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Not so far apart

Virtual visitation
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Cracks in the wall

**What recourse does a
subsequent purchaser have?**

The ending of a customary marriage

*What happens
to the ilobolo?*





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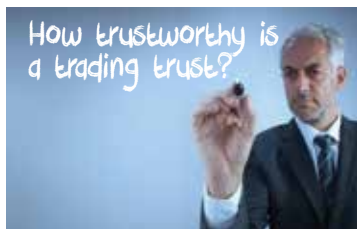
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ACTING EDITOR:

Mapula Sedutla
NDip Journ (DUT) BTech (Journ) (TUT)

NEWS EDITOR:

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NDip Journ (DUT) BTech (Journ) (TUT)

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Danie Olivier (Chairperson), Peter Horn,
Sithembele Mgxaji, Mohamed Randera

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

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Classifieds supplement: Contact: Kathleen Kriel
Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela
Tel (012) 366 8800 E-mail: david@lssa.org.za

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Mapula Sedutla - Acting editor

A crucial transition

As 2013 draws to an end most legal practitioners will be questioning if, in fact, the Legal Practice Bill will be enacted before the country's general elections in April 2014. As previously indicated by the Justice Portfolio Committee, if the Bill is not enacted before a new parliament is elected, all the work that has been done on the Bill will have to be redone. The Portfolio Committee has been earnestly debating the Bill and by mid-October had produced draft 5 of the Bill, with amendments, by the time this issue of *De Rebus* went to print.

The first phase of the implementation process of the Bill will be the establishment of the Transitional South African Legal Practice Council (Transitional Council), which is also referred to as the National Consultative Forum on the Legal Profession (Consultative Forum) in draft 5 of the Bill. The transitional body will exist during the transition period of three years. The Transitional Council/Consultative Forum will be an important body that will influence the future of the organised legal profession and pave the way for the establishment and smooth transition into the permanent South African Legal Practice Council. Its duty will be to iron out and attempt to resolve all the 'contentious' issues that were allocated to it to help speed up the passing of the Bill and any other issues that may arise during the transitional period. Therefore the right people who are well prepared for the hard work ahead should form part of the Transitional Council.

According to clause 96 of the Bill, the Transitional Council/Consultative Forum will comprise of 16 legal practitioners, namely:

- Eight attorneys nominated by the Law Society of South Africa (LSSA), two who represent the Black Lawyers Association, another two who represent the National Association of Democratic Lawyers, one who represents the Cape Law Society, one who represents the Law Society of the Free State, one who represents the Law Society of the Northern Provinces and

one who represents the KwaZulu-Natal Law Society.

- Six advocates nominated by the General Council of the Bar of South Africa.
- One advocate nominated by the Independent Association of Advocates of South Africa, now called the National Bar Council of South Africa (see p 11).
- One advocate nominated by the National Forum of Advocates.
- One teacher of law or legal academic nominated by the South African Law Deans Association.
- Two persons nominated by the Minister, who are fit and proper and have knowledge of the legal profession.
- One person nominated by Legal Aid South Africa.
- One person nominated by the Board of Control for the Fidelity Fund, who may not be a legal practitioner.

The Bill states that the Transitional Council will also be tasked with, *inter alia*, making recommendation within 24 months of existence to the Minister on the following -

- (i) an election procedure for purposes of constituting the first Council;
- (ii) the establishment of the first Regional Councils and their areas of jurisdiction;
- (iii) the powers and functions of the first Regional Councils;
- (iv) the manner in which the first Regional Councils must be elected;
- (v) all the practical vocational training requirements candidate attorneys or pupils must comply with before they can be admitted by the court as legal practitioners;
- (vi) a fees structure for legal practitioners;
- (vii) the right of appearance of a candidate legal practitioner in court or any other institution;
- (viii) a mechanism to wind up the affairs of the Transitional Council; and

(ix) all the requirements necessary for the implementation of compulsory post-qualification professional development.'

It is clear from the above that the Transitional Council/Consultative Forum will have a mammoth task ahead of it during the three-year period.

It is envisaged that some form of public hearings will be held by the National Council of Provinces before the Bill is enacted. Attorneys are urged to be on the lookout for the announcement of the dates and venues of the public hearings, so that they can make an input.

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.

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• Please note that the word limit is now 2000 words.

• Upcoming deadlines for article submissions: 18 November 2013 and 20 January 2014.

LETTERS

TO THE EDITOR

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

Closed corporation liability: Time of deregistration is crucial

I found the article by Perino Pama in the August issue of *De Rebus* very informative (2013 (Aug) DR 38).

I would like to point out that the last paragraph on p 38, going over into the first paragraph on p 39 is not entirely correct. Section 26(5) of the Close Corporations Act 69 of 1984, prior to the Companies Act 71 of 2008, read as follows: 'If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities.'

Section 224(2) of the new Companies Act, which came into effect on 1 May 2011, substituted s 26 of the Close Corporations Act in its entirety to read as follows: 'Sections 81(1)(f), 81(3), 82(3) to (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a

reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.'

Prior to the new Companies Act coming into effect, the members of a closed corporation (CC) were jointly and severally liable for the liabilities of a corporation that was deregistered, if such corporation was deregistered while having outstanding liabilities.

If one has regard to the abovementioned sections of the new Companies Act, the members are now no longer automatically liable jointly and severally with the corporation liable for such liabilities. Section 83(2) of the new Companies Act specifically provides that '[t]he removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register'. Having regard to the changes required by the context, one will therefore have to ascertain to what extent the members of a corpo-

ration were liable for the corporation's liabilities prior to its deregistration.

A litigant will therefore have to determine when the corporation was deregistered, namely, before or after 1 May 2011 and thereafter thoroughly peruse and apply the provisions of either s 26(5) (if the corporation was deregistered prior to 1 May 2011) or ss 63 to 65 of the Close Corporations Act and apply to court to have the members declared personally liable in terms thereof.

If a CC was deregistered prior to the new Companies Act coming into effect on 1 May 2011, the members of the CC will still be liable in terms of s 26(5) of the Close Corporations Act, prior to its substitution. In fact, in the case of *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA), the Supreme Court of Appeal confirmed the principle that where members of a corporation become liable in terms of the provisions of s 26(5) (as it was prior to substitution), such members will remain liable even if the corporation is later reregistered.

In summary, the above statement made by Ms Pama in the article, is appli-



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cable only in respect of corporations deregistered prior to 1 May 2013. With regards to the liability of members of corporations deregistered on or after 1 May 2011, the liability will depend on the provisions of ss 63 to 65 of the Close Corporations Act.

Charl van Rensburg,
attorney, Pretoria

On land registration and the owner of origin

South Africa has a negative system of land registration, which means that original owners are protected. Due to the excellent administration of the system there have been very few failures over the some 350 years that the deeds registry system, if I may call it that, has been in operation.

I recently received the following interesting e-mail message from a friend:

'A lawyer to love - very rare

A New Orleans lawyer sought a Federal Housing Administration (FHA) loan for a client who lost his house in hurricane Katrina and wanted to rebuild. He was told the loan would be granted if he could prove satisfactory title to the parcel of property being offered as collateral. The title to the property dated back to 1803, which took the lawyer three months to track down. After sending all the information to the FHA, he received the following reply:

"Upon review of your letter adjoining your client's loan application, we note that the request is supported by an abstract of title. While we compliment the able manner in which you have prepared and presented the application, we must point out that you have only cleared title to the proposed collateral property back to 1803. Before final approval can be accorded, it will be necessary to clear the title back to its origin."

Annoyed, the lawyer responded as follows:

"Your letter regarding title in case no. 189156 has been received.

I note that you wish to have title extended further than the 194 years covered by the present application. I was unaware that any educated person in this country, particularly those working in the property area, would not know that Louisiana was purchased by the United States (US) from France in 1803, the year of origin identified in our application.

For the edification of uninformed FHA bureaucrats, the title to the land prior to US ownership was obtained from France, which had acquired it by right of conquest from Spain. The land came into the possession of Spain by right of discovery made in the year 1492 by a sea captain named Christopher Columbus, who had been granted the privilege of seeking a new route to India by the Spanish monarch, Isabella.

The good queen, Isabella, being a pious woman and almost as careful about titles as the FHA, took the precaution of securing the blessing of the Pope before she sold her jewels to finance Columbus' expedition. Now the Pope, as I am sure you may know, is the emissary of Jesus Christ, the Son of God, and God, it is commonly accepted, created this world. Therefore, I believe it is safe to presume that God also made that part of the world called Louisiana. God, therefore, would be the owner of origin and His origins date back to before the beginning of time, the world as we know it, and the FHA.

I hope you find God's original claim to be satisfactory. Now, may we have our damn loan?"

He got the loan.'

In America, they also have a negative system of land registration, but they do not have an excellent system like we have of monitoring it. They have what is called 'title insurance', which is quite expensive and enables them to prevent the kind of problem that the lawyer faced in the extract above.

Arthur Schoeman,
attorney, Paarl



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SCA overturns High Court CCMA representation judgment

The Supreme Court of Appeal has overturned a judgment by the North Gauteng High Court that found the Commission for Conciliation, Mediation, and Arbitration's (CCMA's) rule that limits legal representation to be unconstitutional.

This appeal was based on the constitutionality of r 25(1)(c) of the rules for the conduct of proceedings before the CCMA. Rule 25(1)(c) limits the right to legal representation in CCMA arbitration proceedings on the fairness of dismissals for misconduct or incapacity and subjects it to the discretion of the commissioner, unless the commissioner and all the parties consent.

In October 2012 the High Court, per Tuchten J, found the subrule to be unconstitutional and invalid, but suspended the declaration of invalidity for a period of 36 months to enable the parties to consider and promulgate a new subrule. In the meantime, r 25(1)(c) continued to apply.

In the case of *The Law Society of the Northern Provinces v Minister of Labour and Others* (GNP) (unreported case no 61197/11, 11-10-2012) (Tuchten J), the Law Society of the Northern Provinces' (LSNP), *inter alia*, argued that r 25(1)(c) was unconstitutional and that it discriminated unfairly against attorneys' constitutional rights regarding the free choice of their profession and that it therefore denied LSNP members work.

Rule 25(1)(c) states:

'If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties, despite subrule 1(b) are not entitled to be represented

by a legal practitioner in the proceedings unless –

- 1) the commissioner and all the other parties consent;
- 2) the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering –
 - (a) the nature of the questions of law raised by the dispute;
 - (b) the complexity of the dispute;
 - (c) the public interest; and
 - (d) the comparative ability of the opposing parties or their representatives to deal with the dispute.'

The appellants in the matter were the CCMA and its director, the Minister of Labour and the Minister of Justice and Constitutional Development.

The unanimous judgment on the appeal was delivered on 20 September. The SCA concluded that the High Court was wrong in declaring r 25 (1)(c) unconstitutional. The SCA, *inter alia*, found that the High Court disregarded ample evidence placed before it justifying the limitation of legal representation in dismissal cases.

The SCA, as per Malan JA, held that the sole concern of the LSNP in bringing the application was that the rule denied work to its members. The court held that: 'Nothing in the Constitution nor any decided cases suggests that lawyers have a right to receive business. Where they receive business through the operation of the courts or other tribunals that is because their clients have a right to employ their services and not because they have a right to provide them.'

The SCA declared that it did not seem

like the LSNP was pursuing the interests of those who use the CCMA services. 'Indeed, there is not the slightest suggestion in its papers that the restriction on the right to legal representation causes hardship to or has operated to the prejudice of those affected by it. Nor is there any suggestion that the major parties concerned with labour disputes – employers' organisations and trade unions – support the application of the Law Society', the judgment states.

The CCMA has welcomed the judgment. Its director, Nerine Kahn said in a statement: 'This is a historic judgment and reconfirms the spirit in which the LRA [Labour Relations Act 66 of 1995] was drafted. This clause is at the heart of redressing our past and establishing the new labour dispensation. Dismissal disputes comprise of more than 80% of all matters, and this clause underpins the objective of providing an accessible, equitable, speedy and cheap access to redress unfair dismissals.'

Ms Khan said that the involvement of legal practitioners in CCMA processes had been the subject of ongoing debate for many years, with the CCMA seeking to ensure that their involvement is kept to a minimum, adding that this was primarily to ensure that costs were kept to a minimum to allow for cheap and equitable access.

- See 2012 (Dec) DR 24,

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

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Spotlight on the rights of unmarried fathers

McLarens Attorneys held a seminar on the rights of unmarried fathers in September 2013. The seminar was co-hosted by candidate attorney Nuno Palmeira and law firm founder Ian McLaren and was held at its offices in Randburg.

Mr Palmeira said that the aim of the seminar was to clear up some of the vexing issues as the rights of unmarried fathers has become topical.

According to Mr Palmeira, the Children's Act 38 of 2005 (the new Act) repealed many of the old laws that regulated the relationship between parents and their children in South Africa, including the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (the old Act).

Mr Palmeira said that the High Court was the upper guardian of children. He added that the public's perception was that the rights of fathers were limited in respect of their children, that the mother has complete control over what is best for the child and that the father's views were limited. He added that these perceptions were incorrect in terms of the new Act.

Mr Palmeira stated that many unmarried fathers are disillusioned and confused about their rights and responsibilities in respect of their children. 'Some believe that they have lost any rights that were afforded to them by the old Act and that the new Act secures the rights of mothers only,' he said, adding that this was not the case.

'Previously the rights and responsibilities of unmarried fathers were governed by the provisions of the old Act. This Act proved, in various situations and circumstances, to be inadequate in protecting the interests, rights and responsibilities of unmarried fathers, their children and the relationship between them. This inadequacy is hoped to have been remedied by the promulgation of the new Act,' he said.

Mr Palmeira said that s 20 of the new Act states:

'The biological father of a child has full parental responsibilities and rights in respect of the child

(a) if he is married to the child's mother; or

(b) if he was married to the child's mother at -

(i) the time of the child's conception;

(ii) the time of the child's birth; or

(iii) any time between the child's conception and birth.'

He added that s 20 clearly places biological fathers of children on the same level as the biological mother as long as the father falls into one of the four men-



Candidate attorney Nuno Palmeira of McLarens Attorneys speaking at the firm's recent seminar on the rights of unmarried fathers.

tioned categories. He explained what happened if the father did not fall into any of the categories.

Mr Palmeira said that s 21 of the new Act speaks on parental rights and responsibilities of unmarried fathers. He said that s 21 states:

'(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child -

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother -

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.'

'In basic terms, s 21 automatically bestows parental responsibilities and rights

on unmarried biological fathers of children if the father is living with the biological mother when the child is born, or if he does not live with the mother, when he accepts to be identified as the child's biological father or has proven his paternity in court, and has contributed or tried to contribute to the child's upbringing and maintenance. Section 21 therefore grants and protects the rights of unmarried fathers more adequately than previous legislation. This protection, however, does not detract or alter the duty a father has to pay maintenance for his children,' said Mr Palmeira.

Mr Palmeira added that ss 20 and 21 changed the law drastically and gave fathers more rights. He added that fathers can now have joint parental responsibilities and rights with mothers, and all major decisions relating to a minor child needs to be taken by the parties jointly.

Mr Palmeira said that there was a clear distinction between maintenance and contact. He said that maintenance was a legal obligation of all parents and that contact was a legal right that can be varied, awarded or removed.

According to Mr Palmeira, even in a situation where a child's parents were not married, a father can now apply for parental responsibilities and rights if he complies with one of the requirements of s 21. 'In such a situation the mother would still remain the primary caregiver of the child, but the father would now have joint parental responsibilities and rights in respect of the child and thus have a say in the decisions pertaining to the child,' he said.

Mr Palmeira concluded by saying that fathers of children born out of wedlock now had more effective ways to obtain, challenge and enforce the rights they may have in respect of their children, adding that the new Act has addressed the failures of the past and has provided for equality between parents.

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

Erratum

The correct URL in the article, 'Free online legislation project launched' (2013 (Oct) DR 19), is <http://www.lawsouthafrica.up.ac.za/>

Fiduciary experts discuss wills, estate planning, trusts and deceased estates

The Fiduciary Institute of Southern Africa (FISA) held its third annual conference on 19 September in Midrand where fiduciary practitioners and academics discussed issues in the fiduciary industry.

Fiduciary practice includes estate planning, the drafting of wills and the administration of trusts, beneficiary funds and deceased estates. The topics discussed included the winding-up of 'bloody' estates, corporate liability of trustees, wills and marital regimes and estate planning.

Speakers at the event included professor at the department of private law at the University of Pretoria, Linda Schoeman-Malan; estates and financial planning lecturer at the North West University, Anje Vorster and director and deputy dean of the law faculty at the University of the Western Cape, Professor Francois du Toit, the chief master of the High Court, advocate Lester Basson, fiduciary specialists Tiny Carroll, Ronel Williams, as well as head of the wills and deceased estates department at Routledge Modise Inc, Arnold Shapiro. Mr Shapiro is also the co-author of the lecture notes used for practical legal training at the Law Society of South Africa's Legal Education and Development department for courses on wills and the administration of deceased estates.

Ms Schoeman-Malan's presentation was titled 'Winding-up the "bloody" estate'.

Ms Schoeman-Malan proposed an



Head of the wills and deceased estates department at Routledge Modise Inc and co-author of the lecture notes used for practical legal training at the Law Society of South Africa's, Legal Education and Development department for courses on wills and the administration of deceased estates, Arnold Shapiro, speaking on wills at the annual conference of the Fiduciary Institute of Southern Africa.

amendment to the Wills Act 7 of 1953. She said that the amendment would clarify the position of potential heirs who are unworthy to inherit from the estate of a deceased person. She said that there has been a large number of cases where family violence could have the effect that a person who stood to inherit may be disqualified.

Ms Schoeman-Malan said that in the past, in common and case law, the Dutch maxim '*de bloedige hand neemt geen erfenis*', of which the direct translation is 'the bloody hand does not inherit', has been interpreted slightly differently depending on circumstances. She said that the mere fact that someone had been convicted in a criminal trial for actions that led to the death of the testator from whom the convicted person stands to inherit, did not automatically lead to unworthiness and added that a civil court case was mostly necessary.

Ms Schoeman-Malan proposed an amendment to the Wills Act by inserting a s 4B that would read as follows:

4B. Lack of competency of persons involved in the death of the testator

(1) Any person who intentionally or negligently causes or contributes to the death of the deceased, is unworthy to take any benefit from the estate of the deceased.

(2) Any person who causes or contribute to the death of the deceased is also unworthy to inherit from the spouse, chil-

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dren or parents of the deceased.

(3) Any person who shows objectionable behaviour/conduct towards the deceased or who has committed a crime resulting in financial benefits indirectly from the estate of the deceased, is unworthy to benefit from his wrongful act.

(4) Notwithstanding the provisions of subsection (1):

(a) A court may declare a person referred to in subsections (1 – 3) to be capable (worthy) to receive a benefit from a will of the deceased or otherwise from the estate of a person if the court is satisfied that the person's act was justifiable or he or she is not accountable/blameworthy.

(b) A conviction of a crime in a criminal case, related to the death of the deceased or to a benefit that accrues to the person, is sufficient evidence for subsections (1) and (2) to take effect.

(5) For the purpose of subsections (1) and (2) the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will.

She said that the Wills Act already disqualifies certain persons from inheriting, such as someone who has handwritten the will of a deceased person or someone who has witnessed the will. She said that expanding these disqualifications and making the findings of a criminal court admissible evidence in a civil case were much needed amendments.

Ms Williams spoke about the practical problems the executor in a deceased estate faces in cases where potential heirs are disqualified, either by the mentioned existing provisions of the Wills Act, or by the 'bloedige hand' rule.

She said that the consequences of a disqualification are usually disruptive on the performance of the functions of the executor. Ms Williams said that an executor has to make tough calls and is caught between not wanting to transfer an inheritance to someone who is under a cloud as a potentially unworthy person, and the requirements of the Administration of Estates Act 66 of 1965, as well as the demands of the Master of the High Court under this Act.

Ms Vorster spoke about the corporate liability of trustees. She began by saying that it was important to understand the nature of trusts, as explained in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at para 10:

'Except where statute provides otherwise, a trust is not a legal person. It is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality.

It vests in the trustees and must be

administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust's constitutive charter. Outside its provisions the trust estate cannot be bound.'

She emphasised that trustees are duty bound to understand the contents of the trust deed and to execute it faithfully while exercising an independent discretion.

Mr Shapiro spoke on wills under the title: 'Your will – a legacy of love or a deluge of destruction?' He said: 'A good will is not that it will stand up in court, but that it will not need to go to court at all.'

Mr Shapiro said that everyone dies with a will, 'you either make your own will, or the law makes it for you – under the rules of intestate succession'. He added that one of the most common mistakes people make when considering a will is assuming that their estates are not worth enough to warrant a will. 'We work so hard to accumulate a nest-egg for our near and dear ones when we are no longer here to provide for them but leave the distribution of one's hard-earned wealth when it really counts, to chance,' he said, adding that even though certain property is not in one's estate, it still may be dutiable. Mr Shapiro said assets such as life insurance proceeds, accrual claims, foreign assets, usufructs and fiduciary interests are included in one's estate for the calculation of estate duty.

Mr Shapiro said that one's will was the document that gives dignity to one's financial affairs and determines the orderly distribution of one's estate when one is no longer here to do so. He added that a will was a letter of gratitude and should leave a legacy of love.

Mr Shapiro then gave a few pointers on the drafting of wills. He said according to s 4 of the Wills Act, a will can be drafted by anyone who is 16 years or older unless the person, at the time of making the will, is mentally incapable of appreciating the consequence of his or her actions.

Mr Shapiro then spoke about witnesses of a will. He said:

- Anyone who is 14 years or older who at the time he or she witnesses the will is not incompetent to give evidence in a court of law.
- A beneficiary named in a will should not sign as a witness as he or she may be disqualified from receiving any benefit from the will; however, the will remains valid.

Mr Shapiro highlighted the formal requirements to validate a will outlined in s 2 of the Act. The requirements are as



The Chief Master of the High Court, advocate Lester Basson, speaking at the Fiduciary Institute of Southern Africa's annual conference in Midrand in September.

follows:

- The will must be in writing – by hand, typed or printed.
- The maker of the will (testator) must sign it at the end of the will.
- The testator must sign all other pages of the will, anywhere on the pages other than the page on which it ends.
- The testator must sign the will in the presence of two competent witnesses.
- The competent witnesses must sign the will anywhere on the last page of the will in the presence of the testator and of each other.

He added that the definition of 'sign' includes initials and, only in the case of a testator, a mark.

Mr Shapiro said that for a will to be valid there must be absolute compliance with the requirements of the Act. If a will fails to comply, it will be rejected by the Master, which may lead to a High Court application 'to rectify what you should have done correctly in the first place'.

According to Mr Shapiro, one's will should be a practical document in simple language that records one's intention and is easy to understand and execute. 'Do it yourself cheapies are really not adequate and often end up costing a lot more than the imaginary saving, leading to difficulties, delays and the expense of court cases,' he said.

Mr Shapiro touched on the parties excluded from benefiting from a will. He said that these included:

- A witness to a will or a person who signs the will on behalf of the testator or a person who writes the will or any part thereof in his or her own handwriting (manuscript) and any person who is the spouse of such person at the time of execution may be precluded from receiving

ing any benefit from the will.

- Where a witness to a properly executed will is also named as a beneficiary in the will, the will remains valid but the witness may be precluded from inheriting.

He concluded by stating that a will does not have a sell-by date as it remains operative until it is revoked. Mr Shapiro stressed that it was imperative that one's will be updated on a periodic basis, but especially when there is a change in status such as a birth, death, marriage, cohabitation, divorce or separation.

Mr Carroll discussed the impact of the different matrimonial property regimes on estate planning. He stated that, although they do not realise it, most people have four different 'estates', namely –

- personal assets,
- trust assets;
- contractual arrangements such as life assurance with nominated beneficiaries; and
- retirement benefits.

Mr Carroll added that the latter three cannot be bequeathed in a will.

Mr Basson addressed the conference on the systems and information technology developments in the registration of trusts at the various offices of the master across the country. He said that after a few weeks of testing, it was all systems go for the New Integrated Case Management System for Masters Trust. Mr Basson said that the pilot projects at the Pretoria and Pietermaritzburg masters offices proved that the system was stable and ready for more volume. He said that there were no issues or timeouts on the new system, even with a remote slow internet connection.

Mr Basson added that there was a phased-approach rollout of the system at all masters offices country-wide from September. At the time of the conference, the next rollouts were planned for Cape Town, Bloemfontein, Kimberley, Johannesburg and Durban before the end of October 2013.

Mr Basson concluded by saying that it

is envisaged that the process will be virtually paperless in the near future.

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

Income tax appeal hearings chairpersons appointed

The Minister of Finance, Pravin Gordhan, has appointed and reappointed a number of attorneys and advocates as chairpersons of the tax board for the hearing of income tax appeals. The appointments were made in terms of s 111 of the Tax Administration Act 28 of 2011.

Minister Gordhan re-appointed 24 people of which half are attorneys and half are advocates. The new appointments consist of 50 attorneys and 39 advocates.

The candidates were appointed from August 2013 for a period of five years.

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

Name change announcement

The Independent Association of Advocates of South Africa has changed its name to the National Bar Council of South Africa (NBCSA). The chairperson of the NBCSA, Mark Hawyes told *De Rebus* that it was resolved to change the name at its annual general meeting held in June because, with the previous name, the community thought that the NBCSA was linked to independent advocates, which was not the case. The new name came into effect on 9 June 2013.

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Forum for candidate attorneys launched

The Candidates, a recently formed forum for candidate attorneys, was launched in Johannesburg on 2 October.

The inaugural meeting and launch was addressed by the Deputy Public Protector, advocate Kevin Malunga; former acting Judge in the South Gauteng High Court advocate Herman van Eeden SC and masters scholar in psychology Jennifer van den Dool who spoke about the legal responsibilities and ethical duties towards justice, the role of candidate attorneys in the legal profession and the benefits and choice of positive thinking respectively.

The Candidates was formed by Pierre du Toit (24) with the intention for it to be a representative forum or gathering for young candidate attorneys who want to be actively involved in the profession and not just be mere professional 'go-fers' (go fetch this and go fetch that).

Mr Du Toit told *De Rebus* that the forum is intended to be a voice for those who are afraid to speak up, as well as to provide the opportunity to promote and encourage integrity and uprightness. 'It is ultimately intended to be a "think tank" for young minds equipped with the knowledge to effect change, by sculpting a unified direction - the fruit of our tree will truly be tasteful, multicultural and multidirectional.'

Mr Du Toit stated that The Candidates is intended to provide hope and comfort that there are other candidate attorneys out there who are struggling too and that it is acceptable to ask for help. 'I feel that [candidate attorneys] can often, as a result of their unequal bargaining

power, be subjected to various forms of abuse, which must be seen not to be tolerated. I believe it is only once these ideals are made known, that those who are too afraid, or worse yet too tailored not to speak, will come forward. If one considers the letters to the editor and the responses thereto published in the February, March and April 2013 editions of *De Rebus*, it is easy to infer the need for such a gathering,' he said.

Mr Du Toit said that candidate attorneys will get the opportunity to raise their concerns, experiences and lessons learnt freely and that should any notions raised become collective concerns, it is intended that the forum will file a report to the respective law society to consider, comment on and act on these concerns if the need arises.

Academics, practitioners, retired judges and arbitrators will be invited to address the forum on concerns raised. The Candidates will meet every six weeks or alternatively when the need arises to discuss issues or problems encountered in the profession.

Mr Du Toit said that the forum will also go into townships and, *inter alia*, educate the community on basic rights such as consumer protection, education, medical treatment and procedurally adherent arrests. 'We will make it known that candidate attorneys are more involved, more powerful and more valuable than the ratio of our billables in comparison to our salaries', he said.

In his address Mr Malunga explained the difference between juristic responsibilities and ethical duties. He said that juridical duties are duties that may be coercively enforced by external forces such as civil or criminal laws or other social pressures, while ethical duties are not externally enforced. Instead, the subject, through his or her own reasoning, feelings and motives must compel himself or herself to follow them.

Mr Malunga said that against this background it is clear that ethics are about something more than rules. He said it is a personal commitment to doing what is right, adding: 'To the legal profession our ethics represent our commitment to do what is right by the law, our clients, our colleagues and by the community.'

Mr Malunga said there were four fundamental ethical principles for lawyers, namely fidelity, honesty, propriety and competency. He explained each principle as follows:

- Fidelity primarily describes the loyalty owed by a lawyer to his or her clients. A lawyer must ensure that the advice and service offered serve the client's best in-



Former acting Judge in the South Gauteng High Court, advocate Herman van Eeden SC, spoke on the role of candidate attorneys in the legal profession at the recent launch of The Candidates.

terests uninfluenced by any other motivation.

- Honesty means telling the truth through both commissions and omissions. The emphasis is on what is said but also on the absence of deceit with an emphasis on what is not said.
- Propriety is derived from the same root as 'proper' and relates to how a lawyer conducts himself or herself in relation to the external stakeholders in the administration of justice.
- With regard to competency there is general consensus that there is no obligation on a lawyer to take on every matter that presents itself and instructions should only be accepted by a practitioner confident of his or her competency in regard to the matter presented.

Mr Malunga said that lawyers occupy a critical position in the administration of justice and the rule of law. He said that in most legal systems the role that lawyers play in the proper functioning of civil society are so critical that mere legal qualifications or membership of a professional association are not enough to equip them to practise law.

'As officers of the court, lawyers have a fundamental duty to assist and promote the administration of justice and to serve the community to that end. That is why the practice of law is unlike any other business and will always be far more than a mere industry', he said.

Mr Van Eeden spoke on the role of candidate attorneys in the legal profession. He examined it from two angles: First, what firms expect from candidate



The founder of The Candidates, Pierre du Toit at The Candidates' inaugural meeting and launch in October.

attorneys and, secondly, what a candidate attorney expects from himself or herself and what he or she wants to get out of it.

Mr Van Eeden said that law firms have great expectations for candidate attorneys. He said that candidate attorneys play a very important role in the litigation team and that this role was certainly not something that should be underestimated. He highlighted three major expectations that the litigation team would have of the candidate attorney.

'The first one is attention to detail,' he said. 'If you perform at 80% of your ability, I think that it is just not good enough. In litigation you enter a zero-tolerance zone where only 100% is good enough.' Mr Van Eeden said that the biggest reason for the postponement of trials was because the attention to detail was not what it should have been. He advised candidate attorneys to ensure that they equip themselves to pay proper attention to detail. 'Read the rules, read the practice manual and ask for advice,' he said. 'The expectation of attention to detail includes a number of things. It includes the photostating process, trial bundles, discovery process and pagination. We still work in an era where we use hard copies in court. Do not think yourselves above those issues. You are put in charge of them; rise to the occasion,' he urged.

Mr Van Eeden said that the second expectation the litigation team has of candidate attorneys is that they should be the master of the brief. 'You are typically involved from the beginning. You consult with witnesses, you prepare the discovery and you will assist in the preparation of the trial bundle. All of that qualifies you as the first port of call and if you equip yourself as master of the brief, everyone will turn to you with their questions,' he said. He added that without that kind of assistance the team was invariably in trouble.

'The third expectation is the participation of the candidate attorney as a young pro-

fessional,' he said. He added that if a candidate attorney has done all of the above, then he or she has equipped himself or herself to participate. 'I believe that there are some obstacles in your way, you may think that your lack of experience operates as an impediment. I know there sometimes are firms that discourage candidate attorneys from participating; in my experience I have learnt that it is the wrong thing to do,' he said. He encouraged candidate attorneys to take their rightful place as young professional members of the litigation team. 'Do not be shy to share your views, have faith in your own ability if you have paid the proper attention to detail and have mastered the brief; you should participate, that is your right,' he said.

Mr Van Eeden said that he is aware of the fact that candidate attorneys have their own expectations but encouraged them to adopt two further expectations. The first one was experience: 'Everyone understands that candidate attorneys may lack experience, but that is why you are a candidate attorney and it is the ideal time to learn and ask questions at every opportunity. Do not be afraid to make a mistake, just do not make the same mistake twice,' he said.

Mr Van Eeden said that the second expectation was that of networking. 'I believe it is very important to meet people in the profession and your two-year stint as a candidate attorney gives you the ideal opportunity to do just that. It starts with your equals, but it is not limited to members of the profession. It is also important to meet those you interact with on a daily basis. Do not underestimate the importance of court personnel; you will need to familiarise yourself with them and building good relationships with them will help you a lot. The more people you can include in your network, the better,' he advised.

He concluded by saying that competent candidate attorneys make competent practitioners.

De Rebus caught up with a number of candidate attorneys who were at the launch of 'The Candidates' forum for candidate attorneys and asked them what they thought of the forum. This is what they had to say:

Phumelele Jabavu, candidate attorney at Edward Nathan Sonnenbergs.

'I think it is a great initiative. It is a platform where young professionals can share their ideas on how they would like to see the legal profession improved. But more than anything else, it enhances our knowledge and views of what our role as candidate attorneys should be when it comes to judicial conduct and the legal fraternity at present. It will also teach us how we can take it forward and develop it. I really think that it is a brilliant initiative and I look forward to being part of it.'



Blair Wassman, candidate attorney at Fairbridges Attorneys

'I think it is a good thing for candidate attorneys to have a forum where they can voice their opinions and share ideas and where they can discuss matters and concerns together. It is something that I am quite passionate about. I think it is a positive and motivational way forward.'

Palesa Letaba, candidate attorney at Routledge Modise.

'It is quite innovative. I am happy to be part of a forum where people have a common ground and can relate to one another. I do not know if I would have thought of it myself, it is an awesome initiative. Being a candidate attorney is hard and you feel like the only people who can relate to the situation are the people within your group. It is nice to know that there is now actually such a forum.'



Scott McPherson, candidate attorney at De Jager & Kruger.

'I think it is a very positive thing in the profession and I believe that it will move the profession forward. It is refreshing to know that candidate attorneys have a support structure.'

To become part of The Candidates, send an e-mail to Mr Du Toit at pierre@hooyberg.com. Participation is free and the only requirement is that you must be a candidate attorney.

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

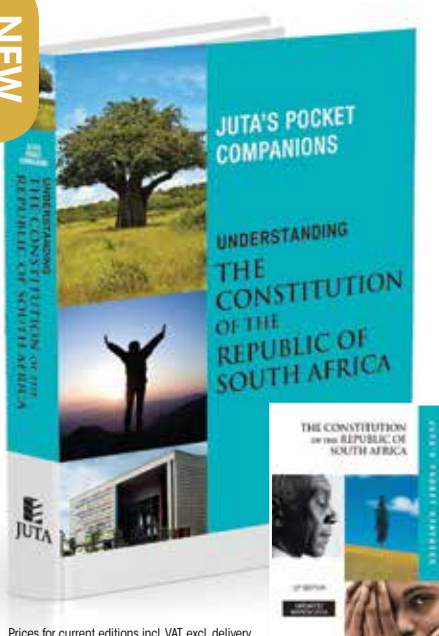
Labour law seminar



South African labour law writer, John Grogan speaking at the annual Juta labour law seminar held recently. Mr Grogan said that an employment contract and what it contains is not worth the paper it is written on as the Labour Relations Act 66 of 1995 supersedes the contract. He advised those present to take this into account when dealing with matters of unfair dismissals.

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Lawyers against Abuse holds annual auction



Lawyers against Abuse (LvA) Art Auction Project Manager Donna Wright; LvA patron and chairman of law firm ENS Professor Michael Katz and chairperson and director of the Centre for Applied Legal Studies Professor Bonita Meyersfield at the recent LvA auction.

The Lawyers against Abuse (LvA) held its second annual art auction in September. The artworks and photographs that were auctioned off were donated by various collectors, as well as established and emerging artists.

Claire Veitch who does LvA's marketing and communications told *De Rebus* that 52 pieces were sold at the auction, raising R 220 000. She added that R 70 000 was raised last year. 'It is a phenomenal 214% more than the amount raised in 2012,' she said.

Ms Veitch said that the bids ranged from R 650 to R 49 000. 'While many of the pieces echoed issues close to the [LvA] cause, others were light and bright, linking the passion of the artists to the passion of the LvA team', said Ms Veitch.

Ms Veitch said that the proceeds of the auction will

be used to provide LvA clients with professional legal advice, assistance and representation in cases relating to gender-based violence.

LvA is a team of specialised lawyers who work with psychologists to provide direct and immediate legal services to women, children, adolescents and men who are survivors of gender-based violence.

The auction was a joint initiative of LvA and arts insurance company, Artinsure, as well as auctioneers of decorative and fine arts, Stephan Welz & Co.

Ms Veitch said that LvA is completely dependent on fundraising so it needed to be proactive by running its own fundraising initiatives. 'The art auction idea came into being last year as a positive and inspiring way to celebrate 16 Days of Activism in South Africa', she said.

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

LSSA and RAF agree to cooperate in fighting corruption in the RAF claims process

At a high-level meeting in Centurion in September 2013, the Law Society of South Africa (LSSA) and the Road Accident Fund (RAF) committed to maintaining mutually beneficial relations to ensure that the best interests of road accident victims are served. In addition, both organisations agreed to root out fraud and corruption actively in the road accident claims process.

The meeting was initiated by the LSSA with a view to discussing matters of mutual interest and establishing channels for continuing communication and cooperation. LSSA Co-chairpersons, Kathleen Matolo-Dlepu and David Bekker, were accompanied by members of the LSSA's Management Committee and directorate, and the RAF management team was

joined by RAF board members Tondani Moyo and Jerry Masekoameng. RAF Chief Executive Officer, Dr Eugene Watson, outlined the state of his organisation and took the opportunity of highlighting its new structure, challenges and plans going into the future. He introduced the organisational flagship projects that include the Road Accident Benefit Scheme and 'RAF on the Road', as well as the customer services centres. He also emphasised the importance of the roles that these projects will play in improving claimants' lives.

From the LSSA's side, Mr Bekker stressed the importance of maintaining good relations between the two organisations and highlighted the significance of constant engagement on all matters of mutual interest. In addition, it was stressed that both organisations have

a joint obligation to root out fraud and corruption, which has had dire consequences to the reputations of the RAF and attorneys' profession.

In a joint press statement issued after the meeting, the LSSA and RAF indicated that a joint strategy to deal with criminal elements in and outside of both organisations should be considered. Both parties committed themselves to sharing information with each other promptly. Key areas of mutual concern such as fraud, delays in finalising claims, the accumulated backlog of both claims and bills of costs, underutilisation of undertakings issued for future medical treatment, and the costs associated with the finalisation of claims, were identified. Suggestions were tabled in order to improve delivery of compensation to claimants.

Profession discusses problems with refugees' and immigrants' banking accounts with stakeholders

In September 2013 members of the Law Society of South Africa's (LSSA's) Immigration and Refugee Law Committee met with representatives of the South African Banking Association, the Financial Intelligence Centre and the Deputy Director-General, Immigration Services from Department of Home Affairs, Jackson McKay. The LSSA delegation, led by Co-chairperson Kathleen Matolo-Dlepu, included committee members Julian Pokroy and Chris Watters, as well as Lizette Burger and Andrew Sebatu from the LSSA professional affairs department.

This meeting was a follow-up to a prior meeting held in June 2013 at the request and instance of the LSSA's immigration and refugee law committee.

The request for the meeting was based on inquiries from the organised legal profession regarding the approach of the commercial banks towards temporary residence permit holders who are on invalid work and other permits, but had applied timeously for extensions of these and, due to delays within the Department of Home Affairs, had reached the expiry dates of their permits without their extension applications being finalised. This period varies between one and nine months past the expiry dates of the original permits. One of the unforeseen consequences of the situation became the perceived arbitrary action of the commercial banks when freezing the banking accounts of the affected foreign nationals. It became apparent to the delegation from the LSSA that there were issues surrounding the ss 22 and 24 permits granted to asylum seekers and refugees under the Refugees Act 130 of 1998 (see also 'LSSA news' on 2013 (Oct) DR 20).

At the September meeting it appeared that one of the issues that had been resolved under the Immigration Act 13 of 2002 was that there would no longer be an arbitrary 'freezing' of foreign nationals' bank accounts until such time as the indi-

viduals had exhausted all remedies under the Immigration Act.

Regarding the issue of ss 22 and 24 permit holders (that is, asylum seeker and refugee permits granted under the Refugees Act) the SA Banking Association representative indicated that a more circumspect approach was being taken by the banks and that, where a permit of this nature had lapsed or expired, the holder was given a 30-day period in which to bring about an 'orderly closure' of the account.



LSSA immigration and refugee law committee members Julian Pokroy (chairperson) and Chris Watters (vice chairperson), and LSSA Co-chairperson Kathleen Matolo-Dlepu, with Stuart Grobler from the South African Banking Association, Susan Potgieter from the South African Banking Risk Information Centre and Jackson McKay, Deputy Director-General, Home Affairs Immigration Services.

Updated LSSA POPI guidelines for attorneys' firms available

Attorneys, by the nature of their practices, typically process vast amounts of personal information. Along with their professional duties of client confidentiality and the more limited, but critically important attorney-and-client privilege requirements, the importance of properly protecting personal information entrusted to attorneys cannot be underestimated. At the time of this issue of *De Rebus* going to print, the Protection of Personal Information Act was still in Bill form, awaiting signature by the President. It had been passed by the House of Assembly and was being translated into Afrikaans.

Due to the impact of this legislation on attorneys' firms and also the necessity for attorneys to advise their clients on the legislation, the LSSA's *Protection of Personal Information for South African Law Firms Guidelines* have been updated by information law specialist attorney Mark Heyink, and are available on the LSSA website under 'Legal Practitioners - Resource Documents' or alternatively on request from contact@LSSA.org.za

Professional examination dates for 2014

- 18 February 2014 Admission examination
- 19 February 2014 Admission examination
- 07 May 2014 Conveyancing examination
- 11 June 2014 Notarial examination
- 12 August 2014 Admission examination
- 13 August 2014 Admission examination
- 10 September 2014 Conveyancing examination
- 08 October 2014 Notarial examination

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



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People and practices

Compiled by Shireen Mahomed



Wright Rose-Innes Incorporated in Johannesburg has appointed Tshegofatso Dikhutso as a director. She specialises in general litigation, employment and labour law, debt collections and evictions.



Cliffe Dekker Hofmeyr in Johannesburg has appointed Munya Gwanzura as a director in the dispute resolution department.

Baker & McKenzie in Johannesburg has two new appointments.



Dhiren Ganasen has been appointed as a partner. He specialises in rail and transport infrastructure.



Mark Preiss has been appointed as a tax consultant. He specialises in corporate tax.

Delpont van den Berg Incorporated in Pretoria has three new appointments.



Yolandie Rivas has been appointed as a director. She specialises in property law.



Suria Conradie has been appointed as a director. She specialises in property law.



Eddie du Toit has been appointed as a director. He specialises in banking and finance litigation.



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By
Louis
Rood

Practice development Techniques and tips

After action, satisfaction – client feedback

When the time comes to close a file, there is one more thing to do. You have fulfilled your mandate, the litigation has run its course, the transaction has been concluded, the transfer registered. You have been paid for your services. What else remains?

It is client feedback. Take the opportunity to ask the client: What worked well? What could we have done better? Did we deliver as promised? What additional systems could improve our service?

The *Chambers* dictionary defines 'feedback' as 'return of part of the output of the system to the input as a means towards improved quality or self-correction of error' (William Geddie (ed) *Chambers 20th Century Dictionary* (W&R Chambers Ltd 1965) at 390).

The *Oxford* dictionary defines 'feedback' as 'modification or control of a process or system by its results or effects, especially by the difference between the desired and actual results' (GB Sykes (ed) *Concise Oxford Diction-*

ary 6ed (Clarendon Press 1979) at 381).

Feedback is a widely applied mechanism used for the same purposes as a debriefing after completion of a mission, or a post-mortem discussion after the conclusion of any event, such as a game or election.

In a legal context, client feedback allows you to determine how accurate your initial (and subsequent) advice was, and to analyse the reasons for any misassessment.

Benefits of client feedback

- Solidifying the relationship with the client.
- Increasing client loyalty.
- Clients appreciate this follow-up.
- Learning from the experience.
- Measuring your performance.
- Gaining market research.
- Obtaining primary and specific research on the specific client.
- Defining required service standards and expectations.
- Preventing loss of work.
- Creating a platform for future work.

- Identifying opportunities for growth.
- Better understanding of the client's business needs.
- Acquiring strategic direction.
- Turning clients into supporters, spreading the word.
- Identifying and fixing what was wrong.
- Getting guidelines to train your staff.
- Assessing how profitable the job was.

A LexisNexis/WBG global survey (Terralex International Independent Law Firm Network Global Meeting, New Orleans 2013) revealed that:

- 52% of global firms do not seek feedback.
- 59% of firms not seeking feedback regard it as unimportant.
- 91% of firms seeking feedback regard it as important or extremely important.
- There is a lack of standardisation and methodology in seeking feedback.
- There is confusion between a 'thank you visit', 'sales call', and 'feedback'.

Practitioners need to work out which method works best for a particular client. One size does not fit all. Perhaps

a personal visit, perhaps a telephone call. It may be better in certain circumstances for the person seeking the feedback not to be the person who acted in the matter. But avoid the impersonal 'hotel chain' questionnaire to be filled in.

The goal of client feedback is to create new conversations with clients. Client feedback is a form of competitive intelligence. It can effectively differentiate you, your approach, and your service levels from that of your competitors. Anyone who has ever conducted a candid exit interview with a departing employee knows how useful and constructive a frank disclosure of problem areas and practices can be.

But what happens if the client is not happy? Attorneys should be open to criticism, even if they might not welcome it. It enables the attorneys to identify where they should improve. If you are not talking to your clients, your competitors are.

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



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How trustworthy is a trading trust?



By
Kathleen
Auld

When the close corporation structure was phased out, the reason given by the Department of Trade and Industry was that it was 'necessary to move away from the largely artificial separation between the different business forms [closed corporations and companies], to recognise only one formal business vehicle and to provide for a simple, easy company formation process' ('South African company law for the 21st century - guidelines for corporate law reform' GenN 1183 GG 26493/23-6-2004). The extent to which the new Companies Act 71 of

2008 provides for a cheaper, simpler incorporation process for small companies is, however, debatable. Those looking for alternatives may instead consider a trading trust. This was referred to by the court in *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) as 'a newer type of trust' that has comparatively recently come into our law with the rise in popularity of the trust as an estate planning tool.

Using a trading trust to run a business

One of the obvious benefits of using a trust in this manner is that trusts, like companies, provide limited liability

to trustees and subsist in perpetuity. Trusts can be sequestrated in their own right, without creditors looking to trustees, beneficiaries or the founder of the trust. Trusts may also provide a tax advantage.

Trading trusts are generally not subject to the same strict requirements as regular, or 'passive', trusts. Where trusts are used as business vehicles they must be able to take the normal risks that directors could take in the course of running a company. There must, however, be provision for this in the trust deed. No powers are given to trustees by either the common law or legislation and the common law rule that trustees must always act in the best interests of



Picture source: Gallo Images/Thinkstock

beneficiaries requires that trustees be highly risk averse.

If the trust is not operated according to trust law however, trustees run the risk of having the trust form disregarded. These trusts may then be viewed as partnerships, or have their form punctured by means of a veil-piercing application. In both instances, the trustees will be personally liable for the debts of the trust. A court is more likely to pierce the veil of a trust than a company as a trust does not have separate legal personality. The rationale for piercing the veil only in extreme circumstances in the case of companies – that the public has an interest in upholding the company form for the sake of certainty – thus falls away with trusts.

In *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) the court decided that it is possible to apply the doctrine of piercing the veil to trusts where there is an insufficient separation between control and enjoyment of trust assets (at para 29). This means that trustees must still act in the interests of the beneficiaries of the trust, and can be held personally liable for breach of this duty. This may be coupled with a delictual claim if a loss has been suffered, except where this has been caused by factors beyond the control of the trustees. This suggests that, even if the trust deed makes provision for normal business risks to be taken by the trustees of a trading trust, trustees are likely to remain more risk averse than directors of a company. This can retard the growth of the business and prevent the large returns that a company may produce. Thus, for certain types of business such a structure may not be a viable option.

Amendment of trust deeds

Amending a company constitution, while not necessarily an easy process, is a feasible exercise. Amendments may be effected by shareholders or members by way of special resolution, which usually requires a 75% majority. Trust deeds on the other hand may be very difficult, if not impossible, to amend. This greatly reduces the practicality of using a trading trust in lieu of a company.

In our law, amendment of an *inter vivos* trust must be done in accordance with contractual principles, unless the trust deed provides otherwise. As confirmed in *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) there must be consent of all parties to the trust deed, including the trustees, founder and vested beneficiaries. However, if there are a large number of beneficiaries, it may be impossible to obtain unanimous consent to an amendment. A testamentary trust is even more difficult to amend because it is created in accordance with the law of succession and subject to the almost hallowed principle of freedom of testation.

Although the trustees can be given the power to amend a trust deed, this must be limited by objectively ascertainable criteria. The trust deed may also give the founder the power to amend the trust unilaterally. In practice, however, this is rarely done. Section 3(3)(d) of the Estate Duty Act 45 of 1955 provides that, when a deceased had control over property immediately prior to his or her death, in that he or she could have disposed of such property, that property is deemed to be included in his or her estate for estate duty purposes. Thus, if a founder has the power to amend the trust unilaterally, the saving of estate duty – one of

the most important benefits of creating a trust – is lost.

A trust deed may also be amended by a court in terms of s 13 of the Trust Property Control Act 57 of 1988 (TPCA) where circumstances arise that were unforeseen by the founder of the trust at the time that the trust was created. The change in circumstances must either render the terms of the trust prejudicial to beneficiaries, be against public policy or be likely to defeat the objects of the founder in creating the trust. Cases such as *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) and *Curators, Emma Smith Educational Fund v University of Kwa-zulu-Natal and Others* 2010 (6) SA 518 (SCA), have focused on public policy and public interest, arguing that the provisions of the trust deed were unconstitutional and out of touch with modern reality.

Whether the section could apply to the situation where there is simply a refusal to amend by a beneficiary is still undecided. Although the common law *ob causum necessarium* rule, which has essentially the same character as s 13, has been applied to vary the terms of a trust deed in the past, the courts have been somewhat erratic in their application of the rule and this is a precarious route to follow.

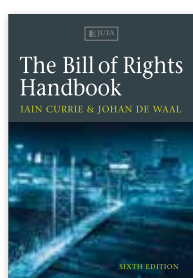
Public policy and the residual rules

Use of the trading trust structure also has certain drawbacks for the general public. At common law, trustees are required to act jointly in making decisions that affect the trust unless the trust deed provides otherwise, as they are considered to be co-owners of the trust property. If trustees do not act jointly, the act is void. This mechanism was put in place for the protection of beneficiaries and tends to work well in a traditional trust setting. In a trading trust, however, this can be a disadvantage for those attempting to contract with the trust. Unfortunately the TPCA provides no guidance when it comes to holding a trust bound to a contract.

In company law there are well-developed principles covering a situation where a person contracting with a company is unaware of internal irregularities or the contents of that company's constitution. These are known as the residual rules and have been developed by the common law. In line with this, s 19(4) of the 2008 Companies Act excludes the doctrine of constructive notice, except in very specific circumstances, and confirms and expands on the common law *Turquand* rule. The doctrine of constructive notice states that an outsider contracting with a company is deemed to know the contents of the company's

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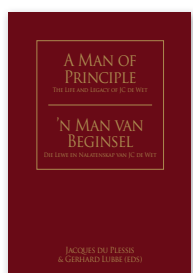
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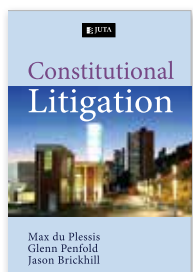


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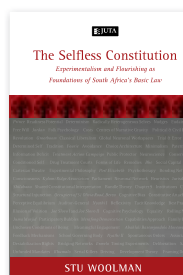
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constitution except in certain circumstances. Sections 20(7) and (8) of the Act allow the *Turquand* rule to be applied by a company outsider in order to hold a company to a contract if that contract is not in fact binding on the company because of some internal irregularity that the outsider could not, and did not, know about. These provisions ensure that an innocent outsider is protected when contracting with a company.

In the *Parker* case (at para 32) the court warned that outsiders must be careful when dealing with trusts. Because trust deeds are often couched in obscure language and are difficult to access, the primary responsibility for compliance with internal formalities and ensuring that contracts are concluded within the authority conferred by the trust deed, lies with the trustees. The courts and the master also have a role to play in ensuring that the trust form is not abused and that trusts are run in accordance with principles of 'business efficacy, sound commercial accountability and the reasonable expectations of outsiders that deal with them' (at para 37).

What this means in practice is unclear. Although the court in the *Parker* case appeared reluctant to apply the doctrine of constructive notice to trusts because of the potential for abuse of the trust form, there is no definite pronouncement to this effect and no indication what a court may decide in future.

The application of the *Turquand* rule to trusts is similarly unclear. In the *Parker* case the court stated that this rule may apply to trusts, but did not pronounce on it. In the *Nieuwoudt* case (at para 8) the court found it unnecessary to decide the question, although it did state that the 'newer type of trust' is troubling in that there is no central register for trusts or trustees, as there is with companies. Thus, 'an underlying principle of company law and the *Turquand* rule, namely that a person who deals with a company is bound by the limitations contained in the [company constitution] because these documents are accessible to the public, is consequently difficult to apply to trusts' (at para 19). This reasoning is also applicable to the exclusion of the doctrine of constructive notice.

Conversely, however, although there is a need to protect outsiders contracting with trading trusts, the interests of beneficiaries may be seriously prejudiced by the introduction of either of these principles into trust law. There may also be other ways of holding trusts to account. In the *Nieuwoudt* case the court observed that the ordinary principles of the law of agency may apply to trusts.

Thus, provided the trust deed allows trustees to delegate power to one of their number and the trustees further create the impression that their powers

have been so delegated, the trust can be held bound to the contract, and the trustees estopped from asserting otherwise. Furthermore, a trustee not duly appointed by the master who holds out authority to bind the trust could be held personally liable on the implied warranty of authority.

Ratification after the fact is also possible as most trading trusts are *inter vivos* trusts. An *inter vivos* trust is a contract in South African law and contractual principles are applicable. However, since an unlawful contract cannot be ratified, ratification would be possible only if the trustees were duly appointed at the time that the contract was concluded and the transaction in question was permitted by the trust deed.

'The unpredictability of future reforms that may affect the ability of a trust to act as a meaningful alternative to a company means that using a trading trust to run a business becomes inherently problematic, given that trusts are long-term planning tools and may be difficult to terminate.'

Lack of regulatory mechanisms

Regulation of trusts, save from a tax and financial perspective, has traditionally been sparse in our law. Although the growing popularity of trusts for estate planning purposes has made legislation dealing with the creation of trusts necessary, the state's traditional suspicion of such vehicles as a means of tax avoidance has contributed to the lack of legislation.

Although the TPCA does regulate certain aspects of trusts, it gives no guidance as to trustees' powers, which must derive from the trust deed itself. As a re-

sult trust deeds may contain very different provisions, with only a few judicial decisions as guidance. Trust companies generally have standard trust deeds, but founders may require the insertion of specific alternative provisions to standard ones.

Another problem is that a trading trust need not be audited, except when required by the master or the trust deed. Although this makes a trading trust cheaper and easier to run, this lack of oversight may be detrimental to an outsider contracting with the trust.

Trusts are of course able to be flexible by leaving the terms of the trust to the founder. Companies too may have radically different provisions in their constitutions. However, while it is true that a certain amount of flexibility is desirable, certainty, at least in a few fundamental aspects, is sorely needed, especially with trading trusts.

Proposed tax reforms

In the 2013 budget speech delivered on 27 February 2013, the Minister of Finance remarked that the budget review 'outlines various measures proposed to protect the tax base and limit the scope for tax leakage and avoidance. The taxation of trusts will come under review to control abuse' (www.treasury.gov.za/documents/national%20budget/2013/speech/speech/pdf, accessed 10-10-2013). The unpredictability of future reforms that may affect the ability of a trust to act as a meaningful alternative to a company means that using a trading trust to run a business becomes inherently problematic, given that trusts are long-term planning tools and may be difficult to terminate.

Conclusion

Whatever impact the stance taken in the budget review has on the creation of trading trusts, it is certainly less risky to run a business through a company structure. Whether a trading trust is a viable alternative to a company also depends on the type of business the trust conducts. For smaller businesses a trading trust may be useful, provided that the trust deed is clearly drafted and made available to prospective customers. This process should ensure that the trading trust does not become subject to time-consuming litigation, and that trustees who act with reasonable care and skill are not held personally liable for trust debts.

Kathleen Auld BCom LLB (UCT) is a candidate attorney at Fairbridges in Cape Town.



Not so far apart

Virtual visitation in relocation disputes

Picture source: Gallo Images/Thinkstock



By
Izette
Knoetze

Child relocation disputes are a reality that parents often encounter after divorce. It generally refers to a change in the place of residence or change of domicile of the child. The courts have recognised the need for children and parents to continue relationships with and have support from both parents following a divorce. Numerous support systems and shared parenting arrangements are applied by the courts to assist with this.

Virtual visitation is one support system that the courts have implemented to assist parents and children in the continuation of their relationships after parental separation and relocation. This is also called internet visitation or electronic communication, and refers to the use of

e-mail, instant messaging, webcams and other internet tools to provide regular contact between a non-custodial parent and his or her child (J LaMarca 'Virtually possible - using the internet to facilitate custody and parenting beyond relocation' *Rutgers Computer and Technology Law Journal* (2012) vol 38 at p 146).

Parental relocation is a typical scenario where virtual visitation is ordered. In these instances the court could be requested to make an order to regulate virtual visitation rights and thereby enabling the non-custodian parent to stay in contact with a child via the use of computer technology.

International case law

Courts have ordered virtual visitation in numerous relocation cases some of which are discussed below.

As early as 1999, the courts in North Dakota, United States (US) embraced modern communication technologies as tools to facilitate child visitation. In the case of *Gilbert v Gilbert* 730 N.W. 2d 833 a mother sought to relocate with her child from North Dakota to West Virginia to pursue enhanced job opportunities. The trial court denied the relocation. The appellate court overturned that decision and specifically directed that the lower court consider virtual visitation tools. It stated that the trial court could include the use of the telephone, internet, webcam and other wireless or wired technologies in its judgment to ensure that the child had frequent and meaningful contact with the non-custodial parent.

Virtual visitation in New Jersey, US, received its first endorsement in the

case of *Chen v Heller* 759 A.2d 873 (N.J. Super Ct App Div 2000). In this case the plaintiff (the mother of the child) requested permission to relocate with the child. In response, the father objected to the petition for relocation and submitted a cross-motion for enhanced visiting time. The trial court denied the mother's request to relocate, but ordered that each party set up computer-assisted video conferencing in their respective homes at their own cost to facilitate continued contact for the children with each parent. The appellate division reversed the denial of the plaintiff's motion for relocation, however, it continued the order for both parents to set up video conferencing in their respective homes at their own cost.

Family courts in Canada are increasingly incorporating virtual visitation in contested relocation cases. The courts have rendered conflicting decisions on whether or not virtual visitation should be used and, if so, the extent to which it should be used. In *Shiplack v Shiplack* 2008 SKQB 254, SJ No 392 the court gave permission to the custodial parent to relocate to Alberta with her child. While virtual visitation was not pertinent to the access order, the court encouraged the use of a webcam and other alternative forms of access to maintain the parent-child relationship.

In the matter of *Cochrane v Graef* 2010 ONSC 4479, OJ No 3756 the Ontario Superior Court of Justice considered the proposed access through virtual visitation of the mother. In permitting the relocation, the judge increased the amount of physical visitation with the father and ordered that visitation be supplemented with 'reasonable telephone and webcam access'.

One of the factors that the Canadian courts have taken into consideration is the age of the child. The courts have taken a cautious approach in their use of virtual visitation in cases where the youngest or only child was of a pre-school age. In *ADP v TEW* [2005] NSFC 22, NSJ No 497 the court discussed the use of virtual visitation by a two-year old child. The court held that it was inappropriate, given the age of the child.

South African case law

The use of visual electronic tools and applications, such as Skype and other webcam applications, were highlighted by the courts in two South African judgments. In the two matters below, the court granted one of the parents access to children through the use of Skype. One such instance is the case of *Central Authority of the Republic of South Africa and Another v LG* 2011 (2) SA 386 (GNP), where the applicant and the respondent discussed divorce and settlement issues via the use of Skype.

Another example where the court granted access to children via Skype was in the case of *HS v WS* 2012 JDR 1066 (GNP). In this case, the court made an order directing the plaintiff and the defendant to install an internet land-line, such as ADSL, at their respective residences and ordered that the plaintiff should load Skype access on the minor children's iPods. The defendant was also allowed to have Skype contact with the minor children every Saturday at certain hours. Prinsloo J noted that the plaintiff should encourage the children to correspond with and contact the defendant and facilitate telephone and Skype contact as far as reasonably possible (at 45).

In *CG v NG* 2012 JDR 1795 (GNP) the court made a draft order regarding telephonic and Skype contact. This was also the case in the matters of *RC v CS* 2011 JDR 1583 (GSJ), *DV v SO* 2010 JDR 1038 (GNP), *K v K* 2009 JDR 0419 (GSJ), *Scheepers v Scheepers* 2009 JDR 0911 (GNP) and *HS v WCS* (GNP) (unreported case no 3524/09, 22-6-2012) (Prinsloo J).

Legislation

Legislation pertaining to virtual visitation is already in effect in some US states. Utah enacted legislation in 2004, Wisconsin in 2006 and both Texas and Florida in 2007.

In 2009, North Carolina amended its general statutes to allow virtual visitation. North Carolina's custody statute now allows a judge to authorise electronic visitation if certain findings are reached and to establish the parameters of such visitation. The factors considered by the court are as follows: 'Whether electronic communication is in the best interest of the minor child, whether equipment to communicate by electronic means is available, accessible and affordable to the parents of the minor child and any other factor the court deems appropriate in determining whether to grant visitation by electronic communication' (CE Doucet "See you on Skype!": Relocation, access, and virtual parenting in the digital age' *Canadian Journal of Family Law* (2011) vol 27 at pp 340 - 341).

Illinois soon followed and enacted legislation in 2010. The most recent state to enact legislation is Hawaii who incorporated virtual visitation into law in 2011. Australia also amended its Family Law Act of 1975 to include a broad provision for electronic communication between parents and children in 2006.

Conclusion

I submit that parents seeking to relocate should consider all available technology to maintain their children's ties with the non-custodian parent. Internet connections are a common fixture in many South African households and webcams

are affordable. The internet can be an instrument for a 'face-to-face' encounter between a parent and a child, but video conferencing with one's child, just like a telephone call, should be used as a supplement to and not a replacement for physical visits and personal communication.

I am of the opinion that the use of these tools is a powerful means to providing parents with immediate access to children. Virtual visitation has the added advantage of enabling children to enjoy private, unrestricted telephone and video access to parents. I submit that virtual visitation is not only a useful tool to encourage communication when children and parents are separated but also a viable alternative in circumstances where children could be endangered by physical contact with a parent, or for children who are less verbal and rely more on visual stimuli for processing new experiences.

Virtual visitation can provide more meaningful development of a parent-child relationship than mere telephone conversations. It is said that virtual visitation helps ease the tensions that come with divorce and makes it more likely that non-custodial parents will pay their child support regularly.

South Africa, like other countries, should enact legislation that addresses the issue of virtual visitation. This will serve as guidance to courts in determining the extent to which virtual visitation should be used in relocation disputes after divorce. Legislation should contain a definition of virtual visitation and outline the scope of its use.

Some experts warn that the battle over virtual visitation often does not end with a settlement agreement or court order. The conflict often shifts to disputes over computer purchases, installation, repairs, e-mail accounts and timing of online chats.

It must be emphasised that virtual and physical visitations are not interchangeable. The internet, although being convenient and efficient to bring two people closer no matter how far they are physically distanced, will never be capable of fulfilling all of the benefits of physical interaction between parents and children. Therefore, virtual visitation could be a powerful alternative, but not the total solution for interaction between children and parents.

Izette Knoetze LLD (UFS) is a legal researcher at Legal Aid South Africa in Johannesburg.



Picture source: Gallo Images/Thinkstock



Administrative law and intellectual property

By
Robyn-Leigh
Merry and
Muhammed
Vally

Administrative law is the branch of public law that regulates the activities of bodies that exercise public powers and perform public functions (C Hoexter *Administrative Law in South Africa* (Cape Town: Juta 2007) at 2). Due to its nature and scope, administrative law permeates a number of branches of the law and the law relating to the protection of registered intellec-

tual property is no exception. Administrative action can be questioned on the basis of either an administrative appeal or by judicial review. An appeal is indicated when the reasoning for the decision and the merits of the case are under consideration, while a review considers whether the decision was arrived at in a rational fashion. However, it is well recognised that the boundary between appeal and review is often indistinct, particularly with respect to judicial review where the focus of the review often falls on the decision itself rather than the process by which the decision was made (*op cit* 106).

The South African patents and designs and the South African trademarks offices are administrative offices headed up by the registrar of patents and designs and the registrar of trademarks, respectively. The enabling legislation with respect to patents, designs and trademarks – namely, the Patents Act 57 of 1978, the Designs Act 195 of 1993 and the Trade Marks Act 194 of 1993 – grants administrative power to the relevant registrars to exercise the powers and perform the duties conferred or imposed on them by such legislation. These public authorities possess only that power that is lawfully conferred on them and authorised. Therefore, all actions they take in the performance of their functions must be justified in terms of the enabling legislation. The nexus between administrative law and intellectual property law is best illustrated with reference to the following case law in this respect.

Trinamics Incorporated v The Registrar of Patents and Others (GNP) (unreported case no: 23902/2010, 29-3-2013) (Prinsloo J): This recently handed down judgment dealt with a judicial review brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). This judicial review was a review of the administrative action of the registrar in terms of the renewal of a patent. During 1992, and with respect to that calendar year, the registrar renewed South African patent ZA88/0864 despite the fact that the payment tendered with respect to such renewal fee was R 6 less than the legislated fee of R 36. In accordance with standard procedure under PAJA, the registrar was asked to furnish reasons with respect to this renewal and in response to such request the registrar condoned this irregularity in terms of an enabling regulation in the Patents Act that provides for condonation in the event that the effect of such condonation will not be detrimental to the rights of any party.

On the basis of the facts of this case, the court held that the registrar's administrative act in accepting the short payment was irregular, but emphasised that an unlawful administrative act remains

valid until set aside by a court. The court then refused to set aside this administrative act as a significant amount of time had passed since it was committed. The public interest in the finality of administrative decisions and administrative functions was found to outweigh the relief sought by the applicant.

University of Pretoria v The Registrar of Patents and Others (unreported case no: ZA2004/2575; ZA2005/08679, 25-10-2011) (Prinsloo J): This matter, which was heard in the court of the commissioner of patents, pertained to the acceptance of two patent applications and the refusal by the registrar, when requested to do so, to rectify the patent register by marking the aforementioned applications as lapsed in accordance with the relevant deeming provisions in the Patent Act. Consequent on such refusal an appeal against the decision was brought by the University of Pretoria.

The regulations to the Patent Act allow for the acceptance of an application for a patent to be delayed to a date not later than 18 months after the date of application. To this effect the registrar is empowered under the Act to grant an extension with respect to such acceptance. On a strict reading of the relevant section of the Act the court found that the registrar was not legally competent and empowered in terms of s 42(3) of the Act (read with reg 46) to grant extensions, particularly unapplied for, unsubstantiated and unfunded extensions, for the length of time that she did. For this reason the court held that the registrar's administrative action to be invalid and confirmed that the patent applications in question had lapsed.

Kaltenbach Thuring Société Anonyme v Grande Paroisse Société 2001 BIP 62 (CP) (Roux J): This matter involved the setting aside of an order for the attachment of a patent. The court held that the patent had lapsed prior to the affecting of the attachment order due to the incorrect actions of the registrar. No attachment could be made since a lapsed patent is merely a *spes* and not a real right, meaning that it cannot be attached. The registrar had improperly accepted the payment of a renewal fee after the patent had already lapsed thereby allowing the patent to ostensibly survive.

The court held that in this instance the registrar had acted *ultra vires* the Act as s 46(2), applicable to renewal fees, provides that the non-payment of renewal fees within a specific time period results in the lapsing of the patent and this cannot be overridden by the registrar.

Weekly Property Trader v LS Erasmus and Another 2002 BIP 303 (T) (Claassen AJ): This matter, which was structured as a review, pertained to the powers of the registrar of trademarks to provide for an extension of time after the lapse

of the period allowed for completing the application in terms of s 20(2) of the Trade Marks Act. The facts of this case pertain to two competing trademarks, namely PROPERTY TRADER and WEEKLY PROPERTY TRADER, both of which could not be simultaneously registered.

The first of the aforementioned marks was under prosecution and during the term of such prosecution a number of extensions were applied for. One of the extensions was applied for outside of the period envisaged by s 20(2) of the Act but was nonetheless granted by the registrar. The court held that once the application had lapsed, as given in terms of s 20(2) of the Act, an extension of time could not be granted by the registrar and therefore it also held that the registrar was acting *ultra vires* the Act in this instance.

Buzbee (Proprietary) Limited v The Registrar of Patents and Another 2010 BIP 42 (CP) (Ebersohn AJ): Administrative law also aids in the interpretation of enabling legislation, as is evident in the *Buzbee* matter wherein a provision in the patent regulations (reg 90(1)) that effectively provided for the deemed revocation of a patent in the instance that the patentee in revocation proceeding fails to timeously file its counterstatement. In this matter the validity of reg 90(1) in terms of the ability of the regulation to bring about the revocation of a patent was questioned and was found to be invalid given that the grounds for the revocation of a patent are specifically set out in the Patent Act.

The case law cited above is illustrative of the general principles of administrative law that provide for the evaluation of the exercise of public power as set out in the relevant enabling legislation. This system enables public entities, private entities and individuals to question the rationale and method behind the exercise of public power and the decision-making process when such power is exercised.

All instances where public power is exercised can be viewed through the spectacles of administrative law, as emphasised in the above-mentioned case law, showing that intellectual property law is no exception. Public functionaries exercising such public power in terms of enabling legislation pertaining to intellectual property are also accountable in terms of administrative law.

Robyn-Leigh Merry BSc (Hons) LLB (Wits) and Muhammed Vally BSc LLB (UJ) are attorneys at DM Kisch Inc in Johannesburg.





By
Michael
Miller

Completed cross-examination

A pre-requisite for a fair trial?

A litigant in both civil and criminal law proceedings has a right to cross-examine any witness called by the other side who has been duly sworn.

However, it often happens that trials are protracted and postponed for long periods of time. In some reported cases the witness has died by the time the trial is resumed. Is the evidence of the witness in respect of whom cross-examination has not been completed admissible?

Although this situation appears to arise mainly in criminal law cases, all that is stated below applies equally to civil cases. The cases show that there are two different approaches by the courts. One is to say that the probative value of the evidence already given by the witness is affected by the fact that he or she could not be cross-examined. It would follow that, if the probative value is not affected, the evidence may indeed be admissible. The other is simply to rule it inadmissible. On either approach, the court cannot take such incomplete evi-

dence into consideration in reaching its judgment.

Some cases dealing with incomplete cross-examination

Engles v Hoffman 1992 (2) SA 650 (C) was a civil trial. On the seventh day of the trial the defendant commenced giving evidence in his defence. On resumption of the trial after an intervening long weekend, the defendant was absent. It appeared that, over the long weekend, he had suffered a nervous breakdown. Finally, about 18 months after the defendant had commenced his evidence, the defendant's attorney brought an application asking that the defendant be excused from further attendance and that the evidence that had been given by him should be regarded as not having been given and ignored for the determination of the trial. Tebbutt J granted the application.

S v Motlhabane and Others 1995 (2) SACR 528 (B) was a criminal trial before

Khumalo J of certain accused persons on charges of murder and robbery. One of the state witnesses died during the trial. Counsel for the accused had commenced his cross-examination of the witness, but had not completed it at the time of the witness's death. At the end of the state's case, counsel for the accused applied for discharge of the accused in terms of s 174 of the Criminal Procedure Act 51 of 1977 on the basis that the evidence of the witness who died should not be taken into account and that, based on the remainder of the evidence, no reasonable man might convict the accused.

Khumalo J came to the conclusion that if a witness dies before cross-examination commences, his evidence is untested and must be regarded as *pro non scripto* (at 531e). If cross-examination had commenced, then the opposing party may, if he or she considers that the purposes of cross-examination have been achieved, agree that the evidence of the deceased witness be considered with the rest of the evidence. Khumalo J excluded the

evidence of the witness who had died and came to the conclusion that the interests of justice would be best served by allowing the application for discharge (at 535g).

S v Manqaba 2005 (2) SACR 489 (W) was a minimum sentence hearing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997 (now repealed) before Satchwell J. This section provided that, in certain cases, a regional magistrate could not sentence a person convicted of rape (as was the case here), but was obliged to refer the matter to the High Court for sentencing.

During the trial in the regional court, the magistrate refused to allow cross-examination of the complainant concerning the contents of statements that she had made to the police. Satchwell J came to the conclusion that the refusal to allow such cross-examination was an irregularity and set the conviction aside.

In *S v Mgudu* 2008 (1) SACR 71 (N) the state, during the trial in the magistrate's court, called one L as a witness and the defence attorney reserved cross-examination of the witness 'pending the outcome of the state's case'. After the state closed its case, the attorney applied for discharge in terms of s 174 of the Criminal Procedure Act, which application was refused.

The defence then applied to recall L for the purposes of cross-examination. The magistrate initially granted this application but then revoked it on the ground that such a procedure was irregular. The magistrate sent the matter on special review.

Madondo J came to the conclusion that the failure to allow cross-examination *in casu* would prejudice the accused 'since there will be no knowledge of what favourable evidence he might have been able to elicit' (at para 26). He went on to point out that s 35(3) of the Constitution guarantees the right to a fair trial and that there can be no fair trial without the exercise of the right to cross-examine witnesses. His view was that he should interfere with the conducting of the criminal proceedings as otherwise a grave injustice would be caused to the accused. The case was remitted to the magistrate who was directed to recall the witness and allow the defence attorney to cross-examine her.

S v Msimango and Another 2010 (1) SACR 544 (GSJ) was a criminal trial in the South Gauteng High Court before Moshidi J. During the course of his cross-examination a state witness died. After considering the cases referred to above as well as similar cases in foreign jurisdictions, Moshidi J held that no probative value should be attached to evidence where cross-examination of a witness was absent 'for whatever reason including illness or death' (at para 26).

Finally, *S v Khumalo* (GSJ) (unreported case no 110/12, 22-8-2012) (Wepener J)

concerned a state witness in a trial in the district court whom the defence attorney had begun cross-examining; however, the matter was postponed to a subsequent date for further cross-examination. On the subsequent trial date the witness failed to attend court and the state's case was closed. The defence attorney applied for discharge in terms of s 174 of the Criminal Procedure Act on the grounds that the accused's right to cross-examination had been infringed and that this was fatal to the state's case. The application was refused and the defence's case was closed without leading any further evidence. In delivering his judgment, the magistrate referred to the evidence of the witness and found him to be credible.

After conviction, the matter was referred to the regional court on account of the accused's previous convictions. The regional magistrate refused to confirm the conviction and sent the matter to the High Court on special review. In setting aside the conviction, Wepener J (at para 17) again came to the conclusion that a fair trial encompasses the right to cross-examine witnesses. He concluded that 'where an accused's right to cross-examine a witness is curtailed for whatever reason other than the accused's refusal or failure to cross-examine a witness of his own volition, infringes on his right to a fair trial guaranteed by the Constitution'. He went on to conclude that the irregularity was of such a nature that the accused's right to a fair trial had been infringed. The accused's conviction was set aside.

In criminal law proceedings the right to cross-examination is guaranteed by s 35(3)(i) of the Constitution and by s 166 of the Criminal Procedure Act. Section 35(3)(i) of the Constitution provides that an accused person has the right to 'adduce and challenge evidence'. The challenging of evidence is through cross-examination. It is therefore a constitutional right.

In civil cases there is no express constitutional or statutory right to cross-examination. In terms of the common law such right probably originates from the *audi alteram partem* rule. In addition, s 34 of the Constitution guarantees a litigant the right to a 'fair public hearing', which would be breached were cross-examination not allowed.

Conclusion

The cases referred to above suggest that incomplete evidence may be excluded on one of two bases. The first is that it is simply inadmissible and in contravention of a party's constitutional rights. The second is that the evidence has no probative value.

At first blush, the distinction may seem to be academic. I submit that it is not. If evidence is inadmissible on the basis that it has no probative value, how

is this to be decided? In the *Msimango* case, Moshidi J referred to various tests that had been propounded in earlier cases in South Africa and elsewhere. These included factors such as –

- whether or not there had been full cross-examination;
- whether the cross-examination was perhaps complete on certain aspects but not on others;
- whether a particular aspect had been fully cross-examined;
- whether it was the cross-examiner's intention to return to any particular aspect;
- whether evidence on a particular issue had been dealt with elsewhere;
- the possible limitation of the right to cross-examine; and
- whether the witness is a single witness.

Although the judge did not accept any of these tests in the *Msimango* case, it is suggestive of the fact that there is a discretion on whether or not to admit the evidence in question. In my opinion, there cannot be such a discretion.

In *S v Shabangu* 1976 (3) SA 555 (A) a criminal trial proceeded without legal representation where the accused wanted legal representation. In setting aside the conviction Jansen JA pointed out that 'it is impossible to say what effect a properly conducted defence could have had on the ultimate result' (at 558F).

A party has a right to adduce and challenge evidence. It is unknown what the result of a complete cross-examination may have been or how it may have affected the outcome of the case. Whether it is because of the right of an accused person to adduce and challenge evidence in terms of s 35(3)(i) of the Constitution, or the right of a litigant in a civil case to a fair public hearing in terms of s 34 of the Constitution or whether it is because of the *audi alteram partem* rule, a party has the right to be afforded an opportunity to complete cross-examination of a witness called by the other party whose evidence is prejudicial or potentially prejudicial to him or her. Without that it cannot be said that there was a fair trial.

It follows from this that there can be no discretion to admit such evidence and that its exclusion has nothing to do with the probative value thereof. It is a guaranteed right. I am of the opinion that where cross-examination has not been completed such evidence should simply be excluded and treated as inadmissible and *pro non scripto*.

Michael Miller BA (NMMU) LL.M (UJ) is an advocate and senior legal researcher at Legal Aid South Africa in Johannesburg.



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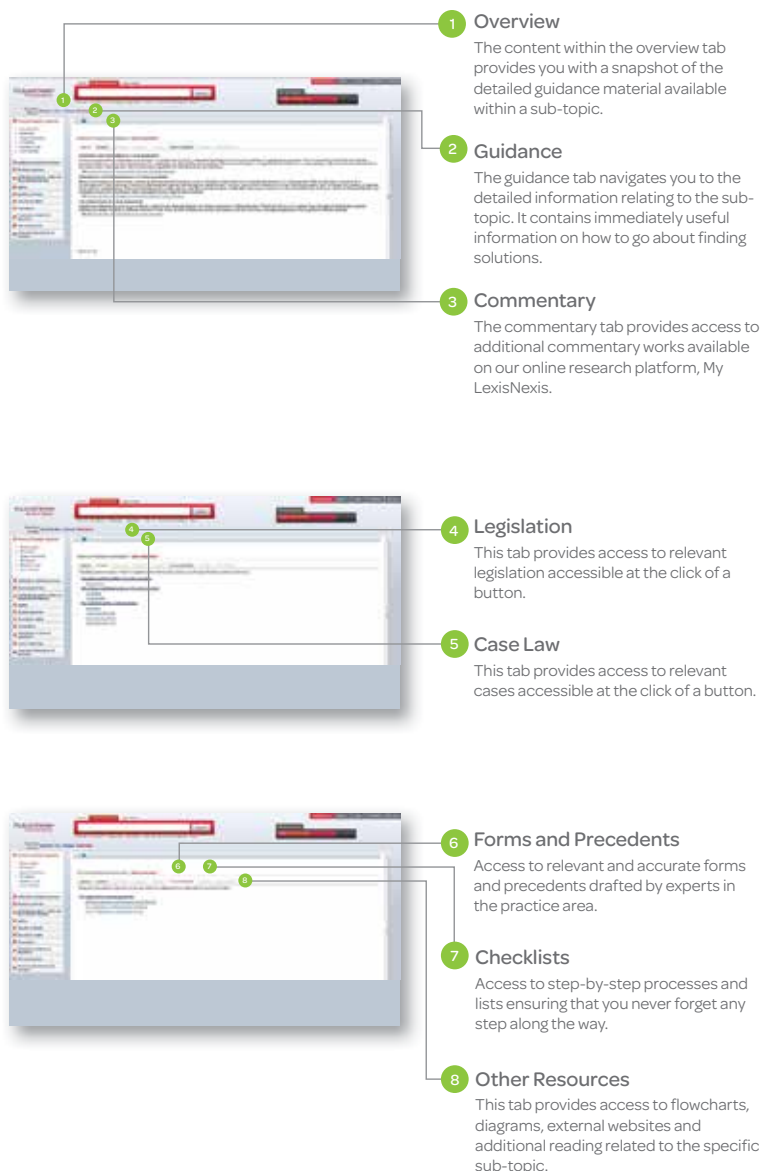
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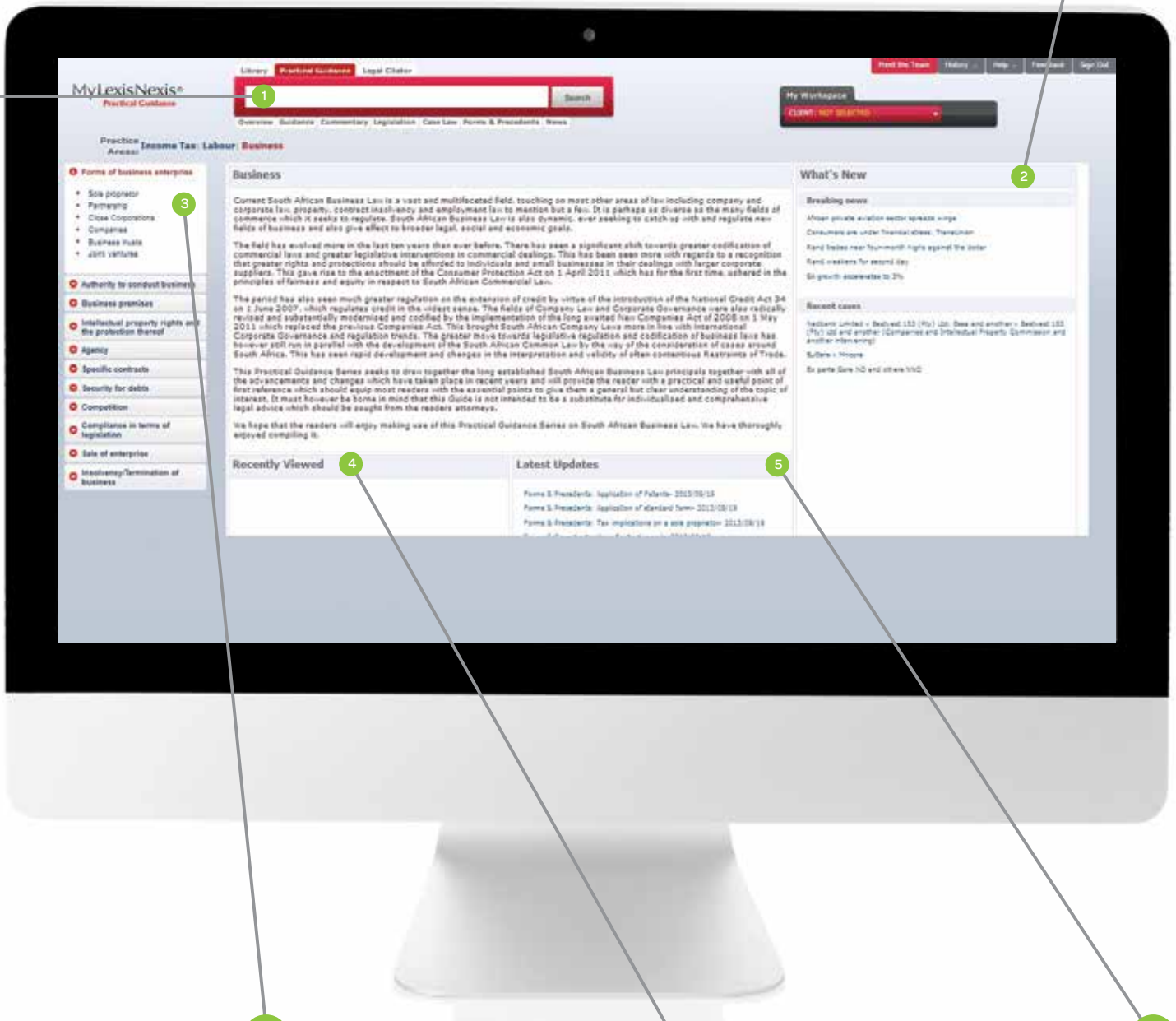
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Kollig op aansoeke om verlof tot appél

Waarom geen redes deur hoogste howe?

Deur
Willie
Herbst

ABSTRACT: Spotlight on applications for leave to appeal

Why no reasons by highest courts?

The small claims court, magistrates' courts, Labour Court and the High Court of South Africa are required by statute to provide motivated reasons for findings and judgments handed down by them.

There are no such obligations on the Supreme Court of Appeal or the Constitutional Court. These courts accordingly do not, as a rule, provide reasons for their decisions in response to applications for leave to appeal.

This situation is unfortunate. The provision of reasons by a judicial officer, *inter alia*, explains to the parties and to the public at large who have an interest in courts being open and transparent, why the decisions in a case were taken. It is a discipline that curbs arbitrary judicial decisions. It is also contrary to the provisions of s 1 of the Constitution, which requires judges not to act arbitrarily and to be accountable. The manner in which the courts ordinarily account for their decisions is by furnishing reasons.

It is accordingly suggested that the relevant statutes should also make it obligatory for the Constitutional Court and the Supreme Court of Appeal to provide reasons for a decision regarding an application for leave to appeal to these courts.

Teen die einde van 2012 het die Vrystaat Hoë Hof in Bloemfontein (die hof) in die saak *Marthinus Petrus Odendaal Aveling NO en Andere v Michiel Daniël Burger NO en Andere*

(ongerapporteerde saakno: 3234/2012, 8-11-2012) (Ebrahim R) aansoek om summierië teen vier verweerders toegestaan. Die eerste drie verweerders was trustees van 'n diskresionêre familietrust. Die vierde verweerder was in sy persoonlike hoedanigheid gestee op grond van 'n skriftelike borgstelling wat hy ten behoewe van die verweerdertrust gegee het.

Die eiser se eis was gebaseer op die bepaling van 'n skriftelike ooreenkoms tussen die eiser en die verweerdertrust, ingevolge waarvan die verweerdertrust, voortvloeiend uit 'n huurkontrak vir skape, aanspreeklikheid teenoor die eiser erken vir betaling van 'n bedrag van ietwat meer as R 1,8 miljoen plus rente of, na die keuse van die verweerdertrust, die teruglewering aan die eiser van skape wat deur die verweerdertrust van die eiser gehuur was en wat die verweerdertrust versuim het om terug te lewer.

Hierbenewens het die verweerdertrust, as sekuriteit vir betaling van die bogenoemde bedrag, 'n tweede verband oor sy plaas ten gunste van die eiser geregistreer. Die verweerdertrust, sowel as die vierde verweerder in sy persoonlike hoedanigheid, het die aksie bestry en in antwoord op die aansoek om summierië vonnis getuienis aan die hof voorgelê dat die eiser (wat ook 'n diskresionêre familietrust is) op geen stadium enige skape aan die verweerdertrust verhuur, beskikbaar gestel of gelewer het nie.

Die verweerdertrust het in die opponerende beëdigde verklaring verder die voorafgaande geskiedenis uiteengesit van die ooreenkomste wat met betrekking tot skape gesluit was – nie tussen die verweerder trust en die eisertrust nie, maar inderdaad tussen 'n ander familietrust (waarvan die vierde verweerder ook 'n trustee is) as huurder en 'n individu in sy persoonlike hoedanigheid as verhuurder wat ook 'n trustee is van die eisertrust.

Laasgenoemde trust as huurder, kon nie sy verpligtinge nakom nie en uit vrees dat 'n diefstalklag teen die vierde verweerder persoonlik, sowel as teen sy eggenote (wat ook een van die trustees van die verweerdertrust is), gelê kon word wat daartoe kon lei dat hulle gearresteer kon word, het die verweerdertrust die dokumente op grond waarvan die aksie ingestel is, geteken, die betrokke verband geregistreer en het die vierde verweerder die borgstelling geteken.

Tydens die aansoek om summierië vonnis het die verweerders betoog dat die kontrak, wat die basis vorm vir die eiser se eis, 'n gesimuleerde kontrak is

en derhalwe onafdwingbaar is. Verder was die verweerdertrust se hoofverweer 'n kategoriese ontkenning dat die eiser ooit enige skape aan die verweerdertrust verhuur, gelewer of beskikbaar gestel het ingevolge 'n huurkontrak of kragtens enige ander regsbasis.

Aansoek om verlof tot appél

Die hof het die aansoek om summierië vonnis toegestaan waarna die verweerdertrust 'n aansoek gerig het vir verlof om teen die vonnis te appelleer. Die gronde vir die aansoek was, onder andere, dat die hof die verkeerde maatstawwe toegepas het by oorweging van die aansoek om summierië vonnis, naamlik dat die hof die opponerende beëdigde verklarings van die verweerdertrust op waarskynlikhede geoordeel het en geloofwaardigheidsbevindinge met betrekking daartoe gemaak het en versuim het om te oorweeg of die verweer wat voor die hof geplaas was, geldig sou wees indien dit by die verhoor bewys sou kon word. Daar is verder aangevoer dat die hof fouteer het in sy bevinding dat dit ondenkbaar is dat die een trustee van die verweerdertrust 'supposedly independent from family connection' en bewus van die simulatie ('farse'), die betrokke skuldbewyse se ondertekening onder die omstandighede sou gemagtig het. Die hof het op sterkte daarvan bevind dat die verweerder se verweer ongelooftwaardig is en verwerp moet word.

Die hof het die aansoek vir verlof om appél van die hand gewys. Toe die hof gevra is om redes te verskaf vir die beslissing is die redes verskaf by wyse van 'n dokument wat uit een sin bestaan: 'In terms of rule 6(2)(d) of the Rules of the Supreme Court of Appeal, the parties are referred to my judgment delivered on [die betrokke datum] on the merits of the application.'

Die verweerdertrust het toe by die Hoogste Hof van Appél aansoek gedoen vir verlof om appél. Die gronde vir die aansoek was dat –

- die hof fouteer het deur die betrokke aangeleentheid op waarskynlikhede te besleg;
- die verweerdertrust slegs nodig gehad het om die hof by wyse van beëdigde verklaring te oortuig dat hy 'n *bona fide* verweer het deur feite voor te lê wat, indien dit by die verhoor bewys sou word, 'n geldige verweer sou daarstel op die eis van die eiser; en
- die hof in die aansoek vir verlof om appél, geen bevinding gemaak het waarom 'n ander hof nie op dieselfde feite moontlik tot 'n ander bevinding sou kom nie.

Die Hoogste Hof van Appél het die aansoek vir verlof om te appelleer van die hand gewys sonder opgawe van redes, behalwe vir 'n kriptiese bevel wat,



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onder andere, soos volg lees: 'This court therefore, in general terms, concurs in the reasoning set out in the judgement of the court below.'

Daar is nêrens verwys na die betoeg deur die applikant en die regsbeginnels waarop gesteun is deur enige van die partye ter ondersteuning of opponering van die aansoek nie.

Verskaffing van redes

Die tersaaklike statutêre bepalings van toepassing op die hof vir klein eise, die landdroshof, die Arbeidshof, sowel as die Hoë Hof van Suid-Afrika, maak dit verpligtend om gemotiveerde redes vir bevindinge en uitsprake te verskaf. Daar is egter geen dergelike bepaling van toepassing op die Hoogste Hof van Appél of die Konstitusionele Hof nie.

Die statutêre bepalings is volkome in ooreenstemming met die voorskrifte en gees van die Grondwet. Dit is ook ooglopend verstandig en sinvol. Indien 'n regterlike amptenaar se bevindinge met betrekking tot die feite, wat volgens hom of haar bewys is, en sy of haar redes vir die vonnis nie by wyse van 'n deurdagte behoorlike samevatting beskikbaar is nie, word 'n nuwe grond vir verskille en dispute tussen die litigante geskep en dit plaas 'n verdere onnodige las op die hof van appél.

'n Applikant het in sy aansoek aan die Hoogste Hof van Appél vir verlof om te appelleer dieselfde frustrasie ervaar toe daardie hof geen redes verskaf het vir die weiering nie. Die applikant het hom toe op die Konstitusionele Hof beroep. In *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) het Goldstone R die gebruik van die Hoogste Hof van Appél behandel.

In hierdie uitspraak word bevestig dat daar geen uitdruklike grondwetlike voorsiening is wat van regters vereis om redes vir hulle uitsprake te gee nie, maar daar word wel verwys na die bepalings van a 1 van die Grondwet: '... [T]he rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons' (in para 12).

In die Konstitusionele Hof se uitspraak word ook vermeld dat die verskaffing van redes deur 'n regterlike amptenaar etlike doeleindes bevredig, onder andere: 'It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions' (in para 12).

In dieselfde uitspraak word verder vermeld dat die verskaffing van redes noodsaaklik is vir die appélproses: '[E]nabling the losing party to take an informed

decision as to whether or not to appeal or, where necessary, seek leave to appeal' (in para 12). Dit verskaf dan ook leiding aan die publiek in verband met dergelike aangeleenthede en daar word, ten slotte, deur die Konstitusionele Hof bevind dat waar 'n beslissing aan 'n verdere reg tot appél onderworpe is en redes nie verskaf word nie, dit moontlik tot 'n skending van die grondwetlike reg van toegang tot howe, mag lei (in para 12).

'In die Konstitusionele Hof se uitspraak word ook vermeld dat die verskaffing van redes deur 'n regterlike amptenaar etlike doeleindes bevredig, onder andere: 'It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions' (Mphahlele v First National Bank of SA Ltd 1999 (2) SA 667 (CC) in para 12).'

In die uitspraak word beklemtoon dat 'n bevel deur die Hoogste Hof van Appél, ingevolge waarvan verlof om te appelleer geweier word, die einde van die regspad vir die betrokke litigant is en dat daardie bevinding nie aan verdere appél onderhewig is nie. Op grond daarvan, is die bevinding dus dat dit nie vir die Hoogste Hof van Appél nodig is om redes vir sy bevinding te verskaf nie: Die redes is reeds deur die hof *a quo* verskaf en die litigant moet daarmee genoë neem.

Goldstone R verwerp die betrokke appellant se beroep op die bepalings van a 32(1) van die Grondwet wat bepaal dat elke persoon die reg van toegang het tot enige inligting wat deur die staat beheer word, as synde ontoepaslik. Hy verwys egter in die betrokke uitspraak ook glad nie na die bepalings van a 33(2) van die Grondwet nie. Hierdie artikel bepaal: 'Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

Afgesien van die voormelde bepalings is dit, na my mening, bloot logies en praktyksinvol dat die Hoogste Hof van Appél, en inderdaad ook die Konstitusionele Hof, wel redes sal verskaf vir besluite om aansoeke vir verlof om te appelleer toe te staan of af te wys.

Op slot van sake is die enigste praktiese manier waarop sodanige aansoek deur die betrokke aangewese appélregters gefinaliseer kan word tog sekerlik dat die redes vir die uitspraak

van die hof *a quo* gelees en oorweeg moet word, aan die hand van die gronde vir die aansoek vir verlof om te appelleer en die opponerende verklaring daartoe, en dat 'n besluit dan, op grond van sekere beginsels en oorwegings, gemaak moet word. Daardie beginsels en oorwegings moet tog sekerlik deur die betrokke appélregters helder en duidelik geïdentifiseer word voordat dit in die betrokke geval toegepas word of, dan sekerlik vir 'n ander regsbeginnel wat net so duidelik geïdentifiseer word, nie toegepas word nie.

Indien hierdie beskouing korrek is, gaan dit tog nie veel ekstra moeite of tyd van die betrokke appélregter verg om dit in die vorm van skriftelike redes uiteen te sit nie. Dit sal terselfdertyd ook die doeleindes, soos geïdentifiseer deur Goldstone R in para 12 van die beslissing in die *Mphahlele*-saak, bevredig.

Deur dit nie te doen nie is nie net die betrokke litigante nie, maar ook hulle regsvertegenwoordigers en inderdaad die publiek in die duister gelaat welke gronde en argumente wat deur die litigante gebruik is, verwerp of aanvaar is en wat die betrokke appélregters genoep het om die bepaalde besluit te neem.

Met verwysing na die aansoek van die verweerdertrust wat hierbo uiteengesit is, is dit ook onduidelik watter beginsels deur die Hoogste Hof van Appél toegepas is in die weiering van die betrokke aansoek.

'n Goeie verwysing na die waarde en nut van die verskaffing van redes wanneer 'n aansoek vir verlof om appél deur die Konstitusionele Hof van die hand gewys word, is te vind in die uitspraak van Jafta R in die saak *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) in para 102: 'In some cases the absence of prospects of success may be decisive. For instance, this will be the position where no pronouncement is to be made by this Court on an important constitutional principle which will guide the litigants and other courts in future cases. But where leave is sought against a fully reasoned judgment of the Supreme Court of Appeal - as is the position here - prospects of success become paramount.'

Gevolgtrekking

Ek is van mening dat dit aangewese is dat daar statutêre voorsiening gemaak sal word dat die Hoogste Hof van Appél, en selfs die Konstitusionele Hof, na aanleiding van 'n aansoek vir verlof om na daardie hof te appelleer, redes sal verskaf vir 'n bevinding - hetsy positief of negatief.

Willie Herbst BCom (Stell) LLB (UFS) is 'n prokureur by Hill McHardy & Herbst Ing in Bloemfontein.





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The ending of a customary marriage

What happens to the ilobolo?

By
Thulani
Nkosi

The conclusion and dissolution of a customary marriage is a process currently regulated by the Recognition of Customary Marriages Act 120 of 1998 (RCMA).

This Act, in the words of Moseneke DCJ in *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 16 'represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of indigenous African people of this country. ... [P]ast courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary "unions" '.

As progressive as the RCMA is, it has not been without shortcomings of its own. Moshidi J in *K v P* (GSJ) (unreported case no 09/41473, 15-10-2010) (Moshidi J) at para 11 opined that: 'Although the legislature's intention in enacting the Recognition Act was undoubtedly noble in recognizing customary marriages previously ignored, and in order to put them on [par] with civil marriages, there are however, clearly still problem areas.'

This article focuses on one problem area presented by the RCMA – namely, that of the retention and/or the refund of *ilobolo* on the dissolution of a customary marriage. Bertelsmann J in *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) at para 28 acknowledged the importance of this question when he held:

'It appears to be well established, however, that "in customary law the central issue in divorce proceedings is refund of bridewealth, an obligation taken so literally that the husband could demand return of the same cattle he had originally given. If they had died in the interim, the defendant could settle the claim with a cash equivalent" '.

It is worth noting that the RCMA does not specifically make the tendering of *ilobolo* a requirement for the conclusion of a valid customary marriage. Section 8 is instructive in providing that a customary marriage is to be dissolved by a decree of divorce granted by a competent court. As of necessity, this provision means that a customary marriage is to be dissolved like a civil marriage and that the provisions of the Divorce Act 70 of 1979 will apply. Although an argument can be made that, in omitting the tendering of *ilobolo* from the general requirements for the validity of a customary marriage, the legislature watered down the role and the significance of *ilobolo* in the conclusion of a customary marriage.

Academics and courts have interpreted s 3(1)(b) of the RCMA as a tacit requirement that *ilobolo* must be given

in order for the customary marriage to be valid, or at the very least, so goes the argument, there must be negotiations and agreement concerning payment, in part or in full, of *ilobolo* (see L Mofokeng 'The *lobolo* agreement as the "silent" prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) 68 *THRHR* 277 at 278). In *Maloba v Dube and Others* (GSJ) (unreported case no 08/3077, 23-6-2008) (Mokgoatheng J) the court held that '[t]he agreement to marry in customary law is predicated upon lobolo in its various manifestations. The agreement to pay lobolo underpins the customary marriage' (at para 26).

Notwithstanding the RCMA's silence on *ilobolo* as a requirement for a valid customary marriage, there is clear understanding of the importance of *ilobolo* from those who practice customary law and the courts. This importance has recently been underlined in *Southon v Moropane* (GSJ) (unreported case no 14295/10, 18-7-2012) (Saldulker J) where the court held that '[t]he traditional principle that there can be no [valid] customary marriage without lobolo being delivered or at least negotiated, still prevails' (at para 81).

I submit that the delivery of, or the negotiation of *ilobolo* pursuant to the conclusion of a customary marriage is the most important ingredient that distinguishes a customary marriage from other forms of marriages. It is the ingredient that differentiates a customary marriage from mere cohabitation, popularly known as *vat en sit*. JC Bekker correctly argues that '[l]obolo is therefore the rock on which the customary marriage is founded; there is considerable justification for the view that a lobolo contract has a greater binding force than a marriage at common law' (JC Bekker *Seymour's Customary Law in Southern Africa* 5ed (Cape Town: Juta 1989) at 151).

Function and significance of *ilobolo*

There are diverse opinions concerning the function and significance of *ilobolo*, especially among feminists and those who do not practise customary law. At the heart of these divergent views is the misconception of *ilobolo* as a purchase-and-sale transaction. To some extent many still hold this misconception. This is probably one of the reasons why the legislature decided not to make the tendering and receiving of *ilobolo* a requirement for the conclusion of a customary marriage.

Adherents of customary law and practices are themselves not united as to the exact function and significance of *ilobolo*, let alone the retention and/or refund

of it on divorce. Some have said that the function and significance of *ilobolo* properly analysed have to do with the transfer of the reproductive capacity of the woman from her family into that of her husband (NJJ Olivier; JC Bekker; NJJ Olivier (Jnr) and WH Olivier *Indigenous Law* (Durban: LexisNexis 1995) at 32). Viewed in this way, it can be said that *ilobolo* plays a legitimising function for the children born of the customary marriage. Some hold a view that *ilobolo* is a token of appreciation that the groom's family extend to the bride's family for rearing the bride and that it is only once *ilobolo* or part of it has been tendered and received that the bride is welcomed by the ancestors of the groom into the family. In capturing these divergent views on the function and significance of *ilobolo*, RM Dlamini argues that *ilobolo* in its proper customary sense has a multiplicity of legal functions (RM Dlamini 'The transformation of a customary marriage in Zulu Law' 1983 *CILSA* 383 at 386).

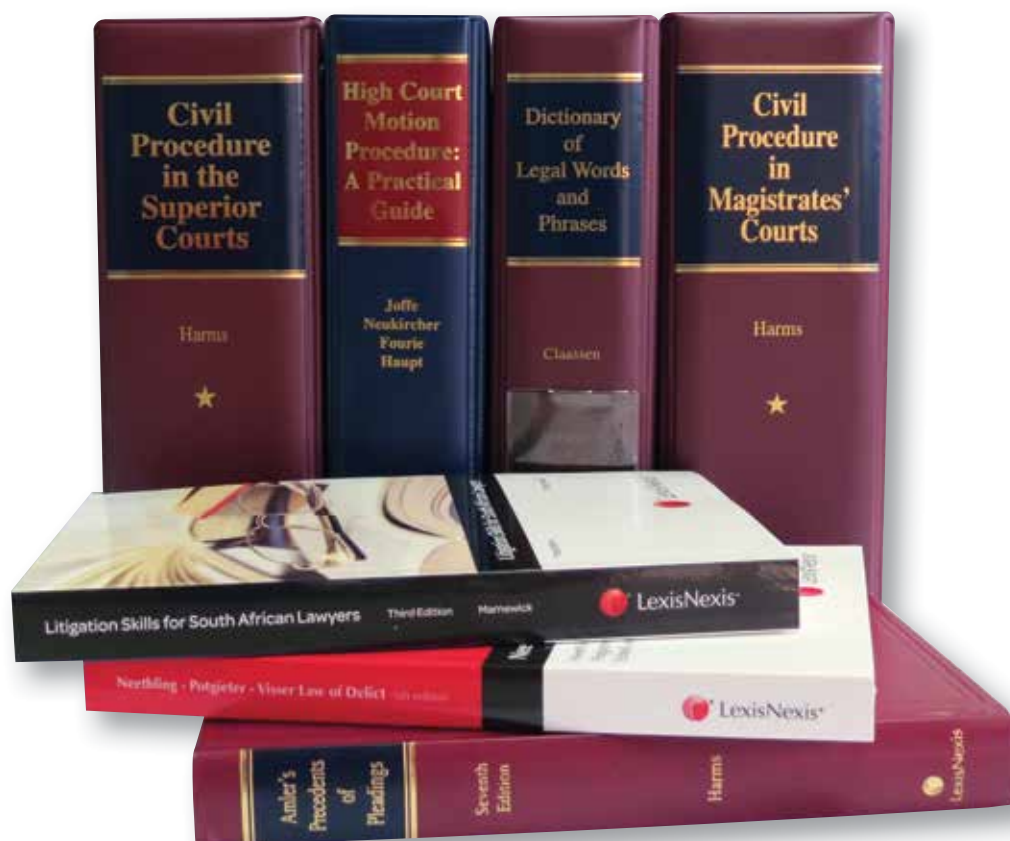
He opined as follows: 'Its ceremonial transfer from the husband's to the wife's group is a public record and expression of the creation of a new matrimonial relationship; it is of probative value and is a validating act by which a customary marriage is concluded; it marks the formal creation of the marital power of the husband over his wife and gives him exclusive access to his wife, thus making it adulterous for another [woman] to have relations with [him]; it also gives the husband parental power over children born of his wife and assures their affiliation to him.'

Whatever the true function and significance of *ilobolo* is, it is clear that its tender or, at the very least, its negotiation is a bedrock on which a customary marriage rests. So important is *ilobolo* that some have argued it provides stability to the customary marriage. In the words of Dlamini (*op cit* 390) the prospect of forfeiture of *ilobolo* was thought to deter a man from divorcing his wife frivolously, and on the other hand, the possible return of *ilobolo* by the wife's father should she misbehave motivated her to behave with due decorum and not to wreck the marriage by her misconduct.

Dissolution of a customary marriage

Section 8 of the RCMA purports to dissolve a customary marriage in the exact terms the Divorce Act dissolves a civil marriage. An anomaly in this is that the very nature of a customary marriage is distinct from a civil marriage. This fact was captured in the *Gumede* case (at para 18) where it was held: 'In our pre-colonial past, [customary] marriage was always a bond between families and not individual spouses. Whilst the two parties to the marriage were not unimportant,

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their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of a larger group.'

It therefore follows that the provisions of an Act that was enacted to dissolve a marriage that is based on individualistic principles like a civil marriage cannot properly apply to a marriage that has a collective or a 'communal substance'. A customary marriage is not purely a matter between the bride and the bridegroom, it is also 'a group concern, legalising a relationship between two groups of relatives' (see *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1072C - D).

Prior to the RCMA, a customary marriage could be dissolved by the death of the husband provided the woman

'Whatever the true function and significance of *ilobolo* is, it is clear that its tender or, at the very least, its negotiation is a bedrock on which a customary marriage rests.'

was not transferred to one of the brothers of the deceased to sire an heir (M Herbst and W du Plessis 'Customary Law v Common Law Marriages: A Hybrid Approach in South Africa' vol 12.1 (2008) *EJCL* at 11) (www.ejcl.org/121/art121-28.pdf, accessed 3-10-2013). This practice, provided the woman accepted, was called *ukungenwa*. During the lifetime of the husband, owing to ill-treatment or any other valid reason, a woman could return to her father's household thereby forcing her husband to *phuthuma* (fetch) her with a fine, failing which, it was accepted that the husband did not want to continue with the marriage (Herbst and Du Plessis *op cit* at 11). These flexible and practical rules developed over time to constitute grounds for dissolution of a custom-

ary marriage, something the RCMA has taken away in insisting that a customary marriage may be dissolved only by a court ordering a decree of divorce.

The established rules in relation to the retention and refund of *ilobolo* were that *ilobolo* or a portion of it could be refunded under certain circumstances, including

- where a wife deserted her husband and refused to return when fetched; or
- was guilty of conduct giving rise to him rejecting her; or
- her father repaid it in an apparent act of dissolving the marriage (Bekker *op cit* at 150 - 151).

But where a husband rejected his wife without cause *ilobolo* could be retained (Bekker *op cit* at 151).

The RCMA is as silent on the retention and repayment of *ilobolo* as it is on the necessity of delivering it at the conclusion of a customary marriage. This is notwithstanding the fact that old authorities on the matter are unanimous that *ilobolo* could be retained and refunded depending on the circumstances leading to the divorce (see *Sila v Masuku* 1937 NAC (N & T) 121; *Matlala v Tompa* 1951 NAC (N-E) 404). I submit that at the time when *ilobolo* carries both a cultural significance and economic value and at the time when divorces are so frequent, it is foreseeable that spouses are going to quarrel over its retention and refund more than ever before. When they do, it is not hard to imagine that courts would once again fashion creative ways within the RCMA and the Divorce Act, which creative ways may very well supplement the apparent shortcomings of the RCMA. After all 'customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community' (see *Shilubana and Others v Nwamitwa and Others* 2008 (9) BCLR 914 (CC) at para 35).

Perhaps one of the creative ways would be for the courts to fashion a solution that looks like a forfeiture of benefits under s 9(1) of the Divorce Act. Should this be the case, courts, when deter-

mining whether to order retention or a refund of *ilobolo* or a part thereof, would be entitled to take into account factors like the duration of the customary marriage, the circumstances giving rise to the breakdown, and any substantial misconduct on the part of either of the parties. In this formulation the principal reason for the retention or a refund of *ilobolo* will be the undue benefit that may arise if such an order of repayment is not made.

Conclusion

Notwithstanding the muteness of the RCMA on issues pertaining to the tender and retention of *ilobolo*, the courts are no strangers to these disputes. In *Nkambule v Linda* 1951 (1) SA 377 (A) at 384D the court held that a woman in a customary marriage is justified to leave a man who has contracted a civil marriage and, in so doing, does

not render her guardian liable for a refund of *ilobolo*. The *Nkambule* judgment has recently been confirmed by the Supreme Court of Appeal in *Netshituka v Netshituka and Others* 2011 (5) SA 453 (SCA). It can therefore be concluded that a claim for a refund of *ilobolo*, despite it not being provided for either in the RCMA or the Divorce Act, remains a competent claim at customary law, which claim could be enforceable against the customary law wife or her guardian or both of them.

Thulani Nkosi BA LLB (Wits) LLM (UJ) is a candidate attorney at the University of the Witwatersrand Law Clinic.



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INSPIRING GREATNESS



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Is behind bars better?

Non-custodial sentencing holds the key

By
Regan
Jules-Macquet

Non-custodial sentencing (NCS) has been on the South African statute books for decades. In ch 28, s 276, the Criminal Procedure Act 51 of 1977 permits alternatives to imprisonment in the form of correctional supervision and fines and, in s 297, in the form of suspended or postponed sentences with conditions.

Prison context

South African prisons have an overcrowding rate of 137% (Department of Correctional Services 'Incarceration Levels' 2011 www.dcs.gov.za/AboutUs/StatisticalInformation.aspx, accessed 21-2-2013). Between 10 and 15% of sentenced incarcerated offenders have regular access to work and rehabilitation programmes (Judicial Inspectorate for Correctional Services 'Annual Report 2009/10' 2010 Cape Town: Judicial Inspectorate for Correctional Services www.dcs.gov.za/Publications/Annual%20Reports/DCS%20

Annual%20Report%202010.pdf, accessed 4-10-2013). There are approximately 503 social workers and 57 psychologists available to service a population of over 158 790 offenders (Department of Correctional Services 'Department of Correctional Services Annual Report 2011/12' 2012 Pretoria: Department of Correctional Services www.dcs.gov.za/docs/landing/DCS%20Annual%20Report%202011-12.pdf, accessed 4-10-2013).

It is clear that in order to effectively address the factors contributing towards crime and criminal behaviour, we must make use of other measures besides incarceration. Prison should be reserved for those offenders who cannot be dealt with in any other form and are too high risk for community-based sentencing.

It is in this context that organisations such as the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) have pioneered community-based non-custodial sentencing options that focus on behavioural change.

New developments in sentencing

NICRO has been rendering offender re-integration services since 1910. In 2006, NICRO began rendering NCS services as an alternative to incarceration. Seven years later, the NCS service has evolved into a credible option for judicial officers.

The NCS service that NICRO, a registered non-profit organisation, offers contains mandatory behavioural change interventions, which include individual and family counselling, therapy, community service, adult and youth life-skills programmes and specialist programmes for substance addiction and domestic violence.

By May 2013, over 4 700 sentenced offenders have received NCS services from NICRO, with an 88% compliance rate. An independent impact evaluation has found that the NCS service, as rendered by NICRO, has achieved significant positive behavioural outcomes in the form

of reduced substance abuse, improved decision-making and interpersonal relationships as well as positive changes in lifestyle (R Griggs 'Independent Impact Evaluation of the Non-Custodial Sentencing Service' 2013 Cape Town: National Institute for Crime Prevention and the Reintegration of Offenders www.nicro.org.za/non-custodial-sentencing-independent-impact-evaluation-seminar-documents, accessed 4-10-2013).

The primary significance of this form of NCS is that it is based on the hypothesis that, in order to reduce the risk of reoffending, the offender must undergo behavioural change interventions. This form of NCS is not primarily structured as a punitive measure, but as a behavioural change intervention, which is reintegrative in nature.

The judicial officers making use of NCS are doing so because they do not believe in the reintegrative potential of fines or suspended sentences without accompanying behavioural change interventions.

Because NICRO is a donor-supported non-profit organisation, the NICRO NCS service is available only at 28 courts across South Africa. It is hoped that, in time, more corporate and governmental support will increase the availability of the service.

Eligibility

Contrary to what many legal and criminal justice practitioners believe, eligibility for reintegrative NCS is not based on the nature of the offence or whether the offender is a first-time offender. Eligibility is determined from an in-depth risk assessment that examines the risk to self, to others and of re-offending. The assessment examines both static and dynamic risk factors and identifies the criminogenic needs of the offender – the behaviour that must change to reduce the likelihood of reoffending (MA Campbell, S French and P Gendreau 'Assessing the Utility of Risk Assessment Tools and Personality Measures in the Prediction of Violent Recidivism for Adult Offenders' United States of America: Department of Public Safety and Emergency Preparedness www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-ssmnt-tls/rsk-ssmnt-tls-eng.pdf, accessed 4-10-2013).

A standard assessment can take up to two hours, and the report can take several hours to compile. Additional data from interviews with the victim and the offender's family or friends is also necessary. For this reason, same-day assessments are not possible.

People who commit violent offences can be eligible and first-time petty offenders can be ineligible. The most common risk factors that form part of the assessment are –

- pro-criminal values;
- attitudes and beliefs;

- pro-criminal associates and friends;
- a history of antisocial behaviour (not necessarily resulting in prior arrests or convictions);
- poor recreation choices;
- poor family dynamics;
- substance abuse or addiction; and
- poor work or school performance.

The above factors are extracted from extensive criminological research that has been undertaken over the past few decades (see F Domurad and M Carey 'Implementing Evidence-Based Practices' 2010 Maryland: Center for Effective Public Policy, www.cepp.com/documents/Implementing%20Evidence%20Based%20Practices.pdf, accessed 4-10-2013; CT Lowenkamp, EJ Latessa and AM Holsinger 'The Risk Principle in Action: What We Have Learned from 13,676 Offenders and 97 Correctional Programs?' 2006 *Crime & Delinquency* 52(77) at 77-93. www.indiana.gov/idoc/files/Article_Risk_Principle_in_Action_Lowenkamp-Latessa.pdf, accessed 4-10-2013; and R Przybylski 'What Works: Effective Recidivism Reduction and Risk-Focused Prevention Programs. A Compendium of Evidence-Based Options for Preventing New and Persistent Criminal Behavior' 2008 RKC Group Prepared for Division of Criminal Justice http://dcj.state.co.us/ors/pdf/docs/ww08_022808.pdf, accessed 4-10-2013 for more detail on offender reintegration evidence-based practice).

'It is clear that in order to effectively address the factors contributing towards crime and criminal behaviour, we must make use of other measures besides incarceration. Prison should be reserved for those offenders who cannot be dealt with in any other form and are too high risk for community-based sentencing.'

Non-compliance

Between January 2009 and April 2013, 550 sentenced offenders have failed to comply with their sentences. This is 12% of the total number of people serving reintegrative NCS sentences at NICRO. An offender is regarded as non-compliant by NICRO if they –

- commit another offence while in service;
- do not attend their mandatory sessions; and
- attend, but are disruptive or do not engage as required.

In the event that an offender is non-compliant for the second and third of the above reasons, the NICRO social worker will attempt to bring the offender back into service. If these efforts are unsuccessful, the social worker will submit an affidavit to the prosecutor and the matter will be taken up in court. The court will generally issue a summons or a warrant for the offender.

Working with a non-governmental service provider

It is sometimes difficult for private legal practitioners to understand the workings of NGOs such as NICRO. Some legal practitioners attempt to secure NCS for their client by approaching NICRO directly. These attempts are unsuccessful, since it is not NICRO's decision as to whether an offender is given NCS or not; only the judicial officer passes sentence. NICRO's role is in conducting the assessment and making recommendations to the court based on the assessment outcomes. The social worker's input is conducted in terms of ch 28, s 274 of the Criminal Procedure Act (evidence on sentence).

NICRO's NCS referrals come directly from either the prosecutor or the judicial officer. Attempts by private legal practitioners to secure assessment bookings directly from NICRO simply complicate the process. All court referrals take precedence over other referrals because the court referrals have set dates by which the court report must be submitted.

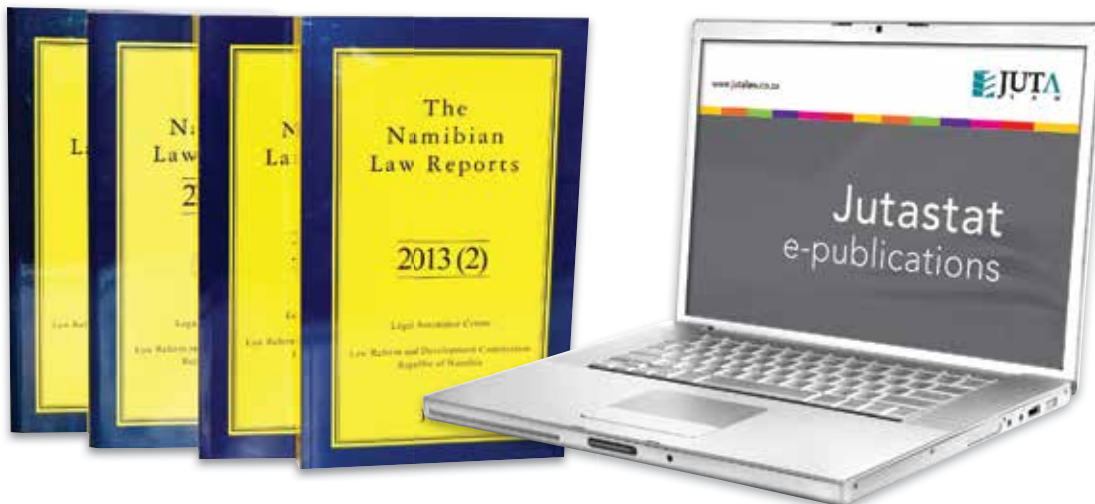
If private legal practitioners wish to explore NCS for their clients, they would be advised to raise the matter in trial at the sentencing stage and request that their clients be sent for assessment. This request then forms part of the court record and the process is overseen by the judicial officer. By acceding to the request, the judicial officer has also indicated a willingness to consider such an assessment.

Clash of paradigms

Challenges have also been experienced with some judicial and legal practitioners not respecting the professional independence of social workers. This has led to social workers complaining of feeling pressurised by legal practitioners to rush an assessment or to arrive at a desired recommendation. This is most likely caused by the adversarial nature of our criminal justice system coming in conflict with the therapeutic nature of social work practice. Legal practition-

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ers may be accustomed to arguing quite aggressively for a particular outcome; whereas social workers are required to approach work with offenders within a therapeutic paradigm.

NCS can be expected to yield positive results only if the evidence-based principles (EBP) are adhered to. This includes conducting thorough individualised assessments, assessing offender risk not based on the offence but based on the offender's static and dynamic risk factors, as well as criminogenic needs and responsivity issues. Reserving longer and more intensive interventions for higher risk offenders is also part of EBP. Focusing on changing pro-criminal values, attitudes and beliefs through interventions is most likely to produce positive outcomes. High levels of pro-criminal cognition can render a person too high risk for NCS, even though the offender is not necessarily violent. Graded sanctions should exist, combined with aftercare and support (see Domurad and Carey and Przybylski *op cit* for more detail on evidence-based practice).

The way the South African criminal justice system functions frequently means that there is conflict between the above paradigm of EBP versus the adversarial nature of the trial as well as in the manner in which the client's interests are managed by the legal practitioner. It is possible for the legal practitioner to push for a particular judicial outcome

that is not necessarily in the client's best behavioural interest, for example paying a fine versus undergoing a behavioural intervention.

It has been noted that administrative pressure to finalise cases quickly renders many judicial officers unwilling to postpone sentencing in order to obtain an assessment (Griggs *op cit*). It is easier to sentence an offender to a suspended or postponed sentence with no conditions other than not committing a similar offence within a specified timeframe. This is unfortunate, because there are few behavioural outcomes that are associated with these types of suspended sentences. According to EBP, in order to change pro-criminal behaviour, the criminogenic needs of the offender must receive attention (Campbell *op cit*). In many cases where the offender has pro-criminal cognition, receiving such a suspended or postponed sentence can strengthen the belief of 'I got away with it.'

Evidence emerging in the assessment

In the more than 4 700 NCS cases that NICRO has worked with, it has occurred only once that material information emerged in the presentence assessment that did not emerge in trial. This case is still *sub judice*, so only a very general description is provided.

The accused was charged with an offence, to which she pleaded guilty. On the

basis of her plea, she was found guilty. During the presentence assessment, she recanted her plea and stated that she was coerced into signing the plea statement, which she claimed was written and submitted without her knowledge. In the assessment with the NICRO social worker, she gave a different version of the offence, which contradicted the available evidence (including DNA evidence). When confronted by her legal practitioner, she told her lawyer that she had lied to the social workers (probation and NICRO). When asked by the social workers which statement was true, she did not retract her denial of the offence.

Based on the above events, both the legal practitioner and the magistrate recused themselves. The case is now underway as a trial *de novo*.

Conclusion

NCS containing behavioural change interventions has much to offer the South African criminal justice system. Prison is not suitable for lower risk offenders, and viable alternatives do exist. If sentencing is to play a more constructive role in reducing crime in South Africa, we need to look at punishment and sentencing in a different way.

Regan Jules-Macquet BA (Hons) (UCT) is a project manager at NICRO in Cape Town. □

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Cracks in the wall

What recourse does a subsequent purchaser have?

The scenario should be all too familiar: A client purchased a house and it transpires that the foundations are riddled with structural defects caused by negligent building. In the deed of sale is the usual *voetstoots* clause, barring any recourse on the basis of latent defects, and, being a private sale, the Consumer Protection Act 68 of 2008 is of no refuge. It would seem that the only avenue for redress is attempting to overcome the *voetstoots* clause by showing deliberate

concealment of the defects, a formidable hurdle. The client will no doubt ask whether the architect, structural engineer, or contractor involved in the construction may be sued for negligence. In terms of the common law, this possibility is instinctively rejected out of hand.

Is it correct to think that the client is without recourse in the law of delict? This article will show that the answer to the subsequent-purchaser question is not immediately obvious, and indeed might run contrary to legal instincts.

Wrongfulness in delict

Like many other contentious issues in the law of delict, the answer to this question rests in the wrongfulness inquiry: Should negligent conduct of a building professional be branded wrongful *vis-à-vis* a subsequent purchaser?

Wrongfulness is an elastic concept that begets no concise definition. The decision whether a particular instance of harm-causing conduct is wrongful is the

outcome of the exercise of judicial discretion, taking into account various policy considerations (Francois du Bois (ed) *Wille's Principles of South African Law* 9ed (Cape Town: Juta 2007) at 1098). The ultimate question that the court asks is whether, assuming that the other requirements for delictual liability are satisfied, it is reasonable to impose liability in the particular instance (*Trustees Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at para 12).

Picture source: Gallo Images/Thinkstock

By
Jason
Mitchell

Delictual liability in a contractual setting

Delictual and contractual liability may overlap in circumstances where conduct constituting a breach of contract also constitutes a delictual wrong. The key point is that a claim in delict is available only alongside a contractual action if the conduct complained of, apart from the breach of contract, also wrongfully and culpably infringes a legally recognised interest of the plaintiff that

exists independently of the contract (J Neethling and JM Potgieter *Law of Delict* 6ed (Durban: LexisNexis 2010) at 259). In other words, a plaintiff cannot rely on the breach of contract alone as wrongful conduct for the purposes of a delictual claim (see *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1985 (1) SA 475 (A)).

The courts are careful to thwart attempts by litigants to circumvent contractual relationships by means of delictual claims. It is clear from the case law that the extension of delictual liability will not readily be allowed in the field of contract law if the prejudiced party was in a position to afford himself or herself adequate contractual remedies.

Indeed, in the seminal decision of the Supreme Court of Appeal in the *Two Oceans* case, the chief reason that motivated Brand JA to find against the plaintiff on the issue of wrongfulness was that there was no reason why the plaintiff could not have covered itself against the risk of harm due to the defendant's negligence by means of appropriate contractual stipulations.

Liability in the subsequent-purchaser situation

Based on the above discussion, it would seem that the courts would shut their doors to a subsequent purchaser relying on a delictual claim to recover pure economic loss. The subsequent purchaser is in a position to cover himself or herself for damage caused by negligent construction by means of an appropriate stipulation in the deed of sale (or by not agreeing to a *voetstoots* clause). However, the concluding paragraphs of Brand JA's judgment in the *Two Oceans* case could hold the key to unlocking such a claim:

'Finally, the appellants argued that the position of the trust *vis-à-vis* the respondent is analogous to that of the relationship between the subsequent owner of a building and the builder responsible for its construction. They therefore sought support for the extension of Aquilian liability in

the present context in those cases where the subsequent owner was afforded a remedy in delict against the builder for damages resulting from the negligent execution of the building contract to which the subsequent owner was not a party In the light of the view that I hold on the facts of this matter, I find it unnecessary to enter into the rather complex debate regarding the extension of delictual liability to afford a remedy in the subsequent-purchaser situation. Unlike the relationship between the trust and the respondent in this matter, there is never any direct contractual relationship between the builder and the subsequent purchaser. Unlike the trust, the subsequent purchaser would therefore not have had any opportunity to arrange the features of that relationship by way of contract. That, as far as I am concerned, is a material difference. Whether that material difference will lead to a different result in the subsequent-purchaser situation, is one we do not have

to decide' (at paras 26 - 27).

In the above paragraphs, Brand JA deliberately distances his judgment from the subsequent-purchaser situation. The effect of this may well be that the subsequent-purchaser case is distinguishable from the *Two Oceans* case, giving scope to argue that the law of delict should place its *imprimatur* on a delictual remedy in these situations, notwithstanding the contractual relationships at play.

For some reason, Brand JA did not, in his brief discussion of the subsequent-purchaser situation, deal with the only South African case directly on point. In *Tsimakopoulos v Hemingway, Isaacs & Coetzee CC and Another* 1993 (4) SA 428 (C), the Cape Provincial Division (as it then was) allowed a subsequent purchaser to sue an engineering firm for damages caused by its negligence in constructing a retaining wall. Briefly, the facts of the case were as follows: In 1987, the defendant was engaged by the then owner of the property, Craw-

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ford, to design a retaining wall to be built on the property. Crawford built the wall according to these plans. The property was sold to the plaintiff approximately two years later. It was common cause that the design of the wall had been negligent. As a result, approximately six months after the plaintiff purchased the property, the wall began to tilt upwards, obliging the plaintiff to take steps to restore the stability of the wall. In doing so, the plaintiff suffered economic loss.

The defendant argued that where the relationship between a plaintiff and defendant had its 'origins in contract', it would be inappropriate and impracticable for a party such as the plaintiff in this case to institute action in delict. Rather, so the argument went, he would be limited to a contractual claim against the seller. The court was not persuaded by this argument, observing that while the relationship between the plaintiff and the seller has its origin in contract, there was never any contract between the plaintiff and the defendant (a key feature of the reasoning of Brand JA in the *Two Oceans* case).

The defendant raised the usual policy arguments traditionally used to militate against extension of delictual liability. In particular, it was argued that recognition of a delictual cause of action would open the door to a multiplicity of claims, and that it would render every building contractor and sub-contractor, architect, or engineer liable not only to his or her immediate contracting partner in contract, but also in delict to all of the latter's successors in title *ad infinitum*. The court rejected this line of argument with the devastatingly simple retort that, in this particular instance, the wall could only fall over once. Once that event had occurred, it could not happen again. Therefore, the spectre of an unlimited class of possible plaintiffs could not arise in this case. The quantum of damages was necessarily limited to the cost of rebuilding the wall. The plaintiff's claim was successful.

Given the fact that Brand JA deliberately distanced the subsequent-purchaser situation from his judgment in the *Two Oceans* case, it would seem that the *Tsimatakopoulos* case remains good law.

However, it must be borne in mind that the principles espoused in this case have yet to be tested directly on an appellate level (see the extensive *obiter* support and justification for this decision emanating from the Cape High Court in *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C) and *Humphrys NO v Barnes* 2004 (2) SA 577 (C)). The *Pinshaw* judgment was subsequently overturned by the SCA in *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA), but the latter judgment did not deal with the merits of the subsequent-purchaser situation as outlined in the *Pinshaw* case).

Limitation of liability

Assuming that a cause of action against a building professional could, in principle, be sustained by a subsequent purchaser, would the former be able to rely, directly or indirectly, on a limitation of liability contained in his or her contract with the seller? While the first port of call may be to deny such a possibility on the basis of a lack of privity between the building professional and the subsequent purchaser, the SCA's decision in *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) suggests an affirmative answer to this question. In this case, the owner of a construction site had contracted with a security firm for it to provide security personnel on-site. The contract excluded liability of the firm for any damage or loss to the owner of the site. A truck, owned by the plaintiff, was stolen from the site, and the plaintiff sought to sue the security firm in delict for the value of the truck.

Lewis JA confirmed that no delictual claim is maintainable when the negligent conduct relied on consists solely in the breach of the contract. However, where the claim exists independently of the contract, a delictual claim for economic loss may certainly lie. This would be so even if the delictual claim would not exist but for the existence of the contract. Accordingly, it is possible that the assumption of contractual duties is capable of giving rise to delictual liability.

Having recognised that the plaintiff would, at least in principle, have a claim

in delict against the defendant, the court went on to consider the relevance of the exclusion of liability in the contract between the defendant and the owner of the building site in determining whether the defendant's conduct was wrongful. Of course, the exclusion of liability was not contractually binding on the plaintiff as there was no contract in existence between the plaintiff and defendant. However, the court ultimately held that, despite the lack of contractual privity, the exclusion of liability ought to inform the wrongfulness inquiry.

The court, quoting with approval the views of Professors Hutchison and Van Heerden (Dale Hutchison and Belinda van Heerden 'The tort/contract divide seen from the South African perspective' 1997 *Acta Juridica* 97 at 114) held that the plaintiff and defendant were contractually linked to the owner of the construction site, and that there was a clear tripartite understanding of where the risk would lie: '[E]ach party, with full knowledge of his risk exposure, could reasonably have been expected to have protected himself by other means. ... To superimpose on the consensual arrangements a delictual duty of care would disturb the balance, by allowing a shifting of losses within the matrix contrary to the original understanding of the parties.'

Applying this to the subsequent-purchaser situation, the contract between the building professional and the seller would be taken into account in determining whether the building professional's negligent conduct is wrongful *vis-à-vis* the subsequent purchaser. In particular, if the former contract contains an exclusion of liability in favour of the building professional, this might militate a finding against recognition of wrongfulness in the particular case.

Jason Mitchell LLB (UCT) is a candidate attorney at ENS in Cape Town. This article was written under the supervision of Cecil Gelbart (director, ENS) and Gerhard du Toit (senior associate, ENS).



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My Will

Freedom of testation

Can a person disinherit a spouse?

By
Edrick
Roux

One of the cornerstones of the law of succession in South Africa is the principle of freedom of testation. One of the ideas behind it is that the testator wishes to distribute the assets he or she collected in life to his or her surviving family members in order to care for them and ensure that they are provided for after his or her death. But freedom of testation goes beyond that – these assets can be distributed to whosoever the testator wishes.

A will is the final expression of what the testator wishes to do with his or her earthly belongings. Another principle in South African law is that, when two parties enter into a marriage or a civil union, they create a legal bond and a duty of support or maintenance between them.

However, what happens when these two principles conflict with one another and a person attempts to disinherit his or her spouse? Both of the abovementioned principles are well founded in South African law and have been protected to a

ing to any estate and the matrimonial property regime of the parties can have a significant influence on how a deceased estate is to be administered.

For example, where a marriage is entered into in community of property, it is effectively impossible to exclude the surviving spouse from benefiting from the estate as he or she already owns 50% of it. However, as will be illustrated below, this may well eliminate a potential maintenance claim against the estate.

In the case of a marriage out of community of property, the presence or absence of the accrual system may have the opposite effect and may, in fact, encourage a maintenance claim. Accordingly, it is important to note that there are many considerations that must be taken into account when determining how far freedom of testation extends.

Limits of freedom of testation

While nothing is as precious as freedom, if complete freedom of testation was permitted, this would result in a blatantly unfair situation and would undoubtedly create issues of racism and sexism. Complete freedom of testation does not, however, exist as is clear from the matter of *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) in which it was found that unconstitutional provisions in a will could not be upheld.

The *Syfrets* matter dealt with a provision in a testamentary trust that was aimed at benefiting persons of European descent who were studying at the University of Cape Town and wished to pursue further studies internationally. The testator added a codicil, which stated that the trust could benefit males of European descent who were not Jewish only.

This matter weighed freedom of testation against the rights and values enshrined in the Constitution, with the result that personal freedom was given less weight than the ideals of a democratic society. The individual had to give way to the needs generated by the moral trends in society and, accordingly, had to conform.

In addition to the above, freedom of testation is primarily limited in two ways, namely that the provisions of the will –

- must not be illegal or immoral; or
- impossible to carry out or implement (LAWSA vol 31).

If a provision in a will cannot be excluded on these grounds, the principle of freedom of testation will prevail and the will of the testator must be carried out.

Maintenance limits

A claim for maintenance, on the other hand, is limited in that the party from whom it is being claimed must be able

to afford to pay such maintenance and the person claiming it requires it to be paid. The formal prerequisites of a duty of support or maintenance are –

- a relationship between the parties that gives rise to the need for maintenance;
- a need to be supported by the party requesting maintenance; and
- adequate resources on the part of the person who is called on to provide support (LAWSA vol 16).

In *Crouse v Crouse* 1954 (2) SA 642 (O) it was held that a duty of support is created between persons when they enter into a marriage. Further, if there is insufficient income on the part of a spouse, some assets may need to be liquidated in order for him or her to fulfill this duty of support (see *Dodo v Dodo* 1990 (2) SA 77 (W)).

Moreover, the courts have in the past stated that in order to fulfil this duty of support, a spouse may be required to do unpaid work in the other spouse's business or to find other employment (see *Plotkin v Western Assurance Co Ltd and Another* 1955 (2) SA 385 (W)).

Qualifying for maintenance

Provision is made for a surviving spouse to claim maintenance against the deceased estate. The considerations to be taken into account when determining the maintenance claim are, in terms of s 3 of the Maintenance of Surviving Spouses Act:

- The amount available for distribution to heirs and legatees.
- The existing and expected means of the surviving spouse. Further, cognisance must be taken of the financial needs and obligations of the surviving spouse and the expected earning capacity of such spouse over the years.
- The surviving spouse's standard of living over the course of the marriage.
- Any other factor that should be taken into account.

If the application of these factors does not favour the surviving spouse; that is if the surviving spouse had or has a strong financial position, then he or she would not be able to claim for maintenance from the estate, as there would be no need for the spouse to claim maintenance and, accordingly, one of the requirements for a maintenance claim is missing (s 2(1) of the Act provides that the surviving spouse has a claim insofar as he or she is not able to provide therefor from his or her own means and earnings).

Disinheriting a spouse

If a surviving spouse does not require support and there are no children born of the marriage, the spouse does not necessarily have a maintenance claim against the estate. The question then

large degree in the past. Which then is more important – personal freedom or personal obligations? The ultimate question, therefore, is: Can a person disinherit his or her spouse?

Relevant legislation

Before this question can be answered, it is important to note that there are a number of pieces of legislation that will influence the ability of the testator to effectively bequeath his or her assets. In my view, the most important of which are:

- The Constitution.
- The Matrimonial Property Act 88 of 1984.
- The Maintenance of Surviving Spouses Act 27 of 1990.

The last two Acts mentioned above are, in my opinion, the greatest impediments to true freedom of testation. A maintenance claim is generally devastat-

arises as to whether a testator can omit to provide for his or her spouse in a will.

Theoretically, the answer is 'yes', since the purpose of a will is to distribute the testator's estate after death. Throughout life, a testator, at least in a marriage out of community of property, is technically able to circumvent his or her spouse by placing his or her money into separate accounts or by registering property into his or her name, so why should the position after his or her death be any different?

Further, provided there are no other impediments, there is nothing illegal in a person dealing with his or her property as he or she wishes. Prior to the enactment of the Maintenance of Surviving Spouses Act, it seems that a testator could disinherit a spouse and leave him or her destitute without any recourse, save if the marriage was in community of property, in which case the surviving spouse would automatically own 50% of the deceased estate.

This is illustrated in *Glazer v Glazer* NO 1963 (4) SA 694 (A), in which the court refused to follow prior case law which found that a deceased estate of a father is liable for the maintenance of the children. I submit that, if a court was willing to find that a father could disinherit a child, the same finding could be made in respect of a spouse.

It was for this reason that the Act was enacted – to provide spouses some measure of recourse against the estate of the deceased. If it was impossible for a spouse to disinherit the other, there would be another significant limitation to the principle of freedom of testation and, further, it would not have been necessary for the legislature to step in, save perhaps to set a minimum as to what could be bequeathed to a spouse.

The statements made by the court in the *Syfre*s matter relating to how the freedom of testation has never been absolute or unfettered, would seem to imply that it is impossible to disinherit the other spouse due to the Act being in operation, but if one considers that the Act is not technically related to inheritance, and the information above, it would seem that the possibility of disinheritance still exists (at para 22).

Therefore, it would seem that, legally, the position that a spouse may disinherit the other spouse is correct, but whether it is morally acceptable is another question, since even though there is no need of support ('need' can be defined, *inter alia*, as 'circumstances in which something is necessary' or 'require [something] because it is essential or very important rather than just desirable' <http://oxforddictionaries.com/definition/english/need>, accessed 3-4-2013), a spouse still has a duty to support ('duty' can be defined, *inter alia*, as a 'moral or

legal obligation; a responsibility' or as something 'done from a sense of moral obligation rather than for pleasure' <http://oxforddictionaries.com/definition/english/duty>, accessed 3-4-2013). Duty, as can be seen from the above, tends to be more important than the needs of the individual. There is thus, in my view, no reason why the trend should be any different in this regard.

Accordingly, a possible argument is that the duty is always present, insofar as a legal obligation exists, irrespective of the current needs of the spouse in question. Effectively, this will bring morality into dispute, which would be challenging to prove in a court, but would, however, eliminate one of the central elements for validity of a will and may well have the result that the will may be declared invalid.

Irrespective, it must always be considered that if one wishes to challenge the validity of a will, it will generally result in a long, tedious court process that may end up draining already limited resources and ultimately may not be worth the cost of attempting the litigious route, for either the executor or the beneficiaries. I suggest that mediation may be more appropriate to deal with disputes of this nature.

There is also no guarantee of success and, in any litigation, particularly in a matter that has the tendency of being easily seen as being instituted maliciously, there is the threat of a costs order.

The above generally relates to where there are no minor children born. It has been held in South African law that the estate of the deceased owes a duty of support to a minor child (*In re Estate Visser* 1948 (3) SA 1129 (C)). However, although the claim for maintenance will be available to both parties, where a spouse disposes of the majority of his or her estate and only enough of the estate is left to cater for the needs of the dependants, as is required in terms of his or her duty of support, there is potential for prejudice for both the spouse and minor dependants.

Thus, when a minor child is involved it seems that any provision aimed at disinheriting a spouse without making an alternative arrangement directly aimed at benefiting the minor child and catering for the needs of the child will be contrary to s 28 of the Constitution, irrespective of any maintenance claims, as, I submit, no such bequest can ever be in the best interests of the child, and therefore should in all likelihood affect the validity of the will.

Where there are many or large debts payable by the estate, another potential problem in respect of maintenance is that, in estates, the payment of the debts of the estate takes precedence over the payment of claims for support and, in

turn, claims for support take precedence over payment to heirs and legatees. In the event of conflicting claims for maintenance by both the surviving spouse and a minor child the claims must be reduced proportionately. (See *LAWSA* vol 31, read with *LAWSA* vol 16 and The Maintenance of Surviving Spouses Act.) The fact that maintenance claims take precedence over legacies and heirs would seem to balance the position somewhat by providing that maintenance should be payable first.

However, the question of whether this order or preference is consistent with s 28 of the Constitution, particularly when both a spouse and a minor child have claims for support, remains open to debate.

Conclusion

From the above, it is clear that a testator has the ability to disinherit a spouse, although in most cases there will be a claim for maintenance brought against the estate, and the testator will still be acting in his or her rights if he or she disinherits his or her spouse. Despite this exercise of his or her rights, personal obligations generally triumph over personal freedom, as can be seen from the existence of the duty of support.

The matrimonial property regime of the parties will significantly influence the exercise of freedom of testation. A marriage in community of property will generally allow more freedom in a will, whereas a marriage out of community of property will generally lead to lesser freedom in the will. The presence or absence of the accrual system will also influence the situation. Whether this will be harmful or beneficial to the estate depends on which party had the greater accrual.

It is in rare circumstances only that an individual will be able to leave a spouse or a child with nothing when he or she passes on, but it would seem that it is possible to come extremely close to doing so by not providing for them in the will, despite the availability of maintenance claims. If the right combination of factors are present that has the effect of excluding a maintenance claim, then the testator can distribute his assets as he pleases.

Edrick Roux LLB (UP) is a dispute resolution specialist at the National Employers' Association of South Africa in Pretoria. He was a candidate attorney at MacRobert Inc in Pretoria at the time of writing this article.



THE LAW REPORTS



Heinrich Schulze *BLC LLB (UP) LLD (Unisa)* is a professor of law at Unisa.

September 2013 (4) *The South African Law Reports* (pp 1 – 323);
[2013] 3 *The All South African Law Reports* August no 1 (pp 227 – 350);
and no 2 (pp 351 – 479)

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

ABBREVIATIONS

CC: Constitutional Court
GSJ: South Gauteng High Court
KZD: KwaZulu-Natal High Court, Durban
KZP: KwaZulu-Natal High Court, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Arbitration

Enforceability of arbitration clause: In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) the court was asked to pronounce on what is probably the most vexed question in the law of arbitration, namely whether it is possible to enforce an arbitration clause where the contract that contains the arbitration clause is invalid.

The facts that led to the present dispute were as follows: The parties had a business relationship in terms of which North East financed the acquisition of goods by third parties. The finance agreements were ceded to Standard Bank (the bank). A dispute arose regarding accounting issues between North East and the bank and they entered into a settlement agreement containing an arbitration clause.

The bank alleged that the settlement had been induced by North East's fraud. The

arbitration clause provided specifically that 'any dispute ... including any question as to the enforceability of this contract' would be referred to arbitration.

There were two issues before the court. First, whether the arbitration clause could be construed to compel submission to arbitration on whether the bank was induced by North East's fraud to conclude the settlement agreement; and secondly, whether the allegations of fraud on the part of North East were unfounded.

Lewis JA held that it was in principle possible for parties to agree that the question of the validity of their agreement would be determined by arbitration even though the reference to arbitration was part of the agreement being questioned. There was one rider though. The parties had to foresee the possibility of such a dispute arising. Whether this was so would depend on a purposive construction of the arbitration clause itself and the agreement generally; having regard to the context of the agreement and what the parties probably intended.

The court pointed out that the purpose of the settlement agreement was to resolve certain accounting issues. The evidence was that the bank had, at the time of the conclusion

of the agreement, not foreseen that there might have been fraudulent conduct by North East. There was thus no intention that the arbitrator would have to resolve issues relating to fraud, it having been envisaged that the arbitrator's role would be to determine disputes in respect of accounting issues.

The court investigated the purpose of the settlement agreement and what the parties envisaged at its conclusion. It found that it was not intended that the validity or enforceability of the agreement, induced as it was by fraudulent misrepresentations and non-disclosures, would be subject to arbitration.

The bank's allegations of fraud by North East were sufficient to conclude that the agreement was probably induced by fraud, and the bank could not be compelled to refer the questions of fraud, and the bank's right to resile from the agreement to arbitration.

The appeal was accordingly dismissed with costs.

Remittal of an award: Various disputes between the appellants and the respondents in *Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others* 2013 (5) SA 84 (SCA) were referred to arbitration by agreement. The nature of the disputes, and

the award that was made on the merits, were not material to the appeal or to the present discussion.

The key issue before the SCA was under what circumstances an award may be remitted to the arbitrator. Section 33(1) of the Arbitration Act 42 of 1965 (the Act) permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained.

In a joint judgment Nugent and Tshiqi JJA pointed out that, in terms of s 32(2) of the Act, a court may on good cause remit an award to the arbitrator. Although the expression 'good cause' is of wide import, it falls to be applied in the context of the Act, which strives for finality in arbitration awards.

The court held that it is not desirable to attempt to circumscribe when 'good cause' for remitting an award will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her. But once an issue has been pertinently addressed and decided there was little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality

- right or wrong - and the court held that there is no reason why an award of costs is to be treated differently to any other aspect of an award.

It concluded that it would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under s 32(2). As has been correctly pointed out in *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C), awards that are not reviewable under s 33 should not be remitted under s 32(2), for the effect would be to emasculate s 33(1).

In the present case the respondent attempted to take the arbitrator on appeal under the guise of a remittal in terms of s 32(2) of the Act and the respondent's counter-application ought to have failed. The appeal was accordingly upheld with costs to be paid by the respondents jointly and severally.

Breach of an arbitration agreement: In *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) Swain J held that if a party to an arbitration agreement institutes court proceedings in breach of the arbitration agreement, the innocent party must choose whether to enforce the arbitration agreement by seeking a stay of proceedings. If the innocent party elects not to seek a stay, it condones the guilty party's breach of the arbitration agreement. In such a case the guilty party is not obliged to abandon the instituted proceedings before referring the dispute to arbitration.

Note: The decision in the *BDE Construction* case is in conflict with the one in *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) in which the court held that a breach of the arbitration agreement, caused by the failure of one party to refer a dispute to arbitration and institute legal proceedings, does not cease to be such where the other party elects not to rely on the

breach and stay the proceedings.

Cession

Cession in securitatem debiti: In *Retmil Financial Services (Pty) Ltd v Sanlam Life Insurance Company Ltd and Others* [2013] 3 All SA 337 (WCC) the court confirmed that, in the case of cession in *securitatem debiti*, ownership of the ceded right is not transferred to the cessionary but remains with the cedent, thus entitling him or her to the reversion of the ceded right on settlement of the secured indebtedness.

The applicant (Retmil) was a registered credit provider. It entered into a loan agreement with the fifth respondent (the closed corporation) in terms of which it lent the closed corporation an amount of R 877 253 repayable by way of 36 monthly instalments. A member of the closed corporation provided security for the loan, and bound himself as surety and co-principal debtor in favour of Retmil for the due fulfilment of the closed corporation's obligations under the loan. He also effected a cession in *securitatem debiti* in favour of Retmil of his right, title and interest in a life insurance policy.

The first respondent (Sanlam) was the insurer under the policy. The said member of the closed corporation died in June 2012, and the closed corporation continued to pay the monthly instalments due in respect of the loan. Following the death of the member, Retmil notified Sanlam that the member had died and requested payment of the proceeds of the policy. Sanlam refused to pay out the proceeds of the policy without a court order, leading to the present application.

Davis AJ identified a number of key issues, two of which merit a discussion here. First, whether Retmil was entitled to demand immediate payment of the policy proceeds in order to discharge the loan, notwithstanding the fact that the loan was not yet due. Secondly, whether Retmil was entitled to accept Sanlam's reduced payment offer on the policy.

The court held that a cession in *securitatem debiti* is analogous to a pledge. The cedent (here: the deceased), as creditor of a right (here: the right to claim under the policy), cedes his or her right or claim to the cessionary (here: Retmil), as security for a debt owed to the latter. The cedent as security-giver is not wholly divested of an interest in the asset which he or she surrenders to the cessionary as security-receiver. He or she retains what has been variously described as 'the bare *dominium*' and 'a reversionary interest' in the ceded right. Ownership of the ceded right is not transferred to the cessionary but remains with the cedent, entitling him or her to the reversion of the ceded right on settlement of the secured indebtedness. Until such time as the secured debt has been paid, only the cessionary has *locus standi* to enforce the ceded right.

Applying the relevant principles, the court held that Retmil was not entitled to demand immediate payment of the proceeds for the purposes of settling the loan. It was also not entitled to accept Sanlam's offer of reduced payment on the policy.

The executor of the deceased's estate was entitled, by virtue of the reversionary interest in the policy that vests in the estate, to take appropriate steps to protect that interest by disputing the reduced offer of payment on the policy and engaging with the insurer in the claims review process in an attempt to secure an increased offer of payment.

The application was dismissed with costs.

Class action

Availability of class action: In *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) the CC was asked to pronounce on the circumstances under which a so-called 'opt-in class action' will be permissible.

In the court *a quo* (reported under the citation of *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA) it

was held that an opt-in class action, that is, one where the class to be represented is confined to claimants who come forward and identify themselves, will be permitted only in exceptional circumstances. Nothing exceptional has been shown by the applicants for the class action and the SCA dismissed the applicants' appeal against the decision in the WCC where the application was also dismissed. (For a more detailed discussion of the decision in the SCA, see 2013 (May) DR 45.)

The salient facts were that the appellants were purveyors of bread. They purchased their bread from one or other of the respondents. It is trite that Pioneer and the other respondents engaged in practices prohibited by the Competition Act 89 of 1998. They engaged in coordinated fixing of prices, fixing of discounts that were given to distributors such as Mukaddam, and agreed not to deal with one another's distributors.

Mukaddam alleged that it and about 100 other distributors of bread in the Western Cape suffered financial loss as a result of the prohibited conduct, particularly the fixing of discounts they would receive. Mukaddam and the other distributors accordingly wish to pursue claims for damages in a class action. Their original application and subsequent appeals were aimed at certifying the institution of a class action on behalf of themselves and other affected distributors for recovery of their losses.

In issue before the CC was what standard a court ought to use in adjudicating an application for certification of an 'opt-in class action'.

Jafta J held that a class action ought to be certified if it were in the interests of justice to do so. Factors to be used in determining where the interests of justice lay were whether -

- the class had identifiable members;
- there was a cause of action raising a triable issue;
- there were common issues of fact or law; and
- there was a suitable class representative.

These factors were not con-

ditions precedent or jurisdictional facts and nor were they exhaustive.

A second issue was when a court of appeal could interfere with a lower court's exercise of the discretion to certify or not certify a class action. The CC held that an appeal court could interfere where the lower court had not acted judicially in exercising its discretion, or where it had based the exercise of its discretion on a wrong principle of law, or on a misdirection of fact.

It further held that the SCA had erred in not finding that Mukaddam's claim was also potentially plausible. A further error committed by the SCA was the finding that certification in an opt-in class action requires the applicant (here: Mukaddam) to show exceptional circumstances. The test of exceptional circumstances is at variance with the standard laid down by the court in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

The appeal was accordingly allowed with costs.

Company law

Close corporation: In *Livanos NO and Others v Oates and Others* 2013 (5) SA 165 (GSJ) the first applicant's father (the deceased) and the first respondent (Oates) had each held a 50% members' interest in a close corporation. After the death of the deceased, the first and second applicants (Mark and Bernadette, who were the son and wife of the deceased), acting in their capacities as the executors in the deceased's estate, wrote to the first respondent (Oates) requesting him to approve the transfer of the deceased's interest to Bernadette, the deceased's sole heir. Oates declined.

The executors then sold the deceased's interest to Mark for R 16 million. They sent Oates a letter requesting his approval of the sale, but he declined. Mark and Bernadette (acting in their personal and official capacities) then approached the court for an order declaring the sale valid.

Oates counter-applied for its rescission. Oates argued that he was entitled, as the remaining member of the close corporation, to purchase the deceased's interest at fair market value, and that he was thus not obliged to consent to the sale to Mark. Mark contended that Oates was obliged to approve the sale.

The key issue was the proper interpretation of s 35(b)(iii) read with s 34(2) of the Close Corporations Act 69 of 1984 (the Act). Section 34(2) of the Act provides for the sale of an insolvent member's interest in a corporation. Section 35, in turn, regulates the disposal of the interest of a deceased member of a corporation.

Wepener J held that a failure to transfer a deceased member's interest to an heir (such as Bernadette) would oblige the executor to act pursuant to s 35(b). Oates' failure to consent to the transfer to Bernadette meant that the executors were entitled to dispose of the deceased's interest under s 35(b), which contained the disjunctive 'or' and thus did not oblige them to sell it either to -

- the corporation itself; or
- a remaining member (such as Oates).

Specifically, they could choose to sell it in terms of s 35(b)(iii) to any other qualified person (such as Mark), in which case s 34(2) would apply. Since Oates had failed to exercise the pre-emptive right bestowed on him by s 34(2)(b), the sale to Mark had become effective. There also was no warrant for reading into the impugned sections the requirement of fair value argued for by Oates.

The application was accordingly granted and Oates' counter-application dismissed with costs.

Deregistration of company: In *Nulandis (Pty) Ltd v Minister of Finance and Another* 2013 (5) SA 294 (KZP) the court was asked to pronounce on the question whether it is possible for a court to reverse the dissolution of a deregistered company and so effect the revival of the company as an association of its members.

The facts were that the applicant (Nulandis) sold and delivered agricultural chemicals to Greenacres Management Services (Pty) Ltd (the company). The company failed to pay for the chemicals and Nulandis obtained judgment against the company. However, before it could enforce the judgment the company was deregistered by the Registrar of Companies for failing to lodge annual returns.

Nulandis brought an application under s 83(4) of the Companies Act 71 of 2008 (the 2008 Act), which allows the court to declare the dissolution of a company void. It also asked the court to order that the deregistered company's assets not vest in the state any longer. This last application was not opposed by the Minister of Finance.

Pillay J held that the 2008 Act has conflated deregistration and dissolution of companies so that it is no longer correct to reserve the concept of dissolution for companies that have been wound up. The deregistration of a company now results in its dissolution.

Under s 82(4) of the 2008 Act only the Companies and Intellectual Property Commission (CIPC) has the power to reinstate a deregistered company to the Register of Companies. Conversely, the power to void the dissolution of a company under s 83(4) of the 2008 Act is a power vested exclusively in the court.

However, the power to reinstate registration for causes that are not administrative and because 'it is just' (the power contained in s 73 of the Companies Act 61 of 1973) has not been provided for under the 2008 Act.

What Nulandis actually sought was to void the company's dissolution. In this regard s 83(4)(a) gave the court a wide discretion to decide the application on its merits. Earlier authority cautioned that dissolution should not be voided unless new assets had been discovered, fraud had come to light, or the dissolution had become an instrument of injustice.

Applying that authority to the present case, the court

held that it would be unjust if the company's dissolution were to result in Nulandis being unable to recover what it was owed. Accordingly it was just and equitable to void Greenacres' dissolution, and the court made an order to this effect.

Nulandis also asked the court to declare that Greenacres' assets were not *bona vacantia* and vested in the state. The court noted in this respect that, on a company being dissolved, its assets became *bona vacantia* and vested in the state. It also noted that a deregistered, but not dissolved, company existed as an association of its members. On a court voiding the dissolution of a company, the property reverted from the state to the association of members of the deregistered company, as had happened in the present case.

As a result, the court ordered that the company be revived as an association of its members; that the company's assets were no longer *bona vacantia*; and that the members of the company be re-vested with its assets.

Contract law

Breach of contract: In *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and Another* [2013] 3 All SA 251 (SCA) the second respondent (Bulk Earthworks) was engaged by the first respondent (Landmark) to undertake earthworks on a property that was being developed. However, as a result of financial difficulties experienced by Landmark, it found itself unable to pay Bulk Earthworks for the work done.

Bulk Earthworks accordingly ceased work on the property and cancelled the contract. It then sued Landmark, claiming payment of various amounts it alleged were due and payable under the contract. In its plea, Landmark averred that, when the contract was concluded, Bulk Earthworks was aware that the appellant municipality was the owner of the property and that Landmark's rights to it arose from a long-term

lease between itself and the municipality.

Landmark further averred that it had been unaware that land claims had been lodged in respect of the land to be developed and such claims meant that the land could not be developed. Landmark, accordingly, joined the municipality as a third party in the action brought by Bulk Earthworks.

The municipality's defence to Landmark's claim for breach of contract was that it became impossible for it to give vacant possession of the property to Landmark, due to the gazetting of the land claims and the land claims commissioner's threat of an interdict to the development of the property in the event of it continuing.

The court *a quo* directed the municipality to pay interest on the sum claimed at the rate of 15,5% per annum, calculated from 16 January 2012 to date of payment. Interest on the balance of R 11 260 148,85 was to be payable at the rate of 160% of the ruling bank rate, from 13 October 2010 to date of payment. The municipality appealed against that order, while Landmark cross-appealed against a certain part of the order that dealt with the question on which part of the debt what interest rate applied. The present discussion will ignore Landmark's cross-appeal.

On appeal Mpati P pointed out that the main issue in the appeal was whether the municipality's plea of supervening impossibility of performance should have succeeded, with the resultant dismissal of Landmark's claim. The allegations made in the third-party notice as a basis for Landmark's claims were that it was an implied, alternatively tacit, term of the lease agreement that the municipality would give Landmark vacant possession of the property. This level of possession entailed that the development work could be conducted and completed lawfully and, that the municipi-

ality was not aware of facts that would render the continuation and completion of the development unlawful or liable to be set aside.

The court decided that the impossibility of performance, as pleaded by the municipality, was self-created, with the result that the appeal against the finding of the court below relating to the defence of supervening impossibility had to fail.

Regarding the rate of interest applied, it was accepted that Landmark obtained a bridging loan for which it was liable to pay interest. The amount of the interest formed part of the damages claimed in the third-party notice. It was thereafter for the municipality to allege and prove the unreasonableness of the rate of the interest payable in that there were alternative places where bridging finance, at a lower rate of interest, was available. The municipality failed to do that.

The appeal was accordingly dismissed with costs.

Contract contrary to public policy: In *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* 2013 (5) SA 205 (WCC) the applicant church was the owner of three properties on which were located three public schools under the control and administration of the state (the Western Cape Provincial Minister of Transport and Public Works, which was the third respondent). During 1987 the church and the state (in a different guise) had concluded three 20-year notarial lease agreements in respect of each of the properties and the school buildings. Clause 16 of the agreements provided that once the 20-year period was over, the church would transfer the properties to the state free of charge. After 20 years the state demanded transfer.

The church disputed the state's claim on the ground that the lease agreements were contrary to public policy and unenforceable because of the -

- unequal bargaining power

that had existed when the agreements were concluded; and

- unconstitutional deprivation of property its enforcement would result in.

It appeared that by 1987 the school buildings were in need of repair and maintenance that the church was unable to afford, and that the state came to its assistance by facilitating a loan from a life insurance company against the security of mortgage bonds over the property. In return the state required the above-mentioned lease agreements to be concluded and registered against the title deeds of the relevant properties.

Zondi J held that two competing principles come into play in the present case, namely, freedom of contract and fairness. The principle of fairness requires consideration of the relative bargaining positions of the contracting parties.

The church had established facts objectively demonstrating that when the lease was concluded it was in a weak bargaining position compared to the state. The state had dictated the terms of an agreement that the church had little option but to accept, and the result was inimical to the public interest and s 25 of the Constitution.

If the state should proceed in enforcing the provisions of clause 16, the church would have no alternative but to transfer its properties to the state without receiving any compensation. This is unconstitutional deprivation as intended in s 25(1) read with s 25(2)(a) and (b) of the Constitution.

Because clause 16 sought to deprive the church of its properties without creating an obligation on the state to pay compensation, it was unfair and therefore contrary to public policy and thus invalid and unenforceable.

Insolvency

Concursus creditorum: The facts in *Van Zyl and Others*

NNO v The Master, Western Cape High Court, and Another 2013 (5) SA 71 (WCC) were as follows. The applicants were the liquidators of a company (Black River). The liquidators sought to review the decision of the master of the High Court in terms of which she (the master) refused to expunge the proven claim of the second respondent, AIK Credit Plc (AIK), a company registered in Mauritius, in the liquidated estate of Black River. The master did not oppose the application, but AIK did.

The facts that led to the present dispute, including the details of a loan in terms of which Black River signed as surety for the repayment of the loan by the principal debtor, are not relevant for purposes of the present discussion.

The gist of the present matter turned on the tension between the principle that, once there has been a *concursus creditorum*, no creditor in a liquidated estate can take steps to improve its position to the prejudice of other estate creditors, on the one hand, and the principle that temporary non-compliance with the provisions of reg 10(1)(c) of the Exchange Control Regulations, which requires treasury approval of any transaction involving the export of capital, does not present a bar to the validity or enforceability of a claim based on such a transaction.

Bozalek J held that a claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based on a transaction requiring treasury approval in terms of reg 10(1)(c), but which approval has, at the relevant time, neither been obtained nor refused. To hold otherwise would lead to 'greater inconveniences and impropriety' and deliver a windfall advantage to competing creditors in the estate. It ignores the fact that the underlying transaction is not void for want of treasury approval and that treasury approval

could still be sought.

The court further held that a claim by a creditor based on a transaction in respect of which treasury approval has not been obtained is irrevocably unenforceable because a *concursum creditorum* in the insolvent estate intervened before such approval was sought would produce an arbitrary and inequitable result not intended by the Exchange Control Regulations.

The application was dismissed and the costs of both the liquidators and AIK was held to be costs in the winding-up of Black River.

Insurance law

Insurable interest: The facts in *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* 2013 (5) SA 42 (WCC) were as follows: The plaintiff (Lorcom) was the only shareholder in Gansbaai Fishing Wholesalers, a company that owned a fishing vessel. Lorcom had insured the vessel against loss and damage in an amount of R 3 million. Upon the loss of the vessel at sea, Lorcom claimed on its insurance policy with the defendant insurer (Zurich). Zurich resisted the claim and argued that Lorcom did not have an insurable interest in the vessel.

Rogers J held that an insurable interest should no longer be regarded as a self-standing requirement for the enforceability of an insurance contract. It is one of a number of public-policy-related factors that have to be considered when determining whether the contract is an enforceable contract of insurance, or an unenforceable contract of gaming or wagering.

In this regard the court referred with approval to the earlier decision in *Phillips v General Accident Insurance Co (SA) Ltd* 1983 (4) SA 652 (W) in which it was held that a contract of insurance should be enforceable if it is not a gambling contract at common law, irrespective of the presence or absence of an insurable interest. In the present

case the contract was clearly not one of gaming or wagering.

The court pointed out that, even if one accepts that an insurable interest has to be present for a contract to qualify as one of insurance, a 100% shareholder (like Lorcom) has an insurable interest in property belonging to that company and can therefore conclude a valid insurance contract on that property.

In establishing an insurable interest by Lorcom in the vessel the court also took into account that Lorcom had a right to make use of the vessel, as well as the expectancy of becoming the owner of the vessel. Lorcom's interest as a 100% shareholder entitled it to recover the full insured value of R 3 million.

Zurich was thus ordered to pay Lorcom the amount of the actual value of the vessel (R 2,85 million) together with interest from the date on which the claim was first repudiated by Zurich.

Sale in execution

Immovable property: In *ABSA Bank Ltd v Morrison and others* 2013 (5) SA 199 (GSJ) the issue before the court was whether the applicant bank (Absa) could set aside a sale in execution of immovable property by public auction on the ground that the third respondent (the judgment debtor), had settled the arrears in full prior to the date of sale. However, due to an administrative error Absa omitted to instruct its attorneys to cancel the sale. The property was knocked down to the first respondent (the buyer of the property at the sale in execution) who contended that 'on the fall of the hammer' the sale was complete and could not be set aside on the grounds of an administrative error by Absa.

Spilg J held that a sale in execution of immovable property by public auction can be set aside where the debtor has settled what it owed to

the creditor in full prior to the date of sale, but where the creditor, in error, has failed to instruct the sheriff to cancel the sale.

In this regard the court referred with approval to the decision in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) where the court held that, under s 129(3), read with s 129(4) of the National Credit Act 34 of 2005 (NCA), a consumer debtor is entitled to have a credit agreement reinstated by paying only the overdue arrears and not the entire debt. The court, in the *Fraser* case, further held that in the case of immovable property, this right extended beyond the date of the sale in execution and terminated only on transfer of ownership into the name of the successful bidder. The court held that the interpretation of the term 'execution' as adopted

in s 129(4)(b) of the NCA contemplates both the sale and registration of transfer of ownership of the immovable property.

Absa's application was accordingly allowed and the sale in execution was cancelled. Absa was ordered to pay the costs of the application.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administrative law, children, civil procedure, constitutional law, consumer law, delict, directors of companies, discovery and inspection, environmental conservation, housing, local authorities, magistrates' courts, mining and minerals, motor vehicle accidents, practice and shipping. □

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

NEW LEGISLATION

Legislation published from
19 August 2013 – 20 September 2013

BILLS INTRODUCED

National Environmental Management: Waste Amendment Bill B32 of 2013.

Determination of Remuneration of Members of Constitutional Institutions Laws Amendment Bill B31 of 2013.
Marine Living Resources Amendment Bill B30 of 2013.
Water Research Amendment Bill B29 of 2013.

COMMENCEMENT OF ACTS

Constitution Seventeenth Amendment Act, 2012. *Commencement:* 23 August 2013. Proc R35 GG36774/22-8-2013.

National Health Amendment Act 12 of 2013 (except ss 2 and 3). *Commencement:* 2 September 2013. Proc37 GG36787/30-8-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Allied Health Professions Act 63 of 1982

Fees payable to the Allied Health Professions Council of South Africa (AHPCSA) for certain services and increase of fees payable by students, interns and practitioners to the AHPCSA. BN183 and BN184 GG36779/30-8-2013.

Astronomy Geographic Advantage Act 21 of 2007

Declaration of scientific endeavours to astronomy and related scientific endeavours. GN684 GG36826/13-9-2013.

Child Justice Act 75 of 2008

Accredited diversion programmes and service providers. GN686 GG36843/13-9-2013.

Civil Aviation Act 13 of 2009

Civil aviation regulations, 2011. GN R688 GG36831/6-9-2013.

Companies Act 71 of 2008

Amendment of the companies regulations, 2011. GN R619 GG36759/20-8-2013.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The national policy framework on management of sexual offences: Section 62(1). GN R649 GG36804/6-9-2013.

Construction Industry Development Board Act 38 of 2000

Standard for developing skills through infrastructure contracts. BN180 GG36760/23-8-2013.

Standard for contractor performance reports for use on construction works contracts (Grades 2 to 9). BN181 GG36760/23-8-2013.

Electronic Communications Act 36 of 2005

Type approval regulations, 2013. GenN871 GG36785/26-8-2013.

Labelling regulations, 2013. GenN872 GG36786/26-8-2013.

Guidelines relating to the type approval framework. GenN883 GG36792/27-8-2013.

Higher Education Act 101 of 1997

Establishment of public universities: Northern Cape and Mpumalanga. GN630 GG36771/23-8-2013 and GN631 GG36772/22-8-2013.

Land Survey Act 8 of 1997

Amendment of regulations. GN645 GG36779/30-8-2013.

Long-Term Insurance Act 52 of 1998

Prescribed long-term insurance fees. BN182 GG36775/23-8-2013 and BN187 GG36801/30-8-2013.

Magistrates' Courts Act 32 of 1944

Annexure of certain districts to the regional court in respect of offences committed within the mining industry (Rustenburg, Mankwe and Brits). GN671 GG36834/6-9-2013.

Medicines and Related Substances Act 101 of 1965

Amendment of schedules. GN R674 GG36827/13-9-2013 and GN R690 GG36850/20-9-2013.

Regulations relating to a transparent pricing system for medicines and scheduled substances: Annual adjustment of the single exit price of medicines and scheduled substances for the year 2014. GN R705 GG36863/20-9-2013.

Merchandise Marks Act 17 of 1941

Rules of use for rooibos. GN911 GG36807/6-9-2013.

Mine Health and Safety Act 29 of 1996

Regulations relating to machinery and equipment. GN R622 GG36761/23-8-2013.

National Environmental Management: Biodiversity Act 10 of 2004

Convention on International Trade in Endangered Species (CITES) regulations. GN R629 GG36770/23-8-2013.

National Environmental Management: Waste Act 59 of 2008

Waste classification and management regulations. GN R634 GG36784/23-8-2013.

National norms and standards for the assessment of waste for landfill disposal. GN R635 GG36784/23-8-2013.

National norms and standards for disposal of waste to landfill. GN R636 GG36784/23-8-2013.

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Contact: Cyril or Willie

Tel: (011) 326 4722 - Fax: (011) 781 8338
info@cmattorneys.com

National Forests Act 84 of 1998

Declaration of particular groups of trees 'champion trees'. GN677 GG36826/13-9-2013.

Declaration of state forests in Mpumalanga as forest nature reserves under s 8(1). GN R673 GG36827/13-9-2013.

National Health Act 61 of 2003

National norms and standards relating to environmental health. GenN943 GG36849/20-9-2013.

National Qualifications Framework Act 67 of 2008

Publication of the general and further education and training qualifications sub-framework and higher education qualifications sub-framework of the national qualifications framework. GenN648 GG36797/30-8-2013.

National Road Traffic Act 93 of 1996

Amount payable by a driving licence testing centre in terms of regs 108(1A) and 119(1A) of the National Road Traffic Regulations. GN R628 GG36766/20-8-2013.

Amendment of National Road

Traffic Regulations. GN R704 GG36862/20-9-2013.

Plant Breeders' Rights Act 15 of 1976

Amendment of regulations relating to plant breeders' rights (table 1). GN R620 GG36761/23-8-2013.

Protection from Harassment Act 17 of 2011

National instruction on protection from harassment. GN688 GG36845/16-9-2013.

Social Housing Act 16 of 2008

Approved amendments of restructuring zones: City of Tshwane Metropolitan Municipality. GN857 GG36760/23-8-2013.

Social Services Professions Act 110 of 1978

Regulations regarding the fees payable by social workers, student social workers and social auxiliary workers. GN R675 GG36827/13-9-2013.

South African Maritime Safety Authority Act 5 of 1998

Determination of charges and levies. GenN920 and GenN921 GG36819/6-9-2013.

Standards Act 8 of 2008

Standards matters. GN646

GG36779/30-8-2013.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Rules relating to the practising of the veterinary professions. GenN874 GG36779/30-8-2013.

Amendment of regulations relating to veterinary and para-veterinary professions. GN R638 GG36780/30-8-2013.

Draft legislation

Draft exemption of veterinarians from certain restrictions relating to the carrying out of restricted activities involving threatened or protected species in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN853 GG36758/19-8-2013. Proposed declaration of the exploration for and or production of onshore unconventional oil or gas resources and any activities incidental thereto including, but not limited to, hydraulic fracturing as a controlled activity in terms of the National Water Act 36 of 2008. GenN863 GG36760/23-8-2013.

Draft Defence Amendment Bill. GenN867 GG36768/21-8-2013.

Draft municipal regulations on standard chart of accounts in terms of the Local Government: Municipal Finance Management Act 56 of 2003. GenN892 GG36806/3-9-2013. Proposed amendments to the Johannesburg Stock Exchange (JSE) listing requirements in terms of the Financial Markets Act 19 of 2012. BN188 GG36813/3-9-2013.

Draft national policy on intellectual property, 2013. GenN918 GG36816/4-9-2013. Draft regulations relating to minimum uniform norms and standards for public school infrastructure. GenN932 GG36837/12-9-2013.

Draft Merchant Shipping Bill, 2013. GenN939 GG36839/11-9-2013.

Draft 'bitstream and shared/full loop' regulations in terms of the Electronic Communications Act 36 of 2005. GenN940 GG36840/11-9-2013.

Draft Traditional Affairs Bill, 2013. GenN947 GG36856/20-9-2013.



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Employment law update



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



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

The interplay between constructive dismissal and reinstatement

In *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* [2013] 8 BLLR 834 (LC) Steenkamp J was required to consider whether an order for reinstatement is competent in a situation where the basis of the employee's claim is that the employer made continued employment intolerable. It also raised the question as to whether seeking reinstatement would defeat a claim for constructive dismissal, since it would not appear to make sense for an employee to allege that he had no other option but to resign but, at the same time, to seek to be reinstated to such an unbearable environment.

The employee in this case, Gordon, had worked for the department for 23 years and suffered a heart attack followed by post-traumatic stress disorder and clinical depression. He was placed on sick leave and applied for ill-health retirement. Gordon submitted medical certificates between June 2007 and September 2008. On 3 December 2008 the department sent a letter to Gordon informing him that his medical certificates did not cover his absence after September 2008 and that the period from October 2008 to December 2008 would be regarded as unauthorised absence and he was ordered to report for duty immediately. He did not report for duty but submitted medical certificates to cover the period from October 2008 to December 2008.

Gordon had also applied for temporary incapacity leave in 2007 and submitted the requisite documents to the department's human resources director. The documents were required to be signed by witnesses and the human resources director undertook to have the documents signed by two witnesses. In May 2009 Gordon was informed that his application for temporary incapacity leave had not been considered as there

was a technical error because it had not been signed by two witnesses. He was required to re-submit the form and did so in August 2009.

The department informed Gordon that, because he had not re-submitted the form timeously, it would institute 'leave without pay' for the period from 31 July 2006 to 6 February 2009 when he was absent and the department would recover R 12 000 per month from his salary in order to recover an amount of R 753 352,02 that had been paid to him in his absence. This would leave him with an income of approximately R 2 159 per month.

Gordon then requested that the department place a moratorium on the deductions pending his application for temporary incapacity leave. He did not receive a response and consequently tendered his resignation and filed a grievance. During the grievance hearing he was given the option of proceeding with his resignation or retracting his resignation to be assisted by the department in an application for ill-health retirement. The department also undertook to reconsider the issue of his absence being regarded as unpaid leave and, in that regard, to revert the amount of the deductions, if any, to be made from his salary.

Gordon chose to withdraw his resignation but the department was not proactive in taking a decision regarding the repayment of the R 12 000 that had been deducted from his salary. There was another grievance meeting on 1 September 2009 but by the end of September there was still no decision regarding the deductions. Gordon submitted his resignation at the end of September 2009 and referred a constructive dismissal dispute to the bargaining council. The arbitrator found that Gordon had been constructively dismissed, that the dismissal was unfair and that he should be reinstated.

The department took the decision on review. The Labour Court held that the appropriate test on review in constructive dismissal cases is whether the

commissioner correctly found that the employee was dismissed. Only if this is answered in the affirmative should the court apply the test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) to determine whether the remedy granted is one that a reasonable commissioner could make. The arbitrator had found that the employee had been constructively dismissed as the employee was placed in circumstances that were objectively intolerable.

Furthermore, the arbitrator was of the view that the intolerable situation was of the department's own making as the department could have taken steps to resolve the issue of the application for temporary incapacity leave quicker. In addition, the deductions made by the department from Gordon's monthly salary were excessive. It was accordingly found that the department's conduct was likely to damage the trust relationship.

By taking these factors into account, Steenkamp J found that Gordon's resignation did amount to constructive dismissal. This was further supported by the fact that Gordon resigned only as a matter of last resort after he had raised the pertinent issues with the department and had given the department the opportunity to rectify the situation but, instead, Gordon was met with passivity and inaction by the department.

Steenkamp J found that it was unusual to claim reinstatement where the employee alleges that the working relationship was intolerable. Furthermore s 193(2)(b) of the Labour Relations Act 66 of 1995 requires an arbitrator to reinstate an employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. However, after considering the evidence that was placed before the arbitrator Steenkamp J agreed with the arbitrator's decision to reinstate Gordon. This was because it appeared that Gordon would not be subjected to the same circumstances that prevailed before he resigned as he would not be subject to the excessive deductions and he had furthermore recovered psychologically.

Thus, it was held that, while the employment circumstances had been intolerable at the time of his resignation in 2009, they were no longer intolerable at the time that he sought reinstatement in 2012. Steenkamp J agreed with the arbitrator's finding and it was held that seeking reinstatement two and a half years later did not defeat Gordon's claim for constructive dismissal. Thus, the arbitrator's conclusion was not so unreasonable that no reasonable arbitrator could have come to the same conclusion and the review application by the department was accordingly dismissed.



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

'Grossly irregular' to reduce the *Sidumo* test

***Herholdt v Nedbank Limited* (SCA) (unreported case 701/2012, 5-9-2013) (Cachalia and Wallis JJA; Nugent, Shongwe JJA and Swain AJA concurring)**

The appellant, Herholdt, a financial advisor, was dismissed for failing to disclose to his employer, Nedbank, that he had been named a benefactor in a client's will.

At arbitration the Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner found Herholdt's conduct did not amount to dishonesty, as argued by Nedbank, and hence his dismissal was substantively unfair. On review the Labour Court set aside the award, at which time Herholdt appeal to the Labour Appeal Court (LAC).

Having lost his appeal at the LAC, Herholdt approached the Supreme Court of Appeal (SCA).

When interpreting the test to be adopted by the Labour Court on review, the LAC in *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC), per Murphy AJA, endorsed the principle set out in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1129 (LC) where the Labour Court said the following: 'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

On the strength and in support of this approach, the LAC held: 'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined.'

With regard to the threshold triggering the Labour Court's intervention on review, the LAC said: 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has

failed to apply his mind to certain of the material facts or issues before him [or her], with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

On appeal to the SCA, the Congress of South African Trade Unions, who was admitted as *amicus curiae*, argued that the courts have unduly relaxed the standard and test on review by introducing 'latent irregularities' and 'dialectical unreasonableness' as alternative and/or further considerations when reviewing awards, as compared to the test held by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

The SCA began by setting out the test to be adopted by the Labour Court on review, as enunciated in the *Sidumo* case. The Constitutional Court, in formulating the 'reasonable decision-maker' test, held that a court on review is tasked with deciding whether or not the decision of the arbitrator is one that a reasonable decision-maker could not have reached, given the evidence before him or her.

This test, according to the SCA focuses on the reasonableness of a decision reached as opposed to how the decision was reached. While the reasons for the arbitrator's findings must be examined when adopting this test, a flaw in the arbitrator's reasoning in arriving at a conclusion, is not in itself sufficient to set aside the award. Apart from an arbitrator's questionable line of reasoning, a reviewing court must still examine whether or not the conclusion reached by the arbitrator is not one a reasonable decision-maker could reach.

In this manner the Constitutional Court, in giving meaning to the purpose of the Labour Relations Act 66 of 1995 (LRA) (which is adopting a speedy and inexpensive dispute resolution system), preserved the distinction between an appeal and review and further maintained the narrow scope in which to set aside awards on review.

Thus, after the *Sidumo* decision, it was clear that applications to review awards could only be considered on the basis of the reasonable decision-maker test, read with the grounds contained in s 145(2)(a) and (b) of the LRA.

Under the heading 'Review of arbitration awards', s 145(2)(a) states that an award can be reviewed if '... the commissioner -

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers.'

In examining s 145(2)(a) the SCA said the following: 'The height of the bar set by the provisions of s 145(2)(a) of the LRA is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions of the Arbitra-

tion Act 42 of 1965. The general principle is that a "gross irregularity" concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a "gross irregularity" is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute then, subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law.'

The grounds listed in the above section were not to be read in isolation but were to be suffused in the legal principle of 'reasonableness'.

Therefore 'gross irregularity in the conduct of the arbitration proceedings' as expressed in s 145 (2)(a)(ii), was limited to situations where, as a result of any gross irregularity, the result reached by the arbitrator was rendered unreasonable.

Turning to the findings of the LAC, the SCA found that the court *a quo*'s views were in support of a *dictum* held by the minority of court in the *Sidumo* case and hence contrary to the binding views upheld by the majority on two grounds.

First, the LAC *in casu* prescribed a lower threshold for which to interfere with an award on review, as compared to the reasonable decision-maker test. Secondly, the legal concept of the 'reasonableness of the decision', expressed in the *Sidumo* case, was no longer a considering factor in that the existence of potential prejudice to a party, brought about by an arbitrator's reasoning was, according to the LAC, sufficient to set aside an award without further asking the question whether the decision under review nevertheless fell within a band of reasonableness.

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

In applying the reasonable decision-maker test, the SCA dismissed the appeal on grounds that the arbitrator arrived at a substantively unreasonable decision given the evidence before her.

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

By
Ivan Kramer

Calculating loss of support claims

If a dependant is compensated for the loss of support by a breadwinner, does the dependant receive

- the support that would have been received had the accident not occurred; or
- the support he or she would have received had the death not occurred?

What difference does it make? If, for example, one child is killed in the same accident as the breadwinner, there would be a difference. For calculation purposes, the income of the deceased is generally split between the different dependants, each adult receiving a two part share and each child a one part share.

If the claim is calculated as if the accident had not occurred, then the situation as it stood before the accident is taken into account. The breadwinner was supporting the whole family, including the child who died in the accident. The calculation of support is thus done reducing the shares of the surviving dependants to allow for support for the child that was killed.

If the claim is calculated as if the death had not occurred, then the calculation is done taking into account everything that has happened, except for the death of the breadwinner. The child who died is excluded in the same way as if he or she had died on that day in a way unrelated to the accident. Had the breadwinner not died, he or she would have supported the family, excluding the child who died. The calculation of support would not allow for a share for the deceased child and therefore the shares for the surviving dependants would be higher.

In *Road Accident Fund v Monani and Another* 2009 (4) SA 327 (SCA), the ruling was that the calculation must ignore the parts consumed by the deceased child (ie, as if the death of the breadwinner had not occurred).

What would the position be if both parents died in the same accident? What would the position be if both parents were earning an income? Could the principle in the *Monani* case apply? Would the ruling in *Santam Insurance Co Ltd v Fourie* 1997 (1) SA 611 (A), as explained below, still apply and the joint income be pooled or will the losses of the children be calculated separately for each parent as though the other parent did not exist?

The first scenario is where the mother (who also died in the accident) was earning no income. In the same way that, in the *Monani* case, the deceased child was excluded from the calculations since he would not have required future support, so too here the deceased mother would be excluded from the calculation since she would not have required future support.

Where the mother was earning an income, a few scenarios need to be consid-

ered. In the examples below, it will be assumed that the father was earning more than the mother. However, the same principles would apply if the mother was earning more, just by swapping the terms father and mother below.

Mother earning income, but not enough to support herself

Including the mother in the calculation: First, it needs to be examined how the calculations would be done without the application of the judgment in the *Monani* case (ie, as things stood before the accident). Based on the *Santam* case, the joint income of the family and the share of each family member will be taken into account. The income of each breadwinner is assumed to be first used to meet his or her share of the apportioned income, any residue being used for the share of the other breadwinner and the remainder going to the support of the children.

In this case, the full income of the mother would have gone to her own support and, in addition, she would have received further support from her husband. Thus the father would have been supporting himself, the two children and providing partial support to his wife.

Excluding the mother from the calculation: Can the principle in the *Monani* case be applied to this case? The answer is yes: Had the mother died in the accident but the father survived, the father would no longer have had to provide the partial support to the mother (being the cost of her support in excess of her own income). He would therefore have been able to provide extra support to the children. Since, in this scenario, the mother would be excluded from the calculation, both her income and her required support would be excluded. The income to be shared among the remaining family members would be the father's income alone.

Using the same logic as in the *Monani* case would allow the children to claim this higher level of support.

Mother earning less than the father, but enough to support herself and give partial support to the children

Including the mother in the calculation: Based on the *Santam* case, the income of each breadwinner is assumed to be first used to meet his or her share of the apportioned income. Thus the father supports himself and the excess is used to support the children. The mother also supports herself, and the excess is used to support the children. The children are therefore receiving support from each parent. Their claim would be the sum of the support received from the father and the mother.

Excluding the mother from the calculation: Can the principle in the *Monani* case be applied to this case? Had the mother died in the accident but the father survived, the father would have to support the children from his own income alone. The support the children received from their mother would fall away. The father could no longer rely on the support to the children previously provided by the mother. Even though the father would reduce his own share of his own income to provide more to the children than he had before, overall the children would be receiving less than they had before the accident (when they were partially supported by both parents). Thus, here, applying the principle in the *Monani* case would not help them. They would be better off claiming the loss of support they received from the father and the mother before the accident.

The principle

The typical way of compensating a dependant is to receive the same support he or she would have received had the accident not occurred. However, the death of certain family members in the accident could have increased the support the remaining dependants would have received from a breadwinner, had he or she survived. In the *Monani* case, by excluding the deceased child, it was accepted that the remaining dependants should get the benefit of this increased support.

Earlier question

Depending on the income of the parents, the principle in the *Monani* case could apply, if both parents were killed. Will the losses of the children be calculated separately for each parent as though the other parent did not exist?

The answer is no. Whenever two possible ways of calculating the loss of support was presented above, each of these was based on either a scenario that did exist (ie, had the accident not occurred) or would have existed (ie, had only the father but not the mother survived the accident). In this latter scenario, the mother was excluded from the calculation, since, in fact, the father would have been supporting the children alone. There would therefore not be a justification for adding the support the mother, on her own, could have provided the children.

Ivan Kramer FAASA FIA BSc (Wits) is a consulting actuary in Johannesburg. The writer is not an attorney and therefore some of the arguments are based on general reasoning, rather than the application of specific legal principles. □



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