

APRIL 2014

SUGAR-COATING GUILT

**Admission
of guilt fines –
no easy fix**

**Merger and
takeover law**

Impact on private companies

Fair divorce:

*Misconduct does not play
a role in forfeiture claims*

guilt



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Admission of guilt fines - no easy fix



In this article, Dr Llewelyn Curlew discusses the judgment in the matter of *S v Tong* 2013 (1) SACR 346 (WCC) and the importance of admission of guilt fines, which is often considered a quick fix, an easy way out, or a short-cut conclusion by defence practitioners and prosecutors alike, where it might – in fact – represent a significant threat.

30 Merger and takeover law

Impact on private companies

Basil Mashabane gives a follow-up on his previous article 'Mergers and takeovers under the new Companies Act', and discusses how the Act has brought enormous changes to the way mergers and takeovers are regulated in South Africa and the impact on private companies.



34 Is sexting a criminal offence?

The act of 'sexting' or to 'sext' is defined as the exchange of pornographic material or sexually explicit messages, pictures or videos via a mobile phone or the internet. In this article Lesedi Malosi Molosiwa determines how South African courts and legislation have dealt with the sexting phenomenon

37 Fair Divorce: Misconduct does not play a role in forfeiture claims



There is a general misconception in divorce litigation that a finding of substantial misconduct on the part of a spouse justifies an order for forfeiture of benefits of a marriage in community of property. Magdaleen de Klerk writes that the substantial misconduct is only one of the factors the court may take into consideration in this regard.

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Mapula Thebe - Editor

Common law contingency fee agreements matter resolved

cially or otherwise in return for a share in the proceeds.

At para 2 the court stated: 'At issue are contingency fees. Under the common law legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the clients might be awarded in litigation. The Act changed this.

It makes provision for these fees to be charged in regulated instances and at set percentages. Certain law societies made rulings allowing their members to charge in excess of the percentages set in the Act. Uncertainty reigned in the attorneys' profession about the correct legal position in relation to contingency fees.'

The CC unanimously found that the legislature's decision to regulate contingency agreements in the case of legal practitioners only was not irrational. The CC also found no merit to the challenge to particular provisions of the Act. The court emphasised that the matter concerned the right of access to justice by practitioners' clients and not a right of the legal practitioners.

Both these matters were on appeal from the North Gauteng High Court in Pretoria and were dismissed with costs.

- See also 2013 (Apr) DR 50.

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 22 April and 19 May 2014.

The much contested issue of common law contingency fee agreements was resolved by the recent Constitutional Court (CC) judgment in *De la Guerre v Ronald Bobroff & Partners Inc and Others* (CC) (unreported case no CCT 122/13, CCT 123/13, 20-2-2014) (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Madlanga J, Van der Westhuizen J and Zondo J) and *The South African Association of Personal Injury Lawyers v The Minister of Justice and Constitutional Development (The Road Accident Fund Intervening)* [2013] 2 All SA 96 (GNP). Both these cases dealt with the issue of the constitutionality of the Contingency Fees Act 66 of 1997 (the Act). In the cases, the issue debated was whether it was justifiable for legal practitioners to charge contingency fees outside of the 25% the Act provides for. The cases also dealt with whether it was rational that the non-regulation of agreements concluded by lay persons where one party undertakes to promote litigation finan-

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Late President Mandela's academic life and legal career

Following the passing of former President Nelson Mandela on 5 December 2013 at the age of 95, *De Rebus* contacted the President of the Law Society of the Northern Provinces (LSNP), Dr Llewellyn Curlewis for more information on former President Mandela's academic life and legal career.

Dr Curlewis said that according to records at the LSNP offices, Mr Mandela began his studies for a Bachelor of Arts degree at the University College of Fort Hare but did not complete the degree there as he was expelled for joining a student protest. He completed his BA through the University of South Africa and went back to Fort Hare for his graduation in 1943. During the early 1940s in Johannesburg, Walter Sisulu introduced him to Lazer Sidelsky and he did his articles at Witkin Eidelman Sidelsky. During his time at university, Mr Mandela became increasingly aware of the racial inequality and injustice faced by non-whites. In 1944, he decided to join the African National Congress and actively took part in the struggle against apartheid. He began studying for an LLB degree at the University of the Witwatersrand. By his own admission he was a poor student and left the university in 1948 without graduating.

Dr Curlewis said that during 1949 the minimum qualification for entering the profession was the Attorney's Diploma (Dip Proc) followed by five years



The late former President Nelson Mandela with then LSNP president Igna Klynsmith, and councillors Danie Olivier and Mike Pinnock at the annual general meeting of the Law Society of the Northern Provinces held in Rustenburg in 1990.

of articles. He said that this is how Mr Mandela qualified as an attorney on 27 March 1952. He and his friend Oliver Tambo opened the first black legal practice, Mandela & Tambo, in South Africa in 1952, giving affordable and often free advice to black people who could otherwise not afford it.

Dr Curlewis said that as one of the few qualified black lawyers, Nelson Mandela was in great demand. He added that his

commitment to the cause saw him promoted through the ranks of the ANC. In 1956, Mr Mandela, along with several other members of the ANC were arrested and charged with treason. After a lengthy and protracted court case the defendants were finally acquitted in 1961. According to Dr Curlewis, with the ANC now banned, Nelson Mandela suggested an active armed resistance to the apartheid regime. This led to the formation of Umkhonto we Sizwe, which would act as a guerrilla resistance movement. Receiving training in other African countries, Umkhonto we Sizwe took part in active sabotage.

Dr Curlewis said that in 1963, Mr Mandela was again arrested and put on trial for treason. He said that this time the state succeeded in convicting Mr Mandela of plotting to overthrow the government.

In 1989, while in the last months of his imprisonment, the late former President obtained an LLB degree through the University of South Africa. He graduated *in absentia* at a ceremony in Cape Town.

Roll of honour

Dr Curlewis said that Mr Mandela was taken up in the roll of honour of the LSNP for his contribution to the attorneys' profession and participation in bringing democracy and freedom to the people of South Africa. Dr Curlewis added that there are two other people that



The late former President Nelson Mandela with LSNP director Thinus Grobler; then advocate of admission and currently Judge of the North Gauteng High Court, Cynthia Pretorius (at the time still an advocate); then LSNP president, Emil Boshoff and Mr Mandela's late son, Makgatho Mandela at the admission of his son as attorney in August 2000.

the LSNP council honoured in this way, namely, Mahatma Gandhi and former President FW de Klerk.

His practice

Dr Curlewis gave an outline of Mr Mandela's legal career according to the LSNP's archives. He said that on –

- 5 September 1952 Mr Mandela advised the law society that he was practising on his own;
- 4 December 1953 he informed the law society that he was in partnership with Oliver Tambo;
- 8 January 1961 he notified the law society that he was practising as a professional assistant;
- 7 June 1961 the law society was informed that Mr Mandela was no longer employed as a professional assistant but that he was doing 'odd jobs' at the magistrates' court. When the treason trial resumed, he left to attend to the trial.
- 5 July 1961 the law society was informed by Germiston law firm, H Davidoff and Herman that Mr Mandela had ceased practising.

When asked to talk about the court case when the then Transvaal Law Socie-

ty applied to strike him from the roll, Dr Curlewis said that Mr Mandela was admitted as an attorney in the then Transvaal province after having served a contract of three years with Witkin Eidelman & Sidelsky. Shortly thereafter, his career took a political turn and he was involved in the political struggle for the abolition of the pass laws and other measures of enforced racial segregation as well as the enforcing of the right of non-whites to vote.

Dr Curlewis said that as a result of his actions, he was found guilty of contravening the provisions of the Suppression of Communism Act 44 of 1950 and because of this, an application was made to strike his name from the attorneys' roll.

'The court refused to entertain this application and found that, although his actions could be regarded in a serious light, he was motivated by an urge to be of service to fellow non-whites. This was not sufficient reason for striking his name from the roll,' he said.

According to *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T), the court also found that Mr Mandela must not be punished again by being struck from the roll or suspended. The

court found that he would only be struck off if what he had done showed that he was unworthy to remain in the ranks of an honourable profession. This contention proceeds, again, on the incorrect assumption that is the court's function to punish an attorney who has been convicted of an offence. The application was dismissed.

The LSNP also paid tribute to Mr Mandela at the time of his death. In a statement, Dr Curlewis said that the LSNP was sad to learn of his passing and added that the LSNP council mourns and celebrates 'the life of one of South Africa's well-known and well-loved attorneys.'

'He served on many international institutions. He gave meaning to the principle of the rule of law. He fought for equality, freedom and democracy. We will continue to promote and protect his legacy and the principles for which he fought', he stated. He added that Mr Mandela would be remembered as a lawyer who had courage and took the initiative to open the very first black attorneys firm in Johannesburg.

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The fight against counterfeiting

Cape Town attorney Vanessa Ferguson, speaking at a round table on the fight against counterfeiting in Cape Town on 13 February, said that because South Africa has the largest economy in Africa, it is the top destination for counterfeit goods, with tax revenue in excess of R 2,5 billion estimated to be lost on counterfeit cigarettes annually. She added that in 2010 counterfeiting was responsible for 14 400 job losses in the textile and clothing industries alone.

Ms Ferguson, who is head of anti-counterfeiting at law firm DM Kisch Inc, and also the convener of the INTA MEASA (Middle East, Africa and South East Asia) anti-counterfeiting subcommittee and SAIPL anti-counterfeiting committee, said that outcomes from the deliberations were that there was an urgent need for changes to the current Counterfeit Goods Act 37 of 1997 as counterfeiters were becoming more sophisticated.

The International Trademark Association (INTA), the South African Institute of Intellectual Property Law (SAIPL), the City of Cape Town and government jointly hosted the round table on the fight against counterfeiting at the Cape Town Civic Centre. Attendees to the event included members of the Specialised Commercial Crime Unit, the National Prosecution Authority, the South African Police Service, and the South African Revenue Service, Customs and Excise.

In a press release, Vanessa Ferguson, said that the purpose of the event was, *inter alia*, to discuss building an effective policy and framework in the fight against counterfeiting, as well as strengthening an already existing relationship that would allow sharing information and working together in order to improve anti-counterfeiting measures in the country.

Conveyancing admission examination rescheduled

Please note that, due to the fifth national general elections taking place on 7 May, the conveyancing examination has been rescheduled to 14 May.

The professional examination dates for 2014 are as follows:

- 14 May: Conveyancing examination
- 11 June: Notarial examination
- 12 August: Admission examination
- 13 August: Admission examination
- 10 September: Conveyancing examination
- 8 October: Notarial examination

NB: Candidates should register for the examinations with their relevant provincial law society.

Twenty years of democracy: NADEL's commitment to democratic debate and socio-economic justice

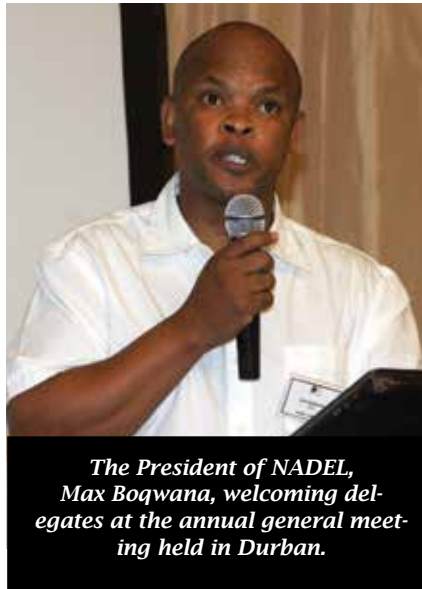
The National Association of Democratic Lawyers (NADEL) held its annual general meeting (AGM) in Durban in February. The theme for the conference was 'Twenty years of democracy - NADEL's commitment to democratic debate and socio-economic justice'. Speakers debated issues around the theme.

Opening the conference, Chairperson of the Durban Branch, Raj Badal, asked delegates to observe a moment of silence in remembrance of all of those who passed away in 2013, including former President Nelson Mandela and former Chief Justice Pius Langa.

Socio-economic justice

Welcoming delegates, NADEL President, Max Boqwana, said that it was the organisation's first gathering since the passing of the first President of NADEL, Pius Langa and the first President of democratic South Africa, Nelson Mandela from whom members drew inspiration and commitment to do what is just. Quoting Mr Mandela he said: 'There is nothing I fear more than waking up without a programme that will help me bring a little happiness to those with no resources, those who are poor, illiterate, and ridden with terminal disease.' He further said that a meeting of this nature forces delegates to pause and reflect on where the organisation stands on the statement made by former President Nelson Mandela.

Mr Boqwana drew attendees' attention to what was happening in the world and in the country. He said that the meeting was taking place during a time of 'growing international capitalists' crises; unemployment is sky rocketing and salaries are plummeting in the developing world, while astronomical food prices and starvation ravage the Third World. The human rights abuses remain unabated in countries like Sri Lanka, Ukraine ... [and] Palestine. The post-Arab Spring society in parts of our continent remains unstable and directionless as reflected in what is happening in Egypt and Libya. The Central African Republic, Sudan and the Democratic Republic of the Congo continue to reflect badly on any probability of African renewal. The economies of many other countries in our continent are hardly benefiting their citizens but continue to be the appendages of their former colonial countries ...'. He added that the continent continues to



The President of NADEL, Max Boqwana, welcoming delegates at the annual general meeting held in Durban.

rely on China for resources, which stifles the likelihood of the continent being self-sufficient and taking care of its own people.

Mr Boqwana said that to draw attention to the issues he had spoken about, NADEL had invited Raji Souran from the Palestinian Centre for Human Rights to share his experience as a lawyer operating in a war zone. He said that Mr Souran would have reflected on the bully tactics of the United States, other Western countries and Israel and the failure of international fora such as the International Criminal Court and the United Nations to deal with the crisis in Palestine. He said that Mr Souran would have spoken about 'many countries' lack of moral courage, including our own, to stand up to bullies'. He added that Mr Souran could not attend the conference as the airport he was due to depart from was bombed.

Disconnect between the Constitution and the public

Delivering the keynote address, former Constitutional Court Justice, Zak Yacoob, said that the African National Congress (ANC) remained two things at the moment, namely - 'a party in power and that it is still in many senses the only positive force in our country as a movement ...'. It is the only organisation which embraces the values of the Constitution ... which is committed to achieving true democracy in our country ... towards achieving a fair society and towards

achieving the eradication of poverty'. He added: 'I would suspect that as the National Association of Democratic Lawyers we align ourselves completely with this direction, with this movement, with this change, which our society needs. And we must understand that these two parts of the ANC can sometimes be in conflict with each other, because the power exercise and the way in which the power exercise is conducted may not properly sit with the movement ...'. And we must make sure that we remain true to the cause of the movement aimed at achieving a better order in the world and in South Africa and ensure that we make the difference between that and the day-to-day exercise of political power and ensure that somehow in the future we make a contribution to how these two sides, these two elements of the ANC come closer and closer together.'

Justice Yacoob commented on the disconnect between the values of the Constitution and the values of many South Africans. 'Our Constitution talks about equality before the law ... and yet we know that our society is the most unequal one and it is our duty to ensure that society does become more equal. The difficulty is that 95% of the middle and the upper classes do not believe in the values of true economic equality and it is there that we have to make the changes. Our society says women and men are equal, yet 90% of the men in our society ... operate on the basis that women are there to be our chattel and our slaves at one level or another ...'. Our Constitution states that gay and lesbian people are equal to everyone else, yet 80 to 90% of people would strongly believe that gay and lesbian people are sinners.'

Justice Yacoob said that the issue of corruption in South Africa should be looked at closely as the country is about to go through elections, which will give citizens an opportunity to make a contribution towards the choice of appropriate leadership. He reminded delegates that one is innocent until proven guilty and that nobody can be convicted of a crime unless there is proof beyond reasonable doubt. He added that voters have to ensure that even if a person has not been convicted of a crime, that they are morally right to run for office.

Tribute to former Chief Justice Pius Langa

Paying tribute to former Chief Justice Pius Langa, Publicity Secretary of NADEL,

Gcina Malindi, said that the organisation was honored to have members of the Langa family present at the conference. Mr Malindi spoke about former Chief Justice Langa's contribution to guarding the institution of the judiciary and 'his commitment to ensuring that the judiciary is what the Constitution tells us it should be, that the judicial authority of the republic is vested in the courts and that they are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.

Mr Malindi quoted former Chief Justice Ismail Mohamed who said judges are given the most formidable power, which they enjoy to use for the benefit of society and the Constitution but which they can also abuse. He said that delegates should be constantly aware of the context that judges are elevated to occupy one of the three branches of government and are therefore tasked with the function of ensuring that the state functions well in a constitutional state where the foundation of democracy is an elected parliament.

Mr Malindi said that judges take an oath that reads: 'I swear or solemnly affirm that as a judge of the Constitutional Court, Supreme Court of Appeal, High Court or any other court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law.' He said that Justice Langa recited the oath in isiZulu, his mother tongue, when he was appointed judge of the Constitutional Court to show that he meant every word.

'Comrade Pius started working as an interpreter messenger, proceeded to be a magistrate, and practised as an advocate. In all these offices he had experienced how judicial officers in the criminal justice system had not adhered to the principles of upholding and protecting human rights; they were faithful to the protection of the apartheid regime and entrenching discrimination. Comrade Pius worked very hard for the entrenchment of the human rights that are in our Constitution and the principles that are contained in the oath or solemn affirmation that judicial officers have to take,' Mr Malindi said.

After Mr Malindi's speech, a DVD presented by the Langa family was screened for delegates.

Legal Practice Bill update

JB Sibanyoni, a member of the Portfolio Committee for Justice and Constitutional Development, gave a brief update on the status of the Legal Practice Bill. He said that the current situation is that legislation pertaining to advocates and attor-



*Nokukhanya Jele,
former Publicity Secretary
of NADEL, speaking on the Legal
Practice Bill.*

neys was fragmented and the two were regulated by different laws. Mr Sibanyoni also pointed out the disparities between the attorneys' and advocates' profession highlighting the difference in the way in which both professions qualify through articles and pupillage.

Mr Sibanyoni said that the legal profession was not representative of the demographics of the country and access to justice by the poor was limited. 'This Bill seeks to correct these shortcomings by uniting the legal profession and regulating it by means of a single statute under a single umbrella regulatory body, the South African Legal Practice Council. ... It recognises the independence of the legal profession and endeavors to strengthen this independence. The Bill is, *inter alia*, a measure to democratise the structures governing the profession, which in turn will lead to greater transformation,' he said.

Johannesburg Advocate Nokukhanya Jele, former Publicity Secretary of NADEL, said that the Bar seemed to be of the view that independence of the profession means that it should remain separate and that nothing remotely resembling a unified profession can exist, lest such independence was obtained. She said that NADEL has been in favour of a unified profession since its inception as an organisation. Referring to the composition of the Legal Practice Council she said: 'The critics of the Bill suggest any slight participation of any state entity will make this a completely state-controlled body. How exactly is it that three persons chosen by the Minister for their knowledge and experience in the legal field out of 21 members of a body, makes it a state-controlled profession?'

Dullah Omar Memorial Lecture

Deputy Minister John Jeffery delivered the Dullah Omar Memorial Lecture. Speaking on the recent criticism of the appointment of judges, he said the process of appointing judges by the Judicial Service Commission (JSC) was outlined in the Constitution in an open, transparent and consultative system. 'As for the composition and structure of the JSC, these provisions are also outlined in the Constitution, in section 178 thereof. So when people criticise the JSC, they would be well advised to remember that these provisions were part and parcel of the constitutional text which certified by the constitutional court in the certification judgments. So, to accuse the ANC of "chipping away at the foundations of our constitutional democracy" when it follows the procedure as set out in section 178 of the Constitution is simply absurd. How can it be unconstitutional to follow the Constitution?' he asked.

Mr Jeffery agreed that the judiciary was not yet fully transformed and more was needed to be done with regards to its transformation, but added that significant progress had been made. 'We no longer have magistrates who are part and parcel of the public service and therefore under the control of the Minister or Director-General. We no longer have presiding officers who uphold apartheid laws while knowing them to be unjust and inhumane,' he said.

Speaking on the Legal Practice Bill, Deputy Minister Jeffery said that even when the Bill is assented to, the establishment of the Legal Practice Council cannot take place for a while. He added 'The Bill as you may know, provides for a consultative forum to resolve some outstanding issues regarding matters such as the powers of provincial structures and the manner of election of the representatives of attorneys and advocates on the Legal Practice Council.'

The NADEL national executive council:

President: Max Boqwana
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Can ethics be taught?

The Law Society of South Africa (LSSA), in conjunction with the National Association of Democratic Lawyers, held a summit on professional legal ethics in Durban at the end of February. Topics debated included ethical lawyering in a constitutional democracy, ethics in the pursuit of transformation as well as legal ethics education.

Retired Constitutional Court Justice, Zak Yacoob, delivered the keynote address. Delegates who presented papers were admitted attorney and legal academic at Rhodes University, Helen Kruuse; attorney at Le Roux Matthews & Du Plessis, Chris du Plessis and attorney at Ngubane & Partners Incorporated, Madoda Nxumalo. The Chairperson of the LSSA ethics committee, Krish Govender gave the welcome address.

Following the code of ethics

Mr Govender referred to an International Bar Association conference held in Dublin some two years ago. He said that he was concerned to notice that during the plenary sessions of that conference, out of the approximately 5 500 delegates that attended the conference, only 30 to 50 attended the session on ethics.

Mr Govender said that the world was too overwhelmed by corporate lawyers with a corporate mentality. He urged South African lawyers to see themselves as lawyers in a developing, growing nation and to entrench ethical principles. According to Mr Govender, law students are being told 'if you apply ethics to your work, you will not make money.' He said that this was very worrisome and questioned what law students were being taught and what kind of values they were seeing in the profession. He added that this was all part of the way society was being structured.

Mr Govender said that practitioners who take ethics seriously were concerned about the type of practitioners that they see, hear and read about; and the difficulties that the public faces in relation to the type of practitioners they come across.

Mr Govender raised the vexed question of 'how do you keep up ethics?' He said that state attorneys must be empowered to act ethically, adding that the role of state attorneys needed to be reviewed. 'I tell attorneys that the day you come back from court and win a bad case, you should hang your head in shame because you have done something that I believe violates the Constitution and Bill



The Chairperson of the LSSA ethics committee, Krish Govender, gave the welcome address at the recent ethics summit held in Durban.

of Rights. We must practise law within a state on the basis of what is fair and just and never try to take advantage of the poor, the small firms, [or] those who cannot afford to run cases like the state can,' he said.

Mr Govender noted that the LSSA has a code of ethics that was adopted by its council at its annual general meeting in March 2006. He said that the code of ethics applies to all law societies and attorneys, adding that it consists of nine points, namely:

- 'All legal practitioners shall -
- honour, respect and promote the values enshrined in the Bill of Rights;
- maintain the highest standards of honesty, integrity and independence at all times;
- act with care and skill, honour undertakings and maintain the reputation and high standards required in the performance of their duties;
- conduct themselves with courtesy and respect towards participants in proceedings, especially persons without legal representation, so as to ensure compliance with the rules and procedures for the fair conduct of such proceedings;
- maintain the highest standards of professionalism and promptly respond to correspondence and messages from colleagues, clients and members of the public;
- comply with all ethical and professional rules of practice;
- respect the legal privilege and confidentiality that exists with clients and former clients;
- subject to the laws as regards contingency fees, and the rules and guidelines as regards advertising, not engage in any form of activity that may be construed as touting;

- extend to all colleagues, judges, academics, professionals, litigants and students, including persons from foreign jurisdictions, cordiality and respect at all times.'

Mr Govender said that it was sad that some attorneys were not aware that this code exists. He added that getting ethics accepted, understood and applied has always been a major problem. He said that he believed that one cannot create an ethical lawyer as one cannot make a person ethical, adding that ethics was about the values one is born and brought up with.

Mr Govender said that some 40 or more years ago, those that had a calling to become lawyers wanted to do something to serve people. 'There was a certain amount of honesty, integrity, value and satisfaction that you got to have done something good for someone and earned a small fee. The landscape today, or over the past 20 years, even worse, in the past five years, is that of absolute greed and corruption. This is the landscape that young lawyers have to confront and are swallowed up in at the moment,' he said.

According to Mr Govender ethics is not about being honest and absolutely clean in what one does, as that has to be a given. 'Ethics is something that is above that, much higher than that. It is about fairness and transparency.' He concluded by saying that there was a fine line between ethics and attorney-client privilege as far as legal practice was concerned.

Ethical lawyering

Speaking on ethical lawyering in a constitutional democracy, Justice Yacoob said that he disagreed with Mr Govender as he did not believe that a lawyer is born ethical. He added that people grow, develop, change and learn with time. Justice Yacoob said that he also took that route. He said that in 1956 he was a racist, an opportunist and sexist, adding that 'all of us have the potential to change and become better and also have the potential to become ethical lawyers, how ever we were born. All human beings have the right and the power to change themselves.'

Justice Yacoob said that the part of the Constitution that has an impact on lawyering in a constitutional order was the Bill of Rights and chap 8 of the Constitution, which apply to the courts and the administration of justice.

'If we [want to practise] in accordance [with] the Bill of Rights and chap 8 of the Constitution, the first step for lawyers

is to know and understand both documents.' He said that the Bill of Rights contains approximately 30 clauses that are simple and straightforward. He added that chap 8 of the Constitution was also simple and straightforward and that it was impossible for lawyers to practise in accordance with the constitutional principles if they did not understand the values and injunctions of the Bill of Rights and what chap 8 required. 'We must not only understand them, we need to internalise and live them,' he said.

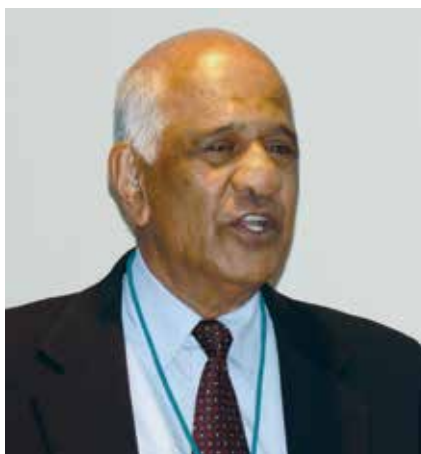
Justice Yacoob said that living the constitutional order was the most important thing for an ethical lawyer, because if you do not embrace constitutional values in your personal life, you cannot embrace them in your practice.

He added that everyone is equal before the law and is entitled to equal protection. The first port of call for people in trouble are lawyers 'and when a person comes to you, you have to treat him with the understanding that this person is equal before the law.' He explained that this meant that you must not treat your rich clients better than your poor clients, as people can only be equal before the law if you treat them equally to begin with.

Justice Yacoob said that honesty was a given but, like in all things, honesty was often qualified as far as practising law is concerned. He said that honesty is balanced by privilege and that only a few lawyers understand the importance of the privilege of their client. 'It is not your privilege, but [that of] your clients. We need to examine what the precise balance is between honesty to the court on the one hand and privilege on the other,' he said.

Justice Yacoob said that it was obvious that lawyers cannot stand by and watch their clients tell lies in the witness box, but queried what layers should do if a client tells them that he or she (the client) was committing another murder somewhere else on the day that he or she is accused of committing the murder the lawyers are defending him or her against and that the accused would like to tell the court that he or she was somewhere else with somebody else, which is a lie. 'Do you put up with that? Those are difficult problems that we need to deal with carefully. Honesty must be qualified with privilege,' he said.

Moving on to the notion of a fair trial, Justice Yacoob said that s 25 of the Constitution has various individual provisions that ensure that an accused has a fair trial. He said that a very important ethical consideration was that all accused people deserved a fair trial, adding that the trial must be fair at all levels and it was the lawyer's duty to contribute to the fairness of a trial. 'Your object in [practising law] in a criminal case



Retired Constitutional Justice Zak Yacoob gave the keynote address at the recent summit on professional ethics held in Durban.

is not to get your client acquitted; that is not your mandate and your mandate is not to get the client convicted either. Your mandate is to represent the client to the best of your ability as honestly as you possibly can, bearing in mind privilege and to ensure that the client has a fair trial,' he stated.

Justice Yacoob said that in civil trials, a constitutional right is not for people to win their cases but that the purpose of adjudication, judging, and court proceedings was to reach a fair result. He added that if one contributed as a lawyer to reaching an unfair result, then that person was not acting constitutionally as a lawyer. 'The right that a person has is not to win their case, the only obligation you have, as a lawyer to your client is to ensure that those civil proceedings are fair, held before an independent tribunal and if you do that, you have done your job. If you go beyond that and win the case unfairly, that is unconstitutional conduct,' he said.

Justice Yacoob concluded by saying that every attorney, advocate, candidate attorney and legal practitioner is potentially a judge and that they needed to bear this in mind, also that they are training with that vocation in mind. 'Unless one has an independent, impartial legal system or lawyers who understand the distinction between fairness and unfairness and who treat people properly, there can never be proper judgments,' he said.

Justice Yacoob added that lawyers must be able to say that they can be a judge. He said that if lawyers become corrupt, the profession will be corrupt. 'You are contributing to judicial fairness. Those who behave unconstitutionally in court and treat the poor or blacks differ-

ently do so because this behaviour existed in the lawyers of yesterday. Behaving ethically and fairly leads to building the judiciary,' he said adding that the lawyer of today is the judge of tomorrow. The ethical lawyer of today is building an ethical judicial system.

Legal ethics education

Ms Kruuse spoke on 'the why, what and how of legal ethics education today'. She said that the legal profession in South Africa was suffering from an ethical crisis, adding that this can be noted from the media, case law and the recent LSSA LLB summit where there was an effort to interrogate legal ethics education. She said that the precise nature of the crisis was unclear. Ms Kruuse said that the origins or the causes of the 'ethical crisis' are not properly understood, which makes finding solutions all the more difficult.

Ms Kruuse focused on the potential issues facing the legal profession today. She said that the profession faced new economic and social conditions that tear at its ethical fabric. Her presentation dealt with three issues:

- Why legal ethics?
- What should be learnt at law schools and therefore what should be taught?
- How can this be learnt and from whom?

She said that lawyers play a public role and also an important role in the justice system. Ms Kruuse said that it was clear that the courts, and those who appear in them, are expected to act as the main vehicles to protect and realise the rights of people, adding that lawyers are seen as especially responsible for what might happen to South Africa's constitutional democracy over the next few years.

'The promotion of ethical decision-making by lawyers is vital to support the justice system. If we do not interrogate legal ethics education or look at our ethical practices and adjust our actions accordingly, the legal profession risks even greater disrespect and even runs the risk of losing its monopoly. Is the profession only about staying in business and protecting its prospects, rather than serving the public's interests?' she asked.

Ms Kruuse defined the word 'ethics', and said that it comes from the Greek word '*ethos*', which means 'habit.' 'A habit can be defined as an internalised, repeated, or innate principle that naturally springs from within a person without reference to an outside rule or commandment,' she explained.

According to Ms Kruuse, South Africa is a diverse society and the habits of its law school and graduates will not present themselves as a unitary homogenous set of values. Therefore, whatever a student learns at university and at practical legal training (PLT), must compete with the multiple moral and ethical influences

he or she has had prior to and beyond the reach of the law faculty and PLT. Ms Kruuse said that ethics at law schools can be taught through summits such as this one, indabas, conferences and seminars. She said that some obstacles standing in the way of students learning ethics or being taught ethics include the students' readiness and willingness to engage meaningfully with ethical issues, as well as the law teachers' readiness. She added that law teachers resort to traditional teaching, adding that these ways alone simply will not do. Ms Kruuse said that in the United Kingdom experimental learning proved to be the best way to teach law students ethics.

Ms Kruuse said that ideally, on completion of their studies, students should be able to demonstrate:

- a thorough understanding of the formal ethical and professional responsibilities in the lawyer's role whether these are expressed in legislation, case law or in a professional code;
- a thorough understanding of the values, social purposes, social responsibilities and limits of the lawyer's role within the legal, political and social system in which South African lawyers practise;
- a developing ability to recognise the typical situations in which ethical issues are likely to arise in legal practice, to engage thoroughly and to make ethically justifiable decisions whenever circumstances require this; and
- an understanding that the law and codes are incomplete in addressing all ethical issues, and therefore develop an ability to exercise discretionary professional judgment, through recourse to core professional values, whenever circumstances require this.

Ms Kruuse said that there needed to be a compulsory course on ethics in the LLB degree curriculum at all universities, adding that most universities did not have it. She added that law students needed to be encouraged to appreciate the significance of ethical dimensions of legal practices. She said that lawyers needed to develop a personal style of practice that reflects this depth of appreciation and understanding.

Ethics in practice

Mr Du Plessis, one of the Chairpersons of the Law Society of the Northern Provinces (LSNP) disciplinary committee, and a PLT lecturer for the past 18 years, told delegates that he has heard a few thousand cases on the wrong end of ethics. He described the feeling he gets when he chairs a meeting that recommends that they contact the court to remove an attorney's name from the roll, as devastating.

Mr Du Plessis said: 'I can imagine that the judges in the old days when passing the death sentence felt like this,



Admitted attorney and legal academic at Rhodes University, Helen Kruuse spoke on legal ethics education at the recent professional ethics summit that was held in Durban.

because labour law wise, we are passing the death sentence on somebody's career, which is their life.' Mr Du Plessis said that one of his students once told him that ethics stand in the way of making money when he asked his class what their views on ethics were. He said that the attorneys present at the summit were there because they had satisfied the court that they were fit and proper persons. 'However, fit and proper is not defined anywhere in any of the Acts. It is a subjective phrase,' he said. He added that the word 'profession' was derived from the Latin word '*professio*', which means 'worthy of public trust and admiration'. He asked the delegates whether they conduct themselves in such a way that people can admire and trust them.

According to Mr Du Plessis, the most important asset that one can ever have is their name as it encompasses integrity, reputation, wisdom, judgment, etcetera and it can be lost in the proverbial one second. If this happens, how and when do you get it back? He advised attorneys to guard their names jealously, adding that to be an attorney means that you are a person worthy of admiration. He said that one could not be a part-time honest or honorable person, as one is honest and honourable in totality or not at all.

Mr Du Plessis stated that in the past 13 years there had been about 20 newspaper articles per year about attorneys, besides the many letters. He said that the LSNP receives numerous attorney complaints, approximately 12 000 a year, adding that many of them are petty matters, such as a lack of communication between attorney and client by, for example, not replying to e-mails. He said: 'Surprisingly and thankfully, serious

complaints such as, for example, trust shortages, make up less than one per cent, which is still a shame but it is gratifying that it is such a small percentage.'

Regarding touting, Mr Du Plessis said that touting was different to *pro bono* work and that there was much confusion on the two matters. He said that there have been attorneys charged with touting because they bought cars in their names and then gave them to estate agents to use in exchange of transfers. 'We have a firm in a certain town with three banks. Every Friday morning the wives of the bank managers phone the secretary at the firm of attorneys. The secretary then tells them how much they can spend in the next week on the attorney's credit card and the amount is determined by how many conveyancing instructions were given to the firm.'

Du Plessis concluded by saying that non-ethical behaviour had horrible consequences. He said that practising law was an awesome privilege that came with awesome responsibility, and that ethics was not a question of rule on rule but a manifestation of one's inner self. Ethics require the highest exercise of your highest self, adding that ethics eventually was to put your client's interest before yours.

Transformation and ethics

Mr Madoda spoke on the impact of transformation on ethics. He said that, prior to 1994, historically disadvantaged practitioners were under the false illusion that, come democracy, they would eat pie in the sky. 'When the reality struck home that the more things change, the more they stay the same attorneys, like all spheres of our society, tripped over each other to attain personal aggrandizement at the expense of ethics. The legal profession, and I have no doubt most professions, was so engrossed in transformation and inadvertently neglected ethics,' he said.

According to Mr Madoda, in the name of transformation, ethics are flouted day in and day out in order to score large state contracts or to do shoddy work in courts to get a quick buck. He said: 'We are prepared to hire previously disadvantaged practitioners in order to fulfil quotas and score cards, all under the pretext of economic empowerment Recently, an in thing is to swallow smaller firms, who happen to be black, by larger firms but only to attract contracts. There is nothing wrong with it as long as such hiring and merging are equally beneficial to both players. The problem only arises when there are sinister undertones. Once we invoked such mischievous thoughts, then we have ethical issues. Some of us view transformation as a threat to our wealth and we are prepared to protect it even if means defying ethics.'

Mr Madoda said that South Africa finds itself in a difficult place, adding that it was a nation in transition, a young democracy that has no identity. It is a country trying to find itself and one that is battling to synchronise ethics in line with the prescripts of the Constitution. 'We are no longer afraid to express ourselves, thanks to freedom of expression, whether in print media or on social networks. The latter finds popularity with younger practitioners. If there are no clear rules, for example, on how, what and when to tweet, ethics becomes an unintended casualty. As a profession we need to embrace change and dare not falter.' He advised attorneys to take full advantage of social media.

Mr Madoda said that he has been told that in KwaZulu-Natal younger practitioners are the main culprits when it comes to misconduct. He said that he believes that seasoned practitioners were putting commercial interest before those of mentoring up-and-coming practitioners. 'Indeed, time is now not only our stock in trade but it has also become the new currency. If we fall short in mentoring, surely ethics suffers. We need to balance the two', he said.

Mr Madoda said that he hopes that the code of conduct, as envisaged by the Legal Practice Bill, will be able to align ethical standards in conformity with the Constitution.

To conclude, Mr Madoda said that unethical behaviour was not confined only to the legal profession but was 'a cancer that is devouring all spheres of our society at unprecedented levels'. He said that it was in forums like these where we could try to curb such cancer.

Mr Madoda said that over the years the profession had introduced many interventions in order to be in sync with societal norms, principles and standards such as mandatory practice management, the Attorneys Development Fund and SynergyLink. South Africa was endowed with opportunities, however, we seem not to notice them. He said that

the sooner South African citizens learn to stop complaining about what they do not have and started using what they have, the better for the country and the profession.

According to Mr Madoda, the judiciary and the media has been the profession's beacon of hope in the battle against moral decay. He said that among all of this, the law was still a noble profession.

Breakaway session

Before the conclusion of the summit, a group discussion took place. The breakaway groups deliberated on five questions, namely:

- What impact does the South African broader context have on professional legal ethics?

In answer to this question, most of the groups were of the opinion that culture, religion and the diversity of South African citizens had an impact on professional legal ethics. They questioned how all this diversity would be put into one ethical code that everyone must abide by. They said that there was a culture of a lack of consequence in South Africa and that a change of mindset was needed. They also questioned whether there was a common understanding of ethics, adding that the word 'ethics' needed to be defined.

- Which rules are most relevant for the profession going forward in 2014?

Some of the groups said that they believed that all rules were relevant as no rule was more important than the other, while others said honesty, integrity, professionalism and mutual respect for colleagues were the most relevant. One group questioned what the difference was between ethics and morality and said that morals were unique to a person while ethics were unique to a profession.

- What might be learned (and therefore should be taught) at LLB level and for the profession?

The general consensus was that there should be a standard LLB curriculum across the country. A point was also

raised that the curriculum was too academic and not practical enough. The groups said that it was difficult to teach ethics as everyone was brought up differently. One group said that medical students do practical work during holidays, suggesting that law students should be doing the same. It was suggested that an ethics course be held for candidate attorneys and that legal ethics must be compulsory and must be taught every year as a part of every subject.

- What is the best method of tuition at LLB level and for PLT and continuing legal education courses?

The groups unanimously said that practical work was the best method of tuition. They said that the profession should be engaged and that law students should partake in community and *pro bono* services.

- What should be done to keep the momentum and promote awareness of ethical decision-making by the legal profession after the summit?

The groups said that the profession should use social media, radio and television to engage with practitioners. They also said that there should be frequent meetings between the profession and law deans, and that the LSSA should have a review to ascertain what has been achieved a year or two after this summit and to conduct a survey on what candidate attorneys think ethical awareness is.

One group said that the LSSA Trustline could also be used to report colleagues who are behaving unethically. Another group said that the presence of attorneys was needed to be felt at university campuses.

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Book announcement

Introduction to International Law

By TW Bennett & J Strug

Cape Town: Juta

(2013) 1st edition

Price: R 475 (incl VAT)

463 pages (soft cover)



Saslaw *pro bono* NPC launched

The South African Society for Labour Law (Saslaw) held a fundraising event that coincided with the launching of Saslaw as a non-profit company (NPC). The event was held in Johannesburg. Speakers at the event included the Deputy Minister of Justice and Constitutional Development, John Jeffery; Judge President of the Labour Courts, Basheer Waglay and Judge of the Labour Court, André van Niekerk.

Pro bono project

Saslaw President Shamima Gaibie gave the welcome address. She said that the Saslaw *pro bono* programme was established as an indispensable part of the four Labour Courts across the country (in Durban, Port Elizabeth, Johannesburg and Cape Town) following the *pro bono* pilot project.

Ms Gaibie said that from February 2011 to February 2014, the Saslaw *pro bono* project saw more than 7 800 clients assisted by approximately 230 practitioners countrywide. She said that this equalled about 5 900 professional hours. 'Of the clients seen, approximately 15% of the cases that came through the project have been taken up and just over 7% of matters have been distributed to Legal Aid South Africa,' she said.

Ms Gaibie said that it seems inconceivable that the Labour Court had been able to function without this project.

Saslaw at *pro bono* clinic

Judge Van Niekerk said that the judges valued the presence of Saslaw members at the *pro bono* clinic, adding that litigants were usually referred directly from the court to the clinic.

Judge Van Niekerk said that very often what is needed is an explanation as to why litigants do not have a case. He added that people who have access to that information or those who are advised properly of their rights often go away as satisfied as those who walk away with some sort of settlement or having won a case. 'While access to legal skills is an important component to access to justice, it is by no means the only one,' he said.

Judge Van Niekerk said that when the Labour Courts were set up, care was taken to put them in the areas of the city that were accessible to workers. 'That is why the Labour Court in Port Elizabeth is right in the taxi rank and the one in Braamfontein is close to Park Station. It was a conscious decision to have them there.'

According to Judge Van Niekerk, the



Justice Department Deputy Minister John Jeffery at the launch of Saslaw as a non-profit company.

Labour Court has taken the decision to send the court to where a large number of litigants are. 'For example if there is a big group in Mpumalanga, we will send a judge there instead of having 50 or 60 people coming to Johannesburg,' he said.

Access to justice

Judge President Waglay said that the rule of law was not only a fundamental principle but was the point of departure for labour peace. He said that a shortage of judges, court rooms and legal representation not only led to a delay in matters being finalised but that it also had a direct and substantial impact on employment and denied access to justice, a basic right of every citizen, and in turn could lead to the erosion of the rule of law.

The Judge President said that over the past three years the Labour Court had called on labour law practitioners to sacrifice at least one week a year to act in the Labour Court in order to deal with the increasing number of matters that were ready to be heard but could not be allocated to the limited number of permanent judges. 'This is not an ideal situation and as a senior member of the Bar informed me, it is an exploitative practice,' he said.

Judge President Waglay said that there was a desperate need to address the issue of the shortage of judges. He added that addressing the issue would also mean addressing the need for increased infrastructure.

According to Judge Waglay, access to court is meaningless in the absence of le-

gal representation. He said that the provision to access to justice for the poor was one of biggest challenges for the state and the profession.

'Strike action raises the question of why the poor do not see the courts as an avenue for their grievances. The reason is that they see courts as complex. The reality is that the poor cannot afford the cost of a number of basic things that are relevant to us, the cost of litigation is one of those. I believe that every member of the profession should be strongly encouraged to provide *pro bono* services. This does not only benefit the litigant but also gives credibility to the rule of law,' Judge Waglay said.

Judge Waglay said that there was a perception that courts are institutions of trouble and harassment. 'This needs to change,' he said. He added that courts must be seen as institutions where people can obtain redress and human dignity. He concluded his speech by saying: 'We cannot have another Marikana. People must come to court to have their grievances dealt with.'

The role of the profession and access to justice

Deputy Minister Jeffery spoke on access to justice, in particular the role of the legal profession and other stakeholders in the light of the Legal Practice Bill. Speaking on the issue of *pro bono* legal services he said that it is a known fact that most South Africans, particularly the working and middle class across all races, battle to afford the services of private attorneys. He added that it is also a known fact that most people, the ones who have no legal background or training, find the legal process and the justice system complicated and overwhelming.

'In most cases, people know that they have rights, but they have no idea how to go about enforcing those rights and especially in the area of labour law, where there is what Professor Barney Jordaan calls, "the inherently unequal relationship between employer and employee", the need for legal services becomes all the more apparent,' he said.

Deputy Minister Jeffery said that he recently heard someone comment that 'the law is a social process'. He added that this was true as the law was often the vehicle that brought about change in society and addressed various civil, political and socio-economic issues. 'In a country such as ours the disparity between rich and poor, between the haves and the have-nots, is glaringly obvious, and we are still struggling to redress the injustices of the past.'

According to the Deputy Minister access to justice is often still the privilege of the wealthy. He added that this means that the demands for *pro bono* services and legal aid are ever-increasing.

'If we have more legal practitioners doing *pro bono* work it will make a significant contribution to increased access to justice. In South Africa *pro bono* work is governed by the rules of each province's law society and the various Bar councils. There have been significant contributions made by way of mandatory *pro bono* work, especially by some of the large law firms, who often go above and beyond the requirements set by the law societies. As an example, one firm, as early as 2006, contributed 8 432 hours to *pro bono* work. This amounted to 34 hours per practitioner, ranging from candidate attorneys to senior partners. In monetary terms, in 2006, this amounted to R 6,5 million. That same firm has in the past few years upped their commitment to *pro bono* work to 50 hours per year per practitioner,' he said.

Deputy Minister Jeffery spoke about community service, which is one of the provisions of the Legal Practice Bill. He said that the Bill provides that community service may include, but is not limited to,

- service in the state;
- service at the South African Human Rights Commission;
- service without any remuneration as a judicial officer in the case of legal prac-

tioners, including as a commissioner in the small claims courts;

- the provision of legal education and training on behalf of the council, or on behalf of an academic institution or non-governmental organisation; or
- any other service that the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.

He added that the Bill also states that the council may, on application and on good cause shown, exempt any candidate legal practitioner or legal practitioner from performing community service, as set out in the rules.

Deputy Minister Jeffery said that during the deliberations on the Bill there were many complaints about the community service clause, mainly that it will be impractical to implement and that it is too vague and unclear on issues such as who will monitor the process, who will remunerate them and who will have to serve and for how long. He said that there was not much opposition regarding community service for candidate legal practitioners and that opposition was mainly received with regard to recurring community service for existing practitioners, since practitioners felt that it would be punitive. He added that this was not the Bill's intention as the intention was for lawyers to give back by imparting their skills to others.

Deputy Minister Jeffery said that the Bill was just one aspect relating to im-

proved access to justice. He said that the justice department was undertaking a variety of other initiatives and interventions to improve access to justice. He said that the department was on track in establishing small claims courts in every magisterial district in the country; the recently passed Superior Courts Act 10 of 2013 establishes a division of the High Court in each of the nine provinces, which opens up access to justice; and that the department was working on finalising the Traditional Courts Bill B1 of 2012 in order to bring the court's operation in line with the Constitution 'as these courts exist and provide access to justice and a mechanism for dispute resolution to many people in the rural areas'.

The Deputy Minister concluded by commending Saslaw and the members of its *pro bono* project and wished them the best in the endeavours of the *Pro Bono* NPC. He said: 'Every single person who is being assisted by this project is a person who is, through the project and its work, being guaranteed access to justice. Access to justice builds confidence and trust not only in the judicial system, but in the rule of law, our democracy and our constitutional dispensation.'

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New Bills passed

Parliament recently passed three new Bills, namely, the Restitution of Land Rights Amendment Bill B35 of 2013, the Private Security Industry Regulation Amendment Bill B27 of 2012 and the Infrastructure Development Bill B49 of 2013.

The Restitution of Land Rights Amendment Bill aims to amend the Restitution of Land Rights Act 22 of 1994. It amends the cut-off date for lodging a claim for restitution, meaning that it re-opens the land restitution process as it sets a new deadline for land claims to 31 December 2018 as opposed to the previous deadline of 31 December 1998. It also aims to regulate the appointment, tenure of office, remuneration and the terms and conditions of service of judges of the Land Claims Court.

The Private Security Industry Regulation Amendment Bill is aimed to amend the Private Security Industry Regulation Act 56 of 2001. It aims to, *inter alia* -

- amend certain definitions;
- provide for additional powers of the minister;
- provide for the authority to promote crime prevention partnerships with other organs of state;
- provide for the regulation of ownership and control of a business operating as a security service provider;
- regulate security services rendered outside South Africa; and
- to empower the Minister to make regulations for the transportation of cash and other valuables.

An amendment to s 20 of the Private Security Industry Regulation Act will compel foreign-owned private security

companies to sell 51% of their shares to South Africans. This section will include an addition of para (c), which reads 'if at least 51 per cent of the ownership and control is exercised by South African citizens'.

The Infrastructure Development Bill aims to provide for the facilitation and coordination of public infrastructure development, which is of significant economic or social importance to the country. It will also ensure that infrastructure development in the country is given priority in planning, approval and implementation and ensure that the development goals of the state are promoted through infrastructure development.

The Infrastructure Development Bill makes provision for a Presidential Infrastructure Coordinating Commission, which is tasked with performing the functions provided for in this Bill. The Presidential Infrastructure Coordinating Commission will have the following members -

- the President;
- the Deputy President;
- Ministers designated by the President;
- the premiers of the provinces; and
- the executive mayors of metropolitan councils as well as the chairperson of the South African Local Government Association recognised in terms of the Organised Local Government Act 52 of 1997 as the national organisation representing municipalities.

The Bill states that the President, or in his absence, the Deputy President, is the chairperson of the commission. Some opposition parties have criticised the Bill as placing too much power in the hands of the President to drive infrastructure projects.

Costs indaba

The Rules Board under, the auspices of the Justice Department, held an indaba on the legal costs of access to justice in Kempton Park in February 2014. The aim of the indaba was to facilitate discussion on the tariffs in the Supreme Court of Appeal, High Court and magistrates' courts; the creation of a tariff for advocates and the overall impact of tariffs on access to justice. Topics discussed included sustainability of costs in the context of access to justice and the structure of court tariffs for attorneys.

The Chairperson of the Rules Board, Constitutional Court Justice Bess Nkabinde gave the welcome address and delegates who spoke included retired Deputy Judge President of the North Gauteng High Court, Willem Van Der Merwe; the Chairperson of the costs committee of the Rules Board, Patrick Hundermark and the Chairperson of the Law Society of South Africa costs committee, Asif Essa who made submissions on behalf of attorneys.

Justice Nkabinde said that the sensitivity of the discourse lay in the fact that the matters that were being discussed affected the livelihood of most of the people who were present at the indaba. 'The matters affect the livelihood of most of us especially members of the legal profession, including sheriffs. It also affects members of the judiciary,' she said.

Justice Nkabinde said that the civil justice system should respond to the needs of everyone, including the needs of lawyers and sheriffs, adding that one of the basic principles that should be met by the civil justice system for the promotion of access to justice was proportional cost in relation to the nature of the issues involved and services rendered by lawyers. 'Our civil justice system does not meet this basic principle. In addition to it being complex and too slow, justice is also very costly. The cost problem is one feature that characterises the problem in our adversarial justice system,' she said.

According to Justice Nkabinde, the vexed question is how to address the issue of court fees without making it impossible for those who render service to be reasonably remunerated. 'How do we also strike a balance by ensuring that successful litigants are properly indemnified for all costs they have incurred in litigation and at the same time making sure that the unsuccessful litigants are not unduly penalised for failing claims against them,' she asked.

Justice Nkabinde said that the quality of justice was the function of the courts and added that what matters was that justice was made accessible to all. She added that lawyers had a pivotal role to play in democracy. This role was to serve

and bring justice to all and to make a positive difference to South African citizens.

Judge Van Der Merwe highlighted the fact that none of the resolutions that will be taken at the indaba would be binding of the Rules Board. He said that the focus of the indaba was on the recovery of cost on the basis that the successful party must be compensated. Judge Van Der Merwe said that Rules Board had to balance the interest of various service providers that provide a service throughout the civil justice value chain and the related costs. He said that in terms of the Legal Practice Bill, the Rules Board will be given two years to determine tariffs for all legal services that are rendered. The tariffs will be determined by a variety of factors that include the complexity of the case, the experience of the legal practitioner, the amount of work and the financial implications involved.

Judge Van Der Merwe concluded by saying that legal practitioners needed to understand their responsibility. 'People become discontented with the Constitution and it affects the rule of law if what they read in the Constitution is not a reality to them. This discontent impacts the economy and the ability to practise your profession,' he said.

Legal cost and access to justice

Mr Essa spoke on behalf of attorneys. He said that there were different role players involved in the administration of justice, adding that attorneys were involved in the filing of documents right up to the trial. He highlighted the fact that attorneys were not remunerated for that and added that this needed to be addressed.

'It is unfortunate that people do not understand the whole purpose of tariffs which is to indemnify a successful litigant against an unsuccessful litigant,' said Mr Essa, adding that it was not what the client pays the attorney.

Mr Essa said that, with regard to the legal costs on access to justice, attorneys can negotiate fees with clients, usually at the beginning of their mandate. This arrangement is contractual and with the informed consent of the client. 'The client has the right not to engage the attorney if he or she is not satisfied with the fee structure. These are known as attorney-and-own-client-costs. This is where the public has lost sight of the whole issue of tariffs,' he said.

Mr Essa said that tariffs increased four times in the past decade, namely in



The Chairperson of the Rules Board, Constitutional Court Justice Bess Nkabinde, giving the welcome address at the recent costs indaba.

2004, 2005, 2009 and 2013. He added that there was a disparity between attorney-and-own-client-costs on one hand and the party-and-party tariff on the other, adding that this inhibits access to justice.

Mr Essa said that various memoranda have been prepared over the years, amplified by economic data justifying increases that have not been implemented, thereby adversely affecting access to justice. He added that the recent increase in the statutory tariffs was inadequate and required immediate consideration.

Mr Essa said that the methodology and frequency of increases in tariffs and the method of the calculation of disbursements were causes of concern to the attorneys' profession and the public. He concluded by saying that the legal profession as a whole, including sheriffs and advocates, needed to get together to discuss these issues.

Unbundling reasonableness

Advocate Ishmael Semenya SC spoke on behalf of the General Council of the Bar of South Africa. He said that there must be access to justice, but that the legal profession must contextualise what that entails. He said that the Constitution also speaks of the right of access to healthcare. 'If you begin to read the right to healthcare to mean that Joe Soap will get access to the best cardiologist in the country or the right to housing to mean that Joe Soap will be living in Clifton, you

are beginning to distort the conversation,' he said.

Mr Semenya said he believes what the Constitution intends to convey is that all those people who have legitimate civil disputes must be able to go and ventilate those disputes and have them arbitrated on in accordance with law by competent judicial practitioners. 'We all agree that the provision of legal services must be reasonable, the controversy is how to unbundle that concept of reasonableness,' he said.

'Ultimately if we all agree that the services that are rendered by the advocates' profession in litigation are essential, can it really matter that they are rendered by someone wearing the hat of an advocate or that of an attorney?' he asked.

Advocate Semenya concluded by saying that the ratio of legal [services] practitioners to the population of South Africa [citizens] was distorted. He added that the profession needed to be open to more members to allow access to justice to a broader audience.

Professor Jonathan Bloom presented a report on behalf of the South African Board for Sheriffs detailing a tariff overview of the past decade. He also presented a financial model on adjustments to future tariff increases.

Resolutions

The delegates then divided into four groups for the breakaway session. The groups discussed the following -

- group one: sustainability of costs in the context of access to justice;
- group two: the structure of the tariff and increases in the tariff for attorneys in the Supreme Court of Appeal, High Court and Magistrates' Courts;
- group three: the structure of the tariff and increases in the tariff for sheriff in the High Court and the Magistrates' Courts; and
- group four: tariff for taxation of advocates' fees in the Supreme Court of Appeal, High Court and the Magistrates' Courts.

Professor at the University of Cape Town and Rules Board member, Mohamed Paleker said that group 1 believed that in an ideal world the burden of ensuring that everyone has access to justice should principally fall on the state as the Constitution talks about access to the courts (s 34) and that everyone is equal before the law (s 9). 'So in an ideal world the state should offer assistance to anyone who finds themselves needing to go to court,' he said.

Mr Paleker added that we are not living in an ideal world and that we need to be realistic. He said that the state has limited resources and that these resource constraints required creative and new thinking. Mr Paleker added that before one can even talk about legal fees and the

cost of litigation, it is vitally important to consider whether the civil justice system is in need of an overhaul. 'If you look at developments in England and Germany and other jurisdictions, the reform of a legal costs regime always occurred in conjunction with an overhaul of the civil justice system. So before trying to overhaul our legal costs regime, we must first think about our justice system,' he said.

Mr Paleker added that alternative dispute resolution also needed to be looked at and utilised more. He said that the jurisdiction of the small claims court needed to be reviewed to allow for greater access to justice. 'We should consider both the monetary and the substantive jurisdiction of small claims courts as turning to these courts can attend to, this can reduce the costs of legal services as legal representation is not permitted in these courts,' he said.

Mr Paleker said: 'We do not have enough lawyers in the country involved in a diverse range of new legal services. Perhaps if there were more attorneys and advocates in the country offering alternative services, it would increase competition which would in turn drive down prices and make access to justice more accessible. This is something the Justice Department must take up. They must think of ways of having more graduates involved in new areas of legal services within the civil justice system' he said.

KwaZulu-Natal attorney and member of the Rules Board, Thoba Poyo-Dlwati spoke on behalf of group 2. She said that her group resolved that the application of the tariffs different version of taxation in the country needed to be harmonised because it was currently not uniformly applied in the provinces across the country.

Her group also said that tariff increases should take place annually and should be based on the consumer price index but that the tariffs needed to be reviewed every three years.

On the issue of how to calculate disbursements group 2 said that a disbursement was a recovery of what one incurred, so one must recover what one has incurred.

Ms Poyo-Dlwati said that for the calculation of disbursements, the AA rates or the national treasury guides should be used for travelling cost calculations as well the rates charged by various cell phone providers for cellular calls and that these rates should be provided to the taxation officials.

Group 2 resolved that the tariff structure for the Magistrates' Courts, High Court and Supreme Court of Appeal should be retained.

Cape Town attorney and Rules Board member Graham Bellairs gave group 3's resolutions. He said that there is an urgent plea by the sheriffs that travelling

expenses must be increased urgently as sheriffs are tariff bound and do not have the cushion that attorneys have [that] of having attorney-and-own-client-tariffs. Mr Bellairs said that new process was required particularly in respect of the frequency of increase in tariffs. 'Sheriff's charges must be kept in line with the escalation of costs in the economy and therefore must be reviewed on an annual basis,' he said.

He added that there needed to be uniformity of tariffs in all the courts, adding that there must be a harmonisation between the tariffs for sheriffs in the High Court and the lower courts. 'Tariffs must be simplified. They currently go on for pages. They must also be more user friendly,' he said.

Mr Bellairs said that the travelling expense should also be the same all the courts.

On behalf of group 4 Cape Town advocate and Rules Board member Paul Farlam said that they had two views on whether there was a need for tariffs. One view was that it was helpful to have a tariff because it promotes uniformity and gives a degree of certainty to litigants as they will know how much they are expected to pay in advance. He added that it could also help bring the cost down for the losing party. The other view was that tariff recovery fees were not necessary and would not provide any benefit to the litigant. 'There was a strong sense that access to justice might be better enhanced as the successful party could recover their cost as much as possible and a tariff would not necessarily enhance that,' he said.

Speaking on the structure of the tariff, Mr Farlam said that there was general consensus that there should not be a fixed fee or fixed amount. Instead, there should be some sort of range that would take into account the nature of the matter, the seniority and experience of the advocate as well as the regional differences as advocate fees differ in the different parts of the country.

Mr Farlam said that there was a unanimous decision in his group that advocate fees are time based and not item based.

To view the submissions made at the costs indaba, go to http://www.justice.gov.za/rules_board/2014indaba.html

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

Legal Practice Bill passed and awaiting Presidential assent

The Legal Practice Bill was passed by the National Assembly on 12 March 2014 and was sent to the office of the State Legal Adviser for final constitutional scrutiny. This was expected to be completed during April 2014 and the President was expected to assent to the Bill before the national elections on 7 May. This would then signal the start of the transitional process, which will be steered by the National Forum on the Legal Profession (NFLP).

After provincial legislature briefings held in February 2014, on 5 March the National Council of Provinces (NCOP) voted on the Bill, which had minor technical amendments, and passed it with five provinces voting in favour, one abstaining and the Western Cape legislature objecting. As s 76 Bill, as the Legal Practice Bill was tagged, requires a minimum vote by five provinces. The Law Society of South Africa (LSSA) made written and oral submissions at the provincial hearings (see 2014 (Mar) DR 3). The Democratic Alliance issued a statement on 12 March indicating that, in its view, the passage of the Bill through the NCOP had been procedurally incorrect as one of the five provinces, Gauteng, did not have a valid mandate.

Also on 12 March 2014, the LSSA's management committee met with the

Department of Justice and Constitutional Development to offer its support to the Department in setting up a steering committee to start working on the roadmap for the transitional process. The Department is responsible for the costs, infrastructure and staffing of the NFLP. However, the understanding is that the profession itself will be expected to take responsibility for the work and negotiations of the NFLP, which will be in existence for a period of three years.

The NFLP

In terms of the Bill, the NFLP will have 21 members, 16 of whom are legal practitioners:

- Eight attorneys designated by the LSSA:
 - Two representing the Black Lawyers Association.
 - Two representing the National Association of Democratic Lawyers.
 - Four representing the four statutory provincial law societies.
- Eight advocates:
 - Five designated by the General Council of the Bar.
 - One designated by the National Bar Council of South Africa.
 - One advocate designated by the National Forum of Advocates.
 - One advocate designated by Advocates for Transformation.

- One teacher of law designated by the South African Law Deans Association.
- Two persons designated by the Minister of Justice and Constitutional Development.
- One person designated by Legal Aid South Africa.
- One person designated by the Board of Control of the Attorneys Fidelity Fund.

Within two years, the NFLP must make recommendations to the Minister on the following:

- An election procedure for purposes of constituting the National Legal Practice Council.
- The establishment of the provincial councils and their areas of jurisdiction.
- The composition, powers and functions of the provincial councils;
- The manner in which the provincial councils must be elected.
- All the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as legal practitioners.
- The right of appearance of a candidate legal practitioner in court or any other institution.
- A mechanism to wind up the affairs of the NFLP.
- Prepare and publish a code of conduct.

LSSA to launch election observer team to observe the national elections

Some 500 attorneys and candidate attorneys have made themselves available as volunteer observers for the national elections on 7 May. The Law Society of South Africa (LSSA) registered as an observer body for the national elections and invited attorneys and candidate attorneys to join the LSSA observer team.

In terms of its election manifesto, the LSSA indicated its support for the national elections in the spirit of the founding values of the Constitution, which espouse the supremacy of the Constitution and the rule of law, as well as universal suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

The LSSA believes that independent legal practitioners will 'serve as the eyes and ears of citizens' by observing

the voting and counting processes, as well as being present at the national results centre. LSSA observers will report their findings and the LSSA will draft a report to the Independent Electoral Commission.

Observers will receive a full-day training workshop provided free of charge by the LSSA, with the support of Lexis-Nexis, to equip them to assess the electoral process with a particular emphasis on compliance with regulations, laws, procedures and codes of conduct. They will also be able to evaluate the participation of citizens and their understanding of the processes. This will contribute to ensuring free and fair elections.

- Further information on the LSSA election monitoring project can be accessed on the LSSA website at www.LSSA.org.za



Norton Rose Fulbright and Lankalebalelo Attorneys in LSSA Synergy Link

Norton Rose Fulbright has entered into a Law Society of South Africa (LSSA) Synergy Link agreement as a transferring firm with Lankalebalelo Attorneys, as the growing firm, to transfer relevant skills to assist the growing firm to explore and develop new areas of practice, as well as providing advice and support on business and management related aspects.

Lindie Langa of Lankalebalelo Attorneys, centre, with Rob Otty and Shu Gule respectively, Managing Director and Chairman of Norton Rose Fulbright South Africa.



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People and practices

Compiled by Shireen Mahomed



Durban-based law firms Van Velden Pike Inc and Nichols Attorneys have merged. The new law firm will be known as Velden Pike Nichols Inc (VPN Law) and will offer legal services in the areas of maritime law, logistics, ports and terminals, marine and non-marine insurance (including professional indemnity), constitutional, and related corporate and commercial law. Standing, from left: Mark van Velden (director), Berning Robertson (associate), Andrew Pike (director) and Nicola-Ann Nel (associate).

Seated, from left: Trudie Nichols (director), Lauren Turner (associate), Mark Kmelisch (associate), Norma Wheeler (associate) and Anisa Govender (director). Absent: Goscelin Gordon (associate).

Garlicke & Bousfield in Durban has one new appointment and one promotion.



Kabby Esat has been appointed as a director in the commercial department.



Megan Gedy has been promoted to an associate in the litigation department.

Werksmans Attorneys has the following new appointments:



Peter Mason joined Werksmans Attorneys as a director in the banking and finance department.



Jason Smit was appointed in the firm's construction and engineering law department and will also lend his expertise to general litigation.

Cliffe Dekker Hofmeyr in Johannesburg has two new announcements.



Attie Pretorius has been promoted to chairman from April 2014. He has been a director at the firm since 1984.



Chris Ewing will retire as a partner but will continue to serve as a mentor and adviser to young lawyers at the firm.

Fairbridges in Cape Town has three new appointments.



Lalena Posthumus, has been appointed as an associate in the commercial department in Cape Town.



Lebona Khabo has been appointed as an associate in the litigation department in Cape Town.



Blair Wassman has been appointed in the litigation and labour law department in Johannesburg.

Adams & Adams in Pretoria has seven new partners.



Nicolette Biggar has been appointed in the trade marks department at the Pretoria office.



Jessica Axelson has been appointed in the trade marks department at the Cape Town office.



Venashrie Mannar has been appointed in the commercial, property and litigation department at the Pretoria office.



Andrew Molver has been appointed in the commercial, property and litigation department at the Pretoria office.



Jani Cronje has been appointed in the trade marks department at the Pretoria office.



Jean-Paul Rudd has been appointed in the commercial, property and litigation department at the Pretoria office.



Wilhem Prozesky has been appointed in the patent department at the Pretoria office.



Rooth & Wessels Inc in Pretoria has appointed Marco Schepers as a professional assistant in its commercial department.

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

GUIDELINES FOR ARTICLES

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

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- Authors are required to disclose their involvement or interest in any matter discussed in their contributions.
- Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.
- Footnotes should be avoided. Case references, for instance, should be incorporated into the text.
- When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details must be included.
- 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.
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Common law right to claim interest

By
Siyonwaba Mviko
and
Victor Mxolisi
Mndebele

Damages that flow from the failure to make payment timeously have recently been the subject of debates in the Supreme Court of Appeal (SCA). As a result thereof, a number of principles emanating from a creditor's right to claim interest have been formulated in a number of reported cases.

Certain of the principles include the following:

- If a debtor is late with payment of a money obligation under a contract, the creditor is entitled to claim *mora* interest on the outstanding debt due to the debtor's failure to make payment on the due date.
- The creditor is entitled to claim this interest even without a specific contractual provision to pay interest.
- If the contract fixes the time for payment, no demand is necessary to place the debtor in default and interest is payable from the date on which payment was due.

In *Land Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd and Others* [2013] 4 All SA 385 (SCA), the appellant (the bank) advanced and lent monies to several commercial farmers (the respondents or borrowers). The loans were all secured by mortgage bonds. Each loan agreement provided that interest at a stipulated annual rate would be calculated on the balance of the capital outstanding from time to time.

In terms of each loan agreement, the loan and interest was repayable in equal instalments annually in arrears (at para 4). The date on which each instalment was due and payable was fixed by agreement. It was common cause that, in many instances, the respondents did not pay their instalments on the due dates.

After all the loans were repaid, the respondents instituted action against the bank on a number of grounds. In this article we will focus only on whether the

bank was entitled to levy *mora* interest on unpaid but due and payable interest. The High Court found that 'in the absence of agreement to that effect, the appellant was not entitled to interest on unpaid interest' and gave judgment for the respondent (at para 10).

On appeal, the SCA held that *mora* interest constitutes a form of damages for breach of contract and 'the general principle in the assessment of such damages is that the sufferer by the breach should be placed in the position he would have occupied had the contract been performed' (at para 13).

Due to the fact that interest is the 'lifeblood of finance' and that tardy payment of monetary obligations will almost invariably deprive the creditor of the productive use of the money and thereby cause him or her loss (at para 13). Accordingly, it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date (at para 19).

Unless specifically excluded in a contract, *mora* interest automatically flows from the breach of contract.

Because *mora* interest represents damages, the rate thereof is not determined nor governed by agreement or in any other manner. *Mora* interest is payable at the prescribed rate, which currently is 15,5%, and is determined by the Minister of Justice, from time to time, in terms of s 1(2) of the Prescribed Rate of Interest Act 55 of 1975, as amended.

The court found in favour of the bank, determining that in the absence of a clear and unambiguous agreement to the contrary, *mora* interest is payable at the prescribed rate on any unpaid interest that is due and payable.

In an earlier judgment, *Crookes Brothers Limited v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2013] 2 All SA 1 (SCA), the SCA held: 'Even in the absence of a contractual obligation to pay interest, where a debtor is in *mora* in regard to the pay-

ment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date' (at para 14).

A party who has been deprived of the use of capital for a period of time suffers a loss and must be compensated by an award of interest. If the contract fixes the time for payment, no demand is necessary to place the debtor in default and interest is payable from the date on which payment was due. If the contract does not include an express or tacit statement of the date when payment is due, a demand for payment within a reasonable time must be sent before interest starts accumulating.

Conclusion

Mora interest constitutes compensation for loss resulting from a breach of contract and is not governed nor dependant on an agreement. *Mora* interest is a common law right, meaning that it automatically applies to contracts unless it is expressly, plainly and unambiguously excluded by agreement between the parties. If a contract or agreement is silent on the rate of interest, then interest can be claimed at the prescribed rate of 15,5%. *Mora* interest can only be claimed at the prescribed rate. The same principles apply equally to a debtor who is in default in respect of a contractual obligation to pay interest.

Siyonwaba Mviko BCom LLB (UJ) is a candidate attorney and Victor Mxolisi Mndebele LLB (Wits) is an attorney at Poswa Inc in Johannesburg.



Having a hunch – tapping into your senses

By
Louis
Rood

Lawyers like to think that they are guided by logic, reason and facts. But does that process always lead to the truth? It is good to be sensible, rational and objective, but is it enough?

Intuition is something that some people have often derided as some sort of irrational, emotional fantasy, which at best is patronisingly tolerated as a harmless form of foolishness. However, in a world where decisions frequently have to be made under severe time constraints and with tight budgets and limited information, more lawyers are having to trust their gut feeling or intuition.

There are two very important components with regard to intuition: Listening to intuition and then trusting it. This trust develops over time and is based on experience gained – namely, that your acute perception, shrewd observation and your feel for what sounds right can indeed be relied on to be accurate.

When you develop the self-confidence to have faith in what your instincts tell you, this can enhance your professional judgement, and give you an edge over more stodgy bean-counters.

Intuition does not mean excluding facts and data; it means adding another powerful source of knowledge. If you rely only on verifiable information – for example, finances, structures and procedures – you remove emotion, instinct and the ability to evolve, invent and innovate. You disconnect yourself from your best instruments for adaptability – namely, creativity and inspiration. We perform best if we passionately

believe in what we are doing. That belief is often intuitive.

What about the risks involved in relying on your intuition? Taking risks is part and parcel of remaining dynamic, effective and competitive in a constantly and ever more rapidly changing business environment. You will never have all the facts and options available before taking a decision. You have to rely on your instincts, your experience and your sound common sense and you have to ensure that you have identified the risks you are taking.

Being alert to opportunities that may arise, despite the risks that go hand-in-hand with such opportunities, means that you never become complacent or bogged down in your comfort zone. You are able to continually review the effectiveness, viability and desirability of your approach. You can never improve unless you are open to change. The greatest risk is often in failing to take those opportunities: If you stay in the middle of the road, you will get run down.

Risk-taking is often necessary in trying to develop a competitive advantage in the market place. If you have sound policies, goals and strategies, you can build up a compelling momentum in how you manage and implement change and, in that way, minimise the risk. Success is not for the faint-hearted; in order to succeed, you need to take calculated risks. It is only with risks that you get rewards.

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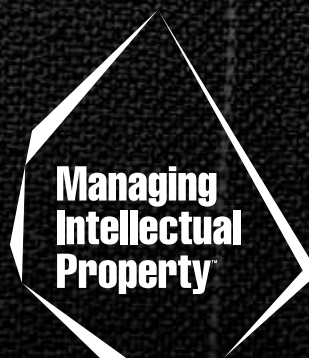
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By
Simthandile
Kholelwa
Myemane

Have you paid your dues?

Section 78(3) of the Attorneys Act 53 of 1979 obliges practitioners to pay any interest earned on deposits in trust accounts in terms of s 78(1) and (2) over to the Attorneys Fidelity Fund (AFF). The AFF has, at its discretion, allowed the following in this regard:

Practitioners may deduct 100% of the allowable bank charges incurred on the s 78(1) funds and pay over the net interest to the AFF. However, if the bank charges incurred exceed the interest earned on the s 78(1) funds, the practitioner bears the cost.

The AFF advises practitioners of allowable deductibles and the following charges are currently disallowed:

- Unusually high cash deposit fees.
- Charges regarding issuance of bank guarantees.
- Forex transaction fees.
- Non-payment bank charges fees.
- Fees in relation to the issue of interim bank statements.
- Special clearance charges.

It is the responsibility of practitioners to ensure that the correct interest is paid

to the AFF on time. In terms of the Fidelity Fund certificate (FFC) issued on behalf of the AFF by the practitioner's statutory law society, which enables an attorney to practise for his or her own account, the interest earned annually up to the last day of February each year should be paid to the law society by 31 May of that year.

An automated monthly transfer system, whereby the banks automatically transfer the interest over to the law societies for further pay-over to the AFF, can be used by practitioners. This system does not take the responsibility away from the practitioner to ensure correct payment; it still remains the duty of the practitioner to ensure that the correct interest is paid. Should the practitioner realise that the bank passed on disallowed bank charges, it is the responsibility of the practitioner to pay the amount involved.

In determining how much of the bank charges to offset against earned interest, a value-added tax (VAT) registered practitioner will reduce the claimed bank charges by the VAT portion, while a non-

registered practitioner will claim VAT inclusive of bank charges. Table 1 (below) is an illustration of how VAT registered and non-registered practitioners will determine the net interest that needs to be paid.

Practitioners must reclaim the cost of their trust audit fees from the AFF. The current audit fee refund formula requires:

- A minimum contribution of R 3 000 per firm.
- A maximum contribution of 20% of net trust interest.


These reclaims, for both bank charges and trust audit fees, are subject to the practitioner complying with the preferential banking arrangements for trust banking accounts, as shown on the AFF's website (www.fidfund.co.za) under 'banking options' and sufficient trust interest being generated by a firm to defray such bank charges.

Type of firm	Interest earned	VAT inclusive bank charges (allowable)	VAT portion deducted	Bank charges reclaimed	Net interest paid
VAT registered	R 8 956,78	R 1 956,32	R 273,89	R 1 682,44	R 7 274,35
VAT non-registered	R 8 956,78	R 1 956,32	Nil	R 1 956,32	R 7 000,46

Table 1: An illustration of how VAT registered and non-registered practitioners will determine the net interest that needs to be paid.

Simthandile Kholelwa Myemane BCom Dip Advanced Business Management (UJ) Cert Forensic and Investigative Auditing (Unisa) is a lead forensic investigator at the Attorneys Fidelity Fund in Centurion. □

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Sugar-coating guilt

Admission of guilt fines – no easy fix



Picture source: Gallo Images/Thinkstock

By
Dr Llewelyn
Curlewis

The Western Cape High Court delivered a judgment in the matter of *S v Tong* 2013 (1) SACR 346 (WCC) on 7 September 2012. The matter related to a case where the appellant (Tong) paid an admission of guilt fine in November 2008 after he had been arrested on a charge of possession of dagga in contravention of s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 and was subsequently released from custody.

In 2011, Tong discovered that he had a criminal record as a result of the possession charge in 2008. The criminal record severely prejudiced him and limited his employment opportunities. Tong alleged that he had not been afforded an opportunity to present his defence in court or to adduce evidence in his defence and stated that he would have elected to defend the charge leveled against him had he known of the implications of paying the admission of guilt fine.

In an article, entitled: 'Section 57 and 57A of the Criminal Procedure Act 51 of 1977 – use them with discretion' 2008 (Apr) *Society News*, no 124 at p 8, I warned against the short-sighted, irresponsible and sometimes ill-considered payment of admission of guilt fines purely for the sake of expediting and finalising criminal proceedings, that is, basically using it as a nonchalant quick-fix method. Practitioners should not be confused by the sometimes artificial advantage created by these sugar-coated sections.

Section 56(1) of the Criminal Procedure Act 51 of 1977 (CPA) provides that, if a peace officer on reasonable grounds believes that a magistrate's court will not, on conviction for that offence, impose a fine exceeding an amount determined in the *Government Gazette* by the Minister of Justice and Constitutional Development, he or she may issue a notice to the accused to pay an amount specified by the peace officer. Section 56(1)(d) of the CPA requires that the written notice must, *inter alia*, contain a certificate by the peace officer that he or she has handed the original written notice to the accused and explained the importance of the notice to the accused.

If an accused elects to pay an admission of guilt fine on being issued a written notice in terms of s 56 of the CPA, s 57 of the CPA will also apply, and the accused may admit his or her guilt without appearing in court by paying the fine stipulated on the written notice. Once the admission of guilt fine is paid by the accused, the particulars of the accused are recorded as a criminal record and the accused is deemed to have been convicted and sentenced by the court in respect of the offence concerned.

The practical implications of these sections of the CPA, as amended, are not

always properly understood. In laymen's terminology and also in legal jargon, the words 'admission of guilt', sounds perfectly descriptive, but this view would amount to seeing only the tip of the iceberg.

It is foreseeable that practitioners will come under fire in future because of these sections. This may even entail a possible claim for malpractice, due to the hasty acceptance of an admission of guilt fine (in the trend of following old habits), without carefully explaining and/or considering all the concomitant effects of such acceptance. Such a claim may possibly even arise from a failure to advise a client against paying the fine in certain circumstances. An admission of guilt fine is very often considered a quick fix, an easy way out, or a short-cut conclusion by defence practitioners and prosecutors alike, where it might – in fact – represent a significant threat.

It is well argued that ss 57 and 57A (inserted into the CPA by s 1 of the Criminal Procedure Second Amendment Act 85 of 1997), are for the benefit of both the justice system and the individual since they reduce overburdened court rolls, relax the stringent and non-user friendly adversarial court process and generally cut to the chase.

'An admission of guilt fine is very often considered a quick fix, an easy way out, or a short-cut conclusion by defence practitioners and prosecutors alike, where it might – in fact – represent a significant threat.'

Section 57 provides for the admission of guilt in respect of the offence and for the payment of a stipulated fine without appearance in court. Section 57A, on the other hand, provides for the admission of guilt and the payment of a fine, after appearing in a court but before the accused has entered a plea in terms of s 106 of the CPA.

Section 57 may be used where a summons is issued under s 54 (s 57(1)(a) has been substituted by s 3(a) of the Crimi-

nal Procedure Matters Amendment Act 109 of 1984 and by s 6(a) of the Criminal Procedure Amendment Act 5 of 1991) or where a written notice under s 56 is handed to the accused.

The aim of this article is not to discourage the payment of admission of guilt fines in meritorious cases. Rather, it serves as a warning signal, suggesting a cautious approach to beg reconsideration by those practitioners and/or members of the public with an attitude of: I would rather pay an admission of guilt fine of R 1 000 now than try and convince a court of my innocence in a lengthy, frustrating and costly court case later.

The payment of an admission of guilt fine is based on the fact that an accused would be fully appraised of his or her rights and the consequences thereof before electing to do so. By electing to pay the admission of guilt fine, an accused waives a number of procedural rights that he or she would have had at a trial (including the right to be sentenced only after proof beyond reasonable doubt that he or she did in fact commit the offence, the right to confront his or her accusers and the right to call witnesses, etc).

The payment of admission of guilt fines is undoubtedly an important component of the criminal justice system, as it affords the opportunity to admit guilt for less serious offences and relieves the burden on the overloaded criminal justice system. However, the payment of an admission of guilt fine may and should not be used as a bargaining tool by the South African Police Service (SAPS) to effect the release of a person from custody. I submit that such an approach is unlawful.

In the *Tong* judgment, the court held that the accused person must be informed and warned by the police officer serving the notice that, should he or she elect to pay the admission of guilt fine, a conviction will be noted against his or her name. As a result, the court held that the existing written notice usually used (J 534 form) is inadequate and may not pass constitutional scrutiny.

The existing J 534 form does not mention the constitutional rights of an accused person, which must be highlighted and a police officer or attorney must surely warn the accused about the criminal record that he or she will have as a result of the decision to pay the admission of guilt fine. The court further held that the existing J 534 form must be amended to include this warning, and that the accused must also be informed that he or she will be waiving –








- the right to be sentenced only after the state has proved his or her guilt beyond reasonable doubt;
- the right to contest the allegations in an open court, to call witnesses; and

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Murder

15 y – Sustained assault on lover – Fists and boots – Age 29 – Alcohol – *S v Zakwe* [2013 JDR 1374 \(GNP\)](#)

18 y – Age 18 – First offender – Borrowed firearm to kill victim for his firearm – *S v Maneli* [2013 JDR 1061 \(ECB\)](#)

20 y (13 NP) – Long-running feud with deceased – No remorse – Age 31 – Firearm – *S v Makhoba* [2013 JDR 1843 \(KZP\)](#)

20 y – Age 31 – First offender – Family inheritance dispute over truck – Firearm – *S v Dlodlu* [2013 JDR 0008 \(GNP\)](#)

Judgments under each offence are sorted from lowest to highest sentence

Concise summaries contain only the facts pertinent to the sentence given. The summaries use key words and phrases to enable accurate searches, e.g. first offender, age, age of victim, firearm, previous conviction, remorse, guilty plea, etc

Hyperlinks to the full text of reported and unreported judgments

Reports under Substantial and Compelling Circumstances

SCC Murder

No – Age 26 – Previous conviction – Out on parole – Home robbery killing – *S v Maswetsa* [2013 JDR 1523 \(GSJ\)](#)

No – Age 28 – Educated – No remorse – Brutally killed own brothers for gain – *S v Elongo* [2013 JDR 0388 \(GSJ\)](#)

Yes – First offender – Rejected by family because HIV – Poisoned son age 4 – *S v Mazibuko* [2013 JDR 1834 \(GNP\)](#)

Yes – Long feud – Self-employed – Supports mother, four siblings – Firearm – *S v Makhoba* [2013 JDR 1843 \(KZP\)](#)

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The summary contains the pivotal facts on which such finding was made

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- sometimes also the right to legal representation.

In order to comply with the abovementioned judgment, the SAPS recently drafted an amended J 534 form. However, it is important to note that the J 534 form is an official form of the Department of Justice and Constitutional Development and, as such, the SAPS is apparently not in a position to amend the form without the permission of that department. According to a memorandum by the National Police Commissioner, Riah Phiyega, dated 12-4-2013, consultations are currently taking place with the department on the amended J 534 form.

In the meantime, it is important that a member of the SAPS must inform an accused who is not legally represented and to whom a J 534 form is issued, of the following information:

- If the person chooses to pay the admission of guilt fine, he or she acknowledges that he or she is guilty of the offence(s) (as stated on the J 534 form that is handed to the accused).

- By paying the admission of guilt fine, he or she will be deemed to have been convicted in court of the offence (without having appeared in court, having had the benefit of facing his or her accuser, having had legal representation or having exercised the right to call a witness in an open court) and that the conviction will be recorded as a previous conviction against his or her name and will appear on his or her criminal record.

Where the accused person is represented by an attorney, the obligation to explain the above-mentioned information is placed on the legal representative. As explained above, it is a loaded burden resting on such person.

In a number of cases I have recently been involved in, the client (the accused) elected to follow the review application route (similar to the *Tong* case) and elected to hold the former attorney, who had initially advised the client to pay the admission of guilt fine (without explaining the consequences), accountable for damages and costs.

In the case of a police officer, a SAPS member should make an entry in his or her pocket book, stating the information as set out above, and record that the accused person has accordingly been informed thereof. I suggest that attorneys should also record this in their file and even require the client to sign a document as proof that he or she was in fact informed.

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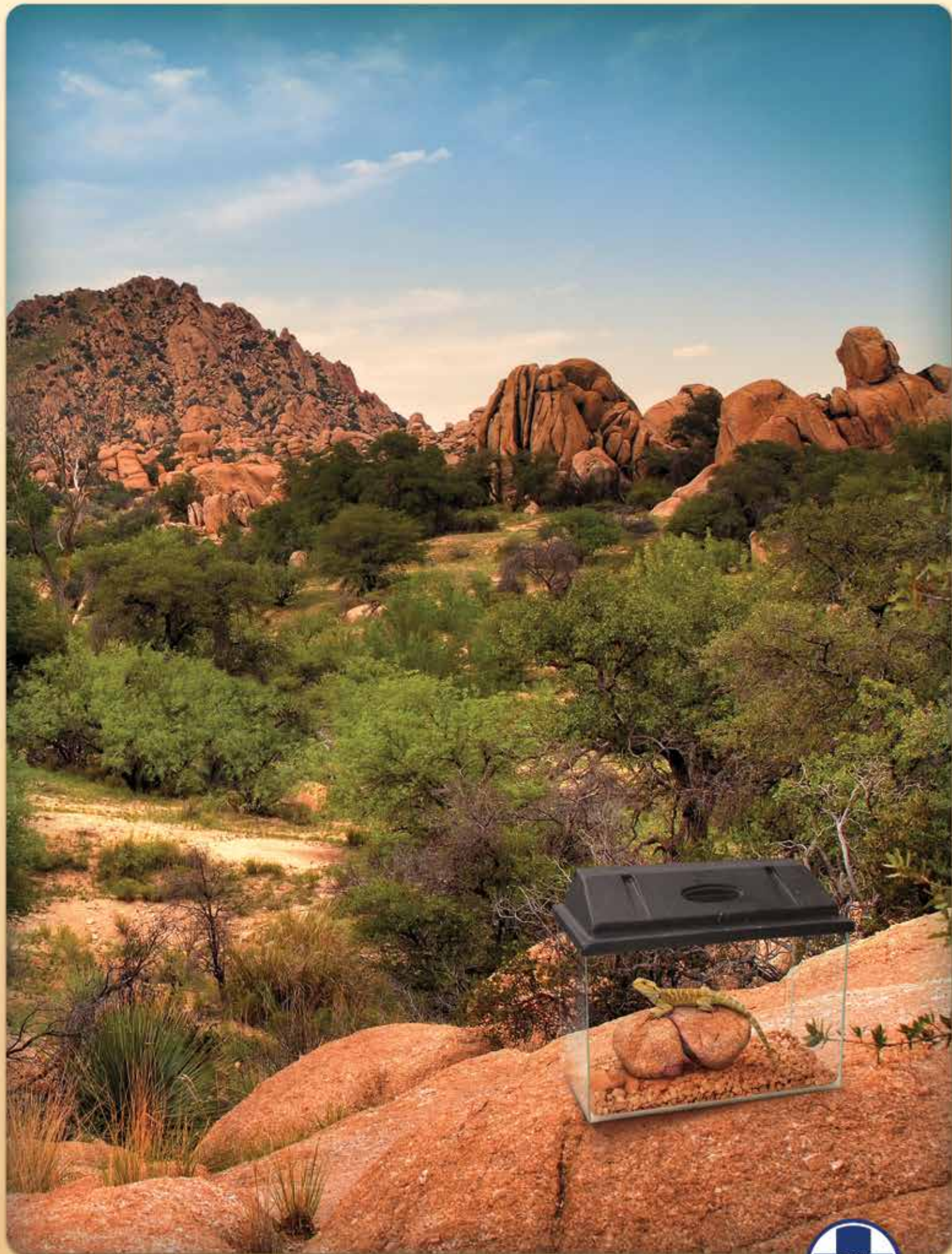
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Merger and takeover law

Impact on private companies

By Basil
Mashabane

enormous changes to the way mergers and takeovers are regulated in South Africa. There is no denying, however, that there exists a number of uncertainties on a few issues pertaining to the Act and its application to mergers and takeovers.

Application of mergers and takeover laws on private companies

The main subject of this article is one of the major changes that the law has introduced that has caused some consternation in business but, at the same time, appears to be enjoying support among the stakeholders it is meant to protect, namely the minority shareholders in companies. The change relates to the application of the Act and the takeover regulations to private companies registered under South African law.

The merger and takeover provisions of the Act apply to regulated companies only and s 118(1) of the Act lists and defines three types of regulated companies, namely –

- public companies (listed or unlisted);
- state-owned companies (unless exempted); and
- private companies.

Under s 118(1)(c) of the Act a private company is regulated only if –

‘(i) the percentage of the issued securities of the company that have been transferred, other than by transfer between or among related or inter-related persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the prescribed percentage in terms of subsection (2) or;

(ii) the Memorandum of Incorporation of that company expressly provides that the company and its securities are subject to this Part, Part C and the Takeover Regulations, irrespective of whether the company falls within the criteria set out in subparagraph (i).’

For a private company to be regarded as regulated, certain steps must have taken place and this stems from the realisation that private companies are by nature, small and tightly held business entities and, to a large degree family controlled, making it easy for the parties to reach agreement on major issues relating to the company and its business, such as acquisitions and/or transfer of the business of the company.

Rationale for the application of the Act to private companies

It could be argued that the Act therefore envisages that a private company, which is regulated, would be a large company with a sizeable number of shareholders and with sizeable corporate activity taking place, including entering into buying

and selling of shares, business transactions or other corporate activity events necessitating the involvement and/or intervention of a regulator such as the Takeover Regulation Panel to ensure that the rights of the company’s minority shareholders are protected.

What is clear however, is that the majority of the matters involving private companies that the Takeover Regulation Panel (the panel) deals with involve fairly small private companies in which shareholders range between two and ten in number. These shareholders are usually party to the sale of shares or disposal of assets agreements being entered into and would proceed with these agreements unhindered, except when a private company entered into a transaction in the past 24 months in which shares exchanged hands, resulting in it being regulated and therefore required to comply with certain statutory requirements before concluding and implementing the particular sale of shares or disposal of assets agreement with another party.

These statutory requirements that a private regulated company is required to meet include the preparation of a circular in terms of the regulations with the purpose of fully explaining and disclosing to shareholders all the aspects of the merger or takeover transaction or agreement that the company is involved in and to also prepare an independent expert report (at its expense) for a valuation of the company’s shares or assets in order to determine, for the benefit of the shareholders, whether the offer to acquire the shares or to effect the disposal of the company’s assets, is fair or unfair to the shareholders of the company.

An argument could be made that the only rationale for regulating mergers and takeover transactions involving private companies is to protect shareholders regardless of the number of shareholders that are involved and whether or not the shareholders are fully in support of the merger or takeover transaction.

The question therefore becomes whether it is proper and rational for these provisions to exist, taking into account the nature of private companies and the transactions regulated by South African merger and takeover law.

Exemption of private companies

In recognition of what could at times appear to be an absurdity, the drafters of the Act and the regulations had the foresight to include a provision in the Act to the effect that the panel has powers to grant an exemption to an offeror to an affected transaction to an extent that doing so is not prejudicial to the interest of any party to the transaction; that the cost of compliance is disproportionate to the value of the transaction or that

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This is a follow-up to the article ‘Mergers and takeovers under the new Companies Act’ (2011 (Sept) *DR* 30) where I discussed the fact that South African mergers and acquisitions are experiencing a paradigm shift following the enactment and implementation of the new Companies Act 71 of 2008 (the Act) on 1 May 2011, replacing the old order.

The Act has been in existence almost three years and it has already brought

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Guide for Registered Auditors: Engagements on Attorneys Trust Accounts

This Guide for Registered Auditors: *Engagements on Attorneys Trust Accounts* (this Guide) was prepared by a Task Group of the Committee for Auditing Standards (CFAS) of the Independent Regulatory Board for Auditors (IRBA) which comprised auditors and representatives of the Law Society of South Africa, the Provincial Law Societies, and the Attorneys Fidelity Fund.

This Guide was approved for issue in February 2014 and replaces the previous SAICA Guide, namely "Guidance for Auditors: The Audit of Attorneys' Trust Accounts in terms of the Attorneys Act, No 53 of 1979, and applicable Rules of the Provincial Law Societies" that has been withdrawn. The auditors' reasonable assurance report replaces the Attorneys Trust Account - Revised Transitional report issued in August 2008 that is similarly withdrawn.

Guidance is provided to registered auditors in the special circumstances applicable to engagements on attorneys trust accounts as required by the Attorneys Act, No 53 of 1979 and Rules of the relevant Provincial Law Society (the Act and the Rules), including an auditor's responsibility to report a reportable irregularity. This Guide is also relevant for attorneys in understanding the nature of the engagement, and the respective responsibilities of the parties. This Guide has been prepared on the basis of the present Rules of the respective Provincial Law Societies and will be updated when the Law Society of South Africa's proposed Uniform Rules are approved and issued.

There is an expectation by the Attorneys Fidelity Fund, the Law Societies, financial institutions, attorneys' clients and members of the public, that auditors of attorneys trust accounts will detect fraud and theft, whereas the main purpose of an engagement on an attorney's trust accounts is for the auditor to evaluate the compliance of attorneys trust accounts with the Act and Rules. Accordingly the Guide contains special considerations applicable to fraud and theft in the circumstances of engagements on attorneys trust accounts.

The Attorney's Annual Statement on Trust Account contains the attorney's compliance representations to the relevant Provincial Law Society, and information extracted from the trust accounting records previously dealt with in the auditor's report. The Attorney's Annual Statement on Trust Accounts is to accompany the auditor's report.

Effective date

The Attorneys' Trust Guide is effective for engagements commencing on or after 1 March 2014.

Early adoption is permissible.

The Attorneys' Guide is available in both PDF and Word formats and may be downloaded free-of-charge from the IRBA website at www.irba.co.za/index.php/auditing-standards-functions-55/92?task=view.

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doing so (ie, granting the exemption) would be both reasonable and justifiable.

Based on the nature of private companies and the type of transaction entered into by these companies, the panel continues to be inundated with applications for exemptions from legal practitioners acting for these companies requesting that the parties involved in these transactions be exempted from compliance with the provisions of the Act and the takeover regulations.

The fact that the panel is, under certain circumstances, allowed to provide an exemption from its requirements should not create the impression that the panel has become a rubber stamp and fortuitously grants exemptions to parties involved in transactions with these regulated companies, particularly where, at face value, it appears that granting an exemption would be correct thing to do.

This is certainly not the case when one considers that the panel would still require a letter from the parties applying for the exemption detailing the nature of the transaction, explaining the basis on which the company is regulated, taking into account s 118(1)(c), together with a motivation as to why an exemption should be granted based on the factors indicated above, which are found in s 119(6), and with supporting documents including written agreements attached.

In addition to these requirements, the

offerer and the party applying for the exemption would also be required to attach waiver letters from shareholders in the regulated company in which the shareholders indicate that they are aware of the offerer's obligations to comply with the provisions of the Act and the takeover regulations on mergers and takeovers, but that they are prepared to allow the offerer to obtain an exemption through them waiving their rights.

Lastly, the waiver letters must be signed in original form by all the shareholders in the regulated company in order for the application to be considered.

Conclusion

There is a prevailing argument in some quarters that the application of the Act and the regulations to private companies is cumbersome and to some extent unnecessary, taking into account the nature of the majority of private companies registered in South Africa. However, there is a counter-argument that the provisions apply to select private companies meeting certain requirements as prescribed only and it is indeed in these companies where such application of the requirements would be necessary.

Further, and in support of the counter-argument that the Act and the regulations do provide an 'escape clause' in terms of s 119(6) wherein the requirements for applying for and obtaining an exemption are all encompassing and

not difficult to satisfy if and when adhered to and, lastly, that the panel has not abrogated its role and still ensures that it plays its regulatory role and function with the same amount of interest and close inspection as it would when it deals with a major takeover transaction for purposes of ensuring that the interests of shareholders are protected.

It should never be taken for granted that a large number of small businesses in South Africa have been incorporated as private companies and most of them acquire their legal services from small and medium-sized law firms.

It has been my experience over the years at the panel that practitioners in these firms hardly get exposure to merger and takeover law work and these changes to the law will inadvertently ensure that these practitioners are exposed to the world of mergers and acquisitions as they provide advice to their clients, albeit that these changes were not motivated by the desire to create more work for practitioners but to simplify the law and to also enhance shareholder protection.

Basil Mashabane LLB (UP) LLM Certificate in Advanced Corporate and Securities Law (Unisa) is a non-practising attorney employed as legal counsel for the Takeover Regulation Panel in Johannesburg.

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IC006/14



Is sexting a criminal offence?

Picture source: Gallo Images/Thinkstock

By Lesedi
Malosi
Molosiwa

The act of 'sexting' or to 'sex' is defined as the exchange of pornographic material or sexually explicit messages, pictures or videos via a mobile phone or the internet.

The assumption is that not all pornography, and especially sexting, is reported in case law in South Africa, which creates gaps in the reported case law. Therefore most of the information is article based.

The objective of this article is to, first, establish the relation between sexting and pornography, secondly, to determine whether there are reported cases of sexting and, lastly, to determine how South African courts and legislation have dealt with sexting. It discusses the premise that sexting is influenced by an increase in the use of mobile technology making it more available globally for both adults and children.

To put the topic into context, the scenario has been created where X (who is married to Y) is found to be in the possession of explicit material, such as child pornography. X may desire to claim freedom of expression and an infringement of privacy if apprehended. X may also claim that it is for research purposes or that the minor is his or her child. The question would be whether X's spouse (Y) or the law would consent to such content being in the possession of X or if the above reasons would be legitimate enough for the court to accept as valid and just reasoning for the accused without further evidence being adduced. With this scenario in mind, existing legislation in South Africa will first be considered.

The Constitution

Section 14 (privacy) and s 16 (freedom of expression) of the Constitution, as provided for in the Bill of Rights, enshrines the rights of all people in the Republic of South Africa, including the right to equality (s 9), the right to dignity (s 10) and the right to freedom and security of the person (s 12), which incorporates the right to be free from all forms of violence from either public or private sources. Most importantly, the Constitution provides for the rights of children and other vulnerable persons (including the disabled) to have their interests protected.

Common law offences or crimes

I submit that, despite the absence of reported case law dealing directly with sexting, it is important to identify the legal position in South Africa when dealing with pornography. The following cases will be looked at in order to provide the South African common law position on pornography, as it is a pivot on which sexting hinges.

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 389 (W) the applicant who had been charged with possession of certain material in contravention of s 27(1) of the Films and Publications Act 65 of 1996 (the FP Act), applied for an order declaring s 27(1) read with s 1 (child pornography) of the FP Act to be inconsistent with the Constitution. In other words, the applicant submitted that the finding of unconstitutionally excluded a defence of legitimate purpose or public good or public interest where such material was possessed for a *bona fide* documentary, research work, drama or work of art without involving real children.

Furthermore, the applicant submitted that the section violated the rights to privacy, more particularly because the definition of child pornography was vague and open-ended, and thus open to arbitrary and subjective decision-making. In addition, the applicant referred to s 22(1) of the FP Act that provides for the exemption of any person or institution from ss 25, 27 and 28 if there was good reason to believe *bona fide* purposes would be served by such exemption. The court held that, in terms of the values that the Constitution espoused and the purpose of s 27(1), the limitation of the rights of the applicant were reasonable and justifiable.

In *S v Geldenhuys* 2009 (1) SACR 1 (SCA) on the other hand, the Supreme Court of Appeal declared ss 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957 constitutionally invalid on the basis that the sentences of imprisonment imposed under these sections suspended pending decisions of the Constitutional Court on whether or not to confirm an order of invalidity.

In *S v Koralev and Another* 2006 (2) SACR 298 (N) the facts briefly stated that the appellants were convicted in a regional magistrate's court on various counts of indecent assault, contraventions of the FP Act and, in the case of the first appellant, were in contravention of s 14(1)(b) of the Sexual Offences Act. The charges related to the commission of indecent acts involving minors and to the creation or possession of child pornography. The first appellant received an effective eight-year term of imprisonment, while the second appellant was sentenced to four years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (CPA).

Hefer JA stated that before the images in question could be admissible in evidence against the appellants there had to be some proof of their accuracy in the form of corroboration that the events depicted actually occurred. The SCA held that the court *a quo* had erred in finding that the first appellant was aware of the

images showing the second appellant in compromising positions and that, by virtue of his possession of these images, he had acted as her accessory. There was in fact no evidence that the first appellant was aware of the presence of these images on the computer; neither was this the only reasonable inference to be drawn from the fact that they were found there. It was possible that some other person had taken the pictures and stored them on the computer unbeknown to the first appellant. This was a further reason for the first appellant's conviction of indecent assault to be set aside. The appeal was upheld and convictions and sentences were set aside.

It is therefore evident that the South African common law position considers the interests of the accused, the community and of justice by applying the principle of 'innocent until proven guilty' by engaging the Constitution, thus addressing access to the courts on appeal and review.

I submit, based on sched 1 of the CPA providing for rape, indecent assault and sodomy, complemented by sched 2 that provides for rape only, that the CPA does provide for common law offences related to sexting. Therefore sexting is a criminal offence in relation to the elements of the crime.

The Films and Publications Amendment Act 3 of 2009

The Films and Publications Board (FPB) is a statutory body established by the FP Act. The FPB's task is mainly to classify films, videos, DVDs, computer games and certain publications for their suitable age viewership. It classifies all film material distributed in South Africa, except that shown on TV.

Section 1(e) of the FP Act (as amended by the Films and Publications Amendment Act 3 of 2009), states that child pornography 'includes any image, however created, or any description of a person, real or simulated, or who is depicted, made to appear, look like, represented or described as being under the age of 18 years'. The FP Act states that 'child pornography' is when a person (including a minor child) is -

- '(i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or
- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation'.

I submit that sexting is addressed by s 1, which defines 'explicit sexual conduct' as graphic and detailed visual presentations or descriptions of any conduct

contemplated in the definition of 'sexual conduct' in the FP Act. Section 1 moreover defines 'sexual violence' as 'conduct or acts contemplated in the definitions of "sexual conduct" and "explicit sexual conduct" that are accompanied either by force or coercion, actual or threatened, or that induces fear or psychological trauma in a victim'.

In addition to various child protection initiatives the Films and Publications Amendment Act has been amended to make the investigation and prosecution of child pornography offenders more effective. This is, for example, provided in s 29, which also refers to s 24 of the FP Act identifying prohibition, offences and penalties on distribution and exhibition of films, games and publication. It states that, in terms of s 24A(1) 'any person who knowingly distributes or exhibits in public a film or game without first having been registered with the [FPB] as a distributor or exhibitor of films or games, shall be guilty of an offence and thus liable, on conviction, to a fine or to imprisonment for a period not exceeding six months, or to both a fine and imprisonment'. The FP Act moreover, in terms of s 24A(2), classifies the above-mentioned acts as 'refused classification' or classified as 'XX'.

In addition, it is also an offence to pos-

sess, create, produce, distribute, import, access, advertise or promote child pornography images. Section 24B(1) - which refers to prohibitions, offences and penalties on possession of films, games and publications - states in s 24B(1)(a) - (d) that: 'Any person who - (a) unlawfully possesses; (b) creates, produces or in any way contributes to, or assists in the creation or production of; (c) imports or in any way takes steps to procure ... obtaining or accessing of; or (d) knowingly makes available, exports, broadcasts or in any way distributes or causes to be made available, exported ... broadcasting or distributing, any film, game or publication which contains depictions, descriptions or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children, shall be guilty of an offence'.

Failure to report knowledge of child pornography images to the police is also an offence. This is provided for in terms of s 24B(2)(a) and (b) of the FP Act. Such a person who has knowledge of commission of an offence provided for in s 24B(1)(a) to (d) must inform a police official of the South African Police Service. It is also an offence to expose children to pornography. This is provided for in the

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in terms of ss 18 and 19 respectively. Section 18, read with s 19, provides that the sexual grooming of children and exposure or display of or causing exposure or display of child pornography or pornography to children is prohibited.

Section 18(1)(d) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act states that if one commits any of these acts related to child pornography outside South Africa, he or she may still be prosecuted on return to the country. I submit that this is an indication that South African laws related to pornography generally co-exist, resulting in the breach thereof being addressed thereby avoiding conflict of laws. This is evident by the Films and Publications Amendment Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act working hand in glove as seen above.

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Fair divorce:

By
Magdaleen
de Klerk

Misconduct does not play a role in forfeiture claims

There is a general misconception in divorce litigation that a finding of 'substantial misconduct' on the part of a spouse who, for example, had extra marital affairs, justifies an order for forfeiture of the benefits of a marriage in community of property or, alternatively, the right to share in the accrual. Substantial misconduct on the part of a spouse is,

however, only one of the factors that the court may take into consideration in this regard.

Substantial misconduct

It was held in *JW v SW* 2011 (1) SA 545 (GNP) that a finding of substantial misconduct does not on its own justify a forfeiture order. The finding of substantial misconduct in this case stemmed from the husband's conviction and imprison-

ment after having assaulted his wife. The conclusion by the court not to grant an order for forfeiture was primarily based on the fact that the husband brought an immovable property into the joint estate.

This principle was also laid down in the case of *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (K) where the court held that it could never have been the intention of the legislature that a wife – who had for 20 years assisted her husband

faithfully – should, because of her adultery, forfeit the benefits of the marriage in community of property. The court further illustrated this point by using the following example: A wealthy elderly man marries a young poor girl. After a marriage of short duration the man realised that he made the mistake of his life by marrying her and, on this realisation, cheated and assaulted his wife. The judge concluded that, notwithstanding the husband's substantial misconduct, a forfeiture order would be granted against his wife, due to the fact that the marriage was of short duration.

Section 9(1) of the Divorce Act 70 of 1979

Section 9(1) of the Divorce Act, which deals with the aspect of forfeiture, reads as follows:

'When a decree of divorce is granted on the grounds of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

The section therefore refers only to three circumstances the court may take into account when considering forfeiture, namely –

- the duration of the marriage;
- the circumstances that gave rise to the break-down thereof; and
- any substantial misconduct on the part of either of the parties.

Conspicuously absent from s 9 is a catch-all phrase permitting the court, in addition to the factors listed, to have regard to any other factor. These three factors therefore fall within a relatively narrow ambit. It was held in the case of *Wijker v Wijker* 1993 (4) SA 720 (A) that s 9 does not provide for the application of the principle of fairness.

It was further held that it is obvious from the wording of s 9 that the first step is to determine whether or not the party against whom the order is sought will in fact benefit. Once that has been established, the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will, in relation to the other, unduly benefit if a forfeiture order is not made.

In *Klerck v Klerck* 1991 (1) SA 265 (W) it was held that s 9 has to be interpreted against a certain known common law background. (The idea behind the old forfeiture rule prior to s 9 was that the guilty spouse must not be allowed to

benefit from a marriage that he or she has wrecked.) It was further held that the legislature has unequivocally turned its back on the 'guilt element' and that it would be surprising if that rejected element would be allowed in through the backdoor in terms of s 9.

Benefit

It was held in *Moodley v Moodley* (KZD) (unreported case no 7241/2002, 14-7-2008) (Tshabalala JP) that what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would have otherwise derived from the marriage. It was further held that it was of the utmost importance that the claimant, in respect of a claim for the forfeiture, must prove some kind of contribution that exceeds the contribution of the other party towards the joint estate.

'Section 9 does not provide for the application of the principle of fairness, neither does it impose a purely penal sanction for a party's misconduct. A party cannot forfeit what he or she has contributed towards the marriage. The court must uphold the law and not make a moral judgment.'

As to what constitutes a contribution towards the joint estate, it was held in *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA) that the traditional role of a housewife, mother and homemaker should not be under-valued because it is not measurable in terms of money.

Substantial misconduct or adultery

In *Swart v Swart* 1980 (4) SA 364 (O) it was held that adultery and desertion might in certain instances merely be symptoms and not causes of a marriage

breakdown and also that conduct that cannot be considered very blameworthy, such as refusal to engage in conversation, might be a factor leading to the marriage breakdown.

In *Beaumont v Beaumont* 1987 (1) SA 967 (A) it was held that in many and probably most cases, both parties will be to blame, in the sense of having contributed to the breakdown of the marriage. In such case, where there is no conspicuous disparity between the conduct of the one party and that of the other, the court will not indulge in an exercise to apportion the fault of the parties and thus nullify the advantages of the no-fault system of divorce.

In *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) it was held that even if the appellant's adultery was the immediate cause of the marriage coming to an end, the respondent was by no means free from blame. Human experience suggests that, generally speaking, where there is a breakdown in a marriage, the conduct of both parties has contributed to it. It seems probable that it was, *inter alia*, the recognition of this basic truth that led the legislature to abolish, (save to the extent where it is expressly indicated otherwise), the notion of 'fault' in divorce.

In the *Engelbrecht* case it was held that the point of departure must be that parties must be held to their antenuptial agreements. In the *Wijker* case it was held that the judge in the court *a quo*, in finding that it would be unfair to allow the appellant to share in his wife's estate agency, lost sight of what community of property entails. The court held that s 9 does not provide for the application of the principle of fairness in order to deviate from the nature of community of property.

Conclusion

Section 9 does not provide for the application of the principle of fairness, neither does it impose a purely penal sanction for a party's misconduct. A party cannot forfeit what he or she has contributed towards the marriage. The court must uphold the law and not make a moral judgment. Attorneys, when advising their clients, should do so as well.

- See also 2011 (July) DR 20 and 2011 (Nov) DR 22.

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THE LAW REPORTS

February 2014 (1) *The South African Law Reports* (pp 323 – 640);
[2014] 1 *The All South African Law Reports* January no 1 (pp 1 – 124)
and no 2 (pp 125 – 248)

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

ABBREVIATIONS

CC: Constitutional Court
GNP: North Gauteng High Court
GSJ: South Gauteng High Court
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Children

Adoption and its effect: Section 230(3) of Children's Act 38 of 2005 (the Act) provides, among others, that a child is adoptable if:

- The child is an orphan and has no guardian or caretaker who is willing to adopt the child.
- The whereabouts of the child's parent or guardian cannot be established.
- The child has been abandoned.
- The child's parent or guardian has abused or deliberately neglected the child.
- The child is in need of permanent alternative placement.

On the other hand, s 242(1)(a) of the Act provides that, except when provided otherwise in the order or in a post-adoption agreement that has been confirmed by the court, an adoption order terminates all parental responsibilities and rights that any person – including a parent, step-parent or partner in a domestic life partnership – had in respect of the child immediately before the adoption. These sections were interpreted by officials in the Children's Court to mean that a child having one guardian could not be adopted by a spouse or life partner of that guardian as such a child was not abandoned and

that, if a step-parent adopted a child, the rights and obligations of that biological child's parents automatically terminated in all instances.

To overcome the above problems in *Centre for Child Law v Minister of Social Development* 2014 (1) SA 468 (GNP) the applicant, the Centre for Child Law, sought a declaratory order to the effect that s 230(3) of the Act did not preclude a child from being adoptable in instances where the child had a guardian and the person seeking to adopt the child was the spouse or permanent domestic life-partner of that guardian.

An order was also sought declaring that s 242 did not automatically terminate all the parental responsibilities and rights of the guardian of a child when an adoption order was granted in favour of the spouse or permanent domestic life-partner of that guardian, having regard to the discretion that s 242 afforded the court to order otherwise. Both orders were granted. As a result it was no longer necessary to consider the constitutional invalidity of the two sections.

Louw J held that where a non-custodian parent had consented to an adoption of his or her child, such parent would be taken to have abandoned the child as contemplated in s 230(3)(c) and, accordingly, render the child adoptable. A child was also taken to have been abandoned where, for no apparent reason, he or she had no contact with the parent, guardian

or caregiver for a period of at least three months. The definition of 'abandonment' in s 1 of the Act did not require that the child should have no contact with both parents for the said period before qualifying as an abandoned child. It was also not required that 'the whereabouts of the non-custodian parent cannot be established'.

Section 231(1)(c), which expressly permitted the adoption of a child by a step-parent did not contain a limitation that a step-parent could only adopt a child if the non-custodian parent was no longer alive. It was therefore in order for a step-parent to adopt a child if the non-custodian parent had consented to the adoption of the child or if the child had, for no apparent reason, no contact with the non-custodian parent for at least three months or if the whereabouts of the non-custodian parent could not be established.

Therefore, s 230(3) did not preclude a child from being adoptable merely because the child had a parent or guardian who took care of the child and the person seeking to adopt the child was the spouse or permanent domestic life-partner of the child's parent or guardian.

In terms of s 242 adoption of a child automatically terminated all rights and responsibilities of the parent in respect of the child, except when otherwise provided for in the adoption order or in a post-adoption agreement that had since been confirmed by the court. Therefore, the

court had discretion to order that the rights and responsibilities of the child's parent or guardian would not terminate on the granting of an adoption order in favour of the step-parent. Save in exceptional circumstances, it would clearly be in the best interests of the child that such an order be made.

Protection of funds awarded to children:

In *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) the plaintiff, Dube, was the father and sole guardian of a minor child aged 11 years, the mother having died. The minor was seriously injured in a motor vehicle collision, and a claim for damages against the defendant, the Road Accident Fund, was settled in an amount of over R 3 million and a draft order was prepared.

However, the court picked up on a number of deficiencies in the draft order, particularly as no mechanism was devised to ensure that the proceeds could not be released from the envisaged trust at any time and used for purposes other than advancing the interests of the minor. As a result the court directed the plaintiff to prepare a revised draft order, which the court amended, and whose highlights included the –

- creation of a trust in terms of the Trust Property Control Act 57 of 1988;
- inclusion of the plaintiff as a co-trustee of a board of

trustees consisting of three members; and

- prohibition of amendment of the trust deed or addition thereto without the court's approval.

The draft order also provided that the minor would be the sole beneficiary of the trust income and capital and also had other features relating to protection of the funds.

In an *obiter dictum*, nothing being contested, Fisher AJ held that it was generally accepted by the courts in the carrying out of their function as upper guardian of minors that, while it had to be acknowledged that the guardian of a child had the power and obligation to manage the child's financial affairs, it would not be a proper approach simply to order that substantial funds be paid to a guardian without regard first being had to the circumstances under which the funds were likely to be administered and applied.

It was the court's function, in cases where relatively significant sums of money were awarded to minors, to inquire into the circumstances relating to the person or persons to whom payment was sought to be released for the purpose of satisfying itself that the order served the best interests of the minor in relation to payment and subsequent administration of the funds. This included assessing the motivations, qualifications and ability of the guardian to properly administer the funds to be paid in the event that it was sought that payment be made to such guardian.

Customs and excise

Unconstitutionality of the search without warrant provisions of the Customs and Excise Act 91 of 1964: Section 4(4) of the Customs and Excise Act (the Act) had extensive provisions giving South African Revenue Service (SARS) officials power to enter any premises, business or residential, in order to inspect, search and remove items if they had suspicion that there was a contravention of the Act. The biggest problem though was that such

entry, inspection, search or seizure could be done at any time and in any place without a search warrant. To effect search and seizure, SARS officials were given power to use force, for example, they were allowed to break any window, door, floor, ceiling or wall and effect forceful opening in any manner, of any room, place, safe, chest, box, etcetera, if it was locked and the keys were not produced on demand.

In *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) SARS officials made such an entry, inspection, search and seizure at the business premises, offices and private dwellings of the applicants, who were directors of a company. In this case the WCC granted an order declaring the impugned sections of the Act unconstitutional and ordered a return of items seized. The order of invalidity was suspended for a period of 18 months and was not retrospective. The court also did extensive rewriting (reading-in) of the section.

The order of invalidity was confirmed by the CC that reduced the period of suspension of invalidity to six months as parliament had already made good progress in attending to the defects in the section. Once again the order of invalidity was not retrospective. There was also less extensive reading-in into the provisions of the section that required entry, inspection, search and seizure to be authorised by a magistrate or judge except in urgent cases. The applicants were granted the costs of the application.

Delivering the unanimous judgment of the CC, Madlanga J held that the wording of the section was so broad that it brought within its sweep not only the places of business and houses of people who were players in the customs and excise industry, but also the homes of their clients, associates, service providers, employees and their relatives. Quite conceivably the premises, business or home, of any person who could be linked to a player in the customs and excise industry could be the subject of a search in terms of the impugned provisions.

The provisions were therefore broad as to the manner of conducting the searches, which searches could be conducted in private dwellings at any time, and officials could not only break in at the dwellings as, once inside, they could even break floors. To do all this SARS officials did not need a warrant. That power, unlimited as to time, the scope of the search and the type of premises, was extremely intrusive and unjustified.

The achievement of the basic purposes of the Act did not require that inspectors be allowed to enter private homes and inspect documents and possessions at will. The fact that the Act was manifestly in the public interest in no way diminished the need to protect and uphold the privacy, and indeed the dignity, of individuals where, as in the case of private dwellings, those rights were by no means attenuated. Less restrictive means to achieve the purpose of the Act were available; for example, there was no cogent reason for not providing for warrants in respect of searches of people's homes.

Government procurement

Broad-based black economic empowerment credentials as a mandatory and material consideration for a tender:

The facts in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) were that in April 2011, the South African Social Security Agency (SASSA) published an invitation to tender (a request for proposals) calling on bidders to present proposals to pay social grants on SASSA's behalf. The proposals were to be assessed in two stages. The first stage was divided into two sessions, each of which required a minimum score of 70% to proceed to the next session or stage.

The first session consisted of technical assessment of the proposal while the second was on oral presentation. Any bid scoring a minimum of 70%

in the second session of oral presentation was to proceed to the second and final phase of finance and black empowerment preference points assessment.

Of the 21 proposals received, only two, namely that of the appellant AllPay and the third respondent Cash Paymaster, qualified for the second session. The appellant's proposal failed at the second session of the first stage, namely oral presentation as it received 58% and not the required minimum of 70%. That was due mainly to the appellant's inability to offer a satisfactory biometric verification system for the identification of beneficiaries of a social grant at every pay point, which verification was required to counter fraudulent payment of grants.

The effect of the appellant's elimination was that only the third respondent's bid reached the second phase of the bidding process. In the absence of competition, SASSA found it unnecessary to assess the third respondent's finances and black empowerment preferential scores and accordingly awarded the tender to it.

Alleging a number of irregularities in the tender process, the appellant approached the High Court for an order declaring the tender award unlawful and setting it aside. The GNP held that the tender process followed was illegal and invalid but declined to set aside the tender award, as doing so would disrupt the payment of social grants. As the appellant appealed to the SCA against failure to set aside the tender award, the third respondent cross-appealed against the High Court order declaring the tender award illegal and invalid.

The SCA upheld the cross-appeal, holding that there were no unlawful irregularities in the tender process, adding that public interest dictated that a procurement process should not be invalidated for minor inconsequential irregularities. After all, a fair process did not demand perfection since not every flaw was fatal.

On further appeal to the CC leave to appeal was granted

and an appeal against the SCA decision was upheld with costs. The tender award to the third respondent was declared constitutionally invalid, such declaration being suspended pending determination of a just and equitable remedy. The parties and *amici curiae* were ordered to provide affidavits and further written submissions on the issue of a just and equitable remedy. Until that remedy was determined, the third respondent was to continue rendering the service of making payments of social grants as per the tender awarded to it.

Reading a unanimous decision of the court Froneman J held that, once a ground of review under the Promotion of Administrative Justice Act 3 of 2000 had been established, there was no room for shying away from it. Section 172(1)(a) of the Constitution required the decision to be declared unlawful. The consequences of the declaration of unlawfulness would then be dealt with in a just and equitable order under s 172(1)(b). The materiality of irregularities was determined primarily by assessing whether the purposes that the tender requirements served had been substantively achieved.

In the instant case, the handling of the tender process by SASSA made the crucial role reserved for transformation in the procurement process a nullity in that black economic empowerment points, which were to be assessed in the second stage, played no role in the decision because by that stage there was no competition.

An investigation into the propriety of empowerment credentials did not become necessary only after a complaint had been lodged. There was an obligation on SASSA to ensure that empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made. That obligation became even more crucial when there were no other competitors left in the second stage. There was then an even greater obligation for the tender administrator to confirm the empowerment

credentials of the winning bidder.

• See also 2013 (Oct) DR 58.

Intellectual property

Purely functional designs do not qualify for registration as aesthetic designs:

The Designs Act 195 of 1993 (the Act) distinguishes between aesthetic and functional designs. The Act defines 'aesthetic design' to mean, among others, one having features, 'which appeal to and are judged solely by the eye, irrespective of the aesthetic quality thereof'. On the other hand a 'functional design' is defined, among others, to mean one having features that are necessitated by the function that the article to which the design is applied, is to perform.

In *BMW AG v Grandmark International (Pty) Ltd and Another* 2014 (1) SA 323 (SCA) the appellant, BMW, sought in the main an interdict restraining the respondent, Grandmark, from importing and distributing in this country certain motor vehicle components over which it held aesthetic design rights. In separate proceedings it also sought from the respondent royalties for alleged infringement of its rights.

Since, by the time of hearing of the appeal before the SCA, the design rights in question had expired, the appellant sought a declaration of infringement of its rights so that it could proceed with its claim for royalties from the respondent. The respondent counterclaimed for revocation of registration of the designs in question, contending that they did not qualify for registration in terms of s 14 of the Act in the first place. The GNP, per Ranchod J, having upheld the revocation counterclaim of the respondent, an appeal against that decision was dismissed with costs by the SCA.

Nugent JA (Brand, Cachalia, Wallis JJA and Swain AJA concurring) held that it was evident from the definitions of aesthetic and functional designs that to qualify for registration a design did not have to be exclusively aes-

thetic as it could combine both aesthetic and functional features. Where it incorporated functional features, however, those features were excluded from protection by s 14(5). Moreover, s 14(6) excluded from protection of a registered functional design any features of pattern, shape or configuration of an article that was in the nature of a spare part for a machine, vehicle or equipment.

Aesthetic designs were those that invited customer selection and consumer discrimination between articles, solely by their visual appeal. In the instant case, while the appellant spent considerable money, time and expertise in designing the appearance of its motor vehicles, it did not follow that because the designs of its vehicles qualified as aesthetic designs, the designs of its components would qualify as such.

The design of individual components had to be judged independently of the design of the built-up vehicles. The articles embodying the design of the components were not selected by customers for their appeal to the eye: They were selected solely for the function they performed, which was to replace components so as to restore the vehicle to its original form. The design of the components was therefore purely functional and did not qualify for registration as aesthetic designs.

Labour law

Constitutionality of limitation of right to legal representation in CCMA arbitration proceedings:

Rule 25(1)(c) of the rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) provides that, if the dispute arbitrated is about the fairness of dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties are not entitled to be represented by a legal practitioner in the proceedings. Nevertheless, the rule allows legal representation if the commissioner and all the parties consent or if the commissioner

concludes that it would be unreasonable to expect a party to deal with the dispute without legal representation after considering the nature of the questions of law raised by the dispute, the complexity of the dispute, public interest and the comparative ability of the opposing parties or their representatives to deal with the dispute.

In the *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)* [2014] 1 All SA 125 (SCA) the respondent Law Society of the Northern Provinces (LSNP) sought and was granted an order by the GNP, per Tuchten J, declaring the rule inconsistent with the Constitution and therefore invalid. The contention of the respondent was that the rule –

- unfairly discriminated against legal practitioners in violation of s 9(3) of the Constitution;
- infringed s 22 of the Constitution that guaranteed every person the right to choose his or her trade, occupation and profession freely; and
- infringed s 34 that ensured that every person had the right to have any dispute that could be resolved by the law to be resolved in a fair public hearing before a court or another independent and impartial tribunal or forum.

An appeal against the High Court order was upheld with costs by the SCA. Malan JA (Nugent, Wallis JJA and Swain and Van der Merwe AJJA concurring) held that the right to legal representation existed for the benefit and protection of litigants. In the instant case the LSNP did not purport to be pursuing the interests of those who used the services of the CCMA. In essence, the complaint of the respondent was that the rule denied work to its members.

In the run-up to the establishment of the CCMA it was decided that, in the interest of efficacy and expeditious resolution of disputes before it, legal representation would not be permitted in less complex matters. The courts had consistently denied entitlement to legal representation as of right in fora other than

courts of law. The CCMA was not a court.

Moreover, the rule and other provisions of the Labour Relations Act 66 of 1995 were sufficiently flexible to allow for legal representation in deserving cases. It impacted only on a litigant's right to be represented in a particular forum. It therefore met the rationality standard.

• See also 2014 (Jan/Feb) *DR* 53.

Unfair dismissal – clash of cultures:

In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* 2014 (1) SA 585 (SCA) the respondent, Ms Mmoledi, was an employee of the appellant, Kievits Kroon. After allegedly seeing visions of ancestors, the respondent understood the visions to mean that she had to undergo a traditional healing course of five weeks so that she could become a traditional healer. Her traditional healer trainer, one Mrs M, prepared a certificate (a written note) explaining the importance of that training as, failing to heed the ancestral call, could result in the respondent's misfortune, including serious illness or death.

The appellant was prepared to allow the respondent to be absent for one week and not five as requested. In the event the respondent attended the training and was absent from work without leave and contrary to the instruction of the employer to report for duty. An internal disciplinary hearing found her guilty of misconduct and recommended her dismissal, which was done.

At the Commission for Conciliation, Mediation and Arbitration (CCMA) hearing it was held that the respondent's dismissal was substantially unfair as she was absent from work due to circumstances beyond her control, namely the call of her ancestors. She was accordingly reinstated but without retrospective payment. A review application to the Labour Court was dismissed. So was an appeal to the Labour Appeal Court before Tlaletsi, Ndlovu JJA and Murphy AJA.

A further appeal to the SCA was dismissed with costs. Cachalia JA (Brand, Leach, Willis JJA and Zondi AJA concurring), noting that the CCMA considered the case to present a 'cultural chasm' between the parties, held that the fact that belief systems in deeply held cultural convictions existed and were part of the culture of customs, ideas and social behaviour of significant sections of the country's people was beyond doubt and had since been acknowledged by the courts. Also beyond dispute was the fact that, as part of those belief systems, people resorted to traditional healers for their physical, spiritual and emotional wellbeing.

Courts were familiar with and equipped to deal with disputes arising from conventional medicine, which were governed by objective standards, whereas questions regarding religious doctrine or cultural practice were not so governed. Courts were therefore unable and not permitted to evaluate the acceptability, logic, consistency or comprehensibility of the belief. They were concerned only with the sincerity of the adherent's belief, and whether it was being invoked for an ulterior purpose.

It was well established that where an employee absented himself or herself from work without permission, and in the face of his or her employer's lawful and reasonable instruction, a court was entitled to grant relief to the employee if the failure to obey the order was justified or reasonable.

In the instant case it was significant that evidence showed that the respondent would not have been dismissed if she produced a certificate from a medical practitioner, instead of a traditional healer, as proof of her illness, the certificate from a traditional healer being considered meaningless and thus rejected as proof of illness.

The court added *obiter* that an employer was not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health as it could, if that was fair in the circumstances, exercise

an election to end the employment relationship.

• See also 2012 (Oct) *DR* 53.

Motor vehicle accidents

No compensation for loss of illegal earnings: In *Heese NO v Road Accident Fund* 2014 (1) SA 357 (WCC) the claimant, Peters, a German national, was seriously injured in a motor vehicle collision in South Africa as a result of which his *curatrix ad litem*, Heese, claimed compensation on his behalf from the respondent, the Road Accident Fund. The claim was settled on general damages and medical expenses, the only remaining issue being compensation for loss of earning capacity.

The problem was that, although he was a businessman, his earnings were made illegally under a massive fraudulent tax evasion scheme. Not only was he under-declaring his earnings but he was also inflating his expenses by, among others, deducting fictitious expenses from his income. The WCC held, per Blignault J, that the claimant was not entitled to compensation for loss of illegal earnings. An appeal to the Full Bench was dismissed with costs.

Rogers J (Veldhuizen and Schippers JJ concurring) held that, if it appeared from evidence that a claimant's earning capacity would as likely as not have been sterilised and rendered worthless by some or other event over the future period covered by the claim, the court could properly conclude that a claim of diminution in earning capacity had not been established on a balance of probability. The future event could, in the instant case, in principle be lengthy imprisonment. It was a factual question whether the earning capacity would have been rendered worthless or diminished in value by a future event such as imprisonment.

On grounds of public policy a South African court would not make an award for diminution in earning capacity if the only way in which the earning capacity could remain productive was by a fail-

ure on the part of the claimant post-accident to comply with his or her legal duties to the tax authorities. Payment of tax was an inevitable part of conducting business. The lawful conduct of business required, among others, compliance with fiscal legislation. A court would, on grounds of public policy, only award such amount as was consistent with compliance by the claimant with his or her duty of disclosure of his or her tax affairs.

Public policy did not permit one to award damages where the exploitation of the earning capacity was dependent on illegality. If disclosure of tax evasion would have sterilised the claimant's earning capacity because of harsh criminal sanctions, the court could properly decline to make an award for diminution in earning capacity.

Payment

Risk of loss of cheque sent through post: In *Stabilpave (Pty) Ltd v South African Revenue Service* 2014 (1) SA 350 (SCA) the respondent, the South African Revenue Service (SARS), owed the appellant, Stabilpave, a tax refund in an amount of over R 700 000. The tax assessment form had a provision to the effect that if banking details provided by the appellant were not valid, payment of a refund would be effected by sending a cheque using the postal service. As the appellant did not provide banking details at all, a tax refund cheque was duly posted but it never reached its destination as it was intercepted and the proceeds misappropriated by a thief.

As a result the appellant sued the respondent for payment, which claim was dismissed by the GNP, per Ismail AJ. An appeal against the decision of the court of first instance was dismissed by a majority of the Full Bench comprising, Mavundla and Mothle JJ, with Fabricius J dissenting. An appeal against the decision of the Full Bench was upheld with costs by the SCA.

Meyer AJA (Brand, Lewis, Bosielo and Theron JJA concurring) held that any 'agreement about the particular

mode of performance' or 'as to the manner of payment' was reached only if the creditor stipulated, requested or authorised a particular mode of payment and the debtor acceded to the request. The decisive question was whether the notice contained in the tax assessment form gave the appellant a choice as to the mode of payment and, if it did, whether the choice was made by the appellant, expressly or by necessary implication, that the respondent should effect payment by sending a cheque through the post.

In the instant case the clear implication of the notice of assessment was an advice from the respondent that the tax record of the appellant reflected no banking details and that payment would therefore be effected by means of a cheque through the post. No choice was afforded to the appellant. The method of payment was dictated by the respondent.

The mere fact that the appellant knew or expected to be paid by cheque through the post or that it did not raise an objection did not itself give rise to an implied request or election to be paid in such manner.

Accordingly, the risk of loss of the cheque was not assumed by the appellant and remained with the respondent that did not discharge its indebtedness by posting a cheque for the amount of the refund that was due to the appellant.

Summary judgment

An officer of a corporate entity may rely on data messages for his or her personal knowledge in deposing to affidavit: Rule 32(2) of the uniform rules of court provides, among others, that the plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or herself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her

opinion there is no *bona fide* defence and that the notice of intention to defend has been delivered solely for the purpose of delay.

In *Absa Bank Ltd v Le Roux and Others* 2014 (1) SA 475 (WCC) an application for summary judgment was resisted on the ground that the deponent to the supporting affidavit did not have personal knowledge of the facts contained therein. In the affidavit the deponent alleged that he was a manager of the plaintiff, Absa Bank, that all the data and records relating to the action were under his control and that he had acquainted himself therewith. The deponent further alleged that he had verified the indebtedness of the defendants to the plaintiff as stated in the summons.

However, as it turned out the indebtedness of the first and second defendants, who were directors of the company and its sureties, and whose indebtedness arose out of suretyship contracts, was different from the amount stated in the summons. The affidavit did not deal with the discrepancy.

Binns-Ward J dismissed the application for summary judgment, granted the defendants leave to defend and ordered the costs to be costs in the cause of the action. The court held that the supporting affidavit fell short of what r 32(2) required. The only facts set out in the affidavit were the defendant's position in the plaintiff's employ, his being based in Johannesburg, his control of and reference to the data and records relating to the action that pertained to an account that was opened and operated at Hermanus in the Western Cape. That by itself that was not good enough.

Sufficient compliance by the plaintiff with the requirements of r 32(2) on the papers considered as a whole was a *sine qua non* to the court's ability to entertain the application. Unless it appeared from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them

and verify the cause of action, the application for summary judgment was fatally defective with the result that the court could not even reach the question whether the defendant had made out a *bona fide* defence.

If the deponent to a supporting affidavit in summary judgment proceedings were able to aver that he was –

- an officer in the service of the plaintiff;
- that the salient facts, which should be particularised, were electronically captured and stored in the plaintiff's records;
- that he was authorised to certify and has executed a certificate certifying the facts contained in such record to be correct; and
- on the basis thereof was able to swear positively that the plaintiff would, having regard to the provisions of s 15(4) of the Electronic Communications and Transactions Act 25 of 2002, be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof; the requirements of r 32(2) would be satisfied.

The court added that it would be salutary for the deponent to any such affidavit also to explain why the evidence was not being adduced by means of the affidavit of someone with direct personal knowledge of the facts.

Others cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with an administrative action review application being brought within reasonable time, appeal against conviction and sentence, appealability of a court order, collateral challenge to the validity of administrative action, compulsory acquisition of minority shares, consent of a spouse to the sale of communal property, convening a meeting of a municipal council, granting and refusal of rezoning applications, levying of different municipal rates for different categories of property, liability for fraudulent misrepresentation, limitation on the right to obtain legal assistance at state expense, motor vehicle accident litigation, party relying on *rei vindicatio* need not tender restitution, payment of purchase price to a conveyancer, reinstatement of the registration of a company, restitution of land rights, right to state-funded legal representation before a commission of inquiry, termination of business rescue proceedings and unfairly prejudicial, unjust, inequitable or oppressive conduct in the running of a close corporation.



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Limitations on liability in delict

By
Ian
Chadwick

Country Cloud Trading CC v MEC, Department of Infrastructure Development (SCA)
(unreported case 751/12, 26-11-2013)
(Brand JA)

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development (SCA)* (unreported case 751/12, 26-11-2013) (Brand JA) the Supreme Court of Appeal (SCA) was confronted with a claim brought in delict by the appellant, Country Cloud Trading CC, that was a stranger to a contract concluded between the respondent and another party (Ilima). The appellant claimed that it had suffered damages as a direct consequence of the repudiation or unlawful cancellation by the respondent of its contract with Ilima and, in consequence thereof, claimed that it was entitled to compensatory damages from the respondent. Such a claim is, as far as I am aware, novel. Brand JA, who delivered the unanimous judgment of the court, dismissed the claim.

Briefly, the facts of the case were that Ilima had concluded a contract with the respondent (referred to in the judgment as the 'completion contract') for the completion of the Zola Clinic in Soweto for a contract price of R 480 million. Ilima was unable to proceed with the work without funding. It obtained this funding by means of a loan that it raised with the appellant in the sum of R 12 million. The appellant was to be repaid the loan, together with a profit of R 8,5 million, out of progress payments by the respondent to Ilima. Prior to any progress payments being made, the respondent cancelled the completion contract alleging material misrepresentations that induced it to conclude the completion contract. Subsequently Ilima went into liquidation without paying the appellant anything.

At the appeal hearing, the SCA accepted the appellant's contention that the respondent had wrongfully repudiated the completion contract in that its representative had intentionally cancelled it without any legal justification. The court then proceeded to examine

whether the element of wrongfulness necessary to sustain a delictual action had been proved. In doing so, the court reviewed the development of the law of delict within the context of liability for pure economic loss, starting with the decision in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

In the *Trust Bank* case, when extending liability for pure economic loss, the court realised the danger of 'limitless liability' inherent in the extension and concluded that the 'instrument of control to prevent limitless liability' is the delictual element of wrongfulness.

Subsequent decisions of the then Appellate Division and SCA and, more recently, the Constitutional Court in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) have held that wrongfulness, in the context of delictual liability, is determined by considerations of legal and public policy. In the *Dey* case, the court was at pains to point out that reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct (at para 122).

With reference to the appellant's argument that public policy should impose liability because the respondent's representative knew that cancellation of the completion contract would cause harm to the appellant, the court approved the statement of M Loubser and R Midgley in *The Law of Delict in South Africa* 2 ed (Cape Town: Oxford University Press 2012) at 141 that 'intentionally causing harm to others will not always be wrongful' and that 'intent does not necessarily indicate wrongfulness'. The court concluded that, in the end, the nature of the fault and the degree of blameworthiness

are considerations to be weighed up with all others in determining whether delictual liability should be imposed. The court further concluded that, since foreseeability of harm is a prerequisite for delictual liability in all cases, that feature could not render the appellant's claim deserving of special treatment.

The court further concluded that since the imposition of delictual liability on the respondent would, as a general principle, render contracting parties liable in delict for harm suffered by strangers that flows from the repudiation of their contract, this was a strong pointer away from the imposition of delictual liability. To find otherwise would open the door to 'indeterminate liability'. A further consideration to which the court referred was the appellant's (lack of) 'vulnerability to risk'. Vulnerability to risk signifies that the plaintiff could not reasonably have avoided the harm suffered by other means.

The court stated that it has now become well-established in law that the finding of non-vulnerability on the part of a plaintiff is an important indicator against the imposition of delictual liability on persons such as the defendant (respondent) in the present case. Thus, where it is reasonably possible for the plaintiff to take steps to protect itself, the law will be less inclined to step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.

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Waiver of rights in insolvency

By
Moffat
Ndou

Kroese and Kroese (NWM) (unreported case no 145/13, 18-4-2013) (Landman J) and *Hattingh and Hattingh* (NWM) (unreported case no 144/13, 18-4-2013) (Landman J)

The North West High Court, Mafikeng in the unreported judgment of *Kroese and Kroese* (NWM) (unreported case no 145/13, 18-4-2013) (Landman J) and *Hattingh and Hattingh* (NWM) (unreported case no 144/13, 18-4-2013) (Landman J) had the opportunity to consider whether the waiver of the rights provided in s 82(6) of the Insolvency Act 24 of 1936 (the Act) is an infringement of a constitutional right of the applicants.

Section 82(6) reads as follows: 'From the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his [or her] household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his [or her] own use any property so excepted from the sale.'

The judgment is in respect of two separate applications for two separate estates. The court gave one judgment in respect of these two applications as, in both applications, the applicants intended to waive assets that were afforded a measure of protection by s 82(6) of the Act. The waivers were done in order to increase the value of the realisable assets and in order to show that the surrender of the respective estates would be to the advantage of creditors.

Both applicants were married in community of property and both applications were for the voluntary surrender of their respective insolvent estates. All the formalities required for an application to surrender an estate had been complied with. The court had to decide whether the waiver by the applicants was permissible because without it there would be no advantage for creditors.

The applicants relied on the full Bench decision in *Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke* 2000 (4) SA 116 (K) in their submission that, in order to establish an advantage to creditors, the applicant may waive the protection afforded by s 82(6) of the Act. The court noted that the *Anthony* case was distinguishable because in that case the court did not consider whether the waiver would be an infringement of the equivalent of a constitutional right of the applicant.

The court raised two concerns regarding the applicants' waiver of their enti-

tlements to their property referred to in s 86(2) of the Act. First, the court was concerned with the discretionary nature of s 82(6). The court refrained from deciding the constitutional validity of the provision, but decided that it will intervene if the discretion was not exercised reasonably.

Secondly, the court was concerned whether the applicants could validly waive their entitlement to basic necessities. The court departed from the decision in the *Anthony* case, because that court paid insufficient attention to the principle that a waiver 'was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his [or her] own benefit but in the interests of the public as well'. The court made it clear that s 82(6) of the Act must be read in the context of the constitutional dispensation.

The court proceeded to interpret the provisions of s 82(6) of the Act in the context of the right to life and dignity. The court noted that the purpose of s 82(6) was to provide measures that are intended to preserve the right to life and dignity of an insolvent and his or her or their dependents and to place them in a position to rebuild their lives.

In placing the entitlement as regards necessities in context, the court refers, *inter alia*, to a passage in Prof RG Evans' article titled 'Legislative exclusions or exemptions of property from the insolvent estate' [2011] (14) 5 PER 28 (www.saflii.org.za/journals/PER/2011/28.pdf, accessed 30-1-2014):

'Although South African insolvency law is based on the policy of the collection of the maximum quantity of assets available, to the advantage of the creditors of the insolvent estate, a further policy, that of allowing a debtor to keep a part of his [or her] estate, has also been entrenched, originally through the common law. It would appear that originally the rationale behind this policy, as it developed through the common law, was to ensure that the insolvent and his [or her] family were not deprived of their dignity and basic life necessities. It is submitted that this remains the cornerstone upon which this policy rests, but that the requirements of modern society, socio-political developments in most societies, and human rights requirements have necessitated a broadening of the classes of assets that should be excluded

or exempted from insolvent estates' (at para 42).

With reference to *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) and *S v Makwanyane and Another* 1995 (3) SA 391 (CC), the court accepted that the right to dignity is at least one of the human rights that are inalienable.

The court considered the applicants' submission by dividing it into four points and made the following findings:

- The court found that the contention that the goods mentioned in s 82(6) of the Act are divisible into two categories was not relevant to the question of waiver.

- With regard to the contention that the waivers related to the applicants' personal capacity and that no public policy was involved, the court pointed out that the Act and other legislation that provides for protection of debtors were enacted for the benefit of debtors and for the wellbeing of the society. The court further remarked that it is not in the state's interest that citizens should renounce their assets and become a burden on society.

- With regard to the applicants' open and frank account of their financial situation and their eagerness to assist the court, the court pointed out that the law does not allow them to make the sacrifice they were attempting to make.

- The applicants submitted that they had a right to freedom of trade, which encompasses the right to dispose of their property at their own and free will. The court answered the submission by pointing out that most rights can be limited and that the protection afforded to their right to life and dignity in terms of the Act was not theirs to waive.

The court made it clear that it was not possible to waive a right to basic necessities. The court refused to grant the voluntary surrender application on the basis that the applicants failed to show sufficient advantage for their respective creditors.

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NEW LEGISLATION

Legislation published from
15 January – 21 February 2014

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

BILLS INTRODUCED

Medical Innovation (Private Member Bill) B100P-2014.
National Water Amendment Bill B3 of 2014.
Development Bank of Southern Africa Amendment Bill B2 of 2014.
Financial Management of Parliament Amendment Bill B1 of 2014.

PROMULGATION OF ACTS

Tax Administration Laws Amendment Act 39 of 2013. *Commencement:* Deemed to have come into operation on 1 October 2012 save insofar as is otherwise provided in the Act. GN14 GG37236/16-1-2014.
Financial Services Laws General Amendment Act 45 of 2013. *Commencement:* To be proclaimed. GN15 GG37237/16-1-2014.
Employment Equity Amendment Act 47 of 2013. *Commencement:* To be proclaimed. GN16 GG37238/16-1-2014.
South African Weather Service Amendment Act 48 of 2013. *Commencement:* On the date two months from the date of publication in the *Government Gazette* or such earlier date determined by proclamation. GN17 GG37239/16-1-2014.
South African Human Rights Commission Act 40 of 2013. *Commencement:* To be proclaimed. GN37 GG37253/22-1-2014.
Judicial Matters Amendment Act 42 of 2013. *Commencement:* Sections 10 and 11 are deemed to have come into operation on 1 April 2010 and s 42 is deemed to have come into operation on 20 September 2010. GN38 GG37254/22-1-2014.
Judicial Matters Second Amendment Act 43 of 2013. *Commencement:* To be proclaimed. GN39 GG37255/22-1-2014.
***Criminal Law (Forensic Procedures) Amendment Act 37 of 2013.** *Commencement:* To be proclaimed. GN52 GG37268/27-1-2014.

South African Post Office SOC Ltd Amendment Act 38 of 2013. *Commencement:* 27 January 2014. GN53 GG37269/27-1-2014.
South African Postbank Limited Amendment Act 44 of 2013. *Commencement:* 27 January 2014. GN54 GG37270/27-1-2014.
Broad-based Black Economic Empowerment Amendment Act 46 of 2013. *Commencement:* To be proclaimed (except for s 3(b) that will come into operation one year after the Act has come into operation). GN55 GG37271/27-1-2014.

COMMENCEMENT OF ACTS

Financial Services Laws General Amendment Act 45 of 2013. *Commencement:* 28 February 2014 (except ss 5(a) and 186(d) that will come into operation on 30 May 2014; s 31 that will come into operation on 29 August 2014; and ss 61, 95, 109(e), (k) and (l), 114(d), 135 and 264 that will come into operation on a date to be proclaimed. GN120 GG37351/18-2-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990
Regulations relating to the grading, packing and marking of avocados intended for sale in the Republic of South Africa. GN R5 GG37223/17-1-2014.
Amendment of standards and requirements regarding control of the export of citrus fruits. GN52 GG37287/7-2-2014.
Amendment of standards and requirements regarding control of the export of cherries. GenN29 GG37246/24-1-2014.
Amendment of standards and requirements regarding control of the export of fruit excluding citrus and certain deciduous fruits. GN53 GG37287/7-2-2014.
Regulations relating to the grading, packing and marking of dry beans intended

for sale in the Republic of South Africa. GN R112 GG37330/14-2-2014.

Animal Diseases Act 35 of 1984

Tariffs payable for veterinary import permits from 1 April 2014. GN51 GG37287/7-2-2014.

Broad-based Black Economic Empowerment Act 53 of 2003

Procedures for the application, administration and allocation of export permits under the trade, development and cooperation agreement between the European Union and the Republic of South Africa. GenN28 GG37242/21-1-2014.

Companies Act 71 of 2008

Amendment of Companies Regulations, 2011 (Reg 15(3)(b)). GN82 GG37299/5-2-2014.

Conservation of Agricultural Resources Act 43 of 1983

Revised tariffs for services rendered in terms of the Act. GN67 GG37286/5-2-2014.

Department of Agriculture, Forestry and Fisheries

Conditions for application for market access permits for particular agricultural products. GenN27 GG37241/21-1-2014.

Electoral Act 73 of 1998

Amendment to the Election Regulations, 2004. GenN31 GG37259/23-1-2014.

Electronic Communications Act 36 of 2005

Call Termination Regulations, 2014. GenN65 GG37295/4-2-2014.

Call Termination Amendment Regulations, 2014. GenN114 GG37356/19-2-2014.

Engineering Council of South Africa

Rules for continuing professional development and renewal of registration. BN16 GG37337/21-2-2014.

Financial Markets Act 19 of 2012

Amendments to depository rules. BN13 GG37344/14-2-2014 and BN14 GG37345/14-2-2014.

Gas Regulator Levies Act 75 of 2002

Levy and interest payable on piped-gas industry. GN41 GG37256/24-1-2014.

Genetically Modified Organisms Act 15 of 1997

Tariffs for services. GN95 GG37307/14-2-2014.

Amendment of regulations. GN96 GG37307/14-2-2014.

Health Professions Act 56 of 1974

Regulations relating to the qualifications for registration of basic ambulance assistants, ambulance emergency assistants, operational emergency care orderlies and paramedics. GN R57 GG37274/28-1-2014.

Regulations relating to the qualifications for the registration of emergency care practitioners. GN R58 GG37275/28-1-2014.

Regulations relating to the registration of student emergency care assistants, student emergency care technicians, or student emergency care practitioners. GN R59 GG37276/28-1-2014.

Regulations relating to names that may not be used in relation to the profession of emergency care. GN60 GG37277/28-1-2014.

Regulations relating to the registration of student emergency care consultants and student emergency care specialists. GN R61 GG37278/28-1-2014.

Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications. BN12 GG37307/14-2-2014.

Regulations relating to the registration of speech language therapy students. GN86 GG37312/10-2-2014.

Amendment of regulations relating to the registration by environmental health practitioners of additional qualifications. GN R102 GG37316/11-2-2014.

Regulations relating to the qualifications for the registration of emergency care consultants. GN R101 GG37319/11-2-2014.

Regulations relating to the undergraduate curricula and professional examinations in audiology. GN R106 GG37323/12-2-2014.

Regulations relating to the qualifications for the registration of emergency care specialists. GN R107 GG37324/13-2-2014.

Regulations relating to the qualifications for the registration of emergency care assistants. GN R109 GG37326/13-2-2014.

Regulations relating to the qualifications for the registration of Emergency Care Technicians. GN R111 GG37329/14-2-2014.

Higher Education Act 101 of 1997

Institutional statute: Walter Sisulu University. GN13 GG37235/17-1-2014.

Income Tax Act 58 of 1962

Protocol amending the agreement between the Government of the Republic of South Africa and the Government of the Republic of Malta for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on

income, signed at Rome on 16 May 1997. GN19 GG37243/24-1-2014.

Supplementary protocol amending the agreement between the Government of the Republic of South Africa and the Government of the Sultanate of Oman for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GN20 GG37244/29-1-2014.

Agreement between the Government of the Republic of South Africa and the Government of the Republic of Liberia for the exchange of information relating to tax matters. GN105 GG37321/12-2-2014.

Convention on Mutual Administrative Assistance in Tax Matters, as amended by the provisions of the protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011. GN113 GG37332/21-2-2014.

Independent Communications Authority of South Africa Act 13 of 2000

Regulations on party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licensees and related matters. GenN101 and 102 GG37350/17-2-2014.

Insolvency Act 24 of 1936

Policy on the appointment of insolvency practitioners. GN77 GG37287/7-2-2014.

Judicial Service Commission Act 9 of 1994

Regulations relating to the Act: Disclosure of registrable interests. GN R56 GG37273/29-1-2014.

Liquor Act 59 of 2003

National liquor norms and standards. GenN80 GG37322/11-2-2014.

Liquor Products Act 60 of 1989

Amendment of regulations. GN R89 GG37308/14-2-2014.

Local Government: Municipal Systems Act 32 of 2000

Local government: Regulations on appointment and conditions of employment of senior managers. GN21 GG37245/17-1-2014.

Magistrates' Courts Act 32 of 1944

Creation of magisterial districts and establishment of district courts for Gauteng and North West provinces. GN43 GG37258/24-1-2014.

Withdrawal of notices creating magisterial districts and establishing district courts for Gauteng and North West provinces. GN42 GG37257/24-1-2014.

Creation of sub-districts and the appointment of a place within the sub-district for the holding of a court. GN121 GG37353/20-2-2014.

Marketing of Agricultural Products Act 47 of 1996

Amendment of declaration of agricultural products. GN R46 GG37263/31-1-2014.

Medicines and Related Substances Act 101 of 1965

Annual adjustment of the single exit price of medicines and scheduled substances (SEPA) for the year 2014. GN R68 GG37292/31-1-2014.

Information to be provided by manufacturers and or importers of medicines and scheduled substances when applying for the single exit price adjustment for 2014. GN R69 GG37292/31-1-2014.

Amendment of schedules to the Act. GN R104 GG37318/11-2-2014.

Military Veterans Act 18 of 2011

Military veterans benefits regulations. GN R122 GG37355/19-2-2014.

Mineral and Petroleum Resources Development Act 28 of 2002

Restriction in terms of s 49(1) of the Act on granting of new applications for reconnaissance permits, technical co-operation permits, exploration rights and production rights in certain areas. GN71 GG37294/3-2-2014.

National Environmental Management: Biodiversity Act 10 of 2004

Norms and standards for biodiversity management plans for ecosystem. GN83 GG37302/7-2-2014.

National Forests Act 84 of 1998

Exempted activities in terms of ss 7(1) and 15(1) of the Act regarding trees protected in terms of s 12(1) of the Act. GN 25 GG 37246/24-1-2014.

National Health Act 61 of 2003

Publication of health infrastructure norms and standards guidelines. GN R116 GG37348/17-2-2014.

National Nuclear Regulator Act 47 of 1999

Fees for nuclear authorisations. GenN38 GG37262/31-1-2014.

National Regulator for Compulsory Specifications Act 5 of 2008

Amendment of the compulsory specification for incandescent lamps (VC 8043). GN R74 GG37288/7-2-2014.

Compulsory specification for energy efficiency and labelling of electrical and electronic apparatus (VC 9008). GN R75 GG37288/7-2-2014.

Occupational Health and Safety Act 85 of 1993

Construction regulations, 2014. GN R84 and 85 GG37305/7-2-2014.

Petroleum Pipelines Levies Act 28 of 2004

Levy and interest payable on petroleum pipelines industry. GN40 GG37256/24-1-2014.

Plant Improvement Act 53 of 1976

Regulations relating to establishments, varieties, plants and propagating material. GN R88 GG37308/14-2-2014.

Plant Breeder's Rights Act 15 of 1976

Amendment of regulations relating to plant breeder's rights. GN R90 GG37308/14-2-2014.

Postal Services Act 124 of 1998

Fees and charges for postal services.

GenN49 GG37283/30-1-2014.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of upper limits of salaries, allowances and benefits of different members of municipal councils. GN R64 GG37281/29-1-2014.

Determination of salaries and allowances of the traditional leaders, members of the national house and provincial houses of traditional leaders. Proc9 GG37352/18-2-2014.

Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN8 GG37262/31-1-2014.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Melmoth. GN28 GG37246/24-1-2014.

Establishment of a small claims court for the area of Nqutu. GN29 GG37246/24-1-2014.

Establishment of small claims courts for the areas of Welkom, Hennenman, Virginia and Ventersburg. GN30 GG37246/24-1-2014.

Establishment of small claims courts for the areas of Bethlehem and Reitz. GN31 GG37246/24-1-2014.

Establishment of a small claims court for the area of Vrede. GN32 GG37246/24-1-2014.

Establishment of a small claims court for the area of Sasolburg. GN33 GG37246/24-1-2014.

Establishment of a small claims court for the area of Tsakane. GN34 GG37246/24-1-2014.

Establishment of small claims courts for the areas of Thohoyandou, Malamulele,

Mutale, Dzanani and Vuwani. GN35 GG37246/24-1-2014.

Establishment of a small claims court for the area of Senekal. GN118 GG37337/21-2-2014.

South African Reserve Bank Act 90 of 1989

Amendment of South African Reserve Bank Regulations, 2010. GN119 GG37337/21-2-2014.

South African Schools Act 84 of 1996

Amended national norms and standards for school funding. GN12 GG37230/17-1-2014.

Tax Administration Act 28 of 2011

Regulation for purposes of s 70(4) of the Act, promulgated under s 257 of the Act, listing the organs of state or institutions to which a senior South African Revenue Service official may lawfully disclose specified information. GN R93 and 94 GG37308/14-2-2014.

Draft legislation

Draft Position Paper on the South African Biofuels Regulatory Framework in terms of the National Energy Act 34 of 2008. GenN24 GG37232/15-1-2014.

Draft Agrément South Africa Bill. GenN26 GG37234/17-1-2014.

Draft Amendment End-user and Subscriber Service Charter in terms of the Electronic Communications Act 36 of 2005. GenN30 GG37251/22-1-2014.

Proposed amendment to the regulations relating to the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators, appeals and imports in terms of the Fertilizers, Farm Feeds,

Agricultural Remedies and Stock Remedies Act 36 of 1947. GN54 GG37287/7-2-2014.

Draft national norms and standards for organic waste composting in terms of the National Environmental Management: Waste Act 59 of 2008. GenN68 GG37300/7-2-2014.

Draft South African automotive industry code of conduct in terms of the Consumer Protection Act 68 of 2008. GenN69 GG37301/7-2-2014.

Draft Alien and Invasive Species Lists, 2014 and Regulations, 2014 in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN78 and 79 GG37320/12-2-2014.

Draft Immigration Regulations, 2014 in terms of the Immigration Act 13 of 2002. GenN97 GG37335/14-2-2014.

Proposed regulations regarding fees for the provision of aviation meteorological services in terms of the South African Weather Service Act 8 of 2001. GenN99 GG37343/14-2-2014.

Draft amendment regulations on bio-prospecting, access and benefit-sharing in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN73 GG37331/17-2-2014.

Proposed amendments to the Johannesburg Stock Exchange listing requirements in terms of the Financial Markets Act 19 of 2012. BN15 GG37337/21-2-2014.

Proposed amendment of regulations on exhumation, reburial or symbolic burial of deceased victims in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. GenN116 GG37358/21-2-2014.

Selected aspects of the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013

The Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 was published as GN52 in GG37268/27-1-2014. The Act will commence on a date to be proclaimed.

Purpose of the Act

The purpose of the Act is, among others -

- to amend the Criminal Procedure Act 51 of 1977 so as to provide for the taking of bodily samples from certain categories of persons for the purposes of forensic DNA analysis;
- to provide in particular for the protection of the rights of women and children in the taking of DNA samples;
- to add to the Criminal Procedure Act, in sch 8, a list of offences in respect of which DNA samples must be taken;

- to establish and regulate the administration and maintenance of the National Forensic DNA Database of South Africa;
- to provide for the conditions under which the samples or forensic DNA profiles derived from the samples may be retained or the periods within which they must be destroyed; and
- to provide for the use of forensic DNA profiles in the investigation of crime and the use of such profiles in proving the innocence or guilt of persons before or during a prosecution or the exoneration of convicted persons.

What is a forensic DNA analysis?

A forensic DNA analysis is the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile: Provided that this does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristic of a

person or to determine any physical information of the person other than the sex of that person.

Forensic DNA profile means the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a unique string of alpha numeric characters to provide identity reference: Provided this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person.

Powers in respect of buccal, bodily and crime scene samples (ss 36D and 36E)

An authorised person must take a buccal sample or cause the taking of any other bodily sample of any person -

- after arrest but before appearance in court to be formally charged for any sch 8 offence;
- released on bail in respect of a sch 8 offence (if not taken on arrest);
- on whom summons has been served in respect of a sch 8 offence;
- whose name appears in the National Register of Sex Offenders; or
- charged or convicted by a court in respect of any offence that the minister has by notice in the *Government Gazette* declared to be an offence for the purposes of s 36D.

The authorised person must supervise the taking of a buccal sample from a person who is required to submit such sample and who requests to take it himself or herself. The station commander or other relevant commander must within 30 days furnish every bodily sample to the authorised officer, who must carry out a forensic DNA analysis on every such sample in terms of ch 5B of the South African Police Service Act 68 of 1995.

Which offences are sch 8 offences?

- Treason.
- Sedition.
- Public violence.
- Murder.
- Any offence referred to in part I or part II of sch 1 to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
- Culpable homicide.
- Rape or compelled rape as contemplated in ss 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, respectively.
- Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in ss 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, respectively.
- Any sexual offence against a child or a person who is mentally disabled as contemplated in part 2 of ch 3 or the whole of ch 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, respectively.
- Robbery.
- Kidnapping.
- Child stealing.
- Assault, when a dangerous wound is inflicted.
- Arson.
- Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
- Theft, whether under the common law or a statutory provision.
- Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in sch 1, or is in such custody in respect of the offence of escaping from lawful custody.
- Any –
 - offence under the Firearms Control Act 60 of 2000, which is punishable with imprisonment for a period of five years or longer in terms of the said Act;
 - offence under the Explosives Act 15 of 2003, which is punishable with imprisonment for a period of five years or longer in terms of the said Act;
 - convention offence or specified offence as defined in s 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004;
 - offence of trafficking in persons as defined in s 1 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013; or
 - offence of torture as defined in the Prevention and Combating of Torture of Persons Act 13 of 2013.
- Any conspiracy, incitement or attempt to commit any offence referred to in this schedule.



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Employment law update



Talita Laubscher *BLur LLB (UFS) LLM (Emory University USA)* is an attorney at Bowman Gilfillan in Johannesburg.



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Payment for accrued annual leave on termination of employment

In *Ludick v Rural Maintenance (Pty) Ltd* [2014] 2 BLLR 178 (LC) the Labour Court considered the accumulation and forfeiture of statutory annual leave granted in terms of the Basic Conditions of Employment Act 75 of 1997 (BCEA) with reference to two conflicting decisions on this issue.

In the *Ludick* case, the applicant employee had worked for the respondent for 27 months and had not taken any annual leave during this period. The applicant therefore claimed to be paid in respect of all the annual leave that had allegedly accrued to him over the two annual leave cycles on the termination of his employment. The respondent argued that the applicant had no such entitlement as, in terms of its leave policy and the applicant's employment contract, all his annual leave had been forfeited because he had failed to take it.

Van Niekerk J considered the provisions of the BCEA that require an employee, on termination of employment, to be paid in respect of annual leave accrued but not granted before the date of termination, together with a *pro rata* amount for leave accrued in the current annual leave cycle. The applicant argued that he was entitled to accumulate an unlimited amount of annual leave as the BCEA is silent on the issue.

The applicant also argued that s 40(b) of the BCEA provides that an employee is entitled to be paid for 'any period of annual leave ... that the employee has not taken'. He alleged that the provisions of

the employment contract providing for the forfeiture of annual leave were unenforceable as they were less favourable than what is provided in the BCEA.

The applicant further argued that, at the very least, he should be entitled to payment in respect of annual leave accrued during the second annual leave cycle as, in terms of the BCEA, an employer must grant annual leave not later than six months after the end of the annual leave cycle in which it accrued. The respondent argued that the applicant was not entitled to any accrued annual leave pay as such leave due to the applicant had been forfeited in accordance with the terms of his employment contract.

The applicant referred to the case of *Jardine v Tongaat-Hulett Sugar Ltd* [2003] 7 BLLR 717 (LC) in which it was found that statutory annual leave not taken within six months after the end of the annual leave cycle in which it accrued is not automatically forfeited nor is any right to accrued annual leave pay ever forfeited. Van Niekerk J considered this view with reference to a different approach that was followed in *Jooste v Kohler Packaging Ltd* [2003] 12 BLLR 1251 (LC) in which it was held that an employee could only be paid on termination of employment in respect of statutory annual leave that had accrued in the annual leave cycle immediately preceding that during which the termination took place and all other annual leave is forfeited.

Van Niekerk J found that the purpose of the BCEA is to ensure that employees take the annual leave that they are entitled to and this purpose would be circumvented if employees were permitted to accumulate annual leave indefinitely and wait to claim payment on termina-

tion. He found that where employees are frustrated from taking annual leave they should then invoke the enforcement provisions of the BCEA.

Van Niekerk J found that there was no reason to depart from the decision in the *Jooste* case where claims for accrued annual leave pay were limited to annual leave not taken in the current annual leave cycle and the immediately prior annual leave cycle. Van Niekerk J stated that, in terms of the BCEA, an employer is obliged to grant employees leave before the expiry of the six-month period following the annual leave cycle in which it accrued.

This does not mean that the employee has the right to depart from the decision in that period. Once annual leave has accrued the timing of leave should be the subject of agreement between the parties. In the absence of agreement, the employer may decide the timing of annual leave and provisions in an employment contract entitling the employer to determine the timing of annual leave were therefore enforceable.

Van Niekerk J found, however, that the forfeiture of annual leave was a separate issue to the timing of the annual leave. In this regard, Van Niekerk J held that an employee does not forfeit annual leave or the right to be paid *in lieu* of annual leave on termination of employment if the annual leave is not taken within the six-month period following the annual leave cycle in which the leave accrued. But this applies only to statutory annual leave in the current annual leave cycle and the immediately preceding annual leave cycle.

Practitioners should note that the balance of authority from the Labour Court now, *inter alia*, suggests that:

- Untaken statutory annual leave from the current annual leave cycle and the immediately preceding leave cycle is not forfeited and must be paid out on termination.
- Statutory annual leave from prior leave cycles is forfeited and an employee has no right to be paid in respect of such annual leave, unless of course the employee's employment contract or the employer's leave policy permits such accumulation and payment.
- Annual leave must be taken by agreement between the employer and the employee and failing agreement, the em-

ployer may determine the time when the employee must take leave.

- If an employee is frustrated from taking leave, he or she must use the enforcement mechanisms contained in the BCEA. Employees earning below the income threshold prescribed in the BCEA (currently R 193 805) may accordingly seek enforcement through the labour inspectorate, and employees earning above this threshold may seek specific performance through the Labour Court.
- Leave granted in addition to an employee's BCEA/statutory entitlement is not subject to the limitations prescribed

by the BCEA and may be subject to whatever conditions are determined by the employer. Such additional leave could therefore be accumulated or forfeited as determined by the employer, and the employer may regulate payment in respect of additional annual leave in the manner it deems appropriate.



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

Question:

Does an employer have the right to dismiss an employee in the middle of a disciplinary inquiry without the chairperson's verdict with the employer stating that the reasons provided for the dismissal were that the chairperson would have found the employee guilty and would have dismissed him or her anyway and also the employer saying that it had difficulties in finalising the disciplinary hearings?

Answer:

While I understand what you seek advice on, I think the more appropriate question is whether the employee would be successful in claiming an unfair dismissal should an employer act in the manner and under the circumstances you have mentioned.

One should remember there is nothing in law preventing an employer from dismissing an employee for any reason he or she thinks fair or in accordance with any procedure he or she thinks is reasonable. Whether or not the employer's subjective views will stand the test of fairness is a different issue and will be decided by an independent third party, either by the Commission for Conciliation, Mediation and Arbitration (CCMA)

or by the Labour Court.

I will therefore answer your question by focussing on what recourse the employee could possibly have under the circumstances you have described.

First, let us assume that having been dismissed before the inquiry was concluded, the employee refers an unfair dismissal dispute to the CCMA.

The employee has a right to challenge the substantive fairness of his or her dismissal (ie, whether the employer had a fair reason to dismiss the employee) and the procedural fairness of the dismissal (ie, whether the dismissal was in accordance with a fair procedure). In terms of s 192 of the Labour Relations Act 66 of 1995 (LRA), once a dismissal is common cause, the inquiry turns on whether the employer can prove the substantive and procedural fairness of the dismissal (this as opposed to whether the employee can prove the dismissal was substantively and procedurally unfair).

Substantive fairness

Arbitration at the CCMA is a *de novo* hearing, meaning the hearing starts afresh with the arbitrator sitting as chairperson tasked with deciding the fairness of the dismissal. As mentioned, the onus of proving the fairness of a dismissal rests with the employer, thus he or she will begin by leading evidence first. Thereafter the employee will lead evidence in support of his or her case. Once both parties have led their respective cases, the arbitrator will make a decision.

The reason I am mentioning these points is because unless the employer knows what the employee's defence or explanation is with regard to the reason for his or her dismissal (which would normally have been set out by the employee at an internal inquiry); the employer runs the risk of becoming aware of such version only at the arbitration and, if the employee's explanation is ac-

cepted, further runs the risk of the dismissal being found substantively unfair. By way of example, let us assume that an employee working in a supermarket was charged for unauthorised possession of company property when found with a packet of tablets that the employer sells. At the internal inquiry the employer leads uncontested evidence that the employee was found in possession of the tablets and that the store sells the very same type of tablets. Without affording the employee an opportunity to defend himself or herself, the employer, for some reason, makes the decision that the employee is guilty and dismisses him or her.

The employee then refers a dispute to the CCMA and at arbitration the employer leads the same evidence that was led at the inquiry, however, when it is time for the employee to raise his or her defence, he or she produces a till slip from a chemist indicating that he or she bought the tablets on the same day he or she was found to be in possession of them and further that the till slip indicates that the purchase was made at 13:30, which was during his or her lunch time.

As the employer cannot dispute these facts, the arbitrator finds the tablets did not belong to the employer and hence the dismissal was substantively unfair and awards the employee retrospective reinstatement. Had the employer concluded the internal inquiry, he or she would have become aware of the employee's defence and would have taken a more informed decision. Failure to do so in this example resulted in the employer having to reinstate the employee and paying his or her normal salary from the date of dismissal to the date of reinstatement.

Procedural fairness

In terms of procedural fairness, the first

question is whether the employer was obliged, in terms of an employment contract or collective agreement or past practice, to have a formal hearing before dismissing the employee. In the absence of such an obligation, the only duty an employer has in terms of procedure is to give the employee an opportunity to be heard before making a decision.

In *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) the court said the following with regard to a pre-dismissal hearing: 'The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal.'

While one should be alive to the fact that subsequent SCA decisions have found that one cannot read, as a tacit term in an employment contract, that an employee has a right to a pre-dismissal hearing and that such right exists only in statute, this debate does not detract from the advice I am offering for the simple reason that the aforementioned example is with regard to an employee challenging his or her dismissal at the CCMA and is not suing in terms of breach of employment contract in a court of law.

Returning to our example, let us assume the employer does have an obligation to set down and conduct a formal hearing. Should the employer dispense with the inquiry without completing this formal process, any subsequent dismissal would be seen as procedurally unfair.

Similarly, if the employer is not obliged to conduct a hearing as described above, then the question is whether or not the employer gave the employee an opportunity to be heard before dismissing him or her. It can hardly be said that the employee in the example above, was given an opportunity to be heard when the employer dispensed with the inquiry in the middle of the process. If found the opportunity was not given, the dismissal would be seen as procedurally unfair.

To summarise, given the risks the employer runs, both from a substantive and procedural point of view, and taking into account the remedies open to employees if their dismissals are found to be unfair, my advice would be that it is never a good idea for an employer to dismiss an employee before the internal inquiry is concluded.

If the employee is the cause for delaying the finalisation of the inquiry, then the employer has available the option of placing the employee on unpaid suspension pending the conclusion of the inquiry. In this way the employer is not prejudiced by an employee who intentionally delays the finalisation of the inquiry with the aim of prolonging their employment for financial reasons.

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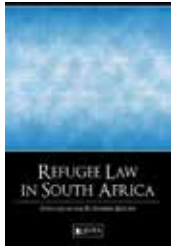
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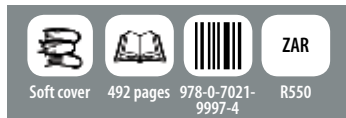
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F Khan, T Schreier (Editors)

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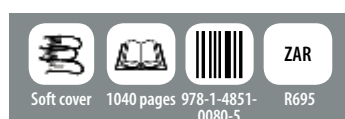
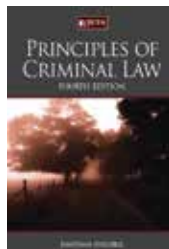
This book contains the full text of the Acts and related material in a convenient pocket-size format. The 7th edition, reflecting the law as at 7 February 2014, contains all the amendments to the Pension Funds Act 24 of 1956 brought about by the Financial Services Laws General Amendment Act 45 of 2013, originally published with effect from a date to be determined. Also included is a Legislation Alert with full details of the various dates of commencement of the aforementioned amendments. The Categorisation of Funds and Prescribed Annual Financial Statements (as amended) are included on a CD.



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