LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

JUNE 2015

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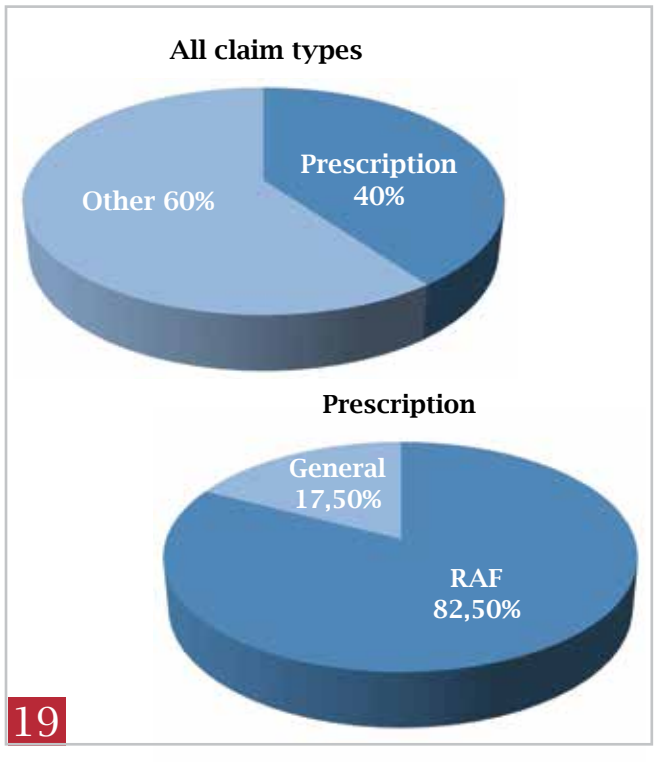

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LAW SOCIETY
OF SOUTH AFRICA

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Circulations of Southern Africa

Xenophobia *quo vadis?*

Mapula Thebe – Editor

South Africa is hailed as having one of the best constitutions in the world, yet in April as the country was about to celebrate 21 years of democracy the country experienced a wave of xenophobic attacks, leaving many foreign nationals displaced from their homes and having to live in camps. Reports of these attacks in mainstream and social media reached every corner of the world, putting to shame the achievements the country has made in the past 21 years.

The xenophobic attacks started in Durban on 14 April. Police reports state that they were sparked by South Africans who accused a supermarket of firing South African workers and hiring foreigners to replace them. The attacks forced foreigners living in the areas of Isipingo, Chatsworth, Umlazi, KwaMashu and Sydenham out of their homes and into displacement camps set up by the government.

The wave of violence was remnant of the 2008 xenophobic attacks, where approximately 60 people were killed and 50 000 displaced from their homes. The 2008 attacks, in townships around Johannesburg, were sparked after a Somali shop owner shot and killed a 14-year-old boy during an alleged burglary.

Organisations such as the United Nations High Commissioner for Refugees (UNHCR) and Lawyers for Human Rights (LHR) expressed concerns on the spate of xenophobia. The UNHCR received numerous reports from foreign nationals, at the time, stating that they were afraid to move around the country at the fear of being attacked. The UNHCR, LHR and Refugee Social Services worked with local authorities to ensure that assistance and services were provided to those who had been displaced.

Although South Africa has one of the most progressive refugee policies and laws, they are not being properly implemented. During the violent attacks, government suggested that refugee camps be set up to process people before they are let into the country. This was to help curb the number of undocumented immigrants. The notion of setting up refugee camps was criticised as unconstitutional and not in line with the Refugee Act by LHR.

Following the recent spate of xenophobic attacks in the country, the draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (action plan) is likely to be presented to Cabinet during the current 2015/2016 financial year and released for public commenting. The action plan has been in the pipeline for almost 14 years. Deputy Minister of Justice and Constitutional Development, John Jeffery, at a consultative workshop on the action plan on 15 May said that the process relating to the development of the action plan stemmed from the Durban Declaration and Programme of Action, which was adopted at the 3rd World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001.

Deputy Minister Jeffery said that the finalisation of the action plan has been a long protracted process for many reasons. Since being drafted, the action plan has had to be redrafted and updated with due regard to developments in the country and in accordance with the latest United Nations Guidelines published in 2014. The action plan will provide the basis for the development of a comprehensive framework for public policy to address the scourges of racism, racial discrimination, xenophobia and related intolerance.

Mr Jeffery said the action plan is not intended to replace any existing laws and policies, rather to complement existing and new legislation, government policies and programmes that address equality, equity and discrimination. He added that the practical implementation of the action plan, once finalised, will be enhanced through the collection, analysis and publication of reliable data to assess the situation of racism, racial discrimination, xenophobia and related intolerance as recommended by the United Nations Practical Guide. The Justice Department intends to develop and implement a long-term tool for compiling periodical assessments of behaviours, attitudes and prevalence of incidents, and to develop future interventions. The tool may take the form of a toll-free hotline that will be easily accessible to the public for the reporting of incidents linked to racism, racial discrimination, xenophobia and related intolerance.

Meanwhile, the Co-chairpersons of the Law Society of South Africa, Busani Mabunda and Richard Scott made a R 50 000 donation to the Gift of the Givers Foundation towards assistance for the victims of xenophobic violence. In addition, the KwaZulu-Natal Law Society and the Law Society of the Northern Provinces have offered the services of attorneys to assist victims, both foreign and local, on a *pro bono* basis (see 12).

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

- **Please note that the word limit is now 2000 words.**
- **Upcoming deadlines for article submissions: 22 June and 20 July 2015.**

Judge's ruling in assisted suicide case divides South Africa

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

The court order allowing advocate Robin Stransham-Ford to ask a doctor to help him end his life, and also declaring that the doctor who did so would not be acting illegally, will not be rescinded, even though he died two hours before the order was granted. This is according to Judge Hans Fabricius who turned down an application by the Justice and Health Ministers, the National Director of Public Prosecution and the Health Professions Council of South Africa (HPCSA) to rescind the order he granted on 30 April.

Mr Stransham-Ford was a 65-year-old man who was dying of prostate cancer. He had asked the court to determine whether a doctor could legally assist him end his life.

Counsel for the respondents argued that Mr Stransham-Ford had died before the order was granted, which meant that his rights had fallen away and that the court order was moot. Counsel for the HPCSA, advocate Harry van Bergen, argued that the person was not alive when the order was granted, therefore, the rights on which he relied did not exist when the order was granted and the application was not brought as a class action or on behalf of an interested party. He argued that the applicant's lawyers 'were shifting the goal posts' because they were now taking the application beyond the boundaries of the original application.

Judge Fabricius turned down the application saying his ruling established a cause of action under the common law where no cause of action existed before. He said that none of the parties were aware that the applicant had died at the time when the ruling was handed down adding that the order would have a practical effect on other parties, because they would now be entitled to approach the court.

Judge Fabricius said the Constitutional Court and Parliament should reconsider the issue of legalising assisted suicide.

Background

The applicant, Mr Stransham-Ford was an unmarried 65-year-old male practicing advocate of the High Court and lived in Cape Town. He held a number of law degrees, had an MBA as well as a number of other diplomas. He had been an advocate for approximately 35 years and was admitted as an advocate of the High Court of South Africa in 2001.

Mr Stransham-Ford lived and worked all over the world. He leaves behind four children, two sons and two daughters, aged between 38 and 12 years who also made a confirmatory affidavit in the assisted suicide proceedings. Judge Fabricius said the applicant was highly qualified, had vast experience in the legal profession and knew exactly what he required and why.

A clinical psychologist also provided a report where she stated that the applicant was well engaged in the interview and that she found no cognitive impairments. She said there was no evidence of any psychiatric disorder and she was particularly impressed as he was totally rational. In her report, she specifically highlighted that the applicant displayed a good understanding and appreciation of the nature, cause and prognosis of his illness and the clinical, ethical and legal aspects of assisted suicide.

Purpose of court application

In his founding affidavit Mr Stransham-Ford said the purpose of the application was to have judicial oversight and to obtain a court order:

- Giving effect to his fundamental rights to –
  - human dignity;
  - not to be treated in a cruel, inhuman or degrading way; and
  - bodily and psychological integrity.
- Declaring that he may request a medical practitioner to end his life or to enable him to end his own life by the administration or provision of a lethal agent, if and when he chooses to do so.
- Declaring that the medical practitioner who administers or provides the lethal agent to him shall not be held accountable and shall be free from any civil, criminal or disciplinary liability that may have arisen from the administration or provision of the lethal agent to him or the cessation of his life.
- To the extent required developing the common law, by declaring the conduct lawful and constitutional in the circumstances of this matter.

The applicant said he was not afraid of dying, but was afraid of dying while suffering.

Current law

The current legal position is that assisted suicide or active voluntary euthanasia is unlawful. Judge Fabricius said a development of the law was required. He said the applicant and his counsel relied on s 39 of the Constitution which reads:

'Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(*a*) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(*b*) must consider international law; and

(*c*) may consider foreign law.

(2) When interpreting any legislation, and when developing the common or customary law, every court, tribunal or forum must promote the spirit, purport the objects of the Bill of Rights.'

Section 8(3) of the Constitution states that: 'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(*a*) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(*b*) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1).'

The applicant also relied on a couple of provisions of the Constitution and in particular the Bill of Rights, which speaks on human dignity, equality and freedom. Section 10 states that: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

The applicant's counsel submitted that from a philosophical point of view there was no difference between assisted suicide by providing the sufferer with a lethal agent or by switching off a life supporting device, or the injecting of a strong dose of morphine with the intent to relieve pain and knowing that the respiratory system will probably close and death will result. In his affidavit the applicant said there was no logical ethical distinction between the withdrawing of treatment to allow 'the natural process of death' and physician-assisted death. He also called this distinction 'intellectually dishonest'.

The South African Law Commission – Project 86

Also in his affidavit, Mr Stransham-Ford referred to the South African Law Commission's (SALC) discussion paper 71 (Project 86) on Euthanasia and the Artificial Preservation of Life, and the proposed legislation that the Commission submitted to the Minister of Health. One of the options on the paper was that a medical practitioner would be allowed to carry out a patient's request to die. Certain safeguards were recommended, namely, that the patient had to be terminally ill, subjected to extreme suffering but mentally competent. A second independent medical practitioner would have to confirm the diagnosis and the findings also had to be recorded in writing. The request must, therefore, be based on an informed and well considered decision and the patient had to make this request repeatedly. In this context, the authors of the paper say that from a constitutional perspective, the SALC's proposal does seem to strike a proper balance between the state's duty to protect life and the person's right (derived from the rights to physical and psychological integrity and to dignity) to end his or her life.

The applicant's winning team, advocate HB Marais SC; advocate Hendrik van Nieuwenhuizen, Sally Buitendag, Professor Willem Landman and advocate Charl du Plessis.

Judge Fabricius also pointed out that the Commission said that the Department of Health had in principle agreed with its proposed legislation legalising euthanasia. 'In the absence of legislation, which is the government's prerogative, any other court will scrupulously scrutinise the facts before it, and will determine on a case-by-case basis, whether any safeguards against abuse are sufficient,' he said.

Judge Fabricius said he did not think it was necessary for the applicant to say who the doctor would be, when he would die, and what lethal agent he would acquire, adding that that is private and a facet of his own dignity.

It was also submitted that the current legal position was of course established in a pre-constitutional era. In a post-constitutional era, the law requires development to give effect to the applicant's constitutional rights. Judge Fabricius said he agreed with this and added that his decision and reasons were based on that premise.

Judge Fabricius said having regard to the details put before him in the affidavits and the submissions made by his counsel, he agreed that there was no dignity in –

- having severe pain all over one's body;
- being dulled with opioid medication;
- being unaware of your surroundings and loved ones;
- being confused and dissociative;
- being unable to care for one's own hygiene;
- dying in a hospital or hospice away from the familiarity of one's own home;
- dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye.

Humanity of euthanasia to cease unbearable suffering:

Speaking on this topic following the applicant's head of argument, Judge Fabricius said it was submitted, with reference to the humane treatment of animals, that it has long been recognised as humane to euthanise a severely injured or diseased animal. This is provided for in s 2(1)(*e*) of the Animals Protection Act 71 of 1962 read with ss 5(1) and 8(1)(*d*). 'It is clear from these provisions that the owner of an animal is obliged to destroy such animal which is seriously injured or diseased or in such a physical condition that to prolong its life would be cruel and would cause such animal unnecessary suffering. The applicant therefore says that it is universally accepted that to permit an injured or sick animal to suffer is not only merciless and cruel but is also a crime. He asked why the same dignity could not be accorded to him.'

According to the judgment, the applicant's counsel pointed out that there are at least 11 foreign countries or states in which assisted suicide or active voluntary euthanasia is not unlawful, namely, Albania, Belgium, Canada, Columbia, Luxembourg, the Netherlands, Switzerland, Oregon, Vermont, Washington, New Mexico and Montana.

Respondent's arguments

According to the judgment, the affidavit on behalf of the first respondent was made by an Acting Chief Director: Legal Services. He referred to the SALC's report. Apart from saying that the report was handed to the Minister of Health in 1999, and was not attended to because other issues of national importance, which required prioritisation such as HIV and the AIDS epidemic, he did not say why the report was not given legislative attention since then. He said the conduct of a medical doctor who provided the assistance sought, would amount to a criminal offence. He denied that the applicant's right to dignity was involved in the present context. He also said the application ought to be dismissed because if it were granted, it would be tantamount to promoting inequalities and discrimination of the poor by way of limiting access to the courts to the rich only, which would be in violation of the constitutional guarantee of the poor to access the courts.

'I do not understand this argument in the present context. It is not relevant, but may be relevant in other future cases if no objective safeguards are put in place either by a court in any particular instance or by way of legislation. For present purposes, this argument is irrelevant. I would have preferred the view of the Minister of Justice in the present application and what he intended doing about the proposals contained in the commission's report or, at the very least what the government's present policy was in this particular context. I understand however, that because of the urgency of this matter, his considered view was probably not able to be obtained timeously,' said Judge Fabricius.

Representative of the fourth respondent, the National Director of Public Prosecution, said assisted suicide was a crime. The third respondent disputed that the applicant's condition constituted a violation of his human right to dignity, or that he was at present being treated in an inhumane or degrading way. 'The sad reality was, so it was put, that the applicant suffers from a condition which may impact on his dignity, as it may on numerous persons who die of causes both natural and otherwise. It is clear that the applicant's dignity was not infringed, because his view was merely subjective. In the first respondent's answering affidavit it was denied that the manner of death as outlined by the applicant was not dignified. It was also said that this was the applicant's own subjective view. I was almost shocked when I read this although I am not easily shocked anymore having regard to my 40 years' experience in litigation,' said Judge Fabricius.

The applicant highlighted the fact that there could be no logical or justifiable distinction between the withdrawal of life sustaining or prolonging medical treatment and active voluntary euthanasia or assisted suicide. He said the main intention for the medical practitioner remains to ensure the patient's quality of life and dignity. The secondary result, namely death or the hastening of death, is exactly the same in both instances.

'I agree that that is so. On behalf of the applicant it was therefore submitted that where a doctor withdraws life sustaining or life prolonging treatment, he or she knows that the result would be a hastening of the patient's death, which a doctor could have avoided, yet reconciled himself or herself with the result and still acted accordingly. Is this not a good example of *dolus eventualis*? Where life sustaining or life prolonging treatment has been administered and is subsequently withdrawn, the act of withdrawal is nonetheless a commission – it remains an active and positive step taken by the medical staff directly causing the death of the patient. It is accepted that such medical treatment may be refused from the outset by a terminally ill patient, in which the failure to render treatment, would constitute an omission only on the part of the medical practitioner. It was therefore submitted that there can be no distinction between active euthanasia and passive euthanasia in the circumstances where such argument is based on so-called ethical considerations. Once it is recognised, so it was put, as was indeed conceded at least by implication, that a medical practitioner has a duty to recognise and ensure that a terminally ill patient's dignity is protected by an omission or passive euthanasia, then, the same duty remains on a medical practitioner through a commission or active euthanasia. From a philosophical point of view and a jurisprudential point of view, I do believe that this argument is sound. One must also remember that suicide and attempted suicide are not criminal offences,' stated Judge Fabricius.

Judge Fabricius said the state allows abortion and so does the medical profession. He said that birth control measures are implemented universally and cessation of treatment, which hastens or causes death happens on a daily basis. In the context of conscientious objections, the applicant said his rights are sacrosanct to him, which should not be sacrificed on the altar of religious self-righteousness. He also submitted that 'conscientious objections' to homosexuality, same-sex marriages, mixed-race marriages and abortion did not detract from enshrined constitutional rights and it should not do so now.

In the context of the specific relief sought the applicant submitted that until the legislature provided statutory safeguards, this court could grant the relief claimed with the safeguards employed in this particular application as it was not uncommon for the courts to first rule on matters such as these prior to legislation being enacted but must keep in mind that the primary responsibility for law reform rests with the legislature. A court should develop the common law incrementally only.

'A further argument was that a court is in law incompetent to declare that the fourth respondent is prohibited from prosecuting the particular medical practitioner because of the provisions of s 179 of the Constitution which grants it the sole power to decide in any particular case. That is so of course, but it does

logically not follow that when a court develops the common law, and holds on the facts of a particular case that a particular act by a person is not unlawful, the prosecuting authority has been unlawfully deprived of its discretionary power as a result. The authority given to the court to develop the common law in a specific case, may have by necessary implication this consequence, such as in the present instance,' the judgment read.

The order

On 30 April 2015 Judge Fabricius made the following order.

- He declared that:

– 'the applicant is entitled to be assisted by a qualified medical doctor, who is willing to do so, to end his life, either by administration of a lethal agent or by providing the applicant with the necessary lethal agent to administer himself;

– no medical doctor is obliged to accede to the request of the applicant;

– the medical doctor who accedes to the request of the applicant shall not be acting unlawfully, and hence, shall not be subject to prosecution by the National Prosecuting Authority or subject to disciplinary proceedings by the HPCSA.'

- Judge Fabricius noted that this order shall not be read as endorsing the proposals of the draft Bill on End of Life as contained in the Law Commission Report of November 1998 (Project 86) as laying down the necessary or only conditions for the entitlement to the assistance of a qualified medical doctor to commit suicide.
- The common law crimes of murder or culpable homicide in the context of assisted suicide by medical practitioners, insofar as they provide for an absolute prohibition, unjustifiably limit the applicant's constitutional rights to human dignity, (s 10) and freedom to bodily and psychological integrity (s 12(2)(*b*), read with ss 1 and 7), and to that extent are declared to be overbroad and in conflict with the said provisions of the Bill of Rights.
- Except as stipulated above, the common law crimes of murder and culpable homicide in the context of assisted suicide by medical practitioners are not affected.

Justice Department spokesperson, Mthunzi Mhaga, said the ruling had far-reaching implications because of how it was going to be interpreted. He said there was a possibility that it might be abused and it could lead to a floodgate of applications if it was allowed to stand.

A notice to appeal (by any of the respondents) must be filed within 14 days of the judgment. As it stands and if any of the respondents actually file the notice to appeal, leave to appeal will be argued before Judge Fabricius on 2 June 2015. The parties may, however, by agreement, decide to argue it on another date. If leave to appeal is granted by Judge Fabricius the case will proceed on appeal to a superior court.

Meanwhile, in an interview with the South African Broadcasting Corporation, Justice Minister Michael Masutha said his department is opposing assisted suicide simply because no one under the Constitution has a right to kill another person. He was adamant that by assisting any person to kill themselves – one becomes party to murder.

Mr Stransham-Ford's lawyer, Sally Buitendag told *De Rebus* that she is pleased that the case has South Africa talking and is raising awareness about the topic. She said that she feels confident about an appeal and that it was beyond rewarding to have the order granted.

This issue of *De Rebus* went to print before the 14-day period to file a notice to appeal expired.

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ProBono.Org and LSNP open joint *pro bono* office

ProBono.Org and the Law Society of the Northern Provinces (LSNP) have opened a joint *pro bono* office in Pretoria.

The new office, which is situated at the Kutlwanong Democracy Centre found at 357 Visagie Street, was opened on 6 May.

Judge of the Gauteng High Court in Pretoria, Jody Kollapen gave the keynote address at the opening and other speakers included the President of the LSNP, Strike Madiba; national director of ProBono.Org, Erica Emdon and chairperson of ProBono.Org, advocate Andy Bester.

Ms Emdon said this initiative was motivated by the idea of combining the two organisations' systems of undertaking *pro bono* work in order to advance the promotion of access to justice in all the provinces under the jurisdiction of the LSNP.

'The collaboration brings distinct value; ProBono.Org will continue to use its approach of encouraging attorneys to undertake *pro bono* work in a number of interesting ways, and the LSNP will use its statutory ability to implement the *pro bono* rule to bring attorneys into the fold,' Ms Emdon said.

Part of the team at the new* pro bono *offices, from left, Lehlogonolo Marota, Jolindie Ferreira, Dimakatso Matlou, Ditankisho Moselakgomo and Humphrey Shivamba.

Rule 79A of the Rules of the LSNP requires members who have practised for less than 40 years and who are less than 60 years of age to perform *pro bono* services of not less than 24 hours per calendar year. Rule 79A provides that *pro bono* referrals should be done on the basis that such work would fall within the

professional competence of the members concerned.

The office will therefore assist attorneys by providing a range of opportunities to become involved that would make it easier for attorneys to comply with the requirement.

All work attended to through a referral or involvement with the Tshwane Office will be acknowledged as part of the *pro bono* commitment required from attorneys. The two organisations are hoping to create flexible methods for attorneys to easily engage in *pro bono* activities and attend to legal gaps that currently exist in society due to a lack of access to justice through the combination of resources and skills.

Mr Madiba said geographically, the office will focus on the Tshwane region and will establish a network to provide *pro bono* assistance to Limpopo, North West and eventually Mpumalanga. The offices will allow for a dedicated space where *pro bono* attorneys can consult with clients in a confidential and secure location.

A means-test will be applied in all matters attended to by the office and the merits of each matter will be considered before making a referral to *pro bono* attorneys. As a result, the office will be able to attend to more clients and its ability to refer matters to law firms will be increased.

Judge Jody Kollapen of the Pretoria High Court delivering the keynote address at the opening of the joint LSNP and ProBono.Org* pro bono *office in Pretoria.

The office will also accommodate legal clinics and projects that attorneys may participate in to provide their services. The office will focus on issues of public interest including family law, domestic violence, maintenance, estates, housing, credit and consumer law.

Judge Kollapen said after the first elections in 1994 most people felt good about voting but added that the sad reality was that nothing much had changed for them. He added that according to statistics from the Presidency's National Development Plan, South Africa remained the most unequal society in the world.

He posed the question whether South Africa belonged to all who lived in it. Judge Kollapen said South African citizens lived in a rules based society, adding that to obey the rules, citizens needed to know the law and needed to have access to the law. 'If one does not have this knowledge, then the law is useless,' he said.

Judge Kollapen said: 'The sad reality is that you get the best education, legal services and healthcare depending on what you get paid. The rights of power ultimately trump human rights. This is why these kind of initiatives are needed.' He concluded his speech by congratulating the LSNP and ProBono.Org on 'such a great' initiative.

Judge Kollapen said the High Court in Pretoria was also in the process of establishing a similar initiative called the Help Desk. He said the Help Desk would work closely with this *pro bono* office and would refer clients to it.

Mr Madiba congratulated Humphrey Shivamba who was the mastermind behind the *pro bono* office. He said Mr Shivamba had converted people and had made them buy into *pro bono* and made them passionate about access to justice.

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Analysis of the Human Trafficking Awareness Index report

Legal and professional information provider, LexisNexis South Africa, has released its latest LexisNexis Human Trafficking Awareness Index report. The report looks at the volume of human trafficking news and high profile cases across South Africa and the continent for a 12-month period from January to December 2014.

The index is based on an online research tool that tracks and analyses media coverage of human trafficking in South Africa and Africa in order to assist anti-trafficking activists to monitor and drive the anti-trafficking agenda, as well as gain an overview of human trafficking cases reported by the media.

This third report was compiled by Dr Monique Emser, a counter trafficking researcher and activist. As with previous reports, it offers a national and regional analysis of the trajectory of developments in high impact ongoing cases.

The report identified 432 unique articles published by the South African media between January and December 2014. Awareness during the 12-month period was on average higher than the baseline of 31 articles per month, indicating increased awareness due to high profile cases reported by the media.

According to the report, there were –

- 93 potential victims trafficked into and within South Africa during the reporting period;
- 76 potential victims who were adults, 17 were children;
- 54 potential victims of migrant smuggling with the end purpose of exploitation. This represents more than half (58%) of all potential victims identified;
- 24 potential victims of sexual exploitation, 16 were women and eight were girls;
- six potential victims of forced labour, all were female. There were five adults and one minor;
- two potential victims of forced marriage; and
- two potential victims of body part trafficking (ritual killing for muti purposes).

Notable trends

Child sexual exploitation

The report states that as noted in the previous reporting periods, child trafficking for the purposes of sexual exploitation remains a serious problem, despite the relatively low number of victims detected and assisted.

It says that child trafficking for the purposes of sexual exploitation tends to be domestic and intraregional. In the two cases profiled, the victims were between ten and 16 years old, and had been trafficked from impoverished rural areas (Eastern Cape, and the other from Mozambique to Mpumulanga). Both cases shared a number of similarities –

- the girls were recruited and/or trafficked by women who not only procured the girls to be abused but had a role to play in controlling them;
- the perpetrators of sexual abuse and rape were middle-aged businessmen living in relatively remote areas of the provinces concerned; and
- both were indicative of small local (opportunistic) trafficking operations involving a small number of victims, little organisation and recruitment or facilitation by an intimate partner or someone from their own community who they thought could be trusted.

According to the report, children trafficked for sexual exploitation suffer extreme violations of their human rights, including the right to liberty, the right to dignity and security of person, the right not to be held in slavery or involuntary servitude, the right to be free from cruel and inhumane treatment, the right to be free from violence, and the right to health.

The report states that 'unpredictability' and 'uncontrollability' are theorised to be predictive of more intense and prolonged reactions to abuse, including post-traumatic stress disorders and other mental health disorders. Repeated rapes, physical and psychological abuse inflicted over a period of months, and even years, mean that these children require intensive psychological support services before and after being reunited with their families or caregivers.

Forced marriage, ukuthwala *and harmful traditional and cultural practices*

The report noted that there were a couple of cases dealing with *ukuthwala*. It stated that early and forced marriage is a violation of human rights that destroys girls' childhoods and women's lives. The causes of early and forced marriage are complex, interrelated and dependent on individual circumstances and context.

The practice is driven by –

- gender inequality;
- poverty;
- harmful traditional or religious practices; and
- failure to enforce the law (or a lack of knowledge of particular laws and rights).

'Although cases linking the practice of "*ukuthwala*" with forced marriage are relatively rare, this culturally sensitive issue has sparked great debate across South Africa as to whether it should be regarded as a form of trafficking,' the report states.

Early and forced marriage contributes to driving girls into a cycle of poverty and powerlessness. They are likely to experience:

- **Illiteracy and poor education**

Girls who are forced to marry are systematically denied their right to education, they tend to drop out of or are removed from school, as their new role is to carry out domestic work and bear children. Girls with no education are three times more likely to be married before the age of 18 than those with secondary education. And the impact continues through the generations. Daughters of young, uneducated mothers are more likely to drop out of school and be married early, repeating the cycle. In addition, early and forced marriage is comparable to trafficking for the purposes of sexual exploitation and domestic servitude.

- **Increased mortality rate**

Girls who are victims of early and forced marriage have higher mortality rates than their unmarried counterparts. In developing countries, the leading cause of death among girls aged 15 – 19 is childbirth, where they are twice as likely to die in labour as a woman over 20.

• Poor sexual health

Most girls who are subjected to early or forced marriage usually have poor sexual health. They will have engaged in sex before being physically and emotionally ready and, due to marrying an older man, will be at increased risk of sexual infections such as HIV (which may be as much as double that of the national average).

• Higher risk of abuse

According to research carried out by the World Health Organisation, married girls aged 15 – 19 are more likely to experience violence than older married women. Due to lack of education, lower status, lack of control and powerlessness, girls subjected to early or forced marriage suffer higher levels of violence, abuse and rape.

Migration-trafficking nexus

'Migrants and refugees continue to fall prey to unscrupulous traffickers. A growing trend in the South African and African context is the increasingly blurred lines between migrant smuggling and human trafficking, as conflict, insurgency, political instability, discrimination and poverty force hundreds of thousands to flee their home countries every year,' the report states.

The report goes on to state that forced migration within the African region increases the vulnerability of men, women and children to becoming victims of human trafficking and other forms of exploitation and abuse. South Africa, as one of the more stable and prosperous countries within the sub-region, is an attractive destinations for refugees and migrants. Many take great risks and transit through third countries illegally in hopes of reaching South African shores, and during this stage of their journey are actively complicit in their illicit transit (migrant smuggling). However, what is becoming increasingly apparent is that on reaching destination countries, they are often held against their will, or in debt bondage, and subsequently exploited.

Human trafficking awareness in Africa

According to the report there were:

• 1 838 unique African media articles on human trafficking, captured during the period;
• 2 958 potential trafficking victims reported on by African media;
• 1 196 victims identified as adults (40% of total victims); and
• 1 343 victims identified as children (45% of reported victims).

Child soldiers and forced recruitment

According to the report, the United Nations Children's Fund estimates that there are up to 300 000 children involved in more than 30 conflicts worldwide. The largest number of child soldiers, estimated at 120 000 (or 40% of the global total), are in Africa, despite the 1999 African Charter on the Rights and Welfare of the Child. This is the only regional treaty outlawing child involvement in armed conflict.

The report defines a child soldier as any child under the age of 18 who is recruited by a state or non-state armed group and used as a fighter, cook, suicide bomber, human shield, messenger, spy, or for sexual purposes. 'Of growing concern is the notable increase in the use of children to carry explosives or plant explosive devices, with some not even aware that they are carrying explosives, which are then detonated from a distance. The recruitment of children under the age of 15 is incontrovertibly prohibited under international humanitarian law (Convention on the Rights of the Child and the Additional Protocols to the Geneva Conventions),' it states.

Child trafficking

The report states that children are trafficked for diverse reasons. The most prevalent types of child trafficking on the con-

tinent during the reporting period were for sexual exploitation (including forced marriage), forced recruitment or child soldiers, and illegal adoptions. A number of reported cases (262) remain undefined and are assigned to the general category of 'child trafficking'.

The migration-trafficking nexus

According to the report, the migration-trafficking nexus remains a key point of vulnerability for migrants and refugees (especially women and children) who often are physically and sexually abused and exploited throughout their journey only to become sex slaves or involved in forced begging at the end of their journey. Men are typically exploited for forced labour. Often intercepted in transit, migrants are arrested and prosecuted for illegally entering a third country.

• To view the full human trafficking awareness index go to www.lexisnexis.co.za/ruleoflaw.

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South African law firms recognised at global intellectual property awards

Intellectual property law firm, Adams & Adams has won the 2015 Managing Intellectual Property (MIP) award for the Best intellectual property (IP) law firm in Africa. The awards were held in London in March. The MIP is a global magazine that is recognised as the voice of the IP industry.

The Africa Award was awarded for the first time this year. The MIP global awards honour outstanding IP law firms and individuals across the world and are chosen based on the editorial team's research and analysis of public information. The awards recognise law firms globally and their commitment to innovation, outstanding work in the previous year, as well as new clients. On the shortlist for the best IP law firm in Africa award were Abu-Ghazaleh Intellectual Property, Saba & Co, NJQ & Associates, ENSafrica and Spoor & Fisher.

In a press release, chairperson of Adams & Adams, Gérard du Plessis said: 'In 2014 Adams & Adams received the MIP award for the Best IP law firm in South Africa and the 2015 award for the whole of Africa is an achievement on an entirely new level.'

This year the award for the Best IP law firm in South Africa went to Spoor & Fisher. The other nominees were DM Kisch, ENSafrica, Von Seidels and Adams & Adams.

In a press release, the chairperson of Spoor & Fisher, Keith Brown, said: 'The award cements our position as the country's best IP practice, with unmatched strength in patents, copyright and trademarks.'

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LSSA launches court bid against the President and ministers to stop ratification of 2014 SADC Protocol on SADC Tribunal

The Law Society of South Africa (LSSA) launched an application in the Gauteng Division, Pretoria in March this year to declare the actions of the President, as well as the Minsters of Justice and International Relations and Cooperation in voting for, signing and planning to ratify the Southern African Development Community (SADC) Summit Protocol in 2014 as it relates to the SADC Tribunal, to be unconstitutional. The respondents filed notice to oppose in April.

'Unlike the previous Protocol, the 2014 Protocol deprives citizens in the SADC region – including South Africans – of the right to refer a dispute between citizens and their government to a regional court if they fail to find relief in their own courts. By signing the 2014 Protocol, the President has infringed the right of South African citizens to access justice in terms of our Bill of Rights,' said LSSA Co-chairpersons Busani Mabunda and Richard Scott.

As the Protocol now stands, it limits the jurisdiction of the SADC Tribunal to disputes only between member states – and no longer between individual citizens and states – in the SADC region.

At the 2014 SADC Summit at Victoria Falls in August 2014, President Jacob Zuma signed the 2014 Protocol, which must now be ratified. The LSSA has brought the application in the interest of members of the public including the private sector, civil society, NGOs, workers and employers' organisations and all citizens of our country in terms of s 38 of our Constitution.

Prior to its earlier suspension in 2010 by the SADC Summit, the SADC Tribunal received 30 matters and finalised 24, all instituted by individuals. No single case had been received from SADC member states. Of the 24 cases instituted by individuals, six were still pending. 'It is highly unlikely that states will make use of the Tribunal to settle matters as they use diplomatic channels to do so,' say Mr Scott and Mr Mabunda.

Other law societies and Bar councils in the SADC region have or are in the process of launching similar actions in their courts to challenge the ratification of the SADC Protocol in their countries. This resolution was taken by members societies at the SADC Lawyers Association annual general meeting held at Victoria Falls immediately after the SADC Summit last year (see 2014 (Oct) *DR* 17).

'Also of concern to lawyers in the SADC region is the continued approach by the SADC states in making decisions on the SADC Tribunal without involving

citizens of the country as required by Article 23 of the SADC Treaty, to which South Africa is a signatory,' said Mr Mabunda and Mr Scott.

The Co-chairpersons pointed out: 'We have an independent and efficient judiciary in our country at the moment, but we have no guarantee that it will always be so. As we know, the protection of our democratic values requires eternal vigilance. This is the specific duty of lawyers. We can cite the example of the irregular and arbitrary arrest and imprisonment of our colleague, human rights lawyer Thulani Maseko and editor and journalist Bheki Makhubu in Swaziland. The fact is that their trial and continued imprisonment – including recent solitary confinement – has little to do with them but rather with the democratic rights they stand for. The courts and judiciary in Swaziland have failed them. They now do not have recourse to the SADC Tribunal as citizens of SADC.'

- See also 'SADC stakeholders form coalition to lobby for restoration of a SADC Tribunal' in 2014 (Oct) *DR* 5; and 'Whither the SADC Tribunal?' in 2013 (May) *DR* 11.
- The documents relating to the SADC Tribunal matter can be viewed on the LSSA website at www.LSSA.org.za

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

Sasseta notice

An administrator for the Safety and Security Seta (Sasseta) was appointed by the Minister of Higher Education and Training in February 2015 to deal with a turnaround strategy.

The Law Society of South Africa (LSSA) is well aware of concerns that attorneys may have, in particular relating to lack of communication and claims for interns' remuneration that remain unpaid by the Sasseta. The LSSA is in contact with the administrator and will consider other options if meaningful communication does not take place.

Attorneys' profession puts its money where its mouth is on xenophobia

The Co-chairpersons of the Law Society of South Africa (LSSA), Richard Scott and Busani Mabunda, made a R 50 000 donation to the Gift of the Givers Foundation towards assistance for the victims of the xenophobic violence that marred our country in the weeks preceding the celebration of 21 years of democracy in April this year. In addition, the KwaZulu-Natal Law Society (KZNLS) and the Law Society of the Northern Provinces – representing the attorneys in the areas most hit by the violence – offered the services of attorneys to assist victims – both foreign and local – on a *pro bono* basis.

In a press release, the Co-chairpersons noted that in April, 21 years ago, South Africa had been held up as a shining example of how different cultures could strive together to live in a peaceful, democratic and prosperous country. Yet this April, the local and international media had shown a very different picture, one that we were all ashamed of and distressed by.

'We need to take our country back to a peaceful place. Next year we will celebrate 20 years of our Constitution. In order to do so proudly and meaningfully, we need to guarantee the rights enshrined in the Constitution for all people who live in our country,' said Mr Scott and Mr Mabunda.

KZNLS President, Manette Strauss, said in a press release: 'The KZNLS unashamedly and unequivocally condemns these acts of violence and flagrant disregard for human rights which fly in the face of all that the Constitution of our country, our very own benchmark, seeks to promote and uphold in respect of all people. … It is a dark day in the history of our country when all that we have fought to achieve in the name of human rights and dignity manifests itself in such abhorrent behaviour.'

National Association of Democratic Lawyers (NADEL) Secretary General, Ndumiso Jaji, said the perception that foreigners take jobs reserved for locals is misplaced and anti-African. 'This perception is fuelled by those that demonstrate hatred for foreigners of African descent. In any event the Freedom Charter stipulates that the country belong to all that live in it. The Constitution too, entrenches protections for all in South Africa. NADEL calls on all political parties, religious organisations to work collectively in an effort to restore peace in the affected areas. We remind ourselves that in the dark days of apartheid, many of the countries that these nationals come from gave refuge to our political exiles. Now is not the time to apportion blame: NADEL supports a collective approach for all political, religious, moral leaders to speak with one voice – a voice which reaffirms value for all human lives in South Africa.'

Black Lawyers Association (BLA) President, Busani Mabunda, called on South Africans to refrain from acts of xenophobia and isolate the criminal elements that appear to have taken advantage of the genuine frustrations of people relating to social conditions. He noted: 'We echo the calls by his Majesty, King Goodwill Zwelithini kaBhekuzulu to protect our African brothers and sisters from these unprovoked attacks. The President of the Republic has called on all our people to work together to protect foreign nationals some of whom came into our country to escape persecutions in their own countries. The call by the President of the Republic should be heeded by all South Africans and work together with the law enforcement agencies to isolate the criminals that instigate this kind of violence.' The BLA also called on the legal fraternity to contribute to the efforts to prevent further attacks and also to help reintegrate foreign nationals into the communities in which they lived prior to these attacks.

Cape Law Society (CLS) President, Ashraf Mahomed, called on the government to end the violent attacks and bring the perpetrators to book. 'South African leaders, lawyers, politicians, priests, etcetera are called upon to do all that they can to ensure peace, security and stability in their communities. We have a constitutional duty to ensure that everyone is treated equally before the law, regardless of their nationality, language, race, gender and status. Everyone has the right to be treated with dignity and respect,' he said.

The CLS called on all sectors of so-

ciety, including business, labour, legal practitioners, civil society, to defend the rights of non-nationals and to protect them against violence or threats of violence, and to address the needs of non-nationals that have been displaced and rendered homeless.

At regional level, President of the Southern Africa Development Community Lawyers Association (SADC LA), Gilberto Correia said: 'The violent actions by South Africans against fellow Africans go against the tenets provided for in African and SADC regional legal instruments. One of the objectives of the African Union as provided for in the Constitutive Act of the Union is to achieve greater unity and solidarity between the African countries and the people of Africa, while the Treaty establishing SADC recognises solidarity, peace and security as some of the principles that the governments and peoples of the region are expected to observe.'

Mr Correia urged: 'We call upon the government of South Africa to step up efforts to protect all foreigners living and working in South Africa with a realisation that this is an obligation that is placed upon the state by international law. The 1993 Vienna Declaration and Programme of Action calls upon governments to take measures and to develop strong policies to prevent and combat all forms and manifestations of xenophobia and related intolerance.'

The Pan African Lawyers Union (PALU) urged strong and sustained action from the central and local governments, to ensure safety, law and order; to hold accountable both those who incited and perpetrated the attacks; to make reparations to those who lost lives, limbs and property; and to engage in civic education and a wider dialogue with those sections of South African society that may be tempted to continue such attacks. PALU President, Elijah Banda SC, urged a measure of understanding and pragmatism from other Africans and the international community when deliberating or making decisions regarding the recent recurrence of xenophobic attacks on South African soil.

PALU noted that the only long-term and sustainable solution to the xenophobic attacks implicates not only South Africa, but also all other African Union member states, especially those from Southern African Development Community. This solution requires that all member states' governments and peoples strive to build strong, viable states that provide adequate security, public services and developmental imperatives to their citizens, in accordance with the African Charter on Democracy, Elections and Governance, the African Governance Architecture and the instruments underpinning the African Peer Review Mechanism. 'This must go beyond rhetoric and political statements into humble, honest and pragmatic dialogue, and action, between the governed and those that govern us. The time for this is now,' said Mr Banda.

PALU called on the Special Mechanisms of the African Commission on Human and Peoples' Rights to undertake a joint mission to South Africa.

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

LSSA stresses the importance for law societies to participate in SAQA evaluation chain for foreign qualifications

In May, the Law Society of South Africa (LSSA) commented to the South African Qualifications Authority (SAQA) on the draft Policy and Criteria for Evaluating Foreign Qualifications within the South African National Qualifications Framework. The LSSA supported the principles set out in the policy document, in particular the principle that professional bodies can be recognised to participate in the evaluation process and chain.

The LSSA noted that, since the policy will also be used in the evaluation of foreign qualifications for purposes of registration and professional licensing of foreign persons by professional bodies, it was clear that the evaluation procedure could also apply to the recognition of foreign qualifications in law to enable foreign lawyers to be registered and admitted to practise law in South Africa.

The LSSA stressed the importance of its participation in such evaluation processes.

Legal position: Foreign qualifications for legal practice in South Africa

The LSSA set out the legal position in regard to the recognition of foreign qualifications for purposes of admission to legal practice in South Africa as currently regulated by the Attorneys Act 53 of 1979. In terms of s 15, a person is permitted to be admitted by a court of law to practise as an attorney in South Africa if such person, *inter alia*, has satisfied all the requirements for a degree at a university in a country (other than South Africa), which has been designated by the Justice Minister and in respect of which a South African university has certified the syllabus and standard of training.

To date only a few such countries have been designated by the Minister.

Without such designation and such

certification, a foreign law degree cannot, in terms of current law, be relied on to enable a foreign lawyer to practise as an attorney in South Africa.

SAQA policy and the Legal Practice Act

As regards the SAQA draft policy, the LSSA pointed out that the Attorneys Act will be replaced by the Legal Practice Act 28 of 2014 (LPA). However, it is expected that the transitional phase for the implementation of the LPA will last some two years, after which the substantive provisions of the LPA will come into effect. In terms of s 24(3) of the LPA, the Justice Minister will have the authority (after following a prescribed consultation process) to determine the right of foreign legal practitioners to be admitted and enrolled to practise as legal practitioners in South Africa. The LSSA noted that it is expected that this determination will include some form of recognition of foreign law degrees, and possibly a SAQA evaluation will form part of such a determination process.

The LSSA stressed that, to ensure that the admission to legal practice in South Africa of persons with foreign law degrees, and the recognition of such law degrees for this purpose, would not compromise the quality of professional legal services and the accountability of the persons providing such services, so as to protect the clients and thus the public, it would be important to ensure that the evaluation and certification of foreign law qualifications by SAQA is in line with the standards and criteria applied by the legal profession.

Under the current Attorneys Act the statutory provincial law societies and the LSSA, as the national representative body, oversee the adherence to the legal provisions in regard to law qualifications for purposes of admission to legal practice. Under the LPA the Legal Practice Council – to be established – will fulfil a similar function. The LSSA noted that it was important, therefore, for these bodies to become part of the evaluation chain of SAQA.

The LSSA stressed that the current provincial law societies and the LSSA would qualify to be recognised as professional bodies and participate in the evaluation chain.

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

National Wills Week 14 to 18 September 2015

Register before end of June to participate

This year's National Wills Week will be held from 14 to 18 September 2015. To participate, please register on the LSSA website at www.LSSA.org.za or with your relevant provincial law society before 26 June 2015.

People and practices

Compiled by Shireen Mahomed

Please note in future issues four or more people featured from one firm will have to submit a group photo.

Cliffe Dekker Hofmeyr in Cape Town and Johannesburg has several new appointments.

Christoff Pienaar has been appointed as a director in the technology, media and telecommunications department in Cape Town.

Emma Dempster has been appointed as a director in the projects and infrastructure department in Johannesburg.

Megan Rodgers has been appointed as a director in the projects and infrastructure department in Cape Town.

Albert Aukema has been appointed as a director in the competition department in Johannesburg.

Craig Wilton has been appointed as an associate in the projects and infrastructure department in Cape Town.

Fatima Valli-Gattoo has been appointed as a director in the real estate department in Johannesburg.

Giovanni Cloete has been appointed as an associate in the projects and infrastructure department in Cape Town.

Yaniv Kleitman has been appointed as a director in the corporate and commercial department in Johannesburg.

Preshan Singh-Dhulam has been appointed as a director in the finance and banking department in Johannesburg.

Werner Mennen has been appointed as a director in the corporate and commercial department in Johannesburg.

Hogan Lovells in Johannesburg has appointments and promotions

Maletlatsa Monica Ledingwane has been appointed as a consultant in the mining department.

Dr Windsor Chan has been appointed as a consultant in the Asia practice.

Jeff Buckland has been appointed as a partner in the corporate and commercial department. He specialises in private and public mergers, acquisitions and disposals.

Leishen Pillay has been promoted to a partner in the commercial department.

Ernie Lai King, head of tax, has been reappointed as member of the income tax special court of appeal.

From left: Rigardt Barnard, Bridget Moatshe, Donald Mokghele and PR de Wet.

VDT Attorneys in Pretoria has four new appointments.

Rigardt Barnard has been appointed as a professional assistant in the correspondent conveyancing department. He specialises in all matters relating to property law.

Bridget Moatshe has been appointed as a professional assistant in the litigation department. She specialises in litigation.

Donald Mokgehle has been appointed as an associate in the property law department. He specialises in all matters relating to property law.

PR de Wet has been appointed as a professional assistant in the commercial department. He specialises in commercial, company and contract law.

Schindlers Attorneys in Johannesburg has four new associates.

Front: Glynn Kent. Back, from left: Justin Sloane, Thando Mabasa and Stephen Gishen.

Stegmanns Inc in Pretoria has three new appointments

Tracy-Erin Duggan has been appointed as a director in the commercial litigation and collections department.

Donald Fischer has been appointed as an associate in the commercial litigation and collections department.

Robyn Haupt has been appointed as a professional assistant in the conveyancing department.

Delport Van Den Berg Attorneys in Pretoria has three new appointments.

Chantelle Labuschagne-de Jongh has been appointed as a director in the property law department.

Merike Pienaar has been appointed as a senior associate in the litigation and dispute resolution department.

Lahriche Stander has been appointed as a senior associate in the property law department.

By
Terence
Matzdorff

Civil procedure – time for change

A few months ago I attended a talk on mediation by Professor Mohamed Paleker, a professor of law at the University of Cape Town.

During the talk, Prof Paleker, who is also a member of the Rules Board for Courts of Law, focused on the then pending introduction of the court-annexed mediation rules. The rules have since come into operation on 1 December 2014.

Prof Paleker mentioned that the Rules Board is conducting an overall review of our system of civil procedure. This forms part of the Civil Justice Reform Project, which has been initiated by the Department of Justice and Correctional Services. He pointed out that innovative thinking in the area of civil procedure is emerging not only in this county, but in other parts of the world. In particular, he mentioned that there are legal systems that have either introduced or are exploring the initiation of all civil proceedings on oath/affirmation.

Shortly after attending Prof Paleker's talk, I became involved in a matter, which is being heard in the English courts. I was informed that according to the Civil Procedure Code of England and Wales, expert evidence in contested matters is given by way of affidavit, and is accepted by all parties and court, without oral evidence being necessary, unless it is disputed. This got me thinking that although our courts do on occasion accept evidence by way of affidavit, this is generally done only in the context of undefended matters and not in contested matters. The question is why the distinction? In application proceedings all evidence is presented on oath/affirmation, so why not in action proceedings? Why is adversarialism more rigorous in the action procedure than in the application procedure? Is this in the interests of justice?

The combined effect of the talk by Prof Paleker and the awareness of what appears to be a simplification in England, of rules relating to expert evidence, has led to this article.

I submit that the concept of substantiating claims and, for that matter, defences on oath/affirmation has merit. I therefore submit that in all action proceedings the plaintiff should, at the time of issuing his or her summons, attest to the nature of his or her claim. Essential supporting documents should be attached (see High Court r 18). I would even go so far as to say that the affidavit should contain both the *facta probanda* as well as the *facta probantia* of the case, as one would expect in applications. It should also not matter whether the claim is liquid or illiquid. Every claim should be brought on oath/affirmation. A defendant who wishes to defend a claim must then do likewise.

Claims brought on oath/affirmation should then act in tandem with the court-annexed mediation rules. If a matter is mediated, the summons or plea on oath/affirmation should stand as the necessary statement of claim or defence for the purposes of the mediation. There would be no need to deliver supplementary information for the purposes of the mediation. If the mediation fails, the summons and the plea should serve as pleadings, should the matter go to trial. Having claims and defences on oath/affirmation will also obviate the need for a protracted discovery and pre-trial procedure because the parties will already be in possession of a substantial amount of documentary and other evidence.

The proposed new procedure would, I submit, have a number of further advantages:

- It would reduce the number of spurious claims which are instituted.
- Civil claims via action (summons) would be approached in a less adversarial manner. At present each party keeps their powder dry for as long as possible, with evidence being tested for the first time in court by way of evidence-in-chief, cross-examination etcetera. It seems better for fact and truth-finding and, *a priori* the administration of justice, that there be early discovery of evidence on both sides. It has always appeared strange to me that we operate like moles in the dark for the greater part of the litigation process, only to see the light at the end of the process, namely during trial, when the evidence each party has to support his or her claim/defence is led. Many claims are settled during trial when it becomes apparent that the evidence does not support the claim or the defence. This method of operating is time-consuming, inefficient and most certainly not cost effective (see Mohamed Paleker 'Fact- and Truth-Finding in South African Civil Procedure' in CH Van Rhee and A Uzelac (eds) *Truth and Efficiency in Civil Litigation – Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context* (Cambridge: Intersentia 2012) at 189 – 227).
- The proposed new system will prevent the state from continuing with its current *modus operandi* which is, in general, to oppose all claims brought against it as a matter of principle and then dragging out those claims for as so long as possible, often at the expense of the tax

payer and to the detriment of claimants with legitimate claims. In passing, I understand that the possibility of a 'solicitor general' being appointed, to take charge of all litigation against the state and to ensure that there are earlier settlements in appropriate matters, and to prevent the current shambles, has not been taken any further. This, in my view, is regrettable.

- A considerable number of matters would be settled at an earlier stage, thereby alleviating the backlog of cases experienced in many courts.

It is interesting to note that our system of civil procedure has hardly been modified in decades. As Prof Paleker noted, the system that we currently have is essentially Victorian in nature and yet, the English in 2000 completely jettisoned their old system of civil procedure in favour of a more efficient one following the recommendations of the Woolf Report (Lord Woolf 'Access to Justice Final Report' July 1996 (http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm, accessed 12-5-2015)). We are thus sitting with an anachronistic system of procedure that does not seem to serve modern needs and commercial realities. Where there have been changes in our system of procedure, these have mostly been minor technical modifications; there has been a lack of critical engagement with the substance of civil procedure. As Prof Paleker noted, we need to think 'out of the box' and overhaul our system of procedure completely if we really want to improve the state of civil justice in South Africa so that we can realise the access to justice provision in s 34 of the Constitution.

Part of this 'out of the box' thinking could, for example, address the question, why summary judgment is inapplicable to illiquid claims? After all, other jurisdictions make provision. Why should a court not separate the issue of quantum and merits when deciding to grant summary judgment? At the very least, it should be possible for a court to grant summary judgment on the merits and reserve quantum for trial.

Where is the radical and critical thinking of our present system of civil procedure? Most readers of this article will be aware of the complaints about the current system including delays, costs, lack of accessibility to justice etcetera. The complaints go on and on and are heard *ad nauseam*. The responses to these complaints have included the introduction of case management in the High Court, harmonisation of magistrate's court and High Court Rules, and attempts to bring in mediation. But is that enough? I argue that a more radical re-engineering of our system of civil procedure is called for.

It appears to me that what we do in South Africa is 'fiddle' with the current rules of civil procedure while Rome burns. We are stuck with what is essentially a Dickensian form of civil procedure based on a system of justice of a bygone era, whereas we need a new system of civil justice, which meets the requirements of the individual and corporate citizens of the 21st century.

It is my hope that this article will generate discussion and debate and lead to the radical reform that, I believe, is required. We need to look at how civil justice works elsewhere in the world and try to incorporate the best features of foreign jurisdictions. After all, is this not what our constitutional parents did when they drafted our Constitution, which today is considered as one of the most progressive constitutions in the world? Has the time not come to produce the most progressive, efficient, cost-effective and people-centred civil justice system in the world?

Terrence Matzdorff *BA LLM (UCT)* is an attorney at Knowles Husain Lindsay Inc in Cape Town.

Prof Paleker assisted in the preparation of this article.

Recent articles & research

Open access law journals:

- ***African Public Procurement Law Journal*** (Faculty of Law, Stellenbosch University, South Africa) http://applj.journals.ac.za/pub
- ***African Human Rights Law Journal:*** www.chr.up.ac.za/index.php/about-the-journal.html
- ***Constitutional Court Review:*** https://jutalaw.co.za/media/filestore/2015/01/CCR_-_Electronic_version.pdf
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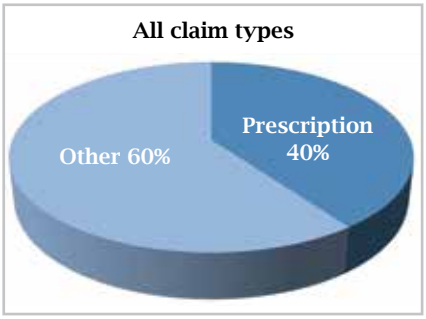
By
Ann
Bertelsmann

The clock is ticking …

Why do so many claims become prescribed?

It might surprise many readers to know that professional indemnity (PI) claims against legal practitioners in South Africa hardly ever result from the practitioner's lack of legal knowledge.

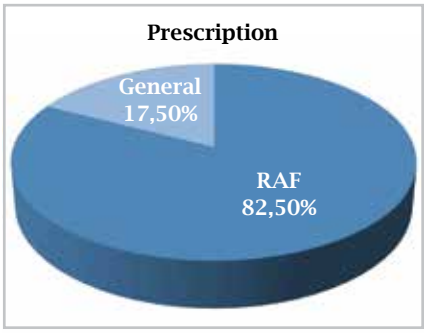
Did you know that currently 40% of all claims notified to the Attorneys Insurance Indemnity Fund (AIIF) result from claims becoming prescribed in the hands of practitioners?



Even more surprising, is the fact that most of these prescribed matters are claims against the Road Accident Fund (RAF) where there are no grey areas in the calculation of prescription dates. It is as easy as ABC … three years for lodging the claim and five years for the service of summons (except in the case of minors/people with incapacities or 'hit and run' accidents). It could not be simpler. This is one of the reasons why such claims attract a higher deductible/excess than the rest of the claim types, other than conveyancing.

However, prescription periods in general matters can sometimes be difficult to calculate as there can be uncertainty as to when exactly prescription begins to run.

Then why do 82,5% of all prescription claims arise from RAF matters and only 17,5% from more complicated general matters?



RAF prescriptions: What goes wrong?

Oversights (the main culprit):

• Diary problems:
The firm has an unreliable diary system and the matter simply does not come to the practitioner's attention timeously.

Suggested remedy: Make the necessary changes to your diary system (preferably use an electronic system). Use (and adhere to) your own back-up system or Prescription Alert (free of charge through the AIIF – see www.aiif.co.za).

• System problems:
The firm does not have secure and well-managed filing systems and follow-up procedures. This can lead to lost or misplaced files. The file does not come out of diary or if it does, it then gets buried under 'more important' files on someone's desk, floor or even the window sill.

Suggested remedy: Ensure that the person responsible for the filing and retrieving of files is well trained and supervised. The removal of files should be carefully monitored. Keep records of who removes which files and when. Maintain a central register of all open and closed files, which records to whom they are/were allocated.

• Diarising ahead for long periods:
This can result in the matter being forgotten, the client not being contactable at a crucial time or too little time left before prescription, for the necessary preparations for lodgment or summons.

Suggested remedy: Diarise for a maximum of two weeks and be proactive in the management of the file. Follow up if you have not received reports that are awaited. If necessary send a staff member to the police station or hospital. Get your assistant to telephone the client to give an update – and to make sure the client can still be contacted.

• Incorrect prescription dates used:
Suggested remedy: Check and get a second person to verify that the accident date on the police report, hospital records, client's affidavit and your file match. Check that your calculation of the prescription date is correct. Is it a 'hit and run'? If there is any doubt about the identity of the owner or driver, rather use the two-year period. Make sure the prescription date is marked prominently on the file so that you do not take your eye off the ball.

• Non-adherence to prescription alert reminders or own diary reminders:
Suggested remedy: Ensure that all support staff are aware of the importance of these reminders and that the file is brought to you – and to your attention immediately.

• Mistakes in perusal and preparation of documents:
Suggested remedy: Check, re-check and get someone else to check important documents. Do not notice too late that the registration number that your client gave you differs from the one on the police report – or that the accident dates or nature of injuries differ.

• Last-minute lodgment of claim/service of summons:
This may be the result of a misconception that RAF claims are straightforward and not enough time remaining for proper attention to the matter. Anything can go wrong at the last minute. The sheriff can serve summons late; a messenger can be unreliable and deliver the claim late; or counsel can take too long in settling the particulars.

Suggested remedy: Rather aim to lodge the claim or serve summons well before the prescription date. Give yourself enough time to give the necessary attention to your client's matter. The prescription dates may be straightforward but the claims seldom are. Remember that only the service (and not the issue) of summons interrupts prescription.

• Absence of checklists:
This can lead to an important step being forgotten/omitted and a last-minute rush.

Suggested remedy: In every area of practice, but especially with RAF claims, the experienced practitioner should compile a checklist, which all staff must follow.

• Staff turnover and transferred files:
This is a common cause of prescription. The file is handled by a succession of (usually junior) practitioners, so that there is no continuity. Someone leaves the practice and takes the file with him or hides it behind a cabinet. He might put a misleading note on the file stating that the summons has been issued – and the person who takes the matter over assumes that it has also been served. Files transferred to you from other firms can also prescribe for similar reasons.

Suggested remedy: Make sure that you have proper, documented procedures for file handovers, and that strict rules are followed regarding file order and the making of comprehensive file notes. In the case of transferred files, the full engagement management proce-

dures of engagement letter, client interviews etcetera, should be done.

• **Absence of file reviews/audits:**

Suggested remedy: Ensure that you have a system of regular file reviews/audits. This will increase the chances of discovering oversights and problems timeously.

• **Missing the date for service of summons when negotiations are in progress:**

This is another favourite. The RAF's claims handler strings you along by promising imminent settlement. 'We need to obtain one more expert report and then we can settle this last issue' they say. You focus on getting your client to attend another consultation. You take your eye off the prescription ball. The file is on your desk and will not come out of diary to remind you. Wham! A day after prescription you get that letter from the RAF.

Suggested remedies: Call in the troops. Have a central list/calendar of all prescription, court appearance and other deadline dates. Make someone responsible for following up with the people concerned, well ahead of time and again closer to the time. Get your assistant to regularly check the prescription dates that are prominently displayed on the files in your office. Serve summons on the RAF during negotiations as a precaution and then agree to stay further pleadings.

Inappropriate delegation and lack of supervision:

Unfortunately, in this area, there are many firms that employ unqualified and/or junior staff to do this work, which they seem to regard as straightforward and not necessarily requiring experience and formal legal training. These employees are also inadequately supervised. Most of the claims that cross our desks at the AIIF are prescribed because they were handled by inexperienced, junior staff without sufficient guidance and supervision. In *Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB) one can see the sort of problems that can arise when this happens.

Suggested remedy: Matters should be delegated in accordance with the training, experience and ability of the delegate. Checklists and guidelines should be in place and the delegate must be properly supervised and assisted. File audits/reviews and discussions of matters are essential.

Engagement management failures:

1 Instructions taken by third parties:

Many claims arise out of firms' receiving instructions via a third party or sending people out to take instructions from accident survivors in rural areas or hospitals (and even churches). We make no comment on possible ethical difficulties in doing this. There are numerous problems that arise. For example, the firm's mandate gets signed by the 'client' who has never been interviewed by the practitioner himself. Sometimes the instruction never comes to his attention or even gets to him at all. Perhaps the instruction does reach the practitioner, but the 'client' is uncontactable. The file might simply be overlooked. Perhaps the 'client' gives the incorrect date of accident or vehicle details. The 'client' has proof of the mandate when he sues this practitioner for allowing his claim to prescribe.

Suggested remedy: Do not do this, or if you must, do so with extreme caution, bear in mind the hazards.

2 Bulk instructions:

Many practitioners (in other jurisdictions as well) take on such instructions *en masse*, for example, from another firm or an organisation offering its members a form of legal assistance. This kind of sausage-factory claims-handling comes with many dangers, some similar to those in point 1 above.

Suggested remedy: Make sure that these files are dealt with immediately and are screened initially for looming prescription dates. Do not take on a matter where prescription is imminent. Do not allocate the whole lot to one practitioner or paralegal. Ensure that each file is dealt with individually, that client is contacted immediately and full instructions are taken in a face-to-face consultation.

3 Instructions taken too close to prescription:

Inevitably you are unable to lodge or serve summons timeously.

Suggested remedy: Do not do this – or if you must, first properly explain the problem of impending the prescription and get the client to sign a carefully worded disclaimer (which must be properly explained to the client). This disclaimer should also be included in your signed letter of engagement.

4 Communication failures:

The client cannot be contacted when prescription is imminent so the claim is not lodged or summons is not served, either because the claim form must be signed, payment is required or instructions are needed.

There is a miscommunication about any issue that might affect the conduct of the claim.

Suggested remedy: Ensure that all possible contact details (including those of friends, employers and relatives) are obtained at the initial consultation. Get a power of attorney (and deposit if required) at the first consultation. Failing these measures, send someone to find client/instruct a tracing agent, serve summons without instructions or deposit and bear those costs, rather than running the risk of a claim against you.

In appropriate cases use the services of an interpreter (preferably not a member of the client's family).

5 Non-engagement problems:

You do not agree to take on the matter, but do not put this in writing (non-engagement letter). The claimant alleges that you did take it on.

Or you do not take on the matter or withdraw and you fail to explain to the claimant that prescription is imminent and the claim should be attended to timeously. In this situation, the practitioner will generally be found to be liable.

Suggested remedy: Ensure that you get the non-client to sign a letter of non-engagement (including a reference to prescription, even if this is not imminent) and keep a record of this. If prescription is imminent give the necessary information and warning. Do not withdraw close to the prescription date.

Stick to all these simple suggestions and beat the ticking clock.

• See 2014 (May) *DR* 26 and 2014 (July) *DR* 20.

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

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Facilitating access to information

Is the appointment of acting judges transparent?

By Tabetha Masengu and Alison Tilley

Picture source: Gallo Images/iStock

The appointment of judges is important in any society. As the third arm of government, tasked with upholding rights and adjudicating disputes, a functioning credible judiciary is essential to constitutional order.

There are a number of reasons for that, most of them trite. A society that is presided over by a judiciary they do not trust will reject their judgments. An executive ordered to act or desist from acting by a judge (who does not believe the judiciary to be legitimate) risks that executive ignoring those judgments. And of course, a credible, transformed judiciary is a requirement of the Constitution.

Lest we forget, the judiciary, and we include the magistracy, were a central platform in upholding Apartheid. In order to build the credibility and legitimacy of the judiciary post 1994 we agreed, in the Constitution, to tackle transformation of the judiciary, as all other aspects of our society, in order to address the demographics of the Bench, broadly defined, and to ensure that the Bench would carry forward the project of a constitutional state, built on the values of equality and dignity. The Constitution set out the creation of the Judicial Service Commission (JSC), and set out the process for appointment of judges, and magistrates.

For the JSC to appoint a person, they have the following criteria in terms of s 174 (1) of the Constitution:

'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer …

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

There are no other legislated guidelines.

In 1998 the late Chief Justice Ismail Mahomed introduced the guidelines (the Mahomed guidelines). These suggested that in elaboration of the first three –

- the applicant had to be a person of integrity;
- a person with the necessary energy and motivation;
- a competent person, both technically as a lawyer, and with respect to the capacity and ability to give expression to the values in the Constitution;
- an experienced person, both technically, with the capacity and ability to give expression to the values in the Constitution;
- a person with appropriate potential, so that any lack of technical experience could be made up by intensive training; and
- whether the applicant's appointment would be symbolic in sending a message to the community at large (see www.justice.gov.za/reportfiles/1999reports/1999_judicial%20service%20comm.htm, accessed 12-5-2015).

These criteria were adopted by the JSC in 2010.

According to advocate Milton Seligson, SC, an important requirement developed by the Commission is that an applicant must have acted as a judge in that court, and delivered a satisfactory level of performance, measured both qualitatively with reference to judgments delivered, and the comments of the permanent judges who have worked with the candidate, and in terms of the level of diligence displayed in producing judgments, and not having delayed unduly in handing down reserved judgments (unpublished paper by Milton Seligson SC, 2-11-2009).

The JSC itself has elaborated the important criteria as –

- the recommendation of the Judge President;
- the support of the candidate's professional body;
- the need to fulfil the constitutional mandate around transformation so as to reflect the ethnic and gender composition of the population;
- the judicial needs of the division concerned;
- the candidate's age and experience, including whether they have served as an acting judge in that division; and
- the relative merits and strengths of the candidates in relation to one another (Susannah Cowen 'Judicial Selection in South Africa Democratic Rights and Governance Unit Working Papers Series' October 2010 (www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf, accessed 12-5-2015)).

Do attorneys fit in to this process of being appointed?

They clearly do. A number of attorneys have been appointed as judges in the past four years. Attorneys who have been appointed have had previous experience as acting judges. In fact, we would go further, and assert that all recent appointments in the last four years to the High Court have had acting experience, whether they were counsel, attorneys, or magistrates. At a conference hosted by the Democratic Governance and Rights Unit of the University of Cape Town in Paarl in November 2013, former Constitutional Court judge Zac Jacoob, asserted that acting experience as a judge was not in fact a criteria for appointment. He is, *de jure*, correct. But, the *de facto* situation is that all the candidates for High Court positions, in front of the committee, have acting experience and the lack of it thereof means one is unlikely to even be shortlisted.

How do attorneys become acting judges?

That is the obscure part of the process. The Judge President (JP) responsible for each division oversees the process. Previously, the JP would simply appoint counsel to act, based on his or her experience, and that of the judges on the bench in that division. Now, it is clear that in order to put forward diverse candidates the JP will draw from three pools, the attorneys, the magistracy and counsel. How do candidates come to the attention of the JP? This is the least transparent part of the appointments process for judges.

Section 175 (2) of the Constitution empowers the Minister of Justice and Constitutional Development to appoint acting judges after consulting the senior judge of the court. Ordinarily the Minister does not play an active role in the process, but merely appoints the candidates he or she is presented with. Former Minister Bridgette Mabandla who was the Minister of Justice under the Mbeki government was known to actively request that lists of acting appointments should contain a certain number of women. (See Angela Quintal 'Justice minister branded a racist' 26-1-2007 *Independent Online* (www.iol.co.za/news/politics/justice-minister-branded-a-racist-1.312496?ot=inmsa.ArticlePrintPageLayout.ot, accessed 12-5-2015) and Wyndham Hartley 'No sinister agenda in transformation of judiciary, Radebe assures MPs' 6-8-2012 *Business Day* (www.bdlive.co.za/articles/2009/06/25/no-sinister-agenda-in-transformation-of-judiciary-radebe-assures-mps, accessed 12-5-2015)). While it is acknowledged that Minister Michael Masutha can play a large role in how acting appointments are conducted, the absence of publicised guidelines, make it difficult to assess where and how he should do so.

Is there an advertising process for acting?

Some divisions seem to advertise by way of a circular to relevant professional bodies. For example, JP Dunstan Mlambo of the Gauteng Division has stated the challenges he encountered in having female advocates putting themselves forward once the circular has been issued. Some divisions have an acting appointments committee that assist the JP in arriving at his or her decision while other JPs make decisions on their own. Either way, an attorney would need to be noticed or be known to the courts for them to be a person of interest. But let us consider the situation of an attorney working in a smaller town in South Africa. They will

appear regularly in front of local magistrates, but perhaps not that frequently in the High Court. Most attorneys still brief counsel for High Court appearances, especially if they do not have many High Court matters. What opportunity do they have for appearing in front of a High Court judge regularly enough to build up a reputation in a division? It could be argued that in smaller divisions, the social networks may be sufficient, and sufficiently transformed, that attorneys can come to the notice of judges, and the JP in particular.

But that is not a very transparent process, and would be dismissed out of hand as unfair by most human resource (HR) managers. It is also dangerous, in the sense that we often trust those who are part of our social networks. JPs do not have HR managers on hand to ensure an open process, nor do they have the mechanisms and time to do some of the basics, namely, to check whether a degree exists; whether experience claimed is actually true; and what the peers of the candidate say about them. In fact, where the candidate is a magistrate, the judgments of that magistrate are not available to the JP, or anyone else for that matter, as a direct result of the antiquated paper based system of our lower and High Courts.

So how is one to know whether a selected candidate for acting appointment is in fact a fit and proper person? And how do they know if a candidate is committed to the transformatatory project of the Constitution? How do you know if their judgments are imbued with the values and precepts of the rights contained in the Constitution? You cannot and even less so for an attorney.

It is little wonder that JPs avoid plunging into these murky waters, and end up looking at word of mouth recommendations for those who should take up acting positions. Word of mouth recommendations do not initially sound like a bad idea. People who are well versed with potential candidates can give an opinion on whether the said candidate is hard working, smart, and knowledgeable and is 'ripe' for judicial appointment. However, this is no panacea – you will recall the startling case of Mr Sibusiso Msani, a Regional Court Magistrate from KwaZulu-Natal interviewed for a High Court position in April 2014. He was a candidate who had acted six times on the said Bench since 2010 (Rebecca Davis 'Analysis: Judging the Judges' 6-6-2014 *Daily Maverick* (http://www.dailymaverick.co.za/article/2014-06-06-analysis-judging-the-judges/#.VVHN4PmqpBd, accessed 12-5-2015)).

He was subsequently not appointed, but his interview raised concerns about the due diligence or lack thereof being done on potential judicial candidates. We would not hesitate to suggest that such a candidate is not one who was upholding and protecting the constitution and the human rights entrenched therein.

So how do we widen the pool of candidates, while recognising the difficulties JPs have in identifying candidates who meet the criteria of being the demographics of the Bench and who ensure that the Bench will carry forward the project of a constitutional state, built on the values of equality and dignity? This is not an easy question to answer but we would suggest a few starting points.

- The need for a transparent process in appointing acting judges, which entails that there be guidelines for their appointment that are publicly available. On the JSC agenda in October 2014 was the issue of guidelines for acting appointments and we hope that this is a sign that there will soon be guidelines that prospective candidates can refer to.
- The guidelines need to be uniform for the most part otherwise, attorneys and other professionals acting appointment aspirations will depend on what type of JP their province has. We acknowledge that some leeway should be left for divisions to have a few differences for reasons such as the need for specialists in areas such as maritime law in Western Cape and KZN. Neverthless, the basic principles of fairness must be maintained. Thus if the JP informs the respective law societies through a circular that he or she is in need of acting judges, all members of that society should receive the notification and should know exactly what the process entails. This is particular necessary if we are to see more attorneys being interviewed for permanent positions in order to continue to refute notions that only advocates, and better yet, senior counsel are adept in the ways of the courts.
- There must be uniform guidelines regarding feedback once candidates have completed their acting stints. Some candidates have reported the lack of feedback from their JPs while others receive helpful face to face reports.

Such a process can only support the transformation of the judiciary, in both its demographics, and its deepening of the constitutional project.

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Picture source: Gallo Images/iStock

By Tafadzwa Brian Mukwende

Current developments in the South African Value Added Tax (VAT) regime consist of new digital tax reforms in comport with the principle of fiscal neutrality. Application of the underlying principle of fiscal neutrality inherent in the common system of VAT requires equal treatment of similar goods and services supplied by taxable persons, which are in competition with each other, see *Grattan PLC v Her Majesty's Revenue & Customs* [2013] UKFTT 488 (TC) at paras 25 – 27 and 38; *Fischer v Finanzamt Donaueschingen* [1998] ECR I-3369 at paras 27 – 30; *Schmeink & Cofreth AG & Co. KG v Finanzamt Borken and Manfred Strobel* [2000] ECR I-6973 at paras 55 – 59. These fundamental tax changes have a colossal impact on e-commerce and also play a pivotal role in aligning current tax laws with contemporary developments in the field of e-commerce.

Transition of the Traditional Value-Added Tax System

VAT in the South African context is defined as an indirect tax charged on the supply of goods and services by a vendor in the course or furtherance of any enterprise as a statutory precondition that lies at the heart of the VAT system as contemplated by s 7 of the Value-Added Tax Act 89 of 1991, (the Act), as laid down in *KCM v Commissioner of South African Revenue Services* (Tax Court) (unreported case no VAT 711/14-8-2009) (Van Oosten J) at para 8. Vendors collect output VAT on behalf of the state for taxable supplies of goods and services from consumers or end users in terms of s 7(1)*(a)* of the Act. Vendors can claim input VAT for supplies acquired or imported from other suppliers subject to exceptions in s 17 of the Act. In some tax jurisdictions, a similar form of indirect or consumptions tax is charged for taxable supplies such as Sales and Use taxes in the United States (US) and Harmonised Sales Tax or Goods and Services Tax in Canada.

Revenue rule

The present day challenges of collecting digital taxes levied on electronic products from technology companies established in foreign states finds substance in the common-law doctrine of the revenue rule, which has evolved over time. The common-law doctrine of the revenue rule in the international sphere recognises that the revenue laws governing a foreign state have no legal force in other sovereign nations, originated from English courts as illustrated in *Holman v Johnson* 98 Eng. Rep. 1120 (KB. 1175) at 1121 per Lord Mansfield. In *Ben Nevis (Holdings) Limited v Commissioners for HM Revenue and Customs* [2013] EWCA civ 578 at paras 51 and 53, the England and Wales Court of Appeal ruled that the revenue rule can be abrogated by way of international treaties that allows tax collection on behalf of the South African Revenue Services (Sars) by the United Kingdom (UK) Her Majesty's Revenue and Customs tax authority party to the bilateral tax treaty with South Africa.

Economic presence test

Among the major changes of the common-law principles governing VAT regimes is the inevitable gradual shift from the prevailing residence-based and source-based system of taxation to the economic-based system. The US Supreme Court in *Quill Corp. v. North Dakota* 504 US 298 (1992) at 306 – 307 (Quill) cited the case of *Burger King Corp. v. Rudzewicz* 471 US 462 (1985) at 476 where it was held that a foreign corporation purposefully avails itself to the state *in personum* jurisdiction even if it has no physical presence in the state. However, the US Supreme Court of Appeal in *Overstock.com Inc v New York State Department of Taxation and Finance et al* 987 N.E. 2d 621, 627 (N.Y. 2013) at 25, overruled the New York's Court of Appeal decision to hold Overstock.com Inc liable for New York sales and user internet taxes based on the economic-effects test. The US Supreme Court of Appeal found that the rationale based on the economic-effects test deviates from precedent set in *Quill* at 306 – 307, that physical presence not merely economic contact is the touchstone of the state's taxing authority under the commerce clause.

Digital reforms

The European Commission (EC) passed Council Regulations (EC) No.1777/2005 on 17 October 2005 (CR), which codify the provisions implementing measures for the Sixth Council Directive 77/388/EEC on the common system of VAT. Article 11 of CR regulates intangible electronically supplied services such as software, music downloads, ringtones, films, e-journals, virtual classrooms, websites, webpages and digitised book contents among others. Article 12 of CR provides for tangible electronically processed products in the form of CDs, floppy disks, CD-ROMs, audio cassettes and games on CD-ROM. South Africa adopt-

ed a similar digital tax model imposing VAT on electronic products supplied by vendor's based in export countries as governed by the Electronic Service Regulations passed by the National Treasury during 2014.

Supply of electronic services

In the new European Union (EU) VAT system as from 1 January 2015, the place of supply of electronic services shall be taxed where the consumer has a permanent establishment rather than where the supplier is established as contemplated in art 58 of the amending Council Directive 2008/8/EC.

VAT grouping

Parent companies and subsidiaries which have financial, economic and organisational links are treated as a single taxable person and identified as members of the same VAT group for VAT purposes according to art 4(4) of the Sixth VAT Directive (see *Ampliscientifica Srl and Amplifin SpA* C-162/07 at para 19).

Online VAT compliance procedures

Compliance with tax reporting and disclosure procedures through e-filing of VAT returns is not a smooth transition from the conventional paper-based method to the electronic system. The court in *LH Bishop Electric Co Ltd v Revenue and Customs Commissioner* [2013] UKFTT 522 (TC) at paras 921 – 924, interpreted regulation 25A of UK VAT Regulations 1995 (SI 1995/2518) governing non-compliance with online filing of VAT returns as disproportionate and subject to exceptions, citing exemption of categories of disabled persons, older persons, computer illiterate citizens and those living remotely from internet access.

Aligning international tax protocols with the digital tax model

The United Nations Commission on International Trade Law (UNCITRAL) was tasked with the mandate of developing Model Laws as standard international guidelines on e-commerce in the wake of global digitisation brought about by technological changes in modern business models. UNCITRAL set internationally accepted rules of conducting commerce through electronic means in the Model Laws on Electronic Commerce (MLEC), which was adopted on 12 June 1996. The EU Sixth VAT Directive formulated by the European Commission in Brussels contains a set of rules regulating the VAT rate; place of supply; the tax point; taxable amount; the scope and special schemes. On 1 January 2007, it was replaced by Directive 2006/112/EC.

Implementation of the common VAT system on intangible digital products supplied through the 'borderless' internet by technology companies without a physical presence in the forum state dealing at arm's length remains a complex issue see *HMRC v Secret Hotels2 Ltd* [2014] UKSC 16 at para 1. Recently, the Court of Justice of the EU in *Skandia America Corp. (USA)*, filial Sverige C-7/13 at para 39, ruled that the cross-border supplies of Information Technology (IT) services made by the parent company based in America to a branch company that is a member of a VAT group established in Europe is subject to VAT at the standard rate. Supply of services by intermediaries shall be taxed at the place where the underlying transaction is supplied in accordance with art 46 of the amending Council Directive 2008/8/EC. Trademarks, trade names, customer lists, customer data and propriety market are characterised as intangibles for accounting purposes for transfer pricing according to art 9 of the Organisation of Economic Co-operation and Development (OECD) Model Tax Convention formulated by the OECD an international fiscal monitoring organization established in 1961 (as outlined in OECD Guidance on Transfer Pricing Aspects of Intangibles Action 8 at 32).

Global perspectives on the digital economy

In a concerted effort to close and tighten loopholes in technology regulations and cyber related laws the South African National Treasury in collaboration with the Sars, saw the imposition of VAT on online digital products supplied by sources from export countries. Some of the products governed by these new regulations are educational services (reg 3), games and games of chance (reg 4), internet-based auction service (reg 5) and subscription services (reg 7) among others. These Electronic Service Regulations came into operation on 1 April 2014 as the date prescribed by the former Minister of Finance, Pravin Gordhan, by proclamation in the *Government Gazette*, which published the regulations prescribing electronic services for purposes of the definition of 'Electronic services' in s 1 of the Act.

Whereas in the US, the Internet Tax Freedom Act of 1998 (ITFA) introduced a three-year moratorium on internet taxes commencing from 1 October 1998 and ending three years after the date of enactment as contemplated by s 1101 of the ITFA. During the 110th Congress of the US, Congress assembled to amend the ITFA in order to extend the moratorium from the beginning of 1 November 2003 and ending on 1 November 2014. On 18 March 2010, the Foreign Account Tax Compliance Act (FATCA), a US Federal law, was enacted by the US Congress in order to combat tax evasion and the under reporting of foreign financial accounts and off-shore assets owned or controlled by foreign financial institutions (FFI's) including other financial intermediaries.

In the UK, there are two specific category definitions for 'UK VAT' for the Union schemes and non-Union schemes. Under the Union schemes 'UK VAT' is defined as VAT in respect of supplies of scheme services treated as made in the UK as contemplated in para 38(1), Part 1 interpretation of Schedule 22 of the Finance Act 2014 (FA). In terms of para 10(2)*(e)*, Part 2 of Schedule 22 of the FA, 'UK VAT' in relation to non-Union schemes means VAT, which a person is obliged to pay either in another member state or in the UK in respect of qualifying supplies treated as provided in the UK at a time when the person is currently or was previously a registered participant under the special scheme. Elsewhere, Canada's digital tax model is basically regulated by the Uniform Electronic Commerce Act (1999) as the primary legislation. Consumers in Canada residing within British Columbia are charged Provincial Sales Taxes for online sales such as acquisition of software or taxable services in terms of s 8 of the Provincial Sales Tax Act, SBC 2012. In contrast, online digital products imported by a recipient in South Africa are subject to VAT in terms of reg 2(2) of the Electronic Service Regulations.

Conclusion

It is my recommendation that when reforming the common VAT system tax legislators, bearing economic considerations in mind, should incorporate the economic presence test that has gained momentum. Where the incidence of tax being the privilege of deriving economic benefit from markets in a forum state where the recipient receives taxable supplies see *Tax Commissioner of West Virginia v MBNA American Bank*, 640 S.E.2d 226 (W.Va.2006) at 18 – 24. In view of the evolving commerce the US Supreme Court in landmark cases adopted the substantial economic nexus test when taxing remote out-of-state retailers trading in intangible products online such as trademarks see *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (1993) at 16 – 19 and intellectual property licensed through franchisees see *KFC Corp v Iowa Department of Revenue* 792 N.W.2d 308 (2010) at 15. Model intergovernmental tax agreements such as the internationally acclaimed US Federal tax legislation, FATCA, is a bold step towards the right direction in future digital economic integration.

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#ThingsThatReallyMatter

The witness is on screen –

video technology assisting the court process

By Izette Knoetze

The legal system is generally slow to embrace new technology, yet the future of our courts is greatly dependent on technology and how technology can improve the functioning of the courts.

At present, for a legal representative to consult with a client held in custody he or she requires a visit to be pre-arranged, with limited time availability and cost for both legal representative (travel and general waiting) and correctional services (in dealing with the legal representative as a visitor, monitoring and supervising the visit). With the use of video technology comes the promise of convenience and cost savings that should be embraced by the legal fraternity.

A new study recommends more usage of videoconferencing in court rooms in the United Kingdom, in order to cut costs. Sir Brian Leveson's review of efficiency in criminal proceedings (Sir Brian Leveson 'Review of Efficiency in Criminal Proceedings' January 2015 (www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf, accessed 4-5-2015)), commissioned by the Lord Chief Justice in February 2014, alongside the Jeffrey review (Sir Bill Jeffrey 'Independent criminal advocacy in England and Wales' May 2014 (www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf, accessed 4-5-2015)) into criminal advocacy, contends that criminal courts are 'lagging significantly' behind the business world in their use of Information Technology (IT) and videoconferencing. Leveson says that it is time to introduce virtual hearings by e-mail and video 'on a more organised basis'. In such hearings, defendants, victims and witnesses 'will be able to participate via an audio or video link'. However, he acknowledges 'for the purposes of this review' that hearings where imprisonment is a possibility will continue to take place in conventional courtrooms. Leveson's review is likely to be seized on by a Ministry of Justice contemplating a further round of budget cuts in the next Parliament, according to the report (see Michael Cross 'Leveson cost-cutting review backs virtual courtrooms' 23-1-2015 *The Law Society Gazette* (www.lawgazette.co.uk/law/leveson-cost-cutting-review-urges-virtual-court-rooms/5046235.article, accessed 11-5-2015)).

Picture source: Gallo Images/iStock

Bail via videoconference

Videoconferenced bail hearings have become increasingly common in legal proceedings in the United States (US). An Illinois court first used video technology to conduct videophone bail hearings in 1972. Philadelphia soon followed in 1974 when a closed-circuit television system was installed in court. By 2002, over half of the states permitted some types of criminal proceedings to be held by videoconference. Amendments to Federal

Rules of Criminal Procedure 5 and 10, which came into effect on 1 December 2002, permit videoconferencing for initial appearance and arraignments, but only with the accused's consent.

According to Shari Seidman Diamond ('Efficiency and Cost: The impact of videoconferenced hearings on bail decisions' (2010) 100 (3) *Journal of Criminal Law & Criminology* at 877) the adoption was fuelled by the attractions of a reduction in transportation and other costs associated with live proceedings. Videoconferenced hearings also have the benefit of reducing safety concerns when prisoners or potentially volatile mentally disturbed incarcerated individuals are involved, because transporting those individuals to court for a live hearing may pose a security risk. All of these considerations led to increasing use of remote video feeds in conducting administrative and civil proceedings, as well as hearings dealing with criminal matters ranging from bail to sentencing.

Constitutionality of conducting bail hearing via videoconference

In the matter of *LaRose v Superintendent*, Hillsborough County Correction Administration 702 A.2d 326, 329 (N.H.1997) the court held that videoconferenced bail hearings were constitutionally permissible. The petitioners maintained that the teleconference procedure violated either statutory or constitutional mandates, that require that a person who is arrested and held in custody 'shall be taken before a district or municipal court without unreasonable delay, but not exceeding 24 hours, Sundays and holidays excepted, to answer for the offense'. Because of the teleconference procedure, the petitioners contended, they were not 'taken before the court'. The court held that one needs to turn first to the plain meaning of the words used in matters of statutory interpretation. What encompasses being 'taken before the court', in light of current audio-visual interactive technology is ambiguous. The court noted that the legislature intended to ensure the timely arraignment of a person being held in custody, not to guarantee face-to-face contact with the court. Consequently it was held that the teleconference procedure was not a violation of constitutional mandates.

Conducting remote hearings

Remote hearings are presently being tested in a number of courts in England and Wales. Sir Leveson proposes that the utilisation of audio and video hearings, with a view to countrywide implementation, should be made a priority within the work of the Criminal Justice System Efficiency Programme.

According to Sir Leveson, some of the advantages of remote hearings are that it enables the presiding officer, provided he or she has access to the relevant materials, to sit at any court centre or any venue with suitable IT facilities. This will ease the pressure on courtrooms because the proceedings can be conducted from their chambers. This will also enable legal representatives to either appear from their chambers or offices, or from a court where they are appearing in other cases. The accused, the victim and witnesses will be able to participate via an audio or video link and observers (members of the public) might also be able to observe the proceedings in a similar way (Leveson (*op cit*) at 14).

There are, however, seven essential prerequisites for remote hearings:

1 High quality equipment

The equipment must be reliable and the audio and visual quality should be of a high standard. The voices and the faces of those involved need to be clear so that the remote hearing in this critical sense replicates what can presently be seen and heard in court.

2 Digital recording and access

The proceedings must be digitally recorded. Access should also be provided to the audio and visual archive.

3 Cases to be 'queued'

A listing system for audio and video hearings should be set up in order for the cases to be queued with the participants waiting online to be called.

4 Video facilities in prisons

The system is dependent on the ability of the prison establishment to provide sufficient video booths so that accused persons can be present during the hearing without having to travel to court. There should also be adequate capacity within the prison to ensure that legal representatives are able to conduct remote conferences and consultations in private with adequate security. This will allow legal representatives the opportunity to receive instructions without travelling to the correctional facility where his or her client is held and without the time constraints that usually operate on such visits.

5 Showing exhibits

A further requirement is that the system must enable documents and other exhibits to be shown via the video link. Various systems that are currently available provide this facility (essentially this is done by allowing one of the party to show or share the screen of his laptop on the screens used by the other party).

6 Training

The proper training in the use of new technology is an essential requirement for all stakeholders involved.

7 Retention of the gravitas of proceedings

Sir Leveson suggests at 16 that a committee should be constituted of representatives from the participants in the justice system to determine best practice in the conduct of such hearings that should then be included in Criminal Practice Rules or Directions.

Current position in South Africa: Audio Visual Remand System

The current Audio Visual Remand (AVR) system in South Africa aims to enhance the efficiency of the criminal justice system and is designed to dispense justice speedily as required by our Constitution. The Justice Department implemented the AVR Systems at certain courts and correctional centres. According to the Protocol on Procedure to be followed in the AVR process and AVR protocol, AVR is being utilised in the postponement of criminal cases against accused persons who are in custody awaiting trial via a high quality audio-visual link between the correctional centre and the court (AVR Protocol of 2013 page 3 (www.capelawsoc.law.za/docs/AVR%20Protocol.pdf, accessed 4-5-2015)). No provision is made for conducting remote hearings in South Africa as the AVR is currently being utilised at courts and facilities where an accused –

'(*a*) is over the age of 18 years;

(*b*) is in custody in a correctional centre in respect of an offence;

(*c*) has already appeared before a court;

(*d*) has been remanded in custody pending his or her trial.'

It is further used in instances where an accused '(*e*) is required to appear or be brought before a court in any subsequent proceedings,' where no evidence is to be led or any argument is to be heard for the purpose of a further postponement of the case or consideration of release on bail.

• See also Roxanne Henderson 'Justice system to go hi-tech' 13-4-2015 *Times Live* (www.timeslive.co.za/thetimes/2015/04/13/justice-system-to-go-hi-tech, accessed 4-5-2015).

Concerns regarding the use of videoconferencing in criminal cases

Legal representatives and judges have offered a variety of arguments against the use of videoconferencing in criminal cases in the US (see Diamond (*op cit*) at

878). They have argued that the use of videoconferencing impairs the fairness and integrity of criminal proceedings in a variety of ways that are briefly discussed below.

The first concern relates to instances where witnesses testify outside of the presence of the accused and the accused is deprived of the opportunity for a physical meeting – a confrontation – with those who provide evidence against him, an arguable violation of the Confrontation Clause of the Sixth Amendment to the US Constitution.

Another concern is that the accused 'presence' for a proceeding is only an image on a video monitor. There is a diminution of the court's ability to gauge such matters as the accused's credibility, his competence, his physical and psychological wellbeing, his ability to understand the proceedings and the voluntariness of any waivers of rights that the accused may be called on to make. The above raise serious procedural due process concerns.

A further concern relates to communication between the client and his legal representative. Does video rather than live interaction deprive the accused of effective attorney-client communication and thus impair adequate representation?

I submit that the justice system must confront serious concerns about the impact of technology on the rights of the accused. In order to remedy this loss it would be necessary to provide the accused with a way to communicate privately with his or her legal representative. The remote accused would have to be able to signal the legal representative in the courtroom that he or she needs to have a private conversation. An accused might, for example, be given a device that he or she could activate to cause a paired receiver to vibrate in his legal representative's pocket to signal a desire to communicate privately. Unlike the brief whisper that can occur when the accused and his legal representative are standing in a courtroom. It should be emphasised that this private conversation would require a private communication channel to preserve confidentiality.

Conclusion

The use of modern IT can and should go much further than what is discussed above.

New technologies are available that provide a reliable and high-quality means of dealing with many aspects of criminal cases without requiring the parties to travel to courts. The attractions of technology invite courts to implement these apparently cost-saving measures, particularly when the demand for court resources is high.

Video monitors, digital projectors and projection screens are making it possible to easily use images to supplement more traditional verbal presentations. The push to allow remote witnesses to testify is both plausible and compelling in situations in which the witness is unavailable. An expert witness for example, experienced with technology, may have no difficulty participating remotely in a hearing.

I suggest that with appropriate investment in equipment and infrastructure, the making of extensive and time-consuming journeys to courtrooms for appearances that often only lasts a very short period of time will soon be something of the past. I further suggest that the use of technology, namely, videoconferencing should not be limited to mere postponements in South African courts but should be expanded to include the conducting of bail hearings (as in the US) and remote hearings (as in England and Wales).

I propose that pilot programmes be conducted that include an evaluation of the operation and impact of proposed reforms.

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By Liezl Zwart

Sibisi NO v Maitin: A dual burden of proof?

Sibisi NO v Maitin 2014 (6) SA 533 (SCA)

The judgment of *Sibisi NO v Maitin* 2014 (6) SA 533 (SCA) (see also See 2015 (Jan/Feb) *DR* 54) saw the issues of medical negligence and the absence of informed consent once again considered by the Supreme Court of Appeal (SCA). This article focuses on the nature and requirements underlying the two grounds of liability and aims to show that the reasoning behind and the results of the court's decision are untenable.

Facts and decision in the *Sibisi* case

The plaintiff in this matter instituted a claim on behalf of her minor daughter, who had suffered bodily injuries following natural birth. The injuries and *sequelae* included damage to the infant's brachial plexus (a network of nerve fibres that run from the spine through to the shoulder and down the arm and hand) as a result of traction during childbirth, resulting in Erb's palsy.

The claim was based on medical negligence, and absence of informed consent in the alternative. The defendant was absolved from liability on both grounds. The court reasoned that once the plaintiff has failed to establish medical negligence, the question of informed consent and of wrongfulness automatically became moot: The plaintiff '…would still have to establish negligence on the part of [the defendant] to succeed in the action … [based on absence of informed consent]' (at para 22). Ironically this court refers to *Castell v de Greef* 1994 (4) SA 408 (C) with regard to informed consent, but like others before it (*Broude v McIntosh and Another* 1998 (3) SA 60 (SCA) and *Louwrens v Oldwage* 2006 (2) SA 161 (SCA)) avoids contradicting the test for disclosure and material risk as established in *Castell* (at para 48 and 51).

The common law proof of negligence and absence of consent

Common law requires that the five elements of a delict (conduct, causality, wrongfulness, capacity and fault) must be proven in order to succeed with a delictual claim. The fault element may take either the form of *dolus* or *culpa*.

If a claim is based on medical negligence as ground of liability, negligence rather than intent, must be proven. The test for medical negligence relates to reasonable skill and care, foreseeability and preventability of ensuing harm, and is measured against the standard of the reasonable expert in the circumstances (*Mitchell v Dixon* 1914 AD 519 and *Van Wyk v Lewis* 1924 AD 438). It is essentially a matter of unskilful or incompetent medical treatment (*Lymbery v Jefferies* 1925 AD 236; NJB Claassen and T Verschoor *Medical negligence in South Africa* (Pretoria: Digma Publications 1992)).

The failure to obtain informed consent has occasionally been deemed medical negligence (*Lymbery*; *Richter and Another v Estate Hammann* 1976 (3) SA 226 (C) and the *Broude* matter). Technically though, the act of administering medical treatment, however favourable the outcome, or laudable the doctor's motives, is nothing but an act of violence or physical force on the patient's person (Strauss 'Bodily injury and the defence of consent' (1964) *SALJ* 187; SA Strauss and MJ Strydom *Die Suid-Afrikaanse geneeskundige reg* (Pretoria: Van Schaik 1967) at 180 – 181 and *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 721B – D). Without informed consent, the doctor should be liable based on common law assault, defined in law as the '… intentional application of force or violence … to the person of another …' (*Rex v Jolly and Others* 1923 AD 176). In the case of assault, the fault element takes the form of intent, and never negligence. Failure to obtain informed consent is therefore largely accepted as constituting assault (*Stoffberg v Elliott* 1923 CPD 148; *Esterhuizen* and *Lampert v Hefer NO* 1955 (2) SA 507 (A) and the *Castell* matter).

Comments on the *Sibisi* judgment

The court's approach in *Sibisi* seemingly fails to take cognisance of the fact that wrongfulness is evaluated separately from fault, and that the form of fault in absence of informed consent (which amounts to common law assault) is that of *dolus* rather than *culpa*, as is the case in medical negligence. From the facts of the case, it appears that Mrs Sibisi would not have discharged the onus of proof on either ground of liability in any event, if the court had applied the common law correctly. The practical outcome would have remained the same. The common law has been re-written to make the proof of negligence prerequisite to the proof of intent. The plaintiff who wishes to prove an absence of informed consent faces a new 'dual burden' of proof.

Conclusion

This test for medical negligence is distinct from that for common law assault. While it was not traditionally required, in order to successfully institute a claim on account of an absence of informed consent, to prove negligence on the part of the attending physician, following the *Sibisi* judgment one must prove all five elements of the delict and, including both possible forms of fault (first negligence, and then also intent), rather than just intent.

Medical negligence and the absence of informed consent are and should be acknowledged as independent alternative claims. I submit that the court in *Sibisi* has conflated the issues of negligence and intent, and that applying the *Sibisi* judgment in future would almost certainly result in legally unsound consequences.

Liezl Zwart *BA LLB (UP)* **is an attorney at Levin van Zyl Inc in Johannesburg.** ❑

THE LAW REPORTS

April 2015 (2) South African Law Reports (pp 331 – 648); [2015] 1 All South African Law Reports March no 1 (pp 525 – 648) and no 2 (pp 649 – 718); 2014 (12) Butterworths Constitutional Law Reports – December (pp 1397 – 1513) and 2015 (1) Butterworths Constitutional Law Reports – January (pp 1 – 125)

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

Abbreviations:

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Closure of schools: In *Minister of Education for the Western Cape and Another v Beauvallon Secondary School and Others* [2015] 1 All SA 542 (SCA) the appellant, Minister of Education for the Western Cape, closed 20 schools in the province, mainly on the grounds of dwindling learner numbers, multiple-grade teaching in one classroom and poor results. Eighteen of the schools applied to the High Court for an order reviewing and setting aside the decision of the appellant. The majority of the WCC (Le Grange and Dolamo JJ) held that the decision of the appellant had to be set aside while the minority (Bozalek J) held to the contrary. An appeal to the SCA, save in respect of the first respondent school, Beauvallon Secondary School and its School Governing Body, the second respondent, was upheld with no order as to costs. Having been successful, the first and second respondents were granted their costs.

The main judgment was delivered by Leach JA (Brand, Maya JJA and Mathopo AJA concurring and Willis JA concurring in a separate judgment, which gave additional reasons) who held that there was no simple litmus test to determine whether a decision by a public official was administrative or executive in nature and in order to determine the issue a close analysis had to be undertaken on the nature of the public power or function in question in the light of the facts of each case. However, a decision heavily influenced by considerations of policy was a clear indication of it being executive rather than administrative in nature. Even in cases in which the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was not of application, the principle of legality could be relied on to set aside an executive decision not made in accordance with the empowering statute. In the present case the statutory incorporation into s 33(1) of the South African Schools Act 84 of 1996 (the Schools Act) of a notice and comment procedure rendered superfluous any attempt to pigeonhole the decision to close the schools as either executive or administrative in nature.

As long as the gist of his reasons was conveyed, the appellant was not obliged to spell out in great detail why the particular schools were being considered for closure. The appellant was not obliged to inform the schools of the adverse policy considerations and information concerning the government's finances to facilitate their making proper representations. The fact that the appellant's ultimate reasons for closure might not have tallied precisely with his initial reasons did not mean either that his final decision was vitiated by procedural unfairness or that additional reasons emerging during consultation process prescribed under the Schools Act could not be taken into account and relied on without giving further notice to the schools or the public.

Companies

Furnishing of copy of winding-up application to employees: Section 346(4A)(*a*) of the Companies Act 61 of 1973 (the Act) provides, among others, that when an application for winding-up of a company is presented to court, the applicant must furnish a copy of the application

to a trade union representing employees, the employees themselves, the South African Revenue Service and the company itself, if it is not the applicant. In the case of the employees, a copy of the application is required to be affixed to any notice board to which the applicant and the employees have access inside the premises of the company or to the front gate of the premises, failing which to the front door of the premises from which the company conducted any business at the time of the application. Furthermore, in terms of s 346(4A)(*b*) the applicant is required, before or during the hearing, to file an affidavit by the person who furnished a copy of the application, explaining the manner in which the application was furnished to the employees.

The above provisions were dealt with in *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA); [2014] 1 All SA 294 (SCA) where the GJ, per Tsoka J, had granted final winding-up orders, at the instance of the respondent, Eskom Holdings, against the first appellant, EB Steam and its 19 subsidiaries. The winding-up orders were resisted on the ground that there had not been compliance with s 346(4A)(*a*) of the Act in that the winding-up order applications had been served at the head office of the first appellant in Johannesburg, rather than affixed at the notice board in all locations all over the country, at which the various companies were conducting operations and had employees. The appeal was successful to the extent that final winding-up orders were set aside and replaced by provisional winding-up orders returnable eight weeks from the date of the order. The appellants were directed to furnish their employees with winding-up applications and, thereafter, file an affidavit explaining what had been done. The respondents' costs were to be costs in the liquidation of the appellants, whereas if the provisional winding-up orders were to be discharged on the return date, the appellants were to be jointly and severally liable for the costs.

Wallis JA (Mthiyane AP, Cachalia, Pillay and Willis JJA concurring) held that while the obligation to furnish the winding-up application papers to the employees was peremptory, the modes of doing so, as indicated in the section, were directory with the result that alternative effective means could be adopted. In other words, the methods for furnishing employees with the application papers as set out in s 346(4A)(*a*) were no more than guides. If other more effective means, such as personal service on employees, were adopted and reflected in the affidavit filed in terms of s 346(4A)(*b*) then, provided that the court was satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees, there would have been compliance with the section.

If the court was satisfied that the method adopted by the applicant to furnish the application papers to the employees was satisfactory and reasonably likely to make them accessible to the employees, there was no reason to refuse a winding-up order, whether provisional or final, merely because they were not furnished to the employees in one of the ways indicated in the section. Nor should the court refuse an order merely because it was not satisfied that the application papers had come to the attention of all employees. The section simply required that the application papers be made accessible to the employees who should be given adequate opportunity to respond, if they were so minded.

NB: The other case dealing with the section is *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GP), which dealt with the person who should make the required affidavit and the contents thereof.

Contempt of court

Disobedience of court order: In *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA); [2015] 1 All SA 299 (SCA) the appellant home owners association, Meadow Glen, obtained several court orders in terms of which the respondent, Tshwane Municipality (Pretoria), was ordered to fence off an adjacent informal settlement, maintain the fence and provide security guards to control entry into and exit from the settlement. However, complying with the court orders proved elusive as residents of the settlement repeatedly cut holes through the fence and duplicated access cards, thus providing access to newcomers. Because of the respondent's failure to comply with the court orders, the appellants approached the High Court for an order for contempt of court in terms of which one Mr F Fenyani, the respondent's Director for Housing Resource Management, would be imprisoned for one month. The GP, per Kubushi J, dismissed the contempt of court application, hence an appeal to the SCA. The appeal was dismissed, each party being ordered to pay own costs.

Wallis JA and Schoeman AJA (Cachalia, Zondi JJA and Dambuza AJA concurring) held that if the respondent municipality experienced difficulty in complying with court orders, it should have returned to court to seek a relaxation of the terms of the orders. It was not appropriate for the municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. The municipality should have taken the initiative and sought clarification from the court.

There was no basis in South African law for orders for contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, who were not themselves personally responsible for the wilful default in complying with a court order that lay at the heart of contempt proceedings. It had to be clear, beyond reasonable doubt, that the official in question was the person who had wilfully and with knowledge of the court order failed to comply with its terms. Contempt of court was too serious a matter for it to be visited on officials, particularly low ranking officials, for breaches of court orders by public bodies for which they were not personally responsible.

The municipal manager was, so far as the officials of a municipality were concerned, the responsible person tasked with overseeing the implementation of court orders against the municipality. The municipal manager would know, as the accounting officer, what was feasible and what was not. The municipal manager could not pass responsibility for those administrative duties to a manager or director who was not directly accountable in terms of their duties. It was unacceptable that a person had to be 'selected' by the municipality to be liable for imprisonment when that person was clearly not the one who had control over all the facets and terms of the order and it was clear that he or she was being made the scapegoat. The municipal manager was the official who was responsible for the overall administration of the municipality and, therefore, the logical person to be held responsible. Even if the municipal manager delegated tasks flowing from a court order to others, it remained his or her responsibility to secure compliance therewith. The court added *obiter* that while certain political office bearers could also be liable for contempt, it was not necessary to traverse the issue in the instant case.

Fundamental rights

Right of access to courts: In *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd and Others* 2015 (2) SA 539 (CC); 2014 (12) BCLR 1465 (CC) the first respondent, Royal Anthem (RA), sold immovable property to the second and third respondents, Yeun Fan (YF) and Shun Chen (SC) respectively, in terms of which the last two were required to pay a deposit and transfer duty to RA's attorneys and conveyancers, the applicant, Stopforth Swanepoel & Brewis Inc (SSB). That was duly done. The agreement further provided that if the deal were to fail, the deposit would be returned with

interest to YF and SC. When that happened RA instructed SSB not to give YF and SC their money back, contending that the contract allowed it to keep same in terms of a forfeiture clause. As a result YF and SC instituted High Court proceedings against RA and SSB to recover payment. SSB gave notice to abide by the decision of the court and as a result the action against it was withdrawn. The GP ordered RA to return the money. An appeal by RA was dismissed by the SCA, which also clarified certain 'ancillary issues' and altered the order of the High Court. It held that as the funds had been transferred to SSB and were held by it in an interest generating trust account in terms of the Attorneys Act 53 of 1979, SSB and not RA, had to return the money. Accordingly, although it was not a party to the proceedings and had given notice to abide, SSB was ordered to return the money. Moreover, that repayment of the money was more than what SSB held, in that whereas the interest earned by the trust account funds was low, the court ordered SSB to return it with interest calculated at the higher legal rate of 15,5% per annum. SSB appealed to the CC against the order of the SCA, which was made against it in its absence.

The CC gave SSB leave to appeal and upheld the appeal. RA, and not SSB, was ordered to return the deposit and transfer duty, with interest calculated at the rate of 15,5% per annum, as well as the amount of that had been invested in the trust account, together with interest that it generated. The court said nothing about the costs.

Reading a unanimous judgment of the court, Nkabinde J held that RA was a party that should have been ordered to repay the money, together with interest, as well as interest that was earned when part of that money was invested in a trust account in terms of the Attorneys Act. It was common cause that the dispute before the SCA did not extend to the liability of SSB. It was also undisputed that SSB merely kept the funds on the instructions of RA. After the dispute arose SSB indicated that it had lodged the funds in the interest-bearing trust account until such time as a court order indicated to whom it should be paid. There was no issue on appeal between SSB on the one hand and YF and SC on the other regarding SSB's liability. SSB was not a participant on appeal and should at the very least have been invited to make submissions. That did not happen. Consequently SSB was not heard. For these reasons SSB was entitled to seek relief in the CC.

Temporary emergency accommodation: In *Mbatha and Others v City of Johannesburg Metropolitan Municipality and Others* [2015] 1 All SA 575 (GJ) the applicants, Mbatha and others, were residents of an informal settlement in Kliptown, Soweto in Gauteng who lived within the flood line and were accordingly troubled by floods during the rainy season, an occurrence they experienced over the years. In December 2014 and immediately after severe floods they sought an urgent High Court order in terms of which the first and second respondents, the City of Johannesburg Metropolitan Municipality and a member of the Mayoral Committee, were required to provide them with temporary emergency accommodation. The respondents offered them accommodation at a civic hall, which the applicants found unacceptable. Moshidi J held that the circumstances of the case justified the granting of the application on an urgent basis, with costs. The respondents were ordered to provide the applicants with temporary emergency accommodation within seven days. The court held that to provide the applicants with temporary accommodation at a community hall until the development of permanent accommodation was completed a few years down the line would violate their rights to privacy, dignity, freedom and security as enshrined in the Constitution. In addition, and of particular importance, were the rights of children at stake. In this regard, s 28(1)(*c*) and (2) of the Constitution guaranteed that every child had the right to basic nutrition, shelter, basic health-care and social services and further that the child's best interests were of paramount importance in every matter concerning the child. All of these rights would be infringed if the applicants were to be given temporary emergency accommodation at the civil hall, as offered by the respondent.

Insolvency law

Invalidity of appointment policy for insolvency practitioners: In February 2014 the Minister of Justice and Constitutional Development adopted a 'Policy on the Appointment of Insolvency Practitioners', which regulated the appointment of insolvency practitioners, defined as *curatores bonis*, trustees and liquidators, by the Master of the High Court. Interested parties opposed the policy and obtained interim interdicts in the WCC and GP pending finalisation of proceedings in which an order declaring the policy unlawful was sought. The envisaged proceedings resulted in *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others, and Another Application* 2015 (2) SA 430 (WCC); [2015] 1 All SA 589 (WCC) in which the applicant, SA Restructuring and Insolvency Practitioners Association (SARIPA), sought an order declaring the policy inconsistent with the Constitution. Although there was no consolidation with the application, which had been instituted in the GP, the two were heard together with the result that the outcome of the WCC was decisive of the Gauteng application. In terms of the policy the first respondent, the Minister, required that the Master of the High Court had to appoint insolvency practitioners using the formula 40% African, coloured, Indian and Chinese females; 30% African, coloured, Indian and Chinese males; 20% white females;

and 10% white males. The appointments had to be sequential in the sense that they had to be made precisely in that order. In the same categories the names were arranged alphabetically using surnames followed by first names, and appointments had to be made using the alphabetical order. The policy was challenged on a number of grounds including lack of discretion on the part of the Master to make appointments, its rigidity, lack of time limit after which it would come to an end, etcetera.

Katz AJ granted an order declaring the policy inconsistent with the Constitution and, therefore, invalid. The third respondent, the Association for Black Business Rescue and Insolvency Practitioners of South Africa (ABRIPSA), an intervening party which took the side of the Minister and Chief Master of the High Court, was ordered to pay costs incurred in the WCC application.

The court held that the formula used in the policy allowed insufficient scope for the Master to balance the practitioners' race, gender and years of experience on the one hand, with their industry-specific knowledge and expertise on the other. The policy put in place a rigid, inflexible regime in which the Master effectively became a rubber stamp, which had to appoint a designated person by rote from fixed lists arranged alphabetically on race and gender lines. To allow such considerations in appointment of provisional liquidators was inconsistent with the Master's oversight role in respect of final liquidators. A system that made use of a strict roster was out of keeping with the discretion required of the Master in s 370 of the Companies Act 61 of 1973 and s 57 of the Insolvency Act 24 of 1936. Therefore the rote alphabetical system set up by the policy unlawfully fettered the Master's discretion. Insofar as the policy aimed to make the insolvency industry accessible to previously disadvantaged individuals, it had to do more than increase numbers but still ensure that there was a match between individual skill and the requirements of the role within the system provided for by the law. Playing a 'numbers game' went further than formal equality and was not lawful affirmative action as contemplated by the Constitution.

The manner in which the race and gender categories were employed in the roster formula created silos, which overly privileged race and gender at the expense of all other relevant characteristics. There was explicitly no scope for considering the skills, knowledge, expertise and experience of practitioners when being appointed by the Master. A scheme of that kind could not possibly give effect to the dignity of either those advantaged or disadvantaged by the policy. In becoming a nearly absolute barrier to employment the policy implicated the right to work and inherent dignity of those it excluded and was, therefore, not a lawful affirmative action.

Local government

No late objection to municipal valuation of property: Section 50 of the Local Government: Municipal Property Rates Act of 2004 (the MPRA), read with s 49(1)(*a*), provides, among others, that any person may lodge an objection with municipal manager regarding any matter reflected in, or omitted from, the valuation roll. Such objection is required to be lodged within 30 days of publication of notice inviting members of the public to inspect the valuation roll and lodge objections thereto. Alternatively, a member of the public may ask for publication of supplementary valuation roll in relation to his or her property. Section 80 empowers the MEC for local government of a province, on good cause shown, to condone any non-compliance with a provision of the MPRA. In *MEC for Local Government and Traditional Affairs, KwaZulu-Natal v Botha NO and Others* 2015 (2) SA 405 (SCA); [2015] 1 All SA 649 (SCA) a certain company, Universal Retail Portfolio (URP), indicated in its records that it purchased property in 2006 for R 24 million. However, that was totally misleading as the market value of the property was in fact in the region of R 4,5 million. The amount of R 24 million was used in order to defraud tax authorities regarding value-added tax claim. Based on the provided information the local government, eThekwini Municipality (Durban), determined the property's market value as R 23 million and assessed it for municipal rates in the amount of some R 2,7 million for the 2008 financial year. The company did not object to the assessment or ask for a supplementary valuation roll. Subsequently, the company was wound up in 2010. In 2011 its liquidators, the present respondents, Botha and others, sold the property in liquidation and sought municipal clearance certificate in order to transfer it to the buyer. It was only then that they found out the outstanding amount, which was inclusive of the R 2,7 million 2006 assessment. They accordingly asked the MEC for condonation and leave to lodge objection against the 2008 assessment. The MEC did not respond. As a result the respondent approached the High Court for, amongst others, an order condoning late objection to assessment or alternatively, an order directing the MEC to consider the application for condonation within 14 days of the granting of the order.

The KZP, per Tonjeni AJ, granted an order referring the respondent's application for condonation to the MEC for consideration and making a decision within 30 days. The MEC appealed against that order while the respondents cross-appealed. In the cross-appeal the respondents sought a court order granting condonation instead of having the matter referred to the MEC for consideration. The SCA upheld the appeal with costs and dismissed the cross-appeal.

Fourie AJA (Navsa ADP, Shongwe, Theron and Swain JJA concurring) held that absent an objection against the

2008 valuation of the property, the internal appeal procedure as provided for in s 54 of the MPRA was not available to the respondents. The company not only misrepresented the 2006 purchase price of the property but subsequently failed to take any steps to prevent the misrepresentation from materially influencing the 2008 municipal valuation of the property. In those circumstances the company would not only be prevented from benefitting from its own fraudulent conduct, but would also be precluded from having such conduct condoned by allowing it to lodge a late objection to the 2008 valuation. In any event, the company would certainly not be able to show 'good cause', which would entitle it to relief in terms of s 80 of the MPRA.

Parent and child

Full parental responsibilities and rights of an unmarried father: Section 21(1)(*b*) of the Children's Act 38 of 2005 (the Act) provides, among others, that an unmarried father of a child, regardless of whether he has lived or is living with the mother of the child, acquires full parental rights and responsibilities over the child if he –

'(i) consents to be identified or successfully applies to in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period'.

In *KLVC v SDI and Another* [2015] 1 All SA 532 (SCA) the issue was whether the first respondent, the father, had satisfied the requirements of the section and accordingly acquired full parental rights and responsibilities over his minor child. During the first respondent's temporary trip overseas, the appellant mother relocated the four-month-old minor from Durban to a location in England without the consent of the father or authority of a court. As a result the first respondent instituted proceedings in an English court for return of the child to South Africa. The English court was unable to decide if the removal of the child from South Africa was wrongful in that it was done without the required consent of the father or authority of court. It accordingly referred the question for determination by a South African court.

The KZD held that the first respondent had satisfied the requirements of the section and accordingly acquired full parental rights and responsibilities over the minor child. An appeal against that order was dismissed with costs by the SCA.

Mbha JA (Maya, Leach, Theron JJA and Schoeman AJA concurring) held that determining whether or not an unmarried father had met the requirements of the section was an entirely factual enquiry. It was a type of matter, which could only be disposed of on a consideration of all the relevant factual circumstances of the case. An unmarried father either acquired parental rights or responsibilities or did not. Judicial discretion had no role in such an enquiry. The concept of a contribution or attempt in good faith to contribute to the child's upbringing for a reasonable period was an elastic one, which permitted a range of considerations culminating in a value judgment as to whether what was done could be said to be a contribution or a good faith attempt at contributing to the child's upbringing over a period which, in the circumstances, was reasonable.

In the present case, the first respondent demonstrated sufficiently that he had acquired full parental responsibilities in respect of the minor. As co-guardian, his consent was required prior to the removal of the child from South Africa by the appellant. By removing the minor without such consent the appellant acted in breach of the first respondent's parental rights and responsibilities.

Patents

Revocation of patent for lack of utility: In *Marine 3 Technologies Holdings (Pty) Ltd v Afrigroup Investments (Pty) Ltd and Another* 2015 (2) SA 387 (SCA) the appellant, Marine 3 Technologies, was the patentee of surface active solution (surfactant), which was used to control dust in mining wet surfaces in fire-fighting and dissolve fertilizers in agriculture. The respondent, Afrigroup Investments, was a distributor of the product. After a dispute arose between the parties and the distribution agreement was terminated, the respondent sought revocation of the patent on a number of grounds, including one of lack of utility of the product, alleging that the product was not capable of achieving the results that it claimed it did. The Court of the Commissioner of Patents, per Tuchten J, granted the revocation because of lack of utility, hence the appeal to the SCA. Accepting that the decision of the court *a quo* was not correct and would be set aside by the SCA, the parties agreed that the respondent would not oppose the appeal and further that the appellant would not seek costs against the respondent, both of appeal and before the court *a quo*. The SCA duly upheld the appeal and set aside the order of the court *a quo*, making no order as to costs.

Ponnan JA (Swain JA, Mathopo, Mocumie, Gorven AJJA concurring) held that the onus of establishing invalidity on the grounds of inutility rested on the respondent. An invention that could not be performed was obviously not capable of being used or applied in trade, industry or agriculture and would therefore not be patentable and, if patented, the registration for it would be liable to be revoked. Inutility was a question of fact to be decided in the circumstances of each case. An invention was not useful if it did not effectively produce the result aimed at or promised by the specification. In particular, where a claim involved the use as ingredients of a class of chemical compounds, it was invalid if any of them did not work. To determine the inutility issue, it was necessary to begin with a consideration of the meaning of the claims of a patent. In construing a claim one had to have regard to the way in which it would appeal to the addressee who had to work with such things.

In the instant case, the conclusion of the respondent's expert witnesses that the surfactant could not be manufactured, was not based on any actual attempt by either of them to manufacture the product but was purely theoretical. The factual evidence that the surfactant had indeed been in commercial manufacture and was sold debunked that theoretical hypothesis. Moreover, the respondent was alleged to have infringed the patent by the manufacture of the same surfactant. Perverse attempts to show failure, or the choice of unusual combinations, which would not succeed, were generally not sufficient to support the plea of non-utility.

• See 44.

Township development

Compensation for expropriation of excess land: Section 28 of the Western Cape's Land Use Planning Ordinance 15 of 1985 (LUPO) provides that: 'The ownership of all public streets and public places over or on land … shall, after the confirmation of such subdivision or part thereof, vest in the local authority … without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor … or is in accordance with a policy determined by the Administrator [now Premier] from time to time'. In brief, when a township is developed, the part of the land that is normally required for public streets and public places shall vest in the local authority free of charge while for any further land (excess

land) that vests in the local authority, unless it so vests in terms of policy determined by the Premier from time to time, compensation has to be paid.

In *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC); 2015 (3) BCLR 243 (CC) public streets and public places duly vested in the respondent, City of Cape Town, when a farm was developed into a residential area. However, further land (excess land) also vested in the respondent for 'higher-order roads', being regional road infrastructure envisaged in the respondent's structure plan. For that vesting of excess land, the appellant, Arun Property Development, claimed compensation in the amount of some R 13 million. At the hearing of the matter the WCC, per Dlodlo J, granted a separation of merits from the quantum and held that the respondent had to pay compensation to the appellant in an amount determined in terms of the Expropriation Act 63 of 1975. That decision was reversed on appeal to the SCA. An appeal to the CC was upheld with costs, the court holding that the appellant was entitled to compensation for expropriation of excess land, the quantum of which was to be determined in terms of the Expropriation Act, just as the High Court had ordered.

Reading a unanimous decision of the court, Moseneke DCJ, held that when the need for public roads arose from the normal needs of the subdivision of land itself, it made sense to expect the developer to bear the burden of providing the land, free of charge, for the purpose of public roads. There could be no township development without public streets and public places. But where the extent of the roads and public places was beyond the normal need, the local authority had to compensate the developer for the excess land that vested in it. The excess land was not related to, and the need for it preceded, and was not created by the subdivision of land. When the local authority resolved that the time had come to build the higher-order roads, the land had to be expropriated and compensation paid to the owner. Excess land, properly so established, should attract compensation, a remedy which s 28 itself used and LUPO provided for in a few other instances such as in s 19.

Unlawful arrest and detention

No vicarious liability for negligent conduct of magistrate: The facts in *Minister of Safety and Security and Others v Van der Walt and Another* [2015] 1 All SA 658 (SCA) were that the respondents, Van der Walt and Van Wyk, were arrested and detained on charges of theft, assault and pointing a firearm. Bail was denied on three occasions because when they made their first appearance in court, and after adjournment, they faced a new charge of armed robbery, which was not there on the original charge sheet. During adjournment the magistrate and prosecutor had a conversation and after resumption of the hearing the magistrate wrote something on the papers before her. The respondents suspected that the charge of armed robbery had been added by the magistrate but that could not be verified. The prosecutor did not know who added the charge of armed robbery. After their release on bail on the fifth day of detention, the respondents sued the complainant, one M, for having laid false charges against them, the first appellant, Minister of Safety and Security, the investigating officer, one P, in his personal capacity, as well as the Minister of Justice, for the wrongful conduct of the magistrate in denying them bail in circumstances where it should have been given.

The High Court, per Van der Merwe AJ, held the complainant M liable to the respondents. The court further held the first appellant, the Minister of Justice, and the investigating officer jointly and severally liable to each respondent in the amount of R 250 000. The complainant M did not appeal. Neither did the respondents cross-appeal against the High Court finding that the first appellant was not liable for the wrongful conduct of the National Prosecution Authority committed through the prosecutor. As a result it was the first appellant, for the conduct of the investigating officer P, the Minister of Justice, for the conduct of the magistrate, and P in his personal capacity, who appealed to the SCA. The appeal achieved limited success in that the amount awarded against the first appellant and P was reduced from R 250 000 to R 120 000. The appeal of the Minister of Justice was upheld, each party being ordered to pay own costs. For the rest of the appeal the first appellant was ordered to pay costs.

Tshiqi JA (Mpati P, Theron, Swain JJA and Mocumie AJA concurring) held that there was no conceivable reason for the refusal by the magistrate to release the respondents on bail. They remained in custody because of the groundless charge of armed robbery, which was added to the charge sheet and the collective negligence of P, the prosecutor and the magistrate. It followed that the detention of the respondents was unlawful. Furthermore, the investigating officer P was negligent in his handling of the bail application. His negligence was the prolonged detention of the respondents. As a result the High Court's finding of liability had to stand. However, the Minister of Justice was not liable because when magistrates acted in the course and scope of their functions they, like all judicial officers, enjoyed a status of judicial independence. That meant that although magistrates remained state employees under their contracts of employment, they performed a judicial function and formed part of the judicial branch of government. There was ample authority to the effect that judicial independence for judicial officers meant that they were protected from liability for their negligent conduct. A magistrate was not liable for

his or her negligent conduct when performing judicial functions because for reasons of public and legal policy his or her conduct was not regarded as wrongful. The fact that the magistrate was immune from liability for his or her negligent conduct meant that there was no basis to hold any other person, such as the Minister of Justice, vicariously liable for such negligent conduct. The court added *obiter* that as in the instant case the magistrate had not acted maliciously, it was not necessary to deal with the issue whether the Minister of Justice was vicariously liable for the malicious conduct of a magistrate.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with *Anton Piller* orders, arrest of associated ship, complaint against medical aid scheme, consolidation of parallel High Court and Equality Court proceedings, dismissal of appeal where judgment or order would have no practical effect or result, eviction of unlawful occupiers of land, extinctive prescription, failure to pay value-added tax not amounting to theft, hypothec arising out of instalment sale transaction, interpretation of rules of homeowners' association, jurisdiction of court to wind-up a company, late review of decision of property developer, remuneration and expenses of business rescue practitioner, search of business premises by police and selection process of judges.

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NEW LEGISLATION

Legislation published from 30 March – 30 April 2015

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SELECTED LIST OF DELEGATED LEGISLATION

Allied Health Professions Act 63 of 1982
Requirements for continuing professional development. BN85 *GG*38707/24-4-2015.
Banks Act 94 of 1990
Amendment of Regulations. GN R309 *GG*38682/10-4-2015.
Collective Investment Schemes Act 45 of 2002
Fees payable in terms of the Act. BN71 *GG*38627/1-4-2015.
Exemption of foreign collective investment schemes form complying with certain requirements. BN74 *GG*38649/1-4-2015.
Requirements for hedge funds. BN70 *GG*38626/1-4-2015.
Exemption of managers of collective investment schemes in securities, property and participation bonds from compliance on certain conditions. BN98 *GG*38735/30-4-2015.
Compensation for Occupational Injuries and Diseases Act 130 of 1993
Amendment of sch 4 (manner of calculating compensation). GN274 *GG*38643/30-3-2015.
Increase of monthly pensions. GN273 *GG*38643/30-3-2015.
Increase of maximum amount of earnings on which assessment of an employer shall be calculated. GN272 *GG*38643/30-3-2015.
Classification of industries. GN279 *GG*38650/2-4-2015.
Annual increase in medical tariffs for medical service providers: Blood services. GenN359 *GG*38719/24-4-2015.
Annual increase in medical tariffs for medical service providers: General rules and tariffs. GenN362 *GG*38722/24-4-2015.
Annual increase in medical tariffs for medical service providers: Hospitals. GenN354 *GG*38714/24-4-2015.
Annual increase in medical tariffs for medical service providers: Occupational therapists. GenN360 *GG*38720/24-4-2015.
Annual increase in medical tariffs for medical service providers: Ambulance services. GenN358 *GG*38718/24-4-2015.
Annual increase in medical tariffs for medical service providers: Wound care. GenN357 *GG*38717/24-4-2015.
Annual increase in medical tariffs for medical service providers: Renal care. GenN356 *GG*38716/24-4-2015.
Annual increase in medical tariffs for medical service providers: Social workers and psychologists. GenN355 *GG*38715/24-4-2015.
Annual increase in medical tariffs for medical service providers: Dental care. GenN353 *GG*38713/24-4-2015.
Annual increase in medical tariffs for medical service providers: Physiotherapists. GenN352 *GG*38712/24-4-2015.
Competition Act 89 of 1998
Guidelines for determination of administrative penalties for prohibited practices. GN323 *GG*38693/17-4-2015.
Consumer Protection Act 68 of 2008
Prescription of Consumer Goods and Services Industry Code and accreditation of alternative dispute resolution scheme administered by the Consumer Goods and Services Industry Ombud. GN R271 *GG*38637/30-3-2015.
Deeds Registries Act 47 of 1937
Amendment of Regulations. GN R269 *GG*38628/31-3-2015.
Electricity Act 41 of 1987
License fees payable by licensed generators of electricity. GenN332 *GG*38693/14-4-2015.
Electronic Communications Act 36 of 2005
Radio Frequency Spectrum Regulations 2015. GenN279 *GG*38641/30-3-2015.
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
Substitution of Table 1 of the Regulations: Tariffs, rates and scales for services, goods and supplies provided by the Department of Agriculture, Forestry and Fisheries. GN R285 *GG*38656/31-3-2015.
Financial Advisory and Intermediary Services Act 37 of 2002
Amendment of qualifications, experience and criteria for the approval as a compliance officer. BN77 GN38665/31-3-2015.
Amendment of qualifying criteria and qualifications for financial service providers. BN76 *GG*38665/31-3-2015.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
Regulations governing general hygiene requirements for food premises, the transport of food and related matters. GN R364 *GG*38746/30-4-2015.
Health Professions Act 56 of 1974
Amendment of rules relating to the registration by dental therapists and oral hygienists of additional qualifications. BN80 *GG*38675/10-4-2015.
Rules relating to fees payable to the Health Professions Council. BN83 *GG*38692/14-4-2015.
Income Tax Act 58 of 1962
Regulations in terms of para (*d*) of the definition of 'research and development' in s 11D(1) on additional criteria for multisource pharmaceutical products. GN R346 *GG*38732/23-4-2015.
Categories of research and development deemed to constitute the carrying on of research and development. GN R343 *GG*38729/23-4-2015.
Regulations in terms of para (*e*) of the definition of 'research and development' in s 11D(1) on criteria for clinical trials. GN R344 *GG*38730/23-4-2015.
Regulations under items (a) and (c) of the definition of 'determined value' in para 7(1) of the seventh schedule to the Act in respect of use of a motor vehicle. GN R362 *GG*38744/28-4-2014.
Labour Relations Act 66 of 1995
Designations of certain services as essential services: Certain services provided by privately owned old age homes as well as nursing homes and institutions that care for assisted and frail care patients and that are not registered with the Department of Social Development or that do not receive any financial assistance or subsidy from the state. GN278 *GG*38648/31-3-2015.
Commission for Conciliation, Mediation and Arbitration tariffs. GN363 *GG*38745/29-4-2015.
Landscape Architectural Profession Act 45 of 2000
Professional fees and charges for 2015/2016. BN75 *GG*38632/2-4-2015.
Lotteries Act 57 of 1997
Amendment of the direction for distribution agencies in determining the distributions of funds from the National Lottery Distribution Trust Fund. GN R312 *GG*38687/14-4-2015.
Medicines and Related Substances Act 101 of 1965
Amendment of regulations relating to a transparent pricing system for medicines and scheduled substances (dispensing fee to be charges by persons licensed in terms of s 22(1)(*a*)). GN R345 *GG*38731/23-4-2015.
National Environmental Management: Air Quality Act 39 of 2004
Amendments to the regulations prescribing the format of the atmospheric impact report. GN R284 *GG*38633/2-4-2015.
National Atmospheric Emission Reporting Regulations. GN R283 *GG*38633/2-4-2015.
National Environmental Management Act 107 of 1998
Regulations relating to the procedure to be followed when oral requests are made in terms of s 30A. GN R310 *GG*38684/10-4-2015.

Magistrates' Courts Act 32 of 1944
Creation of sub-districts and the appointment of a place within the sub-district for the holding of a court. GN265 *GG*38622/30-3-2015.
Creation of magisterial districts and establishment of district courts for Limpopo and Mpumalanga: Withdrawals. GN268 *GG*38625/30-3-2015.
Creation of magisterial districts and establishment of district courts for Mpumalanga. GN266 *GG*38623/30-3-2015.
Creation of magisterial districts and establishment of district courts for Limpopo. GN267 *GG*38624/30-3-2015.

Mine Health and Safety Act 29 of 1996
Regulations relating to competencies for electricity. GN R330 *GG*38708/24-4-2014.
Regulations relating to electricity. GN R332 *GG*38708/24-4-2015.
Private Security Industry Regulatory Authority Act 56 of 2001
Amendment to the regulations made under the Security Officers Act 92 of 1987. GN290 *GG*38632/2-4-2015.

Rules Board for Courts of Law Act 107 of 1985
Amendment of rules regulating the conduct of the proceedings of the magistrates' courts of South Africa (amendment of r 14, r 60 and Form 8 of Annexure 1 with effect from 22 May 2015). GN R318 *GG*38694/17-4-2015.
Amendment of rules regulating the conduct of the proceedings of the High Court of South Africa (substitution of r 10A, amendment of r 49 and r 53 with effect from 22 May 2015). GN R317 *GG*38694/17-4-2015.

Social Assistance Act 13 of 2004
Increase in respect of social grants. GN277 *GG*38647/30-3-2015.
South African Revenue Services Act 34 of 1997
Amendment of sch 1 (legislation administered by the Commissioner). Proc17 *GG*38653/30-3-2015.

Draft legislation

List of species that are threatened or in need of protection, activities that are prohibited and exemption of certain persons from restrictions in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GenN256 *GG*38600/31-3-2015.
Draft Threatened or Protected Species Regulations in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN255 *GG*38600/31-3-2015.
Draft regulations in terms of the Performing Animals Protection Act 24 of 1935. GenN285 *GG*38632/2-4-2015.
Declaration of small-scale char and charcoal plants as controlled emitters under the National Environmental Management: Air Quality Act 39 of 2004 for comment. GenN286 *GG*38632/2-4-2015.
Proposed regulations relating to the grading, packing and marking of table olives intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN305 *GG*38675/10-4-2015.
Draft Biodiversity Management Plan for African Lions in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN351 *GG*38706/17-4-2015.
Proposed revised import requirements for cattle, sheep and goats from Botswana, Lesotho, Namibia and Swaziland in terms of the Animal Diseases Act 35 of 1984. GenN349 *GG*38701/17-4-2015.
Proposed amendments to the code of professional conduct for registered auditors in terms of the Auditing Profession Act 26 of 2005. BN88 *GG*38707/24-4-2015.
Proposed regulations relating to small-scale fishing in terms of the Marine Living Resources Act 18 of 1998. GN R361 *GG*38743/28-4-2015.

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Employment law update

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

Male surrogate parent successfully claims maternity leave

MIA v State Information Technology Agency (Pty) Ltd (LC) (unreported case no D312/2012, 26-3-2015) (Gush J).

Having entered into a same sex civil union with his spouse in terms of the Civil Union Act 17 of 2006, the applicant, his spouse and a surrogate mother concluded a surrogacy agreement as contemplated in the Children's Act 38 of 2005.

In terms of the aforementioned agreement, that was made an order of court, the commissioning parents would be the parents to the child born to the surrogate mother and would assume their responsibilities at the time of birth.

The applicant and his partner agreed that the applicant would assume the role of the birth mother by immediately taking on any associated responsibilities at the time of birth. In light of this agreement the applicant applied to the respondent, his employer, for maternity leave as provided for in the latter's internal policy. While the employer's maternity leave policy is similarly worded to s 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) a material difference is that an employee is granted four months 'paid leave'.

The employer declined the applicant's request and took the view that maternity leave, as provided for in the BCEA, was only reserved for female employees and furthermore the BCEA was silent on instances involving surrogate parents. The employer did, however, grant the applicant two months paid leave and two months unpaid leave in line with its policy applicable to employees who adopt a child younger than 24 months.

Aggrieved by his employer's decision the applicant referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging he was unfairly discriminated against on the grounds of his gender, sex, family responsibility and sexual orientation, as set out in s 61 of the Employment Equity Act 55 of 1998. The applicant sought an order directing the employer to refrain from unfairly discriminating against him and others in his position, his remuneration for the two months he had to take as unpaid leave and damages amounting to R 400 000.

The matter remained unresolved at conciliation and came before Gush J at the Labour Court.

In its defence the employer argued that by implication, the word 'maternity' specifically applies to female employees to the exclusion of male employees and as such maternity leave is a right, which only female employees can enjoy. The employer went on to argue that its own internal policy on maternity leave was developed to cater for employees who gave birth on the understanding that pregnancy and child birth creates an 'undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period.' Thus, according to the employer, its maternity leave policy seeks to protect 'birth mothers from an earning interaction due to the physical incapacity to work immediately before and after childbirth.'

In addressing this argument the court found that the employer's viewpoint did not take into account the fact that maternity leave, as an entitlement, is not solely linked to the health and welfare of the mother but should also be interpreted to include the best interest of the child. Failure to do so will ignore both the Constitution and the Children's Act.

Section 28 of the Constitution states that every child has the right to family and parental care. In addition the Children's Act which is the enabling legislation, specifically states in s 9:

'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

Following this Gush J held:

'[T]here is no reason why an employee in the position of the applicant should not be entitled to "maternity leave" and equally no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother is entitled.

The legislation governing "civil unions" and surrogacy agreements is relatively recent. This legislation is a consequence of the adoption of the Bill of Rights in the Constitution. That our law recognises same-sex marriages and regulates the rights of parents who have entered into surrogacy agreements suggests that any policy adopted by an employer likewise should recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Union Act and the Children's Act.'

The court acknowledged that its views necessitated an amendment to the BCEA when dealing with similar matters in the future, however, on the merits before it, the employer relied on its own internal policy to refuse the applicant four months paid maternity leave.

The court held that the respondent's refusal to grant the applicant four months paid maternity leave constituted unfair discrimination. The employer was ordered to pay the applicant his salary for the two months he was granted unpaid leave. The employer was further directed to apply its maternity policy in a manner that recognised the status of those who are party to a civil union, as well as not to discriminate against commissioning parents in terms of a surrogacy agreement. On the issue of damages, the court was not persuaded that the applicant had established any damages against the employer other than the loss of income he suffered. Costs were awarded against the employer.

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

By Meryl Federl

Recent articles and research

ABBREVIATIONS

ILJ: *Industrial Law Journal* (Juta)
SALJ: *South African Law Journal* (Juta)
SAJCJ: *South African Journal of Criminal Law* (Juta)
SLR: *Stellenbosch Law Review* (Juta)

Animal law

Van der Merwe, CG 'Reflections on the concurrence of the remedies in terms of the reformed pound legislation and the *actio de pastu*' (2014) 25.3 *SLR* 612.

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Mills, L 'Failing children: The courts' disregard of the best interests of the child in *Le Roux v Dey*' (2014) 131.4 *SALJ* 847.
Nicholson, CMA 'Should the court look at the best interests of specific children in abduction cases? An examination of *Central Authority of the Republic of South Africa v JW and HW with C du Toit intervening*' (2014) 131.4 *SALJ 756*.

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Konstant, A 'Passive investments' attempt to find a home in South African competition law' (2014) 131.4 *SALJ* 819.

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Burchell, J 'Protecting dignity under common law and the Constitution: The significance of *crimen iniuria* in South African criminal law' (2014) 27.3 *SAJCJ* 250.
Okpaluba, C 'Reasonable suspicion and conduct of the police officer in arrest without warrant: Are the demands of the Bill of Rights a fifth jurisdictional fact?' (2014) 27.3 *SAJCJ* 325.
Reddi, M and Ramji, B 'The pre-trial right to silence whilst exercising the right to access police dockets in South African law: A right too far?' (2014) 27.3 *SAJCJ* 306.
Schwikkard, PJ 'Professional incompetence, voluntariness and the right to a fair trial' (2014) 27.3 *SAJCJ* 293.

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Eiselen, S 'Unshackling the *Shackleton* defence a little' (2014) 131.4 *SALJ* 729.

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Rycroft, A 'What should the consequences be of an unreasonable refusal to participate in ADR? (2014) 131.4 *SALJ* 778.

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Stander, AL 'Die opskorting van omgewingsgedinge in insolvensie' (2014) 25.3 *SLR* 511.

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Kawadza, H 'A comment on the liability regime introduced by section 65 of the Financial Services Law General Amendment Act 45 of 2013' (2014) 131.4 *SALJ* 768.

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Van Niekerk, A 'Speedy social justice: Streamlining the statutory dispute resolution processes' (2015) 36 April *ILJ* 837.

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Van der Spuy, E and Armstrong, A 'Policing of an urban periphery: The case of Khayelitsha' (2014) 27.3 *SAJCJ* 377.

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

By
Bryce
Matthewson

Marine 3 v Afrigroup: Patent utility interpreted by the Supreme Court of Appeal

It is a basic tenet of patent law that an invention must have utility in order to be capable of patent protection. This principle is recognised by the Patents Act 57 of 1978 (the current Act) as one of the essential requirements of patentability and thus a lack of utility is a ground of revocation of a patent. However, to date, this ground of revocation has not received much judicial attention. This has changed in a recent decision by the Supreme Court of Appeal (SCA) in *Marine 3 Technologies Holdings (Pty) Ltd v Afrigroup Investments (Pty) Ltd and Another* 2015 (2) SA 387 (SCA). Unfortunately the decision is based on what is, in my opinion, an erroneous interpretation of the provisions of the current Act.

The background to *Marine 3* can, for present purposes, be summed up as follows: The applicant (patentee) sought to enforce its patent against the respondents on the basis that they were infringing the patent. The respondents, by way of a counterclaim, applied for the revocation of the patent on the ground that, among others, the patent lacked utility. The Commissioner of Patents found that the patent lacked utility and accordingly revoked the patent. The parties subsequently settled the matter. However, the applicant proceeded with an unopposed appeal against the Commissioner's decision to revoke the patent.

The basis of a claim of lack of utility is found in s 61(1)(*d*) of the current Act, which reads that a patent is liable to be revoked if '… the invention *as illustrated or exemplified in the complete specification concerned* cannot be performed …' (my italics). A lack of utility means that the patent is not useful; that it is not effective to produce the result aimed at or promised. The court in *Marine 3*, at para 7 of its judgment, refers to the ground of revocation without the above emphasised portion. The result of this is, in my opinion, a misinterpretation of the law.

To understand the misinterpretation it is necessary to start with the ground of lack of utility as it existed under the previous Patents Act 37 of 1952 (old Act). The ground of revocation under the old Act was formulated as follows: A patent is liable to be revoked if 'the invention is not useful'. Of importance is that 'the invention' was determined to mean the invention as claimed (see *Frank & Hirsch (Pty) Ltd v Rodi & Wienenberger Aktiengesellschaft* 1960 (3) SA 747 (A) at 756 E – F). Thus, under the old Act, consideration was given to whether the invention as claimed was effective at producing the result aimed at or promised. By contrast, the current Act focuses on 'the invention as illustrated or exemplified in the complete specification'. The distinction between the invention as claimed and the invention as illustrated or exemplified is crucial. Under the old Act, if anything falling within the scope of a claim did not work the claim was invalid. Under the current Act, it is necessary to look at what is illustrated or exemplified in the specification. As such, if any illustrated embodiment or example does not work, then the patent lacks utility. In other words, under the old Act lack of utility applied to the claims of the patent whereas under the current Act lack of utility applies to the specification and more particularly to the illustrated embodiments and examples. Thus for the purposes of this ground, under the current Act, the claims of the patent are irrelevant.

The result of the changes brought about in the current Act has been a significant curtailing of the number of cases in which lack of utility is pleaded. I submit that between 1967 and *Marine 3*, the issue only arose in two reported judgments whereas it had been a common ground of revocation under the old Act.

The court, acting on the basis of the misquoted legislation and relying on a decision of the Transvaal Provincial Division under the old Act (see para 12, relying on *Transvaal and Orange Free State Chamber of Mines v General Electric Co* 1967 (2) SA 32 (T)), 'begin[s] with a consideration of the meaning of the claims of the patent'. The court, having construed the claims of the patent, goes on to consider how the invention, as claimed, would be viewed to a person skilled in the art (at para 14).

This approach of the court is in direct contrast with two previous decisions made under the current Act (see *Coflexip SA v Schlumberger Logelco Inc* 2001 BIP 1 (CP) and *Circuit Breaker Industries Ltd v Barker & Nelson (Pty) Ltd* 1993 BP 431 (CP)). In the decision of the court of the Commissioner of Patents in the *Coflexip* matter, the Commissioner clearly focuses his attention on the illustrations and embodiments of the invention described in the specification. There is no reference at all to the claims of the patent. Similarly, in the earlier decision of the Commissioner in the *Circuit Breaker* matter, the Commissioner focuses on the illustrations or figures, and again there is no reference to the claims of the patent. It is my view that the approach adopted by the Commissioner in the *Coflexip* and *Circuit Breaker* matters are consistent with a proper interpretation of s 61 of the current Act, and in the absence of a compelling reason why this interpretation should not be adopted, the approach taken by the court in *Marine 3* is an error in interpretation. Certainly, the court in *Marine 3* gave no reason for applying lack of utility to the claims rather than the specification.

The court ultimately concluded in *Marine 3* that the invention of claim 1 of the patent does have utility, and in doing so overturned the decision of the court *a quo*.

It should be noted that on the facts of the matter, it is possible or even likely, that the court might have reached the same conclusion that there was no lack of utility, had it rather given consideration to the invention as illustrated or exemplified in the specification; however, this does not soften the blow of the incorrect interpretation being given to the law.

The failure of the court to deal with its deviation from the two previous decisions, and its failure to give reasons for its interpretation, leads me to believe that the court based its decision on the misquoted legislation without having regard to the two previous decisions. This decision clearly illustrates the need for patent disputes to be handled by a specialist court both in the first instance and on appeal.

On the basis of the interpretation adopted by the court in *Marine 3*, an interpretation that will be binding until overturned by a later decision of the same court, there may be new life given to the issue of lack of utility, a life which is, in my opinion, clearly not intended by the legislature. It is hoped that the issue of lack of utility will come before the SCA sooner rather than later so that the interpretation can be corrected.

• See 38

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