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DE REBUS

THE SA ATTORNEYS' JOURNAL

MARCH 2015

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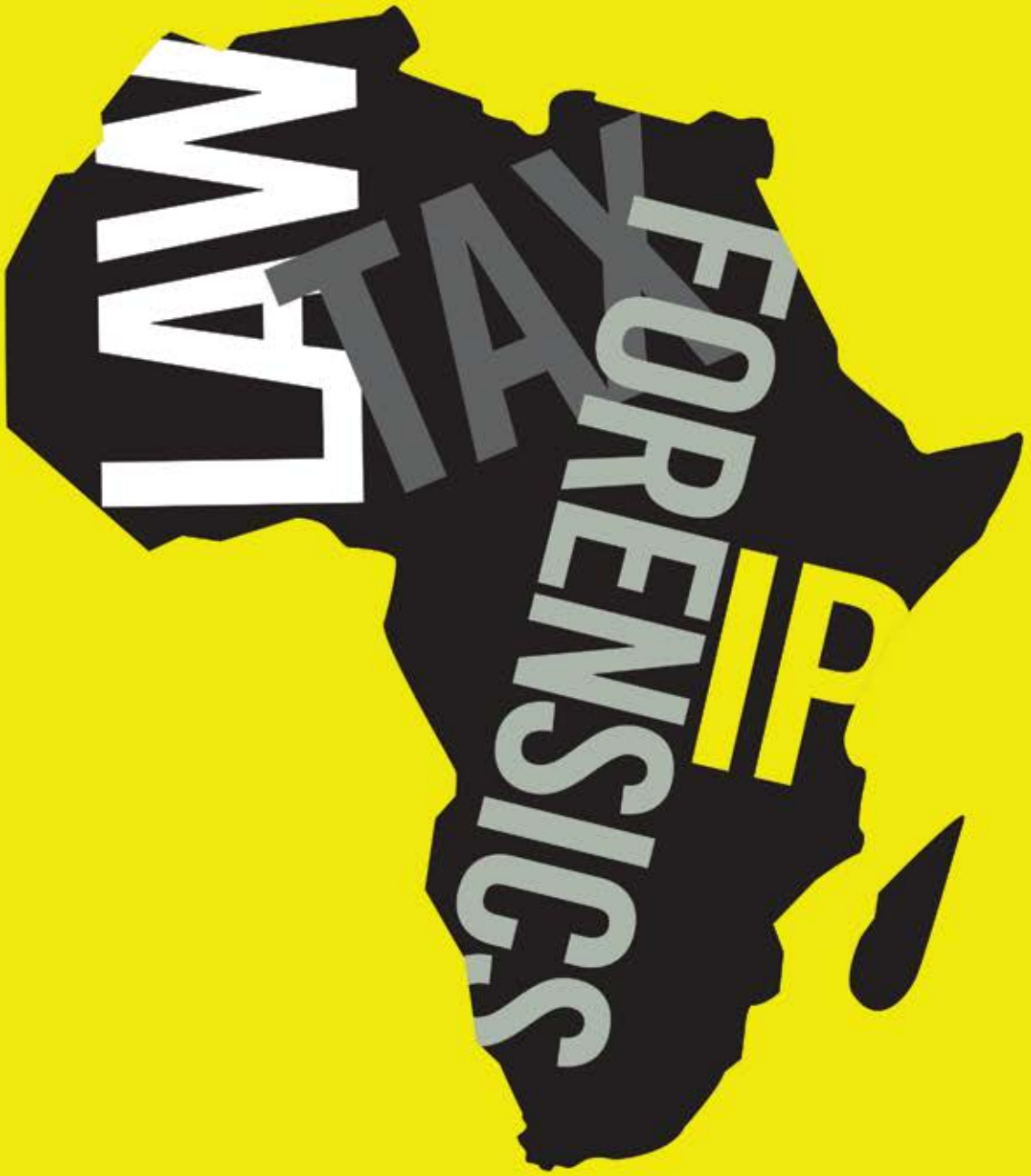
The fairness of spousal maintenance after divorce

Hate speech is a crime

Equality Court rules in favour of domestic worker



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LAW SOCIETY
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What every attorney should know about the Legal Practice Act

After a long period of waiting the Legal Practice Act 28 of 2014 (LPA) was published in *Government Gazette* 38022 on 22 September 2014. In terms of s 120 of the LPA, different provisions of the LPA will come into operation on dates promulgated in the *Government Gazette* and, in one instance, after a lapse of a number of years after ch 10 has come into operation.

On 23 January 2015 and in *Government Gazette* 38412, the President promulgated that parts 1 and 2 (ss 96 – 109) of ch 10 are to come into operation on 1 February 2015. Chapter 2 of the LPA will then come into operation three years from 1 February 2015, thereafter the remaining provisions will come into operation on a date still to be fixed by the President.

The sections that have come into operation pertain to the formation of the National Forum (see 2015 (Jan/Feb) *DR* 21) and its mandate during the transitional period. The National Forum will be in existence for a period not exceeding three years. Section 97(1) states:

'(1) The National Forum must, within 24 months after the commencement of this Chapter—

(*a*) make recommendations to the Minister on the following:

(i) An election procedure for purposes of constituting the Council;

(ii) the establishment of the Provincial Councils and their areas of jurisdiction, taking into account the factors referred to in section 23(2)(*a*);

(iii) the composition, powers and functions of the Provincial Councils;

(iv) the manner in which the Provincial Councils must be elected;

(v) all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as a legal practitioners;

(vi) the right of appearance of a candidate legal practitioner in court or any other institution; and

(vii) a mechanism to wind up the affairs of the National Forum;

(*b*) prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities; and

(*c*) make rules, as provided for in section 109(2).'

Until the LPA has come into operation in its entirety, very little is expected to change in the way attorneys currently practise. The current Attorneys Act 53 of 1979 and the current rules of the various law societies will still apply to the practice of attorneys.

In the period between 1 February 2015 and the final date on which the LPA comes into operation in its entirety, attorneys will be expected to make input on various issues.

One important issue that attorneys will have to debate and give input on is the forming of a voluntary association that can look after the affairs of the profession as this will not be the function of the LPC. When the LPA has come into operation in its entirety, the current four provincial law societies will cease to exist and therefore also the Law Society of South Africa, the publisher of *De Rebus*. A Legal Practice Council (LPC) will be formed to regulate legal practitioners. It is of the utmost importance that attorneys from now on sincerely and urgently consider the forming of a voluntary association to look after the affairs of attorneys. There is also debate whether other legal practitioners, and non-practicing legal practitioners should also be members of such a voluntary association.

Mapula Thebe – Editor

In the next few months *De Rebus* intends to publish a series of articles, which will concentrate on the interaction of the profession with the LPA.

Should you have any questions relating to the LPA, you are invited to write to *De Rebus*, we will then, to the best of our ability, ensure that your questions are published together with answers.

Would you like to write for *De Rebus*?

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

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

- **Please note that the word limit is now 2000 words.**
- **Upcoming deadlines for article submissions: 17 March and 20 April 2015.**

LETTERS TO THE EDITOR

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

Recovering arrear levies and legal costs

Referring to the article 'The recovery of body corporates' legal costs' of attorney Albert Reinecke (2014 (Dec) *DR* 16), I have scant criticism. His explanation of a controversial issue of long standing related to the recovery of attorney-and-client costs from levy defaulters is much appreciated.

As an attorney specialising in sectional title matters for almost 40 years, I am very aware of trustees of sectional title bodies corporate (and sometimes also the management committees of home owners associations) being unwilling or unprepared to pay the costs of their attorneys mandated to collect arrear levies, the argument being that the costs, on an attorney-and-client scale, must be paid by the debtor and the attorney will be fully remunerated on successful completion of the matter. For this reason you will seldom see any provision for legal costs for collecting arrears included in the annual budget of a sectional title body corporate. I have in fact seen such items being removed from budgets at annual general meetings notwithstanding good arguments to the contrary. The result is that when the managing agent is approached for payment of costs, even disbursements, funds are not available. There is of course the further factor that by approving a budget, the owners are in fact determining what their levies will be. This is comparable to citizens being able to determine their own taxes.

As far as levy collections are concerned, the attorney is accordingly 'cornered' into a position in which he knows that he will not be paid by his client and has to make provision for payment of his attorney-and-client-costs when concluding a payment arrangement with the debtor and having to recover his disbursements and fees from payments made by the debtor.

To an extent some managing agents are complicit in sustaining this common budgetary inadequacy by comforting the trustees that they, the managing agents, are themselves perfectly able to provide the necessary legal advice and drafting of such resolutions and rules as may become necessary. While this remark should not be seen as an indictment against managing agents in general, I can mention that a large portion of my work as a sectional title specialist consists of 'correcting errors of the past', which is usually a much more costly exercise than to have done it with the appropriate legal assistance in the first place.

Returning to the issue of levy collections and with reference to the last paragraph of Mr Reinecke's article, it will accordingly seldom be possible for the attorney to recover 'full indemnification' of his costs other than from the debtor in terms of a payment arrangement nor will it be possible for the trustees to deposit recovered costs into the common fund.

Tertius Maree, attorney,
Stellenbosch

Personal data on the Internet

I write in response to the article entitled 'Personal data on the Internet – can POPI protect you?' by Nthupang Magolego in 2014 (Dec) *DR* 20. The concept of data privacy is in its infancy stage in South Africa and the introduction of the Protection of Personal Information Act 4 of 2013 (POPI) is a welcome move to take South Africa towards respecting privacy and a reduction in the misuse of personal information.

In the article the author makes the

statement that: 'The responsible party must obtain consent from the data subject when processing personal data'. The author then goes on to express his concerns about whether a search engine such as Google would be able to obtain this consent.

In my view this statement is an incorrect interpretation of POPI. Even a cursory look at the remainder of s 11 makes it clear that there will be many instances where the personal information (PI) can still be processed without the consent of the data subject, such as where the 'processing complies with an obligation imposed by law on the responsible party' (s 11(1)(*c*)) or where processing 'protects a legitimate interest of the data subject' (s 11(1)(*d*)). In particular (and with reference to search engines) processing of PI is permissible if it 'is necessary for pursuing the legitimate interests of the responsible party…' (s 11(1)(*f*)).

Bearing the above in mind I do not agree with the author that consent must always be obtained by a responsible party in order to process PI, and in particular, I do not believe that POPI seeks to require responsible parties who provide search engine services to obtain consent from every data subject to process their PI (which is patently impossible). Instead the principles of POPI (which are termed 'conditions') should be interrogated by every responsible party in order to determine whether consent in their particular circumstances is in fact necessary and if so how this consent must be obtained and – equally important – maintained. Consent is a 'silver bullet' to achieve compliance with POPI, there are several good reasons why a business should be very careful about obtaining consent where it is not required.

Returning to the example of Google, there is a substantial difference between a responsible party retaining PI until such time as a data subject objects to the processing of the PI, and a responsible party obtaining consent before the PI can form part of a result to a search engine query. It seems highly unlikely (and quite impossible) for any search engine to obtain consent from every data subject about whom the search engine holds PI. If POPI were to require this (and of course I submit that it does not) then search engines would either be almost useless due to the paucity of the search results, or they would go out of business.

Paul Esselaar, attorney, Cape Town

Public Protector's findings not legally binding

The Law Society of South Africa (LSSA) held a colloquium on the Public Protector's powers on 4 February at the University of Pretoria. The theme of the debate was: '*Quo vadis* Public Protector?' which means where to from here Public Protector?

Issues discussed included whether –

- there is an attempt to undermine the Public Protector's office;
- attacks meted out on the office are justified;
- the office has misunderstood its powers and mandate and acts beyond its powers, thus inviting the attacks and criticism; and
- the office has done enough in terms of advocacy.

Also of primary importance was the issue of whether the Public Protector's findings are binding.

On the panel were Deputy Minister of Justice and Constitutional Development, John Jeffrey; Public Protector, Thuli Madonsela; retired Judge of the Constitutional Court, Justice Zak Yacoob; Deputy Head of the School of Law at the University of the Witwatersrand, professor Mtende Mhango and the executive secretary of the Council for the Advancement of the South African Constitution, Lawson Naidoo. The Co-chairperson of the LSSA, Max Boqwana, was the facilitator.

Mr Boqwana said that the Office of the Public Protector is an important institution in the DNA of South Africa's democracy. He said that the Public Protector's office is the one institution that provides South African citizens with what will often be a last defense against bureaucratic oppression and against corruption in public office. 'If the institution falters or finds itself undermined the nation losses an indispensable constitutional guarantee', he said.

Mr Boqwana said that Ms Madonsela 'has been the epitome of bravery in the country.'

Ms Madonsela said that she never thought that there would ever have to be a discussion around whether the Office of the Public Protector is an ordinary ombudsman or if it is a special institution because she has always thought that it was a given. Ms Madonsela argued that a public protector's findings were binding – unless set aside by a court of law. 'The courts' duty, as was the public protector's, was to the Constitution', she said.

Public Protector, Thuli Madonsela and Law Society of South Africa Co-chairperson, Max Boqwana at a colloquium on the Public Protector's powers on 4 February at the University of Pretoria.

Ms Madonsela said it has still not been made clear what the powers of her office are but that as far as she knew, the office's powers are to investigate, report and to correct, but that it seems to have changed. 'Our understanding over the years is that appropriate remedial action meant different remedies. We have now been told that it means only to mediate,' she said.

Professor Mhango said that the Public Protector's powers are not adjudicative or binding. He stressed the point that recommendations are never binding.

Professor Mhango said that the Public Protector was accountable to Parliament: 'Why would the law seek the Public Protector to go to Parliament if her decisions are enforceable or binding?' he questioned, adding that there would be no need to go to the legislature then. Professor Mhango said that the remedies of the Public Protector are political and not judicial.

Justice Yacoob started his speech by clarifying that nowhere in the world are the ombudsman's powers binding.

He said that the Office of the Public Protector is not a court, adding that the recommendations of or actions taken by a Public Protector must be different from a court order. Justice Yacoob added that what the Public Protector is in South Africa would be different to what the Ombudsman is in England, purely because of South Africa's history and Constitution.

Justice Yacoob said, however, that government has a responsibility to assist and protect all Chapter 9 institutions and to ensure their independence, impartiality, dignity and effectiveness. He said that government is obliged by the Constitution to do so. 'When a decision has been made by the Public Protector, government must make absolutely certain that they obey the consequences', he said.

'Government must not interfere with these institutions. No organ or state can interfere with the functioning of these institutions. These institutions are not accountable to government, however, the government might wish it so, they are only accountable to Parliament,' Justice Yacoob said.

For me, to 'take appropriate action' means that the Public Protector has the right to decide what appropriate action is. 'To go to court and say the Public Protector is wrong, is like setting aside administrative action', Justice Yacoob said.

Mr Naidoo said that the findings of the Public Protector are binding but not enforceable. He added that the Office of the Public Protector is not a court of law and its decisions do not hold the same weight as the courts.

Mr Naidoo questioned what the limits of the powers of the Public Protector are and what the effect of its findings and remedial action are.

Mr Naidoo said the country would be on 'a slippery slope' if the Executive ignored the Public Protector's findings.

Deputy Minister Jeffery argued that the Public Protector would wield too much power if her findings were to be binding.

He said that he was surprised that this issue was such a debate because the previous Public Protectors were comfortable with the decision that the office's powers are not binding. 'It has always been like this. Ms Madonsela has even said that the government has implemented a large amount of her recommendations. If her decision is binding, should we not do away with our courts then?' he asked. 'The Public Protector is essentially an investigator, prosecutor and judge all rolled into one. That is quite unheard of in our law,' he said.

Deputy Minister Jeffery said findings of the Office of the Public Protector do not need to be binding because an extremely high percentage are recommended by government anyway.

Deputy Minister of Justice and Constitutional Development, John Jeffrey, speaking at a colloquium on the Public Protector's powers in Pretoria in February.

'The institution works through public pressure. This issue only sprung up after the Nkandla report, it should not be an issue because binding or not, government is responding as it is supposed to,' Deputy Minister Jeffery said.

'Surely the Public Protector is not a quasi-judicial body,' Deputy Minister Jeffery said. '[Her] powers are to investigate, and make findings and recommendations, and put them into the public domain. It is in the public domain that the action must be taken.'

Deputy Minister Jeffrey questioned whether the country was getting the maximum effect out of the Pubic Protector's office adding that it should be possible to criticise the Office. 'She keeps bringing up the issue of funding, but perhaps she cannot manage her resources properly. In the 2010/2011 financial year the Office of the Public Protector was given R 114 million, in the current year it was given R 217 million. The South African Human Rights Commission received R 128 million for this current financial year. Are the Public Protector's resources being used adequately?' he concluded.

With the exception of Ms Madonsela, the panelists in the debate agreed that the Public Protector's findings were not legally binding.

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Survey on South Africa's small law firms

In an effort to understand the unique challenges that attorneys in small law firms face, independent research firm, Activate, conducted a survey on behalf of LexisNexis. Over 160 independent small law firms across South Africa were approached to partake in the survey.

According to the report, the survey was carried out in August 2014 with responses from lawyers and support staff in small law firms. LexisNexis' data shows that of the 10 930 law firms in South Africa, with over 21 000 lawyers in total, more than three quarters, are considered small firms and are made up of one to ten fee earners who are mostly engaged in litigation, debt collecting and conveyancing. The survey sample consisted of a balance of lawyers (56%) and support staff (44%). Activate spoke to a total of 80 lawyers, which consisted of 42 black lawyers and 32 white lawyers, as well as, a smaller number of Indian and coloured legal professionals.

The survey revealed that increased investments in technology, coupled with shifting research trends and the challenges of keeping up to date with frequently changing legislation, are just some of the aspects characterising the small law firms in South Africa. The survey also revealed that smarter use of technology is seen as a key catalyst for growth by the majority of the firms, with networking second and marketing and online services sharing a close third.

Of the independent lawyers surveyed, just under half practise as sole practitioners (47,8%), while 37,4% were firms of one to two fee earners and the minority were in boutique law firms or partnerships.

The respondents had a wide range of experience, with the majority (68,2%) being experienced lawyers who had been practising law for five years or more, while 46,9% had been in their current small law practices for three years or less. For most respondents (more than 80%), practising in a small law firm was a conscious and planned career decision. One in four lawyers specifically wanted to run their own business. Only a small percentage of the sample (1,7%) were in a small law firm due to dissatisfaction with large firms, while under 10% went this route because of a change in circumstance.

Technology

According to the report, the survey showed that most of the law firms are early adopters of change who recognise that technology will have a significant impact on their business. Seven out of ten of the law firms surveyed have already increased their investment in new technology and processes; recognising that this is going to have a significant impact on their businesses.

The majority (58%) view smarter use of technology and networking as the most important ways to grow their business with two thirds stating that they carry out their legal research online.

Six out of ten of the small law practices cited word-of-mouth referrals as the most effective marketing tool to grow their businesses and over three quarters favoured face-to-face networking over online and social media. Social media adoption was low among smaller firms, but among the 40% who are experimenting and innovating, LinkedIn is seen as their main social media channel to grow their business with 72% saying it is their platform of choice. Facebook was the next alternative at 58% with Twitter coming in third at 18%.

The survey also revealed that personal service, specialisation and attention to clients' needs are seen as crucial to delivering the returns among small law firms. Furthermore, the need to evolve and adapt was recognised by 88% of the respondents.

'In terms of their economic outlook, more than half (58%) had a stable business outlook and more than two thirds (37%) said their business was growing, although a significant 68% reported that it is harder to make a living out of law in the current climate. Optimism about the future and continued enjoyment of the practice of law were still highly evident, with 96% of the firms confident to very confident in their practices while 77% had plans to grow over the next five years', the report states.

According to the survey findings, the Legal Practice Act 28 of 2014 emerged as a worry for some lawyers. They feel that the government is making it harder for them to be competitive by over regulating while at the same time taking away business that was exclusively the domain of an attorney such as conveyancing and estates, as this is seen to be eroding the work of smaller practices. Keeping up to date with legislation, precedents and new developments in their field is also a concern to independent lawyers.

Many of the challenges facing small law firms are common to small business owners including cash flow, retaining and growing a client base, economic effects and being up to date with their profession. However a strong entrepreneurial spirit is evident in this market. There is some concern that the pie is shrinking, but more attorneys are wanting a share of it.

According to the survey report, law is a chosen and intentional career decision with over 57% citing it as a planned move, and a further 25% wanting to own a business.

'This is a significant and evolving part of our legal landscape, and we wanted to discover their attitudes towards the challenges facing them. What we discovered were passionate dedicated lawyers who believe strongly in what they do and enjoy contributing to their own sphere of activity,' the report states.

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Cape attorney globally recognised for contribution in establishment of *pro bono*

Cape Town attorney Taswell Papier has been recognised for his services to the profession, particularly for his work in the human rights/access to justice arena, and particularly in his contribution in the establishment of *pro bono* work in South Africa and has been inducted as a fellow of the College of Law Practice Management in Boston, in the United States. He is the first African to receive this honour.

Mr Papier told *De Rebus* that membership at the College of Law Practice Management is based on peer nominations that are evaluated and approved by a selection panel. Individuals are recognised for having made a 'significant contribution to the legal profession over a period of at least ten years'. 'I was a bit embarrassed at being singled out because there are many lawyers who served the cause of *pro bono* and human rights, and who could equally be recognised. As a member of the College, one has access to legal professionals across the world, which assists in building global networks on issues where mutual benefit can be derived and expertise shared,' he said.

Cape Town attorney Taswell Papier has been inducted as a fellow of the College of Law Practice Management in the United States for his contribution in the establishment of pro bono.

The college was formed in 1994 to honour and recognise distinguished law practice management professionals internationally. Since its establishment, the college has inducted 200 fellows from ten different countries.

Mr Papier was also the first African to be adjudged the global lawyer of the year in the United Kingdom in 2006. He said that this award was equally humbling, and added that none of this would have been possible without the work of the National Association of Democratic Lawyers, the Black Lawyers Association, the provincial law societies as a whole in adopting the obligatory *pro bono* rule, and those lawyers who continue to give back generously to society.

Mr Papier, who was admitted as an attorney in 1988, is a partner at ENSafrica where he specialises in corporate and commercial work. 'My previous offices in Mitchells Plain have been retained by ENSafrica as its *pro bono* office and all our attorneys serve time there during the week, advising the poor and conducting workshops in the Mitchells Plain

and Khayelitsha communities. We have replicated this model in the township of Alexandra, where all the lawyers at our Sandton office render free legal services and training', he said.

Mr Papier said that *pro bono* work was imperative as it is about facilitating access to justice, particularly to the poor. 'It is about building the rule of law, and respect for the rule of law. Having access to justice irrespective of social or economic standing is the right of every human being, and it is this which builds the rule of law and respect for the rule of law, and belief in a system of justice. As lawyers, we need to consistently contribute to building confidence in our legal system, facilitating access to it, and providing free legal services to our most marginalised communities is one way of achieving that. This level of sophistication does not only bring relief to the poor and marginalised, but is indeed a barometer for foreign direct investment, growing our economy, and improving our society. Our Apartheid legacy has left a significant gap between rich and poor, which has to consciously and deliberately be eradicated,' he said.

Mr Papier, who was the instructing attorney in the Shrien Dewani case (*S v Dewani* (WCC) (unreported case no CC15/2014, 8-12-2014) (Traverso DJP)), has acted as a judge in the Cape High Court on three occasions. He was the president of the Cape Law Society and chaired its disciplinary committee. He is also the past chairperson of the Law Society of South Africa's *Pro Bono* Committee, and was recognised as a leading lawyer by Best Lawyers 2013 – Finance (South Africa).

Mr Papier is also admitted as an attorney in Namibia.

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Rationalisation of magisterial districts bringing justice closer

Communities in the Gauteng and North West provinces are travelling shorter distances to access justice services closer to where they live. This initiative was launched by the Justice Department and is known as the 'rationalisation of magisterial districts to municipal boundaries'.

This initiative seeks to align the magisterial boundaries of the country's courts with municipal and provincial boundaries, which ensures that people are serviced by a court that is within their municipal boundaries.

For example, in terms of the old magisterial boundaries, the Diepsloot community had to travel to the Pretoria Magistrate's Court to access justice services, which is a distance of about 40 kilometres. With the rationalisation process, the Diepsloot community will now be serviced by the Randburg Magistrate's Court, which is some 15 kilometres away.

In a press release, the Justice Department said that the aim was to alleviate the long distances travelled by communities to access courts and costs they incurred. Moreover, this programme seeks to redress the racially based judicial boundaries under Apartheid where courts were established mainly in affluent areas while historically disadvantaged areas were serviced through under resourced and dilapidated courts.

The Justice Department said that all new cases enrolled from 1 December 2014 in Gauteng and North West are being dealt with in accordance with the newly-proclaimed areas of jurisdictions. Other provinces will undergo the same process from April 2015 starting with Limpopo and Mpumalanga.

There will also be a seat for a Division of the High Court in each of the nine provinces to ensure that communities are able to access services of a High Court in the province of their residence. The construction of the Limpopo and Mpumalanga seats of the High Court, which are currently underway, is part of this reform process.

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2015 examination dates

Admission examination

The admission examination dates for 2015 are:

- 18 August
- 19 August

Conveyancing examination

While the conveyancing examination dates are:

- 13 May
- 9 September

Notarial examination

And the notarial examination dates are:

- 10 June
- 21 October.

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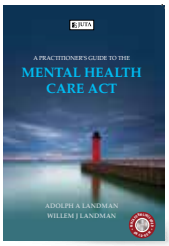

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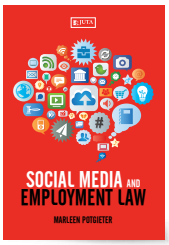
A Practitioner's Guide to the Mental Health Care Act

A Landman, W Landman

A Practitioner's Guide to the Mental Health Care Act provides access to the law on mental health care in the context of the Constitution, case law and international law. The book outlines and explains how the Mental Health Care Act and its regulations are applied to or administered by those who implement the Act, those who administer it and those affected by it. The MHCA forms are provided on CD.



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People and practices

Compiled by Shireen Mahomed

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

ENS has five new appointments:

Chavern Ismail has been appointed as a senior associate in the intellectual property department in Johannesburg.

Shirley Mlombo has been appointed as an associate in the employment department in Johannesburg.

Grant Morgan has been appointed as an associate in the mine and occupational health and safety department in Johannesburg.

Natasha Wagiet has been appointed as a *pro bono* coordinator in the *pro bono* department in Cape Town.

Ryan Reddy has been appointed as a senior associate in the shipping and logistics department in Durban.

Fairbridges Arderne & Lawton Inc in Cape Town has appointed Brittany Badham-Thornhill as an associate in the commercial department.

Bax Kaplan Attorneys and **Russel Inc** in East London will amalgamate from March 2015. Bradley Sparg and Bridgette Magnus directors of Russell Inc will join Steve Clarke and Mike Francis as directors of **Bax Kaplan Russell Inc**.

Bridgette Magnus

Bradley Sparg

Mike Francis

Steve Clarke

Cliffe Dekker Hofmeyr in Johannesburg has three new appointments:

Nayna Parbhoo has been appointed as a director in the real estate department.

Mareli Treurnicht has been appointed as a senior associate in the tax department.

Dayne Muller has been appointed as a senior associate in the finance and banking department.

Fasken Martineau in Johannesburg has appointed seven new associates.

Siphamandla Dube has been appointed in the labour, employment and human rights department.

Nikita Madikoto has been appointed in the banking and finance department.

Robert Burman has been appointed in the banking and finance department.

Margo-Ann Palani has been appointed in the environmental department.

Susan Braybrooke has been appointed in the corporate and commercial department.

Mzimasi Mabokwe has been appointed in the litigation and dispute resolution department.

Ingrid Rogers has been appointed in the antitrust competition and marketing department.

Changes to the Administration of Estates Act 66 of 1965 and the Intestate Succession Act 81 of 1987

By Maurice Alexander

The Minister of Justice and Correctional Services repealed and confirmed the changes to the amounts in respect of the following sections of the Administration of Estates Act 66 of 1965 –

- s 18(3);
- s 80(2)(*a*);
- s 80(2)(*b*); and
- s 90(1) (see GN R920 *GG*38238/38238/24-11-2014).

It is important for all practitioners to note that the amounts in respect of the above sections have now been increased to R 250 000 from its previous limit of R 150 000, which implies the following:

- In terms of s 18(3), if the value of the estate exceeds R 250 000, letters of executorship must be issued and the full process prescribed by the Administration of Estates Act must be followed. However, if the value of the estate is less than R 250 000, the Master may dispense with letters of executorship, and issue letters of authority.
- In terms of s 80(2)(*a*), the Master may at any time authorise 'any alienation of immovable property belonging to a minor or to a person for the administration of whose property a tutor or curator has been appointed, if the value of the particular property to be alienated does not exceed the amount … [R 250 000] … and the alienation would be in the interest of the minor or of such person, as the case may be'.
- In terms of s 80(2)(*b*) the Master may at any time authorise 'any mortgage of any such immovable property to an amount not exceeding in the case of any one such minor or person, the amount … [of R 250 000] … if the mortgage is necessary for the preservation or improvement of the property or for the maintenance, education or other benefit of such minor or person, as the case may be'.
- In terms of s 90(1): 'The Master may, subject to subsection (2) and subject to the terms of any will or written instrument disposing of the money or, in the case of a tutor or curator, by which the tutor or curator has been nominated, pay to the natural guardian or to the tutor or curator, or for and on behalf of the minor or other person concerned, so much of any moneys standing to the credit of the minor or other person in the guardian's fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or any of his dependants, or for any purpose referred to in subparagraph (i), (ii) or (iv) of paragraph (*c*) of the proviso to section 82, or for any investment in immovable property within the Republic or in any mortgage over such immovable property on behalf of the minor or other person, approved by the Master: Provided that, subject to the terms of any such will or instrument, the aggregate of the payments made in the case of any minor or other person for purposes of maintenance, education or other benefit shall not, without the sanction of the court, exceed … [R 250 000] … of the capital amount received for account of the minor or other person concerned'.

The Minister also repealed and fixed the amount in respect of s 1(1)(*c*)(i) of the Intestate Succession Act 81 of 1987 and it is important for all practitioners to note that the change has the following implication:

- In terms of s 1(1)(*c*)(i), if after the commencement of the Act a person dies intestate, either wholly or in part, and is survived by a spouse as well as a descendant, such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed R 250 000, whichever is the greater.

Maurice Alexander *LLB (UWC)* is a candidate attorney at Knowles Husain Lindsay Inc in Cape Town. ❑

By the Financial Forensic Investigation Team of the Attorneys Fidelity Fund

Do you know whose money it was?

Clients from time to time entrust their money and/or property to practitioners for future payments on their instructions to the practitioner/s. Practitioners are required by the Attorneys Act 53 of 1979 (the Act), the rules applicable to the various law societies and the draft uniform rules to keep accounting records for monies that they are entrusted with.

- Section 78(4) of the Act states: 'Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust savings or interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him'.
- KwaZulu-Natal Law Society – r 20(1) states: 'A firm shall keep in an official language of the Republic such accounting records as are necessary fairly to present in accordance with generally accepted accounting practice the state of affairs and business of the firm and to explain the transactions and financial position of the firm including, without derogating from the generality of this rule –

(*a*) records containing particulars and information of all monies received, credited to, held and paid by it including interest for and on account of any person as well as of all monies invested by it in terms of section 78(2) or 78(2A) of the Act;

(*b*) records showing its assets and liabilities'.
- Cape Law Society – r 13.5 states: 'A firm shall keep in an official language of the Republic such accounting records as are necessary to present fairly and in accordance with generally accepted accounting practice the state of affairs and business of the firm and to explain the transactions and financial position of the firm including, without derogation from the generality of this Rule –

13.5.1 records showing its assets and liabilities;

13.5.2 records containing entries from day to day of all monies received and paid by it on its own account;

13.5.3 records containing particulars and information of –

13.5.3.1 all monies received, held and paid by it for and on account of any person;

13.5.3.2 all monies invested by it in terms of section 78(2) or section 78(2A) of the Act;

13.5.3.3 any interest referred to in section 78(3) of the Act which is paid over or credited to it;

13.5.3.4 any interest credited to or in respect of any separate trust savings or other interest-bearing account, referred to in section 78(2A)'.
- Law Society of the Northern Provinces – r 68.1 states: 'A firm shall keep in an official language of the Republic such accounting records as are necessary to represent fully and accurately in accordance with generally accepted accounting practice the state of affairs and business of the firm and to explain the transactions and financial position of the firm including and without derogation from the generality of this rule –

68.1.1 records showing its assets and liabilities;

68.1.2 records containing entries from day to day of all moneys received and paid by it on its own account;

68.1.3 records containing particulars and information of all moneys received, held and paid by it for and on account of any person as well as of all moneys invested by it in terms of section 78(2) or section 78(2A) of the Act and of any interest referred to in section 78(3) of the Act which is paid over or credited to it, as well as any interest credited to or on any separate trust savings or other interest – bearing account referred to in section 78(2A)'.
- Free State Law Society – r 16.1 states: 'A firm shall keep in an official language of the Republic such accounting records as are necessary to reflect in accordance with generally accepted accounting practice the state of affairs and business of the firm and to explain the transactions and financial position of the firm including and without detracting from the generality of this rule –

16.1.1 records showing its assets and liabilities;

16.1.2 records containing day to day entries of all moneys received and paid by it on and from its own account;

16.1.3 records containing particulars and information of all moneys received, held and paid by it for and on account of any person as well as of all moneys invested by it in terms of section 78(2) or section 78(2A) of the Act and of any interest referred to in section 78(3) of the Act which is paid over or credited to it, as well as any interest credited to or on any separate trust savings or other interest – bearing account referred to in section 78(2A).
- The draft uniform rules also capture these requirements under r 35.5 in more or less the same way as it is captured in the Cape Law Society rules.

Every practitioner/practice allocates a client reference for each of its clients, that reference is used in all correspondence between the practice and the client. The client is also expected to quote this reference whenever money is paid into the attorney's trust account in order for the funds to be correctly allocated to the client's respective account. Instances occur where clients either do not quote the reference when they make deposits or they misquote the reference resulting in difficulties for the practice to allocate the funds received in the trust account, as these become unknown/unidentified. When this happens, an account in the general ledger called 'suspense' is used. A suspense account can be defined as 'an account in the general ledger that temporarily stores any transactions for which there is uncertainty about the account in which they should be recorded' (www.accountingtools.com/questions-and-answers/what-is-a-suspense-account.html, accessed 29-1-2015). Once the owner of the funds is known/identified, the funds are removed from the suspense account and allocated in the owner's account.

It is useful to have a suspense account, rather than not recording transactions at all until there is sufficient information available to create an entry to the correct account(s). Otherwise, larger transactions may not be recorded by the end of a reporting period, resulting in inaccurate reporting. However, accurate records and reports of the suspense account should be maintained by the practice, including regular reconciliations of these accounts. It is in the best interest of the practitioner to ensure that these accounts are cleared on a regular basis to avoid keeping transactions in the account for prolonged periods. In clearing

these accounts, the practitioner should ensure that the rightful account is first identified and then funds are removed from the suspense account into that account. There will be accounting entries reflecting on both the suspense and the rightful account as evidence of reallocation of the funds. Should fees be due to the practice, these should not be taken directly from suspense but should first be allocated to the rightful account and fees taken from that account.

There are a number of reasons why these accounts should be cleared on a regular basis, ranging from administrative reasons to risk of misappropriation. The sections that follow explore what could happen:

- Let us assume that a client pays into the attorney's trust account for fees due but does not put a reference or puts an incorrect reference. On receipt of the money by the practice, the amount will be allocated to suspense pending correct identification of the owner. On identification of the owner of the money, the practitioner takes his or her fees directly from suspense to business account (makes a transfer from trust to business), without first removing it from suspense to the owner's account. The owner's account remains open in the practice's records as it would continue to reflect fees outstanding while these were in fact received but never correctly allocated. This becomes an administrative error, which may result in the client being called on to pay in, and putting a burden on the client to prove over and over again that the money was paid in, and in the process ruin the reputation of the practice and the practitioner/s.
- Instances have been noted for some practices where funds sitting in suspense remain in suspense for prolonged periods. There could be malicious staff working with these accounts who observe these monies on a daily basis and may get tempted to use the money as they know that it is unknown and believe it may not be noticed if it goes missing. They then start paying directly out of suspense for their own benefit. This would constitute misappropriation of trust funds. Should the rule of not paying directly from suspense have been enforced at the practice, it would be easier for the practitioner/s to notice such payments and investigate soon.
- Other instances have also been noted where malicious staff, due to enforcement of the rule not to pay directly out of suspense by the practice but to first allocate to the correct account, would create fraudulent accounts, allocate funds removed from suspense to these accounts and effect payments from those for their own benefit. This would also constitute misappropriation of trust funds. Practitioners need to have in place a system where a suspense report and reconciliation is regularly generated and reviewed as means to monitor movements in and out of suspense.
- Other instances have also been noted where malicious staff reflect having passed journals in reallocation of these amounts, thus creating an entry in suspense but the contra leg is untraced, only to find that there were payments effected and not journals passed. This is another form of misappropriation of trust funds. In order to deal with this risk, practitioners should monitor the suspense account closely and ensure that all journals are pre-authorised.

From the foregoing examples of what may happen on the suspense account, the resultant effect is that funds may be misappropriated, which may cause irreparable damage to the practice and the practitioner/s. As a principle, any money sitting in suspense is unknown and remains unknown until it is known and is removed from suspense to the correct account. It, therefore, follows that one may not make any payments or take any fees from unknown funds (suspense account). Monies entrusted are to be used only for the benefit of the owner of the funds, and that owner being known.

Sub-rule 35.10.2 of the draft uniform

rules requires that a firm transfers money from its trust banking account to business banking account '35.10.2.2 if the trust creditor from whose account the transfer is made is identified'.

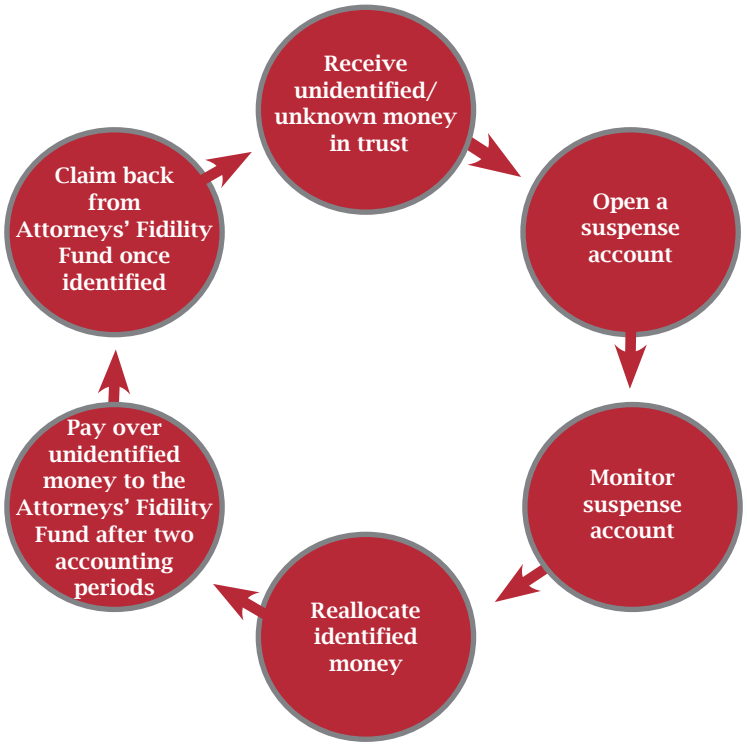
The KwaZulu-Natal Law Society issued a guideline on 14 August 2006 (https://www.lawsoc.co.za/upload/files/2007-CIRC%2001.pdf, accessed 4-2-2015), and s 87(4) of the Legal Practice Act 28 of 2014 captures this guideline which states:

'(*a*) Any money held in the trust account of a trust account practice in respect of which the identity of the owner is unknown or which is unclaimed after one year, must, after the second annual closing of the accounting records of the trust account practice following the date upon which those funds were deposited in the trust account of the trust account practice, be paid over to the Fund by the trust account practice.

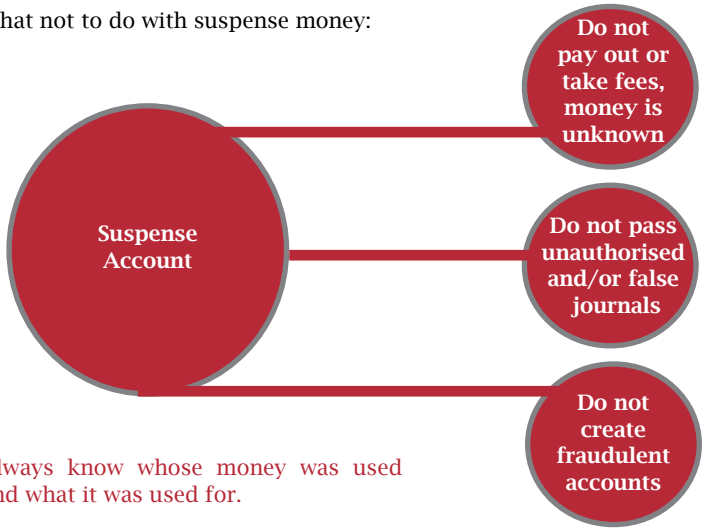
(*b*) Nothing in this subsection deprives the owner of the money contemplated in paragraph (*a*) of the right to claim from the Fund any portion as he or she may prove an entitlement to'.

This subsection aims to avoid monies lying in suspense for too long as people may begin to have ideas of how to misappropriate the funds as suspense money is a 'soft target' for misappropriation.

In summary, what to do if you receive unknown/unidentified monies in trust account:

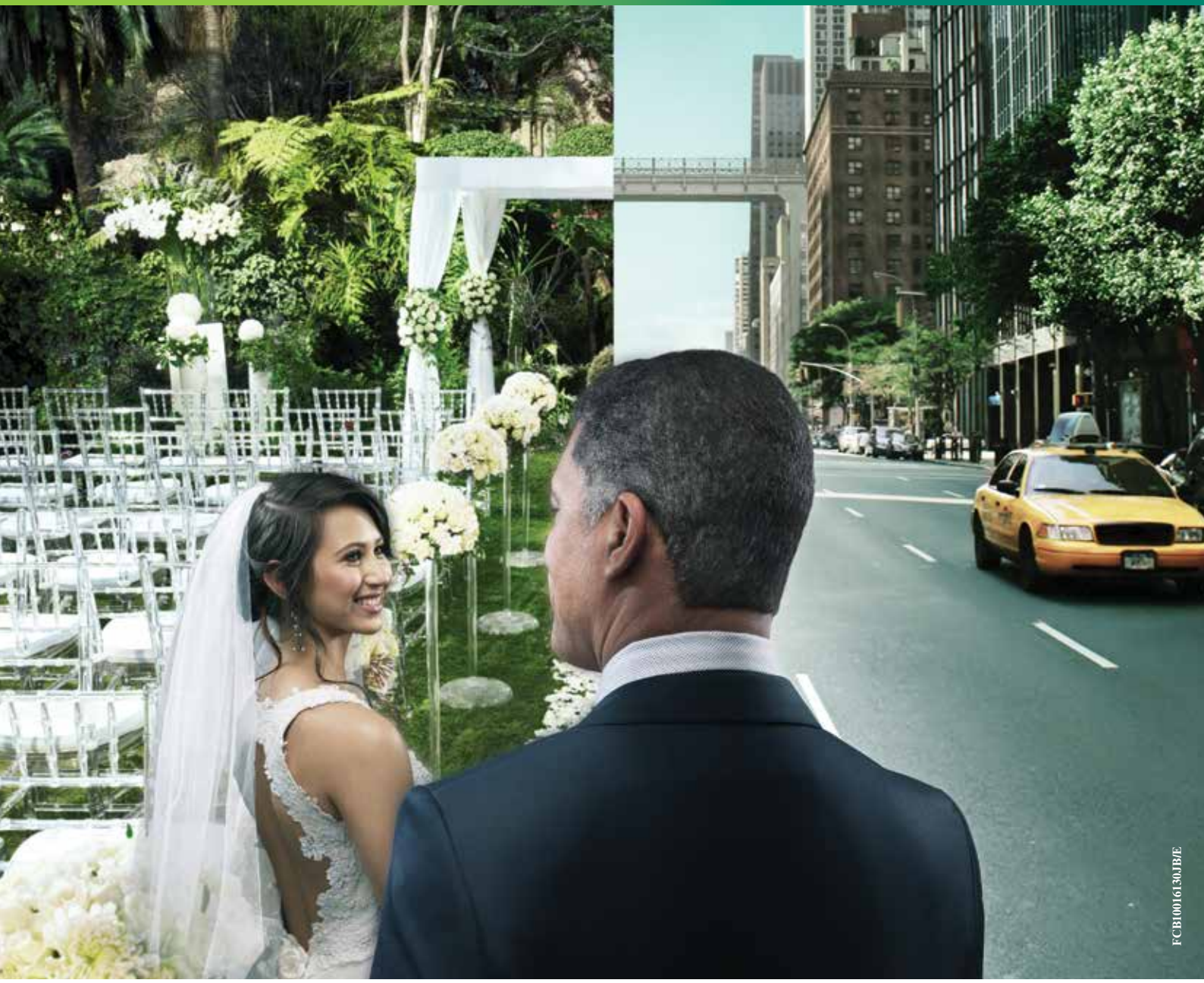


What not to do with suspense money:



Always know whose money was used and what it was used for.

Financial Forensic Investigation Team of the Attorneys Fidelity Fund in Centurion.



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Gimme the money honey

The fairness of spousal maintenance after divorce

By Magdaleen de Klerk

There is a general misconception that the main, or even the sole criterion, for a claim for spousal maintenance on divorce is the claimant's need or ability to maintain himself or herself.

The law to be applied is s 7(2) of the Divorce Act 70 of 1979 (the Act).

Section 7(2) of the Act provides that the court granting a decree of divorce may make a maintenance order in favour of one of the spouses after considering the following factors, namely –

- their existing or prospective means;
- their respective earning capacities;
- their financial needs and obligations;
- the parties ages;
- the duration of the marriage;
- the standard of living of the parties prior to the divorce;
- the parties' conduct insofar as it may be relevant to the break-down of the marriage;
- an order in terms of subs (3); and
- any other factor, which in the court's opinion should be taken into account.

The purpose of the court's inquiry in terms of s 7(2) is to determine what award would be 'just'.

The court is required to consider the factors referred to in s 7(2) in order to decide, firstly whether maintenance is to be paid at all and, if so, the amount to be paid and the period for which maintenance is to be paid.

Section 7(2) gives the court the widest discretion to take into account the factors listed and any other factor that in the opinion of the court should be taken into account.

No particular stress was laid on any one or more of these factors, and they are not listed in any particular order of importance or of greater or lesser relevance.

The feature of overriding importance is that the court will grant such order as it considers to be just.

The discretion given to the court in terms of s 7(2) must be judicially exercised. This means that discretion must be exercised according to established rules of law and practice.

This presupposes that evidence

Picture source: Gallo Images/istock

regarding those factors should be placed before the court.

Each case should be considered on its own merits in the light of the facts and circumstances peculiar to it and with regard to those factors set out in s 7(2).

With regard to the question whether maintenance is to be paid:

It was held in *K v K* 2006 (6) SA 127 (C) that: 'This Court, however, also takes into account the fact that the division of roles in families influences not only the past earning capacity of the parties, but also their future earning capacities. For a discussion of this view, see the article entitled "Labours of Love: Child custody and the division of matrimonial property at divorce" (Elsje Bonthuys, BA LLB PhD, (2001) 49 *THRHR* p 192 at 202), of which the following quotation is an extract:

"A legal reluctance to order maintenance for working women who are considered able to support themselves not only entails, therefore, a refusal to compensate them for past diminution in earning power, but fails to account for loss of earning power which inevitably attaches to post-divorce custody"' (at para 11.2.11).

It was further held that the decision of Mullins J in *P v P* 1990 (1) SA 998 (E) is supported where it is stated that: 'A woman's ability to earn income does not *per se*, in my view, disentitle the Court from ordering her former husband to pay her maintenance' (at 1003–G).

It was held in *B v B* 2009 (3) SA 89 (W) that an approach that no more than financial need on the part of the claimant and ability to pay on the part of the other spouse need be established for the court to make a maintenance order 'is not consistent with the wording of s 7(2) which requires consideration of a multiplicity of identified factors which are not a *numerous clauses*. One is required to go further than "financial needs" and "existing means" and "earning capacities"' (at para 49).

It was held further that: 'What is thought to be a "just" order in the context of the Divorce Act must contain a moral component of what is thought to be "right" and "fair". Fairness envisages that the order is "appropriate" as between the parties, and when measured against all the factors specified in s 7(2) and those others which a court decides should also be taken into account. What is "appropriate" brings one back full circle to the moral consideration that the order must be "deserved"' (at para 46).

It was held in *N v N* 1984 (2) SA 294 (C) that: 'A proper weighing of all these factors is important to counter-balance the inherent immorality that could follow were the sole or even the main criterion for a claim for maintenance to be the plaintiff's need or ability to maintain herself'(at 297–B).

It was held further that: 'Had the Legislature intended to preserve the common law and limit maintenance in accordance with a wife's ability to maintain herself … the Divorce Act could encourage immorality in many ways. It could then be the middle-aged libertine's charter of freedom. A man could throw out the woman who had shared his bed, ran his home, and reared his children, after twenty years or so, replacing her with something younger and prettier, and claim that his wife is not entitled to maintenance because during twenty years of minding his home and family she had also earned money outside that home … and could now that the children were off her hands work that much harder. On the other hand it would be equally unjust that an indigent woman unable to earn much money could marry a wealthy man, walk out of her wifely duties and try to use him as a meal-ticket for life … I can think of no reason why a blameless husband who has sacrificed his own career advancement and along

with it income and pension benefits, in favour of his wife's, should not be entitled to a contribution towards his maintenance from her, merely because he would not starve without' (at 297–C).

It was held in *VDW v VDW* (GNP) (unreported case no55831/08, 23-3-2011) (Southwood J) that: 'Before the commencement of the Act it was said that no maintenance will be awarded to a wife who is able to maintain herself and that a wife cannot expect to enjoy, after divorce, the same standard of living that she had as a married person – see Hahlo *Husband and Wife* 5ed 361 and the cases there cited. However it is clear from the factors enumerated in section 7(2) and the wide discretion which is conferred on the trial court that it is not bound to refuse a wife's claim for maintenance simply because she can support herself.'

It was held in *R v R* 1980 (3) SA 446 (C) that: 'A wife of long standing who has assisted her husband materially in building up his separate estate would in my view in justice be entitled to far more by way of maintenance, in terms of this section, than one who did not more for a few years than share his bed and keep his house' (at 450–G).

In *G v G* 1987 (1) SA 48 (C) the complainant kept a home about which no complaints could be made. 'She was a devoted and exemplary mother to her children. She strove to make a happy home for her husband …'. It was held that: 'In all these circumstances she would be entitled to more by way of maintenance than a wife in a marriage of short duration would be…' (at 53–A).

It was held in *K v K* 1986 (4) SA 616 (E) that bride-grooms must take their brides, as they find them and if they marry wives who probably cannot obtain or retain employment they are not entitled to expect a court to attribute a notional earning capacity to those wives on divorce.

In *B v B* 1987 (1) SA 967 (A) the wife had spent her whole married life at home and in her husband's office helping him for many hours a day, as well as running the house and yet despite her ability to do various useful work of an unskilled nature, was not attributed any notional earning capacity.

It was held that 'one should find some balance in favour of the assumption that she will not obtain work (although not necessarily giving full effect to such assumption), for justice requires that it should be the appellant who must suffer the hardship of paying an additional amount of maintenance, beyond what may turn out to be strictly necessary, rather than to allow the respondent to suffer the hardship of an inadequate income if in fact she does not find employment'.

With regard to the amount of maintenance to be paid it was held in the *K v K* (1986) case (*op cit*) that in most cases persons who have become divorced will be compelled by necessity to reduce their standards of living, for where the available means of support are not adequate to maintain both according to their former scale of living, each must of necessity scale down his or her budget. To say that two can live as cheaply as one, is not true. The fact of the matter is that two living together can live more cheaply than two living apart, for obvious reasons such as the need for two residences plus rates, maintenance, service charges and all the rest of it.

In the *P v P* (1990) matter (*op cit*) it was held that 'a wife *should*, in my view, be able to expect the same standard of living that she had as a married woman. In most cases it may not be possible to achieve this goal, and of course a husband should be entitled to the same expectation, but in the final result it is a question of balancing up the needs of both parties and making an equitable distribution of the available income' (at 1002–F).

In *MB v NB* 2010 (3) SA 220 (GSJ) it was held that 'the proper approach is to postulate that the parties should each continue, following divorce, to live in the style to which they have become accustomed for so long as this was permitted by the resources at their disposal. If, as so often happens, the capital and income are insufficient to meet this standard, then each should abate their requirements accordingly. In this limited sense the touchstone is subjective: The issue is not what people generally would regard as reasonable … but what the parties have come to depend on, subject always to the criterion of affordability' (at para 33).

Clean break principle

It was held in *AV v CV* 2011 (6) SA 189 (KZP) that: '[O]ur courts will always bear in mind the possibility of using their powers … in such a way as to achieve a complete termination of the financial dependence of the one party on the other, if the circumstances permit. The last-mentioned qualification is of course, very important' (at para 17).

It was held further that 'there will no doubt be many cases in which the constraints imposed by the facts … will not allow justice to be done between the parties by effecting a final termination of the financial dependence of the one on the other' (at para 17).

In *VW v VW* (SE) (unreported case no 136/2005, 4-4-2006) (Jones J) it was held: 'There is much to be said in a case such as this for achieving a clean break between the parties. This is normally only possible, in a case of spouses of mature age, where there are assets of sufficient worth to enable both parties to be self-sufficient if the assets are divided. That is not the position here' (at para 9.4).

It was held in the *B v B* (2009) matter (*op cit*) that 'our courts may have been quick to proclaim the need for former spouses to be financially independent of each other whilst not always fully cognisant of the many experiential barriers and familial responsibilities which render such security no more than a chimera for many women' (at para 39).

It was stated by M de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) *THRHR* 75 at 82 that 'the most important asset of most households is the stream of future income that represents a return on career investment'.

Conclusion

In the end the feature of overriding importance is that the court will grant such order as it considers to be just.

Magdaleen de Klerk *BProc BA (UFS)* is an attorney at DDKK Attorneys Inc in Polokwane.

UNIVERSITY OF SOUTH AFRICA

LEGAL ADVISOR: LABOUR LAW

The objective of this post is:

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Requirements

- A qualified and admitted and practising Attorney or Advocate with a Grade 12 (Matric) and relevant legal University Honours Degree or equivalent qualification (LLB)
- 6 Years' relevant experience of which 3 years is post-admittance prosecutorial experience (criminal law, particularly commercial crimes; criminal procedure law and law of evidence)
- Understanding and sound knowledge of the operation and application of Labour Law and Labour Relations and all legal processes relating thereto
- Excellent written and verbal communication skills and expertise in MS Office are required
- Conflict resolution skills and ability to work under pressure
- Ability to work independently and to self-manage

Recommendations

- Practical experience in the field of Labour Law including but not limited to CCMA appearances
- Knowledge of the functioning of a Public Provider of Higher Education

Duties

- Management of all aspects of the employer – employee relationship from a legal perspective
- Render across-the-board legal services, including but not limited to labour-related contracts, legal opinions, CCMA, labour court attendance, employment-related debt collections
- Keep Unisa community informed regarding the requirements of relevant case law, legislation, policies and internal and external directives
- Keep abreast of new developments and conduct research with regard to Labour Law and related fields
- Assist Managers in negotiating, drafting and vetting of regulatory (Statutory and otherwise) documentation
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The role of the Takeover Regulation Panel in protecting investors

Picture source: Gallo Images/istock

By
Madimetja
A Lucky
Phakeng

This article briefly discusses the regulation of mergers and acquisitions in terms of the Companies Act 71 of 2008 (the Act). It is generally accepted that legal protection of the investing public in a country encourages development of financial markets. In countries that have well-functioning legal rules, outside investors are willing to invest by providing funding to firms and are willing to participate in financial markets. On the other hand, where investors are not protected the development of financial markets may be retarded. Shareholders and creditors feeling that their rights are protected are willing to pay more for financial assets including equity and debt, with the recognition that they will be repaid in the form of either dividend or interest rather than losing their investment to expropriation; investors may be willing to pay more. Share prices may increase. This in turn, may lead to investors putting more money in the financial markets and subsequent expansion of the financial markets. (R La Porta, F Lopez-De-Silanes, A Shleifer and R Vishuy 'Investor Protection and Corporate Valuation' (2002) 57 *The Journal of Finance* 1147 (http://onlinelibrary.wiley.com/doi/10.1111/1540-6261.00457/pdf, accessed 30-1-2015). By improving protection for investors', confidence in financial markets is improved.

The role of regulators is often not well appreciated by some market participants. Their role is often misunderstood by the general public. Some professionals view regulators as obstructive bureaucrats' who are intent on delaying and interfering with their mega deals. The general public often overestimate the powers and mandates of these bodies. The fact that the powers of these bodies are circumscribed in some cases is also missed by the general public. This may lead to investors failing to take additional measures to safeguard their investments. There is little doubt that the investing public needs protection. However, the amount of protection is often debatable. In certain instances a light touch approach may be required – lest one interferes with the efficient workings of financial markets – while in others, a more robust approach may be required. A balance is needed.

Regulation of mergers and acquisitions in South Africa is undertaken by a number of regulators. These regulators consider each mergers and acquisition from a different regulatory mandate. For instance the Competition Commission considers mergers and acquisitions with a view to promoting and maintaining competition in South Africa. To achieve these objectives, it has powers to investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers, in order to achieve equity and efficiency in the South African economy. Its purpose is to promote and maintain competition in South Africa. It carries out its mandate in terms of the Competition Act 89 of 1998.

The Takeover Regulation Panel (panel) is another regulator of mergers and acquisitions. The panel has a different mandate. It carries out its mandate in terms of the Act. In particular, ch 5 of the Act and ch 5 of the regulations (the takeover provisions). The mandate of the panel is triggered when certain companies (defined as 'regulated companies') undertake particular transactions (defined as 'affected transactions' or 'offers'). The rationale for regulating affected transactions and offers is to protect minority shareholders by ensuring that during affected transactions or offers such shareholders will have access to certain information. The information include financial reports and valuations of their shares. By having access to this information, shareholders can make informed decisions about their investments.

The panel is responsible for –

- regulating affected transactions or offers;
- investigating complaints in respect of affected transactions or offers;
- applying to court to wind up a company where appropriate; and
- consulting with the Minister of the Department of Trade and Industry in respect of deletion, amendments or additions of the takeover provisions.

The panel may also –

- consult with any person on application of the provisions;
- attend to representations by any person; or
- issue, amend or withdraw information on policy on affected transactions and offers.

In the main, the protection offered is by –

- ensuring the integrity of the marketplace and fairness to the shareholders of the regulated companies;
- ensuring the provision of necessary information in adequate time to shareholders to facilitate the making of fair and informed decisions; and
- preventing actions by regulated companies designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by shareholders.

The panel must further ensure –

- that no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;
- that all shareholders are treated equally and equitably;
- that no relevant information is withheld from shareholders;
- that all shareholders receive the same information from all parties; and
- that shareholders are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision.

In furtherance of its mandate the panel may –

- require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer;
- issue compliance certificates;
- initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer; or
- issue a compliance notice which notice, may prohibit or require any action by a person; or order a person to divest of an acquired asset or account for profits.

The panel may also wholly or partially, and with or without conditions, exempt an offer to an affected transaction or an offer from the application certain provisions relating to affected transactions and offers.

The powers of the panel are limited in that it must not express a view or opinion on the commercial advantages or disadvantages of affected transactions or offers.

The regulations provide detailed requirements and how the requirements must be complied with. Directors of companies undertaking these transactions need to be aware of their obligations in terms of the takeover provisions to ensure that they stay within the law.

The investing public needs to be aware that regulators have limitations. No number of laws or regulations can adequately protect the investing public against all risks, despite the diligence and good intentions of the regulators. In general, the principles set out in the Act are benchmarked against international best practice, and offers protection mechanisms, which have been practised internationally. However, this does not mean that the responsible regulator should be content. The increasing globalisation, and resultant complex cross-border mergers and acquisitions requires continuous vigilance, adaptation and improvement.

While the role of the panel may not be immediately visible, it nevertheless plays an important role in creating confidence among investors. Investors should be comforted in knowing that should there be a takeover of their company, they would be entitled to protection in terms of the takeover provisions.

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Picture source: Gallo Images/iStock

Understanding deemed dismissal in state departments

By
Frans Erasmus
and Geraldine
Kinghorn

The state, as employer, is immunised against unfair dismissal claims in the realm of deemed dismissal. This is ensured by way of s 14(1) of the Employment of Educators Act 76 of 1998 (the Act) and s 17(3)(*a*) of the Public Service Act 103 of 1994 (PSA).

In this short article, we will attempt to provide a clearer understanding of this form of dismissal that operates outside of the Labour Relations Act 66 of 1995 (LRA), sch 8 thereof and the Department of Public Service and Administration Resolution 1 of 2003. The role of the shop steward is vital throughout this process. The employee will in all likelihood be unaware of his or her rights in this regard and will rely heavily on the guidance of the shop steward and legal representatives.

Private sector

Deemed dismissal is not found in the private sector (even if there is such a provision in the contract of employment) as held in *Jammin Retail (Pty) Ltd v Mokwane and Others* [2010] 4 BLLR 404 (LC). A hearing needs to precede the dismissal.

Legislation

On 1 April 2008 the PSA was amended and the subsections of s 17 changed. Section 17(3)(*a*) of the PSA states that an employee is considered deemed dismissed if he or she absents himself from official duties without permission of the head of the department for more than a calendar month from his place of work.

Section 14(1) of the Act states similar provisions except that the period is 14 consecutive days. If these three requirements (conditions precedent) are present, then the contract of employment has by operation of law (*ex lege*) been terminated. In *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA), the court held that the Act mentioned (the Employment of Educators Act), creates a mechanism to infer desertion. The letter of dismissal is merely a notification of that result.

Employer's enforcement of deemed dismissal

The employer needs to ensure beforehand that the abovementioned conditions precedent are met before issuing a deemed

dismissal letter. This implies that the employer needs to gather facts surrounding the absence before considering whether the three requirements were met or not.

What to do with a deemed dismissed employee

Shop stewards need to actively assist the employee in immediately reporting back to duty (in person), as held in *PSA obo Van Der Walt v Minister Public Enterprise and Another* [2010] 1 BLLR 78 (LC) and in terms of s 17(3)(*b*) of the PSA or s 14(2) of the Act. The onus shifts to the employee to show good cause for reinstatement, as stated in *MEC: Department of Education Gauteng v Msweli* 2012 JDR 1476 (LC). Written representations in the form of an application for reinstatement, needs to be drafted showing good cause for the absence. It must be shown that the absence was not wilful and that the employee always intended to return as stated in *Grootboom v NPA and Another* [2010] 9 BLLR 949 (LC) at 56. Annex an original document as proof of the absence. The application for reinstatement must be submitted to the head of department. Regular written follow-ups should be conducted as to its progress. Retain a properly served copy of the application for the union's record.

Reinstatement

In *De Villiers v Head of Department: Education, Western Cape Province* 2010 31 ILJ 1377 (LC) the test for reinstatement was stated by Van Niekerk J as follows: '… unless the employer, having regard to the full conspectus of relevant facts and circumstances, is satisfied that a continued employment relationship has been rendered intolerable by the employee's conduct, the employer should as a general rule approve the reinstatement of the employee …'.

Employer's refusal to reinstate

In the event that the employer decides not to reinstate in terms of the application for reinstatement; the employee may refer the matter to the bargaining council and thereafter on review to the Labour Court. This track was laid down in the *PSA obo Van Der Walt* case.

Employer's reasons for a decision not to reinstate

In the *PSA obo Smit v Mphaphuli NO and Others* (LC) (unreported case no C742/11, 16-4-2014) the court referred to *Weder v Member of the Executive Council for the Department of Health, Western Cape* [2013] 1 BLLR 94 (LC) at 35, wherein it was stated: '… it is difficult to assess whether a decision could have been reasonable and rational when the decision maker offers no reasons for the decision …'. The court also stated that: 'The same must hold true of the MEC's decision. Without him having given any reasons for his decision, it cannot be said to be reasonable. How can it be ascertained if it was reasonable, if he gave no reasons?' The court further stated: 'And, as Cora Hoexter notes, "the giving of reasons is commonly regarded as one of the more fundamental requirements of administrative justice and an important component of procedural fairness"…'.

Criteria for review

Section 158(1)(*h*) of the LRA empowers the Labour Court to review the actions by the state in its capacity as an employer. This was held in both the *De Villiers* and *Mogola and Another v Head of the Department: The Department of Education NO* [2012] 6 BLLR 584 (LC) cases.

Administrative action

The Constitutional Court held in *Gcaba v Minister of Safety and Security and Others* [2009] 12 BLLR 1145 (CC) that the dismissal of a public servant is not an administrative act subject to review, if the cause of action and the remedy is covered by the LRA. In the matter of *De Villiers*, it was stated that the conduct of the state as employer will generally not constitute administrative action. Departure from this rule is justified in specific cases under specific conditions. In the *Mogola* matter the court held that the decision by an member of executive council (MEC) (not to reinstate) constitutes administrative action, which is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or s 158(1)(*h*) of the LRA. The legislature could not have intended to deprive employees of a remedy if the discretion afforded to the MEC is improperly exercised. Even if the Labour Court cannot apply PAJA, it has jurisdiction to review administration relating to employment in terms of s 158(1)(*h*) of the LRA. The court stated that had the MEC applied his mind he would have realised that the conditions precedent for the invocation of the act were not present.

Other employment while on suspension

There is a prohibition on employees to take up remunerative employment while on suspension. In such an instance the employee will be deemed dismissed as stated in *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* [2013] 4 BLLR 362 (LAC).

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Picture source: Gallo Images/iStock

By Peter Williams

Hate speech is a crime

Equality Court rules in favour of domestic worker

The District Court of Cape Town, sitting as an Equality Court, has recently made a landmark ruling in *Nomasomi Gloria Kente v Andre van Deventer* (EqC) (unreported case no EC 9/13, 24-10-2014, Cape Town Magistrates Court) (Magistrate Koeries), by awarding a domestic worker R 50 000 in damages. This was after it found in the domestic worker's favour in a case of hate speech and harassment. Ms Kente, a domestic worker, complained that after her shift had ended, she requested her employer's boyfriend to look after his own child for a brief period of time. while she took a shower. He was upset about this, grabbed her by her pyjamas, spat in her face and told her that she was 'a pathetic Kaffir, that he hated Kaffirs and that he hated her.' He continued by saying that 'Kaffirs had stolen our land'. Ms Kente complained that she had been subjected to racial abuse and harass-

ment over a number of years and that she had previously lodged a case with the police, only to find out that the perpetrator had paid an acknowledgment of guilt fine in the sum of R 150.

Magistrate Jerome Koeries found that the incidents had occurred as described by Ms Kente and indicated that hate speech will not be tolerated by our courts and that violence against women will have dire consequences. The court found that the word 'Kaffir' constitutes hate speech. The judgment implies that where derogatory words, such as 'Kaffir', or even 'Hot-not' or 'coolie' or other derogatory words are used, the court will not hesitate to deal with it harshly. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) provides for victims of hate speech to claim damages for the hurt, humiliation and degradation, which they suffered and in Ms Kente's case, a substantial amount was awarded, relatively speaking.

Hate speech and harassment

In terms of s 10 of the Equality Act, words that are communicated amount to hate speech if:

'i. The words are based on one or more of the prohibited grounds referred to in the Act. Prohibited grounds include race, gender, ethnic or social origin and colour;

ii. Objectively it is considered to be hurtful, harmful, incite harm or propagate hatred. The intention of the person who utters the words is irrelevant; and

iii. It does not fall within the proviso to section 12 (the proviso refers to bona fide engagement in artistic creativity, academic and scientific inquiry and the like.)'

In the case of *Herselman v Geleba* (ECG) (unreported case no 231/2009, 1-9-2011) (Dawood J), the court held that the use of the word 'baboon' amounted to hate speech as defined in s 10 of the Equality Act. The court held that 'the word "baboon" has racial undertones and a derogatory meaning and would be construed as such by a reasonable African person.' Similarly, in the case of *Strydom v Chiloane* 2008 (2) SA 247 (T) a person had called another person a 'baboon' in the presence of two co-workers. The court (two justices of the High Court) found that the magistrate was right 'to find that the words complained of fall within the definition of "hate speech" as defined in section 10 of PEPUDA [the Equality Act].' Referring to *Mangope v Asmal and Another* 1997 (4) SA 277 (T) at 286J – 287A, the court stated that: 'Applying that definition, it is, in my view, clear that when the epithet "baboon" is attributed to a person when he is severely criticised, as in this case, the purpose is to indicate that he is base and of extremely low intelligence. But I also think that it can be inferred from the use of the word in such circumstances that the person mentioned is of subhuman intelligence and not worthy of being described as a human being.'

There can therefore be no doubt that the word 'Kaffir' constitutes hate speech as defined in s 10(1) of the Equality Act as it refers to the race, colour, ethnic or social origin of the complainant and it is both hurtful and harmful.

Section 11 of the Equality Act provides that: 'No person may subject any person to harassment.' 'Harassment' is defined as 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

(a) sex, gender or sexual orientation; or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group ...'. It is clear that the conduct that the complainant was exposed to meets the requirements of this definition and as such constitutes harassment.

How to interpret s 10(1) of the Act

Section 10(1) has given rise to interpretation issues. It reads as follows:

'10 Prohibition of hate speech

Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.'

The question is whether subsections (a), (b) and (c) should be read with an 'and' or with an 'or', in other words whether the conjunctive or disjunctive approach should be used. If the conjunctive approach is used, it means that three requirements must be present or the acts must occur in a group-context, before a court can find that an utterance amounts to hate speech. For the disjunctive approach, it is sufficient for a complainant to prove that the prohibited words were either hurtful or harmful. This issue was expressly discussed in the Herselman case, where two justices of the High Court considered this provision and held the following: 'If one has regard to the purpose of the Act, the object of the Act and the Interpretation clause it militates against the acceptance of the conjunctive approach ... In this case the disjunctive approach appears to be the correct approach in interpreting the provisions of section 10(1) or else the very purpose of the Act may well be defeated.'

The court held the following: 'If one were to adopt a conjunctive approach then racially discriminatory words which are clearly hurtful and even harmful, which are directed at an individual may not fall within the ambit of the Act simply because they may not per se promote or propagate hatred because they were not uttered in a group context. This is untenable and could not have been the intention of the legislature, having regard to the purpose and objectives of the Act and the interpretation clause. Such an approach would undermine the purpose of the Act.'

User-friendly courts

In the case of *Woodways CC v Vallie* 2010 (6) SA 136 (WCC), the following was said: 'It is clear to me that the Act creates an informal and inexpensive platform for adjudication of unfair discrimination [as well as hate speech] disputes. It marks a shift from the conventional way of litigation, which emphasises elegance in the formulation of pleadings.

It creates a space for the victims of unfair discrimination to tell their stories so that systemic inequalities and unfair discrimination, which ... remain deeply embedded in social structures, may be eradicated.'

At para 32 it states: 'The informal nature of proceedings before the Equality Court was considered in *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC)', where the following was held: 'An integral part of the Equality Act, then, is the focus on the creation of a user-friendly Court environment where proceedings are conducted along inquisitorial lines, with an emphasis on informality, participation and the speedy processing of matters ... The formal, adversarial, often expensive and potentially intimidating proceedings that prevail in an ordinary

magistrate's court or High Court and which may act as a barrier to those seeking justice, have no place in an Equality Court.'

In *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape, and Others (No 2)* 2009 (6) SA 589 (SCA) at para 53, the Supreme Court of Appeal held, as per Navsa J that: 'The Equality Court was established in order to provide easy access to justice and to enable even the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek speedy redress against unfair discrimination, through less formal procedures.'

In *Manong and Associates (Pty) Ltd v City of Cape Town and Another* 2011 (2) SA 90 (SCA) the court held: 'Section 20(2) of the Act provides that a person wishing to institute proceedings in terms of or under the Act must, in the prescribed manner, notify the clerk of the Equality Court of their intention to do so. Regulation 6 of the Regulations governing proceedings in the Equality Court provides for a prescribed form to be completed in which the complaint is to be formulated. It is clear that a succinct statement of complaint is required.' The court then went on to criticise one of the parties, stating that, 'instead of using the prescribed form, (he) resorted to a rambling 30 page exposition.'

Equality Act v Employment Equity Act

Section 5(1) of the Equality Act provides that the Act does not apply to any person to whom and to the extent that the Employment Equity Act 55 of 1998 applies. In Kente's case, although the incidents occurred partially at her workplace, the main incident occurred outside her working hours. It was perpetrated by someone who was not her employer and the various incidents occurred sometimes during working hours and sometimes outside of her working hours. At the time of instituting proceedings, Kente's employer was sympathetic towards her and supported her. For that reason Kente did not deem it necessary to institute proceedings against her employer. She would have had a case against her employer as well, since her employer has an obligation to maintain a safe working environment. In the case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC), Nel AJ awarded constitutional damages against an employer even though the applicant was subjected to sexual harassment at the workplace by an unknown perpetrator. The court found that where an employee cannot obtain relief through statutory or common-law remedies and their constitutional right to fair labour practices are violated, the employee may approach the Labour Court for relief in terms of s 23(1) of the Constitution.

Conclusion

The Equality Act is a product of the South African Constitution, which has been described as a transformative constitution. This concept entails that law can serve as a medium for social change and that through the enforcement of individual rights (such as in the present case) people can change not only their own lives, but also effect change in society. The Equality Court serves as an important tool to transform society from the vestiges of apartheid and should serve as a vehicle for transformation.

• In *The State v Andre van Deventer* (unreported case no 17/1430/2013, 6-02-2015, Cape Town Magistrates Court) (Magistrate Alta Le Roux) the court sentenced Andre van Deventer to two years' house arrest and he is also required to complete 70 hours of community service for calling Ms Kente a 'kaffir'. The community work will be in the service of black women - *Editor.*

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THE LAW REPORTS

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January 2015 (1) South African Law Reports (pp 1 – 313); [2014] 4 All South African Law Reports December no 1 (pp 539 – 672); and no 2 (pp 673 – 763); 2014 (12) Butterworths Constitutional Law Reports – December (pp 1397 – 1513)

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
GP: Gauteng Division – Pretoria
KZP: KwaZulu-Natal Division – Pietermaritzburg
SCA: Supreme Court of Appeal

Arbitration

Disputes arising from agreement: In *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL* [2014] 4 All SA 617 (SCA) the court was asked to pronounce on the question whether disputes that arise from an arbitration agreement, are arbitrable. The appellant, Zhongji, a Chinese company, was awarded a tender for certain work at the mining site of a Congolese company, DCP. DCP later merged with the respondent, Kamoto and Kamoto took over all the rights and obligations in terms of the agreement between DCP and Zhongji. Kamoto was also a Congolese company. In consequence of the award of the tender, Zhongji and Kamoto entered into an agreement (the main agreement). In terms of the agreement, the 'governing law' thereof was 'English law'. The agreement provided that, unless the parties otherwise agreed, disputes between them would 'be finally settled under the Rules for the Conduct of Arbitrations as published by the Association of Arbitrators (Southern Africa) (the "Arbitration Association")'.

Problems arose with the implementation of the main agreement. Zhongji and Kamoto then signed an interim agreement to cover the parties until there was more certainty around the project.

In 2010, Zhongji claimed payment from Kamoto as a result of a dispute arising from the contractual relationship between them. Zhongji threatened that if its demand went unsatisfied, it would institute proceedings. The parties agreed that the dispute would be referred to arbitration. Relying on the arbitration clause in the main agreement, Zhongji sought redress by way of arbitration. It approached the High Court for a declaratory order that because Kamoto had assumed the rights and obligations under the main agreement; that it was bound by the arbitral regime catered for in the main agreement in relation to disputes in connection with or arising out of the main agreement; and that certain stipulated disputes to be arbitrable.

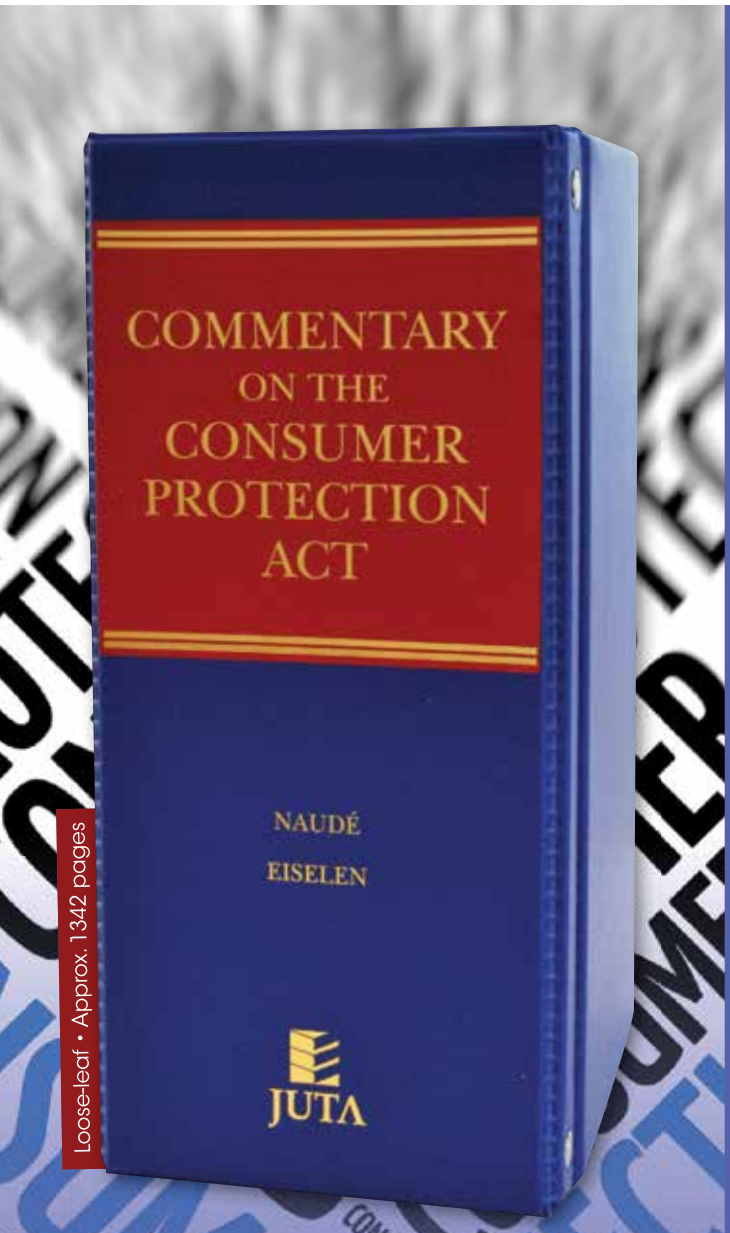
Kamoto argued that if the court were to find that there was a binding obligation, in terms of the main agreement, read together with the merger agreement, Kamoto was to submit to arbitration in respect of Zhongji's claims arising from the main agreement. The duly appointed arbitration tribunal would then have the power to decide whether or not Kamoto was liable to Zhongji for its claims that arose from the interim agreement.

The High Court upheld Kamoto's argument, and dismissed Zhongji's application.

It is trite that both Zhongji and Kamoto were peregrine in South African courts.

On appeal Willis JA held that in terms of the Rules of the Arbitration Association, an arbitrator may decide any dispute regarding the existence, validity, or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his or her own jurisdiction to act. Accordingly, once the arbitration tribunal has been duly appointed in terms of the main agreement, the rules of the Arbitration Association

Tjakie Naudé • Sieg Eiselen (managing editors)



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would give the tribunal itself jurisdiction to decide the issues, which may be raised before it. Because an arbitrator has the power to determine his or her jurisdiction in an issue that arises from the referral to arbitration itself, there was no reason why the dispute about whether or not the claims arising from Zhongji's performance in terms of the interim agreement were indeed arbitrable, should not be decided by the arbitration tribunal prior to an application to the High Court. The process of arbitration, therefore had, to be respected.

The court referred with approval to earlier English case law (*Fiona Trust and Holding Corporation and Others v Primalov and Others* [2007] UKHL 40; [2007] 4 All ER 951 (HL)) in which a liberal construction of an arbitration clause is advocated and which allows for a presumption in favour of so-called one-stop arbitration. In terms of such a 'one-stop arbitration' approach, arbitrators are allowed, where possible, to resolve issues which arise during the arbitration process.

The court concluded that Zhongji's application to the High Court was thus premature and perhaps even unnecessary.

The appeal was accordingly dismissed with costs.

Voluntary association disciplinary proceedings: The facts in *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA); *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and Another* [2015] 1 All SA 121 (SCA) were as follows. De Lange, a Methodist Church minister, announced to her congregations her intent to enter into a same-sex marriage. This caused the church to charge her with breaking its rules. The rule in question was that ministers had to obey church policy, and church policy recognised only heterosexual marriages. The church's district disciplinary committee later found her guilty.

De Lange appealed to the church's connexional disciplinary committee. It confirmed the verdict, and as sentence discontinued her holding of the office of minister. De Lange then referred the matter to arbitration, and its convenor entered into an arbitration agreement on her behalf. The church rules provided that arbitration had to be used for resolution of disputes between ministers and the church.

However, before the arbitration proceeded, De Lange approached the High Court and applied to set aside the arbitration agreement; for a declaration that the decision to discontinue her ministry was unlawful in its being based on a policy that was unfairly discriminatory on the ground of sexual orientation; for the review and setting-aside of the disciplinary committee's decisions; and for her reinstatement. She later abandoned the claim of unfair discrimination in her replying affidavit.

The High Court dismissed the application and held that De Lange ought first to have concluded the arbitration. It granted leave to appeal to the SCA.

The SCA held that in view of De Lange's express disavowal of any contention that she was discriminated against on the grounds of her sexual orientation, the court did not have to explore the relationship between her equality rights and the rights of freedom of religion enjoyed by the church and all people in South Africa.

The crisp issue was therefore about an alleged arbitration agreement and whether it should be set aside or avoided. Ponnan JA held that De Lange had not concluded the arbitration proceedings. In this regard the court reasoned that the grounds she advanced as constituting good cause were without merit; and because the dispute – concerning church rules – ought to be left to the church to determine. It further pointed out that a court should only become involved in such a dispute if it were strictly necessary; and if it did become involved, it ought to refrain from deciding issues of religious doctrine.

The appeal was dismissed. The church commendably agreed to forgo the costs of the appeal.

In a separate concurring judgment Wallis JA considered two issues that were of obiter value only. These issues nevertheless merit a reference here. The first was whether this was a 'matter relating to status'. Section 2(*b*) of the Arbitration Act 42 of 1965 provides that 'a reference to arbitration shall not be permissible in respect of any matter relating to status'. Wallis JA held that because 'a matter relating to status' possibly included a person's right to hold office; and an office could include the position of an ordained minister of religion, the present issue might indeed be not referred to arbitration. The second issue was whether there was an arbitration agreement. The litigants simply assumed there was, but Wallis JA held that there was no agreement. Methodist ministers did not contract with the church to be bound by the Laws and Discipline of the Methodist Church. Ministers followed the Laws rather as a discipline.

Constitutional law

Right of asylum seeker: The facts in *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) were as follows. Musina is a town in the northern part of the Limpopo province and the closest major town to the South African border with Zimbabwe. Municipal and police officials stationed in Musina informed spaza-shop proprietors in that town that they needed permits to operate. However, when Ethiopian and Somali proprietors attempted to apply, the municipality allegedly frustrated their efforts. The police meanwhile conducted inspections, and on a proprietor not producing a permit, immediately closed the business and confiscated the proprietor's stock and equipment. In some cases the police closed the shops of Somalis and Ethiopians even where they held permits. This prompted the appellants (the applicants) to approach the GP.

The applicants were an organisation representing Somalis, an organisation representing Ethiopians, an Ethiopian asylum seeker, an Ethiopian and a Somali refugee, and a Somali permanent resident. They asked for declarations that asylum seekers and refugees had the following rights:

- First, the right to self-employment.
- Secondly, the right to apply for and to renew licenses and permits in terms of the applicable legislation and land-use scheme.
- Thirdly, that closure of businesses run by asylum seekers and refugees with valid permits were unlawful.

The High Court dismissed the application. It held that s 22 of the Constitution gave only South Africans a right to self-employment, and it concluded from this that there was a blanket prohibition on asylum seekers and refugees' self-employment.

On appeal to the SCA, Navsa ADP held as follows:

- First, neither *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) nor *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) considered s 22 of the Constitution as placing a blanket prohibition on asylum seekers and refugees seeking employment. Section 27(*f*) of the Refugees Act 130 of 1998 entitles refugees to 'seek employment' and does not restrict that expression to wage-earning employment.
- Secondly, the court decided that refugees and asylum seekers have a right to self-employment, where they have no other means to support themselves. This on the basis of the constitutional right to dignity.
- Finally, in the present case there were in fact no restrictions on the grant of permits

or licenses to asylum seekers and refugees.

The court thus declared that asylum seekers and refugees had the right to apply for and renew licenses and permits in terms of the legislation and land-use scheme involved; and that the closure of businesses run by asylum seekers and refugees holding valid permits were unlawful.

The appeal was allowed with costs.

Defamation

Facebook: The decision in *RM v RB* 2015 (1) SA 270 (KZP) concerned an application for an interdict restraining the respondent from posting further defamatory postings about the applicant on her Facebook page.

The parties involved in the present application, RM, the applicant and the father of the child, and RB, the respondent and the mother of the child, had been in a relationship. They were the biological parents of a five-year-old daughter. The applicant and respondent were never married. The child stayed with the respondent. In terms of an arrangement the applicant had contact with his daughter every alternate weekend. After one such weekend the respondent made certain postings on her Facebook page relating to the applicant's care of their daughter and referring to the use of alcohol and drugs. A Facebook debate ensued with many of the respondent's Facebook 'friends' critical of the applicant's behaviour. At the time of the posting the respondent had 592 'Facebook friends'. The applicant alleged that the postings had defamed him as a father and were detrimental to his business reputation. He approached the High Court for an urgent interdict ordering the respondent to –

(a) remove the messages from her Facebook page;

(b) refrain from posting further defamatory statements about him on her Facebook; and

(c) refrain from publishing defamatory statements about him in any other way.

Satisfied that a *prima facie* case had been made for relief, the court granted a rule *nisi* as prayed for. In the application for final relief the main area of dispute concerned the ability of the court to restrain material not yet known to the court as per (b) and (c) above.

Chetty J pointed out that other than a denial that the postings were defamatory, the respondent did not make out any argument of the public interest in respect of the statements attributed to the applicant. The rule *nisi* had therefore to be confirmed in respect of prayer (a).

The court held that not every defamatory statement about the applicant by the respondent would be actionable. If she were to repeat her conduct in the future and make derogatory or defamatory statements about him, the applicant could always approach the court for relief in the form of an interdict or sue for damages. The court further held that despite the possibility of defamatory postings on the internet posing a significant risk to the reputational integrity of individuals, to have granted the relief sought in prayers (b) and (c) above, would have been too drastic a limitation and restraint on the respondent's freedom of expression. The court accordingly dismissed prayers (b) and (c).

As a case had been made on the papers by the applicant for the first part of the rule *nisi* it was accordingly confirmed. The respondent was ordered to pay the costs of the application.

Delict

Exclusion of liability: In *Thomas v Minister of Defence and Military Veterans* 2015 (1) SA 253 (SCA) the appellant, Thomas, who was employed as a medical registrar by the Western Cape Department of Health (the Department of Health), slipped and injured herself in 2 Military Hospital (the hospital). It was trite the hospital was a building under the control of the Department of Defence (the defendant). Thomas claimed compensation from the Department of Health under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (the Act) and instituted a claim for damages against the Minister of Defence (the Minister).

The Minister raised a special plea based on s 35(1) of the Act. It provides that: 'No action shall lie by an employee … for the recovery of damages in respect of any occupational injury … against such employee's employer.'

The Minister contended that for the purpose of determining who an 'employer' was, the Act regarded all parts of the state (in this case the Department of Health and the Department of Defence) as simply the state. Thus Thomas was employed by the state (the Department of Health). As a result, so the Minister argued, Thomas' claim against her employer, the state, was invalid. The High Court upheld the Minister's plea but granted leave to appeal.

On appeal the SCA upheld the appeal and rejected the Minister's contention. Gorven AJA held that each part of the state was an 'employer' for the purposes of the Act. It based this conclusion on ss 31(1), 39(2), 84(1) and 88(1) of the Act. In this regard it pointed out that the significance of s 84(1) read with s 39(2) is as follows. A clear distinction is drawn between the heads of the listed departments who are the employers in the national and provincial spheres of government. These are distinguished from the employers in the legislative bodies in these spheres. These are, in turn, distinguished from the employers in the sphere of local government. If, for the purposes of the Act, all of these entities were regarded as a single employer, s 84(1) would read very differently. All that it would need to say is that the state, regardless of whether it is the national, provincial or local sphere and regardless of whether it is the executive or legislative entity, would not be assessed for the purposes of the Act in respect of its employees. The Act does not provide this.

This means that, for the purposes of the Act, and in particular s 35(1), the employer of Thomas was not the state as a single, overarching entity, but the Head: Western Cape Department of Health. It further means that s 35(1) does not find application in the action and Thomas is entitled to pursue her claim against the Minister.

The SCA concluded that the special plea was incorrectly upheld and her claim incorrectly dismissed by the court *a quo*.

As a result, so the SCA reasoned, Thomas' employer was the Department of Health, and s 35(1) did not bar her claim against the Minister.

The appeal was allowed with costs.

Medical negligence: In *Medi-Clinic Ltd v Vermeulen* 2015 (1) SA 241 (SCA) Vermeulen, the plaintiff, was admitted to Medi-Clinic's hospital, the defendant, in Nelspruit for treatment for malaria, which he contracted in Mozambique. During his two month stay in the intensive care unit (ICU) in the defendant's hospital, he developed a bedsore in the area of his sacrum, which, in turn, caused nerve damage. The nerve damage left him paralysed and bound to a wheel chair. He sued the defendant for damages, alleging that the latter's nurses had negligently failed to regularly turn him, and that this had caused the bedsore. The High Court agreed, but granted the defendant leave to appeal to the SCA.

The crisp issue before the SCA was how a court should evaluate conflicting expert opinion on what constituted reasonable conduct.

Zondi JA held that to determine whether or not the defendant's nurses were negligent in not turning the plaintiff while he was in ICU, the court below had to have regard to the views of the parties' experts (see *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) at para 14). This is so because a court's preference for one body of distinguished professional opinion to another also professionally distinguished

is not sufficient to establish negligence. Failure to act in accordance with a practice accepted as proper in the relevant field is necessary, and it was for the court to decide that issue. And in doing so, it had to be satisfied that their opinions have a logical basis and whether, in forming their views, the two experts had directed their minds to the question of comparative risks and benefits and reached a defensible conclusion on the matter.

It held that the court *a quo* erred in simply accepting the plaintiff's expert witness' opinion and deciding the issue of negligence on the basis thereof. It did not subject the plaintiff's expert witness' opinion to critical analysis with a view to establishing two findings. First whether it had a logical basis, and secondly, whether in forming his views the expert witness directed his mind to the question of comparative risks and benefits and reached a defensible conclusion on whether the pressure sore which the plaintiff sustained was avoidable.

Accordingly its finding of negligence, based on the opinion of the plaintiff's expert witness, was wrong, and its judgment had to be set aside.

The appeal was allowed with costs.

Delict – pure economic loss: The facts in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC); *Country Cloud Trading CC v Member of the Executive Council, Department of Infrastructure Development, Gauteng* 2014 (12) BCLR 1397 (CC) were as follows. The appellant, Country Cloud, had lent money to a construction company contracted by the respondent's Department (the Department) to complete the construction of a partially built clinic. In terms of the loan agreement, Country Cloud stood to make a profit of R 8,5 million. However, the Department cancelled the construction contract, which ultimately led to the liquidation of the construction company. Country Cloud instituted an action against the Department in the High Court, for delictual damages in an amount of R 20,5 million together with interest.

The Department's contention was that the contract had been validly cancelled as a result of misrepresentations by the contractor regarding the validity of its tax clearance certificate and because the tender awarded to the contractor was contrary to the procurement regulations and policies of the Department. The court *a quo* held that the contract was invalid and unlawful and dismissed Country Cloud's claim (*Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2012] 4 All SA 555 (GSJ) (see 2014 (May) *DR* 49 – 50)).

Country Cloud appealed to the SCA, which, citing policy reasons, refused to impose delictual liability on the Department.

On appeal in the CC, Country Cloud argued that the SCA erred in focusing on the building contract instead of the loan agreement. As a result, so Country Cloud argued, the Department unlawfully interfered in this contract, rendering it liable to Country Cloud under the established delict of interference with a contractual relationship.

For its argument on wrongfulness Country Cloud relied, among other things, on the nature of the department's fault (intent) and the constitutional value of state accountability. Khampepe J held that the central issue was whether the Department's conduct was wrongful *vis-à-vis* Country Cloud. Since Country Cloud's claim was one for pure economic loss, and wrongfulness was not assumed, liability would depend on whether Country Cloud was able to positively establish wrongfulness.* (*Country Cloud was unable to bring its claim within the established ambit of the delict of unlawful interference in a contract. Had Country Cloud succeeded in doing so, the department's conduct would have been regarded as *prima facie* wrongful.) While the Department's blameworthiness and the risk of indeterminate liability were relevant, they did not compel a finding of wrongfulness because Country Cloud was unable to indicate which of its legal rights or interests were harmed by the Department. Nor did Country Cloud's reliance on state accountability aid its cause: The doctrine did not always give rise to a private-law duty, and in the present case there was no dishonesty or corruption on the part of the Department on which to hang liability. In any event, the link between Country Cloud and the department was too tenuous to impose liability on this basis.

The court's decision regarding wrongfulness as a brake on liability in cases of pure economic loss merits our attention. In dealing with the aspect of pure economic loss the court confirmed that the wrongfulness enquiry focuses on 'the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'

Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance.

Our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed. An additional obstacle for the plaintiff was that a delictual award would interfere with the existing contractual relationship between Country Cloud and Tau Pride. In the premises Country Cloud failed to show that the Department was responsible for its loss.

The appeal was dismissed with costs.

Exchange control

Lawfulness of regulations: The decision in *Shuttleworth v South African Reserve Bank and Others* [2014] 4 All SA 693 (SCA) elicited huge media attention. The facts were as follows: During 2009 the respondent, South Africa Reserve Bank (the Reserve Bank) imposed a 10% levy on the appellant, Shuttleworth, when he took his assets out of South Africa. Shuttleworth paid the levy under protest. The levy amounted to more than R 250 million. The levy was imposed in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act); read with various Exchange Control Regulations, specifically, reg 10(1)(*c*); and Exchange Control Circulars.

In the GP, Shuttleworth argued that these legislative measures were unconstitutional and therefore invalid. He further argued that by introducing reg 10(1)(*c*) the Reserve Bank and the Minister of Finance did not comply with the enabling legislation, in particular s 9(5)(*a*) of the Act which empowered a person to make orders and rules by regulation. The GP dismissed Shuttleworth's application.

On appeal to the SCA Shuttleworth again argued that taxation required a statute passed by Parliament. He further submitted that the requirement contained in ss 75 and 77 of the Constitution, that a money bill (including the appropriation of money or imposition of taxes), must be approved by Parliament. It was common cause that reg 10(1)(*c*) was not approved by Parliament.

The SCA was thus asked to pronounce on the constitutionality and validity of the 10% exit levy.

Navsa ADP and Ponnan

JA in a joint judgment held that the 10% exit levy on the export of capital was a levy of general application that, while in force, was imposed on the export of capital in excess of R 750 000. It can hardly be in dispute that the levy was a revenue-raising mechanism for the state.

The levy could only have been *intra vires* reg 10(1)(*c*) if the regulation legitimately authorised the raising of revenue for the state. It was common cause that reg 10(1)(*c*) had not followed the procedure for taxation prescribed by s 9(4) of the Act.

Section 9(4) is animated by the 'no taxation without representation by Parliament principle'. The Constitution requires that the power of taxation should be tightly controlled. First, s 77(1) of the Constitution provides that a so-called money bill is one that appropriates money, or imposes taxes, levies, duties and surcharges. Secondly, s 73(2) of the Constitution provides that only the Minister of Finance may introduce a money bill in Parliament. It is thus unconstitutional for taxes or levies to be raised by delegated legislation, which is not specifically authorised in a money bill enacted in accordance with the provisions of the Constitution.

The imposition of the 10% levy is inconsistent with ss 75 and 77 of the Constitution and invalid and *ultra vires* reg 10(1)(*c*).

The appeal was accordingly upheld and the Reserve Bank was ordered to repay Shuttleworth the amount of R 250 474 893 with interest. Each party had to pay its own costs.

In passing it needs to be mentioned that the court considered the possibility of a flood of similar claims, but held that because the exit levy had been repealed by the Minister more than three years ago (on 27 October 2010), there is no danger of a flood of similar claims.

Land

Unlawful occupation: In *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC); *MC Denneboom Service Station CC and Another v Phayane* 2014 (12) BCLR 1421 (CC) the respondent, Phayane, had bought an immovable property from the insolvent estate of the second applicant, Chiloane, at a public auction. Phayane subsequently obtained an eviction order in the High Court against Chiloane and the first applicant, Denneboom, who together had run businesses on the property. The eviction order was sought and granted only in respect of the commercial occupants, specifically excluding 'all residential occupants of the premises', so that no compliance with the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was required. However, the order was ambiguous because Chiloane, in addition to running the business with Denneboom, had also resided on the premises.

Although the court of first instance GP and the SCA refused leave to appeal against the eviction order, the CC allowed leave to appeal on the narrow issue of the effect of this ambiguity on the validity of the eviction order.

Khampepe J held that PIE did not apply to the eviction of juristic persons and persons not using buildings and structures as 'a form of dwelling or shelter'. Phayane was, therefore, not obliged to comply with the requirements of PIE in seeking the eviction of Denneboom and persons working for it or working for Chiloane, provided those persons did not also reside on the property. But because Chiloane was an 'unlawful occupier' under the Act and thus the court was required to ensure that PIE's requirements were met before ordering his eviction. The High Court's order was defective in that it could potentially result in Chiloane's eviction when it was common cause that the PIE Act was not complied with. It would, therefore, be just and equitable to amend the high court's order to exclude Chiloane, as a residential occupant, from its operation.

The court accordingly refused leave to appeal, except insofar as it related to the amendment to the order granted by the High Court. The order of the High Court was set aside and replaced with the following order: 'Ejecting [Denneboom] and all those persons working for it, excluding [Chiloane] as a residential occupant, and any other residential occupant [from the present property]' (own insertions). Each party was ordered to pay its own costs.

Security industry

Validity of regulations: The decision in *Security Industry Alliance v Private Security Industry Regulatory Authority and Others* 2015 (1) SA 169 (SCA); *Security Industry Alliance v Private Security Industry Regulatory Authority and Others* [2014] 4 All SA 21 (SCA) concerns the review of amendments to certain regulations by the Minister of Police (the Minister). These regulations affect the security industry in South Africa. The Minister amended the regulations on the recommendation of the Private Security Regulatory Authority (the Authority). The amendments entailed an increase in the fees payable by all security businesses to the authority by huge margins. The Security Industry Alliance (SIA), an umbrella body representing various interests within the security industry, brought an application to have it reviewed and set aside. When this failed the present appeal was lodged with the SCA.

One of SIA's main complaints was the failure by the Authority to differentiate between the fees payable by large and small security service providers with very serious consequences for the latter. Although it appreciated the need for such differentiation, the Authority believed that the enabling legislation, which is contained in s 32(2) of the now repealed Security Officers Act 92 of 1987, did not permit this.

After examining the section in the context of the repealed legislation as a whole, Mpati P concluded that such differentiation was permissible. The Authority had misconstrued the provision, thereby committing an error of law, which had materially affected the outcome of its decision. The Minister was consequently misinformed on two fronts. The first is that he was incorrectly informed that the authority had no power to impose differentiated fees. This constituted an error of law. The second is that he was incorrectly informed that all avenues had been exhausted to arrive at a more equitable fee structure when there was no evidence to support that assertion. This constituted a misinformation as to the facts. The court held that in these circumstances the Minister could not be said to have taken a proper decision.

The Minister's decision was contaminated by the incorrect interpretation, by the authority, of the provisions of s 32(2) of the repealed legislation and the consequent misapprehension of its powers, as well as the factual misinformation.

The amendment to the regulations was set aside. The appeal was thus allowed with costs.

OTHER CASES

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administrative law, civil procedure, constitutional law, criminal procedure, evidence, immigration, judges, local authority, minerals and petroleum, mortgage, practice, revenue and traditional leadership.

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NEW LEGISLATION

Legislation published from 22 December 2014 – 30 January 2015

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BILLS INTRODUCED

Financial and Fiscal Commission Amendment Bill B1 of 2015.

PROMULGATION OF ACTS

Taxations Laws Amendment Act 43 of 2014. *Commencement:* See sections of the Act for various commencement dates. GN21 *GG*38405/20-1-2015.

Tax Administration Laws Amendment Act 44 of 2014. *Commencement:* See s 79 for various commencement dates. GN22 *GG*38406/20-1-2015.

Development Bank of Southern Africa Amendment Act 41 of 2014. *Commencement:* 20 January 2015. GN19 *GG*38403/20-1-2015.

Rates and Monetary Amounts and Amendment of Revenue Laws Act 42 of 2014. *Commencement:* See sections of the Act for various commencement dates. GN20 *GG*38404/20-1-2015.

Public Administration Management Act 11 of 2014. Commencement: To be proclaimed. GN1054 *GG*38374/22-12-2014.

COMMENCEMENT OF ACTS

Correctional Matters Amendment Act 5 of 2011, s 9. *Commencement:* 5 January 2015. Proc1 *GG*38377/5-1-2015.

Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 (except s 2). *Commencement:* 31 January 2015. Proc89 *GG*38376/30-12-2014.

Legal Practice Act 28 of 2014, chapter 10 (parts 1 and 2). *Commencement:* 1 February 2015. Proc R2 *GG*38412/23-1-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Pests Act 36 of 1983
Amendment of control measures. GN R49 *GG*38420/30-1-2015.

Agricultural Product Standards Act 119 of 1990
Amendment of standards and requirements: Export of rooibos and rooibos mixtures. GN18 *GG*38398/23-1-2015.
Amendment of standards and requirements: Export of avocados. GenN66 *GG*38419/30-1-2015.
Regulations regarding the classification and marking of meat intended for sale in South Africa. GN R55 *GG*38431/30-1-2015.

Airports Company Act 44 of 1993
Airport charges. GenN1164 *GG*38362/22-12-2014.

Air Traffic and Navigation Services Company Act 45 of 1993
Traffic service charges. GN1167 *GG*38364/31-12-2014.

Basic Conditions of Employment Act 75 of 1997
Amendment of sectoral determination: Contract cleaning sector. GN6 *GG*38384/6-1-2015.

Civil Aviation Act 13 of 2009
Amendment of the Civil Aviation Regulations (passenger safety charges). GN R1053 *GG*38367/22-12-2014.

Dental Technicians Act 19 of 1979
Annual fees payable. GN R45 *GG*38424/26-1-2015.
Regulations relating to the restricted registration of informally trained persons as dental technicians. GN R46 *GG*38425/27-1-2015.

Financial Markets Act 19 of 2012
Amendments to the Johannesburg Stock Exchange (JSE) interest rate and currency rules. BN2 *GG*38388/16-1-2015.

Health Professions Act 56 of 1974
Regulations relating to the qualifications for registration of oral hygienists. GN R42 *GG*38416/23-1-2015.
Amendment of regulations defining the scope of the profession of optometry. GN R47 *GG*38426/28-1-2015.

Income Tax Act 58 of 1962
Agreement between the governments of South Africa and the Cook Islands for the exchange of information relating to tax matters. GN4 *GG*38378/8-1-2015.

National Environmental Management Act 107 of 1998
Amendments to the regulations on fees for consideration and processing of environmental authorisations and amendments thereto. GN R43 *GG*38417/23-1-2015.

National Environmental Management: Waste Act 59 of 2008
Amendments to the regulations on fees for consideration and processing of applications for waste management licences, transfer and renewal thereof. GN R44 *GG*38417/23-1-2015.

Road Accident Fund Act 56 of 1996
Adjustment of the statutory limit in respect of claims for loss of income and loss of support. BN6 *GG*38419/30-1-2015.

Rules Board for Courts of Law Act 107 of 1985
Amendment of rules regulating the conduct of proceedings of the Magistrates' Courts (Rules 27 and 55 with effect from 13 February 2015). GN R5 *GG*38380/9-1-2015.
Amendment of rules regulating the conduct of proceedings of the Magistrates' Courts (Annexure 2 to the Rules with effect from 24 February 2015). GN R33 *GG*38399/23-1-2015 and GN R32 *GG*38399/23-1-2015.
Amendment of rules regulating the conduct of proceedings of the Magistrates' Courts (Rule 70). GN R31 *GG*38399/23-1-2015.
Amendment of rules regulating the conduct of proceedings of the Magistrates' Courts (Rule with effect from 24 February 2015). GN R30 *GG*38399/23-1-2015.

Small Claims Courts Act 61 of 1984
Establishment of a small claims court for the area of Molteno. GN39 *GG*38415/22-1-2015.
Establishment of a small claims

court for the area of Hanover. GN40 *GG*38415/22-1-2015.
Establishment of a small claims court for the area of Hay. GN41 *GG*38415/22-1-2015.
Establishment of a small claims court for the area of Postmasburg. GN38 *GG*38415/22-1-2015.
Establishment of a small claims court for the area of Mapumulo. GN37 *GG*38415/22-1-2015.
Establishment of a small claims court for the area of Tseki. GN36 *GG*38415/22-1-2015.
Establishment of a small claims court for the area of Empangeni and Mtunzini. GN35 *GG*38415/22-1-2015.

South African Schools Act 84 of 1996
Amended national norms and standards for school funding. GN17 *GG*38397/16-1-2015.

Draft legislation

Draft Regulations in terms of the National Road Traffic Act 93 of 1996. GenN1168 *GG*38370/23-12-2014.
Draft Guidelines for the determination of administrative penalties for prohibited practices in terms of the Competition Act 89 of 1998. GenN1158 *GG*38340/24-12-2014.
Draft norms and standards for translocation of indigenous species in South Africa in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN44 *GG*38395/15-1-2015.
Draft research regulations in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GenN16 *GG*38388/16-1-2015.
Proposed amendments to the JSE equities, derivatives and interest rate and currency rules in terms of the Financial Markets Act 19 of 2012. BN4 *GG*38398/23-1-2015.
Draft National Road Traffic Amendment Bill. GenN77 *GG*38429/28-1-2015.
Proposed amendment regulations relating to the grading, packing and marking of pears intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN68 *GG*38419/30-1-2015.
Proposed amendment regulations relating to the grading, packing and marking of apples intended for sale in South Africa in terms of the Agricultural Product Standards Act. GenN67 *GG*38419/30-1-2015.
Proposed amendment regulations relating to the grading, packing and marking of table grapes intended for sale in South Africa in terms of the Agricultural Product Standards Act. GenN65 *GG*38419/30-1-2015
Proposed amendment regulations relating to the grading, packing and marking of table maize products intended for sale in South Africa in terms of the Agricultural Product Standards Act. GenN69 *GG*38419/30-1-2015

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Employment law update

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Must discipline be consistently applied?

While there is a general rule that discipline must be consistently applied, the Labour Appeal Court (per Waglay JP, Ndlovu JA and Coppin AJA) held in *ABSA Bank Ltd v Naidu* [2015] 1 BLLR 1 (LAC) that the mere fact that another employee was previously not dismissed for similar misconduct did not mean that the employer condoned such behaviour and that it would be unfair to dismiss another employee for similar misconduct.

In this case, Naidu was an investment banker at ABSA and was dismissed after switching funds from one portfolio to another without the client's knowledge or consent. She had tried to obtain consent from the client to move his funds to another fund but allegedly could not get hold of him because he was out of the country. She nevertheless switched his investment from the Money Market to the Property Market as she thought it would be in his best interest to do so. In order to do this, she relied on the client's signature from a previous switch form. This was done in violation of ABSA's Rules and Codes of Conduct and was in breach of Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS) legislation. Naidu later informed her employer that she had done this and was dismissed following a disciplinary inquiry into her misconduct.

After an internal appeal was dismissed, Naidu referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging that her dismissal was substantively unfair as another employee had previously committed similar misconduct but received a final warning. The outcome at the CCMA was that the dismissal was substantively unfair and reinstatement was ordered. According to the CCMA commissioner, the sanction of dismissal was too harsh in the circumstances, especially when regard was had to the following factors –

- ABSA had previously not dismissed an employee for similar misconduct and thus had demonstrated that not all transgressions of this nature are dismissable;
- Naidu had 20 years' service with ABSA;
- Naidu had thought that she was acting in the best interest of the client and ABSA;
- she did not gain personally from her actions; and
- she seemed remorseful and thus it was unlikely that Naidu would commit similar misconduct again.

Furthermore, Naidu had actually come clean about her actions and raised the issue before ABSA found out about it. The CCMA commissioner concluded that the act of dishonesty and breach of FAIS legislation was not sufficient to warrant dismissal.

On review the Labour Court dismissed the review application on the basis that the dismissal was substantively unfair as another employee had received a final written warning for similar misconduct and thus that the commissioner's award was reasonable in the circumstances.

ABSA then appealed to the Labour Appeal Court (LAC). At the LAC Naidu argued that ABSA did not apply the parity principle as another employee who had committed similar misconduct was not dismissed and thus Naidu's dismissal was substantively unfair. Ndlovu JA considered the parity principle and found that the concept of parity requires fairness and equality before the law. This requires like cases to be treated alike. Ndlovu JA, however, found that the parity principle must be applied with caution and the fact that another employee was not dismissed for similar misconduct did not mean that the employer condoned dishonesty. It would not make sense for an employee who commits serious misconduct to get off lightly because a previous employee was not dismissed because of a technicality or differing views of presiding officers. Thus, there needs to be a degree of flexibility so that discretion can be exercised in each case.

Ndlovu JA concluded that there was no justification to condone Naidu's conduct based on one single instance of misconduct by another employee. Furthermore, Ndlovu JA was of the view that the cases were not exactly alike as the other employee's case did not involve a financial transaction but a quotation. In addition, the other employee had committed the act in the spur of the moment while it seemed that Naidu had had time to reflect on the potential gravity of her actions and her conduct was premeditated. Thus, these two cases were not identical. Furthermore, they were presided over by different chairpersons. The LAC held that while the issue of parity is an important factor, it is only one factor and is not decisive. One still needs to consider all the facts of the case.

A mitigating factor that was considered was that Naidu's conduct was not for personal gain but in the best interest of the client. However, Ndlovu JA was of the view that this was not entirely true as prior to this event, Naidu had given the client some bad financial advice and there was a threat that she would be held personally liable for a previous loss of R 40 000. Thus, the switch was probably motivated by a desire to recoup the perceived financial loss. Another mitigating factor that the LAC considered was Naidu's alleged remorse. The LAC considered the fact that she did not take responsibility for her actions in the internal appeal and was accordingly of the view that the remorse she subsequently showed was not true remorse. It was

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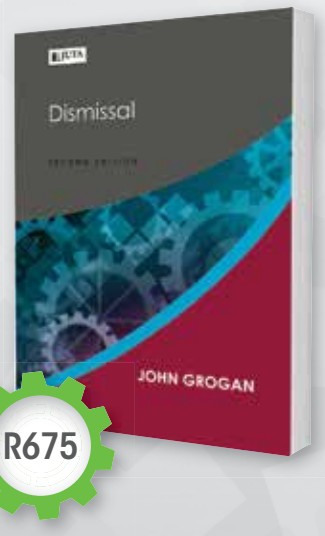

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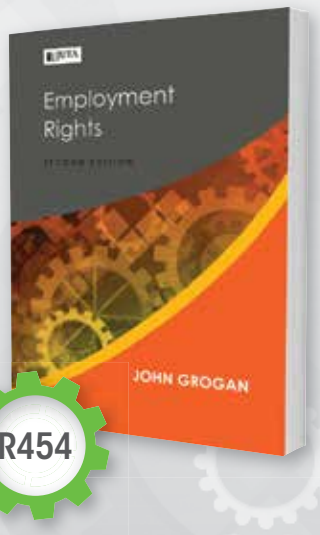

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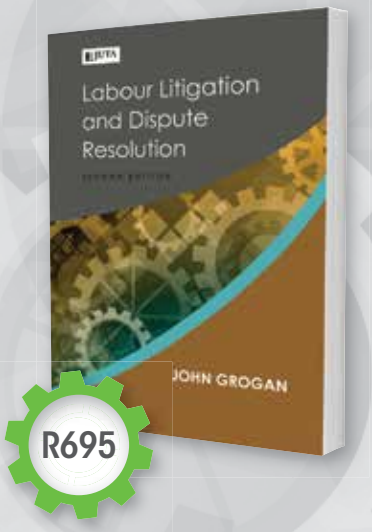

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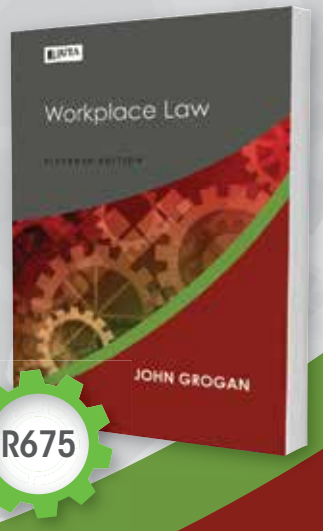

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held further, that even if there had been genuine remorse, this did not constitute an absolute immunity to the sanction of dismissal as remorse is merely one factor to be taken into account.

The LAC held that there are varying degrees of dishonesty and thus each case must be decided on its own facts. Whether the dishonesty in a particular case was gross or not depended on the impact it had on the employer's business. Naidu's conduct severely affected the business and ABSA's reputation. She also occupied a senior position and was involved in significant transactions where a high level of trust was placed in her.

It was held that the trust relationship was irreparably broken down and the remorse, whether genuine or not, was not likely to restore the trust relationship. In the circumstances, the LAC held that the commissioner did not reach a decision that a reasonable decision maker could make and the appeal was upheld.

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

Joinder v Jurisdiction

National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others (CC) (unreported case no CCT 72/14, 12-12-2014) (Cameron J)

Can an employee who alleges his dismissal was automatically unfair, join another employer, which had not been cited in the initial referral to the Conciliation, Mediation and Arbitration (CCMA) or bargaining council, nor was a part of the conciliation process; to proceedings at the Labour Court?

This was the question before the Constitutional Court.

204 National Union of Metalworkers of South Africa (Numsa) members were dismissed for allegedly participating in an unprotected strike. Acting on behalf of its members, Numsa referred a dismissal dispute to the bargaining council citing the third respondent (Steinmüller Africa (Pty) Ltd) as the employer. At conciliation the representatives of Steinmüller disputed that it was the employer of all 204 employees. The matter remained unresolved and a certificate of non-resolution was issued.

Three months after their members were dismissed Numsa referred a second dismissal dispute, together with condonation, on behalf of the same members but this time cited Steinmüller, alternatively Intervalve (Pty) Ltd, alternatively BHR Piping Systems (Pty) Ltd as the employer. The bargaining council refused condonation.

On the strength of the certificate of outcome (consequential to the initial referral), Numsa filed a statement of claim at the Labour Court and then made an application, in terms of r 22 of the Labour Court Rules, to join Intervalve and BHR as employers.

It was not disputed that Steinmüller, Intervalve and BHR were subsidiaries of the same holding company, had common directors and shareholders, operated from the same site and shared a common human resources service and legal representative.

Litigation

The Labour Court, in *National Union of Metalworkers of South Africa obo its Members v Steinmüller Africa (Pty) Ltd and Others* [2012] 7 BLLR 733 (LC), as per Steenkamp J, granted joinder having found that Intervalve and BHR had a substantial as well as a sufficient legal interest in the subject matter of proceedings. The court held that the rule permitting joinder would serve little purpose if Numsa was required to refer disputes against the individual employers and then later consolidate proceedings at court.

LAC

On appeal in *Intervalve (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* (LAC) (unreported case no JA 24/2012, 26-3-2014) Waglay JP (with Francis AJA and Dlodlo AJA concurring) held that s 191(5) of the Labour Relations Act 66 of 1995 imposes, as a jurisdictional precondition, that an employee refer a dispute to conciliation before such dispute can be adjudicated by the Labour Court. In this case the court *a quo* did not have jurisdiction to hear any claim against BHP or Intervalve because no dispute had been conciliated wherein either of these two entities were cited as the employer. The Labour Appeal Court (LAC) went onto say that 'the discretion to join parties to proceedings cannot trump the clear jurisdictional requirements of the LRA'.

The Constitutional Court

In the majority judgment penned by Cameron J (Mogoeng CJ, Moseneke DCJ, Khampepe J, Leeuw AJ and Zondo J concurring), the court began by confirming the legal position, (as held in the majority decision in *National Union of Metalworkers of South Africa and Others v Driveline Technologies (Pty) Ltd and Another* 2000 (4) SA 645 (LAC)), that as a jurisdictional precondition to the Labour Court adjudicating an unfair dismissal dispute, was that the dispute must first be referred to conciliation and either a certificate of non-resolution be issued or a 30 day lapse from when the dispute was referred.

Having arrived at this conclusion the next question was whether it could be argued that by sending the referral to the shared human resources department, the referral to conciliation against Steinmüller encompassed both Intervalve and BHR.

In answering this question the court turned its attention to s 191 of the LRA, in particular s 191(3) which stipulates that when an employee refers a dispute for conciliation, the employee must satisfy the CCMA or bargaining council that a copy of the referral has been served on the employer.

Was this statutory requirement fulfilled?

When dealing with an issue of this nature a court will firstly ascertain, among other things, the purpose for the statutory requirement and then examine whether such purpose has been fulfilled – *in casu* whether the referral against Steinmüller to the shared human resources services, fulfilled the requirement of s 191(3) in respect of Intervalve and BHP.

Applying this principle and dealing firstly with the purpose of s 191(3), the court held:

'The objective cannot be just to let the employer know that a dispute, related to the dispute that affects it, is being conciliated. It must be to put each employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated. Those consequences may be severe. They may include enterprise-threatening implications: trial proceedings, reinstatement orders, back pay and costs orders. So the notice must be directly targeted.'

The next question was whether this purpose had been fulfilled. The court's view can be gleaned from the following extract of the judgment:

'So the purpose of the statutory provision – to tell those on the line that the impending legal process might make

them liable to adverse consequences – was not fulfilled. That the three companies' shared HR services, and the companies' attorney, knew about the referral against Steinmüller did not mean that they knew, or should have concluded, that the dispute against Intervalve and BHR had also been referred for conciliation. On the contrary, the referral against Steinmüller alone told them the opposite. Intervalve and BHR were left out. The ensuing legal process did not encompass them.'

The appeal was dismissed with no order as to costs.

In a dissenting judgment by Nkabinde J (Froneman J, Jafta J, Madlanga J and Van der Westhuizen J concurring), the minority agreed with the importance of conciliation but differed in regard to whether there had been substantial compliance with s 191.

Relevant to the matter were the following factors; all the employees were collectively dismissed over the same strike action by the three entities shared human resources services and received identical dismissal letters, a representative from the shared human resources services and the same attorney representing all three entities both attended the conciliation, the conciliated dispute involved Intervalve and BHR.

When interpreting these factors purposively (having regard to the primary purpose to the LRA, the constitutional right to fair labour practice (s 23), the right to have a dispute resolved by a court or tribunal (34) and the s 39(2) of the Bill of Rights, which obliges a court to interpret legislation having regard to the spirit and purpose of that legislation); the minority found that there had been substantial compliance with s 191.

Nkabinde J held:

'I agree that conciliation requires the referral of a dispute and that parties to the dispute should be granted the opportunity to represent themselves. Driveline confirms this position when it distils the components of a dispute. The facts of this case are in conformity with this position. Intervalve and BHR rely on the lack of initial service and their citation. However, the three companies must have been aware of the dispute. I find it difficult to maintain that with the shared HR services and legal representation, Intervalve and BHR were unaware of the referred dispute. The three companies' argument regarding non-service is a technical one based on the formal requirement to cite and serve employer companies with the referral form. This, in my view, elevates form over substance.'

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By Meryl Federl

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ABBREVIATIONS

APPLJ: *African Public Procurement Law Journal* (Faculty of Law, Stellenbosch University, South Africa)
EL: *Employment Law Journal* (LexisNexis)
PER: *Potchefstroom Electronic Law Journal* (North West University)
PLJ: *Property Law Journal* (LexisNexis)

Affirmative action

Grogan, J 'The chronicles of *Barnard* – affirmative action on trial' (2014) Dec *EL* 3.

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By Valerie Teresa Smit

Everyone has the right to life – Fact or a *nasciturus* fiction?

The debate surrounding prenatal life is a multifaceted and convoluted legal topic, notwithstanding the various religious and philosophical arguments it triggers. Without becoming all dogmatic about life and when it begins, it seems appropriate in light of recent case law surrounding delictual claims of children, to evaluate the right that children have to institute wrongful life claims and the repercussions this has for law reform in the interpretation of the right to life.

Definitions

- Everyone's right to life is guaranteed in s 11 of our Constitution, which section is further left unqualified.
- In *Christian Lawyers Association v Minister of Health and Others* (*Reproductive Health Alliance as Amicus Curiae*) 2005 (1) SA 509 (T) however, the High Court ruled that the word 'everyone' as contained in s 11, does not extend to unborn foetuses, which do not have legal personality under our Bill of Rights.
- The so-called *nasciturus* fiction, refers to the legal principle in which foetuses if subsequently born alive, will acquire all of the rights of born children whenever this is to its advantage. *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) also confirmed that this principle extends to the law of delict.
- Wrongful life is a legal action, which embodies a severely disabled child suing a medical practitioner and/or hospital through the assistance of a parent, for failing to prevent the child's birth. It is argued that had the medical practitioner provided a genetic outlook before the pregnancy or alternatively information about the likelihood of disability during the pregnancy, the mother would have prevented the child's birth or opted for termination of the pregnancy respectively.
- The Choice on Termination of Pregnancy Act 92 of 1996 (the Act), is the law governing abortion in South Africa and embodies the mother's right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

Analysis

The most recent wrongful life claim in which judgment was given by our courts took centre stage at an appeal to the Constitutional Court in August 2014, after the Western Cape High Court delivered judgement in April 2014, upholding an exception to a mother's claim for wrongful life on behalf of her minor son. Exception was raised by the defendant in *H v Kingsbury Foetal Assessment Centre (Pty) Ltd* (WCC) (unreported case no 4872/2013, 24-4-2014) (Baartman J), in that, *inter alia* –

- the particulars of the claim were alleged to be *contra bones mores* and against public policy, as our courts should not be tasked with the question of whether it is better to not have life at all than to have a life shrouded with disabilities; and
- that in applying general principles of delictual law, the defendant could not have undertaken a legal duty towards the foetus that would oblige the defendant to take such action as might be necessary to cause the foetus to be terminated.

The above together with *Friedman v Glicksman* 1996 (1) SA 1134 (W) and *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA) are the cases thus far that stand as precedent for the institution of wrongful life actions. The irony in these decisions is that in rejection of such claims, our courts have more firmly established their regard for the right to life of an unborn foetus and its value *vis-à-vis* termination of a defective pregnancy. It is clear from the reasoning given by the judges who upheld exceptions to the wrongful life claims in these matters, that in making the decision to grant such claims, the courts will inevitably have to decide on and accept in its calculation of damages, that never being born at all is a better alternative to a disabled life. This is something for public policy reasons that the courts are refusing to rule on.

The questions that need to be asked is that in making their decision not to allow wrongful life actions, have the judges erred in bringing the development of our common law in line with constitutional principles, which clearly do not accord any constitutional rights to unborn children, let alone the right to life?

With constitutional values being applicable to all law and thus also to the Act, (which we accept as constitutional), the decision by the courts not to rule on the right to life versus never being born at all, seriously questions whether they are of the opinion that social ethics have shifted. It could be argued from the above that our courts are giving the impression that the blessing of life, albeit a tainted one, reigns sovereign over the prevention of a child's birth by abortion needed to protect the foetus from the future harms of disability.

Many would advocate that there is a great public interest in having the right to life extended to include a foetus and there could very well have been a change in the convictions of the community since the promulgation of the Act almost 20 years ago.

Even more so now than ever, public opinion is being influenced by the over-achieving and spirited disabled persons of the world who against all odds achieve success in sports, arts and science.

The *Pinchin* case also lends the idea that since an unborn child can acquire subjective rights as a foetus, the law regards the foetus as a legal person.

Pro-life and pro-choice, the debate is never-ending. And while South Africa's progressive laws are applauded for upholding women's rights, there seems to be a grey area into which the courts do not feel comfortable entering: The delicate balance between the right to life and the right to prevention of child birth when considering wrongful life actions. It seems this great debate will stand the test of time.

Valerie Teresa Smit *BCom LLB (Unisa)* is a candidate attorney at Boshoff Njokweni Inc in Cape Town.

Workplace Law

By John Grogan
Cape Town: Juta
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Juta has recently published the 11th edition of John Grogan's *Workplace Law*. This book is an invaluable source of information on employment law in South Africa and contains everything you need to know about how to manage the employment relationship. From the basic terms and conditions of employment, how to terminate employment fairly, how to guard against unfair labour practices and unfair discrimination in the workplace, as well as, how to implement affirmative action measures and ensure compliance with the employment equity laws in South Africa. This book also contains information on collective labour law and industrial action.

In my view, a copy of *Workplace Law* is a must-have for every labour law practitioner and employee relations practitioner. I find this book just as helpful to me now, as an attorney practising labour law, as I did as a student. It is, however, important to always do a recent case search in conjunction with using this book as our case law changes rapidly. In this regard, there were some judgments from the latter half of 2014, which were not referred to in this book.

What makes this edition of *Workplace Law* so valuable is that it has been updated to include the recent amendments to the Employment Equity Act 55 of 1998 (EEA), the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997. What I would have liked this book to include is more emphasis on the equal treatment provisions that have recently been included in the EEA and the LRA and hopefully this is something that we can look forward to in the next edition once there has been case law on these issues. I also would have enjoyed a section on the recent amendments pertaining to atypical forms of employment such as the use of labour broker employees and part-time employees. There is, however, a brief section on fixed-term employees and the deeming provisions in respect of fixed-term employees who earn below the prescribed earnings threshold and are engaged for a period of longer than three months, unless certain exceptions apply or there is a justifiable reason for doing so.

For me personally, I particularly enjoyed the chapter on unfair discrimination, which sets out what constitutes unfair discrimination in a clear and succinct manner. This chapter has been updated to include recent case law on age discrimination and a detailed summary of the *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) case. However, it does not include the recent Constitutional Court decision in this matter, which was handed down in September 2014. This book contains comprehensive chapters on dismissals for misconduct, poor work performance, incompatibility and incapacity with reference to recent and relevant case law. In this regard, it has been updated to include the latest decision by the Supreme Court of Appeal on dismissal for absence without leave. There is also a very insightful chapter on automatically unfair dismissals.

Monique Jefferson is an attorney at Bowman Gilfillan in Johannesburg. ❑

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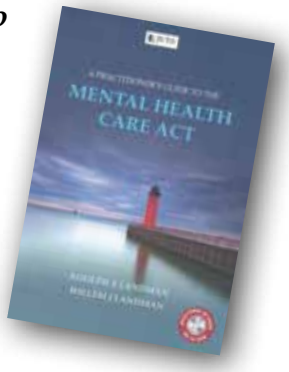

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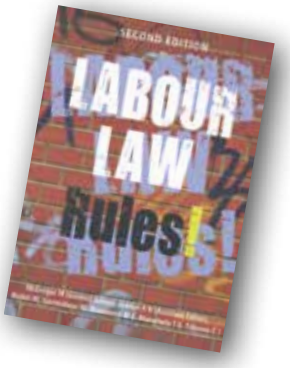

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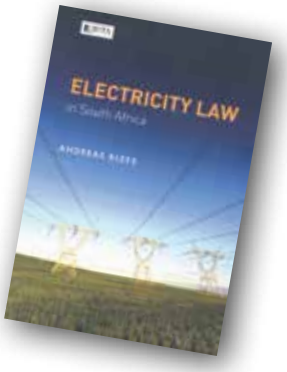

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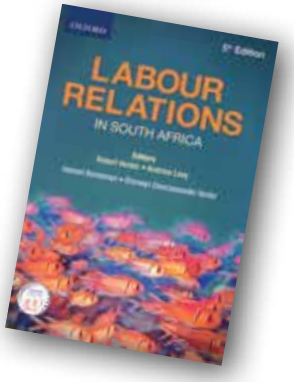

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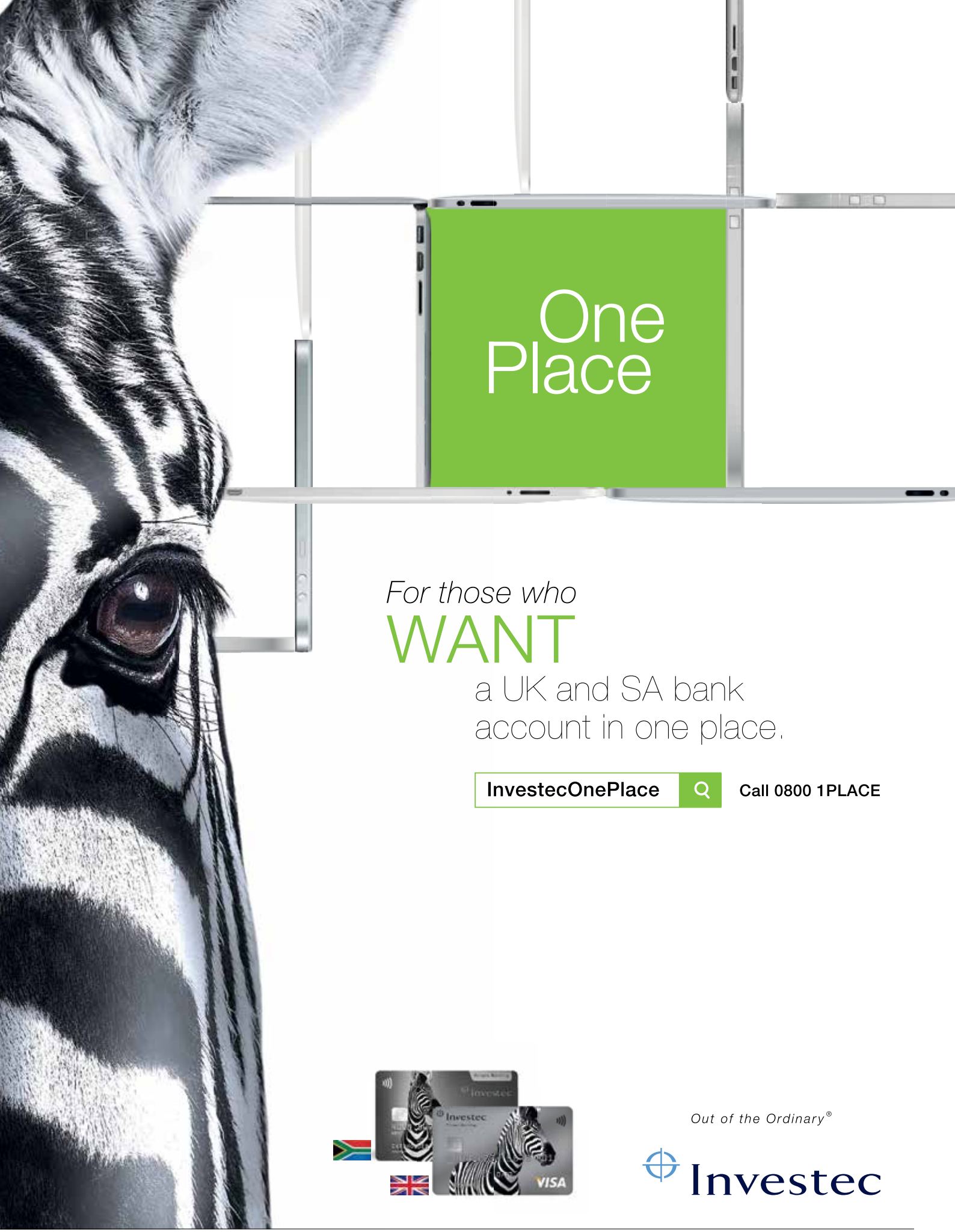

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