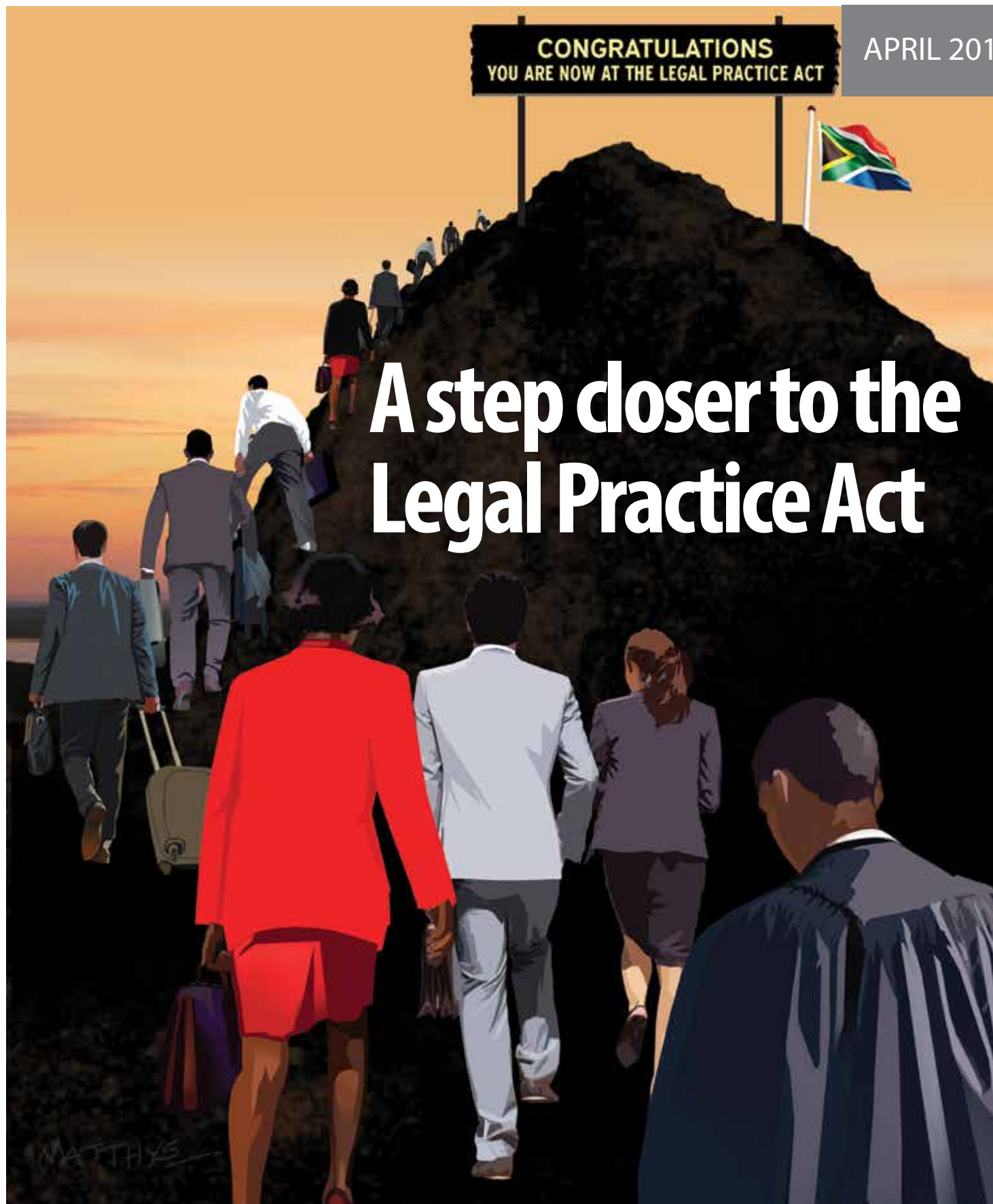


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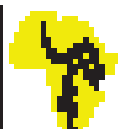


## A step closer to the Legal Practice Act



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The right to liberty is acknowledged as one of the most important rights afforded to a person. However, this recognition is not reflected in the quantum of damages awarded in cases where an individual's right to liberty has been infringed by an unlawful arrest and detention, writes Thulani Nkosi.

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# The Legal Practice Bill – a wake-up call for ordinary attorneys

**T**he Legal Practice Bill (B20 of 2012) will drastically affect the governance, structure and regulation of the legal profession and, with the currently strong political will to enact the legislation, the Bill is likely to be on our statute books soon.

Yet, to date, the Bill seems to have weighed on the minds of only a relatively small number of members of the legal profession. This is reflected in the dearth of debate and discussion on the draft legislation and the submissions to parliament relating to it. It does not appear that its reach has extended broadly to most of the 20 000-odd attorneys practising in the country, despite many efforts to highlight its magnitude, including by the Law Society of South Africa (LSSA) and its various constituents.

So important is the Bill that the late former Chief Justice Arthur Chaskalson dedicated what was to be his last public speech to concerns he had about the legislation and its potential negative impact on the independence of the profession, and therefore on the judiciary, as well as the rule of law.

While the Justice Portfolio Committee received a number of submissions on the Bill, it appears that only two of these were by law firms – both falling into the category of large firms – and three were by individual attorneys. The many voices of average attorneys – those from small, medium or large firms, those practising in urban or rural areas, those with 500 employees or those with no employees – were missing.

This stance could possibly be due to the view that 'this Bill will never be passed', especially due to the lack of major movement on the draft legislation for over a decade, or it could be that attorneys have what they perceive as more pressing demands on their time and attention.

Whatever the reason, now is the time for individual attorneys in the legal profession to wake up to the reality of the Bill being passed soon – possibly this year, regardless of whether the attorneys' and advocates' branches of the profession reach consensus on its core issues.

During the recent hearings on the Bill by the Justice Portfolio Committee, the committee made it clear that it was less than impressed by the lack of consensus among attorneys and advocates on the Bill and emphasised that it would not tolerate any further unnecessary delays in the passage of the legislation. How-

ever, it added that it welcomed further submissions and engagement on the Bill by all who may be impacted by its provisions. But, if those affected do not come to the fore, parliament will step in and legislate on their behalf.

During the hearings, committee member John Jeffery remarked that, while having the buy-in of the profession was important, the absence of this would not be allowed to scupper the Bill's progress – it will move forward in 2013. In this regard, he said:

'We would like to produce a Bill that has the support from all sectors of society, not just the legal profession. ... The buy-in from the Bar Council, among others, is very important. I think we should give you the opportunity for further engagement. However, we delayed these hearings to give you that opportunity. It did not result in anything. I suspect that the only reason that the small concessions coming at the end of the 15 years is because of the pressure. ... We are going to be settling this Bill this year. We would like to be settling it with your support ... but we are going to be finalising this Bill. ... We are not particularly impressed by the advocates or the attorneys not being able to find each other and we hope you find each other soon, because otherwise we will come up with something for you' (see p 22 and p 38).

Having attended the hearings, one thing is clear – the Justice Portfolio Committee will not abrogate its duty to thoroughly interrogate the Bill, as well as the submissions it receives relating to it.

There are a number of important aspects that require input from members of the profession, not only in respect of questions of independence and transformation, but those relating to practical aspects that will affect the day-to-day practice of practitioners, such as capping of practitioners' fees, with maximum permissible charges; funding the new structures established in terms of the Bill, including the regional councils (which may well increasingly fall on the shoulders of individual practitioners if funding from the Attorneys Fidelity Fund is capped or removed, and practitioners could see their dues increase significantly); forms of legal practice; rendering of community service; and the lack of provision in the Bill for a unitary body to look after the interests of practitioners. These are but some of the issues that require input from members of the profession.

In order to reach a Bill that caters for both the public interest and the interests



Kim Hawkey – Editor

of the profession, it is essential that ordinary attorneys engage with parliament now – and not take it for granted that their views are being canvassed or to rely on one organisation or another to challenge the legislation once enacted. A fair comment from any court considering such a challenge would be: Where were the voices of individual attorneys during the engagement period afforded? Why did they not stand up when they were given the opportunity to do so?

## Would you like to write for *De Rebus*?

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

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

Upcoming deadlines for article submissions: 15 April and 20 May 2013.

*K Hawkey*

# 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.

### Small practitioners add real value

I refer to the opinion piece in the December 2012 issue of *De Rebus* containing an extract of a speech by Deputy Judge President Phineas Mojapelo (2012 (Dec) DR 56).

With due respect to Judge Mojapelo, I cannot agree with his contention that small general practitioners 'rarely give any real value'.

Clearly the judge has lost sight of the fact that legal services in the rural areas are provided by these very practitioners to a broad spectrum of clients. The judge also does not take into account that it is impossible for Legal Aid South Africa to have offices in every small town in every corner of South Africa. The local economies and the needs of clients invariably do not allow everyone to 'specialise'.

Often these practitioners are the ones who refer indigent clients to Legal Aid South Africa or to the small claims court. They also serve as commissioners in the small claims court structure. It is also true that these general practitioners build a healthy relationship with their predominantly middle-class client base and, as such, their small law office invariably creates at least three or four jobs. These smaller law firms, in turn, also support the auditors' profession and local shopkeepers. The practitioner pays rates and taxes to the local municipality

and inevitably is also involved in some sort of charitable organisation(s), where he makes a contribution. Apart from all this, his door is always open to indigent people and he does not charge everyone a fee.

Over time, the small practitioner will employ one or more candidate attorneys, who will receive training in fields of law that a candidate attorney in a large city firm would not be exposed to. After a while these candidate attorneys will join as partners in the firm. The firm will then grow and employ six to eight people. This is the principle on which the legal profession has always contributed to the economy of our country. These people are to be praised for their efforts to enhance the economy, rather than disregarded by those who have the benefit of fixed employment by taxpayers. It is unfair and disrespectful to have such little account for small practices in the legal sphere. The small practitioner should never be allowed to disappear, since many of the great law firms in our country started in this way.

The economy of a country cannot rely solely on the work created by government. Every citizen who hires one or more employees and is not reliant on government for his business activities should be treasured. The legal profession should also treasure smaller firms.

Our country's history has shown that some of the bravest men who defended

'enemies' of the former government came from small law firms. Despite the fact that they were regarded as insignificant, the small practitioner had an impact on the trials of freedom fighters and many others.

Let us never forget (or disregard) the role of the small general practitioner. In most cases he is one of the toughest opponents one can meet in court. As many specialist attorneys might attest: Never discount a small general practitioner in any litigation matter. Nine out of ten times his opponent will be sent back to the big city with his tail between his legs.

*JF de Beer, attorney, Bethlehem*

• According to statistics from the Law Society of South Africa, nearly 63% of law firms fall into the 'small law firms' category, with 27,9% comprising one practitioner and 34,9% comprising two to four professionals – *Editor*.

### Balancing act between CAs and principals

The letter 'Protection of candidate attorneys' and the KwaZulu-Natal Law Society's response thereto, as well as the editor's note on the same topic, which appeared in the March 2013 edition of *De Rebus* (2013 (Mar) DR 3 and 4), refer.



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While we sympathise with the candidate attorney (CA) referred to in the editor's note, and are completely shocked at the conditions she has been subjected to (and strongly urge the KwaZulu-Natal Law Society to investigate this), unfortunately our practice has continually been subjected and exposed to the 'millennial' referred to in the editor's note.

We have been subjected to attitudes of entitlement, unwillingness to learn and a general disregard of the professionalism our profession demands by both aspirant CAs and CAs we employ.

Our firm strives to ensure that, at the end of a two-year period of articles, our CAs will be able to go forth into the profession with enough experience in litigation and several other branches of law, as well as practice management, so much so that we strive to empower CAs to be able to open their own practices post-articles. While our CAs do on occasion act as messengers, the documents they are requested to file and serve are pleadings, which they are encouraged to read and the reasons why such documents need to be attended to are explained to them.

Our CAs walk 'the beat' between the magistrates' courts and High Courts and do stand in lines; however, this is done as a learning experience - to learn how

the courts and their registrars/clerks function, to be able to trace a lost file or lost pleadings, to set matters down for hearing and to attend to preparing files for court. All of these experiences are essential in managing cases and ensuring a matter's preparedness for hearing.

Our CAs are given pleadings and documents to draft and are taught from the beginning the essentials of file management and deadlines. They interact with clients on a daily basis and are taught the fundamentals of legal practice.

Should our CAs feel overwhelmed by the amount of work they are given, they are repeatedly encouraged to communicate with us, and our professional staff members take time to sit with the CA and troubleshoot to find solutions to any problems the CA might be facing. We not only encourage transparency, candour and honesty from our staff, but we demand these as essential tools in properly training our CAs. Leave is granted on application and is only denied when the CA's leave days have been exhausted.

Despite the aforesaid, our CA experiences have been shocking and horrifying. The worst behaviour we have experienced is a CA's unwillingness to learn. CAs believe that they are properly equipped to practise with only an LLB

degree; they treat the support staff heinously and with sarcasm, and constantly have outbursts at their principals, like petulant children. Of late, CAs have neither humility nor respect and refuse to follow direct instructions, rather choosing to use their own mistaken ingenuity to fulfil their mandate - blatantly disregarding clearly defined rules and practices.

Many of our colleagues refuse to employ CAs as a result of the trend of such behaviour and, as such, aspirant CAs are prejudiced as less CA positions become available.

Perhaps all CAs must, within the first week of their articles, not only complete their fit and proper interviews, but also be compelled to complete a half-day seminar by the law society dealing with 'what you will experience and what will be expected of you during your articles'.

The law society is requested to assist practitioners with the growing problem they face in employing CAs, so that a clear, definitive solution can be found to maintain the age-old balance between CAs and their principals.

*Leanda Perel*, attorney, Pretoria



## Juta Prize for Candidate Attorneys

*De Rebus* is pleased to announce that Juta Law is offering an annual prize for contributions of articles by candidate attorneys published in *De Rebus* in 2013. The **Juta Law Prize for Candidate Attorneys** will be awarded for the best article contributed by a candidate attorney. The 2013 prize is R7500 in book vouchers OR a 12-month single-user subscription to the online *Juta's Essential Legal Practitioners Bundle* to the value of R10 380.

The following conditions apply to entries:

- The article should not exceed 3 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.
- The article must be published between 1 January and 31 December 2013.
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

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**O**n 7 March the Constitutional Court held a ceremonial court session in honour of the late former Chief Justice Arthur Chaskalson, who passed away in December. Speakers at the service included Chief Justice Mogoeng Mogoeng; President of the Black Lawyers Association, Busani Mabunda; former President of the National Association of Democratic Lawyers (NADEL), Gcina Malindi; a representative of the General Council of the Bar, McCaps Motimele; the chief executive officer of the Law Society of South Africa (LSSA), Nic Swart; and Deputy Minister of Justice and Constitutional Development, Andries Nel.

### Contribution to the Constitutional Court

Chief Justice Mogoeng opened the special session by paying tribute to the founding President of the Constitutional Court. Chief Justice Mogoeng said that for a country that was as deeply divided as South Africa was at the time of the birth of the Constitutional Court, 'only a man or woman of strong maturity [and] calmness, with wisdom, could successfully see it through its birth, crawling, walking and running stages to a point of forcing even the doubting Thomases to acknowledge that our Constitutional Court is a force to be reckoned with'. He added that the world had been forced to pay attention to and respect the Constitutional Court because of the many groundbreaking decisions it handed down under the stewardship of former Chief Justice Chaskalson.

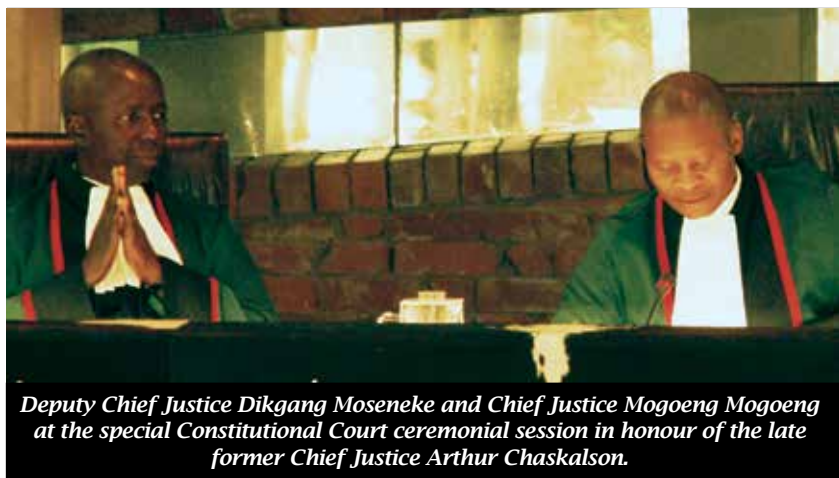
Chief Justice Mogoeng served under Justice Chaskalson as a junior Judge President in the heads of courts forum. The Chief Justice said that some of the lessons he drew from the former Chief Justice was the need to be in command of every situation, however serious it may be; to be courteous to others, however disrespectful or insensitive they may be; and to be a team leader who wants everybody to have their say before a final decision is taken.

Chief Justice Mogoeng noted that Justice Chaskalson was the first Chief Justice to have issues critical for the efficiency and effectiveness of the court system discussed by a body of judges at the national judges' conference. These included –

- the need for judicial independence;
- the need for a civil rule-making authority;
- the need to overhaul the rules;
- access to justice;
- civil justice review; and
- court modernisation.

Justice Chaskalson wanted to create a Constitutional Court that was a champion establishment, that made for excellent access to justice and delivered qual-

## Tribute to a legal giant



*Deputy Chief Justice Dikgang Moseneke and Chief Justice Mogoeng Mogoeng at the special Constitutional Court ceremonial session in honour of the late former Chief Justice Arthur Chaskalson.*

ity judgments. He wanted to put in place a court on which other courts in the country could be modelled. For the first time legislation was passed that not only gave the head of the court the final say in the court's budget, but also gave him a meaningful say in the appointment of the court manager and other senior support staff and information technology resources necessary to facilitate or enhance optimum performance, said Chief Justice Mogoeng.

Chief Justice Mogoeng added that Justice Chaskalson had also ensured that one of the most effective case management systems was put in place at the Constitutional Court.

In terms of this, judges take charge of all applications from the time they are filed and personally manage them, including by drafting directives and managing most of the correspondence to practitioners, until judgment is delivered to make sure that unnecessary backlogs and delays are not experienced.

This model has been piloted in three High Courts, with a view for it to eventually be rolled out nationwide in magistrates' courts to address most of the inefficiencies presently complained about, including backlogs, said Chief Justice Mogoeng.

Building on the milestones achieved by Justice Chaskalson in the early years of court modernisation, Chief Justice Mogoeng said that the Office of the Chief Justice intended to announce proposals related to electronic filing, video conferencing, offsite and on-site record keeping and a move towards paperless courts.

Chief Justice Mogoeng thanked the Chaskalson family, on behalf of the judiciary and South Africa, for giving a share of Justice Chaskalson's time, energy, intellect and leadership.

### Contribution to the legal profession

Mr Mabunda said that, even during former Chief Justice Chaskalson's retirement, he continued to keep the views he aired in line with the oath he committed himself to when he assumed the role of a judicial officer. He added that the former Chief Justice, in a speech on the Legal Practice Bill (B20 of 2012) at the Cape Law Society's 2012 annual general meeting, stressed the importance of the independence of the judiciary and the legal profession for constitutional democracy. Justice Chaskalson 'articulated the doctrine of separation of powers', he said, adding: 'As legal practitioners, we must bear this in mind so that we continue to move forward.'

Mr Malindi paid tribute to Justice Chaskalson on behalf of NADEL and as a friend of the family. He added that Justice Chaskalson had played an important role in supporting NADEL as an organisation committed to the struggle against apartheid and that he had used his legal skills to defend many political activists.

Justice Chaskalson's 'public speeches concerned the rule of law, the courts, the Constitution and transformation. These will continue to be important debates in South Africa's young democracy, and these matters can best be resolved by dialogue, public debate and by looking for solutions to problems that exist. Let us all commit ourselves to following on Arthur's footsteps in adjudication of freedom for the vulnerable and marginalised members of society,' said Mr Malindi.

Mr Motimele said that, as a judge, Justice Chaskalson had always been polite, which he believed was a fast-disappearing quality on the Bench. He added that the profession would miss the former Chief Justice, who had believed in improving



the dignity of life for all and in justice for all. He added that, in his address to the Cape Law Society, the former Chief Justice said that the public must have access to the legal profession, which has a duty to serve the public interest. The profession should take heed of Justice Chaskalson's words, said Mr Motimele.

Mr Swart said that the LSSA was 'deeply saddened' by the passing of the former Chief Justice as he was 'a giant who influenced the legal profession'. Mr Swart said that Justice Chaskalson made an immense contribution to the formation of the Constitutional Court and the Constitution; however, he would also be remembered for the value of the work he did as an advocate to challenge the apartheid government.

'He was one of the courageous few who spoke on and raised important legal issues when others hesitated. ... His work in establishing the Legal Resources Centre, where both attorneys and advocates work together by defending the rights of the vulnerable, will forever add value to the legal system. It is fitting that his last speech at the Cape Law Society annual general meeting marked him as a champion for the independence of the legal profession. As legal practitioners, we must bear the independence of the legal profession in mind so that we continue to move forward on the path that will lead to a stable democracy. The LSSA will remember him for his humility. On behalf of the co-chairpersons of the LSSA and the attorneys' profession, we

pay tribute to him, we lower our flag at his passing,' said Mr Swart.

## Contribution to the country

Mr Nel began his address by quoting former President Nelson Mandela during the conclusion of his address at the inauguration of the Constitutional Court on 14 February 1995:

'To Judge Arthur Chaskalson and other members of the Constitutional Court, let me say the following: Yours is the most noble task that could fall to any legal person. In the last resort, the guarantee of the fundamental rights and freedoms for which we have fought so hard, lies in your hands. We look to you to honour the Constitution and the people it represents. We expect from you; no, demand of you, the greatest use of your wisdom, honesty and good sense - no short cuts, no easy solutions. Your work is not only lofty, it is also lonely. In the end you have only the Constitution and your conscience on which you can rely. We look upon you to serve both without fear or favour.'

Mr Nel said that the country will remember the former Chief Justice's role as a member of the defence team during the Rivonia Trial and the trials of many other freedom fighters; the leading role that he played as a member of the legal profession on the Johannesburg Bar Council; his role in the formation of the Legal Resources Centre; his contribution to the drafting of the interim Constitu-

tion and as the first President of the Constitutional Court; as well as his contribution to the cause of justice and human rights in the international community.

'The [Justice Department] continues, through its work, to promote access to justice through the establishment of new courts, the upgrading of existing courts and through working with the judiciary, the legal profession and all stakeholders to improve the efficiency and effectiveness of both our criminal and civil justice systems. We believe that this work constitutes a fitting tribute to the memory of former Chief Justice Chaskalson,' said Mr Nel.

He cited Justice Chaskalson in *S v Makwanyane and Another* 1995 (3) SA 391 (CC), in which the death penalty was declared unconstitutional: 'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others,' said Mr Nel.

Mr Nel said that one of his enduring memories was of the passion former Chief Justice Chaskalson and his wife Dr Lorraine Chaskalson had for mentoring young people, and law students in particular, in using the law to promote social justice.

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# Social media in court

During the recent bail hearing of murder accused athlete Oscar Pistorius, many people across the world were mesmerised by their PCs, iPads, laptops and smartphones following journalists on Twitter to see what would happen next in the hearing.

The man in the street was tweeting his views on the matter, journalists in the court were tweeting statements made during the bail hearing and attorneys were warning people about what could and could not be said on social media platforms from a legal point of view.

Emma Sadleir, a Johannesburg attorney specialising in social media law at law firm Webber Wentzel, said: 'Until recently, anyone wanting to follow each twist and turn of a case would have had to sit in the court room itself, but with the advent of electronic communication this is changing.'

In terms of being responsible for retweeting a comment by someone else, Ms Sadleir said: 'When you retweet something you are responsible for its publication.'

## The sub judice rule

In respect of the application of the *sub judice* rule to social media, Ms Sadleir said: '*Sub judice* operates from the date of arrest until the matter has been finally disposed of. Comments made on social media are treated the same as comments made on any other public forum. The law of contempt (*sub judice*) was clarified in the 2007 Supreme Court of Appeal case of *Midi Television (Pty) Ltd v Director of Public Prosecutions* (WC) [2007] 3 All SA 318 (SCA), at para 19, where it was held that:

'[A] publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.

In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. ... [I]f a risk of that kind is clearly established, and if it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.'

She added: 'You will appreciate that this sets the standard very high - you need to show that a tweet creates a real risk that substantial and demonstrable prejudice to the administration of justice will occur. It would be very difficult to show that a judge would be swayed by commentary on Twitter. In South Africa, we do not have the added problem of a jury system.'

## Breakthrough for tweeting in court

According to Ms Sadleir, the first breakthrough for tweeting in court came at the bail hearing of Julian Assange, the founder of whistle-blowing website WikiLeaks, in mid-December 2010. She

said: 'The judge, perhaps swayed by the overwhelming public interest in the case, expressly allowed tweeting and texting in court. As a result of this, the wider public was able to receive a blow-by-blow account of the Assange hearing wherever they were.'

Ms Sadleir made reference to attorneys who have tried to stop journalists reporting on social media. In this regard, she said: 'In January 2011 [murder accused] Shrien Dewani's lawyer tried to stop reporters using Twitter during his extradition hearing, saying it could "undermine the solemnity" of proceedings and was the reason there had been "all sorts of leaks" in the case.' Ms Sadleir, added: 'However, the judge held that it could increase accuracy, and as long as it was unobtrusive and did not interrupt proceedings and was accurate, tweeting could take place.'

In terms of the impact tweeting may have on the administration of justice,

the Lord Chief Justice of England and Wales issued a guidance document titled 'Practice guidance: The use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting, 2011' ([www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lbtc-guidance-dec-2011.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lbtc-guidance-dec-2011.pdf), accessed 7-3-2013). The document states: 'It is presumed that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. This is because the most obvious purpose of permitting the use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings.'

According to the guidance document: 'Without being exhaustive, the danger to the administration of justice is likely to be at its most acute in the context of

criminal trials, eg where witnesses who are out of court may be informed of what has already happened in court and so coached or briefed before they then give evidence, or where information posted on, for instance, Twitter about inadmissible evidence may influence members of a jury. However, the danger is not confined to criminal proceedings; in civil and sometimes family proceedings, simultaneous reporting from the court room may create pressure on witnesses, distracting or worrying them.'

## Conclusion

Ms Sadleir said that the court room was not the exclusive domain of the legal fraternity.

'In the modern day, both technology and legal jurisprudence have moved on significantly,' she said.

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# Is the call for gender transformation in the judiciary being heeded?

**O**n 21 November 2012 the Judicial Service Commission (JSC) placed advertisements calling for nominations to fill 11 vacancies in various superior courts. On 23 February 2013 the JSC compiled a shortlist of candidates to be interviewed in Cape Town on 8 to 12 April 2013. Twenty three candidates were shortlisted, of which 14 are women.

Women are still in the minority in the profession, but 'it is improving'; however, it will 'take some time' before there is the right balance, said JSC spokesperson CP Fourie.

The JSC has on numerous occasions highlighted the lack of nominations of suitably qualified female candidates and urged role players to nominate suitably qualified candidates. Regarding the current ratio of male to female nominations, Mr Fourie said: 'It is an encouraging sign, and perhaps now the call is being heeded.'

The issue of gender transformation was again highlighted when former Constitutional Court Judge Zak Yacoob's retirement was announced last year. Of the five candidates shortlisted to replace Justice Yacoob and the subsequent four candidates whose names were submitted to the President to consider for appointment, all were men.

Women have more obstacles in their way and they have to be very 'courageous' to overcome these, said Justice Yacoob.

'The point is that the number of women in the Constitutional Court has been decreased from three to two by the JSC appointments in 2009. Nothing was done by the President or the JSC to right the situation in the appointment of the person to replace the [previous] Chief Justice. I hope that the President will, in the face of the absence of any women making themselves available to replace me, call for more names as he is entitled to do in terms of the Constitution,' said Justice Yacoob.

President of the South African Women Lawyers Association, Noxolo Maduba, told *De Rebus* that the recent announcement by the JSC is a 'good thing and is long overdue'. She also emphasised that women candidates should not merely be shortlisted but 'highly considered' for appointment. Ms Maduba said that women have been historically disadvantaged and have had to 'prove themselves'.

'I do not hope to see [transformation] happen overnight. It is a transition that should be embraced,' she said.

JSC spokesperson Dumisa Ntsebeza stated that the furore regarding the lack of female representation on the Constitutional Court arose over Supreme Court of Appeal Judge Mandisa Maya having been overlooked for a position at the court. Advocate Ntsebeza noted that some female candidates had declined to be nominated.

Mr Ntsebeza added that Justice Yacoob was one of the most critical of the lack of female representation. When compiling

the shortlist, Mr Ntsebeza said that the JSC was conscious of gender. 'There has always been a consciousness [in the JSC] of s 174(2) [of the Constitution], which addresses gender and race balance,' he said.

He added that the JSC had taken many factors into consideration when selecting the candidates for the shortlist.

Currently only two of the positions on the Constitutional Court Bench are held by women.

• See 2012 (Dec) *DR* 10 and 54.

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## Family law conference

The 16th Annual Family Law Conference 2013, an interdisciplinary educational conference to promote the development of family and child law, will take place at the Pavilion Clock Tower Conference Centre, V&A Waterfront, Cape Town on 11 and 12 April 2013. National and international speakers will address delegates on topics such as mediation and arbitration, collaborative law, surrogacy, children's rights, finance and divorce. Contact Joan Cornish 082 372 7517 or e-mail: [bridget@millerdutoitcloete.co.za](mailto:bridget@millerdutoitcloete.co.za) for more information.

# Lawyers Against Abuse

**T**he recently launched non-profit organisation Lawyers Against Abuse (LvA) aims to empower survivors of gender-based violence through free legal advice and assistance.

Patrons of the organisation include Constitutional Court Justice Edwin Cameron and Supreme Court of Appeal Judge Mandisa Maya.

The chairperson of LvA, Professor Bonita Meyersfeld from the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, told *De Rebus* that LvA took an incremental approach to dealing with gender-based violence: 'Rather than giving up because the problem of gender-based violence in South Africa seems unmanageable and almost impossible to solve, LvA takes small, targeted steps towards a clear goal; forcing the system to work for individuals. ... This includes both legal representation in civil matters, such as domestic violence and victim support, and guidance in criminal matters, allowing [people] to take ownership of their human rights. The vision is that the system will better operate for those it is designed to serve,' she said.

Professor Meyersfeld added that volunteer lawyers from LvA represent clients through interaction with state institutions, such as the police, hospitals and courts.

LvA aims to provide interventions in the following ways:

- Providing direct and accessible legal advice, assistance and representation to victims of all types of gender-based violence.

- Developing a multi-sectoral and interdisciplinary approach to gender-based violence.
- Understanding the psycho-social elements of gender-based violence.
- Including research, social work, psycho-education and counselling functions into the organisation.
- Developing a close-knit network to ensure survivors obtain the array of services they need.
- Monitoring and evaluating the implementation of laws.
- Compiling a blueprint for providing services to victims of gender-based violence that will be taken to government to show the exact requirements, costs and steps needed to be taken to ensure that the system works for gender-based violence victims.

Professor Meyersfeld told *De Rebus* that LvA was launched after she saw the need for a non-profit organisation to provide direct legal services for victims of domestic violence. The idea developed while working with interns at CALS. Professor Meyersfeld developed the idea for a centre where those subjected to such violence could receive professional and accountable legal services. She did extensive academic research in the area and consulted sector leaders before the integrated approach - focusing on law and psychology - was concretised.

LvA currently has an office at CALS but aims to move to Alexandra Township or Diepsloot in Johannesburg.

Attorneys can volunteer to assist the organisation by sending an e-mail to kaymahonde@gmail.com or by sending

a message to LvA via its Facebook page. At the time of going to print, LvA had 20 volunteers.

For more information on the organisation or to make a donation:

**Phone:** 071 280 3521

**E-mail:** lawyersagainstabuse@gmail.com

**Website:** www.lawyersagainstabuse.org/

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

## All Labour Courts to have free WiFi

Online legal information provider Sabinet, in conjunction with South African WiFi communications specialist, WirelessG, will be offering free G-Connect WiFi internet access at all Labour Courts in the country.

The service has already been installed in the Johannesburg Labour Court, with the remaining courts to follow soon. The service will be available in most sections of the court, including the judges' chambers, the court rooms, the library and the *pro bono* office.

In a press release, Sabinet's managing director, Rosalind Hattingh, said: 'We strongly believe that fast and efficient connectivity to updated online information has become essential for members of the law fraternity to carry out their daily duties.'

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## NADEL at university law professions' day

The Pietermaritzburg branch of the National Association of Democratic Lawyers (NADEL) was represented at a recent law professions' day at the Pietermaritzburg campus of the University of KwaZulu-Natal. Chairperson of the branch, Harshna Munglee, said of the event: 'Being a progressive lawyers' association, it is our intention to start with the future lawyers of the country, who are able to start early in the organisation, where they will be introduced to the struggles of the past, giving back to the profession and to the true values of what it means to be a progressive lawyer of today. Social gatherings will be held at appropriate times in the year to have regular dialogue between students and attorneys. We hope to form a youth membership in our branch, promoting and encouraging our young lawyers so that we ensure a progression plan is in place in our organisation, thus ensuring the ideals and the legacy of our organisation will continue to thrive in an ever-changing democratic legal society of our country.'



Pictured from left to right: NADEL Pietermaritzburg branch executive members Kushendren Pillay, Reshen Pillay, Sarah Govender, Harshna Munglee and Ashraf Mahomed.



# NADEL AGM highlights law as a tool to achieve democracy

**T**he National Association of Democratic Lawyers (NADEL) held its annual general meeting in Port Elizabeth from 22 to 23 February. The theme for the AGM was 'Quo vadis NADEL? Where is South Africa heading?' Speakers at the conference included Deputy Minister of Justice and Constitutional Development, Andries Nel; former Constitutional Court Justice Zak Yacoob; Judge Vincent Saldanha of the Western Cape High Court and the Justice Department's acting deputy-director of legislative development and secretary of the Rules Board for Courts of Law, Raj Daya.

## Where is South Africa heading?

Deputy Minister Nel, in his keynote address, said that the NADEL conference was taking place at a sombre time when the country was facing a scourge of sexual and gender-based violence. He added that the profession had to stand together with civil society and 'harness its energy to fight this scourge'.

Mr Nel said that the theme of the conference posed an important value-laden question, which 'underscores the vital contribution NADEL has made to the struggle against apartheid' and the construction of a non-racial democratic South Africa, adding that the question signified how NADEL understood that the profession and civil society are intrinsically linked.

Deputy Minister Nel highlighted various achievements of the Justice Department and said that, after 18 years of democracy, over 143 Bills were introduced, which have been 'enacted with the view to give effect to the values embodied in the Constitution'. He said that 'enacting

legislation serves no purpose if the public, especially the poor and vulnerable, are not aware of it, do not understand it or do not have the financial means to access the fruits and benefit of it'. He added that the legal fraternity and the Justice Department had an important role to play in ensuring that justice was accessible to all. He also thanked the legal profession for endeavouring to make the rights of South Africans real.

Mr Nel said that one of the Bills aimed at transforming the legal profession and making it accessible to aspirant lawyers, as well as assisting the poor to access justice, was the Legal Practice Bill (B20 of 2012). He said that the Bill contained numerous transformative factors, such as community service by the law profession, fee structuring, the establishment of a legal services ombud and the obligation of the envisaged South African Legal Practice Council to provide a mechanism to create appropriate and transformative legal education. He said that a united legal profession that serves the interests of the public was 'long overdue'. He added that current discussions on the Bill should alleviate any fears that government seeks to control the legal profession through the Bill.

## Legal education under the Legal Practice Bill

The future of legal education was discussed at the conference, with an address by Justice Yacoob, followed by a panel discussion by President of the South African Law Deans Association, Professor Vivienne Lawack; chief executive officer of the Law Society of South Africa (LSSA) and director of the Legal Education and Development arm of the LSSA, Nic Swart; member of the Cape Bar, Joey Moses; and NADEL representa-



*Keynote speaker, Deputy Minister of Justice and Constitutional Development, Andries Nel.*

tive on the LSSA Standing Committee on Legal Education, Raj Badal.

In his opening address, Justice Yacoob highlighted the importance of legal education as it enabled legal practitioners to effectively deal with problems and resolve their clients' issues. He added that a legal practitioner should understand the law in such a manner that he also understands the purpose of the law, its context and how it can contribute towards achieving democracy. He noted that in the past law was used as a weapon to bring about democratic change, whereas currently legal practitioners needed to use the law to achieve equality as 'a contribution to a greater South Africa'.

Justice Yacoob said that the commercial and non-commercial elements of the law complemented each other and legal practitioners needed to understand how the commercial and democratic practices can work hand in hand in society. He added that legal education should enable a legal practitioner to understand the independence of the profession and that the LLB degree should be designed in a way that produces democratic lawyers, as democracy in South Africa has not yet been fully achieved. He added that society and the country were much more complex than they were 20 years ago and legal education should prepare attorneys for practising in such an environment.

Justice Yacoob commented that the legal profession was conservative and 'the more money they make, the more conservative they become', which affected the entire legal system, noting



*NADEL conference attendees pictured with the Deputy Minister of Justice and Constitutional Development, Andries Nel, and his wife Kim Robinson (in yellow).*



*The 'Legal education under the Legal Practice Bill' panel (from left to right): Chief executive officer of the LSSA and director of the Legal Education and Development arm of the LSSA, Nic Swart; President of the South African Law Deans Association, Professor Vivienne Lawack; NADEL representative on the LSSA Standing Committee on Legal Education, Raj Badal; and member of the Cape Bar, Joey Moses.*

that this should change. He suggested that the legal profession required an organisation to assess competency at a broad-based level, regardless of the legal field a practitioner chooses. He indicated that none of the available vocational training programmes had a transformation element.

Professor Lawack said that the current LLB degree curriculum, as well as the costs of the modules and the duration of the degree, were decided in 1998 in a bid to make the LLB degree accessible to previously disadvantaged individuals. However, she added that 'what was right in 1998 is no longer right in 2013'. Professor Lawack said that statistics revealed that only 13% of students achieve the LLB degree in the prescribed period.

Further, as law is not considered a scarce profession, government spends less money financing law faculties compared to other faculties such as engineering, said Professor Lawack. Law is also considered cheap to teach; therefore a university can place more students in class for less funding, which causes overcrowding in classrooms, she said.

Professor Lawack added that it would take 12 years to rectify the effects of the dysfunctional outcome-based education schooling system, noting that some students at university level were unable to read with comprehension and also lacked numeracy skills. Despite this, she said the law profession continues to place high expectations on university departments to produce skilled and competent lawyers.

She invited NADEL to take part in an upcoming LLB degree summit and urged the association not to hold on to original decisions made in 1998, as NADEL was part of the decision-making process to design the current LLB curriculum. She added that the current context of the LLB degree had changed from the 1998 context and students could no longer be taught in the same way as in the past – a new approach and mindset was needed to teach law students.

Professor Lawack said that legal education was a shared responsibility be-

tween the profession and universities.

Responding to a question from the floor on why students were not offered the opportunity to decide which stream of legal practice they wish to follow during their degrees, Professor Lawack said that the LLB degree did not currently cover all streams of the legal field. She added that exposure to social sciences was missing from the degree.

In conclusion, she noted that the LLB had a high dropout rate and, to combat this, universities identified students at risk for dropping out and placed them in development programmes, which were costly. She urged the profession to team up with universities and volunteer at law clinics, and to mentor law graduates who work there, as part of their *pro bono* work.

Mr Swart said that through legal education lawyers could serve the public better. He said that legal education had to be discussed and unpacked in its entirety and questions legal practitioners needed to ask – which must be addressed by the Legal Practice Bill – were:

- Do we need structured training or is workplace training more appropriate?
- Can we accommodate the Bar in vocational training?
- How will legal education be funded?
- What format will be used for vocational training?
- What other forms of training can we have? (Eg, candidate attorneys could be trained at courts or government departments.)
- Will legal education be downscaled or outsourced?
- What qualifications do foreign practitioners need to practise in South Africa?

Answering a question from the floor, Mr Swart said that it was important for universities to instil a culture of service in law students, even if via projects such as raising money for their community, as this prepares them for rendering much-needed *pro bono* services in the future.

Mr Moses said that currently advocates could be admitted to practice after graduating from their LLB degree, and only those who wish to belong to a certain Bar need to undergo a period of pupil-

lage. He said that the content of the pupillage programme was largely practical and covered topics such as legal writing, ethics, rules of the Bar, rules of conduct, criminal procedure and preparation for civil trials. He questioned whether the content of the programme was appropriate and sufficient or whether it should be amended to accommodate changes that will be brought by the Legal Practice Bill. He also asked what content or form the vocational training should take and if the state would be able to sustain legal education under the Legal Practice Bill.

Mr Moses noted that the Bar limited entrants based on the number of those who can be enrolled for pupillage and queried the fate of those not accepted for pupillage. To address the problem of access to the profession, he queried whether the state would have mechanisms to assist those who could not enrol for pupillage and provide them with vocational training.

Responding to a question from the floor, Mr Moses said that it was in the public interest to have proper legal education and effective vocational training. He added that the profession needed to investigate what was needed to enhance the LLB degree so that universities produced better candidates.

Mr Badal said that, in the narrow sense, legal education was about enabling students to become better lawyers. He said that the difference between a NADEL lawyer and any other lawyer was that a NADEL lawyer served the poor. He added that a NADEL lawyer needed to be seen to influence and participate in human rights issues in the country. He urged senior attorneys to mentor new entrants to the profession. He said that the Legal Practice Bill would aid with improving access to the profession and transforming the profession through legal education. He emphasised that NADEL could play a 'leading role' in legal education. Answering a question from the floor, Mr Badal suggested that the LLB should revert to its previous five-year model and that *pro bono* work should be made mandatory.

## Update from the Justice Department

Mr Daya said that the mediation pilot project, which provides for an option of mediation in civil court matters, was linked to the Justice Review Programme. He said that the Justice Department, in conjunction with the heads of courts, were currently discussing the case flow management process and the need for rules to strengthen the e-filing process. He said that the object of the reform programme was to align the justice system with the Constitution. He added that the department was looking at the current rules to determine if they passed constitutional muster.

Mr Daya noted that the rules do not exist in isolation; they have to take into account the Bill of Rights and the rest of the Constitution. He added that the Justice Department realised the need to harmonise, align and simplify the rules. He also cited discrepancies in the processes and rules of the magistrates' courts and the High Courts.

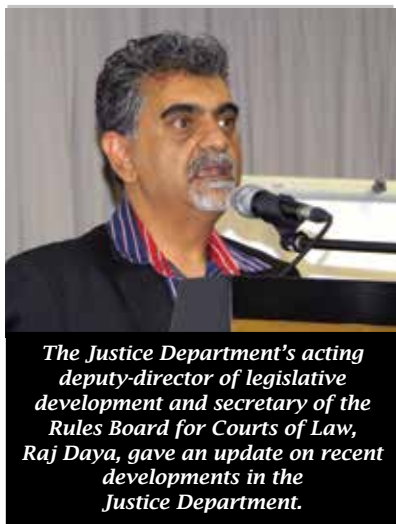
Mr Daya said that the Justice Department would also consider the cost of litigation.

To enhance access to justice, the department will –

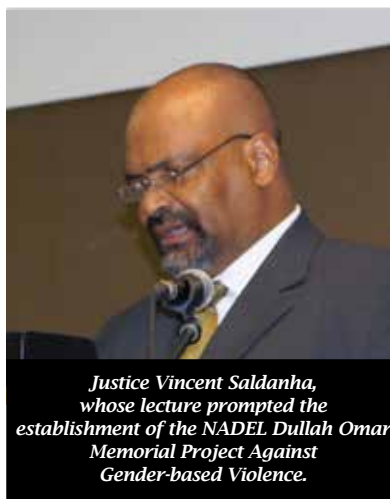
- identify gaps in the alignment of rules;
- review the effectiveness of courts and affordability;
- simplify court rules;
- look at how alternative dispute resolution can aid in lessening the numbers of matters on court rolls;
- modernise information technology;
- have effective case flow management;
- review the impact of delayed judgments;
- have a separate roll for Road Accident Fund matters; and
- identify legislation that required reform.

Mr Daya highlighted the need for access to legal services for those who earn above the prescribed threshold to qualify for legal aid but who still could not afford to consult with an attorney. He suggested that assisting such people could be an area of *pro bono* services.

On mediation, Mr Daya said that there was a need to promote restorative justice. Presently, a number of statutes included mediation as an alternative dispute resolution tool and that one of the spin-offs of mediation was that litigants had an opportunity to save litigation costs. He added that if an attorney decided to follow the proposed mediation route, he would not be penalised if the process did not work and he could go back to the mainstream process. However, Mr Daya said that there could be an adverse outcome for those attorneys who did not opt for mediation if it can be proved that the



*The Justice Department's acting deputy-director of legislative development and secretary of the Rules Board for Courts of Law, Raj Daya, gave an update on recent developments in the Justice Department.*



*Justice Vincent Saldanha, whose lecture prompted the establishment of the NADEL Dullah Omar Memorial Project Against Gender-based Violence.*

matter could have been resolved through this route.

## Dullah Omar Memorial Lecture

NADEL's Dullah Omar Memorial Lecture and gala dinner in honour of Justice Yacoob were held on the night of 23 February. The lecture was given by Justice Saldanha, while other speakers were Deputy Minister Nel and NADEL founding members Silas Nkanunu and Krish Govender.

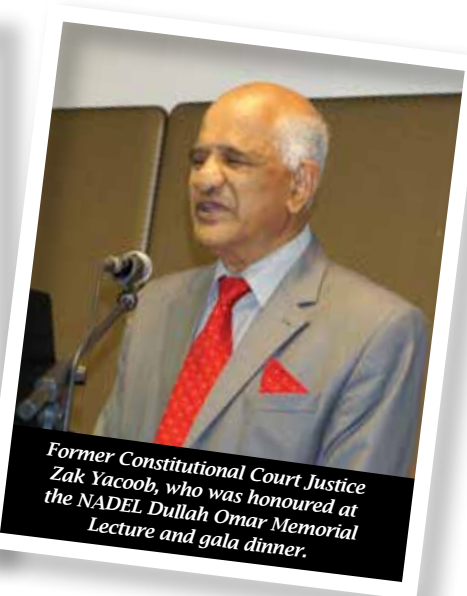
Justice Saldanha said that it would be fictitious not to acknowledge that South Africa is still filled with inequality. He also said that South Africans need to be committed in meeting the challenge of sexual and gender-based violence. He added that Dullah Omar would have expected the profession to do something concrete about this challenge. As a gift, Justice Saldanha brought a box used to store forensic evidence collected in sexual offence matters to be used to educate the public on the collection of forensic evidence. As a result of the lecture, NADEL formed the Dullah Omar Memorial Project Against Gender-based Violence. Attendees and NADEL branch members at the dinner pledged donations towards the project.

In his tribute to Justice Yacoob, Deputy Minister Nel thanked the former judge for his continued contribution to transformation and democracy. Mr Nkanunu and Mr Govender spoke about humorous incidents of the past when the former judge was a legal practitioner and a member of the Bench.

## Resolutions

On the second day of the conference several resolutions on the discussions that were held on the first day were made. These included:

- A need to make sure land restitution is effectively and appropriately achieved.
- Ensuring consistent interaction between NADEL and the Justice Department and



*Former Constitutional Court Justice Zak Yacoob, who was honoured at the NADEL Dullah Omar Memorial Lecture and gala dinner.*

other government departments by establishing a standing committee.

- That NADEL supports the formation of a single judiciary with common benefits depending on the level of experience of judicial officers.
- Issues on the appointment of acting magistrates and their remuneration and employee benefits have to be located within the topic of transformation of the judiciary.
- That the LLB should revert to a five-year qualification, which should ideally consist of a primary degree and a postgraduate degree.
- NADEL's need to give input on the LLB curriculum and to engage with universities to give input on the curricula of law schools, as well as to ensure that the curriculum entails not just substantive law but consciousness of the role of law in society at large.
- Condemning gender-based violence and committing to providing education on evidentiary tools to ensure better prosecution of related crimes, including the collection of forensic evidence.
- Confirming NADEL's position on the Legal Practice Bill as per its submissions to parliament.

## The NADEL national executive council:

President – Max Boqwana  
Vice-president – Gcina Malindi  
General secretary – Faathima Mahomed  
Assistant general secretary – Ilan Lax  
Treasurer – Asif Essa  
Assistant treasurer – Tony Thobane  
Publicity secretary – Nokukhanya Jele  
Projects officer – Patrick Jaji  
Fundraising officer – Mvuzo Ntyesi  
Gender desk – Sheila Mphahlele

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Compiled by Barbara Whittle, communication manager, Law Society of South Africa, [barbara@lssa.org.za](mailto:barbara@lssa.org.za)

## LSSA condemns unscrupulous garnishee practices

Last month the Law Society of South Africa (LSSA) echoed the concern expressed by Finance Minister Pravin Gordhan in his budget speech at the end of February regarding the abuse of emoluments attachment orders that leave workers without money to live on after they have serviced their debts every month.

In a press release, LSSA co-chairpersons Jan Stemmett and Krish Govender condemned the 'unscrupulous abuse, exploitation and maladministration' of the garnishee order system by collection practitioners.

However, the LSSA stressed that criticism in the media against the provincial law societies for failing to address the problem and allowing the problem to worsen was seriously misplaced.

'The responsibility to review the credit industry and the relevant legislation lies with the legislature. Current legislation needs to be amended to allow garnishee orders to be issued only with proper judicial oversight. The courts must interrogate debtors, applicants and their

attorneys before granting emolument attachment orders. The system is open to abuse because the law is weak,' said Mr Govender and Mr Stemmett.

The co-chairpersons stressed that collection attorneys work within the regulatory framework provided by the current legislation. The statutory provincial law societies do not hesitate to investigate complaints from the public regarding attorneys alleged to be involved in the exploitation of the system, and any attorney found to have abused the processes could face severe sanctions.

The LSSA is one of the stakeholders actively participating in the joint task team chaired by Credit Ombud, Manie van Schalkwyk, which is developing a code of conduct in relation to debt recovery. The LSSA is represented on the task team by Cape Town attorney Graham Bellairs, who is chairperson of the LSSA Magistrate's Court Committee, and Jacques Tarica from the Johannesburg Attorneys Association.

The Department of Justice and Constitutional Development published draft

legislation to address this issue in February, and had called for comments on the draft amendments by 26 March.

In the press release by the co-chairpersons, the LSSA recognised the severe impact of the abuse of emoluments attachment orders, particular in the low-income earning sector of society. It pointed out that a number of factors contribute to this problem, including –

- the recklessness with which credit is granted in certain instances;
- the unscrupulous methods adopted by some debt recovery practitioners in securing signatures to written consents to the granting of garnishee orders for amounts that leave little to no income for the debtor employees;
- lack of knowledge and training of the clerks of the courts to pick up abuse and refuse to grant such orders; and
- legislation that allows for the obtaining of garnishee orders without judicial oversight, as well as punitive interest rates and the recovery of excessive legal costs and collection commission.

## Attorneys urged to serve as small claims court commissioners

The Law Society of South Africa (LSSA) is concerned at the shortage of commissioners in the small claims courts around the country. Attorneys are, therefore, urged to make themselves available to serve on a *pro bono* basis as small claims court commissioners.

The 'Small claims courts: Guidelines for commissioners' produced by the Department of Justice and Constitutional Development indicate that, currently, the small claims system in South Africa is dependent on the goodwill and dedication of commissioners. Sitting times of the courts are scheduled after hours so that commissioners can fulfil their small claims court duties without interference with their legal practices.

The guidelines note that the function of commissioners is essentially adjudicative or judicial in nature in that they adjudicate over small civil disputes between plaintiffs and defendants. After the hearing, the commissioner is empowered to grant judgment for either party in respect of the claim, the defence or the counter-claim, insofar as the case has been proved.

The commissioner's decision is based solely on the evidence presented by the

parties during the trial and in accordance with the law. If the commissioner is of the opinion that the evidence does not enable him to give judgment for either party, he may grant absolution from the instance. The commissioner may also grant such judgment as to costs as may be just. The commissioner performs his duties without the assistance of attorneys or advocates, with a considerable amount of discretion and flexibility in the procedure. The commissioner's decision is final and subject to review only.

The guidelines state that, to be appointed a commissioner, a practitioner should have legal qualifications and an uninterrupted period of at least five years of practical experience or involvement in the tuition of law. Commissioners are appointed on a voluntary basis and are not remunerated.

- Copies of the 'Small claims courts: Guidelines for commissioners' and application forms can be obtained from the LSSA professional affairs department by e-mailing [professionalaffairs@LSSA.org.za](mailto:professionalaffairs@LSSA.org.za) or telephone Andrew Sepapu at (012) 366 8800.

## LSSA annual report outlines developments, challenges and achievements in the attorneys' profession

The annual report of the Law Society of South Africa (LSSA) for the period April 2012 to March 2013 will be available from mid-April on the LSSA website at [www.LSSA.org.za](http://www.LSSA.org.za). It carries the reports of co-chairpersons Jan Stemmett and Krish Govender; the chief executive officer Nic Swart, covering all the LSSA departments; and reports on the Attorneys Development Fund and the Legal Provident Fund. In addition, full reports on the activities of 27 LSSA specialist committees are contained in the annual report.

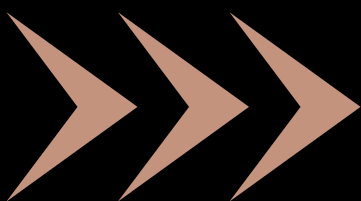
The 'LSSA annual report: April 2012 to March 2013' can be requested by e-mail at [contact@LSSA.org.za](mailto:contact@LSSA.org.za) or from the communication department at tel: (012) 366 8800.



## Candidate Attorney Class of 2013

From left to right:

- Front row:** Nothando Tshabalala, Hlengiwe Dlamini, Noxolo Shange, Tatum Govender, Benazir Cassim, Natasha Leaf, Lauren Coetzee
- Second row:** Daimon Stockl, Tracey-Lee Barnes, Kelcey Smith, Nicole Piaray, Esther van Schalkwyk, Julia Bingham, Khiyara Krige, Tsholo Lepule, Khulekani Khumalo
- Third row:** Thabu Siwedi, Denushka Naidoo, Sarah Norman, Racine Ramhurry, Kate Paterson, Katrijn Thys, Mmanake Msiza, Rhulani Nkomo, Dante Sithole
- Fourth row:** Kasendran Govender, Sanelisiwe Mpofana, Kyle Fyfe, Lungelo Magubane, Izanne van Schalkwyk, Nikita Lume, Yusuf Peer
- Fifth row:** Alex Nieuwoudt, Arshaad Carrim, Melusi Dlamini, Sipiwe Nkosi, Adriaan Engelbrecht
- Back row:** Douglas de Jager, Wayne Murray, Faheem Kaka, Kiren Bagwandeem



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# People and practices

Compiled by Shireen Mahomed

**Gildenhuys Malatji Inc** in Pretoria has five new appointments.



Neetu Dawlal has been appointed as a senior associate in the employment law department.



Mashudu Rambau has been appointed as an associate in the commercial litigation and public law department.



Reham Shamout has been appointed as an associate in the commercial litigation and public law department.



Tim Vlok has been appointed as an associate in the general litigation department.



Miné van Zyl has been appointed as an associate in the general litigation department.

**DSC Attorneys** in Cape Town has one promotion and two appointments.



Claire Pearce has been promoted to a senior associate. She specialises in personal injury law.



Daneil Botha has been appointed as a professional assistant. He specialises in personal injury law.



Jan Potgieter has been appointed as a professional assistant. He specialises in personal injury law.



**Smit Sewgoolam Incorporated** in Johannesburg has appointed Kgosi Nkaiseng as an associate.



**Motalane Kgariya Inc** in Pretoria has appointed Delray Claire Vosloo as an associate in the commercial litigation department.



**Mncedisi Ndlovu & Sedumedi Incorporated** in Johannesburg has appointed Thabiso Maseko as a director.

**Boqwana Burns Inc** has launched a new firm in Port Elizabeth. The firm specialises in all spheres of law and has offices in Johannesburg, Port Elizabeth and Mthatha. Its partners are Max Boqwana and Denver Burns.

Max Boqwana specialises in commercial, administrative and constitutional law. He is President of the National Association of Democratic Lawyers, a past co-chairperson of the Law Society of South Africa and has been appointed as an acting judge on a number of occasions.

Denver Burns specialises in corporate law, commercial litigation and entertainment and sports law.



*Max Boqwana and Denver Burns.*



**Rooth & Wessels Attorneys** in Pretoria has appointed Leon du Toit as a senior associate in the estates department.



*From left: Simon Watson, Keren Oliver and Chris Haralambous.*

**Cox Yeats Attorneys** in Durban has three new partners. Chris Haralambous specialises in alternative dispute resolution, employment and commercial law. Keren Oliver specialises in drafting and negotiating commercial agreements and advising on company, general business and consumer protection law. Simon Watson specialises in constitutional, contractual and company law, drafting commercial agreements and dispute resolution.



## PEOPLE AND PRACTICES

Fairbridges Attorneys has 11 new appointments.



Mike Young has been appointed as a director in the property department in Johannesburg.



Nadia Bulbulia has been appointed as an associate in the property department in Johannesburg.



Johan van der Vyver has been appointed as a director in the commercial property department in Johannesburg.



Greer Savage has been appointed as an associate in the litigation department in Cape Town.



Guy Pudney has been appointed as a director in the commercial department in Johannesburg.



Jodi Poswelle has been appointed as an associate in the litigation department in Johannesburg.



Herman Conradie has been appointed as a director in the litigation department in Cape Town.



Nazli Parker has been appointed as an associate in the intellectual property department in Cape Town.



Melanie Kilian has been appointed as a director in the property department in Cape Town.



Karol Michalowski has been appointed as an associate in the litigation department in Cape Town.



Julia Penn has been appointed as a senior associate in the litigation department in Cape Town.

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



Our transferring firms

**BG Bowman Gilfillan**



Christodoulou & Mavrikis Inc.  
Attorneys



**FAIRBRIDGES**  
ATTORNEYS  
EST 1812

**Fluxmans**  
ATTORNEYS



MAHONS ATTORNEYS



**MAPONYA**  
attorneys notaries & conveyancers

**NORTON ROSE**  
**ROODT inc.**  
ATTORNEYS



**Rossouw's**

**Stegmanns**  
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# 5 minutes with

## the Cape Town Attorneys Association

**T**his month's column features the Cape Town Attorneys Association (CTAA). *De Rebus* news editor Nomfundo Manyathi-Jele spoke to the CTAA President, Shekesh Sirkar, about the association.

### What is the CTAA?

The CTAA is an attorneys' association governed by r 4 of the rules of the Cape Law Society (CLS). It is known as 'Circle 1' and is the largest attorneys' association in the jurisdiction of the CLS.

### What does the CTAA do?

The functions of the CTAA are to –

- consider and deal with matters that specifically affect members practising or otherwise employed in its area;
- discuss matters referred to it by the CLS;
- make representations to the CLS on matters affecting the profession; and
- assist in the friendly settlement of disputes between its members.

We also assist members with complaints they have against institutions that affect their practice, such as the various magistrates' courts, the High Court, the Master's Office, the deeds office and the South African Revenue Service. The CTAA also serves as a conduit between the CLS and its members. We invite our members to forward complaints to us and we assist, as best possible, to resolve these.

### When was the CTAA established?

The CTAA was established in 1935. It has been in existence for over 75 years.

### Who can become a member of the CTAA?

Only attorneys who are members of the CLS become members of the circles in which they practise. The affairs of the CTAA are conducted by a circle committee. Elections are held at the CTAA's annual general meeting in March/April.

### How does one become a member of the CTAA?

All attorneys practising or otherwise employed in the area of Circle 1 (ie, the magisterial district of Cape Town) are members of the CTAA.

We do not collect membership fees directly from our members. However, members pay annual subscriptions to the CLS, which comprise a component for the circles in which members practise. The CLS, in turn, pays over the 'circle subscriptions' to the circles once a year.

This is the only source of income for the CTAA, which we use to fund functions for members (including the AGM), annual donations for needy organisations and other expenses incurred by the CTAA from time to time. The committee members are not remunerated.

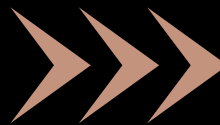
### What is the CTAA's current membership?

The CTAA currently has about 1 450 members.

### Where are the CTAA's offices?

In as much as the CTAA serves attorneys practising in Cape Town and surrounding

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areas, it only operates in Cape Town. Our monthly committee meetings rotate between the law firm offices of the various committee members.

### Contact information

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[www.capetownattorneys.co.za](http://www.capetownattorneys.co.za)



President of the Cape Town  
Attorneys Association,  
Shekesh Sirkar.

If you would like to see a specific organisation featured in the '5 minutes with ...' column, please send an e-mail to [derebus@derebus.org.za](mailto:derebus@derebus.org.za)

*De Rebus* reserves the right to decide on which organisations will be featured in the column, including taking the initiative to approach organisations to be featured.

Nomfundo Manyathi-Jele,  
[nomfundo@derebus.org.za](mailto:nomfundo@derebus.org.za) 

## Guidelines for articles in *De Rebus*

*De Rebus* welcomes contributions in any of the 11 official languages, especially from practitioners.

The following guidelines should be complied with:

1. Contributions should be original and not published or submitted for publication elsewhere. This includes publication in electronic form, such as on websites and in electronic newsletters.
2. *De Rebus* only accepts articles directly from authors and not from public relations officers or marketers.
3. Contributions should be useful or of interest to practising attorneys, whose journal *De Rebus* is. Preference is given, all other things being equal, to articles by attorneys. The decision of the Editorial Committee is final.
4. Authors are required to disclose their involvement or interest in any matter discussed in their contributions.
5. Authors are required to give word counts. Articles should not exceed 3 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.
6. Footnotes should be avoided. Case references, for instance, should be incorporated into the text.
7. When referring to publications, the publisher, city and date of publication should be provided. When citing report-

ed or unreported cases and legislation, full reference details must be included.

8. Authors are requested to have copies of sources referred to in their articles accessible during the editing process in order to address any queries promptly.
9. Articles should be in a format compatible with Microsoft Word and should either be submitted by e-mail or, together with a printout on a compact disk. Letters to the editor, however, may be submitted in any format.
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11. Articles should be submitted to *De Rebus* at e-mail: [derebus@derebus.org.za](mailto:derebus@derebus.org.za) or PO Box 36626, Menlo Park 0102 or Docex 82, Pretoria.
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By  
Caryn  
Gootkin

# Nothing plain about plain drafting

**A**s a profession, one of the stereotypes that plague attorneys is the tendency to wear legalese as a suit of armour. Many believe attorneys use words as weapons, exaggerating for dramatic effect, overstating to intimidate and confounding with jargon.

When drafting contracts for clients, attorneys use language as a preventative bandage to guard against any harm their clients may suffer. But, in an effort to achieve complete certainty and cover their bases, attorneys often get lost along the way.

As Reed Dickerson, professor of law at Indiana University, said: 'The price of clarity, of course, is that the clearer the document the more obvious its substantive deficiencies. For the lazy or dull, this price may be too high' ([www.plainlanguage.gov/resources/quotes/legal.cfm](http://www.plainlanguage.gov/resources/quotes/legal.cfm), accessed 6-3-2013).

This article will demonstrate why drafting in plain language is more than just a legal imperative imposed by the Consumer Protection Act 68 of 2008; it will also provide practical examples of how to use plain language to improve drafting.

## Defining the beast

'Legalese' is defined in the *Collins English Dictionary* as the 'conventional language in which legal documents, etc, are written' ([www.collinsdictionary.com/dictionary/english/legalese?](http://www.collinsdictionary.com/dictionary/english/legalese?), accessed 14-3-2013).

*Dictionary.com*, a free online dictionary, gives a more emotive explanation: '[L]anguage containing an excessive amount of legal terminology or legal jargon' (<http://dictionary.reference.com/browse/legalese>, accessed 6-3-2013).

However defined, the problems with this type of writing are that, when drafting contracts, attorneys often:

- Use many words when one would be enough ('right, title and interest').
- Choose grand words over simpler ones ('notwithstanding the fact that' instead of 'even though').
- Use Latin terms instead of their simple English equivalents ('*inter alia*' instead of 'among others').
- Begin or join sentences with archaic conjunctions ('wherefore' and 'whereupon').
- Write in the passive rather than the active voice ('an application will be brought by the seller' instead of 'the seller will apply').
- List reams of synonyms to amplify a point ('including, but not limited to').

The result is writing that is impersonal, convoluted, long-winded and difficult to understand – the opposite of plain language.

Bryan A Garner is widely regarded as the foremost authority on writing legal documents in plain language. In the foreword to his book *Legal Writing in Plain English*, he warns against regarding plain language as 'drab and dreary'. He maintains: 'It's robust and direct – the opposite of gaudy, pretentious language. You achieve plain English when you use the simplest, most straightforward way of expressing an idea. You can still choose interesting words. But you'll avoid fancy ones that have everyday replacements meaning precisely the same thing' (Bryan A Garner *Legal Writing in Plain English, A Text with Exercises* (University of Chicago Press 2001) at xiv).

## Plain language is a business, as well as a legal, imperative

While there has been growing support in South Africa for using plain language in the legal profession over the past decade, it is still regarded by many as a quite radical 'nice-to-have', rather than the legal and business imperative that it has become. Bevan Frank discussed the laws compelling the use of plain language and the problems inherent in the wording of those Acts in his article 'Simply unclear – Is the legislature an obstacle to plain language?' (2012 (Nov) *DR* 44). Others have covered the definition of 'plain language' (Esti Louw 'Simply legal – Legal language in South Africa'

2011 (Dec) *DR* 22) and provided some guidelines on how to use it (Michele van Eck 'Guidelines for writing in plain language' 2012 (Jul) *DR* 21).

## Why write in plain language?

In addition to the legal imperative, below are several reasons it makes good business sense to write clearly.

- The simpler the message, the better the chance the target audience will understand the message with ease. In the case of consumer contracts and 'terms and conditions', it is important to remember that the target audience is not the client, but their clients/customers. Even regular clients who need commercial contracts like shareholders' agreements and licence agreements will appreciate being



able to digest the documents drafted.

- This will save time since drafters will not need to explain themselves to people who do not understand what they have written.
  - Contracts are functional documents, written to be acted on. For the parties to truly agree, they need to understand what they are signing. No lawyer wants to defend a claim that a party felt bullied into signing something he did not fully grasp.
  - Vague, complicated documents are more likely to lead to a lawsuit. Often misunderstanding is what drives litigation. Lawyers would also prefer to avoid a court scrutinising their documents. Litigation is costly and attorneys serve their clients best by ensuring their writing is clear and accurate.
  - Attorneys who train themselves to draft in plain language will have an advantage over those lawyers unwilling or unable to do so. Those lawyers who learn good drafting skills will attract clients looking for lawyers they can relate to.
  - While initially it may take an attorney longer to express himself clearly, once he has learned the skill, he will train himself to think and write clearly in the first draft, reducing the need for hours of editing and rewriting. This increased efficiency will benefit clients and profitability. Author Blaise Pascal explained this apparent contradiction: 'I have only made this letter longer because I have not had the time to make it shorter' (Blaise Pascal *The Provincial Letters*, 'Letter 16, 1657' [www.goodreads.com/quotes/21224-i-have-only-made-this-letter-longer-because-i-have](http://www.goodreads.com/quotes/21224-i-have-only-made-this-letter-longer-because-i-have), accessed 13-3-2013).
- Writing in plain language requires greater concentration; in order to express an idea or concept clearly, it must be understood fully. In this way, clear writing forces the drafter to think clearly, improving the quality of the document.
- Despite being the lingua franca in South Africa, English is first language to less than 10% of the population (2011 Census). This means that many end users of contracts drafted by attorneys struggle to understand spoken English, let alone written legal documents. Attorneys need to make legal texts more accessible to the vast majority of consumers in the country.
  - Many attorneys have foreign clients who use English as the language of business, but are not mother-tongue speakers. Writing clearly when communicating with and drafting for these clients will ensure an ongoing relationship. If an attorney has, for example, a German client with French partners or clients, using plain English is crucial to proper understanding between all parties.
  - Often attorneys rely on precedents to form the basis of contractual drafting, repeating convoluted expressions and wordy clauses without thought.

## Tips and examples

Below are some tips and examples relating to plain language usage that I have come across:

- There is no need to record obvious intentions in an agreement. If the writing is clear, the intention will be, too. Clauses like 'The parties intend to record their agreement in writing, as they hereby do' can be omitted without making any difference to the rights or obligations of either party.
- Use active verbs unless passive verbs are better suited to the context. Passive writing distances the writing from the reader and usually adds unnecessary words.

**Original clause:** This agreement shall be binding on and enure for the benefit of the parties' successors in title as fully and effectually as if they were a party to this agreement.

**Plain language rewrite:** Our successors in title will be bound by all our rights and obligations in this agreement as if they had signed it.

(Note: This example also demonstrates the benefits of drafting in first or second rather than third person. If, however, the third person is used, replace 'the parties' for 'our'.)

- Avoid complicated ways of referring to parties, preferring their proper names or 'you'.

**Original clause:** The receiving party is employed to fulfil certain functions with regards to the business of the disclosing party wherein they will become aware of certain confidential information regarding the disclosing party's intellectual property, business procedures and working practices.

**Plain language rewrite:** While working for us you will come to know confidential information about our intellectual property, business procedures and working practices.

- Only use as many words as are necessary to convey the intention of the clause.

**Original clause:** The receiving party furthermore hereby acknowledges that the information aforesaid is being made available to it solely in the course of facilitating the receiving party to being able to render necessary services to the disclosing party and for no other purpose whatsoever and that such information would not otherwise have been made available to the receiving party.

**Plain language rewrite:** You have access to this information for one purpose only, to enable you to fulfil your employment obligations.

- Cession clauses are often convoluted and wordy. Usually, these can be rewritten very simply. Below is such an example:

**Original clause:** You acknowledge that you may become indebted to us during this contract. We require you to give us security for your debts by ceding your

rights to receive payment to us.

**Plain language rewrite:** As security for any amounts you may owe us, you cede to us your rights to receive any amounts you are entitled to receive in terms of this contract.

- Another type of clause that is often overwritten is the dispute resolution clause. These can be simplified by referring to the relevant Acts or to a company that specialises in mediation and arbitration. Below is a simple example providing for negotiation, litigation or arbitration:

'Dispute Resolution

1. We will negotiate in good faith to settle any dispute that arises out of this contract.

2. If we can't settle the dispute, then, unless any specific part of this contract provides otherwise, the aggrieved party may seek relief from any competent court having jurisdiction.

3. In addition, we may agree to arbitration in accordance with the Arbitration Act 42 of 1965 to settle the dispute. We must conclude this written agreement to arbitrate within 7 (seven) days of the dispute arising and it must contain all the details of the arbitration process.'

- Wherever possible, strong, active verbs, such as 'apply', should be used instead of their weaker and wordier equivalents, such as 'make application'.

**Original clause:** You will be able to make payment by way of debit order.

**Plain language rewrite:** You can pay by debit order.

This example also illustrates how using 'can' instead of 'be able to' simplifies a sentence.

- Avoid using 'shall' at all costs. Use 'may', 'must' or 'will', depending on the context:

- The seller shall be entitled to advertise the sale.

- The seller shall advertise the sale.

- The seller shall be a preferred creditor.

In each case there is a more accurate word than 'shall', as illustrated in the following rewrites:

- The seller may advertise the sale.

- The seller must advertise the sale.

- The seller will be a preferred creditor.

## The end is near

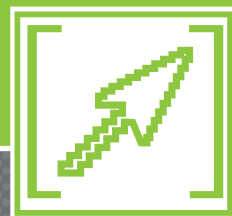
Lawyers often draft an agreement that is not in plain language despite the fact that their client prefers or needs to communicate with their clients/consumers in plain language.

Practitioners should start changing the way they write to be more accessible to non-lawyers.

Caryn Gootkin BA (UCT) BProc (Unisa) MA (Cantab) is a plain language practitioner, writer and columnist at In other words in Cape Town.



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# A step closer

## Oral hearings on the Legal Practice Bill

By  
Kim  
Hawkey

MATTHYS  
DE REBUS - APRIL 2013

**O**n 19 and 20 February the Justice Portfolio Committee (the committee) held public hearings on the Legal Practice Bill (B20 of 2012), which is set to radically change the regulation and governance of the legal profession.

Those granted an opportunity to address the committee were:

- The Competition Commission.
- The Independent Association of Advocates of South Africa (IAASA).
- The Legal Resources Centre (LRC).
- The Black Lawyers Association (BLA).
- The Law Society of South Africa (LSSA).
- The Attorneys Fidelity Fund (AFF).
- The General Council of the Bar (GCB).
- The Cape Bar Council (CBC).
- Advocate Izak Smuts.
- The South African Human Rights Commission (SAHRC).
- The Association of University Legal Aid

Institutions (AULAI).

- The employees of the LSSA.

In addition, the committee received written submissions on the Bill from a number of bodies, including the National Association of Democratic Lawyers; law firms Adams & Adams and Webber Wentzel; the Legal Expenses Group Africa; the South African Institute of Race Relations; the National Alliance for the Development of Community Advice Offices and the National Task Team on Community-based Paralegals; the Centre for Constitutional Rights; the Constitutional Literacy and Service Initiative; the University of the Witwatersrand Law Clinic; Eskom; the Association of Paralegals Practitioners; as well as several individuals (see p 38).

A number of representatives from the Justice Department attended the hearings, including chief state law adviser Enver Daniels; deputy chief state law adviser

responsible for policy development, JB Skosana; chief director of legislative development, Lawrence Bassett; and acting deputy director-general of legislative development and secretary for the Rules Board for Courts of Law, Raj Daya.

Chairperson of the committee, Luwellyn Landers, opened the hearings by referring to the genesis of the Bill. He noted that there had been approximately 15 drafts of the Bill, which he said was 'understandable' due to the nature of the proposed legislation.

'We are expecting robust debate on the Bill and we encourage this. We do not expect you to agree with every single thing. Let us see if we can make this the best product,' Mr Landers concluded before the various bodies began making their oral submissions to the committee.

A synopsis of each of the oral submissions, in the order that they were made, is set out below.

## Competition Commission

**T**he Competition Commission's deputy commissioner, Tembinkosi Bonakele, represented the commission at the hearings. Mr Bonakele noted that the commission's interest in the Bill lay with the impact it would have on competition, as competition law issues dovetail with those of the public interest. The commission's primary submission was that the Bill was not sufficiently transformational and should include a framework to ensure broader representation within a specified time frame.

### Professional rules

Mr Bonakele referred to exemption applications that both the LSSA and the GCB had made to the commission in terms of the respective professional rules for the attorneys' and advocates' branches of the profession. He noted that the LSSA's application had been rejected as the rules in question unjustifiably restricted competition. As this would have led to a lacuna, the commission and the LSSA agreed on an interim arrangement to interpret the professional rules in the least offensive way to competition provisions, he said. In terms of the GCB application, this was also rejected, but challenged and the Supreme Court of Appeal upheld an appeal in respect of the commission's decision relating to the referral rule. The rest of the rules were resubmitted to the commission and the processing of this application recently resumed after the LSSA matter, he added.

### Transformation

In terms of transformation, Mr Bonakele said that the commission was concerned with regulatory barriers to access to the

profession and skewed briefing patterns, which negatively impacted on competition. Further, the Bill does not address issues of access to the profession and to justice, he said:

'The Bill does not deal with these core issues adequately. ... By and large, the status quo has remained.'

He added that the legal services ombud should be given 'more teeth' and its role should include monitoring transformational targets.

He proposed that the Bill should commit the South African Legal Practice Council (the council) to developing a transformation charter to meet the transformation objectives, together with a clear timeline to achieve these.

### Fee structures

On fee structures, Mr Bonakele said that the commission was concerned about the possibility of 'cartel-like' behaviour provided for in the Bill.

In response to questions from the committee, Mr Bonakele said that the setting of prices could not be done by the council, which would be dominated by legal practitioners, who had an inherent conflict of interest: 'Lawyers are competitors ... and, by them being involved in making a recommendation on fees, you essentially have a group of competitors deciding on what the fees should be.'

He proposed that a separate independent structure be established to set and regulate fees, on which consumers of legal services would be represented.

In respect of a query relating to contingency fees, he said that uncapped contingency fees were problematic and the commission was concerned that this

aspect was not addressed in the Bill, although the commission had no objection to the principle of contingency fees.

In terms of fee caps, Mr Bonakele said that, to protect the public, only maximum fees should be provided for – not minimum fees, which 'only protect practitioners': 'Fees that are aimed at protecting the public from overcharging and overreaching do not have to set minimum prices. It is sufficient to protect members of the public to set maximum fees.'

He noted that the Bill left the determination of fees to the regulations to be drafted, but that the Justice Minister's (the Minister's) discretion in this regard was 'too wide'.

He commended the Bill's drafters for being silent on advertising, noting that the Bill would repeal aspects in the Attorneys Act 53 of 1979 relating to advertising, which was 'a step in the right direction'.

### Reserved work

Mr Bonakele noted that the Bill maintained the status quo in respect of reserved work for attorneys and advocates in an 'overly restrictive' manner that prevented non-legal practitioners from providing certain categories of legal services. He said that breaking this 'monopoly' could result in reduced legal costs. 'There is value in having restriction. ... [However,] there is a lot of work that, in fact, can be done by people who do not need a four-year legal qualification to perform,' he said.

Mr Bonakele said that examples of this type of work included conveyancing and drafting wills. He noted that certain ar-

eas of legal work were under-served by the legal profession, which resulted in expensive services.

In this regard, the commission suggested that the Minister designate certain categories of work that could be done by non-legal practitioners.

### Multidisciplinary practices

Mr Bonakele said that the commission recommended the removal of the blanket ban on multidisciplinary practices. 'They

must, however, be properly regulated,' he said. He added that the Bill ignored the growing relationship between the legal profession and other professions, for example there were instances where law firms employed tax and economic advisers and experts such as medical practitioners to provide a 'one-stop service'.

'There is room for allowing some form of multidisciplinary practices, provided that they are properly regulated,' he emphasised.

In conclusion, Mr Bonakele said that, while the commission welcomed the Bill, it was 'not transformational enough', and that it retained much of the status quo regarding matters of access and briefing patterns. He also cautioned against over-reliance on price setting 'as an issue of access' – prices must be capped and determined objectively by an independent body.

## Independent Association of Advocates of South Africa

**T**he IAASA was represented by its chairperson Mark Hawyes, who said that the organisation represented the interests of 430 advocates countrywide. The association supported the Bill and the creation of a single united legal profession, without a distinction between attorneys and advocates, but opposed government – and the Minister in particular – having a role in the governance of the legal profession.

### Regulation and independence

Mr Hawyes said that IAASA supported uniform regulation of the profession: 'We do not shy away from regulation. ... We want it; we just want it to be consistently applied to the whole profession.'

Mr Hawyes added that government should have a role to play in the regulation, but not the governance, of the profession and that the provision in the Bill that allowed the Minister to dissolve the council should be deleted.

IAASA shared the view that the independence of the legal profession was essential for the rule of law and the promotion of constitutional democracy. In response to a question as to whether IAASA viewed the Bill as a threat to the independence of the profession, Mr Hawyes said that there was potential for undue interference with the governance

of the profession and therefore the independence of the profession was indeed threatened by the Bill.

### Direct briefing

IAASA supported the provision in the Bill that permits advocates to receive briefs directly from the public in certain circumstances to be determined by the Minister, which it believed supported access to justice by reducing the legal fees of two professionals to one: 'It is heartening to see that the Bill does envisage instances of direct briefing for advocates.'

Mr Hawyes submitted that instances where advocates could be directly briefed included all criminal law matters; opinions; drafting of contracts, wills, memoranda of incorporation; arbitrations and mediations; maintenance matters; forensic investigations; and quasi-judicial matters.

As a condition to this, he added that advocates should be required to have compulsory indemnity insurance and he suggested that the system of payment distribution agents currently used by debt counsellors could be adapted for use by advocates.

Further, the instances in which advocates may be directly briefed must be clearly defined in regulations to be promulgated by the Minister.

### Fees

IAASA does not support the general capping of legal practitioners' fees, except those for practitioners rendering legal services to the state, as this was 'tantamount to restrictive practice' and could create the impression that the independence of the profession was being infringed on, Mr Hawyes said.

One of the committee members questioned whether capping of fees for practitioners rendering services to the state would not be construed as a disincentive to do such work, to which Mr Hawyes responded that this was an attempt to reduce the fiscal burden on the state, which was of national interest, adding that Legal Aid South Africa had successfully implemented such a model.

In response to questions from the committee, Mr Hawyes conceded that advocates' fees can be 'too high' and suggested that better guidelines be enacted to address this.

### Representation on the council

The Bill currently provides for one IAASA representative to be appointed to the council, however IAASA argued that this should be increased to two. Further, the association believes that there should be equal representation of attorneys and advocates on the council.

### Transformation

Several committee members questioned IAASA's stance on access to the profession, especially for women and black people. Mr Hawyes said that IAASA members did not require chambers in a particular place, which were costly for new entrants. It was also 'more flexible' in its pupillage programme and pupils were, in certain instances, allowed to earn income during their pupillage. He added that IAASA was not limited in terms of the numbers of pupils it could take in, although it was limited in terms of financial resources.

Picture source: Gallo Images/Thinkstock





## Legal Resources Centre

**A**dvocate George Bizos and senior attorney Steve Kahanowitz represented the LRC at the hearings; they were joined by the centre's national director, Janet Love. The LRC held the strong view that the creation of a united legal profession should be attained by consensus rather than dictation.

Mr Bizos started off by saying: 'There are some people who think this may be my swan song. I am going to disappoint them,' before he spoke about the history of the LRC and of the Bill and some of the general elements relating to it.

On the creation of the LRC, which was relevant to current discussions about uniting the profession, he noted: 'Arthur Chaskalson had to put up a huge battle ... in order to be given the right to form such a centre. Both the Bar and the attorneys said: "... [A]dvocates and attorneys occupying the same office, that is taboo and in conflict with the provisions and the rules of the profession. It cannot be done." It took Arthur Chaskalson's patience and integrity to persuade both the Bar Council and the attorneys' profession that the world would not come to an end if some of the rules were not treated as sacrosanct. ... Many of us are concerned about what is good for us and what is good for our group, and not what is good for the legal profession as a whole nor what is good for the people of South Africa, and particularly those who look forward to having their fundamental rights protected. And, having fundamental rights, you require lawyers able to go to court and enforce them. If that does not happen, they remain worthless on a piece of paper,' he said.

He added that the LRC had attached to its written submissions to the committee Justice Chaskalson's last speech prior to his passing, which he made at the Cape Law Society's 2012 annual general meeting in November. He also referred to this speech several times during the oral hearings and emphasised that the rule of law was a key value underpinning the Constitution.

### Role of law clinics

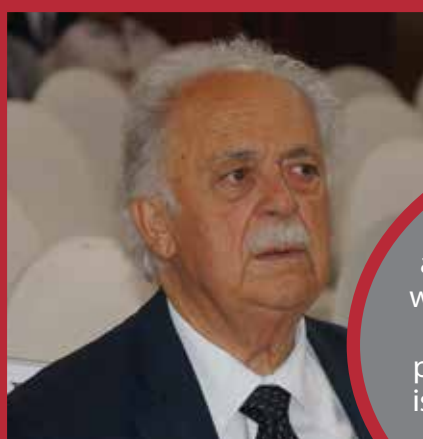
Mr Bizos said that the LRC's submission focused on ensuring that law clinics would not be obstructed by the Bill from providing access to justice to all. He noted that some in the profession believed the LRC deprived them of work; however, Mr Bizos refuted this and said that the centre focused on matters such as evictions where people did not have alternative accommodation, education rights, refugees arrested in the middle

of the night and miners who may get silicosis.

Mr Kahanowitz addressed the committee on the law clinic perspective and on access to justice. He suggested that various terms in the Bill were unclear and should be better defined and used consistently, adding that confusion could obstruct access to justice.

In particular, he said that there was confusion regarding law clinics in the Bill, which should be clarified in the definition section. He also suggested that the definitions of 'attorney' and 'advocate' should specifically provide for practitioners practising in law clinics. He added that the definition of 'community service' was inadequate and should also be improved.

Members of the committee indicated that the definitions could be improved and that law clinics would be dealt with 'sympathetically'.



viously disadvantaged would therefore not receive any benefit.

### Independence and the Minister's powers under the Bill

Mr Bizos said: 'Without independent lawyers, our Constitution cannot operate in the manner it was intended to.'

He said it was important that parliament did not sign off its rights to the Minister in a piece of legislation and that it ensured that the Minister was not empowered as he was under the current version of the Bill. He echoed Justice Chaskalson's words in his last speech that such powers should not be given to a Minister: 'Maybe we trust this Minister, but we cannot give powers to a Minister because we do not know who the next Minister will be.'

He also noted that currently there was a need to critically reassess aspects of the Bill that relate to regulation of the profession by statutory bodies: 'We cannot have a statutory body conducting the affairs of the independent profession,' Mr Bizos said.

'Many of us are concerned about what is good for us and what is good for our group, and not what is good for the legal profession as a whole nor what is good for the people of South Africa ...' – advocate George Bizos

### Unity and access to the profession

Mr Bizos called for a single Bar to represent all advocates. 'We need one Bar with equality within it, irrespective of your background. ... This may be an opportunity to unify the profession,' he said of the Bill.

After quoting from Justice Chaskalson's speech, he warned of one of the possible negative consequences of the Bill if enacted as is:

'You know what is going to happen if this Bill goes through as it is: The big firms are going to set up litigation units where the cream of the crop will be recruited and they will have no difficulty in recruiting the top people. ... The single practitioners or pair of attorneys will not be able to find the top advocates to take their cases,' he said, adding that the pre-

'We in the LRC, while not opposed to the state legislating governance structures for the legal profession – it does in the medical, engineering, accounting and other professions – are opposed to a situation where the end product will be a legal practice which vests members of the executive with far-reaching powers to control important aspects of the functioning of the legal profession. We would therefore encourage a serious reassessment of those aspects of the Bill related to the Minister's regulatory powers and the role of the council.'

In response to a question from the committee as to whether the LRC would be prepared to make submissions to im-

prove the Bill, Mr Bizos said: 'We, as the Legal Resources Centre, are prepared to be of assistance, but I want to make a submission to the committee that ... having a very large body to try and draft is almost impossible. What I believe should be seriously considered is that a five-person committee be formed in order to take into consideration the submissions that have been made here and try and put together a new draft, which each one of the five will try and sell to his or her constituency so that there are solutions. But, in a parliamentary committee or for 30 people to express views on every little point that may be argued this way or that is not going to bear the necessary result,' he said.

However, the committee resisted this suggestion, noting that it was the legislative authority and the Bill was in its hands. 'There is a difficulty in handing it ... over to somebody outside, but, having said that, we make a habit in this committee of welcoming people of expertise to sit with us when there are areas where we feel that we need other views and perhaps a way may be found along that avenue,' committee member Dene Smuts said, while committee member John Jeffery added: 'I wonder what everybody was doing over the last 15 years. I think we will need to keep the Bill, but would want to work closely with interested parties. ... We will endeavour to produce a product that is supported by

as many people as possible, albeit a bit reluctantly in some quarters, but we will endeavour to produce a product that has as broad a consensus as possible.'

Mr Bizos assured the committee that he respected the parliamentary process and that his submissions were influenced by statements by Justice Chaskalson along the lines of 'do not try and impose, but try and get together'. He suggested that a mediator from each of the major constituents be appointed to reach a compromise Bill. He also offered the drafting services of the LRC to the portfolio committee.

'Do not let personal fears, real and imagined, prevent us from doing a good job,' Mr Bizos concluded.

## Black Lawyers Association

The BLA was represented by its President, Busani Mabunda, who was joined by Deputy President Kathleen Dlepu and member Francois Mvundlela. Mr Mabunda noted that the BLA had contributed to, and aligned itself with, the LSSA's submissions on the Bill as one of its constituents; however, he noted that there were some divergent views and the BLA wished to address the committee on its submissions that differed from those of the LSSA.

fession was black (African, coloured and Indian), which was 'substantially low'. Therefore, the BLA supported the Bill on representivity.

'The legal profession is extremely fragmented and it does not align itself with the ethos as enshrined in our Constitution and it is so disturbing that after 13 to 15 years the lawyers, being the advisers in various industries when it comes

'As much as independence is valued and independence is necessary, political oversight with the view of regularising a society which is not perfect is instructive,' he said.

Mr Mabunda noted that what set the BLA's submissions apart from many of the others was its view on the role of the Minister.

'The biggest issue which is putting the BLA at odds in its submissions with many others ... is this issue of the powers of the Minister ... to effect the dissolution of council,' Mr Mabunda said, adding that the BLA supported this, since there was no other provision to deal with a dysfunctional council.

He said that the current provision in the Bill provided 'enough checks and balances'. 'It does not provide or envisage a situation where the Minister can rise up one morning and say: "I do not want this council, it must go". He or she can never go on a frolic of his or her own. There are stringent processes that have to be invoked and the solace which we do have is that we are living in a constitutional democracy. Any interested or affected person may approach the courts to effect the very same dissolution. In other words, the powers as given to the Minister do not in any way take away or oust the jurisdiction of any affected person from wanting to deal with the dissolution of the council. Over and above [this], if the designated person acts in a capricious or arbitrary manner, that is still subject to challenge. We have got an inherent jurisdiction and our courts are final arbiters. So, in our respectful view, the fear is misplaced, save to say it seems to enjoy too much attention at various levels internationally ..., but we are living in a constitutional democracy with clear checks and balances,' Mr Mabunda said.



'... the current provision in the Bill provide[s] "enough checks and balances". It does not provide or envisage a situation where the Minister can rise up one morning and say: "I do not want this council, it must go" – BLA President Busani Mabunda

The BLA was of the view that fears regarding the Minister's power in the Bill were misplaced as there were sufficient checks and balances in place to counter any abuse of power. Further, aggrieved parties could challenge the Minister through the appropriate channels available in a constitutional democracy.

### Transformation

Mr Mabunda said that the race and gender demographics of the legal profession did not reflect those of the country, noting that approximately 30% of the pro-

to transformation, cannot themselves come to regularising themselves in line with the Constitution. That is extremely shameful,' Mr Mabunda said.

### Regional councils, independence and the role of the Minister

Mr Mabunda said that the BLA did not believe that there was anything untoward with the Minister having an active participatory role in determining the location of the regional councils. 'When we talk of access to justice, we must ensure justice reaches the people in all regions,' he said.

However, he added that the BLA should not be construed as 'pro-Minister' in its position, but rather that it had 'to be balanced'.

### Fees and community service

Mr Mabunda said that the BLA did not have a problem with the government capping legal fees as a major consumer of these, provided the fees were reasonable and acceptable to those rendering the services. However, in respect of litigious matters, the BLA submitted that these remain regulated and there were currently checks and balances in place, with clear and prescribed tariffs subject to taxation by the taxing master, and that this should continue. In non-litigious matters, he said that there were fee assessment committees to deal with exorbitant fees.

The committee questioned why the BLA had proposed, in its written submis-

sions, that community service should not recur. Mr Mabunda responded that, while the BLA was not opposed to community service, it did not support the view that where lawyers had not performed community service, they were not entitled to receive their practice certificates.

### Representation on the council

The BLA, unlike many others who made submissions to the committee, did not find it problematic that the Minister, in terms of the Bill, will appoint two members to the Transitional South African Legal Practice Council (the transitional council) and three to the council. 'Our respectful view is that there is absolutely nothing to suggest any form of interference with the independence of the profession. ... Which profession should be acting as a cocoon because it is so sacrosanct?' he said.

Mr Mabunda concluded by asking for a final death knell for the pre-apartheid

legislation that affected the practice of attorneys in certain areas.

In response to questions from the committee, Mr Mvundlela said that the views of Justice Chaskalson on the Bill were 'his views': 'As much as you want to be guided by those things that were said by others before you, I think it would be wrong to assume that you cannot move because somebody else said something else. In my view, the late Arthur Chaskalson, whom I respect very greatly, his views are his views, whether we agree with them is another thing. The question is: Out of those views, do we have to take them as sacrosanct and not move away from whatever guidance they give us and align them with whatever transformational agenda that we seek to achieve or whether you are going to take them as cast in stone ...? I do not think that anybody sitting here, with all due respect, wants to follow that line,' he said.

## Law Society of South Africa

**T**he LSSA was represented at the hearings by council member Max Boqwana, its co-chairpersons Jan Stemmett and Krish Govender, as well as Mr Mabunda.

The LSSA emphasised the importance of unity of the profession and proposed a unified body to represent all legal practitioners.

The LSSA was of the view that the Bill should provide, where applicable, for all references to the Minister to confer 'after consultation' with the profession to be changed to 'in consultation' and emphasised the importance of self-regulation of the profession for the independence of the judiciary. Therefore, its position was that there should be minimal government interference in the profession.

### Representation and interests of the profession

Mr Boqwana said that the upside of the Bill was that it would bring the branches of the profession together. He emphasised the importance of the body that emerges from the Bill being one that represents the entire profession. He said that currently the Bill provided for the establishment of a council, but not for a unified body to represent all lawyers. This means that South Africa will remain the only country in the Southern African Development Community without a general body representing all of its lawyers. This would achieve 'exactly what we are trying to avoid' by fragmenting the profession into different sections, Mr Boqwana said.

Mr Stemmett requested that a provision be added to the objectives of the Bill

that recognises the interests of the profession, subject to the overriding interest of the public.

### Independence and self-regulation

On independence of the profession, Mr Boqwana said: 'If we have got a united profession, then we can talk about a strong profession. It is only a strong profession that can be independent. If we do not have a strong profession, a united profession, we can forget about the independence that everyone is talking about here ... I think that is where it starts; it does not start by looking at government; it starts by looking at us as legal practitioners and saying that we need to unite as legal practitioners because the strength is in our unity and, resulting from that, we can then talk about independence.'

Mr Stemmett mentioned that there were a 'few issues' in respect of which the constituents of the LSSA could not reach consensus, adding that he spoke primarily on behalf of the statutory component of the LSSA.

'Self-regulation is important for the independence of the judiciary and, for that reason, we should have minimal government interference ... Government should provide the framework, but not run the profession, Mr Stemmett said, adding that he agreed that the judiciary should be the final authority over the profession.

Mr Govender said that it was important not to simply import international elements into South Africa.

'I am firmly of the view that a Legal Practice Bill with the intervention by the state is

absolutely necessary. ... We are in a developmental state. We are only 18 years down into a democracy. We are still learning the art of being democratic. We sometimes cannot even tolerate opposition and opposition parties, but we must understand that all of that is part of the strengthening of this whole dynamic of building a state. So when we talk about the independence of the judiciary, and even the independence of the legal profession, we cannot make that a mantra ... and say: "At all costs it is going to happen and government cannot manage that process." ... When we talk of this Bill and the checks and balances there, whether we have a good Minister or a bad Minister, it is a good democracy that will ensure that these things work and we must also remember that a bad Minister can get fired. Why do we not take it to its logical conclusion? So, if we have to have faith in our developing state, we have an ideal democracy in a way, with a beautiful Constitution, but that Constitution has still not gone very far in even satisfying the needs of the people. How is our legal profession operating in this context? It is so fragmented because we represent all the inequality in our society and this is the challenge for the Legal Practice Bill, our Constitution and our democracy to meet and we cannot take one out of context and say we have got to have absolute independence of a legal profession at all costs and therefore the Minister, the government, should not have a say in this and that. It absolutely makes no sense and is actually doing things out of context and it is disingenuous as well. So we must be bold; we must have faith in our Consti-



tution and in our parliament and in our opposition parties to know that this can work and it can move forward,' he said.

## Appointment to, and dissolution of, the council

Mr Boqwana said that the LSSA's constituents could not reach consensus on the Minister's power to dissolve the council in terms of the Bill. However, he noted that accountability and democracy were important and that members of the council must be able to be held to account.

Mr Stemmett said that the statutory component was against the principle of the Minister appointing councillors. Further, the Minister's power to dissolve the council should rather lie with the court, he said.

## Specialised work, quality and the difference between attorneys and advocates

Mr Boqwana emphasised the importance of the profession having quality graduates and that the enhancement of standards of practice was essential. 'We must not unleash half-cooked lawyers on the public,' he said.

He added that the profession had a system whereby the public was protected from theft by attorneys and in terms of which negligence was addressed.

The committee queried how much an attorney who briefs an advocate for an opinion charges and what type of work the attorney renders in this regard. In addition, the committee queried what work was done by a conveyancer as opposed to a conveyancing secretary. Mr Boqwana said that it was the attorney who bore the responsibility and the risk in such matters, not the advocate, and this risk was incorporated into attorneys' fees. 'In this country, there has never been a single advocate that has ever been sued successfully for negligence. Even if you give a hopelessly wrong opinion as an advocate, because that opinion is given to an attorney, it is the attorney who takes responsibility for what the advocate said, because the client remains the client of the attorney and the attorney uses the advocate as a resource. So, part of the cost is the risk that the attorney takes in that type of a brief,' he said, adding that the cost also included the amount of time spent considering the opinion, including the correctness thereof.

In respect of conveyancing, he said that conveyancers carried a great responsibility and employed technical expertise. It is an area of law where money changes hands and members of the public have protection if money is stolen by an attorney, he added.

He said that conveyancing should not be left to paralegals as property acquisition was one of the biggest investments for many South Africans and should be

accorded the seriousness it deserved. Therefore, it should be effected by attorneys, who were properly trained and could be held accountable. This is critical for public protection, he said.

Mr Govender added: 'If an attorney has to see a member of the public, there is a great deal of talking and consulting and sifting that goes on and there is deciding if there is even a case to move forward on, and obviously that sort of work is time consuming and that is where ... costs arise. ... A single person can do it, whether it is the advocate or an attorney, in keeping it simple and finding the quickest solution to a particular problem. However, it could well mean that whoever does it can still charge the same amount at the end ... . There are checks and bal-

important to strengthen small law firms and to consider the geographical spread of firms.

Mr Govender added that state attorneys operate using taxpayers' money and the work they do is not for profit. Therefore, he said that the costs for legal services rendered to the state must be capped.

## Disciplinary matters

The committee noted that there was a perception that the profession was not efficient in terms of its complaints-handling processes, except those relating to theft and, further, there was a perception that the profession protected its own interests.

In response, Mr Boqwana said: 'It is a matter of concern to us as well. There are quite a lot of colleagues ... that we man-



*The LSSA delegation at the hearings, from left to right: Chief executive officer, Nic Swart; Busani Mabunda; co-chairpersons Jan Stemmett and Krish Govender; and Max Boqwana.*

ances and controls, which the law societies have and even the Bar councils, in relation to assessing a person's fee to see whether it is fair and reasonable. Whether that works effectively for everyone and whether people are even aware of these things that they can challenge is part of the problem. ... All of these matters need to be brought into the public domain in a more vigorous way.'

## Access to justice and fees

Mr Boqwana said that access to justice was important to practitioners' existence and was not a matter of charity or 'looking good'.

However, he said that the debate about fees was 'elitist': 'There is quite a lot of debate about fees. ... It is actually an elitist debate because when we talk about these fees, this generally reflects less than 5% of the "magic circle" firms in this country ..., which are the magic circle firms that the government, the parastatals and the big, well-to-do people in this country continuously brief. We have got [a large number] of our firms being two-person and one-person law firms ...; those are your firms that people do not even have to make appointments to go into. You walk into a firm, like my firm, ... and there are probably 60% of people who are seen by those firms who do not pay any fees,' he said, adding that it was

'At the end of it all, we have to take this Legal Practice Bill as something that is going to have to deliver much, much more than just sorting out the legal profession. It has got to be one of the many instruments to save our society as well'  
—co-chairperson of the LSSA, Krish Govender

age to catch and flush out of the system.' Mr Boqwana added that the view that the societies protect their own is a matter of perception due to a lack of communication. He said that it was true that the processes could be slow. Also, some of the schemes to steal money were sophisticated and complex and 'we do not want to gloss over' them, he said.

The LSSA was aware of the problem and had been considering a number of intervention measures, such as working with the National Prosecuting Authority and the Asset Forfeiture Unit, he said.

## Transformation and direct briefing of advocates

Mr Stemmett said the following on the briefing of advocates: 'We do not have a problem if the advocates want to start tak-

ing briefs from the street, but the public needs to be protected. This is paramount. ... If you want to take work from the man in the street and not from an attorney, then get yourself a Fidelity Fund certificate, but then you might as well become an attorney in the current dispensation. We might be working towards fusion, but that is a process. Transformation is a process and the same applies to the colour schemes and gender composition of our profession. We are working towards that. ... We are getting there. ... Look, we are not perfect ... but we are striving to get there.'

### Costs of running the profession

The committee asked the LSSA for information on the cost of running the various constituents of the LSSA. Mr Stem-

mett informed the committee that the annual budget for the Law Society of the Northern Provinces alone for the current financial year was R 60 million. Committee member Debbie Schäfer expressed concern about the impact of how the costing of the structures under the Bill would affect the attorneys' profession.

### Final word from the co-chairperson

In conclusion, Mr Govender said: 'My last note I want to make is that, in looking at the Legal Practice Bill, we also have to look at the future of the largely poor black lawyers, the smaller practitioners, and there is a percentage of poor white lawyers as well, that are also facing ... problems now in our country and we are looking at a diminished base that is avail-

able for people to access lawyers because of unemployment; lawyers themselves cannot find the clients that can pay. Up to 1994 and even right up to 2000 there was legal aid work that more practitioners were able to access. They were able to do Road Accident Fund work; they were able to do a lot of criminal [law] work, but the people are unemployed these days. There is not enough money going around ... . At the end of it all, we have to take this Legal Practice Bill as something that is going to have to deliver much, much more than just sorting out the legal profession. It has got to be one of the many instruments to save our society as well, and this is why we all have to buy in to the solutions, and I believe those solutions can only be driven through parliament, not through our legal profession.'

## Attorneys Fidelity Fund

**T**he AFF delegation at the hearings comprised board chairperson Silas Nkanunu, chief executive officer Motlatsi Molefe and finance executive Andrew Stansfield.

The AFF was concerned about the fund's sustainability in light of the provisions of the Bill that provide for the AFF to support the profession financially. This, the AFF submitted, had the potential to derogate from its primary function of reimbursing victims of theft.

At the end of their presentation, Mr Landers noted: 'I have been here since 1994 and I have never had the urge to applaud a presentation such as yours. ... It was excellent and I felt like standing up and clapping.'

Mr Molefe told the committee that the AFF's submission was based on four points, namely -

- the nature of its funds;
- the beneficiaries of the funds;
- the custodians of the funds; and
- the business model of the AFF.

### Public funds not for 'propping up the profession'

Mr Molefe said that the AFF's core function was not to prop up the legal profession, but to protect the public interest by reimbursing victims of theft.

'These are public funds in essence. ... We are talking about funds that are running into billions of rands that have been, over a period of time, nothing more than the cash cow of the profession. And it became the cash cow of the profession ... because, in terms of the structure of

governance as set out in the Attorneys Act currently and as is repeated ... in the current Bill ... , effectively the custodians are the practitioners themselves ... . It boggles the mind why, if these are public funds, members of the public are not party to decisions that relate to the governance of those funds.'

Mr Molefe reported that 60% of the AFF's expenditure in 2012 'went towards propping up the profession', while 23% addressed its core function, theft. 'If you do not cap this, you really have a problem,' he said.

### Conflict of interest

Mr Molefe said that attorneys should not sit on the board of the AFF because they were potential defaulters who could steal the very funds they were supposed to protect for the public.

'I steal money from the public, and the public then literally carries the can for my theft by reimbursing the victim of my act of theft. That can never be. That is a position that is inherently conflictual,' he said to illustrate this point.

He added that when this issue was raised with the profession, the response was that the profession, by its nature, knows how to manage conflicts of interest.

However, Mr Molefe believed this view was untenable: 'Conflict of interest can never be managed. ... You can never have men and women who essentially come from societies where they discuss issues that actually make them come into the [AFF] board to discuss how they can be funded, being the people that decide on how they should be funded. ... They are

asking money of themselves but in two different capacities.'

### Composition of the AFF board

In terms of the composition of the AFF board, Mr Molefe said that the Bill provided for five members of the board to be nominated by the council, which could enable them to decide to 'prop up the profession and not deal with the core function of the fund'.

### Future funding of the profession

Mr Molefe noted that the Bill provided for the AFF to make an annual appropriation to the council to run its operations, however he said that this amount must be capped to protect the fund.

'If it is open-ended, and you have a situation where five of the board members ... are appointed or designated by the Legal Practice Council, it simply means, whether or not we have money in that particular year to assist them, they can certainly decide to prioritise the regulation and support of the profession, as against the core function of the fund,' Mr Molefe said.

He added that the fund had an interest in regulation of the profession, but this had to be resource dependent. If not, 'then the biggest threat to the collapse of the fund will not be thieves out there; it will be the Legal Practice Council itself', he said.

### Sustainability and capping claims

Mr Molefe also raised concern that the Bill did not protect the fund against

'disaster-sized claims', especially in light of the global practices of many firms. Therefore, he said that it was necessary to cap individual claims against the fund to prevent it 'being wiped out by one claim'.

### Theft by practitioners

Mr Molefe noted that the trend seen by the fund was not an increase in the

number of thieves, but in the value of the theft. He said it was necessary for the AFF to look after its risk. In addition, he said it was 'ridiculous' that the Bill provided for the Minister to consult the council – and not the AFF – on matters that affected the fund.

Mr Molefe concluded by saying: 'In short, all we are seeking from this committee and from the legislature is simply

the power to assert our independence as an institution from the profession and, secondly, the power to look after not just us, but to look after the public, because if you do not give us that, ... ten years from now we will not be in existence. And, more importantly, government will begin to be the guarantor for thieves. And I do not think that is the business which government is in.'

## General Council of the Bar

**T**he GCB was represented at the hearings by its chairperson, Ishmael Semenya, with Rudi van Rooyen, McCaps Motimele and Anthea Platt. The GCB supported the objects of the Bill and highlighted the importance of the legal profession remaining independent for a healthy democratic dispensation and for the rule of law to prevail. However, it proposed a different structure to that provided for in the Bill.

Mr Semenya started the presentation with the words: 'We recognise that, as a constitutional democracy, one of the tenets under which we obtain the rule of law must automatically mean that we have an independent judiciary. That, too, entails that we have an independent legal profession within the meaning of that concept. We embrace the fact that a democratic dispensation is not possible unless the legal profession is indeed independent.'

He added that there was a distinction between regulation and governance and emphasised that the legal profession was best suited to govern itself, while those aspects related to the protection of the public interest, such as access to justice and to the profession, fell in the province of government to regulate.

The GCB, he said, also suggested that the process provided for in the Bill could be truncated in order to 'come sooner rather than later to a permanent structure'.

### Room for improvement

Mr van Rooyen reflected on what had caused the divergent views on the Bill. He conceded that the GCB could have done more to inform others what it was about and could have better addressed negative perceptions about the profession. Further, it perhaps should have engaged with the Competition Commission earlier, he said.

Mr van Rooyen said the GCB had been described as an 'exclusive club', but that it had evolved over many years, with the input of the courts and, further, was in tune with other jurisdictions. 'It has never been an arbitrarily created old boys' club,' he said.

He urged the committee to improve the good elements of the existing governance structures of the profession 'rather than starting from scratch'. He emphasised that, in addition to independence, the perception of independence was important.

### Access to the profession

Committee member Mr Jeffery noted that pupils at the Bar were not remunerated, which was 'an appalling bar to the profession'. In addition, once this hurdle was overcome, he said that it was difficult for a new advocate to start off in the profession on his own. He asked whether the GCB had given thought to this 'crucial issue'.

In addition, committee member Ms Schäfer asked why it was necessary to practise from chambers in a particular place, while committee member Makgathatso Pilane-Majake noted that the expense of certain chambers 'drives some out of the profession'. She said that a number of advocates who had done pupillage were not practising because they were 'discouraged by the fees they have to pay when they are not even sure that they will manage to get cases'.

In respect of chambers, Mr Semenya described the 'upside' of this practice as: 'We are able to have general oversight in the disciplined practice of all of us. That proximity gives us the ability to access wisdom, resources, skills [and] experience, which you would otherwise not be able to do if you practise as an advocate in some of the remote areas of our country. It also gives you access to some of the best legal brains that the country produces ..., which you would otherwise not be able to have, but public interest is very well guarded in making sure you cannot necessarily have an errant advocate who might compromise the interests of lay clients somewhere without scrutiny or observation.'

He added that the cost of running offices was a serious financial burden and

the GCB was investigating ways of using technology to offset this.

### Fees

Committee member Ms Schäfer asked how the GCB intended addressing the 'real issue' of fees, while Ms Pilane-Majake noted that South Africans rely on the legal profession and therefore require affordable legal representation, which was negatively impacted by large fees.

Mr Semenya agreed that there was no access to justice if fees were prohibitive, which was a 'huge barrier' to access that required oversight.

'We are going to be settling this Bill this year. We would like to be settling it with your support ... but we are going to be finalising this Bill. ... We are not particularly impressed by the advocates or the attorneys not being able to find each other and we hope you find each other soon because otherwise we will come up with something for you'  
– committee member John Jeffery

Mr van Rooyen said that appropriate mechanisms were in place to ensure that GCB members did not charge unreasonable fees. He suggested that there may be too much focus on fees as a bar to access to justice, when the focus should rather be on improving *pro bono* structures. 'Perhaps we are focusing too much on fees being the bar to access to justice. Suppose we halve advocates' fees, suppose we cut them down to a third. How many of the poor and needy will be able



to afford them? I would like to put my head on the block and say that I do not think it would make that much of a difference. What we need to focus on is ... improving on our *pro bono* services,' Mr van Rooyen said.

Committee member Nkosi Patekile Holomisa asked for the GCB's view on the perception that in South Africa one had to pay money to access justice.

Mr Motimele responded that it was generally agreed that the notion of access to justice must be given effect to. However, 'every service must be paid for'; the questions being who was to pay for the services and at what cost, he said.

### Difference between attorneys and advocates

In response to a question from the committee as to whether the GCB objected to direct briefing of advocates by the public and, if not, whether such advocates should have Fidelity Fund certificates, Mr Semenya said that there was an 'intrinsic difference' between the practices of attorneys and advocates, which was recognised by the Constitution.

'We find ourselves not sufficiently equipped to deal with matters about conveyancing, about matters that are peculiarly within the province of those who hold public trust money and are responsible for it,' he said.

Mr van Rooyen added that someone without a Fidelity Fund certificate could not be allowed to take money from the public, while Mr Motimele added that it was necessary to have a trust account to handle public funds.

### Representation on the council

Committee member Steve Swart noted that the GCB had raised concerns regarding the constitution and dissolution of the council, which he shared. He queried whether the representation of attorneys and advocates on the council was equitable.

Mr Semenya responded by stating that the GCB was of the view that the advocate representatives on the council should have a measure of veto or a deadlock-breaking mechanism in matters particular to the advocates' profession, such as the cab-rank rule, while Mr van Rooyen said that there should be equal representation of attorneys and advocates on the council: 'It is not a numbers game; we are two different professions,' he said.

Mr Jeffery noted that the GCB seemed to be showing that they were 'very independent' and had a 'take-it-or-leave-it' approach, describing them as displaying a fair amount of 'arrogance'. He said that the key question was whether the GCB could run its affairs in the interests

of the people of South Africa, rather than itself.

In response, Mr Semenya assured the committee that the GCB recognised that oversight over matters of public interest in a constitutional democracy was in the province of elected officials in parliament and gave 'due deference' to this. However, he said that there were matters about governance, those regarding the day-to-day running of the profession, that government may not have a great interest in.

Mr Jeffery concluded by saying: 'We would like to produce a Bill that has the support from all sectors of society, not just the legal profession. ... The buy-in from the Bar Council, among others, is very important. I think we should give you the opportunity for further engagement. However, we delayed these hearings to give you that opportunity. It did not result in anything. I suspect that the only reason that the small concessions coming at the end of the 15 years is because of the pressure. ... We are going to be settling this Bill this year. We would like to be settling it with your support ... but we are going to be finalising this Bill. ... We are not particularly impressed by the advocates or the attorneys not being able to find each other and we hope you find each other soon because otherwise we will come up with something for you.'

## Cape Bar Council

**T**he CBC was represented at the hearings by its chairperson Ismail Jamie and vice-chairperson John Newdigate, who aimed to provide a perspective on the impact of the Bill from an individual Bar.

'We are involved ... at the coalface ... and can speak more directly and more accurately about what we do as a Bar on a daily basis than can the GCB, which is a federal body, which is removed from what happens in the constituent Bars. We are the third largest Bar in the country; we have more than 450 members.'

Mr Jamie emphasised that the good of the current system should be retained:

'We support ... the proposition that the Bar in its present form should remain, whether it is recognised expressly or is recognised, as our submission suggests, by form of accreditation or provision for accreditation. We believe ... the constituent Bars should remain as entities whether expressly or not. In its endeavours to better regulate and make provisions for the objects of the Bill, the committee in parliament should ultimately ... be careful not to destroy the good and not to throw the proverbial

baby out with the bath water. The committee in parliament should preserve what is good about the advocates' profession, while seeking clearly to advance the public interest,' he said.

### Difference between attorneys and advocates and the referral rule

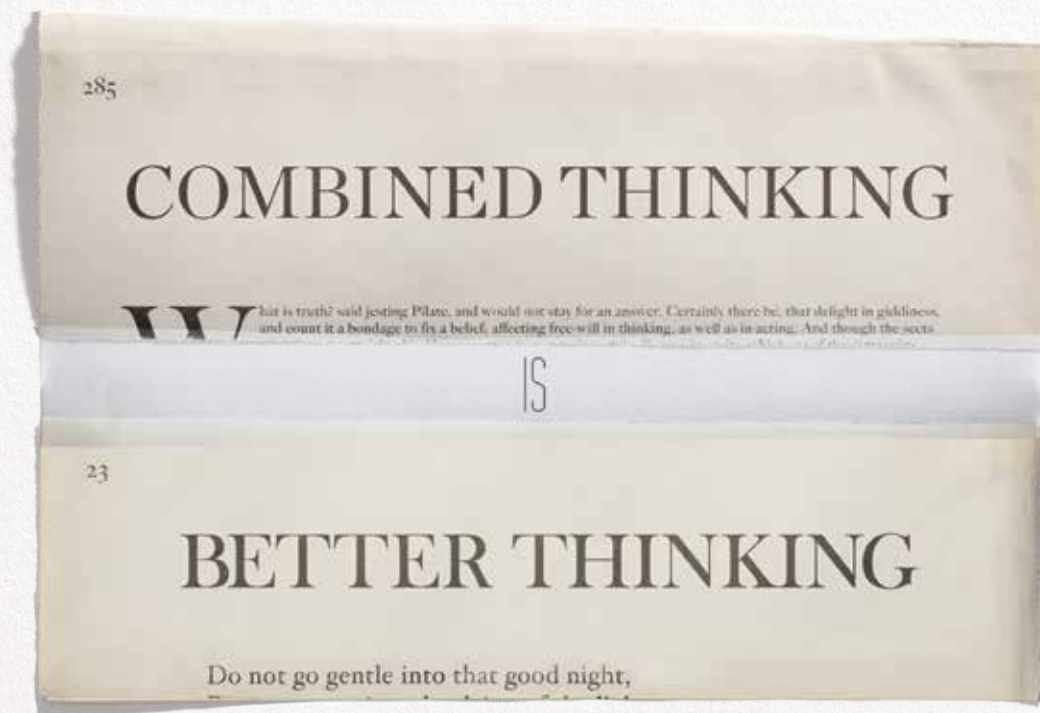
Mr Jamie told the committee that advocates had a level of independence that attorneys did not and that the CBC supported the referral rule.

'Advocates practise at hand's length from our clients and that gives us an essential independence, which attorneys simply do not have. Attorneys ... are on banks' or other organisations' ... panels and, as a matter of course and as a matter of practice, they cannot act against those they act on the panels for. There is a fundamental distinction with the way we practise ...; advocates appear both for and against government on a constant basis; we act for the same client, we act against them. We hold no brief for the client other than our immediate brief. We are truly independent. ... That is the essential difference.' He added: 'Advo-

cates are specialists in the law, we are bad administrators. I would not want to take ... money directly from a member of the public and keep it in trust for which I would need a Fidelity Fund certificate. ... I have no practice or facility in doing that.'

Further, on the distinction between attorneys and advocates, Mr Jamie said: 'I do not want to be beholden to the client. I will go to court and do my best whether the client is an individual, a government entity, a big corporation, etcetera. I will argue the case as I see it. In the best tradition of advocacy, we will not take instructions to argue a particular line of argument. We will take instruction, obviously, within the bounds of ethics, to argue a case, but no advocate ... will take an instruction on how to argue a case. ... You analyse the case yourself, you arrive at a conclusion, you debate it with your colleagues, your attorney, your junior, etcetera, but ultimately, if you are lead counsel in a case, it is your call ... and you are beholden, as our rules of ethics say, to the court; you are beholden to the clients, but ultimately you are beholden to the rule

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Shawn van der Meulen, Hielien Venter.



of law. ... I have never been told how to argue a case and I would not accept such an instruction. That is the hallmark of the advocates' profession. ... The Constitution and the Bill in its present form recognise the fact that there are two branches of the profession.'

In response to a question from the committee as to whether the CBC was stating that the referral rule contributed to advocates being independent, Mr Jamie said that referral was 'fundamental' to what advocates did and it was linked to the cab-rank principle. This was fundamentally different from the practice of attorneys, he said, who had to carry out conflict of interest checks before representing clients in any mat-

ter. In this regard, referral was integral to the independence of the advocates' profession. Advocates are not beholden to clients but to the courts. 'That does not happen with us; we are not a cartel,' he said.

## Pupillage and transformation

Mr Jamie said that the CBC had an 'extensive and sophisticated' pupillage programme and took between 25 to 30 pupils annually. In addition, the CBC has an 'extensive' bursary programme, which awards transformation bursaries to previously disadvantaged individuals.

Committee member Ms Pilane-Majake, who noted the fact that the CBC and the GCB had made separate submissions showed 'how fragmented the legal profession at all levels is', said that the players in the sector must mirror society. 'We need to be careful of what you consider as institutional discrimination,' she added.

Mr Jamie responded by saying that the attrition rate of black practitioners was a concern for the CBC and, further, that there remained a bias towards briefing white advocates, 'at least in the Cape'.

## Costs of running the Bar and fees

With regard to fees, Mr Jamie said that, in practice, the CBC did not experience a duplication of fees.

'We have an extremely rigorous practice and process of looking at the

reasonableness of fees,' he said, adding that the CBC had a fee ombud to deal with fee disputes.

'Anyone charging fees that are found to be unreasonable ... can be the subject of disciplinary proceedings and we have acted against members who have charged fees that are unreasonable or unwarranted,' he said.

In terms of paying money to get justice, Mr Jamie said that it took many years of study and many years of practice to become an 'experienced legal practitioner' and there was a market for those skills, which 'are worth something'.

'There are constitutional rights to freedom of the trade [and] freedom of economic activity, and government has legitimate interests in trying to ensure that more people have access to justice. But, at the end of the day, as unpalatable as it is, justice, ... medicine, health, education, etcetera, all have price tags on them, and we believe it is legitimate for people to charge a reasonable fee for their services. We believe that the user of those services can distinguish between what is worthwhile and what is not and we also believe that the corollary to that is that government is entitled to, and should be permitted to, require that people at whatever level provide services free of charge or at reduced rates,' Mr Jamie said, adding that the CBC requires its members to do *pro bono* work.

Mr Jamie said that the costs of running the Bar were 'significant', including in terms of the hours its members provided voluntarily after hours and on weekends to run the Bar.

'In its endeavours to better regulate and make provisions for the objects of the Bill, the committee in parliament should ultimately ... be careful not to destroy the good and not to throw the proverbial baby out with the bath water. The committee in parliament should preserve what is good about the advocates' profession, while seeking clearly to advance the public interest'  
– Cape Bar Council President  
Ismail Jamie

## Advocate Izak Smuts

Advocate Izak Smuts, the former deputy chairperson of the GCB, who resigned shortly before the hearings due to a divergence of views on the Bill, also made submissions to the committee on the Bill.

He said that the major flaw of the draft legislation was that it did not distinguish between regulation and governance.

Mr Smuts said that he parted with the GCB as a matter of principle over the Bill: 'I have no personal differences with my colleagues ... but I have to give due consideration to the fact that they do not, in their proposals, meet their own standards; the standards that they laid down themselves ... and that is why I felt obliged to make these separate representations.'

In his submission, Mr Smuts proposed the establishment of an accrediting body

to regulate both branches of the profession, while leaving the existing societies intact, which would be in keeping with international norms, he said. Further, he was of the view that, until the cost implications of the Bill were considered, the legislature would be irresponsible to adopt it.

'The thrust of my proposal is aimed at looking at what the Bill proposes for the advocates' profession and its structure, and its regulation and governance, and to deal with that and also the proposal that emerged from the GCB, which I have no doubt was a *bona fide* attempt to meet some of the differences that existed with the attorneys' profession but, in my submission, does not deal with the prerequisites that are laid down in international instruments and in our Constitution for the independence of the advocates' profession,' Mr Smuts said.

## Independence and self-governance

Mr Smuts referred to an extract from Justice Chaskalson's speech mentioned above regarding lawyers joining associations that protect their professional integrity, among others. He noted the comment by the BLA's Mr Mvundlela that Justice Chaskalson's views were his own; however, Mr Smuts said that these were internationally recognised principles and an integral part of the rule of law, not just an individual's views.

Mr Smuts said that he had parted ways with the GCB on the issue of chambers of attorneys and advocates and whether these should be voluntary or self-governing. He said that neither the Bill's proposed structure nor the alternative structure proposed by the GCB was a vol-

untary or a self-governing association. If entitlement to independence of the Bar was recognised, then neither the Bill nor the GCB's proposed structure meets this requirement, he said.

'The Bill as it stands seeks to obliterate the existing voluntary associations of advocates. It wants their assets, it wants their liabilities ... and it wants our staff. It is argued that that does not mean we cannot form voluntary associations, which we already have. ... Why does the department wish to obliterate that which currently exists, which functions, which offers the services ... . Why will it be necessary to establish new societies if we have existing and functioning ones? The reality is that much of the conflict that emerges with the proposals is that these are not simply regulatory proposals. The Constitution provides ... that professions may be regulated by law. ... These proposals in the Bill need to be examined as against whether they propose regulation by law or by ministerial regulation,' he said.

This, he said, would result in 'micro-managing governance' of the profession in conflict with international norms, adding: 'If we transfer regulation functions to governance functions in one body, there is no place for a ministerial role. There is a regulatory role to be played and it is currently being played. It falls within the administration of justice, so why should there not be more of a role for the judiciary, rather than the Minister?' he asked.

In terms of Mr Smuts' proposed accreditation model, the regulatory body would accredit self-governing professional associations and would play a monitoring function to determine whether the accredited bodies deserve to continue to receive their accreditation. This model would allow the Bill to comply with the relevant international principles and, further, would not avoid the regulation of the profession and allow it to continue to operate on an independent basis.

He also pushed for a greater regulatory role for the judiciary in the Bill, which would eliminate much of the criticism of state interference that emerged from the structure proposed in the Bill.

Committee member Ms Smuts agreed with him on this aspect, stating: 'All of the sting is taken out of this Bill if the judiciary takes the place of the Minister.'

## Costing of the Bill

Mr Smuts raised concern about the cost implications of the Bill. He said that there was no evidence that the department had attempted to cost the implementation of the Bill in the past 14 years.

Mr Smuts added that his concern had increased after the AFF's presentation to the committee.

'It was an eye opener to me. It is a matter of grave concern. ... but it has even more grave consequences ... for the Bill that is before you because ... the attorneys' profession relies significantly on what it draws from that fund. Well, if the fund is restricted in what it might pour into the profession ..., the cost to individual practitioners to fund this unfunded model must of necessity increase. ... If we are going to place an increasing cost burden on practitioners, ... however much this Bill might express as an objective the intention to improve access to the profession, it is going to impede access to the profession. ... If the cost of practice is higher, practitioners are going to have to pass on that cost or leave practice and, if they pass on the cost, then it is going to cost litigants more. ... Is there going to be a legal profession if you raise the costs and you cap the income that individuals may draw from it? Is this Bill designed to improve the administration of justice or finally to undermine it? If the intention is to improve the administration of justice, it needs a massive rethink and, quite frankly, until such time as the cost implications are considered, with the utmost respect, the legislature would be gravely irresponsible in adopting anything resembling this proposed model,' he said.

## Transformation and access to the profession

In response to a question by committee member Sheila Shope-Sithole in respect of inadequate gender representation, Mr Smuts said: 'It is an international problem. ... Women are massively under-represented internationally,' he said, adding that, while there had been an improvement, there were no 'quick-fix solutions'.

He suggested options in this regard could include developing capacity to re-integrate women who had been on maternity or early child-rearing leave into practice, as well as to assist them in their practice while they are away. Further, state attorneys should ensure that a prescribed percentage of briefs are given to female practitioners and other historically disadvantaged people. However, he added that the Bill did not address these aspects.

## Standards and the quality of LLB graduates

Mr Smuts referred to an extract of a speech by Deputy Judge President of the South Gauteng High Court, Judge Phineas Mojaelo, published in the December 2012 issue of *De Rebus* (2012 (Dec) DR 56) and noted that some law graduates were granted pupillage when they should not have passed matric.

'Regulate us, do not allow people into the profession who are under-qualified. Do not lay down regulations that are too lax. I suggest that a reduction in stand-

ards has created expectations for admission to the profession which cannot be fulfilled. People are emerging, with respect, at the doors of chambers seeking admission to pupillage who ought not to have matric, but they have been granted LLBs. Specify that it should not just be a four-year LLB, but that it should contain minimum courses that qualify people for potential practice. It does not help to come, with respect, if you are going to be a beginner practitioner... if you do not have criminal law and procedure or civil procedure or the law of evidence because they were electives in your LLB. If you do not have the basics, but you have an LLB, you create expectations ... that they will be admitted to practice, which cannot be fulfilled. You have guaranteed that they will fail,' he said, adding:

'In our country ... you can get a law degree for toffee. There is a massive overproduction of under-skilled people and, regrettably, ... there is any number of legal graduates who ought to be excluded from practice because if you look at what Deputy Judge President Mojaelo says, they offer a disservice rather than a service to their clients,' he said.

## Attorneys and advocates, and the administration of justice

Mr Smuts said that he did not support eradicating the referral nature of the advocates' profession, noting that there was no hierarchy between attorneys and advocates, who had disparate and different interests: 'It simply is not enough to say "you are all in legal practice" ... . The fact that we are both operating within the administration of justice does not mean that there are not significant differences in how we operate. Why are we required to have a one-size-fits-all [Bill]?'

He said that the Bill's one-size-fits-all approach created unnecessary problems: 'We need to be careful, and again it is a problem that arises from the one-size-fits-all proposal on which the Bill is premised, that we do not suggest that recognition of diversity constitutes fragmentation. Bars have organised themselves around the High Court centres. ... We exist where the High Courts are ... because those are the practical exigencies of practice as an advocate. Does that sort of structure necessarily suit attorneys? Probably not. There are hundreds, if not thousands, of rural attorneys who may need specific structures that suit their needs. Why do you want to force us all into one mould when the nature of our practices is completely different? That is why we need to draw a distinction. We are not fragmented in that sense; we perform a different function. We have voluntarily structured ourselves differently. ... We in this profession are enriched by the diversity we have among the various

Bars that make up the affiliate members of the GCB. ... Draw on that diversity, do not eliminate that diversity. ... Yes, eliminate the historical nonsense ..., but the fact that we operate differently in different regions and in different professions is not a threat. Our constitutional preamble refers to unity in diversity. If we want unity, our unity should be in the promotion of our constitutional values; in the rule of law, in the independence of the judiciary, in excellence of judicial

practice, in the administration of justice and we can do that far more effectively drawing on our diversity than turning us all into uniform individuals.'

He added that he was 'certainly not' happy with the status quo. However, he said that what denied people access to justice was, for example, when the basic infrastructure at the courts did not function properly. 'There are many levels on which we need to address access to justice. You cannot simply point fingers at

the legal profession,' he said.

'I am suggesting that ... the administration of justice is a judicial function and everything that falls within it properly resides under the judiciary and there should be no issue as to a conflict of interest or an invasion of the separation of powers. In fact, the reverse. This Bill seeks to allow executive intervention upon what ought to be the judicial province,' Mr Smuts said.

## South African Human Rights Commission

**T**he SAHRC was represented by its chairperson Lawrence Mushwana, deputy chairperson Pregs Govender and international and legislative specialist Judith Cohen. The commission supported the Bill, but raised concerns about how it may impede it in achieving its objectives.

Mr Mushwana spoke on aspects of the Bill that would negatively impact the commission, noting that other similar organisations may be similarly affected.

Ms Cohen said that the SAHRC supported the Bill's purpose of bringing about transformation in legal services and to ensure greater access to justice, particularly for the poor and vulnerable.

### Forms of practice

Ms Cohen noted that the SAHRC employed a number of attorneys and it regularly went to court to litigate on be-

half of the commission. This was done through the vehicle of acquiring law clinic status.

However, in terms of the forms of legal practice provided for in the Bill, the SAHRC, as an independent state institution, 'does not fit in anywhere', including in law clinics as defined in the Bill. 'We are no longer confident that we will in fact be entitled to do this in future and it has also raised the debate of whether we are a law clinic or not,' she said, adding that in terms of the Bill's transformational aims, perhaps new forms of legal practice should be recognised.

Ms Cohen added: 'If we are not recognised, the major consequence would be that we actually cannot carry out our legal mandate.'

### General requests

The commission would, in addition, like

to be specifically included as a beneficiary for purposes of community service. It would also like to take on candidate attorneys, Ms Cohen said.

She concluded by saying that there needed to be a 're-look' at the Bill and 'some tweaking' of it, while an investigation was needed on how the SAHRC could be recognised in the Bill, together with the attorneys and advocates who did work for it.

Mr Mushwana added that the exclusion of the SAHRC from the Bill's provisions would be costly to the ordinary person, especially in terms of the work the commission did at the Equality Court.

Committee member Ms Pilane-Majake noted that the committee considered the SAHRC submissions to be 'valuable' and its concerns would be looked at by the committee.

## Association of University Legal Aid Institutions

**A**ULAI, the umbrella body of law clinics, was represented by its treasurer, Shamiel Jassiem. He said that the association represented 17 law clinics, 55 attorneys and 130 candidate attorneys and that the clinics provided training to senior law students, who consult with clients and provide advice under supervision.

### Forms of practice

Currently, Mr Jassiem said, attorneys at the clinics do not require Fidelity Fund certificates, but the clinics do apply for accreditation. He noted that the definition of 'attorney' in the Bill was restricted to a legal practitioner practising with a Fidelity Fund certificate, which excluded practitioners practising at law clinics or justice centres. He

said that AULAI submitted that attorneys at law clinics should not need Fidelity Fund certificates and the status quo should remain.

### Fees

Mr Jassiem said that the law clinics did not charge clients fees for their services; however, if they were successful in litigation and were awarded costs in their favour, clients ceded their right to recover legal costs to the clinic. He noted that the Bill was silent on this point.

### Representation on the council and the AFF board

Mr Jassiem proposed that AULAI have a seat on the council in addition to the academic staff provided for in the Bill, as well as representation on the AFF board. In response to a question from

the committee in this regard, Mr Jassiem said that the AFF was a major funder of law clinics and AULAI could help the fund identify the financial assistance required for law clinics.

### Candidate attorneys

AULAI asked that principals at law clinics be able to supervise ten candidate practitioners at one time.

### New work for clinics

Committee member Ms Schäfer queried how AULAI proposed to administer minor estates - as it suggested in its written submissions - without managing funds. In response, Mr Jassiem conceded that it was envisaged that the clinics would play an advisory role, with the executor or Master's representative managing the finances.



## Employees of the LSSA

**T**he employees of the LSSA, represented by attorney Sicelo Mngomezulu and chairperson of the staff forum of the LSSA, Andries Modiba, highlighted the implications of the Bill for the society's staff.

Mr Mngomezulu said that, to date, little had been said about the fate of the employees of the LSSA, hence they felt the need to appear before the committee to explain the specifics peculiar to them in terms of how they would be affected by the Bill.

He said that the LSSA served the interests of all attorneys nationally by providing, among others, education and development of attorneys and providing information to practitioners in *De Rebus*.

Mr Mngomezulu highlighted the specialist skills among the society's employees and noted that the Bill seemed to provide for the employees of the provincial law societies, but not those of the LSSA. 'This is a critical concern,' he said. He noted that the provision in the Bill that empowered the transitional

council to negotiate the transfer of employees of the current regulatory structures of the profession to the council or regional councils did not, as of right, cover employees of the LSSA. Similarly, it appeared that the council did not have a corresponding duty to employ or second employees from the existing governance structures of the professions. It was therefore submitted that LSSA employees be expressly covered under this provision in the Bill.

Mr Mngomezulu also asked whether it would be possible for the LSSA to be entrusted with the operational and management functions of the transitional council.

Mr Modiba emphasised that employees were 'worried' about job security due to uncertainty regarding the Bill. 'There is no certainty or assurance in terms of our future and we wanted to appeal to the members of the portfolio committee to restructure some of the parts that have been highlighted and to review the Bill itself so that they can accommodate us.'

## Conclusion of the hearings

At the end of the hearings, Mr Landers noted that two or three more organisations may still need to appear before the committee and they would be accommodated. He added that the hearings should not mark an end to public engagement on the Bill and interested parties were welcome to make further submissions on the draft legislation and sit in on deliberations of the committee or to make use of watching briefs. 'We want you to engage,' he said.

The full audio recordings of the hearings can be found at [www.pmg.org.za/node/35978](http://www.pmg.org.za/node/35978) (day one) and [www.pmg.org.za/node/36011](http://www.pmg.org.za/node/36011) (day two). Further, those on Twitter can view a synopsis of the hearings under the handle @LSSALPB.

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By  
Kim  
Hawkey

## Written submissions on the Legal Practice Bill

**I**n addition to the oral submissions on the Legal Practice Bill (B20 of 2012), the Justice Portfolio Committee received several written submissions on the draft legislation. This is a summary of those submissions published on the Parliamentary Monitoring Group's website.

## ORGANISATIONS

### Adams & Adams

Adams & Adams' submissions focus on issues relevant to it as a law firm providing specialised legal services in various fields of law, including intellectual property (IP) law, commercial litigation and property law.

The primary focus of its submissions relate to fees and the requirements for admission as a legal practitioner.

#### Fees

The firm submits that legal services in the 'highly specialised' area of IP law merit a sector-specific fee structure that provides remuneration commensurate with the importance, volume and financial implications of this type of work.

Similarly, it recommends that the Justice Minister (the Minister) should also consider determining a sector-specific fee structure for specialised commercial and litigation services.

It refers to the Minister's power in the Bill to make regulations relating to the fee structure of legal practitioners, as well as the factors to be taken into account in determining such structure. It notes the sometimes complicated and often technical nature of IP work, as well as the sector-specific qualifications that practitioners need to do certain work. The firm says that the importance, significance, complexity and expertise of the legal services; the volume of work required and time spent; as well as the financial implications of such work need to be taken into account.

Further, clients of these services include foreign clients, often large companies, which require legal services on a high and consistent level of quality in order to be assured that their IP is properly protected, as well as South African conglomerates, whose foreign market share is protected by IP rights.

'It would not be unrealistic to expect of such clients to pay a fee commensurate with the services demanded. In the case of foreign companies, this also results in a flow of foreign currency into South Africa and increased revenues for the Com-

panies and Intellectual Property Commission,' the firm states.

Further, on the capping of fees, Adams & Adams notes: 'Unduly capping the fees which IP practitioners will be allowed to charge would result in disincentivising talented young law and science/engineering graduates from pursuing careers in IP law. This would lead to a gradual degeneration of the IP system and almost certainly loss of vital IP rights to South African individuals and companies seeking to compete in the global knowledge economy.'

#### Admission and enrolment of legal practitioners

Adams & Adams also notes that the provisions in s 24 of the Bill, which deal with admission and enrolment of legal practitioners, may 'open the door for the scales to be tipped in favour of foreign persons' as the usual requirements 'will not always apply to foreign persons'.

It notes that this section permits the Minister (after consultation with the South African Legal Practice Council (the council)) to make regulations in respect of admission and enrolment to, *inter alia*, determine the right of foreign legal practitioners to practise in South Africa; give effect to any reciprocal international agreement regulating the provision of legal services in South Africa by foreign legal practitioners or the admission and enrolment of such foreign legal practitioners; or permit a person or category of persons, if it is in the public interest, to expeditiously commence practising in South Africa as legal practitioners by virtue of academic qualifications or professional experience.

Taking into account the General Agreement on Trade in Services, of which South Africa is a member, this, the firm says, means that if such practising rights, or if expedited admission rights, are granted by the Minister to foreign legal practitioners from one or more specific countries, the same treatment will need to be accorded to legal practitioners of all other World Trade Organization countries.

'It is clear that this would throw wide open the door for foreign legal practitioners to claim entitlement to practising rights in South Africa,' its submissions state.

'It would not be unrealistic to expect of such clients to pay a fee commensurate with the services demanded  
– Adams & Adams



## Aleagis Consulting

The submission of Aleagis Consulting, an 'international network of trade experts, attorneys and scholars', is in the form of a complaint to the Competition Commission, in which it objects to the rules of the constituents of the Law Society of South Africa that relate to -

- organisational forms;

- reserved work;
- advertising, marketing, touting and fee sharing; and
- 'undercutting'.

It says that these rules preclude it from -

- establishing territorial offices;
- approaching the persons who need its services the most, namely government departments, parastatals and multina-

tionals; and

- competing in this market on price, merit, innovation, turnaround times, specialisation, public interest or otherwise.

This amounts to an abuse of dominance and/or an egregious violation of international law, it claims.

## Association of Paralegals Practitioners

In its submission, the Association of Paralegals Practitioners requests recognition of paralegal community law workers as legitimate community law practitioners in the Bill, as well as, *inter alia* -

- acknowledgment and recognition that paralegal community law practitioners are an integral part of the South African law community and serve a legitimate constituency and need for law services;
- for paralegal community law workers

to be formalised through the South African Qualifications Authority accreditation, with the paralegal national certificate being the entry requirement to practice;

- that a code of conduct be drawn up to regulate paralegal community law workers;
- that those who have been deregistered or debarred as lawyers should not be allowed to emerge later as paralegal law advisers, as this can tarnish the image of

the practice;

- the enforcement of a funding and fee structure approved in terms of the Bill; and

- that people with criminal records should not be allowed to practise as paralegal community law workers.

It adds that government support can be modelled around workers' trade union support that has been administered through the Department of Labour.

## Centre for Constitutional Rights (CFCR)

In its submission, the CFCR focuses on aspects of the Bill that may negatively impact the independence of the legal profession and, by implication, the judiciary and the rule of law.

It submits: 'The Bill in its current form vests extensive power to control essential aspects of the legal profession in the [Minister] - in our opinion, powers well beyond constitutional parameters and international norms and principles. This is untenable in our constitutional democracy. It is therefore submitted that the relevant matters of concern be seriously considered by the committee, aimed at alignment with constitutional requirements and international norms and standards, in the context of effective transformation and improved access to justice as required by the Constitution.'

Its key concerns relate to aspects of the Bill that 'clearly infringe on the independence of the legal profession'. In this regard, it states: 'The relevant provisions in the Bill provide for a council which is partially to be appointed by the Minister, must advise the Minister and can be dissolved by the Minister on fairly wide grounds. In addition, a number of the powers and functions of the council are to be fulfilled in consultation with the Minister - with the Minister having a final decision over matters such as fee

structures, vocational training requirements and community service.'

In detail, this includes:

- The Minister may appoint three members (who do not have to be legal practitioners) to the council. Additionally, it appears to be unclear who or what the 'organisations representing law teachers or legal academics' may be and it appears as if Legal Aid South Africa may appoint any 'person', regardless of qualification, profession or experience. 'As such, the Bill fails to respect those international norms and standards which entitle legal professionals to form and join self-governing professional associations that represent their interests, promote their continuing education and training, protect their professional integrity and exercise of its functions without external interference - especially by the executive.'

- The Minister's power to dissolve the council: Although the Minister must appoint a retired judge to investigate the council's conduct, he will not be bound by the judge's recommendations and can dissolve the council regardless of these. If the Minister dissolves the council, he must appoint an interim council for up to six months and must designate a chairperson of the interim council from its members. Since the

council has extensive regulatory powers, 'the Minister could effectively, through an interim council and chairperson, potentially effect undue pressure on the legal profession and individual legal practitioners'.

- It contends that the Minister's powers to regulate on a wide range of matters encroach on the ability of the legal profession to regulate itself on matters that could affect its independence.

- The legal services ombud provided for in the Bill reports to the Minister and its budget is allocated from that of the Justice Department, requiring further reporting obligations to the department, which has implications for independence. It suggests as a possible solution that the ombud be appointed by and report to the Chief Justice.

*'[T]he Minister could effectively, through an interim council and chairperson, potentially effect undue pressure on the legal profession and individual legal practitioners'*  
- Centre for Constitutional Rights

## Constitutional Literacy and Service Initiative (CLASI)

CLASI, which lists its primary vision as working with law students and graduates to deepen access to justice and information about the Constitution in communities, comments on aspects of the Bill that relate to access to justice.

In particular, CLASI focuses on community service, legal education and the regulation of paralegals.

### In respect of community service, it proposes, *inter alia*:

- That community service should be a requirement for both entry into the legal profession and for continued registration as a legal practitioner, with the possibility of community service as a requirement for entry into the profession taking place during the LLB degree, after graduation or, possibly, as a combination of both.
- Remuneration for community service: 'If the aim is to reach a point where the legal profession is reflective of the demographic composition of the country, it can hardly be feasible to require young graduates, many of whom may be from disadvantaged communities, to find a way to support themselves while working without compensation.'

However, CLASI proposes that aspirant legal practitioners who engage in community service programmes during the course of their legal studies would not need to be compensated, but would receive academic credit.

- The establishment of a working group dedicated to community service under the auspices of the council. The group

would be responsible for keeping a register of approved opportunities for placement, as well as facilitating supervision of aspirant legal practitioners by legal practitioners, in fulfilment of both parties' community service obligations.

### On legal education, it submits, *inter alia*:

- In order to further the project of 'transformative constitutionalism' in South Africa, legal education needs to be reformed. It recommends expanding clinical legal education and integrating clinical methodology in existing law faculties, which would serve 'the twin goals of providing opportunities to aspirant legal practitioners to fulfil community service requirements, as well as offering a dynamic pedagogy that will develop better law graduates'.
- The new constitutional dispensation requires a shift from the formalistic parameters of legal education and the legal profession to a more substantive one, which considers moral and political values and the social context in which law operates – both in how and what is taught.
- Law faculties, in partnership with the council, should play a more intentional role in rethinking the design and implementation of the LLB curriculum in light of the skills and values desirable in law graduates. Law students must be holistically exposed to the balance between knowledge, skills and values in the course of all doctrinal or theory-based courses, which must not be reserved for a stand-alone legal practice course in their final year.

- That the council and the Transitional South African Legal Practice Council (the transitional council) include one teacher of law or legal academic nominated by law teachers, legal academics or organisations representing law teachers or legal academics, as well as one clinician nominated by and a member of the Association of University Legal Aid Institutions.

### On paralegals, it proposes, *inter alia*:

- The regulation of services by paralegals under the same body that will regulate attorneys and advocates.

'The exclusion of paralegals from the Legal Practice Bill and the scheme that it creates undermines the status of the group within the legal landscape of South Africa. In order to play the vital role that it should, the sector requires respect, which could be achieved through external recognition and regulation. Access to justice can be enhanced if the credibility of paralegals is fostered, and their role in the profession concretised. Separate regulation ... will ... detract from the legitimacy of the profession. Moreover, linkages between the formal legal profession and the paralegal sector should be strengthened, a goal that will be achieved by regulating legal and paralegal practitioners together.'

- Paralegals should be regulated, specifically with regard to their training and qualifications, in a separate chapter of the Bill.
- Representation of paralegals on the council.

## Eskom

The main emphasis in Eskom's submission is the protection of the independence of the judiciary. 'The question is asked whether, with the Minister appointing members to the main governing professional body, that is possible,' its submission reads.

Further, Eskom asks, *inter alia*:

- Whether the Bill applies to practising members of the profession only and excludes those who have qualified, but are, for example, legal advisers in private or public companies. If such people are excluded, Eskom proposes the establishment of an independent body to

regulate their professional affairs.

- Whether the prescription of training for legal practitioners extends to non-practising legal practitioners.
- That consideration be given to the possibility that the rendering of community service should apply to candidate attorneys only and not to legal practitioners.
- For a requirement that Fidelity Fund certificates be clearly displayed at attorneys' offices.

Eskom notes that 'non-practising practitioners make up a significant percentage of the legal fraternity and have direct influence on South African business as legal advisers and legal counsel'

and therefore it was of concern that they were not eligible to be members of the council and that it was 'essential' that non-practising attorneys have appropriate representation on the council. It also asks that consideration be given to allowing a qualified, admitted attorney, who is a non-practising full-time legal adviser/corporate counsel, the right of appearance on behalf of his employer, with conditions and/or limitations if necessary. 'This may also enable corporate organisations to take on articulated clerks in the future, as is the case in some other professions,' Eskom notes.

## Legal Expenses Group Africa (LEZA), comprising LegalWise and Scorpion Legal Protection

In its submission, LEZA focuses on access to the profession, multidisciplinary practices and reserved work, and contends that: '[M]uch of the status quo of what is widely perceived in the private sector in general as unwarranted exclusivity and protection of the legal profession at the expense of the consumer has been left intact.'

In this regard, it claims that few, if any, barriers to entry have been removed and the provincial law societies are 'merely replaced' by a single self-regulating council consisting primarily of legal practitioners, 'which has the potential to impede a holistic approach concerning legal services'.

It states: 'It denies all those lawyers who work in corporations throughout the country as employees, but who may be admitted and are equally qualified, the right to appear in court. Well-meaning corporations, for example, may well find it attractive to employ legal practitioners to attend to the legal needs of its staff, including court appearances, as an employee benefit. The shortage of legal practitioners will be significantly alleviated if all qualified lawyers – subject only to the appropriate and obvious safeguards regarding education, prior and ongoing vocational training, professional indemnity insurance, etcetera – are able to perform the work reserved for legal practitioners as currently defined in the Bill.'

It adds that it is 'difficult to find cogent reasons to justify that it is in the public interest that the largely administrative functions of conveyancing and notarial work should, by virtue of qualification requirements, in effect be provided by legal practitioners only'.

LEZA supports broadening the base of legal practitioners by recognising alternative business structures, such as incorporated legal practices owned and controlled by non-legal practitioner third parties, but with the legal practitioners of the incorporated legal practice being subject to the provisions of the Bill.

*'We do not believe that a level of independence that equates to near total autonomy to practise a profession is required in the public interest'*  
– Legal Expenses Group Africa

Among others, it recommends:

- A system in terms of which legal practitioners are obliged to enter into written costs agreements with clients, disclosing the proposed hourly rate, an estimate of the total number of hours to be spent and all other contractual terms to govern the relationship, prior to providing services. 'If a fixed fee is prescribed in terms of this Act or any

other Act, the costs agreement must reflect that.'

- Legal practitioners should be allowed to advertise freely, provided that advertisements comply with the requirements of the Advertising Standards Authority of South Africa or any applicable law, which will 'result in an improved consumer-centric approach'.

- On independence, it states: 'We agree with an independent legal profession in the sense of [its members] being able to represent whoever they choose to, whoever the opponent, without interference or prejudice to privileged attorney/client communications, provided that it is underpinned by an independent judiciary and constitutional safeguards. We do not believe that a level of independence that equates to near total autonomy to practise a profession is required in the public interest. Perhaps the term "independence" should be defined.'

- The inclusion in the council of at least two persons nominated by the legal expenses insurance sector, after consultation with the National Consumer Commissioner.

Further, it supports the Minister having three appointees to the council and notes that the power of the Minister to dissolve the council 'appears justifiable in the public interest'.

- The Bill should allow for any juristic entity to conduct an incorporated legal practice, regardless of ownership and control.

## National Alliance for the Development of Community Advice Offices (NADCAO) and the National Task Team on Community-based Paralegals (the task team)

In a joint submission, NADCAO and the task team call for the inclusion of community-based paralegals in the Bill, as well as for a national interim governance structure to regulate this sector. It believes that a separate regulatory framework will 'irreparably and irrevocably detach and disconnect community-based paralegals from other legal practitioners and from the main-

stream justice sector', adding: 'This divisiveness goes against the intended spirit of the Bill to bring the legal professions together and this will not augur well for sustained access to justice.'

*Inter alia*, they ask for the following inclusions in the Bill:

- Recognition of community-based paralegals as legal practitioners.
- The possibility of subsidising or whol-

ly paying for the costs of community advice offices.

- The appointment of not less than two community-based paralegals appointed by the Minister to the council or other representative body, after receiving nominations from community-based paralegal practitioners or organisations representing the interests of community-based paralegals.



## National Association of Democratic Lawyers (NADEL)

In its submission, NADEL sets out general comments on the Bill, as well as commentary and analysis of certain sections of the draft legislation.

NADEL records its long-term view of 'a truly and entirely unified profession' and notes that it has always argued for fusion, viewing the distinction between attorneys and advocates as archaic and artificial.

In terms of independence, NADEL is of the view that it is appropriate that the legal profession 'govern itself with little or no interference from the executive and legislative branches of government'; however, it believes that the Minister's powers in terms of the Bill do not threaten the independence of the profession:

'The arguments of some elements in the profession that the Bill's provisions constitute an attack by the Minister or the [Justice] Department on the independence of the profession belie the fact that the profession (including both advocates and attorneys) cooperated with the apartheid government and had a poor track record with regard to executive interference. The independence of the profession rather relies upon people with strong values who are able to act in an independent manner when faced with difficult choices. Provided the members of the profession are free to choose the cases they take on and provided there is no attempt to "punish" or isolate those who take on unpopular causes – and the Bill appears not provide any basis for this kind of intervention – the independence of the profession can hardly be regarded as being under threat.'

NADEL does not believe that there is anything objectionable in the requirement that reports are to be made to the Minister on a regular basis, or that the ministerial appointment of three members to a 21-member council could

amount to unreasonable governmental interference.

However, NADEL objects to the provision in the Bill allowing the Minister to dissolve the council: 'The power to dissolve the council cannot vest in the hands of the Minister. In line with the principle of independence of the profession, only a court should be able to order the council's dissolution. Nothing would naturally stop the Minister from approaching a court for such an order.'

Further, any interim council appointed on such dissolution would have to be appointed by majority by members of the profession 'and ought not to be appointed by the Minister alone'.

The association also notes that 'a key feature' missing from the Bill is that it does not provide for the council including organisations such as 'trade unions' of legal practitioners with the interest of members as one of its functions: 'At its core, the Bill focuses primarily on the regulation of the profession. The omission of members'/the profession's interests needs to be addressed.'

Further, NADEL does not believe the transformative objectives envisaged in the Bill are achievable during the time of the transitional council 'as the issue of representation actually relates to the permanent council and not the transitional council'. It therefore proposes the continued accreditation of the Black Lawyers Association (BLA), NADEL and Advocates for Transformation (AFT) for a longer period, in the region of five years, 'to sustain achievement of the objective of transformation'.

The association also suggests the possibility of sunset clauses 'in view of the numerical strength of white male lawyers' and the recognition for the need of race and gender balance, and the potential for the governing structures to be

dominated by big firms, senior counsel and urban-based lawyers.

In terms of access to work in the light of transformation, NADEL says that this issue has not been 'tackled in a coherent fashion' by the profession, government, statutory bodies, state-owned enterprises and private business, and a single regulatory regime must deal with this matter as a priority.

In respect of particular aspects of the Bill, NADEL submits, *inter alia*:

- A fee structure, as prescribed by the Bill, is likely to fall foul of the Competition Act 89 of 1998 and practitioners' capacity to earn a living 'should not be limited by making access to justice the sole reason for setting fee structures'. It adds that access to justice can be achieved in a number of other ways. 'We need to ensure a balance between greed and unreasonable expectations, on the one side, and sound practice management and fair reward, on the other,' it says.

- The Bill does not provide for the transitional council and the council to have a corporate structure with perpetual succession. The transfer of assets/secondment of staff provided for in the Bill therefore 'raises huge complications'. The role of the director-general of the Justice Department 'is also questionable' in this process, NADEL submits.

- The composition of the transitional council fails to take into account that AFT represents 50% of the General Council of the Bar and therefore ought not to have additional separate representation. Further, BLA and NADEL have non-attorney members, who are advocates or members of the profession in other functions, which ought to be considered when determining the representation of these organisations on the council.

## South African Institute of Race Relations (SAIRR)

The SAIRR's main contention is that the Bill seeks to abolish the independent Bar councils and law societies and replace them with a new council, despite 'no sound reasons for this change' being put forward.

It believes the Bill is an attempt to bring the legal profession under ministerial control with the consequence that '[o]nce all legal practitioners are regu-

lated by a council answerable to the Justice Minister, it is likely to become much harder to find lawyers willing to take up contentious cases against the state'.

### The council and the transitional council

The institute states: 'This council will report to the Justice Minister. It will also be vulnerable to dissolution by him at

any time, without adequate safeguards against potential abuse of this power, militating against its independence.'

It is of the opinion that it is unacceptable for the Minister to have 'so much influence over the council's composition'.

'The new council – like the Judicial Service Commission – is likely to include a core of people who support the ruling party, and might even be its deployed

cadres as well,' its submissions read.

It states that the composition of the transitional council is likely to give the Minister significant influence over the council's deliberations and decisions. 'Moreover, if the transitional council is unable to reach agreement, this will open the way for the Justice Minister himself to decide by regulation what the "election procedure" for the permanent council should be. Effectively, this will allow him to control the composition of the permanent council by executive fiat.'

On the Minister's powers in respect of dissolution of the council, the SAIRR

submits that the safeguards against potential abuse of this power are insufficient. While the Minister must afford the council a reasonable opportunity to respond to the reasons for dissolution, and must afford the council a hearing on any submissions received, he is not obliged to take such submissions into account or to give reasons for rejecting them.

Further, although the Minister must appoint a retired judge to conduct an investigation and make recommendations prior to dissolving the council, the Minister is not bound by such recommen-

dations. 'He is not even obliged to take them into account, or explain why he has overruled them.'

'Making the council subject to dissolution by the Minister in such circumstances will erode whatever independence it might otherwise have. Moreover, since the council will control the right of legal practitioners to practise their craft, this will give the Minister an indirect control over the legal profession which is profoundly at odds with the independence needed by the Bar, the Side Bar and the Bench.'

## Various academics from the faculty of law at the University of South Africa

Senior lecturer **Dalita Ramwell** from the department of private law notes the following as potential problem areas of the Bill:

- The definition of 'attorney' has the effect that an attorney who fails to obtain a Fidelity Fund certificate in a specific year is automatically an advocate.
- There is no definition of the 'public interest' in the Bill.
- The objects of the council include ensuring that legal fees are reasonable and promote access to legal services, and regulating legal practitioners. In this regard, Ms Ramwell states: 'It is debatable whether it is wise to fix prices in this manner in a largely capitalist economy. That such price fixing only applies to registered attorneys and advocates seems undeniably discriminatory. It also risks benefiting only the rich and not the poor ... The Bill does not prescribe how the reasonable fees will be achieved, and that is perhaps the key issue.'
- The provisions on the dissolution of the council and the appointment of an interim council seem to create the potential for 'a relatively small number of members to "highjack" the council and

pass undemocratic resolutions'.

- The criteria for a fee structure omit seniority and experience of the practitioner.
- The questionable need for a transitional council. 'Why not go from ordinary law societies to the Legal Practice Council? The answer seems to be contained in section 97. It merely postpones the problems and disputes that could not be resolved thus far, in that the transitional council must advise the Minister on problematic and controversial issues ... and, most importantly, the transitional council must, within 24 months, "negotiate with and reach an agreement" with the attorneys' and advocates' professions in respect of the transfer of their assets, rights, liabilities, obligations and staff. To provide that parties must reach an agreement seems *contra bonos mores* and unenforceable. Furthermore, taking over the assets of private institutions, operating more or less like a club, where all the members have a shared interest in the assets, seems to indicate a deprivation or expropriation, with all the constitutional implications of that.'

In conclusion, Ms Ramwell states: 'Most concerning, however, is that I did not find any provisions that may strengthen the independence of the legal profession. On the contrary, the over-regulation seems to have the opposite effect.'

Professor **Magda Slabbert** of the department of jurisprudence notes a number of positive aspects in the Bill, but raises, *inter alia*, the following concerns:

- Paralegals are not addressed in the Bill.
- Competent persons should be appointed to the council and not political figures with the 'right connections'.
- The four-year LLB is a major concern: Few students succeed in four

years and, apart from obtaining the degree, they are not ready for practice.

- Pupillage for advocates should be compulsory.
- A single code of conduct for lawyers will not suffice - there should be separate ones for attorneys and advocates due to their differing roles.
- Council members should be appointed for five-year terms, not three, to work effectively.
- The term 'fit and proper' is vague, subjective and discretionary and a full explanation of its meaning is necessary.

In addition, Professor Slabbert asks why only one teacher of law is to be represented on the council and, further, where the regional councils will be situated.

Professor **Heinrich Schulze** of the department of mercantile law says that the reference in the preamble to the removal of 'any barriers for entry into the legal profession' is too wide and should be omitted, alternatively amended to proclaim that only unnecessary barriers be removed.

Further, in respect of s 6(1)(d) of the Bill - which provides, *inter alia*, that the council may, having due regard to the Constitution, applicable legislation and the inputs of the ombud and parliament, 'perform any act in respect of negotiable instruments or the electronic transfer of monies' - he says that negotiable instruments and the electronic transfer of funds 'are by no means the only, or even the two most important, examples of methods or instruments of payment'. Therefore, the wording of this subsection should encompass all forms of money.

Finally, he says that the structuring and wording of s 91 of the Bill 'do not make sense' and sets out fully why he believes the provisions in this section contradict each other.

*'It is debatable whether it is wise to fix prices in this manner in a largely capitalist economy. That such price fixing only applies to registered attorneys and advocates seems undeniably discriminatory'*  
-Dalita Ramwell

## University of the Witwatersrand Law Clinic, School of Law

The University of the Witwatersrand Law Clinic submits that:

- Fidelity Fund certificates should be a requirement to practise as an attorney at a university law clinic, since such attorneys are often in receipt of trust money in the form of damages recovered on behalf of clients and deposits for disbursements.
- Limitations on the type of legal work that can be performed by university law clinics 'have no place in the Bill and should be scrapped'. 'It is a form of protectionism which is to the prejudice of the poor,' its submissions read.
- University law clinics must be able to

recover costs awarded, which must be taxed in the clinic's name.

- The forms of legal practice in the Bill fail to provide for an attorney who practises in the full-time employ of a university law clinic. The section should be amended to accommodate such attorneys.
- The definition of 'community service' in the Bill does not provide that the legal services rendered by the attorneys and candidate attorneys at university law clinics qualifies as such. The section should be amended to provide that the legal services and training provided by attorneys and candidate attorneys at a university law clinic, free of charge to the public,

qualify as community service.

- The right of appearance in the lower courts should be extended to suitably qualified final-year undergraduate students. 'The time is ripe to implement the rule as a matter of principle, with the proposed council to regulate the minutia of the rules determining the conditions under which students will be able to appear in our lower courts.'
- Like in the case of medical graduates, suitable funding should be made available from the national fiscus to cover the running costs of community service as part of law graduates' practical vocational training.

## Webber Wentzel

Webber Wentzel raises a number of items relating to the Bill that are of concern to it as a large corporate law firm. These fall under four main headings:

- Regulation of fees: Webber Wentzel says that experience, location and overhead costs should also be included as factors to be taken into account for the fee structure to be determined in terms of the Bill. Further, the firm notes that its clients are 'very sophisticated users of legal services' and the Bill does not expressly take into account their power, bargaining position and ability to regulate and keep fees competitive. It proposes that such users be allowed to contract out of the fee structure.

On fee caps, it says: 'We feel that it is inevitable that if fees are regulated as is proposed, almost all lawyers will move to charge the maximum capped rate. This will distort competition in the market ... We believe that the market does and should have the freedom to determine and regulate rates.'

- Multidisciplinary practices: Webber Wentzel submits that the relevant wording in the Bill is too speculative and does not provide set time periods. It notes that firms like it compete with many multidisciplinary practice international firms and clients would benefit from a 'one-stop shop', in particular those offering tax and related financial services.

- Limited liability practices: The firm also believes that the relevant wording in the Bill is too speculative. Allowing limited liability practices will be of great benefit to the public and should be prioritised, it says, adding that sufficient control measures are in place to protect the public. The current barrier discourages the establishment of new firms, it adds.

- Continuing professional development: Webber Wentzel requests clarity and certainty on what this requirement will entail and whether internal training programmes will be capable of being accredited as training providers.

## INDIVIDUALS

Swaziland-based attorney  
Sydney Dlamini

Mr Dlamini has issue with the fact that legal practitioners who are South African citizens residing outside the country cannot be admitted as attorneys in South Africa without 'starting from scratch'. He says that currently an attorney who has been practising for more than ten, or even 20, years in a foreign jurisdiction, must serve articles if he wishes to relocate to South Africa. 'This is not fair considering the history of South Africa,' he says.

'It is not a reasonable thing to require that an attorney who is over 40 years [old] and who has been practising for many years should start from scratch if that practitioner wishes to pursue his/her trade in South Africa,' he says.

He therefore motivates for recognition in the Bill of such attorneys who have practised for more than ten years, and who meet the other requirements in the Bill, being allowed to petition the court for admission as a practitioner.

## Advocate Eric du Preez

Mr du Preez says that many legally qualified persons have been excluded by the 'system' in place for many years. 'Please accommodate those of us who have experience, but have not, or could, not afford to follow the current requirement for admission, imposed by a system that emanates from the previous century. Allow these people ... to work freely and the market forces will soon make legal assistance affordable to all,' he asks.

In support of his submissions, Mr du Preez cites his personal experience as an LLB graduate at age 55 after a 34-year career in the police service and his subsequent inability to secure pupillage or articles at a law firm. After 15 months of working for free as a candidate attorney at a university law clinic, he was subsequently trained by the Commission for Conciliation, Mediation and Arbitration, where he has been a part-time commissioner for the past nine years.

Despite this, he says: 'As I am admitted as an advocate by the High Court, I have right of appearance in the High Court and other courts, where I practised as an independent practitioner. However, I may not accept money from a client "upfront" and

can only receive payment after the task is completed - placing myself a risk of not being paid,' he says, adding:

'The dilemma I find myself in is experienced by many legally qualified persons who have, for whatever reason, not done pupillage and/or the candidate attorney route. These are magistrates, prosecutors [and] legal advisers working for government, in the private sector, provinces, banks, etcetera. Most of these persons have huge knowledge and experience in their particular field, but are marginalised because of the fact that they could not follow the current recognised system to become an advocate or [attorney] and to ply their trade.'

He says that the argument that without formal, post-university training, a person is not competent to do legal work 'does not hold water': 'All industries have in-house training, why not legal practitioners?' he asks. As further support for his submission, he notes that many South Africans have done part-time work to finance their legal studies; they have families and often cannot afford to do pupillage of a year without income or 'candidateship with a salary usually so small that they just could not survive'.



## Pretoria advocate Connie Erasmus

**A**lthough a deputy director of public prosecutions, Ms Erasmus comments on the Bill in her personal capacity.

She recommends, *inter alia*, the following amendments to the Bill:

- The name of the Bill should be changed to the 'Legal Professions Bill'.
- That the LLB degree as a minimum academic qualification, plus the vocational training by each of the professions, be collapsed into a single legal professional qualification providing, entrance to the attorneys' profession, prosecutors and attorneys engaged as corporate lawyers.
- That the LLM degree as a minimum academic qualification, together with the vocational training of the individual professions, be collapsed into a single legal professional qualification providing entrance to the advocates' profession, specialist prosecutors, specialist corporate lawyers and advocates engaged as researchers of law and judges' professions.
- The proposed legal professional qualification should run over a maximum period of two years full-time.
- After the transitional period provided for in the Bill, advocates with seven or more years' experience can continue practising as ad-

vocates, advocates engaged in prosecution, as corporate lawyers or as researchers of law, or they can convert their registration to attorneys. Those with less than seven years' experience and without an LLM can practise as attorneys, attorneys engaged in prosecution or as corporate lawyers. All attorneys with more than seven years' experience who have an LLM can convert their registration to advocates.

- A partially completed LLB degree entitles the holder to practise as a legal adviser/paralegal, which should be provided for in separate legislation.
- All lawyers should be subject to a lawyers' fidelity fund and board (instead of the Attorneys Fidelity Fund (AFF) and board), with prosecutors, state attorneys, governmental corporate lawyers and advocates excluded from such authority.
- That advocates be allowed to form partnerships with each other or attorneys, and that advocates may become notaries and conveyancers.
- That the National Director of Public Prosecutions and/or his delegate be given a seat on the Judicial Service Commission (JSC) and the council.
- All references to the Minister in the Bill be changed to the JSC.

## Springbok former public prosecutor Derrick Grootboom

**M**r Grootboom, who does not have an LLB degree, but who has other legal qualifications and experience, asks that he – and others in his position – be recognised in the Bill as able to qualify to be admitted as an advocate and/or an attorney.

Mr Grootboom has a Bluris degree and an LLM. Further, during 2009 to 2011 he sat as a member of the Western Cape High Court Bench, presiding

with judges in criminal trials, while at the same time practising as a legal consultant for a law firm. He is also a former public prosecutor at the National Prosecuting Authority.

However, he notes that his qualifications do not 'fulfil the LLB requirement': 'Despite the above, I am not allowed to practise as a lawyer representing clients in the South African courts of law, charging clients professional fees, because the require-

ments set in the Attorneys Act [53 of 1979] and the [Admission of Advocates Act 74 of 1964], which [are] now copied into the Legal Practice Bill, debar me [from earning] my living as a legal practitioner, as guaranteed by the Constitution ... in sections 22 (freedom of trade, occupation and profession) and 9 (right to equality).'

He maintains: 'I respectfully submit that I should not be further debarred from appearing in the South African

courts of law, earning my living as a legal practitioner with two law degrees, obtained under the harshness apartheid weighed on me as a black person, by the requirements ... of the Admission of Advocates Act ... (which [are] similar to [those] in the Attorneys Act) and that provision must be made that I, and others like myself, must be regarded to be duly qualified to be admitted as advocates/attorneys by virtue of the Legal Practice Bill.'

## Pietermaritzburg legal administration officer Nosihle Gumbi

**M**s Gumbi notes her 'great anxiety' over the term 'attorney', defined in the Bill as 'a legal practitioner practising with a Fidelity Fund certificate', which is a 'move away from' the definition in the Attorneys Act. She asks: 'Would it mean that a person such as myself, who met the requirement of being admitted as an attorney but is not in practice, is no longer

an attorney?'

Further, she raises concern over s 24(1) of the Bill, which provides: 'A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.' In this regard, she asks: 'What about us who were admitted in terms of the Attorneys Act? Are we no longer attorneys?'

## Andre Jensen

**M**r Jensen, from Port Elizabeth, proposes that the Bill 'make the legal profession accountable to their clients' and preclude practitioners from charging for time 'negligently wasted'.

He states that the legal profession, like the medical profession, enjoys 'the latitude of being able to charge for their services even when the outcomes are unsatisfactory', adding that: 'In the light of the fact that there is so often uncertainty of outcome in these professions, this is understandable.' However, he says that this tolerance is being abused by the legal profession. 'Some members of the legal profession find it very tempting to persuade their clients to take legal action

even when they know for certain, or should know for certain, that the action will prove futile. In such cases the onus should be on the legal profession to tell their clients that the matter will prove futile, but the temptation is to not tell the clients this and to then enable the earning of fees,' he says.

*'Some members of the legal profession find it very tempting to persuade their clients to take legal action even when they know for certain, or should know for certain, that the action will prove futile'*  
–Andre Jensen

## Cape Town attorney Andries Landman

Mr Landman proposes that –

• ‘family member’ in s 57(1)(a) of the Bill be adequately defined as it is vague and will lead to litigation. This subsection excludes liability by the AFF for compensation for loss suffered by a family member or a member of the household of the attorney found guilty of the theft; and

• the words ‘contemplated in paragraph (d)’ be deleted from s 57(1)(e) of the Bill. Section 57(1)(e) excludes the AFF’s liability for loss suffered by any person as a result of theft of money which an attorney has been instructed to invest on behalf of the person contemplated in paragraph (d).

Section 57(1)(d) excludes liability for loss as a result of theft that occurred after the victim received notice in writing from the council or the AFF board warning against the use or continued use of the legal services of the practice concerned, or the giving of any money or property in trust to that practice, and the person in question has failed to take reasonable steps after being so warned.

Mr Landman claims that the above renders ‘the limitation of liability of very little use in practice as thefts are in almost all instances discovered after the event. It thus makes little sense to exclude the fund’s liability only in those instances.’

## Johannesburg advocate Jacques Lourens

In his submission, Mr Lourens submits that the Bill is ‘fatally flawed’ for a number of reasons and, if adopted as is, will be unconstitutional. His two main objections are:

• The Bill is a threat to an independent legal profession

and the courts, including because the body to regulate the affairs of practitioners will be state controlled.

• Capping of legal fees, which is likely to be deemed uncompetitive, noting that there are already guidelines and review powers in place.

## Johannesburg attorney June Marks

Ms Marks informs the committee that the fee charges of advocates are ‘out of control’ and ‘the Bar Council insists on payments and forces attorneys to pay without submission of time sheets and allows conduct which is in fact fraudulent, being many different accounts for one month by the same counsel for the same

matter’.

Further, she notes that she has advised the Bar Council of the criminal activities of many members of the profession against whom charges have been laid and dockets have been opened. ‘The Bar Council ignores this and, in fact, promotes such counsel to senior positions,’ she says.

## Joseph Maseko

Mr Maseko, the managing member of Maseko Management Services CC, proposes the following in respect of the Bill:

• Right of Appearance: Certain attorneys already enjoy the right to appear in the superior courts, while no advocates are allowed take briefs directly from the public in all areas. This is unfair and marginalises advocates, he says, adding: ‘There is no equality before the law for legal practitioners.’

• Coverage of specialist fields for advocates: Certain advo-

cates should be allowed to take direct briefs from the public in specialist areas like those relating to consumer courts and tribunals, Labour Courts and conveyancing work.

• A possible Fidelity Fund for advocates, which would deal with the concern over safeguarding the public if advocates were to be briefed directly.

• Certain, if not all, categories of counsel should be designated to deal with direct briefs for certain paying clients.

## Dr Ramola Naidoo

Ms Naidoo, who was admitted as an advocate in 1979, submits that the Bill does not measure up to its objectives.

Ms Naidoo notes that one of the reasons she does not practise law is the ‘old boys’ network’ in the profession, which is ‘as prevalent today as it was 30 years ago’. She highlights some of the difficulties for women advocates in particular:

‘It is a huge challenge to practise as an advocate if one has taken a break away from practice (as I have done) as one’s own professional network is lost. The loss of sustainable income is not just my own experience, but that of other lawyers as well. Thus it is extremely challenging to practise at the Bar if there are no briefs forthcoming. A number of women have shared the same misgivings.’

She says that the Bill entrenches the current split Bar system ‘with a layer of costly bureaucracy and does not fully address the root of the problem’.

She therefore proposes, *inter alia*:

• That the Bill provide for 30% of all briefs from private attorneys and 50% of those from state attorneys to go to female advocates listed on a public database and website operated by the council or the Justice Department. Further, that advocates should not be discriminated against for being out of the traditional matrix of the Bar. The proposed amendment should be implemented for a period of five years subject to annual review by parliament. ‘Naturally, women who are already successful and well established in the legal profession may opt out of inclusion in this database but care should be taken to ensure that the work assigned to women on the database should be fair and highly remunerative, as opposed to just a pittance as in *pro deo* cases of the past,’ Ms Naidoo submits.

• That advocates should be allowed to practise from any location, including at home, with flexible hours.

• That advocates should be allowed to advertise their services and to give advice electronically, for example on websites.

- That the traditional garb worn by advocates, which is 'cumbersome and archaic', should be abandoned.
- That parliament, not the Minister, should be mandated to dissolve the council.
- There should be minimal state intervention in regulating the legal profession.

Further, Ms Naidoo submits that a legal services ombud is unnecessary. 'It is far too costly and would create a bureaucracy of managers and other bureaucrats. It is hard to imagine thousands of people in the Republic who have legitimate complaints against lawyers,' she says.

In this regard, she adds: 'Where there is embezzlement or fraud, then clients should report this to the commercial fraud office of the South African Police Service. The majority of the people in the Republic neither have the means to go to court nor do they understand their rights

to even think of litigation, so they will hardly be in a position to lodge a complaint against a lawyer. Indeed, it would be surprising if there are many lawyers based in rural areas. I have also canvassed opinion from ordinary South Africans, who say that they have not felt the need to get any legal advice and some who say that they pay a monthly fee to LegalWise or similar organisations more as an "insurance" if they ever needed a lawyer, but that this has not yet arisen.'

Further, she says: 'Until we educate the broader public about their legal rights and concomitant obligations, we can hardly develop a sophisticated public who would opt for legal advice and litigation rather than extra-legal means to resolve any conflicts that they may have. ... An affluent society like Sweden can surely afford such a luxury of the services of an ombud ... In

South Africa, however, we call ill afford to pay for yet another independent government body that has its own highly paid management and administration when a simple unit with the department would suffice to handle complaints from the public. The money used to create the ombud can surely be well spent elsewhere to ensure true sustainable development in this land where poverty is the norm.'

Ms Naidoo adds that, in the long term, an option would be

to expand the mandate of the Public Protector 'so that complaints against state-employed lawyers as well as against lawyers in private practice may be investigated by the Office of the Public Protector'.

Finally, she calls for wider public participation in drafting any amendment to existing laws regulating the profession and for the committee to hold public hearings on the Bill in provinces other than the Western Cape.

## Advocate Nick Smythe

Advocate Smythe commends the provision in the Bill that will, in certain circumstances, allow advocates to render legal services directly to the public, which he says will 'considerably reduce the cost of legal services'.

However, he advocates for the eradication of 'obsolete rules' imposed by the Bar that result in clients being required to pay additional amounts.

'For example, advocates may not appear in court unless an attorney is present. That made sense in the days before cell phones, but now the only effect of this rule is to require clients to pay for the cost of both an attorney and counsel at court, when this is often unnecessary. ... There may be occasions where the presence of attorneys is warranted but it should not be mandatory ... [I]n many instances law firms send jun-

ior attorneys and candidate attorneys to accompany counsel, merely because they are compelled to do so and not because they believe it is necessary, and then pass the cost on to the client,' he says.

Further, Mr Smythe says that another obsolete rule is the one requiring attorneys to be present when an advocate consults with a client. 'By analogy, in the medical profession when a patient consults a surgeon there is no requirement that the referring doctor or general practitioner be present.'

However, he adds that advocates taking work directly from the public should not be allowed to hold money in trust or operate trust accounts. Further, such advocates must have completed pupillage and their training will need to be extended to cover matters such as the issue and service of summonses.

## Johannesburg advocate EK Tsatsi

Advocate Tsatsi submits that people who are not practising law or who do not belong to any professional body should not be allowed to use the title 'advocate'.

The reason for this, Ms Tsatsi says, is that such persons are not subject to any

ethical and professional rules and are 'difficult to monitor'.

'When a person like this does something wrong, it seems as if the advocate profession is put into disrepute. There is no way of disciplining the said person,' she says.

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By  
George  
van Niekerk

# Door closed on common law contingency fees

*De la Guerre v Ronald Bobroff & Partners Inc and Others (GNP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J)*

*The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening) (GNP) (unreported case no 32894/12, 13-2-2013) (Kathree-Setiloane J)*

For many years contingency fees agreements have been a matter of contention, and the questionable existence of common law contingency fees agreements after the enactment of the Contingency Fees Act 66 of 1997 (the Act), in particular, has led to much confusion.

However, the two recent full Bench decisions in the linked *De la Guerre* and *South African Association of Personal Injury Lawyers* (SAAPIL) cases appear to have finally put the matter to rest.

It is important to note, however, that at the time of going to print, notice of leave to appeal both decisions had been filed at the Supreme Court of Appeal.

## The *De la Guerre* decision

The applicant, De la Guerre, was a client of the first respondent, Ronald Bobroff & Partners (RBP). She had instructed RBP to claim damages on her behalf from the third respondent, the Road Accident Fund (RAF), for injuries she had sustained in a road accident.

The RAF paid compensation of approximately R 2,8 million, and it was common cause that RBP charged a fee of approximately R 870 000, which was 30% of the capital and costs awarded to De la Guerre, together with value added tax.

The fee was determined in accordance with a so-called common law contingency fees agreement concluded between De la Guerre and RBP. De la Guerre contended that this agreement was invalid as it contravened the Act.

De la Guerre's contention was that a reasonable attorney and client fee for the services rendered would have been approximately R 180 000. Even if doubled, as provided for in the Act, RBP was notionally entitled to charge her approximately R 354 000, she claimed.

The second respondent, the Law Society of the Northern Provinces, argued that common law contingency fees agreements were permissible if concluded within the recognised parameters, including that the attorneys' remuneration was fair. RBP did not file an answering affidavit but requested the court to stay the proceedings pending a decision in the SAAPIL matter, which was heard on the same day by the same full Bench. SAAPIL, *inter alia*, argued in favour of common law contingency fees agreements.

The RAF supported De la Guerre's view that a contingency fees agreement between a lawyer and his client was unlawful at common law.

The full Bench, per Fabricius J (with Mlambo JP and Kathree-Setiloane J), held that the provisions of the Act clearly pro-

hibit any contingency fees agreement between an attorney and client outside of the Act.

The court noted that, after the promulgation of the Act, the Supreme Court of Appeal in *PricewaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) held that: 'Any contingency fee agreement ... which is not covered by the Act is therefore illegal.'

Fabricius J also referred to a number of decisions in the North and South Gauteng High Courts that arrived at the same conclusion.

In the present matter, the court held: 'It is abundantly clear from all authorities that the common law prohibited contingency fee agreements between lawyers and their clients,' and added that the Act is 'exhaustive' on the subject. Any contingency fees agreement not in compliance with the Act is thus invalid.

Further, the court held that RBP 'must have been aware' that its agreement with De la Guerre was invalid and that concluding such an agreement 'could, in the proper context, amount to unprofessional conduct'.

The court awarded a punitive costs order against RBP on a scale as between attorney and own client.

## The SAAPIL decision

The court in the SAAPIL application dealt with two main arguments advanced by SAAPIL, which were that the Act did not override the common law and that legal practitioners retained a common law right, outside of the Act, to enter into contingency fees agreements, provided they observed their ethical duties, alternatively that the Act is unconstitutional on the grounds that it discriminates against lawyers and their clients in breach of s 9 of the Constitution.

The application was opposed by the respondent, the Minister of Justice and Constitutional Development, and the RAF, which was granted leave to intervene in the proceedings.

The court dismissed the constitutional challenge to the Act with costs, holding it was without merit.

The court traced the history of the Act to the South African Law Reform Commission report 'Speculative and Contingency Fees' (Project 93) (1996), which had recommended the legalisation on contingency fees agreements, subject to the prescribed safeguards contained in the Act.

It noted that 'the meaning, effect and constitutionality of the Act have generated much controversy and debate in the legal profession since its enactment.'

The full Bench, per Kathree-Setiloane J (with Mlambo JP and Fabricius J), held that the law commission had highlighted the conflict of interests introduced by a contingency fees agreement – the legal practitioner owed a responsibility to the client and a duty to the court, and the practitioner enjoyed a financial interest in the outcome of the matter. These conflicts have to be managed very carefully, hence the safeguards contained in the Act.

The court noted that the effect of the Act is twofold:

- It permits contingency fees agreements.
- It makes all contingency fees agreements subject to certain limitations and requirements in the Act.

In doing so, the court held, 'the Act leaves no room for lawful contingency fees agreements which do not comply with [these] limitations and requirements'.

Further, the court held that SAAPIL's 'proposition that parliament has no right to put in place special statutory protections to prevent abuse by lawyers acting on contingency', was unsustainable.

The court found that the limit prescribed by the Act on attorneys' fees – to no more than 100% of the normal fees (ie, double the normal fee) or, in claims sounding in money, a maximum of 25% of the total amount awarded – was both permissible and justifiable.

Further, the constraints in the Act were required to protect clients, and were described by the court as, 'plainly laudable and important measures which outweigh the marginal limitation of rights contended for by SAAPIL'.

## Conclusion

Much-needed clarity on the permissibility of common law contingency fees agreements has now been achieved and the decisions in these two matters should settle once and for all the difference of opinion that caused much uncertainty.

George van Niekerk BA LLB (Stell) is an attorney at ENS in Cape Town.



- At the time of going to print, notice of leave to appeal to the Supreme Court of Appeal in both the *De la Guerre* and SAAPIL decisions was filed by RBP and SAAPIL respectively. In both matters the respective appellant claims that the court erred in fact, alternatively law, alternatively in fact and law in a number of respects – *Editor*.
- See 2012 (Oct) DR 48 and 2012 (Dec) DR 44.

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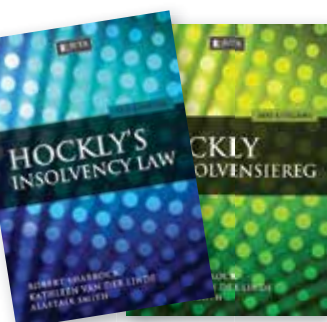
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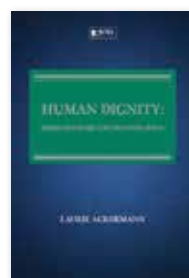
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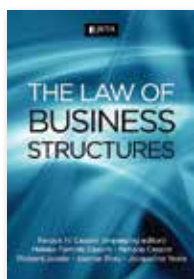
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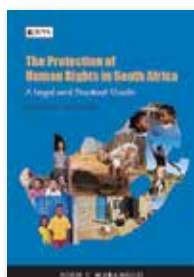
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# THE LAW REPORTS

February 2013 (1) The South African Law Reports (pp 323 – 646);  
[2013] 1 The All South African Law Reports January no 1  
(pp 1 – 126) and no 2 (pp 127 – 251)

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  
KZP: KwaZulu-Natal High Court, Pietermaritzburg  
SCA: Supreme Court of Appeal

## Banking

**Conducting the business of a bank:** Section 11(1) of the Banks Act 94 of 1990 (the Act) provides that no person shall conduct the business of a bank unless such a person is a public company and is registered in terms of the Act. In *Corpco 2290 CC t/a U-Care and Another v Registrar of Banks* [2013] 1 All SA 127 (SCA) the respondent, the Registrar of Banks, was granted an interdict prohibiting the first appellant, Corpco, from conducting the business of a bank contrary to s 11(1) of the Act.

In the court *a quo* Booyens AJ held that the activities of the first appellant, a close corporation (ie, not a public company), which was not registered as a bank in terms of the Act, amounted to conducting the business of a bank in that the latter was collecting funds from members of the public that it deposited into its account with a commercial bank and thereafter paid 60% of the money back to the depositor/contributor as commissions and/or bonuses; 20% to the second appellant, the management company, as 'administrative expenses'; and the remaining 20% as donations to charity. Because of the donation of 20% of the money to charity, the first appellant contended that it was not conducting the business of a bank but was instead conducting a

charity-funding business that provided a service to both donors (participants in the scheme) and charities. However, no information was forthcoming on the details of the alleged charities, the amounts paid to them and the time of such payment. An appeal to the SCA was dismissed with costs.

Southwood AJA (Mpati P, Leach, Lewis and Malan JJA concurring) held that s 11(1) clearly prohibited any person other than a public company registered as a bank in terms of the Act, from conducting the business of a bank, which business included the 'business practice', as defined in GN 498 published by the respondent in GG17895/27-3-1997, to include the acceptance or obtaining of money, directly or indirectly, from members of the public, as a regular feature of a business practice, with the prospect of such members receiving payments or other money-related benefits, directly or indirectly, on or after the introduction of other members of the public to the business practice. Moreover, s 81 of the Act provided that the respondent could take action if he had reason to suspect that any person who was not registered as a bank in terms of the Act was likely to conduct the business of a bank in contravention of the provisions of s 11(1) or that a contravention was likely to be continued or repeated. The instant case was therefore one of 'clear and straightforward' prohibition of defined conduct, as well as clear and straightforward

provisions authorising the respondent's action.

## Civil procedure

### Discretion to allow a claim to stand notwithstanding a special plea of *res judicata*:

Although there were four plaintiffs and defendants in *NSC Carriers & Forwarding CC and Others v Hyprop Investments Ltd and Others* 2013 (1) SA 340 (GSJ) the main parties were NSC, the plaintiff, and Hyprop, the defendant. In 2008 Hyprop, as the lessor, entered into two identical lease agreements with NSC, as the lessee, for commercial premises in a shopping centre. NSC took occupation but shortly thereafter ceased to pay rent and related charges because of certain allegedly fraudulent misrepresentations by the lessor. As a result, Hyprop cancelled the leases and sought a High Court order confirming cancellation and evicting NSC. The application was contested on the basis of the alleged fraudulent misrepresentations.

Mokgoathleng J held that NSC had elected to abide by the leases fully aware of the shortcomings of the shopping centre; thus ruling out any fraudulent misrepresentations, as alleged. Leave to appeal was denied by both the court *a quo* and the SCA.

In the present action NSC claimed damages from Hyprop for alleged fraudulent misrepresentations, the action being delictual and not contractual. The defendant raised four special pleas to the claim, including non-joinder of other parties and a stay of proceedings. For present purposes, the dis-

cussion is confined to the special plea of *res judicata*, a variation of which is issue estoppel. It was the defendant's case that the issue of fraudulent misrepresentation had already been adjudicated between the parties in the eviction application, where it was resolved in its favour.

Sutherland J held that the issue of fraudulent misrepresentation had indeed been decided by Mokgoathleng J in the eviction application, as the very complaints put up in that application were about the same subject matter relied on in the instant action, which was incontrovertible. What remained, however, was whether or not it was appropriate in the exercise of a judicial discretion, which the court had, to order that the claim be allowed to stand or the special plea be upheld. The prospect of unsuiting a party in application proceedings was distinct from doing so where there was a trial. There was a risk that, in a trial where discovery and cross-examination could conceivably yield, a different outcome could result.

A substantial factor for not unsuiting a litigant on the basis of issue estoppel in the instant case was the fact that the second case was going to be a trial rather than application proceedings and therefore had the potential to produce a different result. The court noted that it should never be overlooked that a finding in application proceedings was always fundamentally vulnerable for that reason. Thus it was open to the court to exercise its discretion not

to dismiss the claim on the ground of *res judicata*. Finding these considerations compelling, the court dismissed the special plea of *res judicata* but nevertheless emphasised that it was not thereby laying down a principle that whenever there was a trial that was to follow an application, regardless of other considerations, a *res judicata* plea would always be trumped. The costs were ordered to be costs in the cause at the trial.

## Companies

### Effect of cancellation of deregistration of a company:

In *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ) the first respondent company, Awake Solutions, was deregistered in March 2008 by the Registrar of Companies in terms of the Companies Act 61 of 1973 (the 1973 Act) for failure to file annual financial returns. Unaware of the deregistration, the company continued business as usual and was also at the receiving end of certain steps, including being placed in provisional liquidation in April 2008, as a result of which provisional liquidators were appointed. This order was set aside by Makume J in application proceedings in October 2012 and the company was discharged from liquidation. In March 2011 the company instituted proceedings to recover certain amounts from the applicant, Fintech, and another company in respect of which negotiations were held, the claims settled and payment was made by Fintech to the company. In August 2011 the company filed notice to amend the prayers sought in the application proceedings to amend the amount claimed. The amendment was opposed by Fintech but Maluleke J granted judgment with costs in favour of the company. When it became known that the company had been deregistered, its sole shareholder and director, Walker, applied for its reinstatement in terms of the Companies Act 71 of 2008 (the 2008 Act).

The Companies and Intellectual Property Commission (the commission) 'cancelled' deregistration of the company in April 2012.

In the present application Fintech sought an order nullifying, alternatively setting aside, the orders of Makume J and Maluleke J and declaring that all the activities by and against the company during its deregistration period should be nullified and payment made by it to the company during that time be returned as the company was, by virtue of deregistration, not a legal person but a non-existing entity.

The application was dismissed with costs. Van Oosten J granted an order declaring that all acts done by or against the company from the date of its deregistration until the date of its reinstatement were valid and of full force and effect. It was held that there was a difference between 'reinstatement of registration' by the commission, which could be done in terms of s 82(4) of the 2008 Act read with reg 40(6) of the Companies Regulations, 2011 and 'cancellation of deregistration', which took place in the instant case. The difference between the two concepts was that cancellation of the process meant an elimination of the entire process, including the initial deregistration, as if it had never occurred, whereas reinstatement implied putting the company back in its position prior to deregistration. That had the effect that, by cancellation of deregistration, the company at all times remained a corporate entity. Unlike the 1973 Act, which expressly provided for retrospectivity on reinstatement of registration of the company, the 2008 Act did not do so. However, there was no reason why the court should not be able to exercise its inherent jurisdiction in view of the absence of enabling statutory provisions under the 2008 Act, on application or otherwise, to validate anything done by or against the affected company between deregistration and reinstatement and to make such order it considered appropriate.

### Furnishing copy of winding-up application to SARS:

Section 346(4A)(a)(iii) and (b) of the repealed Companies Act 61 of 1973 (the Act) provided, among others, that when an application was presented to court for the winding-up of a company, the applicant had to furnish a copy of the

application to the South African Revenue Service (SARS), accompanied by an affidavit deposed to by the person who furnished a copy of the application to SARS. In *Corporate Money Managers (Pty) Ltd and Others v Panamo Properties 49 (Pty) Ltd* 2013 (1) SA 522 (GNP) the respondent, Panamo Properties, was placed under voluntary winding-up. Thereafter Murphy J granted an order placing the respondent under provisional compulsory winding-up. On the return day of the *rule nisi* the applicant creditor, Corporate Money Managers, sought an order setting aside the voluntary winding-up order and another placing the company under final winding-up. The application was dismissed with costs.

Van Loggerenberg AJ held that the furnishing of a copy of an application for the winding-up of a company to SARS at the time when the application was lodged with the registrar of the court, and not when the application was heard, was peremptory. Proof of such furnishing by means of an affidavit was also peremptory. Since that had not been done in the instant case, the voluntary winding-up of the company could not be set aside and the provisional winding-up order could not be made final.

**Reasonable prospect of rescue required:** In *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) a creditor, Propspec Investments, applied for an order placing the first respondent, Pacific Coast (the company), under supervision and commencing rescue proceedings. The application was opposed by one of the creditors. The company in question owed its creditors just under R 94 million, while it had some R 40 000 in its savings accounts. It also owned land that had been developed into residential units to be sold, after which it would remain with nothing as the proceeds of such sales were to be used to pay its debts. As a result, after completion of the business rescue plan, the company would remain without funds or assets. Moreover, it had no employees.

Van der Merwe J held that, since the applicant's case was that the company's property was going to be sold, either as a whole or by individual erven, there was no practical prospect of the company continuing to exist on a solvent basis. Further, the applicant could not show a reasonable prospect of a better return than would be the case in liquidation. Accordingly, the application was dismissed with costs.

The court held that the phrase 'reasonable prospect' for rescuing the company, as used in s 131(4)(a) of the Companies Act 71 of 2008 (the Act) indicated something less than a 'reasonable probability', as was required for placing a company under judicial management in terms of s 427(1) of the repealed Companies Act 61 of 1973. Judicial management under the repealed Act failed mainly because of the high threshold of proof required. A prospect in the present context meant an expectation, which could come true in some instances or not materialise in others. Therefore, a prospect signified a possibility. A possibility was reasonable if it rested on a ground that was objectively ascertainable. There was thus no doubt that in order to succeed in an application for business rescue, the applicant had to place before the court a factual foundation for the existence of a reasonable prospect that the desired object could be achieved. Vague averments and mere speculative suggestions would not suffice in this regard.

## Delict

### Unlawful interference with contractual relationship:

In *Makulu Plastics & Packaging CC v Born Free Investments 128 (Pty) Ltd and Others* 2013 (1) SA 377 (GSJ) the appellant, Makulu Plastics, had an oral and an unsigned written contract of lease with the first respondent, Born Free, in terms of which it leased the latter's premises. The lease was concluded after the previous lessee went into liquidation. The former lessee had a consumer contract with the third respondent municipality, Ekurhuleni Metropolitan Municipality, for the supply of electricity, water, sanitary and refuse removal services. After

a commercial dispute arose between the appellant and the first respondent, the latter requested the municipality to stop the supply of services to the leased property and to never enter into a consumer contract with anybody in illegal occupation of the property. The first respondent did not mention that it had a contract of lease with the appellant, which was in occupation of the property.

The municipality, having terminated the supply of services to the property, refused to enter into a consumer contract with the appellant and therefore did not resume the supply of the services. As a result, the appellant approached the High Court for a number of orders, including interdicting and restraining the first respondent from –

- preventing it from entering into a consumer agreement with the municipality for the supply of the services;
- requesting or encouraging the municipality to terminate the supply of services; and
- hindering or obstructing the appellant and its employees' access to and use or enjoyment of the property.

It also sought an order directing the municipality to conclude a consumer contract with it for the supply of services.

A single judge of the High Court dismissed the application, holding that the relief sought was not competent as there was nothing that the first respondent, as a lessor of the property, could do to prevent the municipality from entering into a consumer contract if it chose to do so. An appeal to the full Bench was upheld with costs.

Lamont J (Tsoka and Francis JJ concurring) held that the act of the first respondent in notifying the municipality that the leased property was occupied by a person with whom it had no contractual relationship, if such contractual relationship indeed existed, would constitute an interference by the first respondent in the contractual relationship between the appellant and the municipality. The fact that no contract existed between the appellant and the municipality in the instant case did not

change the position. Such contract would inevitably have been concluded but for the interference. In terms of the lease agreement, the first respondent was, by necessary implication, at the very least to have cooperated with the appellant, which sought the services agreement with the municipality. It was apparent that the municipality, in consequence of the interference by the first respondent, declined to conclude a contract with the appellant. The conduct of the first respondent in performing acts designed to frustrate the free commercial activity of the appellant constituted a wrongful act.

**Note:** Another reported case dealing with unlawful interference with the contractual relationship of another person is *Uniplate Group (Pty) Ltd v New Number Plate Requisites CC* [2013] 1 All SA 231 (GSJ).

## Estate agents

**Contract concluded by estate agent without Fidelity Fund certificate null and void *ab initio*:** In *Enelon CC t/a Realnet Wilgers & Surrounds v Nortje and Another* 2013 (1) SA 525 (GNP) the applicant, Enelon, was a close corporation registered as an estate agent. Its sole member, Schutte, was also registered as an estate agent. In 2010 the applicant concluded a contract of employment with the first respondent, Nortje, and the second respondent, both being employed as estate agents. Shortly after their employment, the respondents entered into a restraint of trade agreement in terms of which they undertook not to compete with the applicant in the estate agency industry within a radius of 5 km for a period of 12 months after termination of their employment. A year later the respondents left the employ of the applicant and joined its rival. As a result, the applicant sought a court order restraining the respondents from acting in breach of the restraint of trade agreement.

Legodi J dismissed the application with costs for two reasons. First, at the time of concluding the restraint of trade agreement, and for the rest of that year, none of the

parties – being the applicant, its sole member, as well as the respondents – had a Fidelity Fund certificate as required by s 26 of the Estate Agency Affairs Act 112 of 1976 (the Act). The restraint of trade agreement was so tainted that it was null and void from the start. One would expect the applicant to have waited for the issue of the Fidelity Fund certificate to be resolved before entering into the restraint of trade agreement or to ensure that it was obtained immediately thereafter, not only for itself but also for the respondents. Secondly, the application also fell to be dismissed on the non-joinder issue in that the respondents' new employer, who had a material interest in the proceedings, was not cited as a party.

## Income tax

**Ringfencing of capital expenditure in mining operations:** The deduction of mining capital expenditure is governed by s 36(7E) and (7F) of the Income Tax Act 58 of 1962 (the Act). Very briefly, s 36(7E) deals with overall ringfencing and provides that the aggregate of the amounts of capital expenditure (capex) in respect of any year of assessment in relation to any mine or mines shall not exceed the taxable income derived by the taxpayer from mining. Any amount of such excess shall be carried forward to the next succeeding year of assessment in respect of the mine or mines to which such capital expenditure relates.

Unlike s 36(7E), which deals with all the mines operated by the taxpayer, s 36(7F) deals with a specific mine and provides that the aggregate of the amounts of capital expenditure in respect of any year of assessment in relation to any one mine shall not, unless the Minister of Finance directs otherwise, exceed the taxable income derived by the taxpayer from mining on that mine. Any amount in excess of such taxable income shall be carried forward to the next succeeding year of assessment in respect of that mine.

The application of these sections arose in *Armgold/Harmony Freegold Joint Ven-*

*ture (Pty) Ltd v Commissioner, South African Revenue Service* 2013 (1) SA 353 (SCA). The appellant, Armgold, owned and operated three gold mines, being Freegold, Joel and St Helena. For the tax years 2003 and 2004 Freegold and Joel had taxable income while St Helena made a loss. For those tax years the respondent, the South African Revenue Service (SARS), set off the losses of St Helena against the taxable income of the Freegold and Joel mines before taking into account the mining capital expenditure incurred in respect of those mines. The effect of such set-off was to reduce the amount of capital expenditure that could be redeemed in respect of the Freegold and Joel mines. The appellant's objection was rejected by the respondent and an appeal to the Tax Court in Johannesburg was dismissed. A further appeal to the SCA was dismissed with costs, albeit for different reasons.

Leach JA (Navsa, Cloete, Heher and Pillay JJA concurring) held that the mining activities conducted by the appellant at each of its three mines could not be said to be a separate 'trade' from the trade conducted at other mines. This was so as the definition of 'trade' in s 1 of the Act was very wide and included 'every profession, trade, business, employment, calling, occupation or venture'. A company that carried on mining operations certainly carried on the 'trade' of mining and it would be 'both fanciful and artificial' to regard the mining operations of the appellant at the St Helena mine as being different trade from the operations it conducted at its other mines. Had the legislature intended each mine's operations to be regarded as a separate trade, it could easily have said so. Not only did it not do so, but the provisions of s 36(7E), in which reference is made to the aggregate of the amounts of capital expenditure in relation to the mine or mines, clearly exclude different mining operations being regarded as different trades. The amount to be determined under s 36(7E) was the taxable income to the appellant's mining opera-



tions from all its mines, and in determining that amount the gross incomes and the operating expenses of all three mines had to be taken into account. The taxable income of a taxpayer is, after all, determined by deducting operating expenses from gross income, and St Helena's loss could not, therefore, be left out of reckoning. Accordingly, the appellant's argument based on the necessity to regard its operations at its different mines as different trades had to fail.

Nevertheless, the court noted that much of the appellant's criticism of SARS' method of assessment had merit. Section 36(7F) envisaged the capex deduction of each mine to be determined by having regard to the taxable income derived from that mine, an objective that would be defeated if the operating expenses incurred at one mine were to be taken into account in respect of another. Section 36(7C) provides for the amount to be deducted under s 15(a) to be the capital expenditure on a particular mine, determined by the income derived from working that mine. 'Violence' would be done to that principle if the operating expenses of one mine were set off against the income of another, which was impermissible.

## Local government

**Duty of municipality to comply with court order:** In *Mchunu and Others v Executive Mayor, eThekweni Municipality and Others* 2013 (1) SA 555 (KZD) the applicants, Mchunu and others, were residents of an informal settlement in the area of jurisdiction of the eThekweni Municipality. The Member of the Executive Council for Transport in KwaZulu-Natal obtained a High Court order for their eviction from the informal settlement. The court order provided that the applicants were to remain in a transit camp for a period not exceeding 12 months, after which they were to be relocated to a low-cost housing project.

However, some 22 months after the granting of the court order they were still living in unsafe and unhygienic conditions in the transit camp as

a result of misallocation of housing in the low-cost housing project. The applicants therefore approached the High Court for an order declaring that functionaries of the municipality, being the executive mayor, municipal manager and director of housing, were constitutionally and statutorily obliged to take all necessary steps to ensure that the municipality complied with the terms of the court order within a specified time, failing which, an application would be made to hold them in contempt of court. The application was granted with costs.

Hollis AJ held that all court orders, whether correctly or incorrectly granted, had to be obeyed until they were properly set aside. In terms of s 165(5) of the Constitution, a court order bound a municipality as an organ of state to adhere to it. The state had to lead by example in its conduct. In the instant case, while it was correct that the officials of the municipality had failed to comply with the terms of the court order, it could not however be said that they ignored the court order wilfully, even though their effort to comply with the order had fallen far short of what should have been done.

## Spoliation order

**Impossibility to order restoration of possession:** In *Schubert Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) the first respondent, the City of Tshwane Metropolitan Municipality, was the owner of four blocks of a residential complex known as Schubert Park. Complaining about the living conditions in the complex and the termination of water and electricity supply, the residents embarked on a violent protest, which included burning tyres, starting fires and throwing stones and other objects at vehicles and the police. As a result, the municipality secured the services of the police to remove the residents from the complex and prevent their re-entry.

The residents applied for an urgent order authorising their return to the complex, as well as restoration of the wa-

ter and electricity supply. The application was dismissed as the court found that, because of the prevailing violent conditions, it was not safe to order the residents to return to the complex. Nevertheless, the court ordered the parties to enter into negotiations in order to solve the problem.

The order also provided that any resident of the complex who accepted the tender made by the municipality would have that tender serve as a court order.

Leave to appeal against the order was denied by both the High Court and the SCA. As a result, the residents approached the CC for leave to appeal.

Such leave was granted, the appeal was upheld with costs and the High Court orders set aside. The court declared that the dismissal of the residents' application by the High Court did not have the effect of evicting them. They were therefore entitled to return to the complex as soon as reasonably possible and, further, that the parties were to meaningfully engage to give effect to the declaratory order.

Delivering a unanimous decision of the court, Froneman J held that the spoliation order did not determine the lawfulness of competing claims to the relevant object or property. For this reason, there were only a limited number of defences available to a spoliation claim under the common law, impossibility of restoration being one of them. It was conducive to clarity to retain the 'possessory focus' of the remedy of spoliation and keep it from constitutional 'appropriate relief' contained in s 38 of the Constitution. That was because the order made in relation to factual possession in spoliation proceedings did not in itself directly determine constitutional rights, but merely set the scene for a possible return to the status quo in order for the subsequent determination of such rights in relation to the property. Therefore, spoliation proceedings – whether they resulted in restoration or not – should not serve as the judicial foundation for permanent dispossession, namely eviction in terms of s 26(3) of the Constitution.

Neither the dismissal order granted by the High Court nor the subsequent tender order could serve as justification for the eviction of the residents from their homes for the purposes of s 26(3) of the Constitution. Where urgency dictated that immediate restoration should not be ordered, it had to be made clear, preferably by a declaratory order to that effect, that the refusal to order reoccupation did not purport to lay the foundation for a lawful eviction under s 26(3) of the Constitution. The order had to be temporary and subject to revision by the court. In the instant case the situation was such that the High Court could not order immediate restoration. However, as a matter of law, it could and should have issued a declaratory order indicating the residents' eventual entitlement to restoration.

## Other cases

Apart from the cases and material referred to above, the material under review also contained cases dealing with the admission policy of a public school; allowance and benefits for employees; amendment of parenting plan; appointment of judges; calculation of permanent pension disability benefits; concurrence of remedies in delict and contract; consumer credit agreement; eviction of unlawful occupiers; external company not being South African resident; filing of further affidavits at discretion of court; imposition of municipal rates on residential and non-residential properties; *mora debitoris*; power of Judge President to make rules relating to placing applications on the roll; power of licensee to enter upon land, construct and maintain telephone base mast; proceedings on behalf of a company in liquidation; property held in statutory trust being state property; prosecution of a child under 16 years of age; refusal to order property executable; transformation of fishing industry; subdivision of agricultural land; special notarial bond over immovable property; use of official languages by government; and winding-up of a company on just and equitable ground. □



# NEW LEGISLATION

Legislation published during the period 22 January – 15 February 2013.

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

## BILLS INTRODUCED

Appropriation Bill B1 of 2013.  
Division of Revenue Bill B2 of 2013.

## PROMULGATION OF ACTS

\* **Financial Markets Act 19 of 2012.**  
*Commencement:* To be proclaimed.  
GN70 GG36121/1-2-2013.  
**Taxation Laws Amendment Act 22 of 2012.** *Commencement:* 1 January 2013 (except insofar as otherwise provided).  
GN71 GG36122/1-2-2013.

## COMMENCEMENT OF ACTS

**Road Accident Fund (Transitional Provisions) Act 15 of 2012.** *Commencement:* 13 February 2013. Proc3 GG36141/8-2-2013.

## SELECTED LIST OF DELEGATED LEGISLATION

**Agricultural Pests Act 36 of 1983**  
Amendment of control measures and regulations. GN R76 and 77 GG36124/8-2-2013.  
**Agricultural Product Standards Act 119 of 1990**  
Regulations relating to the grading, packing and marking of jam, jelly and marmalade intended for sale in the Republic of South Africa. GN81 GG36123/8-2-2013.  
Export standards and requirements of the export of eggs. GN82 GG36123/8-2-2013.  
Regulations regarding the classification, packing and marking of edible ices intended for sale in the Republic of South Africa. GN R78 GG36124/8-2-2013.  
**Basic Conditions of Employment Act 75 of 1997**  
Amendment of sectoral determination 9: Wholesale and retail sector, South Africa. GN R47 GG36094/22-1-2013.  
Amendment of sectoral determination 6: Private security sector, South Africa. GN R61 GG36110/30-1-2013.  
Sectoral determination 13, Farm worker sector, South Africa. GN 65 GG36115/5-2-2013.  
**Civil Aviation Act 13 of 2009**  
Civil Aviation Regulations, 2011. GN90 GG36139/8-2-2013 and GN R91 GG36140/8-2-2013.  
**Consumer Protection Act 68 of 2008**  
National Consumer Commission: South African Automotive Industry Code of Conduct. GenN113 GG36155/15-2-2013.

### Criminal Procedure Act 51 of 1977

Determination of amounts for purposes of certain provisions of the Criminal Procedure Act. GN R62 GG36111/30-1-2013.  
**Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947**

Amended regulations relating to the registration of fertilisers, farm feed, agricultural remedies, stock remedies, sterilising plants and pest control operators, appeals and imports. GN R75 GG36124/8-2-2013.

### Genetically Modified Organisms Act 15 of 1997

Tariffs for services. GN80 GG36123/8-2-2013.

Amendment of regulations. GN R89 GG36124/8-2-2013.

### Magistrates' Courts Act 32 of 1944

Determination of amount for purposes of s 92(1)(b). GN R63 GG36111/30-1-2013.

**Marine Living Resources Act 18 of 1998**  
Regulations for fishing for Elasmobranchs (sharks) in the estuary of the Breede River. GN R105 GG36147/15-2-2013.

### Medicines and Related Substances Act 101 of 1965

Annual adjustment of the single exit price of medicines and scheduled substances for the year 2013. GN R35 GG36087/22-1-2013.

Regulations relating to a transparent pricing system for medicines and scheduled substances. GN R36 GG36087/22-1-2013.  
Regulations relating to a transparent pricing system for medicines and scheduled substances: Publication of the guidelines for pharmacoeconomic submissions. GN R68 GG36118/1-2-2013.

### Merchandise Marks Act 17 of 1941

Final prohibition on the use of a certain emblem and the words 'Tshwane Metropolitan Police Service'. GenN51 GG36102/1-2-2013.

Final prohibition on the use of a certain emblem and the words 'City of Tshwane igniting excellence'. GenN109 GG36146/15-2-2013.

### National Environmental Management: Biodiversity Act 10 of 2004

Biodiversity management plan for the black rhinoceros in South Africa 2011-2020. GN49 GG36096/25-1-2013.

### Plant Improvement Act 53 of 1976

Amendment of regulations relating to application of the Act. GN R54 GG36103/1-2-2013.

Amendment of regulations relating to establishments, varieties, plants and propa-

gating material. GN95 GG36147/15-2-2013.

### Postal Services Act 124 of 1998

Fees and charges for postal services. GenN40 GG36109/29-1-2013.

### Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN6 GG36082/25-1-2013.

Road Accident (Transitional Provisions) Fund Regulations, 2013. GN R92 GG36142/8-2-2013.

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

Amendment of the rules regulating the conduct of the proceedings of the Supreme Court of Appeal of South Africa (attorneys' fees). GN R113 GG36157/15-2-2013.

Amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (sheriffs' tariffs). GN R114 GG36157/15-2-2013.

Magistrates' courts: Amendment of the Rules of Court (sheriffs' tariffs). GN R115 GG36157/15-2-2013.

### Small Claims Courts Act 61 of 1984

Establishment of small claims courts for the areas of Volksrust and Wakkerstroom. GN50 GG36099/25-1-2013.

Establishment of small claims courts for the areas of Thohoyandou and Malamulele. GN51 GG36099/25-1-2013.

Establishment of small claims courts for the areas of Fauresmith and Jagersfontein. GN52 GG36100/25-1-2013.

Establishment of small claims courts for the areas Graaff-Reinet and Aberdeen. GN53 GG36100/25-1-2013.

### Social Service Professions Act 110 of 1978

Regulations relating to the registration of a speciality in probation services. GN R116 GG36159/15-2-2013.

### Tax Administration Act 28 of 2011

Application and cost recovery fees for binding private rulings and binding class rulings. GN102 GG36119/8-2-2013.

Additional considerations in terms of s 80(2) of the Act in respect of which an application for a binding private ruling or a binding class ruling may be rejected. GN103 GG36119/8-2-2012.

## DRAFT LEGISLATION

Draft policy directive on the exportation of ferrous and non-ferrous waste and

scrap metal in terms of the International Trade Administration Act 71 of 2002. GenN33 GG36090/25-1-2013.

Draft export control guidelines on the exportation of ferrous and non-ferrous metal waste and scrap in terms of the International Trade Administration Act 71 of 2002. GenN34 GG36091/25-1-2013.

Draft model tender and contract documents for public transport services in terms of the National Land Transport Act 5 of 2009. GenN37 GG36098/25-1-2013.

Proposed regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001. GenN39 GG36107/25-1-2013.

Draft regulations in terms of the Financial Management of Parliament Act 10 of 2009. GN56 GG36130/4-2-2013.

Road Accident Benefit Scheme Bill, 2013, for comments. GenN98 GG36138/8-2-2013.

Draft Infrastructure Development Bill for comments. GenN99 GG36143/8-2-2013.

Proposed guideline tariffs for medical practitioners and dentists. BN13 GG36158/15-2-2013.

Proposed amendments to the 2007 National Framework for Air Quality Management in the Republic of South Africa in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN115 GG36161/15-2-2013.

## Selected aspects of the Financial Markets Act

The Financial Markets Act was published in GN70 GG36121/1-2-2013.

### Commencement date

To be proclaimed.

The Act provides for –

- regulation of financial markets;
- licensing and regulation of exchanges, central securities depositories, clearing houses and trade repositories;
- regulation and control of securities trading, clearing and settlement, and the custody and administration of securities;
- prohibition of insider trading, and other market abuses;
- approval of nominees;
- codes of conduct; and
- replacement of the Securities Services Act 36 of 2004.

### Objects of the Act (s 2)

The Act, among others, aims to –

- ensure fair, efficient and transparent financial markets;
- increase confidence in the South African financial markets;
- promote the protection of regulated persons, clients and investors;
- reduce systemic risk; and
- promote the international and domestic competitiveness of South African financial markets.

### Application of the Act and rules (s 3)

- Sections 100 – 103 do not apply to the South African Reserve Bank or a bank.
- Any law or the common law relating to gambling or wagering does not apply to any act regulated by or under this Act.

In the event of an inconsistency, the following rules apply:

- If there is an inconsistency between any provision of this Act and any other legislation (other than the Financial Intelligence Centre Act 38 of 2001), this Act prevails. However, the provisions of this Act and the rules relating to insolvency proceedings and settlement effectiveness of entries in a central securities account and securities account, prevail over any other law, legislation, agreement or founding document of any person, and are binding on any person.
- Despite any other law, if other national legislation confers a power on, or imposes a duty on, an organ of state in respect of a matter regulated under this Act, that power or duty must be exercised or performed in consultation with the Registrar of Securities Services, and any decision taken in accordance with that power or duty must be taken with the approval of the registrar.
- Despite the provisions of the Consumer Protection Act 68 of 2008, that Act does not apply to any activities of a regulated person, or goods or services provided by a regulated person, that are subject to this Act.

### Prohibitions (s 4)

A person may not –

- act as an authorised user unless authorised by a licensed exchange in terms of the exchange rules;
- carry on the business of buying or selling listed securities unless that person complies with s 24;

- provide securities services in respect of unlisted securities in contravention of conditions imposed or prescribed under s 6(7);
- act as a participant unless authorised as a participant by a licensed central securities depository in terms of s 31;
- act as a clearing member unless authorised by a licensed exchange or a licensed independent clearing house, as the case may be;
- act as a nominee unless that person is approved under s 76;
- perform the functions of, or operate as a, trade repository unless that person is licensed under s 56; or
- in any manner, directly or indirectly, advertise or canvass for carrying on the business of an authorised user, participant or clearing member, unless that person is an authorised user, participant or clearing member, or an officer or employee of an authorised user, participant or clearing member, who is so permitted in terms of exchange rules, depository rules or clearing house rules, as the case may be.

A person who is not licensed as an exchange (ss 7 – 9), a central securities depository (ss 27 – 29), a trade repository (ss 54 – 56) or a clearing house (ss 47 – 49); a participant; an authorised user; a clearing member; an approved nominee (s 76); or an issuer of listed securities, may not fulfil that function or behave in a manner or use a name or description that suggests, signifies or implies that there is some connection between that person and an exchange, a central securities depository, trade repository, clearing house, participant, authorised user or clearing member, as the case may be, where in fact no such connection exists.

Further, an authorised user, participant or clearing member may only provide the securities services for which it is authorised by a licensed exchange in terms of the exchange rules, a licensed central securities depository in terms of the depository rules, or by a licensed exchange or licensed independent clearing house, as the case may be, in terms of the exchange rules or clearing house rules, as the case may be.

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# Employment law update



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## Section 197 – appointment of new service provider

In *Franmann Services (Pty) Ltd v Simba (Pty) Ltd and Another* [2012] 12 BLLR 1293 (LC) the applicant, Franmann, sought an order declaring that on the termination of an agreement between it and the first respondent, Simba, the employment contracts of Franmann's employees engaged in performing services to Simba would transfer to the new contractor, the second respondent, Capital Outsourcing.

Franmann and Capital Outsourcing were labour brokers. Franmann had provided labour to Simba since 2000 and this contract terminated on 31 August 2012. Simba subsequently appointed Capital Outsourcing to provide it with temporary employment services.

The Labour Court, per Van Niekerk J, held that whether there has been a transfer of a business as a going concern for purposes of s 197 of the Labour Relations Act 66 of 1995 is a matter of fact to be determined objectively. This requires an inquiry into –

- the existence of a transfer by one employer to another;
- whether there was a transfer of a business (ie, an economic entity capable of being transferred); and
- whether the business is transferred as a going concern (ie, does the entity retain its identity after the transfer?).

If so, s 197 is triggered and the new contractor is automatically substituted by operation of law as the employer of those of the transferor's employees engaged in the business on the date of the transfer.

The court noted that there was no reason in principle why s 197 should not apply to outsourcing arrangements. Further, whether the arrangement is one

of an initial outsourcing from a client to a service provider (a first generation transfer), from one service provider to another (second and further generation transfers), or a resumption by the client of a service previously outsourced (in-sourcing) is not significant; the same test must be applied to each transaction, which must be considered in view of its unique facts and circumstances.

With reference to the decision in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* [2012] 3 BLLR 211 (CC), the court held: '[I]t must be emphasised that what is capable of being transferred is the business that supplies the service and not the service itself. Were it to be otherwise, a termination of a service contract by one party and its subsequent appointment of another service provider would constitute a transfer within the contemplation of the section. ... [T]his is not what the section was designed to achieve ...'

Considering whether s 197 applied in the present matter, the court considered the following factors:

- Franmann had decided to cease operating as a labour broker.
- Capital Outsourcing would be engaged to render similar services.
- Capital Outsourcing was not 'taking over' Franmann's business – Franmann's business was closing shop.
- The fact that Capital Outsourcing intended to take on some of Franmann's employees to perform the same tasks did not in itself trigger s 197.
- Capital Outsourcing would not acquire or take over the use of any of Franmann's assets or use any of Franmann's processes. Capital Outsourcing would furthermore not acquire any right to use any of Simba's assets.

In the absence of any assets (or the use thereof) being transferred, the court

held that s 197 was not triggered by the cancellation of the Franmann contract and the appointment of Capital Outsourcing, and that there was no transfer of a business as a going concern. The service obtained through Capital Outsourcing was therefore not the Franmann service in different hands, but a new service.

The application was dismissed with costs.

In light of this decision, practitioners should be aware that not every cancellation of a service contract and appointment of a new service provider will trigger the application of s 197. Each case must be considered carefully and the various tests (ie, whether there is a transfer of a business as a going concern) must be applied properly in order to determine whether there is, in fact, an economic entity retaining its identity in different hands after the transfer.

## Retrenchment following a strike

In *Food and Allied Workers Union and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* [2012] 12 BLLR 1222 (LAC) the Labour Appeal Court (LAC) considered the fairness of selecting employees for retrenchment on the basis that they had committed acts of misconduct during a protected strike.

A particularly violent protected national strike commenced on 5 March 2007 following a failure of wage negotiations with the first applicant, the Food and Allied Workers Union (FAWU). Some of the employees belonging to FAWU chose not to participate in the strike and continued working. There were also some non-unionised employees and temporary staff who continued to render services at the respondent, Premier Foods, during the strike.

Serious acts of violence, harassment and intimidation took place during the strike. The respondent attempted to identify employees who had committed acts of serious misconduct and took statements from non-strikers and family members to determine the identity of the perpetrators. Criminal charges were laid with the police, but the police were unable to provide much assistance and the crimes went unpunished.

When the strike eventually ended, the respondent attempted to take disciplinary action against the perpetrators but there was insufficient evidence as potential witnesses were too afraid to testify and a key witness had disappeared. The respondent decided to abandon the process of holding disciplinary inquiries and instead embarked on a retrench-

ment exercise. The Commission for Conciliation, Mediation and Arbitration (CCMA) facilitated a consultation process and on 1 October 2007 certain employees were given notice of retrenchment with effect from 31 October 2007. FAWU then launched an application in the Labour Court alleging that the dismissals were substantively and procedurally unfair.

The Labour Court found that the dismissals were not related to financial constraints but were rather on account of misconduct. The court observed that there may be situations where an employer can rely on s 189 of the Labour Relations Act 66 of 1995 where misconduct triggered the operational rationale to retrench, but this was not such a case. Here, s 189 was simply relied on since the respondent was unable to prove the charges against the employees. The dismissal of the 31 employees

was accordingly regarded as substantively and procedurally unfair and they were awarded compensation equal to 12 months' salary.

The appellants appealed, contending that the employees should have been reinstated. The respondent cross-appealed against the finding that the dismissals were unfair on a number of grounds.

The LAC assumed that it may be permissible to retrench employees for misconduct and that the selection of strikers who committed acts of violence and intimidation may constitute fair and objective selection criteria.

In light of these assumptions, the LAC considered whether the respondent had applied fair and objective selection criteria in determining the employees to be retrenched.

The LAC found that, had the respondent presented evidence in the form of

written affidavits or testimonies under oath that the appellants had committed the acts of misconduct, which were accepted by the court, the respondent would have discharged this onus. However, the respondent had relied on hearsay evidence to prove that the employees had committed the acts of misconduct. The respondent therefore failed to prove that the selection criterion was fairly and objectively applied and the cross-appeal was dismissed.

In terms of the appeal, the LAC further found that there was no evidence that the employment relationship had been destroyed as there was no evidence linking the acts of misconduct to the appellants. Reinstatement, as the preferred remedy for dismissal, was accordingly ordered, with retrospective effect to the date of dismissal.



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## Does s 197 apply to franchise agreements?

*PE Pack 4100CC v Sanders and Others* (LAC) (unreported case no PA 08/10, 22-1-2013) (Davis JA)

Does s 197 of the Labour Relations Act 66 of 1995 (LRA), dealing with a transfer of a business, apply when a franchisor terminates its franchise agreement with one entity and replaces it by entering into another franchise agreement with a different entity?

The Labour Court in the present matter held that under such circumstances a transfer of a business, as contemplated in s 197, takes place. As a result, according to the court, employees working for an entity in terms of the old franchise agreement would automatically be transferred to the entity that is

a party to the new franchise agreement with the franchisor.

Section 197(1)(a) of the Act defines 'business' as 'includes the whole or a part of any business, trade, undertaking or service', while 'transfer' is defined as 'the transfer of a business by one employer ("the old employer") to another employer ("the new employer") as a going concern'.

Section 197(2) of the Act provides, *inter alia*, that if a transfer of a business takes place –

'(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

## Background

On 30 April 2010 the second respondent, Cell C Provider Company (Pty) (Cell C), cancelled its franchise agreement

with the third and fourth respondents and entered into a new franchise agreement with the appellant, effective 1 May 2010.

Under both franchise agreements Cell C remained the lessee of the premises and sub-leased same to the entity with whom it had a franchise agreement. It further retained ownership of the fittings and furniture on the premises. All stock belonged to the third and fourth respondents and, as such, was not transferred back to Cell C on cancellation of the franchise agreement.

Having lost the franchise agreement, the third and fourth respondents advised the first respondent, its employee Sanders, of his likely retrenchment.

On the advice of his legal representative, the first respondent took the view that s 197 was triggered once Cell C cancelled its agreement with the third and fourth respondents and entered into a similar agreement, involving the same nature of business conducted on the same premises, with the appellant. Thus, according to the first respondent, his employment should have been automatically transferred to the appellant.

Cell C's view was that it did not buy back the franchise from the third and fourth respondents but merely cancelled it in terms of the contract. Further, as Cell C owned the entire infrastructure – including the premises, furniture, fittings and operating systems – under the agreement with the third and fourth respondents, it could not be argued that there was any transfer of a business from these entities to Cell C.

Arising from these divergent views, the first respondent approached the Labour Court for a declaratory order.

## Labour Court

The Labour Court, per De Swardt AJ, in *Sanders v Cell C Provider Co (Pty) Ltd and Others* (2010) 31 ILJ 2722 (LC) applied the 'snapshot' test in deciding whether or not a transfer of a business had occurred. In this regard, the court held:

'In the instant case, if one were to take a snapshot of the businesses conducted by the third and fourth respondents before 30 April 2010, one would find an outlet selling cell phone contracts, and pay-as-you-go airtime, where customers could bring in their cell phones for repairs or could inquire about a variety of problems [relating to] their use of Cell C's products. A snapshot taken of the businesses on 1 May 2010 or on any day thereafter, would reveal a similar picture. The businesses remained located in exactly the same place, the telephone numbers remained the same, the nature of the business remained the same. The only visible difference would ostensibly have been that there were some new faces behind the counter. Indeed, as [Sanders' attorney] pointed out in argument, customers who had brought their cell phones in for repair prior to 1 May 2010 would collect these after 1 May 2010 once these had been repaired. Potential customers who came into either of the shops prior to 1 May 2010 to inquire about cell phone contracts, could come back on or after 1 May 2010 to conclude the contract.'

On this basis, the court found that in a franchise agreement, the franchisor effectively 'outsources' its business to the franchisee, who runs it on behalf

of the former, and therefore a transfer of business as contemplated by s 197 occurs. While Cell C was free to choose whom to outsource its business to, once it decided to change this entity, s 197 remained operative and, with that, the first respondent's employment was automatically transferred to the appellant.

## Labour Appeal Court

Aggrieved by the outcome in the Labour Court, the appellant approached the Labour Appeal Court (LAC).

Before addressing the merits, the LAC briefly described the roles and duties of parties to a franchise agreement: The franchisor grants the franchisee the right to use either its network, trade name, intellectual property or business model to sell certain products for its own (ie, the franchisee's) behalf. In return for the use of either or all of the above, the franchisee remunerates the franchisor.

Turning to the merits, the LAC held the following:

'In short, appellant had not acquired the business as a going concern from either third or fourth respondent. It cannot be said therefore that components of the business operated by third or fourth respondent had then been passed onto the appellant. What effectively had taken place was that the licence to operate a business on behalf of second respondent had been terminated by the latter, insofar as third and fourth respondents were concerned. This was not the equivalent situation to that of an outsourcing agreement. The franchisor continued to hold the core assets. They remained those of the franchisor, being second respondent,

both before and after the agreement had been concluded. There was thus no transfer of infrastructural assets which would sustain an argument that there was a transfer of a going concern. Once the core assets remained intact, that is, in the ownership of the second respondent as the franchisor, it becomes difficult to see how a transfer of a business pursuant to s 197(1) has taken place.'

The majority upheld the appeal with costs and the order of the court *a quo* was set aside.

In a dissenting judgment, Landman AJA stated the following:

'Was there a transfer from the old employer to the new employer? It could be said that there has been no such transfer because the franchisor does not intend operating the shop. The franchisor intends extending a franchise to a new franchisee. In this case, taking into account the nature and *modus operandi* of a franchise, it may be said that the franchisor intended to seamlessly transfer the operation of the shop to the new franchisee. The old franchisee knows that this will happen and so does the new franchisee. In these circumstances, there has been transfer of an undertaking, albeit an indirect one, from the old franchisee (old employer) to the new franchisee (new employer). The franchisor fulfils the role of a self-interested conduit [between] the old and new franchisees.'

• See 2011 (Jan/Feb) DR 52.

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



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By  
Henk  
Delpont

# Recent articles and research

## ABBREVIATIONS:

**EL:** *Employment Law* (LexisNexis)  
**ILJ:** *Industrial Law Journal* (Juta)  
**ITR:** *Income Tax Reporter* (LexisNexis)  
**JJS:** *Journal for Juridical Science* (Faculty of Law, University of the Free State)  
**SALJ:** *The South African Law Journal* (Juta)  
**SA Merc LJ:** *SA Mercantile Law Journal* (Juta)  
**THRHR:** *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (LexisNexis)

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# Balancing



By  
Thulani  
Nkosi

**T**here has been a general acknowledgment by the courts that the right to liberty is one of the most important rights afforded to a person. This has been the case since long before the 1996 Constitution, which guarantees certain individual rights. As long ago as 1879, De Villiers CJ in *In re Willem Kok and Nathaniel Balie* (1879) 9 Buch 45 pronounced, at 64, that courts were duty bound to protect personal liberty when it was illegally infringed on. This acknowledgment continued in cases such as *Ochse v King William's Town Municipality* 1990 (2) SA 855, in which it was held at 860F – G:

'The right of an individual to personal freedom is a right which has always been jealously guarded by our courts, and our law has always regarded the deprivation of personal liberty as a serious injury. The unlawful arrest and detention of the plaintiff amounted to a serious invasion of this right.'

Similarly, in *Mthimkhulu and Another v Minister of Law and Order* 1993 (3) SA 432 at 440D, it was held: 'The deprivation of personal liberty has consistently been regarded by our courts as a serious injury.'

After the advent of constitutional democracy, courts continued to reaffirm the view that a right to personal liberty was important. In *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ), at 389F, the court stated:

'It has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful.'

In line with this general acknowledgment, the courts have held that interference with a person's liberty can take place only under restrained conditions because in a constitutional democracy personal freedom is highly prized (see *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) at para 12).

With the advent of the Constitution, the already jealously guarded right to personal freedom was afforded constitutional protection in, among others, ss 10 and 12(1). It cannot be dis-

puted that an unlawful interference with an individual's right to personal freedom amounts to a violation of that person's dignity. On this point, Clive Plasket has, in my view correctly, opined that: '[A] person's right to human dignity will be infringed by his or her arrest. That was the case at common law and remains so under the Constitution even if, practically speaking, the right merely serves as a "forensic reinforcement" to a claim based on a breach of the right to freedom' (Clive Plasket 'Controlling the discretion to arrest without a warrant through the Constitution' 11 *South African Journal of Criminal Justice* (1998) at 179).

It therefore follows that, in the current constitutional dispensation, an unlawful interference with a person's right to liberty is not only a common law issue, but is also a constitutional infringement. The effect of constitutionally entrenching rights, in the words of Vivier ADP in *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA) at para 12, is that '[t]he entrenchment of fundamental rights and values in the Bill of Rights ... enhances their protection and affords them a higher status ...'.

## The *actio iniuriarum* for unlawful arrests and detention

It is a well-established principle in South African law that the basis for the protection of individual liberty is the *actio iniuriarum* (see the *Theobald* case, for example). The primary purpose of this action where it is used to vindicate infringed rights to liberty is to give the aggrieved party compensation in the form of money. It stands to reason that where a right is said to be jealously guarded and has been afforded constitutional protection, one would expect that an unlawful infringement of that right is not only frowned on, but proper measures are employed to correct the infringement and ensure that future infringements do not occur.

Once the litigant has alleged an arrest that cannot be justified by the arrestor, the inquiry shifts to the determination of an appropriate quantum of damages to be awarded to the litigant. This is because it is trite law that an arrest is *prima facie* wrongful and unlawful (see *Ralekwa v Minister of Safety*

and Security 2004 (2) SA 342 at 345H – I).

From a procedural and onus point of view, it was held in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E – F that:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

## Determining an appropriate quantum of damages

There is no fixed formula for the determination of the quantum of damages obtainable through the *actio iniuriarum*. Such determination is in the discretion of the judge, who must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair (J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* 2ed (Durban: LexisNexis 2005) at 60). It should follow that where a right is said to be so important that it has been afforded constitutional protection, any quantum of damages would reflect that importance. In *Thandani v Minister of Law and Order* 1991 (1) SA 702 at 707A – B, for example, it was held:

‘In considering quantum, sight must not be lost of the fact that liberty of the individual is one of the fundamental rights of a man in a free society, which should be jealously guarded at all times and there is a duty on courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.’

In my view, awards made by the courts in respect of deprivation of liberty cases reveal a disparity between what courts say about the protection of a person's right to liberty and what they do when that right is infringed. This state of affairs was noted as far back as 1989 in *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 at 847B – C, in which it was noted:

‘When researching the case law on the quantum of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in southern African courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values.’

In awarding insignificant awards, the courts have stated that, when assessing damages for unlawful arrest and detention, courts are not extravagant in compensating the loss as there are many legitimate calls on the public purse to ensure that other rights that are no less important also receive protection (see *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 326E).

Elsewhere, it has been held that it is important to bear in mind that the primary purpose when assessing damages is not to enrich the aggrieved party but to offer him some much-needed solatium for his injured feelings (see *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93C – D).

## What about the Bill of Rights?

Decisions handed down post the interim and final Constitutions have emphasised the importance of the rights of freedom and dignity and how an arrest and subsequent detention constitute a drastic invasion of rights (see *Theobald* at para 389E). Unfortunately, however, the awards are not commensurate with the infringed constitutional rights. In realisation of this, Willis J in *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W), at 499H – I, reasoned as follows:

‘It seems to me that the courts must move, however glacially, to reflect in their awards for damages in cases of this nature

the changes in values which have occurred not only in society as a whole, but which we as judges are expected to apply.’

Willis J's clarion call to make the quantum of damages awarded in unlawful deprivation of liberty cases commensurate with the importance of the right to liberty was cautiously followed in *Olgar v The Minister of Safety and Security* 2008 (JDR 15821E) at para 16, where the judge held that:

‘In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the “horn of the plenty”, at the expense of the defendant.’

In my view, it is one thing to say there is a high premium placed on an individual's right to personal liberty, but it is meaningless if, by the same token, that high premium is not reflected in the award where this right is infringed.

Kriegler J, in my view correctly, held in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 95 that:

‘[T]he harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violations are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise.’

It follows from the premise that the right to liberty is a highly guarded right both at common law and in the Bill of Rights that the quantum of damages where this right has been infringed must, as a matter of course, reflect the importance afforded to it. If the quantum of damages does not reflect this, then unfortunately, I submit, the courts are doing no more than paying lip service to the Constitution and the rights entrenched therein.

## Benchmarking the quantum of damages

Innes CJ, in a slightly different context, held in *Botha v Pretoria Printing Works Ltd and Others* 1906 TS 710 at 714:

‘If courts of law do not intervene effectively in cases of this kind, then one of two results will follow – either one man will avenge himself for an insult to himself by insulting the other, or else he will take the law into his own hands. I do not think that the principle of minimising damages in actions of *iniuria*

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is sound. Where the injury is clear, substantial damages ought as a general rule to be given.'

When determining the quantum of damages to be awarded for unlawful deprivation of liberty, courts are essentially being asked to balance the interests of the litigant and those of the public purse. There is nothing unusual in courts playing this role. What is notable, however, in my opinion, is that courts often lean heavily in favour of protecting the public purse and thereby fail to pay sufficient attention to the constitutional rights of the litigant before court. This would seem to emanate from the *obiter dictum* of Holmes J in *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) at 287E - F, where the judge, in relation to the assessment of damages, opined:

'I have only to add that the court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.'

Similar sentiments were repeated by Ackermann J in the *Fose* case at paras 71 - 72, where the judge reasoned that there was nothing to suggest that substantial awards in the form of constitutional damages would have any deterrent or preventative effect against individual or systemic repetition of the infringement of the constitutional rights.

If this is the position courts take when protecting the public purse, I submit that it is inconsistent with the high premium that is said to be placed on personal liberty.

In the *Tyulu* case at 93D - F Bosielo AJA, in my view correctly, held as follows with regard to assessing quantum:

'It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed

in our law. I readily concede that it is impossible to determine an award of damages for this kind of *iniuria* with any kind of mathematical accuracy. ... The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.'

If the quantum of damages in unlawful deprivation of liberty cases is to be benchmarked in such a way that the constitutional imperatives of the rights normally infringed by the deprivation are taken into account, then this will be in line with the basic principles that laws must be uniform, certain and easily ascertainable in that, from there onwards, there will be certainty and uniformity on how courts view arbitrary infringements of constitutional rights. An injury is never clearer than when it impacts on constitutionally entrenched rights. The full measure of the protection of constitutional rights means that the Constitution is not only mentioned, but that the awards given reflect the significance of their content.

## Conclusion

The current state of awards for deprivation of liberty is not in sync with the pronouncement both at common law and under the Constitution that an individual's right to liberty is to be jealously guarded. Under the constitutional dispensation, where the challenge is to make the Bill of Rights work for its beneficiaries, this approach is to be rejected. When determining an appropriate award for damages, courts are called on to consider the fact that in unlawful arrest and detention cases, the rights infringed are not of such a nature as to warrant the trivial awards that are currently being made.

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