with the Act and have measures in place to mitigate the potential burden placed on property owners by the Act. For instance, recording the financial benefits the lessee would have when entering into a lease agreement for a term exceeding the prescribed term. In order to mitigate damages, when a lessee is in breach of a lease agreement governed by s 14, it is necessary for an owner to appreciate the need to place the lessee in *mora* as soon as possible.

The purpose of the CPA is to protect the consumer, however, it was not the intention of the Act to unjustly prejudice a property owner. The owner has a responsibility to comply with the Act, but this compliance does not have to be to the detriment of the owner. When dealt with correctly, s 14 meets the purpose of the CPA without creating an unreasonable disadvantage to the owner.

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# Navigating the Consumer Protection Act 68 of 2008

Picture source: Gallo Images/Thinkstock

By  
Neels  
Coertse

**T**he Consumer Protection Act 68 of 2008 (CPA) came into force on 1 April 2011. It is here to stay and it regulates the relationship between a supplier of goods and/or services to a consumer. It therefore applies to services rendered by attorneys. The full impact of the CPA is set to be massive but stands to be developed to the full in time.

It created the following nine fundamental consumer rights:

- The right of equality in consumer market (s 8 – 10).
- The consumer's right to privacy (s 11 – 12).
- The consumer's right to choose (s 13 – 21).
- The right to disclosure and information (s 22 – 28).
- The right to fair and responsible marketing (s 29 – 39).
- The right to fair and honest dealing (s 40 – 47).
- The right to fair, just and reasonable terms and conditions (s 48 – 52).

- The right to fair value, good quality and safety (s 53 – 61).
- The supplier's accountability to consumers (s 62 – 67).

## Impacts on civil procedure and fundamental rights protected and enforced by various entities

The CPA impacts drastically on civil procedure in the widest sense of the word. Life was 'simple' under the old dispensation – there were more or less only the courts and arbitrations to contend with.

In summary these fundamental rights are protected and enforceable by –

- the National Consumer Commission;
- the National Consumer Tribunal;
- consumer courts;
- consumer protection groups;
- an ombud with jurisdiction;
- an accredited industry ombud;
- a person or an entity providing conciliation, mediation or arbitration services; and
- the courts.

It is beyond the scope of this article to discuss how these entities will protect and enforce these rights.

## Impacts on the rules of legal interpretation and the principle of *stare decisis*

The crisp rules pertaining to legal interpretation and consequently the principle of *stare decisis* are fundamentally re-written in that the Act prescribes how it may be interpreted or applied (s 2(1) and (2)).

When the CPA is interpreted or applied, a person, court, tribunal or the commission may consider the following –

- appropriate foreign and international law;
- appropriate international conventions, declarations or protocols relating to consumer protection; and
- any decision of a consumer court, ombud or arbitrator in terms of the CPA, to the extent that such a decision has not been set aside, reversed or overruled by



the High Court, the Supreme Court of Appeal or the Constitutional Court.

We surely can learn a lot from the international community on how to protect consumers against exploitation by suppliers. But the converse is also valid in that suppliers will also benefit from foreign and international law, conventions, declarations or protocols.

It is of some concern that the CPA seems to allow the decision of one decision making body to have some influence on another, or even on an ombud or an arbitrator. While it is uncertain how this will meet with the approach of one judgment of a particular court not binding another (see *Hollington v F Hewthorn and Company Limited* [1943] 2 All ER 35) the cross implementation of such findings will likely create uncertainty, unpredictability and unreliability, these being the very essence of the *stare decisis* principle (as was again expressed in *Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA) at 40E) as it is unsure how every individual court, ombud or arbitrator will interpret and apply the CPA in a manner that is consistent and sustainable.

### Freedom and sanctity of contract replaced by constitutional contractual model

The classical theory of freedom and sanctity of contract between a supplier and a consumer has been replaced by the constitutional model enshrined in the CPA and, so it seems, only applicable between a supplier and a consumer.

### The *exceptio doli* have been revived

The Appeal Court, as it then was, delivered the death knell to the *exceptio doli* and Joubert AJ delivered the obituary in *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) in these very strong words: 'All things considered, the time has now arrived, in my judgment, *once and for all*, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace*' (see 607B) (my emphasis). However, it has been revived (see: Section 40 (unconscionable conduct); s 48 (unfair, unreasonable or unjust contract terms) and reg 44 (the blacklisted terms and conditions, which are presumed not to be fair and reasonable).

The opening words of the *Afrox* case are enlightening to say the least: 'Is 'n kontraktuele beding wat 'n hospitaal teen aanspreeklikheid vir die nalatigheid van sy verpleegpersoneel vrywaar, geldig en afdwingbaar? Dit is die kernvraag in hierdie appél.' In 2002 the court held that it is valid and enforceable. With the advent of the CPA in 2011, I am of the opinion that in light of ss 40, 48 and reg 44(3)(a), it would in all probability

be held to be invalid and unenforceable. These sections and regulation would also strike at the heart of even the *De Ornelas* case.

### Impact on five common law principles

In the article 'The Consumer Protection Act and Five Common Principles' by Sarah-lynn Tennant and Vuyokazi Mbele (2013 (Jan/Feb) *DR* 36) it is pointed out that the following common law principles were severely impacted on by the CPA:

- *Caveat subscriptor*.
- Freedom to contract.
- Passing of the risk rule.
- Parol evidence rule.
- The *voetstoots* clause.

### Impacts on the procedural and substantive fairness in respect of the enforcement of consumer rights

The impact was also investigated in another article by L Hawthorne 'Public Governance: Unpacking the Consumer Protection Act 68 of 2008' (2012) 75 *THRHR* 345. He discusses *inter alia*:

- procedural fairness –
  - information obligations;
  - unconscionable conduct;
- substantive fairness –
  - right to fair, just and reasonable terms and conditions (the general terms);
  - absolutely prohibited terms, conditions or transactions (the blacklisted terms); and
  - terms and conditions presumed to be unfair (grey listed terms and conditions).

### Impact of plain language

Section 22 requires that a document or visual representation should be in plain language. There is no definition of 'plain language' in the CPA. What then does it mean? Section 22(2) gives us a hint as to what it might be –

'... a ... document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the ... document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the ... document or visual representation without undue effort ...'.

The reasoning behind 'the plain language' phenomenon is that the reader should –

- easily find what he or she needs;
- understand what is written; and
- use the information easily.

Is it applicable to statutes? I would argue and say more so, especially in a statute that enshrines that very right. That being the case let us randomly apply it to

the CPA. I submit that it fails miserably for the following reasons:

- It is voluminous: There are 122 sections.
- These 122 sections are extremely complicated to circumnavigate. It is divided into seven Chapters, which are in turn subdivided into various parts.
- It is difficult to ascertain and understand which sections were amended, restricted or extended. It is cumbersome hard reading and really requires undue effort.
- The transitional provisions are clearly beyond the average consumer (see: Section 121 and schedule 1 and 2).
- Accessing the string of amended statutes in schedule 1 is beyond the capabilities of the average consumer. I wonder how many of my colleagues would be able to access these statutes.
- The average consumer should be able to decipher the extent of the application to pre-existing agreements (see: Paragraph 3 of schedule 2). The reader is confronted with a table and a long list of sections and subsections in the CPA.

I suggest that the CPA is neither plainly understandable nor easily accessible to the average consumer or even to me as a privileged seasoned educated consumer.

The preamble to the CPA states categorically that '... apartheid and discriminatory laws of the past have burdened the nation with unacceptable high levels of poverty, illiteracy and other forms of social and economic inequality ...'. It follows that these very consumers will be at a loss as to how this statute grants them relief – it is once again left to lawyers to assist these unfortunate consumers.

It is entertaining to read articles about the plain language phenomenon. When the authors get going it becomes very academic and is completely off the mark and no longer written in plain language. So, the question remains? What is meant by plain language?

### Conclusion

RH Christie *The Law of Contract* 5ed (Durban: LexisNexis 2006) at 12 states that the *De Ornelas* case '... has been justly criticised for its positivist and over-scholarly method of historical reasoning and absence of an in-depth discussion of general policy considerations or the responsibility of a court to ensure justice ...'. I suggest that this critique applies to the *Afrox* case.

This Act sets the record straight – if you can circumnavigate your way through the maze of chapters, parts, sections, subsections and regulations.

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By  
Rezen  
Papaya

**T**remendous strides have been made towards the regulation of business rescue practitioners. The Companies and Intellectual Property Commission (CIPC) currently issues conditional licences to business rescue practitioners and the experience of the applicant as well as the size of the company are factors taken into account. The CIPC's authority is conferred on it by the Companies Act 71 of 2008 (the Act) and the Companies Regulations, 2011. The present system is merely the foundation and requires perfecting if business rescue practitioners are to be adequately regulated. The need for better regulation stems from the complex task that a business rescue practitioner undertakes. Regulation of business rescue practitioners is two-fold, it involves -

- the appointment of suitably qualified practitioners in accordance with the qualifications set out in s 128 of the Act; and
- the monitoring of business rescue

practitioners in their performance of business rescues.

### Statutory role of a business rescue practitioner

Section 128(1)(d) of the Act defines a 'business rescue practitioner' as 'a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings ...'. Consequently business rescue is defined in s 128 as 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for -

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

(ii) ...

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maxim-

ises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company'.

Regulation of business rescue practitioners is a complex task due to the multi-faceted task of a business rescue practitioner. A business rescue practitioner is an officer of the court (s 140), a pseudo-director in whom all the management powers of a company are vested as well as the person who is supposed to safeguard the interest of all affected persons. As evidenced in s 128 a business rescue practitioner is supposed to act as an overseer, a facilitator, supervisor and manager during the business rescue period.

### Selection and appointment of a business rescue practitioner

Section 138 of the Act states that in order to qualify for appointment as a business rescue practitioner, an individual or individuals have to be 'a member in good standing of a legal, accounting or business management profession accredited by the Commission'. The section presupposes membership to a pre-existing profession and thereafter adds the requirement of accreditation. The CIPC has been tasked with the accreditation of business rescue practitioners. Subsequently s 138(3)(a) and (b) empowers the Minister to promulgate regulations prescribing -

'(a) standards and procedures to be followed by the Commission in carrying out its licensing functions and powers in terms of this section; and

(b) minimum qualifications for a person to practise as a business rescue practitioner, including different minimum qualifications for different categories of companies'.

The provisions of the Act are highly prescriptive in relation to the category of individuals that may be appointed. The Act coupled with the regulations provides clear guidelines on the skill set required of business rescue practitioners.

Regulation 126(1)(a) (Companies Regulations, 2011) states that the Commis-

sion must, when considering an application for accreditation of a profession under s 138(1), 'have due regard to the qualifications and experience that are set as conditions for membership of any such profession, and the ability of such profession to discipline its members and the Commission may revoke any such accreditation if it has reasonable grounds to believe that the profession is no longer able to properly monitor or discipline its members.' This points to a heavy reliance on the manner in which these professions are able to adequately regulate their own affairs. Peradventure such professional bodies fail to regulate their professionals this will have a ripple effect on the efficacy of appointed business rescue practitioners. It therefore becomes relevant to analyse the professional bodies envisaged in the Companies Act.

Section 138(1)(a) explicitly states that practitioners are to be appointed from the legal, accounting and business management professionals. The legal profession is regulated by the four law societies while the accounting profession is regulated by the South African Institute of Chartered Accountants (SAICA) and to a certain extent business management professionals are governed by the Turnaround Management Association (Southern Africa). The Act makes the assumption that these professional bodies are adequately equipped to assist in regulating their members who in turn will be appointed as business rescue practitioners. The relationship between such bodies and the CIPC would have to be well-defined in order for the regulation of business rescue practitioners to be effective. The Act stipulates that the member of these professional bodies must be in good standing with their respective profession. This raises the question that in the event that such a member is no longer in good standing with the profession would the onus be on the professional body to report same to the CIPC. Conversely it is plausible that the impetus might lie on the CIPC to ascertain the standing of a practitioner within their professions before appointment. Alternatively periodic checks regarding a practitioner's standing may also be necessary.

It appears that the CIPC has taken cognisance of the potential incongruence that may arise if professional bodies act as middle-men in the regulation of business rescue practitioners. The CIPC has therefore mooted the idea of a Business Rescue Accreditation Model Liaison Committee. The chapter 6 provisions clearly intended to create an entirely new profession of business rescue prac-

tioners. The next logical step would, therefore, be to create a separate professional body to regulate the members of the business rescue profession. The CIPC currently only issues conditional licences that are valid for the duration of a particular rescue. The licenses issued are therefore not transferable from one business rescue to another. As such no individual can claim to be a pre-licensed business rescue practitioner.

Presently business rescue practitioners are appointed according to experience and have been categorised into senior, experienced and junior business rescue practitioners. A junior business rescue practitioner may only be appointed as business rescue practitioner for a small company and may not be appointed as a practitioner of a medium or large company (Regulation 127(3)(a) and b). An experienced business rescue practitioner may be appointed as a practitioner of a medium company or a small company. In turn he or she may not be appointed as a practitioner for a large or state owned company (Regulation 127(4)(a) and (b)). Lastly a senior business rescue practitioner may be appointed as a practitioner over any company (Regulation 127).

### Appointment of a liquidator as a Business Rescue Practitioner?

A liquidator could be appointed as a business rescue practitioner if he or she, as set out in s 138(1)(a) 'is a member in good standing of a legal, accounting or business management profession accredited by the Commission'. The Act does not preclude the appointment of a liquidator as a business rescue practitioner provided the individual meets the requirements set out in s 138 (1). Section 140(4), however, states that a liquidator who has been appointed as a business rescue practitioner cannot subsequently be appointed as a liquidator if the business rescue fails and the business goes into liquidation. Henoschberg notes that the fact that an individual is a liquidator does not automatically render them qualified to be appointed as a business rescue practitioner.

### Underegulation

It is evident that although the regulation of business rescue practitioners has a solid legislative foundation. In the main, the legislative provisions have not translated into clear regulation. It is imperative that an accreditation body be set up for the licensing of business rescue practitioners. Professional bodies generally have professional examinations that its members have to undergo before they

are appointed. Similarly business rescue practitioners may need a tailor-made set of examinations to be passed before appointment as business rescue practitioners. Support for such a notion can be found in the fact that at present no single profession possesses all the skills required to undertake business rescue proceedings. Several different individuals often have to be appointed from the legal, accounting and business management professionals before a business can be successfully rescued. This incurs costs for a business that is already in distress. Therefore, it would be more efficient to devise examinations that ensure that business rescue practitioners have sound legal, business and commercial knowledge.

The ordinary meaning of regulate denotes 'control or maintain[ing] the rate or speed of (a machine or process) so that it operates properly'. The present mechanism comprising of the issuing of conditional licences by the CIPC is commendable but falls short of the creation of an entirely separate profession. A completely separate body regulating business rescue practitioners is advisable. Such a body will be responsible for the licensing of business rescue practitioners after they have undertaken some form of examination to determine suitability for appointment. Thereafter a code may be developed containing a code of conduct and perhaps the ethics expected from business rescue professionals. A significant number of business rescue practitioners are unaware of what their duties and obligations are. Professionals undertake the rescue of a company but are unaware of the legal obligations they have to the court and to various affected persons. (Amanda Lotheringen 'Do All Answers Lie in the Skill Set of the Business Rescue Practitioner?' ([www.tma-sa.com/events/event-downloads/doc\\_details/55-presentation-by-amanda-lotheringen-of-cipc-june-2013-.html](http://www.tma-sa.com/events/event-downloads/doc_details/55-presentation-by-amanda-lotheringen-of-cipc-june-2013-.html)), accessed 30-10-2014)).

### Conclusion

Regulation of business rescue practitioners has a solid legislative framework and genuine efforts are being made to regulate the profession. However additional progress can be made in order to adequately regulate business rescue practitioners.

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# THE LAW REPORTS



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October 2014 (5) South African Law Reports (pp 317 – 633); [2014] 3 All South African Law Reports September no 1 (pp 529 – 652) and no 2 (pp 653 – 730); 2014 (3) Butterworths Constitutional Law Reports – March (pp 251 – 371) and 2014 (5) May (pp 511 – 640)

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  
ECM: Eastern Cape Local Division, Mthatha  
GJ: Gauteng Local Division, Johannesburg  
GP: Gauteng Division, Pretoria  
KZP: KwaZulu-Natal Division, Pietermaritzburg  
SCA: Supreme Court of Appeal

## Attorneys

**No readmission of attorney who is on parole:** In *Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM) the applicant, Mtshabe, was a practising attorney who was struck off the roll of attorneys because of a criminal record. In the course of his practice as an attorney the applicant defrauded the state by overcharging and billing his client, the Minister of Defence, for work not done. In this application, the applicant admitted that he lied during his evidence before the court. He was found guilty and

sentenced to eight years of imprisonment. After serving three years and seven months of his term he was released on parole, which was to expire in 2015. While still on parole he applied for readmission as an attorney in terms of s 15(3) of the Attorneys Act 53 of 1979 (the Act). The application was dismissed with no order as to costs as the respondent law society, the Cape Law Society, did not oppose the application.

Goosen J (Griffiths J concurring) held that in terms of s 16 of the Act any person who applied to court to be admitted or readmitted and enrolled as an attorney was obliged to satisfy the society of the province when he applied, *inter alia*, that he was a fit and proper person to be so admitted or readmitted and enrolled. In considering whether the onus had been discharged a court was called on –

• to have regard to the nature and degree of the conduct

which occasioned his removal from the roll;

- the explanation afforded by him for such conduct;
- his actions in regard to an inquiry into his conduct and proceedings consequent thereon, including the proceedings to secure his removal;
- the lapse of time between his removal and application for reinstatement;
- his activities subsequent to removal; and
- the expression of contrition by him and its genuineness as well as his efforts at repairing the harm that his conduct could have occasioned to others.

When the status of a person on parole is considered, it would be wholly contrary to public policy that a person in that position could be regarded as being a fit and proper person to be admitted as a legal practitioner. Although parole appeared to be an absolute bar to readmission there could well be circumstances

in which a person on parole could still be fit to hold office as an attorney. However, in the present case, taking into account the nature of the offence for which the applicant was convicted and the reasons for him having been struck off the roll of attorneys, his status as a person on parole precluded his readmission as an attorney.

**Refusal to register articles of clerkship if the applicant is on parole:** Section 4(b) of the Attorneys Act 53 of 1979 (the Act) provides among others that '(a)ny person intending to serve ... articles of clerkship shall submit to the ... society ... proof to the satisfaction of the society that he or she ... is a fit and proper person'. However, the Act does not define the expression 'fit and proper'. In *Thukwane v Law Society, Northern Provinces* 2014 (5) SA 513 (GP) the respondent, Law Society of the Northern Provinces, rejected the application of Thukwane

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for registration of articles of clerkship, taking the view that the applicant was not a 'fit and proper' person to register as a candidate attorney. That was so as the applicant was serving parole after conviction of murder, robbery and illegal possession of a firearm. He also had a conviction for failure to report loss of a firearm. For all these convictions he was sentenced to an effective period of imprisonment for sixteen years. The murder he was convicted of was a very violent one in which he shot his young girlfriend at point-blank range in the face after an argument. His application for review and setting aside of the decision of the respondent was dismissed with costs.

Rabie J (Makgoba and Kubushi JJ concurring) held that the Act specifically required that a person should be fit and proper in order to serve under articles of clerkship and also to be admitted as an attorney. The sole purpose of registering such a contract of articles of clerkship was to allow that person, after other requirements have been complied with, to enter the attorney's profession. For that reason alone the core principles and considerations relating to admission, striking-off and readmission of attorneys applied with equal force. The applicant in the instant case had been convicted of serious crimes involving among others, murder, violence and dishonesty. There could be no doubt that those crimes were of such a disgraceful character that a person committing them could not be admitted to an honourable profession. By committing those crimes the applicant showed serious character deficiencies that would clearly disqualify him as a fit and proper person to have his contract of articles of clerkship registered unless he could at least prove to the satisfaction of the respondent that he had undergone a complete and permanent reformation in respect of such conduct and accompanying character defects, which caused him to commit the crimes in the first place. The granting of parole was not an

indication that the applicant should be regarded as a 'fit and proper' person as envisaged by the Act.

## Companies

**Setting aside a shareholder's frivolous, vexatious or unmeritorious demand:** Section 165 of the Companies Act 71 of 2008 (the Act) abolishes a shareholder's common law derivative action and in its place provides that a person may serve a demand on a company to commence or continue legal proceedings or take related steps to protect the legal interests of the company. In subs (3) of the section it is provided that '(a) company that has been served with a demand may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit'. The application of the section fell to be decided in *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) where a group of companies, Amdocs, had contracts with Telkom Ltd (Telkom), a state-owned company, in terms of which the group supplied Telkom with telecommunications related software and services. As required by law Telkom adopted a procurement policy and said that they would not renew the contracts with companies unless they became Black Economic Empowerment (BEE) compliant. To do this the applicant company, Amdocs SA, was formed, with Amdocs holding 51% of the shares and the rest held by other shareholders, including the respondent, Kwezi. The founders' agreement on the basis of which the applicant was established provided among others that the applicant was required to generate business (purchase orders) with South African companies in the amount of at least US\$40 million within 12 months of its establishment, failing which it would be disbanded. In other words if the applicant Amdocs SA were to be successful in generating business to the minimum value indicated it would be given the opportunity to do business with Tel-

kom while at the same time Amdocs would also continue doing business with Telkom. The applicant failed to do the required business with South Africa companies but it was not disbanded. When the five year contracts between Telkom and Amdocs expired they were not renewed because of lack of BEE partners on the part of Amdocs. This notwithstanding Telkom and Amdocs continued doing business as before since the former needed products and services offered by the latter.

Thereafter, the respondent made a demand on the applicant, requiring it to institute proceedings against Amdocs to recover income, profits and benefits that should have accrued to it from Telkom contracts. The applicant considered the demand frivolous, vexatious and without merit and accordingly requested the respondent to withdraw it. As no withdrawal was forthcoming the applicant approached the court for an order setting aside the demand. The application was granted with costs.

Myburgh AJ held that an applicant for relief in terms of s 165(3) was entitled to succeed if he was able to demonstrate that the demand was without merit in the sense that it could not succeed. The correct approach was to consider the demand in the light of evidence placed before court. If it appeared that the demand was misdirected in the sense that it was either bad in law or was at odds with the facts to the extent that the proposed action could not succeed then it could properly be set aside. The applicant bore the onus and the absence of merit should be clearly demonstrated. In the instant case there was nothing in the papers from which it could be inferred that it was unlawful for any of the Amdocs companies to have competed with the respondent. Shareholders were at liberty to conduct themselves relative to their shares and, in their dealings with the company generally, were free to deal with it as they saw fit subject only to the provisions of the founding statute or any

shareholders' agreement that could be there.

## Constitutional law

**Abstract challenge to provisions of Prevention of Organised Crime Act:** Section 2 of the Prevention of Organised Crime Act 121 of 1998 (POCA) deals with, among others, the 'pattern of racketeering activity', 'enterprise' and penalises a person who 'ought reasonably to have known' that it was unlawful to engage in any of the list activities. The constitutionality of the provisions of s 2 were challenged in *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC); *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) BCLR 606 (CC) where the applicants, Savoi and others, were charged with, among others, racketeering, fraud and corruption relating to unlawful conduct concerning tenders. Criminal proceedings were stayed pending finalisation of constitutional challenges to the provisions of the section. The challenges to the section were that the definition of 'pattern of racketeering activity' and 'enterprise' were vague and overbroad; that the provisions of the section violated the right to a fair trial by accommodating acceptance of hearsay evidence, similar fact evidence and previous conviction if such evidence would not result in the trial being unfair and also that the provisions had retrospective operation. The KZP held that the words 'ought to have reasonably known' were unconstitutional and struck them out, although the applicants had not asked for such order nor was the issue raised in evidence so that the respondent, National Director of Public Prosecutions, could deal with it. The other challenges to the constitutionality of the section were dismissed by Madondo J. As a result the applicants sought an order confirming the unconstitutionality of the phrase 'ought to have reasonably known' and appealed against dismissal of other grounds of the challenge. The respondent

cross-appealed and opposed confirmation of the invalidity order, doing so mostly on the ground that the issues raised by the applicants were abstract as criminal proceedings had not started and the applicants had not shown how they would be affected by the impugned provisions. Leave to appeal was granted, the applicants' appeal dismissed, the respondents' cross-appeal upheld and the order of unconstitutionality not confirmed. The court made no order as to costs.

Reading a unanimous judgment of the CC, Madlanga J held that unless an applicant's claim to standing was truly unmeritorious, courts should be slow to shut the door on them. That did not, however, make it irrelevant that the challenge to statutory provisions was brought in the abstract. Courts would generally treat abstract challenges with disfavour. For that reason the applicants bore a heavy burden of showing that the provisions they sought to impugn were constitutionally unsound merely on their face.

There was no vagueness in the words 'pattern of racketeering activity'. That the list of activities envisaged could possibly incorporate offences which, when viewed individually, could not be expected to fall under the sort of notions that readily came to mind when one thought of organised crime did not necessarily translate to vagueness. What the concept of 'pattern of racketeering activity' sought to prohibit were the connections between conduct that would normally seem disparate but were in fact linked through the orchestrated activities of an organised criminal enterprise. It would be idle to attack the definition 'pattern of racketeering activity' by isolating individual offences, forming an opinion on how relatively minor they were individually and concluding that they were therefore unsuited to the notion of organised crime. Doing so would be shutting one's eyes to how organised crime worked.

A challenge to the possibil-

ity of using hearsay evidence, similar fact evidence and evidence of previous convictions could not be sustained because s 2(2) of POCA itself provided that such evidence could be used only if it would not render the trial unfair. It was therefore the task of the trial court to guard against possible unfairness. Furthermore the provisions of POCA did not have retrospective operation as they criminalised only those activities of racketeering, which were committed after coming into operation of POCA and not before. On the 'ought reasonably to have known' issue it was held that a statute creating a criminal offence could not be invalidated simply on the ground that it identified negligence for the fault element. As that choice lay within the purview of the legislature's competence, Parliament had to be given the necessary leeway.

**Unreasonable delay in challenging unlawful action:** In *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC); *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC) the Department of Education in KwaZulu-Natal advertised the post of 'chief personnel officer' in March 2004, specifying the requirements as among others '... 2 or more years of supervisory experience at level 6 of 7...'. The first applicant, Khumalo, did not meet the requirements as he had experience at level 5. He was nevertheless shortlisted for the post and eventually appointed. On the other hand the second applicant, Ritchie, met the requirements in that he had level 7. He was nevertheless not shortlisted. The second respondent having referred the dispute to arbitration at the bargaining council, the matter was settled, which settlement agreement was made an arbitration award of the bargaining council. In terms of the settlement agreement, the second applicant was granted a 'protected promotion', meaning that he was promoted without af-

fecting the appointment of the first applicant. After complaints by other employees a task team was set up to investigate and it filed a report indicating that the appointment of the first applicant and the 'protected promotion' of the second applicant were 'unfair'. The respondent, the MEC, did nothing about the report. Only after 20 months did she apply to the Labour Court for an order declaring the appointment and protected promotion unlawful so that they could be set aside.

The Labour Court held that both the appointment and protected promotion were unlawful and accordingly set them aside. An appeal to the Labour Appeal Court was dismissed. Also dismissed was petition to the SCA for special leave to appeal. As a result the applicants approached the CC for leave to appeal, which was granted and the appeal itself upheld with costs.

The majority judgment was read by Skweyiya J (with Zondo J dissenting and Jafta J concurring in the dissenting judgment) who held that despite trying to do the right thing the respondent delayed reprehensibly in taking her application to the Labour Court and did not seek in any way to explain the delay. It was a long-standing rule that a legality review should be initiated without undue delay and that courts had the pow-

er (as part of their inherent jurisdiction, to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. However, that discretion was not open-ended and had to be informed by the values of the Constitution. While a court would be slow to allow a challenge to the lawfulness of an exercise of public power, that did not mean that the Constitution had dispensed with the basic procedural requirement that review proceedings had to be brought without undue delay or with the court's discretion to overlook a delay. In the instant case, considering the typically short time frames for challenges to decisions in the context of labour law, the respondent's delay of some 20 months was significant in itself. Furthermore, in the absence of any explanation, the delay was unreasonable.

## Consumer credit agreements

**Default does not include minor, unwitting and excusable defaults:** Section 88(3) of the National Credit Act 34 of 2005 (the NCA) provides among others that a credit provider who receives notice of court proceedings for debt rearrangement may not exercise or enforce by litigation or other judicial process any right or security under

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that credit agreement until the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit provider or ordered by the court or the tribunal. In *Nedbank Ltd v Thompson and Another* 2014 (5) SA 392 (GJ) the court sanctioned a debt rearrangement agreement in terms of which the consumers, the respondents, the Thompsons, were declared over-indebted and payment of their debts rearranged. As a result the debt counsellor appointed a payment distribution agency to make monthly distribution to various creditors, including the applicant Nedbank to whom the respondents were indebted in an amount of some R 949 000 in respect of a mortgage bond. The alleged 'default' in the instant case arose due to the error of the payment distribution agency when it made preferential payment for legal fees, which it was not supposed to do. Because of that error the bank received less than as stipulated in the debt rearrangement

agreement, the shortfall being in a small amount of some R 441. Because of that default the applicant approached the High Court for recovery of the total contract amount of some R 949 000, together with interest and an order declaring the mortgaged property specially executable. The court rejected the request and dismissed the application with costs.

Gautschi AJ held that although s 7 of the National Payment Systems Act 79 of 1998 referred to actions of the payment distribution agency as making payment on behalf of the consumer to a third party to whom that payment was due, that did not create a relationship of agency between the national payment distribution agency (NPDA) and the consumer. It was the debt counsellor who appointed the payment distribution agency in order to receive the consumer's contributions and pay them to persons to whom payment was due. In the absence of agreement between the pay-

ment distribution agency and the consumer that the former would act as the latter's agent, it could not be held that the payment distribution agency acted as an agent of the consumer, and that its actions or inactions would bind the consumer. The respondents did not have any contractual relationship with the NPDA and had no control over or any say in its actions. Errors of the NPDA could not be laid at the door of the respondents. Accordingly, the 'default' was not a default by the respondents, this having the result that the requirements of s 88(3) had not been met.

Even if the above approach were to turn to have been wrong, the court was still not inclined to grant judgment against the respondents for an amount of some R 949 000 with interest and declare the property executable because of an inadvertent default by a payment distribution agency in a relatively insignificant amount of some R 441 at the time when the application was launched, after which the respondents continued making payment to the extent that subsequent to the launching of the proceedings they were in advance with payment. Section 3 included as a purpose of the NCA the protection of consumers by 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'. Therefore, the word 'defaults' in s 88(3) had to be interpreted to exclude minor, unwitting and excusable defaults of the nature that occurred in the present case. For that reason too the requirements of s 88(3) had not been met.

## Income tax

**Apportionment of a deduction that has dual purpose:** For the tax years 2001 – 2004 the taxpayer in *Commissioner, South African Revenue Service v Mobile Telephone Networks Holdings (Pty) Ltd* 2014 (5) SA 366 (SCA), being the respondent MTN Holdings, deducted from its gross income a certain amount in respect of auditors' fees paid. The

taxpayer derived its income from two sources, namely, dividends in respect of shares held in subsidiaries and interest on loans made to some of the subsidiaries. However, the bulk of its income was in the form of dividends, part of which was tax exempt as provided for in the Income Tax Act 58 of 1962. Because of the tax exempt status of part of the dividend income, audit fees deductions had to be apportioned between taxable dividend income and the non-taxable part thereof. The taxpayer duly did apportionment but the thorny issue became the percentage thereof. The appellant Commissioner allowed a deduction of 2% – 6% of the audit fees, which the Tax Court increased to 50% and was further increased to 94% on appeal to the full Bench of the GJ (per Victor J, with Horn and Wepener JJ concurring). On further appeal the SCA reduced the apportionment to 10% of the audit fees.

Ponnan JA (Shongwe, Wallis JJA, Van Zyl and Legodi AJJA concurring) held that where expenditure was laid out for a dual or mixed purpose the courts in South Africa and in other countries had in principle approved of an apportionment of such expenditure. Apportionment, which had to be fair and reasonable, was essentially a question of fact depending on the particular circumstances of each case. In the instant case the audit function concerned involved auditing the taxpayer's affairs as a whole, the major part of which concerned the consolidation of the subsidiaries' results into the taxpayer's results. It followed therefore that any apportionment had to be heavily weighted in favour of the disallowance of the deduction given the predominant role played by the taxpayer's equity and dividend operations as opposed to its more limited income-earning operations. On the facts of the present case a 50/50 apportionment of the audit fees, as ordered by the Tax Court, was too far generous to the taxpayer. Instead, it would be fair and reasonable that only 10% of the audit



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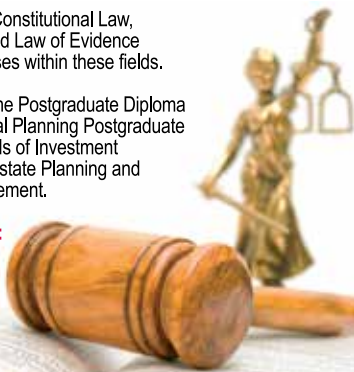
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fees claimed by the taxpayer for each of the years in question should be allowed. As a result an appeal against the decision of the full Bench was upheld with costs.

## Land reform

### **Regional land claims commissioner is not allowed to reopen investigation after rejecting land claim because criteria for acceptance not met:**

The facts in *Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA); *The Manok Family Trust v Blue Horison Investment 10 (Pty) Ltd and Others* [2014] 3 All SA 443 (SCA) were that in 1998 Kgoshi (chief) Manok lodged a land claim with the regional land claims commissioner in respect of a farm in Lydenburg district in Mpumalanga. In 2000 after conducting research relating to the history of the farm the regional commissioner advised Kgoshi Manok that there was never dispossession of any rights in the farm and that the claim was accordingly precluded by the Restitution of Land Rights Act 22 of 1994 (the Act). However, in 2007 one Moleke, acting on behalf of the descendant of Kgoshi Manok and the Manok community, and in the name of the appellant Manok Family Trust, being supported by the relevant MEC: Department of Agriculture and Land Administration, Mpumalanga in Provincial Government, requested the regional commissioner to revive the old claim, alleging discovery of new facts. The regional commissioner duly obliged and the claim was published in the *Gazette*. As a result the respondents, Blue Horison and others, being owners of the farm and who were developing it into residential and industrial units, approached the Land Claims Court (LCC) for an order setting aside the decision of the regional commissioner to revive the claim. The order was granted, hence the present appeal to the SCA. The appeal was dismissed with no order as to costs.

Mpati P (Maya, Bosielo,

Leach JJA and Mocumie AJA concurring) held that when deciding to reopen the process on revival of the land claim brought by Moleke on behalf of the appellant, the regional commissioner simply ignored the previous decision to not process it for the reason that doing so was precluded as there had been no dispossession. The Act made provision for withdrawal or amendment of a notice of claim that had been published in the *Gazette* in terms of s 11(1). The regional commissioner had the power, conferred by the Act, to change his or her original decision that the criteria set out in s 11(1) had been met. But, the Act made no provision for a reversal by the regional commissioner of a decision, taken in terms of s 11(4), that the criteria set out in paras (a), (b) and (c) of s 11(1) had not been met and thereby in effect declining to process the claim any further. It followed that the regional commissioner, in reversing his initial decision and deciding to reopen investigations into the land claim at the instance of Moleke and the interference of the MEC, acted in a manner that was inconsistent with the Constitution. As a result, his conduct in doing so was invalid. The absence, in the Act, of a provision that empowered a regional commissioner to reverse a decision made in terms of s 11(4) led one to the conclusion that such decision, though not a dismissal of the claim, was final and could not be reversed.

## Res judicata

**Exception to res judicata:** In *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* 2014 (5) SA 406 (SCA); *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others* [2014] 2 All SA 26 (SCA) the appellant, Hyprop, entered into two contracts of lease with the first respondent NSC and the second respondent's representative, Costa, who also signed a deed of suretyship in respect of the leases. After

the respondents failed to pay rental the appellant cancelled the leases and sought a High Court order confirming cancellation of the leases, ordering ejectment of the respondents from the premises and payment of arrear rental. The respondents raised a defence that the leases had been induced by fraudulent misrepresentations. The GJ held per Mokgoatheng J that there had not been any fraudulent misrepresentation and granted the orders sought by the appellants. Leave to appeal was denied by both the High Court and the SCA.

Thereafter the respondents instituted a claim for damages against the appellants based on fraudulent misrepresentation. A special plea of *res judicata* was raised, the appellants contending that the issue of fraudulent misrepresentation had been decided during the ejectment application before Mokgoatheng J. Sutherland J dismissed the special plea, holding that it would be inequitable to uphold the special plea as the issue of fraudulent misrepresentation that arose before Mokgoatheng J had been decided on the papers alone without the benefit of cross-examination. The appellants appealed to the SCA against the decision of Sutherland J, which appeal was dismissed with costs.

Lewis JA (Theron, Willis JJA, Van der Merwe and Meyer AJJA concurring) held that the SCA had previously pointed out that the plea of *res judicata*, which was to the effect that the same matter had already been decided, was available where the dispute was between the same parties, for the same relief or on the same cause of action. Over the years the requirements were relaxed and where there was no absolute identity of the relief and cause of action, the attenuated defence has become known as issue estoppel. In the instant case Sutherland J's discretion not to apply issue estoppels had been exercised judicially. Mokgoatheng J not only made

a finding on the absence of fraudulent misrepresentation where the evidence had not been properly tested but also considered that reliance on fraudulent misrepresentation was precluded by the terms of the contract, which was not a correct principle of the law as fraudulent misrepresentation was always actionable regardless of the provisions of the contract. If that ruling on fraudulent misrepresentation were to bind the respondents and prevent them from suing for loss suffered as a result of the misrepresentation, issue estoppels would operate most inequitably. It would be inequitable if the respondents were not entitled to have their claims in delict adjudicated in terms of the correct principles of law. In any event, it would be patently inequitable and unfair to hold the respondents bound to inappropriate findings in another forum.

**Note:** *Res judicata* and issue estoppel were also dealt with by the SCA in *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* 2014 (5) SA 562 (SCA).

## Trademarks

### **Removal of a trademark from the register due to lack of good faith and unethical conduct in its registration:**

Section 10 of the Trade Marks Act 194 of 1993 (the Act) provides, among others, that a trademark shall not be registered but if already registered it shall be liable to be removed from the register if the applicant for registration has no *bona fide* claim to proprietorship or the application for registration was made *mala fide*. In *Reynolds Presto Products Inc t/a Presto Products Co v PRS Mediterranean Ltd and Another* 2014 (5) SA 353 (GP) the applicant Presto applied for removal from the register of trademarks a certain trademark, namely GEOWEB, which was registered in the name of the respondent PRS. The application was granted with costs and the registrar of trademarks ordered to remove the trademark from the register. That was after



the applicant, the proprietor of the trademark, had entered into a licensing agreement in terms of which the respondent was allowed to use it for five years ending in 2001. A further agreement was entered into in 2001 and extended the licence for another five-year period, which ended in 2006. In 2003, while the licensing agreement was in operation the respondent started appropriating the trademark and in 2007, after termination of the licensing agreement, had the trademark registered in its name. The applicant contended that the respondent was not the *bona fide* proprietor of the trademark and that the conduct of the respondent in registering it was *mala fide*. The court agreed.

Murphy J held that the word 'proprietorship', which was not defined in the Act, did not import common-law owner-

ship of the trademark but was used in the sense of a person who had exclusive right or title to the use of a trademark. The concept of good faith was a public policy consideration of circumscribed application in legal relationships arising from commercial activity. Accordingly, the requirement of a *bona fide* claim to proprietorship involved an ethical value judgment, as did the determination of whether an application for registration of a trademark was made *mala fide*. In the instant case while the respondent could have gained reputation and goodwill in relation to its goods using the trademark concerned, any claim by it to proprietorship of the trademark was tainted by the element of unethical dealing. Bad faith in relation to claims to proprietorship and trademark registration did not necessarily involve breach of a legal obli-

gation. It was sufficient if the court was of the view that the conduct was unethical.

The respondent was contractually bound not to appropriate or adopt the trademark when it did so during the currency of the contract in 2003. Any use of the trademark other than in accordance with the contract was in breach of contract and consequently undermined the *bona fides* of its claim to proprietorship. It was commercially unethical for the respondent to seek to appropriate the trademark without authorisation during the currency of a contractual relationship premised on the supposition that the applicant was the proprietor of the trademark.

### Other cases

Apart from the cases and material dealt with or referred to above, the material under review also contained cases

dealing with arrest of associated ship, cancellation of servitude by abandonment, concurrent jurisdiction of local division, deemed discharge from public service, deregistration of a company that is in liquidation, dispute of fact in motion proceedings, duty to disclose record of review, failure of court to postpone hearing *mero motu*, failure to first exhaust internal remedies before seeking review of administrative action, municipal rates, negligence, ratification of contract, rehabilitation of an insolvent, *rei vindication*, rescission of default judgment, review of administrative action, sale of business, unbreakable deadlock among company directors, temporary asylum seeker permit and unconstitutionality of exclusion of claim against the Road Accident Fund.

## LEAD launches pilot project for empowering women



*The Law Society of South Africa's Legal Education and Development division (LEAD), in association with the Nelson Mandela Metropolitan University, launched a pilot project aimed at empowering women attorneys by focussing on key concepts relating to leadership. Pictured are the tutors and attendees of the first pilot course, which was offered in Johannesburg.*

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# NEW LEGISLATION

Legislation published from  
29 September – 30 October 2014

## BILLS INTRODUCED

Adjustments Appropriation Bill B10 of 2014.

Division of Revenue Amendment Bill B11 of 2014.

The Rates and Monetary Amounts and Amendment of Revenue Laws Bill B12 of 2014.

Taxations Laws Amendment Bill B13 of 2014.

Tax Administration Laws Amendment Bill B14 of 2014.

## COMMENCEMENT OF ACTS

**Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.** *Commencement:* 24 October 2014. Proc72 GG38126/24-10-2014.

## SELECTED LIST OF DELEGATED LEGISLATION

**Agricultural Product Standards Act 119 of 1990**

Regulations regarding control of the export of fresh fruits. GN R748 GG38033/3-10-2014.

Amendment of standards and requirements regarding control of the export of maize products. GN R749 GG38033/3-10-2014.

Regulations relating to the quality, grading, packing and marking of tomatoes intended for sale in the Republic of South Africa. GN R750 GG38033/3-10-2014.

**Civil Aviation Act 13 of 2009**

Sixth Amendment of the Civil Aviation Regulations, 2011. GN R765 GG38045/1-10-2014.

Civil Aviation Regulations, 2011. GN R808 GG38121/24-10-2014.

**Consumer Protection Act 68 of 2008**

Prescription of the South African Automotive Industry Code and Accreditation of the Alternative Dispute Resolution Scheme Administered by the Motor Industry Ombud of South Africa

as an accredited Industry Ombud. GN817 GG38107/17-10-2014.

**Electronic Communications Act 36 of 2005**

Call Termination Regulations, 2014. GenN844 GG38042/30-9-2014.

**Films and Publications Act 65 of 1996**

Classification guidelines for the classification of films, interactive computer games and certain publications. GN770 GG38051/3-10-2014.

**Health Professions Act 56 of 1974**

Amendment of regulations relating to the registration by environmental health practitioners of additional qualifications. GN R766 GG38046/1-10-2014.

Amendment of regulations relating to the qualifications which entitle psychologists to registration. GN R768 GG38048/2-10-2014.

Regulations relating to the qualifications which entitle medical laboratory scientists to registration. GN R769 GG38049/2-10-2014.

Regulations defining the scope of the progression of speech-language therapy. GN R787 GG38096/13-10-2014.

**Insolvency Act 24 of 1936**

Amendment of the Policy on the Appointment of Insolvency Practitioners. GN798 GG38088/17-10-2014.

**Medicines and Related Substances Act 101 of 1965**

Registration of medicine: Oral preparations containing a vitamin(s) or an elemental mineral(s) and exceeding the recommended total daily dose stated in this Government Notice are to be registered as Category A medicines as defined in reg 25(1) of the General Regulations promulgated under the Act. GN R837 GG38133/28-10-2014.

**National Qualifications Act 67 of 2008**

Higher Education Qualifications sub-framework. GN819 GG38116/17-10-2014.

**National Regulator for Compulsory Specifications Act 5 of 2008**

Amendment of regulations relating to the payment of levy and fees with regard

to Compulsory Specifications: Tariffs for automotive; chemical, mechanical and materials; electrotechnical; as well as food and associated industries. GN R791 GG38089/17-10-2014.

**Nursing Act 33 of 2005**

Regulations setting out the acts or omissions in respect of which the council may take disciplinary steps. GN R767 GG38047/1-10-2014.

Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration in the category midwife. GN R786 GG38095/13-10-2014.

**Small Claims Courts Act 61 of 1984**

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Establishment of a small claims court for the area of Pearston. GN754 GG38032/3-10-2014.

Alteration of the area for which the small claims court for Port Elizabeth was established. GN799 GG38088/17-10-2014.

Establishment of small claims courts for the areas of Fort Beaufort, Adelaide and Bedford. GN800 GG38088/17-10-2014.

Establishment of small claims courts for the areas of Lulekani, Phalaborwa and Namakgale. GN801 GG38088/17-10-2014.

Establishment of small claims courts for the areas of Paarl and Wellington. GN841 GG38140/29-10-2014.

Establishment of small claims courts for the areas of Vredenburg and Hopefield. GN842 GG38140/29-10-2014.

Establishment of a small claims court for the area of Impendle. GN843 GG38140/29-10-2014.

Establishment of a small claims court for the area of Murraysburg. GN844 GG38140/29-10-2014

### South African National Roads Agency Limited and National Roads Act 7 of 1998

Gauteng Freeway Improvement Project, toll roads: Amendment to the exemption from the payment of toll: Certain public transport services. GN747 GG38038/29-9-2014.

### Trade Metrology Act 77 of 1973

Regulations relating to the tariff of fees charged for services rendered in terms of the Act by the National Regulator for Compulsory Specifications. GN R807 GG38089/17-10-2014.

## Draft legislation

Draft Code of Good Practice on Equal Pay for Work of Equal Value in terms of the Employment Equity Act 55 of 1998. GN746 GG38031/29-9-2014.

Draft Agricultural Product Standards Amendment Bill, 2014 for comments. GenN829 GG38032/3-10-2014.

Proposed Language Policy of the Department of Arts and Culture in terms of the Use of Official Languages Act 12 of 2012. GenN846 GG38041/30-9-2014.

Draft National Lotteries Amendment Regulations, 2014 in terms of the National Lotteries Act 57 of 1997. GenN845 GG38043/1-10-2014.

Draft Amendment to the distinguishing marks for mini-bus and midi-bus regulations in terms of the National Land Transport Act 5 of 2009. GenN847 GG38054/3-10-2014.

Proposed amendments to the Johannesburg Stock Exchange Equities Rules in terms of the Financial Markets Act 19 of 2012. BN117 GG38055/3-10-2014.

Proposed amendments to the regulations relating to breeds recognised under the Animal Improvement Act 62 of 1998 in South Africa. GenN848 GG38056/3-10-2014.

Draft Consumer Goods and Services Sector Code of Conduct in terms of the Consumer Protection Act 68 of 2008. GenN850 GG38058/3-10-2014.

Draft Amendment Regulations regarding Petroleum Products Pipeline in terms of the Petroleum Pipelines Act 60 of 2003. GenN885 GG38088/17-10-2014.

Draft National Air Quality Appeal Regulations in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN915 GG38122/24-10-2014.

Draft Code of Ethics, including Guidelines for Good Practice and Advertising Guidelines in terms of the Allied Health Professions Act 63 1982. BN128 GG38125/30-10-2014.

# Employment law update



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## Section 197 transfers

In *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and Others* (LAC) (unreported case no JA55/2012, 29-5-2014) (Davis JA), the Labour Appeal Court (LAC) considered an appeal against the Labour Court's finding that s 197 of the Labour Relations Act 66 of 1995 applied to the cancellation of two service level agreements between the appellant and the first respondent.

The business of Grinpal Energy Management Services (Pty) Ltd (Grinpal) is to manufacture, supply, install, operate and maintain metering systems and electrical infrastructure. In 2003 it was awarded a tender and entered into two service level agreements in terms of which it would supply a prepaid metering system to City Power (Pty) Ltd. In 2012 City Power cancelled the service agreements but Grinpal was required to carry on with the performance of its obligations until a proper handover could be done. A meeting was held regarding the termination of the relationship and details of the handover were discussed. In this regard, Grinpal would provide City Power with customer databases, customer details, connectivity to customers, the vending platform and server, the telecommunication platform and contacts with service providers, as well as the details of all staff. It was intended that all of the assets, both tangible and intangible, which were required to operate the project would transfer to City Power. Given the fact that the infrastructure required for conducting the business transferred from Grinpal to City Power, the Labour

Court, per Rabkin-Naicker J, concluded that s 197 applied.

On appeal, City Power argued that there could not have been a transfer of a business as a going concern as the business would not be carried out by City Power in the same manner that it was carried out by Grinpal. The LAC confirmed that in determining whether s 197 applies the question is whether the activities conducted by a party constitute a defined set of activities, which represents an identifiable business undertaking so that when the termination of an agreement occurs this set of activities is taken over by another party.

The LAC per Davis JA found that the business was identifiable and discrete and Grinpal's equipment and expertise was required by City Power to take over the project. Grinpal was also required to provide training to City Power's employees so that it could continue to run the project. Thus, the business of providing a system of prepaid electricity was continuing but would henceforth be in different hands. Davis JA concluded that s 197 did apply.

In *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and Others* (LAC) (unreported case no JA58/2014, 6-8-2014), the LAC per Waglay JP, Tlaletsi DJP and Davis JA considered an appeal against a judgment of the Labour Court per Van Niekerk J. Van Niekerk J had found that the termination of a warehousing agreement between Unitrans Supply Chain Solutions (Pty) Ltd (Unitrans) and Nampak Glass (Pty) Ltd (Nampak) and the subsequent appointment by Nampak of TMS





Group Industrial Services (Pty) Ltd (TMS) to provide similar services constituted a transfer in terms of s 197.

In 2007, Nampak outsourced its warehousing functions to Unitrans, a company that conducts the business of providing supply chain solutions. A warehousing agreement was concluded that expired in January 2014. The production facility where the services were performed was owned by Nampak and all the assets required to perform the services were owned by Nampak but were used by Unitrans. Van Niekerk J found that the services rendered by TMS were substantially the same as those that had been performed by Unitrans. In fact, the same services were now being performed by TMS at the same site and within the same premises. Van Niekerk J found that it was reasonable to conclude that the same equipment and information technology systems that were used by Unitrans remained the property of Nampak and would continue to be used by TMS. Van Niekerk J concluded that the warehousing service was an economic entity comprising the contractual right to perform the services, the assets owned by Nampak but used by the service provider, the activity of warehousing and the employees. Van Niekerk J found that the contractual right to provide warehousing services now vested in TMS and TMS was using the same assets to provide the same services. Thus, s 197 applied.

On appeal, the LAC had to consider three arguments why s 197 potentially did not apply:

- there was no written agreement between TMS and Nampak to perform the services;
- the employees who performed the services in terms of the agreement between Unitrans and Nampak were not employed by Unitrans but were instead employees of a wholly owned subsidiary of Unitrans; and
- no assets of Unitrans were taken over by TMS. TMS simply continued to use assets that had always remained the property of Nampak.

As regards the lack of a written agreement, the LAC considered that factually, TMS was actually performing the services for Nampak and thus the lack of a final written agreement to this effect did not prevent the application of s 197. As regards the fact that the employees who had been performing the services under the agreement between Unitrans and Nampak were not employees of Unitrans but were employed by a different entity, the LAC held that Unitrans was the *de facto* employer of the employees. If TMS's argument was upheld (ie, that s 197 could not apply because it was not

the business of the entity that employed the employees that had transferred to TMS), this would create a mechanism to circumvent the consequences of s 197. As regards the argument that no assets were transferred from Unitrans to TMS, the LAC held that this was merely one factor to be taken into account when determining the application of s 197 and one needed to look at the substance of the transaction. It was held that TMS assumed the right to use Nampak's assets and infrastructure to continue to perform the same services that were performed by Unitrans and this was sufficient to trigger the application of s 197. The appeal was dismissed with costs.



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

### Question:

The South African Local Government Bargaining Council Disciplinary Procedure and Code collective agreement (collective agreement) stipulates the following in clause 4.2: 'The code is a product of collective bargaining and the application thereof is peremptory and it is deemed to be a condition of service'.

Clause 5.6 stipulates as follows: 'This procedure must be published and issued to all employees so that they are made aware, explicitly, of the standard of conduct in the workplace'.

Clause 6.10 states as follows: 'The Disciplinary Hearing should commence within a reasonable time from the date of service of the notice of Misconduct and shall take place not earlier than five (5) days and not later than fifteen (15) days from the date of service of the Notice of Misconduct'.

My questions are as follows: What happens if the employer fails to comply with all of the mentioned clauses and if I raise a point *in limine* will I be correct to say I expect to dispose of the matter in a disciplinary hearing?

### Answer:

My understanding of your question is

that you would like to know whether or not you would be able to argue, at the commencement of your client's disciplinary process, that as a direct result of the employer not following out an agreed on procedure, as contained in a collective agreement and which is specifically incorporated into your client's employment contract, the employer is barred from continuing with the disciplinary process.

Much will depend on how one interprets the collective agreement, not only the terms in question but the agreement as a whole, but in general the answer will be no.

Firstly, one should bear in mind that a chairperson generally is not mandated to dispense with the disciplinary process for want of non-compliance to a collective agreement, unless the collective agreement provides for this. One would need to approach the courts to obtain an interdict for this relief. The Labour Court has repeatedly held that it would intervene only in matters where the disciplinary process has not been finalised, under exceptional circumstances.

With that in mind, I would not advise you to approach the court for such relief.

From a procedural viewpoint, the fact that the employer has not complied with the collective agreement does not in itself render the disciplinary process procedurally unfair. In *Highveld District Council v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 517 (LAC) the Labour Appeal Court (LAC) held:

'Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in s 188(1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair ... . When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair.'

Substantively the employee will have difficulty arguing that the employer's failure to adhere to any prescribed procedure as set out in the collective agreement, results in the employer giving up its right to discipline the employee (it bears reiterating that the position would be different if the collective agreement specifically provides for this).

In *Lekabe v Minister: Department of Justice and Constitutional Development*

(2009) 30 ILJ 2444 (LC), the applicant employee was placed on precautionary suspension. In terms of the employer's disciplinary procedure, which was incorporated into the employee's employment contract, the employer had to set down a disciplinary hearing no later than 60 days from when the employee had been placed on suspension.

The employer gave the employee notice to attend a disciplinary inquiry well after the 60-day period had expired. The employee approached the Labour Court on an urgent basis seeking to interdict the employer from pursuing any disciplinary action against him.

In dismissing the employee's application the court held:

'...the case of the applicant in the present instance is that the right of the respondent to proceed with the disciplinary hearing prescribed on the expiry of the 60 days from the date of his suspension.

In my view clause 2.7(2)(c) deals with suspension and not disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 days from the date of the suspension.

... the right of the employee in the event that the employer does not uplift the suspension on the expiry of the 60 days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension. I need to emphasise that in my view it could never have been the intention of parties that the right to discipline by an employer would fall away on the expiry of the 60 days.'

Having made this point it is interesting to note that if a collective agreement provides for a specific dispute resolution path before, or in substitute of employees embarking on strike action, any strike action by employees, who did not follow this agreed on procedure could render the strike unlawful.

In *BMW SA (Pty) Ltd v National Union of*

*Metalworkers of SA on behalf of Members* (2012) 33 ILJ 140 (LAC), the employer and trade union entered into a collective agreement, which specified that a dispute concerning a matter of mutual interest would first be facilitated and if unsuccessful will be arbitrated. The union did not follow this procedure and instead followed the statutory dispute resolution path, after which its members embarked on strike action. The LAC, in relation to this specific fact, held:

'It is common cause between parties that the clause sets out the procedure which the parties need to follow in dealing with the demand. The appellant however argued that the procedure set out in clause A.8.3 was the only way that the respondent was entitled to proceed in addressing its demand. I agree. Parties by way of a collective agreement set out certain procedural steps which they will follow in dealing with their demands, grievances, concerns, etc. In this respect appellant is correct to submit that the respondent was obliged to follow clause 8.3 in having its demand addressed.

... A collective agreement concluded between the parties is binding between them. It is a contract that sets the agreed terms between them and as long as what is agreed upon is not in conflict with the applicable legislation or contra bonos mores it is binding and enforceable between them.'

In my view the distinction between the principle in *BMW* and *Lekabe* cases is that in the former decision the language used in the collective agreement was interpreted to mean the right to embark on strike action was dependant on following an agreed on dispute resolution path. In the latter decision the interpretation of the collective agreement did not lend support to the argument that the employer lost its right to discipline its employee when failing to adhere to an agreed upon process.

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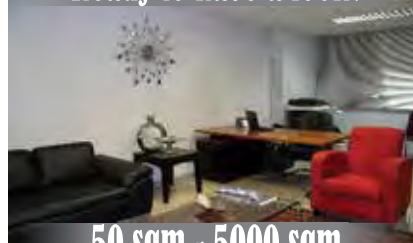
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**AJ:** *Acta Juridica* (Juta)

**SALJ:** *South African Law Journal* (Juta)

**SLR:** *Stellenbosch Law Review* (Juta)

**TSAR:** *Tydskrif vir die Suid-Afrikaanse Reg* (Juta)

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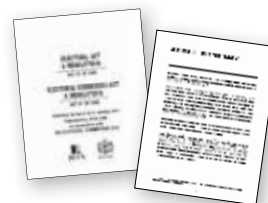
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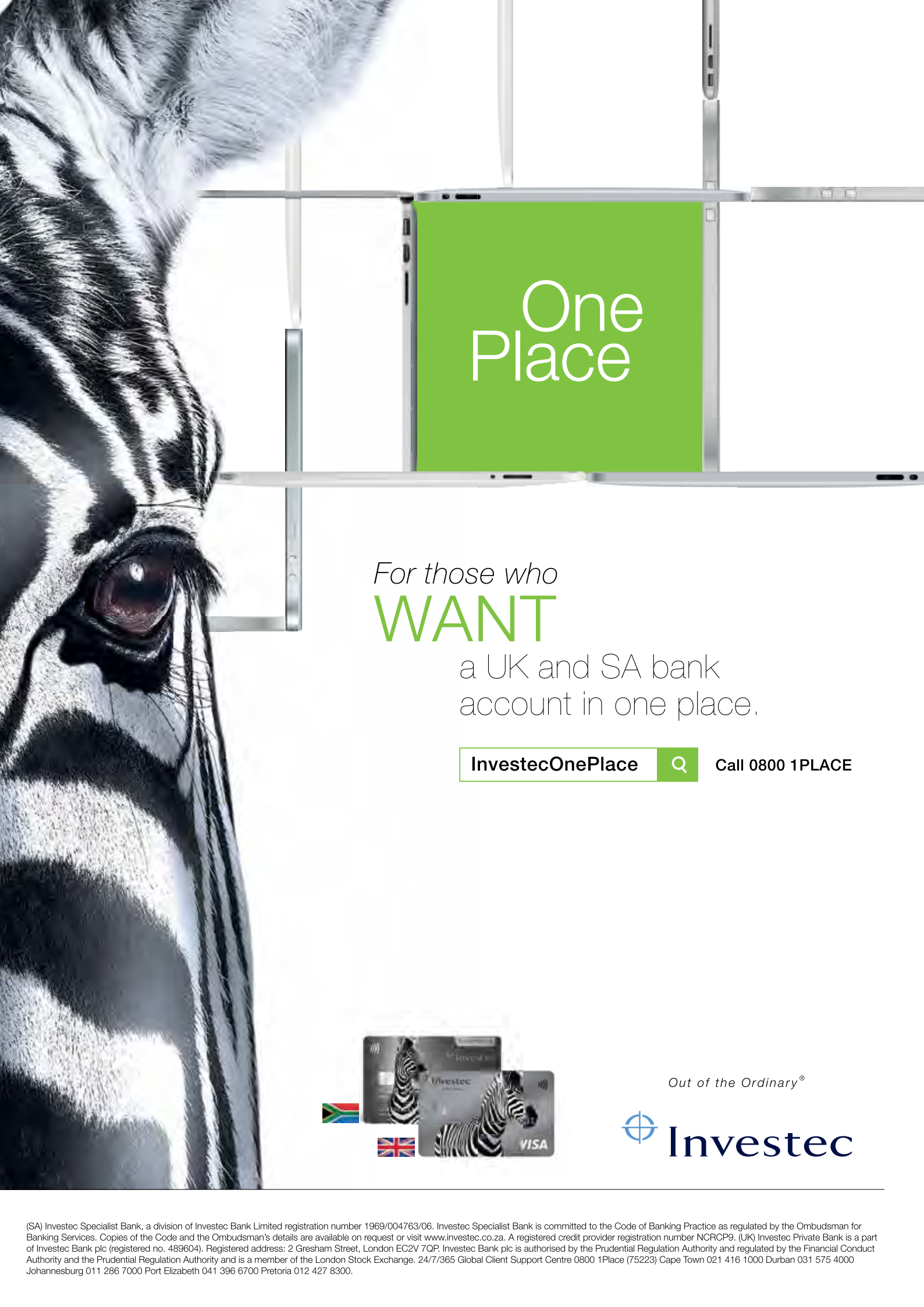
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