

MAY 2014

UNSPOKEN TRICKS OF THE TRADE

When does advertising become touting?

**Condemning the leaking of
Public Protector's provisional reports**

Difficulties in regulating class action litigation

Is there a need to articulate the rules?

POPI:
**Is South Africa keeping up
with international trends?**





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35 Difficulties in regulating class action litigation: Is there a need to articulate the rules?

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40 Eviction - need for a way out

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44 POPI - Is South Africa keeping up with international trends?

The internet allows data transactions to occur from one country to another seamlessly. Paradoxically, this is one of the greatest benefits of the technology era but also one of the greatest challenges to its effective regulation. Russel Luck asks if South Africa is keeping up with international trends.

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Mapula Sedutla - Editor

Effectiveness of attorneys = IT literacy

One of the most interesting sessions held during the Law Society of South Africa's (LSSA's) annual general meeting (AGM) was the panel discussion on developments and trends in the information technology (IT) and electronic environment (see p 7). It is without a doubt that for any law firm to survive in this day and age, big or small, it needs to have access to functional software and hardware that will enable it to stand out from the rest. Technology has the potential to increase functionality in any firm, therefore enabling attorneys to process and deal with cases expeditiously and in turn increasing access to justice.

For law firms that are just starting out, acquiring computer equipment might not be financially possible. Fortunately for those law firms, the Attorneys Development Fund has made it possible for them to apply for office equipment that may include a desktop computer or laptop and 3G data card or a Telkom ADSL (see p 28). A computer and access to the internet will be a start in the right direction in enabling a law firm to ensure sustainability and keep abreast of technology developments.

More often than not attorneys find themselves working outside

of the office. Therefore, it makes sense for attorneys to invest in a laptop, tablet, netbook or smart mobile device that will enable them to still carry

on working regardless of the place they are in. Because of the demand for these devices, more affordable devices are being released in the market enabling attorneys to have access to one and not be restricted to purchasing the expensive mainstream devices. There are many available applications (apps) that will enable attorneys to have their law firms literally at their fingertips. These apps range from case-flow management to billing systems.

Price is usually a determining factor in whether a law firm will have the best available software or apps. Attorneys will be pleased to learn that there are a myriad of free available software and apps that can and will perform the function of most of the paid apps and software. All it takes is the time to search for such free software and apps. Key to receiving a suitable and desirable hit, on free software or apps, in any search engine is knowing what function the software or app is required to perform. Meaning attorneys should first ask themselves what they want the app or software to do before searching for it on the internet.

During his captivating presentation at the LSSA AGM, Fred Baumhardt from Microsoft emphasised that the effectiveness of any attorney will be dependent on their IT knowledge. Attorneys should note that IT is not some-

thing to be feared but should rather be embraced as those who do not will be left behind in the inevitable digital migration of rendering law services.



Would you like to write for *De Rebus*?

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 19 May and 17 June 2014.

LETTERS

TO THE EDITOR

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

National Credit Act: Rental agreement – a wolf in sheep's clothing?

I wish to bring the following topic to the fore. It concerns a much-debated legal issue regarding the interpretation of the National Credit Act 34 of 2005 (NCA). In particular, the applicability of the NCA to a so-called 'rental agreement' or common law lease. In the latest decision by the Supreme Court of Appeal (SCA) in *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC and Another* 2013 (3) SA 426 (SCA), this issue was traversed by the court. It is trite that a flat rental agreement where the lessee pays an invariable rental for the full term of the rental agreement is not governed by the NCA. That much is clearly defined in the Act and reconfirmed by the SCA.

The question that arises, however, is the so called 'rental agreements' in disguise. Professor JM Otto discussed the case of *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC and Others* 2011 (6) SA 606 (FB) in NJ Grové

& JM Otto *Basic Principles of Consumer Credit Law* 2ed (Cape Town: Juta 2002) at 15. The so-called 'variable rental agreements' in contrast to the so-called 'flat rental agreements', were scrutinised by Prof Otto and I quote from the article by him (as the court did in the *Pabi's* case), 'This profit is often nothing else but disguised interest. In fact, the contract will often provide for a variable rental during the term of the contract which rental is determined by a particular reference rate, such as the prime rate of a certain bank. That in itself is a dead giveaway' (at para 15).

In my view, the prime question flowing from the above, is therefore not what the rental agreement appears to be, but what the content thereof in factual terms evidences. For example, a common law lease with a flat and invariable rental for the full period of the lease, clearly does not fall under the ambit of the NCA. If the rental varies in some way or other during the term of the agreement, one has to scrutinise the content of the lease very carefully to ascertain whether it contains hidden interest/fees/charges, which is in

effect part and parcel of a debt deferred to a later date.

Against the background of the above contentions, I want to provide a practical example for scrutiny to ascertain whether it is a flat rental agreement not governed by the NCA or is it a so-called extended credit agreement under s 8(4)(f) of the NCA: Some rental agreements make provision, not for variable rentals in terms of a variable bank rate but for an annual increase of the rental by a fixed percentage of say 15% per annum. Is this now still a common law lease not governed by NCA or do we have a 'variable' rental agreement that probably falls under s 8(4)(f)? In most cases the lessee is unaware of this annual increase. But say he or she was informed at the time, is this form of rental agreement a credit agreement governed by NCA or not?

Based on the example above, I would like to pose for consideration the following questions:

Can the fixed 15% rental increase annually, be equated to a deferral of a rental to be paid at a date in the future



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for the same reason that a variable rental agreement referred to in Prof Otto's article, can thus be equated? The increased part of the rental for the second year is indeed as a fact 'deferred' to the second and following years. Or is the increased rental simply what it appears to be: A yearly escalation of a rental, which is not uncommon to common-law leases? Or is this the part where hidden interest and profit come in? Furthermore, if we should assume that the 'increased part' of future rentals is a deferral of a debt already due but payable only in the second and following years, where are the fees, charge or interest payable in terms of the agreement or the amount that has been deferred? Can it be said that a fee or charge or interest is also included in the annual percentage increase in the rental payable? The fact of the matter remains that it is not a flat rental for the full term of the lease as in the *Michael's Bid a House* case. If the lessee in our example initially pays, say R 303 per month in terms of the rental agreement and the term of that agreement is, say five years, he will end up paying R 529,95 per month during the fifth year. Almost double the initial rent. Over the full term of the lease with the annual increased rentals, he will pay the total amount of R 24 515,04 whereas he would have paid, if a flat invariable rental was payable, only R 18 180. Is the difference simply as a result of normal escalation or can it be regarded as disguised interest, fees or profits?

My final question thus is: Is the above scenario simply the result of an escalation in terms of a standard common law lease, which does not fall under the ambit of the NCA or do we have a wolf in sheep's clothing?

Hannes du Bois
attorney, Cape Town

Inter-company loans and suretyships: Getting caught by the new Companies Act

The heading to s 45 of the Companies Act 71 of 2008 is misleading. It is recorded as 'loans or other financial assistance to directors'. However, in the body of the section the legislature has chosen to include financial assistance between related or inter-related companies as well as financial assistance to directors.

For purposes of s 45, it is important to have regard to the definitions of the terms 'related' and 'inter-related' in the Companies Act. Essentially without wanting to simplify them too much, when they are used in relation to juristic persons, these terms refer to companies within the same group.

Section 45(2) of the Companies Act states that a board may authorise a company to provide direct or indirect financial assistance to a '... related or inter-related company...', subject to subsections (3) and (4).

Subsection (3) then proceeds to require –

- a special resolution of the shareholders, adopted within the previous two years, which approved of such assistance either for the specific recipient, or generally for a category of potential recipients; and
- a confirmation that the board, at the time of approving of the financial assistance, is satisfied that the company meets the solvency and liquidity test set out in the Companies Act and that the terms of the financial assistance are fair and reasonable to the company.

In this regard it is important that one bears in mind that the term 'financial assistance' goes much further than simply incurring an expenditure on behalf of another or advancing money on loan account, but it also includes guaranteeing a loan or other obligation or securing a debt or obligation. As such, a holding company's decision to grant a suretyship or a guarantee for a subsidiary needs to comply with the provisions of this section.

Section 45(6) of the Act provides that any resolution that the board of a company passes, agreeing to provide financial assistance and any subsequent agreement that it may conclude in relation to such assistance, is void to the extent provision of that assistance is inconsistent with the section. Section 45(7) of the Act further provides that a director is liable to the extent referred to in s 77(3)(e)(v) of the Act personally for any losses, damages or costs sustained by the company as a direct consequence of that financial assistance if the director was present at the time the board decision was approved and failed to vote against same.

I have no doubt that there are many companies in South Africa that record running loan accounts between themselves, their subsidiary companies and their holding companies without considering compliance with s 45. Indeed, many of these companies also conclude suretyships and guarantees for the obligations of other members of the group as an ordinary course matter. This now needs a special resolution before the board can authorise such financial assistance.

I suggest that each company should, every two years, pass and renew a standing shareholder authority to grant loans to the various companies in the group of which it forms part, in relation those matters that are reasonably foreseeable in the next few years. Some of these foreseeable matters include settling expenses

on behalf of other group companies or securing the debts and obligations of other group companies in relation to various contractual obligations (such as leases and banking facilities).

Because the agreement itself is void (and the board resolution is void) it stands to reason that the shareholders resolution must be passed before the financial assistance is granted. Accordingly, this financial assistance cannot be ratified after the fact.

Derrick Kaufmann
attorney, Johannesburg

Barring of CAs from CCMA proceedings disconcerting

At the risk of sounding flippant, it is my assertion that the barring of candidate attorneys (CAs), with right of appearance, from appearing at the Commission for Conciliation Mediation and Arbitration (CCMA) is perturbing, to say the least.

Notwithstanding the provisions of s 8(1) of the Attorneys Act 53 of 1979 authorising a CA to appear for and on behalf of his or her principal in any court in the Republic of South Africa (not being a regional court or any division of the High Court) and before any statutory board that his or her principal is entitled to appear, the CCMA r 25(1)(c) read with s 213 of the Labour Relations Act 66 of 1995 (LRA) still finds a CA incompetent to appear before its proceedings by virtue of not being admitted to practice.

It is mind-boggling though that a robed CA, who appears before a magistrate in a very formal court setting, is barred from conducting a CCMA arbitration, as arbitration is conducted in a less formal setting.

The recent judgment handed down by the Supreme Court of Appeal in *CCMA v Law Society, Northern Provinces* (SCA) (unreported case no 005/13, 20-9-2013) (Nugent, Malan, Wallis JJA, Van der Merwe and Swain AJJA) dealt extensively with legal representation. In light of some of the findings therein, it is my view that legal representation in misconduct/incapacity cases (where attorneys and advocates are not allowed as of right) should be endorsed for CAs. These matters are less complex and will provide CAs with the requisite practical experience in labour dispute resolution, which is not dealt with in the magistrates' courts. This should be the case especially for those CAs who have chosen labour dispute resolution as an elective at the law school (school for legal practice).

In the context of the foregoing, it is my view that the current state of affairs is devoid of any rational basis and further, prejudicial to CAs' developmental

aspirations, especially to some of us who have earmarked employment law as one of specialisations in practice.

Siphiwe Ntuli
assisted by
Harry Makgalemele
candidate attorneys,
Johannesburg

Concerns regarding appointment of *pro bono* acting judges in the labour court

I am a practising attorney specialising in labour law and naturally I am a regular at the Labour Court.

I am very concerned about the appointment of *pro bono* acting judges for the Labour Court. I would like relevant people, including the officer of the Labour Court, Judge President and the Chief Justice, to elucidate the criteria used to select *pro bono* acting judges for the Labour Court during the recess periods.

Labour law practising lawyers form a very small society and, therefore, we know each other as well as the judges, and even CCMA commissioners.

Ordinarily, one assumes that for a person to be appointed as an acting judge in the Labour Court, such a candidate would be well-acquainted with the basic principles of labour law and the rules governing the Labour Court.

Unfortunately, due to their ignorance of labour law principles, some of the *pro bono* acting judges compromise the integrity of the judicial system in the manner in which they conduct labour law cases. It is obvious that some are certainly not labour law practitioners and they are simply thrown in at the deep end when it comes to adjudicating labour disputes.

Attorney, Johannesburg

• The author of this letter has asked to remain anonymous. The editor is satisfied as to the author's identity.

Ukuthwala

In a landmark judgment and sentencing, the Wynberg Regional Court has jailed a man for 22 years for practising *ukuthwala* by taking a 14-year-old girl from her home against her will but with the consent of her uncle and grandmother and made her his wife. The court denounced this as rape, trafficking in children and assault on the child under the guise of culture and religion.

This practice is very rife in Bergville (KwaZulu-Natal) where school girls are forced into marriage by young adult males, who are sometimes total strangers. *Ukuthwala* causes an abrupt end to a girl's childhood and schooling career.

This custom has no place in our constitutional democracy and the 21st century. Sections 30 and 31 of the Constitution protect culture and individual rights, including the rights of children to be protected against abuse, which takes precedent over the recognition of customary law. Child trafficking, abduction and gender-based sexual violence should not be sugar-coated as *ukuthwala*. How can a 14-year-old make an informed decision? She cannot grasp the concepts of pregnancy, venereal disease and HIV and AIDS.

Section 12 of the Constitution guarantees the right to freedom from all forms of violence. Age of consent to sexual intercourse is 16 in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Recognition of Customary Marriages Act 120 of 1998 prescribes that spouses be over the age of 18 and that they must both consent to marriage.

Ambrose Mfayela
regional magistrate,
Scottburgh

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A changing profession in a changing environment

The Law Society of South Africa (LSSA) held its annual general meeting (AGM) on 28 and 29 March in Bloemfontein. Presenters and delegates debated issues of importance in the law profession under the heading: 'A changing profession in a changing environment'. Topics discussed included the impending Legal Practice Bill, the relationship between Southern African Democratic Community Lawyers Association (SADC LA) and the law societies of the SADC region, speedy delivery of justice, attorneys making a profit, judicial independence, the Office of the Public Protector and the use of information technology (IT) in law firms.

AFF matters

Chairperson of the Attorneys Fidelity Fund (AFF), CP Fourie, while giving a report from the fund, said that the 2013 LSSA AGM had been held amidst tension and conflict between the organised profession and the AFF. He said the tension and conflict was due to positions taken on the Legal Practice Bill, the Judicial Matters Amendment Bill as well as the Attorneys Amendment Bill. He added that, fortunately the tension could be defused and the conflict resolved resulting in healthy relations being restored without compromising the independence of the AFF to carry out its fiduciary functions.

Mr Fourie commented that: 'The AFF and the organised profession are closely intertwined with a commonality of interests as, after all, the fund was created at the initiative of the organised profession and in many instances the fund and the organised profession need to act in collaboration in order to promote and protect the public at large without straying into the terrain that each of these entities had been given through legislation.'

Speaking on the Legal Practice Bill, Mr Fourie said that only s 10 of the Bill will come into operation once the Bill is assented. He said that this section, dealing with the National Forum and



Acting Judge President of the Free State High Court, Judge Nathan Erasmus, delivering the keynote address of the first day of the annual general meeting.

Transitional Provisions, will come into operation on a date determined by the President in the *Government Gazette*. Adding that s 2 of the Bill, which provides for the establishment, powers and functions of the South African Legal Practice Council and its operations will only come into operation three years after the commencement of s 10.

SADC LA and its regions' law societies

Chief Executive Officer of the SADC LA, Makanatsa Makonese, made a presentation on the relationship between SADC LA and the law societies in the SADC region. She made the presentation on behalf of the President of SADC LA, Kondwa Sakala-Chibiya, who could not make it to the AGM. Giving a brief history of the organisation, Ms Makonese said that in her view the association is a product of the law societies and the Bar associations in the region, and that the association owes its success or failure to the law societies and Bar associations in the region.

Ms Makonese said that it was important for lawyers in the region to understand the link between their associations, the link between themselves as individuals and the SADC LA. She

said that the association was formed in 1999 in Maputo and that currently law societies from 12 of the countries in the SADC region were institutional members of the association. Adding that, the three countries that are not currently members are Madagascar, Seychelles and Mauritius. 'The SADC Lawyers' Association works in such a way that each law society that is an institutional member is represented on the Council of the SADC Lawyers Association by two members and currently your representatives are the Law Society of South Africa's, Ms Thoba Poyodlwati, the immediate past President, and Mr Max Boqwana,' she said.

According to Ms Makonese SADC LA's current main focus is on human rights and rule of law issues in the SADC region. She said that the reason behind the establishment of the association was the promotion of interest of lawyers in the development of the legal profession. However, she said, currently human rights and rule of law work dominate the operations of the SADC LA mainly because the work is donor funded.

The association has identified other means of acquiring funding such as



Attorney at Phatshoane Henney Attorneys in Bloemfontein, Alet Lubbe, spoke about attorneys making a profit in view of the public's interest.

selling advertising space in its magazine published twice a year and holding an AGM. The 2014 SADC LA AGM will be held from 21 to 24 August in Victoria Falls; visit www.sadcla.org for more information.

Speedy delivery of justice

The keynote address of the first day of the AGM was delivered by Acting Judge President of the Free State High Court, Judge Nathan Erasmus. Judge Erasmus spoke in his capacity as the convener of the National Operations Committee of the National Efficiency Enhancement Committee. Giving background on the reason behind the formation of the committee, Judge Erasmus said that the Chief Justice has the responsibility over the performance of all courts in the Republic and that it was a known fact that courts in South Africa are still underperforming.

'Our public is entitled to the speedy delivery of justice, which includes having their cases finalised before our courts as quickly as possible. It is absolutely no justification for the delays and in some instances the lack of quality of justice that we deliver. ... It is unfortunate that we have come to the point where the public perception is that we, and when I say we I include all the people in this room, as practitioners, judicial officers and other stakeholders are not doing what we're supposed to do. That's the background to the national efficiency structure. The structure is aimed at ensuring that we deliver quality justice as speedily as possible.'

Making a profit: What about the public interest?

A panel discussion was held to discuss the question of attorneys making a profit while taking into account the public's interests. Speakers during the session were attorney at Phatshoane Henney Attorneys in Bloemfontein, Alet Lubbe, and President of the Black Lawyers Association, Busani Mabunda.

Speaking on legal costs, Ms Lubbe said that legal costs were a complex field that was not explained in one reference guide, which made it difficult to understand and therefore created grey areas. She said that there has been a growing concern regarding overcharging and unfair practices by attorneys. She added that the Legal Practice Bill will address such issues and that while it is a practitioner's right to make a profit on the one hand, the public has a right to access to justice on the other hand. She said that because the public do not understand legal fees, some practitioners go beyond the scope of reasonable guidelines and

overcharge clients creating a misconception that attorney fees are unaffordable.

Ms Lubbe said that most attorneys were scared of the Legal Practice Bill because they believed it will change the way they recover fees from clients. She said the Bill states that practitioners must supply clients with a cost estimate in writing. 'This estimate must include details of likely financial implications in respect of fees and disbursements, the hourly rate, attorney and advocate costs and an outline of the work they anticipate. In other words, a detailed written mandate,' she said.

Mr Mabunda asked why do the poor in South Africa not see the courts as an avenue for the resolution of their grievances. He said the answer to that question is complex and is rooted in the country's



President of the Black Lawyers Association, Busani Mabunda, discussed attorneys making a profit while not forgetting their role in assisting with access to justice.

history, but he also suggested that the reality is that the poor cannot afford the cost of civil litigation. Adding that the essence of being in business, including the practice of law, is to make a profit. However, he reminded delegates that the practice of law is not only about making a profit but it was also to serve the public's interest in order to advance democracy.

Quoting s 34 of the Constitution, Mr Mabunda said: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. Mr Mabunda pointed out that the word 'everyone' in the section included the poor.

Mr Mabunda noted that s 35 of the Legal Practice Bill endeavors to regu-

late fees in respect of legal services. He said that the provisions of the section are aimed at working towards accessibility to courts as envisaged in s 34 of the Constitution, which goes against the ingrained value of many attorneys who push for profit above public interests. He added that the challenge for practitioners is to find a balance between the two interests.

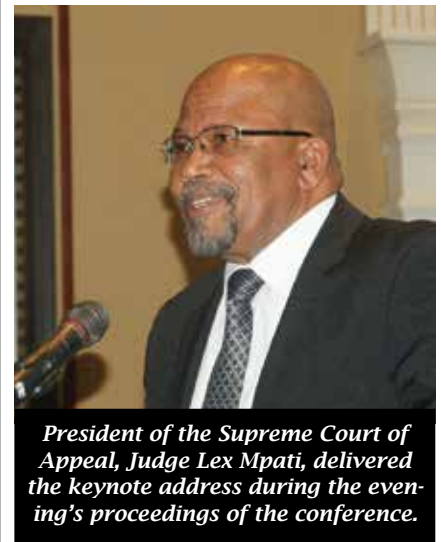
In conclusion, Mr Mabunda said that practitioners should ask themselves how further should the profession make a sacrifice for the needy to ensure that legal services are affordable, therefore increasing access to justice. He added that if legal costs are not made affordable to the poor, the profession risks being resented by the majority of society.

Independence of the judiciary

During the evening proceedings of the first day of the AGM, President of the Supreme Court of Appeal, Justice Lex Mpati, delivered the keynote address. In his speech he spoke about the independence of the judiciary.

Judge Mpati said that while the judiciary, through the Chief Justice and the heads of the superior courts, is making endeavors to achieve independence it must, in the meantime, appear to be independent and maintain its integrity. He added that independence and integrity are essential requirements for a judge.

Justice Mpati said that the Chief Justice has taken on the task unfinished by his predecessor of ensuring that the judiciary gains and maintains the respect of society. He said to earn the respect and confidence of the public, the judiciary must ensure that when litigants leave the courtroom at the end of their case,



President of the Supreme Court of Appeal, Judge Lex Mpati, delivered the keynote address during the evening's proceedings of the conference.



Public Protector, Advocate Thuli Madonsela speaking on the importance of the work done by the Office of the Public Protector in democratic South Africa.

whatever the outcome, they individually received a fair hearing before competent, independent and impartial judicial officers, 'in the sense that they each had a fair opportunity to present their case and that they were afforded equal treatment'.

'But in addition, judges must endeavour to ensure that cases that come before them are dealt with expeditiously and that justice in any case is swift. It is with these ideals in mind, that the Chief Justice, with the concurrence of the leadership of the judiciary, issued the norms and standards that have been the subject of some discontent and, possibly, resentment,' Justice Mpati said.

In conclusion, Justice Mpati submitted that for the judiciary to gain and maintain the respect and confidence of the populace, it needs to move in earnest with implementing case management strategies that would ensure that cases are dealt with expeditiously.

Importance of the Office of the Public Protector

The second day's proceedings of the AGM were opened by a keynote address by the Public Protector, Advocate Thuli Madonsela. Her speech focused on the importance of the work done by the Office of the Public Protector in democratic South Africa.

Ms Madonsela said that she and her team were encouraged by the LSSA's unwavering interest and support to her office's work. She then spoke about a matter she recently investigated and publicly reported on that dealt with government administration. She said that the report also touched on the uncomfortable issue of improper allocation of public resources.

es. She added that never before has the Office of the Public Protector had such a reaction because of a report. The report gained her much criticism even from the legal profession, 'I must indicate, at the outset, that fair criticism delivered with civility is more than welcome,' she said.

Giving background to the Office of the Public Protector, Ms Madonsela said that her office entered the constitutional democracy architecture in 1995 with the basis been laid in the interim Constitution of 1993. She said the Public Protector is established by s 181 of the Constitution to strengthen constitutional democracy. She added - 'we can agree that the Public Protector helps the people exact accountability on those they've entrusted with public power and control over public resources. For the majority of the thousands of cases, being 40 000 this year and over 33 thousand last year,



Fred Baumhardt from Microsoft speaking on the importance of information technology.

we pursue our mandate through a quiet conversation with relevant organs of state. You can refer to it as "whispering truth to power".

Ms Madonsela said that there is a prospect of partnership between her office and the legal profession. 'Prospects for the future include sharing training experiences with my team, participating in selected investigations, *pro bono* work when a matter goes on review and referrals to the law society of matters involving alleged improper conduct by lawyers. Lawyers can also report wrongdoing if not in breach of client attorney privilege.'

The law firm of the future

After the keynote address, a panel discussed developments and trends in IT and the electronic environment. The

panelists included Fred Baumhardt from Microsoft and member of the LSSA's E-Law Committee, Brendan Hughes. The panel discussion emphasised the importance of having the best available software and hardware to run a profitable law firm that can render services faster and therefore help curb exorbitant legal fees.

Mr Baumhardt said that in the future technology will be determined by the user, adding that the effectiveness of any attorney will depend on their IT literacy. Speaking on the direction IT will take he said: 'Cloud computing is going to be a transformational element in terms of what you are going to be able to expect. You are going to subscribe to a technology that you need, just in time, you are going to get it in seconds, and you need to get it in seconds, and once you have finished with it you can take the app off or you can take the discussion off.'

Mr Hughes spoke about one of the projects that the LSSA has initiated, which is the E-signature project. He said: 'The E-signature project is basically a project that is designed to assist attorneys in getting digital signatures that they can apply to documents electronically that can identify who that document was signed by; can identify whether that person is a practising attorney, a notary or a conveyancer; can identify whether that document had since the time the signature was applied been altered or edited in any way. And can also encrypt the communications within that document during the course of transmission, so that if intercepted, they cannot actually be viewed if necessary.'



Member of the Law Society of South Africa's E-Law Committee, Brendan Hughes, speaking on the E-signature project.

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Progress on judicial case-flow management

The Office of the Chief Justice held a workshop on judicial case-flow management in Kempton Park in March. The main aim of the workshop was to review progress to date following the implementation of the judicial case-flow management pilot project in Gauteng, KwaZulu-Natal, Western Cape and the North West in October 2012.

The judicial case-flow management pilot sites were initiated as a direct response to on-going criticisms related to excessive delays in the finalisation of cases that were experienced in courts around the country.

The workshop was attended by Chief Justice Mogoeng Mogoeng, the Deputy President of the Supreme Court of Appeal Judge Khayelihle Mthiyane, Judge of the Supreme Court of Appeal Steven Majiedt, Judge Presidents of the Gauteng High Court Dunstan Mlambo, the North West Monica Leeuw and of the Northern Cape Frans Kgomo and the Acting Judge President of the Free State, Nathan Erasmus.

Also in attendance were Deputy Judges President of the North and South Gauteng High Court, KwaZulu-Natal, Western Cape, the Labour Court, as well as senior judges of the Supreme Court of Appeal, the Labour Appeal Court, the Land Claims Court and judges from each division who are members of the Judicial Case-Flow Management Committee.

In a press release, judiciary spokesperson and media relations director at the Private Office of the Chief Justice, Lulama Luti, said that Chief Justice Mogoeng urged members of the judicial case-flow management committee to consider strongly cascading the successes gleaned in the High Court to the magistrates courts around the country, particularly because s 8 of the Superior Courts Act 10 of 2013 puts the responsibility of the coordination of judicial functions of the magistrate's courts on the shoulders of the Judges President.

Judicial case management makes it the duty of a judicial officer to intervene as early as possible in the management of a case, thus taking the control of the pace of litigation out the hands of the parties and their legal representatives.

The press release stated that the



Chief Justice Mogoeng Mogoeng delivering his speech at the recent workshop on judicial case management in Kempton Park.

workshop revealed that judicial case management had worked so well that only when a matter has been certified trial-ready by a judge, is a trial date allocated in the Western Cape. 'Currently, a trial date is allocated within three months of the certification by a judge, where before the commencement of the pilot project, it could take up to two years from the date of allocation to the hearing of the matter,' Ms Luti stated in the press release.

Among the successes also noted during the workshop was the reduction in the waiting time to obtain a trial date. Since the commencement of the project, in the KwaZulu-Natal division of the High Court, the waiting time for trial dates has been reduced from 12 months to six to eight months in Durban and from two to three years to eight to 12 months in Pietermaritzburg.

'Successes were also recorded in the North West where criminal cases are finalised within six months of enrol-

ment in the High Court. Within 14 days of a matter being transferred from the magistrate's court to the High Court, it is monitored closely to register it in the broader case-flow process to enable its finalisation accordingly,' stated Ms Luti.

'In my court we do not postpone matters indefinitely, we postpone matters to definite dates and as a result all matters on our rolls have been allocated trial dates until September 2014. Currently, we do not have requests for trial dates in October and beyond,' said North West Judge President Leeuw.

Challenges

Challenges identified at the workshop included:

- Lack of buy-in by judicial officers in some divisions.
- A shortage of skilled administrative personnel and interpreters.
- Over-burdened staff, aggrieved legal practitioners, shortage of filing clerks.
- A lack of statisticians and an inability to attract suitably qualified staff members because of low salary scales.

According to Ms Luti, recommendations of the workshop included that court personnel involved in the project be trained in the procedures and processes of case-flow management and that an electronic case management system be developed to include e-filing and to assist with the tracking and monitoring of cases.

The press release states that the chairperson of the national judicial case management and Supreme Court of Appeal Deputy President Mthiyane said that the committee had investigated various systems in other jurisdictions, which were successfully implementing case-flow management. He added that South Africa was now implementing some of the best practices gleaned from those jurisdictions, which include the United States, United Kingdom, Norway and Malaysia.

- See 2012 (Oct) DR 5.

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The Deputy Minister of Justice and Constitutional Development, John Jeffery, recently announced the appointment of new sheriffs and the introduction of a new code of conduct and pledge for sheriffs.

In his address at parliament, he said that the sheriffs' profession is a critical component of the justice system and that it contributes immensely to the quality and accessibility of justice. Deputy Minister Jeffery said that sheriffs play a critical role in the administration of the civil justice system and are an important interface between the public and the justice system. 'Their work is critical in the promotion of constitutional rights, which characterises our democratic society,' he said.

Deputy Minister Jeffery said that this was the reason why it was necessary that the sheriffs' sector be regularly capacitated and transformed to ensure that it is in line with the Constitution. He added that several steps had been taken to change the sheriffs' profession's outlook and functioning.

Sheriff statistics

According to Deputy Minister Jeffery, before 1994 there were 465 sheriffs operating nationally. Of these, 22 (4,73%) were women and 443 (95,27%) were men. In terms of racial demographics of the 465 sheriffs, 414 were white (89,03%), 44 were African (9,46%), five were coloured (1,08%) and two were Indian (0,43%).

Deputy Minister Jeffery said that a nationwide audit of the sheriffs' profession in 2009 revealed that of the 546 sheriffs, 76% were white, while 24% were black and women comprised only 9% of all sheriffs.

'The audit also revealed that most sheriffs who are white were appointed in the most lucrative offices which were situated in the metropolitan areas and affluent cities and suburbs, while the majority of sheriffs who are black were appointed in former homelands and traditionally black townships and rural villages which generated a low income,' he said.

Deputy Minister Jeffery said that according to the South African Board for Sheriffs as at 1 October 2013 there were 348 permanent sheriffs operating in the country. Of these, 171 are white (49%), 128 African (37%), 26 Indian (7%) and 23 coloured (7%). He added that this resulted in a 6,73% increase of black persons (African, Indian and coloured) represented in the profession. Of the 348 permanent sheriffs, 271 were men, representing 78% and 77 were women.

In February this year, Deputy Minister Jeffery appointed 18 sheriffs to various vacant sheriff offices. Of these, 11 are

New code of conduct for sheriffs



The chairperson of the South African Board for Sheriffs, Charmaine Mabuza.

African (61%), three are white, two are coloured and two are Indian. Six of these are women.

The newly appointed sheriffs bring the total number of permanent sheriffs in the country from 348 to 362 (the total number of sheriffs is only affected by 14 of the 18 appointments as four are already permanent sheriffs in neighbouring sheriff offices that are not economically viable on their own).

Deputy Minister Jeffery said that 16 of the newly appointed sheriffs would assume duty as of 1 June 2014, after completing a mandatory induction training programme. The other two would take up office on 1 July and 9 September.

Deputy Minister Jeffery stated: 'Whilst there is still a long way to go, these appointments have gone a substantial way to making the profession more representative and in line with the transformative vision and goals of our Constitution.'

Code of conduct

The Deputy Minister also announced that the South African Board for Sheriffs, with the approval of the Minister, has adopted a new code of conduct and pledge for sheriffs with effect from 1 March 2014.

According to him, the sheriff's code of

conduct had last been updated in 1990 when the Sheriffs Act 90 of 1986 was amended, resulting in the code not being in line with the Constitution.

'The conduct of the sheriff or deputy sheriff plays a big part in how people perceive the law and the legal system. If people view the law and the justice system as hostile, negative and ineffective, there will be no respect for the rule of law. All of our people must be able to have confidence in the justice system and have the belief that the system will protect their rights and that they will be treated fairly and equally,' Deputy Minister Jeffery said.

The new code of conduct contains provisions including:

- The conduct of a sheriff entrusted with the service or execution of a process must act without avoidable delay in accordance with the rules of court and provided that any process, requiring urgent attention shall be dealt with immediately.
- That trust money must be paid out to the person entitled thereto without avoidable delay.
- A sheriff may not perform any act as sheriff in any matter in which he or she has a direct or indirect interest.
- A sheriff must serve members of the public in the official language in which he or she is addressed or otherwise communicated with.

Deputy Minister Jeffery said that central to the new code is the requirement for all sheriffs to hold constantly in high regard the rights of all citizens in performing their functions.

Pledge

'In terms of the new code, sheriffs will be expected to undertake a pledge before they can start practising. The sheriff will pledge to uphold the constitutional rights of all citizens and to uphold the principles of good governance by maintaining a high standard of accountability, transparency, honesty and integrity. The South African Board for Sheriffs is currently in the process of training all sheriffs on this new code of conduct and in ensuring that all sheriffs have taken this pledge,' Deputy Minister Jeffery said.

Deputy Minister Jeffery concluded by saying that the Justice Department was confident that the new code of conduct and pledge would go a long way in improving service delivery by the sheriffs' profession and would also assist in re-

newing the public's faith in the profession.

The chairperson of the South African Board for Sheriffs, Charmaine Mabuza, told *De Rebus* that she welcomes the new code of conduct that has been brought in line with the Constitution. She added that under the new code, sheriffs are required to execute court orders without undue delay and that they must serve the public in a language they understand. 'Sheriffs and their deputies are obliged to respect the citizens of South Africa when performing their duties and functions as a sheriff. The code ensures

compliance with national legislation and constitutional imperatives,' she said.

Challenges

Ms Mabuza said that the biggest challenges facing sheriffs are interpleader proceedings, where property is attached and a third party has a claim to it. Ms Mabuza added that other challenges were that the public and communities did not necessarily understand the role and function of the sheriff adding that at times they hamper and obstruct the sheriffs when they execute their tasks. Ms Mabuza said that sheriffs were also

experiencing difficulty with the execution of Labour Court matters and small claims court matters.

Ms Mabuza stated that it was gratifying to see that the demographics of the sheriff's profession had changed dramatically since the new dispensation, with the number of black and female sheriffs increasing. She added that 96 of the sheriffs are female making 18,75% of sheriffs countrywide, 40 of whom are African.

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Justice, Crime Prevention and Security cluster update

Justice Minister Jeff Radebe gave an update on the Justice, Crime Prevention and Security (JCPS) cluster in parliament in March where he outlined various accomplishments of the cluster in the 2012/13 financial year.

Minister Radebe said that the new democratic government inherited a dysfunctional and polarised system that deliberately denied the fundamental rights of the majority of people. He added that the challenge that confronted the JCPS was to unite and help transform a nation that was divided across race, class, sex, creed and economic status. 'In addition, we were faced with the urgent task of ensuring a safer and secure South Africa,' he said.

Minister Radebe said that the criminal justice system that existed pre-1994 served the interests of the apartheid government and as a result, there was a disparity in delivery of services, dependent on race and geographic location. And added that the Justice Department needed to remodel the criminal justice system and align it with the values of the Constitution.

Institutional reform

Minister Radebe said that the Justice Department had made substantial progress in changing the face of the criminal justice system, establishing the rule of law and transforming institutions that had previously served the apartheid state.

According to Minister Radebe, measures have been taken to strengthen bodies such as the Office of the Public Protector; the South African Human Rights Commission; the National Prosecuting Authority and Legal Aid South Africa, which help citizens enjoy the rights enshrined in the Constitution.

Minister Radebe said that the judiciary has further strengthened as a separate branch of the state with the Superior Courts Act 10 of 2013. The Act

accords the Office of the Chief Justice an identity and responsibility separate from the Justice Department. 'The Constitution Seventeenth Amendment Act [2012] also confers on the Chief Justice the power to lead and guide the judiciary,' he said.

'Another huge task that confronted us was the transformation of the judicial system,' said Minister Radebe, adding that one of the initiatives to transform the judiciary and the legal sector was to establish a judiciary that broadly represent the racial and gender demographics of South Africa.

'Black judges (black, coloured and Indians) now constitute 61% of all judges. We are currently looking at various ways to nourish the pool from which female judges can be appointed. The finalisation of the Legal Practice Bill ... will assist in the transformation of the legal profession and broaden the pool from which potential judicial officers can be selected,' Minister Radebe said.

Serious crimes

Minister Radebe said that the JCPS cluster has intensified the fight against crime so that citizens are and feel safe.

He then went on to give statistics saying that over the past nine years (2004/5 to 2012/13) incidents of crime declined against the increase in population figures. 'Murder reduced by 27,2% over nine years, with a further reduction of 16,6% during the past four years', he said.

Minister Radebe said that conviction rates have increased in the past five years in organised crime, sexual offences and trio crimes (hijacking, murder and business robberies). He added that most of the people arrested for serious crimes have received harsher sentences of up to 20 years imprisonment.

Some of the long sentences imposed were -

- 12 104 people sentenced to 15 to 20 years;
- 9 438 sentenced for more than 20 years; and
- 12 443 sentenced to life.

Minister Radebe said that some of the categories of crimes that have impacted on society were -

- organised crime 87,9%;
- trio crimes 84,7%; and
- sexual offences cases 66,7%.

Minister Radebe stated that several South African surveys have shown that more people are beginning to feel safer. He said that in October 2013, the largest global economics consultancy in the world, IHS, released its Crime Index report, which found that crime in South Africa was at its lowest level in 15 years. The report further stated that crime rates dropped 38% since its peak during the 2002/2003 financial year.

According to Minister Radebe, over the past five years, several interventions were introduced to address gender-based violence and sexual offences against vulnerable groups. These interventions include the adoption and ascent of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Child Justice Act 75 of 2008. These Acts provided for expanded definitions of crimes such as rape and provided greater protection for children. He added that 176 specialised Family Violence Child Protection and Sexual Offences units are operational throughout the country.

Minister Radebe said: 'We are encouraged by our courts, which have demonstrated an aggressive stance in addressing the scourge of sexual violence in our country. Our courts have imposed severe sentences in two prominent cases with the rapist and killer of Anene Booysen being sentenced to 25 years and

the Tholeni serial rapist and killer from Butterworth in the Eastern Cape to 25 life terms. This was hardly a week after the re-introduction of the sexual offences courts in the Eastern Cape.'

Minister Radebe said that the number of convicted sex offenders on the National Register for Sex Offenders has increased from 2 792 names as at 31 March 2013 to 13 216 as at 31 December 2013. He added that in October 2013, alone, 3 384 current and historic convictions were registered.

According to Minister Radebe, new initiatives such as the Victim-Offender Dialogues (VOD) have been introduced to place the victims of crime at the centre of the correctional process. He said that the VOD programme was implemented to ensure that victims of crime are not erased from public memory once the courts sentence the offender. 'As government we acknowledge that the loss suffered by victims is irreplaceable and that the healing of wounds and pain is a process that does not end once guilt is established by the courts,' he said.

Minister Radebe said that over the past five years, the Justice Department has intensified focus on the education of offenders in order to help break the cycle of crime. He added that the prisons were now correctional centres of rehabilitation and that offenders are given new hope and encouragement to adopt a lifestyle that will result in a second chance towards becoming ideal citizens.

The fight against corruption

Minister Radebe said that the cluster has established the Anti-Corruption Task Team, which prioritises the investigation and prosecution of corruption cases. He said that by the end of December 2013, 48 people were convicted in cases where more than R 5 million in illicit gains were involved and freezing orders amounting to R 1,3 billion were obtained against 67 people.

Minister Radebe added that in the first six months of 2013/14, a total of R149 million was paid into the Criminal Assets Recovery Account Fund. The fund was established to redirect the proceeds of criminal activity to enhance the fight against crime.

Strengthening the criminal justice system

Minister Radebe said that the cluster has developed various business plans to improve investigative, prosecuting, court and case management systems and according to him, the most comprehensive initiative in this regard is the Integrated Justice System Programme, which aims to manage inter-departmental information exchange within the cluster.

Because of this programme, Minister

Radebe said, it was now possible to deal with electronic exchanges of docket ready data and information at 99 police stations and 20 courts with further roll-out continuing.

New legislation

'Another key development is that South Africa has become the 57th country worldwide to pass criminal offender DNA database legislation [in the form of the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013]. This legislation will help to solve and prevent crime in South Africa,' he said.

This Act was enacted in January 2014 and it amends the Criminal Procedure Act 51 of 1977, so as to -

- provide for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis;
- to provide for the conditions under which the samples or forensic DNA profiles derived from the samples may be retained or the periods within which they may be destroyed;
- to further regulate proof of certain facts by affidavit or certificate;
- to amend the South African Police Service Act 68 of 1995,
- to establish and regulate the administration and maintenance of the National Forensic DNA Database of South Africa;
- to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of taking of bodily samples for investigation purposes; and
- to amend the Explosives Act, 2003, so as to further regulate the powers in respect of taking of bodily samples for investigation purposes; and to provide for matters connected therewith.

The Act is consistent with global DNA database trends and requires most people convicted or arrested for crimes to submit a DNA sample. Also consistent with global trends, arrestee samples and profiles will be destroyed if not convicted.

Case backlog

Minister Radebe said that there has been an improvement in the finalisation of cases as there has been a significant reduction of criminal court case backlogs through the 82 Backlog Courts. 'At the end of December 2013, the total number of criminal case backlogs across all courts (that is, those cases that are longer than six months on the district court rolls, nine months on the regional court rolls and 12 months on the High Court rolls) have been reduced from 34 327 cases (in 2007) to 25 762 backlog cases which is 13,8% of all outstanding cases country-wide (186 420 cases),' he said. Minister Radebe added that 42 of the regional backlog courts have been created as additional permanent courts

to ensure the backlog reduction is sustained, adding that justice delayed was justice denied.

Access to justice

Speaking on access to justice, Minister Radebe stated that 43 new courts had been built since 1994. He said that nine of these were built in the 2009 to 2013 period. Minister Radebe stated that 24 Branch Courts have been elevated into full service courts as part of the re-demarcation of magisterial districts and that the outstanding 65 Branch Courts are also earmarked for upgrade gradually in line with the National Development Plan.

Border security

According to Minister Radebe the deployment of the South African National Defence Force across the country's border from 2010 to 2013 has resulted in the following -

- over R 100 million worth of contraband confiscated which was mainly cigarettes and liquor;
- 15,42 tons of dagga with a value of over R 50 million confiscated;
- 103 weapons confiscated;
- 80 000 undocumented persons apprehended;
- over 300 stolen vehicles recovered;
- 2 000 suspected criminals arrested; and
- 18 000 livestock recovered.

Cybercrime

Minister Radebe said that the National Cyber Security Policy Framework was developed and approved by cabinet as part of government's response to new forms of crime. He added that during 2012/13, the courts finalised 136 cybercrime-related cases with a conviction rate of 97,8%.

Conclusion

Minister Radebe concluded by saying: 'Today, as we look back at the road travelled since 1994, we can reflect that though the journey has not been easy, the cluster has made tremendous progress in the fight against crime and corruption.'

'The past five years were spent consolidating legislation and other measures aimed at the deepening democracy; enhancing access to justice; transforming the administration of justice including the judiciary and the courts; improving court performance; strengthening coordination through the cluster system and the outcomes-based approach of government to deal with priorities; and strengthening the rule of law,' he said.

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Office of the Tax Ombud launched

Taxpayers who feel that they have been unfairly treated now have an avenue to air their grievances. The first ever South African Office of the Tax Ombud was officially launched on 7 April by Finance Minister Pravin Gordhan.

The objective of the Tax Ombud is to review and address complaints by taxpayers regarding service, procedural or administrative issues relating to their dealings with the South African Revenue Service (SARS).

According to Minister Gordhan, the Tax Ombud is an additional and free avenue to deal with complaints by taxpayers that cannot be resolved through SARS's internal mechanisms.

In a press release, the Finance Ministry said that the Tax Ombud is intended to be a simple and affordable remedy to taxpayers who have legitimate complaints that relate to administrative matters, poor service or the failure by SARS to observe taxpayer rights.

According to s 17 of the Tax Administration Act 28 of 2011, the Tax Ombud may not review –

- legislation or tax policy;
- SARS policy or practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS;
- a matter subject to objection and appeal under a tax Act, except for an administrative matter relating to such objection and appeal; or
- a decision of, proceeding in or matter before the tax court.

'In discharging its mandate, the Tax Ombud's office must review a complaint and if necessary, resolve it through mediation or conciliation with SARS officials specifically identified to interact with the Tax Ombud's office. The Tax Ombud may only review a complaint after a taxpayer has exhausted SARS' internal complaints resolution mechanisms. Direct access to the Tax Ombud will be allowed only if there are compelling circumstances for doing so,' states the press release.

Although the office was officially launched in April 2013, the Tax Ombud, retired Judge Bernard Ngoepe was appointed in October 2013.

Judge Ngoepe served as the Judge President of the North and South Gauteng High Courts for 14 years. He was the first black judge to be accepted onto the Pretoria Bar in 1995.

Judge Ngoepe has also acted for a term as a Constitutional Court Judge. In 2006 he was appointed as part-time Judge of the African Union's African Court of Human and Peoples' Rights. He is presently Vice-President of the court.

Before sitting on the Bench, Judge Ngoepe was admitted as an attorney in



Retired Judge President Bernard Ngoepe is South Africa's Tax Ombud.

1976 and practised until 1983 when he was admitted as an advocate. In 1994 his career reached another peak when he was appointed senior counsel.

Judge Ngoepe has been a member of a number of bodies such as the Amnesty Committee of the Truth and Reconciliation Commission, the Judicial Service Commission, the Court of Military Appeals, the Magistrates Commission, the Appeals Panel of the Press Council of South Africa and the Appeals Board of the South African Council for Medical Schemes. He has been the chairperson of most of these bodies, a title he still holds. He is also the chancellor of the University of South Africa.

In the press release he said: 'Our challenge as the office of the Tax Ombud is not just about affording the taxpayer a fair hearing, or the provision of service; it is much more than that. It is also about providing information that is easily accessible and understandable. In addition, the office treats the taxpayer public with utmost dignity and respect and provides an open, accountable and timely service. It also renders well-reasoned decisions in respect of actions taken by it.'

According to Judge Ngoepe, the office operates independently of SARS and treats all communication between it and the taxpayer with strict confidence. The office expects to contribute towards boosting the taxpayers' confidence in tax administration, which will hopefully result in better tax compliance.

The chief executive officer of the Office of the Tax Ombud is advocate Eric Mkhawane. Mr Mkhawane practised as an attorney until 1998 when he joined SARS as a manager in its legal department. He was later appointed as a regional manager for enforcement from 2005 until 2010 when he was admitted as an advocate of the High Court (Johannesburg Bar).

Mr Mkhawane told *De Rebus* that since

the office opened in the beginning of October last year to date, over 700 matters had been received. However, not all the matters were complaints, some were inquiries on how the office works, how to lodge a complaint etcetera and that only 61 of the matters fell into the office's mandate.

Mr Mkhawane said that 70% of the 61 matters that fell within the Tax Ombud's mandate had been resolved and that the remaining 30% awaiting finalisation were still within the turnaround time. He said that the office was waiting for more information on those matters from SARS.

Mr Mkhawane also said that the complaints received thus far were from both individuals and businesses and that the queries involved different aspects such as refunds, service delivery and correct procedures by SARS. He added that complaints can also be lodged online.

The Co-Chairperson of the Law Society of South Africa (LSSA), Etienne Barnard, attended the launch. Speaking from the floor, he said that the LSSA welcomed the launch as the office would help in broadening access to justice. He also pledged co-operation from the attorneys' profession.

The Tax Ombud reports directly to the Finance Minister and the Ombud's annual report must be tabled in Parliament by the minister.

Section 259(2) of the Tax Administration Act sets a one year retrospective time limit for complaints. It states: 'The first Tax Ombud appointed under this Act may not review a matter that arose more than one year before the day on which the Tax Ombud is appointed, unless the Minister requests the Tax Ombud to do so.'

This means that since the Tax Ombud was appointed with effect from 1 October 2013, matters that arose before 1 October 2012 may not be considered by the office unless requested by the minister.

The Tax Ombud can be reached at:
Tel: 0800 662 837
Fax: (012) 452 5013
E-mail: complaints@taxombud.gov.za
www.taxombud.gov.za
Physical address: IParioli building, Block A3, Ground Floor; 1166 Park Street (Between Jan Shoba and Grosvenor Streets), Hatfield, Pretoria.

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Swaziland judiciary once again in the spotlight

The Swaziland Civil Society recently held a media briefing in Johannesburg on 11 April to voice their concerns about the Swazi judiciary. The media briefing was prompted by the ongoing saga pertaining to the arrests in March of human rights lawyer, Thulani Maseko, and the editor of monthly publication, *The Nation* magazine, Bheki Makhubu, for articles published in the February and March editions of the magazine.

The panel was made up of Lomcebo Dlamini from the Swaziland Coalition of Concerned Civic Organisations, Mary da Silva from the Lawyers for Human Rights Swaziland (LHRS) and Wandile Dlodlu from the Swaziland United Democratic Front who collectively were representing the Swaziland Civil Society. Ms Dlamini said that the three organisations had been asked to coordinate the advocacy and legal interventions that were becoming necessary in view of how the judicial saga was unfolding. She added that although this was playing itself out in the arena of the judiciary and the courts, civil society was looking at it as a larger problem of governance.

Background

On giving the build up to the issue at hand, Ms Da Silva said that on 17 and 18 March 2014 respectively, Mr Maseko and Mr Makhubu were arrested following a warrant issued by Swaziland's Chief Justice Michael Ramodibedi, on charges of scandalising the judiciary and contempt of court. The two were arrested after the magazine published a report questioning the detention of a government vehicle inspector, Bhantshana Gwebu, who was detained for nine days without being charged. The articles criticised the arrest as an abuse of authority and a lack of impartiality of the Swazi judicial system. The article written by Mr Makhubu appeared in the February issue of *The Nation*, which did not receive much attention, and the one by Mr Maseko – which dealt with the same issue but provided a breakdown of the legal issues involved – was published in March.

The articles published relate to contempt charges, also initiated by Chief Justice Ramodibedi, against a government vehicle inspector who issued a ticket to a judge's driver. The driver was transporting Judge Esther Ota, without the required authorisation for the use of



From left: Mary Da Silva, Wandile Dlodlu and Lomcebo Dlamini of the Swaziland Civil Society spoke to South African media on the Swaziland judiciary at a recent media briefing held in Johannesburg.

a government car.

The articles in *The Nation* attacked the inspector's arrest as an abuse of authority. In his column, Mr Makhubu compared the Chief Justice to Caiaphas, the High Priest of Judea implicated in the condemnation of Jesus, saying that he had 'massaged' the law to suit his own agenda.

Ms Da Silva said that authorities claimed the articles interfered with the court proceedings and charged them with contempt of court. She added that the media in Swaziland operates under strict regulations, where criticism of King Mswati III and his government is not tolerated. Ms Da Silva also said that when the Chief Justice was questioned on how the arrests were carried out, he said that the matter was *sui generis*, which Ms Da Silva says means that it falls outside any laid down procedures and any rules of the High Court or any court or law. She said that surprisingly to the lawyers, they also learnt that the matter also falls outside the ambit of the Constitution of Swaziland, which is the supreme law in the land. 'What Judge Mpendulo Simelane was literally saying was that the court can adopt any procedure that it wants to, whether legal or not, in dealing with this matter,' she said.

Ms Da Silva said that there was a request made that a full Bench should hear the matter because they foresaw that this would happen. A letter was addressed to the registrar who responded in a letter to the defence counsel on the day of the hearing saying that the Chief Justice did not think that the matter war-

rants a full Bench.

Ms Da Silva said that on 18 March, the duo was expected to appear in court but was instead subjected to a private hearing in Chief Justice Ramodibedi's chambers, which she says was in violation of s 21 of the Constitution of the Kingdom of Swaziland, which guarantees the right to a fair trial.

They were kept in custody until the second hearing, which took place on 25 March where they appeared at the High Court of Mbabane with legal representation. Their detention was extended until the next hearing, which took place on 1 April and when they appeared, their detention was extended for the third time to the next hearing, scheduled for 8 April.

Ms Da Silva said that the decision to extend the custody of the two was taken by newly appointed Judge Simelane, who is also the former High Court Registrar implicated in the articles published.

Ms Da Silva said that on 4 April, the accused filed an application at the High Court where they were seeking a declaratory order on the grounds that the warrant of arrest issued by the Chief Justice was unconstitutional, unlawful and irregular. They argued that the High Court does not have the power to issue same as it was a magistrate who issued warrants.

Mr Makhubu and Mr Maseko were denied bail on the basis that they were a flight risk. They remained in custody with other inmates for 20 days before a court granted an application for their release, on the grounds that Chief Justice Ramodibedi had no power to issue an ar-

rest warrant.

Ms Da Silva said that the accused had been forced to wear leg-irons during court appearances. She said that on 6 April Mr Maseko and Mr Makhubu were released after High Court Judge Mumcy Dlamini set aside the arrest warrant following an application lodged by the two defenders' lawyers seeking a declaratory order that the 17 March arrest warrant issued against them was unconstitutional.

However, on 7 April Chief Justice Ramodibedi, along with the Office of the Director of Public Prosecutions, the Attorney's General Office and the Swaziland Government, appealed against the decision of Justice Dlamini. This appeal was pending at the time of going to print. On 9 April, Judge Simelane subsequently issued a ruling stating that the 7 April appeal had automatically suspended the 6 April decision to free the two defenders and that as a consequence they should be re-arrested.

On the morning of 10 April a first hearing took place and the provisional detention of the two defenders was extended until the next hearing scheduled on 14 April.

Ms Da Silva said that central to the ongoing saga are the questions hanging over Chief Justice Ramodibedi who is currently suspended from a judicial position in his home country Lesotho, where he is facing allegations of fraud and misconduct. She added that in Swaziland, questions have also been raised as to how Judges Ramodibedi and Simelane can be impartial adjudicators when they are both subjects of the articles. Mr Makhubu and Mr Maseko filed an application for the recusal of Judge Simelane stating that it would not be feasible for him to preside over a matter that he may be called as a witness to.

Ms Da Silva said that Chief Justice Ramodibedi's position as Swaziland's chief justice is currently breaching Swaziland's Constitution because s 157(1) of the constitution, which came into effect on July 26 2005, states: 'A person who is not a citizen of Swaziland shall not be appointed as Justice of a superior court after seven years from the commencement of this Constitution.'

Ms Da Silva said that when Judge Simelane set April 14 as the trial date, advocate Lucas Maziya representing Mr Maseko and Mr Makhubu inquired what matter would be heard on that date, to which Judge Simelane replied: 'The main matter, contempt of court.'

'Lawyers and observers at the court were left wondering how a trial date could be set by Judge Simelane when a pre-trial appeal, on the same matter, is yet to be heard', said Ms Da Silva.

Swaziland political crisis

Mr Dlodlu said that Swaziland was undergoing a political crisis. He said that it

was a state with no democracy and one that primarily strives at not respecting basic human rights of its citizens. He said that *The Nation* magazine was under siege adding that he would not be surprised if it was forced to shut down.

'We have a number of political and human rights activists who are behind bars with the harshest possible sentences. One is serving an 85 year sentence, the other recent one is serving a 15 year sentence and we are expecting a high sentence for Mr Maseko and Mr Makhubu,' he said.

Mr Dlodlu said: 'Our conscious and gut as a nation is very clear about the fact that there is nothing wrong with the articles in question but because Swaziland has a system run by his Majesty, that refuses to democratise, where you would have a rule of law where the conduct of judges would be subjected to scrutiny. There is no debate that the Chief Justice in this case, is completely out of order, but there is no recourse.'

Mr Dlodlu went on to query why Swaziland was being treated with 'soft gloves' especially by South Africa. He appealed to the South African government to help Swaziland in its political, social, judicial and economic crises, which could explode any day, which would be to the detriment of the Southern African Development Community region generally and not just to the citizens of Swaziland.

When asked whether the present situation made their lives as lawyers difficult, Ms Da Silva said that there was a lot of uncertainty as a lawyer in Swaziland. 'You do not know how your matter will be handled. You are not sure whether it will be handled procedurally by the registrar and whether the judge allocated the matter will exercise a fair mind towards it, especially with the interference of the Chief Justice. Right now we are donning our robes and going to court to do the best that we can. But as I sit here as a practising lawyer, and being part of the panel here today, I could just go back home and face contempt charges myself because anything said about the Chief Justice or Judge Simelane, even though we are giving facts and the truth, can be classified as contempt of court. Anyone can face contempt charges and [be] put in prison for a very long time.'

She added that she was not worried or scared but that some of her colleagues were. 'But those that have been in the game for a while have brushed it aside and said come what may because there is nothing that we can do about the situation,' she said.

Current situation

At the time of going to print, at a six-hour court hearing on 14 April, Mr Maseko and Mr Makhubu had been remanded back into custody for a further seven days, they were due to appear again on

23 April. At the same hearing, Judge Simelane refused to recuse himself stating that he would be able to preside over the case objectively.

The Law Society of Swaziland has also challenged the appointment of Judge Simelane as a High Court judge, and an investigation regarding the appointment is under way. If found to be an irregular appointment, all the matters that Judge Simelane has presided over since his appointment, would be nullified.

Reaction

The Law Society of South Africa (LSSA) expressed its grave concern in March at the arrests, which it described as 'irregular and arbitrary'.

In a press release, the former co-chairperson's of the LSSA Kathleen Matolo-Dlepu and David Bekker said that it has, on previous occasions, publicly raised its concern in media statements and with President Jacob Zuma, regarding the subversion of legal proceedings and of internationally accepted legal and human rights principles by Swaziland's Chief Justice Ramodibedi.

'We understand that Mr Maseko and Mr Makhubu were denied access to legal representation when arrested, remanded in custody after closed proceedings and denied the opportunity to apply for bail. Not only do these actions demonstrate the Swazi authorities' intolerance of freedom of speech, they also show an ongoing contempt for the rule of law and a flouting of the fundamental principles of justice and fairness,' said the co-chairpersons.

They went on to say that such actions reflect negatively not only on the Swazi authorities and justice system, but also on the SADC region as a whole. And reaffirmed the South African attorneys' professions' support for its colleagues in Swaziland.

In a statement the president of the SADC Lawyers' Association (SADC LA), Kondwa Sakala-Chibiya, said that SADC LA was gravely concerned over the reports that while in police custody, Mr Maseko and Mr Makhubu were denied access to legal counsel and that a request made by them that the indictment proceedings be held in open court, was also denied in favour of holding closed proceedings in the Chief Justice's chambers.

'The Constitution of the Kingdom of Swaziland guarantees the right to a fair trial. The UN Basic Principles on the Role of Lawyers (Principles) provide for the prompt access to, and assistance of, a lawyer to protect and establish the rights of an accused and to defend them in all stages of criminal proceedings; the Principles also require the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with a lawyer of their choice

without delay and in full confidentiality. The International Covenant on Civil and Political Rights, to which the Kingdom of Swaziland acceded on 26 March 2004, provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal,' said Ms Sakala-Chibiya.

Ms Sakala-Chibiya concluded by call-

ing on the Swazi authorities to ensure that the due process of the law is respected in this matter without subjecting the accused to any form of abuse of their rights and/or discrimination in the manner in which their trial is held.

The article that landed the accused in jail can be found at www.salo.org.za/wp-content/uploads/2014/03/THE-AR-

TICLE-THAT-GOT-HIM-JAILED-By-THULANI-MASEKO.pdf

• At the time of going to print, the matter was still ongoing.

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Humanising legal education

The University of South Africa's College of Law and the Institute for Dispute Resolution in Africa (IDRA) hosted a colloquium on 'humanising legal education and practice' in Pretoria in March. The speaker at the event was jurist and author Kim Wright who spoke about the manner in which integrative law models are being applied in a range of practice areas, from restorative justice in the criminal context to collaborative law in divorce matters and mindful value-based contracts in business.

In introducing Ms Wright, the head of IDRA, Professor John Faris said that he believes that there is a new consciousness in the world. He added: 'We are wrestling with the problems of legal practice and the conduct of practitioners. The stress that it causes upon the adversarial system, affects the clients and the people who need these services. This is a long-going debate. There is a shift and we need to be part of that, we need to be aware of it.'

Ms Wright said that there were a lot of systems changing in the law. She added that she was convinced that lawyers all over the world were in the process of creating an alternative system. 'We cannot argue that there is a change happening but we all see different parts of it. It is a collective intelligence systems change that we are all working towards,' said Ms Wright.

Ms Wright said that humanising legal education was an initiative shared by legal educators seeking to maximise the overall health, wellbeing and career satisfaction of law students and lawyers. 'We find cause for concern in our observations of law students and in the research on, and reports of, problems in the legal profession including dissatisfaction, depression, excessive work, substance abuse and eroding professionalism. We are interested in the ways legal education is conducted, the impact those choices may have on the attitudes, values, health and wellbeing of



From left: The Law Society of South Africa Chief Executive Officer, Nic Swart; jurist and author Kim Wright and the head of the Institute for Dispute Resolution in Africa, Professor John Faris, pictured at a colloquium on humanising legal education and practice in Pretoria in March.

law students, and the possible relationship between each of those matters and the problems experienced by our graduates in the profession. Through scholarship, web-based discussion, empirical research and conferences, we hope to inform the development of innovative teaching methods when appropriate,' she said.

According to Ms Wright, there are many symptoms showing that the legal system is declining. She added that there was evidence that lawyers do not like what they do and added that there is a high level of alcoholism, suicide, divorce and all kinds of addiction. 'We are just not a happy profession as a general rule and a lot of people are leaving the profession. At one point there was a study that asked if you had a chance to do it all over again, would you become a lawyer and 86% said no. Something is not working. If people that are called to the law are not happy there, then something needs to change,' she said.

Speaking on access to justice, Ms Wright said that according to the American Bar Association, 70% of people in the United States (US) cannot afford legal representation and are not eligible for legal aid. She added: 'There is a percentage that can get legal aid and a percentage who can afford their own legal fees, and in the middle, there is 70% who cannot afford lawyers and so it has become a much polarised profession.'

Ms Wright said that another study indicated that in California 90% of people now file their own divorces rather than using a lawyer because they do not trust lawyers and do not want to work with them.

Ms Wright said Berley and Hastings, a law school in California, decided that it was going to determine how to admit students that were going to be successful lawyers and drew up a list of the qualities an effective lawyer should have. Ms Wright said that the law school did extensive research and came up with 26

factors under the following headings –

- intellectual and cognitive;
- research and information gathering;
- communications;
- planning and organising;
- conflict resolution;
- client and business relations – entrepreneurship;
- working with others; and
- character.

She asked the audience how many of these were on the curriculum. ‘Are we learning as law students to develop relationships or about passion and engagement or stress management?’, she asked adding that most law schools in the US said that the most they were teaching were 15 of the 26 factors.

Ms Wright said that humanising legal education involves –

- promoting emotionally competent lawyering;
- enhancing wisdom and compassion throughout all interactions with the legal system;
- encouraging accountability, engagement, and restoration;
- preventing legal problems from the beginning; and
- responding to societal changes mindfully, resolving conflicts and promoting client-centered lawyering.

Ms Wright said that procedural justice was an aspect of humanising legal education. She asked: ‘What is it that makes people feel like justice was served? There are two primary components of this. The first is, did I tell my story? And was I treated with respect? If so, I am satisfied, no matter the outcome.’

Ms Wright said that there is a study going on in a few courts in New York where they call people by their name instead of ‘the litigant’ or ‘defendant’ etcetera. She said that litigants are referred to by their names instead of case numbers. ‘The sat-

isfaction with the court system has skyrocketed’, she said.

Therapeutic jurisprudence

Speaking on therapeutic jurisprudence Ms Wright said that this type of law started out as an academic inquiry on how legal practice promotes psychological and principle wellbeing. She said that it was using social science to ‘study the extent to which a legal rule or practice promotes the psychological or physical wellbeing of the people it affects’ (C Slobogin ‘Therapeutic jurisprudence: Five dilemmas to ponder’ (1995) (1) *Psychology, Public Policy, and Law* 193).

Ms Wright added that this type of law uses law and legal processes that promote therapeutic consequences and minimise anti-therapeutic consequences, without trumping legal rights. Because of this, the US came up with problem-solving courts.

These courts use an interdisciplinary team approach and focus on the fact that if someone has an addiction, they will keep committing that crime to feed their addiction. So these courts deal with the addiction and focus on rehabilitation.

Below are some facts about these courts:

- There are more than 2 800 drug courts in the US and more than 1 200 other problem-solving courts.
- Problem-solving courts are now operating in 20 other countries.
- In some communities, prisons have closed due to reduction in inmate populations and drug courts were credited.
- Some studies estimate drug courts reduce crime by as much as 45%.
- Seventy-five percent of graduates remain arrest-free after three years. Typically, without this intervention, the re-

cidivism rate (return to incarceration) is the opposite; about 69% go back to prison within three years.

- Family reunification statistics are 50% higher for family drug court participants.

Other problem-solving courts include –

- domestic violence;
- homelessness;
- mental health;
- veterans;
- community court;
- gambling court;
- truancy court;
- gun court; and
- father’s court (to help fathers develop relationships with children so they support them).

Preventative law

Ms Wright said that preventative law focuses on predicting legal disputes and avoiding or minimising them before they occur. She added that proactive law falls under this type of law. Ms Wright said that proactive law considers law as an instrument that can create success and foster sustainable relationships.

Ms Wright concluded her dialogue by saying that lawyers need to become the bridge to the new paradigm of law. She said that this can be done by:

- Creating the infrastructure for an alternative legal system that works for our times and harnesses the best practices of the innovators, names them, supports them, connects them with clients, and illuminates new ways of preventing and resolving conflicts.
- Collaborating with most lawyers.
- Creating a world that works for all.

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KwaZulu-Natal Law Society pays tribute to Bedver Irving

The council and members of the KwaZulu-Natal Law Society (KZNLS) mourn the passing of Bedver Irving, a member of the society and former member of its council and associated entities.

In a press release, the director of the KZNLS, Gavin John, said that Mr Irving ‘had an illustrious career in law which culminated in him being appointed as the Managing Director in 2000 of the [Durban law] firm Woodhead, Bigby & Irving. He was also admitted as a practising solicitor of the Senior Courts of England and Wales with his primary areas of expertise in international contracts, insurance, maritime law and specialised High Court litigation.’

According to Mr John, Mr Irving also served with distinction as a member of the KZNLS council as well as on the Boards of Control of the Fidelity Fund and the Durban School for Legal Practice. ‘He was often a unifying factor in all their deliberations and was destined to play a leading role in the governance of the legal profession,’ he added.

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Free State High Court launches knowledge-sharing initiative

Acting Judge President Nathan Erasmus initiated a series of knowledge-sharing sessions in the Free State High Court, the first of which was held in February. Stakeholders representing various role players in, inter alia, the criminal justice process attended the initial session and participated in a collaborative effort to deal practically with challenges of an effective justice system. These interactive sessions provide an opportunity for practitioners to voice concerns and possible solutions to the challenges faced in providing quality legal services to clients, while at the same time ensuring the effective and speedy finalisation of cases.

Legal practitioners need to stay abreast of new developments and through trial and error, to share best practices from their own experiences and expertise. The practice of law in itself is a life-long commitment to the study of law. Reciprocal learning develops skills and reinforces values in a way that will never be achieved through mere class-room teaching. Instead of isolating the learning experience to specific stages of legal education and training, and blaming short-comings of recently admitted professionals to a faulty higher education system, law schools and faculties need the 'buy-in' from the judiciary and practitioners to provide opportunities, such as this initiative, to expose practical skills to law students as well as those not exposed to a certain field of law on a regular basis, to additional learning experiences. Deductive and inductive reasoning and critical analytical skills are mirrored in the lessons learnt from practice.

Applying legal theory to a set of facts with a definite outcome in mind cannot be equated to real life situations where a specific outcome cannot be anticipated from the onset of a case. Legal assistance seekers seldom have an isolated problem that neatly falls within the realm of a particular module of the law curriculum. What emerges from a single real life 'set of facts' often necessitates that a practitioner analyses the law holistically and relies on external role players, to best serve the needs of his or her client, bearing in mind the interest of justice. Legal education and training is the responsibility of every individual in the legal process as part of a civic duty to work towards an effective justice system.

A series of knowledge-sharing sessions will be presented in the Free State High Court addressing topics identified by the participants. The idea of this initiative is to enrich each other on an informal

basis, on relevant topics. Anyone is free to submit and/or present these topics. Public funds are not used for this initiative, and it relies on sponsors for each of the sessions held at the Free State High Court. The judiciary of the Free State High Court collectively decided to support this initiative to engage with the profession. Those wishing to enter it, and those who recently entered it by inviting speakers with expertise in fields relating to the law have been asked to step forward and

share their experiences in these various, often complex, subjects.

Inez Bezuidenhout

Director: University of the Free State
Law Clinic, and

Joleen Maartens

Senior Law Researcher:
Department of Justice and
Constitutional Development.

Botswana Law Society delegation visits LEAD

On 20 March, delegates from the Botswana Law Society visited the Legal Education and Development (LEAD) offices in Pretoria. Law Society of South Africa (LSSA) Chief Executive Officer, Nic Swart and Kathleen Matolo-Dlepu, former Co-chairperson of the LSSA welcomed the delegation.

In the day's proceedings, LEAD staff members offered assistance to the delegation on certain areas of interest, including, the structure and man-

agement of the law school, courses offered by the law school, course content and the allocation of points and e-learning.

The meeting was arranged by Nomsa Sethosa, manager of courses and distance education at LEAD. Ms Sethosa said that the day was a success; 'We are looking forward to working with the Botswana Law Society in the future and assisting them with the expertise we have'.



Front row from left: Manager of courses and distance education at Legal Education and Development, Nomsa Sethosa; Deputy Executive Secretary of the Botswana Law Society, Wema Isa-Molwane; and former Law Society of South Africa Co-chairperson, Kathleen Matolo-Dlepu.

Middle row: Council member of the Botswana Law Society, Gibson Mabudu; Executive Secretary of the Botswana Law Society, Tebogo Moipolai; and council member of the Botswana Law Society, Jost Isaac.

Back row: Chief Executive Officer of the Law Society of South Africa, Nic Swart and senior manager at Legal Education and Development Ogilvie Ramoshaba.

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The Kovsie First-Year Moot Court Competition: Celebrating 10 years of mooting excellence

In June 2004, the department of procedural law and law of evidence of the faculty of law at the University of the Free State (UFS) devised a moot competition that would be unique in legal education. Not only was it to be for first-year law students but it had to be as close as possible to a real appearance in the South African higher courts.

The mooting format (as opposed to the mock format of competition) was chosen as it was felt that this would reflect students' research and legal drafting abilities and lay the foundation for good oral advocacy skills. The Supreme Court of Appeal (SCA), located in Bloemfontein, was chosen as the venue for the competition and retired and serving judges from both this court, as well as the Free State division of the High Court were asked to act as judges in the competition. Rules for the competition and judging criteria were devised and the first competition was held at the SCA in September 2004 with three teams from, Rhodes University, the University of the North-West and the UFS, participating. The competition has steadily grown and is now presented over two days, with 24 teams participating in 2013. The Free State High Court is used in the preliminary rounds and the final rounds are held in the SCA. Members of the legal profession now supplement sitting and retired judges in judging the competition.

September 2014 marks the first decade of the competition's existence.

Due to the limited number of students who receive exposure from a moot court competition, the UFS makes it compulsory for all its first-year students in legal practice to research and prepare heads of argument, based on the competition set of facts, and to argue these in preliminary rounds before eventual representatives are chosen.

Responding to calls for practical legal education

Law faculties in South Africa are familiar with calls from both the legal profession and law students to equip students with practice-orientated training and education. Apart from experiencing simulated real-life court appearance, students are exposed to court etiquette and experience the role and function of the law in real life. Competition rules determine that students do their own research and draft their own heads of argument. Many judges have in the past commented on the high quality of both written and oral advocacy exhibited by first-year students. A substantial number of faculties have reported that this competition has served as an early identifier of promising students who have later proceeded to representing their faculties at competitions like the All Africa Human Rights Moot Court, the Jessup International Law Moot Court and the Willem C. Vis International Commercial Arbitration Moot Court competitions.



Justice Fritz Brand, while addressing the participants at the opening function at the Supreme Court of Appeal in October 2013.

Inez Bezuidenhout
Director: University of the Free State Law Clinic, and
Joleen Maartens
Senior Law Researcher: Department of Justice and Constitutional Development.

Law Society of Namibia Council

The council of the Law Society of Namibia from November 2013 to November 2014 is:



Photo by Vera Botha

Front: Dee Sauls, (Vice President) and Alwyn Harmse (President).
Middle: Retha Steinmann (Director), Carol Williams, Ingrid Husselmann and Nolan Swarts.
Back: Beatrix Greyvenstein and Ramon Maasdorp.
Insert: Pieter de Beer .

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

Boqwana and Barnard elected to lead attorneys' profession through initial transition to new legal dispensation

Port Elizabeth attorney Max Boqwana and Somerset West attorney Ettienne Barnard were elected as Co-Chairpersons of the Law Society of South Africa (LSSA) at the annual general meeting held in Bloemfontein on 29 March. They will lead the attorneys' profession through the crucial initial stages of the transitional process to a new dispensation under the National Forum envisioned in the Legal Practice Bill.

The Bill was passed by both houses of parliament in March this year and, at the time of this issue going to print, was awaiting assent by President Zuma, which was expected before the 7 May elections.

About Ettienne Barnard

Ettienne Barnard is the Vice President of the Cape Law Society where he has served as a council member and a member of its Magistrate's Court Committee. He holds the BA LLB degrees from Stellenbosch University and was admitted as an attorney and conveyancer in 1993. He specialises in commercial law and litigation at the firm Ettienne Barnard Attorneys.

He is a council member of the LSSA and a member of its Small Claims Courts Committee. In the field of skills development, Mr Barnard is a drafter and lecturer in magistrate's court practice, commercial subjects as well as practice management and administration for the LSSA's Legal Education and Development (LEAD) division.

Mr Barnard, who serves as a commissioner of the Small Claims Court, has been a member of the Small Claims Court Joint Venture Committee with the Department of Justice and Constitutional Development and Western Cape universities, and has assisted in drafting and updating the manuals for clerks and commissioners of the Small Claims Court. He is also a member of the Western Cape Advisory Committee to the Sheriffs' Board and Minister of Justice and Constitutional Development regarding the appointment of sheriffs.



*Law Society of South Africa Co-Chairpersons
Ettienne Barnard (left) and Max Boqwana (right).*

He has chaired and held executive and various positions in the governing bodies of a number of local and regional community organisations and trusts.

About Max Boqwana

Max Boqwana, who is also the President of the National Association of Democratic Lawyers, is serving his third term as LSSA Co-Chairperson. He served as Co-Chairperson in August 2008 until April 2009, taking over from Vincent Saldanha who was appointed as a judge in the Western Cape High Court; Cape Town, and was again Co-Chairperson of the LSSA in 2010.

Max Boqwana is a council member of the LSSA, a member of the LSSA's Management Committee, a council member of the SADC Lawyers Association and an executive member of the International Association of Democratic Lawyers.

He has the BA LLB degrees from Rhodes University. He is a director at Boqwana Burns Inc, which has offices in Johannesburg and Port Elizabeth, and where

he focuses on commercial and administrative law. He has served as an acting Judge in the Eastern Cape High Court.

Mr Boqwana was Chairperson of the Board of Control of the Attorneys Fidelity Fund from 2005 to 2007 and was a director of the Attorney Insurance Indemnity Fund. He served as a council member of the Cape Law Society for several years.

Besides holding other commercial leadership positions, Mr Boqwana was a director of the Eastern Cape Cricket Board and a former director of the United Cricket Board of South Africa/Cricket South Africa.

Roodt Inc forms Synergy Link with K Tootla Attorneys



Khatija Tootla of K Tootla Attorneys (left) and Johan Roodt of Roodt Inc (right).

Roodt Inc of Johannesburg is participating in the Law Society of South Africa's Synergy Link initiative, by linking with K Tootla Attorneys. By linking with K Tootla Attorneys, Roodt Inc will endeavour to assist the firm to master the following areas of practice through guidance and mentorship in –

- mergers and acquisitions;
- corporate and commercial law;
- competition law; and
- contract law.

Roodt Inc renders specialised legal services to its select group of local and international corporate clients in these practice areas. Khatija Tootla, who holds an LLM in competition and company law, has welcomed the opportunity to gain experience through the Synergy Link with Roodt Inc.

As one of its objectives to promote transformation and skills transfer in the attorneys' profession, the LSSA has created Synergy Link, comprising a panel of law firms assigned to assist with the transfer of specialist skills on a wide range of specialised legal services. The LSSA's Synergy Link enables law firms that possess specialised expertise to assist other law firms to master specified areas of legal practice.



NORTON ROSE FULBRIGHT



**Wherever you are,
you're never that far
from your first step
into global law.**

Top graduate employer in the legal sector
South African Graduate Recruiters Association
Candidate Survey, 2013

*Rankings, awards and accolades included here pre-date the combination of Norton Rose and Fulbright and Jaworski LLP on June 3, 2013.

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nortonrosefulbright.com

Financial institutions | Energy | Infrastructure, mining and commodities
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People and practices

Compiled by Shireen Mahomed



Stegmanns Inc in Pretoria has appointed Jacqueline Retief as a professional assistant in the litigation department. She specialises in labour law, civil and matrimonial litigation.



Jay Pundit & Co in Stanger KwaZulu-Natal has appointed Nishana Panday as a partner. She specialises in civil litigation and mediation.



Cox Yeats in Durban has four new appointments. Randhir Naicker has been appointed as a partner. He specialises in commercial law and medical schemes.



David Vlcek has been appointed as a partner. He specialises in commercial litigation and construction and infrastructure law.



Tamryn Viljoen has been appointed as an associate. She specialises in maritime law.



Kim Edwards has been appointed as an associate. She specialises in property law.

Cliffe Dekker Hofmeyr has appointed six new directors.



Giada Masina has been appointed in the corporate and commercial department in Johannesburg.



Lauren Wilson has been appointed in the corporate commercial department in Johannesburg.



Allison Alexander has been appointed in the real estate department in Johannesburg.



Andrew Lewis has been appointed in the tax department in Johannesburg.



Susan Meyer has been appointed in the competition law department in Johannesburg.



Simone Immelman has been appointed in the real estate department in Cape Town.

ENS has five new appointments.



Johann Basson has been appointed as an associate in the banking and finance department in Johannesburg.



Vicky-Louise Borg-Jorgensen has been appointed as an associate in the banking and finance department in Johannesburg.



Louis Hiemstra has been appointed as an associate in the corporate commercial department in Johannesburg.



Sara Spiro has been appointed as an associate in the intellectual property department in Johannesburg.



Manisha Bugwande-Doorasamy has been appointed as a senior associate in the intellectual property department in Durban.

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.

Practice development – moving your merchandise – techniques and tips

By
Louis
Rood

Lawyers sell legal services. However, while lawyers pay due attention to their legal services, they do not think much about the sales process. Legal services do not sell themselves. If you want to improve or increase your sales, you should enhance your understanding not only of what you are offering for sale, but how best to sell it. In fact, the sale is an integral part of the service.

Here are some elements to consider.

Every sale is a purchase

When dealing with the market, shift the emphasis from what you sell to why the client should buy from you. Your competitors offer the same legal services that you offer, so why should the client buy from you? They should because of the quality of your service, your reputation for excellence, your professionalism, your reliability, all those things that the client really wants.

Know your customer

There are essentially three different kinds of buyers:

- 'How much?' – the best price buyer: This client buys matter by matter, and can switch to another supplier any time. Your profit margin is low and the relationship can feel adversarial.
- 'Can you solve my problem?' – the solution-seeking buyer: This is a more complex relationship. The buyer and seller spend time identifying the problem and defining objectives, then work together to find and implement solutions.
- 'Can you be our lawyers?' – the alliance partner: This is the most complex relationship to develop, but will deliver the most cost-effective

and sustainable benefits for both the buyer and the seller. The challenge is to coax all your clients to become regular 'shoppers' at your 'store'.

De-personalised sales

There is an increasing demand for e-commerce, internet banking and transactions where goods and services are supplied and paid for without any personal human connection. Lawyers have had to respond. The following options have been identified as the way legal services can be delivered:

- **Bespoke.** This is individually tailored to the specific requirements of the client. It is the most expensive option.
 - **Standardised.** This service follows a regular accepted format customised only to accommodate the individual identity and details of the client and transaction. Well-established precedents make this more affordable.
 - **Systematised.** The whole process rolls out at the tap of a button, generated from a system, loaded and compliant with the legal and regulatory requirements. Quick, efficient and inexpensive, but deviations from the norm will cost extra.
 - **Packaged.** The entire all-inclusive service is delivered as is. You get what you pay for.
 - **Commoditised.** This is the self-catering option, bought off the shelf to take home and do-it-yourself. Impersonal, but a bargain. No comebacks or complaints if it does not work out.
- This may all sound very mercenary and commercial, probably because it is. It is a consequence, not only of a connected and competitive world, but also a kickback against those two traditional spectres of the legal profession – expense and delay, or

put another way, time and money.

Price appeal


Some retailers seek to boost sales on price – two for the price of one, for example, this week's special, pensioner's discount. These promotions are not really available to attorneys. They have to be aggressively marketed and thus probably amount to unprofessional conduct. Although haggling for a bazaar bargain may not be appropriate, negotiating rates and exploring alternative fee arrangements certainly are. Engaging and reaching agreements with your client on the cost of legal services is part of the process of evaluating and assessing the nature, scope and complexity of the services to be rendered.

Repeat Customers

Another common sales practice is the use of loyalty programmes to attract and retain customers where schemes build up credits or points that can be redeemed at partici-

pating merchants in various ways. This is also not realistically an option available to attorneys. The problem with rewards programmes is that they do not really engender loyalty – they rather encourage demands from fickle customers for more innovative rewards, under threat of switching to a competitor's rival scheme.

Building a loyal client base is a crucial long-term strategic goal for any attorney. Most clients of professional service providers, such as doctors, dentists or attorneys, prefer not to 'shop around' but to search for a relationship of trust. Therefore, the best way to engender loyalty in your client base is to cut out all those things that your client does not really need or want and with care and professionalism deliver cost-effective, value-added services that are relevant. That is something your clients will buy.

Louis Rood BA LLB (UCT)
is chairman of Fairbridges
in Cape Town. 

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What is the status of the former South Gauteng Local Division, formerly the Witwatersrand Local Division?

By
Luis
Teixeira

In terms of s 1 of the Superior Courts Act 10 of 2013, the 'High Court' means the High Court of South Africa, referred to in s 6(1).

Section 6(1) lists nine High Courts next to letters (a) to (i). Next to letter (c) the following words appear:

'Gauteng Division with its main seat in Pretoria'.

No mention is made in this section of the former South Gauteng High Court, formerly the Witwatersrand Local Division of the Supreme Court of South Africa. Prior thereto, it was called the High Court of the Witwatersrand, and acquired the status of a local division of the Supreme Court of South Africa by virtue of s 98 of the South Africa Act 1909.

In terms of s 50(1)(k) of the Superior Courts Act, the South Gauteng High Court, Johannesburg, becomes a local seat of the Gauteng division.

The status of that court, which was formerly a High Court in its own right, prior to the coming into operation of the South Africa Act, later a division of the Supreme Court of South Africa in its own right and thereafter, again, a High Court in its own right, has been reduced to that of a local seat of another court, namely the Gauteng Division. The same applies to the North Gauteng High Court. In the result, where there were formerly two High Courts, there is now only one, which sits in two places.

The preamble to the Superior Courts Act refers to s 165 of the Constitution, which states, *inter alia*, that no person or organ of state may interfere with the functioning of the courts. It also refers to s 166, which states that the courts include 'the High Court of South Africa'.

The former South Gauteng High Court and North Gauteng High Courts acquired those names by virtue of the Renaming of High Courts Act 30 of 2008, and they are thus the very same courts to which

the Constitution affords the protection from interference from any person or organ of state, referred to in s 165 (c) of the Constitution, the latter phrase including parliament.

Surely, the diminution of the status of a court from that of an independent division of the High Court of South Africa to that of a mere local seat of another High Court constitutes interference with the functioning of that court. For example s 50(4) of the Superior Courts Act provides, *inter alia*, that the Judge President and the Deputy Judge President of a court, referred to in subs (1) shall become the Judge President or Deputy Judge President of '... the Division in question'. Where two divisions of a High Court, each with its own Judge President and Deputy Judge President, are reduced to one division of the High Court, the section makes provision for the existence only of a Judge President and Deputy Judge President of a division of the High Court and not for the existence of a Judge President and Deputy Judge President of a seat of a division, the questions that arise are:

- Which of the former Judge Presidents and Deputy Judge Presidents of the former two divisions of the High Court is to acquire that status in respect of the single division of the High Court that now exists?
- What is the status of the other two persons in the single division of the High Courts that remains?

Two possibilities exist. Either, the incumbents are to become Co-Judge Presidents and Co-Deputy Judge Presidents of the new single division of the High Court, or two of the incumbents are to lose that status. Regardless of the solution that is decided on, the effect of the statute is, in my view, to interfere with the functioning of the courts, and the power that is granted to organs of state, is to abolish whichever High Courts it

chooses, and to deprive judges of their status, at its own discretion.

The Law Society of the Northern Provinces issued a notice on 28 January 2014, entitled 'Citation of Courts on Pleadings and Erratum Notice'. This notice states that the former North Gauteng High Court is to be cited as 'the Gauteng Division, Pretoria' and that the former South Gauteng High Court is to be cited as 'The Gauteng Local Division, Johannesburg'. By referring to these courts as a division and as a local division, this notice is inconsistent with the wording of ss 1, 6(1) and 50(1) of the Superior Courts Act, and the solution to the dilemma that it provides, being the maintenance of the fiction of two divisions of the High Court, where the statute recognises only one, is unsatisfactory.

I am of the view that the only solution to the above dilemma is for the Superior Courts Act to be amended retrospectively to restore the former South Gauteng High Court to its status as that of a division of the High Court, rather than as a mere local seat of the Gauteng Division of the High Court, and for the names of the resultant divisions of the High Court to be the North Gauteng Division and the South Gauteng Division of the High Court.

Luis Teixeira BCom (Wits) BProc (Unisa) is an acting magistrate and an attorney at Luis Teixeira Inc in Germiston.

Is your firm at risk for claims by clients or third-parties?

By
Ann
Bertelsmann

If you are in the rare and fortunate position of never having had a professional indemnity claim against your practice, your answer to the above question would probably be 'no'. Most practices have, however, faced the stark reality of such a claim at one time or another.

Claims against attorneys are increasing

As can be seen from the graph below (table 1), the number of claims against the profession has increased alarmingly since 2007.

Possible reasons for the increase

This increase can only be partially attributed to a steady increase in the size of the profession. The Attorneys Insurance Indemnity Fund (AIIF) has identified the following other important reasons for the increase:

- An increasingly litigious and aware public and legal profession.
- An absence of effective management of the risks inherent in attorneys' practices (particularly where supervision of staff is concerned).

Who is most at risk?

It is a common misconception that smaller practices are more vulnerable to claims. Approximately 71% of claims are notified to the AIIF by practices consisting of one to three partners or directors. However, around 73% of the profession is made up of single practitioners so this does not seem to be the case. Practices of all sizes are equally at risk. Interestingly, again looking at our statistics, practices in all provinces are equally at risk.

Most risky areas of practice

Looking at table 2 (on the next page) it becomes clear that the majority of claims arise out of two areas of practice: Road Accident Fund (RAF) and conveyancing work.

Prescription (of RAF and other types of claims) is the single biggest threat to your practice.

There are numerous other causes of claims, the most frequent aside from prescription and lack of supervision are -

- diary problems;
- communication problems;
- failure to properly apply the Financial

Intelligence Centre Act 38 of 2001 (FICA);

- unauthorised payment of trust funds;
- failure to properly investigate the facts;
- incorrect understanding or application of the law or taking on matters without necessary expertise;
- failure to check the accuracy of documents;
- delegation of responsibility to unqualified employees;
- failure to follow client's instructions or report to the client;
- suing clients for fees; and
- absence of file notes.

How can we protect our practices from this risk?

The answer to this question is two-fold:

- By having comprehensive insurance cover, in case a problem should occur.
- By implementing effective practice and risk management to prevent problems.

Insurance

Attorneys practising in South Africa enjoy an automatic, primary layer of professional indemnity cover through the AIIF. This provides a measure of cover for mistakes made by you and your employees in the



Table 1: Claims against the profession

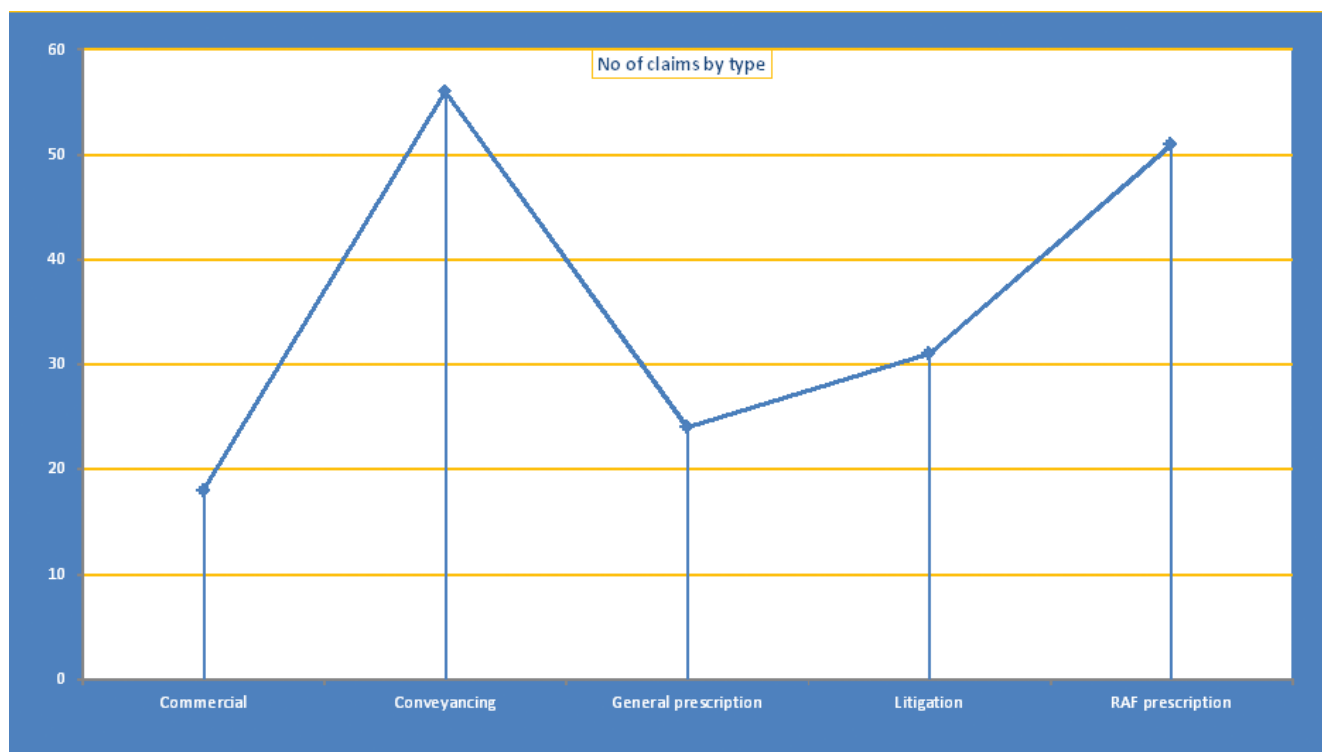


Table 2: Most risky areas of practice

conduct of the profession. It is currently provided at no cost to practitioners and is funded by the Attorneys Fidelity Fund (AFF).

Given the increase in the number and value of claims in recent years, this insurance is becoming unsustainable and eventually practitioners will have to contribute towards their cover. The AIIF is currently looking at new models to ensure its sustainability.

Your AIIF cover is currently limited to between R 1 562 500 and R 3 125 000 per year, depending on the size of your practice and it specifically excludes, *inter alia*, claims arising out of the theft of trust money. It is, therefore, essential that you consider obtaining additional cover in the open market, to ensure that your practice and the partners' or directors' personal estates are protected.

More information about the AIIF cover and a copy of the policy can be obtained on the website www.aiif.co.za.

Also, contrary to another popular misconception, the AFF is a fund of last resort and only provides protection against misappropriation of trust money to the public and not to the profession (see www.fidfund.co.za).

Risk management

This is a much more complex matter and cannot be looked at comprehensively in this short article. What follows are suggestions about where to begin.

- Recognising and understanding the risks that an attorneys' practice faces.

As a starting point, you need to ensure

that you understand most of the biggest risks that your own practice faces. This is no simple matter. Firstly, a consideration of the risk areas mentioned above, may help. Secondly, you might get some direction by properly completing the AIIF's *Risk Management Self-Assessment Questionnaire* (which you can complete online or download from www.aiif.co.za).

- Producing a comprehensive risk-prevention plan to minimise these risks.

Once you know what the risks are, you are in a position to plan how to deal with and avoid them. In order for this plan to be effective your firm's business plan and mission statement as well as all the risks that you may have identified, such as conflicts of interest, inadequately qualified or trained staff, supervision problems, filing and diary issues, the nature of the work you do and billing issues should be taken into consideration.

Naturally every practice will have a unique plan. Ideally, to be effective and to promote 'buy-in', this plan should be developed in consultation with your partners or directors and staff.

Based on this plan, comprehensive Minimum Operating Standards or Standard Operating Procedures should be drawn up. These do not describe how the job is done, namely technical or legal skills, they describe the firm's rules for doing the job namely, procedural requirements, such as policies for protection of client information, FICA, conflicts of interest, billing, file order, file notes, the use of letters of engagement, correspondence, diarising of files and filing.

Such a document is of minimal value unless:

- It is reduced to writing.
- It is updated as times and circumstances change.
- It is freely available to all staff.
- Training is provided to ensure that the standards and procedures are understood.
- Regular supervision and audits are conducted to ensure implementation.
- There are sanctions for failure to comply.

Once these measures have been put in place, you should confidently be able to say a definite 'no' to the question posed in the headline of this article.

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

By
Mackenzie
Mukansi

Attorneys Development Fund progress

We are pleased to have started the new year on an enthusiastic pace. It is humbling to notice that the Attorneys Development Fund (ADF) is not only attracting applications from single practitioners but, also from partnerships. This indicates the growth of the organised profession. We are thriving to change the way in which we communicate with our shareholders, clients and prospective clients, thus this platform is afforded us.

There has been a great change in the way that we assist practitioners, the most significant being that the ADF considers applications on an on-going basis as opposed to the past where applications were received and approved on a quarterly basis. Our turnaround time for processing applications has improved to less than seven days, at times, due to the commitment and constant availability of our board of directors and relevant sub-committees that vet these applications.

The ADF Board's decision to change this system is applauded as a significant step towards ensuring access to justice bearing in mind that when we expedite setting up of a new firm, we are in fact adding to the pool of practitioners equipped to be agents in the pursuit of justice that communities require.

In the near future we will be communicating with our existing clients through *De Rebus* where clients will share with us their progress since they received funding from us.

About the ADF

Established in 2011, the ADF, is a joint venture between the Attorneys Fidelity Fund (AFF), the Law Society of South

Africa (LSSA) and its six constituent members, namely the –

- Black Lawyers Association;
- Cape Law Society;
- KwaZulu-Natal Law Society;
- Law Society of the Free State;
- Law Society of the Northern Provinces; and
- National Association of Democratic Lawyers.

The ADF is an independent Section 21 company (association not for profit) and was set up through contributions from the AFF and the provincial law societies. A board of directors governs the ADF, which consists of representatives from the above organisations.

What office equipment is provided?

The equipment provided depends on the needs of the law firm. Below in table 1 is the list of equipment currently supported and or offered by the ADF to law firms. The ADF reserves the right to change the allocation and or maximum benefit.

What is the repayment period?

The cost of the equipment, including interest is repayable by the law firm over a maximum period of three years (applicants can elect not to make any repayments in the first year). Repayments are made at regular intervals as agreed with the ADF and the ADF reserves ownership of equipment until the full amount is repaid in full by the law firm.

The current interest rate charged by the ADF is the prime lending rate

minus 3% and is calculated as envisaged by reg 40(1) of the regulations made in terms of the National Credit Act 34 of 2005 (ie, interest will be calculated daily and will be added to the deferred amount monthly, at the end of the month). No interest is to be debited in the first 12 months. Interest to accrue only after 12 months.

How often are applications assessed by the board?

Law firms can submit their applications to the ADF at any time during the year. The applications are considered by the ADF on an on-going basis and not on a quarterly basis as it was previously.

What are the application criteria?

The applicant must –

- be an admitted attorney practising or intending to practice;
- be without own funds or assets to finance the law firm's operational needs;
- provide a business plan, marketing plan and cash flow statement;
- have the capacity to –
 - become an efficient and proficient attorney;
 - learn how to establish and run a successful business;
 - conduct a sustainable practice;
- be willing to be mentored and trained further and monitored continuously;
- recognise and accept his or her responsibility to repay the full amount;
- be within acceptable margins as a business risk. If an applicant has a poor credit bureau record, this will negatively affect his or her chance of receiving the ADF support;
- be in good standing with his or her statutory, provincial law society; and
- have registered for, or be exempted from, or have undertaken to enrol for the mandatory Practice Management Training.

The applicant must note that no direct cash requests will be considered and the ADF reserves the right to request additional information and/or details about any information provided.

Office equipment

A desk-top computer or a laptop
3G data card (or Telkom ADSL)
Legal accounting software
Four-in-one printer, copier, fax and scanner
Office furniture
Telkom line

Dependent on evaluation and approval by the board, the maximum amount that may be approved by the ADF including the following resources is currently a maximum of R 40 000 (VAT included).

Table 1: The list of equipment currently supported and or offered by the ADF to law firms

Mackenzie Mukansi, Manager,
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Tel: (012) 366 8856
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Unspoken tricks of the trade

When does advertising become touting?

By
Lindy
Langner

Picture source: Gallo Images/Thinkstock

Touting has been taboo in our profession since the beginning. As law students, prospective attorneys were forewarned of the ultimate consequence of touting - being struck off the attorneys' roll.

The *Oxford Dictionary* defines touting as 'solicit custom persistently; pester customers (touting for business)' or

'solicit the custom of a person or for a thing'.

On the plain wording it is thus clear that approaching potential clients without their consent or invitation repeatedly and aggressively, thus forcing oneself on them in a bold manner, would on the face of it suffice as touting.

With this in mind, attorneys eagerly enter the profession to learn how to

build their practices without overstepping boundaries. Attorneys were previously not allowed to advertise and market their services, attorneys were, and still are, quite at a disadvantage in trying to establish starter firms, in comparison to well-known established law firms.

Cohabiting in a technologically-driven era with digital presence advancing at a rapid speed, the older 'word of mouth'

approach seems a far beyond effective means to build a successful practice with advertising and marketing becoming all the more unavoidable and now incorporated into the codes of ethics of attorneys.

Accordingly, the Law Society of the Northern Provinces (LSNP) has published advertising and marketing guidelines for attorneys to promote their services in an ethical and honourable manner ('Advertising and marketing guidelines - Advertising and marketing for attorneys' (www.northernlaw.co.za/Documents/marketing_rules/Advertising_guidelines.pdf, accessed 26-3-2014)).

That being said, established older generation law firms might feel threatened by fast moving multi-media in the advertising and marketing sector and are very quick to point a finger and accuse the younger generation of 'touting' in an attempt to build a practice.

An underlying practical problem then arises as at what stage does one cross the fine line between advertising and marketing and touting as this appears to be an unknown ground.

From the outset it would appear as though a simple telephone call - based on a referral and inquiry from a prospective client, offering to explore your services, followed by delivering of marketing material, leading to a meeting - would not be regarded as touting per se, or would it?

The plain wording in the above scenario does not purport the persistent 'pes-tering' in an attempt to convince the prospective client to utilise your services. However, given that the attorney telephoned the prospective client based on the inquiry and referral and not the client phoning the attorney, this might fall within the ambit of unprofessional conduct due to technicality in terms of the LNSP guidelines. Naturally, it depends from which point of view one is looking at the scenario, as touting seems to be quite a subjective term.

Unspoken 'tricks of the trade' are that law firms establish separate marketing firms purported to be their clients who attend to the general marketing and advertising of the particular law firm, thus by-passing technicalities and the rules of advertising and marketing and touting in general.

Also, the term 'fair marketing' as per the Competition Commission allows for equal opportunity to compete in the open market, which due to restrictions imposed by the law societies cannot set forth a level playing field within the legal profession, at this stage.

In the matter of *Law Society of the Northern Provinces v Sonntag* (SCA) (unreported case no 189/2011, 25-11-2011) (Malan JA (Harms AP, Lewis, Malan and Leach JJA and Plasket AJA)), Sonntag was

struck off the roll for employing touts in third-party work, sharing both offices and fees, 'purchasing' third-party claims from touts and acting dishonestly. Section 22(1)(d) of the Attorneys Act 53 of 1979 provides that an attorney may be struck off the roll or suspended from practice 'if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'.

Sonntag was charged with unprofessional, dishonourable or unworthy conduct in that she referred or assisted or co-operated with a person or organisation, work which was reserved for practising attorneys only. Further to this, such person or organisation received payment or other consideration in respect thereof and Sonntag shared both offices and fees with an organisation or person, not being a practising attorney.

'[W]ith digital presence advancing at a rapid speed, the older "word of mouth" approach seems a far beyond effective means to build a successful practice.'

Further to this, Sonntag placed an advertisement in the *Letaba Herald* on 16 August 2002 under the heading 'Your One Stop Legal Centre' with photos of the person whom she worked with noting that he had '12 years' experience' in third-party claims, yet such person and organisation was never part of the profession.

It was held that Sonntag was dishonest by touting and charging clients for the fees of the touts. She was not a fit and proper person to practise as an attorney and further that there were exceptional circumstances of dishonesty, justifying removal from the roll as she repeatedly denied her serious misconduct, thus never being able to grasp her misconduct, if not struck from the roll.

From the above case law, it appears as though courts do consider the surrounding circumstances before striking an attorney off the roll for touting and false advertising and marketing, in that 'the crime must fit the punishment'.

Referring only to the definition of

touting as contained in the dictionary, one can clearly note that aggressively pursuing prospective clients or paying fees to touts for clients, is unquestionably touting and unlawful conduct.

However, touting in the broader sense and, as portrayed in the advertising and marketing guidelines for attorneys, can refer to just about any approach to marketing one's services safe for general bill boards, radio or television advertising setting ground rules for what such advertisements may and may not contain.

The Director of the LSNP, Tinus Grobler, has pointed out that the below definition of touting as per the draft uniform rules, is currently under consideration:

'A member will be regarded as being guilty of touting for professional work if he or she either personally or through the agency of another, procures or seeks to procure, or solicits for, professional work in an improper or unprofessional manner or by unfair means, all of which for purposes of this rule will include, but not be limited to:

49.17.1 the payment of money, or the offering of any financial reward or other inducement of any kind whatsoever, directly or indirectly, to any person, in return for the referral of professional work; or

49.17.2 directly or indirectly participating in an arrangement or scheme of operation resulting in, or calculated to result in the member's securing professional work solicited by a third party' ('Draft Uniform Rules' (www.northernlaw.co.za/Documents/uniform_rules/Draft_Uniform_Rules.pdf, accessed 26-3-2014)).

Further draft definitions of touting are also currently under review by the Competition Commission.

Considering the abovementioned case law, the proposed definition of touting is a clear indication of unprofessional conduct while touting in terms of the advertising and marketing guidelines should be reconsidered to indicate exactly what would and what would not be classified as touting. This would certainly avoid petty issues that may lead to unnecessary investigations and time spent by the law societies.

As attorneys it is advised that touting, as per the plain definition and wording, be avoided and any alleged touting in terms of the advertising and marketing guidelines first be approved by the board of ethics of the relevant law society in order to ensure that no boundaries are overstepped.

Lindy Langner LLB (UP) is an attorney at Langner attorneys in Pretoria.

Condemning the leaking of Public Protector's provisional reports



Picture source: Gallo Images/Thinkstock

By
Clement
Marumoagae

A democratic country requires accountable public administration. Chapter 9 of the Constitution has created a number of institutions that seek to ensure accountable public administration, among which is the Office of the Public Protector. In terms of s 181(2) – (5) of the Constitution, these institutions are accountable to parliament and are meant to be independent and impartial when carrying out their duties. Thus, other state organs are instructed to assist these institutions to perform their functions and should not interfere with their functioning.

In this article, I will discuss the role of the Public Protector, more specifically the provisional reports that she prepares. The purpose of this article is to evaluate whether there is any authority that grants the Public Protector any power to issue provisional reports. I will be arguing that the continued leakage of provisional reports prepared by the Public Protector has serious potential to compromise the integrity of that office.

Creation and powers of the Office of the Public Protector

The Office of the Public Protector was established in terms of s 181 of the Constitution and his or her appointment should be carried out in accordance with s 193 of the Constitution. The powers of the Public Protector are outlined in s 182 of the Constitution, and they include the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. These are extraordinary powers that are vested in an individual, thus there is a need for such powers to be exercised carefully with caution and not be abused.

The work of the Public Protector should be informed by among others, principles of – justice, fairness, competency, trustworthiness, reliability, honesty, efficiency, human dignity, impartiality, transparency, integrity, equality and accountability (s 181 (2) and (3) of the Constitution). The Public Protector should not be seen to be opposing any individual or institution, nor supporting or advancing the interests of any individual or institution. As such, the citizens that the Public Protector serves should at all times have confidence that the Public Protector will always carry out his or her duties without fear or favour nor being unduly influenced by any sector of our society.

In terms of s 182(2) of the Constitution, the Public Protector has additional powers that are outlined in the Public

Protector Act 23 of 1994 (as amended) (PPA). Section 6(4) of the PPA provides the Public Protector with the power to investigate maladministration, abuse of power, improper or dishonest acts, unlawful enrichment and receipt of improper advantage within government structures (see also C Thornhill 'The Role of the Public Protector Case Studies in Public Accountability' 2011 (4) *African Journal of Public Affairs* 79 at 82). He or she can further report any criminal activity to the prosecuting authority if his or her investigations establish any wrongdoing that attracts criminal liability. The Public Protector can also endeavour to resolve any dispute within government structures through mediation, conciliation and negotiation.

Investigation and preparation of provisional reports

It is worth mentioning that even though s 7(1) of the PPA provides the Public Protector with express powers to conduct preliminary investigations for the purpose of determining the merits of a complaint, however, it does not seem that there is provision in the PPA where the Public Protector is granted the power to provide preliminary findings on his or her preliminary investigations. I hasten to add that even the Constitution is silent on the Public Protector's power to issue preliminary findings. In terms of s 182(1)(a) and (c) of the Constitution, the Public Protector can investigate any conduct in state affairs and report on that conduct. It may be argued that the wording of this provision is wide enough so as to be interpreted to include preliminary investigation, leading to preliminary findings and reports. It seems as though the Public Protector is issuing provisional reports on the strength of s 7(9) of the PPA. It has been stated that: 'The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents' (see report no 4 of 2013/14, para 6.7 (www.pprotect.org/library/investigation_report/2013-14/UNPAID%20SERVICES.PDF, accessed 26-3-2014)).

In terms of s 7 (9) of the PPA: '(9)(a) It appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

(b)(i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

(ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.'

Nowhere in s 7(9) is there provision that the Public Protector is required to issue a provisional report. This section does not give the Public Protector the power to provide anyone with a provisional report in order for that person to comment on its contents. This section merely allows for a procedure during the course of the Public Protector's investigation, for the Public Protector to extend his or her hand to the parties subject to an investigation to respond to the allegations that might surface against such parties. Such affected parties are provided with an opportunity during the course of investigations to question some of their accusers or those who implicate them under the watch of the Public Protector, in order for the Public Protector to have more information that will assist in his or her investigations.

I am of the view that there is no need for the Public Protector to issue a provisional report in her investigations. I submit that the Public Protector should only forward whatever allegations are made to the implicated persons and allow them a chance to respond thereto by either giving evidence or questioning witnesses if they so wish.

Leaking provisional reports and their publication by media

It has become customary for the Public Protector to prepare provisional reports and make them available to certain affected individuals or institutions in order to afford them an opportunity to comment or respond to such reports. These provisional reports, depending on their level of public interest, end up being published by major South African media houses.

Although, s 7(2) of the PPA prohibits the publication of documents produced by the office of the Public Protector during the course of the investigation, it nonetheless allows the Public Protector to determine otherwise. The qualification in this section suggests that the Public Protector has the power to allow any person, including a media house to publish a provisional report.

In terms of s 11(1) and (4) of the PPA, any person who contravenes the provisions of s 7(2) shall be guilty of an of-

fence and on conviction be liable to a fine not exceeding R 40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

A newspaper that publishes a provisional report usually does not indicate from whom it received the report from (see 'Nkandla report: Zuma in the deep end' *Mail and Guardian* 29-11-2013 (<http://mg.co.za/article/2013-11-28-nkandla-report-zuma-in-the-deep-end>, accessed 26-3-2014)). There will be sectors in society who will argue that the Public Protector is the one who leaked the report to the media (Carien du Plessis 'Public Protector did it: ANC on Nkandla leak' *City Press* 3-12-2013 (www.citypress.co.za/politics/public-protector-anc-nkandla-leak, accessed 26-3-2014)). On the other hand, there are those who have argued that those parties, to whom the report has been provided, are responsible for leaking the report to the media with a view to discrediting the work done by the Public Protector ('Security cluster leaked Nkandla report: EFF' *Sowetan* 3-12-2013 (www.sowetanlive.co.za/news/2013/12/03/security-cluster-leaked-nkandla-report-eff, accessed 26-3-2014)).

In my view, irrespective of who actually leaks the provisional report to the media, there is no justification for newspapers to publish it. In terms of s 7(2) of the PPA, it is a criminal offence to publish the Public Protector's reports without a determination from the Public Protector. Leaking reports to the media has potential to damage the legitimacy of the Office of the Public Protector, thereby decreasing the public's confidence in that office. I am of the view that it is the responsibility of the Public Protector to ensure that the reports prepared by his or her office do not end up in the wrong hands. In an effort to eliminate opportunities for report leakages, the Public Protector has recently said that 'affected and implicated parties will no longer get full provisional reports. Instead, they will be furnished with information or parts of the report that relate to them for purposes of soliciting their comments' ('Public Protector announces a new measure to stem report leaks' (www.pprotect.org/media_gallery/2013/02122013.asp, accessed 26-3-2014)). It seems that the current Public Protector is of the view that those affected parties to whom she provided the report are responsible for making it available to the newspapers. Advocate Thuli Madonsela has stated that: 'We work with sensitive information for months without any leakages. It cannot be a coincidence that the so-called leaks occur only after reports leave our offices into the hands of parties' (*op cit*).

Conclusion

If indeed the leakages of the Public Protector's provisional reports are not from her office, as suggested by some, I am of the view that the Public Protector has a duty to see to it that the media houses who act contrary to s 7(2) of the PPA are brought to book. Media houses cannot break the law and get away with it. I submit that the PPA should be amended to include substantial fines for media houses and to provide personal liability to those journalists who choose to act contrary to the PPA. It is clear from the PPA that it is a crime to publish the Public Protector's reports without his or her authorisation. In order to preserve the integrity of the Public Protector's office, it is imperative that media houses who continue to undermine the law should be prosecuted. It is not enough that the Public Protector simply issues a statement and says that publishing the report was both unethical and unlawful. Those individuals, as well as the institutions they belong to when they act unlawfully, should be dealt with accordingly, because they are compromising the integrity of the Office of the Public Protector.

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Difficulties in regulating class action litigation

Is there a need to articulate the rules?



By
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Picture source: Gallo Images/Thinkstock

Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA) was a significant leap forward in the South African jurisprudence of both class actions and litigation in general. The Supreme Court of Appeal (SCA) judgment, penned by Wallis JA, broke judicial ground on two fronts. First, it developed the common law so as to recognise class action claims in all suits (and not just Bill of Rights claims). Second, the judgment went further than any prior case in detailing the procedure that should exist for the administration of class actions in South Africa.

The Constitutional Court (CC) has since made its mark on the development of class actions in South Africa in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC). In our view, the judgment has received comparatively little attention and has seemed to lack the novelty of the SCA's decision. This may be partly attributed to the fact that

the majority judgment accepts most of the groundwork in the *Children's Resource Centre Trust* case and does not provide any in-depth engagement into the nature of class actions. Nonetheless, it would be misguided to view the CC judgment as simply confirmation of the *Children's Resource Centre Trust* case's approach. An examination of the judgment reveals important, albeit nuanced, shifts in the treatment of class actions. However, rather than assisting in the practical development of class action litigation, these shifts have the potential to compound the inherent difficulties in regulating class action litigation.

A step in the right direction? The SCA's approach to prior certification

Establishing coherent requirements for prior certification – the procedural hurdle that must be overcome by any group of individual litigants seeking recognition as a class – is perhaps the most trou-

blesome aspect faced by any jurisdiction venturing into the realm of class actions. Having regard to comparative developments abroad, Wallis JA, in the *Children's Resource Centre Trust* case, specified the following criteria as the core considerations that should be taken into account in a certification inquiry:

- Class definition: The class must be defined with enough precision so as to allow for the objective determination that an individual falls into that class (para 29).
- A cause of action raising a triable issue (para 35).
- Common issues of law or fact (para 44).
- The representative of the class. The representative should not have any conflict of interest with the class and must have the capacity to conduct the litigation properly (para 46 – 47).
- The tool of a class action must be the most appropriate procedure to adopt for adjudication of the underlying claims (para 23).

While accepting that these consider-

ations are not exhaustive, and with factors such as appropriateness of the relief sought also being mentioned, Wallis JA clearly establishes that, at the least, the above factors have to be present before granting certification. He says (at para 28): 'Without excluding the possibility of there being other issues that require consideration, it suffices for our purposes to say that a court faced with an application for certification of a class action must consider the factors set out in the list [on previous page] and be satisfied that they are present before granting certification'.

Against a background of years of legislative inaction in the field of class actions, the *Children's Resource Centre Trust* case judgment was an undeniably welcomed step forward. The *Children's Resource Centre Trust* case's criteria for certification were immediately applied in the separate but related matter of *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

The appellants in the *Mukaddam* case sought certification for an 'opt-in' class action, where interested persons only become part of the class once they choose to join the proceedings. Applying the *Children's Resource Centre Trust* criteria, Nugent JA concluded that Mr Mukaddam's class action should not be certified. Nugent JA found that he had no legally tenable claim and, importantly, held that r 10 of the uniform rules provided Mr Mukaddam with a far more suitable procedure to pursue his claim. Mr Mukaddam took his case on appeal to the CC.

A step back in the interests of justice? The CC's approach

In the *Mukaddam* case, the majority judgment spent surprisingly little time on the conceptual nuances of class action claims and the detail of certification requirements. Indeed, for the most part, the CC accepts the judicial groundwork set out in the *Children's Resource Centre Trust* case. However, Jafta J focuses particularly on the role and implications of judicial discretion under s 173 of the Constitution and the power to regulate the process by which litigants approach the court.

With s 173 as the reference point for judicial innovation in procedural matters, the majority concludes that Wallis JA erred in the *Children's Resource Centre Trust* case when he suggested that the requirements for prior certification are conditions that must be met in order to succeed in an application for certification. Rather, the court held that the interests of justice standard should guide whether certification should be

granted. The result, as we understand it, is that a court may permit a claim for certification where one or more of the requirements are not met, or may deny a claim for certification even where all the requirements for certification are met.

We are not suggesting that the interests of justice standard has no role to play in class action litigation. However, it is a principle that is inherently nebulous and dependent on the exercise of a court's discretion. Managing litigation requires certainty and, to some extent, formality, in order to safeguard the proper working of the judicial system. This is particularly so when it comes to class action claims, which is an area of law that presents many challenges to the legal system simply by virtue of the size of claims, number of litigants and complexity of legal arguments. It is, therefore, imperative for the courts to ground the interests of justice standard firmly by substantively engaging with the range of complexities that arise in such a procedural innovation.

While the emphasis on a degree of flexibility is to be welcomed, the CC case of *Mukaddam* does not provide sufficient guidance on when it will be in the interests of justice to grant certification. Effectively the CC reduces the criteria for certification to a mere guideline, but with only a cursory consideration of the individual criteria in the *Children's Resource Centre Trust* case and their relative importance. The court does not offer any examples of instances where the *Children's Resource Centre Trust* case criteria may not be met, and yet would nonetheless be in the interests of justice to grant certification. Most striking perhaps is the failure to offer substantive reasoning as to why it may be in the interests of justice to allow for opt-in class actions even when a suitable alternative procedure is available that adequately allows for access to courts. Given that Mr Mukaddam had sought certification for an opt-in class action and the joinder procedure would have been available, further guidance here would have been expected. The majority only states that Nugent JA erred in finding that certification in an opt-in class action requires the applicant to show 'exceptional circumstances' as opposed to being guided by the more flexible interests of justice standard (*Mukaddam*, at para 55). The failure by the court to provide an explanation on this front seems to suggest that the existence of other appropriate mechanisms is not a substantial consideration in the interests of justice inquiry. In our view, this has the potential to dilute the utility of the certification process.

Furthermore, the already uncertain field of class action litigation will almost certainly not benefit by the puzzling

distinction that the majority of the CC makes between the procedure to be followed in Bill of Rights class action litigation and class action litigation based on other claims. In this regard, the majority holds that certification will not be required in Bill of Rights class action claims against the state. No view is expressed as to whether certification will be required in Bill of Rights class action claims against private persons. (In a separate concurring judgment, Froneman J expressed no opinion on whether certification should also be required where class actions are brought under s 38 of the Constitution. Froneman J finds that it was not an issue before the court and the parties were not in a position to present full argument on it.) Mhlantla AJ dissents on this point. In a brief judgment, she held that, given the rationale for certification and the nature of class actions, there is no reason in principle or practice for mandating the certification process to only some class action claims. Significantly, Mhlantla AJ recognises that certification is important in protecting the interests of persons whose rights may be extinguished by a class action (through the application of the *res judicata* principle). We agree with Mhlantla AJ and we expect that this aspect of the majority's reasoning may open the door to unfortunate attempts at artificially crafting a Bill of Rights dimension so as to avoid certification.

Conclusion

The *Children's Resource Centre Trust* case was not perfect. There were many aspects of the judgment that remain fertile ground for further development and refinement. But rather than advancing the gains made in the *Children's Resource Centre Trust* case, the CC in the *Mukaddam* case has failed to grapple adequately with the defining features and difficulties in class action litigation. The result is a judgment that seems to embrace an entirely open-ended approach to certification with insufficient guidelines for future class action litigation in South Africa. The upshot is that, with the seeming exhaustion of all alternative strategies, the imperative for legislative intervention has become resoundingly clear. There is a need to clearly articulate the rules around class action litigation so as to ensure that the right of access to courts can be protected for all parties implicated in class action claims.

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Forensic science: The coming paradigm shift

By
Claire Lewis
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Edmonds-Smith

The field of forensic science, like many others, is continually changing and improving. The current evolution is in the form of a much-needed paradigm shift. This much-needed attention in a field that has been hidden in the shadows for much of its duration seems to be bringing about this paradigm shift.

In an article written by Michael J Saks and Jonathan J Koehler (2005) 309 *Science* 892 at 895) describing 'The coming paradigm shift in forensic identification science' in the United States (US), four major forces that influenced the shift in the forensic identification (fingerprint, tool mark and ballistic analyses) were detailed. These four forces included a scientifically sound model for identification sciences; changes in the standards that make an expert testimony admissible; the discovery of incorrect convictions, later amended through DNA typing; and studies into the error rates of the various identifications sciences. They stated that these forces were pushing forensic science out of the realm of 'pre-science' to one of 'empirically grounded science.'

Erroneous convictions do occur from time to time, especially when the evidence relies heavily on witness testimonies, however, what if the preferred methods of evidence analysis are not scientific? Then, inevitably, we land up with questionable results and often, wrongful convictions. In order to rectify some of these past wrongful convictions, cases have been reopened, and new scientific methods, such as DNA typing, applied. The application of new scientific methods may assist in some cases, however, DNA typing has incorrectly become known as the essential element of the wrongful convictions. While DNA typing is more scientific than the identification sciences, the exact odds of one person possessing the same DNA sequence as

another is as yet unknown and therefore the accuracy of DNA typing must be approached with caution. DNA typing, while far more accurate than friction ridge, tool mark, or ballistic, analyses has its own flaws. This is particularly in cases where the sample is less than ideal, many of which are only now being discovered and is, therefore, not a 100% certainty and should by no means be relied on as the sole method to convict or acquit.

The use of DNA typing to correct erroneous convictions does display the inaccuracy of the original identification science methods. These wrongful convictions not only place doubt on past convictions but should also place doubt on future convictions, as although the methods have been shown to be inaccurate they are still in use by our forensic experts today. These identification science methods need to change in order to prevent incorrect convictions from occurring and it is hoped that the inaccuracy of these methods will drive the discovery of more scientific, accurate methods.

This leads to the question of whether identification science should even be considered a science at all. The comparison of friction ridges in fingerprint analyses or bullet striations in ballistics analyses is a subjective comparison whereas science is objective, by its own definition of dealing with a body of fact or truth. Although scientific methods may not find the exact truth, they should approach the truth as closely as is possible. Science is fact and should not favour one side or the other, but should rather remain impartial. Identification science methods, however, are performed by a

single individual who determines whether or not two images match based on his or her opinion and experience. Opinion and experience are not scientific. Science is not meant to rely on experience. Therefore, new models for the identification sciences that are scientific need to be created in order to do away with the bias that comes with the current methods. This will drive forensics into new fields and will force research into new techniques.

In the US, forensic science testimony is measured in terms of the Daubert test as set out in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 U.S. 579 (1993). A forensic practitioner's testimony can now be gauged, with respect to a standard, to determine if it would be admissible in court or not. The Daubert test is comprised of three guidelines that -

- the testimony is based on sufficient scientific facts or data;
- the methods and principles utilised by the expert witness are reliable; and
- the methods and principles are applied correctly and reliably (supra 584 - 587).

The judge has been assigned the role of deciding if the said testimony would be admissible or not. In order to determine the relevance and reliability of the evidence given by an expert witness, the judge would make use of the Daubert test. The Daubert test is comprised of four considerations: Empirical testing, peer review, known or potential error

rates, and acceptability in the scientific community (supra 584 – 587).

Although the Daubert test is widely known and used in the US, there are currently no set tests in South African law by which expert testimony can be gauged. This is a major problem in many cases in South Africa as individuals who are not qualified to give expert evidence, according to the Daubert test, are able to testify. This lack of education/knowledge/experience by the 'expert witness' leads to evidence that has been incor-

rectly understood and/or incorrectly explained, leaving the presiding judge or magistrate, who is not versed in scientific reasoning and fact, to make their judgment based on incorrect science that will, in some cases, lead to the incorrect conviction or acquittal of the accused.

So far the encountered 'expert witnesses,' with the exception of a few, do not have degrees in science let alone postgraduate experience. Undergraduate studies, as South African forensic expert Dr David Klatzow puts it, teach you the language of your chosen field of science, and postgraduate studies teach you how to perform research and provide you with the licence to learn and apply your mind. Forensic science requires a multidisciplinary approach. For example, in South Africa, drunken driving or driving under the influence is a criminal offence and the courts rely heavily on the testimony of the doctor or nurse who drew the blood from the accused, as well as the laboratory analyst who ran the blood and determined the blood alcohol levels. Understanding the procedure of blood testing requires the knowledge of not just analytical chemistry but biochemistry, microbiology, statistics, physiology and chemistry all of which aid in the procedure and calculations. The employees at the South African Police Services (SAPS) forensic laboratory have achieved, in most cases, a diploma in a single subject from a technical college. Therefore, the laboratory analysts very often do not understand the 'language' of their chosen field and sometimes cannot comprehend the questions being posed to them. They are not correctly trained, or even sufficiently trained to be classified as expert witnesses. Their training mirrors that of a laboratory technician. They follow standard operating procedures and, while this is excellent from a technical point of view, it does not ensure their understanding of the work that they are performing. A thorough understanding of multiple fields of science should be

an absolute minimum requirement to be an analyst, which would be taught in any undergraduate programme in the field. This will ensure that the analysts understand all the facets of their work and the procedures they are following as well as being able to provide clear understandable testimony in court.

Another cause for concern with the training of these SAPS forensic laboratory analysts is that much of the training, if not all of it as with the ballistic, fingerprint and evidence collection units, is in-house training. This means that individuals who do not thoroughly understand their field, its protocols, and methodologies are teaching other individuals. This will inevitably create a dilution of the knowledge and of the correct operation procedures as messages will get lost or incorrectly portrayed along the way and result in substandard training and thus substandard analyses. In addition, some analysts may be hired with diplomas in fields that do not relate to the field in which they practise, this resulting in the analyst not possessing enough knowledge in the correct fields.

Sometimes the expert witness is a medical doctor and/or forensic practitioner, and while the medical fraternity does remarkable work every day, not every medical doctor is a researcher, and very few are true scientists. Medicine has its place in the law, just as science does but not many doctors or forensic practitioners are pushed to learn outside of their field of focus or specialisation. They interpret data based on the extensive knowledge they possess in their field of expertise. However, they do not often apply these interpretations to fields outside of their expertise that can influence an entire case. Therefore, the standards by which expert witnesses are measured require much revision. It is too often taken for granted by the courts that an individual is an expert witness but their qualifications are not taken into account and thus junk science is passed off as real science without anyone knowing any better. Just as a scientist's knowledge of the law is limited so too is the courts' knowledge of science and if one blindly believes what they are told by a so-called 'expert witness' without questioning whether the 'expert witness' is indeed an expert then anything said could be taken as evidence.

Studies have been performed into the error rates of identification sciences and some alarming results have been found. Michael J Saks and Jonathan J Koehler quote that spectrographic voice identification error rates are 63%, handwriting error rates are about 40% and sometimes approach 100%, bite mark false-positives run as high as 64%, and microscopic hair comparisons are about 12%. With regard to fingerprint analysis errors, about 25%

of examiners failed to correctly identify all latent prints in a test, about 4 to 5% of examiners committed false-positive errors on at least one latent, and in one test, 20% of examiners mistook one person's prints for those of his twin. These statistics display some of the error rates that occur in identification sciences. Other more infamous stories also detail how incorrect identification sciences have resulted in wrongful convictions or acquittals. These include cases of Brandon Mayfield, who was wrongly arrested for a bombing in Madrid, Spain in 2004; Hawley Harvey Crippen, who was wrongfully convicted and hanged for the murder of his wife; and Shirley McKie, who was wrongfully charged with perjury for allegedly lying about depositing her fingerprint at a crime scene. In addition the *Daily Mail Online* posted an article in which it detailed that 27 prisoners awaiting the death penalty had been found not guilty and were exonerated by means of DNA analysis (Louise Boyle 'Shock report into FBI errors cast doubt on twenty-seven death penalty convictions' 18-7-2013 *Daily Mail Online*. www.dailymail.co.uk/news/article-2369273/FBI-forensic-hair-analysis-errors-casts-doubt-dozens-death-penalty-convictions.html, accessed on 19-01-2014). The Innocence Project, whose main objective is to correct erroneous convictions, stated that 250 people had been exonerated in the US by 4 February 2013 (www.innocenceproject.org/Content/How_many_people_have_been_exonerated_through_DNA_testing.php, accessed 19-01-2014).

All of these cases display the inaccuracies of current forensic techniques that are universally utilised. These statistics are pushing the paradigm shift in the right direction, that is, towards more accurate scientific methods.

In addition to other complications, all of the above-mentioned factors that affect the paradigm shift worldwide are prevalent in South Africa. Forensics in South Africa need to participate with the rest of the world in rectifying these practices and ensure that these updated methods are employed. Forensic science is a growing industry in South Africa and the correct training methods need to be put into place to identify and challenge these identification sciences. Academic institutions also need to join the international community in providing research into new identification methods that are more scientific and able to withstand the criticism.

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Eviction - need for a way out

By
Christo
Smith

The Supreme Court of Appeal, in the matter of *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) set guidelines for municipalities in reporting to court in eviction matters. In a wide range of eviction cases municipalities have been ordered to provide occupiers with emergency accommodation, to furnish detailed reports or to meaningfully engage with occupiers. In many instances municipalities have failed to comply or to comply adequately with such orders. This has resulted in many cases being referred back to court, to further orders being made, as well as appeals in some cases, all resulting in protracted and sometimes fruitless litigation. At the receiving end of this conundrum is the land owner, because in the majority of

cases the eviction is sought from privately-owned land.

The Hlophe case

Subsequent to the *Changing Tides* case, in the matter of *Hlophe and Others v City of Johannesburg and Others* 2013 (4) SA 212 (GSJ) the High Court, per Satchwell J, made a detailed order holding city officials personally responsible for not ensuring the city's compliance with earlier orders. The present status of this matter confirms the general trend: The municipality has taken the decision on appeal and the matter has been further delayed to the prejudice of the landowner. In the *Hlophe* case the court was of the view that the report was inadequate because it merely dealt with the city's inability to provide emergency accommodation to the evicted occupiers. The city reported

that its inability to comply with the order was due to financial constraints, lack of resources and availability of alternative accommodation. In the judgment, Satchwell J referred the various obstacles raised by municipalities when confronted with such orders, as follows (at para 24 - 25):

"They may lament that the City of Johannesburg will be expected to house the entire continent of Africa. They may disagree that no distinction is drawn between South Africans and non-South Africans when it comes to providing temporary housing for the homeless. They may complain that the rates and other income in this City cannot support provision of housing of those who do not directly contribute to the tax base of the City. They may protest that provision of temporary housing as required will en-

courage persons to bypass housing waiting lists and prejudice persons who have been patiently waiting on housing lists. And on and on the dissatisfactions may be expressed.

But there is no room for any tier of government or any organ of the state or any court in the land to be inimical to the reasoning or the decisions of the Constitutional Court. The City of Johannesburg is bound thereby. This court is bound thereby. We must all do our best and exert ourselves to implement the decisions of the Constitutional Court in pursuit of the constitutional promises.'

Inconsistency

Admittedly, municipalities frequently fail to perform basic duties and are sometimes even guilty of contempt of court, however, the concerns raised by them as alluded to by the court in the Hlophe case, should be seriously considered. Do the courts always adequately consider whether their orders are executable? Why is there a growing inconsistency between judgments in eviction matters?

At the core of the controversy is the discretion a court has when applying the 'just and equitability' requirement in terms of ss 4(7) and 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). A court must essentially make three determinations: Firstly, whether an eviction order should be granted, secondly, if the order is granted, the date by which the property is to be vacated and thirdly, the date by which the eviction order may be executed if the property has not been voluntarily vacated. All three determinations must be 'just and equitable' (see the *Changing Tides* case at para 12; and *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village* 2013 (1) SA 583 (GSJ) at para 33 and 126).

Determination of the eviction date and execution of the order are discretionary. When a court is clothed with a discretion, it can be either in a wide or narrow sense. A discretion in the wide sense refers to a discretion being exercised from a range of permissible options while a discretion in narrow sense leaves little room for variation. The courts essentially support application of the discretion in the narrow sense in evictions. See for instance, *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) where Skweyiya J, delivering the unanimous judgment of the Constitutional Court (CC), said: 'The application of PIE is not discretionary' (at para 15). In an earlier decision the SCA, in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) favoured the same view. The discretion in the narrow sense, however, applies only in theory because essentially

ly an eviction does not have one possible justified outcome. Therefore, the CC and the SCA, when applying the discretion in the narrow sense, tend to set aside the judgments of the High Court and lower courts due to the fact that, as stated by Willis J (as he then was) (the Newtown case at para 21 and 127): 'A conundrum arises from what is meant by "just and equitable"... it is intellectually and morally impossible to insist that there can be only one correct date in the determination of (a) the date upon which an occupier is to vacate the property and (b) failing which the occupier is to be evicted therefrom.' Application of the discretion in the narrow sense would, according to Willis J '[render] the functioning of the courts in regard to eviction matters unworkable. It would be grossly unfair to judges' (the Newton case at para 36).

'Do the courts always adequately consider whether their orders are executable? Why is there a growing inconsistency between judgments in eviction matters?'

Roulette

Intrinsic to the rule of law is predictability, reliability and certainty (see Ben Beinart 'The Rule of Law' *Acta Juridica* (Balkema: Cape Town) 1962 at 99, quoted in the Newtown case). Practitioners are increasingly perturbed about the intolerable inconsistency in evictions. They cannot advise clients and are literally confronted with a roulette table when litigious matters are generally determined on equity and the value system of the particular judge, rather than the law. In *Cassell & Co Limited v Broome and Another* [1972] All ER 801 (HL) the then Lord Chancellor of England, Lord Hailsham of St Marylebone, dealt with the questions of predictability, reliability and certainty in the courts and viewed the disputes between different courts as embarrassing. The SCA, in *Brisley v Dotsky* 2002 (4) SA 1 (HHA), in upholding the enforcement of the *pacta sunt servanda* maxim, held that the law and not the values of an individual judge, should determine what is just and equitable.

Courts frequently insist that municipalities provide alternative accommoda-

tion 'at all costs'. One has to agree with Willis J when he held that (the Newtown case at para 92):

'... it would be intellectually dishonest for a court not to take into account the real problem that exists at a Municipal level, with its capacity in terms both of finance and its administrative personnel, to solve problems. If a city cannot even mend potholes promptly and resolve billing crises expeditiously, what hope does it have of addressing adequately the needs of housing? The courts cannot blink, Bambi-like, at the real dangers that are posed through a lack of capacity at a municipal level. The judges on duty in the motion court in the South Gauteng High Court stare real evil in the face every week. Among these evils is the hijacking of buildings in the City. This hijacking is not only criminal but brings with it attendant evils of exploitation, squalor and degradation.'

He further states that when it comes to the provision of housing in South Africa, the CC has made and is likely to continue to make orders that may impact, to a major degree, on questions of funding for projects of national development that, in classical constitutional theory and on an ordinary reading of the Constitution, it is the government's prerogative to decide, subject to approval by parliament (at para 89). He further states that (at para 95):

'It is indubitably desirable that an aura of intellectual incontestability should be distinctive of the Constitutional Court's determinations. Unfortunately, controversy has dogged its judgments on eviction matters since [*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)].'

Citizenship

The citizen status of occupiers is apparently not regarded by the courts as a relevant circumstance (see the *Changing Tides* case para 38 - 41). The SCA, in *Changing Tides* (at para 40 - 41) held that a general report by a municipality is not sufficient. A list of circumstances to be considered in evictions as enumerated in our case law was summarised by the court in *Changing Tides*. However, the citizen status of an unlawful occupier, is not one of them.

I submit that a further inquiry a court should make in an eviction matter, is to question the origin of the occupier. Is it 'just and equitable' that a municipality is forced to provide accommodation, emergency or otherwise, to illegal immigrants? Existing housing programmes and waiting lists are often ignored by the courts and jeopardised. An origin inquiry is also relevant to South African citizens, merely because many occupiers are *mala fide*. They unscrupulously

occupy city properties in so-called building hijackings, sometimes at the instance of vigilantes, criminal syndicates and political pressure groups. In many instances these occupiers have willingly abandoned their places of abode elsewhere in the country (where they might have had adequate homes and employment) to become a burden on already cash-strapped urban municipalities. I submit that the occupiers should bear the onus to provide this information to the court. Applicants will undoubtedly not be in a position to gather such information (see the matter of *Changing Tides* where the SCA places the onus to a large extent on applicants).

Apartheid-ghost

In the *Hlophe* case the court, as in so many eviction matters thus far, equated eviction at common law in general terms with forced removals under apartheid. In this regard Willis J, in the *Newton* case, states quite correctly, that the position of owners of immovable property seeking to enforce, under the common law, the eviction of those who occupy their properties without the owners' consent is not remotely comparable to the forced removals under the previous dispensation (at para 18). Granting and execution of eviction orders, absent those that were politically motivated, have over

many years been acceptable. These orders inadvertently cause inconvenience and trauma, but so does any order made against a losing party. The courts have noted frequently that if the facts justify eviction, it cannot and should not be avoided (the *Brisley* case). Seemingly, the apartheid-ghost is haunting an otherwise justified and normal legal procedure.

Homeless?

Courts frequently decline or delay eviction orders because the order will allegedly render occupiers homeless. Neither the SCA nor the CC have attempted to define the term 'homeless'. In the *Newtown* case Willis J defined 'homeless' as (at para 85):

'Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property and the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is (a) of a comparable or better standard to and (b) at a similar rental to and (c) within reasonable proximity to that of the property from which the eviction is sought.'

The mere fact that a person stands to be evicted does not necessarily mean that he or she will be rendered homeless.

To determine this fact, an inquiry into the *bona fides* and detailed personal circumstances of occupiers is imperative.

The course that our courts are on will invariably lead to orders becoming increasingly unexecutable. There are no signs that the influx to the cities, legal or illegal, is going to decrease. Officials may be held in contempt and may even be incarcerated, but the real problem will not go away. In the meantime landowners are suffering, development is discouraged and property rights in terms of s 25 of the Constitution are merely 'blinked at Bambi-like'.

This situation favours vigilante groups as well as *mala fide* and other illegal occupiers of land. Moreover, the judicial system is contributing to the crisis in governmental housing programmes. We need a way out of the cul de sac in the eviction road. Innovative judgments, boldness, astute action by practitioners and possibly, even legislative intervention, can hopefully assist.

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POPI – Is South Africa keeping up with international trends?

Information
privacy

By
Russel
Luck

In South Africa, the much anticipated Protection of Personal Information Act 4 of 2013 (POPI) was promulgated in Gen 912 GG 37067/26-11-2013. Its commencement date shall be determined in accordance with s 115 of POPI by the President and its provisions will come into effect one year thereafter.

What is the paradigm of personal information and privacy legislation?

The internet allows data transactions to occur from one country to another seamlessly. Paradoxically, this is one of the greatest benefits of the technology era but also one of the greatest challenges to its effective regulation. Citizens bound by data privacy laws in their country

could transfer data to countries that are less regulated than their own and bypass the protection that is offered by that state to its citizens.

European Union laws such as European Union Data Protection Directives of 1995 ((23-22-95) Official Journal of the European Communities No 281/31), 2002 (OJ L 201, 31.7.2002, p 37) and 2006 ((13.4.2006) Official Journal of the European Union L 105/54) (the EUDPD) have been highly influential on the drafters of POPI. A detailed discussion is beyond the scope of this article, save for mentioning that the EUDPD aims in art 1 to provide for economic and social progress of European Union (EU) members and art 25 prohibits transborder information flows to countries with less data privacy protection than member states. The EUDPD has been successful in creating uniform

standards of data privacy for all member states with the result that businesses within the EU that are reliant on data can easily transact with one another. This, in turn, has assisted economic and social progress among signatories of the EUDPD.

The challenge arises when EU members conduct business in jurisdictions that have less data privacy regulation than their own. Article 25 of the EUDPD prohibits data transfers necessary for such business to occur. The United States (US) has not adopted uniform data protection standards equivalent to the EUDPD. Data-reliant industries such as direct marketing, insurance, banking, travel, finance and pharmaceuticals all rely on data profiles in order to operate business. Should European businesses wish to transact with US companies and

of US entities complied with EUDPD principles. Non-compliance ranged from lack of privacy policy displayed on websites to lack of clarity regarding 'onwards transfers' of data and disclosing the 'intended use' of processing that data.

It appears that the current paradigm of personal information legislation is that individual privacy seems to rank below the economic interests of global business. This international paradigm is important when understanding how POPI might be interpreted by our courts and function practically in the global economy.

How does POPI balance the international privacy paradigm?

POPI was drafted largely on the recommendations of the South African Law Reform Commission (SALRC) in discussion paper 109 of project 124 (2005) (www.justice.gov.za/salrc/dpapers/dp124.pdf, accessed 11-4-2014). The SALRC expressly recognised the importance of privacy in terms of the constitution and pre-existing common law. It noted that while privacy is a fundamental right, it can be limited and balanced against economic and trade considerations looking at data privacy not only as a domestic policy issue but as part of the global community. A comprehensive analysis of POPI is beyond the scope of this article. Some of POPI's key features are dealt with below:

- POPI will affect many industries across South Africa, finance, insurance, pharmaceuticals, direct marketing and retail are just some of the sectors that will need to make adjustments in order to be POPI compliant. Much like Regulation of Interception of Communication-related Information Act (RICA) 70 of 2002, which was supplemented by a directive, notice, schedule, four proclamations and two amendments (with a further two amendments pending), POPI will most likely undergo changes in the future. It is improbable that each and every outcome of POPI could be foreseen by the drafters at inception of the Act. It is probably for this reason that POPI provides for an information regulator defined as the 'Regulator' who will, among other things, report to parliament on issues relating to POPI and be responsible for 'codes of conduct' that will set obligations and conditions for the lawful 'processing' of 'personal information' (ss1, 34, 60 - 68 of POPI). POPI's commencement date has yet to be determined by the President and its provisions become effective one year thereafter. This grace period will provide time, perhaps not enough, for affected parties to make certain adjustments and communicate with the 'Regulator' on issues specific to their industry.
- POPI regulates the 'processing' of per-

sonal information. The definition of 'processing' is very wide and refers to almost any instance where personal information is handled. The scope of POPI is narrowed by the definition of personal information that lists many types of information considered to be personal information. This definition is not a closed list and even information not listed in s 1 as personal information could be considered personal information and protected by POPI. Personal information is not information that is 'de-identified' or information that relates to a purely personal or household activity. There are further exclusions for journalistic, literary or artistic expression and matters of national security. The gateway into POPI lies inside the ambit of personal information and 'special personal information' but outside the ambit of anything that is considered de-identified or exempt. Information that has been 're-identified' no longer falls outside the ambit of POPI and would be protected by the Act.

- POPI confers rights on 'data subjects' including but not limited to, the right to be notified when personal information is processed and the right to be notified when personal information has been compromised or hacked by unauthorised individuals. Data subjects have the right to know (free of charge) if a 'responsible party' holds the personal information of a data subject. They also have the right to a record or copy of that personal information but the responsible party may charge a fee for providing access to this record. Data subjects have the right to correct and amend the records of their personal information held by responsible parties. They also have the right to object to the processing of their personal information and not to be subjected to direct marketing. The rights of data subjects is not absolute under POPI and can be limited where, for example, providing access to a record would defeat the object of that record or the information regulator has provided an exemption to the responsible party under POPI.

'The internet allows data transactions to occur from one country to another seamlessly. Paradoxically, this is one of the greatest benefits of the technology era but also one of the greatest challenges to its effective regulation.'

gain the economic and social progress mentioned in art 1 of the EUDPD, art 25 of the EUDPD prevents them from doing so.

Ostensibly, the US adopted the United States Department of Commerce Safe Harbor Privacy Principles 2000 (Safe Harbor Agreement) that allow US businesses to self-certify that they are compliant with the standards of data protection adopted by EU nations through the EUDPD. The problem with self-certification is obvious, there is very little practical control or enforcement the EU citizens would have over American companies who received their personal information. According to the Safe Harbour Decision Implementation Study (http://export.gov/safeharbor/eu/eg_main018475.asp, accessed 11-4-2014) conducted in 2004, a prevalent minority

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- Conversely, POPI confers duties on responsible parties to 'process' personal information in compliance with conditions, including but not limited to, the condition that processing must be conducted in a manner that is accountable, lawful, reasonable and has a minimal intrusion on the data subject's rights. Personal information processing (under normal circumstances) must be done with the consent of the data subject and gathered from the subject directly, though this is not the only way personal information can be processed. Personal information must be collected for a specific purpose and the data subject must (under normal circumstances) be notified that their personal information is being processed. There are limitations on the length of time personal information can be retained. There are also limitations on processing personal information for reasons other than those disclosed to the data subject. Personal information must be reasonably accurate and secure from unlawful access and further dissemination.

- 'Operators' or people acting under contract or mandate of a responsible party have a duty not to disclose any personal information they come into contact with and must maintain the integrity and confidentiality of the personal information they have collected.

- One of the issues raised by practitioners and mooted by parties affected by POPI is whether POPI applies retrospectively (www.pmg.org.za/report/20130522-protection-personal-information-bill-departmental-and-public-representations, accessed 2-4-2014). One of the concerns is that immediately prior to POPI coming into force, a surge of personal information may be transferred in a final attempt to compile precious databases for marketing and business purposes. POPI in its current form does not apply retrospectively and in the absence of the Act being amended or the President bringing it into force with retrospective effect, this position will stand. It is my view that POPI would be too large a burden to administer and enforce retrospectively. Moreover the consent and opt-out provisions under s 69 of POPI would provide data subjects with sufficient ability to curtail unsolicited marketing communications relatively quickly.

- Once POPI is in full force and effect penalties for non-compliance are severe, amounting to fines not exceeding R 10 million or imprisonment of up to ten years (ss 107 and 108 of POPI). POPI's provisions are onerous and expansive. Compliance is not a one-size-fits-all matter and each business will require its data practices and data privacy policies to be reviewed by their respective legal advisers.

- Lastly, like art 25 of the EUDPD, s 72 of POPI prohibits transborder data flows to countries that have lower standards of data protection than South Africa. This affects the ability of South African businesses to transfer information in the global market place. It does, however, allow South African businesses to receive data flows from countries that have similar data protection provisions in their jurisdiction. Had POPI not been drafted with a limitation on transborder data flows, South African businesses would struggle to transact with businesses based in the EU. In cases where South African businesses wish to engage in transborder data flows to countries that have lower data protection standards than South Africa, obtaining the data subject's consent or satisfying another exception to s 72's prohibitions would ease restrictions on South African businesses from engaging in transborder data flows to businesses in those jurisdictions.

Challenges and analysis

Technology evolves faster than law makers can regulate it

A recent incident in the US demonstrates the need for data protection and the manner in which current practices 'fudge' technology matters regulated by statute. *The Wall Street Journal* reported (Dana Mattioli 'On Orbitz, Mac Users Steered to Pricier Hotels' *The Wall Street Journal* 23-8-2012, (<http://online.wsj.com/news/articles/SB10001424052702304458604577488822667325882>, accessed 2-4-2014)) that a search engine powered by Orbitz Worldwide Inc suggested more expensive hotels to users visiting the site with a Mac Computer than a personal computer.

The details relating to this scandal are varied and it is not clear what information was processed by Orbitz. It was traditionally believed that an internet protocol (IP) address is not 'Personally Identifiable Information' (American definition) because it relied on a dial-up connection to access the internet, each time a user dialed-up, a new IP address was assigned to that computer. However, according to PM Schwartz and DJ Solve, the mass movement away from dial-up and towards broad-band internet use has resulted in fixed IP addresses being assigned to certain computers as unique identifiers ('The PII Problem: Privacy and a new concept of personally identifiable information' (2011) 86 *New York University Law Review* 1814). Whether an IP address reveals a user's 'identifying number, symbol ... online identifier' sufficient to trigger subs (c) under the 'personal information' definition in POPI has yet to be evaluated by our courts. As always, clarity will be established on a case-by-case basis.

In the above, the concept of 'de-identified personal information' had its vulnerabilities exposed. In 2006, America Online (AOL) released 20 million search queries for research purposes, which it believed to be sufficiently de-identified. Reporters at the *New York Times* exposed the ease with which such information could be re-identified using techniques that tracked searches for landscape gardeners in a specific area with a host of circumstantial information to reveal the identity of a user.

Clearly technology evolves at a speed that exceeds our law maker's ability to regulate it in its entirety. It is hoped that the information regulator and industry leaders will dialogue over the provisions of POPI to ensure our system of data protection is coherent and in keeping with current technology practices.

First world laws and third world problems

POPI's place in the international privacy paradigm is promising. Its provisions match the EUDPD's standards of data protection with the effect that South African businesses could engage in transactions with European businesses that are heavily reliant on data. What has yet to be seen is whether the US's standards of data protection will satisfy South Africa in the same way that the EU has accepted the Safe Harbour Agreement despite its imperfections. The SALRC in its discussion paper 109 of project 204 sought to balance the right to privacy against economic and social progress. This aspiration is reflected in the preamble of POPI. South Africa is a developing economy and strives to attract foreign investment that is critical for its future development and growth.

Many of South Africa's technology industries are in their infancy, despite having solid legal regulations in place. Amazon.com Inc opened its customer service centre in Cape Town in 2010 and software development centre thereafter. It forecasted that 1400 new jobs would be created when operations are at their peak. Similarly, Google Inc's expansion of its office in Johannesburg is an encouraging sign of foreign business interest in South African opportunities. POPI should be interpreted in a manner that is friendly to foreign business yet protective of unscrupulous information practices. There is every reason to be optimistic that it will achieve both these aspirations.

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THE LAW REPORTS



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March 2014 (2) The South African Law Reports (pp – 3190;
[2014] 1 The All Law Reports February no 1 (pp 249 – 374);
and no 2 (pp 375 – 489)

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
GSJ: Gauteng South High Court, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape High Court, Cape Town

Arbitration

Review of award: In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* [2014] 1 All SA 375 (SCA) the court was asked to pronounce on the question whether or not an arbitrator is obliged to apply the rules of evidence in the same way as a court of law.

The salient facts were that the first respondent (Trustco) purchased from the appellant (Dexgroup) the entire issued share capital of the third respondent (the company). The agreement was concluded in November 2007. Part of the purchase price was to be paid in cash and the balance was to be paid by way of the issue of shares in Trustco. In terms of the agreement, Trustco made available to Dexgroup a banking facility or cash of up to R 30 million. In 2009, when Dexgroup contended that it was entitled to receive some 3 million shares in Trustco in

settlement of the balance of the payment price, Trustco objected. Trustco argued that Dexgroup would be entitled to the shares only once the facility was discharged or settled, which had not occurred. The parties then submitted the dispute over FirstRand's entitlement to receive payment of the balance of the purchase price of the company to arbitration. Because the facility had not been properly discharged, as required, the arbiter dismissed FirstRand's claim and upheld a counterclaim by Trustco for declaratory relief.

Section 28 of the Arbitration Act 42 of 1965 (the Act) provides that the arbitrator's award was final and binding and not subject to appeal. It could only be challenged on the limited grounds provided in s 33(1) of the Act. The ground on which FirstRand relied in bringing its application was that the arbitrator committed a gross irregularity in terms of s 33(1)(b) of the Act, alternatively, that he exceeded his powers.

The primary issue in the arbitration was whether Dexgroup had satisfied its obligations under the agreement, in relation to the repayment of the facility. On appeal the

court was asked to pronounce on a number of issues, only two of which merit discussion here.

Wallis JA rejected Dexgroup's first contention that the arbitration proceeded on the basis of allegations that had not been pleaded or adequately raised, with the result that Dexgroup and its witness were taken by surprise and thereby deprived of a fair hearing.

Secondly, Dexgroup argued that the arbitrator had allowed evidence that should have been admitted. In this regard, Dexgroup argued an arbitrator is obliged to apply the rules of evidence in the same way as a court of law. However, the court referred to earlier authority stating that in modern arbitral practice, the rule is that, unless the arbitration agreement otherwise provides, the arbitrator is not obliged to follow strict rules of evidence provided the procedure adopted is fair to both parties and conforms to the requirements of natural justice. Arbitrators should be free to adopt such procedures, which they regard as appropriate for the expeditious and inexpensive resolution of the dispute before them, unless the arbitral

agreement precludes them from doing so.

The court *a quo* was correct to dismiss the challenge to the arbitrator's award. The appeal was accordingly dismissed with costs.

Banking law

Bank-customer relationship – bank's duty of care: The facts in *Absa Bank Limited v Hanley* [2014] 1 All SA 249 (SCA) were that the appellant (Hanley) an Irish solicitor and customer of the respondent bank (Absa), had opened an investment account with Absa and invested an amount of US \$1 750 000 into the account. In July 2003, a sum of US \$1 600 000 was transferred out of the account.

Hanley alleged that the transfer was effected through a fraudulent document submitted by one La Cote, who was also a customer of Absa. Hanley further denied that he had authorised the transfer and sued Absa for re-payment of the lost amount.

Absa alleged that the amount was transferred as a result of Hanley's negligence, *inter alia*, by allowing La Cote to come into possession of a transfer instruction document that was signed by Hanley.

In terms of the document that Hanley handed over to La Cote, Hanley instructed Absa to transfer \$100 000 from his account to that of La Cote.

Absa raised the defence of 'estoppel' by contending that Hanley owed a duty of care in regard to how he operated his account.

The main issues to be determined were –

- whether Hanley had any legal duty of care as contended by Absa;
- the question of onus on the issue of duty of care; and
- the alleged negligent conduct of Absa.

The present discussion will be restricted to the third issue.

The court *a quo* held that Absa transferred the money from Hanley's account, not because of any negligence by Hanley, but primarily because it failed to apply prudent and acceptable banking practice. Absa was found to be negligent and was ordered to credit Hanley's account in the relevant amount.

On appeal Malan JA held that the principal duty of a bank effecting a credit transfer is to perform its mandate timeously, in good faith and without negligence. The duty of the customer is to draw his payment instructions with reasonable care in order to prevent forgery or alteration and to warn of known or suspected fraud or forgery arises from this relationship.

In the present case there were quite a number of factors that indicated that Absa was negligent. Firstly, Absa did not phone the client to confirm the client's signature. Secondly, Absa made the payment on the basis of a fax and not the original bank form. Thirdly, Absa had opened the bank account for the client, which purported to be a company without any proof of a company resolution authorising the opening of the bank account.

It further held that Hanley could not reasonably have foreseen the possibility that the amount stated on the second page of the bank form would be altered. Hanley did not facilitate the alteration,

and wrote the figures and words with care.

Further, it was an employee of Absa who authorised the payment. The employee's negligence was the proximate cause of the loss by not noticing that the amount on the payment instruction had been altered.

Absa was held liable to repay Hanley the amount of the unauthorised payment.

The appeal was accordingly dismissed with costs.

Company Law

Application for winding-up – service: In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* [2014] 1 All SA 294 (SCA) the court was asked to pronounce on the requirements for the winding-up of a company. The facts were that winding-up orders were made against 20 companies, all of which are apparently subsidiaries of the appellant. The winding-up applications arose out of their failure to satisfy arbitration awards in varying amounts made against each of them. The applications were opposed on the ground that there had not been proper service on the employees of the companies as required by s 346(4A) of the Companies Act 61 of 1973.

The applications for winding-up were duly served on the companies at their registered office. The sheriff purported to serve the applications on the employees of each subsidiary company by affixing a copy of the application for winding-up in relation to that company to the front door of the registered office. The appellant argued that that form of service was defective for two reasons. First, the sheriff had obtained access to the registered office, because he had served the applications on the companies at that office on an employee apparently over the age of 16 years and in charge of the premises. In the absence of any explanation that it was not possible for him to do so, s 346(4A)(a)(ii) (aa) required service to be effected by affixing the applica-

tion papers to a notice board within the premises to which the employees had access. Service to the front door was thus defective. Second, it was submitted that it was obvious from the names of the companies and the nature of their business that they operated at locations throughout the country and that in those circumstances the court should not have accepted the correctness of the sheriff's return.

Wallis JA held that s 346(4A) imposes an obligation on the applicant to furnish the application papers to the persons named in the section. Section 346(4A) provides that the application papers 'must' be furnished to the named persons, which makes the requirement peremptory. It is not, however, peremptory when furnishing them to the respondent's employees, that this be done in any of the ways specified in s 346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section.

Finally, it held that the court below should not have been satisfied that there had been compliance with the requirements of s 346(4A) insofar as the employees were concerned.

The appeals were upheld to the extent that the final winding-up orders granted were set aside and replaced by provisional winding-up orders returnable eight weeks from the date of the present order.

Inquiry into affairs of company: In *FirstRand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town and Others* [2014] 1 All SA 489 (WCC) the third respondents (the liquidators) were the joint liquidators of Lighthouse Square (Pty) Ltd (the company). The second respondent trust held 25% of the shares in the company and the second applicant held 50% of the shares. The company acquired certain immovable properties and the first applicant (FirstRand) advanced various sums to the company to en-

able it to develop the properties.

The company was unable to repay its debt to FirstRand. FirstRand successfully applied for its liquidation. The attorney acting for the trust wrote to the Master asking for authority to convene an inquiry into the affairs of the company in terms of the provisions of ss 417 and 418 of the Companies Act 61 of 1973 (the Act). The present application was for the review and setting aside of the decision of the Master of the High Court, to authorise a commission of inquiry in terms of ss 417 and 418 of the Act. The critical issue on which the review application was based was the fact that an attorney of the trust had attended a meeting at the Master's office, the outcome of which was that the Master authorised the proposed inquiry.

Blignault J pointed out that the trust's attorney attended the meeting with the Master in order to motivate the holding of the inquiry. The meeting with the Master took place in the absence of FirstRand's attorney and without informing the attorney in any way of the meeting to be held. That amounted to a misrepresentation in the form of a failure to disclose material facts. The trust's attorney was under a duty to disclose his intended visit to the Master to FirstRand's attorney.

FirstRand's right to procedural fairness was violated by the manner in which the Master, encouraged by the trust's attorney, dealt with the application for the authorisation of the inquiry.

FirstRand's review application was thus successful.

Liquidation order – just and equitable: In *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd and Others* [2014] 1 All SA 474 (SCA) the court *a quo* made an order liquidating the first respondent on the basis that it was just and equitable to do so. The 'just and equitable' ground for liquidation is provided for by s 81(1)(d)(iii) of the Companies Act 71 of

2008 (the Act). The appellants and the second and third respondents (the shareholders) were shareholders of the first holding 25% of the shares in the company. The company was solvent, but the court *a quo* ordered its liquidation due to the general breakdown of the relationship between the shareholders. Each of the shareholders had the right to participate in the management of the company. The shareholders' rights to dispose of their shares were restricted so that a shareholder could not, without the consent of the other shareholders, simply sell its shares and go elsewhere. The respondents stated that the directors were not able to operate and make decisions commercially because of a deadlock. Given the irretrievable breakdown in the relationship between the parties, the court found that the liquidation of the company was, in the absence of any other remedy, the only route to follow.

The application in the present case was based on s 81(1)(d)(iii), an alternative ground to various listed grounds for winding-up, where it is just and equitable for the company to be wound up. The application was motivated by the desire of the second and third respondents to dispose of their shares. In terms of the shareholders' agreement, that could be done only with the consent of the other shareholders. The appellants, it was alleged, were unwilling to consent to the respondents disposing of their shares.

The appellants contended that the relationship between the parties had irretrievably broken down.

The issue to be decided by Malan JA was whether the provisions of s 81(1)(d)(i) and (ii) affect the interpretation of the words 'just and equitable' in s 81(1)(d)(iii) so as to preclude all other grounds of deadlock. The court confirmed that the just and equitable ground in s 81(1)(d)(iii) should not be interpreted so as to include only matters similar to the other grounds stated in s 81(1). The examples of 'deadlock' given in s 81(1)(d)(i) and (ii), that is,

where either the board or the shareholders are deadlocked are examples only, and are not exhaustive and do not limit s 81(1)(d)(iii).

The court was satisfied that the relationship between the shareholders had failed. The company could only function consensually. Transfer of the shares of members was restricted. For those reasons, the company could function only when the relationship of confidence and trust between the parties was maintained. The evidence clearly established a breakdown in the relationship between the shareholders. The court below, therefore, correctly found that it was just and equitable that the company be wound up.

The appeal was dismissed.

Constitutional law

Needs of pregnant learners: The underlying dispute in *Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) concerned the question how best should the special needs of pregnant learners be accommodated at public schools. The salient facts of the *Welkom High School* case concerned a clash between the respondent schools' 'Management of Learner Pregnancy' policies (the policies) and the Constitution. The gist of the policies entail that the schools' governing bodies have the right to temporarily exclude a pregnant learner from school. The head of a provincial department of education (the HOD), applied for leave to appeal against the SCA's dismissal of his appeal against a High Court order interdicting him from interfering with the respondent schools' pregnancy policies. The HOD had instructed the respective principals to ignore these policies.

Khampepe J delivered the CC's main judgment. There were two further concurring judgments. The CC identified two material issues for determination: First, whether the HOD has the power to instruct principals of public schools to ignore policies adopted by the governing bodies of those schools when

the HOD is of the opinion that the policy is unconstitutional; and secondly, the manner and extent to which the court could address the concerns raised regarding the unconstitutionality of the pregnancy policy.

Section 16 of the South African Schools Act 84 of 1996 (the Schools Act) vested the 'governance' of public schools in its governing body (s 16(1)) and its 'professional management' in the principal under authority of the HOD (s 16(3)). 'Governance' in the context of the Schools Act should be understood in contrast to 'professional management', the two being distinct categories of responsibility set out in the statute.

A governing body was akin to a legislative authority within the public-school setting, being responsible for the formulation of certain policies and regulations. Conversely, a principal's authority was more executive and administrative in nature, being responsible (under the authority of the HOD) for the implementation of applicable policies and the running of the school on a day-to-day basis.

In addition, s 8 of the Schools Act empowered school governing bodies, pursuant to a consultative process involving learners, their parents and educators, to adopt 'codes of conduct'.

In the light of the foregoing, the governing bodies were empowered to adopt pregnancy policies for their respective schools pursuant to their governance responsibilities and their authority to adopt codes of conduct. That being the case, the HOD was obliged to address his concerns with the pregnancy policies pursuant to his powers under the Schools Act. The HOD was not empowered by the Schools Act to act as if policies adopted by a school governing body did not exist when, on the basis of the HOD's analysis, they *prima facie* offended the Constitution and the Schools Act.

In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and An-*

other 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 it had been unanimously decided that, although an HOD had supervisory authority over the exercise by a governing body of its policy-making governance, that supervisory authority may be exercised only pursuant to the mechanisms provided for by the Schools Act. The present court was bound by the decision in the *Hoërskool Ermelo* case to conclude that, in addressing his concerns regarding the content of the pregnancy policies, the HOD was obliged to act in accordance with the relevant provisions of the Schools Act or to approach the courts for appropriate relief. The powers of governing bodies must be exercised subject to the limitations laid down by the Constitution and the Schools Act. There was no doubt that the rights of pregnant learners to freedom from unfair discrimination and to receive education had to be protected, promoted and fulfilled, but this had to be done lawfully.

The court accordingly held that the HOD had acted unlawfully, and the courts below were, therefore, correct to have granted and upheld the interdictory relief sought by the schools.

Finally, the court ordered the respondent schools' governing bodies to review their pregnancy policies in the light of the present judgment. The schools were further ordered to report back to the CC on reasonable steps they have taken to review their pregnancy policies.

Although the respondent schools have been successful in relation to the issue of the unlawfulness of the HOD's conduct, their pregnancy policies seem to have violated various fundamental rights of learners. Each party was thus ordered to pay its own costs.

Delict

Liability to third party: The facts in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA); [2014] 1 All SA 267 (SCA) were as follows. The appellant (the

plaintiff) 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, the plaintiff 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. The plaintiff 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 the plaintiff's claim (*Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2012] 4 All SA 555 (GSJ)).

On appeal Brand JA dismissed the department's contentions regarding the cancellation of the contract due to non-compliance with statutory provisions and regulations as flawed. Therefore, its defence, based on an unlawful award of the completion contract, should not have been upheld.

The court also considered the department's further defence, namely that it could not be held liable in delict for the damages claimed because the plaintiff had failed to establish the element of wrongfulness, which is essential for aquilian liability. Suffice it to mention here that since 1979 aquilian liability was extended to also include liability for pure economic loss. Wrongfulness in the context of delictual liability for pure economic loss is ultimately dependent on an evaluation based on considerations of legal and public policy. The obstacle to the relief sought by

the plaintiff was that it was not a party to the contract in this case. For the plaintiff to succeed, the court had to extend delictual liability to a contracting party for damages suffered by a stranger to the contract resulting from the intentional repudiation of the contract by that contracting party. That has never been done before.

A further consideration weighing heavily against the imposition of delictual liability on the department, in the circumstances of the present case, was what has become known in the context of wrongfulness as the plaintiff's 'vulnerability to risk'. Vulnerability to risk signifies that the plaintiff could not reasonably have avoided the harm suffered by other means. It has become well-established in our law that the finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant.

There was in the circumstances no reason to impose delictual liability on the department for the loss claimed by the plaintiff. The appeal was dismissed with costs.

Guarantees

Construction guarantee: In *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* [2014] 1 All SA 307 (SCA) the first respondent (Kentz: the employer) was involved in the construction of the Medupi power plant. In September 2008 Kentz entered into a written contract (the contract) with Brokrew (the contractor) relating to the supply of ducting at Medupi. In terms of the contract Brokrew was obliged to secure 'an irrevocable, on demand bank guarantee from a recognised financial institution' for proper performance by Kentz. Brokrew requested the first appellant (Guardrisk) to issue two construction guarantees in favour of Kentz.

By January 2010 Brokrew was experiencing severe financial difficulties and it informed Kentz that unless the

terms of the contract were renegotiated, it would not be in a position to perform its obligations in terms of the contract.

On 9 March 2010 Kentz informed Brokrew that in terms of their contract Brokrew was in breach and that Kentz had decided to exercise its right to cancel the contract. Also, on 9 March, Kentz demanded payment from Guardrisk in terms of the guarantees.

Guardrisk resisted the claims on the basis that Kentz's claims were fraudulent because Kentz was not entitled to cancel the contract.

Kentz successfully claimed payment from Guardrisk in the GSJ where the court held that Guardrisk had failed to prove that Kentz had acted fraudulently.

On appeal to the Supreme Court of Appeal, Theron JA held that the gist of Guardrisk's arguments on appeal was that the bank guarantees in question were conditional guarantees, rather than demand guarantees.

In order to determine the nature of the guarantees in the present case (that is, whether they are conditional or demand guarantees) the court must interpret their terms.

It was trite that Guardrisk undertook to pay Kentz the guaranteed sums on demand. Such demand had to be in writing and had to contain a statement that the demand amount was payable in terms of the contract and that Brokrew was in breach of its obligations under the contract.

The guarantees provided that Guardrisk's liability was absolute and unconditional and did not create an accessory obligation.

The guarantees were, thus, unconditional and the only basis on which Guardrisk could escape liability was to show proof of fraud by Kentz.

The court further held that the mere fact that Kentz presented the guarantees for payment knowing that Brokrew held a contrary view about Kentz's right to cancel the contract did not amount to fraud. Guardrisk relied heavily on the earlier, but in-

correct majority decision in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA) and the accuracy of the minority decision.

In *Dormell* the majority held that the beneficiary of a demand guarantee is not entitled to claim payment under the guarantee where an arbitrator had found that the beneficiary had not been entitled to cancel the underlying contract and its cancellation constituted a repudiation.

In *FirstRand Bank Ltd v Bre-ra Investments CC* 2013 (5) SA 556 (SCA) the court dismissed the reasoning of the majority in *Dormell* and supported the minority judgment where it was held that 'once [the employer] had complied with the [provisions] of the guarantee, [the guarantor] had no defence to a claim under the guarantee. The fact that an arbitrator has determined that the [employer] was not entitled to cancel the contract, binds the [employer] - but only *vis-à-vis* [the contractor]. [The award by the arbitrator] is *res inter alios acta* as far as the [guarantor] is concerned' (own insertions).

The court concluded that Guardrisk and Brokrew failed to prove fraud and the appeal was accordingly dismissed with costs.

Land

Instalment sale agreement: In *Katshwa and Others v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases* 2014 (2) SA 128 (WCC) the appellants (the buyers) in the present five appeals had entered into instalment sale agreements with the respondent (the seller) for the purchase of immovable property and had all fallen into arrears with their payments. The seller purported to cancel the agreements and eventually launched motion proceedings in a magistrate's court for the eviction of the buyers. The applications succeeded and the buyers were ordered to vacate the properties by a specified date, failing which the sheriff was ordered to evict them. The buyers ap-

pealed to the High Court. It was common cause that the seller had failed to register the contracts with the Registrar of Deeds as required by s 20(1)(a) of the Alienation of Land Act 68 of 1981 (the Act). The buyers further relied on s 26 of the Act, which provided that no person 'shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until (a) such erf or unit is registrable; and (b) in case the deed of alienation is a contract required to be recorded in terms of s 20, such recording has been effected'.

The buyers contended that the seller was not entitled to receive any consideration, in terms of the contracts, from the buyers and they were, thus, not in arrears in the payment of their instalments. As a result, so the buyers argued, the seller's cancellation of the contracts was invalid. The seller, in turn, argued that s 4 of the Act exempted the state and local authorities as sellers from having to comply with s 20, and that the seller, though ostensibly a private company, had to be regarded as a functionary of the state.

Steyn J held that the purpose of s 20 was to protect vulnerable, financially disadvantaged and relatively unsophisticated buyers from private companies, with or without state shareholders. The use of the word 'state' in s 4 referred to closed categories of entities, and the wording of 'state' in this context could not be widened to include organs of state and definitely not private companies such as the seller in the present matter, regardless of the interest in it by certain organs of state and regardless of whether or not its purpose was to generate profit. The seller was an independent contractor performing certain governmental obligations, including the provision of housing, and there was no evidence before court that the seller formed part of government at any level or was controlled by government, or that it should be regarded as an organ of state. On the contrary, the seller's own factual

averments led to the conclusion that it was not an organ of state, but was, in fact, a private company. The seller had accordingly not shown that there was any foundation in fact or in law why it should be regarded as the state.

The appeals were accordingly allowed with costs.

Prescription

Extinctive prescription: *Solenta Aviation (Pty) Ltd v Aviation @ Work* 2014 (2) SA 106 (SCA) concerned an appeal against a judgment of the court *a quo* in which it upheld a special plea of prescription raised by the respondent (the defendant).

The underlying contract concerned the lease of a Cessna aircraft by the appellant's (plaintiff) predecessor in title to the defendant. It was alleged by the plaintiff that the defendant had committed a breach of contract that caused damage to the plaintiff. The original claimant was not the true creditor. The original claimant was subsequently substituted with the true one (the plaintiff) by means of an amendment. The amendment took place only after the prescriptive period had lapsed.

The description of the lessor in terms of the contract is 'Solenta Aviation (Pty) Ltd' and not Solenta Aviation Workshops as described in the combined summons and in the particulars of claim. On 18 August 2009 a notice of intention to amend was delivered in which notice was given that the description of the plaintiff was to be amended to 'Solenta Aviation (Pty) Ltd' by the deletion of the word 'Workshops' where it appears in the summons and in para 1 of the particulars of claim.

It was alleged in a special plea by the defendant that service on it, whereby the plaintiff claimed payment of damages arising from the defendant's alleged breach of the contract, did not interrupt the running of prescription in terms of s 15(1) of the Prescription Act 68 of 1999 (the Act), and that a period of more than three years had

elapsed since the alleged breach and the delivery of the notice of intention to amend the citation of the plaintiff, or of the actual substitution of the plaintiff for its predecessor in title.

The crisp issue before the court was whether the process served on the debtor was a claim by the creditor of the debt in compliance with the provisions of s 15(1) of the Prescription Act 68 of 1969.

Meyer AJA held that in applying the objective test the claim made in the combined summons was, on a plain reading, not that of the true creditor (here: the plaintiff), and service of the process on the defendant did not interrupt the running of prescription.

The admissions by the defendant of the citations of the parties and of the contract and its terms also did not avail the plaintiff. They did not bring about an automatic substitution of one plaintiff for another.

The appeal was accordingly dismissed with costs, including the costs of two counsel.

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, criminal procedure, intellectual property law, international law, judgments, jurisdictions, labour law, local government, powers of the President, practice, prescription, public service, right to housing, sexual offences and trusts.



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Contingency fees – *quo vadis*

By
Michael
de Broglio

Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (CC) unreported case no CCT 122/13, CCT 123/13 20-2-2014) (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Van der Westhuizen J and Zondo J)

The Constitutional Court judgment in the cases of *Ronald Bobroff & Partners Inc v De La Guerre and South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (CC)* unreported case no CCT 122/13, CCT 123/13, 20-2-2014) (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Van der Westhuizen J and Zondo J) has once and for all removed all doubt that may have existed regarding the legality of common law contingency fee agreements between attorneys and their clients. In February, the Constitutional Court (CC) dismissed an application for leave to appeal against the finding of the full court in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) to the effect that the Contingency Fees Act 66 of 1997 (the Act) and in particular ss 2 and 4, were not unconstitutional on the grounds raised. In the process the CC, without favouring us with anything approaching a *ratio decidendi*, found that: 'Under the common law, legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the clients might be awarded in litigation' (at para 2).

The attack by certain personal injury lawyers belonging to the South African Association of Personal Injury Lawyers (SAAPIL) on ss 2 and 4 of the Act was based on a limitation of the fundamental right of access to justice. The court held that the right had been misunderstood by SAAPIL in that it was not the right of the legal practitioners themselves, but the rights of their clients that the Act sought to protect.

SAAPIL's application was not brought as a representative action in terms of s 38 of the Constitution, but as one

where SAAPIL acted only on behalf of its own members. The court held that even if they had sought to bring it on behalf of others, there was no evidence before the court that any clients' rights had been limited.

In its judgment, the Constitutional Court referred to the decision of the court *a quo*, saying: 'The Full Bench accepted that a rational distinction may be made between the regulation of contingency fees for attorneys and that of champertous agreements amongst lay persons' (at para 10).

When a lay person enters into a contingency arrangement with another lay person – in other words, agrees to finance litigation in exchange for part of the proceeds – it is known as champerty, which now it seems is perfectly permissible. This followed on the decision in the case of *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA). The full Bench held that there was a difference between lay persons concluding such agreements with each other and legal practitioners entering into such agreements with their clients. Legal practitioners are perceived by their clients to be experts, which puts them in a 'powerful position to influence the actual conduct of litigation'. The court held that lay persons who enter into champertous agreements 'do not possess any of the skills or characteristics' of lawyers. Legal practitioners (in that capacity) have ethical duties to their clients, and to the courts, and that these can come into conflict with their own financial interest in litigation where contingency fee arrangements are involved. Lay persons have no ethical or other legal duties towards the person they are financing. There is therefore, no possibility of a conflict of interest, and they are free to agree on a percentage basis as a reward for financing the case. One begins to wonder how our

courts really view the members of our profession. Are we assumed to be prone to ignore ethical duties, duties that were after all mostly developed by ourselves and are ultimately sanctionable by professional bodies and courts? To put it differently, attorneys at least do have ethical duties to guide their conduct, whereas lay men are apparently at large to enter any *pactum de quota litis*, conscionable or not. Lay men, it seems, are at least given the benefit of the doubt.

Common law contingency fee agreements were from time-to-time accepted by courts. These agreements are now clearly prohibited. Subsequent to the CC's ruling, any attorney who now enters into such an agreement with a client, might well have no fee agreement at all. Common law contingency fee agreements were widely used as an alternative to contingency fee agreements in terms of the Act.

The courts have recently made it clear that unless one has used the exact agreement as laid out in the regulations to the Act, subject to the variations and insertions that that particular form allows, the agreement is not a valid contingency fee agreement, whether it was entered into in the spirit of the Act and follows its other directions or not. South Gauteng High Court Deputy Judge President Mojaelo, in *Mofokeng v Road Accident Fund, Makhuvale v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund* (GSJ) (unreported case no 2009/22649, 2011/19509, 2010/24932, 2011/20268 22-8-2012) (Mojaelo DJP) found that the Contingency Fees Act agreement has to be in accordance with the prescribed form in the Act. The Act is clear and unambiguous in that an attorney shall use the agreement as prescribed in the regulations. In other words, you cannot use any other agreement that appears on the face of it to be a contingency fee agreement, and

then claim that it falls within the Act. According to the *Mofokeng* judgment, one should either use the agreement laid out in the Act, an ordinary non-contingency fee agreement or be faced with invalidity.

Practitioners are left with the choice of either entering into an ordinary hourly fee agreement, where fees are due irrespective of the outcome or an agreement in terms of the Act. This would include a simple 'no success, no fee agreement', where no success fee is charged. This type of agreement, where the practitioner assumes all the risk in exchange for charging only his normal hourly fees, is a fee agreement where payment of fees, but not the extent thereof, is contingent on a successful outcome (non-success fee contingency fee agreements). Such an agreement still has to follow the Act and be in the form prescribed by the Minister. This differs from a contingency fee where the practitioner contracts to receive something more than his normal fee for taking the risk as provided by the Act, which would then be subject to the limitations (a success fee contingency fee agreement).

The courts seem to interpret the limitation of 25% of the capital in success fee contingency fee agreements to apply to the entire fee, which would consist of the normal fee plus the success or uplift fee. Accordingly, always subject to the limitation of double the normal fee, the total fee can never be more than 25% of the capital award. There has been much dispute over the years as to how the contingency fee would be calculated. Opinion obtained from Senior Counsel by the KwaZulu-Natal Law Society and the report on Speculative and Contingency Fees by the South African Law Commission seem to indicate that the 25% limit applied not to the normal fee, but only to the success part of the fee (the uplift fee) and accordingly the normal fee and the success fee together could exceed 25%. The CC never heard argument in this regard, nor dealt with the specific

issues, but, again without any particular reasoning, remarked that the maximum amount allowed under the Act is 25%.

The curious result is that, when a non-success fee contingency fee agreement is entered into, there is apparently no limitation to the maximum that can be levied. The limitations in s 2(2) of the Act, on the face of it, seem to apply only in an instance where fees higher than the normal fees have been negotiated. Accordingly the astonishing result is that, depending on the quantum of the award, an attorney who has not negotiated a higher success fee, might well be entitled to a higher eventual fee than his colleague who has done so. As an example, if an attorney obtains an amount of R 100 000 for his client with whom he has a success fee contingency fee agreement and his normal fees would amount to R 30 000, he is entitled to only R 25 000. The attorney who entered into a non-success fee contingency fee agreement, obtains the same result for the same amount of normal fees will, however, be entitled to the full R 30 000. Even more curious would be the instance where the party and party fees are taxed at R 30 000 for a matter which resulted in a successful claim of R 100 000. What about the difference of R 5 000?

There are a number of issues that have not been resolved by the courts yet, and which will no doubt be raised and dealt with in the coming years. In June 2008, for example, in the judgment of Acting Judge Ramagaga in the *Van der Merwe v The Law Society of the Northern Provinces* (T) (unreported case no 36216/2006, 20-6-2008) it was held that the 25% cap covered not only the total amount of attorneys fees but would also include the advocates' fees as well. It does appear, however, that the Acting Judge limited her views only to instances where the advocate has also agreed to work on contingency and negotiated a higher 'success fee'. It remains, however, an area of uncertainty and it was uncertainties such as these that made many attorneys

very wary of entering into Contingency Fee Act agreements.

In *Thulo v Road Accident Fund* 2011 (5) SA 446 (GSJ), Acting Judge Morison further confused issues by suggesting that the attorneys' fees were still limited to 25% of the amount awarded in the judgment, excluding the costs, but implied that one could enter into an agreement to keep the party and party costs in addition to the 25%. The *Mofokeng* judgment differed in this regard and found this interpretation to be incorrect. Until there are further judgments clarifying these issues, or perhaps the Supreme Court of Appeal delivers a judgment on this, these issues relating to the costs, advocates' fees and also proclamations by judges, incorporated into court orders, will continue to be a source of debate and difference of opinion.

There is also a difference of opinion as to whether or not the 25% includes VAT, especially when the 25% cap has already limited the attorneys fees to lower than what he or she would have been entitled to in terms of a normal fee agreement or non-success fee contingency fee. Another issue to be considered is the question of what the normal fee is and one would assume, logically, that it is whatever the normal hourly fee of the practitioner is. This would be subject of course to the law societies' oversight as well as that of the Taxing Master when it comes to what is a reasonable fee. No law society or attorneys' association would be foolhardy enough to attempt to set down or dictate a normal fee bearing in mind the R 250 000 fine that the Pretoria Attorneys Association incurred a decade ago for giving its members guidance on fees to charge.

• See also 2013 (April) DR 50 and 2014 (April) DR 3.

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University policy and national legislation against equality

By
Tshepo
Mashile

Dean of the Law Faculty of the University of North West and Others v Masisi (SCA) (unreported case no 297/2013, 20-2-2014)
(Navasa, Mhlantla and Petse JJA, Van Zyl and Swain AJJA)

The case of *Dean of the Law Faculty of the University of North West and Others v Masisi* deals with an appeal against a judgment of the Equality Court, Mahikeng (Lacock J). Crisply put, the litigation leading up to the present appeal arose because the respondent, Moramang Simon Masisi, was aggrieved that the three appellants, the Dean of the Law Faculty of the North-West (NWU), the Vice Chancellor of the NWU and the NWU Statutory Body represented by the Rector of the Mahikeng campus, refused to give him academic credit for all the courses he had completed in obtaining his BProc degree from the University of the North (currently the University of Limpopo) in pursuance of his LLB degree for which he had latterly registered at the NWU. Essentially, the respondent complained that he was being discriminated against and that his constitutional right to equal treatment had been violated. The reasoning on which this was based appears to be as follows: Students who began and completed their BProc degrees at the NWU were given credit for all their courses or modules completed in attaining the degree, while those who obtained their BProc degrees from other universities were treated differently and only obtained credit for 50% of the courses completed in obtaining their BProc degrees. This discriminatory treatment, as alleged, was contrary to the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) (at para 1).

In refusing to recognise more than 50% of the courses or modules completed by the respondent at the University of Limpopo, UNW considered itself bound by its own general academic rules to that effect. Furthermore, UNW considered itself bound by s 18(2) of the Joint Statute of the Universities in the Republic of

South Africa approved by the Minister of Education, Arts and Science under the Universities Act 61 of 1955, the relevant provisions of which require a minimum period of attendance at the university to which he has applied for exemption and which in addition stipulates that a student has to complete at least half of the courses prescribed for the degree at such university (at para 2).

The respondent took his complaint to the Equality Court, established in terms of s 16 of the Equality Act, which made the following order (at para 3):

'1. The provisions contained in the paragraphs 15.1.1, 15.1.3, 15.2.1 and 15.2.3 of Rule G15 of the General Academic Rules of the North West University are hereby struck down and declared null and void.

2. The proviso to Rule A5.7.1 of the General Academic Rules of the North West University reading, "provided that exemption shall not be granted for more than half of the number of modules required for the curriculum" is hereby struck down and declared null and void.

3. Section 18(2)(b)(i) and (ii) of the Joint Statute of the Universities in the RSA approved by the Minister of Education, Arts & Science under the Universities Act no 61 of 1955 (the Joint Statute), is hereby struck down and declared null and void, except to the extent that section 8(2)(b)(ii) apply to candidates writing the degree of Bachelor of Education (B.Ed) or Bachelor of Physical Education (B.Ed.Ph.) a Bachelor of Philosophy (B.Phil.).

4. The first to third respondents are directed to grant exemption to the applicant for purposes of writing the LLB degree of all those applicable courses and/or modules successfully completed by the applicant at the University of the North (presently the University of Limpopo) for his B.Proc degree.

5. The first to third respondents are directed to jointly and severally pay the applicant's costs of the application.'

The breadth of the order referred to above is such that the Joint Statute of the Universities in South Africa, which has statutory underpinning and is consonant with the Higher Education Qualifications Framework, published by the Minister of Education, acting within her statutory powers, has been set aside. The order clearly affects all universities in South Africa and impacts on government policy. It is necessary to point out that, although the Minister of Education was cited as a party to the litigation in the Equality Court, the respondent ultimately indicated that no relief would be sought against the minister. As a consequence, the minister did not participate in the proceedings in the Equality Court. None of the other universities was cited as a party (at para 4).

Before the court the Higher Education South Africa NPC (HESA), a non-profit company, appeared as *amicus curiae*. HESA represents 23 South African universities and asserts that it is the voice of South Africa's university leadership. HESA contended that all universities in South Africa are required to comply with the joint statute, which is delegated legislation and remains in force in terms of s 74(6) of the Higher Education Act 101 of 1997 and that the policy underlying the joint statute is supported by it. The Higher Education Qualifications Framework published in October 2007 by the Ministry of Education has the same underlying policy (at para 5).

In its application to be admitted as *amicus curiae* in this court, HESA provided the following justification for the policy referred to in the preceding paragraph:

'Section 18(2)(b) of the Joint Statute has the effect that a student must com-

plete at least half of his or her university courses at the university conferring the degree. This enables the university conferring the degree to have confidence that the student does indeed meet the standards which it proclaims and on which its reputation rests. ... in passing that in certain prestigious foreign universities, no recognition whatsoever is given to courses passed at other universities, no doubt for much the same reason.'

Analysis of legal principle and finding

The court found that the order set out above was probably due to a lack of proper thought being given to whether those issues could viably be delinked from the statutory underpinning for university policy. Before this court the questions were raised about the power of the Equality Court to issue the order referred to above. The appellants also contended that it was not competent for the Equality Court to decide issues beyond those identified at the directions hearing.

The court found further that it is undesirable and inappropriate for courts to make orders declaring statutory provisions and policy directives invalid without providing relevant organs of state

an opportunity to intervene and that it is indeed undesirable for courts to make orders affecting any party without affording such party an opportunity to oppose the relief being sought. In the present case, the Minister of Education has a direct abiding and crucial interest in the issues that arise from the respondent's complaint and which are affected by the order referred to above. In a similar vein the court referred to r 10A of the Uniform Rules of Court.

It was further held that universities or its collective voice, HESA, have a vital interest in the litigation and a possible result. They too were not cited or involved in the litigation in the Equality Court. The Minister and HESA were both interested parties and ought, at the very least, to have been afforded an opportunity to deal with all the issues raised by the respondent's complaint, including the question of the competence of the Equality Court to make an order setting aside legislation.

Having regard to what is set out above, the parties were agreed and the court made the following order (at para 12):

- '1. The appeal is upheld to the extent reflected in the paragraphs that follow -
2. The order of the Equality Court,

North West High Court is set aside;

3. The dispute is referred back to the Equality Court, North West High Court to be dealt with *de novo*;

4. The respondent shall ensure that he will serve a copy of this order and founding papers stating the relief he seeks on all interested parties including (but not limited to) the Minister of Education, The Council on Higher Education, Higher Education South Africa (HESA) and affording them an opportunity to join the dispute and make representations thereon;

5. Any party so identified must respond within the time periods provided in Rule 6 of the Uniform Rules;

6. The Equality Court, North West High Court shall take steps to ensure that the dispute is determined as expeditiously as possible, and may issue directions for the conduct of the proceedings;

7. The costs of the proceedings in the Equality Court and in this Court shall be costs in the cause.'

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NEW LEGISLATION

Legislation published from
15 January – 21 February 2014

* Items marked with an asterisk will be discussed later in the column

BILLS INTRODUCED

Unemployment Insurance Amendment Bill B7 of 2014.
Protection of Crucial Infrastructure (Private Member Bill) B200P of 2014.
Appropriation Bill B4 of 2014.
Medicines and Related Substances Amendment Bill B6 of 2014.
Financial Management of Parliament Amendment Bill B1B of 2014.

COMMENCEMENT OF ACTS

Births and Deaths Registration Act 18 of 2010. Commencement: 1 March 2014. Proc R11 GG37373/26-2-2014.
Defence Special Account Amendment Act 18 of 2005. Commencement: 1 April 2014. Proc19 GG37443/20-3-2014.
Africa Institute of South Africa Act Repeal Act 21 of 2013. Commencement: 1 April 2014. Proc20 GG37460/24-3-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990
Amendment of Regulations regarding Inspections and Appeals (local and international). GN R130 and 131 GG37365/28-2-2014.
Architectural Profession Act 44 of 2000
Fees and charges for the financial year 1 April 2014 – 31 March 2015. BN35 GG37452/20-3-2014.
Auditing Profession Act 26 of 2005
Independent Regulatory Board of Auditors (IRBA): Fees payable to the IRBA with effect from 1 April 2014. BN24 GG37392/7-3-2014.
Independent Regulatory Board of Auditors (IRBA): The Code of Professional Conduct for Registered Auditors (revised 2014). BN25 GG37392/7-3-2014.
Basic Conditions of Employment Act 75 of 1997
Determination: Earnings threshold. GenN202 GG37437/12-3-2014.

Births and Deaths Registration Amendment Act 18 of 2010

Regulations on the registration of births and deaths, 2014. GN R128 GG37373/26-2-2014.

Civil Aviation Act 13 of 2009

Fifth Amendment of the Civil Aviation Regulations, 2011. GN R166 GG37417/7-3-2014 and GN R180 GG37439/14-3-2014.

Civil Aviation Regulations, 2011. GN180 GG37439/14-3-2014.

Collective Investment Schemes Control Act 45 of 2002

Financial Services Board: Determination of permissible deductions from a portfolio. BN39 GG37461/28-3-2014.

Financial Services Board: Exemption of managers of collective investment schemes in property from certain provisions of the Act. BN40 GG37461/28-3-2014 and BN41 GG37487/28-3-2014.

Conditions for the winding up of a Collective Investment Scheme in property under certain circumstances. BN42 GG37487/28-3-2014.

Companies Act 71 of 2008

Alternative methods for incorporating a short standard private company and maintaining company and close corporation information with the Companies and Intellectual Property Commission. GenN192 GG37421/14-3-2014.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Increase of maximum amount of earnings on which the assessment of an employer shall be calculated. GN136 GG37379/26-2-2014.

Increase in monthly pensions. GN137 GG37379/26-2-2014.

Increase in monthly pensions: Amendment of sched 4. GN138 GG37379/26-2-2014.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes issued in terms of s 2(a). GenN203 GG37441/14-3-2014.

Drugs and Drug Trafficking Act 140 of 1992

Amendment of sched 1 and 2. GN R222 GG37495/28-3-2014.

Electoral Act 73 of 1998

Election Timetable for the election of the National Assembly and the election of Provincial Legislature. GN145 GG37387/26-2-2014.

Determination of the fixed number of seats reserved for each region in the 2014 election of the National Assembly. GN R146 GG37388/26-2-2014.

Electoral Commission: National and Provincial Elections: 7 May 2014: Official list of voting stations. GenN161 and 162 GG37409/5-3-2014.

Electronic Communications Act 36 of 2005

Second Call Termination Amendment Regulations, 2014. GenN240 GG37471/26-3-2014.

Films and Publications Act 65 of 1996

Films and Publications Regulations, 2014. GN R184 GG37449/20-3-2014.

Financial Intelligence Centre Act 38 of 2001

Directive 01/2013: Updating of registration information of accountable and reporting institutions. GenN231 GG37461/28-3-2014.

Directive 02/2014: Use of login credentials pursuant to registration with the Financial Intelligence Centre. GenN232 GG37461/28-3-2014.

Financial Markets Act 19 of 2012

Financial Services Board: Amendments to the Johannesburg Stock Exchange (JSE) Equities and Derivatives Rules. BN36 GG37461/28-3-2014.

Financial Services Board: Amendments to JSE listing requirements. BN37 GG37461/28-3-2014.

Health Professions Act 56 of 1974

Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications. BN28 GG37421/14-3-2014.

Income Tax Act 58 of 1962

Determination of the daily amount in respect of meals and incidental costs for purposes of s 8(1). GN114 GG37333/26-2-2014.

Fixing of rate per kilometre in respect of motor vehicles. GN129 GG37375/26-2-2014.

Judges Remuneration and Conditions of Employment Act 47 of 2001

Remuneration of Constitutional Court Judges and Judges. Proc14 GG37389/27-2-2014.

Magistrates Act 90 of 1993

Remuneration of Magistrates. Proc15 GG37389/27-2-2014.

Magistrates' Courts Act 32 of 1944

*Determination of monetary jurisdiction for causes of action in respect of regional divisions. GN216 GG37477/27-3-2014.

*Determination of monetary jurisdiction for causes of action in respect of courts for districts. GN217 GG37477/27-3-2014.

Marketing of Agricultural Products Act 47 of 1996

Establishment of statutory measure: Records and returns by exporters, importers, processors and purchasers of cotton. GN198 and 199 GG37461/28-3-2014.

Establishment of statutory measure and determination of guideline prices: Levy relating to cotton lint. GN200 GG37461/28-3-2014.

Medical Schemes Act 131 of 1998

Council for Medical Schemes: Registered medical schemes. GenN119 GG37372/25-2-2014.

Mental Health Care Act 17 of 2002

Regulations establishing Ministerial Advisory Committee on Mental Health. GN R192 GG37457/20-3-2014.

Municipal Finance Management Act 56 of 2003

Exemption from Regulations 15 and 18 of Municipal Regulations on Minimum Competency Levels, 2007. GN179 GG37432/14-3-2014.

National Credit Act 34 of 2005

Removal of adverse consumer credit information and information relating to paid up judgments. GN R144 GG37386/26-2-2014.

National Environmental Management: Air Quality Act 39 of 2004

Declaration of greenhouse gases as priority air pollutants. GenN172 GG37421/14-3-2014.

Declaration of temporary asphalt plants as a controlled emitter and establishment of emission standards. GN201 GG37461/28-3-2014.

National Environmental Management Act 107 of 1998

Fees for consideration and processing of applications for environmental authorisations and amendments thereto. GN141 GG37383/28-2-2014.

Amendments to sched 1 and 2. GN152 GG37401/28-2-2014.

National Environmental Management: Waste Act 59 of 2003

Fee structure for consideration and processing of applications for waste management licenses, transfer and renewal thereof. GN142 GG37383/28-2-2014.

National Health Act 61 of 2003

Establishment of the National Forensic Pathology Services Committee. GN R178 GG37430/11-3-2014.

Rules Board for Courts of Law Act 107 of 1985

Amendment of rules regulating the conduct of the proceedings of the Magistrate's Courts of South Africa. GN R183 GG37448/18-3-2013.

Amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (r 17, 46 and 66.) GN R212, 213 and 214 GG37475/28-3-2014.

Amendment of the Rules regulating the conduct of the proceedings of the Magistrate's Courts of South Africa (r 20). GN R215 GG37475/28-3-2014.

Small Claims Courts Act 61 of 1984

*Determination of amount (R 15 000) for purposes of ss 15 and 16 of the Small Claims Courts Act. GN R185 GG37450/18-3-2014.

Sheriffs Act 90 of 1986

Appointment of sheriffs for certain areas. GenN167 GG37419/7-3-2014.

• See p 11.

Social Assistance Act 13 of 2004

Increase in respect of social grants. GN211 GG37474/28-3-2014.

Superior Courts Act 10 of 2013

Norms and standards for the performance of judicial functions. GN147 GG37390/28-2-2014.

*Renaming of courts in terms of s 6 of the Act. GN148 GG37390/28-2-2014.

Determination of sittings of the specific courts. GN149 GG37390/28-2-2014.

Use of Official Languages Act 12 of 2012

Regulations in terms of s 13 of the Act. GN R150 GG37398/28-2-2014.

Value-Added Tax Act 89 of 1991

Regulations Prescribing Services for the purpose of the definition of 'Electronic Services' in s 1(1) of the Act. GN R221 GG37489/28-3-2014.

Draft legislation

Draft Employment Equity Regulations, 2014 in terms of the Employment Equity Act 55 of 1998. GN R124 GG37338/28-2-2014.

Proposed amendments to the JSE Equities and Derivatives Rules in terms of the Financial Markets Act 19 of 2012. BN23 GG37364/28-2-2014.

Draft Labour Relations Amendment Bill (s 198A). GN R132 GG37365/28-2-2014.

Proposed criteria for the issuing of licences for pharmacy premises in terms of the Pharmacy Act 53 of 1974. GN R151 GG37399/28-2-2014.

Draft National Exemption Regulations in terms of the National Environmental Management Act 107 of 1998. GenN142 GG37400/28-2-2014.

Draft determination of safety permit fees under s 23(2)(a) of the National Railway Safety Regulator Act 16 of 2002. GenN193 GG37421/14-3-2014.

Draft Rules for Representative Bodies and Support Organisations in terms of the Co-operative Banks Act 40 of 2007. GenN206 GG37443/20-3-2014.

National Pollution Prevention Plans Regulations, 2014 in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GenN171 GG37421/14-3-2014.

Proposed adjustment of the rate of interest provided for in s 1 of the Prescribed Rate of Interest Act 55 of 1975. GenN227 GG37454/19-3-2014.

SELECTED ASPECTS OF LEGISLATION RELATED TO JURISDICTION OF COURTS AND RENAMING OF COURTS

MONETARY JURISDICTION FOR CAUSES OF ACTION IN RESPECT OF REGIONAL DIVISIONS

The determination of the monetary jurisdiction for causes of action in respect of regional divisions has been published in GN216 GG37477/27-3-2014. The jurisdiction will be as follow with effect from 1 June 2014:

Section of the Magistrates' Court Act	Amount
Section 29(1)(a) actions for the delivery or transfer of any property, movable or immovable	Above R 200 000 up to R400 000

NEW LEGISLATION

Section of the Magistrates' Court Act	Amount
Section 29(1)(b) actions of ejectment	Above R 200 000 up to R 400 000
Section 29(1)(d) actions on or arising out of a liquid document or a mortgage bond	Above R 200 000 up to R 400 000
Section 29(1)(e) actions on or arising out of a credit agreement as defined in s 1 of the National Credit Act 34 of 2005	Above R 200 000 up to R 400 000
Section 29 (1)(f) actions in terms of s 16(1) of the Matrimonial Property Act 88 of 1984	Above R 200 000 up to R 400 000
Section 29 (1)(g) actions other than those already mentioned in s 29(1)	Above R 200 000 up to R 400 000

MONETARY JURISDICTION FOR CAUSES OF ACTION IN RESPECT OF DISTRICT DIVISIONS

The determination of the monetary jurisdiction for causes of action in respect of courts for districts has been published in GN217 GG37477/27-3-2014. The jurisdiction will be as follow with effect from 1 June 2014:

Section of the Magistrates' Court Act	Amount
Section 29(1)(a) actions in which is claimed the delivery or transfer of any property, movable or immovable	R 200 000
Section 29(1)(b) actions of ejectment against the occupier of any premises or land within the district	R 200 000
Section 29(1)(c) actions for the determination of a right of way, notwithstanding the provisions of s 46	R 200 000
Section 29(1)(d) actions on or arising out of a liquid document or a mortgage bond	R 200 000
Section 29(1)(f) actions in terms of s 16(1) of the Matrimonial Property Act 88 of 1984	R 200 000
Section 29(1)(g) actions other than those already mentioned in this section	R 200 000

Section of the Magistrates' Court Act	Amount
Section 46(2)(c)(i) the rendering of an account	R 200 000
Section 46(2)(c)(ii) the delivery or transfer of property, movable or immovable	R 200 000
Section 46(2)(c)(iii) the delivery or transfer of property, movable or immovable, exceeding the amount of R 200 000, where the consent of the parties has been obtained in terms of s 45	R 200 000
Section 50(1) any action in which the amount of the claim exceeds the amount mentioned in the next column exclusive of interest and costs	R 3 000
Section 651(3) amount of judgment debtor's debts for purposes of s 651(2)	R 50 000
Section 74(1)(b) statement by a debtor of his total debts	R 50 000
Section 74(2) total amount of debtor's debts	R 50 000
Section 92(1)(b) fine imposed by a court of a regional division as punishment for an offence	R 120 000 where the court is not the court of a regional division, and R 600 000 where the court is the court of a regional division.

MONETARY JURISDICTION OF SMALL CLAIMS COURTS

The determination of the monetary jurisdiction of small claim courts has been published in GN R185 GG37450/18-3-2014. The jurisdiction will be as follow with effect from 1 April 2014:

Section of the Small Claims Court Act	Amount
Sections 15 and 16	R 15 000

RENAMING OF COURTS IN TERMS OF S 6 OF THE SUPERIOR COURTS ACT 10 OF 2003

A notice on the renaming of courts in terms of s 6 of the Superior Courts Act has been published in GN148 GG37390/28-2-2014. The Superior Courts Act has created a single High Court

with various divisions in terms of s 6. Therefore all court processes in the High Court shall be headed in accordance with the Act, which shall be as follow:

Eastern Cape	In the High Court of South Africa Eastern Cape Division, Grahamstown
	In the High Court of South Africa Eastern Cape Local Division, Bhisho
	In the High Court of South Africa Eastern Cape Local Division, Mthatha
	In the High Court of South Africa Eastern Cape Local Division, Port Elizabeth
Free State	In the High Court of South Africa Free State Division, Bloemfontein
Gauteng	In the High Court of South Africa Gauteng Division, Pretoria
	In the High Court of South Africa Gauteng Local Division, Johannesburg
Limpopo	In the High Court of South Africa Gauteng Division, Pretoria (functioning as Limpopo Division, Polokwane)
	In the High Court of South Africa Gauteng Division, Pretoria (functioning as Limpopo Local Division, Thohoyandou)
Mpumalanga	In the High Court of South Africa Gauteng Division, Pretoria (functioning as Mpumalanga Division, Nelspruit)
KwaZulu-Natal	In the High Court of South Africa KwaZulu-Natal Division, Pietermaritzburg
	In the High Court of South Africa KwaZulu-Natal Local Division, Durban
Northern Cape	In the High Court of South Africa Northern Cape Division, Kimberley
North-West	In the High Court of South Africa North West Division, Mahikeng
Western Cape	In the High Court of South Africa Western Cape Division, Cape Town



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Employment law update



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Traditional healer certificates

In the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoleli and Others* [2014] 3 BLLR 207 (SCA) the Supreme Court of Appeal (SCA) was asked to consider the Labour Court's finding that the employee's dismissal for failing to obey an instruction to resume work was substantively unfair. The employee had remained off work in order to complete her training as a traditional healer. The employer's version was that the employee had wilfully been absent from work after the employer had refused to grant her leave for purposes unrelated to her employment. The employee's case, on the other hand, was that her absence was for reasons beyond her control as in terms of her culture she had a calling from her ancestors to train as a traditional healer and she genuinely believed that she would suffer misfortune if she returned to work and did not complete her course.

When the employee first pursued her calling to be a traditional healer she requested that the employer accommodate her by not requiring her to work the afternoon shift so that she could attend her training. This request was accommodated. Later in the year the employee again approached the employer and requested that she be granted about five weeks' unpaid leave to attend further training as a traditional healer. Given the fact that the employee had exhausted her annual leave, sick leave and compassionate leave entitlement and the fact that the employer was short staffed and would not be able to provide a proper service to its guests without her, the employee was granted only one week's un-

paid leave and was instructed to return to work immediately thereafter.

Before going on unpaid leave the employee left an envelope on her manager's desk containing two notes from her traditional healer. The first note requested that the employee be excused from work for approximately five weeks to allow her to complete her traditional healer's course. The other note was a certificate stating that the employee had been diagnosed as having 'perminisions [sic] of ancestors'. The certificate recorded that the employee would only resume work on 8 July 2007, approximately five weeks later. The day before the employee was required to return to work she phoned her employer to check that they had received the documents contained in the envelope. She was advised that her application for leave had been rejected and that the employer would institute disciplinary action in the event that she did not report for duty. The employee did not report for duty and was charged with, *inter alia*, insubordination and being absent from work for more than three days without permission. At the disciplinary inquiry, the employee contended that she was unable to return to work as she was seriously ill in that she was 'disturbed in her spirits'. This was confirmed by the letter from her traditional healer and thus the employee alleged that her absence should be treated as sick leave. She argued that the employer should attach the same weight to the letter as it would to a medical certificate. The employer refused and maintained that the employee had committed misconduct by absconding from work to attend a course that was unrelated to her employment in contravention of the employer's policies and procedures. This

was particularly because the letter from the traditional healer was not a medical certificate issued and signed by a medical practitioner as contemplated in the Basic Conditions of Employment Act 75 of 1997. The employee was found guilty of the charges against her and dismissed.

The employee referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA). The employer argued, at the CCMA, that the employee had been denied unpaid leave as it would have been short staffed and unable to provide a proper service to its guests in the event that the employee had been granted five weeks' unpaid leave. The employer contended that the fact that the employee wanted to attend a traditional healer's course was irrelevant to its decision, which was based purely on operational requirements. The employee argued that she was of the view that she was seriously ill as she saw visions of her ancestors and was required to complete her training as a traditional healer. She believed that if she did not attend the training her health would have seriously deteriorated. The traditional healer testified at the CCMA that if the employee did not attend the training, death might have befallen her. This evidence was not challenged by the employer. However, the employer stated that it would have only treated the absence as sick leave in the event that the employee had submitted a medical certificate from a medical practitioner. The commissioner found that the employer did not understand the employee's cultural beliefs and that if such beliefs had been properly understood then the employer would have considered the employee's condition as an illness and granted her sick

leave. The commissioner further found that the employee had no option but to disregard her employer's instructions to report to work as she genuinely believed that her health would deteriorate if she did not adhere to her ancestors' calling to train as a traditional healer. The commissioner concluded that the employee's absence was due to circumstances beyond her control and that her dismissal was substantively unfair.

When the commissioner's decision was taken on review, the Labour Court found that the award was well reasoned and accordingly dismissed the review application. Similarly, the Labour Appeal Court (LAC) dismissed the appeal and found that the commissioner had properly applied his mind to the facts.

On appeal to the SCA the employer argued that the commissioner committed a gross irregularity in terms of s 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 in that he misconceived the true nature of the inquiry. In this regard, it was alleged that the commissioner should have considered the fact that the employee had no contractual entitlement to unpaid leave. Furthermore, the operational requirements of the employer could not justify a period of absence of five weeks. It was also alleged that the commissioner was required to consider the fact that the employee had been insubordinate in refusing to report for duty. Thus, the employer alleged

that if the commissioner had considered whether the employer applied the correct principles applicable to a request for unpaid leave as opposed to determining whether the employee was justified in not reporting for duty, then he would have found that the dismissal was substantively fair.

Cachalia JA found that where an employee is dismissed for being absent without authorisation, and even in direct contravention of an employer's instructions, a court may intervene if the employee's failure to obey an instruction to report for duty is reasonable and justified. The commissioner was, therefore, entitled to determine whether there was a justifiable reason for the employee failing to obey the instruction. It was significant that the employer stated that the employee would not have been dismissed if she had submitted a medical certificate from a medical practitioner. Such absence would have been tolerated despite the employer's operational requirements. The request for unpaid leave was thus rejected purely on the basis that it was supported by the traditional healer's note as proof of incapacity.

The employer seemed to understand the cultural significance of training to become a traditional healer as it had accommodated the employee on two occasions to enable her to carry out her training. However, the employer did not

accept that the employee was sick in the absence of a medical certificate from a registered medical practitioner. Cachalia JA considered the fact that the World Health Organisation found that 80% of South Africans make use of traditional medicine and that traditional medicine considers the spiritual origin of illness, which includes communication with the ancestors. It was noted that while the courts are equipped to deal with conventional medicine, they have not been equipped to deal with religious doctrine and cultural practices. Thus, Cachalia JA found that it is not up to the courts to decide the acceptability, logic, consistency or comprehensibility of the belief – the courts should only be concerned with the sincerity of a person's belief and whether or not there is an ulterior motive for invoking the belief. Cachalia JA pointed out that there may be operational requirements that justify terminating an employment relationship where an employee is on extended absence due to ill health but this was not the process followed in these circumstances.

Cachalia JA (with Brand JA, Leach JA, Willis JJA and Zondi AJA concurring) concluded that the LAC's decision was correct and dismissed the appeal.

• See also 2014 (Apr) DR 42 and 2012 (Oct) DR 53.



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Curriculum Vitae fraud – dishonest act which warrants dismissal

Rainbow Farms (Pty) Ltd v Dorasamy and Others (unreported case no D 303-11, 25-2-2014 (Cele J)).

The employee was dismissed for what is commonly referred to as CV fraud.

The first respondent arbitrator found her dismissal substantively unfair and as a result thereof the employee was awarded reinstatement without back pay.

On review the applicant employer sought to have the arbitrator's decision set aside and substituted with a finding that the employee's dismissal was substantively fair.

The employee took up a permanent position with the employer in 1999 as a vaccine technologist. In 2006 the employee held the position of virologist and was promoted to quality manager in 2007.

In response to an internal advertisement, the employee applied for the post of vaccine manager and submitted her CV wherein she listed her qualifications as –

- Matric exemption – 1992;
- Diploma: Biotechnology – 1998;
- Bachelors of Technology Degree: Business Administration – 2002; and

• Bachelors of Technology: Quality Management – 2005.

Subsequent to submitting her CV, but before being interviewed, it came to the attention of her manager that the employee had not obtained her Bachelors of Technology: Quality Management degree in that one course for the degree remained outstanding. Her manager advised her to change her CV to reflect this, which in turn prompted the employee to insert the word 'current' after listing the aforementioned degree.

Having been interviewed by her manager and two others, the employee was asked to produce copies of her qualifications. At that point it became apparent that the employee had not yet completed another degree, that being her Business Administrative degree and was charged and dismissed for dishonesty, more particularly for the reason that she was aware that she had to expressly qualify in her CV which qualifications remained incomplete.

Arbitration

Having heard the evidence of both parties the arbitrator held the following:

The employer would have sooner or later ascertained the employee's error – it funded the employee's studies and gave the latter time off to prepare and write her exams. As such, it could be expected that the employer had a file with all the relevant documentation pertaining to the employee which, among others, would have included the employee's qualifications. Therefore, if the employer wanted to verify the employee's qualifications it should have accessed the employee's personal file. Had it done so, it could have informed the employee of her error and rectified it.

In her explanation the employee stated that when listing the qualification of

Business Administrative, the corresponding year she inserted in her CV was intended to reflect the year she commenced her studies for that qualification. In light of the fact that the employee was aware she had not completed her studies for that course, the arbitrator accepted the employee's explanation.

In his conclusion the arbitrator held that the employee was not dishonest and at best could be described as a person who did not know how to compile a CV. In support of this, the arbitrator accepted that the qualification under review was not relevant to the post the employee applied for and further that the employee's non-disclosure of the qualification in question would not have altered the fact that the interviewing panel found her to be the preferred candidate for the post.

With regard to remedy the arbitrator found that it was fitting to reinstate the employee into the position of vaccine manager or a position similar or to her previous position of quality manager.

Review

In adopting the appropriate test on review the court, per Cele J, set aside the award on the following grounds:

First the court found it unreasonable for anyone to accept the employee's version with regard to her interpretation of the corresponding year inserted next to the qualification Business Administrative. In support of this finding the court noted that when listing her first two qualifications, the corresponding year the employee inserted was the year she obtained such qualifications; this, according to the court, strongly inferred that the employee appreciated the conventional understanding of what a corresponding year means, listed next to a qualification, but yet seems to relinquish this understanding, without explanation, when it came to the qualification under review.

With regard to the arbitrator's first finding, the court said the following:

'The commissioner's findings that the applicant would have sooner or later found out about the third respondent's misrepresentation or ought to have found out about it and brought it to her attention by looking at her personnel file was completely unreasonable and based upon an incorrect premise. There was no need to tell the third respondent what she very well knew. She was the creator of her CV and the commissioner benefitted her with ignorance that she was never entitled to in the first place.

It is not a defence to an allegation of fraud that the person to whom the representation was being made, could have by the exercise of reasonable care, discovered the truth of the misrepresentation and ought never to have been duped by it.'

The court further held that

on a proper assessment of the employee's conduct one is left with the inescapable conclusion that the employee was guilty of a dishonest act, the effect of which severed the trust relationship between employer and employee and thus justifying dismissal.

The award was set aside and replaced with a finding that the employee's dismissal was substantively fair. No order as to costs was made.

Note: Unreported cases at date of publication may have subsequently been reported.

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Recent articles and research

The backlog of journal articles from October 2013 will be published in the following months issues of *De Rebus*.

ABBREVIATIONS:

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

JFJS: *Journal for Juridical Science*

PLD: *Property Law Digest* (LexisNexis)

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

SALJ: *South African Law Journal* (Juta)

SLR: *Stellenbosch Law Review*

SA Merc LJ: *South African Mercantile Law Journal* (Juta)

THRHR: *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (LexisNexis)

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

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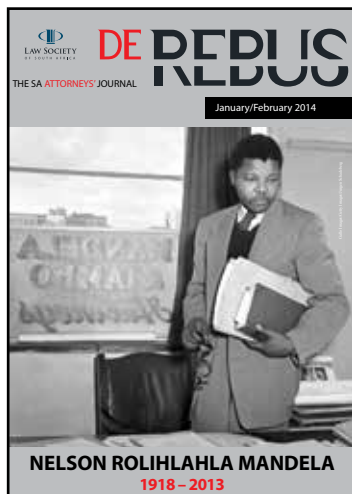
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By Max du Plessis, Glenn Penfold and Jason Brickhill

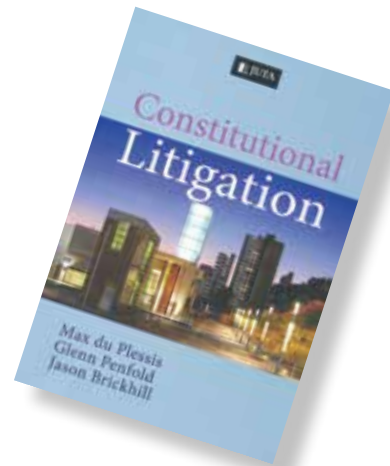
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Constitutional Litigation is a valuable addition to the library of books on post-apartheid constitutional law in South Africa. Authored by three lawyers, skilled in the craft of constitutional litigation themselves, the book offers practical guidance as to the procedure of constitutional litigation.

Twenty years into constitutional democracy, the law of South Africa has been shaken to its roots by the imperative that all law, including common law, must comply with the Constitution, particularly the Bill of Rights. No area of law, not even that of contract law, is immune from constitutional scrutiny. The result has been a burgeoning area of legal practice that requires the astute application of constitutional principles and provisions to legal disputes. The Constitution goes further and stipulates that the state must take certain steps in relation to the realisation of rights in the Bill of Rights. This has led to a new body of law in which the state is held accountable for its (non)compliance with these duties, often in relation to socio-economic rights.

The book guides the practitioner through rules of procedure that are specific to constitutional litigation in a manner that is easy to follow. The contents are comprehensive and with over ten chapters, the book covers the typical procedural issues that a practitioner will encounter in constitutional litigation. In addition to the prosaic procedural matters of leave to appeal, confirmation proceedings and the like, the book also takes one through the terrain of the relaxed standing requirements

in constitutional matters, the expanded role of *amici curiae* and the various remedial options that are available to parties. These subjects involve more than a mechanical technique of constitutional litigation, but a nuanced understanding of what is at stake in such litigation. Given the breadth of the subject-matter it is not surprising that the authors do not study the topics in great depth. Instead, they offer detailed references that will allow a reader who wishes to explore an issue to be pointed in the right direction.

As an aid to readers, the book also reproduces the rules of the Constitutional Court, the Constitutional Court Practice Directives and rules of various courts governing *amici curiae* as appendices. In keeping with the functional style of the book, the authors also dedicate a chapter to 'Hearings in the Constitutional Court', with such pragmatic advice as how to address the justices of the court such as, by their surname rather than the antiquated form of address in other superior courts; a habit that can take counsel a few attempts to break.

This book is recommended reading for those wanting to hone their skills in constitutional practice. It is certainly my hope that it will contribute to a swelling of the ranks of constitutional lawyers. For, 20 years on, the Constitution has proven its mettle and will remain an important source of the development of our law as our democracy matures.

Adila Hassim is a member of the Thulamela Group of Advocates and is head of litigation at Section27. 

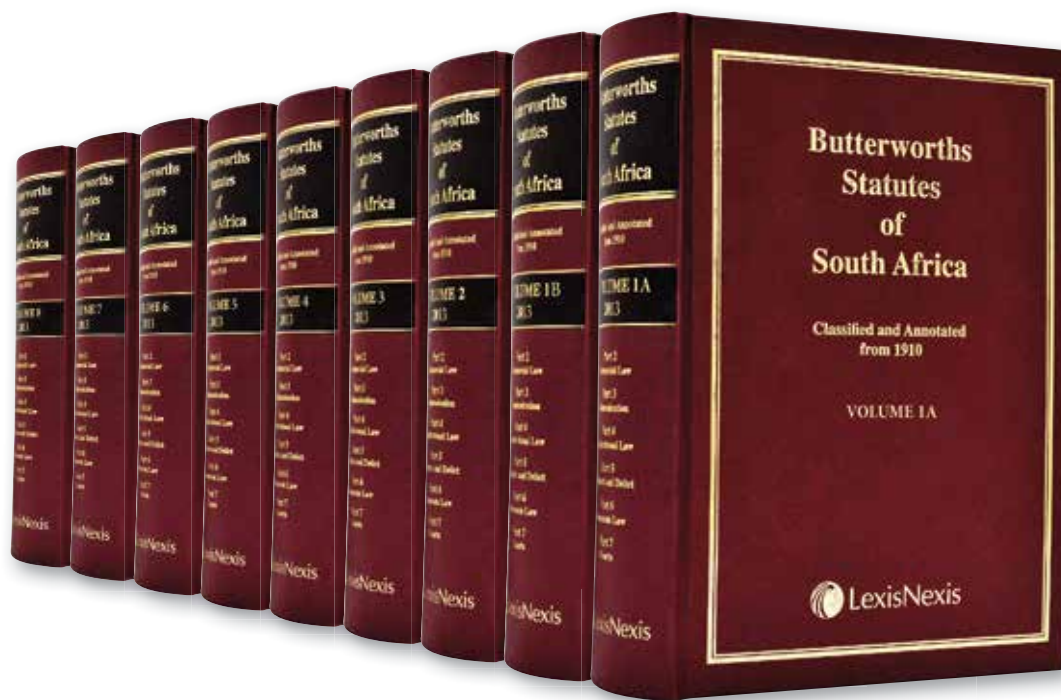


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