LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

DECEMBER 2013

# CUTTING THE LIFELINE

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THE SA ATTORNEYS' JOURNAL

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DECEMBER 2013 | Issue 537
ISSN 0250-0329


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***DE REBUS* ONLINE:** www.derebus.org.za

**CONTENTS:** Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

*De Rebus* editorial staff use the **LexisNexis online product:** MyLexisNexis.
Go to www.lexisnexis.co.za for more information.

**PRINTER:** Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

**AUDIO VERSION:** The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

**ADVERTISEMENTS:**
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**CIRCULATION:** *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. It circulates free of charge to all practising attorneys and candidate attorneys and is also available on general subscription.

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All inquiries and notifications by practising attorneys and candidate attorneys should be addressed to the relevant law society which, in turn, will notify the Law Society of SA.

**SUBSCRIPTIONS:**
General, and non-practising attorneys: R 693 p/a
Retired attorneys and full-time law students: R 532.40 p/a
Cover price: R73 each
Subscribers from African Postal Union countries (surface mail): R 1 101.10 (VAT excl)
Overseas subscribers (surface mail): R 1 344.20 (VAT excl)

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# Lost in transformation

This is an abridged version of a paper delivered by Johannesburg attorney Mohamed Husain at the Ahmed Kathrada Foundation 2013 annual conference in October 2013, titled *Lost in transformation? Reviewing 20 years of transformation in South Africa*, in a session on judicial transformation.

The word 'transformation' means different things to different people. It does not appear in the South African Constitution and yet is one of the most important reasons for, and the basic premise, of the Constitution. The interim Constitution refers to itself as providing 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

The late Chief Justice Pius Langa suggested that transformation entails 'a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships'.

Unfortunately, transformation is often not understood to be the revolutionary and all-encompassing process referred to by Justice Langa. Worse still, it is equated merely to race and gender representivity. Representivity is an important element of, but does not equate to, transformation. Any societal institution that is committed to transformation has to demonstrate not only that it is broadly demographically representative (being a necessary measure to counter the destructive social, political and economic engineering of our past), but also that such representatives demonstrate a commitment by word and deed to the reconstruction of the state and society referred to by Justice Langa, so that the values enshrined in the Constitution become a reality for all.

Professor Pierre De Vos of the University of Cape Town poses a few acerbic and rhetorical questions to demonstrate what transformation is not. He asks what politicians or the emerging business elite mean when they refer to transformation. 'Do they mean that we should continue as before but should just have less white people with their snouts in the trough and more black people benefiting from the spoils of a system that remains – in its essential structure at least – not much different from that which operated under apartheid?' He continues: 'What is transformation? Can one eat it and use it as a blanket at night to ward off the cold? Will it provide a roof over one's head, clean drinking water and electricity and a job that will allow one to live with a semblance of dignity? Can one feed one's children with transformation and send them to school on it? Can one get good medical care (I have not yet seen any pharmacy stocking transformation pills that will make us healthy) and protect oneself and one's loved ones from crime with a transformation blanket?' (P de Vos 'What do we talk about when we talk about "transformation"?' http://constitutionallyspeaking.co.za/what-do-we-talk-about-when-we-talk-about-transformation-2/, accessed 13-11-2013).

He states that transformation has become a catchphrase to justify greed and self-interest and prevent the fundamental changes needed to actually address the monumental poverty and the criminal gap in wealth and personal circumstances between the rich (more and more a non-racial rich) and the poor, which remains largely black. He says that the word 'transformation' 'does not cut the mustard, [i]t has become a hollow and empty word, devoid of any real meaning'.

The above discussion is critical to the way we view the transformation of the judiciary.

Because I start from the premise that racial and gender representivity is but one aspect of transformation and that it is not axiomatic that such representivity leads to the fundamental reconstruction of our society that is required (which seems to be if not an overt then at least a subliminal message conveyed by many contributors to the debate), I am not going to spend much time on the numbers of black and female judicial officers. Suffice to say that much progress has been made in ensuring that the Bench is racially representative, but more can be done to make it more gender representative.

Generally speaking, the South African judiciary has acquitted itself quite favourably since the advent of democracy. The jurisprudence of the Constitutional Court is highly regarded across the world. It has handed down many seminal judgments such as in the cases of *S v Makwanyane and Another* 1995 (3) SA 391 (CC), *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC), *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) and cases dealing with discrimination based on, among other things, sexual orientation. Generally speaking, the Bench has shown itself to be independent. However, the current concerns around the structure and functioning of the Judicial Service Commission (JSC) need to be addressed carefully. Unless these concerns are debated dispassionately, openly and maturely a dark cloud will hang over the propriety of the judicial appointment process and its contribution to transformation. Ultimately, this would lead to a lack of respect for the Bench.

The creation of the JSC was revolutionary and a decisive break from the past. In the past, judges were by and large appointed on the basis of their political affiliation by the executive through a secret process. The only transparent aspect of the process was that you knew that you stood a good chance of being appointed if you sup-

ported the status quo and could be counted on to give judicial legitimacy to repressive legislation. Of course, not all judges fell into this description, but I speak generally.

Many years before the United Kingdom and other developed countries within the Commonwealth introduced judicial appointment bodies, the JSC was created. Unlike most countries it issued public invitations for vacancies, interviewed applicants openly and sometimes under the glare of television cameras and it was comprised of a cross-section of persons.

Currently, the biggest debate regarding the functioning of the JSC relates to its interpretation of ss 174(1) and 174(2) of the Constitution. Since that debate turns on the *functioning* of the JSC (and is a litmus test for what its members regard transformation to be), I deal with another problematic question, which has not received as much exposure, namely the *composition* of the JSC.

Section 178 of the Constitution deals with the composition of the JSC. It is comprised of 23 members, namely –

- the Chief Justice;
- the Minister of Justice;
- the President of the Supreme Court of Appeal;
- one Judge President;
- two practising attorneys;
- two practising advocates;
- one professor of law;
- four presidential nominees; and
- ten members of parliament.

Therefore 15 of the 23 members are representative of the executive and the legislature. I believe this to be undesirable. It can lead to the perception, at the very least, that the appointment process of judges is not an independent one and that the process is unduly influenced by the executive and legislature. I raise this as a matter of principle and not on the assumption that the Minister of Justice, the presidential nominees and the members of parliament will vote as a block.

I can understand representation from members of parliament on the JSC. However, I believe that this should be kept to a minimum and almost certainly the president's power to nominate should be abolished. The United Kingdom's Judicial Appointments Commission is made up of 15 members – two from the legal profession, five judges, one member of the tribunal (who is a judge), one magistrate and six lay people including the chairman. There are no representatives of the executive or legislature. The Nigerian National Judicial Council is comprised of 25 members the majority of whom are serving and retired judges, five of whom represent the profession and two are lay persons. In India, the process is not transparent in that the chief justice nominates judges for appointment to the prime minister, after private consultations with other judges. However, there is no direct involvement of the legislature or the executive in the nominations process. The Judicial Commission of New South Wales consists of six official members (who are all judges) and four appointed members. Although the last four members are appointed by the governor of New South Wales, one is a legal practitioner and the other three are lay persons. The majority therefore is constituted by members of the Bench. I believe there are many other examples around the world that reflect the trend of minimal, if any, involvement in the judicial appointments process by appointees of the legislature and executive.

The interesting question that arises, insofar as the members of parliament are concerned, is whether they are to act in a representative capacity in discharging their functions on the JSC. In other words, are they to approach their functions in accordance with party political lines? The answer to this must be in the negative. Each member of the JSC is to consider only the criteria referred to in s 174 of the Constitution and is not to be motivated by any political party preferences or agendas.

The vexed question of the proper interpretation of s 174(1) and (2) must be dealt with. Section 174(1) in its relevant part provides: 'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.' Section 174(2) provides: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.' At the heart of the debate is the relationship between the requirements of being 'appropriately qualified' and being a 'fit and proper person' on the one hand and the need for the judiciary to broadly reflect the country's population in terms of race and gender on the other.

It has been argued that the actual criteria for appointment as a judge are the two referred to in s 174(1), namely that a person must be 'appropriately qualified' and must be 'fit and proper', while the requirement of s 174(2), namely race and gender representivity, is a consideration or a rider and not a criterion. It is instructive to note that the section itself uses the word 'consideration'. It is therefore not a dispositive criterion. In support of this argument, it is contended that s 174(2) is subordinate to s 174(1). There is much to be said for this argument and it appears to be supported by a textual interpretation of the relevant subsections. It is also logical.

The contrary argument is that the requirement of representivity in s 174(2) is a constitutional imperative and that it is as much a criterion as the two set out in s 174(1). However, this argument appears not to be sustainable. The matter is currently before court and the sooner we get clarity on the proper interpretation, the better.

The requirements of appropriate qualification and fitness and propriety are not defined in the Constitution. 'Appropriately qualified' can have a narrow meaning and can refer only to academic and professional qualifications. I think it is accepted that this narrow definition is inadequate and that legal knowledge and experience are part and parcel of the definition. This does not necessarily mean that every candidate must have the skills and the experience in every branch of the law. Legislation relating to specialist courts such as the Labour Court and the Land Claims Court requires their judges to have had experience and expertise in those fields. Academics who have spent a lifetime teaching, for example, public law, might well be more suited to the Constitutional Court than to the High Court where experience in general litigation and criminal law might be more appropriate. Of course, candidates must show that they will be able to demonstrate the qualities that judges are required to have – namely, a good grasp of the law and its application, forensic ability, court procedure and the ability to articulate both orally and in writing.

One of the major difficulties in considering the criterion of appropriate qualification, especially in the broad sense in which it must be defined, is that due to our past, people of colour were forced to study at so-called 'bush colleges' where the standard was certainly not the same as those in the more established and better resourced 'white' universities, such as the University of the Witwatersrand and the University of Cape Town. Similarly, most practitioners of colour were not exposed to many areas of practice either as advocates or attorneys. A nuanced approach has to be followed in this regard, with consideration given to the potential that such candidates would have as opposed to actual experience, as one of the measures to level the playing fields. However, this does not mean that a person of colour who is clearly not appropriately qualified ought to be appointed on the basis that it satisfies the requirement of racial and gender representivity referred to in s 174(2).

The criterion of fitness and propriety refers to the personal attributes of honesty, integrity, independence and an unwavering commitment to the values of the Constitution. These attributes cover the definition of transformation by Justice Langa that I referred to above and are informed by s 165(2) of the Constitution, which states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially without fear, favour or prejudice. A great deal more can be said about these elements.

The provision of s 174(2) that the judiciary ought to reflect broadly the racial and gender composition of South Africa needs to be unpacked.

For the judiciary to be legitimate, it is important that black men and women are appointed in good number. However, it needs to be understood that these judges are not representatives of any particular constituency. Sir Sydney Kentridge QC put it this way when talking about the UK's Supreme Court:

'The concept of representativeness may be quickly discarded. A more fruitful concept is diversity. Diversity in a court of final appeal is in my view a good in itself. This does not mean that a woman judge on the panel or a judge from a different ethnic background will necessarily decide a case differently from a white male judge. But their presence could enrich the court' (S Kentridge 'The Highest Court: Selecting the Judges' (2003) 62(1) *Cambridge Law Journal* 55 at 60).

He also quoted Lady Justice Hale who said that 'a generally more diverse Bench, with a wider range of backgrounds, experience and perspectives on life, may well be expected to bring about some collective change in empathy and understanding for the diverse background, experience and perspectives of those whose cases come before them' (at 60).

Speaking of his experience as a judge of the South African Constitutional Court, Sir Kentridge said:

'This diversity [of the court] illuminated our conferences especially when competing interests, individual, governmental and social, had to be weighed. I have no doubt that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had. Yet no-one, black, white, male or female was representing any constituency' (at 61).

Professor Kate Malleson states that: 'The need for judges to be independent and impartial means that we should not talk about a representative judiciary in the same way we might the legislature and the executive. Judges are not there to represent the interests of any particular group but to ensure that the law is applied fairly and equally to all' (K Malleson 'The New Judiciary: Rethinking the Merit Principle in Judicial Selection' vol 33 no 1 (2006) *Journal of Law and Society* 126).

What demographic representivity cannot mean is that one should resort to the racial classifications used under apartheid, namely black, coloured, Indian and white. That would lead to the absurdity that each such group should be represented proportionately.

I agree with the University of Cape Town's Democratic Governance and Rights Unit, when it states that:

'While it is difficult to resist the conclusion that the section has been unhelpfully drafted, it is similarly difficult to see both as a matter of interpretation and given our colonial and apartheid history why we should not strive for a Bench that is composed primarily of judges of African descent. That being said, we must strongly resist any interpretation that frustrates non-racialism and perpetuates apartheid's offensive racial practices' (S Cowen 'Judicial Selection in South Africa' (2010) www.dgru.uct.ac.za, accessed 14-11-2013).

The transformation of the judiciary depends on each candidate applying for appointment being carefully considered against the wider definitions of 'appropriately qualified' and 'fit and proper' suggested above. If a black candidate does not meet these criteria then whether he or she contributes towards the racial and gender composition of the Bench is irrelevant. The converse holds true: If a white candidate meets the criteria in all respects that candidate should not be excluded on account solely of his or her colour and gender. A narrow approach to the criteria in s 174(1) and a narrow and formalistic approach to the requirement of race and gender representivity in s 174(2) could have the effect of excluding white progressives and appointing black conservatives on the Bench.

As regards the question whether representivity in the judiciary translates to more socially-just practices, the answer has to be 'not likely', unless those appointed on such a ticket meet the requirements of the criteria as defined above and demonstrate a commitment to true transformation.

I submit that the JSC can do much more to ensure that candidates are questioned more intensely on broader considerations of transformation. With respect, there have been a few unfortunate appointments of both white and black candidates, which suggest that the process has not been sufficiently rigorous and all-embracing. The proper functioning and structuring of the JSC would enable the Bench to meet the imperatives of independence, of being subject only to the Constitution and the law and of applying the law impartially and without fear, favour or prejudice, as is required by s 165(2) of the Constitution.

❑

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**• Please note that the word limit is now 2 000 words.**

**• Upcoming deadlines for article submissions: 20 January 2014 and 17 February 2014.**


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

*De Rebus* will be back in 2014 with its combined January/February edition, which will be sent out at the beginning of February.

Standing from left to right: Kevin O'Reilly, Kathleen Kriel and Shireen Mahomed.

Seated from left to right: Mapula Sedutla and Nomfundo Manyathi-Jele

# 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.

## Is judicare allocation really equal?

I am writing this letter in response to the letter 'Legal Aid SA subscribes to equal opportunity in judicare allocation' by Bongani Mahlangu in the September issue of *De Rebus* (2013 (Sept) *DR* 4). I applied to be placed on the judicare roster of the Durban Justice Centre in 2009. However, I have still not received a single instruction.

At the outset I wish to state that I fully identify with the aspirations of Legal Aid South Africa in providing legal services for the poor, particularly the previously marginalised. In fact, that was one of the reasons why I wanted to do judicare work. I am also a former candidate attorney of Legal Aid South Africa. Access to legal representation is ineffable and imperative in any constitutional democracy.

In South Africa, criminal proceedings are heard in lower courts, namely district and regional courts, and in the High Court. In terms of an accreditation agreement I signed in 2009, no experience is required to do district court work.

For the past four years I have not received a single instruction from the Durban Justice Centre. After I contacted Mr Kishore Mehta, the principal of the Durban Justice Centre in 2009, I was informed that the reason why I received no instructions was because I did not have right of appearance in the High Court and only such matters were given to private attorneys at that time. I subsequently acquired right of appearance in the High Court, yet four years later, I have still received no instructions. Last year, I was contacted by the administrative manager of the Durban Justice Centre, Henk Engelbrecht, who stated that Legal Aid South Africa required my practice to have a tax clearance certificate. Since I had not received a single instruction from them, why should I be expected to provide a tax clearance certificate? Essentially, it would be a mere formality to remove my practice from the judicare roster.

After telling the administrative manager that I saw no point in providing them with the certificate, he stated that I had to provide a tax clearance certificate regardless of the fact that I had received no instructions. As stated, I had not received any instructions for district court matters (for which no experience is required) or for High Court matters, even after obtaining right of appearance on the advice of the Justice Centre principal.

The facts speak for themselves. It must also be mentioned that any practitioner undertaking judicare work has to be recommended by the Justice Centre Executive (JCE). If any objections were to be raised against me for any reason whatsoever, surely, the JCE could have opted to exercise this discretion and not recommend me.

Mr Mahlangu has mentioned the commitment of his organisation to eq-

uity. However, more can be said. As I stated in my previous letter, 'Is everyone equal before the law?' that was published in the August issue of *De Rebus* (2013 (Aug) *DR* 4), the right to equality consists of two concepts, namely formal and substantive equality. Formal equality entails providing the previously disadvantaged with equal rights. Substantive equality entails positive measures, such as black economic empowerment, to advance the previously marginalised. Such measures, however, are required to be reasonable, justiciable and not arbitrary.

Lofty ideals should be put into practice, otherwise our Constitution will remain paper law. Mr Mahlangu has stated that Legal Aid South Africa has taken steps to ensure that their judicare allocation ensures equal opportunities for judicare practitioners. However, one must distinguish between idealism and reality.

***Constantinos Constantinides,***
attorney, Durban

## LLB debate disheartening to students

I am writing in response to the letter 'BProc degree can set standard' by André Muller in the October 2013 issue of *De Rebus* (2013 (Oct) *DR* 4). With regard to the recent debate on the quality of the LLB graduates, it is disheartening to read the comments made about this subject. I am a third-year LLB student at the University of South Africa (Unisa) and, as students, we have no choice but to do the LLB degree if we wish to become attorneys, advocates, legal advisers, etcetera. There simply is no other choice. I work very hard to obtain a high percentage average and am passionate about law. I take this degree very seriously. The negative perception about the quality of my degree is, however, possibly in the back of employers' minds and I worry about my chances of securing articles.

With regard to Mr Muller's comments about the curriculum, constitutional law and administrative law are still compulsory second-year level modules. I disagree with his suggestion to have Latin as a separate module. Latin is included to some degree in every LLB module, admittedly, more so in some than others. The maxims and principles form part of the coursework and are included in assignments and examinations. Secondly, Latin as a separate module would go against the plain English movement to avoid jargon and allow the layman easier understanding of, for example, contracts. Thirdly, if Latin is made a compulsory module, some other compulsory module will have to fall away.

Accountancy is included in the LLB in the module 'Financial accounting principles for law practitioners'. This is a compulsory first-year level module. Of course, I can only comment on Unisa's modules and have no knowledge of the coursework of other universities.

I do not believe there is a simple or easy solution to rectify this perception. Perhaps, we will all just have to prove ourselves worthy of being included in this illustrious profession.

***Shannon Nelmes,***
LLB student, Johannesburg

# NCOP hearings on the Legal Practice Bill expected in early 2014

The Legal Practice Bill, 2012 was passed at a second-reading debate by the National Assembly in Parliament on 12 November 2013. The Bill was then passed to the National Council of Provinces (NCOP). At the time of going to press, it was speculated that the NCOP would call for comments at some stage and then schedule public hearings both at provincial and national level in February 2014. This would be followed by deliberations with a view to the NCOP voting on the Bill before mid-March 2014.

The Law Society of South Africa (LSSA) was to consider making comments to the NCOP after reviewing the final version of the Bill published on 12 November 2013. Attorneys are urged to consult the LSSA website for further submissions, as well as information on provincial hearings, which will be open to the public.

The LSSA websites has a full chronology on the Bill, including the various drafts that led up to the adoption of the final version. The LSSA's submissions to the NCOP will also be available on the website.

See www.LSSA.org.za or call the LSSA at (012) 366 8800.

***Barbara Whittle***, Communication Manager, Law Society of South Africa, barbara@lssa.org.za

# LSNP denied leave to appeal in CCMA representation challenge

The Constitutional Court has dismissed the Law Society of the Northern Provinces (LSNP) application for leave to appeal a Supreme Court of Appeal (SCA) judgment.

The LSNP's applications for leave to appeal came after the SCA overturned a judgment by the North Gauteng High Court that found the Commission for Conciliation, Mediation, and Arbitration's (CCMA's) r 25(1)(c) that limits legal representation to be unconstitutional.

Rule 25(1)(c) limits the right to legal representation in CCMA arbitration proceedings on the fairness of dismissals for misconduct or incapacity and subjects it to the discretion of the commissioner, unless the commissioner and all the parties consent.

In October 2012 the High Court, per Tuchten J, found the subrule to be unconstitutional and invalid, but suspended the declaration of invalidity for a period of 36 months to enable the parties to consider and promulgate a new subrule. The SCA, inter alia, found that the High Court disregarded ample evidence placed before it justifying the limitation of legal representation in dismissal cases.

The appeal was dismissed with costs.

The CCMA has welcomed the judgment. Its director, Nerine Kahn said in a statement: 'The Constitutional Court has in their decision upheld a central tenant of the Labour Relations Act [66 of 1995] which is to ensure that all citizens have access to affordable justice in terms of dispute resolution as provided for by the Commission for Conciliation, Mediation and Arbitration.'

The President of the LSNP Dr Llewellyn Curlewis told *De Rebus* that this decision came as 'a huge surprise to the LSNP and other stakeholders, since many of the most brilliant legal minds in this country that concurred in the sound principles which formed the basis of the application and assisted in the preparation of the application.' He added that he believes that the order would usher in a far-reaching effect on all legal practitioners, not only with regard to labour law, but also with regard to most other domestic tribunals.

'This is a tragic turn of events, especially in a democratic society where access to justice and the right to legal representation should, in our view, always be guaranteed and without limitation in all fora and in all circumstances,' he said.

Dr Curlewis said that attorneys and advocates alike, must be mindful that the implication of this case may result in more potential work being taken away from practitioners in future.

Dr Curlewis said that the main argument against legal representation was that proceedings were often obfuscated, protracted and delayed. 'Exclusion of legal representatives who are inherently best suited to deal with matters that are adjudicative in nature, results in an unwarranted differentiation, namely legal representatives versus the non-representatives.' He suggests the commissioner should have a general discretion to exclude all representatives, not only attorneys and advocates. He adds: 'The discretion the commissioner currently has is irrational and implies that the other representatives are better suited to represent persons than admitted attorneys and advocates. This in essence amounts to discrimination as there is no rationality in distinguishing the representatives. The LSNP still believes that r 25 mentioned is inconsistent with the Promotion of Administrative Justice Act 3 of 2000 and would have wanted clarity and legal certainty once and for all on these and other related issues. Respectfully said, the order of the Constitutional Court therefore does not facilitate the desperately needed finality in this sphere of the law.'

• See 2012 (Dec) *DR* 24 and 2013 (Nov) *DR* 7.

*Nomfundo Manyathi-Jele*, nomfundo@derebus.org.za

# LEAD places students at law firms

The Law Society of South Africa's (LSSA) Legal Education and Development (LEAD) division has identified 100 law students to be placed at 50 law firms in Limpopo and Gauteng during the faculty recess.

The LSSA's chief executive officer and LEAD director, Nic Swart, told *De Rebus* that the initiative was started when LEAD received a request from law student 'LEADers' from Limpopo. LEAD then decided to see what the interest was among firms in Gauteng and Limpopo.

'I was pleasantly surprised by the response,' said Mr Swart adding that the aim of the pilot project was to expose law students to the world of practical work. 'This will certainly make their study more meaningful', he said.

Mr Swart said that he hopes that the project will be a success and that if it leads to future employment of these students, it would be a bonus.

Mr Swart said that LEAD is hoping to implement the project to other parts of the country. He said: 'We will obtain reports from the participants on both sides to improve the programme.'

*Nomfundo Manyathi-Jele*, nomfundo@derebus.org.za

# Two SA attorneys overseas for training

This year's two South African candidates for the three-month International Lawyers for Africa (ILFA) training programme are Patience Nyabadza and Tasneem Parkar.

The pair are two of 21 candidates chosen for this year's programme. ILFA provides work experience at international law firms as well as training in international law and key legal practice skills. This year the programme runs from 6 September to 4 December. Seventeen African countries participated in the programme, including Botswana, Sierra Leone, Zimbabwe and Rwanda.

Ms Nyabadza (35) is currently a legal adviser at First National Bank focusing mainly on commercial law, procurement law, regulatory law and applicable compliance regulations, legislations and policies. She holds an LLM in commercial law from the University of the Witwatersrand and an LLB degree from the University of Fort Hare. She has been seconded to Hogan Lovells International LLP in London.

Ms Nyabadza told *De Rebus* that she applied to participate in the programme because she was looking for an opportunity to broaden her legal expertise and gain exposure to global legal experience in project finance and law of banking and finance. She added that she saw the programme as a platform for making a profound difference in her career as she has more than five years' post-admission commercial and regulatory work experience.

Ms Nyabadza says that she is delighted and filled with gratitude to be part of the programme and to be given the opportunity to augment her skills at the highest levels of the legal profession.

*Patience Nyabadza (left) and Tasneem Parkar are in London and Dubai for this year's International Lawyers for Africa's three-month training programme.*

She is hoping that the programme will give her exposure to banking and corporate finance transactional matters and that she will experience first-hand knowledge and insight into the work of finance lawyers in the United Kingdom (UK). 'I would like to acquire project finance knowledge and gain more knowledge about the UK banking market,' she said, adding that she also believes that the programme will assist her with networking with other lawyers from different jurisdictions, which would facilitate an exchange of ideas.

Ms Nyabadza says that working at Hogan Lovells International LLP has been exciting. 'I experienced insight into the work of the finance legal team. I have participated in different transactions and got myself involved as much as possible in the matters. The legal team

ensured that I understood the project finance transactions and that I could identify and manage risks, and that I had observed how the vital key drives for the parties in structuring the transactions and objectives were captured in the project documentation when we drafted, reviewed and negotiated them. Furthermore, I have learnt how multi-jurisdictional issues, legal issues and related matters are dealt with and covered in the documentation,' she said.

Ms Nyabadza says that she has also had an opportunity to be seconded to UK Barclays as part of the programme where she had first-hand experience in retail and business banking. 'The programme was designed to give me an insight into the work of retail and business banking lawyers and how they support the business units and stakeholders,' she said.

She urged future candidates to seize the opportunity with both hands as it offers a once in a lifetime opportunity that they will never regret.

Ms Parkar (28) is currently practising as a senior associate at the Cape Town-based law firm, Bisset Boehmke McBlain, where she specialises in corporate and commercial law with a particular interest in South Africa's new consumer protection legislation. Ms Parkar holds an LLB degree and a post-graduate diploma in tax law from the University of Cape Town. Ms Parkar has been seconded to SJ Berwin LLP in Dubai.

Ms Parkar told *De Rebus* that she applied to participate in the programme because the training would give her an opportunity to learn, grow and develop and she saw the benefits that such opportunities held for her as an individual and lawyer.

She says that she still cannot believe that from the many lawyers in South Africa, she was selected to participate in 'such a wonderful programme.' She said: 'Being selected to participate in ILFA has been a privilege and a blessing.'

Ms Parkar is hoping that the programme will provide an opportunity for her to become a better lawyer and to enable her with the skills and network to grow her practice in an international environment.

She told *De Rebus* that the first two months of the three-month ILFA programme had flown by. 'On reflection, the programme has provided me with invaluable experiences. Not only have I been exposed to areas of law I was otherwise not knowledgeable about, I have also met amazing lawyers from different regions in Africa. I have come to appreciate the fact that the South African legal system is well-developed and we as South Africans, should be proud of this development,' she said.

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# JSC recommendations for judicial appointments

The Judicial Service Commission (JSC) has concluded its interviews for judges to be appointed to the Bench and has made its recommendations to President Jacob Zuma.

Nine candidates were recommended in total. Of these, seven are women and three are attorneys. The following attorneys have been recommended:

Pretoria attorney Sheila Mphahlele (45) has been recommended for a position in the Gauteng Division of the High Court. She was admitted as an attorney in June 1998 and served as deputy president of the Law Society of the Northern Provinces from 2008 to 2009.

In her application to the JSC she said that one of her most significant cases was a matter in which she acted on a *pro bono* basis for the Mamelodi Society for the Care of the Aged. It was an eviction matter where they managed to evict unlawful occupiers from the society's property.

Ms Mphahlele has acted as a judge in the North and South Gauteng High Court periodically in 2011 and 2013.

There were four advertised vacancies for the Gauteng Division and six candidates were interviewed. Three advocates were also recommended for the vacancies.

Johannesburg attorney Nolwazi Boqwana (40) has been recommended to fill a position at the Western Cape High Court. Ms Boqwana was admitted in September 1998. She has acted as a judge in the Labour Court on a number of occasions since October 2011 and also at the Western Cape High Court since January 2013.

The JSC advertised one vacancy for this division. Four candidates were shortlisted and interviewed.

Durban attorney Sungaree Pather (60) was admitted as an attorney in June 1979 and as a conveyancer in August 1983. She has sat as acting judge in the Eastern Cape High Court, the Land Claims Court in Randburg and the Labour Court. She is also a founding member of the National Association of Democratic Lawyers. She has been recommended to fill a position at the Electoral Court.

There was one vacancy advertised and Ms Pather was the only candidate shortlisted.

Judge Lazarus Tlaletsi (53) has been appointed as Deputy President of the Labour Court and Labour Appeal Court. Mr Tlaletsi was President of the Law Society of Bophuthatswana from 2002 to 2003.

Other recommendations were –

- advocate Igna Stretch for the Eastern Cape High Court;
- magistrate Somaganthie Naidoo for the Free State High Court; and
- advocates Albertus Bam SC, Maria Jansen SC and Nicoline Niewenhuizen for the Gauteng Division.

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# ProBono.Org's Housing Information Day

ProBono.Org held its Housing Information Day on 16 October at the Women's Jail in Constitution Hill where ProBono.Org gave advice and legal assistance to attendees on a *pro bono* basis. One of the main objectives of the event was to educate people on property ownership and the rights that occupants of homes have.

Event organiser and staff attorney at ProBono.Org, Annelie du Plessis, said that the event was held in conjunction with the United Nations' (UN) World Habitat Day, which is celebrated annually on the first Monday of October. The event aims to recognise the basic and continuing need for affordable, adequate housing and shelter and to emphasise the importance of safety in homes, shelters and buildings. Housing Information Day was also initiated to educate the community on what ownership of immovable property entails as well as to offer continuing legal support where it was required.

According to Ms Du Plessis approximately 50 clients consulted with the attorneys and advocates. Of those, 27 clients were given once-off advice, 12 clients were referred back to ProBono.Org for further assistance

and the volunteer attorneys who consulted immediately took on four matters. Eighteen attorneys, candidate attorneys and advocates volunteered on the day.

The speakers at the event included the Johannesburg Acting Registrar of Deeds, Makaziwe Mahlangu; Deputy Director of the Assets Disposal and Regularisation Unit of the Gauteng Provincial Department of Housing, Ronnie Stevens and Outreach Facilitator of the Office of the Public Protector, Maureen Mabase.

'Through our work, ProBono.Org has noted that many of the clients do not understand the concept of ownership and face on-going issues with the family home concept. In this regard, properties are often registered in one family member's name, often by agreement that the home will stay a family home but ultimately leading to this family member taking out a bond, defaulting and losing the property, or applying for the eviction of the other family members. We often see this scenario in our deceased estates department as well, where no provision is made for the remaining family members,' said Ms Du Plessis.

Ms Mahlangu informed the attendees of the duties of the deeds registry and explained in which situations a person may approach the deeds office for information or assistance. She also explained what it means to own property and touched on the process of transferring properties and registering title deeds at the deeds registry.

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# Law firm joins fight to save the rhino

Port Elizabeth based law firm Rushmere Noach has donated R 190 000 towards the Kariega Game Reserve's Save the Rhino project.

The firm raised the funds as part of its 80th birthday celebrations where it contributed R 45 000, while the balance of R 145 000 was collected through pledges from the firm's clients.

According to a press release, part of the donation will be used towards an anti-poaching communication system.

The Eastern Cape-based game reserve experienced poaching incidents in March 2012 and it has since dehorned all its rhinos in an effort to protect them.


*Rushmere Noach directors from left; James Parker, Robin Jefferson, Judy Theron, Steve Gough, Liane Koorsse and Chris Arnold.*

*Nomfundo Manyathi-Jele*,
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# People and practices

**Compiled by Shireen Mahomed**

Lindsay Keller Attorneys in Johannesburg has appointed Shakes Motubatse as a partner in the litigation department. He specialises in Road Accident Fund litigation and labour law.

Jan Coenrad Nelson Borman, senior director of Nelson Borman & Partners in Johannesburg, received a lifetime achievement award. He has been practising for 55 years, specialising in commercial drafting, conveyancing, corporate divorce, environmental law and litigation.

Herold Gie Attorneys recently celebrated David Lotz reaching a milestone, in having served the firm for 50 of its 120-year history.

David joined Herold Gie in 1963 and continues to practice in the firm's property department. He was admitted as an attorney and conveyancer in 1968, and shortly thereafter as a notary. David specialises in all aspects of property law. Until 2011 he was one of three examiners sitting on the conveyancing examination panel, a position he occupied for more than 25 years.

# Should you specialise?

By Louis Rood

To grow your legal practice and attract more lucrative work, do you try to expand the range of services you offer, or do you concentrate on becoming an expert on a particular aspect of law?

There are different points of view:

- **Generalist:** Knowing a little about a lot enables you to retain your clients for all their legal requirements. You can always outsource – for example, by briefing counsel – if you need additional expertise. The skills and knowledge you acquire in one sphere, such as labour negotiations, can benefit you in other spheres. When one aspect of your practice goes through a lean period, you will have other sources of work to rely on.
- **Specialist:** Knowing a lot about a little enables you to attract more clients seeking that particular expertise, which may not generally be available. You can grow your distinctive brand as a specialist, and differentiate yourself from your competitors. You can concentrate all your efforts and energies on a narrower field and so really build up your specialist knowledge. But if all your eggs are in one basket, do not drop the basket.

Research on which is the better approach varies. Specialisation seems to be an advantage throughout a professional career, but it is less important earlier in a career. Later on, specialisation signals that the practitioner already has broader experience. Even with specialists, general ability is required. But specialisation does not necessarily reflect accumulated skills – calling yourself an expert does not make you an expert.

Of course, the particular personality and temperament of the individual also determine the focus of his or her practice. Not everyone is suited to be a jack of all trades and master of none. Others thrive in that role, delegate well, and would soon be bored in a defined channel.

Here are some pointers for building a specialist practice:

- Create a specialist CV: This should highlight your unique speciality. It should describe your specific attributes and experience.
- Build a name for yourself online: Brand yourself as a specialist through professional networking and social media sites. Add key words to your profile that reflect your specialisation. Participate in groups in your area of interest. Contribute to online discussions.
- Be yourself: Your niche practice should strongly interest and suit you. You will be motivated to acquire additional training and qualifications in that area. Focussing on what you enjoy is more likely to lead to long-term success.
- Market yourself: In a competitive field a specialist needs to be noticed. Participate in any industry associations whose members require your specialist services. Attend their conventions. Offer your services as a presenter, speaker or panellist. Write for their media publications.

## Shape up

Both specialist and general practitioners would do well to adopt a strategic approach to giving shape and substance to their practice. This comprises four dimensions:

- Breadth: Expand and extend the range of your skills and capabilities, even within your speciality.
- Depth: Gain comprehensive knowledge and understanding of every aspect of your subject.
- Height: Become prominent in your field. Aim high and stand out from the crowd, head and shoulders above your competitors.
- Length: Build and consolidate a sustainable practice with the resources and trained people to continue to serve clients in the long-term.

Ultimately, every successful attorney has to acquire and apply knowledge, skills and expertise, and so gain experience and build a reputation that attracts a client base.

The very best attorneys all become specialists – either single specialists or multi-specialists. Successfully juggling all the balls in a generalist practice could in itself be considered to be a speciality.

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

# Cutting the lifeline

By Jakomien van Staden

## *The termination of business rescue proceedings*

Business rescue proceedings (BRPs) were introduced into South African law by ch 6 of the Companies Act 71 of 2008 (the Act), which commenced on 1 May 2011. These provisions have provided ample opportunity for businesses in financial distress to remedy the situation and effectively work to avoid an otherwise imminent liquidation.

The full extent of the right of affected parties still needs to be determined as the Act provides for participation in the initial process but is not clear on the termination thereof. Section 132(2) of the Act regulates the termination of BRPs and creates the following five distinctive options to terminate BRPs.

### Where the court sets aside the resolution or order that began the BRPs

This is regulated by s 130 that states that, subject to subs (2), at any time after the adoption of a resolution in terms of s 129, until the adoption of a business rescue plan in terms of s 152, an affected person may apply to a court for an order setting aside the resolution, on the grounds that –

- there is no reasonable basis for believing that the company is financially distressed;
- there is no reasonable prospect for rescuing the company; or
- the company has failed to satisfy the procedural requirements set out in s 129.

Subsection (2) states that an affected person who, as a director of the company, voted in favour of a resolution contemplated in s 129 may not apply to a court in terms of subs (1)(*a*) to set aside that resolution unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

The court, when considering an application made in terms of s 130 of the Act may either set aside the resolution, or, if having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so, afford the practitioner sufficient time to form an opinion whether or not the company appears to be financially distressed, or there is a reasonable prospect of rescuing the company. After receiving a report from the practitioner, the court may then set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company.

The court may, with an order setting aside the order or resolution that began the BRPs, make any further necessary and appropriate order, including an order placing the company under liquidation. If the court has found that there were no reasonable grounds for believing that the company would be likely to pay all of its debts as they became due and payable, an order of costs may be made against any director who voted in favour of the resolution to commence BRPs, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely on in terms of s 76(4) and (5).

Directors must therefore beware of premature or unnecessary resolutions for business rescue if there is no real financial distress to the company as this could lead to a costs order against the directors.

An order to set aside a resolution may be brought on an urgent basis, as is the case in *Climax Concrete Products CC t/a Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd and Others* (ECP) (unreported case no 812/2012, 21-6-2012) (Beshe J), where the court stated that: 'In my view, the fact that [the] applicant seeks to have a resolution to commence [BRPs] set aside, on its own entitles the applicant to be heard on an urgent basis. This is so because, if the first and second respondents were to successfully commence [BRPs], that would provide a "temporary moratorium" on the rights of claimants against the company/companies or in respect of property in its possession' (at para 16).

### Where the court has converted the BRPs into liquidation proceedings

This can occur only in the instances where, in terms of s 141(2)(*a*), the practitioner at any time during the BRPs concludes that there is no reasonable prospect for the company to be rescued. The practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and apply to the court for an order discontinuing the BRPs and placing the company into liquidation.

It is interesting to note that the legislature used the word 'discontinuing' in this section as opposed to 'terminating', suggesting that the proceedings do not end as in the other cases, but is rather converted, as stated in s 132, into liquidation proceedings. The Oxford dictionary defines 'convert' as: '[To] change the form, character, or

Picture source: Gallo Images/Thinkstock

function of something' (S Wehmeier (ed) *The Oxford Advanced Learner's Dictionary International Student's Edition* 7ed (Oxford University Press 2010) at 321). Therefore, BRPs do not end *per se*, but is transformed into liquidation proceedings.

**'The court may, with an order setting aside the order or resolution that began the BRPs, make any further necessary and appropriate order, including an order placing the company under liquidation.'**

## The practitioner has filed a notice of the termination of BRPs with the commission

In s 132(2)(*c*), the Act states that BRPs end when the practitioner has filed a notice of termination of BRPs.

Such notice may be filed in terms of s 141, where the practitioner has investigated the company's affairs, business, property, and financial situation, and after having done so, considered whether there is any reasonable prospect of the

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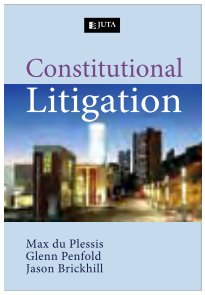


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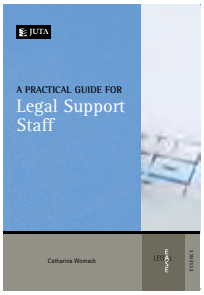


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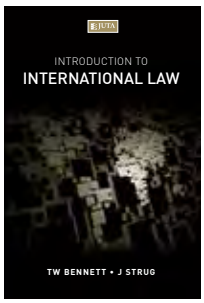


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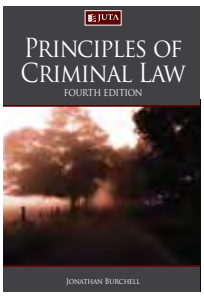


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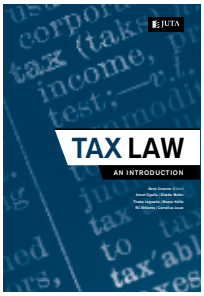


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company being rescued. Section 141(2)(*b*) further stipulates that if, at any time during BRPs, the practitioner concludes that there are no longer reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner. If the business rescue process was confirmed by a court order in terms of s 130 or initiated by an application to the court in terms of s 131 the practitioner must then apply to the court for an order terminating the BRP or otherwise file a notice of termination of the BRP.

## A business plan has been proposed and rejected in terms of part D of this chapter, and no affected person has acted to extend the proceedings in any matter contemplated in s 153

Section 153 sets out the necessary steps to be implemented to draft a business rescue plan and adopt the business rescue plan. The section also provides for the situation where the business plan is rejected. The practitioner can do two things –

- seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
- advise the meeting that the company will apply to court to set aside the result of the vote on the grounds that it was inappropriate.

Where the practitioner does not take any action, an affected person at the meeting may elect to do either of the practitioner's choices or make a binding offer to purchase the voting interests of one or more persons who opposed the adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return of that person or those persons if the company were to be liquidated.

If no person takes any action as contemplated in subs (1), the practitioner must promptly file a notice of the termination of the BRPs.

## A business plan has been adopted in terms of part D of this chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan

**Participation by creditors, holders of company's securities and trade unions of employees:** An 'affected person' in terms of the Act is defined in s 128 as a shareholder or creditor of the company, any registered trade union representing employees of the company and, if any of the employees are not represented by a registered trade union, each of those employees or their respective representatives.

In terms of ss 145(1), 146, and 144(3) respectively, creditors, holders of the company's securities and trade unions of employees are entitled to notification of any court proceedings and are further entitled to participate in any court proceedings arising during the BRPs.

The Act also repeatedly makes provision for any affected person to participate in any hearing of any application provided for in the relevant sections.

Two distinct circumstances arise out of BRPs and the participation of affected persons. First, during the process of placing the company under business rescue and when such resolution was filed or a court order granted, and before adoption of the business rescue plan, and secondly, after the adoption of the business rescue plan.

Section 152(4) states that where a business rescue plan has been adopted, it is binding on the company and on each of the creditors of the company and on every holder of the company's securities, whether or not such a person was present at the meeting, voted in favour of adoption of the plan or, in the case of creditors, had proven their claims against the company.

Furthermore, s 133 places a moratorium on legal proceedings against the company while under business rescue, with certain exceptions. No person can therefore institute any action against the company during the BRPs.

In terms of s 152(4), and because no provision to that extent is granted in the Act, it is safe to assume that from the instance that a business rescue plan is accepted, affected persons have less of a say regarding the termination of the BRPs. It is further safe to assume that in the case of the conversion of the BRPs to liquidation proceedings, affected persons my intervene those proceedings but may not institute an application for conversion into liquidation of those proceedings.

In *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Project Managers (Pty) Ltd intervening)* 2011 (5) SA 600 (WCC) Rodgers AJ held that: 'I do not think that the legislature contemplated that an affected party would have to apply for leave to intervene in the proceedings. If the person is an "affected person" such person has a right to participate in the hearing. If the person wishes to file affidavits, the court will obviously need to regulate the procedure to be followed to ensure fairness to all concerned' (at para 21).

This approach was also adopted in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) where Boruchowitz J stated: 'Engen, as an affected person, has a right to participate in the hearing of an application in terms of s 131(1) of the Act. It would not require leave of the court to intervene. Such leave may, however, be necessary as a procedural requirement' (at para 30).

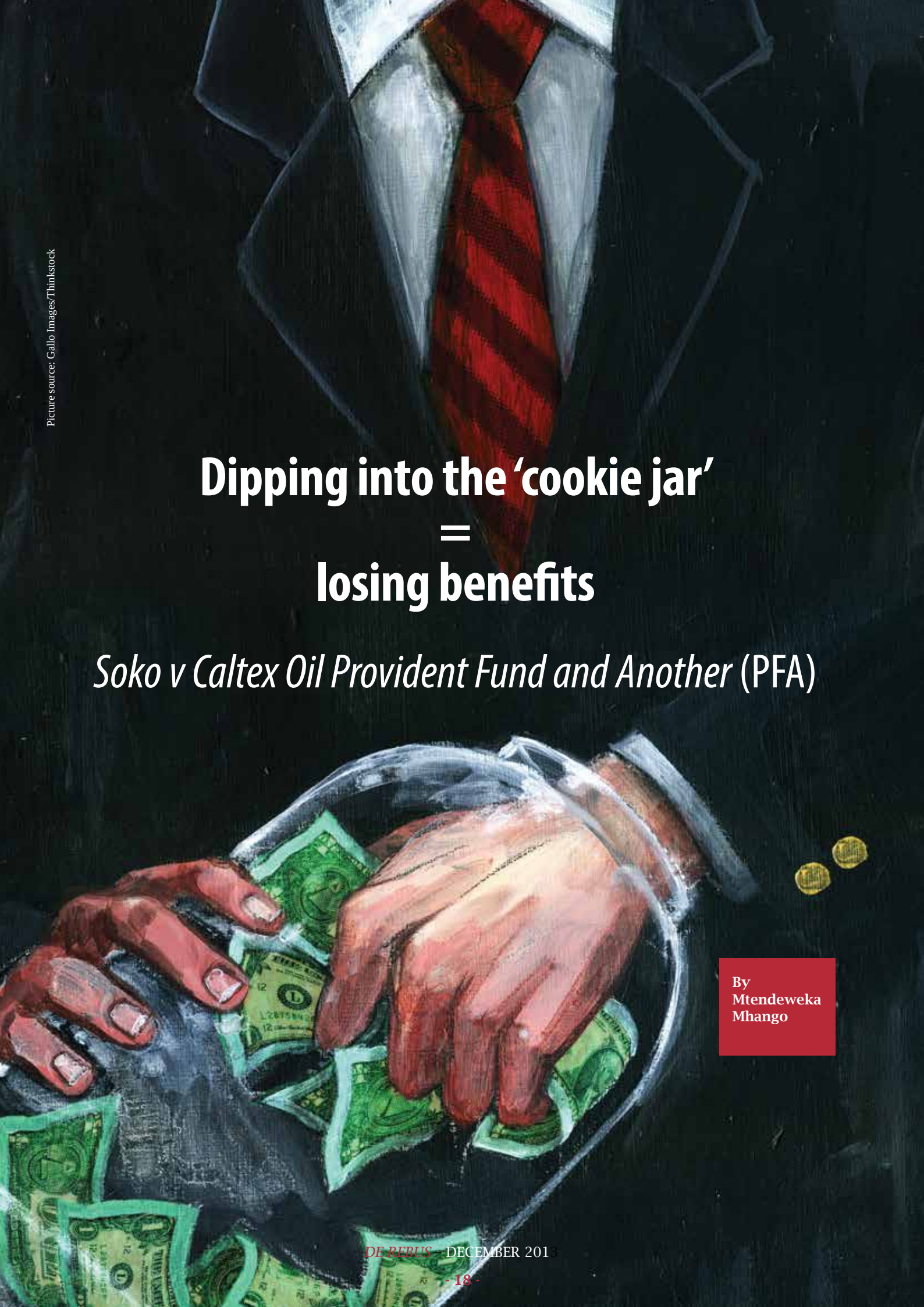
An affected person can therefore, by deduction, oppose any such application for conversion of BRPs to liquidation that the practitioner may bring. The question now arises as to how much weight the court will grant the assessment done by the practitioner to come to the conclusion that there is no reasonable prospect of rescuing the company.

If any regard may be given to the case of *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (GSJ) (unreported case no 12/45437, 16566/12, 28-3-2013) (Van Eeden J), the judge made the statement that he 'might perhaps have been persuaded that there was reasonable prospect for rescuing the company by obtaining third party funding. … But the company was in business rescue … for more than a year and no viable offer was received' (at para 23).

Also to be noted, is the decision in *Commissioner, South African Revenue Service v Beginsel NO and Others* 2013 (1) SA 307 (WCC) where the court granted leave to continue BRPs even though it was evident that the business could not be rescued because the continuation would result in better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

It is clear that there is definitely a place for the role of affected persons in the termination of BRPs. However, the full extent of this role still needs to be defined by our courts.

**Jakomien van Staden *BCom LLB (NWU)* is an attorney at Morné Coetzee Attorneys in Pretoria. She was a candidate attorney at the time of writing this article.**



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# Dipping into the 'cookie jar' = losing benefits

## *Soko v Caltex Oil Provident Fund and Another* (PFA)

By Mtendeweka Mhango

Can a pension fund deduct from a complainant's pension benefits an amount that the complainant was accused by his or her employer of stealing from the company? This was the issue that the pension funds adjudicator had to determine in *Soko v Caltex Oil Provident Fund and Another* (PFA) (unreported case no PFA/GA/23047/2008/MN/LPM). While the adjudicator was not able to rule on the merits of the complaint because the matter had prescribed, the Supreme Court of Appeal has upheld the power of a pension fund to deduct pension benefits pending proceedings in a court of law by a participating employer (see *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA)). Despite the fact that the *Soko* case was decided in 2008, it remains important to warrant academic commentary.

## The *Soko* case

This case involved the deduction from the complainant's pension benefit of an amount that the complainant was accused by his employer of stealing from the company. The complainant was employed by Caltex Oil SA (Pty) Ltd (the employer) until he was dismissed in 2001. An amount of R 42 000 was withheld by the first respondent for alleged damage suffered by the employer, but for which criminal charges had not proceeded.

The complainant complained that Alexander Forbes Financial Services (the second respondent) withheld his benefit without his approval. He submitted that the second respondent claimed that it acted on the employer's instruction and that it was agreed that the money deducted would be withheld until the criminal case against him was finalised. However, despite the case being withdrawn more than six years ago, his benefits had not been paid to him. The complainant therefore lodged a complaint with the adjudicator and sought an order against the second respondent to pay him his benefits.

The second respondent, citing the High Court case *Metro Group Retirement Fund and Another v Murphy NO and Another* (WCC) (unreported case no 8278/2001, 23-7-2002) (HJ Erasmus J), responded that this matter had prescribed in terms of the Prescription Act 68 of 1969. Furthermore, the second respondent stated that the court in the *Metro Group* case held that the Prescription Act does not grant the adjudicator any power to condone a claim lodged after a period of three years from the date on which the debt became due. It therefore requested the adjudicator to dismiss the complaint on the basis that the complainant's claim had prescribed in terms of the Prescription Act.

The second respondent advanced another argument that it carried out an investigation to establish exactly what benefits were paid to the complainant. The second respondent noted that it was not in a position to retrieve any information relating to the complainant's case. Despite this, the second respondent submitted that it had complied with its obligations to maintain records for the period prescribed by law and that the complainant's request for information, insofar as it relates to the payment of his benefit, falls outside the prescribed time. This period is set at five years in terms of s 18 of the Financial Advisory and Intermediary Services Act 37 of 2002.

In resolving this complaint, the adjudicator observed that an amount of R 42 000 was withheld from the complainant's withdrawal benefit by the second respondent following the complainant being suspected of defrauding the employer in the same amount, and that the issues complained of ensued in 2001. The adjudicator found that the complaint was lodged with this office on 11 February 2008, seven years after the cause of action arose. As a result, the adjudicator ruled that pursuant to s 30I of the Pension Funds Act 24 of 1956, it had no authority to investigate and adjudicate on any complaint that is time-barred and dismissed the complaint.

## Comment and analysis

While the adjudicator's ruling was determined on a technical matter, namely s 30I of the Pension Funds Act, it should be noted that, had the adjudicator been given an opportunity to rule on the merits, it probably would have sustained the second respondent's power to withhold the pension benefits. This is because the power to withhold pension benefits has recently been upheld by the Supreme Court of Appeal in the *Highveld Steel* case.

What is more, the complainant's argument that his benefits were withheld without his approval would not have succeeded under the authority of the *Highveld Steel* case and other previous rulings by the adjudicator, namely *Twigg v Orion Money Pension Purchase Fund and Another (1)* [2001] 12 BPLR 2870 (PFA), *Charlton and Others v Tongaat-Hulett Pension Fund and Other* [2006] 2 BPLR 94 (D), and *Appanna Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA). Moreover, it is likely that the reasoning and judgment in the *Highveld Steel* case will apply to cases involving both pending civil and criminal proceedings. Put differently, the fact that the proceedings in the present determination were criminal and not civil would probably not preclude the application of the judgment in the *Highveld Steel* case.

The latter proposition was recently confirmed by the adjudicator in *Coka and Another v Old Mutual Superfund Pension Fund and Others* [2013] JOL 30751 (PFA) who ruled that an employer may recover legal costs against benefits of members and that such costs must be related to the recovery of financial damages owing to dishonesty, theft, fraud or misconduct of the employee.

**Mtendeweka Mhango *BA (Morehead State University) JD (Michigan State University) LLM (Wayne State University)* is an associate professor and acting head of the School of Law at the University of the Witwatersrand.**

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# Protecting preferent creditors:

## *Setting a reserve or obtaining consent?*

By
Rouan J
Bouwer

In a recent unreported judgment of *Terence Christopher Demetriou and Another v Sheriff of the Magistrate's Court: Alberton and Others* (GSJ) (unreported judgment no 2012/43269) (26-4-2013) the court was faced with a discrepancy in the method of executing against immovable property in terms of the provision of s 66(2) of the Magistrates' Courts Act 32 of 1944 (the Act) as opposed to the provisions of r 46(5) of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the Supreme Court of South Africa (the uniform rules of court of the Supreme Court).

The applicants purchased the immovable property at a public auction conducted by the first respondent (the sheriff, Alberton), pursuant to a magistrate's court declaring the property specially executable.

The sheriff had previously given written notice in terms of s 66(2)(*a*) to the second respondent (Absa Bank Limited), a preferent creditor, in respect of the intended sale of the immovable property. The property was sold to the applicants, being the highest bidders, for the low amount of R 100 000. Absa was a preferent creditor with a debt owing to it of over R 650 000.

Subsequent to the purchase of the property, the applicants were informed by the attorneys, on the instructions of Absa, that they were in the process of registering transfer of the property into the name of a third party. The applicants unsuccessfully attempted to dissuade the transferring attorneys from continuing with such a transfer, which led to the applicants obtaining an interim interdict against all the respondents.

The applicants simultaneously launched an application to declare the conditions of sale constituting their purchase agreement in respect of the immovable property as valid, and directing the registrar of deeds and the sheriff to effect transfer of the immovable property in terms of the aforementioned conditions of sale.

The applicants contended that due notice of the sale in execution was given to Absa by the sheriff and, as a result of the Absa's failure to react to such notice, they were not required to comply with the further requirements of s 66(2) of the Act. Furthermore, it was contended that Absa should be estopped from denying the validity and binding nature of the conditions of sale, in that Absa's inaction entitled the applicants to purchase the property without acceptance of the conditions of sale by Absa.

Absa and the transferring attorneys contended that the failure by the applicants to meet all the requirements of s 66(2) of the Act rendered the condi-

tions of sale null and void and asked for the dismissal of the applicants' claim.

In argument, the applicants submitted that their interpretation of s 66(2) of the Act is supported by the equivalent codified in r 46(5) of the uniform rules of court. Rule 46(5) of the uniform rules of court provides as follows:

'No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless –

(*a*) the execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his [or her] address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed, or

(*b*) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) of this subrule within the time stated in such notice.'

The applicants furthermore relied on the authority of *McCreath v Wolmarans NO and Others* 2009 (5) SA 451 (ECG) and submitted that in that matter the preferent judgment creditor could not set aside a sale in execution for failure to set a reserve price (in terms of the uniform rules of court), and that the sale was valid and binding between the sheriff and the purchaser.

Section 66(2) of the Act provides as follows:

'No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless –

(*a*) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or

(*b*) the magistrate or an additional or assistant magistrate of the district in which the property is situate has upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out, *and unless* –

(*c*) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full; or

(*d*) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim' (my italics).

Rule 43(10) of the magistrates' courts rules, as amended, provides that: 'A sale in execution of immovable property shall be by public auction *without reserve* and the property shall, *subject to the provisions of section 66(2) of the Act* and to the other conditions of sale, be sold to the highest bidder' (my italics).

One of the major contentious issues was the fact that the words 'and unless' was encapsulated in subs 66(2)(*b*), and not written separately, thus implying that subss 66(2)(*c*) and (*d*) were subsidiary and applicable only if the position contemplated in subs 66(2)(*b*) was applicable.

In the court's judgment, it relied squarely on the judgment of *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA) where it was held that 'immovable property that was subject to any claim preferent to that of the judgment creditor should not be sold unless the requirements listed in section 66(2)(*a*)-(*d*) were met'.

It bears mentioning that the South African Law Reports, as relied on by the court does not contain the quoted judgment as set out above. However, it is contained in the All SA Law Reports iteration of the same judgment of *FirstRand Bank Ltd v Body Corporate of Geovy Villa* [2004] 1 All SA 259 (SCA).

The court's reasons were that, on a simplified version, the provisions of s 66(2) are to the effect that, for a judgment creditor who attached immovable property that is subject to a preferent claim of another party to sell such property, he or she must:

- Follow the steps in either s 66(2)(*a*) or (*b*) in notifying the preferent creditor of the intended sale; which was done in the current case.
- Ensure that the property is sold for an amount out of which the debt owing to the preferent creditor will be paid in full.
- Where, for whatever reason, the property cannot attract an amount that will settle the preferent creditor's claim in full, the judgment creditor cannot sell the property without obtaining the written consent of the preferent creditor.

As the purchase consideration was not sufficient to cover the preferent creditor's debt, the court held that the judgment creditor was obliged in terms of s 66(2) to seek the written consent of the Absa for the conditions of sale to be valid and binding. If such consent is refused, the property cannot be legally sold.

The failure to seek and obtain such consent from Absa rendered the sale of immovable property in terms of s 66(2) of the Act invalid. The application was accordingly dismissed.

## Conclusion

From the authorities, as set out above, there appears to be a divergence in the manner in which immovable property is to be sold in execution, depending as to whether the property was to be sold pursuant to the uniform rules of court, or in terms of the Magistrates' Courts Act.

The uniform rules of court place a stringent obligation on the preferent creditor to stipulate a reserve price, or to agree in writing to a sale without a reserve price as provided for in subr 46 (5)(a) within the time stated in such notice. Should the preferent creditor fail, or neglect to do so, the immovable property may be sold and the preferent creditor has only himself or herself to blame for not protecting his or her interests.

The Act, however, contemplates a different position to that of the uniform rules of court: Once the preferent creditor has been notified, there is no further obligation on him or her to respond to such a notice. The property may then not be sold by execution unless the proceeds would settle the debt due to the preferent creditor, or unless consent of the sale was obtained from the preferent creditor. If the proceeds of the sale are insufficient, and no consent is obtained from the preferent creditor, the sale is invalid.

Where an auction sale of an immovable property is concerned in terms of the Act, practitioners should take the necessary precautions to ensure that either a reserve price is obtained from a preferent creditor, if any, before a sale in execution is proceeded with; or that consent is obtained from the preferent creditor authorising a sale in execution at a price lower than the indebtedness owed to the relevant preferent creditor.

Failure to do so may lead to the preferent creditor setting the sale in execution aside for lack of compliance with the requirements of s 66(2) of the Act, which in turn could have dire cost implications incurred through the sale in execution already convened.

**Rouan J Bouwer *BCom Law LLB (UJ)* is an advocate in Johannesburg. He appeared for the second and fourth respondents in the above case. He furthermore appeared and successfully opposed the application for leave to appeal.** ❑

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# Lending a helping hand

## *The role of creditors in business rescues?*

By Richard Bradstreet

In May 2013 the Supreme Court of Appeal (SCA) handed down its first judgment on business rescue in the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] 3 All SA 303 (SCA). This case is of significance in that it has confirmed an interpretation of the meaning of 'business rescue' that embraces the protection of creditors. In the light of the new business rescue regime being viewed as a shift away from more traditional creditor-oriented insolvency procedures that may be traced back to South Africa's English law roots, this case gives reassurance to creditors that their interests, although no longer of paramount importance, are afforded protection by the very definition of what business rescue seeks to achieve.

In delivering the unanimous decision of the full bench, Brand JA held (at para 26) that 'business rescue' in terms of s 131(4) of the Companies Act 71 of 2008 ('the Act') means 'rehabilitation', which in turn means the achievement of either one of two goals, namely to –

- return the company to solvency; or
- provide a better deal for creditors and shareholders than what they would receive through liquidation.

This has implications for the role and required qualifications of business rescue practitioners, as well as for the value and utility of the business rescue procedure for creditors.

## Role of business rescue practitioners in ch 6 reorganisations

It has previously been submitted (see 'Business rescue practitioners: What role for the legal profession?' in 2012 (July) *DR* 22) that the legal profession may have a somewhat limited role to play in business rescue where the practitioner comes on board to realign the internal management and strategy of the business with a view to steering it towards a profitable going concern. In recent research by Professor Marius Pretorius of the University of Pretoria, it has been suggested that the competencies required in the development and implementation of a business rescue plan (as envisaged by s 150(2) of the Act) involve a high degree of expertise in management and business strategy rather than legal knowledge, although some legal expertise is crucial, particularly in regard to issues of compliance. The research involved a sample of 47 business rescue practitioners, who were asked to give detailed instructions to a hypothetical 'double' who would need to be told exactly how to go about the business rescue process. On a task-by-task breakdown, it was shown that approximately 60% of the practitioners' tasks would be managerial in nature (see M Pretorius 'Tasks and activities of the business rescue practitioner: A strategy as practice approach' (2013) vol 17 *Southern African Business Review*).

Quite the contrary, however, would be the case when the practitioner arrives on a salvage mission, seeking to slow the sinking of the business and bringing as much property as possible to shore. In this capacity, a business rescue practitioner will serve a role similar to that of a liquidator, and in spite of the criticisms that have been advanced in relation to such persons acting as 'rehabilitation' practitioners, the skill sets of liquidators would be invaluable where the practitioner is tasked with reorganising with a view to an effective liquidation by way of s 131.

## Philosophy underlying the ch 6 definition of 'rescue'

It is somewhat incongruous to view the latter process as a 'rescue' or 'rehabilitation' in the ordinary English sense of the words, but it is now settled that 'section 128(1)(*b*) gives its own meaning to the terms' (per Brand JA at para 26). Taking this approach in appropriate circumstances should therefore not portray the practitioner as a managerial mutineer seeking to plunder the vessel for its loot (the old maxim for this metaphor being 'liquidation *ex debito justitiae*'), but rather a method of preserving value for creditors and other interested parties where the only other option would be traditional liquidation proceedings. It appears as though the absolute right of creditors to liquidate a company that has not paid debts may no longer be as strictly applicable under the Act (see Don Mahon '*Ex debito justitiae* principle liquidated?' 2013 (March) *DR* 38), and I submit that the option of making use of one procedure (ie, business rescue) instead of traditional insolvency proceedings may also assist in streamlining the process of investigating a company's affairs and ultimately deciding on the company's future.

In conclusion, it is perhaps worth noting that South Africa's legislative approach to insolvency may be departing from the traditional view taken in the United Kingdom and Europe where insolvent companies are treated as cursed and delinquent. Business rescue appears to be underpinned by a more pragmatic philosophy that recognises the value of both debtor and creditor in the marketplace. In the United States, where the prototype for this kind of 'debtor-in-possession' procedure originates, risk-taking is encouraged, and reckless trading – for example – is not prohibited.

New York attorney, Philip Mindlin, notes that the active role played by creditors in bankruptcy cases in the United States (US) is one of the features that contribute to the success of reorganisations under the American form of corporate reorganisation (under ch 11 of the US Bankruptcy Code). Such involvement is partially through membership of committees of creditors who employ sophisticated advisers to promote their interests in court proceedings and also assist with analyses of the reorganisation case as it develops. Large creditors also play a meaningful role outside of the committees by 'filing pleadings with the court on every significant matter and appearing to express their views', and investors who buy claims against bankrupt companies are often able to play a role in proceedings that would not have been cost-effective for the previous holders of that debt to have played (Philip Mindlin 'Comparative Analysis of Chapter 6 of The South African Companies Act, No. 71 of 2008', presentation to the Company Law Symposium organised by the South African Department of Trade and Industry and the Specialist Committee on Company Law, Johannesburg, 1 March 2013; www.thedti.gov.za/business_regulation/presentations/symposium1of6.pdf, accessed 31-10-2013).

If creditors become constructively involved in the business rescue process, by way of the numerous provisions that exist to facilitate their involvement during the process, particularly when creditors bring applications themselves to make use of business rescue under s 131 with the intention of being cooperative rather than hostile in the enforcement of their claims, we may see this shift in approach to defaulting debtors transferred into practice.

**Richard Bradstreet *BA LLM* (*UCT*) is a lecturer at the department of commercial law at the University of Cape Town.** **With special thanks to Philip Mindlin (partner at Wachtell, Lipton, Rosen & Katz in New York), and Marius Pretorius (professor of business strategy at the University of Pretoria).**

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# Unfit parent –

## Losing parental responsibilities and rights

By Vishal Ramruch

The Children's Act 38 of 2005 (the Act) brings about numerous additions and details in matters relating to children and family life. This article deals with a matter finalised at the Newcastle Justice Centre and is based on s 28 of the Children's Act, which deals with the termination of parental responsibilities and rights.

The applicant in *C v L* (Children's Court) (unreported case no 14/1/4-54/10, 10-2-2012) had a three-year-old son with the respondent. The parties were unmarried but they had had a relationship for two years. They separated when the applicant fell pregnant.

The circumstances that led to their separation were as follows:

- The applicant discovered that the respondent was engaged to be married to someone else.
- On hearing of the applicant's pregnancy, the respondent was unhappy and pressurised the applicant to have an abortion.
- Seeing that no abortion was forthcoming, the respondent became abusive towards the applicant, both physically and emotionally.

After the birth of the child, the respondent visited the child whenever he wanted to and attempted to initiate a relationship with him. Gradually, the respondent started to visit on an *ad hoc* basis and at odd times, which became of concern to the applicant. She decided to approach the Office of the Family Advocate with a view of devising a parenting plan. The respondent did not keep to the plan, nor did he contribute financially towards maintaining the child.

The applicant wanted the respondent to play an active role in the child's life, but she was unsure whether it would indeed be in the child's best interest in view of the respondent's behaviour and lack of commitment to the child. The applicant was advised of the provisions of s 28 of the Act, which provides for the termination of parental responsibilities and rights under certain circumstances.

### Applicable law

Section 28 of the Act, states the following:

'Termination, extension, suspension or restriction of parental responsibilities and rights –

(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order –

(*a*) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(*b*) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

(2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.

(3) An application for an order referred to in subsection (1) may be brought –

(*a*) by a co-holder of parental responsibilities and rights in respect of the child;

(*b*) by any other person having a sufficient interest in the care, protection, well-being or development of the child;

(*c*) by the child, acting with leave of the court;

(*d*) in the child's interest by any other person, acting with leave of the court; or

(*e*) by a family advocate or the representative of any interested organ of state.

(4) When considering such application the court must take into account –

(*a*) the best interests of the child;

(*b*) the relationship between the child and the person whose parental responsibilities and rights are being challenged;

(*c*) the degree of commitment that the person has shown towards the child; and

(*d*) any other fact that should, in the opinion of the court, be taken into account.'

### *Locus standi*

Section 28(3) of the Act stipulates who can bring the application to court. Since the applicant in this matter is the biological mother of the child, *locus standi* could easily be established.

### Jurisdiction

As stated above, s 28(1) provides that a person referred to in subs (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order. This was certainly the main concern in the matter. The High Court has always been considered to be the 'upper guardian of minor children' and to envisage that another court, albeit lower, could entertain such an application was something new.

There was and is no case law dealing with the application of s 28 and jurisdiction. A related case is that of *Ex Parte Sibisi* 2011 (1) SA 192 (KZP), but this case deals with the issue of assignment of guardianship and not termination of parental responsibilities and rights. In the judgment, it was stated that only the High Court has jurisdiction in assignment of guardianship, not the children's court. The court stated that '[i]t is immediately apparent that the relief envisaged in ss 22(4)(*b*), 23(1) and 28 may be obtained from the High Court, the divorce court or the children's court. None of these sections deal with the subject of guardianship' (at para 9).

Jurisdiction in the children's court is confirmed by s 29(1), which states that a children's court does have jurisdiction to hear a matter in terms of s 28, within whose area of jurisdiction the child concerned is ordinarily resident.

### Procedure

Section 52(1) of the Act states that the provisions of the Magistrate's Courts Act 32 of 1944 applies. Therefore, an application by way of a notice of motion with a supporting affidavit by the applicant, detailing the merits of the matter and supporting annexures were used. This was served on the respondent via the sheriff and on the Office of the Family Advocate as its intervention could be required by the court at some stage in the proceedings.

### Merits

Section 28(4) contains the factors that a court will consider in deciding whether or not to grant the application. In applying these factors to the case at hand, it was argued that:

- The relationship that existed was one between father and son, but the argument was what 'real relationship' the respondent had with the child?
- The degree of commitment to the child from the respondent was the bare minimum since:

- He did not financially support the child in any way.
- He did not spend any time with the child and visited whenever it pleased him.
- His role as a father figure was virtually absent.

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- He never defended the matter, despite being offered assistance by Legal Aid South Africa, which confirmed the applicant's version of the facts.

- The parties have time and again sought outside assistance – ranging from child welfare; crisis centres; attempting supervised contact and having an interim agreement with a family advocate that was later made an order of court – all of which were futile because of the respondent's lack of interest in the child.
- The court had to also consider the respondent's violent behaviour and the protection order against him.

## The best interests of the child

The applicant alleged that it would be in the best interest of the child to have his biological father removed from his life for the following reasons:

- Lack of any financial support – the mother fully supports the child.
- Lack of emotional support – the respondent did not spend time with the child and did not show any love and affection towards the child.
- Unstable life – the bond established with the minor child was subject to the will and suitability of the respondent.
- No routine in the child's life – the respondent did not adhere to the contact arrangements that were set by the family advocate and were made an order of court.
- Abandonment – the respondent's actions were tantamount to abandonment of the child.
- Violence – the respondent was a violent person and was placed on a supervised visitation routine.

An application in terms of s 28 is a drastic measure and should not be brought frivolously or maliciously by any party. This is the reason why a court will be slow in granting such an application, as it may be abused.

Nonetheless, in the matter of *V v V* 1998 (4) SA 169 (C), the court stated that '[t]he child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child, which effectively cuts across the parents' rights' (at 189 B–C).

## Constitutionality

Section 28 of the Act raises a constitutional issue: Is it constitutionally correct to terminate a biological father's (or mother's) responsibilities and rights towards his (her) child? Perhaps it is not, perhaps it is, but in certain circumstances. Note how the legislature termed parental 'responsibilities' and then 'rights' as it would seem that emphasis is placed on the parent's responsibilities to the child, rather than rights towards the child.

In *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC), the Constitutional Court held that discrimination against fathers in non-Christian marriages are no longer permitted.

## Court's findings

The court upheld the validity and correctness of the application, such as procedure and jurisdiction. The court ordered that a new family advocate's report be devised, giving the respondent further visitation rights. The new report was made an order of court and a provisional date was given to assess compliance.

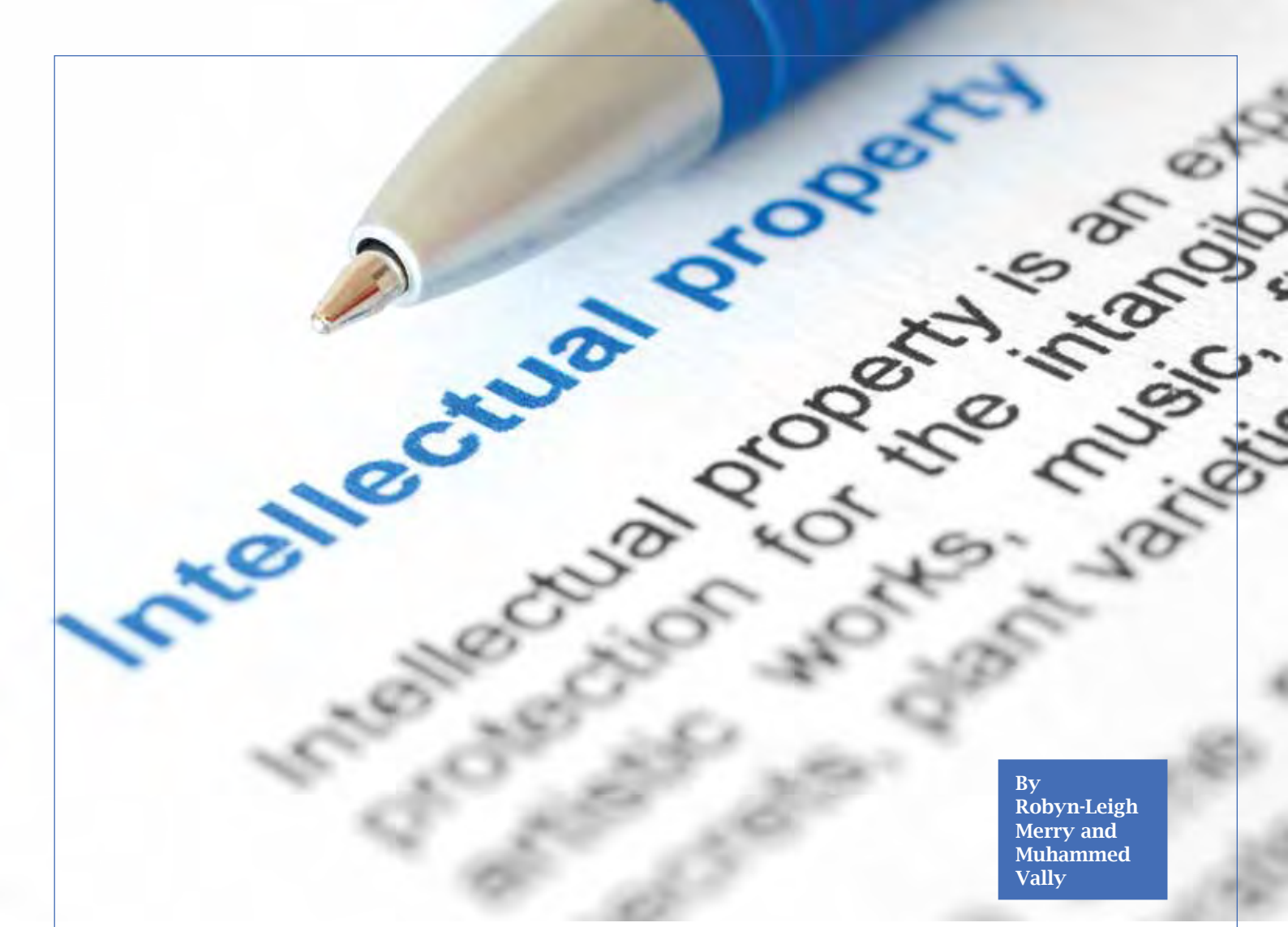
However, the respondent failed to honour the court order by not keeping to the contact arrangements and agreement. He further failed to attend his review meeting with the family advocate on a later date. The family advocate eventually recommended to the court that the respondent's parental responsibilities and rights be terminated.

The respondent did not attend court thereafter. The court granted the application and the respondent's parental responsibilities and rights were terminated.

## Conclusion

An application of this nature must be *bona fide* and must place the interest of the child before any other interest. Section 28 of the Act indeed creates controversy, as highlighted under the headings 'constitutionality' and 'jurisdiction'. Had the matter been taken to a higher court, it may have very well made some finding or *obiter* regarding these two aspects.

**Vishal Ramruch *LLB (UKZN)* is an attorney at Legal Aid South Africa in Newcastle.**




By Robyn-Leigh Merry and Muhammed Vally

# Employing intellectual property wisely

Most of us have seen the standard catch-all clauses in an employment contract whereby all forms of intellectual property (IP) are assigned to the employer. These clauses exist in various forms. Most of these forms are, on the face of it, fairly straightforward and understandable. However, such clauses are occasionally unenforceable and void.

In South Africa various forms of IP are provided for and, as a result of the sheer breadth of this field, the scope of this article will be focused on the more common areas of registered intellectual property, including copyright, patents and registered designs.

## Copyright

In South Africa, the Copyright Act 98 of 1978, governs various aspects of copyright law. Included in the Copyright Act is a clear description of the various works that are capable of protection under the Copyright Act. These various works, as set out in s 2 of the Copyright Act include literary, musical and artistic works, as well as cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs.

Under each type of work subtle differences in the approach exist in determining questions relating to who the author or owner will be. In most instances the general approach would be that the author (as defined in s 1(1)) would be the first owner of the copyright that subsists in the respective work. However, as set out in s 21(1)(*b*) to (*d*) there are anomalies to the general approach. Of particular relevance to the content of this article is s 21(1)(*d*), which essentially states that

all works (not falling within the categories of s 21(1)(*b*) or (*c*)), which are made in the course and scope of the author's employment by another person under a contract of service or apprenticeship, the copyright will be owned by such other person.

In other words, unless there is an agreement to the contrary, a work created by an employee under a contract of service (an employment contract) in the course and scope of his or her employment will be automatically assigned to the employer. This was confirmed in the judgment of *King v South African Weather Service* 2009 (3) SA 13 (SCA); [2009] All SA 31 (SCA) wherein the issue of the ownership of the copyright in certain computer programs was questioned. These programs were found to have been written within the course and scope of King's employment and in terms of a contract of service, thereby implying that the South African Weather Service owned the copyright therein.

Automatic assignment is peculiar to the employment context and does not apply to works created by independent contractors. Where an independent contractor is commissioned to create a work in terms of a contract of work (ie, the contractor is not an employee of the commissioner), the copyright contained within such work will be owned by the contractor. In this instance there is no automatic assignment of the copyright to the commissioner of that work.

There are a number of exceptions that are provided for in s 21(1)(*c*) as regards the commissioning of photographs, the painting or drawing of portraits, the making of a gravure, the making of a cinematograph film or the making of a sound recording wherein the commissioner, by virtue of such commission, is deemed to own the copyright associated with these specific types of work.

## Patents and designs

As a result of the similarities in the wording of the Patents Act 57 of 1978 and the Designs Act 195 of 1993, it is simpler to consider these Acts side by side with respect to the various sections that make particular reference to clauses that influence employment contract clauses.

In this regard, both Acts provide for the transfer of ownership by way of an assignment, which should be in writing and recorded in the register at the patents or designs office, recordal being relevant for the purposes of constructive notice. As such, employment contracts can mandate the assignment of an invention (the invention forming the basis for a patent and/or design) to the employer in the event that the invention was made during the course and scope of the employment of an employee.

The position originally set out in *El du Pont de Nemours and Company v SA Nylon Spinners (Propriety) Limited* 1987 BP 282 (CP) was confirmed in *Firm Construction Co Ltd v PG Kusel* 1997 BIP 25 (CP) where it was held that the employment contract can be submitted as proof with respect to ownership of the invention by the employer and lodged in place of a formal assignment of invention in the instance of a recalcitrant or absent employee. Where an employer/employee relationship exists, albeit only by way of an oral agreement, an assignment of the patent to the employer is possible, provided that the employee acted in the course and scope of his or her duties as confirmed in the *Firm Construction* case. In such instances, if any proof is needed it can be provided by the submission of an affidavit (if the agreement was an oral agreement).

Such assignment by operation of law is specifically provided for in s 59 of the Patents Act and s 29 of the Designs Act. However, one would be wise to note the restrictions placed on the scope of such assignment by operation of law. Section 59(2) of the Patents Act states:


**'Although specific instances of automatic assignment of IP are already provided for in the relevant Acts, it is still advisable to include a clause in the employee's contract of employment as this will mitigate against a possible issue arising at a later stage as to the ownership of the particular IP.'**

'Any condition in a contract of employment which –
(*a*) requires an employee to assign to his [or her] employer an invention made by him [or her] otherwise than within the *course and scope* of his [or her] employment; or
(*b*) restricts the rights of an employee in an invention made by him [or her] more than one year after the termination of the contract of employment, shall be null and void' (our italics).

The aforementioned restrictions define the ambit of a clause mandating assignment in a contract of employment and sets a time limit after the termination of employment within which such clause can operate. Commonly, for periods falling outside the time limit of one year, employers include clauses that bind the employee to license such inventions that, but for the termination of their employment, would have fallen within the scope of his or her employment to them in exchange for a notional royalty. The employer thereby avoids the restrictions associated with s 59(2) but allows for its continued use of the invention.

Section 29(2) of the Designs Act is almost identical to s 59(2) of the Patents Act, though the major difference is that s 29(2)(*a*) of the Designs Act is more restrictive in that it applies only to 'a design made by him [or her] otherwise than within the *course* of his [or her] employment'. Hence, this section should apply in much the same manner as its sister section found in the Patents Act, save as regards the requirement for the design to be made only during the course of employment. This implies that employers shall have the right to take assignment of designs made during the course of an employee's employment even though such design may be outside the scope of their employment, therefore making the obligations on employees under the Designs Act much broader.

## Conclusion

Although specific instances of automatic assignment of IP are already provided for in the relevant Acts, it is still advisable to include a clause in the employee's contract of employment as this will mitigate against a possible issue arising at a later stage as to the ownership of the particular IP. The signed employment contract may then also be relied on as being a written assignment in the event of a former employee being recalcitrant.

However, employers (and drafters of such employment contracts) must take special note of limitations for assignment of inventions and designs as set out in s 59 of the Patents Act and s 29 of the Designs Act and may consider including a clause that allows for the licensing of such invention or design after the one-year period has passed in an attempt to further protect their interests.

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# Muslim spouses

## *Are they 'equally' married?*

By
Sheri
Breslaw

The fundamental shift that occurred when South Africa became a constitutional democracy in 1994 heralded changes in all areas of the law. Significant changes were made, and continue to be made, in family law. By way of example, the Recognition of Customary Marriages Act 120 of 1998 gave legal recognition to marriages contracted in terms of African customary laws, thereby protecting the spouses of these potentially polygamous unions.

The Children's Act 38 of 2005 brought about significant changes and improvements to the rights of children, the rights of fathers of children born out of wedlock, and the rights of other 'interested parties', who previously did not enjoy such rights. The Civil Union Act 17 of 2006 has given same-sex couples the opportunity to marry and be afforded the same rights in law as heterosexual couples.

Picture source: Gallo Images/Thinkstock

Where South African statutory law is still fundamentally lacking is in the recognition of the rights of and protection of parties to marriages contracted only in terms of Muslim law. For couples married in accordance with civil law, marriages and divorces are dealt with under the relevant statutes, namely the Marriage Act 25 of 1961, the Civil Union Act and the Divorce Act 70 of 1979. No provision is, however, made in statutory law for the recognition of marriages concluded in terms of Muslim Shariah law. Previously the courts have held that this was due to the potentially polygamous nature of Muslim marriages.

However, it is not as if this shortcoming in the law has not been noticed. The status of Muslim marriages has, since 1990, been the subject of continuing investigation by the South African Law Reform Commission (SALRC). Despite the efforts of the SALRC, as well as the draft Muslim Marriages Bill, which was published as long ago as 2000, there has been no change to statutory law as it stands.

So where does that leave attorneys when they are consulted by clients who want to know what their rights – or lack thereof – may be? Fortunately, it seems that while the legislature has lagged behind, the courts have not. In determining disputes between parties who were married by Muslim law alone, the courts have had to rely on the development of case law in order to come to the assistance of parties involved in litigation.

In terms of Muslim law, the system of community of property is not recognised as the default principle, as it is in civil law. Instead, Muslim marriages are deemed to be marriages out of community of property, excluding the accrual system. Where both parties to a marriage have contributed assets to that marriage, each retains ownership of those assets, both during and on termination of the marriage. The estate is thus considered to be one in which separate assets are mixed, but are not merged into one estate.

The non-tangible contribution made by one partner to an estate, such as the raising of children or the maintenance of the home, are under Muslim law not deemed to be the equivalent of tangible contributions. This is therefore where one of the greatest difficulties lie for spouses when divorcing. In terms of Muslim law there is no possibility of redistribution or of a universal partnership claim, as would be the case in civil law.

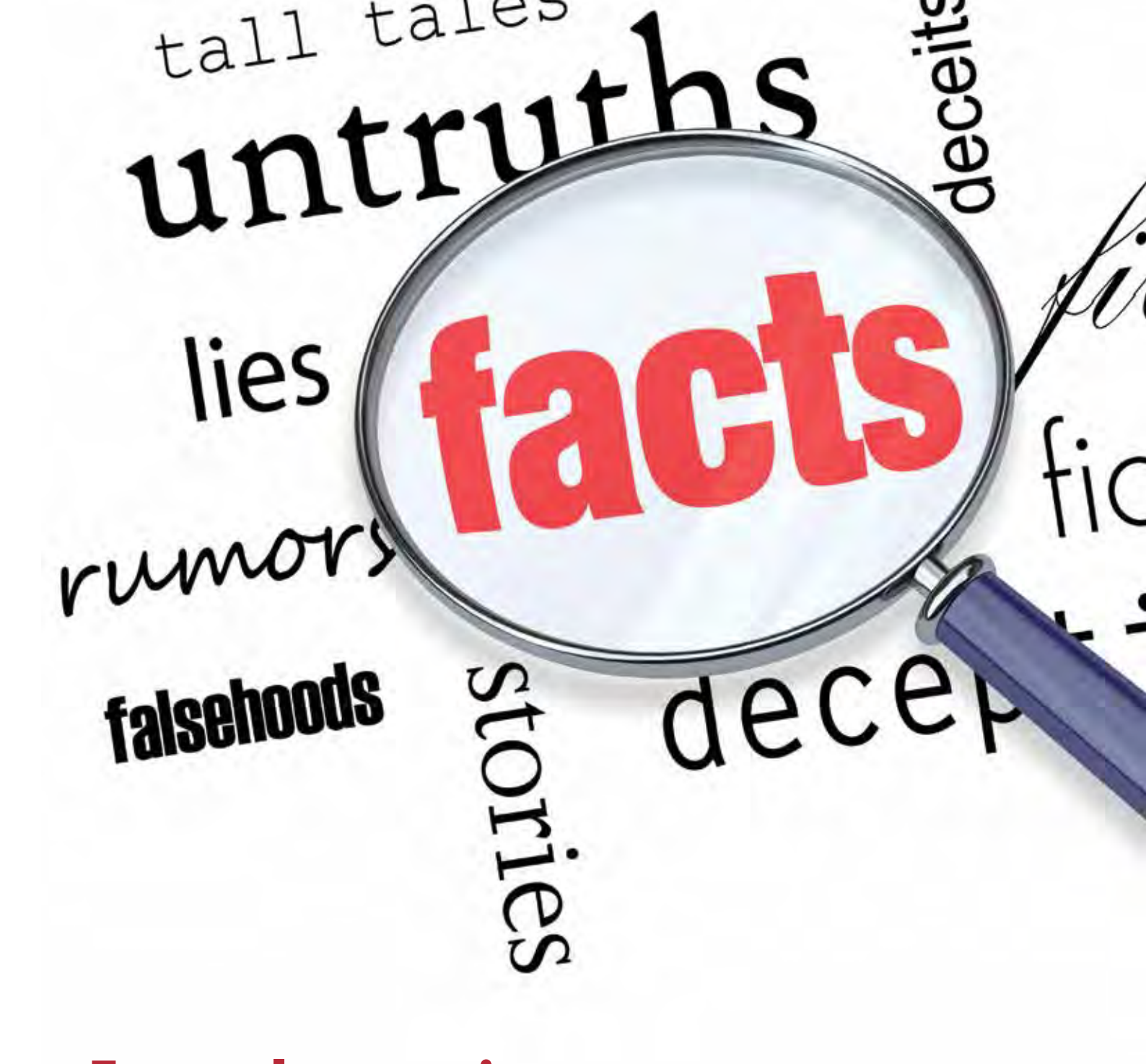
To demonstrate how South African case law has assisted in developing this area of the law, it is useful to start with the case of *Ismail v Ismail* 1983 (1) SA 1006 (A), where it was held that marriages solemnised under Islamic law do not enjoy the same status of marriage in civil law because these unions are potentially polygamous and therefore against public policy.

That same year, however, in the case of *Moola and Others v Aulsebrook NO and Others* 1983 (1) SA 687 (N) the judge was a bit more charitable and held that Muslim marriages are putative marriages. Where this assisted at the time was that the children born of such a union were deemed legitimate. The Children's Act has since provided that children born of Muslim marriages are legitimate, as the Act specifically includes religious marriages in the definition of the word 'marriage'. The courts then seemed to take a step back in the case of *Solomons v Abrams* 1991 (4) SA 437 (W) by deciding that a putative marriage could not come into existence unless the parties went through a marriage ceremony performed by a marriage officer as defined in the Marriage Act (which would not include an imam).

In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) the Constitutional Court, for the first time, recognised the need to take account of the traditions, beliefs and values of all sectors of society, as well as the fact that the Constitution expressly acknowledges the situation where legal pluralism based on religion can be recognised.

Two years later in the case of *Ryland v Edros* 1997 (2) SA 690 (C) it was held that, since a Muslim marriage is a contract from which certain proprietary obligations flow, it provided reason enough to impose some of the consequences of civil marriage on a Muslim marriage, chiefly the obligation of maintenance. Where the decision stopped short however, was in regard to the patrimonial consequences of the marriage. The judge was not prepared to make a ruling that the wife was entitled to a share of the husband's estate.

Continued on page 40.




# Factual causation:

## *One size does not fit all*

By Jerome Veldsman

The judgment of *Lee v Minister for Correctional Services* 2011 (6) SA 564 (WCC) may be an opportunity missed by both the Supreme Court of Appeal (SCA) (see *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA)) and the Constitutional Court (CC) (see *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC)) to develop the South African law of delict with regard to factual causation. In the light of four starkly different judgments, namely, one in the High Court; one in the SCA; and two in the Constitutional Court (Nkabinde J and Cameron J), in relation to the same (mainly undisputed) facts, such development seems necessary or at least expedient.

A distinction between two different factual casual patterns is a useful start to this discussion:

- In the majority of delictual claims, the facts are such that the actual factual cause of the plaintiff's injury can be determined on a balance of probabilities (ie, straightforward cases).
- However, in some delictual claims, there are two or more competing but independent possible causes for the plaintiff's injury, only one of which is a result of the defendant's negligence; and the others are caused by some other factor unrelated to the defendant's (negligent) conduct. Further, there is an admitted lack of sufficient evidence to determine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on a balance of probabilities which of the possible causes actually caused the plaintiff's injury. In 'Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach' (2003) *Texas International Law Journal* vol 38: no 249, Erik S Knutsen terms such factual patterns 'ambiguous cause-in-fact cases' (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1164202, accessed 4-11-2013).

A reason for the distinction in certain other common law jurisdictions between straightforward cases and ambiguous cause-in-fact cases is to treat an ambiguous cause-in-fact case differently with regard to the determination of factual causation. In an ambiguous cause-in-fact case the 'but-for' test inevitably nonsuits the plaintiff, as he or she (by definition) fails to prove on a balance of probabilities that the defendant's (proven) negligence was a *causa sine qua non* of his or her injury. The distinction is not generally overtly made in South Africa, but was alluded to in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915.

The *Lee* case is a 'classic' ambiguous cause-in-fact case. The applicant was arrested in 1999 and detained in prison awaiting trial. Save for a four-month period out on bail in 2000, the applicant was detained until his acquittal in 2004. In 2003 the applicant became ill and was diagnosed as suffering from pulmonary tuberculosis (TB). He instituted a delictual action against the Minister of Correctional Services for damages on the basis that the poor prison health management caused his infection with TB.

The negligence of the Department of Correctional Services was apparent – it had breached its duty of care towards the applicant with regard to proper prison health management – and its conduct was wrongful. However, many prisoners become infected with TB in prison, even under proper prison health management. In other words, either the Department of Correctional Services' negligence, or an unavoidable 'fact-of-life' risk of contagion, caused the applicant's infection; and medical science cannot reliably predict whether or not proper prison health management would have prevented the applicant's infection.

The High Court applied the common law 'but-for' test to determine factual causation, and found in favour of the applicant: 'On the totality of the evidence, I am accordingly satisfied that it is more probable than not that the plaintiff contracted TB as a result of his incarceration in the maximum security prison at Pollsmoor' (at para 236). In brief, the High Court (as to the facts, incorrectly) dealt with the matter as a straightforward case rather than as an ambiguous cause-in-fact case, but achieved a just outcome.

On appeal, the Supreme Court of Appeal (SCA), in a unanimous judgment, applied the standard common law 'but-for' test to determine factual causation, and found in favour of the Minister: 'The difficulty that is faced by Mr Lee is that he does not know the source of his infection. Had he known its source, it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic omission. But, in the absence of proof that reasonable systemic adequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease. On that ground I think that the claim ought to have failed' (at para 64). In brief, the SCA (as to the facts, correctly) dealt with the matter as an ambiguous cause-in-fact case, but achieved an unjust outcome.

All the judges in the Constitutional Court (CC) disagreed with the unjust outcome in the SCA, but the two judgments agreed on little else.

Cameron J, writing for the minority in the CC, held that the SCA had correctly applied the common law 'but-for' test (implying that, in his view, such test is the be all and end all for factual causation), and that the common law ought to be developed to prevent the unjust outcome of the SCA judgment. Cameron J, having conducted an analysis of some foreign judgments dealing with ambiguous cause-in-fact cases, would have ordered that the matter be remitted to the trial court to develop the common law.

Nkabinde J, writing for the majority in the CC, found in favour of the applicant, and held that the SCA had incorrectly applied the common law 'but-for' test (and also implied that such test is not the be all and end all for factual causation), and that the case does not require any development of the common law. However, as is argued below, Nkabinde J did indeed, at least *obiter*, develop the common law in respect of ambiguous cause-in-fact cases.

Nkabinde J endorsed the High Court finding as follows: 'There was thus nothing in our law that prevented the High Court from approaching the question of causation simply by asking whether the factual conditions of Mr Lee's incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions. That is what the High Court did and there was no reason, based on our law, to interfere with that finding' (at para 55).

However, that is not exactly what the High Court did (refer to the quotation from the High Court finding above). The High Court did not find factual causation based on an increase in risk to the applicant; it found factual causation *per se* (I submit, on the facts, incorrectly so). Nkabinde J does not dispute the findings of the SCA and Cameron J that medical science cannot reliably predict whether or not proper prison health management would have prevented the applicant's infection.

One of the solutions in certain other common law jurisdictions for the inadequacy of the 'but-for' test in ambiguous cause-in-fact cases is to substitute a

'material increase in risk test for the "but-for" test'. In the case of *Clements v Clements* 2012 SCC (at paras 13 and 14) the Supreme Court of Canada made the following judgment: 'Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. ... [T]his can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it. In these cases, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of the injury. "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk.'

In *Sienkiewicz v Greif (UK) Ltd*; *Knowsley MBC v Willmore* [2011] UKSC 10 the United Kingdom (UK) Supreme Court applied the 'material contribution to risk' test as a substitute for the 'but-for' test to a single wrongdoer (the *Sienkiewicz* case is a 'follow-up' to *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, discussed by Cameron J). The simplified facts were that the plaintiff died of mesothelioma, a rare form of cancer commonly caused by exposure to asbestos. In common with other inhabitants of the local area, she would have been exposed to a low level of asbestos in the general atmosphere. However, the manufacturing process at her place of employment released asbestos dust into the atmosphere. The court held that the contribution to risk was sufficient to constitute factual causation.

In the United States of America (USA), the equivalent 'material contribution to risk rule' in *Rutherford v Owens-Illinois Inc* (1997) 16 Cal. 4th 953 – the plaintiff's exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability it contributed to the plaintiff's risk of developing cancer – has been applied to a single wrongdoer (see *Kennedy v Southern California Edison Co*, 219 F. 3d 988 (9th Cir. 2000)).

Nkabinde J appears to endorse the 'material contribution to risk' approach in respect of a single wrongdoer: 'It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures' (at para 60). Cameron J (in paras 105 – 108) disagreed with the material increase in risk approach as enunciated by Nkabinde J. His criticism includes the concern that a miniscule increase in an already substantial risk would result in (full) liability. Such matter is dealt with in the *Sienkiewicz* case as follows: 'I doubt whether it is ever possible to define, in quantitative terms, what for the purposes of the application of any principle of law, is *de minimis*. This must be a question for the judge on the facts of the particular case' (at para 108).

Technically, '... the material contribution to risk exception to "but for" causation is not a test for proving factual causation, but a basis for finding "legal" causation where fairness and justice demand deviation from the "but for" test' (the *Clements* case at para 45). Note the criticism of Nkabinde J (at para51) on blurring of the distinction between factual and legal causation.

The *Clements* case concerned a motorcycle accident, and caution was expressed about the general extension of the *Sienkiewicz* case (which is restricted in the UK to mesothelioma cases). The *Sienkiewicz* case contains the following statement: 'Although, therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the "but for" test of causation at its peril' (at para 186).

Plaintiff lawyers, especially in the USA, view the 'material contribution to risk' approach with glee. It would perhaps be wrong, albeit plausible, to seize on the *Lee* case as introducing this approach into South African law. However, there may be a risk that the material contribution to risk approach could open the floodgates of litigation.

In the law of delict/tort, subtle differences between different legal systems make reliable borrowings and comparisons challenging. In the light of the complexity in and volume of relevant foreign judicial authority, our law of delict could benefit from academic assessment of factual causation in ambiguous cause-in-fact cases in a South African context, including consideration of –

- the 'material increase in risk' approach;
- the 'reversal' approach; reversing the burden of proof of causation to the defendant; and
- the 'inference' approach; inferring causation from the facts of the case (similar to the 'common sense' approach alluded to by Nkabinde J in the *Lee* case).

An ideal legal position would be more predictable than an imprecisely formulated 'material increase in risk' approach or 'common sense' approach.

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# THE LAW REPORTS

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**October 2013 (5) The South African Law Reports (pp 325 – 639); [2013] 3 The All South African Law Reports September no 1 (pp 481 – 603) and no 2 (pp 605 – 670)**

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
**GNP**: Gauteng North High Court, Pretoria
**GSJ**: Gauteng South High Court, Johannesburg
**KZD**: KwaZulu-Natal High Court, Durban
**SCA**: Supreme Court of Appeal
**WCC**: Western Cape High Court, Cape Town

## Civil procedure

**Service of summons on employee of another entity:** Rule 4(1)(a)(v) of the uniform rules of court provides that service of any process of the court directed to the sheriff shall be effected by the sheriff in one or other of the following manners, namely in the case of a close corporation or company, by delivery of a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept the service, by affixing a copy to the main door of such office or place or in any other manner provided by law.

In *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA), [2013] 3 All SA 605 (SCA) the appellant, Arendsnes, was a close corporation that had a registered office but had ceased trading and had no presence there. A summons issued against it was served by the sheriff there on one P. However, P was not an employee of the appellant but of another entity that was conducting business at the premises.

The appellant contended that, as the summons had not been affixed to the main door at the premises but was served on an employee of another entity, there was no proper service with the result that the debt had prescribed. The GNP, per Stockwell AJ, dismissed the special plea of prescription. An appeal to the SCA was dismissed with costs.

Shongwe JA (Mthiyane DP, Pillay and Petse JJA concurring and Leach JA reading a separate concurring judgment) held that effectiveness of the service of a court process or substantial compliance should trump form. In other words, by reason of the fact that a copy of the summons was served at the registered office of the appellant there had been substantial compliance with the requirements of r 4(1)(a)(v) even though the service did not strictly comply with the rule. It would not be a proper exercise of a court's discretion to uphold the special plea in circumstances where there was substantial compliance with the rules. Moreover, a corporation should not be permitted to register an office address where it had no purpose or business and by so doing frustrate service of summons and other court processes on it.

## Constitutional law

**Constitutional damages for infringement of the right to parental care:** In *M and Another v Minister of Police* 2013 (5) SA 622 (GNP) one WM died in police custody after he was seriously assaulted by fellow police cell inmates. As a result his two wives sued the defendant, the Minister of Police, for the loss of support they suffered. Furthermore, they also sued for loss of parental care suffered by their minor children as a result of the death of their father.

The claim for the loss of support suffered by the wives was settled in terms of an agreement that was made an order of court. After preparing a stated case in terms of which the facts were agreed, the parties requested the court to adjudicate on whether the minor children's action for loss of parental care was sustainable in law. The court held that such a claim was valid and ordered the defendant to pay costs. The issue of quantum was referred to the trial court for determination.

Mothle J held that although South Africa, unlike some countries, did not have a statute providing for compensation to any child for damages consequent to the unlawful death of a parent at the hands of a third party, the law nevertheless recognised that constitutional damages could be awarded as appropriate relief in compensation for loss suffered as a consequence of the unlawful infringement of a constitutional right. In this regard, a court could fashion a new remedy and make an award in the form of constitutional damages as appropriate relief to compensate for an infringement of that right.

Any claim for damages on behalf of a minor child had to be based on the provisions of s 28 of the Constitution (children's rights) read with the relevant provisions of the Children's Act 38 of 2005 (the Act). A party intending to claim damages on behalf of a child for loss of parental care as a result of the unlawful death of a parent should also base such a claim on s 28 of the Constitution read with the relevant provisions of the Act, depending on which specific right was alleged to have been infringed.

The cause of action for such constitutional damages should be stated in terms of s 15 of the Act as appropriate relief in the form of a claim for damages arising out of loss of parental care. The court cautioned though that a child could not claim for both loss of support and deprivation of parental care separately as the former was part of the latter. Claiming for both would be a duplication and amount to undue enrichment.

**Separation of powers between the judiciary and executive:** Section 2 of the Performing Animals Protec-

tion Act 24 of 1935 (the Act) provides that any person intending to exhibit or train for exhibition any animals, or who uses a dog for safeguarding, may apply in writing in the prescribed manner to the magistrate of his or her district for a licence to do so. Section 3 provides that the holder of a licence shall not exhibit, train or use any dog for safeguarding unless he or she is in possession of a certificate authorising such exhibition, training or use of all animals covered by the licence.

The constitutionality of these provisions was challenged in *NSPCA v Minister of Agriculture, Forestry and Fisheries and Others* 2013 (5) SA 571 (CC) where the applicant, the National Society for the Prevention of Cruelty to Animals (NSPCA), contended that they encroached on the principle of separation of powers between the judiciary and the executive by empowering a judicial officer, a magistrate, to do a non-judicial function, namely an administrative function of granting licences.

The GNP held, per Legodi J, that the provisions were unconstitutional and declared the sections invalid. Pending confirmation of the invalidity order by the CC the High Court ordered that a committee consisting of five members had to perform the licensing function.

The invalidity order was confirmed by the CC that amended the High Court order by removing the part relating to the appointment of the committee of five. The court suspended the order of invalidity for a period of 18 months during which the sections would continue to apply. No order was made as to costs.

Reading a unanimous judgment of the court, Zondo J held that although the South African model of separation of powers was not one that required a complete or total separation and it permitted the performance of some non-judicial functions by the judiciary, the court had to take an approach that promoted rather than diluted the principle of separation of powers and the independence of the judiciary. In other words, while the approach to be taken should enhance and promote the separation of powers, it had at the same time to be based on an acceptance that there would always be some administrative functions that members of the judiciary would perform from time to time without infringing the doctrine of separation of powers

The performance by the judiciary of administrative functions that the Constitution sanctioned did not offend against the doctrine. Furthermore, the performance of certain administrative functions by the judiciary that were closely connected with the core function of the judiciary did not offend the doctrine. The appropriate approach to be followed involved the following questions, namely:

- Whether the function complained of was a non-judicial one. It if was a judicial function, that was the end of the inquiry as there could be no concern. If it was a non-judicial function, the inquiry proceeded to the next question.
- Whether the performance of the non-judicial function by a member of the judiciary was expressly provided for in the Constitution. If it was, that was the end of the inquiry as there could be no infringement of the separation of powers doctrine. If it was not, the inquiry proceeded to the next question.
- Whether the non-judicial function was closely connected with the core function of the judiciary. If it was, the doctrine was not offended. If not, the inquiry proceeded to the next question.
- Whether there was a compelling reason why a non-judicial function that was not closely connected with the core function of the judiciary should be performed by a member of the judiciary and not be the executive or a person appointed by the executive for that purpose.

In the instant case the performance by a magistrate of the function complained of offended against separation of powers doctrine and was therefore inconsistent with the Constitution as there was no compelling reason why it could not be performed by the executive or some other person appointed by the executive.

## Consumer credit agreements

**Unlawful service charges:** Section 101(1) of the National Credit Act 34 of 2005 (the NCA) provides, among others, that a credit agreement must not require payment by the consumer of any money or other consideration except the principal debt, initiation fee and a service fee that must not exceed the prescribed amount relative to the debt.

In *Barko Financial Services (Pty) Ltd v National Credit Regulator and Another* 2013 (5) SA 370 (GNP) the amount of the prescribed service fee agreement was R 50 per month per transaction. The credit provider was the appellant Barko, which provided credit services to a number of consumers. After investigating the business activities of the appellant the first respondent, the National Credit Regulator, found them inconsistent with the NCA and issued a compliance notice requiring the appellant to make repayment to the consumers. The compliance notice was upheld by the National Consumer Tribunal against whose decision the appellant appealed to the High Court.

In terms of an agreement concluded between the appellant and the consumer, the latter had to pay a service fee to the former. Furthermore, the consumer had to pay an additional service fee to a third party, NuPay, with whom the consumer did not have a separate agreement. That payment was in excess of the prescribed R 50 per month and was made for a service rendered by NuPay to the appellant, not to the consumer. Furthermore, such payment was made to the appellant from whom NuPay would collect it. The appellant's appeal against the decision of the National Consumer Tribunal was dismissed with costs.

Pretorius J (Vorster and Hughes AJJA concurring) held that s 101(1) of the NCA did not make provision for the consumer to pay additional fees that would exceed the prescribed amount of R 50. In the instant case, even though the appellant argued that the consumer benefitted from the services of NuPay, it was in fact the appellant who benefitted. An additional monetary liability was imposed on the consumer by the so-called agreement with NuPay in respect of which the appellant contravened s 100(1)(*d*). The capped service fee of the appellant was R 50 but, in addition, the consumer had to pay a monthly service fee to NuPay. The appellant contravened s 90(2) by providing for an additional service fee and evading the provisions of s 101.

## Exchange control

**Validity of 10% levy imposed on removal of funds from the country:** In February 2003 after his budget speech the Minister of Finance released a circular announcing that anyone leaving the country would be allowed to take with a maximum amount of R 750 000 and that taking any amount in excess thereof would need authorisation from the Exchange Control Department of the South African Reserve Bank (SARB). If granted, such authorisation would be conditional on the emigrant paying a 10% levy on such extra amount. The circular was issued pursuant to the exchange control regulations made in terms of the Currency and Exchanges Act 9 of 1933 (the Act).

In *Shuttleworth v South African Reserve Bank and Others* [2013] 3 All SA 625 (GNP) the applicant Shuttleworth (S) was a South African citizen who emigrated to the Isle of Man, British Isles, in 2001 and had an amount of R 4,27 billion to take along. It was arranged that the amount would be taken in blocks. In 2009 S sought to take the last block of some R 2,5 billion.

The first respondent, the SARB, through its Exchange Control Department, approved the removal of the funds from the country but subject to the 10% levy of some R 250 million which S

duly paid, although under protest. Thereafter the applicant sought an order reviewing and setting aside the levy of 10% imposed on him, the return of the amount thus paid together with interest. He also sought an order declaring a number of regulations unconstitutional, as well as one declaring invalid the 'closed door policy' of the SARB in terms of which members of the public wishing to take money out of the country made application to authorised dealers or commercial banks instead of dealing directly with the SARB.

Under challenge also was the power of the president of the country to make regulations amending or suspending any part of the Act or any other Act of parliament. The application succeeded in part but failed in a number of respects. As a result each party was ordered to pay their own costs. Some regulations that were found unconstitutional were struck down, while the invalidity others was suspended for 12 months.

Legodi J held that the first respondent's 'closed door policy' was neither unlawful nor unconstitutionally unfair since providing information or advice on exchange control or currency matters as well as granting approval or permission in respect of exchange, currency and gold transactions were governed by the regulations. When those roles were assigned to commercial banks it could not be said that there was no empowering authority for doing so.

Turning to the 10% levy, the court held that once it was found that the decision to impose a levy was derived from the empowering s 9(1) of the Act and reg 10(1)(c), there was nothing left of the track of unconstitutionality of the rules, circulars and rulings issued by the minister. The object of the levy was to limit the adverse consequences of the outflow of funds on the external balance of payments that was necessary to maintain the country's macro-economic health and to promote financial growth and stability.

On the question of s 9(3) of the Act the court held that it gave the president not only the power, through regulations, to amend or suspend any part of the Act and any other law relating to currency, banking or exchange but also the power to amend or suspend any other Act of parliament. That was an extraordinary wide power that effectively vested in the president the power to amend or suspend any Act of parliament irrespective of whether that other piece of legislation dealt with issues of currency, banking or exchange. Without further ado, s 9(3) had to be found to be inconsistent with the Constitution.

## Foreign judgments and orders

**Recognition of foreign judgments and orders:** Article 32 of the Tribunal Protocol (the tribunal) provides, among others, that states and institutions of the Southern African Development Community shall take all measures necessary to ensure execution of decisions of the tribunal. It further provides that those decisions shall be binding on the parties to the dispute in respect of the particular case and will be enforceable within the territories of the states.

The tribunal was established in terms of the Treaty of the Southern African Development Community (the treaty) to which South Africa and Zimbabwe belong. The goals of the treaty include guaranteeing democratic rights as well as observing human rights and the rule of law.

These goals were disregarded in Zimbabwe and led to litigation in *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) when the appellant, the government of Zimbabwe, acting in terms of the constitution of that country, expropriated agricultural land belonging to commercial farmers without compensation. The same constitution denied farmers access to courts regarding complaints about expropriation. As a result the respondents, being Fick and others, took the matter to the tribunal in terms of art 32.

The tribunal made a ruling, with costs, in favour of the respondents but that ruling had to be taken to the summit of the treaty consisting of heads of state or government for final determination. In the meantime the respondents wanted to execute the costs order and, since that could not be done in Zimbabwe because of the provisions of the constitution of that country, they turned to South Africa to attach and execute on property of the appellant situated in this country.

The GNP, per Rabie J found in favour of the respondents, as did the SCA. As a result the appellant appealed to the CC, contending in the main that as a sovereign state it was immune from civil litigation in South Africa as provided for in the Foreign States Immunities Act 87 of 1981 (the Immunities Act). The CC granted leave to appeal to it but dismissed the appeal with costs.

Reading the main judgment, from which Jafta J dissented, Mogoeng CJ held that art 32 of the tribunal imposed a legal obligation on South Africa to take all legal steps necessary to facilitate the execution of decisions taken. Although, in terms of the Immunities Act, the government of Zimbabwe would be immune from the jurisdiction of the courts of South Africa that would not be so if immunity was expressly waived. In the instant case such waiver took place when Zimbabwe agreed to be bound by the tribunal.

More problematic though was the fact that, in terms of s 2(1) of the Enforcement of Foreign Civil Judgments Act 32 of 1988 (the Enforcement Act), foreign civil judgments could be enforced in South Africa if they were granted by a component of the 'domestic court system of any country' whereas the tribunal was not part of the domestic system of any country. Moreover, the application of the Enforcement Act was confined to South African magistrates' courts. To overcome this problem and put the superior courts in a position to enforce an order of the tribunal, the CC held that the common law had to be developed to extend the meaning of a 'foreign court' to include the tribunal.

As a result s 34 of the Constitution, which makes provision for access to courts, had to be interpreted, and the common law developed, so as to grant the right of access to South African courts to facilitate the enforcement of the decisions of the tribunal in this country. Such development of the common law was not retrospective but was confined to the instant case and future matters.

## Government procurement

**Interdicting a tender that was not awarded to highest-scoring tenderer:** In *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality and Another* 2013 (5) SA 461 (KZD) after the first respondent municipality, Umhlathuze Municipality (Richards Bay) invited bids for a building contract for sewage works, the applicant WJ Building (WJ) emerged as the apparent winner after scoring the highest points and offering the lowest price. However, the tender was awarded to the runner-up, the second respondent PC.

The reason for not awarding the tender to the front-runner was that it had in the recent past been awarded two contracts, this creating a desire on the part of the municipality to rotate the award of tenders. However, such considerations were not part of the bidding process. Aggrieved by the award of the tender, the applicant sought an interdict restraining the execution of the contract pending prosecution of review proceedings to have the award set aside. The interdict was granted, costs being reserved for determination in review proceedings.

Lopes J held that the municipality's rationale for not awarding the contract to the appellant, which scored the highest points, had to be based on objective criteria that were reasonable and justifiable. On the contrary, the reasons put forward by the municipality's evaluation committee were arbitrary and did not appear in the tender invitation advertisement, the Preferential Procurement Pol-

icy Framework Act 5 of 2000 (the PPPFA) or the preferential procurement regulations, nor were they evident from the municipality's preferential procurement policy.

The arbitrary use of any measure to determine the success or failure of a bid was contrary to the functions required of the bid evaluation committee by the municipality's supply chain management policy. The fact that the applicant might have benefitted from previous projects was not, of itself, a reason for rejecting its bid. The deciding number of previous projects, for example, was an arbitrary decision by the bid evaluation committee.

The need to encourage rotation of service providers, which could be a legitimate objective of the municipality, was nowhere expressed as a factor that could be taken into account in determining the successful bidder. It should have been reflected in the invitations to bid, otherwise tenderers would not have been able to consider and deal with it. Therefore, the award of the project to the second respondent was made on an unfair basis. The applicant had thus established a *prima facie* case for an interdict.

## Labour law

**Liability of a trade union for breach of mandate to represent its members after undertaking to do so:** In *Food and Allied Workers Union v Ngcobo NO and Another* 2013 (5) SA 378 (SCA) Ndlela and Mkhize, the respondents, were employees of Nestlé and members of the appellant trade union, Food and Allied Workers Union (FAWU). After their unfair dismissal, in that they were informed of their retrenchment by the employer who did not follow the required retrenchment procedure as required by s 189 of the Labour Relations Act 66 of 1996 (the LRA), the appellant represented them at the Commission for Conciliation, Mediation and Arbitration (CCMA) where the dispute was not resolved and had to be referred to the Labour Court.

The respondents duly mandated the appellant to refer the dispute to the Labour Court. After much assurance that the dispute had been referred to the Labour Court as requested, the respondents established about a year later that no such referral had been done. At that stage the appellant advised that condonation for late referral of the dispute was required, but neither the appellant nor the respondents applied for the condonation.

As a result the respondents' claim against the employer was lost. The respondents therefore instituted High Court proceedings against the appellant for breach of mandate in which they claimed what they would have recovered had their dispute with the employer been referred to the Labour Court

The KZD held, per Swain J, that the appellant had to pay the respondents' damages in an amount equal to twelve months' pay. The appellant appealed against that decision while the respondents cross-appealed, seeking damages in an amount equal to twenty-four months' pay. Both the appeal and cross-appeal were dismissed, the appellant being ordered to pay the costs.

Ponnan JA and Plasket AJA (Malan and Tshiqi JJA concurring and Southwood AJA dissenting) held that the respondents' claim was based on contract and not on delict. What the respondents were alleging was that there was a contract between the parties that imposed an obligation on the appellant, which the latter failed to perform in the manner contemplated by the contract.

That contract was a mandate that, once accepted, the appellant was obliged to perform its functions faithfully, honestly and with care and due diligence. The mandate given to the appellant was a relatively simple one in that all it had to do was to take such steps as were necessary to have the respondents' labour dispute with their employer determined in accordance with the provisions of the LRA which the appellant could easily have done but did not, thus committing breach.

It committed breach in the first place by failing to timeously refer the respondents' dispute with the employer to the Labour Court and, in the second place, by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently. All that the respondents had to establish to succeed in the action against the appellant was that, had their dispute been referred by the appellant to the Labour Court in accordance with the terms of the mandate, it would have been resolved in their favour.

- See also 2013 (June) *DR* 58.

## Marriage

**No claim for prospective loss for breach of promise to marry:** In the case of *Cloete v Maritz* 2013 (5) SA 448 (WCC) the facts were that in 1998 the plaintiff, Ms Cloete, and the defendant, Mr Maritz, orally agreed to marry each other within a reasonable time. As a result they became engaged in 1999.

Some ten years later, in 2009, the defendant repudiated the agreement by orally refusing to marry the plaintiff and informing her that he did not want to see her again as he had found someone new in his life.

This being the case, the plaintiff instituted a claim against him consisting of three heads, namely –

- payment of the amount of donation that she allegedly made to him;
- loss of financial benefits of the marriage in the form of enjoyment of immovable property and maintenance she would have received had the parties married; and
- breach of her dignity and reputation by the contumelious manner in which the defendant breached the promise to marry, allegedly having used foul language and telling his new woman many things about the plaintiff.

The defendant raised a special plea to the claim for loss of financial benefits, contending that such claim was no longer available in South African law. The special plea was upheld and costs stood over for later determination.

Henney J held that the law relating to breach of promise to marry had to be considered in the light of the prevailing *mores* and public policy considerations if regard was to be had to the values that underlie the Constitution. The existing approach to engagement did not reflect the current *boni mores* or public policy considerations based on the values of the Constitution, that is, to see a party's failure to honour his or her original promise to marry purely within the context of contractual damages was not acceptable.

To hold a party accountable on a rigid contractual footing where such party failed to abide by a promise to marry did not reflect the changed *mores* or public interest. To hold a party liable for contractual damages for breach of promise could lead parties to enter into marriages they did not in good conscience want to enter into, doing so purely due to fear of being faced with such a claim, which situation was untenable. Moreover, it would be illogical to recognise the irretrievable breakdown of marriage as a ground for divorce while not doing so in respect of the breakdown of an engagement.

Considerations of public policy and changed *mores* did not permit a party to be made to pay prospective damages on a purely contractual footing where such a party wanted to resile from a personal relationship and thus committed a breach of promise to marry. To base a claim for breach of promise to marry on a rigid contractual footing, in the sense that a claim for prospective losses would be permissible, was not a valid cause of action.

## Motor vehicle accidents

**Calculation of loss of income:** In *Jonosky v Road Accident Fund* 2013 (5) SA 356 (GSJ) the plaintiff, Jonosky, was injured in a motor vehicle collision and, as a result, instituted proceedings against the Road Accident Fund for recovery of compensation. All

issues were settled save the amount of compensation for loss of income, which problem stemmed from different methods of calculation used by the parties' actuaries, resulting in a difference of almost R 400 000.

The issue was therefore the correct interpretation and application of s 17(4)(*c*) and (4A)(*b*) of the Road Accident Fund 56 of 1996 (the Act). Section 17(4)(*c*) provides, among others, that where a claim for compensation includes a claim for loss of income the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding R X per year in the case of a claim for loss of income. Section 17(4A)(*b*) on the other hand, provides that the amount, as adjusted quarterly in order to counter the effect of inflation, shall be the amount set out in the last notice issued prior to the date on which the cause of action arose.

Very briefly, the argument for the plaintiff was that the amount awarded in respect of both past and future loss of income had to be adjusted to counter the effect of inflation while for the defendant it was argued that no adjustment should be made for future loss of income as the future rate of inflation was subject to fluctuations and, as such, inexact while at best it was speculative.

Claassen J held that in calculating future loss of earnings beyond the date on which such calculation was made, an actuary was duty-bound to incorporate a projected future inflation rate on an annual basis. As a result the court awarded the higher amount sought by the plaintiff and granted the parties leave to prepare a draft order that would be made a final order of court.

It was held that s 17(4A)(*b*) contemplated the adjustment to the amounts stipulated in s 17(4)(*c*) in respect of a claim for loss of income as at the date when the loss occurred, this being the date of the collision. The subsection did not purport to deal with adjustments after the date on which the cause of action arose.

However, in respect of future annual loss, reliance had to be placed on the actuarial calculations of future loss of earnings which, in the past, had always taken into consideration a projected future inflation rate for each year up to the date of retirement. There was no need to disturb that methodology when calculating future loss of earnings.

There had always been a speculative 'looking into a crystal ball' to come up with a projected annual inflation rate during the future years up to retirement. Therefore the purpose of s 17(4A)(*b*) was intended to set a starting date for utilising adjustment amounts when calculating loss of earnings after the accident and for no other purpose.

## Set-off

**Debtor's claim against parent cannot be set-off against child's claim:** In *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA) a mother, one S, together with her two very young children, P and L, aged two years and four months respectively, were injured in a motor vehicle collision. Her attorney lodged a claim with the appellant, the Road Accident Fund.

For no very clear reasons the mother received no compensation at all, while P and L received offers of settlement in the amount of some R 8 000 and R 7 000 respectively from which the appellant deducted 30% for the mother's alleged contributory negligence.

Some ten years later the respondent, Myhill, was appointed a *curator ad litem* to represent the minors and instituted proceedings for setting aside the settlement agreements on two grounds, namely that the amounts given were inadequate as the minors had suffered serious head injuries and also because set-off of the claims for a debt owed by the parent was not allowed. Moreover, new proceedings had been instituted on behalf of the minors in which a substantial amount of R 850 000 was sought for each child.

The GSJ, per Strydom AJ set aside the settlement agreements as they were prejudicial to the minors. An appeal to the SCA against that decision was dismissed with costs.

Leach JA (Brand, Shongwe JJA, Willis and Van der Merwe AJJA concurring) held that the settlement agreements fell to be rescinded. The relatively trifling amounts at which the children's claims were settled bore no realistic relationship to the measure of their damages, regard being had to the nature and severity of the injuries and the very real prospect that they could experience epilepsy in the future. The agreements could not be allowed to stand as they caused the children to suffer substantial prejudice.

On the issue of set-off the court held that the general principle was trite that in order for set-off to operate between two parties there should be reciprocal indebtedness which, if both debts were equal, would lead to their mutual discharge or, if they were not equal, to the larger being reduced by the amount of the smaller. It was also trite that individuals in their personal capacities were treated as different persons when they acted in representative capacities.

Consequently, a debt owed by or to a person in his or her individual capacity could not be set off against a debt owed to or by the same person in a representative capacity whether as executor, trustee, custodial parent, stakeholder or however. The time had come for the SCA to put the matter beyond doubt and rule that a debtor liable to a minor child, when sued by the child's custodian parent, was not allowed to set off against its liability to that child any amount that it might personally be owed by the custodian parent.

Accordingly, it was impermissible to reduce the appellant's liability to the minors by way of setting off against the claims the alleged personal liability of their mother to it arising from contributory negligence on her part. In the instant case the two children were clearly prejudiced by the appellant having done so.

## Unlawful competition

**Validity of corporate leniency policy:** The Competition Commission (the commission), which was established in terms of the Competition Act 89 of 1998 (the Act), has adopted a corporate leniency policy (CLP) in terms of which a member of a cartel (whistleblower) who provides information about the existence of a cartel and its activities would be granted immunity.

In *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others* 2013 (5) SA 484 (SCA), Consolidated Wire Industries (CWI) was a member of a cartel in the steel industry that engaged in price fixing, division of the market and collusive tenders. CWI disclosed the existence of the cartel, its membership and activities to the Commission.

After investigation, the commission referred a complaint to the commission tribunal seeking an order declaring that –

- the activities of the cartel were unlawful;
- members should desist from engaging in such unlawful activities; and
- each one of them should pay a penalty equal to 10% of its annual turnover for the 2008 financial year.

A member of the cartel, the appellant Agri Wire, sought a High Court order setting aside the adoption of the CLP by the commission, its granting to CWI and that evidence obtained in terms thereof should not be used in follow-up proceedings. It was the appellant's case that if a complaint was lodged with the Competition Tribunal it had to be against all members of the cartel and not selectively by excluding the whistleblower. The GNP, per Zondo J, dismissed the application. An appeal to the SCA was dismissed with costs.

Wallis and Pillay JJA (Nugent, Leach and Tshiqi JJA concurring) held that the commission was empowered by the Act to adopt and implement the CLP by giving conditional and total immunity to parties who made disclo-

sure and provided evidence that enabled it to pursue cartels and bring them to an end. The Act specifically provided that the commission could refer all or some of the particulars of the complaint and could add particulars to the complaint submitted by the complainant. If the complaint was that A and B and C had engaged in cartel behaviour, the commission could decide to refer only A and B. In that way the commission would have exercised the express statutory power to exclude certain particulars, namely C from referral. Equally, when the commission decided to add D as a participant in the cartel, that was in accordance with the express provisions of the statute.

**NB:** 'Corporate leniency policy' was also dealt with in *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) where the main issue was confidentiality of the contents of application for leniency and waiver of such confidentiality.

## Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with application for environmental authorisation, arbitration of building contract disputes, claim by creditor against insolvent's insurer, commencement of liquidation proceedings, commissioning of affidavit, contributory negligence, deferral of summary judgment, detention of illegal immigrants, filing answering affidavit and replying affidavit, free residue in insolvency, full and final settlement, impermissible payments to trustee of medical scheme, interpretation of construction guarantee, *mandament van spolie*, medical negligence, power of local government to impose rates on property, proceedings by liquidator on behalf of company, procedural requirements for sale in execution, proof of oral agreement, racketeering activity, registration of title in immovable property by other than ordinary procedure, requirements for interim interdict and warrant to take possession of insolvent estate's property.

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## Muslim spouses: Are they 'equally' married? Continued from page 31.

In *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality intervening)* 1999 (4) SA 1319 (SCA) it was held that a legally enforceable duty of support will arise from a marriage in accordance with the tenets of a recognised and accepted faith, and that the 'inequality, arbitrariness, intolerance and inequity' that would result from not following this approach was inconsistent with the new ethos of a constitutional democracy. In this case, which involved a claim made by a spouse in a Muslim marriage against the deceased estate of her spouse, the court emphasised that the crucial question was whether the relationship between the deceased and the dependant was one that deserved recognition and protection at common law.

In the case of *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) the Constitutional Court held that a Muslim spouse in a monogamous marriage had the right to inherit and the right to claim maintenance from a deceased spouse who had died intestate. It was further determined that the word 'spouse', as contained in the Intestate Succession Act 81 of 1987, as well as the word 'survivor', as contained in the Maintenance of Surviving Spouses Act 27 of 1990, should apply to spouses married in accordance with Muslim law. In the case of *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) the Constitutional Court went further and held that this right extended to polygamous Muslim unions as well.

The issue of maintenance was dealt with in the case of *Khan v Kahn* 2005 (2) SA 272 (T) where it was decided that partners in Muslim marriages, irrespective of whether such marriage was monogamous or polygamous, owe each other a duty of support and therefore have the right to claim maintenance from one another in terms of the Maintenance Act 99 of 1998. In the case of *Mahomed v Mahomed* 2009 JOL 23733 (ECP) this right to claim maintenance was extended to include a claim for interim maintenance in terms of r 43 of the rules of the High Court, relating to applications brought by a spouse pending the finalisation of divorce proceedings.

In *Du Toit v Seria* 2006 (8) BCLR 869 (CC) the issue before the court was whether there existed a universal partnership between spouses married in terms of Muslim law. The party wishing to claim that such a partnership existed, Mrs Du Toit, took the matter to the Constitutional Court. Unfortunately, by virtue of the fact that the constitutional issues relating to the recognition of Muslim marriages had not been specifically pleaded in the initial action, which she had brought in the lower court, the appeal was dismissed and no finding was made.

In the case of *Butters v Mncora* 2012 (4) SA 1 (SCA) the Supreme Court of Appeal recognised and confirmed the existence of a universal partnership between a couple who had lived together for 20 years. The court awarded the claimant 30% of the other party's estate. The court ruled that, while cohabitation does not give rise to special legal consequences, a cohabitee can invoke a remedy in private law which, in this case, was based on the law of partnership. But the Bench observed that it is not possible to establish a norm for cohabitees, as could be done for spouses, and that a universal partnership is not the same as a marriage in community of property.

The issue of a spouse's claim to the other spouse's pension interest came before the pension funds adjudicator in the case of *Tryon TY v Nedgroup Defined Contribution Pension and Provident Funds and Another* (unreported case no PFA/GA/8796/2011/TCM). The adjudicator had to deal with the question of whether a spouse in an Islamic marriage can share in the other spouse's pension interest on divorce. The adjudicator ruled that it is possible for a spouse married and divorced in terms of Islamic rights only to share in the other spouse's pension interest on divorce. The member spouse's retirement fund would have to make payment to the non-member spouse if the agreement reached between the spouses regarding the division of pension interest states as much and has been made an order of court.

In terms of the Civil Proceedings Evidence Act 25 of 1965 as well as the Criminal Procedure Act 51 of 1977, a spouse to a Muslim marriage may not be compelled to testify in civil or criminal proceedings against his or her spouse, as is the case with spouses who are civilly married. Similarly, the Transfer Duty Act 40 of 1949 exempts from duty property inherited from the deceased estate of a spouse married in terms of Muslim law. The Estate Duty Act 45 of 1955 also provides an exemption on property accruing to a surviving spouse to a Muslim marriage from the estate of the deceased spouse.

While it is regrettably obvious that the South African legislature has a long way to go in terms of equalising the rights of Muslim spouses, it is equally apparent that the courts have made every endeavour to make use of the Bill of Rights, as well as the general ethos of the country, where possible, to extend the rights of Muslim spouses so as to afford them the same rights as parties to a civil or customary union.

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By Michele Gioia

# Don't wait until it is too late

## *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others (SCA) (unreported case no 90/2013, 9-10-2013) (Brand JA)*

In the case of *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* (SCA) (unreported case no 90/2013, 9-10-2013) (Brand JA) the Supreme Court of Appeal (SCA), recently dismissed the appeal of the Opposition to Urban Tolling Alliance (OUTA) and others relating to its review proceedings against the South African National Roads Agency (SANRAL) and others' decision to declare certain roads situated within Gauteng as toll roads in terms of s 27 of The South African National Roads Agency Limited and National Roads Act 7 of 1998.

The review proceedings were launched at the behest of OUTA, the Southern African Vehicle Renting and Leasing Association (SAVRALA) and the South African National Consumer Union. It was common cause that the appellants themselves comprised of various corporate organisations and members of the public.

This decision is regarded as the fall of the final obstacle faced by SANRAL in its plan to implement the proposed toll system in respect of certain highways in Gauteng. While there has been public dismay at the decision, it is interesting to examine the legal principles and reasons given by the court in arriving at the decision.

### History of OUTA's litigation

In March 2012 OUTA launched an urgent application wherein it sought an order interdicting SANRAL from levying and collecting tolls on the seven roads in Gauteng, pending a review of the decision to declare these roads as toll roads. This urgent application was granted on 28 April 2012 in the North Gauteng High Court.

The respondents', however, appealed the decision by way of a direct appeal to the Constitutional Court. This appeal was successful and the judgment has since been reported as *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC). The Constitutional Court, however, stressed that its decision should in no way affect the outcome of the review application that was still to be heard.

In due course the review application came before Vorster AJ in the North Gauteng High Court (see *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* (GNP) (unreported case no 17141/2012, 13-12-2012) (Vorster AJ)). He dismissed the review application with costs in favour of the respondents, including the costs reserved by the Constitutional Court. This gave rise to the appeal to the SCA.

### The SCA decision

The important issue faced by the court centred around the period of time that had transpired between the time the decision to proceed with the toll system and the commencement of the litigation described above, which commenced during March 2012. The court first examined the historical timeline associated with the decision to implement the tolling system and, secondly, the time periods stipulated by s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The court's examination of the timeline revealed that the decision to implement this system was first included in a report dated September 2006, which dealt with the need for improvements and additions to the South African transportation system and, in particular, the network of highways in Gauteng and the associated funding. This report also gave rise to the formation of the Gauteng Freeway Implementation Plan (GFIP). On 8 October 2007 the then Minister of Transport officially announced the launch of the GFIP.

The GFIP was launched at a media event at which members of the media (print, radio and TV) were present and the keynote address contained a presentation that referred to the proposed toll tariffs of between 30 and 50 cents per kilometre. Following this presentation of the freeway tolling concept, the implementation of the project and the expected toll tariff were reported in the printed media and on radio and television.

On 9 May 2008 SANRAL issued a media release to the effect that it had awarded seven contracts for the implementation of the GFIP. On 24 June 2008 work commenced in earnest on the project and continued for the next two years in order to prepare certain sections of the proposed toll road network for the FIFA 2010 Soccer World Cup. This analysis of the timeline was necessary in order to determine when the appellants, and for that fact the public at large, became aware of the respondents' decision to proceed with the tolling system.

It was necessary in order to determine whether the appellants had complied with s 7(1) of PAJA, which provided that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrator's action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

It was common cause between the parties that the appellants had not complied with this requirement. Furthermore, the court found that the public at large, which included the appellants, must have known about the respondents' decision to proceed with the tolling system by at least 9 May 2008. Accordingly, a period of approximately five years elapsed before the appellants instituted the above-mentioned litigation.

The court was then asked to examine whether the delay in launching the above-mentioned proceedings could be condoned in terms of s 9(1) of PAJA, which provides that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'. This formed the crux of the SCA's decision.

The court also dealt with the issue of the funding secured by SANRAL, which amounted to approximately R 20 bil-

lion. The court took cognisance of the respondents' allegations that, had the appellants launched their review application timeously (ie, shortly after the media statement of May 2008), SANRAL would not have attempted to secure this necessary funding and the freeway improvements would not have taken place. This funding included issuing bonds in order to raise the necessary finance and procuring a guarantee from the government as security for the repayment of the R 20 billion.

The court ultimately found that the proverbial horse had bolted and what SANRAL had done in the past five years could not be undone. Furthermore, the court found, in the event that the tolling system did not go ahead, SANRAL would default on the R 20 billion loan, which would result in it calling up the guarantee issued by the government's guarantee. This, in turn, would have a detrimental effect on the public of South Africa as this money would have to be recovered elsewhere.

Accordingly, the SCA dismissed the appeal. In applying what is known as the 'Biowatch principle' (this principle arising from the decision in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)), the SCA, however, found it would be unreasonable to burden the appellants with costs orders in instances where applications are made against the state that involve important constitutional principles. Accordingly, the SCA reversed the costs orders issued against the appellants and gave no order as to costs.

## What can be learned?

The court, in relation to the delay in launching the review proceedings, examined the undue delay rule and noted that, in terms of the common law, this rule required a two-stage inquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (the court, as an example, referred to the decision of *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para 47). In respect of the application of this two-stage inquiry to the provisions of s 7(1) of PAJA, Brand JA stated:

'Up to a point, I think, s 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9' (at para 26).

Accordingly, even if review proceedings are instituted within the 180-day period afforded by s 7(1) of PAJA, a court may still find that there was unreasonable delay on the part of the applicant in launching such proceedings.

While the outcome of this judgment disappoints many, it illustrates the danger of being complacent in review proceedings. The SCA referred to the decision in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC):

'As was explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [para 31] administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence' (at para 62).

This decision highlights the importance of avoiding delay in launching review proceedings, especially if those proceedings are launched within the 180-day period provided for in terms of s 7(1) of PAJA.

**Michele Gioia *LLB (UJ)* is an advocate in Johannesburg.** ❑

# NEW LEGISLATION

## Legislation published from 26 September 2013 – 25 October 2013

Philip Stoop *BCom LLM (UP) LLD (Unisa)* is an associate professor in the department of mercantile law at Unisa.

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

## BILLS INTRODUCED

Taxation Laws Amendment Bill B39 of 2013.
Tax Administration Laws Amendment Bill B40 of 2013.
Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Bill B41 of 2013.
Merchant Shipping (International Oil Pollution Compensation Fund) Administration Bill B42 of 2013
Customs Duty Bill B43 of 2013.
Customs and Excise Amendment Bill B44 of 2013.
Customs Control Bill B45 of 2013.
Employment Tax Incentive Bill B46 of 2013.
Adjustments Appropriation Bill B37 of 2013.
Division of Revenue Amendment Bill B38 of 2013.
Science and Technology Laws Amendment Bill 36 of 2013.
Restitution of Land Rights Amendment Bill B35 of 2013.
Defence Amendment (Private Member Bill) B800P of 2013.
Legal Metrology Bill B34 of 2013.
Local Government: Municipal Property Rates Amendment Bill B33 of 2013.

## PROMULAGATION OF ACTS

**Transport Laws and Related Matters Amendment Act 3 of 2013**. *Commencement:* 9 October 2013. GN716 *GG*36878/26-9-2013.

## COMMENCEMENT OF ACTS

**Dangerous Weapons Act 15 of 2013.** *Commencement:* 2 January 2014. Proc45 *GG*36949/21-10-2013.

**Transport Laws and Related Matters Amendment Act 3 of 2013**. *Commencement:* 9 October 2013. Proc R44 *GG*36911/9-10-2013.

## SELECTED LIST OF DELEGATED LEGISLATION

**Agricultural Product Standards Act 119 of 1990**
Amendment of standards and requirements regarding control of the export of apricots, pears, plums and prunes, table grapes, apples, and peaches and nectarines. GenN1007-1012 *GG*36904/11-10-2013.

**Auditing Professions Act 26 of 2005**
Adoption of international quality control, auditing, review, other assurance and related services pronouncements. BN207 *GG*36923/18-10-2013.

**Basic Conditions of Employment Act 75 of 1997**
Sectoral determination 1: Contract cleaning sector, South Africa. GN783 *GG*36933/15-10-2013.
Sectoral determination 7: Domestic worker sector, South Africa. GN7834 *GG*36933/15-10-2013

**Broad-Based Black Economic Empowerment Act 53 of 2003**
Issue of codes of good practice. GenN1019 *GG*36928/11-10-2013.

**Companies Act 71 of 2008**
Amendment of the Companies Regulations, 2011. GN781 *GG*36923/18-10-2013.

***Consumer Protection Act 68 of 2008**
Categories of goods that are required to have a trade description applied to them in terms of the Consumer Protection Act: Processed and packaged meat products and dried and packaged meat products. GN825 *GG*36968/25-10-2013.

**Electoral Act 73 of 1998**
Amendment to the regulations concerning the registration of voters, 1998. GN R816 *GG*36960/25-10-2013 and GN R821 *GG*36961/22-10-2013.

**Health Professions Act 56 of 1974**
Regulations defining the scope of the profession of oral hygiene. GN R800 *GG*36944/17-10-2013.

**Medicines and Related Substances Act 101 of 1965**
Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN R714 *GG*36875/26-9-2013.
Amendment of general regulations. GN R766 *GG*36929/14-10-2013.

**National Environmental Management Act 107 of 1998**
Environmental impact assessment guideline for aquaculture in South Africa. GenN994 *GG*36894/3-10-2013.

**National Environmental Management: Air Quality Act 39 of 2004**
Regulations prescribing the format of the atmospheric impact report. GN747 *GG*36904/11-10-2013.

**National Environmental Management: Protected Areas Act 57 of 2003**
Declaration of land to be part of certain national parks: Table Mountain, Comdeboo, West Coast National Park, Tankwa Karoo, Namaqua, Mountain Zebra, Karoo and Addo Elephant National Parks. GN804-811. *GG*36951/25-10-2013.
Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites Amendment Regulations, 2013. GenN1052 *GG*36969/25-10-2013.

**National Regulator for Compulsory Specifications Act 5 of 2008**
Amendment of regulations relating to the payment of levy and fees with regard to compulsory specifications. GN R723 *GG*36885/4-10-2013 and GN R767 *GG*36930/14-10-2013.

**National Road Traffic Act 93 of 1996/ Nasionale Padverkeerswet 93 van 1996**
Amount payable by a driving licence testing centre in terms of regs 108(1A) and 119(1A) of the National Road Traffic Regulations, 2000. GenN961 *GG*36874/26-9-2013.
Amendment of the regulations in terms of the National Road Traffic Act, 1996. GN R758 *GG*36911/9-10-2013/Wysiging van regulasies ingevolge die Nasionale Padverkeerswet, 1996. GN R820 *GG*36962/23-10-2013.

**Nursing Act 33 of 2005**
Regulations regarding the scope of practice of nurses and midwives. GN R786 *GG*36935/15-10-2013.

**Perishable Products Export Control Act 9 of 1983**
Perishable Products Export Control Board: Imposition of levies on perishable products. BN204 *GG*36904/11-10-2013.

**Petroleum Products Act 120 of 1977**
Commencement of Regulations regarding the Mandatory Blending of Biofuels and Diesel, 2012. GN R719 *GG*36890/30-9-2013.

**Public Service Act 103 of 1994**
Amendment of sch 1 to the Act. Proc46 *GG*36957/21-10-2013.

**Road Accident Fund Act 56 of 1996**

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN209 *GG*36951/25-10-2013.

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

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 70). GN R759 *GG*36913/11-10-2013.

Amendment of rules regulating the conduct of the proceedings of the magistrates' courts of South Africa (r 33 and annexure 2). GN R760 *GG*36913/11-10-2013.

**Small Claims Courts Act 61 of 1984**

Establishment of small claims courts for the areas of Ladybrand and Clocolan. GN GN709 *GG*36865/27-9-2013.

Establishment of small claims courts for the areas of Highveld Ridge and Secunda. GN710 *GG*36865/27-9-2013.

Establishment of a small claims courts for the area of Fort Beaufort. GN750 *GG*36904/11-10-2013.

Establishment of small claims courts for the areas of Sandveld and Bultfontein. GN751 *GG*36904/11-10-2013.

Establishment of a small claims court for the area of Williston. GN752 *GG*36904/11-10-2013.

Establishment of a small claims court for the area of Middelburg (Mpumalanga). GN753 *GG*36904/11-10-2013.

Establishment of small claims courts for the area of Thohoyandou, Mutale and Dzanani. GN754 *GG*36904/11-10-2013.

Establishment of small claims courts for the areas of Vredendal and Vanrhynsdorp. GN755 *GG*36904/11-10-2013.

Establishment of small claims courts for the areas of Vanderbijlpark and Sebokeng. GN785 *GG*36934/15-10-2013.

**Social Assistance Act 13 of 2004**

Increase in respect of social grants. GN712 *GG*36870/25-9-2013.

**South African National Roads Agency Limited and National Roads Act 7 of 1998/Wet op die Suid-Afrikaanse Nasionale Padagentskap Beperk en Nasionale Paaie 7 van 1998**

E-road regulations. GN R739 *GG*36911/9-10-2013/E-pad regulasies. GN R817 *GG*36962/23-10-2013.

Specifications regulations (E-road). GN R740 *GG*36911/9-10-2013/Spesifikasieregulasies. GN R818 *GG*36962/23-10-2013.

Regulations on exemptions from the payment of tolls. GN R741 *GG*36911/9-10-2013/Regulasies oor vrystellings van die betaling van tol. GN R819 *GG*36962/23-10-2013.

**South African Police Service Act 68 of 1995**

South African Reserve Police Service amendment regulations. GN765 *GG*36922/15-10-2013.

**Standards Act 8 of 2008**

Standards matters. GN782 *GG*36923/18-10-2013.

**Tax Administration Act 28 of 2011**

Method of payment prescribed for taxes assessed in terms of the Income Tax Act 58 of 1962; payments of value-added tax in terms of the Value-Added Tax Act 89 of 1991; and payments of employees tax in terms of sch 4 of the Income Tax Act. GN764 *GG*36921/21-10-2013.

**Trade Metrology Act 77 of 1973**

Regulations relating to the tariff of fees charged for services rendered in terms of the Trade Metrology Act by the National Regulator for Compulsory Specifications. GN R724 *GG*36885/4-10-2013.

**Water Services Act 108 of 1997**

Regulations relating to compulsory national standards for process controllers and water services works. GN R813 *GG*36958/23-10-2013 and GN R826 *GG*36978/25-10-2013.

## Draft legislation

Land Management Commission Bill for comments. GenN964 *GG*36880/27-9-2013.

Proposed removal of adverse credit information in terms of the National Credit Act 34 of 2005. GenN966 *GG*36889/30-9-2013.

Proposed tariffs for different categories of road users and classes of motor vehicles: Gauteng Freeway Improvement Project, toll roads. GenN1006 *GG*36912/9-10-2013.

Draft call termination regulations in terms of the Electronic Communications Act 36 of 2005. GenN1018 *GG*36919/11-10-2013.

Proposed amendments to the Code of Professional Conduct for Registered Auditors. BN208 *GG*36923/18-10-2013.

International Health Regulations Bill, 2013 for comment. GenN1020 *GG*36931/14-10-2013.

Proposed technical regulations for petroleum exploration and exploitation in terms of the Mineral and Petroleum Resources Development Act 28 of 2002. GenN1032 *GG*36938/15-10-2013.

The Extension of Security of Tenure Amendment Bill, 2013 for comment. GenN1035 *GG*36942/17-10-2013.

Proposed levy on the piped-gas and petroleum pipeline industries for 2014/2015 in terms of the Gas Regulator Levies Act 75 of 2002 and Petroleum Pipeline Levies Act 28 of 2004. GenN1048 *GG*36959/23-10-2013.

# ASPECTS OF CATEGORIES OF GOODS THAT ARE REQUIRED TO HAVE A TRADE DESCRIPTION APPLIED TO THEM IN TERMS OF THE CONSUMER PROTECTION ACT 68 OF 2008

In terms of s 24(4) of the Consumer Protection Act 68 of 2008 the Minister of Trade and Industry may prescribe categories of goods that must have a trade description applied to them, or rules to be used in accordance with any international agreement for the purpose of determining the country of origin of the goods.

The Minister may also prescribe the information that is required to be included in any trade description.

In GenN 238 of 2013 in *GG*36285/22-3-2013 the Minister of Trade and Industry gave notice of his intention to issue a notice of further categories of goods, namely processed and packaged meat products and dried and packaged meat products, that will be required to have a trade description applied to them after the media has reported on incorrect labelling of meat products.

The final notice was published in GN825 *GG*36968/25-10-2013.

## Commencement date

The notice will come into effect six months after the publication in the *Government Gazette*, which is 23 April 2014

## Trade description requirements set out in the notice

The information in the table below must be included in the trade description of the specified products.

| Goods | Information to be included in the trade description |
|---|---|
| Processed and packaged meat products<br><br>Dried and packaged meat products | • The number, quantity, measure, weight or gauge of the goods.<br>• The name of the producer of the goods.<br>• The ingredients of which the goods consist, or material of which the goods are made, including a plain language description of the animal from which any particles, portions or constituents of meat were derived.<br>• The mode of manufacturing or producing the goods. ❑ |

# Employment law update

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Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

## Unfair discrimination on the basis of age

In *Jansen van Vuuren v South African Airways (Pty) Ltd and Another* [2013] 10 BLLR 1004 (LC) the Labour Court was required to consider whether South African Airways (SAA) had unfairly discriminated against the applicant employee on the basis of age when it introduced certain new terms and conditions of employment in accordance with a collective agreement. In addition, Shaik AJ was required to consider whether SAA committed an unfair labour practice by unilaterally deducting annual leave from the employee's annual leave entitlement without the employee's knowledge.

The employee was an airline pilot who had reached the then official SAA retirement age of 60. At the time that he reached this age, SAA had in principle agreed with the Air Line Pilots Association of South Africa that the retirement age would be increased but this still needed to be formalised in writing. The employee made inquiries as to whether, given the negotiations around an increased retirement age, he would remain in service after he reached the age of 60.

He was advised telephonically that he would remain in service until he reached the age of 63 but that he was to remain at home for the period during which the terms and conditions of the collective agreement were being negotiated. The employee continued to receive his normal salary during this period, but it later transpired that SAA treated this period as annual leave and unilaterally deducted his absence from his annual leave entitlement without him having any knowledge of this.

In terms of the collective agreement SAA extended its retirement age to 63, subject to certain terms and conditions. The employee was recalled to flying duty but was subject to the new terms and conditions of the collective agreement, including a reduction in his salary for doing the same work as before. He alleged that SAA had unfairly discriminated against him by introducing new terms and conditions that prejudiced him because of his age. The effect of the terms of the collective agreement was that pilots over the age of 60 earned a lower salary and were denied certain privileges compared to their younger counterparts. Pilots over the age of 60 were in effect treated as subordinates to those whom they had previously supervised and this differentiation was based solely on age.

Shaik AJ considered this in light of the Constitution and the Employment Equity Act 55 of 1998 (the EEA), which prohibits unfair discrimination. SAA argued that the employee did not have a claim as the employee's employment had automatically terminated when he reached the age of 60 and thus the new collective agreement that came into effect after his retirement novated his previous terms and conditions.

However, Shaik AJ held that the employment contract had not been terminated – the applicant had simply been told to stay at home while SAA was re-negotiating the retirement age. Furthermore, the employee never received a new contract of employment with new terms and conditions and he was not entitled to be paid accrued annual leave pay until he retired at the age of 63.

There was undisputed evidence that SAA differentiated between employees on the basis of age. SAA, however, argued that the employee had failed to show that there was an employment policy or practice that unfairly discriminated on the grounds of age and there was no comparator. It was also alleged by SAA that it was unlawful for the employee to 'cherry pick' certain terms of the collective agreement, that is, the extension of the retirement age, and to request the court to ignore other terms, such as the reduced remuneration.

Furthermore, SAA alleged that the remuneration and conditions were as a result of collective bargaining and the court should therefore not nullify the outcome of collective bargaining. Shaik AJ considered the fact that, in terms of s 11 of the EEA where an employee shows that discrimination exists, there is a rebuttable presumption that such discrimination is unfair unless the employer can justify it.

Shaik AJ held that a collective agreement is subject to the Constitution and the EEA and cannot be used to justify unfair discrimination. Furthermore, public policy had to be determined with reference to the Constitution and terms that violated the Constitution were therefore contrary to public policy and accordingly unenforceable.

SAA later unilaterally terminated the collective agreement in 2007. Shaik AJ found that reliance on the collective agreement to justify discrimination was misplaced as SAA did not appear to regard itself as bound by it and unilaterally terminated it. It was concluded that the collective agreement was discriminatory and unfair and served no legitimate purpose. It was also held that there was no need for a comparator as it was not a claim for equal pay for equal work.

Shaik AJ considered mitigating factors that the collective agreement was subsequently cancelled and thus discrimination was brought to an end. However, this did not detract from the fact that the employee had suffered discrimination and SAA derived a benefit at the employee's expense. Thus, SAA was ordered to pay compensation equal to one year's remuneration and damages equal to the difference between the salary the employee received and the salary and benefits he should have received had his terms and conditions not been unilaterally changed by the collective agreement.

As regards the alleged unfair labour practice, at the time that the employee reached the age of 60 he had accrued annual leave to the value of R 330 000. Had his employment terminated, he would have been paid out this amount as accrued annual leave pay. In fact, he did receive payment of R 330 000 in respect of his accrued annual leave but was then told that this amount was paid in error as he was entitled to be paid such amount only on retirement and he was thus required to repay this amount.

The employee was under the impression that he had received his normal salary during this time. However, it subsequently transpired that SAA treated this period as annual leave and deducted this absence from his annual leave entitlement. The amount that the employee received each month was actually his accrued annual leave pay and not a normal salary. The employee was not consulted with on this and this arrangement was unilaterally implemented.

SAA conceded that this was unfair but alleged that it was not an unfair labour practice as leave is not a benefit. Shaik AJ held that while there may be case law to the effect that leave pay is not a benefit, this does not mean that leave itself is not a benefit. It was held that forcing the employee to go on leave constitutes an unfair labour practice and SAA was ordered to pay the employee a sum equivalent to the number of days' annual leave that had been deducted from his annual leave entitlement.

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

## Credibility findings – post *Heroldt v Nedbank*

***Solidarity obo Van Zyl v KPMG Services (Pty) Ltd and Others*** **(LC) (unreported case no JR960/12, 10-10-2013) (Fourie AJ)**

The question posed by the court in this application was to what extent an arbitrator's error in accessing the credibility of witnesses when faced with two mutually destructive versions, renders such award reviewable.

The applicant was dismissed for allegedly uttering a racial slur while in the presence of three colleagues. One colleague reported the incident to the employer, KPMG. At an internal inquiry, the colleague testified to what she had heard and, despite the applicant denying this allegation, he was found guilty and dismissed.

In arbitration proceedings, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), KPMG led the evidence of the employee who laid the complaint. Not only did the applicant continue to deny such wrongdoing, he further led, as witnesses, the evidence of the remaining two colleagues who were present when the incident allegedly occurred. Both colleagues denied having heard the applicant make these remarks.

Faced with these mutually destructive versions the arbitrator accepted KPMG's version over that of the applicant's. The arbitrator based his findings on the sole ground that no reason could be advanced as to why KPMG's witness would fabricate her version, especially in light of the fact that there was no 'bad blood' between the applicant and KPMG's witness.

At the core of this application was the fact that the arbitrator failed to assess the credibility of any of the witnesses when arriving at his decision.

On review, the court referred to the judgment of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* (2003) 1 SA (11) SCA wherein the Supreme Court of Appeal laid out the accepted test applicable to both a trail court and an arbitrator when faced with a factual dispute. According to the judgment (at para 5) the court had to come to a conclusion on the disputed issues by making findings on –

- the credibility of the various factual witnesses;
- their reliability; and
- the probabilities.

The court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. This finding will, in turn, depend on a variety of subsidiary factors, such as –

- the witness' candour and demeanour in the witness-box;
- his or her bias, latent and blatant;
- internal contradictions in his or her evidence;
- external contradictions with what was pleaded or put on his or her behalf, or with established fact or with his or her own extra-curial statements or actions;
- the probability or improbability of particular aspects of his or her version; and
- the calibre and cogency of his or her performance compared to that of other witnesses testifying about the same incident or events.

A witness' reliability will depend, apart from some of the factors above, on –

- the opportunities he or she had to experience or observe the event in question; and
- the quality, integrity and independence of his or her recall thereof.

Finally, an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues are necessary components in coming to a conclusion. In the light of its assessment of all of the above factors the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.

While acknowledging the above approach to be sound in law, the court pointed out that this approach needs to be exercised with some caution in order to maintain the distinction between reviews and appeals. To apply this onerous test, applicable when appealing credibility findings of a trial court, to review proceedings under the Labour Relations Act 66 of 1995 (LRA), could blur the distinction between appeals and reviews, especially in light of the recent decision in *Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)* 2013 (6) SA 224 (SCA), wherein the SCA, in setting out the proper approach to reviews under the LRA held:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(*a*) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(*a*)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable' (at para 25).

Against this backdrop, the court held that it is not axiomatic that an award wherein the arbitrator failed to properly apply the aforementioned test was reviewable for this reason alone.

On this point, Fourie AJ, at para 17 held: 'While arbitrators should always aspire to meet the exacting standard set by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award.'

In adopting this approach to the merits before it the court found that, by failing to assess the credibility of any of the witnesses, the arbitrator *in casu* fell short of the standard aspired to in the *Stellenbosch* case. However, this alone did not render the award reviewable without first considering whether his decision fell within the band of reasonableness. Further to this it was not necessary for the arbitrator to have found the applicant and his or her witnesses unreliable for him or her to find their version improbable (see *Transnet Ltd v Gouws and Others* (LC) (unreported case no JR206/09, 25-4-2012), at paras 11 to 20).

Factors, as recorded in the proceedings that supported a finding that it was improbable for KPMG's witness to have fabricated her version were:

- The complainant did not initially mention the applicant's name in her complaint and intended for KPMG to send a general instruction for employees to divest from such behaviour.
- KPMG disciplined the applicant after an investigation and not at the behest of the complainant.
- The complainant was reluctant to participate in both the inquiry and at arbitration and did not intend for the applicant to be dismissed.

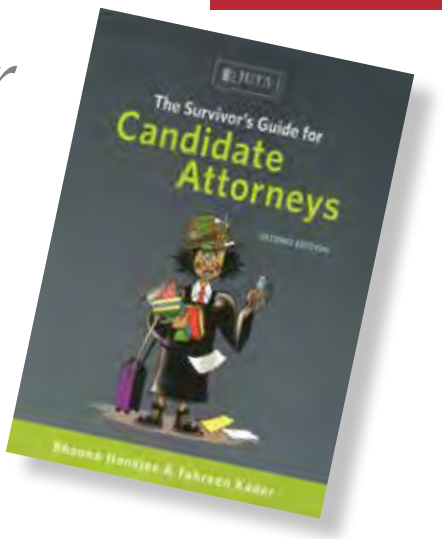
In light of the above, the court held that in finding KPMG's version more probable, the arbitrator's decision was not one that a reasonable person could not come to given the evidence before him or her.

The application was dismissed with no order as to costs.

**Note: Unreported cases at date of publication may have subsequently been reported.**

**Do you have a labour law-related question that you would like answered? Please send your question to derebus@derebus.org.za** ❑

# *The Survivor's Guide for Candidate Attorneys*




*By Bhauna Hansjee & Fahreen Kader*
*Cape Town: Juta*
*(2013) 2nd edition*
*Price: R 325 (incl VAT)*
*226 pages (soft cover)*

*The Survivor's Guide for Candidate Attorneys* is a book aimed at guiding the lost and confused candidate attorneys (CAs) who have just entered into the working environment of the legal profession. The title grabbed my attention since, as a candidate attorney, I have found that the legal profession is not as glamorous as portrayed by television dramas. The book gives CAs the assurance that they are still sane and it can offer guidance in difficult situations.

It offers advice on situations that CAs may find overwhelming or in which they may be unsure of what to do, how to do it, and where to start. This guide is user-friendly as it offers easy language, step-by-step guidance on tasks a CA may be faced with, and useful forms, checklists and contact information in respect of various ombudsmen and other important bodies. Another plus factor is that one is given tips by the authors on how to handle situations that are common in practice for CAs.

Another upside to this book is that the authors are able to give CAs a sense of assurance that they are human and are therefore bound to succeed through trial and error. I love the jokes that the authors sneaked in, it offers a reminder of where we all started. While reading this book I had flashbacks, some good and some that I would rather forget, to when I first started as a CA and my experiences along the way. The way in which the book is written encouraged me that all is not lost after all.

A few negatives about this book is that some of the paragraphs are too long and the layout of some pages could deter one from continuing to read that page. Another issue is that some of the information is repeated throughout the book, creating a feeling of *dejá vu*. While I am aware that the book cannot address everything one needs to know in the legal profession, I do feel that the authors could have gone into more detail in some chapters, especially ch 4 and part of ch 13.

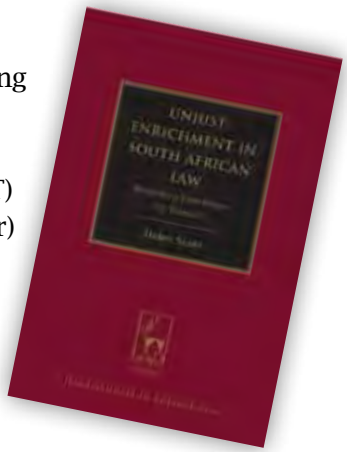
I would recommend this book to CAs, but I would also encourage students who are about to complete their LLB degrees to read this book, as it will give them insight as to what to expect when they leave the comforting walls of university. I would also encourage principals to read this book, especially chs 4 and 13 (p 103), so that they can be aware of certain aspects that they may tend to forget about.

**Busisiwe Zulu is a candidate attorney at Kafu & Dlamini Attorneys in Durban.**

# Book announcements

***A man of principle***
***The life and legacy of***
***JC de Wet***
***'n Man van beginsel***
***Die lewe en nalatenskap***
***van JC de Wet***
By Jacques du Plessis &
Gerhard Lubbe (eds)
Cape Town: Juta
(2013) 1st edition
Price: R 495 (incl VAT)
458 pages (hard cover)

***Unjust Enrichment in South African Law***
By Helen Scott
Oxford: Hart Publishing Limited
(2013) 1st edition
Price: R 878 (excl VAT)
250 pages (hard cover)



# Service in the superior courts

By Danie van Loggerenberg

On 27 July 2012 uniform rule of court 4A, dealing with the delivery of documents and notices, came into operation. On 23 August 2013 the Superior Courts Act 10 of 2013 that deals, in s 44, with transmission of summonses, writs and other process came into operation.

In *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC and Another* 2013 (3) SA 426 (SCA) Lewis JA made the following remark concerning the National Credit Act 34 of 2005: 'The [H]igh [C]ourt … held that the particular lease was not a lease. This may sound like a fragment of *Alice in Wonderland*. If that is so, it is because the Act itself could have been written by Lewis Carroll, so peculiar are some of its provisions' (at para 1).

The remark is apposite to some of the provisions of the uniform rules of court and the Superior Courts Act dealing with service in High Court practice.

Section 44(1)(*a*) of the Superior Courts Act provides for two instances in civil proceedings before a superior court where service may take place by means of transmission by fax or any other electronic medium 'as provided by the rules' –

- first, in the case of any summons, writ, warrant, rule, order, notice, document or other process of a superior court; and
- secondly, in the case of any other communication which by any law, rule or agreement of parties is required or directed to be served or executed on any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby.

There is, however, currently no rule providing for service by means of fax or any other electronic medium as contemplated in s 44(1)(*a*). In other words, there is simply a *lacuna* in the rules in this regard: Rule 4A is irrelevant and r 4(1) does not provide for the *process* of service by means of fax or any other electronic medium.

In the premises, the uniform rules of court should be amended to give effect to the provisions of s 44(1)(*a*) of the Superior Courts Act.

Rule 4A deals with service of documents and notices subsequent to service of process (which is provided for in r 4(1)(a)). The rule contemplates that a party may, under rr 6(5)(b), 6(5)(d)(i), 17(3), 19(3) and 34(8), provide an address at which service may take place in one or more of the following manners:

- By hand at the physical address for service provided;
- By registered post to the postal address provided; or
- By facsimile or electronic mail to the respective addresses provided.

The problem, however, is that neither of rr 6(5), 17(3), 19(3) and 34(8), nor the relevant forms in the first schedule to the uniform rules of court, oblige a party to provide such party's facsimile and electronic mail addresses. Rules 6(5)(d)(i), 17(3) and 19(3) simply require these addresses to be provided 'where available'. Rule 34(8) contains no provision concerning facsimile and electronic mail addresses.

In any event, the current provisions concerning these addresses, and any possible amendment of the aforesaid rules in order to bring them in line with r 4A(1), would be to no avail as a result of the requirement in each of them that an address within 15 kilometres of the office of the registrar must be appointed at which a party will accept notice and service of all documents. The requirement of a physical address within 15 kilometres of the office of the registrar flies in the face of, and is contradictory to, the provisions of r 4A(1)(c) (as well as r 4A(1)(b)).

It is difficult to fathom why the framers of the uniform rules of court and the Superior Courts Act could not have dealt with the important issue of service of process and subsequent documents and notices (ie, the *audi alteram partem* principle) in a clear, uniform and harmonised manner at the outset. I submit that the necessary amendments should be introduced without delay.

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