

January/February 2014



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NELSON ROLIHLEHLA MANDELA
1918 – 2013



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

De Rebus editorial staff use the **LexisNexis online product:** MyLexisNexis.

Go to www.lexisnexis.co.za for more information.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

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

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

SUBSCRIPTIONS:

General, and non-practising attorneys: R 762 p/a

Retired attorneys and full-time law students: R 586 p/a

Cover price: R 80 each

Subscribers from African Postal Union countries (surface mail): R 1211 (VAT excl)

Overseas subscribers (surface mail): R 1 344.20 (VAT excl)

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

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Law Society of South Africa 021-21-NPO
Tel: (012) 366 8800

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Mapula Sedutla - Acting editor

2014 year of the morally ethical lawyer

The beginning of a year signals the time when most people make personal resolutions or goals they would like to achieve for the year. This year should be the year the profession endeavours to ensure that when dealing with their clients, colleagues, commissioners, judges, magistrates and the public they remain morally ethical and uphold the highest standards of the law.

One of the greatest examples of a morally ethical lawyer was former President Nelson Rolihlahla Mandela who the Law Society of South Africa (LSSA) has called 'one of the greatest moral compasses' of the profession (see p 6 - 8). As we bid farewell and celebrate the life of former President Mandela, the profession should take a page from his book and learn that the profession is not only about earning an income, but also has a humanitarian element to it.

As former Chief Justice Ngcobo points out on p 13, in his speech at the Cape Law Society annual general meeting (AGM), sensitivity to ethics and professional responsibility are essential attributes law graduates should strive to achieve. If morals and ethics are instilled in attorneys from the time they study for their LLB degree, they would be hard lessons to ignore when they practice.

In a press release in mid-November the LSSA Co-chairpersons David Bekker and Kathleen Matolo-Dlepu said that: 'The legal profession is an honourable one and attorneys are

bound by strict rules of ethics and professional conduct. Conduct that leads to unnecessary delays and prejudice to litigants, as well as excessive fees - or overreaching

- are not tolerated. We believe that such conduct can be eradicated with the assistance of judicial officers and other stakeholders' (see p 25). These are words the profession should take to heart and strive to live by.

Over the past few years the image of the profession has been tarnished by media reports of unethical conduct by some attorneys. The Attorneys' Fidelity Fund's (AFF's) 2013 report on claims paints a better picture of the profession than what is usually seen in media reports. The AFF's report shows that there have been 348 less claims to the fund in 2013 as compared to the same period in 2012. The report also shows that the percentage of errant attorneys is still less than 1%. As CP Fourie, Chairperson of the AFF said, during his speech at the Cape Law Society AGM, any attorney who stole was one too many. However, the report also shows that the trend over the years is the increment of the amounts being misappropriated.

The public's perception on the profession is very important as Deputy Minister John Jeffery said, in his speech at the Law Society of the Northern Provinces AGM: 'Attorneys and advocates are officers of the court. They regard themselves as honourable people who are part of a noble profession. But why is it that the public perception of lawyers is not the same and that all the jokes about lawyers is of them being money grabbing and dishonest people? Ultimately it's about delivering quality services to

the public and the protection of the public' (see p 18).

It is the responsibility of each and every attorney to ensure that the image of the profession is protected at all times.

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

Women in the profession must grasp opportunities

I agree with the school of thought that believes female practitioners do not require a specific lobby or separate consideration, and that they can compete on the same level playing field as their male colleagues. The reason why fewer women have high positions in the profession is not because they are not being treated fairly or equally; there are ample opportunities available for both women and men, but women choose not to apply. Why is that?

I am only a candidate attorney but I can testify that most women I know in this profession are just not ambitious enough, they do not want to step out of their comfort zones. As long as they have a job that gives them enough to survive daily, they are content; they do not take risks and they lack passion.

I am yet to grow in this profession and I believe that there is no challenge that will constitute a barrier to my advancement in the same way that my male colleagues advance. We need to change how we see ourselves as women, because even if we are offered opportunities on silver platters and have seminars that encourage us to move forward, we will not move forward if

we do not believe that we can. What do men have that we do not have?

Carla Mkhawana,
candidate attorney, Tzaneen



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Letter of the month

In for a penny, in for a pound

In the recent matter of *Price Waterhouse Coopers Inc and Others v IMF (Australia) Limited and Another* 2013 (6) SA 216 (GNP), Botha J again confirmed the legality of champertous agreements, as previously decided by the Supreme Court of Appeal in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Limited* 2004 (6) SA 66 (SCA).

However, in the present matter Botha J was specifically asked to develop the common law in order to make a direct order for costs against a third party funder (IMF (Australia) Ltd). Although there is no South African precedent for making costs orders against persons who fund litigation, this principle has been established in common-law countries (see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others* [2005] 4 All ER 195; and *Arkin v Borchard Lines*

Ltd [2005] EWCA Civ. 655). It was accepted that the court can, and should, in terms of its inherent power and in terms of s 173 of the Constitution, develop the common law to cope with modern problems.

Botha J remarked: 'In my view there is no reason why such relief should not be available. It is already possible to obtain direct orders for costs *de bonis propriis* against non-parties such as legal representatives and public officials. To enable the applicants to join the first respondent would be a logical progression from the situation created by the Supreme Court of Appeal. ... To allow litigants like the applicants to hold funders directly liable for costs would also be considered to be one of the measures that the courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous contracts' (at 222E).

With rising concerns regarding excessive litigation costs, the market for funders is expanding. Prospective funders must take note of this important decision and recognise the risks associated with entering into funding agreements with prospective litigants.

Theo Steyn,
attorney, Pretoria

• See also p 42 of this issue. ☐



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Farewell to 'one of the greatest moral compasses'

Nelson Rolihlahla Mandela 1918 – 2013

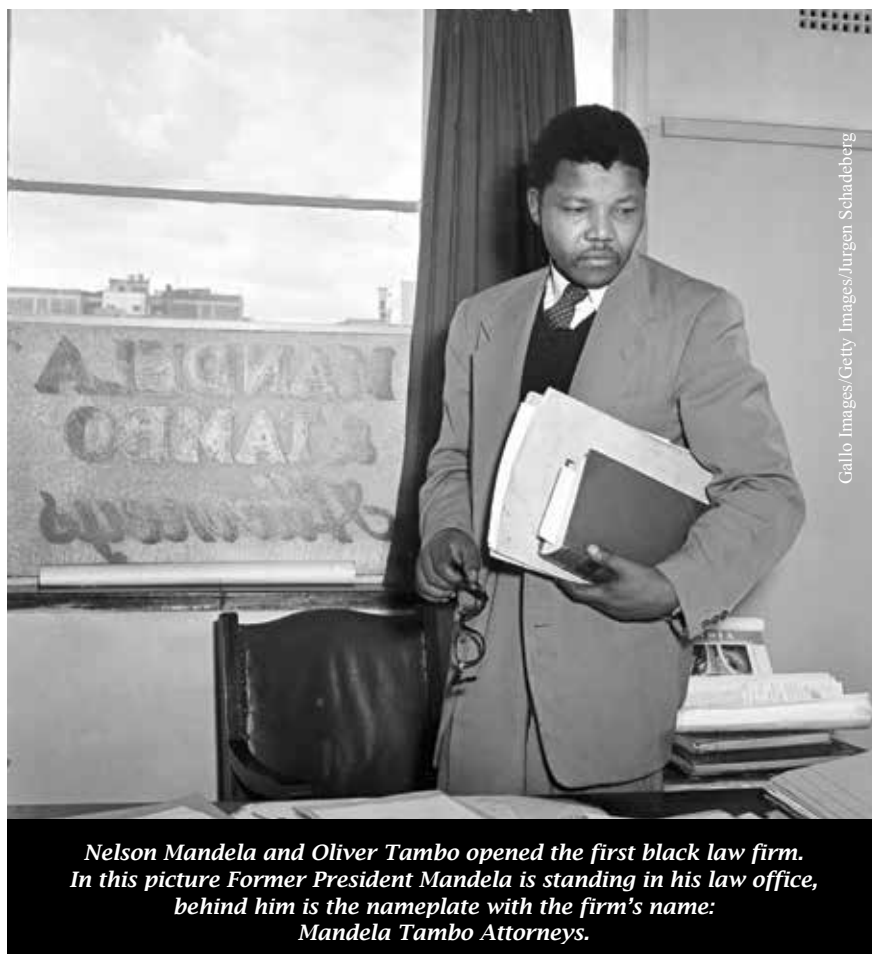
The legal fraternity has been mourning the loss of 'one of the greatest moral compasses', former President Nelson Mandela, who died on 5 December at the age of 95.

Former President Mandela was South Africa's first democratically-elected president, an icon of peace and reconciliation the world over and a lawyer at heart. He attended the University of Fort Hare and the University of the Witwatersrand, where he studied law. While in his first year, he was expelled from the University of Fort Hare after joining a student protest. He later completed his BA degree through the University of South Africa (Unisa), which he followed up with a law degree from the University of the Witwatersrand.

Legal career

Former President Mandela began his legal career working as a clerk in a law firm. He studied in the evening through a correspondence course with Unisa to complete his BA degree, which he was awarded in 1941. In 1942 he was articled to another firm of attorneys and started on a law degree at the University of Witwatersrand. By 1948 Nelson Mandela had failed to pass the exams required for his LLB degree and he decided instead to settle for the 'qualifying' exam that would allow him to practise as an attorney. Nelson Mandela and Oliver Tambo opened the first black law firm in South Africa, Mandela and Tambo in 1952. The bulk of their work involved defending people affected by apartheid laws. His landmark legal achievement was his initiating the first non-racial law in South Africa in 1994 as part of the negotiations to end apartheid, namely the interim Constitution, which became the Constitution on 4 February 1997.

In his autobiography, *Long Walk to Freedom*, he described his career as an attorney (N Mandela, *Long Walk to Freedom* (Randburg: Macdonald Purnell 1994) at p 137): 'In 1951, after I had completed my articles at Witkin, Sidelsky and Eidelman, I went to work for the law firm of Terblanche & Briggish. When I completed my articles, I was not yet a fully-fledged attorney, but I was in a po-



Nelson Mandela and Oliver Tambo opened the first black law firm. In this picture Former President Mandela is standing in his law office, behind him is the nameplate with the firm's name: Mandela Tambo Attorneys.

sition to draw court pleadings, send out summonses, interview witnesses – all of which an attorney must do before a case goes to court. After leaving Sidelsky, I had investigated a number of white firms – there were, of course, no African law firms. I was particularly interested in the scale of fees charged by these firms and was outraged to discover that many of the most blue-chip law firms charged Africans even higher fees for criminal and civil cases than they did their far wealthier white clients.'

'After working for Terblanche & Briggish for about one year, I joined the firm of Helman and Michel. It was a liberal firm, and one of the few that charged Africans on a reasonable scale ... I stayed at Helman and Michel for a number of

months while I was studying for my qualification exam, which would establish me as a fully-fledged attorney. I had given up studying for my LLB degree at the University of the Witwatersrand after failing my exams several times. I opted to take the qualifying exam so that I could practise and begin to earn enough money to support my family' (at p 137).

After passing his examination, Mr Mandela went to work for HM Basner as a fully-fledged attorney. Basner was a passionate supporter and defender of African rights. According to Mandela '[f]or the months that I worked there, I was often in court representing the firm's many African clients ... [a]fter the experience I gained there, I felt ready to go off on my own' (at p 138).

In his book, former President Mandela outlined his first few months of practice. 'In August of 1952, I opened my own law office. ... Oliver Tambo was then working for a firm called Kovalsky and Tuch. I often visited him there during his lunch hour, and made a point of sitting in a Whites Only chair in the Whites Only waiting room. ... It seemed natural for us to practise together and I asked him to join me. ... "Mandela and Tambo" read the brass plate on our office door in Chancellor House, a small building just across the street from the marble statues of Justice standing in front of the Magistrate's Court in central Johannesburg. Our building, owned by Indians, was one of the few places where Africans could rent offices in the city. From the beginning, Mandela and Tambo was besieged with clients. We were not the only African lawyers in South Africa, but we were the only firm of African lawyers. For Africans, we were the firm of first choice and last resort. To reach our offices each morning, we had to move through a crowd of people in the hallways, on the stairs, and in our small waiting room.'

'Africans were desperate for legal help in government buildings: It was a crime to walk through a Whites Only door, a crime to ride a Whites Only bus, a crime to use a Whites Only drinking fountain, a crime to walk on a Whites Only beach, a crime to be on the streets past eleven, a crime not to have a pass book and a crime to have the wrong signature in that book, a crime to be unemployed and a crime to be employed in the wrong place, a crime to live in certain places and a crime to have no place to live' (at pp 138-139).

Mr Mandela went on to write that he quickly realised what Mandela and Tambo meant to ordinary Africans. He added that their law firm was a place where people could come and find a sympathetic ear and a competent ally, 'a place where they would not be either turned away or cheated, a place where they might actually feel proud to be represented by men of their own skin colour. This was the reason I had become a lawyer in the first place, and my work often made me feel I had made the right decision' (at p 139).

According to Mr Mandela they often dealt with half a dozen cases in a morning, and were in and out of court all day long. He wrote that in some courts they were treated with courtesy while in others with contempt. 'But even as we practised and fought and won cases, we always knew that no matter how well we pursued our careers as attorneys, we could never become a prosecutor, a magistrate, a judge. ... [W]e often encountered prejudice in the court itself. White witnesses often refused to answer questions from a black attorney' (at p 139).

Mr Mandela said that '[w]orking as a

lawyer in South Africa meant operating under a debased system of justice, a code of law that did not enshrine equality but its opposite' (at p 141).

Mr Mandela wrote that when he had a case outside of Johannesburg he applied for his bans to be temporarily lifted. He reminisced about a case that made him travel to Carolina in the then eastern Transvaal. 'My arrival caused quite a sensation, as many of the people had never before seen an African lawyer. ... [T]he case did not begin for quite a while as they asked me numerous questions about my career and how I became a lawyer. ... As an attorney, I could be rather flamboyant in court. I did not act as though I were a black man in a white man's court, but as if everyone else - white and black - was a guest in my court. When presenting a case, I often made sweeping gestures and used high-flown language' (at pp 141-142).

Tributes from the legal profession

Law Society of South Africa

The legal fraternity has paid tribute to the former President in the form of press releases. The Law Society of South Africa (LSSA) said that the attorneys' profession had lost one of its greatest moral compasses. 'To the world he was an icon, to his family and our nation, a father, but to the attorneys' profession he was the embodiment of the principles that all in the profession aspire to: Reconciliation, social justice and respect for the values enshrined in the Bill of Rights,' the Co-chairpersons of the LSSA, Kathleen Mato-Dlepu and David Bekker said.

• See also p 8 of this issue.

Commonwealth Lawyers Association

The Commonwealth Lawyers Association (CLA) said that it was deeply saddened by the death. It added: 'Mandela's life was filled with purpose and he came to embody the fight for human rights, justice and equality for all. While mourning his death, the CLA celebrates his achievements and recognises his enduring legacy particularly in fostering forgiveness and reconciliation among a people scarred by the crimes of apartheid. The CLA is proud that Mandela was a member of our profession.'

International Bar Association

The International Bar Association joined the international community in expressing sadness at the announcement of the death of former President Mandela who was the Founding Honorary President of the International Bar Association's Human Rights Institute (IBAHRI) and international ambassador for democracy and freedom. Zimbabwean lawyer and

IBAHRI Co-chairperson, Sternford Moyo, said, 'I am deeply saddened by the death of the great Nelson Mandela, who has done so much for freedom and democracy in Southern Africa. Mr Mandela's courage and determination to fight for justice and equality is an inspiration to us all. He was an incredible man, who demonstrated enormous courage and sacrifice for the cause and principles in which he believed. His achievements are both within and outside of the political arena, and span beyond the borders of South Africa. His legacy will remain.'

Free State Law Society

The Free State Law Society said that the passing brought sadness to the hearts of all and sundry, not only on the continent, but to the world at large. 'As a lawyer, he was a formidable fighter for human rights together with his partner, the late Oliver Tambo; with whom he challenged the apartheid system and fought the injustice that pervaded the country. He was a man so challenged and yet so forgiving. Not many are like him. A man of all seasons who stood by his principles and said his truth with neither fear nor favour. We in the legal profession are saddened by his death; yet find solace in the memory of his brilliant life and the legacy he left; which all of us should strive to emulate.'

Kwa-Zulu Natal Law Society

The KwaZulu-Natal Law Society said that the brightness that shines on us as a nation, a continent and the world flickered briefly with the passing away of the former President. It said: 'We are proud to record that Mr Mandela was one of us, a dedicated attorney, who was one of the first black lawyers in our country. He practised at the height of apartheid serving the poor, the marginalised and disenfranchised Insofar as the legal profession is concerned he also initiated legislation to reform the profession, such as the right of appearance of attorneys in the High Court. The Legal Practice Bill that has just been passed by parliament is no doubt one of the great reforms initiated under the presidency and leadership of Mr Mandela to transform the legal profession for the benefit of our society.'

Black Lawyers Association

The Black Lawyers Association (BLA) said that no amount of words could 'equal the huge loss the human race has suffered due to the death of the father of the nation.' It added that the BLA would forever cherish former President Mandela's contribution to our just society and legal system. 'Madiba, a legal giant himself fought fiercely against discriminatory laws in our courts. He opposed with all his strength the demarcation, by race,

of seating arrangement of attorneys in courts. It is through the contribution and efforts of Mandela that black legal practitioners of South Africa can today practice law in the fields of their choice and in the big cities and suburbs free from harassment and possible persecution against legislation and enforcement by the apartheid regime.'

National Association of Democratic Lawyers

The National Association of Democratic Lawyers was greatly saddened to hear of the passing. It said that former President Mandela, together with such giants as Walter Sisulu and Oliver Tambo, showed us that a legal career was a means of effecting societal change.

Judiciary

Chief Justice Mogoeng Mogoeng issued a press release on behalf of the judiciary. He said that he was grossly saddened by the news of his passing. 'A legal eagle who was a true human rights champion; whose seminal contribution to redressing South Africa's unjust socio-political

imbalances truly rendered him a father of our nation. It is our wish that our country and the world would continue to emulate his vigour and passion for nation building, profound compassion and forgiveness - which will ultimately help our nation map out new ways of dealing with the rifts that continue to plague us as a people, thus contributing to our much-needed nation building and oneness,' he said.

Pan African Lawyers Union

The Pan African Lawyers Union (PALU) expressed its condolences to the family of Nelson Mandela, the people of South Africa, Africa and the world at large. It said: 'We celebrate his life and the great impact he made in the development of the law, legal profession, rule of law, human and peoples' rights and democracy and he will forever be the honorary life president of PALU.'

South African Women Lawyers Association

The South African Women Lawyers Association (SAWLA) said that it was sad-

dened by the passing of a legal eagle who made an immense contribution to a just society and the legal fraternity. 'SAWLA will remember Tata Madiba by the speech he made as the country's president on 9 August 1996 during the South African Women's Day commemorations in Pretoria. Tata Madiba acknowledged that the legacy of oppression weighed heavily on women and undertook to strengthen the forces for change in the country and committed to specific and practical guidelines for attaining gender equality and the empowerment of women. "Equal power and glory to the women of South Africa", those are the words he saluted with and will always echo in the ears of women and he will always be remembered with by women in this country. It is by his legacy that women continue with their fights and efforts in ensuring the equal power to women.'

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

LSSA pays tribute to Nelson Mandela

In December 2013, the Law Society of South Africa (LSSA) and its six constituent members joined the rest of the world in mourning the death of former President Nelson Mandela and celebrating his life and innumerable interventions in bringing true democracy to South Africa. In a tribute press release on 6 December 2013, the LSSA noted:

'To the world he was an icon, to his family and our nation, a father, but to the attorneys' profession he was the embodiment of the principles that all in the profession aspire to: Reconciliation, social justice and respect for the values enshrined in the Bill of Rights.

As a profession we are honoured that Mr Mandela chose to serve in our ranks. He, along with Oliver Tambo, opened the first black attorneys' firm in the country, providing hope and dignity to a people given to despair, leading the way for our current generation of attorneys.' LSSA Co-chairpersons, Kathleen Matlo-Dlepu and David Bekker, led a delegation of attorneys to represent the attorneys'



The LSSA delegation at the final send-off for Nelson Mandela: Krish Govender, Martha Mbele, Joseph Mhlambi, Kathleen Matolto-Dlepu, Poobi Govindasamy, David Bekker, Etienne Barnard, Sandile Beauchamp, Giusi Harper, Mohamed Husain and Sabeeha Husain.

profession at the final send-off function for Mr Mandela at the Air Force Base Waterkloof in Pretoria on the morning of 14 December 2013. Legal practitioners wore their gowns and court dress in honour of

Mr Mandela having been an admitted attorney in his professional life.

Barbara Whittle, communications manager
barbara@lssa.org.za

NADEL launches Dullah Omar Project to fight gender-based sexual violence 'war'

At the launch of the Dullah Omar Project against Gender-Based Sexual Violence in Durban at the end of November 2013, National Association of Democratic Lawyers (NADEL) members committed themselves to –

- disseminating an information checklist to educate members of the public with regard to the importance of preserving evidence in gender-based violent crimes;
- cooperating with stakeholders such as the South African Police Service (SAPS), the DNA Project and community caregivers to compile and disseminate information documents for the public;
- empowering children so that the voices of child victims are heard through child leadership programmes;
- promoting better communication and the empowerment of vulnerable and disabled victims of sexual crimes, including the availability of sign-language interpreters in courts as well as guidelines for the cross-examination of 'vulnerable' witnesses where improper examination by legal practitioners should be made a disciplinary offence; and
- providing guidance to the SAPS on taking proper statements.

Opening the launch workshop of the Dullah Omar Project against Gender-Based Sexual Violence, NADEL President Max Boqwana said that, despite constitutional imperatives, which demand that children's interests be treated as paramount, and assurances from various quarters, women and children, including infants, in South Africa were living as if they were in a war zone, where they could be violated at any moment both by strangers and those close to them. 'This is a sign of a sick nation; this is the price we pay for our violent past; this is the price we pay for dehumanising the majority of our people; this is the price of exclusion when many in our society find themselves at the periphery; this is the price of our failure to restore dignity to many of our people.' He asked: 'Why must this burden of society be carried by vulnerable children, infants and women?'

In commemorating the life of and work of the late former Minister of Justice, Dullah Omar, Mr Boqwana said NADEL had celebrated his ability to merge theory and practice in a manner that was beneficial to the society that he sought to serve. 'We are able to say that, whatever is troubling our society today, ours is not to buckle under pressure and behave as if the sun shall never shine again. Whatever our difficulties, Dullah Omar taught us that the price of freedom is eternal vigilance. We are here then to repay Dullah in a practical way; by finding ways to work side by side among ourselves and with those that are charged with that heavy responsibility of ensuring that the vulnerable in our society feel a sense of protection and comfort.'

Mr Boqwana noted: 'Although violence against women and children is a classless phenomenon, recent gruesome incidents that shame us all seem to have occurred in environments that –

- depict extreme levels of poverty;
- are havens for drug and alcohol abuse;
- display squalid, almost inhuman living conditions;
- have absent fathers, or those present being the actual perpetrators;
- have an absence of social support structures and professionals like social workers; and
- show an absence of amenities for children.

'None of these can even remotely be a justification for these heinous crimes, but gives us an understanding of the complex problem that we are dealing with,' he said. He added: 'NADEL realises that it may not be able to deal with all the challenges, but it can focus directly in an area that most of its members



NADEL executive members Max Boqwana, President (right), Gcina Malindi SC (left) and Khanya Jele at the launch of the Dullah Omar Project against Gender-Based Sexual Violence with Senior State Advocate Aaron Raletjema from the National Prosecuting Authority.

are particularly skilled and are able to play a role. That is to secure convictions for the perpetrators. This is important in that those that commit these offences generally do so with a view that they will never be caught or, if caught, they will never be convicted. We believe that convictions play an important deterrent effect in society, bringing closure to some of these difficult incidents but also serving as an expression of collective disgust by the community.'

Retired Constitutional Court Justice Zac Yacoob said judicial officers dealing with sexual violence cases must bring their own humanity into play. 'We should not be misled by clever legal arguments. We must assess cases by understanding the human condition,' he said. He added that judicial training should have aspects of the programme that focus specifically on sexual offences. In addition, he called on members of the National Prosecuting Authority to ensure that those accused of rape are properly prosecuted. Similarly, the SAPS must be trained properly to investigate cases and the evidence gathering process must be done properly and sensitively. The rights of the victim should not be juxtaposed with the rights of the accused. 'We must go beyond moral outrage and make things better,' he stressed.

Several speakers from the SAPS's forensic science biology section, the National Prosecuting Authority, forensic pathologists and the DNA Project dealt with rape kits and the collection and preservation of DNA and other evidence and challenges relating to the prosecution of sexual offences cases. One of the concerns raised was the shortage and unavailability of adult rape kits in some areas of the country. There also appeared to be little or no training available to doctors who must use the newly developed rape kits. In addition, changes to rape kits without proper training of medical practitioners can cause confusion that can lead to unsatisfactory use of the kits.

After discussion, there was a general view that integrated multidisciplinary training, where all the stakeholders – including legal and medical practitioners as well as police officers – involved in the evidence collection and investigation process, would be beneficial and preferable.

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Spotlight on law societies' AGMs

The four provincial law societies and the Black Lawyers Association held their annual general meetings (AGMs) towards the end of 2013. The Legal Practice Bill, the uniform rules for the profession, transformation, access to justice and the independence of the judiciary were some of the topics discussed at these meetings. *De Rebus's* news editor, Nomfundo Manyathi-Jele attended the AGMs and compiled this report. Reports on the KwaZulu-Natal Law Society and Black Lawyers Association AGMs will be published in the March 2014 issue.

Free State Law Society

The Law Society of the Free State (FSLS) held its annual general meeting in Bloemfontein on 25 October 2013. The Legal Practice Bill and the draft uniform rules were discussed during the AGM.

On the evening preceding the AGM, the FSLS held a gala dinner where the Chief Operations Officer of the Department of Justice and Constitutional Development, Dr Khotso de Wee, delivered the keynote address focusing on access to justice.

Dr de Wee said that there were various factors that impede the realisation of constitutional rights. He said that Prof Sandra Liebenberg of the University of Stellenbosch had argued that these factors included, among others –

- budgetary constraints;
- a lack of capacity to ensure effective service delivery;
- a lack of knowledge and awareness among communities about their rights and how to enforce them; as well as
- inadequate support for communities to assist them to make optimum use of available resources.

'Access to justice is a fundamental right that unlocks access to all the other rights enshrined in our Constitution. This right has the power to transform our society into a just and equitable one and to correct the injustices of our past. Especially in a relatively young democracy such as ours, access to justice, along with a strong rule of law and trust in the judiciary, is crucial to the development of the country and to the provision of socio-economic rights for the poor and marginalised,' he said.

'The famous Irish jurist, Sir James Mathew, once remarked that: "Justice is open to everyone in the same way as the Ritz Hotel." In other words, it is open and accessible to all in theory, but not in reality,' Dr de Wee said. According to Dr de Wee, Sir Mathew's remarks were

relevant for South Africa. He said that poverty had a direct impact on access to justice since South Africans who have little or no resources to access their rights were being deprived of basic services and any opportunity to attain a better life. 'However, one must understand that the problem of access to justice is exacerbated by our history... Gross poverty and inequality, the high cost of legal services and, to some extent, the remoteness of the law from people's lives are all factors that exacerbate the situation. Despite the best political will in the world, it is simply unrealistic to expect 20 years of democracy to redress the wrongs of more than 300 years of colonialism and apartheid,' he said.

Because of this, said Dr de Wee, South Africa's socio-economic adversity dictates the need for a comprehensive system of legal assistance for poor people in order to allow their issues to be adequately articulated and to promote parity in the legal process. He said that the demand for legal services will be heavily influenced by the level of knowledge among the population of their constitutional rights. 'Without knowledge it becomes impossible for people to exercise their rights or to hold the state to its duties,' he said.

Dr de Wee shed light on ways to improve access to justice practically. He said that, on the part of the state, improving access to justice can be achieved by focusing on predominantly two areas,

namely the courts and legal representation in the form of legal aid.

On the part of civil society, he said, access to justice, is achieved through the involvement of non-governmental organisations, the legal profession and community-based organisations, and by means such as advocacy, education, awareness and lobbying.

According to Dr de Wee, access to justice can be achieved effectively only if all prospective litigants have an unfettered right to bring a case before a court. He stated that access to justice was more than this. According to him, it is when a prospective litigant –

- is able to identify that he or she may be able to obtain a remedy from a court of law;
- has some knowledge about what to do in order to achieve access; and
- has the necessary skills to institute (or defend) the case and present it to a court.

Dr de Wee stated that recent studies have shown that the demand for legal aid from people who cannot afford pri-



The Chief Operations Officer of the Justice Department, Dr Khotso de Wee, delivered the keynote address at the Free State Law Society gala dinner.

vate legal services will greatly increase in future. He added that there was a need to find other ways of making justice more accessible, such as providing for community service or placing a greater emphasis on *pro bono* work rendered by law firms.

Dr de Wee stated that the legal profession had an important role to play in making justice accessible. He urged attorneys to avail themselves to act as commissioners of small claims courts as this was a way in which attorneys could make a significant contribution to improved access to justice.

Dr de Wee said that one of the biggest factors why people do not institute legal action or do not defend their rights was because they could not afford to do so. 'We are aware of the provision of mandatory *pro bono* work by law firms, as run by the various law societies, but the amount of time and resources available for *pro bono* cases are simply not sufficient to meet the demand', he said, adding that one of the ways the Justice Department was trying to make the le-

gal profession more accessible to people was by way of the provisions of the Legal Practice Bill.

Dr de Wee said that the legal profession was on the threshold of major changes with the imminent finalisation of the Bill. He added that there were some who would say that the Bill was unnecessary – that there was nothing wrong with the legal profession that needed to be fixed. 'A few go further to claim that this Bill will destroy the independence of the profession or that the changes will destroy the professionalism of the attorneys and advocates,' he said.

He then highlighted a few facts about the South African justice system. 'We come from a British common law system and when it comes to the legal profession, comparisons need to be made with other British Commonwealth countries. Reform of the legal profession is something that has been happening in almost all the larger countries of the Commonwealth. Britain itself – in its component parts of England, Ireland, Scotland and Wales – has been reforming the profes-

sion on an on-going basis. In Nigeria, Kenya, Zimbabwe and Namibia the distinction between the Bar and Side Bar was abolished. The same situation applies in New Zealand and parts of Australia. Legal reform is a vital and integral part of a maturing democracy,' he said.

Dr de Wee said that the Justice Department and the legal profession needed to change the way they think about the law. He said that law was a dynamic and ever-changing field of study that must adapt to meet the changing needs of society. 'We need to sit down and think creatively about the law and the legal system, so as to constantly evaluate whether the system is indeed meeting the needs of our people and in what ways we can improve access to justice for all,' he said.

Dr de Wee concluded by saying that in law the Constitution is usually a good place to start.

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Cape Law Society

The Cape Law Society held its annual general meeting at the V&A Waterfront in Cape Town on 1 and 2 November 2013. Former Chief Justice Sandile Ngcobo delivered the keynote address on the first day of the AGM, and on the second day, a constitutional law workshop on the influence of government in the appointment of judges was held.

The panel for the workshop included Johannesburg attorney Mohamed Hu-

sain; Judicial Service Commission (JSC) member and spokesperson advocate Dumisa Ntsebeza; constitutional law expert, Professor Pierre de Vos; Professor of Public Law, Hugh Corder and former JSC member advocate Izak Smuts SC.

Justice Ngcobo on the LLB degree

Justice Ngcobo shared his thoughts on the legal education crisis. He said that according to articles he had read after the LLB summit, there are a number of

graduates who have been admitted as attorneys despite their lack of essential requisite skills. Justice Ngcobo said that there was a state of unpreparedness among some of the lawyers that appear in court, adding that it was not just in the trial courts but also in the Constitutional Court where one would have thought that practitioners who appear in that court would be thoroughly prepared and know the facts and the law.

'What is frightening is that it took 15 years to realise that the LLB degree, as

dealing with deceased estates, trusts and conveyancing whose beneficiaries are living overseas

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presently structured, is not able to produce law graduates who can effectively serve the public ... the system has not only failed the public, but it has also failed those law graduates who were admitted as legal practitioners despite their inadequate training' said Justice Ngcobo.

He added that the harm this has caused to the integrity of the legal profession may not be known, but that it would not be too speculative to suggest that this may well have diminished public confidence in the system of legal education and training. 'But the real question is where do we go from here?' he said.

Justice Ngcobo suggested that the legal profession should question whether legal education and training provides law graduates with the knowledge, skills and professional attributes to meet the present and future needs of business consumers and also the private interest needs of society. He added that the crisis has also highlighted other challenges facing the legal profession, such as the need for a rapidly developing economy and the need for transformation that is required by the Constitution.

Justice Ngcobo shared some of his thoughts on ways to remedy the situation. 'In my view the most appropriate response to these challenges is to conduct a comprehensive review of all systems of legal education and training as well as our continuing legal education and training. This review must be designed to achieve one basic outcome, namely that the lawyers of the future, regardless of where they end up, must be adequately trained to meet the expanding needs of the society and those who conduct this review must represent all the stakeholders who have a direct interest in the education and training of law graduates such as law teachers, the legal profession, the judiciary and the government.'

The role of the law in society

Justice Ngcobo also reflected briefly on the role of the law and lawyers in society. He said that this was an aspect of legal education that was often overlooked and yet it was crucial in understanding and addressing the challenges that were facing the legal profession. 'Law exists in society in order to solve its social and economic problems and, perhaps more recent, also to solve the kind of political problems that could not be resolved through the ballot box,' he said.

Justice Ngcobo said that the law must be constantly readjusted to address the changing needs of society. 'In the advent of technology such as e-mails, Skype, video conferencing and other developments and online facilities, they require that many of our laws be reviewed so as to accommodate these developments for

the new crimes it brings with them, such as cybercrime. In the context of our society, the law has a special role to play in facilitating that transition. But the law can only be effective to the hands that use it,' he added.

Justice Ngcobo said that society has a deep interest in the system that trains lawyers. He added that a lack of confidence in the system may well diminish confidence in the justice system in general.

He highlighted three inter-related challenges namely to -

- reform legal education in light of an already identified crisis with the LLB degree;
- respond to globalisation of commerce and legal services; and
- transform society.

Justice Ngcobo said that the LLB summit was held to address the LLB crisis and to identify the root cause of the problem. There had been consensus that the LLB degree, as presently structured, was inadequate to prepare law graduates to meet the needs of society. 'The summit also revealed that, contrary to expectation, it did not facilitate access to the legal profession as only 22% of law students completed the degree in four years', he said.

Delegates identified a number of factors that affected the quality of the LLB degree, which included -

- the shortage of staff;
- a lack of resources; and
- the lack of a uniform standard for the LLB curricula.

He added it had also been noted that students entering universities lacked the requisite knowledge, skills and competencies that are needed for tertiary education, such as language literacy and reading skills. In addition, there were concerns that the LLB degree failed to integrate practice into the academic component of the curriculum.

'The unfortunate consequence of the deficiency in the skills and competence required for entry has had at least two adverse consequences. First, it meant that no school could offer remedial courses in order to supplement the kind of education received at high school level and secondly, it was revealed that students were spoon-fed and lacked the ability to engage in legal problems independently. Moreover, students lacked knowledge of basic legal principles and core concepts and were unable to conduct basic research and interpret legal text independently,' he said.



Former Chief Justice Sandile Ngcobo delivered the keynote address at the Cape Law Society annual general meeting in Cape Town late last year.

Justice Ngcobo added that the problems with the LLB degree did not stop at legal education, but it also had an impact in practice since it also affected the judiciary. Justice Ngcobo said: 'Instead of conducting a trial in the ordinary manner that is expected, you also have to safeguard the interest of parties because they are not in capable hands and this is not acceptable.'

Ways to remedy the situation

According to Justice Ngcobo the LLB summit made two recommendations. The first was that the Council on Higher Education (CHE) would conduct a standard-setting process for the LLB degree, and the second one was the establishment of an LLB national task team that will monitor the work of the CHE.

He noted that these steps were commendable, but added that these alone were insufficient. 'Our legal education is yearning for reform. It must be re-designed to ensure that lawyers of the future, regardless of where they end up, have the knowledge, skills and professional attributes to meet the present and future needs of society. It needs to be emphasised that what matters is not the years one spends at university but what one is taught at university. The inquiry that will be conducted by the CHE is going to look at the problem from an academic side. However, the academic integrity of the legal qualification can be achieved only with the support and input of the legal profession and stakeholders,' he said.

According to Justice Ngcobo, the inquiry would have to be followed by a secondary inquiry that must be practical and professional to complement the academic-based report. He stated that a reform process must take into account both professional experience and theoretical aspects of the law.

Justice Ngcobo stated that the reform of legal education should be the product of collaborative work by representatives

of the profession, the judiciary, consumers and government as they all have a direct interest in the development of legal education and training. 'If we are to expand legal services to society, we need a new approach on how we teach law. We must think of law as an everchanging instrument that must be used to solve social and economic problems in South Africa.'

He added that this method would produce people-orientated lawyers who can meet the expanding needs of society. 'We should not produce graduates who are able to give a lucid dissertation on the refinements of mergers and takeovers but are unable to advise an elderly person on how to apply for a social grant.'

Justice Ngcobo then highlighted matters that he felt required attention. He said that the principle purpose of law school is to prepare individuals to provide law-related services, hence there was a need to pay more attention to skills training, experiential learning, the development of practice-orientated subjects and finding a balance between theory and practice.

'The law school curriculum must be reconsidered. While there is a need to teach traditional law courses, we should consider introducing contemporary subjects in our legal education. Legal education must reflect the change in rule of law in society, which is no longer restricted to resolving disputes in the court rooms but now involves policy makers, policy planners, business advisors and all other new areas of law,' he said.

Justice Ngcobo noted that experienced lawyers and judges can be drawn to teaching and working in law faculties at universities: 'One of the ways legal education can be enriched with professional education is through clinical education. Properly utilised law clinics can be an effective tool to provide law graduates

with practical training. Law clinics perform an essential task, as they introduce law students to the practical aspect of the law.' He added that law clinics must be staffed by experienced practitioners who can guide law students on the intricacies of legal practice in order for the training to be effective.

Justice Ngcobo stated that legal education needed to reflect on how law teachers are trained. Law teachers generally left law school and went into teaching. Some of them had never been to a court. He proposed that it would be useful if law teachers were exposed to the practical aspects of the law, in particular those who taught procedural law such as criminal and civil procedure as well as, to a certain extent, constitutional law.

Justice Ngcobo then outlined essential attributes that he believed a law graduate should strive to achieve. These were –

- a basic knowledge of the principles and doctrines of major areas of law;
- a basic knowledge of the way the law is made, interpreted and applied;
- basic skills enabling law graduates to identify, define and analyse the problem to formulate options for its solution and to advise clients if necessary to use alternative dispute resolution;
- sensitivity to ethics and professional responsibility;
- oral and written communication skills;
- client-relationship management skills;
- analytical skills;
- critical judgment and evaluation;
- autonomy and the ability to learn; and
- numeracy, information technology and team work.

Justice Ngcobo concluded by saying that legal education was an investment, which, if wisely made, will produce beneficial results for the nation and for the profession, as well as accelerating the pace of development. 'It is this investment that will determine whether we are

able to meet the needs of a developing country with a globalised economy and legal services and the effort we invest in legal education and training will determine whether we as a nation will be able to achieve the goals in the Constitution, namely to create a new society based on democratic values, social justice and fundamental human rights.

• See also 2013 (July) DR 8.

Constitutional law workshop:

The influence of government in the appointment of judges

Professor Pierre de Vos said that it was his contention that an extraordinary amount of nonsense was spoken and written about the role of the Judicial Service Commission (JSC) in the appointment of judges in South Africa.

He said that much of the confusion could be blamed on the mistaken understanding of the exact nature of the function performed by the JSC when it appoints judges and the failure to appreciate the political 'cover' provided for judges by the JSC. 'Some critics of the JSC appear to believe that any political influence on its work represents a fundamental attack on the independence and impartiality of the judiciary. On the other hand, some members of the JSC seem to labour under the misconception that any criticism of the JSC is illegitimate and that no court should ever be allowed to review its actions. The truth lies somewhere between these two extremes,' he said.

Prof de Vos said that society had to accept that judges in a constitutional democracy made decisions with potentially enormous political consequences and that the values, beliefs and political views of judges play some role in how they will decide some of the more difficult and contentious cases.

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'The South African system of appointing judges recognises that there is a need to avoid the appointment of judges who would destroy the legitimacy of the judiciary by blatantly making decisions purely based on their party political commitments, while also accepting the reality that the personal judicial philosophy of a judge may well influence the individual judge's interpretation and application of the Constitution,' he said. He added that this was why the JSC consists of both lawyers and judges and politicians and why the interviews with candidates for appointment are conducted in public.

Prof de Vos believes that the involvement of politicians in the JSC appointment process was potentially a good thing, adding that not only did it help in the appointment of judges whose values were not completely anathema to the vast majority of voters, it also protected judges to the extent that politicians cannot say that they were selected by a process in which politicians had no say.

'If judges make decisions that politicians do not like, well, politicians are partly to blame for the appointment of those judges. The involvement of politicians in the appointment of judges will not stop attacks on it, but it does provide some cover for judges who can point out that politicians had a large say in their appointment,' he said.

On the issue of ss 174(1) and 174(2) of the Constitution, Prof de Vos said: 'Section 174(1) of the Constitution states that any appropriately qualified person can be appointed as a judge. Section 174(2) states that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. Often in debates about the appointment of judges these two provisions are set up as opposites that are in fundamental conflict with one another: Either you appoint good judges, people of merit who are appropriately qualified, or you appoint black or female judges. I think this reasoning is rather insulting and also damaging to the judiciary. It displays a lack of understanding of the benefits of diversity on the Bench.'

According to Prof de Vos, even some supporters of racial and gender transformation of the judiciary at times make the mistake of contrasting merit with transformation. He said Chief Justice Mogoeng Mogoeng had stated that although the 'merit' of applicants did count when considering appointments to the Bench, the considerations of 'transformation is just as important'. Prof de Vos added that this juxtaposition of 'merit' with the need for 'transformation' in the judiciary was highly problematic.

Prof de Vos said that the problem with the JSC's approach to judicial appointments was that it has embraced a narrow and constitutionally problematic idea of what both transformation and merit mean. 'By stating that there is a tension between the need to appoint judges on merit and the need to appoint more black and female judges (as part of the need to transform the judiciary), the JSC is saying that black and female appointees often do not possess the same 'merit' as white candidates. This is highly problematic as it perpetuates the deeply entrenched white male-centric notion that upper middle-class white men are almost always superior in 'merit' to black and female candidates,' he said.

Prof de Vos concluded by saying that there was an urgent need for the JSC to revisit its conceptions of merit and transformation to avoid the unjustified stereotyping of black and female candidates as generally possessing inferior merit.

Mr Ntsebeza opened by stressing the point that what he was about to say were

However, Mr Ntsebeza noted that if you are black it did not necessarily mean that you were progressive.

Mr Ntsebeza concluded: 'It is not easy for us to sit and determine whether the appointment of judges or the functioning of the JSC is operating in a meaningful way. The JSC is doing the best it can with imperfect tools to achieve a perfect outcome.'

Professor Corder started his presentation by reminding delegates that the judiciary was part of government. He said that he believed that it was quite legitimate and proper that parliament and the cabinet should play a constitutional review role in the judiciary because this is one of the most effective means of holding the judiciary accountable.

Prof Corder said that the present judiciary is much better than pre-1994 and that there is a clear need for demographic change on the Bench, but that there is also a need for transformation. He reminded delegates that someone who, in the apartheid regime, was regarded



Professor of Public Law, Hugh Corder; constitutional law expert, Prof Pierre de Vos; Judicial Service Commission member and spokesperson, advocate Dumisa Ntsebeza; former JSC member advocate Izak Smuts and Johannesburg attorney, Mohamed Husain; formed the panel that discussed the influence of government in the appointment of judges at the Cape Law Society AGM held in Cape Town.

his views and not those of the JSC. He said that as lawyers we tend to say that the JSC must be changed.

Mr Ntsebeza pointed out that two future Chief Justices sat on the ANC Constitutional Committee that drafted the Constitution before 1994 - Arthur Chaskalson and Pius Langa. 'It was with them in attendance that it was deliberately intended to include a disproportionate number of non-lawyers on the JSC,' he said. He pointed out that the historical context must be considered when calling for change in the composition of the JSC.

Mr Ntsebeza said that one can understand why those who decided that race and gender must be pivotal in the determination of who should be considered by the JSC for recommendation for judicial appointment did so back in 1994, as in 1994 there were only two female judges and both were white. In that same year, he said, there were three black judges, one Indian, one African and one coloured.

Mr Ntsebeza said that it was the Constitution that decided that out of all the criteria that define equality, that only two should be the imperatives for the appointment of judges, race and gender.

as white can be progressive and someone who was regarded as black, can be deeply conservative and anti-transformation.

'I do not think that we need to tinker with the composition of the JSC. I think that, despite a few mistakes, the JSC did quite well from 1994 to 2009. I do think that the JSC has lost the plot a bit since 2009. The courts think so too as they have found the JSC wanting on a number of occasions since 2009,' he said.

Prof Corder noted that the process for appointing acting judges must be reviewed. He said that acting judges have been part of our history since 1910 and that acting judgeships can be incredibly important, productive and constructive in both giving people an opportunity to see what it is like to be a judge and

how tough it is being a judge. 'We have unfortunately had a number of cases since 1994 where judges who have been appointed have not been up to the task, have not been able to cope with being a judge and have taken long periods of sick leave. Being an acting judge gives you the opportunity to see what it is like – it is an awesome responsibility that one bears as a judge. It also gives fellow judges an opportunity to see how collegial, productive, hardworking and committed to transformation a particular acting judge is,' he said.

Prof Corder outlined how acting judges are appointed. He said that the judge president of a division selects someone for recommendation to the justice minister who appoints the person for a month or a term. He added that the judiciary has now been experiencing the phenomenon of 'serial reappointment' of acting judges for quite a long time. 'It takes them out of their practices so they have nothing to go back to and then you sit with someone who has been an acting judge for a year or more. If they do not get appointed, do they just continue being an acting judge without having gone through the processes of the JSC? One of the points we have to think about here is not doing away with acting judgeship but a more accountable, responsible way with the key values of our Constitution in appointing acting judges,' he concluded.

Mr Smuts said that there was nothing unconstitutional about executive participation in judicial appointment. He said that the first certification judgment (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)) makes that clear as it records that the constitutional principles did not create any obligation for the constitutional assembly even to es-

tablish the JSC, but it is the assessment of the role of the JSC that the judgment makes the most important observation. Mr Smuts says that, in para 124 of the judgment, the Constitutional Court observes of the JSC that, as an institution, it provides a broadly based selection panel for the appointment to the judiciary and provides a check and balance of the power of the executive to make such appointments. 'If that is the role of the JSC, we can legitimately find out whether the JSC is playing that role or whether the check-and-balance function of the judiciary is fair,' he said.

Mr Smuts said that the JSC was established in terms of the Constitution, which is part of a project to create a new and just society founded on the values of human dignity and the achievement of equality. He added that the government structure was designed to achieve these ends and that the design requires that the judiciary be impartial.

However, he asked: 'How has the government gone about ensuring that we establish a judiciary that will ensure the development and protection of the constitutional values of society?'

Mr Husain said that the process for appointing judicial officers was critical to the independence and legitimacy of the Bench. He outlined the composition of the JSC saying that he believed that there was too much representation by members of parliament. Mr Husain also looked at the appointment process of judges in other countries. He unpacked the vex-



CP Fourie of the Attorneys Fidelity Fund delivered the fund's report at the Cape Law Society AGM in Cape Town.

ing question of the proper interpretation ss 174(1) and 174(2) of the Constitution. For more information on his presentation see 2013 (Dec) DR 3.

AFF report: Claims decrease

CP Fourie, Chairperson of the Attorneys' Fidelity Fund (AFF), gave an overview of the position of the AFF. Speaking on claims, Mr Fourie said that the AFF had received 508 claims totalling an amount of about R 125 million from January to mid-October 2013. He said that in the same period in 2012 and 2011 the AFF received 856 claims totalling R 258 million and 972 claims totalling R 205 million respectively.

Mr Fourie said that conveyancing claims remained one of the AFF's biggest risk areas with estates second and bridging finance third.

'Claims paid during 2013 are expected to end in the vicinity of R 100 million as opposed to R 105 million last year. The board has projected claims in the sum of R 38 million as not being valid claims and claims to the amount of R 366 million are still being investigated, he said.

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He said that the AFF protects the public against the misappropriation of trust monies and added that fortunately the percentage of errant attorneys was still well under 1%, which was not a bad statistic but that, on the other hand, any attorney who stole was one too many. Mr Fourie, however, said that the trend over the years was that the amounts stolen were increasing.

Mr Fourie said that as of 30 September 2013 a total of R 150 million had been withdrawn from the AFF's reserves to fund operational issues or expenses. He added that R 94,7 million was used

for professional indemnity cover and the payment of claims. 'The fund is budgeting for an operational deficit of R 250 million in 2014. While the 2014 total income is expected to remain static at 2013 levels, the overall expenditure is expected to increase with more than inflation. The AFF will need to withdraw at least R 250 million from its investment portfolios in 2014 to meet operating requirements,' he said.

Mr Fourie said that as far as the Legal Practice Bill was concerned there seemed to be a new risk element for the AFF that may be brought about by a third category of practitioners in the making, namely advocates with Fidelity Fund certificates who would be able to take direct instructions from the public.

He added that no one, at that stage, had any idea of what the proposed structure of the profession would cost and whether it would be sustainable going forward once the Bill was passed.

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Law Society of the Northern Provinces

The Law Society of the Northern Provinces' annual general meeting took place on 9 November 2013 at Sun City. Speakers on that day included the Judge President of the North and South Gauteng High Courts, Judge Dunstan Mlambo who delivered the opening address, and the Deputy Minister of the Justice Department, John Jeffery.

Judge Mlambo spoke on the pursuit of meaningful social justice. He said that the adoption of the 1996 Constitution created a society where everyone was equally protected by the law and to improve the quality of life of all citizens. He added that it was the intention of the Constitution to transform society by healing the divisions of the past and to establish a society that was based on democratic values, social justice and fundamental rights for the future.

South Africa's socio-economic situation

Judge Mlambo said: 'In 1998 President Mbeki [as he then was] famously described South Africa as a "two-nation" society: As "one of these nations being white, relatively prosperous, regardless of gender or geographical dispersal. The second and larger nation being black and poor, with the worst affected being women in the rural population in general, and the disabled". These two nations were distinguished by unequal access to infrastructure of all kinds and unequal access to opportunities. While this may have been true at that time, the racial makeup of [South Africa] is no longer the distinguishing feature of the two-nations concept, that feature has become disadvantage and poverty.'

It is thus clear that, while political freedom has been achieved, the historical legacy of apartheid in the realm of equality of opportunity and comparable living standards still presents a challenge.

Democracy and social justice

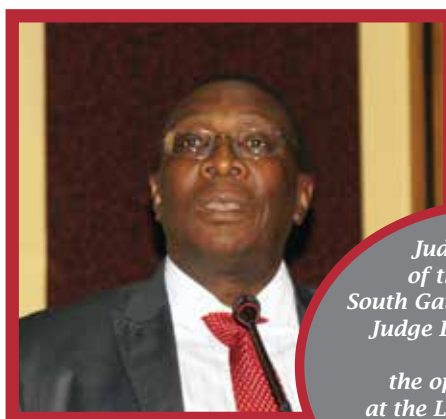
Judge Mlambo said that the situation

South Africa finds itself in as a nation presents a threat to the hard-won democracy that was paid for in the pursuit of social justice.

'Protecting our democracy by combating inequality is the task of social justice lawyers. The term "social justice" is a heavily loaded concept. I believe that social justice is the process of remedying oppression, which includes exploitation, marginalisation, powerlessness, cultural imperialism and violence ... Social justice also includes public interest work in its many forms,' he said.

According to Judge Mlambo social justice lawyers seek to give material meaning to democratic ideals in the daily lives of individuals and communities that are marginalised, subordinated and under-represented. He added that while lawyers are not the complete solution, they remain a key ingredient needed to work with communities struggling to seek a dignified way of life.

Judge Mlambo said that the Constitution has been described and acknowl-



Judge President of the North and South Gauteng High Courts, Judge Dunstan Mlambo delivered the opening address at the Law Society of the Northern Province's AGM held late last year.

edged in diverse academic publications as being one of the best in the world, yet he thinks that 'we as lawyers have not done enough to make the Constitution a living reality in the lives of the poor'.

Making the pursuit of social justice relevant

Judge Mlambo said that while there is a lot that can be said of our legal profession, not all of it was good. He said that South African commercial law firms are recognised as among the best in the world. 'This has been demonstrated by the manner in which the number of overseas commercial law firms have either merged or formed partnerships with their South African counterparts,' he said.

'Law students are enrolling in ever increasing numbers to acquire the necessary knowledge and proficiency in commercial matters to the detriment of

courses dealing with human rights issues, constitutional law, and laws affecting the rights of women, children and the disabled,' he added.

Judge Mlambo said that commercial law courses rarely intersect with the everyday world of the poor and the homeless. He said that to reverse this trend one of the intellectual challenges for law schools should be students' re-assessing their vision of what social justice means to them now and what it will mean to them later as attorneys.

Judge Mlambo stated that it may not be possible for law schools to recapture the passion for challenging injustice and the experience of participating in a struggle for social change that animated legal services and civil rights lawyers in the fight against the apartheid system. He said that law schools should encourage students to pursue a programme of social justice by first creating an atmosphere of compassion where diversity is appreciated and differences between people are recognised and celebrated. Judge Mlambo added that the debate on the curriculum of the undergraduate LLB degree should make it mandatory for students to learn about social justice and community service.

The challenges in litigating socio-economic rights

Judge Mlambo then highlighted the challenges faced in socio-economic litigation. He said that there were gaps in the delivery of civil legal assistance to the indigent and the poor so that they could approach the courts. He said that these challenges included -

- A lack of knowledge about rights.
- The problem of polycentricity. He said that socio-economic cases were considered to be polycentric because of the conception that they have budgetary consequences. For example, a case involving a person's right to housing would not only impact on that person and the state but also on the interests of other citizens. 'The interests of other citizens would raise questions such as whether the money should be used to build a crèche, hospital or school,' he said.
- Limited access to justice.
- Reactionary litigation. Judge Mlambo said that the term 'rearticulation' referred to the process and practice of re-defining political interest and identities through a process of recombining familiar ideas and values into hitherto unrecognised ways. He added that right wing groups and legal organisations now use the law to block social change and transformation effectively along many fronts. 'Through this process and practice, the political right has rearticulated public interest law and it now resides in a domain that is hostile to the interests of social justice,' he said.

The Judge President concluded by saying that the legal profession should not withdraw into a laager where only members of the public who can afford to pay fees will be assisted. 'We cannot leave it all to the government that is already carrying a huge social security bill to assist the poor. Legal Aid South Africa is straining to meet the demand and on its own it cannot provide the solution. I challenge you as a collective to also consider the role you can play in meaningfully advancing the social justice agenda of our country and in helping engagements such as these bear fruit that will improve the justice and fairness of citizens' lives ... By undertaking public interest litigation and the pursuit of social justice, the legal profession will take its rightful place in society as the custodians of justice and peace. Encouraging people to have their disputes heard in an open forum will foster a healthy respect for the rule of law and install confidence in the judiciary. These are essential for any fully functioning democracy,' he said.

Imminent change for the profession

Deputy Minister Jeffery said that the legal profession was facing imminent change with the passing of the Legal Practice Bill in the National Assembly in November 2013.

Mr Jeffery said that some may be asking why the legal profession needed to change. 'Why do we need a new law regulating the profession? What is wrong that needs to be fixed, you may ask?'

He replied: '[T]he first issue is that of racial and gender transformation. Has the profession really changed over the past two decades? How can it be that 19 years into our democracy our legal profession is still not transformed so as to broadly reflect the diversity and demographics of our country? Nineteen years into our democracy, only nine out

of South Africa's 473 senior counsel are black women. Moreover, only four of these are African. This is less than 1% of the total. White women are also not adequately represented, with only 20 practising as senior counsel in South Africa.'

Transformation in the legal profession

Deputy Minister Jeffery said that the lack of transformation was not only evident in the composition of law firms and in the advocates' profession, but also in briefing patterns. He queried why there was resistance to change, adding that whatever the underlying reasons for the resistance to change, it was clear that the legal profession had not changed much over the past two decades.

Mr Jeffery said the profile of South African law firms painted a rather disheartening picture. 'For example, if one looks at some of the firms who constitute the so-called 'big five' there is cause for concern about the lack of representativity, especially on the level of directors or partners. My office found that in one of the 'big five' firms there are 123 partners, of whom 93 are white and only 30 are black. Of the 30 black practitioners, only 17 are African,' he said.

Mr Jeffery said that one of the 'big five' firms mentions that it is an equal opportunity employer committed to employment equity at all levels. The firm states that some 42% of their legal staff and 60% of their business services staff are persons of colour. But as a professional partnership, the firm is owned by its equity partners, with only 17,5% being owned by previously disadvantaged individuals. The Deputy Minister said that this raised the question: How, in 2013, can a firm with over 150 partners, have only 17,5% black equity?

'Why is it possible for our smaller law firms to have more majority black ownership, but not our big firms? Why is it that other professions, for example chartered accountants, can have firms like Sizwe Ntsaluba Gobodo (SNG)? SNG is the largest black-owned and black-managed accounting firm and the fifth largest accounting firm in South Africa. It has 55 partners and is nearly completely black owned and black managed,' he said.

Mr Jeffery noted that another interesting fact one notices when examining some of the firms is a tendency that black people, in general, and Africans in par-



The Deputy Minister of the Justice Department, John Jeffery speaking at the Law Society of the Northern Provinces AGM late last year.

ticular, are predominantly to be found at associate level. 'And what power or influence do associates really have? And how long does it take the average associate to become a senior associate and then a partner?' he asks.

Statistics

Mr Jeffery then referred to a survey on the demographic composition of corporate law firms by Plus 94 Research (see 2013 (July) *DR* 10). He said that the profiles of the country's law firms of being overwhelmingly white and male are in stark contrast to the racial and gender profiles of law students. To this point he said: 'In 2011 the majority of LLB graduates were African (1 784), 355 were coloured, 404 were Indian and 1 268 white. Also the majority of the graduates were female, with 1 954 females as opposed to 1 622 males.

However, what is more startling is the fact that, despite the majority of LLB graduates being African, it is still the white graduates who are getting articles. The Law Society of South Africa's figures show that the Law Society of the Northern Provinces (LSNP) has just over 12 000 practising attorneys. Of those the overwhelming majority of 8 207 are white, with 3 165 African. The LSNP registered 1 104 articles of clerkship in 2012, but of these 587 candidate attorneys were white, as opposed to 412 African, 89 Indian and 16 coloured.'

The Deputy Minister asked how committed the profession really was when it came to transformation and what could be done to improve the situation. He said that meaningful transformation must entail more than a simple numbers game, adding that it was about mentorship and the meaningful transfer of skills by exposing graduates to a range of different types of cases and areas of law, so that they can develop expertise in a chosen area.

Mr Jeffery looked at a few of the initiatives undertaken by some firms that were aimed at advancing black and female professionals. He looked at a particular law firm, saying that it -

- ensures that at least 60% of their annual candidate attorney intake comprises previously disadvantaged persons;
- engages in a number of guidance and advisory arrangements with fledgling law firms owned by previously disadvantaged individuals;
- participates in the Integrated Bar Project, a programme designed to expose previously disadvantaged law students to major commercial law firms;
- seconds previously disadvantaged attorneys to international law firms in Australia, the United Kingdom and the United States of America and runs an English language bridging course to as-

sist attorneys whose first language is not English;

- offers bursaries to previously disadvantaged law students studying at South African universities; and
- invites law students from South African universities to take up internship positions in the firm.

Deputy Minister Jeffery said that another area of concern was that of the cost of litigation. '[R]ecent increases in tariffs have been inflation linked, but there were substantial, higher-than-inflation increases in tariffs in the past. By way of international comparison, it is interesting to note recent developments in Germany. In July this year, German lawmakers passed new laws pertaining to court and legal fees. The Act on Modernisation of Cost Rules (*Kostenrechtsmodernisierungsgesetz*) amends both the German statutory provisions on lawyers' fees (*Rechtsanwaltsvergütungsgesetz*) and on court fees (*Gerichtskostengesetz*). It consists of both increases of the fee tariffs and structural changes to cost rules. On average, the value-based legal fees have been increased in the order of 12%. It is interesting to note that in discussions on the new tariff increases, it is explained that 'these increases may sound exorbitant', but the tariffs had remained unchanged for almost a decade and some fees had not been amended for even longer,' he said.

'In a constitutional dispensation like ours, the duty to protect democracy falls even more heavily on the lawyers.' - Retired Judge President Bernard Ngoepe.

Mr Jeffery said that in Germany an increase of 12% is considered to be exorbitant. He added that, in Germany, lawyers' fees, court fees and additional costs are extremely transparent. Statutory scales exist for lawyers' fees and court fees. Negotiated hourly rates usually range between € 210 and € 300, according to the complexity of the case.

Mr Jeffery concluded by saying: 'Attorneys and advocates are officers of the court. They regard themselves as honourable people who are part of a noble profession. But why is it that the public perception of lawyers is not the same

and that all the jokes about lawyers is of them being money grabbing and dishonest people? Ultimately it's about delivering quality services to the public and the protection of the public; something we also aim to address in the new Bill,' he said.

Lawyers should protect democracy

The dinner on the night of the AGM was in honour of retired Judge President of the North and South Gauteng High Court, Bernard Ngoepe who had also recently been appointed as South Africa's first tax ombudsman.

In the speech that he delivered, Judge Ngoepe spoke on protecting democracy in South Africa, noting that in a constitutional dispensation like ours, the duty to protect democracy falls even more heavily on the lawyers.

Judge Ngoepe said that the one constitutional institution that needs to be defended by attorneys is the Judicial Service Commission (JSC). He said that this was a body directly relevant to the legal profession and before which some of those present were going to appear.

Judge Ngoepe said that there have been some unjustified attacks on the JSC; its only sin having been not to recommend certain individuals, notably senior counsel (SC), for judicial appointment. 'After my appointment as Judge President, I deliberately went out of my way to appoint attorneys as acting judges; among them the two current deputy judges president of this division. Yes, I could have continued with the practice of consistently appointing SCs only. But I knew then, as I still know today, that you did not have to be an SC to make for a good judge. In fact, I knew more than that: Throughout my career, both as an attorney and especially as an advocate, and also in my period as judge president and a member of the JSC, I came to realise that not every successful and competent SC would necessarily make for a good judge. The truth of this has been proved many times. I also came to realise that SCs who were not so highly rated, turned out to be very good judges,' he said.

Judge Ngoepe said that the JSC will occasionally make weak appointments as the members are merely human. He emphasised the fact that nobody's appearance before the JSC should be a mere formality and that no candidate should be assured of an appointment. Judge Ngoepe said that that kind of attitude discloses a fundamental lack of understanding as to what is required of a judge. 'Nobody should litigate their way to the Bench, not even by proxy. It is an office of honour; you do not fight for it. There is another reason why one should

not litigate one's way to the Bench: Judges cannot appoint judges; they are too poorly qualified, if at all, to make a good judicial appointment,' he said.

Judge Ngoepe warned that judges should not try to influence the outcomes of the JSC through their judgments. 'Should they do that, some of us will openly criticise them. Some of us were there when the 1993 interim Constitution was drafted. One of the priorities was to wrestle the power to appoint judges from the executive; this was done,' he said.

According to Judge Ngoepe 'the power was not to be given to parliament or to the judiciary. It was to be given to an independent and representative body of no less than twenty something people; representative of the diversity of our nation'.

'The executive, parliament or the judiciary, may not usurp this power. There may be a point in saying that the JSC is dominated by politicians; if that is the problem, we should direct our effort towards changing that, instead of making it our pastime to criticise the JSC whenever our own perceived champions are not appointed, or whenever we begin to panic and want to halt the process of representivity,' he said.

Judge Ngoepe concluded his speech by saying that he was amazed that nearly 20 years down the line, it was only now that society began not to know or understand what the criteria was for the appointment of a judge, or how the criteria was applied. 'Really? Were these criteria not known and applied during the period of Chief Justices Corbett, Mahomed,

Chaskalson and all those who followed? Why is it that, suddenly, they are not known or are vague, or it is not clear how they are being applied?' He added that society should criticise the JSC when it felt it was necessary, but that it must do so for the right reasons and with the right motive. 'Care must be taken not to delegitimise constitutional institutions by attacking them for wrong reasons and with nefarious ulterior motives. Well-meaning lawyers would have to speak out and it is encouraging that some have done so and will hopefully continue to do so,' he said.

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LSSA co-chairperson's mid-term report

The co-chairperson of the Law Society of South Africa (LSSA), David Bekker delivered the mid-term report of the LSSA at the various AGMs of the respective law societies.

On the LLB summit, Mr Bekker said that in May 2013 the LSSA had hosted the LLB summit in conjunction with the South African Law Deans Association (SALDA), which included various stakeholders in the profession. The summit debated the content of the current LLB degree and the concerns raised by the judiciary and the profession regarding the fact that LLB graduates appear to be unprepared to enter the profession on completing the current four-year degree. 'It was resolved to request the Council for Higher Education (CHE) to conduct a standard-setting process for the LLB degree to be concluded by 30 June 2014. The CHE should conduct this exercise by consulting widely with the LLB summit steering committee, which represents all the stakeholders who attended the LLB summit,' he said. (See also 2013(July) DR 8.).

Mr Bekker said that in August 2013 the LSSA task team dealing with the LLB met and resolved to -

- monitor LLB standard setting by the CHE;
- invite the judiciary to attend and endeavour to include the Departments of Justice and Higher Education;
- to elaborate on the profession's needs relating to the LLB through the LSSA's Legal Education and Development (LEAD) department's participation in the national conference of the Society of Law Teachers in January 2014, and
- arrange a workshop where law teachers will be guided in the integration of information technology-related law in legal subjects.

'The task team agreed that the summit had expressed substantial consensus on the extension of the LLB degree from four to five years; however, the structure and content required further research and debate,' he said.

Mr Bekker also highlighted several other initiatives of the LSSA, such as electronic signatures and anti-corruption and the image of the profession.

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Uniform rules for the profession and Legal Practice Bill

The four sets of separate rules of the provincial law societies have been combined into one uniform set of rules under the auspices of the Law Society of South Africa (LSSA). In order to be implemented, the uniform rules must be accepted by members of each provincial law society at an AGM.

A discussion on the rules took place at all the AGMs. Before the AGMs, a representative task team of the LSSA constituent members prioritised the finalisation of a uniform set of rules for consideration at the various law society AGMs. If approved, the uniform rules would serve as a basis for both certainty about national uniformity and as a working document for the future Legal Practice Council. The following decisions regarding the rules were taken at the various annual general meetings:

- Cape Law Society: Rejected the draft rules *in toto* and referred them to a subcommittee for reconsideration.
- Free State and KwaZulu-Natal law societies: Adopted the uniform rules.
- Law Society of the Northern Provinces: Adopted the rules except for some rules dealing mostly with accounting aspects.

A joint meeting of law societies' representatives was due to be held at the end of January 2014 to deal with the outstanding issues.

Legal Practice Bill

A discussion on the Legal Practice Bill also took place at the various AGMs. In mid-November 2013 the Bill passed the second reading debate and was sent on to the National Council of Provinces (NCOP). There were 227 votes in favour of the Bill, 81 against and one abstention. Provincial public hearings on the Bill were due to be scheduled by the NCOP in February 2014.

Constitutionalism in the SADC region discussed at the **SADC LA AGM**

The Southern African Democratic Countries Lawyers' Association (SADC LA) 14th annual conference was held at Lilongwe, Malawi in August 2013. The theme of the conference was: 'Constitution-making and constitutionalism in the SADC region: Opportunity or illusion for justice, peace and shared values?' Judges, law society and Bar leaders, legal practitioners, government officials, and representatives from regional and national civil society organisations from 12 of the 15 SADC countries interrogated topical issues under the conference theme.

President of the Malawi Law Society, Mandala Mambulasa, opened the conference by saying that in these hard economic times, for many, it has been a huge sacrifice to attend the conference. He added that, however, in view of the topics lined up, attending the conference was money well spent.

Constitution-making and constitutionalism

During the opening ceremony the main topic of discussion was constitution-making and constitutionalism. Under the topic, the President of the SADC LA, Kondwa Sakala-Chibiya, observed that: 'A student of the law is taught that a constitution is the supreme law of a sovereign state from which basic rights, obligations and all the laws and policies of the land emanate and with which they all must comply. ... Hence the question posed within the conference theme. There can be no justice, peace and shared values without constitutionalism and the rule of law.' She added that a flawed constitution-making process is a recipe for constitutional instability.

The keynote address was delivered by former President Thabo Mbeki. He began by saying that the question posed by the conference theme is



*In front: Immediate past President of the SADC Lawyers' Association, Thoba Poyo-Dlwati; President of the SADC Lawyers' Association, Kondwa Sakala-Chibiya; Law Society of South Africa Co-chairperson, David Bekker; former President Thabo Mbeki; Law Society of South Africa Co-chairperson, Kathleen Matolo-Dlepu.
At the back: Law Society of South Africa Councillor, Krish Govender.*

both legal and political. Answering the theme question former President Mbeki said: 'You ask whether constitution-making and constitutionalism present us with an opportunity for justice, peace and shared values. My immediate answer is - certainly, yes! And if I am asked if the constitution-making process is but an illusion in respect of giving citizens the opportunity to reflect on justice, peace and shared values, my immediate answer would be - certainly not!'

On constitutions former President Mbeki remarked that: 'Constitutions are reflections of the best that brings us together as nations. Properly crafted, the constitution of a country is that one codicil whose provisions are embraced, protected and defended by all citizens, regardless of their political beliefs, race, class and gender divides, age, ethnicity and religious belief. ... The constitution is the one document that all citizens should protect at all times. This can happen only if both the process leading to the adoption and the contents of such constitution are as inclusive as possible.' He

added: 'I am told that in law school you are taught that a constitution is like a love letter. It expresses the deepest feelings of a nation about itself in the same way that lovers express their deepest feelings in love letters.'

Best practices using IP

Parallel sessions were held on the second part of the first day of the conference. The first parallel session was titled 'Best practices and emerging trends in corporate law and governance'. During this session, Mwelwa Chibesakunda, partner at Chibesakunda & Co, presented a paper on information technology trends that reduce risk, boost efficiency and enhance good governance in law firms.

Mr Chibesakunda encouraged delegates to embrace technology, quoting Bill Gates he said: 'The first rule of any technology used in a business is that automation applied to an efficient operation will magnify the efficiency. The second is that automation applied to an inefficient operation will magnify the inefficiency.'

Commenting on the future of time recording and billing, Mr Chibesakunda said that in the future law firms should have –

- automated budgeting and actuals comparison;
- key financial information on mobile devices; and
- semi-automated time capture, based on passive activity tracking.

Mr Chibesakunda said that law firms should consider using the Budgeteer software that assists with case budgeting and allows one to forecast and understand case profitability and to model case costs and profitability based on assumed levels of effort by different levels of attorneys. Mr Chibesakunda also suggested that law firms should use the WorkSite software, which is used by over 1 400 law firms, for better document management. He said that the software allows for –

- a centralised document and e-mail storage for local and global team working;
- Outlook integration;
- multi-level case centric security;
- automatic document audit trail;
- document version control; and
- full text content searching of saved documents

According to Mr Chibesakunda one of the best global communication tools is the Microsoft Lync software. He said the software would enable attorneys to –

- see if a colleague is in the office, in a meeting, on a call, busy or available;
- send a colleague, team or department a quick instant message for a quick response, instead of sending a lengthy e-mail;
- use a USB headset to call any colleague for free;
- allow one-to-one calls to progress into a multi-person conference call;
- progress from a Lync audio call to a video call using a web camera;
- progress from a one-to-one video call to a multi-person video conference;
- use Outlook to schedule a Lync conference and send out as a calendar invite;
- discuss a document and collaborate on-screen by sharing an application or entire desktop and also edit and update documents while a colleague views them;
- record audio or video calls and instant message conversations and desktop sharing, which can be sent to

colleagues unable to attend the meeting; and

- communicate with clients and third parties who also use Lync.

Good financial governance

On the second day of the conference, a session was held to discuss SADC legal frameworks and policies governing economic and financial governance. During this session Governor Charles Chuka, Governor of the Reserve Bank of Malawi gave a presentation on behalf of the Chairperson of the SADC Committee of Central Bank Governors and Governor of the South African Reserve Bank, Dr Gill Marcus.

Governor Chuka explained that the 'integration of SADC central banks is not about the establishment of a single central bank and a monetary union; but it refers to efforts aimed at ensuring policy and operational coherence in the pursuit of the SADC community's aspirations for regional economic integration. He added: 'Generally, SADC central banks are preoccupied with not just price stability but also the soundness of financial systems. As such, central banks in the region are responsible for monetary policy in their respective countries and, with few exceptions, for supervision and regulation of both banks and non-bank financial institutions.'

Governor Chuka emphasised that SADC's main objective is to promote regional integration. He said: 'It has, as an aspiration, a target of ensuring that the SADC countries become sufficiently integrated, economically and politically, that we can have a single currency and a single central bank. As the example of the ECB [European Central Bank] and monetary union in Europe demonstrate, there are a number of preconditions that must be satisfied before this goal becomes attainable – one of which is effective regional coordination of financial regulation and financial governance.

I hope I have convinced you that the region's central banks are working hard to achieve this condition. Lawyers and the law can contribute to this effort by helping us in developing the legal and regulatory frameworks that facilitate financial integration and good regional financial governance. I also hope that your association will continue to show interest in our work and will play some role in developing the regional legal frameworks that can contribute to real improvement in the lives of all our citizens.'

Impact of public-private partnerships

During the SADC 'Legal frameworks and policies governing economic and financial governance' session, Boma Ozobia, past President of the Commonwealth Lawyers Association and partner at Sterling Partnership, discussed the impact of private partnership. She explained that a public-private partnership is a contractual agreement between a public agency and a private sector entity. She added: 'Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.'

Ms Ozobia elaborated on the need of public-private partnerships. She said that these partnerships fill a critical resource and expertise gap in infrastructure procurement, delivery and operation, while also producing accelerated procurement of infrastructure and services. She added that public-private partnerships –

- promote faster implementation of projects, and reduced lifecycle costs

Immediate past President of the Commonwealth Lawyers Association, Boma Ozobia, during her presentation on Assessing the Economic Utility and Impact of Public-Private Partnerships.



and operations due to private sector efficiencies;

- provide for better risk allocation between public and private sectors, thus offering a better and sustainable incentive to perform;
- engender accountability in resource utilisation and also improve the overall quality of service; and
- often lead to the generation of additional revenue and overall value for money for the entire economy.

Resolutions

During the two-day conference, issues of importance to lawyers practicing in the SADC region were deliberated. Below are resolutions issued on the official communiqué of the conference.

In terms of constitution-making and constitutionalism in the SADC region, delegates –

- urged governments and civil society to ensure that constitution-making and constitutional-review processes are people-driven to ensure ultimate ownership by, and accountability to, the people; and
- advised that constitutions should entrench provisions to safeguard the separation of powers, uphold the independence of the judiciary and respect for human rights, and preserve democracy.

On best practices and emerging trends in corporate law and governance, delegates resolved on the need to –

- stay informed on and invest in technological advances to align their legal practices to 21st century standards and best practices as a means of ensuring efficient service delivery to clients;
- recognise mining as a significant development resource in Africa and as an emerging area for cross-border deals;
- (with regard to mining contracts) engage in advocacy and negotiation efforts, which yield agreements that mitigate risks, and accrue the maximum benefits, to the resourceful nations; and
- (SADC citizens and judiciaries) be aware that arbitration is a viable dispute-resolution mechanism – governed by choice of law provisions in contracts and transnational laws – and does not undermine conventional judicial processes but should, to be most effective, be mainstreamed.

In terms of consensus-building ef-

forts and the level of compliance with SADC summit decisions, delegates recommended that:

- Conflict-resolution and military interventions in SADC require a transparent legal and policy framework.
- Past, ongoing and future SADC interventions on politics, peace and security need to be better publicised, and ongoing and future interventions need to be implemented with a view to ensuring timely and decisive action, finality in resolution, and the appearance of a regional response.
- In line with the SADC Strategic Indicative Plan for the Organ, the SADC Lawyers' Association should establish a framework for and actively engage in mediation and conflict-resolution efforts in SADC.
- The suspension of the SADC Tribunal presents lacunae for the consolidation of regional integration efforts and facilitates the impugned disregard for the rule of law in the region, which should be minimised by SADC legal professionals through active and creative engagement of supranational courts and fora.
- The SADC LA should promote research activities to facilitate quality litigation strategies, and should re-examine advocacy efforts to not only bolster litigation efforts but to ensure that SADC leaders understand and positively respond to demands made through advocacy efforts.
- On constitutions as tools and safeguards for good governance, rule of law, human rights and democracy, it was resolved that:
 - Sovereign power belongs to 'the people' and governments derive power from 'the people'. It follows, therefore, that the right to participate in a political process includes the public's right to participate in the law-making process and, therefore, in the absence of the people's participation in making laws, those laws should be invalidated.
 - For the avoidance of doubt, constitutions should clearly articulate the demarcations between government and political party office to facilitate smooth power transitions.
 - The rule of law must be allowed to prevail free from political interference in the lead up to and during elections, and the independence of judiciaries as final arbiters must not be compromised to ensure a just outcome.
 - Lawyers have a pivotal role to play in promoting, defending and protecting constitutions.

On SADC regional integration it was noted that SADC regional integration is the end goal (or 'dream'), that it is an attainable 'reality', and that there have been significant achievements in promoting regional integration and cooperation. It was agreed that:

- There is a need to develop and provide information on the SADC protocols on trade, finance and investment, and the free movement of persons.
- SADC member states that have not ratified the above-mentioned protocols must be advised and urged to do so.
- There is a specific need for advocacy work on trade agreements.
- There is need to increase the interest in - and scope of - international trade law beyond academics to ensure competent stakeholder advisory services in the SADC region.

In terms of the SADC legal and policy frameworks governing economic and financial governance it was resolved that:

- There is a role for SADC legal professionals to develop or advise on a regional legal and guiding framework for the long-term goal of attaining an independent SADC Central Bank.
- SADC legal professionals must become fully conversant with anti-money laundering legislation in the region to discharge their legal obligation of advising clients about compliance issues.
- There is a real opportunity and demand for lawyers to specialise in providing governments with expert advisory services to facilitate private-public partnerships.

On the independence and effectiveness of SADC judiciaries it was agreed that:

- Judges should be appointed by independent judicial service commissions to independently and competently serve the interests of the law, the constitution, and to uphold human rights and dignity.
- Governments must ensure that the judiciaries in the region are adequately resourced, are independent and are able to carry out their mandate without fear and favour.

On guidelines for judicial transformation and the reform of the office of the Attorney General and National Prosecuting Authority recognised the need for and adopted guidelines to establish regional standards on:

- Judicial transformation with the intention of entrenching not only the

independence of the judiciary but also enforcing and protecting the rule of law in the SADC region.

- Reform of the role and functions of the office of the Attorney General and National Prosecuting Authority with a view to enhancing the functions of these departments, and entrench and protect the rule of law in the SADC region.

- These guidelines make provision for their adaptation to local socio-political and legal dictates.

In terms of the SADC Tribunal delegates noted with concern that the continued suspension of the Tribunal impacts negatively on the rights of SADC citizens, not only to access justice but to seek effective legal remedies. It was also noted further that the resolution by the SADC Heads of State Summit in Maputo to bar non-state actors from accessing the Tribunal and to restrict applicable law to that provided only in the SADC Treaty and SADC Protocols should be strongly condemned by all well-meaning citizens. The limitations on the powers of the Tribunal impacts not only on human rights but also on the trends towards regional courts, the SADC integration agenda and investor confidence, therefore SADC LA advised and urged the SADC heads of state to defer the adoption of a new protocol on the SADC Tribunal during the SADC Summit of Heads of State or government to pave the way for a consultative drafting process.

Mapula Sedutla,
mapula@derebus.org.za

Parliament's 2014 first term programme

There are a number of Bills that await finalisation before the end of the first term in March. Some of the contentious pieces of legislation that the second house of parliament, the National Council of Provinces, plans on finalising by March 2014 include the –

- Legal Practice Bill B20B of 2012 (s 76);
- Traditional Courts Bill B1 of 2012 (s 76 (2)); and

- Private Security Industry Regulation Amendment Bill B27B of 2012 (s 75).

Provincial hearings on the Legal Practice Bill and the Judicial Matters Amendment Bill B7B of 2013 (s 76) are planned for the week of 11-17 February.

Other public hearings also targeted for the first term of parliament in 2014 include hearings on the National Credit Amendment Bill, National Environmental Management: Waste Amendment Bill B32 of 2013 and the National Water Policy Review.

Based on the publicly available programme for the first term, there are Bills that are not likely to be finalised by this parliament, in particular s 76 Bills. Bills that are likely to be affected, *inter alia*, include the –

- Public Administration Management Bill B48 of 2013 (s 76);
- Infrastructure Development Bill B49 of 2013 (proposed s 75);
- Women Empowerment and Gender Equality Bill B50 of 2013 (proposed s 75);
- State Attorney Amendment Bill B52 of 2013 (proposed s 75);
- Mineral and Petroleum Resources Development Amendment Bill B15 of 2013 (s 76);

- Restitution of Land Rights Amendment Bill B35 of 2013 (proposed s 75);
- National Environmental Management: Waste Amendment Bill B32 of 2013 (s 76);
- Water Research Amendment Bill B29 of 2013 (s 75);
- Property Valuation Bill B54 of 2013 (proposed s 75); and
- Local Government: Municipal Property Rates Amendment Bill (s 75).

There are also still approximately six private member Bills that will lapse if not passed by both houses of parliament by 14 March. These include the –

- Constitution Eighteenth Amendment Bill (s 74);
- Special Investigating Units and Special Tribunals Amendment Bill (s 75);
- Constitution Nineteenth Amendment Bill (s 74);
- Protection of Traditional Knowledge Bill (s 76(1)); and
- the Defence Amendment Bill B11 of 2010 (proposed s 75).

In conclusion, it is important to note that even though parliament's first term programme for 2014 is short, the issues and the nature of the Bills under discussion are of paramount importance, not only to the legal profession but the public at large. Therefore this will require continued robust engagement and monitoring of the legislative programme. February and March 2014 will remain the two most important months in the life of the Legal Practice Bill.

Nonhlanhla Chanza
Parliamentary liaison officer

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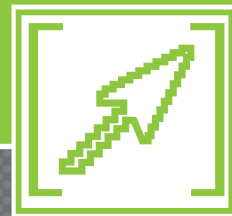
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Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za

LSSA commits to supporting Office of the Chief Justice and national court enhancement initiatives

Late in November 2013, the LSSA's Management Committee (Manco) members met with Chief Justice Mogoeng Mogoeng and representatives of the Office of the Chief Justice in Johannesburg. The Chief Justice thanked the LSSA for its cooperation in and support of the National Efficiency Enhancement Committee (NEEC), and the provincial committees that were launched in mid-November last year. 'The judiciary and the profession need to view one another as partners,' said Chief Justice Mogoeng.

In a press release in mid-November, the LSSA noted that it had participated actively in the NEEC since its inception last year and was committed to supporting the Office of the Chief Justice, the Judges President, the chairperson of the NEEC, Judge Nathan Erasmus, and all the other stakeholders in this critical endeavour to improve the delivery of justice to members of the public who use the courts and the legal profession to seek redress. Co-chairpersons Kathleen Matolo-Dlepu and David Bekker said: 'With the assistance of the statutory provincial law societies, the LSSA has committed to –

- exploring effective ways of dealing with attorneys who may appear to be unprepared when appearing in court and with those who habitually request postponements of matters;
- dealing with arrangements between judicial officers, prosecutors and lawyers to postpone cases unnecessarily as a favour to each other, but to the detriment of litigants; and
- monitoring legal fees so that they are affordable to the public.

'The legal profession is an honourable one and attorneys are bound by strict rules of ethics and professional conduct. Conduct that leads to unnecessary delays and prejudice to litigants, as well as excessive fees – or overreaching – are not tolerated. We believe that such conduct can be eradicated with the assistance of judicial officers and other stakeholders.'

The LSSA also stressed the attorneys' profession's ongoing commitment to access to justice through the provision of *pro bono* services to indigent members of the public. In addition, the profession is in the process of instituting a 'First Interview Scheme' on a national basis. In terms of the scheme, members of the public who did not qualify for *pro bono* services or legal aid, would be referred to a participating attorney for a



Chief Justice Mogoeng Mogoeng (front centre) with LSSA Co-chairpersons David Bekker and Kathleen Matolo-Dlepu at the meeting between the Office of the Chief Justice and the LSSA at the end of November 2013. Back, LSSA Manco members Krish Govender and Max Boqwana; Meme Sejosengwe, Secretary-General of the Office of the Chief Justice and Dr Gomolemo Moshoeu, CEO of the South African Judicial Education Institute.

first free half-hour consultation. During the consultation, clients receive advice on whether there is merit in the matters they wish to pursue and also receive an indication of the costs*.

At the meeting with the Chief Justice, he indicated that when members of judiciary say or do something unacceptable, the profession should seek a meeting with him so that matters can be discussed and clarified. This could avoid unnecessary public misunderstandings. In addition, the Chief Justice and the LSSA delegation also discussed:

- The importance of modernising the court system and the role of the Office of the Chief Justice and the profession. This included the proper implementation of judicial case management, the investigation of electronic filing and video conferencing for witnesses, as well as an overhaul of court rules.
- More active participation by South African legal practitioners in international tribunals and courts (such as the African Court on Human and Peoples' Rights,

the International Criminal Court, the International Court of Arbitration and the International Court of Justice), including nominations to serve as judicial officers and representing claimants on a *pro bono* basis in human rights abuse cases.

- The role of the profession in exerting pressure within the Southern African Development Community (SADC) regarding the re-establishment of the SADC Tribunal.
- The need to prepare, train and mentor legal practitioners for judicial office so that they are properly equipped and prepared when being interviewed by the Judicial Service Commission; the need to mentor female candidates in particular, was stressed, as was the need to ensure that historically disadvantaged practitioners are briefed to appear in the higher courts, including the Constitutional Court.

*Attorneys who wish to be placed on the roster to receive First Interview Scheme instructions should contact their relevant provincial law society.

Legal Practice Bill **update**

Provincial public hearings on the Legal Practice Bill, 2012 will be scheduled by the National Council of Provinces (NCOP) in mid-February 2014. At the time of this issue going to print in mid-January, the LSSA was in the process of finalising its submissions to the NCOP. The LSSA submissions, as well as the schedule for NCOP provincial hearings, will be available on the LSSA website at www.LSSA.org.za as they are made available. Practitioners are urged to consult the website for the latest developments on the Bill.

SAJEI training course for aspirant judges to be presented in June 2014

The South African Judicial Training Institute (SAJEI) is presenting a Basic Aspirant Judges Training Course in Johannesburg from 30 June to 3 July 2014. The closing date for applications is 24 February 2014.

Selection criteria

The selection criteria for aspirant judges training are as follows:

- The applicant must be a fit and proper person.
- A minimum period of 10 years' experience as an attorney, advocate, a judicial officer (including acting appointments) or legal academic and any other relevant capacity.
- A certificate of good standing from statutory bodies and recognised Bar associations. Prosecutors must submit letters of good standing from their employers. Magistrates must submit letters of good standing from the Magistrates Commission.
- Academic qualifications: A law degree recognised in South Africa.
- Evidence of commitment to the transformation of the legal system in promoting the values set out in s 1 of the Constitution.

The selection committee will also consider race and gender, age, as well as previously disadvantaged individuals.

Contact Ms Naledi Soga at the Office of the Chief Justice at e-mail: NaSoga@ocj.gov.za for application forms.

Professional examination dates for 2014

18 February 2014: Admission examination

19 February 2014: Admission examination

7 May 2014: Conveyancing examination

11 June 2014: Notarial examination

12 August 2014: Admission examination

13 August 2014: Admission examination

10 September 2014: Conveyancing examination

8 October 2014: Notarial examination

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

International Lawyers for Africa placements in London, Dubai or Paris: September 2014

Applications are invited for the 3 months' ILFA advanced training scheme and work experience placements starting in September 2014 in leading law firms or corporate legal departments in London, Dubai or Paris.

International Lawyers for Africa (ILFA) is an award-winning initiative set up by leading law firms and academics in the United Kingdom, which aims to develop African lawyers' legal skills in international relations, trade, finance and dispute resolution. www.ilfa.org.uk

Applications are invited from qualified lawyers:

- working or seeking to work in private practice, commerce or government service; and
- committed to developing their legal skills in international law, commercial law and/or dispute resolution.

For complete candidate specifications, more on the placement and to download the application form: <http://www.ilfa.org.uk/apply.php>



Applications are to be submitted to the South African ILFA National Committee:

c/o Fiona Kedijang at the Law Society of South Africa at
e-mail: fiona@LSSA.org.za
or by hard copy, delivery to
Fiona Kedijang

Law Society of South Africa,
304 Brooks Street, Menlo Park,
Pretoria 0081

Deadline for applications:
Monday, 3 March 2014.

People and practices

Compiled by Shireen Mahomed

Van Velden Duffey Inc in Rustenburg has appointed four directors in the litigation department.



Charl Ackermann



Tshepo Lekokotla



Martin Bezuidenhout



Wesley Keeny

Gildenhuys Malatji Inc in Pretoria has the following new appointments and promotions:



Back: Jacques Theron and Mampho Motsomi (associates – commercial litigation department), Jones Ditsela (senior associate – commercial litigation department), Anita du Toit (associate – commercial litigation department) and Simon Maelane (associate – general litigation department).
Front: Wandile Moeketsane (associate – commercial litigation department) and Thando Molobye (associate – employment law department).



Thekiso Maodi has been appointed as a director in the commercial litigation department.



Greyling Erasmus has been appointed as a director in the general litigation department.

Garlicke & Bousfield Inc in Durban has three promotions and one new appointment.



Raymond Meneses has been appointed as director of the employment law department.



Graeme Palmer has been promoted to director in the corporate and commercial department. He specialises in tax law.



Phila Magwaza has been promoted to a director in the corporate and commercial department. He specialises in commercial law, corporate commercial, trust law and commercial litigation.



Sanelisiwe Nyasulu has been promoted to a director in the labour law department.

Routledge Modise in Johannesburg has merged with global law firm Hogan Lovells.

The combined firm's Johannesburg office will comprise of 120 lawyers, including 41 partners, and will focus on corporate, commercial, banking, finance, litigation, mining and real estate.

Routledge Modise will rebrand and re-launch as Hogan Lovells in 2014.

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MT Silinda & Associates Inc in Nelspruit has appointed four associates.

Seated: Meshack Thembinkosi Silinda (executive chairman) with associates, from left: Tiyani Vukeya, Sibusiso Mdhuli, Mafuna Ramothwala, and Vutivi Ngobeni.

Tomlinson Mnguni James in Pietermaritzburg has three promotions and one new appointment.



From left: Judd Reid, Ian Patterson-Roberts and Venesen Reddy.

Judd Reid has been appointed as a director in the estates and trusts department in Umhlanga. Ian Patterson-Roberts has been promoted in the litigation department. Venesen Reddy has been promoted to director in the litigation department.



Robyn Wills has been promoted as an associate in Pietermaritzburg.

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

Controlling outcomes – project management

By
Louis
Rood

Project management is a term most often associated with the construction industry, but it is a concept that can very effectively be applied to legal practice. What does it mean? The following steps will help attorneys to implement the project management process:

- Tell your client you are going to project manage the instruction, especially litigation.
- Clarify timelines before you begin a project.
- Resist the urge to dive in – plan and develop a schedule and structure for the project.
- Advise realistically on costs, set a budget, and be accountable for that budget.
- Offer predictability in billing – clients do not want nasty surprises.
- Make sure up-front what the ambit is of what the client wants and expects; clarify his or her needs and expectations at the outset.
- Spend time with clients so that you understand their business and industry.
- Develop an early case assessment.
- Avoid new issues that can affect the scope of the job and increase the costs.
- Do not make a meal of it. Do not do what is unnecessary. Do not expand or inflate the project. This does not mean that you cannot modify or adjust when necessary, but get it verified by the client.
- Explain options to the client, for example, using an associate at a lower charge-out rate with partner oversight.
- Ensure that your client gets regular, substantive, informative and reliable communication. Link this to the project planning.
- Clarify communication preferences for all members of your team and the client's team – for example, do they

prefer e-mail or telephone communication, memo or bullet-point, and who should be included?

- Make it easy to get in contact with everyone on the team and offer back-up connections for each individual.
- Understand the client's definition of success. What is the desired outcome? This may change over time.
- Ascertain what the client's definition of responsiveness is – do you have to revert within 2 hours or 24 hours?
- Take nothing for granted. Spell it out plainly and clearly.
- Assume less, and communicate more.
- Do not let your communications become 'lost in translation'. Make sure the client understands exactly what is happening.
- Do not bill the client for your training.
- Systematically and efficiently deal with the job.

Always remember that excellent client service is defined by the client, not by the lawyer or law firm. Value is also defined by the client and often never shows up on the legal bill. Try to add value to every single thing you do.

The project management approach lets things unfold in a logical, planned, and cost-effective manner. It starts with clear goals, making step-by-step progress. It makes it easier to meet and beat deadlines. It allows you and your client to deal with setbacks, because that possibility has already been factored into your planning. It largely removes the uncertainty, and as a result the anxiety. A less-stressed client with a less-stressed attorney is a much more effective team.

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

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A hand in a dark suit with a light blue cuff is pointing its index finger down at a thick, white, twisted rope that runs horizontally across the frame. The background is a dark, textured grey.

RICA

By
Russel
Luck

Picture source: Gallo Images/Thinkstock

Walking a fine line between crime prevention and protection of rights

The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA) advances the Interception and Monitoring Prohibition Act 127 of 1992. The pre-ambles of RICA discusses, among other things, regulating the interception and monitoring of communications and the execution of directions and entry warrants by law enforcement officers. No express mention is made of crime prevention throughout the pre-ambles, though it is implicit that the rationale behind RICA is to effectively prevent crime and prosecute criminals.

RICA regulates 'direct communications' and 'indirect communications', which are defined broadly to include, but are not limited to, e-mail and mobile phone transmissions and communications that deploy text, data and visual images or a combination of the above.

RICA has been widely covered in the media as South Africa becomes increasingly reliant on technology in all spheres of life. This article provides an overview of RICA and identifies two areas in which the balance to preserve

rights and prevent crime may be skewed.

Overview of RICA

Since its initial enactment in 2002, the provisions of RICA have been amended and supplemented several times to include, among others, a schedule relating to fixed line operators, mobile cellular operators and internet service providers. It further contains directives on the technical requirements and security requirements covering the interception, recording, storing and routing of various forms of communications.

When analysing these supplements and amendments superficially, it is clear that additional guidelines and definitions are necessary to successfully regulate communications in an ever-changing technological and digital world. Their effect is to impose duties on the providers of communication services to keep records of their customers and records relating to their customer's communications before they can provide such services to customers.

In order to exemplify how efficacious the provisions of RICA have been on casting a net wide enough to regulate the mobile phone sector in

South Africa, a statement issued by the Department of Justice on 6 July 2011 is informative:

'At midnight on the 30th of June 2011 the following numbers of registered SIM cards from different MCO's had been registered: Cell C had 99,99% of contracts and 97 % of prepaid subscribers registered, MTN had 99,5% of contracts and 97% of prepaid subscribers registered and Vodacom had 98,98 % of contracts and 95,12% of prepaid subscribers registered' ('Post RICA Campaign Media Briefing' www.justice.gov.za/m_statements/2011/20110706_rica-briefing.htm, accessed 13-1-14).

As a default position, s 2 of RICA prescribes that the interception and monitoring of communications is prohibited. Similarly, communication service providers (as defined) may not disseminate information relating to those communications. No person may disclose information they acquired while exercising a duty in terms of RICA. No person may manufacture equipment that would primarily be used for the monitoring, interception or recording of information relating to communications.

However, RICA provides, primarily in ss 3-11, exceptions to the above prohibitions where in certain instances communications may be monitored or intercepted, namely -

- a directive has been granted that permits the above prohibited activities;
- the party protected by RICA gives requisite consent;
- the entity engaging in the above activity was also a party to those communications;
- intercepting, monitoring or disseminating information of an employee while carrying on a business;
- interception to prevent serious bodily harm;
- interception to determine a location during an emergency; or
- when entitled to do so in terms of other legislation.

Lastly, s 30 of RICA imposes duties on parties who use or supply communication services regulated by the Act. Telecommunication service providers must store communication-related information about their customers. They must disseminate such information if an appropriate directive has been issued and cannot create a network that

is incapable of recording communication-related information. Decryption key holders must supply a decryption key when an appropriate directive has been issued. Customers of various telecommunication service providers must supply certain information to those service providers.

When looking at RICA within the broader legislative framework that protects 'data' and recognises 'data messages' (as defined in the Electronic Communications and Transactions Act 25 of 2002), RICA could be a potent weapon to assist in criminal prosecution and crime prevention. However, two aspects of RICA may lead to rights infringements and practical abuse.

Privileged communications intercepted using s 5 of RICA

Section 5 of RICA allows communications to be intercepted if a party to those communications gave prior written consent to do so. The question arises whether privileged communications between an attorney and client could also be intercepted in terms of the provisions of s 5?

In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) the court, in paras 183 and 184, maintained that attorney-client privilege is to be taken very seriously but it is not an absolute right and can be outweighed by countervailing considerations.

Similarly in *S v Tandwa and Others* 2008 (1) SACR 613 (SCA), the court outlined in paras 18 and 19 that attorney-client privilege can be waived expressly, tacitly or by conduct sufficient to impute that the privilege has been waived by the client.

Section 5 of RICA has yet to be tested by our courts, but it is asserted that where a general consent to have communications intercepted inadvertently intercepts communications that are privileged, the right to privacy and

fair trial would be infringed. In each instance, one would have to look at the surrounding circumstances and the parameters of the written consent to determine if such infringement was justifiable.

Stretching the limits of s 23

Section 23 of RICA allows for a direction application to be made orally, as an alternative to a written application, during 'exceptional circumstances'. Such an application may be granted immediately provided that, within 48 hours of such application being made, a written version is supplied to the appropriate judge. This is problematic as the grounds on which the application was made orally could differ substantially from the written version received by the judge after the direction or warrant has been granted.

Similarly, s 23(7) of RICA allows for an application for an interception direction or entry warrant to be made orally and granted orally, provided that the designated judge confirms the terms of that interception direction or warrant in writing within 12 hours after it has been issued. This too provides a period of time in which the terms of an orally granted interception direction could be stretched by applicants to exceed the powers conferred on them under that interception direction.

In both of the above instances, s 25(5) of RICA holds that the contents of any communication will be inadmissible in civil or criminal law proceedings, unless the court opines that admitting such evidence would not be detrimental to the trial or administration of justice. Once again, the facts of each specific case would determine if an unjustifiable infringement of human rights occurred.

What is concerning about s 23 (and interception and monitoring legislation in general) is its potential for abuse. For example, a ruling political party could use such legislation to further its agenda rather than to protect citizens from crime. The Oxford Pro Bono Publico reported three instances in South Af-

rica where alleged abuse of power occurred under RICA's predecessor legislation, the Interception and Monitoring Prohibition Act 127 of 1992 (Oxford Pro Bono Publico 'Legal Opinion on Intercept Communication' (2006) University of Oxford (www2.law.ox.ac.uk/opbp/OPBP%20Intercept%20Evidence%20Report.pdf, accessed 13-1-14).

In 1996 the South African Police Service was alleged to have tapped thousands of telephones as reported in 'Newspaper uncovers "unlawful tapping by intelligence units"' *The Star* 21-2-1996. The Democratic Party was reported to have found monitoring devices in its offices in 'Democratic Party outraged by bugging of its offices' *Africa News* 23-11-1999. In 2000, Reuters news wire reported that the South African government issued an apology to the German government after spy cameras were found in the German embassy in 'SA spy camera points at German Embassy' *iolnews* 19-11-1999 (www.iol.co.za/news/south-africa/sa-spy-camera-points-at-german-embassy-1.20141#.UtOpztGlqid, accessed 13-1-14).

Conclusion

In today's digital world South Africans communicate through technology – more frequently than ever before – via mobile phone, e-mail, social media, short message service and various forms of data transmission.

These communications can be monitored and intercepted with increased sophistication and little transparency. It is hoped that the courts remain vigilant of the subtle ways in which RICA's provisions could be misused and ensure that RICA is directed towards meaningful crime prevention.

Russel Luck BA LLB (UCT)
is a legal adviser in Thailand.

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Weighing up the Wayback Machine

An analysis of the admissibility of archived websites

By
Bryce
Matthewson

The effect of the internet on our daily lives is undeniable. Recently we have even seen a court accepting service via Facebook. These changes raise new challenges for the legal system, one of which comes in the form of the Wayback Machine.

What is the Wayback Machine?

The Wayback Machine is a technology that preserves a comprehensive record of all websites, documents and other information contained on the internet. Because of the inherent fluidity of in-

ternet-based content, information that is available one minute can be gone the next. This can pose a serious problem for litigants.

In short, the Wayback Machine is a system that allows the public to view a website as it appeared on a previous date. It operates by scouring the internet in a methodical manner, making copies of all publicly accessible websites. These copies are then arranged by date, archived, and made accessible to the public.

Using the Wayback Machine is simple. After accessing the website (www.archive.org) you enter the URL of the website you are looking for, and out pops a list of dates on which the website was copied. You can then view the site as it appeared on those dates. No registration is required, and it is completely free.

Why is the Wayback Machine important to lawyers?

At first glance the Wayback Machine will probably seem like a nifty gadget, however, the Wayback Machine may have potential in a lawyer's practice. Foreign law reports are dotted with examples of intellectual property lawyers having tried to use Wayback Machine printouts to show the use of a trade mark or prior disclosure of a patented invention. Similarly, it could be essential in proving copyright infringement, defamation, privacy infringement, unlawful competition, comparative advertising, etcetera.

But not all that glistens is gold and before one launches a case based on a Wayback Machine printout one must consider the weight of that evidence.

The Wayback Machine as evidence

Objection M'Lord! That's hearsay! The obvious objection is that evidence obtained using the Wayback Machine is hearsay and accordingly inadmissible, unless the contrary is proven.

Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (the EAA) defines 'hearsay evidence' as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

At first sight, Wayback Machine printouts fall squarely within that definition. Internet Archive (the company that operates the Wayback Machine) recognises this and offers a standard affidavit that provides that the printouts 'are true and accurate copies of printouts of Internet Archive's records'. But we all know that that is not the same as saying they are accurate.

One might be inclined to subpoena an expert from Internet Archive to present the evidence, but this carries with it the

inherent risks of using subpoenaed witnesses. Internet Archive expressly asks on its website that users do not resort to this course because of the strain it will place on its resources.

Despite not having gained traction in South Africa, the Wayback Machine has been used extensively in other jurisdictions where the courts have had to grapple with these issues.

In the first such case, *EchoStar* sought to introduce printouts of *Telewizja Polska's* website obtained using the Wayback Machine (*Telewizja Polska USA Inc v EchoStar Satellite* No. 02 C 3293, 65 Fed. R. Evid. Serv. 673 (N.D. Ill. 14-10-2004)). *EchoStar* relied on an affidavit by Molly Davis, the administrative director of the Internet Archive. In the affidavit Davis attested that the printouts were 'true and accurate copies of printouts of Internet Archive's records'. *Polska* launched an *in limine* motion to suppress the evidence on the basis that it was hearsay and was not authenticated.

Although *Polska* failed in the preliminary stage, the trial judge found that the affidavit from Internet Archive contained both hearsay and inconclusive supporting statements, and the printouts were not self-authenticating. (Almost all articles cite only the decision of the magistrate and ignore the overruling decision of the district court. The district court decision, which was given during the trial is confirmed in *CA Levitt & ME Rosch, Find Info Like a Pro: Mining the Internet's Publicly Available Resources for Investigative Research*, (American Bar Association 2007) vol 1 at 195). Accordingly, the website printouts were inadmissible.

Since that decision there have been a number of further decisions, but not with any level of consistency.

In the later decision of *St. Luke's Cathedral & Laser Institute P.A. v Sanderson, M.D., LLC*. (No. 06-CV-223, 2006 WL 1320242 (M.D. Fla. 12-5-2006)) the court was faced with a similar issue. The plaintiff in the *St Luke's* case did not produce an affidavit from Internet Archive, but simply relied on Davis' affidavit from the *Telewizja* case. The judge ruled that the evidence was not admissible but noted that, if the plaintiff had produced an affidavit by 'a representative of Internet Archive with personal knowledge of its contents, verifying that the printouts ... are true and accurate copies of Internet Archive's records', the evidence may have been admissible.

However, two district courts in the Second Circuit have taken a different view by focusing on the authenticity of the original rather than the copy. In the matter of *Novak v Tucows Inc* (no 06-CV-1909, 2007 U.S. Dist. LEXIS 21269 (E.D.N.Y. Mar. 26, 2007)), *Novak* sought to admit several Wayback Machine print-

outs. In doing so he relied on his own affidavit in which he attested to having obtained them using the Wayback Machine. The court ruled that the pages were hearsay, and that *Novak* could not authenticate them because he lacked the personal knowledge to prove that the printouts were a true reflection of the original website (ie, not just that they were a true reflection of Wayback Machine's records).

The approach in the *Novak* case was thereafter followed by another United States (US) district court in the matter of *Chamila, LLC v Pandora Jewelry, LLC*. (85 U.S.P.Q.2d 1169 (S.D.N.Y. 2007)) and has been subsequently affirmed by the Court of Appeals for the Second Circuit (*Novak v Tucows Inc* no 07-2211-cv, 2009 U.S. App. LEXIS 9786, at *6 (2d Cir. 6-5-2009)).

Judicial attention has not been limited to the US. The Canadian courts have found in criminal matters (*R v Balendine* 2009 BCSC 1938), civil matters (*ITV Technologies Inc v WIC Television Ltd* 2003 FC 1056 (CanLII)), trade mark proceedings (*eMusic.com Inc* (Re) 2011 TMOB 34 (CanLII) and *St. Joseph Media Inc v Starwood Hotels & Resorts Worldwide Inc* 2010 TMOB 188 (CanLII)) and patent proceedings (*Re U-Haul International Inc* (2010) 82 C.P.R. (4th) 279) that Wayback Machine printouts can be admissible.

By contrast, the Australian courts in *E & J Gallo Winery v. Lion Nathan Australia (Pty) Ltd* [2008] FCA 934 found that Wayback Machine printouts were inherently unreliable and accordingly not admissible (although this decision was subsequently overturned on appeal, the appeal was decided on a different issue).

I find the reasoning of the court in the *Novak* case to be the most convincing. Although the court in the *St. Luke's* case suggested that the evidence may be admissible if introduced with an affidavit from an employee of Internet Archive, in my view the evidence would still be hearsay. As suggested in the *Novak* case the true deponent to the affidavit should be the webmaster (or other such similar person) of the original website. The question that should rather be asked is whether the printouts should nevertheless be admissible.

In terms of the EAA, hearsay evidence can be admitted by agreement between the parties, or if the court is of the view that such evidence should be admitted in the interests of justice, having regard to the following -

- the nature of the proceedings;
- the nature of the evidence;
- the purpose for which the evidence is tendered;
- the probative value of the evidence;
- the reason why the evidence is not giv-

en by the person on whose credibility the probative value of such evidence depends;

- any prejudice to a party that the admission of such evidence might entail; and
- any other factor that should, in the opinion of the court, be taken into account.

In the absence of a factual matrix it is impossible to consider all of these factors. However, if one considers those factors that can be considered in a factual vacuum, one begins to paint a picture favouring the admission of Wayback Machine printouts.

First, having regard to the nature of the evidence, which is an issue primarily concerned with the reliability of the evidence, one must favour the admission of the evidence as a computer printout, ascertained in the manner in which the Wayback Machine works, is inherently reliable.

If one then considers why the evidence is not being given by the primary source, a strong argument can be made in favour of admitting the evidence. The primary source would ordinarily be the webmaster, who in most cases will be the webmaster for many websites, and who will in all likelihood not recall what was posted on a website, what could be, years ago. Furthermore, this individual may be contracted to one of the parties and accordingly will have an interest in the matter. For those reasons alone this individual's evidence would have to be considered with caution and accordingly Wayback Machine printouts should be favoured.

The last factor is the catch all and in this regard issues regarding the underlying purpose of the rules relating to hearsay should be taken into account. First, it is trite that the hear-

say rule is justified by the best evidence rule. In these circumstances, because of the above-mentioned concerns regarding the value of the webmaster's evidence, the best evidence is the Wayback Machine printouts (see also DR Eltgroth 'Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence' Fordham Law Review (2009) 78 at 181 for a full discussion on this issue). Secondly, the hearsay rule is aimed at ensuring that jurors will not be influenced by hearsay evidence. This does not apply in the South African context where judges are able to consider the appropriate probative weight with which to consider hearsay statements.

A further consideration is the Electronic Communications and Transactions Act 25 of 2002 (ECTA). Section 15 of ECTA provides that the rules of evidence must not be used to deny the admissibility of a data message on the grounds that it is not in its original form if it is the best evidence that the person adducing it could reasonably be expected to obtain. Section 21 of the ECTA defines a data message as data generated, sent, received or stored by electronic means and includes a stored record, which clearly includes a Wayback Machine printout.

As discussed above, the inherent difficulties in obtaining the primary evidence would in ordinary circumstances render Wayback Machine printouts the best evidence, and accordingly, in terms of s 15, it should not be refused. This proposition is consistent with the proposed reading of the EAA suggest above.

Section 15 of ECTA goes on to provide that a data message should be given due evidential weight, having regard to -

- the reliability of the manner in which the data message was generated, stored or communicated;
- the reliability of the manner in which the integrity of the data message was maintained;
- the manner in which its originator was identified; and
- any other relevant factor.

The first three factors are dealt with briefly in the standard affidavit that Internet Archive will provide on request. Should these issues be challenged, it may be necessary to introduce expert evidence. However, having regard to the approach of foreign courts, it seems that the manner of collection, storage and reliability of the message is generally considered reliable, and accordingly the printout should be considered with a high degree of evidentiary weight.

As regards the catch-all provision, it is difficult to envisage what else could be considered relevant. It is possible that issues similar to those considered in the hearsay provision discussed above could also be considered, such as the potential prejudice, and the purpose of the evidence. In my opinion, the court, in properly exercising its discretion in terms of s 15 of ECTA, should, unless satisfactory evidence is produced to dispute the reliability of the printouts, admit the printouts and consider them with a high degree of evidentiary weight.

Conclusion

The impact of the internet on legal practice is becoming increasingly apparent. Attorneys must consider whether any useful evidence (for their client or their opponent) could be obtained using the Wayback Machine. One should also be acutely aware that the admission of the printouts may be challenged and should prepare accordingly.

That being said, I submit that unless the objector can produce convincing evidence disputing the reliability of Wayback Machine printouts, the courts should admit them, and consider them of a high probative value.

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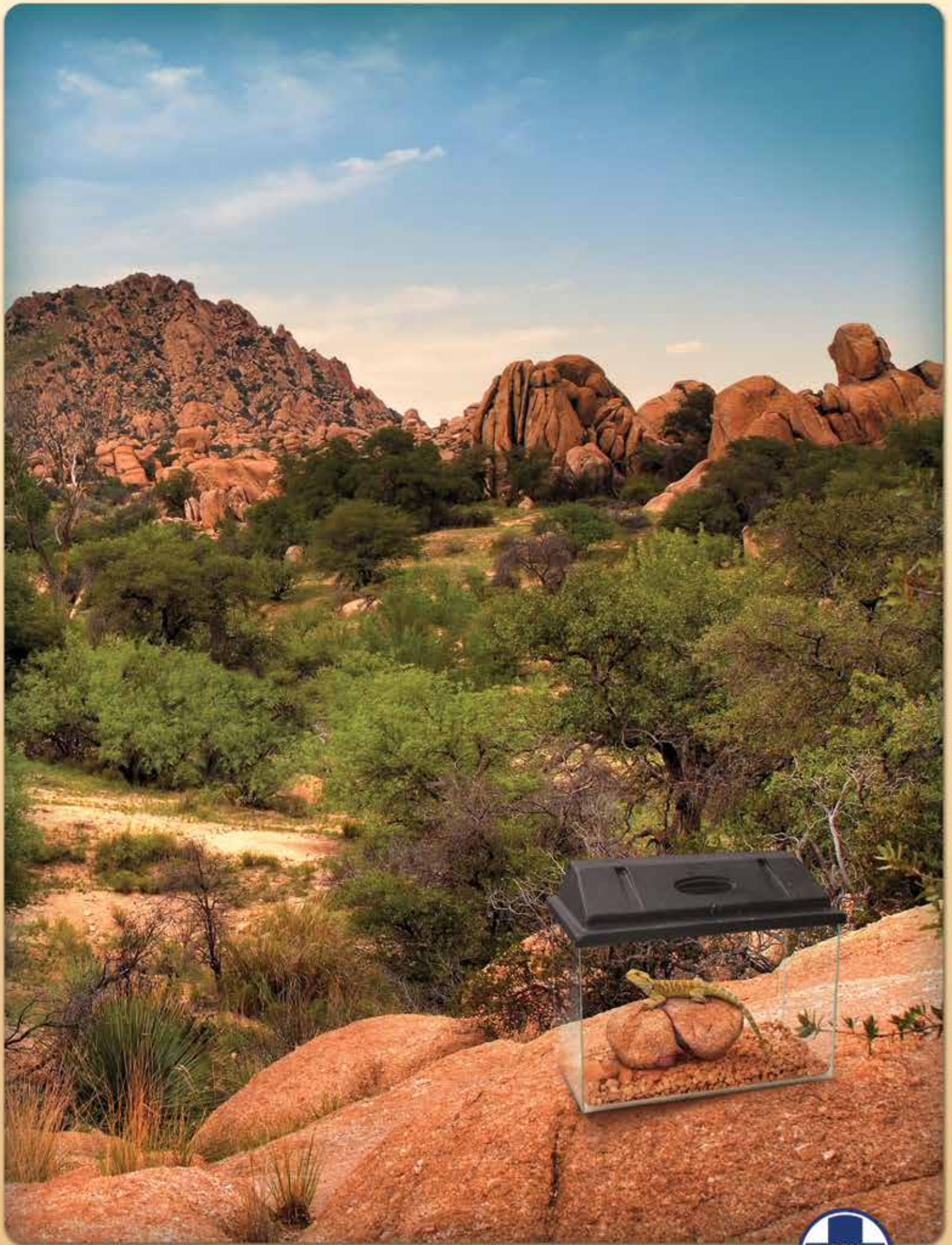
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By
Blair
Wassman

Since the inception of the Companies Act 71 of 2008 (the Act) in May 2011, the concept of business rescue remains rather contentious. It has been the alternative to liquidation of several well-known entities, such as 1time and Top TV. While some companies have struggled to get rescue proceedings off the ground there are a few success stories, but these remain in the minority. The limited two-year time frame since 2011 has shown that instituting such proceedings is fairly onerous given that the guidelines in ch 6 of the Act are not always clear and certain benchmarks are yet to be determined.

Recently, it has become apparent that courts are no longer faced with simpli-

stic applications as envisioned by s 131 whereby any affected person can, on application to the High Court, apply to have a company placed under business rescue. Competing applications for liquidation and business rescue are now both running the litigation race and vying for a win. While this area of law is still largely uncharted, the courts have been faced with some cases that attempt to narrow the parameters and set the benchmarks.

Commencement of business rescue

The process of business rescue begins either by means of a resolution of the board of directors of the company (s 129) or, alternatively, through successful application to the High Court by an

affected person (s 131). While different parties may commence the proceedings the main requirements are essentially the same.

By resolution

The board of directors may pass a resolution to commence business rescue proceedings providing that the two built-in 'requirements' of s 129 are met. The board of directors must therefore have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company. Section 128(f) defines financially distressed as follows:

' "[F]inancially distressed", in reference to a particular company at any particular time, means that -

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.'

This definition makes use of the concept of commercial insolvency, namely the inability of a company to service its debts as they become due during a prescribed period of time, and not factual insolvency, where the company's liabilities exceed its assets, in determining the financial distress of the company. This is important as it encourages companies to use the proceedings at the first sign of financial difficulty and gives them an alternative prior to reaching insolvency.

The second stage is to prove that a reasonable prospect of success exists. The wording in the Act itself does not, however, provide the standard of proof. It would appear that one need not prove that the rescue will succeed, but merely that reasonable prospects exist. The prospects should thus be objectively assessed and possible and should certainly be demonstrated in any application for business rescue.

An additional requirement is that business rescue proceedings may be launched only if no liquidation proceedings have been initiated by or against the company (s 129(2)(a)). The business rescue proceedings also have no force until the resolution has been filed (s 129(2)(b)).

The time constraints are stringent and the court has indicated a zero tolerance to non-compliance. In *Advanced Technologies and Engineering Company (Pty) Ltd (in business rescue) v Aeronautique et Technologies Embarquees SA and Others* (GNP) (unreported case no 72522/11, 6-6-2012) (Fabricius J) the court held:

'It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings. The purpose of s 129(5), is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to "substantial compliance".'

By court order

In terms of s 131(1) any 'affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings'. An 'affected person' as defined in s 128(1)(a) is '(i) a shareholder

or creditor of the company; (ii) any registered trade union representing employees of the company; and (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives'.

Before a court will consider granting an order in favour of the applicant, various requirements have to be met.

First, the applicant is to notify each affected person in the prescribed manner and serve a copy of the application on the company as well as the commission (s 131(2)(a) and (b)). Secondly, the court will only make an order provided it is satisfied in terms of s 131(4)(1)(a) (i)-(iii), that '(i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company'.

Should it not be satisfied, the court may dismiss the application together with any appropriate order, including a liquidation order (s 131(4)(1)(b)).

The case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) highlights the higher threshold concerning succeeding with a rescue in involuntary circumstances.

Termination and time frames

Business rescue proceedings do not have an automatic termination through effluxion of an allocated time period. However, provision is made in s 132(3) that if proceedings have not ended within three months of initiation, a monthly progress report must be submitted. This submission is to be delivered to court or the commission as well as to each affected person. Due to the lack of a time clause with regard to the life-span of rescue proceedings it may, theoretically, continue indefinitely. This is undesirable in that a company may enjoy the benefits of the moratorium for extended periods of time with no consequence for not paying its debts. This will result in rather unhappy creditors and possibly disgruntled employees and shareholders as well.

While it may seem unlikely that the procedure would be allowed to continue indefinitely the practical reality of regulating many applications must be considered. The difficulty is that many applications will need to be monitored and an increasing amount of applications may over time allow for 'slips through the cracks' with regard to the monthly progress reports.

Alternative methods of termination include the setting aside of the resolu-

tion or where, in terms of s 132(2)(a), the proceedings have been converted into liquidation proceedings. Further, the termination may occur through application for termination by the business rescue practitioner or if a business rescue plan has been adopted, together with the practitioner filing substantial implementation of that plan, or the business plan has been proposed but rejected without an affected person extending the proceedings in terms of s 153.

One must bear in mind the consequences or effects of an indefinite business rescue on affected persons and, in particular, on creditors. The moratorium has the effect of suspending and preventing any legal proceedings. While this provides some breathing space for the company to re-arrange its debt and financial structure, it provides no relief for any aggrieved party as the moratorium can potentially continue indefinitely. The courts will therefore also consider this aspect when determining whether to grant an order in favour of business rescue.

A positive measure within the Act to combat abuse of process is that the time constraints from the initiation of business rescue are fairly onerous, but these may be extended either by obtaining consent from affected parties or through application to court. In *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ), the applicant requested that the court grant a postponement in respect of the business rescue proceedings to allow for the filing of a supplementary affidavit that would address the issues of reasonable prospects of success.

Coetzee AJ deliberated the importance of the reasonable prospects being included in the founding papers given its materiality to such an application. The argument put forward by Petzetakis Holdings did not provide any substantial averments as to reasonable prospects. The judge concluded that '[b]efore a court can make the rescue order which would give rise to the practitioner's opportunity to work out a rescue plan it must be satisfied that there is a reasonable prospect of rescuing Petzetakis Africa or, ... that there is a prospect that the future rescue plan will achieve the alternative object of s 128(b)(iii), namely a better result than immediate liquidation. On the evidence as presented and the known evidence to be presented in the event of a postponement as disclosed, the court cannot be so satisfied.'

This may appear to be a robust approach but one must be mindful that there are certain minimum requirements and, while the court does have a discretion in assessing them, they must at the very least be present.

The balance of convenience and reasonable prospects

The requirements for business rescue are not only contained in ch 6 of the Act. The courts will also look to s 7(k) for guidance, especially when adjudicating competing applications. Section 7(k) highlights one of the purposes of the Act, namely provision 'for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'.

This concept has recently been adjudicated in the judgment of *Newcity Group (Pty) Ltd v Pellow NO and Others, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd and Others* (GSJ) (unreported case no 12/45437, 16566/12, 28-3-2013) (Van Eeden J), where the judge was tasked with adjudicating competing applications for liquidation and business rescue (see also 2013 (Dec) DR 15). Newcity Group brought an application in terms of s 131 whereby any affected person may apply to a court to place the company under supervision in line with the requirements mentioned above. Newcity Group as a shareholder of Crystal Lagoon was an affected person, and as such brought an application to place Crystal Lagoon in business rescue.

The judge observed that an application in terms of s 131 differs from one brought by special resolution in terms of s 129(1) given that there are other requirements in addition to financial distress. These are that 'the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or it is otherwise just and equitable to do so for financial reasons'.

Van Eeden J pointed out that these jurisdictional requirements are 'qualified by a further, and thus overriding requirement, which is that "there is a reasonable prospect for rescuing the company", regardless of which jurisdictional requirement is present in each instance'. He stressed that the Act favours business rescue over liquidation. However, in light of the *Southern Palace* case referred to above, the rescue plan will surely not succeed if the rescue plan does not address the 'cause of the demise or failure of the company's business and offers a remedy therefor that has a reasonable prospect of being sustainable'.

Van der Merwe J has also confirmed in *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) that a prospect of success must be evident and further that, while it is only an 'expectation', it

should be one that rests on a ground that is objectively reasonable. Arguments advanced by Van Eeden J in favour of the liquidation stemmed largely from the historical nature of the matter, given that the company had been in business rescue before and that at various junctures in the process business rescue had ceased and provisional liquidation orders had been agreed to by the parties involved. It would appear that the parties in favour of the liquidation wanted finality and the court acknowledged that it had been established that certain creditors were being preferred.

Arguments in favour of the rescue were two-fold:

- A change in the management of the company would lead to the satisfaction of the business rescue objectives.
- A third-party investment would provide the requisite financial relief.

On the issue of changing the management, the court decided that this would not achieve the standard of reasonableness as there would be a large expense incurred effecting this change and no evidence was led as to how this exercise would be funded. In addition, no evidence was presented that the company had any grievance with the management. As a result the court was not satisfied that this averment addressed the cause of the demise of the company nor did it provide the objective grounds for success.

The argument advanced of third-party investment was contested given that the company had previously been in business rescue and provisional liquidation for more than a year and that investors mentioned as far back as 2011 had not materialised.

The company claimed that creditors and shareholders would receive a better return than in the alternative scenario of liquidation. The court did not share these sentiments as no facts had been advanced to support this contention, save for a submission made in respect of the difference in costs between liquidators and business rescue practitioners.

Ultimately, the court dismissed the application for business rescue and granted a final order for the winding up of the company. Van Eeden J concluded that, in his view: '[N]ot one of the two objectives of business rescue is present. Even if one were, I would in any event have exercised my discretion against granting the application given the remoteness of a business rescue plan being approved and the rights and interests of the stakeholders. There is presently no viable business rescue plan - one must still be developed. The passing of more than a year without any solution renders the reasonable prospect of a plan being developed remote. It seems the reasonable prospects of rescuing the company have

been exhausted ... [a]s already stated, I do not think it has been demonstrated that Newcity, the shareholder, will receive a better return if business rescue is ordered and the biggest creditor is in favour of liquidation. A creditor will normally know best whether a better return will be achieved by business rescue or not. In my view balancing the rights and interests of these stakeholders require that finality now be reached.'

It would appear that Van Eeden J considered the logistics of succeeding with business rescue if the potential majority creditor would oppose any rescue plan. He had the unenviable task of balancing the rights of interested parties, but based his decision on the consequences of business rescue, such as the moratorium on legal proceedings, as well as to give effect to ch 6 and s 7(k) of the Act.

Conclusion

It has become apparent that the courts are not allowing frivolous applications to succeed and, as a result, are setting the standard or benchmark to succeed with rescue proceedings on grounds that are material, factual and objective. The consequence of this is that one should exercise caution when considering business rescue and not use this instrument as a quick fix to avoid debt. One should consider the impact on all stakeholders involved and whether or not the support of all stakeholders would be achieved in seeking business rescue.

The procedure is able to succeed only with the voting support of the affected parties, in particular the creditors and if one therefore does not have the support of the stakeholders the process may be thwarted before it even begins. If the process does become litigious it would seem that the courts are placing a great deal of weight on the balance of interest and rights of all those involved.

This approach is welcomed to prevent abuse of the process and to ensure that business rescue is utilised for its proper purpose. While the test for achieving the minimum standard remains flexible, parties are still required to identify and provide objectively reasonable prospects accompanied by factual support to ensure success. It is undeniable that, should an applicant fail to provide reasonable prospects, the application is doomed to fail.

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Protecting the nest egg

Pension fund administration and the law

There are four parties involved in pension fund administration, namely the trustees, the principal officer, the administrators of the fund and lastly the registrar of pension funds. This article will deal with administration by the trustees, followed by the principal officer, the administrators and, finally, the registrar of pension funds.

Trustees of the fund

The board of trustees handle the day-to-day administration of the fund that, in terms of s 7D of the Pension Funds 24 of 1956 as amended (the Act), includes *inter alia* -

- the duty of ensuring that proper record of the operations of the fund are kept;
- the communication of information to the members; and
- ensuring that the rules and the operation and administration of the fund comply with the Act, the Financial Institutions (Protection of Funds) Act 28 of 2001, and all other applicable laws.

In terms of s 7C of the Act, the trustees have a further duty to act with due care, diligence and in good faith and they have to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times.

These duties create difficulty with employer operated pension funds, where employees are elected to serve as trustees of the pension fund. In such circumstances the employees also owes a duty of good faith to their employer. In the case of conflict between the interests of the members of the fund and the employer, which party's interests will reign supreme?

The common law principle, *bonis patrifamilias* would naturally apply as the trustees are in a position of dealing with the members' money and, according to Financial Services Board (FSB) Circular PF130, the board shall at all times act in utmost good faith towards the fund and in the best interest of the members.

The situation may arise where an employer may feel that the employee acting as trustee has overstepped his or her boundaries and then charge the trustee with misconduct. In such circumstances, it may well lead to intimidation from the employer that may subconsciously cause the employee not to comply with the duties as set out in the act, as he or she remains an employee.

The rules of conduct for the trustees is ordinarily contained in the rules of the pension fund, which must provide for an indemnification or immunity that the trustees may not be disciplinary charged by the employer for decisions taken when acting in his or her capacity as a trustee. In this regard FSB Circular PF130 specifically states at para 67 that the board is independent of the employer/employee relationship.

A further question arises as to when a court may remove a trustee from office. Section 5 of the Financial Institutions Act states that the registrar of the FSB may apply to a division of the High Court, on

good cause shown, for the appointment of a curator to manage the whole or part of a business. In *Ex parte Executive Officer of the Financial Services Board; In re Joint Municipal Pension Fund* [2003] 4 All SA 603 (T), Bertelsmann J held that the wording 'a good cause shown' in s 5 of the Financial Institutions Act does not suggest a test that is more lenient than the common law test. Therefore the common law test that a trustee may be removed only if his or her actions are such that a very real risk exist that the funds entrusted to him or her will be dissipated, remains applicable if an application is brought to remove a trustee from office.

There is, however, nothing preventing the members of the fund to lodge a motion of no confidence for the removal of the board or a trustee and, if carried by a majority in terms of the rules of that pension fund, the board or trustee must vacate their offices.

Principal officer

The principal officer is central to the administration of a pension fund, as he or she is the link between the fund and the registrar, as well as between the trustees and the members of the fund.

The principal officer of the fund is appointed by the board of trustees and will, *inter alia* -

- arrange the meetings of the board of trustees as well as the annual general meeting with the members;
- minute the resolutions;
- ensure that a proper meeting is constituted; and
- ensure that the rules of the fund are updated after amendments and that these amendments are registered with the registrar of pension funds.

In terms of FSB Circular PF130 the functions of the principal officer also include ensuring that the decisions of the board of trustees are executed and ensuring that the fund complies with the formal requirements of the law, directives from South Africa Revenue Service, including all other regulatory bodies and to communicate with the service providers.

The trustees may also delegate certain administrative functions to the principal officer to avoid having to take a formal resolution for every administrative function. It is therefore clear that the principal officer plays a crucial part in the administration of a pension fund.

Despite this, the Act merely requires that a principal officer must be residing in South Africa. According to Ewing 'Principles for Principals' *Today's Trustee* July/August 2005 (www.totrust.co.za/200508_principles.htm, accessed 9-12-2013), the principal officer -

- must ensure good corporate governance;

- put in place infrastructure to ensure compliance with the Act;
- must have a good understanding of the process in formulating investment strategy, setting benchmarks and asset managers mandates;
- monitor the investment strategy's implementation; and
- oversee daily operations and instructions from trustees.

As it stands now, the board of trustees must take full responsibility in appointing a principal officer who will also be accountable to the trustees.

My submission is that the legislature should intervene to ensure that, due to the importance of the position, a fit and proper person be appointed by the board of trustees to protect the interest of the members of the fund.

Administrator

A pension fund may appoint an administrator to administer the fund's investments, but before an administrator may be appointed such appointment must be approved in terms of s 13B(1) of the Act which states that:

'No person shall administer on behalf of a pension fund the investments of such a pension fund, or the disposition of benefits provided for in the rules of the fund, unless the registrar has in a particular case or in general granted approval thereto and the person complies with such conditions as the registrar may from time to time determine in the particular case or in general.'

The administrator that is appointed must report to the trustees on matters such as the investment portfolio for a financial year, as well as the investment performances, to enable the trustees to make informed decisions and to provide feedback to the members.

The administrator will usually be a firm of actuaries who are duly qualified and who appoints several fund managers to invest the pension fund's money in order to spread the risk of the members.

The registrar of pension funds

The fourth party in pension fund administration is the registrar of pension funds who has various powers, such as the approval of the rules and the amendments to the rules that regulate the administration of a pension fund.

The registrar also has specific powers such as the right to inspect and investigate a fund and/or its administrator in terms of s 25(1) and (2). The person tasked with the inspection or investigation has a right of access at any reasonable time to all the documents as may reasonably be required to conduct such investigation. Regular inspections will, *inter alia*, ensure that trustees cannot be

manipulated by their employers in employer pension funds, such as a municipal pension fund.

The registrar may further, in terms of s 26(1) of the Act, intervene in the management of a fund, after considering the interests of the members and may direct that the rules of the fund be amended if the investigation or inspection in terms of s 25 necessitates amendment of the rules.

Should a pension fund fail to comply with a direction or condition from the registrar to submit information, the registrar may, in terms of s 37(2), impose an administrative penalty not exceeding R 1 000 for every day such failure continues.

Before imposing such penalty, the registrar must in writing -

- inform the fund or administrator of its intention;
- specify the particulars and amount of the intended penalty;
- provide reasons; and
- invite interested persons to make representations.

The question, however, remains, who will be liable to pay the penalty? The members can surely not be prejudiced by the administrator's or trustees' failure to comply with a direction of the registrar.

I submit that the rules of a pension fund should incorporate a provision to prevent that the fund's money may be used in such circumstances.

Conclusion

The rules of a pension fund are of utmost importance for the administration of the fund and it should ultimately ensure that the members' interests are protected at all times.

The trustees have a fiduciary duty towards the members and should act with the utmost good faith at all times.

If there are any uncertainties or an ambiguity in the rules, the trustees and the principal officer of the fund must ensure that the rules are amended timeously to eliminate such uncertainties or ambiguities in order to create a greater certainty in the administration of the fund.

A duly qualified and competent principal officer must be appointed by the board of trustees to ensure that the functions of the post is fulfilled and to safeguard themselves as they carry an inherent fiduciary duty towards the members and beneficiaries of the fund.

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THE LAW REPORTS



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November 2013 (6) *The South African Law Reports* (pp 1 – 317);
[2013] 3 *The All South African Law Reports* October no 1 (pp 1 – 116);
and no 2 (pp 117 – 252)

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

ECP: Eastern Cape High Court, Port Elizabeth
GNP: Gauteng North High Court, Pretoria
GSJ: South Gauteng High Court, Johannesburg
KZD: KwaZulu-Natal High Court, Durban
KZP: KwaZulu-Natal High Court, Pietermaritzburg
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Attorneys

Duty of confidentiality to client: In *Wishart and Others v Blieden NO and Others* 2013 (6) SA 59 (KZP) the three applicants were summoned to appear before the first respondent in July 2011 in an inquiry convened under s 417 of the now repealed Companies Act 61 of 1973. The inquiry related to a company called Avstar Aviation.

The second and third respondents are advocates practising at the Johannesburg Bar. The fourth respondent is an attorney. The applicants did not want to be examined at the inquiry by the second, third and fourth respondents and did not attend the inquiry. Their attorney of record appeared instead. He submitted that the first respondent should not allow the second to fourth respondents to represent the fifth respondent (Billiton) in the inquiry. The first respondent declined to make such a ruling. This led to the present application in terms of which

the applicants attempted to interdict the second, third and fourth respondents from examining the applicants.

The gist of the application turned on an alleged conflict of interest on the part of the respondents. The applicants allege that they disclosed certain privileged information to the respondents during consultations they had with the respondents.

Gorven J pointed out that once the attorney-client relationship has come to an end, the only basis on which any legal duty can remain is if an implied term of the contract provides for this or Aquilian principles impose it. In the present case the legal duty at stake was to respect the confidentiality of information imparted or received in confidence and to refrain from using or disclosing such information otherwise than as permitted by law or contract.

The court held that, in order to obtain an interdict preventing a legal practitioner representing a client against a former client, the former client would need to prove three elements. First, that confidential information was imparted or received in confidence as a result of the attorney-client relationship and the information remains confidential. Secondly, that it is relevant to the matter at hand; and finally, that the interests of the present client are adverse to those of the former client.

The court decided that there is no ongoing fiduciary

relationship or duty of loyalty owed by the legal practitioner to the former client at however residual a level. Any legal duty to the former client is limited to respecting confidential information acquired during the course of the attorney-client relationship. Thus, where the former client fails to establish any of these requirements, an application for an interdict preventing the legal practitioner representing the later client against the former client must fail.

In the present case the applicants had failed to prove the clear right required for an interdict. They had also not proved any injury actually committed or reasonably apprehended. Two of the three requisites for the granting of an interdict were therefore not present.

The application was dismissed with costs.

Champerty

Validity of champerty: The decision in *Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP) concerned an application to join the first respondent (IMF) as a third party in proceedings between the applicant and the second respondent. The second respondent received funding from IMF in its (ie, the second respondent's) litigation against the applicant.

It is common cause that the arrangement between

the second respondent and IMF amounted to a champertous agreement. A champertous agreement is one between a party to litigation and an outsider whereby the latter agrees to pay for the action and thereby shares in any proceeds recovered. Champertous agreements were, but are no longer unlawful under South African law.

The applicants have proved that there is a real possibility that, if they obtain an order for costs, the security furnished by the second respondent will not be sufficient to defray such costs.

The applicants argued that although there is no South African precedent for making costs orders against persons who fund litigation, the principle has been well established in common-law countries. The court was specifically asked to develop the common law so as to make a direct order for costs against a funder possible.

Botha J held that there is no reason why such relief should not be available. It is already possible to obtain direct orders for costs *de bonis propriis* against non-parties such as legal representatives and public officials. To enable the applicants in the present case to join the first respondent would be a logical progression from the principle laid down in *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) where the court held that champertous agree-

ments were not unlawful. To allow litigants like the applicants to hold funders directly liable for costs could also be considered to be one of the measures that the courts could adopt to counter any possible abuses arising from the recognition of the validity of champertous contracts.

The applicant was thus entitled to relief in the form of an order joining the funder to the litigations (here: IMF) so that a direct order for costs could be obtained against it.

Company law

Business rescue: The facts in *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 (KZP) concerned two applications by two different applicants. A liquidation application was enrolled for hearing, but then postponed because the court was informed that an application for a business rescue of the same close corporation would also be made. The court decided both applications together.

The business rescue applicant argued that the liquidation application could not be heard as it had been suspended by the business rescue application, as envisaged by s 131(6) of the Companies Act 71 of 2008 (the Act). At stake was the question of when an application can be said to have been made for purposes of s 131(6) of the Act, which provides as follows:

'If liquidation proceedings have already been commenced by or against the company at the time an application [for business rescue] is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for.'

Hartzenberg AJ held that s 131(6) of the Act refers to an application made in terms of s 131(1). Two interpretations are possible. The first is that an application is made once it has been lodged with the registrar of the court (registrar) and is issued by the registrar.

The second possibility is that an application is made only once the service and notification requirements prescribed by s 131(2) have been complied with.

The court held that the second interpretation is the correct one. A business rescue application has been properly made after it had been lodged with the registrar, the registrar had duly issued it, a copy of it had been served on the Companies and Intellectual Property Commission (CIPC), and each affected person had been notified.

Compliance with the notification requirements is an integral part of the application. Since the suspension of liquidation proceedings has significant disruptive consequences, there is a strong policy justification in favour of the second interpretation. The court held that, once affected parties have been notified, they are in a position to limit unnecessary delays of the application. Insisting on notification limits the risk that a business rescue application could be abused as a delaying tactic.

The court thus confirmed that the business rescue application had not been properly made.

In regard to the liquidation application the court held that the applicant had established that it was a creditor of the close corporation and that the close corporation was indeed unable to pay its debts as contemplated in terms of s 344 (f) of the Companies Act 61 of 1973.

A provisional winding-up order was accordingly granted.

Customary law

Administration of estate: The facts in *Palesa NO and Another v Moleko and Others* [2013] 4 All SA 166 (GSJ) were as follows. The first applicant was the appointed executrix of a deceased estate of one NA Moleko (the deceased). At the time of his death the deceased owned a number of assets, including three vehicles that were used as taxis in the deceased's taxi business. The second applicant contended that the three taxis contributed

approximately R 70 000 a week into the joint estate belonging to her and the deceased. At the time of the deceased's death the vehicles were all registered in his name, but 17 days after his death they were re-registered in the name of the first respondent.

The second applicant and the first two respondents all claimed to have been married to the deceased by customary law.

The present application sought for a declaratory order confirming the first and second applicants' appointment as representatives of the deceased estate for purposes of its finalisation. The application also sought orders directing the first three respondents to restore possession of the motor vehicles of the deceased and/or the restoration of their registration numbers or particulars to the state they were as at the date of the death of the deceased.

Gkomo J held that s 7(1)(a) of the Administration of Estates Act 66 of 1965 provides that whenever any person dies leaving any property, the surviving spouse, 'or if there is no surviving spouse, his or her nearest relative or connection residing in the district in which the death has taken place' shall within 14 days thereafter give a notice of death in the prescribed form, or cause such a notice to be given to the Master. Section 13 of the same Act allows only the executor to liquidate or distribute the deceased estate.

After the death of a property or asset owner, the assets that he or she owned cannot be transferred in any other way other than through duly issued and authorised letters of executorship issued by the Master of the High Court. None of the respondents produced any such letters of executorship. Consequently, any transfer of ownership of any of the vehicles of the deceased and the appropriate taxi licences cannot be valid or authorised.

One of the main disputes between the parties was whether the second applicant or any of the first two respondents was married to

the deceased by customary law. In terms of the Marriage Act 25 of 1961 production of a civil marriage certificate by any person shall be *prima facie* proof of the valid existence of a marriage relationship between the parties therein mentioned. Consequently, until such time that there was cogent and acceptable and credible evidence to the contrary, the court accepted that the second applicant was married to the deceased by civil rites in community of property. Therefore, any subsequent customary union purportedly entered into after the date of that marriage, was invalid and of no legal consequence.

The second applicant was declared the duly appointed executrix of the deceased estate, and was authorised and mandated to collect and take into possession all the assets of the deceased.

Husband and wife

Divorce: The decision in *MB v DB* 2013 (6) SA 86 (KZD) concerned a divorce action between parties married out of community of property with the application of the accrual system. The issue was which party bore the onus of proof with regard to the nature and quantum of the assets excluded in their antenuptial contract from forming part of the accrual in the defendant's (the husband's) estate.

The plaintiff (wife) relied on the evidence of a chartered accountant to prove the value of the husband's estate and, therefore, of her potential share of the accrual. The husband led no evidence to demonstrate how he had dealt with the excluded assets over time, instead contending, *inter alia*, that –

- his ex-wife's claim was premature, since the extent of the assets and liabilities could be determined only as at the date of divorce; and
- there was no proof of the current value of his estate because the evidence that she had sought to rely on was incomplete and in any event hearsay and therefore inadmissible.

Lopes J held that it was the husband, being the one in possession of all the facts re-

lating to the assets reflected as excluded in the antenuptial contract, who bore the onus of proving which assets were to be excluded and why; to demonstrate what had happened to those assets, how they were converted from time to time, and what their present values were that fell to be excluded from the calculation of his net worth.

The operative moment when the value of the respective estates of the parties had to be assessed was at *litis contestatio*, (ie, close of pleadings) not when the divorce order was made.

Because the husband led no evidence to demonstrate how the excluded assets were dealt with by him from time to time, the court held that it would not be possible to determine what had happened to those excluded assets without making reasonable deductions from the discovered documents.

The court reasoned that South African courts should follow the approach to evidence adopted in a number of English cases when dealing with failure by a party to discharge his or her duty to disclose financial information in divorce proceedings. In terms of the approach followed in English law, courts were entitled to draw inferences (where they can be properly made) and to take notice of inherent probabilities in deciding whether or not assets formed part of the non-discloser's estate.

The court accordingly ordered the division of the husband's estate, the exact details of which fall outside the scope of the present discussion.

The husband was ordered to pay the costs of the present action.

Mandament van spolie

Defences: In *Afzal v Kalim* 2013 (6) SA 176 (ECP) the parties were previously married. Their divorce was acrimonious. Before the divorce Kalim (the wife) left their common home in Port Elizabeth to live and work in East London. In 2010 she moved from East London to Cape Town and

lived in a house that her family bought for her and her children.

Afzal (the husband) later married someone else and lived in the house (the contested house) in Port Elizabeth where he and Kalim previously lived. In 2012 Kalim and her children returned to Port Elizabeth where she gained access to the contested house through a stratagem. She then refused to leave the house, taking over the main bedroom. Afzal, contending that he had been deprived of the peaceful and undisturbed possession of his home, approached the High Court for a *mandament van spolie*.

The court issued a rule *nisi* calling on Kalim to show cause why she should not be ordered to vacate the house immediately; and also why she should not be prohibited from interfering with Afzal's use and enjoyment of the property.

Kalim, in response, contended that she was entitled to return to the house by virtue of an agreement between the parties. She also contended that s 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) applied and, because Afzal did not comply with the provisions of s 4(1), his application was defective.

Plasket J held that Kalim's claim that Afzal had agreed that she could return to the contested house in Port Elizabeth was far-fetched and untenable.

Afzal had clearly established the requirements for the *mandament*, so the issue was whether PIE was applicable as alleged by Kalim. Although PIE might prevent the use of the *mandament* to evict a person from his or her home, it could not be said that the contested house was Kalim's home. It was, by the time of her return to Port Elizabeth, the family home of Afzal and his second family. Kalim's own connection with the house had become tenuous. She had not, from early in 2009, occupied it regularly or with any degree of permanence. It was not her fixed residence, much less the seat of her domestic life. Since the

house was not her home – even if she was its co-owner – PIE would not apply.

The rule *nisi* was accordingly confirmed with costs.

Prescription

Commencement of prescription: The facts in *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) were as follows. The respondent (the plaintiff in the court *a quo*) was injured in a motor vehicle accident when she was three years old. The appellant (the defendant in the court *a quo*) is the attorney who, instructed by the plaintiff's mother, instituted a claim against the statutory insurer on the plaintiff's behalf, which was settled when the plaintiff was 13 years old. She became aware of the settlement amount fortuitously when, on or about 19 April 2006 and in response to a related inquiry, the defendant's candidate attorney e-mailed certain documents to her relating to the claim.

On 8 April 2009, when she was almost 25 years old, she instituted action against the defendant, alleging that the settlement was a significant under recovery of her true damages and that, by accepting it, the defendant had acted in breach of contract and in breach of his duty of care. The plaintiff stated in her particulars of claim that she became aware of the defendant's negligence only when she consulted her attorneys on 4 February 2009. The defendant's special plea of prescription, which specifically relied on constructive knowledge, was dismissed by the High Court.

On appeal to the SCA, Tshiqi JA identified two interrelated issues –

- firstly, whether the plaintiff could reasonably have known the facts from which her debt against the defendant arose before 19 April 2006; and
- secondly, whether an adverse inference should be drawn from the plaintiff's failure to give evidence about her state of mind, circumstances or conduct during that period.

In deciding these two issues the court referred to the provisions contained in

s 12(3) of the Prescription Act 68 of 1969. The constructive knowledge contemplated in s 12(3) is established if it can be shown that the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. Courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself.

A defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. This burden shifts to the plaintiff only if the defendant has established a *prima facie* case.

As to the first issue, the court held that the question was not whether the plaintiff could or could not have obtained the documents from her mother or the defendant, but rather whether she was negligent or innocent in failing to do so. The court concluded that it was reasonable for the plaintiff to have trusted that her mother and the defendant were acting in her best interests, and that there was no conceivable reason why that belief would change merely because she had attained majority. It was accordingly held that there was no basis to arrive at a conclusion that the plaintiff was negligent.

As to the second issue, it was held that the factors that the defendant had suggested cumulatively required the plaintiff to explain the delay were neutral and established no basis for the contention that she should have appreciated earlier that she had a claim against the defendant. The court concluded that there was nothing in the plaintiff's evidence that she needed to rebut, and equally no adverse inference could be drawn from her failure to testify. The appeal was dismissed with costs.

Property

Registration pursuant to fraud: The facts in *Nedbank Ltd v Mendelow and Another*

NNO 2013 (6) SA 130 (SCA) were that Mrs Valente (the deceased) owned certain immovable property. She had two sons, Evan and Riccardo.

In 2001 the property was sold to a company in liquidation after Riccardo had forged the deceased's signature. He also forged his brother Evan's signature on a document entitled 'consent to sale' that was used to induce the Master of the High Court to sign a certificate that there was no objection to the sale by any beneficiary of the deceased's estate.

A bond was registered over the property in favour of Nedbank. The respondents (the executors of the deceased estate) successfully applied in the court *a quo* for an order setting aside the purported transfer of the property to the company, and the registration of the bond in favour of Nedbank.

The basis of the executors' cause of action was a review in terms of ss 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The court *a quo* set the master's certificate aside and the registrar of deeds was ordered to transfer the property to the estate and to cancel the bond.

On appeal Nedbank argued that PAJA did not provide for vindictory relief.

Lewis JA held that the provisions of PAJA do not apply to the present case and that the matter must be decided on general principles of law. Where registration of a transfer of immovable property is effected pursuant to fraud or a forged document, ownership of the property does not pass. Because Riccardo forged his mother's signature on the deed of sale of property and the signature of a beneficiary of her will, Evan did not intend to transfer ownership of the property.

The court further held that the power of attorney signed by the Master to permit the registration of transfer was vitiated by Riccardo's fraud and the ownership of the property did not pass to the company. The bond registered in favour of Nedbank was accordingly not valid.

The court pointed out that not every act of an official

amounts to administrative action that is reviewable under PAJA. Where a functionary performs acts that are purely clerical and which the functionary are required to do in terms of the statute that empowers him or her, he or she is not performing administrative acts within the definition of PAJA, or even under the common law.

In this regard the court drew a distinction between discretionary powers and mechanical powers. A mechanical power (as was performed in the present case by the Master and the registrar) involves no choice on the part of the functionary and is therefore not reviewable. Whether there may be situations where a functionary will be required to make a genuine decision involving the performance of a duty or not, the court did not decide in the present case. Because the requirements for the registration of the property had been met, the registrar had no choice but to register the property in the company's name.

As a result, so the court reasoned, only discretionary powers (as opposed to mechanical powers) can be taken on review, either under PAJA or the common law. The court accordingly ordered that the property has to be registered in the name of the deceased estate.

The appeal was dismissed with costs.

Sale of land

Section 2(1) of the Alienation of Land Act: In *Osborne and Another v West Dunes Properties 176 (Pty) Ltd and Others* 2013 (6) SA 105 (WCC) the court was asked to interpret s 2(1) of the Alienation of Land Act 68 of 1981 (the Act). More specifically the court was asked to interpret the provision contained in s 2(1) that requires the agreement to be signed by 'the parties thereto'.

The crisp facts were that the formal agreement between the parties purports to record an agreement between the plaintiff and the defendant. However, the plaintiff argued that the true agreement

was between the plaintiff and a third party. The plaintiff claimed rectification of the deed of sale to reflect the fact that the sale was concluded between the plaintiff and the third party, and not between the plaintiff and the defendant.

Blignault J held that the phrase 'the parties thereto' refers to the true parties to the agreement. It would be absurd to construe the phrase as relating to the formal parties because there is no legal bond between them. It is therefore essential that the true parties be identified in the written agreement.

In the present case the formal agreement thus fails to identify the purchaser in terms of the true agreement of sale. The formal agreement of sale does not comply with the requirement of s 2(1) in that it does not identify the true parties to the agreement. The legal bond that the formal agreement purports to record in fact does not exist. For that reason it is not capable of being rectified.

The requirement contained in s 2(1) that the agreement must be 'signed by' the parties refer to the signatures of

the true parties to the agreement. Likewise it would be absurd to interpret them as referring to the signatures of persons that do not enter into the true agreement.

In the present case the formal agreement of sale does not comply with the requirements of s 2(1), since it was not signed by the parties. The plaintiffs' particulars of claim were accordingly set aside, but leave was granted to the plaintiffs to apply for the amendment of their particulars of claim.

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, admiralty law, children, civil procedure, company law, constitutional law, contract law, credit law, divorce, elections, health professions, labour law, land reform, marriage, motor-vehicle accidents, parliamentary rules, pension funds and property law.



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THE LAW REPORTS

December 2013 (6) The South African Law Reports (pp 319 – 634);
[2013] 4 The All South African Law Reports November no 1
(pp 253 – 383) and no 2 (pp 385 – 508)

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ABBREVIATIONS

GNP: Gauteng North High Court, Pretoria

GSJ: South Gauteng High Court, Johannesburg

SCA: Supreme Court of Appeal

WCC: Western Cape High Court

LCC: Land Claims Court

Actio ad exhibendum

Requirements: In *Rossouw NO and Another v Land and Agricultural Development Bank of South Africa* [2013] 4 All SA 318 (SCA) the respondent, Land Bank, bought certain irrigation equipment from a supplier (Andrag), which included pivots. The purpose of buying the equipment was to sell it to SJP Trust (the trust). Before it could pay the purchase price to the supplier the respondent required written declarations, one provided by the trust and the other by the supplier, confirming that the equipment had ten pivots that had actually been delivered, installed and were functional.

The declarations were duly provided. However, it subsequently transpired that the declarations were false as only six instead of ten pivots had been delivered and that the price had been inflated in terms of collusive conduct

between the trust and the supplier. After completing financing of the equipment, the respondent entered into an instalment sale agreement with the trust in terms of which it reserved ownership of the pivots until the trust had paid the price in full.

The trust failed to pay the instalments as required and the respondent approached the GNP for an interdict restraining the trust, represented by the appellant trustee Rossouw, from disposing of the pivots, a *mandamus* for a return of the pivots and alternatively, and only if the pivots had already been disposed of, payment of their value (*actio ad exhibendum*). As it became common cause that the pivots had been disposed of, the application proceeded on the *actio ad exhibendum* and succeeded. Hiemstra AJ granted the respondent judgment for payment of the value of ten pivots, even though only six had been delivered to the trust and had subsequently been disposed of.

An appeal against the decision of the High Court succeeded on the amount of the value of the pivots, the SCA holding that such amount had to be limited to the six pivots delivered to the trust and disposed of by it. The value of

each pivot disposed of was the market value at the date of alienation to a third party. The appellant's costs were limited to the employment of one and not two counsel.

Majiedt JA (Brand, Leach JJA and Meyer, Van der Merwe AJJA concurring), noting that the appeal concerned a vindictory claim and, in the alternative, a claim in terms of the *actio ad exhibendum*, held that in order to succeed with the *actio ad exhibendum* the respondent had to prove the following requirements, namely that –

- it was the owner of the pivots at the time of their disposal by the trust;
- the trust had been in possession of the pivots when it disposed of them;
- the trust acted intentionally in that it had knowledge of the respondent's ownership or its claim to ownership when it parted with possession of the pivots; and
- the respondent would be entitled to delictual damages as well as the extent thereof (taking into account, among others, the value of the pivots when the trust sold them to a third party).

Appeals

Appeal against a costs order: Rule 16A(1) of the uni-

form rules of court provides that any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading and that such notice shall contain a clear and succinct description of the constitutional issue concerned. The rule continues to provide that the registrar shall, on receipt of such notice, forthwith place it on a notice board designated for that purpose, which notice shall be stamped by the registrar to indicate the date on which it was placed on the notice board and shall remain there for a period of 20 days.

The main issue in *Phillips v SA Reserve Bank and Others* 2013 (6) SA 450 (SCA) was whether there had been compliance with the rule and what was to be done if that was not the case. The appellant, Phillips, sought a High Court order setting aside the decision of the first respondent, the South African Reserve Bank, not to return foreign currency seized from him at the airport. He also sought an order declaring some regulations of the Exchange Control Regulations, promulgated in Government Notice R1111 of 1 December 1961, unconstitutional. However, he did not

specify the grounds on which they were alleged to be unconstitutional.

The GNP held, per Makgoba J, that the appellant had not complied with r 16A(1) and therefore had to proceed without pursuing the unconstitutionality of the regulations concerned or seek postponement in order to comply with the rule, in which case he would have to pay wasted costs occasioned by the postponement. In the event, postponement was granted and the appellant was ordered to pay the costs occasioned by it. The appellant appealed against the costs order. The issue before the SCA was whether such an order was appealable. The appeal was upheld with costs.

Farlam JA (Mthiyane DP concurring and Majiedt JA, in whose judgment Petse and Ndita AJJA concurred, reading a separate concurring judgment) held that the costs order made by the High Court would stand, unless it was upset on appeal, until at the earliest the main case was dealt with on appeal. As the High Court order was wrongly made, it gave rise to considerable inconvenience and prejudice and also impeded the attainment of justice in cases involving constitutional issues where argument arose as to whether r 16A(1) had been complied with. That in itself afforded sufficient reason to allow an appeal at that stage.

Furthermore, in this case there were exceptional circumstances within the meaning of s 21A(3) of the Supreme Court Act 59 of 1959 so as to permit an appeal to be brought solely against a costs order. Obtaining a decision by the SCA on the interpretation of r 16A(1), as well as the other issues relating to the question as to whether the rule was complied with, satisfied the requirement of exceptional circumstances. The court held further that there had been compliance with r 16A(1) in that the appellant's notice had identified the issue at stake as the constitutional invalidity of the Exchange Control Regulations. It was not necessary to

elaborate by specifying the grounds of the constitutional challenge as the High Court held.

Constitutional law

Unconstitutionality of s 50(2)(a)(i) of Criminal Law (Sexual Offences and Related Matters) Amendment Act: Section 50(2)(a)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) provides that a court that has, in terms of the Act or any law, convicted a person of a sexual offence against a child or person who is mentally disabled and after sentence has been imposed by that court for such offence, in the presence of the convicted person, 'must' make an order that the particulars of the person be included in the National Register for Sexual Offences (the register). The purpose of the register is to keep track of offenders and deny them jobs and positions that would give them access to minors and persons with mental disability.

The section was declared to be inconsistent with the Constitution and therefore invalid in *Johannes v S* [2013] 4 All SA 483 (WCC) where the order of invalidity, which was not retrospective, was suspended for 18 months to give parliament the opportunity to remedy the defect. The matter was referred to the Constitutional Court for confirmation of the High Court order.

The case came to the WCC by way of automatic review in terms of s 85(1)(a) of the Child Justice Act 75 of 2008 (the CJA). That was after the accused, Johannes, who was legally represented, pleaded guilty to three charges for the rape of very young boys, two of whom were aged six years and the other seven years of age. He also pleaded guilty to a charge of grievous bodily harm to a girl aged 12 years after having stabbed her with a knife. The accused, at the time of the commission of the offences, was a 14-year old minor.

In respect of the rape convictions the accused was sentenced to compulsory residence in a child and youth

care centre for five years, after completion of which he would serve three years' imprisonment and, significantly for present purposes, the regional magistrate ordered that his name be entered in the register in terms of the section.

The review issue before the High Court was whether it was 'competent' for the presiding officer to order entry of the name of the offender in the register without giving him the opportunity to make representation, more so since he was a minor at the time of the commission of the offences.

It will be noted that the better word would be 'appropriate' rather than 'competent', since the Act gave the court authority and in fact required it to order that such entry be made.

Henney J (Fourie and Steyn JJ concurring) held that failure to afford an offender the right to be heard before an order was made in terms of s 50(2)(a)(i) could not be said to be a reasonable and justifiable limitation of the right of a sexual offender in order to enforce and protect the dignity, freedom and physical integrity of children, and mentally disabled persons, against sexual abuse and exploitation. The section offended against a person's right to a fair hearing as it did not allow a court a discretion to consider whether or not an entry in the register should be made. The section should have made provision for giving the offender, as well as the prosecution, the opportunity to address the court as to whether it would be in the interest of justice that an order be made directing that the particulars of the offender be entered in the register.

Customs and excise

Lapsing of anti-dumping duties: In the *Association of Meat Importers and Exporters and Others v International Trade Administration Commission and Others* [2013] 4 All SA 253 (SCA) the appellant, the Association of Meat Importers and Exporters, together with other interested parties, appealed against a High Court

order declaring sched 2 to the Customs and Excise Act 91 of 1964 (the Act) invalid and of no force and effect, which order gave the Minister of Finance a period of three years within which to rectify the defect.

In the schedule the Minister had given a list of imported goods that were suspect to anti-dumping duties. The list included, among others, chicken meat portions, garlic, acrylic blankets, glass, etcetera. The duties in question were imposed for a period of five years after which they were to lapse unless their operation was extended in terms of sunset review provisions.

The authorities – being the first respondent the International Trade Administration Commission (ITAC) established in terms of International Trade Administration Act 71 of 2002, the South African Revenue Service, the Minister of Finance as well as the Minister of Trade and Industry – took the view that the schedule was invalid, unaware that as it had already lapsed the issue of its invalidity was no longer live. In other words, the authorities took a matter to court regarding duties that had since ceased to exist, there being a dispute about that fact.

The GNP held, per Raulinga J, that the schedule was invalid and suspended its invalidity for a period of three years so that the Minister of Finance could attend to its defects. An appeal to the SCA against the order was upheld with costs.

Nugent JA (Lewis, Theron and Saldulker JJA concurring and Wallis JA concurring in part and dissenting in part) held that the principle underlying the World Trade Organisation Agreement 1994 (WTO agreement) was that anti-dumping duties were exceptional measures that were imposed only in an amount and for so long as they would be required to counter injury to the domestic industry. Dumping occurred when goods were exported from one country to another at an export price that was lower than the price of goods when sold for consumption in the

exporting country. The practice gave imported goods an unfair advantage over those produced domestically and it was common internationally for anti-dumping duties to be levied by the importing country so as to neutralise that advantage.

When a court made a declaration, it was declaring the existence of a state of affairs. The state of affairs that existed before a law was declared invalid was that it purported to have force of law but that in truth it did not. For so long as it purported to have the force of law it commanded obedience but, on being declared invalid, it no longer purported to have the force of law and could be ignored with impunity. When a declaration of invalidity was made, and then suspended, the state of affairs remained as it was before the declaration, that law purporting to have the force of law and commanding obedience. When there was nothing purporting to have the force of law in the first place, a court could declare that state of affairs, but such declaration did not bring about any change. Before the declaration there was nothing purporting to have the force of law and after the declaration there was also nothing purporting to have the force of law. Suspending the declaration had no effect on the position because no change in the state of affairs was brought about by the declaration.

In the instant case whether the anti-dumping duties came to an end by operation of art 11.3 of the WTO agreement or reg 53.1 of sched 2, the fact remained that, by the time of the granting of the High Court order, they had ceased to exist with the result that there was nothing that purported to command obedience. That being the state of affairs, a declaration of invalidity was not competent. Therefore, the High Court ought not to have declared the anti-dumping duties to be invalid because that was not the state of affairs that existed. The orders of the High Court were not competent and had to be set aside.

Divorce

Separation of issues: Rule 33(4) of the uniform rules of court provides, among others, that if in any pending action it appears to the court that there is a question of law or fact that may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of and the court shall, on application by any party, make such order unless it appears that the question cannot conveniently be decided separately.

An application for separation of issues in terms of the rule was made by the applicant, the husband, in *CC v MVC* [2013] 4 All SA 327 (GSJ) but was opposed by the respondent wife, MVC. The parties were married out of community of property, profit and loss without accrual sharing. As the parties were married before the enactment of the Matrimonial Property Act 88 of 1984 (the Act), maintenance and patrimonial issues arising from the marriage were governed by s 7(2) and (3) of the Act.

When the applicant sued for divorce, citing the irretrievable breakdown of the marriage relation as the parties had not lived together as husband and wife for some seven years, the respondent opposed the action, contending that there was no irretrievable breakdown of the marriage. In a counterclaim she alleged that if there was irretrievable breakdown of the marriage, it was due to the applicant's extra-marital affair with one K. She sought maintenance and redistribution of patrimonial assets in terms of s 7(2) and (3) of the Act.

The problem was, however, the determination of the size of the applicant's estate as, after making donations of cash and shares to his sons, D and P, he wanted to have those donations set aside by the court

because of the trouble that D and P were causing him. Litigation to set aside the donations was expected to drag on for years with the further risk of appeal. As a result the applicant applied for separation of the issue of granting a decree of divorce from the maintenance and distribution of patrimonial assets. The respondent opposed the application, contending that the issues were inextricably linked and should therefore not be decided separately.

Mokgoatheng J ordered separation of the issues as sought by the applicant, the costs being costs in the cause. The court held that, in applying the provisions of r 33(4), it would consider whether questions of law or fact could be decided separately before others or whether the issues sought to be separated could be conveniently separated. In considering the question of convenience, a court would have regard to its convenience, the convenience of the parties and possible prejudice that either party would suffer if separation was granted. The court was obliged to order separation unless it determined that the issues could not be conveniently separated, in other words, the court was obliged to order separation except where the balance of convenience did not justify such separation.

In the instant case the balance of convenience was in favour of granting separation as it was inappropriate for a party to an apparently irretrievably broken down marriage to oppose the separation of issues in a divorce action for the sole purpose of gaining a tactical advantage in order to secure a more favourable s 7(3) patrimonial distribution award, or to use the perpetuation of what seemingly appeared to be an irretrievably broken down marriage as leverage for tactical reason to pre-empt the dissolution of such marriage for ulterior motives. If the marriage were dissolved, maintenance and patrimonial assets redistribution could be decided once litigation between the applicant and his sons, relating to the donations, was finalised.

Practice

Stay of proceedings on basis of *lis alibi pendens*: In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) the appellant, Caesarstone, had an agency agreement with the first respondent, World of Marble and Granite (WOMAG), and the Sachs family, in terms of which WOMAG and the Sachs family would act as its agents to sell its product, namely quartz panels, in South Africa. In return for services rendered, the respondents were to receive commission. The Sachs family consisted of Oren Sachs, his father and three brothers.

Thereafter, alleging that WOMAG and Oren Sachs had failed to meet their agency agreement obligations, the appellant cancelled the agreement and instituted legal proceedings in Israel for confirmation of cancellation of the contract and return of commission already paid. While proceedings in Israel were still underway, the respondents instituted proceedings against the appellant in the WCC in which they sought damages for breach of contract that allegedly occurred when the appellant repudiated the agency agreement, which repudiation they had since accepted.

The appellant raised a special plea of *lis alibi pendens* requesting a stay of High Court proceedings until litigation between the parties in Israel was finalised. Blignault J dismissed the special plea, hence the present appeal to the SCA. The appeal was upheld with costs and the High Court proceedings stayed, save for proceedings by the respondents other than WOMAG and members of the Sachs family, that is, those respondents who were not involved in the Israeli proceedings.

Wallis JA (Mthiyane AP, Maya, Theron JJA and Van der Merwe AJA concurring) held that a plea of *lis alibi pendens* was based on the proposition that the dispute (*lis*) between the parties was being litigated in the court in which the plea was raised. The policy underlying it was

that there should be a limit to the extent to which the same issue was litigated between the same parties and it was desirable that there be finality in litigation. The courts were also concerned to avoid a situation where different courts would pronounce on the same issue with the risk that they could reach differing conclusions. There were three requirements for a successful reliance on a plea of *lis alibi pendens*, namely:

- The litigation was between the same parties.
- The cause of action was the same.
- The same relief was sought in those actions.

In the instant case, insofar as WOMAG was concerned, all the requirements for a valid plea of *lis alibi pendens* were satisfied, both in respect of its individual claim and in respect of the claim it was pursuing jointly with the Sachs family. The special plea could be rejected only if the court, in the exercise of its discretion, declined to grant a stay.

The position was the same regarding Oren Sachs. Neither WOMAG nor Oren Sachs had advanced adequate reasons for the High Court action not to be stayed as against them. However, that was not so with the other members of the Sachs family. The only sensible way in which to address the problem concerning other members of the Sachs family who were not involved in the Israeli legal proceedings, was for the court also to stay their High Court proceedings, not on the basis of *lis alibi pendens*, but in the exercise of its inherent powers to regulate its own procedures.

Restitution of land rights

When restitution is not feasible: In *Baphiring Community and Others v Tshwaranani Projects CC (formerly Matthys Johannes Uys) and Others* [2013] 4 All SA 292 (SCA) the facts were that in 1971 the appellant, Baphiring Community, was removed from their land that was situated in Koster, North West Province, in terms of racially discriminatory laws. In the instant case the community sought the land back, which land was owned by several commercial farmers and was to be restored to a communal property association created specifically for that purpose.

The Land Claims Court (LCC) held per Mia AJ (Gildenhuys J and Wiechers (assessor) concurring) that restoration was not feasible, with the result that the community was entitled only to equitable redress. In arriving at that conclusion the LCC took into account the fact that there was lack of financial assistance from the state, doing so after hearing extensive expert evidence on the failure of other resettlement projects where the state had not provided adequate institutional and financial support for restoration. The LCC also took into account the huge cost that would result from the state having to restore the land to the appellants. In other words, the LCC held that it would not be in the public interest, and therefore not feasible, to restore the land to the appellants, having regard to the prohibitive cost to the state.

An appeal against the decision of the LCC was upheld by the SCA with no order as to costs. The matter was remitted to the LCC to consider and determine anew the feasibility of restoring the land in question. In particular, the state was required to do a feasibility study and place evidence before the LCC to justify its assertion that it would not be able to fund the cost of the restoration.

Cachalia JA (Shongwe, Majiedt JJA, Van der Merwe and Mbha AJJA concurring) held that it was well established that a claimant for restitution of a land right was entitled to have the land lost through dispossession restored whenever feasible. A court should, therefore, restore the actual land to a claimant unless doing so was inimical to the public interest. Other forms of equitable redress in the form of a grant of alternative state land or payment of compensation could be considered only thereafter.

In the instant case the LCC was correct to consider the cost implications of the restoration because it lay at the heart of a proper assessment feasibility. Those costs would include the cost of expropriating the land from the current owners, resettling the claimants on that land and supporting a sustainable development plan for the resettled community.

The main problem, however, was that evidence presented by the state on those issues was at best inadequate, which meant that the court was hamstrung in making the assessment. After all, a claim for restoration of land was a


claim against the state and not against current landowners. Therefore, the state could not adopt a supine stance, as it did in the instant case, when such claim was made. Before a court could make a non-restoration order it had to be satisfied that doing so was justified by the applicable legal principles and facts. It followed therefore that a non-restoration order granted in the absence of such evidence constituted a material irregularity and vitiated the order made by the LCC.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with adoption of business rescue plan, amendment of particulars of claim, asylum application, building contract dispute resolution, business rescue application, child trafficking, conduct of arbitration proceedings, contempt of court, defamatory Facebook posting, determination of capacity of public school, effect of voluntary surrender, indirect challenge of administrative action, interest on interest, jurisdiction of court over foreign defendant, liability for omission, meaning of administrative action, nature of verifying affidavit, private nature of arbitration proceedings, referral of complaint to Competition Tribunal, restoration of registration of close corporation, review of award of tender and transparency in tender process.



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SOUTH AFRICAN LEGAL FELLOWS PROGRAM

The Cyrus R. Vance Center for International Justice of the New York City Bar is seeking applications from lawyers to participate in the South African Legal Fellows Program. The Legal Fellows Program, which the Vance Center administers in partnership with the Law Society of South Africa, arranges for lawyers from historically disadvantaged backgrounds in South Africa to participate in working fellowships at corporate law firms and corporate legal departments in New York City (and possibly other international financial capitals) for one-year terms.

Participants in the program are called Vance Fellows. The 2013/2014 program year will begin in September 2013.

CRITERIA FOR PARTICIPATION

To be eligible to participate in the Program an individual must

- be a member of a historically disadvantaged group in South Africa;
- have a distinguished academic background;
- be a practising lawyer at a law firm in South Africa and have a minimum of two years of corporate legal practice experience (beyond articles) and a record of having performed high-quality work at a junior level;
- have a record of involvement in and commitment to community or *pro bono* work;
- have strong references; and
- have a demonstrated plan to return to South Africa after the fellowship and to share the skills he or she acquired through the fellowship with others.

REQUIRED SUBMISSIONS

Applicants are requested to provide the following information:

- a curriculum vitae;
- a law school transcript;
- a written statement by a lawyer familiar with the applicant's work describing his or her capacity to work well at the junior level in a commercial transaction; and
- a cover letter that includes
 - (i) an explanation of how the applicant's professional experience to date will contribute to his or her success in New York,
 - (ii) a description of his or her record of community and *pro bono* work; and
 - (iii) an explanation of how participation in the Program will promote his or her further professional development and of how he or she will share the skills he or she acquires in New York with others upon returning to South Africa.

Fellows receive transportation and initial housing expenses and an annual fellowship stipend of U.S. \$115,000 along with health benefits, all provided by the firms and/or legal departments at which they are placed. After the initial two-week period fellows pay their own housing expenses.

Lawyers who wish to apply should send the required materials by email to both Kris Devan at the Law Society at kris@LSSA.org.za, and Valerie Jean-Charles at the Vance Center at vjean-charles@nycbar.org.

The deadline for submission is 14 March, 2014.

Candidates who are selected for interviews will be notified in mid-April, with interviews to take place in Johannesburg on 10-11 May 2014.





NEW LEGISLATION

Legislation published from
30 October 2013 – 6 December 2013

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

BILLS INTRODUCED

Rental Housing Amendment Bill B56 of 2013.
Public Administration Management Bill B55 of 2013.
Property Valuation Bill B54 of 2013
Judicial Matters Third Amendment Bill B53 of 2013.
State Attorney Amendment Bill B52 of 2013.
Women Empowerment and Gender Equality Bill B50 of 2013.
Infrastructure Development Bill B49 of 2013.
National Credit Amendment Bill B47 of 2013.

PROMULGATION OF ACTS

Protection of Personal Information Act 4 of 2013. *Commencement:* To be proclaimed. GenN912 GG37067/26-11-2013.
Commission on Gender Equality Amendment Act 17 of 2013. *Commencement:* 26 November 2013. GenN913 GG37068/26-11-2013.
Electoral Amendment Act 18 of 2013. *Commencement:* 26 November 2013. GenN914 GG37069/26-11-2013.
Rates and Monetary Amounts and Amendment of Revenue Laws Act 23 of 2013. *Commencement:* 2 December 2013. GN933 GG37104/2-12-2013.
Division of Revenue Amendment Act 29 of 2013. *Commencement:* 2 December 2013. GN934 GG37105/2-12-2013.

COMMENCEMENT OF ACTS

Income Tax Act 58 of 1962, s 12L. *Commencement:* 1 November 2013. GN855 GG37019/8-11-2013.
Sheriffs Act 90 of 1986, ss 1, 4(i), 5 (to the extent that it inserts s 6B in the Act), 6 and 10-15. *Commencement:* 1 November 2013. Proc R47 GG36985/1-11-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Administrative Adjudication of Road Traffic Offences Act 46 of 1998

Amendment of Administrative Adjudication of Road Traffic Offences Regulations, 2008. GN R838 GG36991/1-11-2013.

Administrative Adjudication of Road Traffic Offences Regulations, 2013. GN R869 GG37025/14-11-2013.

Agricultural Pests Act 36 of 1983

Control measures relating to honey-bees. GN R858 GG37015/15-11-2013.

Agricultural Product Standards Act 119 of 1990

Regulations relating to the grading, packing and marking of avocados intended for sale in the Republic of South Africa. GN R859 GG37015/15-11-2013.

Service fee in respect of abattoirs that participate in the classification and marking of meat. GenN1183 GG37092/6-12-2013.

Architectural Profession Act 44 of 2000

Rules for the procedure of nomination of South African Council for the Architectural Profession council members. BN223 GG36987/1-11-2013.

Credit Rating Services Act 24 of 2012

Financial Services Board: Credit rating agency rules. BN228 GG37014/15-11-2013.

Electoral Act 73 of 1998

Amendment to the regulations concerning the submission of the list of candidates, 2004. GN R969 GG37133/6-12-2013.

Amendment to the regulations concerning the registration of voters, 1998. GN R970 GG37134/6-12-2013.

Electronic Communications Act 36 of 2005

Health content policy framework for television broadcasting in South Africa. GN830 GG36973/1-11-2013.

Engineering Profession Act 46 of 2000

Guideline for services and processes for estimating fees for persons registered in

terms of the Act. BN243 GG37102/4-12-2013.

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Notice for prohibition of import, export, possession, acquisition, sale, use and disposal of agricultural remedies containing certain substances. GenN1116 GG37037/22-11-2013.

Financial Advisory and Intermediary Services Act 37 of 2002

Determination of fees payable to the Registrar of Financial Services Providers. GN R892 GG37052/20-11-2013.

Housing Consumers Protection Measures Act 95 of 1998

National Home Builders Registration Council (NHBC): Amendment to rules regarding NHBC fees. BN227 GG37014/15-11-2013.

Judicial Service Commission Act 9 of 1994

Tariff of allowance payable to a person appointed in terms of s 23(2) of the Act. GN R894 GG37055/22-11-2013.

Justice of the Peace and Commissioners of Oaths Act 16 of 1963

Designation of commissioners of oaths in terms of s 6 of the Act: Registered government auditors. GN909 GG37063/29-11-2013.

Liquor Act 59 of 2003

African Nations Championship (CHAN) 2014, liquor regulations. GN R927 GG37090/2-12-2013.

Amendment regulations. GN R928 GG37091/2-12-2013.

National liquor norms and standards. GenN1194 GG37110/4-12-2013.

Long-Term Insurance Act 52 of 1998

Maximum amount contemplated in the definition of 'assistance policy': R30 000. GN868 GG37022/11-11-2013.

Marine Living Resources Act 18 of 1998

Amendment of regulations related to recreational fishing permits to engage in fishing. GN R873 GG37036/15-11-2013.

Regulations prohibiting fishing at night in the estuary of the Breede River. GN R886 GG37047/18-11-2013.

Medicines and Related Substances Act 101 of 1965

Amendment of Regulations relating to a transparent pricing system for medicines and scheduled substances. GenN1096 GG37011/8-11-2013.

Medicines that have been declared undesirable. GN916 GG37075/27-11-2013.

General regulations made in terms of the Medicines and Related Substances Act. GN R870 GG37032/15-11-2013.

National Council of Societies for the Prevention of Cruelty to Animals

Amendment of rules. BN249 GG37092/6-12-2013.

National Environmental Management Act 107 of 1998

Amendments to Environmental Impact Assessment Regulations Listing Notice 1 of 2010. GN R922 GG37084/29-11-2013.

Amendment to Environmental Impact Assessment Regulations Listing Notice 2 of 2010. GN R923 GG37085/29-11-2013.

National standards for the extraction, flaring or recovery of landfill gas. GN924 GG37086/29-11-2013.

National standards for the scrapping or recovery of motor vehicles. GN925 GG37087/29-11-2013.

National norms and standards for the storage of waste. GN926 GG37088/29-11-2013.

National Environmental Management: Air Quality Act 39 of 2004

Declaration of a small boiler as a controlled emitter and establishment of emission standards. GN831 GG36973/1-11-2013.

National dust control regulations. GN R827 GG36974/1-11-2013.

List of activities that result in atmospheric emissions, which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. GN893 GG37054/22-11-2013.

Amendment to the 2007 National Framework for Air Quality Management in the Republic of South Africa. GN919 GG37078/29-11-2013.

National Environmental Management: Waste Act 59 of 2008

List of waste management activities that have, or are likely to have, a detrimental effect on the environment. GN921 GG37083/29-11-2013.

National Forests Act 84 of 1998

List of protected tree species under the Act. GN877 GG37037/22-11-2013.

National Road Traffic Act 93 of 1996

Amendment of the National Road Traffic Regulations. GN R890 GG37048/19-11-2013.

National Veld and Forest Fire Act 101 of 1998

Publication of the fire danger rating system. GenN1099 GG37014/15-11-2013.

Pharmacy Act 53 of 1974

Fees payable to the council under the Act. BN214 GG36982/30-10-2013

Postal Services Act 124 of 1998

Price Cap Regulations for Reserved Postal Services. GenN1095 GG37010/8-11-2013.

Project and Construction Management Professions Act 48 of 2000

Rules relating to the payment of annual fees for registered persons. BN 151 and 152 GG37109/4-12-2013.

Promotion of National Unity and Reconciliation Act 34 of 1995

Regulations relating to community rehabilitation. GN929 GG37097/29-11-2013.

Property Valuers Profession Act 47 of 2000

Amendment of the rules for the property valuers profession, 2008. BN235 GG37062/29-11-2013.

Public Finance Management Act 1 of 1999

Amendment to treasury regulations. GN R874 GG37042/15-11-2013.

The Refugees Act 130 of 1998

The Refugee Appeal Board Rules, 2013. GN955 GG37122/6-12-2013.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Melmoth. GN910 GG37062/29-11-2013.

South African National Roads Agency Limited and National Roads Act 7 of 1998

Gauteng Freeway Improvement Project, Toll roads: Publication of tolls. GN R887 GG37038/19-11-2013.

South African National Roads Agency SOC Limited: Gauteng Freeway Improvement Project, Toll roads: Conditions for payment of e-tolls. GN R888 GG37038/19-11-2013.

South African National Roads Agency SOC Limited: Gauteng Freeway Improvement Project, Toll roads: Exemption from the payment of toll: Certain public transport services and emergency vehicles. GN R889 GG37038/19-11-2013.

National Road 17: Springs and Ermelo toll road: Publication of date and time from which toll tariffs will become payable. GN950 GG37111/4-12-2013.

South African Schools Act 84 of 1996

Regulations relating to minimum uniform norms and standards for public school infrastructure. GN R920 GG37081/29-11-2013.

Draft legislation

Proposed directive on application of the standards of generally recognised accounting practice by public further education and training colleges in terms of the Auditing Profession Act 26 of 2005. BN211 GG36973/1-11-2013.

Proposed amendments to the Johannesburg Stock Exchange (JSE) listing requirements. BN213 GG36973/1-11-2013, BN233 and BN234 GG37061/29-11-2013 and BN236 GG37070/26-11-2013.

Promotion and Protection of Investment Bill for comment. GenN1087 GG36995/1-11-2013.

Draft amendment to treasury regulations in terms of the Public Finance Management Act 1 of 1999. GenN1093 GG37008/6-11-2013.

Draft regulations in terms of the Planning Profession Act 36 of 2002. GenN1094 GG37009/8-11-2013 and GenN1111 GG37033/15-11-2013.

Proposed amendment to Strate rules in terms of the Financial Services Markets Act 19 of 2012. BN225 GG37014/15-11-2013.

Proposed best practice project assessment system: Best practice: Minimum requirements for engaging subcontractors on construction works contracts in terms of the Construction Industry Development Board Act 38 of 2000. BN226 GG37014/15-11-2013.

Children's Second Amendment Bill, 2013 for comment. GenN1105 GG37014/15-11-2013.

Children's Amendment Bill, 2013 for comment. GenN1106 GG37014/15-11-2013.

Draft Mine Health and Safety Bill, 2013. GenN1103 GG37027/15-11-2013.

Proposed changes to the magisterial districts for Gauteng and North West province. GenN1104 GG37028/13-11-2013.

Proposed development of the regulations relating to the grading, packing and marking of rice intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN1114 GG37037/22-11-2013.

Amendment Cross Border Road Transport Act, Regulations, 1998 in terms of the Cross Border Road Transport Act 4 of 1998 for comment. GenN1112 GG37043/19-11-2013.

Proposed levies on medical schemes issued in terms of s 3(a) of the Council for Medical Schemes Levies Act 58 of 2000. GenN1133 GG37056/22-11-2013.

Draft amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GenN1136 GG37059/22-11-2013.

Amendment of the National Road Traffic Regulations in terms of the National Road Traffic Act 93 of 1996 for comment. GN R917 GG37076/27-11-2013.

Proposed amendments to the JSE derivatives rules and the JSE interest rate derivatives rules. BN239 GG37079/27-11-2013 and BN240 GG37080/27-11-2013.

Employment law update



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Legal representation at the CCMA

In *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of Transvaal)* [2013] 11 BLLR 1057 (SCA) the Supreme Court of Appeal (SCA) considered the constitutionality of r 25(1)(c) of the rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) (the rule) that limits the right of appearance by legal practitioners in CCMA arbitrations concerning dismissals for misconduct or incapacity. In terms of this rule commissioners may exercise their discretion and permit legal representation at an arbitration on specified grounds.

The Law Society of the Northern Provinces (LSNP) applied to the High Court to have this rule declared unconstitutional as it was alleged that the rule unfairly discriminated against legal practitioners and that it was in contravention of the right to equality as guaranteed in s 9(3) of the Constitution and the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Furthermore, it was alleged that the rule contravenes ss 22 and 34 of the Constitution, which respectively guarantees the right of every person to choose his or her trade, occupation and profession freely and the right that every person has to have any dispute resolved in a fair public hearing before a court or another independent and impartial tribunal or forum.

This rule was declared unconstitutional and invalid by Tuchten J in the High Court (*Law Society of the Northern Provinces v Minister of Labour and Others* [2013] BLLR 105 (GNP)), but the declaration of invalidity was suspended for

36 months to enable the CCMA to promulgate a new rule that did not unfairly discriminate against legal practitioners.

In terms of the rule, legal practitioners are excluded entirely from CCMA conciliation proceedings. However, legal representation is permitted in all arbitration proceedings, except those concerning dismissals for misconduct or incapacity. This exclusion, however, is not absolute as legal representation is permitted where all parties and the commissioner agree or where the commissioner is satisfied that it would be unreasonable to expect a party to proceed without legal representation after considering factors such as the complexity of the matter and the comparative ability of the parties or their representatives to deal with the dispute.

Tuchten J based his High Court finding that the rule was unconstitutional on the principle of legality and the perceived inconsistency between the rule and the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which requires administrative action to be rational. Furthermore, s 3 of PAJA permits legal representation in serious cases and Tuchten J was of the view that dismissal cases are generally always serious in nature.

The CCMA had argued that it was necessary to exercise this discretion because the involvement of legal practitioners often leads to obfuscation, unnecessary complication of issues and time wasting. However, Tuchten J rejected the CCMA's evidence and found that it was impossible for a commissioner to decide in advance whether matters are complex or not. Tuchten J was of the view that, in the majority of cases, legal practitioners actually aided the efficient and speedy resolution of disputes. He concluded that the CCMA had not established that the limitation on the right to legal repre-

sentation was reasonable and justifiable and the rule was therefore unconstitutional.

The decision of the High Court was taken on appeal to the SCA. The SCA held that Tuchten J had not considered the impact of the discretion afforded to commissioners by the rule. In this regard, a litigant is able to make a request for legal representation and the commissioner has considerable scope in exercising his or her discretion to determine whether legal representation should be permitted. Litigants are furthermore entitled to legal representation should the matter proceed to the Labour Court. Thus, it was held by the SCA that there was sufficient flexibility to allow for legal representation in deserving cases.

The SCA considered the historical background to the rule and the fact that the parties to the National Economic Development and Labour Council negotiations agreed that legal representation in arbitration proceedings concerning the fairness of dismissals for misconduct and incapacity should be permitted only when the circumstances justify it. This was because international research showed that South Africa's system of adjudication of unfair dismissals is one of the most lengthy and expensive in the world and legal practitioners were regarded as making the process more legalistic and expensive.

The SCA considered the fact that the CCMA plays an important role in resolving labour disputes and that it should resolve such matters quickly and fairly with the minimum of legal formalities. The SCA noted that the CCMA is not a court. Arbitration proceedings are administrative action and administrative tribunals are accordingly required to act consistently with PAJA. It was held that the right to fair and rational administra-

tive action for litigants at the CCMA does not automatically entitle them to a right to legal representation. In terms of the common law there is a right to a procedurally fair hearing in civil and administrative matters, but neither the constitutional right to fair administrative action nor PAJA confers an absolute right to legal representation.

The CCMA led evidence that 80% of all matters referred to the CCMA relate to dismissals for misconduct. It was held that the reason why disputes over dismissals for misconduct and incapacity were carved out of the right to automatic legal representation is because they constitute the majority of disputes referred to the CCMA. The CCMA argued that the reason for limiting legal representation is not the gravity of the consequences of the dismissal for the employee, but the fact that these dismissals usually involve one employee and not a whole workforce.

On appeal, the SCA found that the right to legal representation exists for

the benefit and protection of litigants and the LSNP was not acting in the interests of litigants who use the CCMA, but rather was concerned with the fact that the rule denied its members work. The SCA found that the Constitution does not provide that lawyers have a right to receive business.

On the issue of the rationality of the rule, the SCA found that the fact that the rule distinguishes between different kinds of cases does not necessarily render the rule irrational. It was found that there was a rational historical basis for the rule excluding legal representation in disputes involving unfair dismissals for incapacity and misconduct since the majority of cases referred to the CCMA involve these categories of dismissals. There was accordingly a rational decision for the legislature to exclude legal representation from these categories of dismissals.

It was furthermore found that the rule did not infringe the legal practitioners' rights to dignity that is inextricably

linked to the right to equality. It was further found by the SCA that the rule did not infringe the s 22 right to freely choose a profession and practise the chosen profession, since the rule does not regulate entry into the profession or affect the continuing choice of practitioners to remain in the profession. It merely impacts on a litigant's right to be represented in a particular forum. It was furthermore found that the rule did not contravene s 34 of the Constitution as there is no unqualified constitutional right to legal representation before administrative tribunals.

The SCA upheld the appeal with costs. The Constitutional Court subsequently dismissed the application for leave to appeal the SCA's decision with costs on the basis that the application bears no prospects of success.

• See also 2013 (Dec) DR 8.



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The court's inquiry on review

Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others (LAC) (unreported case no JA 2/2012, 4-11-2013) (Waglay JP)

The employee, Moreki, was employed by the appellant as a senior sampler whose duties included locating the exact position of a stope face from which samples would be extracted and tested to determine the suitability of mining at that specific location.

It was found that the location of a certain stope face, as provided by Moreki, was 11 metres off its actual position, which potentially could have cost the appellant R 1,2 million had it relied on the data Moreki provided.

He was charged and dismissed for 'serious neglect of duty' and failure to work according to an acceptable standard. Aggrieved by his dismissal, Moreki referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At arbitration before the second respondent, Moreki was found guilty of poor work performance, but on the basis that his conduct could be corrected and improved, he was reinstated without back-pay.

On review the Labour Court, per Fourie AJ, dismissed an application to set aside the award for the following reasons –

- the fact that the arbitrator miscategorised the reason for dismissal as poor performance instead of misconduct was immaterial to the overall findings and not unreasonable;
- the finding that the dismissal was substantively unfair passed the test of reasonableness; and
- the grounds of review attacked the result of the arbitrator's findings.

With leave to appeal the appellant approached the LAC.

The appellant began by arguing that the court *a quo's* third reason for dismissing its application was incorrect. On review, according to the appellant, it sought to challenge the process of how the commissioner arrived at his decision rather than the result of the commissioner's findings, which was what the Labour Court found. Following this point and in continuing its attack on the pro-

cess of how the commissioner arrived at his findings, the appellant further argued that the Labour Court erred in that the correct categorisation of Moreki's dismissal was key when determining whether dismissal, as a sanction, was fair taking into account the totality of the circumstances.

In light of the recent developments concerning process-related grounds of review, the LAC began by examining the test the Labour Court adopts when reviewing statutory awards.

To start with, the LAC stated that the *Sidumo* test (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC)) does not postulate a simple evaluation of whether the arbitrator's findings were reasonable given the evidence that was presented at arbitration. The Constitutional Court in the *Sidumo* case held that the Labour Court must continue to hear review applications on the grounds listed in s 145 of the Labour Relations Act 66 of 1995, but, in doing so, the court must be alive to the fact that the constitutional standard of reasonableness is suffused in the application of s 145. This means that, on review, the court's inquiry does not end once it establishes the arbitrator committed a gross irregularity or misconceived the nature of the inquiry, but further inquires as to whether or not the arbitrator's findings nevertheless falls within the band of decisions a reasonable decision-maker could arrive at. Put

differently, the court must also inquire whether or not the arbitrator's misconduct renders the award unreasonable, taking into account the totality of the evidence that was before the arbitrator.

On this basis the LAC set out the following questions a reviewing court should determine when dealing with an argument that the arbitrator committed a gross irregularity:

- In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process employed by the arbitrator give the parties a full opportunity to have their say in respect of the dispute?
- Did the arbitrator identify the dispute he or she was required to arbitrate?
- Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- Did he or she deal with the substantial merits of the dispute?
- Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

While the LAC acknowledged that an arbitrator's failure to take into account material facts or to follow proper process could render an unreasonable outcome, these issues should not be examined in isolation and should be considered against a broad-based evaluation of the totality of evidence presented.

In applying this test to the facts before it, the LAC found that the arbitrator

misconceived the nature of the inquiry – that being to ascertain the fairness of a dismissal for misconduct and not, as the arbitrator found, the fairness of a dismissal relating to poor work performance.

In highlighting the distinction between misconduct and poor work performance, Waglay JP held that the requirements for proving the fairness of a dismissal relating to misconduct and poor performance differ. In dismissals relating to misconduct the employer must establish that the employee, without proper justification, breached a workplace rule that he or she was, or reasonably should have been aware of. In dismissals relating to poor performance, the employer must generally establish a certain standard that, objectively speaking, is considered reasonable and which standard the employee did not meet despite the employer's efforts to assist the employee.

Returning to the merits of the case, the LAC noted that the evidence presented at arbitration centred around Moreki's failure to perform duties that he had correctly performed in the past, rather than him being unable to meet a standard that was required of him. The evidence led therefore related to Moreki's negligence, as opposed to his poor work performance.

Having arrived at this conclusion, the LAC, in line with the aforementioned inquiry, further considered the reasonable-

ness of the decision by asking whether or not the decision was reasonable had the arbitrator correctly categorised the nature of the dispute. Taking into account the fact that Moreki committed an act of serious misconduct whereby his years of service and seniority served as aggravating factors, together with the potential financial impact his conduct had on the appellant, the LAC found the decision reached by the arbitrator was not one that a reasonable decision-maker could have arrived at.

The appeal was upheld and the court *a quo's* order replaced with a finding that the dismissal was substantively fair. No order as to costs was made.

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

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The Law of Evidence in South Africa

By Adrian Bellengère & Robin Palmer (Eds)

Cape Town: Oxford University Press

(2013) 1st edition

Price: R 429.95 (incl VAT)

494 pages (soft cover)

For many decades The South African Law of Evidence (formally Hoffmann and Zeffertt) (Durban: LexisNexis/Butterworths) took pride of place in libraries of legal practitioners and students alike. It is refreshing, and long overdue, that a new reference book on the law of evidence in South Africa has been published.

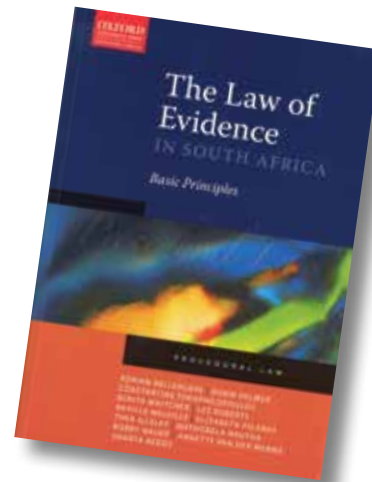
The 12 esteemed authors who are legal academics and practitioners, ably supported by researchers from the University of Kwa-Zulu Natal, found a way to succinctly and effectively provide a comprehensive and up-to-date work for the legal fraternity.

The authors have cleverly combined their expertise to clarify a subject that is extremely complex to understand for both students and practitioners. The law of evidence is extensive. However, this textbook has been created in such a way that the reader is able to navigate through it with ease.

The work has been separated into nine discernible parts. The parts, in turn, have been divided into chapters. Most chapters begin with succinct introductions directing the reader to the subject matter, followed up by a summary of the essence of the chapter. This is a very useful, time-saving, and innovative tool for those that do not have sufficient time to read the chapter in depth. The font and layout are simple and makes the reading easy.

The content covers –

- the brief history and sources of the South African law of evidence;
- the impact of the Constitution;
- basic concepts;



- kinds of evidence;
- methods of presentation of evidence;
- rules of trial;
- evaluation of evidence;
- rules for excluding evidence;
- special evidentiary procedures; as well as
- contemporary issues that have previously not been explored, such as scientific truth verification that encompasses DNA testing, blood typing, fingerprints, body prints, polygraphs, voice stress analysis, digital and computer based forensic issues, and brain fingerprinting.

The notable features of the book include key terms and concepts, discussion boxes, diagrams, chapter in essence, glossary, and bibliography. The references are sourced from recognised authorities only and well-known case law and the footnotes make for easier researching should the reader wish to explore the topic or seek further explanation.

Although the authors have directed this reference work to students, I highly recommend that this book be purchased and regularly used by students and legal practitioners alike, to keep them abreast of the developments in this area that are often ignored or misunderstood in practice.

Anwar Bhayat is an attorney at AY Bhayat in Johannesburg.



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