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MAY 2015

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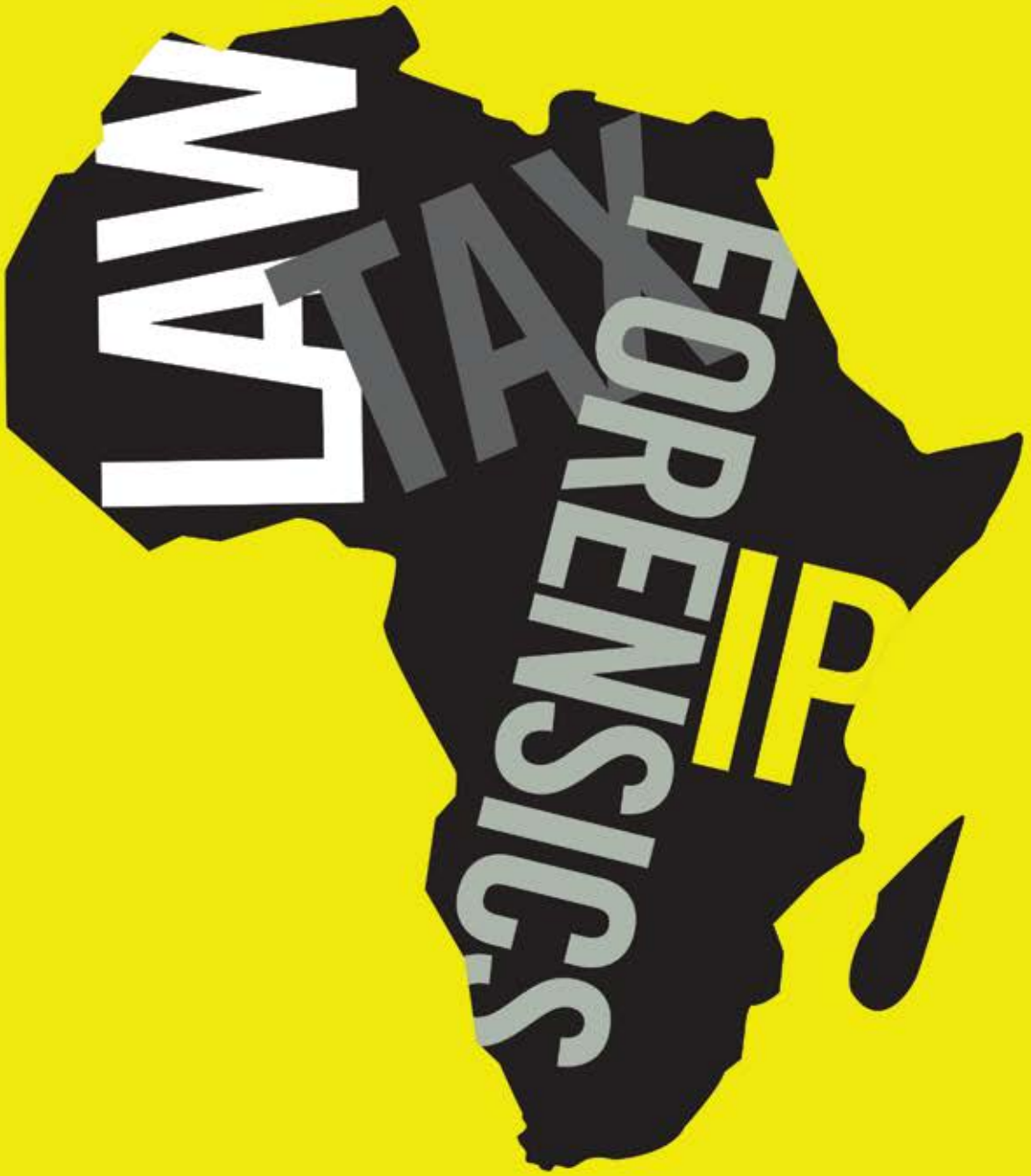

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LAW SOCIETY OF SOUTH AFRICA

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RAF loses Constitutional Court case on grants amid fraud allegations

On 20 April The Constitutional Court, ruled against the Road Accident Fund (RAF) in a matter pertaining to foster care grants. In *Coughlan NO v Road Accident Fund* (CC) (unreported case no CCT 160/14, 20-4-2015) the court ruled in a unanimous judgment that the foster care grants a grandmother received to support three children after their mother was killed in a road accident do not absolve the RAF for loss of support. The ruling upheld an appeal by a curator on behalf of the children who have now reached the age of majority.

The matter was an application for leave to appeal against a judgment and order of the Supreme Court of Appeal (SCA) in terms of which a decision of the Western Cape Division of the High Court against the RAF was set aside. The case looked at whether foster care grants, paid to the foster parents after the death of the mother of the three children in 2002, are deductible from compensation payable by the RAF for loss of support to those children. The curator contended that foster grants are not deductible, while the RAF contended that they are as this would amount to double compensation.

The High Court held that the grants were *res inter alios acta* and that the children were entitled to the full amount of damages suffered as loss of support, while the SCA held a different view. The SCA held that it was satisfied that if it was not for the death of the children's mother, the foster parents would not have claimed the foster child grants and that the foster child grants were deductible.

Meanwhile, on 21 April the opposition party – Democratic Alliance (DA) – released a press statement that says that it is in possession of evidence in the form of letters from complaint attorneys to claimants that allege that the RAF sues itself in an attempt to maintain a certain cash flow, which then delays claims made by road accident victims.

The DA is set to lay criminal charges against the RAF CEO, Eugene Watson, on behalf of road accident victims who are awaiting pay-outs.

The RAF released a statement saying that it would not comment on the allegations until it has seen the charge sheet and any accompanying documents relating to the allegations.

NOTICE:

De Rebus experienced server difficulties over the past month and would like to apologise for any inconvenience caused during this time.
If you did contact us and did not receive a reply from the staff, please resend the e-mail to us at derebus@derebus.org.za

Mapula Thebe – Editor

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: 18 May and 15 June 2015.

NOTICE:

In the article, 'Revised checklist for leave to appeal to the SCA' (2015 (April) DR 20), 'the letter' in para 3 under the heading 'No other annexures other than those mentioned in r 6' relates to a letter of the Free State Law Society of 8 March 2006, which has been fully quoted in *Erasmus: Supreme Court Practice* (Juta: Cape Town) commentary on r 6.

Duty to represent

The Law Society of South Africa held a press conference to address statements made on the role of attorneys in medical malpractice claims. From left: Co-chairperson Busani Mabunda, and former Co-chairpersons Ettienne Barnard and Max Boqwana.

The Law Society of South Africa (LSSA) held a press conference to address statements made by Minister of Health, Dr Aaron Motsoaledi, on the role of attorneys in medical malpractice claims. The press conference was held in Durban on 19 March prior to the LSSA's annual general meeting. Present at the press conference were outgoing Co-chairpersons Max Boqwana and Ettienne Barnard, as well as incoming Co-chairperson Busani Mabunda.

Mr Boqwana said attacks on the law profession are made because the public is unaware of the expensive nature of litigation. He added that, typically, during a medical malpractice case, attorneys take on the burden of expenses as they need to employ experts that will assist with the matter. 'People that utilise public hospitals cannot afford experienced advocates to work on their cases. Therefore, attorneys finance the whole process and pay for all the high fees and bills from advocates or experts,' he said.

Mr Boqwana said that it is the duty of attorneys to intervene and assist the poor sector of the community with matters of this nature because every citizen has a right to legal representation and because some claimants are not fully aware of their rights. 'Attorneys should not apologise for their role in society,' he added.

Mr Boqwana noted that media reports have raised concerns of collusion between attorneys and doctors in medical malpractice claims. He said that the LSSA does not condone such behaviour. 'There are instances of misconduct by attorneys; this involves touting and buying work. There are also instances of overreaching and overcharging that have been reported to the four statutory provincial law societies whose function is to regulate the attorneys' profession. The matters reported to the law societies are dealt with within the disciplinary structures of those law societies,' he said.

Mr Boqwana added: 'There is no way an attorney can manufacture a claim. That matter would not be taken through court. They would never succeed as proper verification of the injury would be made. Therefore, claims that are taken to court are valid and actual.'

Mr Barnard said that law societies investigate complaints that are brought to their attention and they then decide if the attorney is guilty or not. Giving the statistics of attorneys that have been found guilty of misconduct, Mr Barnard said that the figures were minor in comparison to the number of attorneys that practice in the country. 'Attorneys do their work in the interest of the public to ensure that the public has the right to representation. They sometimes do this *pro bono*,' he said.

Speaking on fabricated claims, Mr Barnard said: 'An attorney that takes a false claim to court would do that at their own peril. The injury would have to be proven through expert evidence and the evidence would be tested by the court'.

At the onset Mr Mabunda said that he acknowledges that attorneys are not angels. He added that there are processes in place that deal with misconduct and are there to protect the public. 'Attorneys have a duty to ensure that the public is represented in medical malpractice matters. Attorneys cannot fold their arms while there is wrongdoing. … The adjudication with respect to quantum is made by the courts after they have had regard of expert opinion, lawyers do not make the determination,' he said.

Giving a reason for the spike in medical malpractice claims, Mr Boqwana said that South Africa is a rights-based constitutional dispensation and the public is becoming aware of its rights. He said the public wants to utilise the benefits of the Constitution. On the other hand, Mr Boqwana said that the rise in claims can be attributed to challenges that hospitals face. 'The public hospital system is under stress and we have seen a decline in standards in the past years,' he said.

• See 21.

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Legal Practice Act and human rights at the core of issues discussed at LSSA AGM

The Law Society of South Africa (LSSA) held its 17th annual general meeting (AGM) in Durban on 20 and 21 March. The well-attended AGM coincided with Human Rights Day. On the first day of the AGM Justice Minister, Michael Masutha, delivered the keynote address, while former United Nations Commissioner for Human Rights, Judge Navi Pillay, delivered the keynote address on the second day.

On 20 March delegates also attended a dinner and lecture in honour of the centenary celebrations for Archie Gumede. The lecture was delivered by former Minister of Finance and Minister in the Presidency, Trevor Manuel.

Opening the proceedings, CEO of the LSSA, Nic Swart, asked delegates to stand and observe a moment of silence in memory of the late Minister of Public Service and Administration Collins Chabane who had passed away with others during a motor vehicle accident.

The President of the KwaZulu-Natal Law Society, Manette Strauss, welcomed delegates to KwaZulu-Natal. Speaking on the Legal Practice Act 28 of 2014, she said: 'Most of us are keen to see what impact this legislation is going to have on the way that we not only do business, but serve the public. The future implications are up to us, together with our colleagues from the Bar and other stakeholders, to determine what the Act is to achieve for the profession as a whole. … The legal profession's slate has been wiped clean and we now have the rare opportunity to contribute to making it a more accessible, a more reflective and a more competent system.'

Co-chairs report

The outgoing Co-chairperson of the LSSA, Ettienne Barnard, highlighted aspects of the Co-chairs report and said that the LSSA through its six constituent members, represents about 23 000 attorneys and just under 6 000 candidate attorneys. 'Statistics show that the profession is changing slowly year on year and of the practising attorneys, 36% are black and 37% are women (13% are black women). Statistics from 2008 to 2014 show that, while white male attorney numbers have grown only marginally, the total of white male attorneys has dropped by 7% from 2008 to 2014. Black male attorneys have increased from some 3 900 to 5 100. As regards candidate attorneys, 56% are females and 57% are black. Eighteen percent of candidate attorneys are white males, whereas 31% are black females. Black female and white female candidate attorneys are 26% and 25% respectively. An average of 1 590 attorneys have been admitted to the profession per year over the past ten years. Last year, 57% of these were women and half of those admitted were black. Generally, for the past five years, more women have been admitted to the profession than men, and the number of black attorneys that are admitted vary between 47% and 50%,' he said.

Minister of Justice, Michael Masutha, delivering the keynote address.

Speaking on the strategy and vision of the LSSA, Mr Barnard said: 'Our vision is a unified, independent, legal profession that protects and promotes the rights enshrined in the Constitution. … The Law Society of South Africa still has a very important role to play.' He added that the LSSA will provide sustainable support in concluding the transitional process of the Legal Practice Act to ensure meaningful transfer of institutional knowledge. The LSSA will also 'communicate developments widely to stakeholders and assist with strategic planning, as well as the development of policies, protocols and guidelines,' he said.

'White boys club?'

Opening his keynote address, Mr Masutha on behalf of the Justice sector, expressed heartfelt condolences to the family, friends and colleagues in the Cabinet and the Executive, for the passing away of Minister Collins Chabane and his two bodyguards. He said that the AGM was an opportune time for the LSSA to reflect on the progress made with regard to the transformation of the profession in the past 20 years of democracy – or lack thereof – in order to put in place a workable plan of action for the future.

Speaking on the National Forum on the Legal Profession in terms of the Legal Practice Act, Mr Masutha said that he faced embarrassment and was bombarded with questions relating to the composition of the forum when he presented the names of the members to Cabinet. At the time, only three of the 19 members were women, therefore, he had no choice but to ensure that both his nominees were women. He added: 'If the white males were to allow me, no offense to themselves, [the forum is] essentially a white boys' club and my apologies for bad manners and bad language, but that is a reality that we need to confront, because it is not just a reflection of this body, which is meant to lead transformation, but it is a reflection on us as a profession. It poses questions about how transformed we are. Where are we, relative to the rest of society?'

Mr Masutha said that the developmental character of the Constitution remains an important tool that is necessary to redress the imbalances of the past. 'Then enforcibility of the Bill of Rights places a higher responsibility on the judicial system of ensuring that all people have access to justice. Access to justice is, therefore, a universal and an honourable right without which all rights in the Bill of Rights would be meaningless. The judiciary and the legal profession are at the epicentre of the government's or the state's quest to provide an accessible and affordable judicial system. Legal practitioners have a legal and moral duty to assist litigants to enforce their rights in courts of law. It is important, therefore, in order to restore public confidence in the judicial system that the legal profession, like the judiciary is transformed in line with the tenets of our democratic constitution,' he said.

Addressing the issue of gender transformation, Mr Masutha said that the few women judges on the Bench is partly attributed to the few women practitioners across the attorneys' and advocates' professions. 'The latest statistics brought

to my attention indicates that of a total number of 22 912 attorneys, … only 8 343 are women. Of the latter number, only a mere 2 989 are black female practitioners. In respect of the advocates' profession, of the 2 571 advocates who are enrolled through the constituent Bars of the General Council of the Bar, only 116 are African women practitioners out of a number of 645 women advocates. The Legal Practice Act must help us change, not only the face of the profession, but also the way in which the profession provides services to the people who are the beneficiaries of the legal system,' he said.

In conclusion, Mr Masutha thanked the legal profession for the role it continues to play in aspects of the justice system and society. 'One such important service is in relation to the small claims courts, which are an important vehicle of widening access to justice, in particular for the poor members of our society. Let me also express profound gratitude following the enthusiasm and support that the profession has shown in the court-annexed mediation dispensation, which we have recently introduced into our legal system. Attorneys and advocates have come forward in their large numbers to play part in this worthy cause that is aimed at maximising access to justice,' he said.

• See 12.

Word from the Attorneys Fidelity Fund

Outgoing Chairperson of the Attorneys Fidelity Fund (AFF), CP Fourie, spoke on the position of the AFF during the transitional phase of the Legal Practice Act and also gave a report on its performance during 2014. 'We are now indeed and at long last in the transitional phase and during this phase, which will be for a period of at least three years, the AFF will continue to operate and fulfil its obligations in terms of the Attorneys Act [53] of 1979, as amended. … During 2014 the total nett assets of the fund improved by 5,1%. As at 31 December 2014 the total nett assets of the fund amounted to R 4,324 billion. The positive result for 2014 can be attributed to investment performance. The Fund's investments grew by 9,33% on average across all asset classes,' he said.

Speaking on claims paid out to the public Mr Fourie said: 'Theft claims paid in 2014 amounted to R 97 million. Over the last six years, theft claims paid totalled R 549 million, which, on average, is R 91,5 million per year. This, no doubt, is a shocking figure. The positive side, however, is that members of the public were assisted to such an extent, which is the very purpose why the fund was established. Even more alarming is the fact that the cumulative percentage growth in claims on record over the past five years is an enormous 99%. In other words, the growth in claims on record over five years has doubled. Therefore, concerns remain over the fund's financial sustainability in the longer term. The way forward: The Board of Control has approved and implemented a comprehensive three-year plan to address the challenges and also the opportunities presented by the Legal Practice Act. In order to endeavour to ensure the financial sustainability of the fund [and that it] remains intact going forward, the fund has to continue to maximise income, curb expenses where practically possible and ensure effective risk management and the limiting of risk exposure.'

With regard to maximising income for the AFF, Mr Fourie made the following points:

- The Legal Practice Act provides that a percentage of the interest earned on s 78(2A) trust account investments shall vest in and be paid over to the AFF. The Attorneys Act may be amended to include this provision during the transitional phase so that this new income stream is available to the fund earlier.
- With effect from 1 March 2015, it will become mandatory for practitioners to pay over interest earned on trust current banking accounts to the AFF via the appropriate collecting law society on a monthly basis. The money will not be automatically swept if there is no money in the trust account.
- The AFF will have a focused investment strategy, designed to preserve capital and to achieve investment growth that should continue to be followed.

As regards the curbing of expenses, Mr Fourie said that there will be capping of s 46(*b*) – funding until 2017. 'This primarily impacts on legal education and the necessity and/or affordability to have three providers of legal education should again be closely scrutinised. Secondly, there will be capping of the fund's contribution for professional indemnity insurance cover, pending the re-engineering of the Attorneys Insurance Indemnity Fund [AIIF]. The review of the business model has been concluded and the recommendation is that the AIIF continues with the current model, with the exception that in future practitioners be responsible for the funding of the [Professional Indemnity] cover they enjoy or a contribution be levied in respect thereof,' he said.

Further, Mr Fourie said that the management of the AIIF scheme by Aon finally came to an end in November 2014. 'The management of the AIIF's business is now fully in the hands of its own management and the entire business of the AIIF is conducted from the new premises of the AFF in Centurion. Staff members formally employed by Aon have now been absorbed into the AIIF. Operating from the same premises makes the sharing of services possible, which should hopefully result in achieving significant savings,' he said.

• See 16.

In terms of continued effective risk management and the limiting of risk exposure Mr Fourie said the Legal Practice Act has an empowering provision that the Minister may cap claims. 'This will significantly reduce the risk exposure of the fund. Hopefully by way of an amendment to the Attorneys Act the capping of claims will be possible, also during the transitional phase. The new Compliance Support program, to assist new practices with their opening audits and to also assist such practices into the mainstream as soon as possible, has commenced in KwaZulu-Natal. In due course, it will hopefully be introduced nationally. Under the Legal Practice Act the Fund will be able to inspect the accounting records of any trust

account practice. Such compliance inspections should significantly contribute to effective risk management,' he said.

Word from the Southern African Development Community Lawyers Association

Vice-president of the Southern African Development Community Lawyers Association (SADC LA) James Banda gave a brief history of the association: 'This organisation was formed in Maputo, in Mozambique in 1999 by senior law society members and Bar leaders from within the SADC region. Currently the association has 12 institutional members of the 15 SADC countries. Three of the SADC countries, namely the Indian Ocean Island nations of Madagascar, Mauritius and Seychelles are not members. ... Member law societies second their members to sit on the SADC LA Council and from there Executive Committee members are elected every two years. So, each law society will provide two representatives,' he said.

Mr Banda said that SADC LA has recently embarked on a drive to recruit individual lawyers as members in order to encourage direct participation in the work of the association by lawyers outside of the law society membership, as well as help improve sustainability of the organisation. The membership fee for individuals is $ 100 per year.

Mr Banda noted, at its inception, SADC LA's main focus was on the promotion of the interest of lawyers and the development of the legal profession and this was one of the reasons the association was established. However, he said that this focus has shifted as currently human rights and rule of law work dominates operations of SADC LA, as such work is largely funded by donors, while program activities focusing on the interest of the profession require direct funding from lawyers in the region.

Speaking on joint initiatives between the LSSA and SADC LA, Mr Banda said: 'Election observation is obviously important for the simple reason that apart from having a few truant leaders in our region, it's obviously important for lawyers to observe elections … . At the beginning of 2014 SADC LA Secretariat worked closely with LSSA Management in developing and implementing an election observation project. The activities included the training of lawyers in South Africa, in election observation, as well as the deployment of lawyers to observe the elections, which were held on 7th May 2014.'

Mr Banda raised concerns on the SADC Tribunal. 'In the past year, following the suspension of the SADC Tribunal by the SADC Heads of State and governments in 2010, SADC LA has been working very closely with the law societies and Bar associations in the region in challenging the suspension of the Tribunal and advocating for its reinstatement. Multiple strategies were used in an effort to meet this objective and these include direct engagement with the governments in the SADC region, research and publication of opinions on the legality of the suspension, as well as litigation. Now, in 2014 the focus was on litigation and SADC LA worked closely with some of the law societies in the region to institute legal proceedings in their respective national courts, challenging, amongst other things, the decision making process that led to the suspension of the Tribunal. The LSSA has been one of the key supporters of this process,' he said.

• See 18.

Other speakers

Manager of the Attorneys Development Fund (ADF), Mackenzie Mukansi spoke about the progress of the ADF since its inception. The final speaker of the day was Mr Gavin McLachlan, from the National Law Library. For more information on how to access the services of the library visit www.lawlibrary.co.za

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Archie Gumede: One of the stars in the struggle for human rights

Former Minister of Finance and Minister in the Presidency, Trevor Manuel delivered the Archie Gumede Lecture at a dinner in Durban as part of the Law Society of South Africa's (LSSA) AGM held on 20 March. Other speakers of the evening included, the Premier of KwaZulu-Natal, Senzo Mchunu; Member of Parliament, Don Gumede; outgoing LSSA Co-chairperson, Max Boqwana; and Paul David who was Archie Gumede's friend.

Mr David recalled that his relationship with Archie Gumede stretched over many years. 'He and my family were neighbours in Camps Drift Road in Pietermaritzburg. … We worked together in political organisations and civic organisations. We were incarcerated together. We faced the treason trial together and my sister, Phyllis was his partner. … I want to congratulate the society for this occasion and for the thinking that went behind the launch of this programme dedicated to the memory of Archie Gumede, not because he was a lawyer, I hope, but because he was a political activist and one of the stars in the struggle for human rights.'

Archie Gumede, delivering a speech at a rally.

Premier Mchunu said that 'Baba Archie Gumede' was an inspiring humble leader during very turbulent times in South Africa. He added: 'Without any hesitation, he sought to restore hope to the millions of our people in this country through what he said and through what he did and every day of his life he made it possible for these millions of people to see the day of liberation and freedom getting closer and closer. It's a coincidence that we are here in this function, celebrating the work of this gallant fighter of our people and champion of

dignity, justice and the rights for all, particularly following the principles of non-racialism, non-sexism, democracy and unity among the people, that when at the same time are mourning the passing on of one of our comrades, Collins Chabane, through the tragic accident, that this coincidence make it even more possible for us to think even deeper.'

Premier Mchunu said that he met with the leadership of the National Democratic Lawyers Association and the Black Lawyers Association in the province. 'We discussed, among other things, the fact that the issues around justice and transformation of the judiciary, including the need to access justice to all in the true sense of the word, gets off and relocated to the periphery in terms of our daily discourse, mistakenly so and it is befitting to recommit ourselves, all of us this evening. ... to the course that Baba Archie Gumede stood for, for he would never have retired from fighting for all, especially those amongst us who are least recognised and are vulnerable to injustices,' he said.

Speaking on ethics, Mr Boqwana said that it was unacceptable that the Attorneys Fidelity Fund had to pay R 97 million, in the past financial year to members of the public as a result of theft committed by practising attorneys. He said that this behaviour dishonours the work done by the generation of Archie Gumede. 'It is in this context therefore that ... we thought it's important that we begin a series of lectures on ethics. We are actually going to formulate a course on ethics and that course will be named after Archie Gumede so that it's a constant reminder of what we are doing,' he added.

In conclusion Mr Boqwana said: 'We all owe it to Archie Gumede and his generations – the generation of Phyllis Naidoo;

Former Minister of Finance and Minister in the Presidency, Trevor Manuel said that he had a great privilege of serving under Archie Gumede who was the President of the United Democratic Front.

the generation of Pius Langa, Griffiths and Victoria Mxenge – to serve the people of South Africa in a principled and value-driven fashion, lacking neither courage, drive and self-reliance when we do the course of justice. Let it be that we must never say what is just is unjust. To traverse this and other critical important lessons drawn from Archie Gumede, from the days of the formation of the United Democratic Front, and the determination of a dream of a new society and to question whether the dream that was formulated at that time, whether that dream has been realised. We could no better therefore, colleagues and friends, than to ask Mr Trevor Manual to do that. Mr Trevor Manual belongs to that privileged generation that took the responsibility to put the final nail on the coffin of apartheid.'

Delivering his lecture, Mr Manuel said that he had the great privilege of serving under Archie Gumede, who was the President of the United Democratic Front (UDF). 'The slogan said it all "UDF unites, apartheid divides." You made a choice in life. You are either with those who united society or you chose to be on the other side and if you chose to be amongst those who united people, there were certain ethics required of you. You behaved yourself in a particular way. There weren't many rules. You demonstrated respect. You demonstrated determination. You demonstrated courage. You did not divide the people. You didn't factionalise ... . You appreciated the values of non-racialism and you were determined to work for democracy,' he remarked.

Speaking on the Constitution Mr Manuel said: 'Because part of what we have done in our Constitution is to create difficult formulations. We have undertaken to adopt 11 official languages. What does it mean for us? You see, when we undertake the issues to build a nation state we need to be very clear about what this entails and the task at hand is a big one. In Italy, for instance, Massimo d'Azeglio, at the point of unifications of Italy said "we have built Italy, now we must make Italians." Perhaps when we adopted the Constitution in May of 1996 we should have looked to our people and said now we have made South Africa. How will we make South Africans? How do we create the sense of unity, the sense of common purpose, because without that what are we after all? ... You see, we also say we believe South Africa belongs to all who live in it, black and white, it's from the Freedom Charter, it's in our Constitution. Now, what do we say to people who've recently arrived, these shopkeepers? Who stops the xenophobia in our country and say South Africa belongs also to those who live in it?'

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Human rights, ICT and fees discussed on second day of AGM

On 21 March, Human Rights Day, the first speaker of the 17th annual general meeting (AGM) of the Law Society of South Africa (LSSA) former United Nations High Commissioner for Human Rights, Judge Navi Pillay, delivered the keynote address.

Judge Pillay said that the first lesson she had to learn while serving as United Nations High Commissioner for Human Rights was that she was not passing judgment on anyone but rather advocating to see change on the ground. She headed an office of 1 000 highly qualified experts. In order for one to be an intern in the office of High Commissioner for Human Rights they need to have a Master's degree or be registered for a PhD. She added that her training as an attorney helped her to be able to perform her duties.

Speaking on the rule of law she said: 'Rule of law implies laws that are compliant with the United Nations system framework, which includes the Charter, the Universal Declaration of Human Rights. My training together with you on professionalism, preparation, ethics, honesty, transparency and independence, impartiality, stood me in good stead and when I left six years later these are the values that were highlighted. Some ambassadors said what's good about you is that you listen, so that's important too. Let us listen and hear the other side's point of view. Today is Human Rights Day, March 21st, as a result of 67 peaceful protesters being killed at Sharpeville, the entire world, through the United Nations, adopted this date, March 21st. As the day to celebrate human

rights. It's a moment for us to think that if the world paid so much attention to 67 people being killed here on our streets, what should the South African government, what should the South African society and the profession do in reacting to thousands and thousands of killings in conflict today?'

Cybercrime

Deputy Chairperson of the LSSA's E-law Committee, Sizwe Snail ka Mtuze began his presentation by speaking about the Budapest Convention. 'The Budapest Convention is a document of the Council of Europe. It has nothing to do with Africa, however, the Budapest Convention or the Cybercrime Convention as they call it, is known as international best practice. South Africa has signed the Budapest Convention but has not ratified it … . The convention has a list of offences against confidentiality, integrity and availability of computer data systems. Those would be your illegal access, what we call colloquially as hacking, illegal interception that is when someone intercepts your communications. Data interference, like we had in Parliament the other day. System interference that is when someone remotely interferes with the workings of your computer system, and the misuse of devices. … The misuse of devices basically relates to the use of electronic devices for purposes that are not lawful, be it listening devices, be it un-encryption devices, be it password sniffers, be it phishing devices. These are the principles pertaining to the confidentiality and the integrity of personal information that need to be protected,' he said.

Mr Snail ka Mtuze added that there was another category, which is termed computer related offences, where computers are used to commit crimes such as online forgery. 'You always hear about the 419 scams. 419 is actually a section of the Nigerian Code that deals with advance-fee fraud, that's where the number 419 comes from. Then we also have content-related offences, that are another category, mostly your child pornography offences … Then we also have the last categories and that is the offences relating to copyright infringements and other intellectual property,' he said.

With the introduction of corporate liability, Mr Snail ka Mtuze said that companies can no longer claim that only their employees are to be held liable for cybercrime.

Mr Snail ka Mtuze said that in terms of cybercrime in the African perspective: 'The East African community has its own model laws, SADC [Southern Africa Development Community] also has its own model law, they have a model law in e-commerce as well as one on cybercrime. The ECOWAS [Economic Community of West African States] region that is West Africa, also has its own and most interest-

Former United Nations High Commissioner for Human Rights, Judge Navi Pillay, delivered the keynote address on the second day of the conference.

ingly so does the African Union. You will appreciate that there is now an African Union Convention on the Establishment of a Credible Legal Framework for Cyber Security in Africa. It encompasses basically the rules of e-commerce, cybercrime and cyber security.'

Speaking on the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) he said: 'The Electronic Communications Transactions Act guides electronic commerce. … Section 3, which is the interpretation clause basically, says that this particular law has not just been created to give effect to electronic communications but also to accommodate whatever laws that are enforced even before the ECT came. In other words, if we do have a problem in proving e-fraud then we can rely on common law fraud. If we have an issue of not proving a denial of service attack then we can go in and say, well maybe that's theft of use, theft of data. So, this basically allows us, as lawyers, to really test the law and to really go back into the law as it was and to fuse it into the current times that we have.

'Section 85 basically talks about unlawful access. Unlawful access is anyone who accesses an information system even if lawfully, and at that particular stage if his lawful access then becomes terminated and he remains on that computer system, if that particular person does that then that access is also unlawful. So, it is not just a person who has hacked you but it may also be an employee who has a right to access a computer system between particular times and then after that his authority may not be there and he then decides to stay on the system and to use it for other purposes,' he said.

Mr Snail ka Mtuze went on further to discuss other sections of the ECT Act that attorneys should take note of such as ss 14, 15, 45, 86(1), 86(2), 86(3), 86(4) and 86(5).

On the Regulation of Interception of Communication-related Information Act 70 of 2002 (RICA), Mr Snail ka Mtuze said: 'RICA deals with interception and monitoring, it was used in the matter of [*Cwele v S* [2012] 4 All SA 497 (SCA)]. … In *Cwele* there was an interception order that was granted in terms of this Act. RICA has a section in terms of which a designated judge may grant an interception order where there are serious economic crimes taking place, where there is state security leaks. We always talk about RICA Act and we think it has to do with your cell phone and your ID number. RICA is a very powerful Act. It also talks about consent, under which circumstances you can consent to your interceptions being monitored.'

Developments and innovative thinking for law firms

Megan Jones, industry liaison at Infology, a software technology provider for the legal sector, focused on electronic signatures and technology developments that affect law firms. Touching on the ECT Act she said that the Act was promulgated 13 years ago and is out-dated. She added: 'The main objective of this particular Act is to promote legal certainty and confidence in respect of electronic communications and transactions … The important sections in particular are specific definitions about electronic signatures versus advanced electronic signatures, and looking at the actual legal requirements for data messages. Electronic communications are actually defined as communication by means of data messages. A data message is considered as data generated, sent, received or stored by electronic means, and it

Deputy Chairperson of the LSSA's E-law Committee, Sizwe Snail ka Mtuze, speaking on cybercrime.

Industry liaison for Infology on software technology for the legal sector, Megan Jones.

includes voice when used in automated transaction but also a stored record, and data, quite generally, is actually defined as an electronic representation of information in any form. Looking at the word signature and the actual expanded meaning of signature; we do have a traditional concept of signature in South African law that was developed by our courts and then we also have these different types of electronic signatures, which have been provided for in terms of the ECT Act … This means our data, the electronic representation of information, that is attached to, incorporated, or logically associated with other data and intended by the user to serve as a signature. … The definition was extended slightly to also define an advanced electronic signature to be an electronic signature, which actually requires a process of being accredited by the Accreditation Authority. … What could qualify as an electronic signature going forward; we have a usual PIN or a password, smartcards at the moment, scan signatures, voice messages, our biometric, such as our fingerprinting etcetera, so all of that is actually now qualified under an electronic signature.

'With regards to advanced electronic signatures, in 2007 these accreditation regulations were published by the Department of Communications. It outlined the process for receiving accreditation as a supplier of an advanced electronic signature. So, what this means in our law is, in order to get an advanced electronic signature you have to go to one of these accredited suppliers to receive it. It was in 2007 that we got these accreditation regulations, but it was only eventually in 2013 where the first two advanced signature technologies were actually approved by the South African Accreditation Authority, so that's the South African Post Office and Law Trust'.

Ms Jones said that there are many functions of electronic signatures. 'Through the general signature we obviously have identity, authorship, the intention to be bound, which must always be there, approval of contents, the association with the contents as well as the personal involvement. Another function it serves can be security and integrity. This can be achieved through encryption, and then obviously an electronic signature can be both, be evidentiary and used for security purposes,' she said.

Ms Jones also spoke about the impact of electronic signatures on non-variation clauses (see 2015 (Jan/Feb) *DR* 57).

In terms of the future of law firms, Ms Jones asked delegates at the AGM, what security technology, information security policies, and procedures they have in place to protect their clients' information? 'We are not plugged into our local company's intranet anymore; we are using our own personal devices. Who knows what protection or lack of protection is on there? New technologies are impacting every aspect in every industry, but particularly on our legal field, which a lot of people have not realised yet – we actually have judicial recognition of this impact in our courts. In [*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD)], Steyn J stated that changes in technology or communication have increased exponentially and it's therefore not unreasonable to expect the law to recognise such changes and in effect to put procedures in place to be able to combat and move with those changes as they go along,' she said.

Panel discussion on fees

The last session of the day was a panel discussion on fees. The panellists were attorney Asif Essa; member of the Rules Board, Graham Bellairs; and attorney Anand Nepaul. Giving background on the discussion Mr Essa said that during February 2014, there had been an indaba on legal costs held under the auspices of the Rules Board for Courts of Law and at that indaba there were four issues that were discussed, which were:

- The sustainability of costs in the context of access to justice.
- The structure of and the increase in the tariffs of attorneys in the Supreme Court of Appeal, High Court and the magistrate's court.
- The structure of and increases in the tariffs of Sheriffs in the High Court and magistrate's court.
- The tariff of taxation, or the tariff for taxation of advocate fees in the Supreme Court of Appeal, High Court and magistrate's court.

Discussing the indaba further, Mr Essa said: 'The meeting had different sessions dealing with different topics and I happened to be one of 12 people in the discussion on whether there should be a tariff for advocate's fees like there is a tariff for attorney's fees, and at the end of that discussion the rapporteur indicated to the meeting that there were two views in this session. The two views were, one, that there should be a tariff for advocate's fees and the other, that there should not be one. Ironically there was one attorney and 11 advocates on that panel. The advocates are totally against the idea of having a tariff. Thankfully, I can tell you that there's a process in the Rules Board in terms of which there is discussion on the whole issue of a tariff for advocates.'

Kicking off the discussion, Mr Bellairs discussed the potential problems in the implementation of s 35 of the Legal Practice Act 28 of 2014, which requires the determination of tariffs by the Rules Board and mechanism to be put in place by the South African Law Reform Commission for determining tariffs. 'Section 35(1) requires the Rules Board for Courts of Law to make tariffs in respect of litigious and non-litigious services rendered by legal practitioners who are defined in s 34, and they include sole practitioners, partnerships, juristic entities, law clinics and Legal Aid South Africa. This is an immediate process. The Rules Board has got to now go and determine tariffs. However, s 35(4) requires: The South African Law Reform Commission within two years after the commencement of chapter 2 of the Legal Practice Act to investigate and report back to the Minister with recommendations on, among other things, the following: The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. Secondly, the composition of the mechanisms referred to above and the process it should follow in determining fees and tariffs. And thirdly, the desirability of giving users of legal services the options of voluntarily agreeing to pay fees for legal services less or in excess of any amount to be set by the mechanism referred to above.

'The Rules Board's obligation to deter-

Attorney Asif Essa speaking on fees.

mine the tariffs appears to be immediate, whereas the obligation placed on the South African Law Reform Commission to determine the desirability for the creation of a mechanism to determine fees, and tariffs commences only two years after the commencement of chapter 2, which in turn comes into operation three years after the commencement of chapter 10. It therefore appears that the Legal Practice Act has put the cart before the horse,' he said.

The next issue Mr Bellairs discussed was the parties who will be bound by these tariffs. He said: 'It has been noted that the tariffs to be determined by the Rules Board are in respect of both litigious and non-litigious legal services and the question therefore arises, whether persons who do not fall within those definitions will be bound by the tariff. If not, this would be iniquitous and will result in an unequal application of the law as those such as banks, accountants, financial advisors, letting agents, business brokers, the like, falling outside of the section 34 definitions, would be free to charge what they like for non-litigious work, which is not reserved to legal practitioners.'

Mr Bellairs asked, what work is covered by non-litigious work? He said s 33 provides that: Only a legal practitioner in expectation of a fee can appear in courts of law, tribunals and the like and only they may draft pleadings, notices and documents for use in those forums. He added: 'However, the Act is silent on whether or not non-litigious work is work reserved only for legal practitioners. We are all familiar with the concept of reserved work and two such examples are of course conveyancing and notarial work. There is no definition in the Act of what non-litigious work is and therefore the parameters and extent of the Rules Board in determining tariffs is going to prove difficult.'

Further Mr Bellairs said that s 35(2) of the Legal Practice Act defines certain criteria for determining tariffs. He added: 'These are also problematic, they are multi-fold and include the following, firstly the importance, significance, complexity and expertise of the legal services required. Secondly, the seniority and experience of the legal practitioner concerned. Thirdly, the volume of work required and time spent in respect of the legal services rendered, and fourthly, the financial implications of the matter at hand. These criteria are not divisible and all are to be taken into account at the same time. In other words, they must be considered together. The question arises, how do you take all of these factors into account in determining a tariff, and furthermore, are the criteria subjective or objective? Further, against what parameter would one determine importance, significance, complexity and expertise?'

Panelists discussing fees, from left: Attorneys Anand Nepaul and Graham Bellairs.

In conclusion Mr Bellairs asked: 'Will the tariff or tariffs determined by the Rules Board apply universally to all legal practitioners across the length and breadth of South Africa? Are attorneys practising in small towns in isolated areas where communities are relatively poorer than those in the more expensive areas, and the areas in the big cities, required to charge the same fees for the same work? Historically micro-economies have their own cost of living and overheads. Salaries and rentals have reached different levels. How, therefore, can a uniform tariff be fairly applied across these socio-economic areas? If the tariffs are strictly applied without client's initiating a reduction or increase of fees this will result in the large firms having to run at a loss, and clients in rural and poorer areas still not being able to afford their attorney's fees. The point is, that market forces should determine fees charged and payable by attorneys and clients. Tariffs will work against this and not achieve their ultimate objective, which is access to justice.'

Mr Nepaul said that tariffs have been there for a long time and that there are difficulties and dynamics of what goes into a tariff. 'I think there is argument and authority as to retention of tariffs and not to the total abolition of it, but perhaps more interesting than that, as I see it, and perhaps more important than that, would be to deal with the treatment of our attorneys as against counsel when it comes to the very issue of costs, and there has always been this perception that advocates have a seniority and a superiority to members of the sidebar and this fallacy unfortunately still continues,' he said.

He added: 'I think for the sidebar members any recognition that we get that our costs should be on par with the opposition that you have from the Bar would be a substantial increase in the fee that we would be earning. We are being terribly underpaid at the moment in respect of our work when we appear in the High Court as against counsel. … I am sure many of my colleagues at the sidebar have this situation that they have come across. That you have briefed the senior counsel, he has drafted the affidavits, come back, and of course you have got to check it, and then you do find that on checking it that there are errors in it, what fee should you then charge? We are restricted to either time or simply the checking or redrawing of the document on tariff, which is a pittance in regard to what you are going to be billed for by counsel. The other practical difficulty that I have come across, and this emanates from a recent situation that we had, is that the control of costs of advocates lies within their society and their taxing or fee assessment committee, and experience has shown that what really happens there is effectively just simply a rubber-stamping of fee notes produced by their members. We had a practical experience late last year where a particular counsel had agreed on a fee with the client of the attorney of X thousand Rand per day. He went to court in the morning on an opposed motion, the matter was adjourned and after it was adjourned he returned to his chambers and then did a short memorandum. He then charged another X full day fee for that. Obviously, a dispute arose and when the dispute couldn't be resolved the member went off to his taxing committee of his society and produced his fee notes and that committee found that those fees were fair and reasonable and rubber-stamped them.'

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First meeting of the National Forum of the Legal Practice Act

Johannesburg advocate Kgomotso Moroka SC and Port Elizabeth attorney and former Co-chairperson of the Law Society of South Africa (LSSA) and president of the National Association of Democratic Lawyers (NADEL), Max Boqwana have been appointed as the chairperson and deputy chairperson of the National Forum. The appointment was made at the first meeting of the members of the National Forum on the Legal Profession that was held at Kempton Park on 31 March 2015.

The meeting was attended by 19 of the 21 members of the National Forum, as well as a few delegates from other institutions.

In his opening address Justice Minister Michael Masutha said that the legal profession was a troubled profession, adding that that was the reason why 'we are here today'. He added that the process of transformation was moving slowly and that looking around the room, it was evident that gender representation was low. 'How are we going to achieve transformation when we, the organ that is supposed to be driving transformation, are not representative of transformation? We have a long way to go. This forum is not fully representative, we are starting on a wrong note. That is why the Justice Department designated two women as members of the forum. The forum is far from reflecting the demographics of the South African society, which is a constitutional imperative. The under representation of women in particular, who are only three amongst the 19 members designated by the constituent bodies, flies in the face of the very objective for which the forum has been established,' the Justice Minister said.

In outlining the core function of the forum, Minister Masutha said that the main task of the forum was to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the country as set out in the Legal Practice Act 28 of 2014. He added that the forum is expected to level the playing field for the establishment of the Legal Practice Council and provincial councils.

The deputy chairperson and chairperson of the National Forum, Max Boqwana and Kgomotso Moroka, shortly after election on 31 March.

Minister Masutha said: 'We are meant to be the drivers of transformation in the profession. Between ourselves as politicians and as members of the legal profession, I think that we hold the bulk of influence on the subject of transformation, nation building, constitutional democracy etcetera and yet only about two weeks ago I had a file presented before me to sign off to the president to bring into operation the new Attorneys Amendment Act [40 of 2014], which will have the effect of changing the names of the various law societies and shedding off the old names of Transvaal, Orange Free State and Cape of Good Hope and so on. I thought wow, 21 years later, just to change names, that is how long it has taken this profession.'

Minister Masutha said that he 'dreams of, and would love an era where South Africans do not find pain in constituting the goals of the Constitution'. He added that he would like to visit big white law firms to find out the challenges they experience in constituting transformation as well as what they are doing in constituting transformation. Minister Masutha added that government also has its own grievances, as it is losing cases every day. He said that lawyers representing government have an 'all-is-in-the-bag, we-do-not-need-to-prove-ourselves, they-will-pay-us-either-way' attitude, which he said was detrimental to government.

The Deputy Minister of Justice, John Jeffery, spoke on the salient features of the Act and what is expected of the forum. He said that the South African legal profession was right at the back with regards to transformation. 'We are far behind. This process began over 20 years ago, the idea was to get attorneys and advocates to sit together and resolve issues. The reason for this forum is because you could not agree on everything. This is your chance to resolve issues, if you cannot resolve it among yourselves then the Minister will resolve it for you. It is better for you to resolve the issues yourselves,' he said.

Deputy Minister Jeffery reminded the forum that it is already two months into the 24 month period. He added that the main task of the forum is to discuss its powers, functions and unresolved issues of the Act such as the training of candidate attorneys and pupillage. 'It has two years to do it from 1 February 2015. The Minister can extend the period but the forum has a lifespan of three years,' he said.

Deputy Minister Jeffery reiterated that if no agreement is reached, then the Justice Minister will make a decision, only after consultation with the forum. He added that although constituent bodies can remove their nominees from the forum, that there must be good course and the bodies must get confirmation from the High Court first. 'We want to make it harder for constituent members to remove you just for straying over the boundaries of the bodies you represent. They cannot just remove you for that,' he said.

The Deputy Minister concluded by saying: 'It has been a long process, thank you for accepting the nomination. The Justice Department will provide admin support but you are basically running your own thing. The two professions – attorneys and advocates – must resolve issues themselves.'

Three of the six female members of the National Forum, from left, Martha Mbhele, Thina Siwendu and Janine Myburgh at the first meeting of the forum on 31 March.

Comment from members of the forum

The floor was then open for comment from members of the forum. Krish Govender, who was designated to the forum by the LSSA, said that the legal profession and the Justice Department were 'in this together'. He said that the Justice Department should not be saying 'you' (the legal profession) and 'us' (government), adding that it was not just the legal profession not agreeing that put the Act on hold. Mr Govender added that the process started moving during the last term of the previous Justice Minister.

On the issue of transformation, Mr Govender said that there were many black men in the profession that were doing well. He added that black lawyers from NADEL and the Black Lawyers Association (BLA) brought a number of women into government and into the judiciary. 'When you ask us where our women are, the answer is they are in the Bar and the judiciary,' he said. He questioned what the legal system was doing to provide for and support these women, adding that this was a problem that both government and the legal profession needed to share.

'We cannot in a united country, isolate a particular subject matter and think that it is a problem on its own. When the Minister refers to a troubled profession, I would like to link it to a troubled country and a troubled government. Because we are troubled and I do not say you, I say we as a nation. We in the legal profession are part of a troubled profession, which is part of a troubled government and part of a troubled country,' he said.

Mr Govender asked why there is such a small pool of female lawyers? He said that South Africans must ask themselves what the systems of government are able to provide women, 'what is our legal system doing at all the levels in advancing women? There are problems that we must share, this is not the cause of the legal profession,' he said.

Speaking on briefing patterns, as a former state attorney, Mr Govender said that if government did its homework, and looked at the statistics, it would see that the Justice Department has done a sterling job in making sure that work goes to a percentage of previously disadvantaged individuals but that if one looks at the representation at the top, in the highest courts, that that is where the problem lies. 'Who is being briefed there, and by whom?' he asked. 'The parastatals are out of control in terms of not even recognising the concepts of transformation for briefing patterns. When the state attorneys insist on briefing others, private lawyers just get briefed instead and decisions are taken elsewhere,' he said. Mr Govender reiterated his point that the Justice Department and the profession needed to work together to fix these problems.

Advocate Willem van der Linde of the General Council of the Bar (GCB) agreed with and fully supported everything Mr Govender said. He added that this is a completely new Act, one that is not copied from any legislation anywhere in the ten countries that still have voluntary Bar associations. 'It is innovative, so it requires of us to be inventive. It also requires us to revisit fundamentally important principles, we have to relive, revisit and reconsider the principles that we think are important in our profession. Because if we do that we may come across principles that we have thought are important but are not really and we also may come across others that we may never adhere to but are now important in our thinking,' he said.

Mr van der Linde said that the GCB accepts the challenge being laid before it and does so with great commitment.

Brian Nair of Legal Aid South Africa (Legal Aid SA) said that Legal Aid SA represents the majority of indigent persons in the country and, therefore, it will play a meaningful role in contributing to deliberations of the forum. He added: 'We have not been involved in previous disputes in previous deliberation on the Act and, therefore, come from a very neutral perspective. We will be able to contribute objectively to any future disputes that may take place.'

All stakeholders including the National Bar Council of South Africa, GCB, Attorneys Fidelity Fund, Legal Aid SA, Advocates for Transformation (AFT) and the National Forum of Advocates (NFA) who attended the forum expressed their commitment to the cause and assured the forum of their full participation in playing their part towards achieving the goals set out by the forum.

Speaking on behalf of the AFT, Advocate Dali Mpofu said that when everyone was against the Legal Practice Bill, the AFT looked at the preamble of the Bill, which spoke on access to justice, transformation, access to the profession etcetera and came to the conclusion that nobody in their right mind could ever oppose those ideals put in the preamble. 'The million-dollar question, and that is our task, is to make sure that the body of the Act delivers on the promises of the preamble,' he said. Advocate Mpofu added that he is not too concerned that the forum is not as representative as it should be because the honest truth is that neither is the profession. 'So, in a way, this body is representative of the profession. We should not gloss over

that fact. Let us just hope that when the permanent body takes over that the problems of transformation in the profession are overcome by then,' he said.

Gender representation in the forum also dominated the meeting where the BLA's Martha Mbhele – also an LSSA nominee – raised a concern that black women attorneys who opened their own practices have to close shop due to sustainability and lack of support in the male-dominated profession. She said that a survey conducted by the LSSA's gender committee revealed that women put up their practices and structures but six to 12 months down the line they close shop to join the legal departments of retail shops or any other institutions to help them survive. She said that the reason the survey was conducted was because the committee noticed that there are more women entering the profession as candidate attorneys but do not last in the profession as 'they disappear somewhere, we do not know where they go.'

Ms Mbhele added: 'Most black women left their firms to join these big white law firms, but did not survive. Once the firms had sucked them dry and used them enough to attract work, they kicked them to the street. Something has to be done to stop the complete disappearance of women lawyers because they are disappearing quickly.'

Ms Mbhele said that the minister is talking about approaching law firms to find out what contribution they can make to the transformation agenda and said that what the big law firms are probably asking is 'how do you expect me to help you develop a strategy to take bread off my table?'

Janine Myburgh from the Cape Law Society – nominated by the LSSA – said that it was not important just to fill the room with women but to fill the room with people able to do the job.

Speaking on behalf of NADEL, Max Boqwana said that he is afraid that the current Act is not capable of addressing any of the things that worried the profession. 'There is nothing in this Act that will address access to justice and to the legal profession, nothing in the Act defines a common South Africaness. This Act brings us together to do regulatory issues but after the meeting it allows us to be divided even worse than before. We have multiple identities. This is the issue we spoke about in 1996. Firstly we spoke about fusion, and understood the difficulties around it. We said it was maybe not a good idea, let us talk about unity. Unfortunately, 15 years later, we are unable to reflect that unity. This is the conversation that we should be dealing with. How do we identify a common South African identity that all of us can belong to?' he asked.

During the meeting, the Justice Department's Chief Financial Officer, Lorraine Rossouw announced that the department has set out R 17,9 million that will assist the forum in fulfilling its mandate. The money will be used for startup costs as well as to compensate the council.

First address of the chairperson

Ms Moroka was given a chance to give her first address as the chairperson of the forum. She said that she is aware that she is the minister's designate but she is hoping that at a point in time she will earn the respect of the organised profession and all other members of the forum especially because the suggestion to make her chairperson did not come from the floor but from the minister. 'I have been in this profession for over three decades. I have listened very carefully to the comments from the floor this morning and to what the minister and deputy minister have had to say and I agree that we have a huge job to do and that we have a timeframe to do it in, as well as a purpose to it and I am hoping all of us will put our shoulders to the wheel and get this thing done,' she said. She added: 'It has been a long time coming. We need to focus on what it is as a country we want to do and want to achieve and I believe we are going to be able to do it.'

The issue of alternates

The members of the forum also spoke briefly about alternates. The general feeling was that although the Act does not make provision for alternates, that members should be allowed to have designated alternates.

Deputy Minister Jeffrey said that the forum was a statutory body and that there is no provision for alternates in the Act. 'So surely if the legislation does not provide for that and from the committees side we were never asked to consider alternates, surely you cannot. Maybe it is something that can be discussed by the forum but I would have thought an alternate on the point of view to listening and reporting back to the full member, but in terms of voting, I do not think that an alternate can vote. If the Act does not provide for alternates, how is it then possible to bring it into the Act?' he asked.

It was suggested that there should be an agreed schedule with all the year's meetings lined up so that the members of the forum can be available.

Deputy Minster Jeffery also reminded the forum that it has to provide six-monthly reports to the minister, which will get tabled in parliament. He closed the meeting by saying: 'Apart from the support being given by the Justice Department, you are now on your own, the minister and I will not be attending your meetings going forward. Good luck with everything and thank you for accepting the nomination. Hopefully it will not take you too long to resolve the remaining issues.'

The KwaZulu-Natal Law Society has since requested that its recommended LSSA designate, Richard Scott, be replaced with Manette Strauss. Mr Scott was elected as the new LSSA co-chairperson in March (see 20). This will bring the number of women designates on the forum to six.

The 21 members of the national forum

GCB designates

- Willem van der Linde SC
- Ismail Jamie SC
- Greg Harpur SC
- Thami Ncongwane SC
- Dali Mpofu SC

Other designates

- Mark Hawyes (National Bar Council of South Africa designate)
- Jurgens Prinsloo (National Forum of Advocates designate)
- Dumisa Ntsebeza SC (Advocates for Transformation designate)
- Abe Mathebula (Attorneys Fidelity Fund designate)
- Professor Managay Reddi (South African Law Deans Association designate)
- Brian Nair (Legal Aid South Africa designate)

Ministerial designates

- Kgomotso Moroka SC (chairperson of the forum)
- Thina Siwendu.

LSSA designates

- Max Boqwana (deputy chairperson of the forum and chairperson of the LSSA delegation)
- Jan Stemmett (deputy chairperson of the LSSA delegation)
- Krish Govender
- Jan Maree
- Martha Mbhele
- Janine Myburgh
- Lutendo Sigogo
- Manette Strauss

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2014 prize winners for best articles published in *De Rebus*

Polokwane attorney, Magdeleen de Klerk (48) has won the 2014 LexisNexis Prize for Legal Practitioners for the best article by a practising attorney published in *De Rebus*.

She has won the award for her article titled 'Fair Divorce: Misconduct does not play a role in forfeiture claims,' published in 2014 (April) *DR* 37.

The article dealt with the fact that forfeiture of the benefits of a marriage is not about 'punishment' of a party for substantial misconduct or, in other words, a moral judgment. The article looked at how, even if substantial misconduct is proved, forfeiture will not be granted (against the alleged 'guilty' party) if he or she has contributed namely, financially, by way of assets or in the traditional sense (as housewife and mother).

Ms de Klerk has won an iPad mini and one year's free access to LexisNexis Practical Guidance. She told *De Rebus* that she is humbled and honoured to have won this prize.

Ms de Klerk has been a practising attorney in Polokwane for the past 21 years and has been with her current firm, DDKK Attorneys Inc, since 2000 where she specialises in family law.

When asked what inspired her to write on this topic, Ms de Klerk said: 'I have noticed that the concept was misunderstood by some of my colleagues and even judicial officers. I wanted to share my knowledge in this regard with my colleagues and if possible shed some light on the subject.' She added that she was amazed by the positive response she received from her colleagues after the article was published.

Polokwane attorney, Magdeleen de Klerk, and Johannesburg candidate attorney, Tafadzwa Mukwende, have won the 2014 LexisNexis Prize for Legal Practitioners and the 2014 Juta Law Prize for Candidate Attorney Article for the best articles by a practising attorney and candidate attorney published in De Rebus *in 2014.*

Meanwhile, Johannesburg candidate attorney, Tafadzwa Mukwende (31), has won the 2014 Juta Prize for candidate attorney for his article titled 'Reform, reintegrate, rehabilitate – Balancing restorative justice and juvenile offender rehabilitation', which was published in 2014 (Oct) *DR* 33.

The article was based on whether imposing the custodial sentencing regime on juvenile offenders is an effective mode of rehabilitation and restorative justice.

Mr Mukwende says that he feels fantastic to have won the prize adding that 'it feels as if I have hit the lottery.'

Mr Mukwende is currently completing his articles of clerkship at Locketts Attorneys.

He told *De Rebus* that he was inspired to pen the article by a friend who works as a social worker for a non-governmental organisation who are currently advocating for non-custodial sentencing for juvenile offenders.

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New premises for the Attorneys Fidelity Fund

The Attorneys Fidelity Fund (AFF) officially opened its building in Centurion on 25 March. The keynote address was delivered by Judge President of the Gauteng Division of the High Court, Judge Dunstan Mlambo. Other speakers of the day included CEO of the AFF Motlatsi Molefe and former Chairperson of the AFF CP Fourie.

Mr Molefe said that the acquiring of the new premises was a culmination of a strategic vision that was set out in 2010. He said that when he took over from the former Executive Director of the AFF, John Moorhouse, he found that the AFF was a healthy organisation that ran well.

The new building will also house a forensic unit that will be based in Gauteng as this is the province where the AFF faces the most risk in terms of claims. Mr Molefe added that the number of practising attorneys in Gauteng dictate that the AFF should have an office in the province. The presence in Gauteng will also aid the AFF with its defensive risk strategy.

The new building also houses the Attorneys Insurance Indemnity Fund (AIIF). Mr Molefe said that this move will assist the AFF to save costs as renting space for the AIIF in Sandton was expensive. The cost savings will then be used towards further development of the AFF, he added.

Judge President of the Gauteng Division of the High Court, Judge Dunstan Mlambo, and former Chairperson of the Attorneys Fidelity Fund, CP Fourie, at the opening of the Attorneys Fidelity Fund's new premises.

Delivering the keynote address, Judge Mlambo said that the AFF plays an important role in protecting the public against misappropriation of funds. He noted that the AFF also plays an important role in ensuring that the standards of the law profession are kept high by funding legal education and *De Rebus* and also providing bursaries to deserving top students to study law. He added that the AFF also plays an invaluable role of supplementary funding for law clinics, which enables the clinics to provide services to the poor.

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Irish ambassador visits LEAD

Irish ambassador, Liam MacGabhann addressing delegates at the commercial law course on 16 April.

The Law Society of South Africa's Legal Education and Development (LEAD) division received a visit by the Irish ambassador, Liam MacGabhann on 16 April. The visit coincides with the commercial law course held by LEAD, in conjunction with Irish Aid and Irish Rule of Law International.

The course was launched in 2012 and is an intensive one-year training programme intended for attorneys from previously disadvantaged backgrounds who would like to pursue a career in commercial law. Twenty attorneys are selected annually and the programme is fully sponsored by Irish Aid. The programme consists of three parts, namely, the commercial law training course held in April and July; a one-year certificate in corporate law from the University of South Africa; and a mentorship programme.

Ambassador MacGabhann said he was encouraged by the positive feedback of the programme and congratulated the attorneys on their success thus far.

Kathleen Kriel
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Irish ambassador, Liam MacGabhann with staff of the Law Society of South Africa's Legal Education and Development, Irish Aid, Irish Rule of Law International and the attorneys participating in the commercial law course.

New car seat law effective 1 May

Parents who do not strap their children under the age of three into a car seat will, from 1 May, be issued with a traffic fine.

This is according to a new regulation introduced by Transport Minister, Dipuo Peters, to the National Road Traffic Act 93 of 1996 which seeks to protect children.

A series of amendments to the regulations were first announced and published in the *Government Gazette* on 31 October 2014 (GN R846 *GG*38142/31-10-2014). According to the Transport Department, this would have allowed enough time for motorists to acquire the necessary car seat equipment.

This new law is an amendment to reg 213 of the regulations, which will be amended by first stating who an infant is ('an infant is a person below the age of three years') and the insertion of the following subregulation after subreg (6):

'(6A) The driver of a motor vehicle operated on a public road shall ensure that an infant travelling in such a motor vehicle is seated on an appropriate child restraint: Provided that this provision shall not apply in a case of a minibus, midibus or bus operating for reward'.

The previous regulation merely stated:

'(6) The driver of a motor vehicle operated on a public road shall ensure that a child seated on a seat of the motor vehicle –

(*a*) where it is available in the motor vehicle, uses an appropriate child restraint; or

(*b*) if no child restraint is available, wears the seatbelt if an unoccupied seat which is fitted with a seatbelt is available.'

Before 1 May, there was no penalty for motorists who were travelling with children under the age of three years, not in a baby seat with the seat belt on.

Government will be relying on traffic officers to enforce this new regulation especially during roadblocks.

The new law has generally been welcomed by parents although some say that their children do not like being restrained in a car seat and cry uncontrollably until they reach their destination.

To view all the amendments to the Act, go to http://www.gov.za/sites/www.gov.za/files/38142_rg10303_gon846.pdf

De Rebus asked a few parents what they thought of the new law.

Patience Ngubane: 'I believe the new law is a good thing. We have reckless drivers on our roads and cannot predict the driving of other motorists, look at all the drunken driving cases that we read about. The moment an accident happens what will happen to the child if they not buckled up? That child is smashed through the window or windscreen and thrown out the car. Our kids are not always controllable so if we buckle them up there will be no opening of car doors while the car is in motion and the parent cannot be disturbed while driving such as them wanting to change gears, or touch the steering wheel etcetera. Yes, I am for this new law.'

Lauren Freitag:'As a parent I am very pleased that there is a law protecting our children and their safety. It should be both a law, and made common practice that children should be in a car seat and buckled up. Our children are very precious cargo that travel on our not-so-safe-roads these days'.

Gad Ginindza: 'Personally I think it should not carry a fine because with kids you sometimes have situations that are beyond your control, causing a child to be unbuckled. It is in our best interests to keep our kids safe, so no parent will leave a child unbuckled unless they absolutely have to.

Kira Mc Allister: 'I think until your child is stable enough to sustain an accident of any type in a grown up chair with a safety belt on, they should remain in the car chair. Car chairs are not accessories, they save lives. Mothers who drive with little kids on their lap or let their children stand and jump around in the car should imagine another driver hitting them and seeing what would happen to their child. I would rather deal with a week of my child screaming about being in a car chair than be haunted by the image of my child flying through the windscreen and having to pick up his body and plan his funeral. I would never be able to forgive myself. So I am all for this law! In fact, three is too young, it should be older.'

Reagan Skyle:'I am totally for this new law and feel that it is long overdue. I am always shocked when I see children standing on the seats of moving vehicles and I am glad that as a country we are taking the necessary strides towards road safety awareness. As a father, I would do everything in my power to keep my children safe and a secure car seat is a small price to pay.'

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Election observation mission to Lesotho

The Southern Africa Development Community (SADC) is made up of Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The SADC Lawyers' Association is a regional voluntary lawyers' association tasked with advancing and promoting human rights, the rule of law, democracy and good governance in the SADC region and beyond. For more information on how to become an individual member and get involved in our crucial work, please visit www.sadcla.org.

SADC Lawyers' Association participated in a co-ordinated civil society election observation mission to Lesotho for the National Assembly Elections held on 28 February 2015. The mission was in conjunction with the SADC Council of Non-Governmental Organisations and the Media Institute of Southern Africa. These much anticipated elections were held to ease political instability in the country following an attempted coup in 2014 and stalled peace talks between deadlocked political parties. This followed a breakdown in the coalition government after only two and a half years of ruling the country. South Africa played a key role in bringing about stability to the country and led the SADC brokered talks to hash out a solution to the crisis. It was believed that early elections could restore stability to the country and give the people of Lesotho a voice in ending the crisis. It was against this backdrop that the coordinated civil society mission observed the elections to determine the preparedness of the Independent Electoral Commission (IEC) of Lesotho to host the elections and overall, whether the elections were free, fair and transparent.

The mission observed that Lesotho has a relatively strong electoral framework governing and regulating elections. The constitution of Lesotho 1993 (amended in 1997) guarantees electoral democracy (s 83) and provides for the right of all citizens to vote and stand for public office (s 20); the right to freedom of assembly (s 15), association (s 16) and expression (s 14) with certain limitations dealing with public safety and the rights and freedoms of others. The National Assembly Electoral Act 14 of 2011 (the Act) specifically provides that political parties must facilitate the full participation by women, youth and disabled persons in political activities on the basis of equality. The Act has attempted to ensure gender equality in the Parliament as political parties are also required to have an equal number of men and women in their party lists, and to adopt a zebra style of one man, one woman for the proportional representation party lists (s 30 of the Act). The legislative framework further establishes the IEC to conduct the elections (s 66 of the Constitution) and it guarantees the independence of the electoral management body with the body accounting to Parliament (s 143 of the Act).

Even though the legislative framework in Lesotho is strong and has benefitted from a number of amendments in previous years of instability around the electoral process, a number of issues still remain. The mission noted in a pre-election assessment that civil society stakeholders raised concerns about the security challenges and related persisting tension and division among elements of security sector, namely the police and the defence force. There were also issues with the polarisation of the media along party lines, corruption and tension among political parties that demonstrated a leadership vacuum in terms of a clear vision for the country's recovery from the crisis to adequately address the factors that led to the current instability.

A voter casting her ballot in Maseru.

The mission observed that the media had made great efforts to facilitate voter education and expand the reach of its reporting. They were also able to report on the pre-election campaign and the election process without fear of censorship or intimidation. However, the mission witnessed a lack of professionalism and adherence to media ethics throughout

Checking for the voter's name on the voters' roll in Maseru.

Police and security forces were deployed from various SADC countries in order to ensure peaceful elections.

the electoral campaign process. The mission was also concerned by the uneven reportage and distribution of airtime to political parties and candidates. Lesotho has a weak legal framework dealing with the media and there are still archaic laws that criminalise free expression such as insult, defamation and sedition laws.

The mission was also of the view that despite the short time in order to prepare for the elections, the IEC was well prepared to conduct free and fair elections. However, the mission did note that many people could not register to vote, as the suspension of the registration period came earlier than expected. Further issues have been raised about the credibility of the voters' roll. The IEC, did however, state that these inaccuracies would have no effect on the results but it is critical that the voters' roll is clean and accurate as possible.

The mission noted that the voting on Election Day was generally peaceful and free but there was overall a low turnout of voters of only 47%. The mission did not receive any reports of intimidation or coerced voting. In some polling stations, the secrecy of the voters were compromised as a result of congestion. The mission further observed that counting proceeded well but that at some counting stations there was no light and cellphone torches were used to count the ballots.

The mission has made a number of recommendations for the improvement of the electoral environment. These include repealing the archaic laws that criminalise free expression such as insult, defamation and sedition laws. The IEC is encouraged to invest in ensuring that the voters' roll is revised and accurate. These elections have not addressed the underlying security sector problems as well as the tension between political parties. As a result, the government of Lesotho should consider the reforms to the legal framework and security reforms to strengthen the arrangement of the coalition government to ensure an effective and stable government. Further, SADC is called to continue supporting Lesotho in consolidating peace and stable governance, especially in the implementation of the above reforms.

For more information on how to participate in the work of the SADC Lawyers' Association and become an individual member please visit www.sadcla.org

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Mabunda and Scott elected as LSSA Co-chairpersons

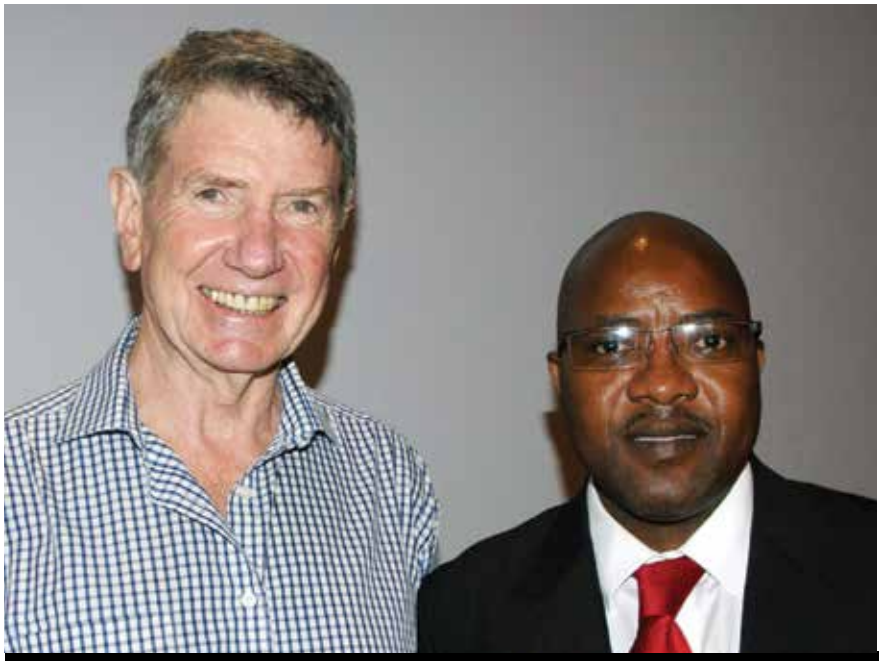
Johannesburg attorney and Black Lawyers Association (BLA) President, Busani Mabunda, and Pietermaritzburg attorney, Richard Scott, were elected as Co-chairpersons of the Law Society of South Africa (LSSA) at the annual general meeting on 21 March 2015. They took the helm of the attorneys' profession on the eve of the first meeting of the National Forum on the Legal Profession, the transitional body that will debate, negotiate and define the regulation of the legal profession – attorneys and advocates – once the Legal Practice Council takes over the regulation.

Mr Scott said: 'The LSSA will take a leading role in the deliberations of the National Forum. In addition the LSSA will also discuss creating a unified body that will continue to serve the interests of attorneys, as distinct from the strictly regulatory functions that will be performed by the Legal Practice Council under the Legal Practice Act.'

'We will make a meaningful contribution to the changes in the legal landscape, as regards the regulatory framework for the legal profession and by ensuring that the best interests of both the public and the profession – which serves the public – are promoted and protected,' said Mr Mabunda.

Mr Mabunda and Mr Scott will also focus on the unprecedented attacks on the legal profession from various quarters, including from the Minister of Health, Dr Aaron Motsoaledi, who continues to attribute the failures of healthcare practitioners, the healthcare system and its institutions to attorneys' claiming for medical malpractice on behalf of the victims of these failures.

• See 4.



Pietermaritzburg attorney, Richard Scott, and Johannesburg attorney, Busani Mabunda, were elected Co-chairpersons of the Law Society of South Africa in March this year.

About Busani Mabunda

Busani Mabunda has been the President of the BLA since 2011. He has served as a council member of the LSSA for several years where he has represented the BLA, and is a member of the LSSA's Management Committee. He represents the LSSA on the Judicial Service Commission, which interviews and nominates judicial candidates for appointment by the President.

Mr Mabunda holds the BProc (UKZN) and LLB (Wits) degrees, an LLM in Labour Law (UNIN) and certificates and diplomas in banking law, criminal justice and forensic auditing, administrative and constitutional law and sports law from various universities. After serving his articles with Mlambo & Modise Attorneys, he became a director at Mabunda Inc in Johannesburg where he has practised since 1997. He focuses on labour law, civil and criminal legislation in the magistrate's and High Court, as well as personal injury and medical negligence claims.

At provincial level, Mr Mabunda has served on the council of the Law Society of the Northern Provinces since 2008 and was its President in 2013.

Mr Mabunda is Chairman of the Council of the Vaal University of Technology.

About Richard Scott

Richard Scott is senior partner and chairperson of Austen Smith in Pietermaritzburg where he too has extensive experience in the fields of labour law as well as civil and criminal litigation, mainly in the High Court.

He has been a member of the council of the KwaZulu-Natal Law Society since 2010 and was its President from 2012 to 2013. He represents the KwaZulu-Natal Law Society on the LSSA Council and on its Management Committee.

Mr Scott has the BA (Rhodes) and LLB (UKZN) degrees. He served articles of clerkship with the firm J Leslie Smith & Co where he practised as a professional assistant after admission as an attorney and later became a partner at the firm. He joined his current firm in 1988.

LSSA concern at Health Minister's plans for dealing with medical negligence victims

The Law Society of South Africa (LSSA) is seeking a meeting with Minister of Health, Dr Aaron Motsoaledi, so as to make a contribution to the discussion around medical negligence claims. In March, outgoing LSSA Co-chairpersons Max Boqwana and Ettienne Barnard, reacted sharply to public comments made by the Minister following a medico-legal summit held in Pretoria.

The LSSA voiced its serious concern at the sweeping statements made by the Minster and other organisations in the healthcare sector, regarding the possible limitation of the right to fair compensation of medical malpractice victims and the role of lawyers in these claims.

'It cannot be that victims of medical malpractice – who are often the poor and vulnerable – should be expected to have the specialist knowledge, money or power to take on the state through an "administrative process" if they have suffered life-changing and critical damage at the hands of the healthcare system and healthcare practitioners. Such victims have the right to legal representation and to be compensated fairly for their losses. They must have parity or arms if they are going to challenge the very institutions that caused their loss in the first place. That is the duty of lawyers. The Minister must focus on addressing the dire skills shortages and poor conditions as well as the duty of care owed by healthcare professionals and medical facilities to patients, rather than on removing the right to fair and legitimate compensation from victims of malpractice,' said the Co-chairpersons.

They added: 'Legal practitioners cannot "manufacture" malpractice injuries – these are substantiated by experts. If there is alleged collusion between medical professionals and legal practitioners as well as a downgrading of standards to create an opportunity for collusion, this must be reported to the relevant statutory provincial law society and to the law enforcement agencies. If attorneys are found to be overreaching or overcharging, the law societies have assessment committees that investigate the allegations and assess the fees charged. This is regarded as serious misconduct by the profession and by the courts.'

'We would have expected the Minister to raise his concerns with the LSSA before going to the media and to include the legal profession in recent discussions and in the way forward. Both the medical profession and the legal profession exist to serve the public and it is in the best interest of the public that they cooperate to ensure that members of the public and victims of medical malpractice are treated fairly and professionally,' said the LSSA Co-chairpersons.

The Co-Chairpersons also held a press conference on the issue before the start of the LSSA's annual general meeting in Durban on 19 March 2015 (see 4 of this issue.)

Eversheds and FR Pandelani Inc: Taking the LSSA Synergy Link to new levels

In September 2013, Eversheds embraced the call to be part of the Law Society of South Africa's (LSSA) Synergy Link empowerment initiative to transfer skills and expertise by linking up with Johannesburg law firm FR Pandelani Inc.

'Since then, the relationship between the firms has grown from strength to strength where opportunities for mentorship, skills transfer and networking engagements have been grasped and capitalised upon. The firms have recognised the importance of marrying their respective strengths in order to achieve the goals established by the LSSA,' said Peter van Niekerk, managing partner of Eversheds.

He added: 'Despite the initiatives being targeted at an individual development level, we have combined each firm's respective strengths to pursue joint ventures. We believe this will provide opportunities for all attorneys involved by creating access to a wide range of specialised legal resources.'

Although the ultimate purpose of the Synergy Link initiative is for the transfer of skills and expertise, Eversheds has taken the relationship one step further. In June 2014, the offices of FR Pandelani were destroyed by a fire and Eversheds promptly made office space available in their Sandton branch to accommodate FR Pandelani's staff and facilitate their continued availability to their clients. This unfortunate incident, however, had the fortunate spin-off of the attorneys from both sides working side by side.

'Eversheds opened their doors and made their resources available when most required. We were able to sustain client relations and directly access the wealth of information available at Eversheds. This Synergy Link has better equipped us to service our clients and we look forward to sustaining this relationship for a long time to come,' said Fhedzisani Pandelani, managing partner of FR Pandelani.

In addition to the continued transfer of knowledge and expertise, Mr Pandelani has recently been appointed as a non-executive director of Eversheds. The Synergy Link has undoubtedly been a success as it has provided an opportunity for both firms to grow under a relationship that continues to flourish.

People and practices

Compiled by Shireen Mahomed

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

Ngubane & Partners Inc has rebranded and is now named **Tembe Kheswa Nxumalo Inc**, trading as **TKN Inc**. The firm specialises in all spheres of the law and has offices in Durban.

Its directors are Thamsanqa Tembe, Nonduduzo Khanyile-Kheswa and Madoda Nxumalo.

Mr Tembe has experience in High Court litigation and is part of a team that specialises in High Court civil litigation. He is currently the Chairperson of the Standing Disciplinary Committee of the South African Board for Sheriffs, where he has presided over many disciplinary hearings.

Ms Khanyile-Kheswa, who is the firms managing director, specialises in civil litigation, corporate and commercial law, drafting of contracts, insolvency and liquidations, medical negligence, forensics and rates and debt collection services. She is also the Chairperson of the Attorneys Fidelity Fund.

Mr Nxumalo specialises in litigation, accident claims, company law, contract law, constitutional law, asset forfeiture and criminal law. He is currently serving as the Chairperson on the Municipal Bid Appeal Tribunal at the KwaZulu-Natal Treasury.

From left: Thamsanqa Tembe, Nonduduzo Khanyile-Kheswa and Madoda Nxumalo.

Shepstone and Wylie Attorneys in Durban has new promotions.

Janice Tooley has been promoted as a partner in the environmental and clean energy law department. She specialises in environmental law.

Wesley Wood has been promoted as a partner in the international transport trade and energy department. He specialises in all aspects of maritime and international trade law.

Janine Smith has been promoted as a partner in the litigation department. She specialises in general and commercial litigation.

Shane Price has been promoted as a partner in the corporate, tax and commercial department. He specialises in general commercial transactions, tax disputes and banking law.

Carlyle Field has been promoted as a partner in the employment and pension law department. He specialises in pension fund law.

Standing, from left: Shane Price and Carlyle Field. Seated, from left: Janice Tooley, Wesley Wood and Janine Smith.

DSC Attorneys in Cape Town has six new appointments.

Jan Potgieter has been appointed as an associate.

Charles Owen has been appointed as a senior associate.

Daniel Botha has been appointed as an associate.

Dawie Maartens has been appointed as a senior associate.

Handrie Calitz has been appointed as a professional assistant.

Sanel van Zyl has been appointed as a senior associate.

Fasken Martineau in Johannesburg has three new appointments.

Hlengiwe Zondo-Kabini has been appointed as a partner in the finance and projects department.

Ayanda Mubima has been appointed as a senior associate.

Bontle Pilane has been appointed as a senior associate.

By
Mervyn
Messias

Attorneys as trustees beware!

I would like to bring to the attention of attorneys an issue that I consider to be highly relevant in the context of trust law. As far as I have been able to ascertain, attorneys most often accept the appointment as an independent outsider trustee without really considering the ramifications of this acceptance – they do so in order to accommodate their client, although they may have very little experience with trusts and trust law. They take on a risk that is not commensurate with the remuneration they might receive. There is usually no remuneration, only the hope of receiving legal work. Apart from the client (assuming the client is one of the trustees), the attorney often has very little interaction with any other trustee and most often accommodates the client provided the decisions are lawful.

In this article I will briefly deal with three issues arising from two cases that I refer to hereafter, namely –

- the essential notion of trust law;
- the independent outsider trustee; and
- possible consequences if the above points are not complied with.

The case of *Land and Agricultural Development Bank of SA and Others v Parker* [2004] 4 All SA 261 (SCA) relevance. This was a battle about a family trust concerning an outstanding debt of over R16 million. It brought to the fore questions about the use and abuse of the trust form. Some of the noteworthy statements that Cameron JA made were the following:

'The core idea of the trust is the separation of ownership (or control) from enjoyment … the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. … It may be said … that the English law trust, and the trust-like institutions of the Roman and Roman-Dutch law, were designed essentially to protect the weak and to safeguard the interests of those who are absent or dead. This guiding principle provided the foundation for this court's major decisions over the past century in which the trust form has been adapted to South African law: that the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another. The essential notion of trust law, from which the further development of the trust form must proceed, is that enjoyment and control should be functionally separate. The duties imposed on trustees and the standard of care exacted of them, derive from this principle'.

The judge commented on 'family

trusts – those designed to secure the interests and protect the property of a group of family members, usually identified in the trust deed by name or by descent or by degree of kinship to the founder'.

In referring to the facts of this case, the judge held that: 'The debasement of the trust form evidenced in this and other cases, and the consequent breaches of trust this entails, suggests that the master should in carrying out his statutory functions ensure that an adequate separation of control from enjoyment is maintained in every trust. This can be achieved by insisting on the appointment of an independent outsider as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another'. The independent outsider should be 'someone who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly, that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised and checked. Such an outsider will not accept office without being aware that failure to observe these duties may risk action for breach of trust. The courts will themselves in appropriate cases ensure that the trust form is not abused'.

Trustees in this case were ordered to pay the costs from their own pockets.

The more recent case of *Van Zyl v Van Zyl and Others* [2014] JOL 31973 (GSJ) has relevance.

The trustees of the trust included a company represented by an attorney. The court held as follows:

'There is no real evidence in this matter of the precise relationship and interaction between the first respondent and [the attorney] as trustees'. The court commented further that '[t]he applicant stated (as a statement of fact but [the court] assumed without personal knowledge) that [the attorney] played no role in the decisions made in respect of the trust assets. To that the first respondent responded by referring to the terms of the deed of trust, and by the equally bald statement that "the third respondent indeed plays an active role in the administration of the trusts and decisions regarding the trusts' assets" and that "there is nothing to suggest that the third respondent [the attorney] will simply vote in favor of any resolution I propose". [The attorney] simply confirms this in a confirmatory affidavit, without adding any evidence of his own. I do not believe that I can draw any conclusions … from these allegations'.

The court considered various aspects in relation to a trust and concluded that the first respondent embarked on 'prudent estate planning' without consulting the applicant and at a time when the marriage relationship was on shaky grounds. The court stated that the first respondent had shown that he regarded and treated the assets and liabilities of the trusts as his personal assets and liabilities. 'In other words, the first respondent treated the trusts as his alter ego.'

The court held that the attorney's 'role in the trusts was equivocal, and it is not said that he would block any decision against the wishes of the first respondent. His involvement in the trusts seemed to be less than the first respondent would have [the court] believe. In terms of the trust deed … any trustee may appoint an alternate to act or vote on his behalf at meetings or to sign resolutions. The annual financial statements for the year [for the trust] … were signed by [another party] acting as alternate signatory for [the attorney]'. This other person also signed six other resolutions.

The court held: 'The first respondent appears to have chosen his words very carefully when referring to the involvement of [the attorney] in his trusts. An example will suffice. The applicant contends, *inter alia,* that [the attorney] plays no role in the decisions made in respect of the trust assets'.

The court further held that: 'It lies within the direct and intimate knowledge of the first respondent and [the attorney] precisely what role [the attorney] plays in each trust, and to what extent he is simply supine and allows the first respondent to treat the trusts as his personal fiefdoms. They have not done sufficient to dispel the latter, more probable, [from an] inference … The reality seems to be that payments flow between the trusts … and the first respondent without any formal decisions, and clearly entirely within the control of the first respondent'.

In regard to costs, the court stated that the first respondent's conduct was such that it would visit its displeasure in awarding costs on a punitive scale. The court also declared the assets of the trust deemed to be the assets of the first respondent for all purposes including in any redistribution order made in the divorce action between the parties.

Having regard to these two cases, it would seem that if the requirements of an independent outsider trustee set out on the Parker case, were not adhered to, it could be a factor resulting in a trust being broken into. Attorneys would be well advised to be aware lest they be the cause.

Mervin Messias *BA LLB (Wits)* is an attorney at Mervin Messias Attorneys in Johannesburg. ❑

By the Prosecution and Financial Forensic Investigation Team of the Attorneys Fidelity Fund

Bridging finance pitfalls

Law firms venture into bridging finance, especially for conveyancing matters.

What is bridging finance?

Bridging finance is essentially a short-term loan that is set up between an individual or business and a financial institution that specialises in these loans, which allows them to gain access to their money. Companies that specialise in bridging finance offer property sellers, buyers and bond 'switchers' access to a percentage of the value of the nett surplus proceeds of their transaction. Such lenders usually base their calculations on a percentage (typically 80%) of the nett future amount due to you. Actual fees may be negotiated if the size of the bridge loan is large. Bridging finance is widely used in property transactions to overcome the obstacles presented by time delays.

Bridge finance is defined by various dictionaries differently, but they all emphasise the limited timespan for which the loan is advanced.

This kind of financing has the following characteristics –

- it is available in short notice;
- it is simple to apply for; and
- it is a high-risk loan (unsecured) with relatively high interest rates.

Looking at the characteristics displayed in the foregoing, these are convenience loans. Any convenience service attracts a premium charge, purely for its convenience.

Why do attorneys use bridging finance in conveyancing matters?

Given the delays resulting from the property transfer process, many participants in property transactions require access to funds, which would otherwise only become available on the day that the transaction is registered in the relevant Deeds Office.

Bridging finance companies provide finance that creates a bridge between the participant's immediate cash flow requirement and the eventual entitlement to funds on registration in the Deeds Office. Bridging finance is typically not provided by commercial banks.

Various forms of bridging finance are available, depending on the participant in the property transactions that requires finance. Sellers of fixed property can bridge sales proceeds, estate agents bridge estate agents' commission, and mortgagors bridge the proceeds of further or switch bonds. Bridging finance is also available to settle outstanding property taxes or municipal accounts or to pay transfer duties.

What can go wrong?

When a bridge loan is taken out by an attorney's client who is involved in a conveyancing matter, the attorney is usually required to provide an undertaking or guarantee to the financier. This undertaking or guarantee is usually reduced to writing and forms a legally binding document between the attorney and the financing company.

The *Concise English Oxford Dictionary* defines an undertaking as 'a formal pledge or promise to do something'.

The *Business Dictionary of Law* defines it as 'a promise, especially in legal proceedings, that creates an obligation'.

A law definition of guarantee in the *Oxford Dictionary* is 'an undertaking to answer for the payment or performance of another person's debt or obligation in the event of a default by the person primarily responsible for it'.

Both the undertaking and guarantee place a burden on the attorney issuing it to become liable for the capital and any related charges.

One of the major concerns for attorneys is understanding what they are getting themselves and their firm into. Instances of attorneys misinterpreting the agreements that they enter into with the financiers have been noted. Such attorneys tend to bind firms in onerous agreements.

Examples of such instances are when an attorney fails to realise that the agreement does not make provision for in case the transaction does not succeed for whatever reason. In such instances, while there are no proceeds from the anticipated sale, as it did not pull through, the attorney is still expected to do good to the agreement by paying back the capital amount advanced by the financier and all related costs. This is as a result of the attorney signing a standard undertaking without necessarily scrutinising it in detail. The standard undertakings may include representations by the attorney to the effect that the transaction will not fail or has been concluded with all necessary requirements being met, and when it does fail, that representation holds them liable.

When financiers advance credit to the borrowers in conveyancing matters, they consider the nett proceeds to be received by the seller and usually can advance up to 80% of those nett proceeds. An illustration of how the amount that can be advanced is determined is as follows:

Selling price	R 1 300 000
Balance owing in existing bond	R 1 062 354,26
Nett proceeds	R 237 645,74

Maximum amount that can be advanced is therefore R 190 116,59 (80% x R 237 645,74).

Should the maximum amount be advanced, the liability towards the financier is, therefore, that amount, the finance charges on the amount and any other charges stipulated in the agreement. As soon as the financier advances the finance and pays it into the attorney's trust account for the benefit of the attorney's client, specifically indicating the purpose for which the money has been advanced, and that being provision of services by the attorney in the conduct of his or her duties, the money is entrusted with the attorney.

Readers are referred to the following orders dealing with bridging finance matters:

- *Attorney Fidelity Fund Board of Control v Claassens* (WCC) (unreported case no A620/2011, 4-12-2012) (Allie J); and
- *Honey & Partners Inc and Others v Quince Property Finance (Pty) Ltd* (SCA) (unreported case no 345/11, 29-11-2011) (Ponnan JA).

How can the risk be managed?

While no measure can completely eliminate risk, there are benefits to be derived from putting sound measures in place. The following are possible measures:

- The consent of the practitioner's client to obtain finance should always be obtained and filed.
- Conveyancers and/or staff dealing with conveyancing matters should be adequately supervised.
- Ensure that your client's tax affairs are in order before signing an undertaking.
- Practitioners, especially directors in law firms, should always know what undertakings or guarantees have been issued. An internal arrangement at the law firm should exist and always be adhered to, and can bind the law firm in any kind of agreement or arrangement.
- Undertakings and/or guarantees issued must be properly read and interpreted with care to guard against the risk of not being able to get out of them should circumstances dictate or should it become extremely difficult and/or expensive to exit the agreement.
- The finance should be closely monitored throughout its life to ensure no new charges not agreed to are accumulating and that there will be sufficient funds on registration to cover the balance due. Statements should be received from the financier in this regard and scrutinised.
- On receipt of proceeds from the sale, ensure that all obligations are properly discharged in terms of the agreement.
- As far as possible, background checks should be conducted on the possible financiers. There is an association for bridging financiers known as the Bridging Finance Association of South Africa (BFASA) (www.bfasa.org.za), although not a statutory body, which bridging financiers can become members of. This association has a Code of Good Conduct for BFASA members effective from 1 February 2010, which members are expected to uphold. The code governs the relationship between the BFASA members and its clients; other members as well as the association. Each bridging finance company (BFC) by accepting the code is committed to the promotion of good practices and the formalisation of the bridging industry. The code is as follows:

Code	Interpretation
Conduct	Each member shall conduct themselves and their business to avoid doubt being cast on their professional integrity. A member shall ensure that they provide a financial service that is proper, efficient and in the interest of good business practices.
Rules for practice	Only members with a valid Certificate of Good Standing are permitted to display the BFASA logo and their membership to BFASA on their website or corporate publications/stationary.
Ethical practice	Members shall at all times act honestly, ethical and fairly in their dealings with members of the public. They will refrain from activities that can bring BFASA or the bridging industry into disrepute.
Regulatory compliance	All members will abide by all applicable laws and regulations.
Accountability	To enhance consumer confidence in the bridging industry, members making their services available agree to make their systems, practices and records available for inspection and review by any industry relevant legitimate authority.
Consumer privacy and data protection	Members will design and operate their services to afford consumers privacy and confidentiality. Each member will institute controls to detect and eliminate fraud and to protect data from breaches. A member must treat all facts and information concerning their client obtained as confidential and must not make any unauthorised use of such facts or information. Information exchanged between members and/or BFASA must be treated as confidential by all members.
Entity listings	BFASA's entity listings (available at www.bfasa.org.za) are intended to combat fraud. The listings should be considered as confidential and only for internal use by the members. Each member must independently decide on the applicability of the listing to their business. BFASA does not accept any responsibility or liability for inaccurate information displayed on the website or the listings thereon. As cited in 'responsibilities of members under this code' below, each member hereby accepts their duty to actively contribute to this entity listings on a continuous basis. An entity or individual must be listed on the BFASA website at such an early stage where the BFC suspects or is aware of any fraud, negligence, high risk or bad payment behaviour.
Truth in advertising	Members shall be truthful in promotions and publish only accurate information about their operations
Consumer interest	The interests of the consumer are always foremost for members. Such conduct is to assure sustainable development of the bridging industry and in order to procure desirable and acceptable business practices.
Complaints from the public	Even though BFASA is not a regulatory body, its objective is to enhance, improve and develop the bridging finance industry. If the association receives complaints from the public, the board of directors will have the right to further investigate the complaint in their sole discretion and to assist the complainant in referring the matter to the appropriate authority.
Professionalism	Members commit themselves to the goal of continuously improving themselves, their business and their employees in the chosen profession.
Responsibilities of members under this code	Each member has the explicit responsibility to: 1 Be actively involved in and contribute to the activities of BFASA. 2 Attend a minimum of 75% of BFASA meetings per annum. 3 To actively list entities and/or individuals on the internal BFASA entity listing

Code	Interpretation
Responsibilities of members under this code	4 Ensure that they do not have any outstanding fees due to the association or their associates. 5 Ensure that their employees are familiar with the contents of this code and adheres thereto. Responsibilities pertaining to business conduct: 6 A member must make available his fees before concluding an agreement with a consumer including: 6.1.1. The way in which the fees are calculated; 6.1.2. Cancellation or default charges; 6.1.3. Adverse information he has obtained about the consumer. 7 The BFC will provide the client with a copy of the agreement. 8 The BFC will provide the client with a statement of account. 9 The BFC will keep records of all their financing activities.

Code	Interpretation
Responsibilities of members under this code	10 The BFC will at all times strive to enhance the wellbeing of their clients.
Certificate of Good Standing	BFASA will issue each member annually with a Certificate of Good Standing provided that the member is in compliance with this Code of Conduct. This certificate should be displayed at the Member's place of business. The certificate (and subsequently the BFC's membership) may be retracted by the Board of the Association in their sole discretion and with immediate effect.
Membership fees	Membership fees payable will be determined annually at the first official members meeting for that year.

Law firms and practitioners should therefore take extreme care when dealing in bridging finance as it can become a nightmare for them.

The Prosecution and Financial Forensic Investigation Team of the Attorneys Fidelity Fund in Centurion. ❑

Picture source: Gallo Images/iStock

Keep your Tweets twibel free

By Sherika Maharaj

A storm is raging

Social media has taken the communications world by storm. There has never been an easier and more accessible means of interacting with a worldwide audience than now. The internet and social media sites are becoming breeding grounds for potential defamatory conduct amounting to online defamation.

The arrival of Twitter

Twitter Inc was founded on 21 March 2006 and is marketed as a free application that lets you connect with people, express yourself and discover more about the thing you love. It 'is an online social networking service that enables users to send and read short 140-character messages called "tweets". Registered users can read and post tweets, but unregistered users can only read them.' (http://en.m.wikipedia.org/wiki/Twitter, accessed 10-4-2015.)

In the words of Pierre de Vos posted on his blog 'Constitutionally Speaking' (Pierre de Vos 'Defamation and social media: We have moved on from Jane Austen' 27-2-2013 (http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen/, accessed 2-4-2015)) 'There is something about internet websites and social media platforms like Facebook and Twitter that seem to bring out the worst in people. Otherwise reasonably decent people who might well carefully weigh their words … can become raving hatemongers and irresponsible tattletales on these platforms.'

They coined the phrase 'twibel'

Defamation law in the United States is referred to as libel law. With the increasing amount of litigation surrounding twitter posts the American public have coined the phrase 'twibel'.

In an article published in the *Los Angeles Times* (Carina Knoll 'Singer-actress Courtney Love wins landmark Twitter libel case' 24-1-2014 *Los Angeles Times* (http://articles.latimes.com/2014/jan/24/local/la-me-love-libel-20140125, accessed 2-4-2015)) reported that a Los Angeles jury determined that the musician did not defame her former attorney in a Tweet. The Tweet was posted as follows '"@noozjunkie I was … devastated when Rhonda J Holmes Esq of San Diego was bought off @fairnewsspears perhaps you can get a quote," Love tweeted in June 2010 under @CourtneyLoveUK.' 'Dubbed "twibel", the civil suit seeking $8 million was filed by Rhonda Holmes, who had once acted as Love's fraud litigation attorney. The singer-actress filed her own complaint against Holmes, claiming legal malpractice.'

South African law: Common law definition of 'defamation'

The Constitutional Court handed down judgment in *Khumalo and Others v Holomisa* 2002 (8) BCLR 771 (CC) and held at para 17 as follows: 'The law of defamation in South Africa is based on the *actio injuriarum*, a flexible remedy arising from Roman Law, which afforded the right to claim damages to a person whose personality rights had been impaired intentionally by the unlawful act of another. One of those personality rights, is the right to reputation or *fama*, and it is this aspect of personality rights that was protected by the law of defamation'.

The court held a para 18: 'At common law, the elements of the delict of defamation are –
(a) The wrongful and
(b) Intentional
(c) Publication of
(d) A defamatory statement
(e) Concerning the plaintiff.

It is not an element of the delict of common law that the statement be false. Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention'.

Mickle v Farley (2013) NSWDC 295 (29-11-2013)

In one of the first judgments of its kind in Australia involving social media, a defendant who posted defamatory statements on Twitter and Facebook was ordered to pay $ 105,000 in damages plus costs. The plaintiff was appointed as acting head teacher in place of the defendant's father who had taken leave from the position due to ill health. The defendant had 63 followers on twitter and posted defamatory and abusive Tweets and messages about the plaintiff. The court noted that the defendant, Mr Farley, had a grudge against the plaintiff. The plaintiff alleged that the comments had a devasting effect on her. Elkain DCJ stated as follows: 'When defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.'

"'There is something about internet websites and social media platforms like Facebook and Twitter that seem to bring out the worst in people. Otherwise reasonably decent people who might well carefully weigh their words … can become raving hatemongers and irresponsible tattletales on these platforms.'"

The United Kingdom follows:

The first British twibel case to go to trial in the UK involved former town Mayor, Colin Elsbury, who inaccurately claimed that Eddie Talbot, his political rival, 'had to be removed by police from a polling station' in a Tweet during a 2009 city council by-election. The Tweet stated, 'It's not in our nature to deride our opponents however Eddie Talbot had to be removed by Police from the Polling Station.' The High Court in Cardiff ordered Elsbury to pay £ 3 000 in compensation, legal costs and to apologise to Talbot via Twitter' ('Former Mayor becomes first Briton ordered to pay damages for Twitter libel' 11-3-2011 *Daily Mail* (www.dailymail.co.uk/news/article-1365289/Twitter-libel-case-Former-Mayor-Briton-pay-damages.html, accessed 2-4-2015)).

In another decision, cited as *McAlpine v Bercow* (2013) *EWHC* 1342 (QB) the High Court of justice, queens bench division Mr Justice Tugendhat presided over a hearing to determine the meaning of the words complained of in the libel action (the Tweet) and whether they are defamatory of the claimant. The question of its meaning was tried separately as a preliminary issue. If it was found that the Tweet was not defamatory of the claimant then that would be the end of the action. If it was found that the Tweet was defamatory then the case would proceed to the assessment of damages unless the parties reach an agreement.

The Tweet read 'Why is Lord McAlpine trending? *innocent face*'. The judgment explains further that the Twitter website has a screen with a box headed 'trends'. It lists names of individuals and other topics. Twitter explains that this list is generated by an algorithm that identifies topics that are immediately popular, rather than topics that have been popu-

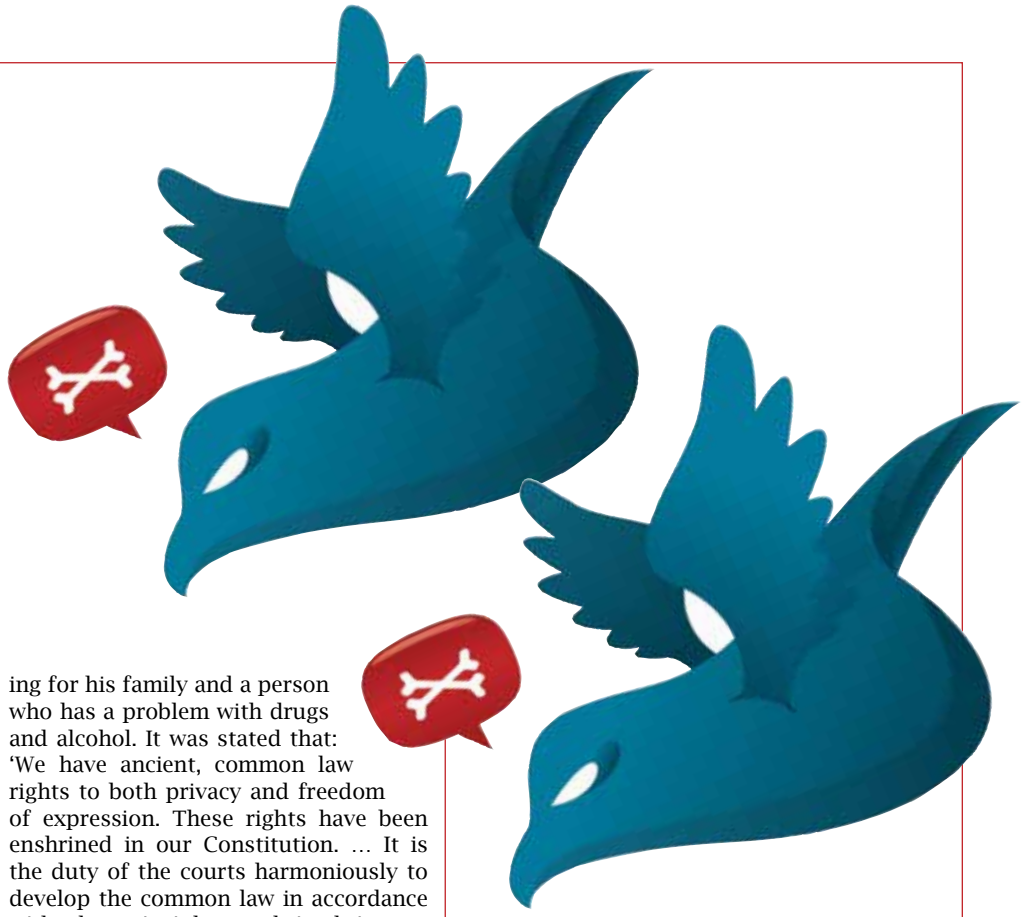
lar for a while or on a daily basis, to help you discover the hottest emerging topics of discussion on Twitter. The defendant accepted that the question in her Tweet implied that the claimant was trending on 4 November. The defendant is well known as the wife of the speaker of the House of Commons. The claimant is a former deputy chairman of the conservative party and a former party treasurer and was a close aide to Margaret Thatcher during her time as Prime Minister.

The judge concluded that the Tweet meant in its natural and ordinary defamatory meaning that the claimant was a paedophile who was guilty of sexually abusing boys, or alternatively, he found that the Tweet bore an innuendo meaning to the same effect. The court in arriving at this conclusion considered the following:

- The circumstances in which the Tweet was published.
- What the parties contend that the Tweet meant.
- What does the law mean by the word 'defamatory'.
- How the court must decide an issue as to meaning.
- The test of reasonableness.
- Submissions for the claimant.

South Africa: Head on its heels: *H v W* 2013 (5) BCLR 554 (GSJ)

Judge Willis dealt with an application by the applicant who sought an order against the respondent, *inter alia*, interdicting and restraining the respondent from posting any information pertaining to the applicant on Facebook or any other social media. The respondent was the author of a posting on Facebook. The applicant complained that the posting in question published information that portrayed him as a father who did not provide financially for his children and would rather go out drinking than caring for his family and a person who has a problem with drugs and alcohol. It was stated that: 'We have ancient, common law rights to both privacy and freedom of expression. These rights have been enshrined in our Constitution. … It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution'.



The court ordered the respondent to remove all postings that she had posted on Facebook or any other site in the social media that referred to the applicant.

It is interesting to note that no claim for damages was brought by the applicant as was done by our Australian, British and American counterparts above.

Conclusion

As more of these 'twibel' cases are receiving media coverage both internationally and locally, I submit that people will be more wary and think twice before speaking their minds on a public platform specifically on social media sites. It is clear that no one's conduct can escape liability and people have to be accountable for their words. An article published in the *Journal of High Technology Law* by Ellyn M Angelotti states as follows: 'Since Twitter enjoys immunity from liability for defamatory content under Section 230 of the Communications Decency Act, the best option for resolution may not be to focus on Twitter as an organisation solving the problem, but rather to look to the community itself for a solution' (EM Angelotti 'Twibel Law: What defamation and its remedies look like in the age of twitter?' (2013) 13 *Journal of High Technology Law* 430). The author's point of view is indeed food for thought.

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The debt collection scandal

By Gerhard Buchner

The credit explosion

'Reckless lending continues unabated' says Angelique Arde in the *Star* 14-2-2015. The cause of the Marikana revolt, is the impoverishment of lowly paid and over indebted mine workers that is in turn due to the excessive Emolument Attachment Orders (EAO) issued against their wages, is the opinion of Bobby Godsell, the previous CEO of Anglogold Ashanti Limited (Rene Vollgraff 'Don't let employer collect debts, says Godsell' 4-11-2013 *Mail & Guardian* (www.mg.co.za/article/2013-11-04-ex-anglogold-ceo-godsell-wants-ban-on-garnishee-orders/, accessed 13-4-2015). It is estimated that there were more than three million EAOs by 2014. Arde's article claims there were 22,5 million credit active consumers at the end of September 2014, of which 10,05 million had impaired credit records. The only criterion for the granting of loans to consumers by most credit providers is whether or not the consumer is employed. It was soon realised by attorneys and debt collectors that the legal processes provided for, in the Magistrate's Courts Act 32 of 1944 (MCA), for the collection of debts, presented a lucrative opportunity to generate large fees and commissions. Regrettably these processes also lent themselves to easy exploitation of ignorant and vulnerable debtors and consumers.

The lofty ideal of the National Credit Act 34 of 2005 (NCA), envisaged in s 3: '… to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers', remains an elusive pipe dream.

The question that arises is why the NCA, promulgated by much fanfare from the government, has failed to prevent the ballooning of consumer debt, the collection of which has become a national crisis?

In my opinion the following factors have contributed thereto:

The MCA

Certain draconian amendments to the MCA were introduced during 1976. Their aim was to enable attorneys to benefit financially from an effective debt collection process that would counter the threat posed by debt collectors. Provision was also made for the arrest and detention of debtors who failed to pay their debts in terms of court orders for a maximum period of 30 days. Imprisonment for failure to satisfy a judgment debt was eventually declared unconstitutional (*Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 (CC)).

These draconian amendments to the MCA and their consequences can be summarised as follows.

Sections 57, 58 and 65J(2) of the MCA provided for the obtaining of a written consent from a debtor in terms whereof the debtor consented to a default judgment for the amount stated therein, an undertaking to pay the debt in monthly instalments, consenting to the issuing of an EAO for deductions against the debtor's wages by his or her employer, to consent to pay collection commission and legal costs on an attorney-and-client scale as laid down by the relevant provincial law society. There is no obligation on the attorney to consider the debtor's financial position at all in preparing the written consent for signature by the debtor. Attorneys and debt collectors typically ensure that the following clause or something similar, usually untrue, is incorporated into all written consents: 'I confirm that after the satisfaction of the Emolument Attachment Order I will have sufficient means for my own and my dependents' maintenance.'

Default judgments and EAO's in terms of ss 57 or 58 are granted and issued routinely by clerks of the court. Judicial oversight was deliberately avoided by these amendments to accelerate the

Picture source: Gallo Images/iStock

granting of default judgments and the issuing of EAO's until very recently but only in respect of matters to which the NCA applies. Ostensibly clerks of the court had to tax the claims for attorney-and-client costs and collection commission. This resulted in gross irregularities in the claiming of unjustified and unsubstantiated amounts of fees, commissions and disbursements by many attorneys. Clerks of the court simply did not have the skills to carry out these tasks, or were overwhelmed by the sheer volumes, or in some instances bribed.

Section 65J(5) makes it obligatory for the debtor's employer to make the payment deductions as set out in the EAO from the debtor's wages, failing which the employer's assets could be attached by way of a writ and sold in execution in satisfaction of their employee's debt. Credit providers soon realised that their 'unsecured debt' is secured by the employer. This contributed greatly to the credit explosion.

Attorneys ensured that the Attorneys Act 53 of 1979 empowered the law societies of the various provinces to prescribe collection commission and attorney-and-client fees for debt collection matters under their jurisdiction. In reg 47 of the NCA, the legislator attempted to curtail costs in collection matters, but strangely, reg 47(b)(ii) still provides for collection costs on an attorney-and-client scale and collection commission to be charged in terms of the Attorneys Act. This incentivises lucrative debt collection practices and exploitation of consumers by attorneys on an unprecedented scale.

Unscrupulous attorneys and debt collectors typically incorporate a clause into their sS 57 and 58 written consents, which purportedly contains a consent by the debtor to the jurisdiction of a specifically named court, that is many hundreds of kilometres away from the debtor's places of residence or employment as well as his or her employer's place of business. Justification for this, it is argued, is to be found in the provisions of s 46 of the MCA. This makes it impractical and financially impossible for debtors or most employers to oppose any legal proceedings instituted by these attorneys (*Van Heerden v Muir* 1955 (2) SA 376 (A)). Unscrupulous attorneys select courts where clerks of the court are lax in enforcing the rules, can be bribed, or otherwise cajoled into obedient compliance. This type of unseemly 'forum shopping' sometimes manifested itself by the dumping of large numbers of process with clerks of courts large distances away from the particular attorney's own practice that would then be mechanically stamped by the obliging clerk. A further procedural ruse and indeed abuse resorted to by attorneys in this regard was based on a misapplication of s 28(1)(*f*) of the MCA based on a distorted interpretation of the judgment in *Muller v Möller and Another* 1965 (1) SA 872 (C). In that case it was held that the signing by a debtor of a s 57 or s 58 consent to the jurisdiction of a specific court, constituted an appearance before that court with the concomitant absence of any objection to the jurisdiction of the court, as is envisaged by s 28(1)(*f*). The facts in that matter, however, do not conform to the typical set of facts where an unrepresented debtor has signed a consent to judgment in terms of either ss 57 or 58 of the MCA and in no sense appears before the court.

The amendments contain ineffectual provisions, which provide ostensible protection to debtors but have no practical value. The vast majority of debtors do not have the financial resources or level of sophistication to defend or protect their rights in the courts. Law clinics, legal resource centres and legal aid offices do not have the resources to assist large numbers of consumers.

The debt collection procedures introduced by these amendments to the MCA, lend themselves to abuse and the exploitation of debtors by attorneys and debt collectors on a large scale notwithstanding the legislator's ineffective attempts to curtail the exploitation. Peter Allwright of Horizon Forensics states: 'Clerks of the court are being bribed, or organisations themselves are duplicating the stamps, signatures and case numbers and completely bypassing the courts' (Jan Bornman 'Court officers in dock' 6-8-2013 *Times Live* (http://m.timeslive.co.za/thetimes/?articleId=9675352, accessed 13-4-2015)). The introduction of these debt collection procedures, which are not only legally unsound, ethically indefensible and subversive of consumers' rights, also resulted in debt collection becoming an attractive field of endeavour for both the attorneys' profession and debt collectors.

Field agents

Attorneys and debt collectors, alike, in furtherance of their objective to boost fee income employ the services of 'field agents' whose task it is to collect as many signed consents to default judgment and EAO's as possible in the shortest possible time. Signatures of debtors are often falsified or forged on the consents by field agents. Such agents, who have country-wide networks, usually visit debtors at their places of employment unannounced to embarrass them. They often coerce, deceive or cajole debtors into the signing of written consents at their places of employment. The threefold consents to the jurisdiction of a particular court, consent to judgment, as well as consent to an EAO are presented for signature without any explanation, nor is the debtor's financial position considered. Debtors invariably sign the consents without reading them simply to rid themselves of the embarrassing presence of the field agents. Many consumers, even if they would read such documents would not understand the import thereof. To compound matters, attorneys and debt collectors often turn a blind eye to the malpractices by field agents.

Failure to implement certain provisions of the MCA: Rule 4(2)

Rule 4(2) of the MCA, introduced on 23 August 2010, requires every request for default judgment, in terms of s 59, to be supported by an affidavit containing such evidence as may be necessary to establish that all requirements in law had been complied with. Attorneys and debt collectors file such compliance affidavits as a matter of course when applying for judgments based on signed consents in terms of ss 57 or 58 received from field agents.

Where the debtor did not sign the written consent in the presence of the attorney or debt collector, the standard affidavit alleging compliance with all requirements in law required by r 4(2) is, in my opinion, legally flawed. The requirements of the rule can only be met if an affidavit by the field agent is also filed to confirm compliance with the provisions of r 4(3). This rule requires the debtor to sign the written consent in the presence of two witnesses whose addresses and telephone numbers appear on the consent.

A further affidavit would be required from a representative of the credit provider who is able to confirm that all the requirements of the NCA had been complied with as far as the conclusion of the credit agreement is concerned. That could be done by a person, for example, employed by the credit provider who has access to the records of the credit provider (*R v Varachia* 1958 (4) SA 529 (T)). Neither attorneys nor debt collectors, for obvious reasons, can state under oath that these peremptory provisions of the NCA have been complied with as is required by r 4(2). Yet, in large numbers of cases processed by the courts, attorneys would glibly depose to affidavits in terms of r 4(2).

The legislator: Analysis paralysis

Attorneys have strongly resisted the repeal of ss 57, 58 and 65J(2) of the MCA on the grounds that the alternative procedures for the execution of judgments provided for in the MCA are ineffective because of corruption, high costs and the systemic dysfunctionality of the courts. The question arises as to why the seriously flawed debt collection system created by ss 57, 58 and 65J(2) of the MCA should be perpetuated, given that it provides the framework for the exploitation of vulnerable consumers.

The playing fields between attorneys and debt collectors have long since been levelled, which negates the original reason for the promulgation of ss 57, 58 and 65J(2) and makes their repeal on legal and ethical grounds a matter of urgency. Arranging for an acceptable and fair process to replace these draconian measures is not insurmountable. The legislator, under pressure from attorneys and various government departments, has made numerous amendments to the NCA and MCA in a vain attempt to curtail widespread consumer exploitation through the abuse of the legal system without addressing the cause thereof.

The present legislation is fundamentally flawed and is subversive of the advancement of consumer protection and the development of an efficient, accountable and sustainable consumer credit industry.

Gerhard Buchner *BA LLB (Stell)* is an attorney at Gerhard Buchner Attorney in Johannesburg.

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‘Beware the hired gun’

Are expert witnesses unbiased?

By Henry Lerm

Picture source: Gallo Images/iStock

More than a century and a half ago, judges started complaining about the lack of independence and objectivity when hearing expert evidence. That lament was aptly illustrated in the English case of *Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 374 when the judge stated:

'Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.'

(The dictum was repeated by Sperling in the article *Expert Evidence: The Problem of Bias and Other Things* (New South Wales: 1999 at 1)).

Those cautionary remarks have continued to resonate in different courts around the world. (See the seminal decisions by the Supreme Court of the United States in *Daubert v Merrel Dow Pharmaceuticals, Inc.* 113 S. Ct. 2786 (1993); the English decisions of *Whitehouse v Jordan* [1981] All ER 267; [1981] 1 WLR 246 and the influential judgment of Creswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81-82). Those remarks have also not escaped South African courts and the warning by Davis J in the case of *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) loom large and should be heeded.

This article has a brief look at the nature and scope of the work of expert witnesses and their duties and responsibilities towards the court. The article also deals with the approach of our courts towards expert evidence including, the drawing of inferences and remedies available to the courts, where it is found that an expert has displayed some bias and, with the influence of his or her attorney, acted dishonestly during the process of litigation.

The nature and scope of the work of an expert

Modern day has seen the advance of science in most disciplines in life. This has resulted in complex concepts and principles being explained with greater clarity and certainty. The presentation of forensic evidence such as DNA, ballistics and other types of forensic evidence in criminal law litigation, have caused the courts to decide on complex issues (see *S v Mdlongwa* 2010 (2) SACR 419 (SCA) at para 18). Similarly, on a civil law terrain, the opinion of an expert for example, involving the reconstruction of motor vehicle accidents (see *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (ECD)) or complex assessment of medical risks and causation, cannot be executed without a clinical judgment involving expert evidence. (See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at para 39; *Wright v Medi-Clinic Ltd* [2007] 2 All SA 515 (C); and *Buthulezi v Ndaba* 2013 (5) SA 437 (SCA) at paras 16 and 17.) The same can be said about many other disciplines, including engineering, aviation and the like.

Where those matters are brought before a court, presiding judges lacking in knowledge and experience would find themselves in unchartered waters, and not be able to adequately decide those matters without expert guidance. (See Meintjies-Van der Walt 'Expert odyssey: Thoughts on the presentation and evaluation of scientific evidence' (2003) 120 *SALJ* 352 at 353; for case law see also *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (ECD); *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 616H; and *Holtzhauzen v Roodt* 1997 (4) SA 766 (WLD) 779D.) But then for experts to make worthwhile contributions, they must have scientific knowledge and experience in their respective disciplines and be able to give their opinion in a logical and defensible manner.

Duties and responsibilities of expert witnesses

Judges are sometimes mercifully dependent on the special knowledge and skills of experts. Without their evidence, judges will be unable to draw appropriate inferences or reach fair conclusions. That weighs heavily on the duties and responsibilities of experts. (See Price '"Dealing with differences": Admitting expert evidence to stretch judicial thinking beyond personal experience, intuition and common sense' (2006) 19 *SACJ* 141 at 142; see also Meintjies-Van der Walt 'Decision-makers' dilemma: Evaluating expert evidence' 2000 13 *SACJ* 319 at 326.)

Because of the so-called 'knowledge and/or experience gap', there is a danger that some experts may try to manipulate the situation so as to give an opinion aimed at advancing the case of those who instruct him or her, instead of placing an independent and unbiased defensible theory before the court. To counter that, rules have been designed over time to ensure that experts and those who instruct them, provide the courts with unbiased opinions. Of all the guidelines, perhaps the code of conduct devised by Creswell J in the *National Justice Compania Naviera SA* case (*op cit*) at 81 on the duties of an expert is the most instructive. They read:

'1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise … . An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.'

What it all means is this, of an expert is required originality, objectivity and an unbiased assistance to the court. The expert's opinion should be based on all the facts or assumptions. No expert should be unwilling to make concessions about something either not falling within his or her expertise or not known when first expressing that opinion.

The code has since been accepted by the South Africa writers Zeffertt, Paizes & Skeen *The South African Law of Evidence* 5ed (Durban: LexisNexis/Butterworths 2003) at 330 and quoted with approval in the *Schneider* case at 211.

The *Schneider* case

This case investigated the home-schooling of two minor children. The CEO of an organisation promoting home education, was called as an expert witness by the mother of the children. The said organisation had also funded the litigation. Another expert witness had apparently been brought in as a 'hired gun' to discredit the evidence of a third expert witness. None of this was revealed to the court by the second respondent's legal team.

Besides emphasising that 'the best interests of children are very serious', the court found that the second respondent's legal representatives owed the court a fiduciary responsibility. But, because of their lack of openness, they failed in this duty (at 218H – 219A).

The court stated the primary duty of an expert witness as: 'An expert comes to court to give the court the benefit of his or her expertise'. Turning to the responsibilities of an expert witness, the court found that he or she must provide 'the court with as objective and unbiased an opinion, based on his or her expertise … . An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case' nor does he or she 'assume the role of an advocate' (at 211J – 212B).

As a mark of the court's displeasure, both counsel and the attorney were reported to their respective provincial law society and Bar Council. The attorney was ordered to pay costs *de bonis propiis* on the scale as between attorney and own client (at 220H and 223F).

Other duties and responsibilities of an expert witness and lawyers

The law also expects of experts and lawyers the following duties and responsibilities:

- Expert witnesses are expected to advance a theory with a theoretical or factual foundation (see the *Wright* case at para 166).
- For their evidence to be effective, experts ought to give evidence that address the issue(s) directly (see the *Wright* case at para 167).
- The reluctance of an expert to make concessions when indicated, may result in him or her being discredited (see the *Schneider* case at para 213C).
- Because lawyers are regarded as officers of the court, they owe the court certain duties including, to act honestly and fairly and to conduct themselves with honour and integrity. They should avoid any conduct which, if known, could damage their reputation. (See Lewis's 'golden rule to ethics' in Lewis *Legal ethics: A guide to professional conduct for South African Attorneys* (Cape Town: Juta & Co 1982) at 7 – 17; see also JR Midgley 'Ethical and Legal Duties' 1990 (Aug) *DR* 525.)
- The so-called contingency fee arrangement, alternatively known as the 'no win-no fee' arrangement between expert and attorney, where the result of the case determines whether they will be paid, has the potential that some practitioners may be tempted to influence the expert witnesses to give evidence in favour of their client.

Handy hints for attorneys

When instructing an expert witness, the following may well serve as some dos and don'ts:

- Ensure that the expert possess the necessary qualifications, experience and knowledge appropriate to the issue(s) for which he or she is called. Consider the expert's qualifications; publications in recognised journals; papers delivered at conferences; evidence given before, how he or she fared under cross-examination. Has the expert ever been discredited?
- Where there has been a close social connection between lawyer and expert, care should be taken not to compromise the independence of the expert. The lawyer may well be advised to engage another expert, instead.
- Determine the nature of the relationship between the expert and your client namely, any prior psycho-therapy or any other medical treatment given by the expert to the client. It may also not be wise to call that expert for fear of potential bias. Similarly, identify any close relationship between your opponent and their client, alternatively, between their expert and client. That may come in handy to show up bias in cross-examination.
- That the expert compiles a comprehensive report in language that is educational and understood by you, your opponent and court alike. The contents of the report must also be relevant to the issue(s) before the court.
- Avoid influencing an expert in whatever form as to the opinion he or she ought to give and the evidence he or she should provide to the court. That may very well come to haunt you.

Conclusion

Expert evidence has certainly made a significant contribution to courts' understanding of certain kinds of evidence. It has especially made a difference where it is so complex that judges and magistrates are not always in a position to grasp the evidence with certainty. What has, however, for centuries caused challenges is the lack of objectivity in expert evidence. Instead of experts coming to court to help the court, they sometimes come under the influence of their lawyers just to support the views of the party calling them. Cases involving contingency fee arrangements, may well present temptations to lawyers to call an expert witness as a hired gun. Here, an ethical duty is at war with a craving for gain. But, before a lawyer is tempted, he or she should remind themselves that legal services should never become a common trade commodity. Traditional legal services belong to a noble profession, governed by ethics and not to the cut-throat business milieu, where ethics hardly feature.

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Muslim marriages and divorce

Picture source: Gallo Images/iStock

By Megan Harrington-Johnson

The status of Muslim Marriages in South Africa has, since 1990, been the subject of ongoing investigation and discussion by the South African Law Reform Commission. The Muslim Marriages Bill was published in 2000 (www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf, accessed 13-4-2015), but is still subject to intense debate in the Muslim community and as such has not yet been passed.

In the meantime, Muslim couples who choose to marry according to Islamic law can only be afforded the protection of the South African legal system as it pertains to spouses if they, in addition, register a civil marriage.

Current position

While we anxiously await the coming into effect of the Muslim Marriages Bill, it is still generally accepted and understood that Muslim marriages are not yet formally recognised by our law, and as such, spouses in these types of unions do not fully enjoy the rights afforded to other spouses married in accordance with South African civil law. There has, however, been some progress in this field insofar as our courts and government have been taking steps towards the recognition thereof.

Development by courts

In 1983, in the case of *Moola and Others v Aulsebrook NO and Others* 1983 (1) SA 687 (N) it was decided that Muslim marriages are putative marriages, namely, marriages that are not automatically invalid and this meant that the children born from such marriages were no longer seen as being illegitimate. (This has obviously changed with the advent of the Children's Act 38 of 2005, in terms whereof the concept of 'illegitimate children' has been done away with).

In 1997, in the case of *Ryland v Edros* 1997 (2) SA 690 (CC) it was decided that, as a Muslim marriage is a contract from which certain proprietary obligations flow, this was reason enough to impose some of the consequences of a civil marriage on a Muslim marriage, chiefly the obligation of maintenance.

In 2004, in the case of *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) the Constitutional Court decided that a Muslim spouse in a monogamous Muslim marriage had the right to inherit and to claim maintenance from their deceased spouse in terms of the Intestate Succession Act 81 of 1987 and also in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

In 2005, the *Khan v Kahn* 2005 (2) SA 272 (T) held that partners in Muslim marriages also owe each other a duty of support, just as in civil marriages and, therefore, have the right to claim maintenance from one another in terms of the Maintenance Act 99 of 1998.

Finally, in 2009, in the case of *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC), the Constitutional Court held that the right to claim maintenance from a deceased spouse, as decided in the *Daniels* case, was also to be extended to polygamous Muslim marriages as well.

More recently the right to claim maintenance has been extended to include claims for interim maintenance during Muslim marriage divorce proceedings, namely, in terms of High Court r 43.

It has even been held, that it is possible for a spouse married and divorced in terms of Islamic Rights to share in the other spouse's pension interest on divorce.

Recently, the Western Cape High Court held, in the as yet unreported case, *Rose v Rose* (WCC) (unreported case no 14770/11,13-8-2014), that Faiza Rose, a nurse from Simon's Town who was married to one Faizel Rose for 20 years, could claim for maintenance and a share of her former husband's pension.

This is ground breaking as when Faiza married Faizel under Islamic law in 1988 he was legally married to another woman. That marriage ended a few months later, and his marriage to Faiza was annulled by the Muslim Judicial Council in 2009.

Prior to this judgment, spouses in Muslim marriages were unable to claim their share of the assets of their marriage to their former husband's if their husband was already married to another woman at the time that he married her. However, in the case of the *Rose* judgment the court held that Muslim men often enter into more than one marriage simultaneously, that marriages can be civil, religious or customary, and that the mere fact that a Muslim marriage is polygymous should not prejudice the spouses to the union, and this brings the case law in line with that pertaining to customary marriages.

Developments by government

Further to this almost tacit recognition by our courts, in May 2014 the Department of Home Affairs initiated a project in which more than 100 Muslim Clerics or Imaams were trained, in a pilot project, to officiate over unions that will be recognised by law. These clerics will, in effect, be marriage officers who will be authorised to issue marriage certificates in terms of South African law. This means that those Muslim spouses who wish to conclude a civil marriage at the time of their Muslim marriage may do so, but both spouses will have to consent to such civil marriage. Thus this is not in itself a recognition of Muslim marriages, despite what has generally been reported in the press, but is most definitely a step in the right direction.

Further development as evidenced by a recent case study

Background

Mrs S was married in accordance with Islamic law to Mr S. The matter was heard in the Johannesburg High Court before the Andrews AJ as an unopposed divorce (*S v S* (GJ) (unreported case no 2014/05928, 26-9-2014).

Facts

Mr and Mrs S were married in 2002 in terms of Islamic rights. The parties never concluded a civil marriage. They had one child born of their Muslim marriage who was nine years old at the time the proceedings were instituted.

In or during the beginning of January 2014, the marriage relationship between them irretrievably broke down.

Mr S refused to grant Mrs S a Talaq (according to the *Oxford Dictionary*, talaq (in Islamic law) is defined as 'divorce effected by the husband's enunciation of the word "Talaq", this constituting a formal repudiation of his wife' (http://www.oxforddictionaries.com/definition/english/talaq, accessed 13-4-2015)), which is required to terminate the marriage in terms of Islamic rights, or to pay her any form of maintenance and as such, she approached the attorney and it was decided to issue a summons, in terms whereof Mrs S requested that a decree of divorce be granted, that she be paid maintenance by Mr S and their 'joint estate' be divided.

The summons was issued during February 2014, and the process went so far as a trial date being obtained.

During this period, the parties, duly represented, managed to conclude a settlement agreement.

The settlement agreement

The settlement agreement contained all of the usual terms pertaining to civil divorces, including but not limited to, care and contact to the minor child, maintenance and division of patrimonial assets. What was interesting in the agreement was that it provided that –

- the court would grant a decree of divorce incorporating the settlement agreement; and
- it further recorded that Mr S would, as soon as reasonably possible after the granting of the decree of divorce, issue to Mrs S a Talaq.

The court order

The order handed down by Andrews AJ stated, *inter alia*, as follows –

- the 'marriage is dissolved'; and
- a prayer that Mrs S had inserted relating to a partnership agreement having been concluded between herself and Mr S, which stated as follows, was upheld – the Plaintiff (Mrs S) submits that on or about 26 October 2002, the parties, acting in their personal capacities, entered into a partly oral, partly tacit agreement, the material express[ed] alternatively tacit terms whereof were as follows:

A) The parties agreed to cohabit as man and wife;

B) The parties would have a joint estate; and

C) The parties agreed that any profits arising out of their cohabitation and relationship would be divided between them equally.

It is interesting to note that at the hearing of the unopposed divorce, the aforesaid relief was in fact not requested by either party, and all that was sought was a decree of divorce incorporating the settlement agreement.

It is further interesting to note that the wording contained in the order that was handed down was 'the marriage is dissolved' and not 'the decree of divorce is granted'. It is, however, of interest that the court used the term 'marriage' at all.

Opinion as to the reasoning of this court order

It is my view that the reasoning behind this judgment was that the court obviously recognised that a marriage between the parties did in fact exist.

The fact that the 'partnership' was confirmed, is, in my belief the court's way of inferring that the regime that should apply to Muslim marriages, in the absence of evidence to the contrary, is that of one of in community of property.

Thus, what this judgment seems to infer is that these types of religious marriages should be recognised, and further that if they are so recognised, they should be subject to the same regimes that apply to all other forms of civil marriage in South Africa, including customary marriages, namely, that if one does not conclude an antenuptial contract, the marriage is automatically one of community of property by operation of the law.

Implications of this court order

This judgment has, in my opinion, far reaching implications. It is clearly yet another step to formally recognise Muslim marriages, and bring them in line with the South African Constitution.

What, to my mind, is the most important aspect of this judgment is that it may afford protection to those members of the Muslim community who are financially prejudiced by being unable to share in their spouses estates, and may go that little bit further to help prevent such individuals from being essentially held hostage in marriages from which they wish to escape but cannot because of the rules relating to a Talaq or the fear of being unable to financially survive alone.

- Ms Harrington-Johnson acted on behalf of the plaintiff (Mrs S) in the above matter.

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THE LAW REPORTS

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March 2015 (1) South African Law Reports (pp 1 – 328); [2015] 1 All South African Law Reports February no 1 (pp 261 – 392); and no 2 (pp 393 – 524); 2015 (2) Butterworths Constitutional Law Reports – February (pp 127 – 182)

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
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Company law

Winding-up of company: In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (in liquidation)* [2015] 1 All SA 324 (GJ) the court was asked to interpret the provisions of s 341(2) of the Companies Act 61 of 1973 (the Act).

The facts that led to the present decision were as follows: The applicant, Engen, supplied fuel to the respondent, Goudis, since October 2002. Goudis had a credit account. On 14 September 2012, a creditor of Goudis filed a winding-up application. Engen was ignorant of this occurrence. On 23 October 2012 a final winding-up order was granted, establishing *concursus creditorum* on 14 September. Again, Engen was ignorant of this occurrence and continued to supply fuel to Goudis up to 30 November 2012. Engen learnt of the order on 10 December 2012. The proof of the appointment of a liquidator was given to Engen on 12 December 2012. Goudis had made several payments to Engen. One payment on 11 September 2014, four days before the winding-up application was filed. Between 14 September and 23 October no payments were made. Between 23 October and 10 December payments were made on 31 October, and 16 November. After 10 December 2012, payments were made on 14 December 2012 and on 7, 10 and 14 January 2013.

Section 341(2) deals with dispositions and share transfers after winding-up. It provides that '[e]very disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders'.

The 'commencement' of a winding-up, is, in terms of s 348 of the Act, the date the application was filed or presented to court.

At stake was the liability of Engen to repay to Goudis the sums paid after 23 October 2012. Put differently, the dispute concerned whether a disposition made by the company, Goudis, after the date on which the final winding-up order was made was subject to s 341(2) of the Act.

Sutherland J held that the effect of s 348 of the Act is a retrospectively effective date for establishing a *concursus creditorum*. The effect is to convert what were valid and binding dispositions into void dispositions. The so-called 's 341(2) order' is effective and binding on creditors, the company being wound up and on the recipient of the payment, which payment, but for the winding-up, would have been uncontroversial. However, the court is not empowered to convert an unlawful, invalid or unauthorised transaction into a valid one. The disposition had to enjoy the attributes of validity at the moment it occurred. This original status of validity is critical to the function performed by the section.

Section 341(2) further applies only to dispositions that a company could validly effect. After the final winding-up order a compa-

ny cannot effect valid transactions precisely because of the *concursus*, from which moment, the control of the company is removed from its office bearers. Section 341(2) cannot apply beyond the final winding-up order because there cannot be a valid and binding disposition by the company from that date.

The court thus held that s 341(2) confers a power on a court to intervene in respect of dispositions, which a company may lawfully make during the period between the date on which the application for a winding-up has been presented and the date on which the final winding-up order is granted.

The court ordered Engen to repay the payments received from Goudis after 23 October 2013.

Contract law

Effect of arbitration agreement: The facts in *Stieler Properties CC (Registration number 2003/014057/23) v Shaik Prop Holdings (Pty) Ltd (Registration number 2001/028696/07)* [2015] 1 All SA 513 (GJ) were as follows: The applicant, Stieler, purchased immovable property situated in a Johannesburg residential estate from the first respondent, Shaik. Transfer of the property was delayed due to the requirement that the estate's homeowners' association had to approve the sub-division of the property.

Stieler applied for a declaration that the contract was void *ab initio* due to impossibility of performance, occasioned by inability to sectionalise and effect transfer. In the alternative, Stieler sought an order that it had validly cancelled the agreement. Shaik contended that it was not a requirement for the validity of a contract for the sale of land, that transfer take place on the date of sale, and that the inability to effect transfer on the date of sale, did not constitute impossibility of performance. It contended that Stieler was always aware of the process, and that Stieler had brought the application prematurely. It, therefore, sought a stay of proceedings so that the dispute could be resolved by means of arbitration as provided for in clause 16 of the agreement.

In considering the application, Mosikatsana AJ held that the allegation of impossibility of performance was not sustainable. The alleged impossibility was subjective, and not absolute. It, therefore, did not render the contract void *ab initio*, but possibly voidable.

There is no automatic right of cancellation of a contract on the basis of the debtor's *mora*. Cancellation is an extraordinary remedy. Restitution is not part and parcel of the act of rescission, but a consequence of it.

The court held that the application was brought prematurely, and that the dispute should have been referred to arbitration. Stieler's application for a stay of proceedings, pending arbitration, was granted. The court made no order as to costs.

Formalities: In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA) the court confirmed that e-mails generally have the same legal status in law as paper-based documents and conventional 'pen on paper' signatures.

The two parties, Wilberry and Spring Forest, entered into several agreements in terms of which Spring Forest leased from Wilberry its Mobile Dispensing Units for use in its car wash business. At stake was the validity of the cancellation, of a number of agreements between the parties, by exchange of e-mails. The agreements contained clauses providing that the agreements may only be cancelled in writing and signed by the parties. Spring Forest was not able to meet its rental commitments and the parties met and agreed orally to cancel their agreements. The terms of the cancellation were recorded in a subsequent e-mail exchange where the names of the parties appeared at the foot of each e-mail. Spring Forest then entered into an agreement with another entity to conduct the same business. In response, Wilberry instituted proceedings to interdict Spring Forest from continuing its business on the grounds that this was in breach of their agreements. It alleged Spring Forest was in breach because the amendments (which were only recorded in e-mail exchanges) did not satisfy the non-variation clause requirement that amendments are only valid if 'in writing and signed' by both parties. Wilberry also claimed that only 'advanced' electronic signatures referred to in s 13(1) of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act) can satisfy a signature requirement where the parties to an agreement require a signature for something to be valid.

Section 13(1) of the ECT Act provides that where a signature is required by law and the law does not specify the type of signature to be used, this requirement is met only if an 'advanced electronic signature' is used. Wilberry thus argued that the reference in s 13(1) to 'required by law' is not limited to statutory law, but also includes where parties require a signature in terms of a contract.

Cachalia JA held that where parties to an agreement require amendments to be made 'in writing and signed', e-mail does satisfy the 'writing' requirement and a party's name at the foot of an e-mail may qualify as a signature.

The test is whether the method of the signature used fulfilled the function of a signature to authenticate the identity of the signatory. Where the parties to an electronic transaction require a signature, but they have not specified the type of electronic signature to be used, the requirement is met if a method is used to identify the person and to indicate the person's approval of the information communicated.

The typewritten names of the parties at the foot of the e-mails, which were used to identify the users, constituted 'data' that was logically associated with the data in the body of the e-mails – as envisaged in the definition of an 'electronic signature'. They therefore satisfied the requirement of a signature, and had the effect of authenticating the information contained in the e-mails.

Finally, the court held that s 13(1) – which deals with 'advanced' e-signatures – is only applicable where a signature is required by statutory law, not by contract.

The appeal was accordingly upheld with costs.

• See (Jan/Feb) *DR* 57.

Criminal law

***Dolus eventualis*:** The incident that led to the prosecution of the accused in *S v Maarohanye and Another* 2015 (2) SA 73 (GJ) enjoyed a lot of media attention. The appellants (the accused), one of whom is a well-known South African musician, caused a motor vehicle accident in which four pedestrians were killed and two maimed. All the charges arose from a single incident, which took place in March 2010 in Mdlalose Street, Soweto. The accused lost control of their vehicles while racing each other in Mdlalose Street, while being under the influence of drugs. The trial court convicted the accused of murder based on intention in the form *dolus eventualis*, for '(r)ecklessly disregarding the rules of the road, subjectively foreseeing that they might cause the death or injuries to (pedestrians) and still (persisting) in their conduct despite such foresight'.

On appeal to a full Bench of the High Court, Mlambo, Maluleke and Pretorius JJ in a joint judgment, held that the determination of *dolus eventualis* was in essence a subjective value judgment that was reliant on inferential reasoning, and based on what the person thought, not on what he should have foreseen. The court confirmed that for a conviction of murder to be reached based on *dolus eventualis*, the test is twofold –

(a) did the accused subjectively foresee the possibility of the death of the victims ensuing from their conduct; and

(b) did they reconcile themselves to that possibility.

Once the trial court made its finding about the effect of drugs on the faculties of the accused, that is, that the drugs induced a sense of euphoria which led them to believe that they would not cause any collision and that other road users would give way to them, *dolus* in any form, especially *dolus eventualis*, was eliminated from the equation. In this context there could be no suggestion that the accused foresaw that their escapade could result in death and serious injury to pedestrians and had reconciled themselves to that eventuality.

Their mental make-up must, therefore, have been the opposite of causing death or injury. Rather, their disposition was that no collision, let alone a life-threatening one, would take place. There having been no foresight of the possibility of a collision resulting in death or serious injury, coupled with a reconciliation to that eventuality and a persistence in their course despite that reconciliation, there could be no *dolus eventualis*. Both conditions required for *dolus eventualis* were clearly absent. This was the conclusion that should have been arrived at by the trial court and the result was that the murder and attempted-murder convictions could not stand.

The only conviction that was confirmed by the present court was the one for driving a motor vehicle while under the influence of a drug having a narcotic effect in terms of s 65(1)(*a*) of the National Road Traffic Act 93 of 1996.

The appeals against the remaining seven convictions, including that of murder, and sentences imposed by the trial court were upheld. The convictions of murder were replaced by ones of culpable homicide. The accused's sentence was changed to ten years' imprisonment, two years of which were suspended on condition that the accused were not convicted of similar offences within five years of these convictions.

Minimum sentence: The facts that led to the decision in *S v Brown* [2015] 1 All SA 452 (SCA), and especially the trial in the WCC, attracted a great deal of media attention as well as an outcry from the general public. At the centre of the criminal trial stood the accused, J Arthur Brown, the master mind behind the Fidentia Asset Management investment scheme. Brown pleaded guilty to two counts of fraud. He was sentenced on each count to a R 75 000 fine or a suspended sentence of 18 months' imprisonment. In terms of s 316B of the Criminal Procedure Act 51 of 1977 (the Act), the State appealed against the sentence imposed on Brown.

The two offences relevant to the matter involved, first, a misrepresentation to an investor that assets in excess of R 200 million were being managed in accordance with the mandate given by the investor to Brown. It also involved in the second place, a misrepresentation to shareholders of an entity that administered pension funds that the purchase price for that entity would be paid from the cash resources of Brown's own company. In reality, the balance of purchase price amounting to tens of millions of Rands was paid for with funds under administration by the seller of that entity.

One of the issues that arose during the proceedings before the court *a quo* was whether s 112(1)(*b*) of the Act applied when a plea of guilty is raised beyond the beginning of a trial. At the time that the plea was tendered and accepted, the High Court took the view that s 112 did not find application when a plea of guilty was tendered *in medias res*. The court considered it to only apply when a plea was tendered at the commencement of a trial.

In imposing the sentence it did, the High Court reasoned that the plea of guilty on the two counts was limited and was based on *dolus eventualis* and potential rather than actual prejudice.

On appeal to the SCA, Navsa ADP referred with approval to earlier case law in which it was held that the High Court was obliged, when the plea was tendered, to consider whether the plea ought to be accepted, with particular regard being paid to the effect of the evidence led up until that stage. The High Court relinquished that responsibility, and the plea was accepted by both the court and the State. In deciding on an appropriate sentence, the court below ought not to have restricted itself to the bare facts contained in the plea. The tendered plea did not provide context nor did it present enough of a picture for the court to properly fulfil its sentencing function.

Evaluating the evidence consistent with Brown's plea, the High Court looked at the definition of *dolus eventualis*. A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and he reconciles himself to this possibility. While Brown's primary object might have been optimising investment returns by investing in a range of asset classes contrary to the mandate, he ignored the most basic regulatory rules directed at ensuring that the funds were safeguarded and treated as trust funds. During his testimony, it was clear that his primary concern appeared to be his own interests and comfort, and he continuously downplayed and minimised his moral and legal blameworthiness. Therefore, the conclusion by the High Court that the two counts of fraud on which Brown had been convicted were not that serious and that his moral blameworthiness was limited, was entirely unjustified.

The High Court thus erred in holding that the minimum sentencing provisions in s 51(2)(*a*) of the Criminal Law Amendment Act 105 of 1997 were inapplicable. Finding to the contrary, the SCA proceeded to consider whether there were substantial and compelling circumstances

justifying a departure from the prescribed minimum sentence of 15 years' imprisonment. Brown's personal circumstances were not such that, by themselves, they compelled a departure from the prescribed minimum sentence. Taking all other factors into account, the SCA held that the sentence imposed by the High Court tended toward bringing the administration of justice into disrepute.

The SCA accordingly set aside the sentences imposed by the High Court and substituted them with the prescribed minimum sentence of 15 years' imprisonment on each count of fraud. It ordered the two sentences to run concurrently.

Delict

***Res ipsa loquitur*:** The facts in *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) were not unique. The appellant, Goliath, underwent a routine hysterectomy at a provincial hospital in Port Elizabeth. It was trite that the hospital fell under the respondent's (the MEC) auspices and control. A surgical swab was left in Goliath's abdomen during the surgery performed as part of the hysterectomy. It resulted in infection. Further surgery at another provincial hospital was required to remove the swab. Goliath sued the MEC in delict, alleging negligence on the part of the doctors and nursing staff that performed the hysterectomy. The High Court dismissed the claim despite the fact that the MEC did not adduce any evidence. In holding that Goliath failed to discharge the onus of establishing negligence, the High Court pointed out that it was precluded by precedent from applying the *res ipsa loquitur* (the case speaks for itself) doctrine in the medical-negligence field.

On appeal to the SCA, Ponnan JA pointed out that the inquiry was whether Goliath discharged the onus to prove her case, namely that the damage she sustained was caused by the negligence of the doctors and nursing staff in allowing the swab to be left in her.

The court referred with approval to earlier case law in which it was held that a 'medical practitioner is not expected to bring to bear on the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' (see *Mitchell v Dixon* 1914 AD 519 at 525 and *Castell v De Greef* 1993 (3) SA 501 (C) where the court held (at 512A–B) that '(t)he test remains always whether the [medical] practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field'). The reasoning in the *Castell* case was referred to with approval in *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA).

Res ipsa loquitur is a convenient Latin phrase used to describe the proof of facts that are sufficient to support an inference that a defendant (here: the MEC) was negligent and thereby to establish a *prima facie* case against him. It was not a magic formula and did not entail a 'shifting' of the onus or a suspension of common sense. Specifically, the maxim should not tempt a court to first draw an inference of negligence from the occurrence itself and then decide whether it was rebutted by the defendant's explanation. Moreover, in the *Buthelezi* case the court pointed out that the maxim *res ipsa loquitur* 'could rarely, if ever, find application in cases based on alleged medical negligence'.

In the present case the High Court's focus on the applicability of the maxim to medical negligence suits had diverted it from the obvious inference of negligence dictated by Goliath's evidence of the left-behind swab. In failing, without explanation, to adduce any countervailing evidence whatsoever, the MEC took the risk of judgment being given against him.

The SCA, by way of an *obiter dictum*, suggested that the time may have come to jettison the *res ipsa loquitur* maxim from our legal vocabulary.

The court accordingly upheld the appeal with costs. The MEC was ordered to pay Goliath the sum of R 250 000 plus interest *a tempore morae*.

Wrongful life: In *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC); *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC) the court considered the potential development of the common law to recognise a claim for wrongful life.

Prospective parents can obtain medical advice during pregnancy to ascertain whether their child will be born in good health. If the parents are told that the child will probably suffer from a serious medical condition or congenital disability, the mother may, in terms of s 12(2)(*a*) of the Constitution and the Choice on Termination of Pregnancy Act 92 of 1996, choose not to give birth to the child. Our law also recognises a claim by the parents for patrimonial damages in circumstances where that kind of medical advice should have been given to them but, was negligently not provided. The scenario is generally referred to as 'wrongful life'. Until now, our law has denied the child any claim in those circumstances. The question that arose for decision in the present case was whether that should change.

The appellant, H, was a boy with Down's Syndrome. He was represented in the present proceedings by his mother. H sued the respondent, Fetal Assessment Centre (the centre) for his damages flowing from the centre's alleged failure to warn his pregnant mother that there was a high risk of him being born with Down's Syndrome. H alleged that had his mother been informed of the risk she would have terminated the pregnancy. The damages he claimed were for his past and future medical expenses, for disability and for loss of amenities of life. The centre excepted to the claim as not disclosing a cause of action. The WCC upheld the exception and dismissed H's claim. H then appealed directly to the CC. In issue was whether the common law might be developed to recognise the child's claim.

Froneman J held that the common law might indeed be developed to recognise a claim for wrongful life. In acknowledging the possibility of such recognition, the court reasoned that earlier authority in which the possibility of such a claim was barred, did not take into account the right of a child as entrenched in s 28(2) of the Constitution, nor other constitutional rights. The court confirmed that the elements of the law of delict could accommodate the claim. It further referred with approval to foreign authority that provides for such a claim.

In the final instance it held that it remained for the High Court to determine whether the claim did exist, and if so, in what form?

The CC accordingly upheld the appeal, set aside the order of the High Court, and replaced it with an order granting H leave to amend his particulars of claim.

Insolvency law

Effect on instalment agreement: In *PMG Motors Kyalami (Pty) Ltd (in liquidation) and Another v Firstrand Bank Ltd, Wesbank Division* [2015] 1 All SA 437 (SCA) the appellants, the dealerships, were companies that had functioned as motor vehicle dealerships, but were now in liquidation. The respondent, FirstRand, had concluded floor plan agreements with each of the dealerships. The agreements reserved ownership in the vehicles sold under them to FirstRand until full payment had been made. The registered address of all of the dealerships was in KwaZulu-Natal.

FirstRand cancelled the agreements and demanded the return of all the vehicles subject to the agreements. It proceeded to collect all the affected vehicles with the permission of the dealerships, and thereafter sold the vehicles. The dealerships were subsequently liquidated. Relying on s 84(2) of the Insolvency Act 24 of 1936 (the Act), the liquidators of the dealerships requested that FirstRand pay them the amounts realised from the

sale of the vehicles. FirstRand acceded to the request and made the payments. It thereafter took the view that s 84(2) did not apply to the amounts and that the payments had therefore been made in the mistaken belief that they were owing. The liquidators refused to repay the amounts and lodged accounts with the Master reflecting the amounts as assets of the dealerships.

FirstRand, in return, successfully applied in the court *a quo* under the *condictio indebiti* to claim back the amounts paid to each dealership.

On appeal to the SCA the court had to determine whether a genuine factual dispute was raised by the dealerships. Gorven AJA decided that a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. It was found that the dealerships' assertions did not give rise to a genuine factual dispute as to delivery of the letters of cancellation.

The dealerships further contended that even if it was found that the agreements were cancelled prior to the commencement of the liquidations, the provisions of s 84(2) of the Act applied to the moneys realised from the sale of the vehicles. That, in effect, amounts to a submission that the payments were not made *indebite* (ie, 'not due') because a valid *causa* for them was provided by s 84(2).

The crisp issue was thus whether s 84(2) applies to property that was the subject of such an agreement where ownership was reserved and where the agreement was cancelled prior to the commencement of the liquidation of a company. That, in turn, depended on a construction of s 84(2). The court found that s 84(2) applies only where an agreement remained in existence and the property in question was, accordingly, subject to the agreement as at the date of commencement of winding-up. By reason of the fact that the agreements in the present matter were cancelled prior to the commencement of the liquidations of the dealerships, s 84(2) did not apply and the payments were made *indebite*.

The court below was, therefore, correct in its finding and the appeal was dismissed with costs.

Set-off

Both debts must be liquidated: In *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) a company, Roofcrafters, sold its invoices to Standard Bank. One of Roofcrafters' debtors was the respondent, Renico. The accounts of Roofcrafters recorded Renico as indebted to Roofcrafters in a sum of close to R 2,5 million. Standard Bank demanded payment from Renico. The latter refused to pay Standard Bank on the ground that Roofcrafters owed it (Renico) more than it owed Roofcrafters. As a result, so Renico argued, these reciprocal debts were extinguished by set-off.

The main question before the present court was whether the debts between Roofcrafters and Renico were capable of set-off. Among the 'debts' Renico wanted to set off against Roofrafters' claim, were claims for contractual damages for a lease breached by Roofcrafters.

Sutherland J first listed the elements of set-off:

- Both debts must be due to and owed by the same pair of persons.
- Both debts must be liquidated.
- Both debts must be due and payable.

The court rejected Renico's alleged claim to set-off. The court held that the flaw in Renico's case was that the computation of contractual damages was not a matter of mere arithmetic. A value judgment had to be made in determining the effects of a reasonable effort to mitigate the damages. Until that debate was exhausted – as a rule before a court – the quantum of damages could not be determined.

The court accordingly held that the contractual damages that Roofcrafters allegedly owed Renico were not a liquidated debt for the purpose of set-off.

However, some of Renico's other claims against Roofcrafters were held to be liquidated and the court accordingly ordered Renico to pay Standard Bank an amount of R 811 501,13, plus interest *a tempore morae*.

Trade marks

Infringement of: The dispute and outcome in *Société des Produits Nestlé SA and Another v International Foodstuffs Co and Others* [2015] 1 All SA 492 (SCA) enjoyed, for reasons that will become clear below, more than mere passing interest from the average chocolate *aficionado*.

The appellants, Nestlé, and the first two respondents, Iffco, were international competitors in the sale of chocolates. They were in dispute about the physical shape, as well as the name of a chocolate bar marketed and sold by Iffco. Nestlé alleged that these attributes of Iffco's 'Break' chocolate bar, infringed trademarks held by Nestlé in the well-known 'Kit Kat' chocolate bar, marketed and sold by Nestlé. It also alleged that those attributes resulted in the passing off of Iffco's chocolate bar for that of Nestlé.

Nestlé had for many years manufactured the four finger and two finger shape 'Kit Kat' wafer chocolate. It is trite that Iffco had recently started to manufacture similarly looking four finger and two finger shape wafer chocolates, which it marketed under the name of 'Break'.

Nestlé unsuccessfully sought interdictory relief in the GP based for trade mark infringement and passing off. Iffco, too, was unsuccessful in its attempt, brought by way of a counter-application before the court *a quo*, to expunge certain shape trademarks held by Nestlé in its Kit Kat chocolate bar, as well as an application to review the

registration of those shape trademarks. Each party obtained leave to appeal to the SCA.

For considerations of space I will merely mention here, that Swain JA, dismissed Iffco's appeal. The court pointed out that Nestlé's chocolate bars had been marketed and sold in South Africa under the name 'Kit Kat', in the shape depicted in the applications for registration, for the past 50 years. In addition, Nestlé had also for a considerable period of time made extensive use of this shape of the chocolate bar in advertisements to promote its sale.

Next, the court was asked to consider Nestlé's claim that its registered word trade marks, which consisted, *inter alia*, of the phrase 'Have a Break, Have a Kit Kat' were infringed by Iffco. The registered word trade marks of Iffco are 'Quanta Break' and 'Tiffany Break', but Iffco used the word 'Break' on its packaging as a trade mark. Nestlé claimed that the use of the word 'Break' as a trade mark is confusingly or deceptively similar to Nestlé's trade mark 'Have a Break, Have a Kit Kat'. In order for a court to find that a consumer would be confused or deceived into thinking that the word 'Break' indicated that the origin of Iffco's product was that of Nestlé, the highly distinctive name of Nestlé's product 'Kit Kat' would have to be ignored. The likelihood of confusion amongst consumers confronted by the respective trade marks had not been established by Nestlé.

As far as Nestlé's main appeal against the dismissal in the court of its application for interdictory relief was concerned, the court ruled as follows: In terms of s 34(1)(*a*) of the Trade Marks Act 194 of 1993, Nestlé had to establish that Iffco had used the mark in respect of the same goods for which the trademarks were registered, which was either identical to, or so nearly resembled the registered trade mark, so as to be likely to deceive or cause confusion. The mark was used in respect of the same goods, namely chocolate bars. The issue, accordingly, was whether there was a likelihood of confusion or deception between the chocolate bars. In addition, Nestlé had to establish that Iffco was using the finger wafer shapes themselves, or on the packaging of its chocolate bar, as a badge of origin and not simply in a descriptive manner. The High Court's findings on that question were found to be incorrect. It was held that the use by Iffco of the shape as depicted on its packaging and its three-dimensional form would be perceived by the consumer as a source identifier, that is, as a badge of origin, of the goods as emanating from Nestlé. The court *a quo*, accordingly, erred in concluding that Nestlé had failed to prove an infringement of the registered finger wafer trade marks in terms of s 34(1)(*c*) of the Act.

Nestlé's appeal was allowed with costs and Iffco was interdicted to infringe Nestlé's trade marks in respect of its four and two finger 'Kit Kat' chocolate wafer bars.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with civil procedure, constitutional law, counsel's fees, criminal procedure, education, environmental law, immigration, interpretation, local government, motor-vehicle accidents, national key points, prisons, and revenue.

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The new Interest Withholding Tax: What attorneys need to know

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On 1 March 2015, a new Interest Withholding Tax (IWT) came into effect in South Africa. From that date, 15% of any interest paid to or for the benefit of a non-resident, from a South African source, must be withheld and the payer of the interest is required to pay the tax over to the South African Revenue Service (Sars).

IWT is among several withholding taxes that South Africa has introduced in recent years. It joins –

- the long standing royalties withholding tax;
- a withholding tax on fees paid to foreign sportspersons and entertainers that debuted in 2005;
- a 2007 withholding tax on proceeds from the disposal of immovable property to non-residents; and
- the 2012 withholding tax on dividends.

Next year, a withholding tax on service fees paid to non-residents has been mooted.

This article attempts to address some of the most frequently asked questions pertaining to the new IWT. It will especially consider aspects of the new tax that are of relevance to attorneys that advise and assist clients involved in cross-border transactions.

Background

It would be useful, as a starting point, to explain why the IWT was introduced in the first place.

Prior to its introduction, interest payable to foreign lenders was exempt from South African tax unless such lenders actively participated in the South African economy in specified ways. That meant that South African tax could only be levied on interest paid to foreign residents that conducted business in South Africa through permanent establishments (ie, generally fixed places of business in South Africa) or to foreign residents that were present in South Africa for more than six months of the tax year. The underlying rationale for this exemption related to the need to attract capital flows to South Africa.

In 2010 however, the South African government, desperate for new sources of tax revenue, announced a change to this policy. It was noticed that most countries did tax interest paid to foreigners, so there was no need for South Africa to be overly generous in this area. Moreover, concerns were raised that the existing exemption fostered tax avoidance schemes and incentivised the funding of businesses with disproportionate debt over equity. Lastly, local funders complained that foreign debt was needlessly given a tax advantage over local debt. Hence, a decision was taken to tax interest on debt extended by foreigners.

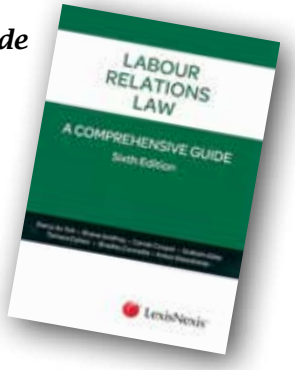
Of course, it is, practically, very difficult to collect tax from non-residents that lack ties to South Africa and, for this reason, a withholding tax was proposed to facilitate ease of administration. Such a tax imposes the obligation for collection or withholding of the tax on the payer of the income as opposed to the recipient. Thus, if the payer is South African, it is easier for the tax authorities to enforce collection of the tax.

Although, the Taxation Laws Amendment Act 7 of 2010 introduced the legislative provisions that imposed the new tax, implementation was delayed for five years to give affected parties time to ready their systems for the withholding obligation.

Notwithstanding this lengthy period, given to businesspeople to prepare themselves for the new tax, there are still lingering questions related to it.

Book announcements

Labour Relations Law
A Comprehensive Guide
By Darcy du Toit (managing ed)
Durban: LexisNexis
(2015) 6th edition
Price: R 855 (incl VAT)
925 pages (soft cover)



Corporate Governance in South Africa With International Comparisons
By Tobie Wiese
Cape Town: Juta
(2014) 1st edition
Price: R 395 (incl VAT)
238 pages (soft cover)

On what interest is the tax levied?

One of the key questions relates to the nature of the interest on which the IWT is levied.

In terms of the legislation, IWT may be imposed on South African sourced interest that is paid to or for the benefit of a foreign person by any person.

The statutory source provisions in the South African Income Tax Act 58 of 1962 deem interest to be from a South African source where that interest is, *inter alia*, received in respect of the utilisation or application, in South Africa, by any person of any funds or credit obtained in terms of any form of interest-bearing arrangement.

This means that the person paying the interest need not be a South African resident. Interest paid by a non-resident borrower to a non-resident lender may be subject to the IWT, if the non-resident borrower has utilised or applied, in South Africa, the funding obtained from the non-resident lender. This will result in a withholding obligation being placed on a non-resident.

Please note though that, in his February 2015 Budget Speech, Finance Minister Nhlanhla Nene has promised to clarify aspects of the definition of interest in the next round of legislative amendments to the Income Tax Act.

Not all South African sourced interest will be taxed. Exemptions from the IWT include interest payable by –

- the government of South Africa (in the national, provincial and local sphere);
- any bank;
- the South African Reserve Bank;
- the Development Bank of South Africa; and
- the Industrial Development Corporation.

Interest payable on so-called 'listed debt' is also exempt from IWT, regardless of the nature of the person paying the interest. (It should be noted that these exemptions are subject to some exclusions. In particular, taxpayers attempting to circumvent IWT through back-to-back loans with banks are in for a nasty surprise – the IWT will be levied on such arrangements. Back-to-back loans refers to arrangements under which banks act as intermediaries for funding between foreign lenders and local borrowers.)

In addition, the IWT provisions make allowance for a reduction in the rate of IWT where the provisions of a Double Taxation Agreement so provide. A Double Tax Agreement refers to a treaty between South Africa and another country that allocates taxing rights. Many of South Africa's double tax agreements reduce the IWT rate – in some cases completely eliminating it. However, the foreign recipient must provide a specific declaration before the payer is permitted to apply the reduced rate. The wording for this specific declaration is available on the SARS website at www.sars.gov.za.

When is the tax levied?

A further tricky question relates to when the tax is levied on the aforementioned interest.

According to the relevant legislation, the IWT provisions will be applicable to interest that is paid or becomes due and payable on or after 1 March 2015.

The meaning of the words 'due and payable', however, is not defined in the legislation and is not entirely clear.

It is indicated in the explanatory memorandum to the new legislation, as well as in other documents prepared by the drafters, that the change in wording means that IWT will not necessarily be imposed on accrual of interest (ie, the date when the recipient acquires an unconditional right to the interest).

There is also strong persuasive judicial precedent which indicates that an amount will only become 'due and payable' at the time at which payment of the amount is stipulated by the parties.

The difference between when an amount of interest is 'incurred or accrues' relative to when the amount is 'due and payable' may be illustrated by a vanilla bullet loan arrangement in terms of which interest is calculated at a fixed rate over the period of the loan but is only payable at the end of the term. From an income tax perspective, the interest on the loan will be deemed to have been incurred or to accrue on a yield to maturity basis over the term of the loan. The interest is, however, only 'due and payable' at the end of the term of the loan (assuming that the words 'due and payable' means at the time at which payment of the amount is stipulated by the parties).

What happens if the tax is not paid?

Failure to comply with the IWT provisions could lead to a tax liability for the party charged with collections of the tax and imposition of penalties and interest on unpaid taxes.

Summary and what attorneys need to know

In summary, attorneys need to be aware of the following important points with respect to the IWT:

- It is imposed on all South African sourced interest paid to non-resident person subject to certain exemptions – this means that even amounts paid by non-resident clients could be subject to the IWT.
- Interest from South African banks is exempt from the IWT unless it arises from a back-to-back loan.
- Double Tax Agreements should be checked to see if they reduce the IWT rate imposed on the interest, but to get the benefit of the reduction, the foreign recipient needs to provide the payer with a specific declaration.
- IWT will only be imposed on interest that is paid or becomes due and payable. Amounts only become due and payable at a time stipulated by the parties.
- Penalties and interest can be levied on the payer if the IWT is not withheld.

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NEW LEGISLATION

Legislation published from 4 March – 27 March 2015

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BILLS INTRODUCED

Plant Breeders' Rights Bill B11 of 2015.
Disaster Management Amendment Bill B10 of 2015.
Plant Improvement Bill B8 of 2015.
Performing Animals Protection Amendment Bill B9 of 2015.
Defence Laws Repeal and Amendment Bill B7 of 2015.
Expropriation Bill B4 of 2015.

COMMENCEMENT OF ACTS

Further Education and Training Colleges Amendment Act 1 of 2013, ss 24, 25(2) and 25(3). Commencement: 1 April 2015. Proc8 *GG*38534/4-3-2015.
National Credit Amendment Act 19 of 2014. Commencement: 13 March 2015. Proc R10 *GG*38557/13-3-2015 (see 2014 (July) *DR* 47 for a discussion).
Financial Management of Parliament Amendment Act 34 of 2014. Commencement: 1 April 2015. Proc 11 *GG*38564/17-3-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Pests Act 36 of 1983
Amendment of tariff for an import permit. GN194 *GG*38546/13-3-2015.

Agricultural Product Standards Act 119 of 1990
Regulations relating to the grading, packing and marking of onions and shallots intended for sale in South Africa. GN192 *GG*38546/13-3-2015.
Animal Diseases Act 35 of 1984
Amendment of tariff for a veterinary import permit. GN190 *GG*38546/13-3-2015.
Auditing Profession Act 26 of 2005
Fees payable to the Independent Regulatory Board for Auditors from 1 April. BN65 *GG*38602/27-3-2015.
Basic Conditions of Employment Act 75 of 1997
Amendment of Sectoral Determination 12: Forestry worker sector. GN208 *GG*38562/13-3-2015.
Collective Investment Schemes Control Act 45 of 2002
Determination of the requirements for hedge funds. BN52 *GG*38540/6-3-2015.
Criminal Law (Forensic Procedures) Amendment Act 37 of 2013
Forensic DNA Regulations, 2015. GN R207 *GG*38561/13-3-2015.
Financial Advisory and Intermediary Services Act 37 of 2002
Determination of fees payable to the Registrar of Financial Service Providers. GN R241 *GG*38597/24-3-2015.
Estate Agency Affairs Act 112 of 1976
Penalty payable for late payment of levies and contributions. GN R244 *GG*38603/27-3-2015.
Financial Institutions (Protection of Funds) Act 28 of 2001
Guidelines on the conduct of curators. BN56 *GG*38550/6-3-2015.
Financial Management of Parliament Amendment Act 34 of 2014
Supply Chain Management Regulations. GN R210 *GG*38565/17-5-2015.
Income Tax Act 58 of 1962
Regulations in terms of s 12L on the allowance for energy efficiency savings. GN R186 *GG*38541/6-3-2015.

Judges' Remuneration and Conditions of Employment Act 47 of 2001
Remuneration of Constitutional Court judges and judges. Proc12 *GG*38568/13-3-2015.

Labour Relations Act 66 of 1995
Rules for the conduct of proceedings before the Commission of Conciliation, Mediation and Arbitration (CCMA). GN R223 *GG*38572/17-3-2015.
CCMA guidelines on misconduct arbitration. GN R224 *GG*38573/17-3-2015.

Magistrates Act 90 of 1993
Determination of the salaries of magistrates. Proc13 *GG*38568/13-3-2015.

Medicines and Related Substances Act 101 of 1965
Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fees for pharmacists. GN R211 *GG*38566/16-3-2015.
Updated schedules. GN R234 *GG*38586/20-3-2015.

Adjustment of fees payable to brokers. GN238 *GG*38591/20-3-2015.

National Credit Act 34 of 2005

National Credit Regulations including Affordability Assessment Regulations. GN R202 *GG*38557/13-3-2015.

Amendment of regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the National Consumer Tribunal. GN R203 *GG*38557/13-3-2015

National Environmental Management Act 107 of 1998

National Appeal Amendment Regulations. GN R205 *GG*38559/12-3-2015.

Perishable Products Export Control Act 9 of 1983

Impositions of levies on perishable products from 1 April. BN66 and BN67 *GG*38602/27-3-2015.

Remuneration of Public Office Bearers Act 20 of 1998

Determination of salaries and allowances of the traditional leaders, members of the National House and Provincial Houses of Traditional Leaders. Proc14 *GG*38568/13-3-2015.

South African Police Service Act 68 of 1995

Amendment of the Regulations for the South African Police Services. GN R206 *GG*38560/13-3-2015.

Spatial Planning and Land Use Management Act 16 of 2013

Regulations in terms of the Act. GN R239 *GG*38594/23-3-2015.

Tax Administration Act 28 of 2011

Listing arrangements for purposes of ss 35(2) and 36(4) of the Tax Administration Act. GN212 *GG*38569/16-3-2015.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Regulations relating to the performance of compulsory community service. GN235 *GG*38574/20-3-2015.

DRAFT LEGISLATION

Draft online regulation policy in terms of the Films and Publications Act 61 of 1996. GenN182 *GG*38531/4-3-2015.

Draft Regulations in terms of s 43(3) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013. GenN152 *GG*38542/6-3-2015.

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Employment law update

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Mutual termination agreements

The applicants in *Schroeder and Another v Pharmacare Ltd t/a Aspen Pharmacare* [2015] 2 BLLR 168 (LC) each signed a 'mutual termination settlement agreement' in terms of which they agreed, *inter alia*, that their employment with Aspen would terminate by mutual agreement on 16 February 2011. It is not apparent from the judgment why the applicants concluded these agreements or what process preceded the conclusion of these agreements. In any event, notwithstanding having concluded the agreements, both applicants subsequently referred an unfair dismissal claim against Aspen to the bargaining council. The presiding arbitrators held that the council lacked jurisdiction to entertain the disputes because of the existence of the agreements. The arbitrators accordingly held that the individual employees were not 'dismissed' but that their employment came to an end by mutual agreement.

The applicants did not challenge the jurisdictional rulings by way of a review to the Labour Court. Instead, on 30 January 2012, the applicants filed a statement of case in the Labour Court in accordance with r 6 of the Labour Court Rules in terms of which they sought an order to set aside the settlement agreements and for reinstatement with retrospective effect. Aspen raised two special pleas in defence: First, it argued that the applicants unduly delayed in challenging the validity of the separation agreements; and second, that the court lacked jurisdiction to determine the dispute.

This matter turned on whether the Labour Court has jurisdiction to set aside an agreement (on grounds such as duress or misrepresentation) entered into between an employer and employee in terms of which a termination is mutually agreed. Van Niekerk J held that it is well-established that the Labour Court's jurisdiction must be established with reference to the applicants' pleadings. In this case, there was no reference to any provision of the Labour Relations Act 66 of 1995 (LRA) that confers jurisdiction on the Labour Court to determine the validity of a settlement agreement. Van Niekerk J held that the court has jurisdiction to make a settlement agreement an order of the Labour Court (see s 158(1)(*c*)). In addition, the court may determine whether an agreement induced by duress or misrepresentation ought to be set aside in the context, for example, of an alleged unfair dismissal for a reason related to the employer's operational requirements. However, in those circumstances, the court exercises jurisdiction by virtue of the fact that the reason for the dismissal (such as the operational requirements of the employer) falls within the court's jurisdictional ambit. Nowhere in the LRA is the Labour Court empowered to consider the validity of a settlement agreement *per se*. With reference to the Basic Conditions of Employment Act 75 of 1997 (BCEA), the court held that it has jurisdiction in terms of s 77 in respect of matters arising from employment contracts. The applicants in this case did not argue that the dispute about the validity of the settlement agreements was a matter that arose from their employment contracts, and consequently the court held that it was not an issue that it was required to decide.

In the circumstances, the applicants' claim was dismissed.

Referral of claims in terms of the Employment Equity Act 55 of 1998

In *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and Others* [2015] 2 BLLR 137 (LAC), the South African Transport and Allied Workers' Union (SATAWU) referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on behalf of certain of its members. The dispute was not resolved and a certificate of non-resolution was issued on 14 November 2011. SATAWU referred the matter to arbitration, which was set down for 12 March 2012. The arbitrating commissioner ruled that the CCMA did not have jurisdiction to arbitrate the dispute since it related to alleged unfair discrimination and should, therefore, have been referred to the Labour Court. SATAWU filed its statement of case in the Labour Court on 12 June 2012, about seven months from the date of the certificate. SATAWU contended that the statement of case was only filed in June due to the internal processes that had to be followed at the union before a decision could be taken to institute proceedings in the Labour Court. It explained that the shop steward who was handling the matter referred it to the union's local Kempton Park office on 30 April. From there it was referred to the provincial office which, in turn, had to refer it to the union's head office. The attorneys were only instructed to act on 24 May 2012 and the first consultation with the attorneys took place on 25 May 2012. A subsequent consultation with the affected employees took place on 6 June 2012; a meeting on the matter took place with the SATAWU president on 11 June; and the statement of case was filed on 12 June 2012.

The applicants' claim concerned alleged recruitment discrimination following the appointment of external candidates (two males and one female) allegedly in violation of the South African Airways (SAA) recruitment policy to the exclusion of the three internal female applicants.

SATAWU applied for condonation of the late filing of its statement of case. SAA opposed the condonation application. The matter came before the Labour Court on 12 December 2012 and the application for condonation was dismissed. The Labour Court held that the statement of claim had to be filed within 90 days of the date of the certificate of non-resolution, namely, by 12 February 2012. The statement of claim was, therefore, four months out of time. The court held that the explanation for the delay in filing the statement of case was weak, and so were the applicants' prospect of success on the merits.

SATAWU appealed to the Labour Appeal Court (LAC). With reference to *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC) the court (per Tlaletsi DJP) confirmed that the applicable time period to refer an unfair discrimination dispute to the Labour Court following the issuing of a certificate of non-resolution is 90 days. Considering the Labour Court's reasoning on condonation, the LAC was of the view that although the delay was lengthy, it was adequately explained. As regards the merits of the unfair discrimination claim, the court stated that the claims were not well-articulated in the statement of claim, but in view of the fact that the onus of proof is on the employer to establish fairness, one should loath to shut the door for the employees in cases of this nature. The LAC furthermore observed that SATAWU had all along intended to have the dispute adjudicated, which was evident from the timely referral of the dispute to arbitration, albeit that this was the wrong forum. The court therefore held that condonation should have been granted and the appeal was successful.

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Termination in breach of a statutory provision – a dismissal or nullity?

Edcon v Steenkamp and Others (LAC) (unreported case no JS648/13, JS51/14, JS350/14, 3-3-2015) (Murphy AJA with Tlaletsi DJP and Musi JA concurring).

Section 189A of the Labour Relations Act 66 of 1995 was introduced to 'enhance the effectiveness of consultation in large scale retrenchments' and allows parties to appoint a facilitator to facilitate consultation between them.

If a facilitator is not appointed then in terms of s 189A(8):

(*a*) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of s 189(3); and

(*b*) once the periods in s 64(1)(*a*) have elapsed –

(i) the employer may give notice to terminate the contracts of employment in accordance with s 37(1) of the Basic Conditions of Employment Act 75 of 1997.

The period referred to in s 64(1)(*a*) is a 30 day period or until such time as a certificate of non-resolution is issued.

In *National Union of Mineworkers v De Beers Consolidated Mines (Pty) Ltd* (2006) 27 ILJ 1909 (LC), Freund AJ had occasion to interpret s 189A(8). In that case the union, acting in terms of s 189A(8)(*a*), referred a dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA) on 30 March 2006. The following day the employer gave its employees notice of termination advising them that their last working day would be 30 April 2006. The union approached the Labour Court arguing that the notice was premature and in breach of s 189A(8)(*b*). The court held that an employer can only serve a termination notice once 30 days have lapsed from the time the dispute was referred to the CCMA or once a certificate of non-resolution concomitant to the dispute referred, was issued. De Beers gave notices of termination a day after a dispute was referred to the CCMA and therefore acted in breach of a statutory provision (ie, s 189A(8)(*b*)) rendering the notices invalid. As part of the court's reasoning Freund AJ relied on the peremptory language used in s 189A(2)(*a*) which reads:

'In respect of any dismissal covered by this section –

(*a*) an employer must give notice of termination of employment in accordance with the provisions of this section.'

In an unrelated case the Labour Appeal Court (LAC) in *De Beers Group Services (Pty) Ltd v NUM* [2011] 4 BLLR 319 (LAC), when faced with a similar situation wherein the employer retrenched its employees before the 30 day period had expired from when the union referred a dispute to the CCMA, relied on Freund AJ reasoning and held that not only were the termination notices invalid but the ensuing dismissals were also invalid. Davis JA held:

'In short, if the employer fails to comply with the mandatory requirement of consultation in terms of section 189(2) and moves to terminate the employment in breach of these provisions, then the dismissal must be considered to be invalid and accordingly of no force and effect'.

Edcon, the employer *in casu*, approached the court for a declaratory order.

Edcon sought an order declaring the decision of the LAC in De Beers was wrong in that a termination in breach of the time periods set out in s 189A(8), should not be deemed void where employees are automatically reinstated as a result of the employers non-compliance with a procedural issue. Under such circumstances, according to Edcon, a court should accept that there was indeed a dismissal and from there decide whether the dismissal was fair or not.

Given the importance of the case, the Judge President directed that the matter be heard by the LAC acting as a court of first instance.

In brief, Edcon's declaratory was launched in response to three separate applications brought against it by employees whom Edcon retrenched and who relied on the principle set out in De Beers to argue their dismissals were void and, therefore, they should be automatically reinstated retrospectively. In all three applications the employees did not allege their dismissals were unfair but rather in breach of s 189A(8).

As a starting point the LAC held that the definition of 'dismissal', as set out in the LRA is wide enough to include an invalid termination in breach of statutory or contractual notice period.

Having made this point the court went on to say that a mere non-compliance with a statutory provision does not automatically lead to a nullity. Various factors must be taken into account in deciding whether such breach leads to any consequential act being declared void. These factors include the subject matter of the prohibition, its purpose in the context of the legislation, any statutory remedy which is provided in the event of a breach, any inconvenience that may flow from invalidity.

The court held that if a statute provides a remedy when one of its provisions are breached or if the declaration of invalidity would have disproportionate or inequitable consequences, then these would be significant factors to support the conclusion that the breach in question does not lead to a nullity.

In analysing s 189A in its entirety, the LAC noted that there was a statu-

tory remedy available to employees. In terms of s 189A(9) when an employer does not comply with the time periods set out in s 189A(7) and (8) and in so doing issues a premature notice of termination, it is open for the employees to give the employer notice to embark on a protected strike. Under this section employees would be entitled to embark on strike action without first having to refer a dispute to the CCMA and waiting for a certificate before giving the employer notice to strike. Alternatively employees may approach the Labour Court on an urgent basis, in terms of s 189A(13) to order the employer to reinstate the employees or prevent the employer from dismissing the employees until such time as the former complies with a fair procedure.

In addition, the court held that compensation was the only remedy available to an employee whose dismissal was unfair for procedural reasons only. However, any violation of the time periods set out in s 189A(8), which must be considered a procedural issue, will be met with reinstatement on the basis that such a breach leads to a consequential dismissal being void – this according to the LAC went against the general scheme of the LRA. The remedy of compensation, as opposed to automatic reinstatement as a result of a statutory breach, under such circumstances would lead to a more proportionate and less capricious consequence.

In arriving at this conclusion the LAC held:

'In the premises, we are persuaded that non-compliance with section 189A(8) of the LRA was not intended by the legislature to result in the invalidity or nullity of any ensuing dismissals. Consequently, we are of the opinion that the decisions in *De Beers Group Services (Pty) Ltd v NUM* and *Revan Civil Engineering Contractors and Others v NUM* were wrongly decided.'

The court ordered the declaratory relief Edcon sought with costs.

• Moksha Naidoo will be conducting a one day labour law seminars on behalf of the Legal Education and Development arm of the Law Society of South African at various provinces in June 2015. For more information and to register please visit www.lssalead.org.za and click on labour law seminar.

❑

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Abbreviations:

EL: *Employment Law* (LexisNexis)
PER: *Potchefstroom Electronic Law Journal* (North West University)
SALJ: *South African Law Journal* (Juta)
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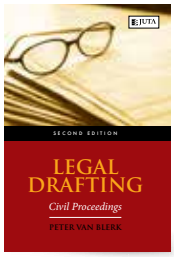

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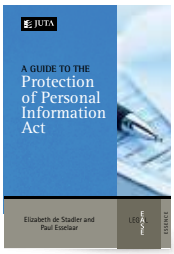

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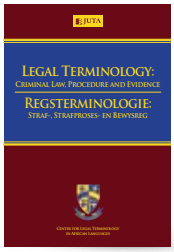

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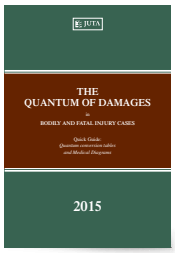

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