

JULY 2014

18 the new 21 –

The retrospective application of a statute

Destination SA:

The preferred legal outsourcing destination

The *sub judice* rule and the Oscar Pistorius case

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OR
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It may come as a surprise that the Legal Process Outsourcing (LPO) model is, in fact, taking off among local enterprises as an alternative to traditional legal service frameworks. What does this mean for the wider legal services market in South Africa? Richard English discusses LPO and why South Africa is an ideal outsourcing destination.

EDITOR:

Mapula Thebe

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

PRODUCTION EDITOR:

Kathleen Kriel – BTech
(Journ) (TUT)

NEWS EDITOR:

Nomfundo Manyathi-Jele
NDip Journ (DUT)
BTech (Journ)(TUT)

SUB-EDITOR:

Kevin O' Reilly – MA (NMMU)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Danie Olivier (Chairperson), Peter Horn,
Mohamed Randera, Lutendo Sigogo

ISSUE EDITOR:

Barbara Whittle

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

DE REBUS ONLINE: www.derebus.org.za

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Contact: Ian Wright • Tel (011) 305 7340 • Fax (011) 241 3040 Cell:
082 574 6979 • E-mail: ianw@ince.co.za

Classifieds supplement: Contact: Kathleen Kriel

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

ACCOUNT INQUIRIES: David Madonsela

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

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ATTORNEYS' MAILING LIST INQUIRIES: Gail Mason

Tel (012) 441 4629 E-mail: gail@lssalead.org.za

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NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

Tel: (012) 366 8800 • E-mail: david@lssa.org.za



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The Legal Practice Bill: What will change for attorneys?

To many attorneys, the Legal Practice Bill – which at the time of writing was still awaiting assent by the President – has been the subject of political and academic debate for a number of years. These discussions do not appear to have filtered down to the average attorney, whose focus has been on running his or her practice on the basis that not much will change. Yes, there will be one national regulatory body for all legal practitioners – attorneys, advocates who take referral instructions, advocates who will take instructions direct from the public and candidate legal practitioners – and there will be a Legal Services Ombud to whom members of the public can turn when they are dissatisfied with the decisions made by the Legal Practice Council.

The focus of the Council will be on the public interest and greater transparency, with the inclusion of non-legal practitioners as Council members. In addition, legal practitioners will elect attorney and advocate representatives to the Council.

As regards practitioners themselves, the Bill provides that any person who has been admitted by the High Court and authorised to be enrolled as an advocate, attorney, conveyancer or notary when the Act comes into effect, will be regarded as having been unconditionally admitted to practice and authorised to be enrolled as a legal practitioner under the new legislation.

Attorneys are urged to ensure that their details and contact information are correct and kept up to date at their provincial law societies to ensure that the correct information is transferred to the new Council's national database.

What else will change?

Legal practitioners will be able to practise and have right of appearance in any court across the country, with attorneys wishing to appear in the High Court, Supreme Court of Appeal or Constitutional Court having to comply with certain requirements.

A legal practitioner who has been enrolled as an attorney or advocate may convert his or her enrolment from attorney to advocate and *vice versa*. The aim of this provision is to provide for an easier mechanism for legal practitioners to change direction in their careers within the profession. A similar

conversion of enrolment is provided for in the case of advocates who practise with Fidelity Fund certificates and who wish to practise without a Fidelity Fund certificate and *vice versa*.

Legal practitioners – like other professionals – will have to do compulsory post-qualification continuing professional development.

The concept of community service has been introduced and will be refined in the rules to be drafted by the transitional National Forum. This can include a minimum period of recurring service by legal practitioners on which continued enrolment is dependent – or, simply put, mandatory *pro bono*.

The Council will draw up a code of conduct which, in support of the principle of transparency, will first be published in the *Government Gazette* for public comment before being issued to legal practitioners.

Similarly, in the interests of transparency, disciplinary committees will include lay persons. Proceedings will be open to the public (and by inference, the media) and the particulars of all disciplinary hearings will be published on the Council's website.

The Ombud can monitor the investigation of complaints, the conduct of disciplinary committees and the disciplinary appeal tribunal. The Bill notes that the clauses regarding disciplinary matters are transformational as the current regime does not provide for the oversight of disciplinary matters relating to legal practitioners by an independent body, except through a court process. The clauses relating to the oversight role of the Ombud provide for greater accountability on the part of the legal profession to the public.

And then there is clause 35, which changes the landscape as regards legal fees. The intentions of the Justice Portfolio Committee in including the clause close to the end of its nine-month deliberations on the Bill, were noble and driven by public dissatisfaction with what is perceived as excessive fees charged by legal practitioners. Clause 35 caught the profession off guard. It was left with no time or scope for comment or input.

Briefly, clause 35 provides that, until an investigation by the South African Law Reform Commission has been completed during the two-year transitional period, fees for legal services

(litigious and non-litigious) must be in accordance with tariffs determined by the Rules Board for Courts of Law. The Rules Board must take into account the importance, significance and complexity of the service rendered, the seniority and experience of the legal practitioner concerned, the volume of work done and the financial implications of the matter must be taken into account when the fees are determined. Among other requirements, a legal practitioner, when first receiving instructions from a client, will have to provide the client with information regarding the envisaged costs of the legal services in question and the processes involved.

Exactly how this will work in practice is unclear. Practitioners have indicated that the system borders on the draconian and goes against the concept of a free-market economy. Also, the question has been raised as to how the Rules Board plans to accommodate the vastly different cost structures of small plateland (rural) firms as compared to the resource-hungry large city firms. The Law Society of South Africa (LSSA) is urged to engage with the Rules Board as a matter of urgency to seek clarity on the way forward.

As with any Curate's Egg – some parts of the Bill can be interpreted as good, and others as less welcome, but in the eyes of many, necessary. However, the devil, as always, will be in the detail of the rules and regulations to be negotiated and drafted at the transitional National Forum. This is where some 'bad eggs' will have to be broken, some 'good eggs' preserved, 'new eggs' hatched and nurtured, and communications unscrambled to ensure the best possible outcome for the public and the profession.

A great responsibility rests on the shoulders of the eight attorneys nominated by the LSSA to the National Forum as the 'negotiating team' on behalf of the attorneys' profession.

What do you think will be the impact of the Legal Practice Bill on you as a practitioner? Tell us: derebus@derebus.org.za

You can access the Bill on www.LSSA.org.za

LETTERS

TO THE EDITOR

PO Box 36626, Menlo Park 0102 • Docex 82, Pretoria • E-mail: derebus@derebus.org.za • Fax (012) 362 0969

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.

Increased opportunities for attorneys to do *pro bono* work: Options and flexibility to aid those in need

ProBono.Org strongly supports the recent announcement by Legal Aid South Africa that they will be launching a national *pro bono* scheme, as well as the recent press release issued by the Law Society of South Africa (LSSA) encouraging attorneys to contact their local law societies to be assigned *pro bono* work.

It is opportune in the context of these two developments by the organised legal profession, to distinguish the work of ProBono.Org from that of Legal Aid South Africa and the law societies by highlighting its *modus operandi*.

Legal Aid South Africa employs thousands of lawyers in hundreds of offices across the country, providing free legal aid for mainly criminal offenders. The announcement of its newly developed *pro bono* scheme allows lawyers who are in private practice to offer their time for *pro bono* cases, particularly civil matters.

The LSSA, through the statutory pro-

vincial law societies, instituted a scheme that requires practising attorneys to work a minimum of 24 *pro bono* legal hours per year. Attorneys can contact their provincial law societies, which will refer *pro bono* matters to them.

ProBono.Org has been running a slightly different model of *pro bono* legal work since 2006.

It was the first organisation to develop this particular model in South Africa – which has its origins in the United States civil rights movements in the 1960s, and has gained traction in Australia and Southeast Asia – and ProBono.Org continues to be the only organisation in the country that functions purely as a legal clearing house for *pro bono* cases.

Unlike Legal Aid South Africa that is state funded, and the law societies which are subscription funded, ProBono.Org is privately funded (mainly by large international donors) and relies on voluntarism. The model offers lawyers a range of choices regarding the *pro bono* legal work they want to do. This model can be distinguished from a model where cases are assigned to attorneys, regardless of the nature of the case or the skill or

time constraints of the attorney. Where Legal Aid South Africa and the law society-initiated *pro bono* cases serve only individuals, ProBono.Org also serves the interests of non-governmental organisations (NGOs), small, medium and micro-sized enterprises (SMME), start-ups and community-based organisations.

ProBono.Org is a recognised structure with the KwaZulu-Natal Law Society and the Law Society of the Northern Provinces – which means that it reports any *pro bono* hours done by attorneys to the relevant law societies for recognition. ProBono.Org also runs a range of specialist clinics, from housing law and family law clinics, to refugee and consumer law, giving attorneys the opportunity to staff these legal clinics and provide consultation and advice for up to 90 minutes per client.

Partnering with ProBono.Org gives attorneys the opportunity to give back to the community in a flexible, yet structured manner, allowing them a range of projects, clinics and opportunities and a choice of cases. Additionally, it provides free education on specific areas of the law, and equips volunteer attorneys to

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assist in *pro bono* matters that they may not have expertise in, but are interested in exploring.

Many attorneys do not know that by providing legal education, for example to community organisations (such as Families South Africa (FAMSA)), they may also be given recognition for *pro bono* hours.

ProBono.Org succeeds and thrives because of its incredibly simple user-friendly process for attorneys. Cases that have been screened by ProBono.Org are e-mailed out to the database of attorneys (or advocates in certain situations), according to their speciality, and the lawyers volunteer to take on cases of their choice rather than be randomly assigned matters. Almost all cases sent out in this manner, are taken on by lawyers in private practice. This incredible response has been heartening, indicating as it does, how committed the legal profession is becoming to offering up its time to help those who would otherwise not be able to afford this expert service. ProBono.Org has nothing but praise for these attorneys and advocates for their *pro bono* efforts. It works on a continual

basis to attract new legal professionals to join its panel of volunteers, and offers free legal workshops to lawyers on various subjects connected to its cases. In this way, the group of *pro bono* attorneys and advocates continues to grow.

ProBono.Org has been operating for eight years, building a highly committed network of attorneys and advocates to do *pro bono* work for its clients – people, communities and non-profits that cannot afford private legal fees. In 2013 it was able to open over 7 000 client files indicating a massive increase in the service it offers, as in 2007, the first year of operation, it opened only 150 files.

Erica Emdon,

Director, ProBono.Org

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Any queries and correspondence should be addressed to:
The editor, *De Rebus*, PO Box 36626, Menlo Park 0102
Tel: 012 366 8800, Fax: 012 362 0969, Email: derebus@derebus.org.za

New justice ministry announced

The Department of Justice and Constitutional Development has been merged with the Correctional Services department to form the Department of Justice and Correctional Services. President Jacob Zuma said that this move was necessary to 'improve efficiency in the criminal justice system'.

The announcement was made in May when President Zuma announced the new members of the national executive who have been tasked with improving and speeding up the implementation of policies and programmes.

In his speech, President Zuma explained that some of the departments had been reconfigured while others were expanded in order to improve capacity.

Speaking on the Department of Justice and Correctional Services, President Zuma said that the new justice minister was Michael Masutha, adding that the department would have two deputies, namely, the current deputy minister, John Jeffery, who would be responsible for the justice and constitutional development component and Thabang Makwetla, responsible for the correctional services portfolio.

According to the South Africa Government Online, Mr Masutha did a BLUR at the then University of the North (now the University of Limpopo) from 1985 to 1988 and obtained an LLB degree from the University of the Witwatersrand in 1989. He was admitted as an advocate of the High Court in 1995.

Mr Masutha was the Deputy Minister of Science and Technology from 9 July 2013 until the May 2014 elections and has been a member of parliament for the African National Congress since 1999.

Mr Masutha served on a number of parliamentary committees including Justice and Constitutional Development; Social Development; Auditor General Rules, and Constitutional Review.

The Minister was born with a visual impairment and went to the Siloe School for the Blind in Tzaneen, Limpopo from which he matriculated in 1984.



The Parliament Building in Cape Town.

Mr Jeffery continues in his portfolio as Deputy Minister for Justice and Constitutional Development to which he was first appointed in July 2013. He holds the BA and LLB degrees as well as a post-graduate diploma in environmental law from the University of KwaZulu-Natal.

Mr Jeffery commenced his articles in 1993 at Cheadle Thompson & Haysom's (CTH) Pietermaritzburg office. These were later transferred to Von Klemperer & Davis in Pietermaritzburg when the CTH office in Pietermaritzburg closed. Mr Jeffery served articles from 1993 to 1995 and was admitted as an attorney in December 1995.

Mr Jeffery was a member of the KwaZulu-Natal provincial legislature from

1994 to 1999. He chaired the Environment and Conservation Portfolio Committee and was also a member of the Economic Affairs and the Safety and Security Portfolio Committee. He also led the African National Congress component of the Constitutional Committee in the provincial legislature, which was tasked with drafting a provincial constitution for KwaZulu-Natal.

The Law Society of South Africa (LSSA) congratulated Minister Masutha on his appointment. In a press release the Co-chairpersons of the LSSA Etienne Barnard and Max Boqwana said: The LSSA offers its support to Minister Masutha and his deputies, and looks forward to an early meeting with him in order to

discuss various issues affecting the legal profession and its service to the public generally; but in particular the LSSA wishes to expedite discussions around setting an agenda for the implementation of the transitional National Forum envisaged in the Legal Practice Bill. Although the Bill is awaiting assent by the President, the LSSA believes that much of the preparatory work can be initiated to start implementing the new legal dispensation as envisaged in the Bill.'

The National Association of Democratic Lawyers (Nadel) welcomed the new appointments. In a press release, Nadel's publicity secretary, Gcina Malindi SC said that both the Minister and Mr Jeffery have served diligently and competently in the Portfolio Committee on Justice and Constitutional Development in their many years of service in the National Assembly. He added that Nadel was satisfied that the new combined department would be able to address all matters related to justice.

Mr Malindi stated: 'We further welcome the President's announcement that this period of the fifth term of the ANC led government will usher in a radical phase of socio-economic transformation. This signals an important shift from the side of government to be pro-active in the realisation of socio-economic rights rather than being reactive to the many court challenges of the past 20 years of democracy where government was ordered by the courts to afford these rights to many communities.'

The Black Lawyers Association (BLA) also welcomed the appointments. Its president, Busani Mabunda, said that Minister Masutha's background was

'firmly rooted in the struggle for human rights. We believe that he will lead the department with great efficiency, zeal and dedication.' Mr Mabunda added: 'We believe that Minister Masutha will continue to champion people's cause in his new position. Minister Masutha proved his worth in the debates he participated in as a member of the Portfolio Committee on Justice and Constitutional Development. We count on his capabilities and believe that he will take forth from where his predecessors left and he will strive to ensure that the Legal Practice Bill gets signed into law without further delay.'

Other changes to the cabinet

According to President Zuma other changes to the national executive included:

- A ministry of telecommunications and postal services was established, President Zuma said this was because South Africa has a fast-growing telecommunications sector and added that the Post Office has a great developmental capacity especially in delivering financial services to the country's remote areas.
- The National Planning Commission as well as the Performance Monitoring and Evaluation Ministries in the Presidency have been combined into one ministry to harmonise the planning and monitoring functions. This ministry is also responsible for youth development.
- The establishment of a new Communications Ministry that will be responsible for overarching communication policy and strategy, information dissemination

and publicity as well as the branding of the country abroad. The Independent Communications Authority of South Africa; the South African Broadcasting Corporation; Government Communications and Information System; Brand SA; and the Media Development and Diversity Agency will fall under this ministry. The Ministry of Women, Children and People with Disability is now the Ministry of Women which will be located in The Presidency.

- The Ministry of Water and Sanitation was established in order to improve the provision of water and sanitation.
- The Ministry for Small Business Development was established.
- Two Deputy Ministers were appointed for Rural Development and Land Reform and the labour portfolio gained a deputy minister because of 'the important role of the department in the economic cluster'.
- Cyril Ramaphosa was named the new Deputy President and the former Justice Minister, Jeff Radebe, became the Minister in the Presidency.

In total President Zuma appointed 20 men and 15 women ministers, as well as 20 men and 16 women deputy ministers. He concluded his speech by saying that government was happy to be moving closer to its target of having more women in cabinet and the national executive as a whole.

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

In memoriam: Jeff Malherbe

Former President of the Cape Law Society, Jeff Malherbe died in Cape Town on 10 May 2014 at the age of 85.

According to the Cape Law Society (CLS) Mr Malherbe matriculated at Robertson High School in the Western Cape, where his father was the headmaster. He then went on to study at the University of Cape Town where he obtained his BCom LLB degrees. He joined the firm Jan S de Villiers & Son (now Werksmans Inc) and became the senior partner and chairman of the firm.

In May 1968 he became a councillor of the Cape Law Society and from 1968 to 1972 he served as its President. In 1972 he was elected President of the Association of Law Societies (the predecessor of the Law Society of South Africa). In 1981 he became the deputy chairman of the Board of Control of the Attorneys Fidelity Fund (AFF) and in 1990 he succeeded the late Eric Liefeldt and became the chairman of the Fund, a position he held until 1996.

In its tribute to Mr Malherbe, the CLS said that Mr Malherbe's invaluable trade mark will continue to resonate within the profession for years to come. The CLS further stated that he took up the cause of university education as compulsory for entry to the profession, resulting in the

BProc degree being instituted as the minimum qualification for admission. 'With his able assistance and enthusiasm the foundation was laid for acceptance by the public that attorneys were, academically, as well qualified as advocates,' it stated.

At the AFF, Mr Malherbe initiated and championed the cause of indigent black students as applicants for bursaries to assist them in their studies for legal degrees and at the time of his retirement more than 1 053 black candidates had received financial assistance from the Fund.

In the course of his professional career Mr Malherbe acted for many well-known public companies and became a long-serving director of companies like Naspers, Stellenbosch Farmers' Winery and Shoprite.

The finance executive at the AFF, Andrew Stanfield, has expressed the fund's condolences. He said Mr Malherbe served on the Fund's Board at various times, starting in 1970 while President of the CLS. Mr Stanfield said that the AFF was deeply appreciative of Mr Malherbe's input over the years.

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

National LLB Task Team on access and quality legal education

At a meeting in May 2014, the National LLB Task Team indicated that until the standards for the LLB are published and finalised, entry to the profession still remains the four-year undergraduate LLB for current and prospective students.

The LLB Task Team comprises representatives from the South African Law Deans' Association (SALDA), the Society of Law Teachers of Southern Africa (SLTSA), the Law Society of South Africa (LSSA), the General Council of the Bar (GCB), the Department of Justice and Correctional Services and the Department of Higher Education and Training.

The task team was established after a national LLB summit held in May 2013 resolved to establish standard setting under the auspices of the Council on Higher Education (CHE). The summit was held in order to find a common approach for optimising the value of legal education.

It was envisaged that the drafting of the standards would be completed by the CHE by 30 June 2014.

In a joint statement, the LLB Task Team stressed that, in addition to standard-setting and the curriculum, it was also concerned about the under-funding of legal education, taking into account the resources available to faculties of law as well as students' socio-economic backgrounds.

Following a legal ethics workshop held earlier this year, the LLB Task Team concluded that legal ethics must be an essential part of the legal education curriculum. The task team agreed that changes (if any) to the structure and duration of the LLB for national application can be best discussed once the new standards developed under the CHE have been finalised.

The LLB Task Team also confirmed its commitment to the goals stated by the late former Justice Minister Dullah Omar in 1997, when parliament considered the legislative changes that led to entry requirements to the legal profession becoming a four-year degree. 'These stated goals are ensuring access to justice, access to the profession and access to the



courts, and must be born in mind when the future structure and duration are considered,' it stated.

Meanwhile, the University of the Witwatersrand's School of Law (Wits) has announced that it will be offering the LLB degree as a second bachelor's degree from 2015. This means that all Wits LLB graduates will graduate with two undergraduate bachelor's degrees. The two-degree law programme is currently available at most South African law schools but will become compulsory at Wits from next year.

In a press release, the school's head, Professor Vinodh Jaichand, stated that from next year students with an interest in law would have to complete either a three-year BA Law or BCom Law degree before enrolling for the two-year LLB programme. Those studying towards the four-year LLB would be allowed to continue with it.

The Co-chairpersons of the Law Society of South Africa, Etienne Barnard and Max Boqwana said that the LSSA is committed to cooperating with all stakeholders to promote the reform of legal study which will ensure that the public receives the best possible service from professional and ethical legal practitioners. 'These are hallmarks that will continue to distinguish lawyers as a profession, rather than a business. It is imperative that the LLB degree, in whatever form it is presented, should prepare students not only to enter practice effectively, but

also to understand the context of the society which they will serve,' they said in a press release.

The Co-chairpersons went on to say that the LSSA was firmly of the view that the design of the new LLB must also take cognisance of students' financial position, adding that, if study is extended, assistance must be provided to ensure that access to the profession is not restricted. 'On the other hand, the LSSA acknowledges that most law faculties are subject to financial constraints. They are often not in a position to attract or retrain senior teaching staff. This too affects the quality of law graduates as much the structure of the degree. The legal profession intends to approach the government in this regard. It is in principle unfair to expect faculties to produce excellence, if the playing fields are unequal,' they said.

The four-year undergraduate LLB degree was introduced after the promulgation of the Qualification of Legal Practitioners Amendment Act 78 of 1997, and was designed to broaden access to legal education among the formerly disadvantaged by cutting a year's financial cost off studying towards becoming a lawyer. However, indications from universities have been that only 20% of those who enter the four-year LLB programme complete it in four years.

In a statement in May, SALDA President, Professor Vivienne Lawack said: 'It is recognised that a five-year law programme (including the two-degree option) is educationally sound and serves to prepare law graduates well for the legal profession and related careers. ... SALDA and the legal profession have been lobbying for an extended LLB, namely a five-year programme which will be able to produce well equipped graduates for the legal profession and broader society.'

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

Pro bono index launched

South African law firms are reporting some of the highest average hours of *pro bono* work per fee earner globally. This was revealed at the global launch of Thomson Reuters Foundation's TrustLaw Index of Pro Bono on 28 May 2014. The index, the first of its kind, analyses the *pro bono* work undertaken by law firms on a country-by-country basis and identifies success stories and global trends.

At the launch, the foundation's chief executive officer, Monique Villa, said the index was designed after months of consultation with law firms. She said it examines how much *pro bono* is being done as a benchmark. 'Given the vast cultural and contextual differences around the world, average *pro bono* hours per fee-earner in each jurisdiction is being used as the key metric to draw comparisons. It is patently clear that this is just one measure of a successful practice and that this metric does not take into account the impact of the work being done. In spite of that, the creation of a robust database that quantifies the *pro bono* hours and engagement within firms, along with analysis of the *pro bono* 'infrastructure' within those firms, will help foster the development of the sector and will also feed into the discussion around measuring the impact of *pro bono* work,' she said.

The Foundation's head of legal, Nicholas Glicher, told *De Rebus* that the law firms were asked to provide information on how they organise their *pro bono* practice and how much *pro bono* they do in the different countries and jurisdictions they operate in. Mr Glicher said that 103 firms in 69 countries provided information adding that, of those, 77 submitted very detailed data about how much *pro bono* their lawyers are doing.

South Africa's profile

According to the index, South Africa has a good track record in *pro bono* and the Law Society of South Africa spearheaded the requirement – implemented by the provincial law societies – that all attorneys should provide 24 hours per year of free legal advice to members of the public who meet a means test.

'On average, lawyers in South Africa performed 32,7 hours of *pro bono* per year. This is one of the highest averages globally and is significantly higher than the regional average. Seven firms with offices in South Africa responded to the index, five of whom provided data about the levels of *pro bono* performed over the last 12 months,' the index states. To put this into perspective, the 32,7 hours is lower than the United States, at an average of 74 hours, but higher than England and Wales at 21 hours. These two countries are recognised as global leaders in *pro bono*.

The index further states that a number of South African law firms have *pro bono* or public interest law teams that perform a significant proportion of the firm's *pro bono* work. 'The knock-on effect of this is that fewer lawyers within the firms are involved with *pro bono* matters than one might think given the high average hours of *pro bono*. The percentage of lawyers performing 10 or more hours of *pro bono* is 40,1%, which is again high regionally, but far nearer the regional average of 37,3%.'

South African law firms which participated in the survey displayed among the highest percentages globally – at 40% in terms of partners working on *pro bono* matters over the last 12 months.

'Interestingly, not all the firms have a requirement that lawyers perform a minimum amount of *pro bono*, a third of the respondents indicated there was no requirement. For the other firms, the requirement ranges from the law society mandated 24 hours up to 32 hours, with a further aspirational target of 50 hours per lawyer per annum at another. Thirty-three percent of respondents also indicated they did not factor *pro bono* into compensation for either lawyers or partners,' the index states.

The vast majority of South African respondents (80%) indicated that they work on access to justice matters and 60% work on economic development, microfinance and social finance.

The law firms that participated in the survey in South Africa were Hogan Lovells, White & Case, Norton Rose Fulbright, Webber Wentzel and Bowman Gilfillan Inc.



The chief executive officer of the Thomson Reuters Foundation, Monique Villa, speaking at the launch of the foundation's TrustLaw Index of Pro Bono in May.

Other findings

Miss Villa said that one of the key findings of the research was that *pro bono* is global and thriving. 'Firms with just one lawyer and firms with over 1 500 responded, providing an array of fascinating insights into the *pro bono* sector at large,' she said.

According to the index, other findings included –

Almost 36 000 lawyers work at the firms that responded to the index and on average, these lawyers have performed 43 hours of *pro bono* each over the last 12 months.

There is no strong relationship between the number of fee-earners at a firm and the amount of *pro bono* being done. However, larger and smaller legal teams in each country tended to do more *pro bono* than middle-sized firms. Firms with more than 100 fee-earners in a jurisdiction perform on average of 34,2 hours of *pro bono*, while the number of those with 20 to 99 fee-earners drops to 15,8 hours. Firms with less than 20 fee-earners average 22,4 hours.

Factoring *pro bono* into compensation for lawyers has a dramatic impact on the amount lawyers do. Those lawyers for whom *pro bono* does count as part of their compensation perform on average 39,5 hours of *pro bono* per year, com-

pared to 23,5 hours for those that do not have the same incentive.

Lawyers at firms with *pro bono* coordinators in place do 34,4 hours of *pro bono* on average, compared to 23,6 hours at firms that do not have a coordinator. This sizeable difference seems to show that the presence of a *pro bono* coordinator is an important factor in strengthening *pro bono* practices. When this coordinator is full time, the difference is even greater as firms with a full-time coordinator in place average 44,8 hours of *pro bono* per fee-earner per year, versus 20,3 hours for those with a part-time coordinator.

There is also a big difference in the proportion of lawyers doing ten or more hours of *pro bono* at firms with coordinators compared to those without (48,3% compared to 23,6%).

The presence of a *pro bono* committee also has an impact on the average number of *pro bono* hours undertaken. Firms with a committee reported an average of 34,8 hours compared to 28,9 hours at firms that do not. Interestingly this has less impact on the proportion of lawyers performing ten or more hours of *pro bono*. With a committee in place, that proportion stands at 44,8%, as opposed to 40,7% without.

Firms with a *pro bono* requirement in place, either encouraging or requiring their lawyers to do a minimum number of hours of *pro bono* each year, do on average, more *pro bono* work than those without. Those with this requirement in place did an average of 42,7 hours compared to 29,3 hours for those without.

While many have traditionally viewed *pro bono* work as providing assistance to individuals in need, charities and non-profits are the most commonly supported *pro bono* clients. Rather than working with individuals, 87,6% of firms said they support non-profits and registered charities, with 73% working with social enterprises. Only 67,4% work with individuals. The most commonly supported development fields are access to justice,



Head of legal at the Thomson Reuters Foundation, Nicholas Glicher; Legal Aid South Africa chairperson and Judge President of the North and South Gauteng High Courts, Dunstan Mlambo, at the launch of the foundation's Pro Bono index in Morningside.

selected by 62,4% of respondent firms, economic development at 43,5% and human rights at 41,1%.

Only 21,4% of firms have a *pro bono* target or requirement in place for lawyers (non-partners) in their firm. Approximately 55% of those have a mandatory, as opposed to aspirational requirement in place.

Firms with targets do on average 42,7 hours of *pro bono* per fee-earner, compared to 29,3 hours at those without.

Approximately half of the respondent firms compensate lawyers for the *pro bono* work they do. Most of the firms structure their compensation such that *pro bono* hours are rewarded and count towards billable-hour targets up to a maximum threshold. This threshold ranges from 21 to 100 hours. Other firms indicate that lawyers are unable to qualify for bonuses unless a minimum *pro bono* hours threshold is met. In all cases

where *pro bono* hours are considered as part of the compensation process, they are treated in exactly the same way as hours recorded on fee-earning transactions for both performance ratings and for compensation calibration.

Ms Villa believes that, over time, the index will become a hub for information about trends in the *pro bono* sector. 'Through the layers of data gathered each year, the index will be able to monitor trends, not only in terms of how much *pro bono* is being done, but also any evolution in the way practices are managed.'

The full index can be found at: www.trust.org/spotlight/pbi14/?tab=data

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



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The MAD campaign launched at LEAD Schools

The Law Society of South Africa's Legal Education and Development department launched a 'Making a Difference' campaign (MAD) at its ten centres of the School for Legal Practice as part of the School's social responsibility programme.

The School for Legal Practice in Cape Town embarked on a winter clothing drive which entailed collecting clothes and blankets and presenting them to a local shelter called the Haven Night Shelter in May 2014.

The School's director, Gail Kemp, says that the project was adopted to assist the homeless on the Cape Flats who face the 'notoriously harsh Cape winter'. The Haven Night Shelter was chosen because it operates in closed proximity to the School and services the disadvantaged, poor communities from the Cape Flats and townships.

Meanwhile, candidates at the School for Legal Practice in Polokwane provided legal advice to the Moletji community situated some 20 km from Polokwane. The School's director, Molatelo Mashabane, said that topics discussed included:



Candidates from the School for Legal Practice in Cape Town at the Haven Night Shelter.

- the different matrimonial systems in South Africa;
- the implications of not registering customary marriages;
- maintenance;
- Road Accident Fund claims; and
- criminal court procedures such as pre-trial, trials and sentencing.

Ms Mashabane said that the students participated extensively in the programme and showed a great interest in dispensing legal knowledge.



Candidates at the School for Legal Practice in Polokwane provided legal advice to the Moletji community

The event was hosted in partnership with the Commission for Gender Equality and was attended by Moletji Tribal councillor Kgosi Moloto.

Ms Mashabane said that Mr Moloto expressed the view that communities needed more events such as these.

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

Bring Back our Girls Campaign at Cape Town School



Candidates at the Law Society of South Africa's School for Legal Practice in Cape Town dressed in red, black and white to show their support for the 'Bring Back our Girls' campaign'. The school's training coordinator, Zulpha Anthony, said that the school was delighted that it has a generation of lawyers who see beyond law books and examinations and are giving back. 'As we celebrated Africa Day, we were reminded of the special role we have as lawyers to pursue the issue of human rights and justice,' she said.

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

SADC LA preliminary election report calls for greater voter education

The Southern African Development Community Lawyers Association (SADC LA) has recommended that the Electoral Commission (IEC) implements continuous voter education as well as training for electoral officials.

This recommendation comes after the May elections in which SADC LA had an opportunity to observe as an international observer. It has released a preliminary statement on its election observation mission in KwaZulu-Natal (KZN) in partnership with the KZN Christian Council, a provincial fellowship of churches and church-based organisations.

In the statement SADC LA says that election observation and monitoring is part of its strategy to contribute towards the development of just and democratic societies in the region and for the promotion of free, fair and credible elections as conditions for durable peace and sustainable development.

The reason why the SADC LA chose to focus its observation mission in KZN was because the province had a long-standing history of politically motivated violence and intolerance.

According to the statement, the 30-member observation mission comprised of observers from 10 SADC countries namely, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Swaziland, Zimbabwe, Tanzania, Zambia, Mauritius and South Africa.

The mission was led by former president of the Commonwealth Lawyers Association and current partner at Nigerian law firm Sterling Partnership, Boma Ozobia.

To prepare, observers underwent a multi-pronged information gathering strategy which included reviewing the constitutional and legal framework governing South African elections.

Observers also participated in a mandatory briefing session workshop.

The SADC LA's stated objectives for the mission were to –

- observe and monitor the general elections in KZN and assess how the national and regional (SADC) standards governing democratic elections were complied with, in order to ensure the achievement of free and fair elections;
- promote understanding and awareness



Head of the SADC LA election observer mission in KwaZulu Natal, Boma Ozobia and SADC LA executive secretary, Makanatsa Makonese, at a briefing by the Electoral Commission in Johannesburg.

of the state of democracy, electoral laws and processes, as well as human rights in South Africa, particularly in KZN;

- promote principles of democratic governance, including free, fair and credible elections as a means to building sustainable peace in KZN; and
- produce a report which would inform future democratic processes and contribute to the strengthening of peace-building processes in KZN.

Preliminary findings

With regards to the pre-election environment, the mission found that the number of registered voters had increased. At the time of going to print, the SADC LA was still to determine how many voters on the roll actually turned up at the polls.

The SADC LA reported that there were some glitches in some parts of the province with special voters not turning up to vote or IEC officials delaying to visit the special voters. For example, at one polling station in the KwaMashu area there were 32 special voters registered, but by closing of the polling station, only 13 people had voted. The special vote took place on 5 and 6 May.

On Election Day, the SADC LA mission

observed that the atmosphere was generally calm and peaceful with no major incidences of violence and intimidation with many SADC LA observer teams reporting that voting in their respective areas had progressed well, although some concerns and inconsistencies were noted.

The report states that the concerns included the following –

- Some polling stations opened late. This was due to the late arrival of electoral equipment such as scanners.
- The different interpretations of s 24 of the Electoral Act 73 of 1998, which requires voters to complete the s 24 form, when voting at a different polling station from where they registered. At some stations, voters were allowed to vote, while at others they were sent to the stations where they had registered.
- At some stations, some voters were assisted to cast their votes by people wearing party insignia. 'While the law allows assistance by any person of the voter's choice, the SADC LA noted with concern that this arrangement might compromise the secrecy of the assisted voter's vote, their rights to a free choice and may possibly lead to intimidation.'
- Political intolerance was reported in



Members of the SADC LA election observer mission in KwaZulu-Natal, Ngosa Simalchela, Kholwani Khabo and Arthur Singini stationed in the uMkhanyakude district.

one area where National Freedom Party supporters tried to blockade ANC supporters from entering the eMahlashini School voting station. The police were called to intervene and the crowd was dispersed.

- A ballot box went missing in the Stanger Correctional Services voting station.
- Low voter-turnout was observed in the Ilembe district.
- In the Durban CBD, SADC LA observers witnessed some 30 ANC supporters singing and dancing in the street close to a polling station. In the Ndewndwe local municipality, observers also witnessed an event called an inter-cultural festival hosted by the ANC very close to the polling station.
- In the rural villages observed, the SADC

LA noted that no wheelchair facilities were provided. This was different for urban areas where polling stations were wheelchair accessible.

The SADC LA observed that apart from the above incidents, no major human rights concerns were reported that could have had a negative impact on the outcome of the election.

The SADC LA commended the IEC for its effort to attract young, first-time voters. It reported that there was a high number of youth voting.

The SADC LA would make recommendations to various bodies involved with the elections in its full report. Some preliminary recommendations included the following:

- The IEC should have continuous voter education, including for electoral officials; and ballot paper for the visually impaired should include the names of political parties instead of the numbers.
- Political parties should promote continuous respect and tolerance among their members and between members and opponents. 'Messages of peace should be communicated throughout the years and not just during the pre-election campaign. Peace-building programmes involving local traditional leaders, women's groups, youth movements and all other stakeholders should be enhanced to ensure broad-based support and ownership by all stakeholders.'
- Chapter 9 institutions, particularly the South African Human Rights Commission, should play a more active role during the election period. The SADC LA suggested that it could, for example, partner with the IEC to address, promote and protect human rights during elections. In addition, it may assist the IEC in dealing with complaints relating to human rights violations during elections.

At the time of going to print, the SADC LA was still to release its final report which was scheduled to be completed in June. The report will outline in detail its analysis and findings on the elections.

- To read the Law Society of South Africa's report on its election observer mission see 2014 (July) *DR* 15.

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



LEAVING A BEQUEST

Contact the Director on 031 309 4991
or email director@blindanddeafsocietykzn.org.za

Justice Zak Yacoob, retired Judge of the Constitutional Court of South Africa and now President of the KwaZulu-Natal Blind and Deaf Society humbly requests that, when advising your client on making a Will, please ask them to take a moment to think about leaving a bequest in their Will to help the KwaZulu-Natal Blind and Deaf Society to provide services for Blind and partially sighted and Deaf and hard of hearing people. We would like all of them to lead healthy, productive lives side by side with their sighted and hearing counterparts.

We need the resources to teach sign language, computer skills, braille literacy, daily living skills, orientation and mobility and, as well as, find employment Without this training, Blind and Deaf people remain helpless, isolated and unemployed.

The KZNBDS is a registered Section 18A organisation and as such will issue donors with a 18A certificate to claim donations as a tax deduction. Note that more than 90 % of our beneficiaries are Black, the majority of these are African rural people. The KZN Blind and Deaf Society is a registered Level 1 BBBEE contributor.



The SA Board for Sheriffs is a statutory body established under section 7 of the Sheriffs' Act and has as its objectives

- the maintenance of the esteem of;
- the enhancement of the status of,
- and the improvement of the standard of training of and functions performed by sheriffs.

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

LSSA election observation report finds elections free and fair; makes recommendations for improvements

The Law Society of South Africa (LSSA) submitted its election observation mission report to the Electoral Commission (IEC) at the end of May 2014. Generally, based on the over-all observations of its attorney observers, the LSSA concluded that the elections were free and fair. IEC voting staff were friendly and helpful and most observers found the organisation of the stations and the handling of issues by IEC officials to be positive, with most issues duly resolved by the voting agents. Most voting stations appeared to be run efficiently and effectively and voters were in good spirits, with a calm and peaceful atmosphere reported at the majority of the stations.

The LSSA commended the IEC for ensuring free and fair national and provincial elections on 7 May 2014.

Reporting on the election monitoring initiative to the LSSA Council at its meeting at the end of May, LSSA Co-chairperson Max Boqwana said that, through the attorneys and candidate attorney observers, the attorneys' profession had given a clear indication that it takes an interest in the democratic processes in the country. Chief Executive Officer, Nic Swart said that the LSSA would keep a database of available observers and would start planning for the 2016 local government elections. The observer database would also serve as a pool of observers for the LSSA to deploy as part of observer missions to other Southern African Development Community (SADC) countries.

Mr Boqwana added that a further aspect of the LSSA election initiative would be to consider a review of the electoral legislation to assess whether the legislation itself provides a basis for free and fair election, or whether amendments could be suggested.

Earlier this year, the LSSA resolved that it should observe the elections on 7 May and applied for and received accreditation from the IEC as a domestic observer. The LSSA then called on attorneys to make themselves available on a voluntary basis to observe the elections.



*Law Society of South Africa
election observer accreditation.*

Some 262 attorneys and candidate attorneys who attended the full-day training in April, with training materials sponsored by LexisNexis, committed their time to observe at various voting stations at their own expense. They were supplied with observer kit by the LSSA and a call centre was set up at the LSSA office to take calls from observers who required assistance and advice on Election Day.

Observers had been requested to visit three voting stations and more if they wished to do so. They visited the station where they were registered first, followed by a second station of their choice and a last station of their choice where they observed the counting process. It was found that observers went above and beyond the call of duty and many stayed until the early hours of the morning to observe the counting process. Many observers also chose to visit between four and six voting stations and over 450 reports were received. Mr Boqwana and Mr Swart were present at the National Results Centre in Pretoria after the polls closed and votes were reported.

The LSSA's goals for the 2014 observer mission were to –

- place highly trained observers in voting stations;
- place trained attorneys and candidate attorneys in counting stations;
- ensure the presence of independent lawyers in the results centre;
- provide support for the Electoral Commission;
- support and strengthen the integrity of the elections process;
- assess the electoral process, with a particular emphasis on compliance with regulations, laws, procedures and codes of conduct;
- evaluate participation of voters and their understanding of the process; and
- ensure that the elections would be free and fair.

Recommendations

Besides its general observations, the LSSA report also contains a number of recommendations for the IEC.

Voter education

The biggest issues among the voters seemed to be that they were not educated in regard to the general registration process and special-votes registration process. Large numbers of voters were turned away because they were not registered to vote and the registration process had to be explained to them by IEC staff or observers.

The LSSA recommend that the registration period for votes should be extended by a couple of months, and that there should be more than two official registration campaigns.

In addition, there should be more advertising around the registration campaigns, and the advertising should be done well before the registration dates. More emphasis needed to be placed on the fact that voters cannot cast votes if they are not registered to vote. This goes hand-in-hand with educating voters to register in their voting districts. A major issue observed during this election was the fact that presiding officers reported s 24A abuse of the Electoral Act 73 of 1998, and elections materials running out due to the vast number of

s 244 votes being cast. Voters should also be informed of the purpose of a special vote, and when they will qualify to apply for a special vote. This would relieve a lot of frustration and tension among voters on Election Day.

Voting staff education

The LSSA recommended that there be specific focus placed on the opening procedure of a voting station since most issues seemed to occur at that stage. Staff seemed disorganised, not always sure of the voting station layout, and there were many instances where party agents were getting involved to help move the process along.

Replacement of zip-zip machines

The malfunctioning of zip-zip machines caused most delays in the opening process of the voting stations. Reports showed that numerous stations had problems with malfunctioning machines. The LSSA recommended different ma-

chines be used in the next elections, or alternatively, staff should be educated on alternative means of proceeding with the opening of the station if the machines are not working.

Provision of election materials

The LSSA recommended that more staff be employed in order to ensure speedy delivery of election materials where more might be needed. More VEC 4 forms should be supplied to all stations by default in order to ensure that voters are not turned away due to lack of voting materials and VEC 4 forms. LSSA observers reported many instances where the name of the voter did not appear on the voters' roll but the voter claimed that he or she was indeed registered at that particular station.

Vigilance regarding party intimidation of voters

The most severe issue observed was the

fact that there were many stations with political parties marking voters' names on 'voters' rolls' or checking ID numbers of voters. This was a severe problem and could cause intimidation of voters which could directly influence their choice. The LSSA recommended that presiding officers should be educated on the rules and regulations pertaining to the activities of political parties allowed on Election Day. They should be instructed to be more vigilant in addressing these issues the moment they become aware of them.

- The LSSA's full election observation report can be accessed on the LSSA website in the 'Elections 2014' tag on the left navigation bar.

Other LSSA briefs:

Contingency fees

In the light of all the recent judgment relating to the Contingency Fees Act 66 of 1997, the LSSA Contingency Fees Committee are drafting proposals to give practitioners guidance regarding the interpretation of the Act.

Court-annexed mediation

LSSA representatives attended a Justice Department consultative workshop on the court-annexed mediation rules and other aspects relating to court-annexed mediation that is due to be implemented in certain selected courts across the country on a pilot basis from 1 August 2014. Arising from this workshop the LSSA made input on training, qualifications and assessment of mediators, a code of conduct as well as a complaints process for mediators.

The LSSA also provided the department with a preliminary list of attorney mediators. The LSSA will update this

list on a regular basis. Practitioners who have completed relevant training as mediators, can upload their details and their certificates on the LSSA website at www.LSSA.org.za or e-mail LSSA@LSSA.org.za for information on how to upload data on the mediators' database.

Costs

Following discussions at the Costs Indaba held on 22 February 2014, the LSSA Costs Committee will be considering the following at its meeting early in July 2014 -

- simplification of the tariffs;
- tariffs for advocates;
- issues relating to r 43;
- costs in the context of the Legal Practice Bill; and
- an increase in tariffs in the current set up vis-à-vis the way forward.

Book announcements

The Judiciary in South Africa

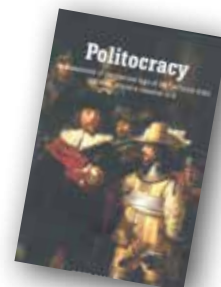
By Cora Hoexter and Morné Olivier

Cape Town: Juta
(2014) 1st edition
Price: R 595 (incl VAT)
442 pages (soft cover)



Politocracy

By Koos Malan
Pretoria: Pretoria University Law Press
(2012) 1st edition
Price: R 190 (incl VAT)
356 pages (soft cover)



People and practices

Compiled by Shireen Mahomed

Adams & Adams in Pretoria has new appointments and promotions.



Andrew Molver has been promoted as a partner; Andrew Phillips has been promoted as a senior associate; Renee Nienaber, Tiffany Conley and Nicole Smalberger have been promoted to a senior associates; Gérard du Plessis has been promoted to chairman; Nolwazi Gcaba has been appointed as a partner in the trade mark department; Nondumiso Msimang has been promoted to a senior associate; Nicolette Biggar, Jani Cronjé and Jean-Paul Rudd have been promoted as partners.



Kareema Shaik has been promoted at Adams & Adams as an associate in the trade mark department.

Schindlers Attorneys in Johannesburg has eight new appointments.



Front: Lisa-Marie Hussey, Mosa Matlosa, Daniella Brocco. Back: Samuel Rosseau, Alec Veitch, Ramon Pereira, Todd Julyan and Gabriel Da Matta.

Stegmanns Incorporated in Pretoria has appointed two new senior associates.



Isa Voster specialises in labour law, family law and civil litigation.



Tracy-Erin Duggan heads the commercial litigation and collection department.



Cliffe Dekker Hofmeyr in Cape Town has appointed Helen Dagut as a director in its environmental department.

Eversheds in Johannesburg has three new appointments.



Sara-Jane Pluke has been appointed as a partner in the intellectual property department.



Rowan Stafford has been appointed as an associate in the tax department.



Nikhil Lawton-Misra has been appointed as an associate in the commercial department.

Durban law firm **Knight Turner** has joined global firm Eversheds. The affiliation has seen the Durban firm re-brand as Eversheds. Knight Turner's founding partner Andrew Turner, described the tie-up as a 'once in a lifetime' opportunity that offered benefits for the La Lucia Ridge firm and its clients. Knight Turner's agreement gives Eversheds a presence in KwaZulu-Natal.



Andrew Turner



Shepstone & Wylie has appointed Shane Terence Price as an associate partner in the corporate commercial and tax department. He specialises in tax and commercial law.

Fasken Martineau Inc in Johannesburg has several appointments and promotions.



Neil Searle has been promoted to a senior associate in the labour employment and human rights department.



Elschen Solomi has been promoted to an associate in the global energy department.



Carey-Anne Sallie has been promoted to a senior associate in the project finance department.



Robyn Armstrong has been promoted to an associate in the securities and mergers acquisitions department.



Tamsyn Zulch has been promoted to a senior associate in the project finance department.



Isaac Munyuki has been promoted to an associate in the global mining department.



Clare Grainger has been promoted to a senior associate in the litigation and dispute resolution department.



Precious Mudau has been promoted to an associate in the litigation and dispute resolution department.



Sabelo Dlamini has been appointed as an associate in the global mining department.



John Letsoalo has been promoted to an associate in the litigation and dispute resolution department.



Katherine McFie has been appointed as an associate in the securities and mergers & acquisitions department.



Lerato Nonyana has been promoted to an associate in the project finance department.

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



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A PI claim's waiting to happen

By
Ann
Bertelsmann

Leading on from the article in this column in 2014 (May) DR 23 'Is your firm at risk for claims by clients or third parties?'- this discussion seeks to give practical examples of things that can and do go wrong and some of the causes of professional indemnity (PI) claims.

Some danger signals

The following are danger signals to look out for:

- a busy department employing a number of candidate/junior attorneys or paralegals who do most of the work (for example Road Accident Fund, collections or conveyancing);
- no enforcement of rules relating to delegation and supervision;
- no central diary system or back-up to the diary system within the practice;
- no system recording details of all matters taken on by the firm and to whom they are allocated;
- no reliable filing system;
- desks and offices cluttered with files;
- no minimum operating standards (MOS) or procedures manual;
- no formal professional and support staff training (on the firm's own procedures and the law);
- no uniform use of engagement letters;
- no policy on making file notes or confirming all instructions/discussions in writing;
- no use of checklists and working plans;
- no checks and balances like file audits and checking of mail;
- no policy on client care;
- taking over a matter from another attorney (within the practice or from outside);
- taking on a matter that is about to prescribe;
- taking instructions from friends or family of any director or employee of the practice;

- no adequate compliance with the Financial Intelligence Centre Act 38 of 2001; and
- no stringent checks and balances in place when paying out trust money.

When can your client or a third party bring a claim against your practice?

The judgment of *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB) dealt in some detail with the duties of and the standard of care to be expected of an attorney. In this regard the court referred, *inter alia*, to *Slomowitz v Kok* 1983 (1) SA 130 (AD) and *Mazibuko v Singer* 1979 (3) SA 258 (W).

If your client/a third party has suffered any loss as a result of your failure to conduct the client's legal mandate with the necessary skill, knowledge and diligence expected of an average attorney, a claim may be brought against your practice.

In *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA), the SCA held that:

'Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that *the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position*' (my emphasis).

In the *Mlenzana* matter, the widow sued her erstwhile attorneys for allowing her dependant's claim against the RAF to become prescribed.

The facts and history of *Mlenzana* gives some instructive insight into how not to run your matters. Certainly in this case a PI claim was waiting to happen. The facts of the *Mlenzana* case are not as unusual as one might imagine. The judgment also sheds light on the various

courts' pronouncements on what an attorney's duties are. It is well worth reading.

Some of the problem areas that can be identified from a reading of the lengthy judgment were:

Ineffective delegation together with lack of supervision and training

The widow's claim was dealt with by a newly qualified professional assistant, S, who had little experience or expertise in handling RAF matters. In fact, it turns out that she was left to run both the RAF and conveyancing departments of the firm on her own, with little or no supervision or guidance. This was a recipe for disaster.

Taking on a matter without having the necessary expertise

A practice should not take on work in which it is not competent to act. Stick to areas you know or at the very least do the necessary research and get guidance from a mentor with more experience in the field.

No minimum operating standards (MOS)

Judging by the way in which S approached the widow's claim, MOS were either not in place in the practice or they were not enforced (see 2014 (May) DR 23).

Flawed or no working plan/strategy/practice checklist

There should have been a comprehensive RAF practice checklist in place for the RAF department. This would have ensured that all requirements for lodgement of the claim were met. These requirements should have also been discussed with the widow at the first consultation. Had a proper checklist

been kept, S would have noted that she already had some of the necessary information and documents with which to lodge the claim.

Ineffective communication

Much of this judgment deals with the importance of communication with one's client. It is not enough to have written a few letters to your client at the address that you have on file. An attorney needs to ensure that such communications in fact reach the client. The method and frequency of communications should be agreed up front and details of this should be included in the letter of engagement/mandate. It is advisable to ensure that you have more than one method of contacting your clients, particularly if they live in an informal settlement or rural area. If necessary, a tracing agent should be employed in order to locate clients (see also the *Mazibuko* case).

Failure to investigate and obtain important facts and documents: Ineffective investigation

In this regard, S failed dismally. The court criticised her for expecting the client to travel to far-off places to obtain the required documents and remarked that

'[t]here comes a time when a diligent attorney has to leave the comfort of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client'.

The court further suggested that, even though the widow had been unable to provide S with the deceased's employer's contact details, she could have obtained these by various methods, including employing the services of a tracing agent, sending a messenger to look for the employer, or contacting one of the deceased's co-workers.

Another criticism was that there had also been no investigation of the merits of the collision. S's inactivity was referred to as a 'chronicle of procrastination'.

Failure to make file notes

The court was critical of the fact that S had made no proper file notes of discussions and consultations with the widow and alleged telephone discussions with the deceased's employer.

The importance of making file notes should not be underestimated (and should be stipulated in the firm's MOS). These should form a comprehensive record of all interactions. Their importance lies in the following:

- They provide a record in conducting the matter.
- They can be retained as evidence in the event of a dispute.
- They are essential for proper billing and drawing up of bills of cost.

- If anyone needs to take the file over or answer a query in your absence, they will know what has happened previously.

Failure to keep the file in order

S kept asking the widow for information and documents that were already in her possession. From this, one can infer that her file was not kept in any logical order, with documents in a separate section. There should be a uniform rule on file order within any practice. If, for any reason a colleague needs to take over the file in your absence, all necessary information and documents should be easy to locate.

Presumed failure of diary system

From the facts of the case, it is unclear whether or not S was aware of the prescription date or had diarised the file accordingly. It is also unclear whether or not S registered the matter with Prescription Alert. Regular reminders from Prescription Alert would have provided back-up in case of the failure of S's diary system.

Problems with engagement management

S should have set out the terms of the agreement with the client in a letter of engagement. This could have covered the issues of the method and frequency of communication, what S expected from the client and *vice versa*. It could have stipulated any outstanding documents to be obtained from the client and consequences of her failure to provide them. When no information/documentation was forthcoming, a letter of non-engagement or disengagement could have been sent to the client with the necessary advice on prescription (provided that the client received them).

No checks and balances

Had there been regular file audits or other checks in place, someone in the firm may have picked up the problem before prescription and advised S to lodge the claim with the information she had at hand. Discussions of problem files in regular professional staff meetings might also have resolved the problem. Had a senior director checked incoming and outgoing mail, if, for example, any letters to the widow had been returned to sender, the problems in this matter may have come to the firm's attention.

Bearing in mind all of the above, start today by measuring up the effectiveness of your risk management and doing something about the gaps.

Ann Bertelsmann BA (FA) HED (Unisa) LLB (Wits) is the legal risk manager for the Attorneys Insurance Indemnity Fund in Johannesburg. □

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Law firm leadership

By
Louis
Rood

To be successful, all law firms need to be well managed. The functions and responsibilities of a managing partner or an executive management committee derive not only from the structures and policies of the firm, but should be based on sound business principles. However, effective management is not enough. To achieve significant sustainable growth, a firm also requires leadership.

The distinction between management and leadership is not always appreciated. After all, a good manager needs to demonstrate sound qualities of leadership. It has been said that management means doing things right, while leadership means doing the right things.

Management's role is to implement, improve and optimise the systems, structures and processes of the firm. The focus is on productivity, efficiency and cost-effectiveness. This involves elements of supervision, administration, coordination and monitoring of performance. Investigating, evaluating and making recommendations on anticipated needs are an important management function. Oversight of financial matters, career development, compliance and innumerable other tasks all land on the manager's desk (to the undoubted relief of the non-managing partners).

It is not surprising that the role of leadership is often obliterated in the daily clamour of crisis management and cascading deadlines. But even the smallest firm will benefit from recognising the critical need for a leadership role, separate from the management function.

Some law firms have successfully opted to appoint non-lawyer management on the premise that a commercial graduate with an MBA, for example, is better qualified and trained for financial and business management than an attorney. But for effective leadership, evidence suggests that without a proven background in the profession, it is difficult for a non-lawyer to win the loyalty and buy-in of other lawyers in the firm.

The three most common attributes of a successful leader are consistently shown to be:

- **Trust:** So much depends on the relationships established by a leader – not only between the leader and the wider firm, but the degree of trust within the firm and between team members. Trust will flourish where a leader is decisive, communicative and ethical.

- **Emotional engagement:** A leader must have genuine care and concern for every individual, a belief in their worth and role in the mission of the firm. This emotional intelligence is the key to gaining respect and instilling confidence.

- **Competence:** Leaders often have to give direction to highly intelligent, skilled and talented people, some of whom may reject the notion that they need any leadership at all. For this reason, only a leader who has earned credibility through performance, and demonstrated the acumen and qualities required for leadership, is likely to be recognised by the sceptics as having the credentials to take the leadership reins. The leader's skills must combine judgment, timing and vision. Not everyone is a natural leader, but many become highly competent leaders through experience, selfless dedication and moral authority.

Whereas management operates within the firm, the focus of leadership extends beyond that. A leader must be able to take an overview of the direction of the firm, understand where it is best posi-

tioned in the market, and both develop and represent the character and brand of the firm. The aim is to create an environment where the team embraces a shared goal, and takes ownership of a collective sense of purpose.

Leadership is a continuous process. It should construct a long-term platform on which the firm can build its plans, aspirations and values that align with the marketplace of the future and are relevant to each and every employee. This road map provides a context for decision making.

There are many positive consequences which flow from a leader-driven vision. Individuals are motivated and even inspired by the attributes valued by the firm, such as innovation and knowledge. The impetus to strive to achieve clearly-identified, desirable goals leads to significantly higher levels of job satisfaction, loyalty, pride and productivity.

A secondary, but equally important, benefit of bold leadership is that a habit of leadership is established. Potential future leaders take their cue from the top. A succession ladder is created. Authority can confidently be delegated. Change and reform are not feared but embraced.

Fundamental to sound leadership is a good dose of realism. The way to success is littered with obstacles. Many firms doubt whether they can even survive, let alone prosper. A mature, thoughtful assessment of the firm's strengths and weaknesses, a focus on satisfying the needs of clients, and the setting of re-

'Fundamental to sound leadership is a good dose of realism. The way to success is littered with obstacles. Many firms doubt whether they can even survive, let alone prosper.'

alistic and achievable goals that remain flexible enough to allow for change, can generate the enthusiasm and determination needed for success. Statesmanlike emphasis on mutual support, generosity of spirit and putting the welfare of the team above selfish interests is not only a rewarding and personally satisfying way to behave – but infuses that critical element – an ethos of service leadership.

That is why emotional engagement by leaders is so important. If negative baggage, bad attitudes and small-mindedness can be dealt with and put to rest, the collective intellectual, physical and emotional energy of everyone in the firm is able to be harnessed constructively. With that comes growing self-assurance and fulfilment in the competitive endeavour.

There are a number of distinctive leadership styles that have been identified. Each can be successful to a greater or lesser degree in the right context.

The coercive style

This is the domineering style of the master and commander. It demands immediate compliance. It is a top-down inflexible approach. This approach can be effective in breaking failed business habits and shock people into new ways of working. It is often appropriate in a genuine emergency. It is militaristic. Orders are barked and must be obeyed, but once the crisis has eased, if this dissonant style continues, it will crush the spirit and feelings of those affected. This style permits no individual initiative. It leads to a loss of motivation and pride in performance. The 'big boss' syndrome can morph into a dictatorship with the leader perceived as a despot; a bully who tolerates no other views or input. People feel disrespected and their sense of responsibility and loyalty evaporates.

A sub-species of the coercive style is management by embarrassment. This is a process of naming and shaming employees who get it wrong in some way, humiliating them before everyone else. This cracking of the whip seeks to intimidate employees into compliance by fear. Needless to say, this climate of oppression kills loyalty, pride and initiative stone dead. It is not leadership at all.

The visionary style

When clear direction is needed, this authoritative style acts as a change catalyst, mobilising people towards a fresh vision. Characteristic of this style is vibrant enthusiasm, empathy and the ability to conceive and articulate a strategic mission. Visionary leadership maximises commitment to the firm's goals and strategies. Standards are defined as they revolve around that vision, but people are given the freedom to innovate, experiment and take calculated risks. People

'Good leadership creates good firms.'

who work for such leaders understand that what they do matters and why.

The affiliative style

This permission-based style of leadership values people and their emotions more than tasks and goals. By building strong emotional bonds, there is a positive effect on communication and trust. Loyalty improves and so does flexibility because the affiliative leader gives people the freedom to do their job in the way they think is most effective.

This bonding approach creates a sense of belonging. It is most effective when trying to build team harmony, improve communication or repair broken trust. The leader is also not afraid to openly express his or her own emotions. However, an exclusive focus on praise can allow poor performance to go uncorrected. When people need clear directives to navigate through complex challenges, the caring, nurturing approach can leave them adrift.

The democratic style

This is where the leader asks for ideas and seeks consensus on the way forward. This consultative process aids buy-in through participation. It builds trust, respect and commitment. By listening to employees' concerns, the democratic leader learns what to do to raise morale. This style can generate fresh ideas, but if consensus is not achieved, divisions may become entrenched. This process can get bogged down in endless meetings. There are two sub-species of this democratic style:

- The distributive style. Leadership is shared and spread throughout the firm, but this can be effective only with constant coordination and communication to avoid a free-for-all where momentum is dissipated and focus is lost. Silos can form where individuals or groups operate in isolation from, and even in competition with, others in the firm. Dispersing leadership may dilute the sense of direction of the firm.
- The collective style. This form of political leadership is unlikely to succeed in business or the professions because no individual ultimately takes responsibility or can be held personally accountable. All forms of leadership ultimately require someone to be in charge. Decision-making also becomes cumbersome and time-consuming. Communication from

various groupings or persons making up the collective leadership can be contradictory and uncoordinated. Consensus, which is agreement by compromise, is a good way to develop policy, but seldom a template for dynamic leadership.

The pacesetter style

The leader sets extremely high performance standards and exemplifies them. This demanding style can place undue pressure on employees. Flexibility evaporates and people feel the pacesetter does not trust them to work in their own way. There is little understanding of how each person's work fits into the big picture. Setting an example is a good approach, but really works only when everyone is self-motivated, highly competent and needs little direction or coordination.

Leading from the front can leave the leader isolated. It is usually a better option for the leader to marshal his or her troops and let the frontrunners, in terms of performance, crack on at their pace, secure in the knowledge that they have the team behind them, and that everyone understand his or her role. A good leader will also ensure that attention is given to the stragglers to up their pace.

The coaching style

Here the leader acts more like a counselor and mentor than a traditional boss. Employees are encouraged to establish long-term career goals and raise performance, but, teaching people and helping them grow is a time-consuming and tedious process that requires constant dialogue. Results of this style can be patchy. Self-starting independent-minded employees often do not respond well to a coaching style. Other employees appreciate the confidence shown in them and react whole-heartedly.

Effective leaders are intuitively able to switch from one leadership style to another. They have the nimbleness to apply their competencies in building relationships and communication to achieve maximum influence. The most successful leadership style is a seamless combination of styles which allows for the agility to operate on a number of levels with different individuals and groupings.

Good leadership creates good firms, and good firms outlast their leaders. That is why the best leaders pass on the baton before any cult of personality develops.

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



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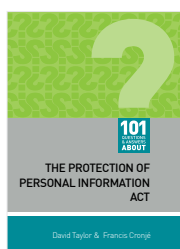
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Voyager or victim?

Refugees are not holiday travellers

By
Lesirela
Letsebe

South Africa is a signatory to, among others, the 1951 United Nations Convention relating to the Status of Refugees (UN Convention), the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). To give effect to its obligations under these and other relevant international law instruments, principles and standards relating to refugees, in 1998 South Africa enacted the Refugees Act 130 of 1998 (Refugees Act), which was later amended by the Refugees Amendment Act 33 of 2008 (Refugees Amendment Act). Section 1 of the Refugees Act defines 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic', and 'refugee' as 'any person who has been granted asylum in terms of this Act'. 'Asylum' under this section denotes 'refugee status recognised in terms of this Act'. The elements that could influence a determination on whether or not an asylum seeker should be granted asylum are described in the definition of 'refugee status' in s 3 as follows:

'[A] person qualifies for refugee status for the purposes of this Act if that person –

(a) owing to a well-founded fear of being persecuted by reason of his or her

race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).'

Section 3(b) is derived from art 1(2) of the OAU Convention that takes cognisance of Africa's peculiar history where foreign powerful nations with imperialistic and colonialist interests on the continent, violently invaded powerless countries; or fermented internal conflict and sponsored civil wars to gain access to affected countries' land and natural resources, as wars raged. While this happened, affected countries' citizens faced displacement and forced movement into foreign countries to seek asylum (see for example, L Weinstein 'The New Scramble for Africa' *ISR* Issue 60, July – August 2008 ([\[africa.shtml\]\(http://africa.shtml\), accessed on 4-6-2014\)\). This is still a reality in many countries in Africa, especially the African Great Lakes region.](http://www.isreview.org/issues/60/feat-</p></div><div data-bbox=)

According to para 37 of the *United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (UNHCR Handbook), the phrase 'well-founded fear of being persecuted' is the key phrase of the definition of refugee status. Accordingly, it implies that it is not only the frame of mind of the person seeking asylum that determines his refugee status, but that this frame of mind must be supported by an objective situation. The phrase 'well-founded fear' therefore contains both subjective and objective elements, and in determining whether well-founded fear exists, both elements must be taken into account (para 38, UNHCR Handbook). That an asylum seeker should be presumed to have a well-founded fear of persecution and should be given the benefit of the doubt until the status determination process is concluded otherwise, is best set out at para 39 of the UNHCR Handbook as follows:

'It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason.'

The peculiar nature of refugees' circumstances is best summed up by Kondile J

Picture source: Gallo Images/Thinkstock

in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) as follows:

'Vulnerability of refugees'

Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.

The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse."

Perpetrators of persecution

According to the UNHCR Handbook (para 65), persecution normally relates to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

Prohibition against forced return of asylum seeker or refugee to country of persecution: The principle of non-refoulement

The UN and AU recognise the special case and particular vulnerability of refugees by prohibiting any measures by State parties that are geared towards refusing refugees entry into State parties' territories, their expulsion and extradition or return from the host countries. Consistent with arts 33 of the UN Convention and 2(3) of OAU Convention, read together with art 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, s 2 of the Refugees Act extends refugees' protection thus:

'General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances –

Notwithstanding any provision of this Act or any other law to the contrary, no

person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where –

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

The above protection is non-violable in international law and enjoys recognition in terms of art 53 of the Vienna Convention on the Law of Treaties (Vienna Convention) as follows:

'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

In *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) Bertelsmann AJA, held as follows:

'The appellants would face a real risk of suffering physical harm if they were forced to return to Somalia. It is obvious that no effective guarantee can be given that the appellants would not be persecuted or subjected to some form of torture, or cruel, inhuman and degrading treatment if they are compelled to re-enter that country. It is the prevention of this harm that the Act seeks to address by prohibiting a refugee's deportation. Deportation to another state that would result in the imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution' (at para 26).

Under s 28 of the Refugees Act, a refugee may be removed from the Republic in the interests of national security. However, the Minister of Home Affairs must afford a reasonable time to the refugee concerned to obtain approval from any country of his or her own choice (other than his or her country of nationality where he or she in the first place fled persecution), for his or her removal to that country.

The UNHCR Handbook distinguishes between economic migrants and refugees (see para 62). The distinction is found in the voluntary nature of the economic migrants' movement from their countries to others, as opposed to the

often imminent and coercive nature of the refugees' movement. The one is jovial and adventurous, while the other is inevitable, leaving the affected with the difficult options either to flee, or stay and face consequences. Economic and other forms of migration are governed by the Immigration Act 13 of 2002, which requires those intent on travelling to the country to seek prior permission.

Refugee status not always indefinite

Persons that have gained recognition as refugees will under s 5 of the Refugees Act cease to be so recognised if they re-avail themselves of the protection of their country of nationality; or having lost their nationality, they reacquire it voluntarily by some voluntary and formal act; or they become citizens of the Republic, or acquire the nationality of some other country and enjoy the protection of the country of their new nationality; or they voluntarily re-establish themselves in the country which they left; or they can no longer continue to refuse to avail themselves of the protection of the country of their nationality because the circumstances in connection with which they have been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify their continued recognition as refugees. Section 27(c) of the Refugees Act is an exception to the rule that refugee status is not indefinite. A refugee may under this provision apply to the Standing Committee for Refugee Affairs (SCRA) for a certification that he or she will remain a refugee indefinitely, in which case he or she can, once so certified, begin applying for an immigration permit.

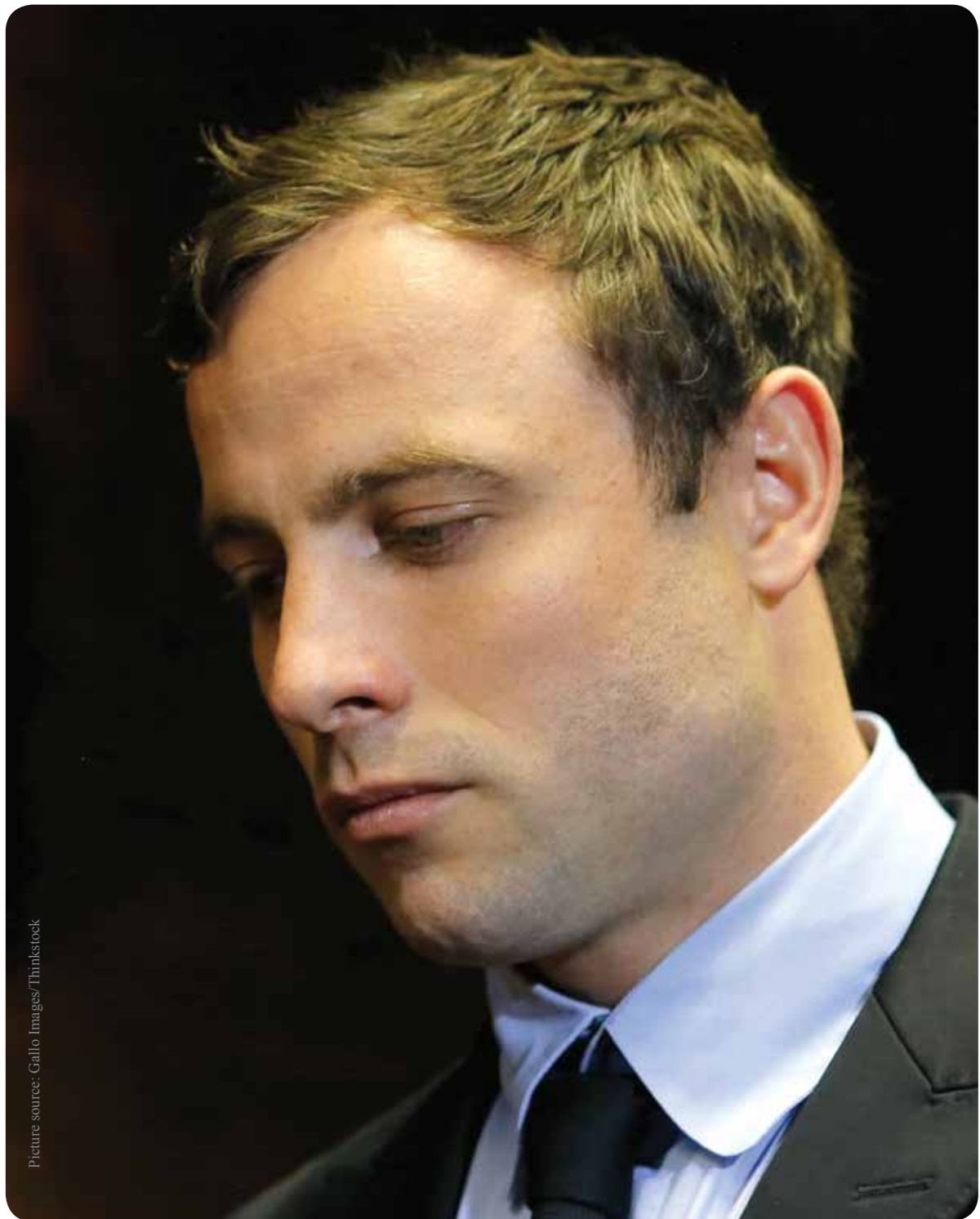
Conclusion

In the unstable world in which we live, where various interests and alliances continue to grow, shift and conflict, no country is guaranteed peace. Anyone is a potential asylum seeker in another's country in a predictable or unpredictable future. If we appreciate this, we should be compassionate with refugees and understand that they are not in this country on a holiday, but are here because they need humanitarian protection until human rights abuses in their own countries have ceased. All they need to do is abide by the country's laws like every other citizen or economic migrant.

Lesirela Letsebe *Bluris LLB (University of Limpopo) LLM (UP)* is an attorney at Lawyers for Human Rights in Johannesburg.



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The *sub judice* rule and the Oscar Pistorius case:

Will the crime of contempt of court ex facie curiae become abrogated by disuse?

By
Brenda
Wardle

Inextricably intertwined with the very fashionable concept of open justice is the question of whether contempt of court, *ex facie curiae*, shall now become abrogated by disuse. It has, after all, been held (by the Constitutional Court no less), that freedom of expression presupposes the right by the public to evaluate and criticise our justice system and our courts.

In the judgment by Mlambo J in the case of *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another; In Re: S v Pistorius and Another Related Matter* [2014] 2 All SA 446 (GP) the court specifically held the following:

'[I]t has come to my attention that there are media houses that intend to establish 24 hour channels dedicated to the trial only and that panels of legal experts and retired judges may be assembled to discuss and analyse the proceedings as they unfold. Because of these intentions, it behoves me to reiterate that there is only one court that will have the duty to analyse and pass judgment in this matter. The so-called trial by media inclinations cannot be in the interest of justice as required in this matter and have the potential to seriously undermine the court proceedings that will soon start as well as the administration of justice in general.'

However, despite the paragraph cited above, the discussions around the *Pistorius* trial including the merits, have been occurring across the globe and locally. I must admit, that I too have given my opinion in South Africa, the United Kingdom (UK) and the United States (US), to mention but a few countries. Regrettably however, there are instances where analysts have gotten it wrong; for example, in their criticism of Judge Masipa in relation to the referral of Mr Pistorius for psychiatric evaluation and the 'out-patient' recommendation of the judge. Some analysts have even incorrectly cited the provisions of s 77 of the Criminal Procedure Act 51 of 1977 as finding applicability when in fact it is ss 78 and 79 that are applicable.

The *sub judice* rule

This brings us to that somewhat elusive, if not evasive rule of law, known as the *sub judice* rule. The *sub judice* rule emanates from the Latin phrase for 'under judgment' or more simply put 'under consideration'. In some jurisdictions it is referred to as 'the case at bar'. In many countries including Australia, England and Wales, to mention but a few, it is generally considered inappropriate to comment publicly on ongoing trials. In South Africa, where the rule of law finds applicability, it could be held that the ongoing commentary somewhat interferes with due process ideals. We have heard

witness after witness in the *Pistorius* trial confessing to having been glued to their television screens, and one wonders just how far these witnesses have gone to tailor their evidence in favour of or against the State and/or Mr Pistorius. Some expert witnesses who are not usually expected to remain outside as others testify (which is an accepted rule for normal witnesses), have remained in court throughout and have, to a large extent, focussed on either agreeing or disagreeing with other experts. A 'working record' of proceedings is produced and made available, ensuring that both sides can study this record thoroughly and focus on closing any gaps. Even if the record were not transcribed, one can download the entire proceedings online from websites like 'Wild About Trial'. It is indeed true that the public and journalists are allowed to report on proceedings in the print media, but it appears as though this is the first instance where analysis of a case takes place on such a grand scale.

In English law (on which our common law for our law of evidence and procedure is based), the term *sub judice* was used to describe material that would prejudice court proceedings by publication. That was, however, the situation before 1981. Contempt of court in England is now codified through the Contempt of Court Act, 1981. Section 2 of this Act refers to a substantial risk of serious prejudice only being possible by a media report when proceedings are active. Active proceedings are further defined to mean instances when there is an arrest, an oral charge, a warrant issued or a summons.

The situation in the US through their First Amendment, is somewhat different as the extent of the right to free speech there prevents tight restrictions on free speech. The First Amendment guarantees freedoms concerning religion,

expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government. (www.law.cornell.edu/constitution/first_amendment, accessed 9-6-2014). However, having said that, State Rules of Professional Conduct governing legal practitioners in the US, often place restrictions on the out-of-court statements an attorney may make regarding an ongoing case.

That situation has largely been accepted as standard practice for professionals in South Africa as well. Mlambo J in warning about who the trier was in the *Pistorius* case, must have had in mind – and in fact explicitly mentioned – that a media circus would be undesirable. Since South African courts must take international law into account and may take foreign law into account, it would be sad if Mr Pistorius's lawyers can argue that he was convicted (in the event that he is convicted) in an atmosphere of a media circus resulting in his fair trial rights being violated to such an extent that they call for the entire proceedings to be vitiated and the conviction overturned.

The *sub judice* rule itself has origins in the jury system and was designed to prevent juries from being influenced by irrelevant considerations. In jurisdictions where in criminal cases, the jury is still pivotal, the *sub judice* rule is still critical. It is very difficult to gauge the extent to which judges and lay assessors (and perhaps even the state and defence) are swayed by the public discourse on these matters. It would thus be highly unlikely if they were not aware of all the

'We have heard witness after witness in the Pistorius trial confessing to having been glued to their television screens, and one wonders just how far these witnesses have gone to tailor their evidence in favour of or against the State and/or Mr Pistorius.'

‘...the critical question which remains to be answered, is whether they would be influenced by irrelevant factors arising out of innocuous and/or potentially contemptuous statements or discussions taking place in the public domain.’

discussions and debates. However, the critical question which remains to be answered, is whether they would be influenced by irrelevant factors arising out of innocuous and/or potentially contemptuous statements or discussions taking place in the public domain. The example of the ruling by Judge Masipa banning ‘all tweets and blogging’, is a case in point where the judge was made aware of the dissent and contravention of her order.

It is clear from Mlambo J’s order that he was careful to ensure that Mr Pistorius is not vilified as an accused person, as his vilification would pose a potential impediment to the course of justice. The interests of justice demand (and this is both for the benefit of the state and defence), that fair trial rights remain supreme. There is a real fear in such instances that potential witnesses might be deterred from providing valuable information about the commission of the crime and in some instances they may even refuse to testify. In the *Pistorius* matter some expert witnesses who ought to have testified were no longer called to testify. One can speculate whether witnesses were reluctant to be associated with Mr Pistorius or whether they feared being perceived to be his supporters. There is also a possibility that they now doubt information at their disposal, which is either inculpatory or exculpatory.

Ongoing adverse publicity around the trial and allegations of unequal treatment of accused persons also has the tendency and potential to impede the course of justice and impact on perceptions around the administration of justice. The pressure principle is another consideration, given the vast barrage of commentary going mostly in one direction in this instance. The sensational nature of the *Pistorius* trial will no doubt fuel perceptions by the public that courts are influenced by publicity and external pressure, when in fact it might not be so at all. The blocking out of images of Reeva Steenkamp and the comparison to the case of Anene Booysen is but one example.

It is critical to bear in mind that the course of justice is not only concerned with the outcome of the proceedings or the substantive issues but also the entire process (meaning that attention has to be given to formal law as well). A serious prejudice thus arises in instances where the accused, the state and/or the court are influenced to the extent that they change

their course, rulings and strategies based on the court of public opinion.

It is thus, in conclusion, not sufficient merely to weigh the right to freedom of expression by the media against the right of an accused to a fair trial as the latter has far-reaching consequences for the liberty of an individual. It can never be held that the public (of South Africa and by necessary implication of the world) has a more superior right to be ‘informed’ (whatever that entails in the context of the *Pistorius* matter) which supercedes the rights of Mr Pistorius to be tried in a manner that is fair and humane.

The Lord Thomas the Lord Chief Justice of England and Wales – responding to questions during the annual oral evidence session of the House of Lords Select Committee on the Constitution on 7 May 2014 – expressed his concern with what is happening in South Africa at the *Pistorius* trial, indicating that he had requested a report on live broadcasts. To a certain extent, I am in total agreement with the concern he expressed.

Brenda Wardle LLB LLM (Unisa) is Chief Operations Officer at Wardle College of Law in Johannesburg.

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By
Kirstie
Haslam

18 the new 21 – *the retrospective application of a statute*

The Supreme Court of Appeal, has recently, in the matter of *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) conclusively ruled on the effect of the reduction of the age of majority from 21 to 18 years by virtue of s 17 of the Children's Act 38 of 2005 on the interpretation of s 13(1)(a) of the Prescription Act 68 of 1969. The plaintiff, a minor at the time that his claim for damages arose (prior to the coming into operation on 1 July 2007 of s 17 of the Children's Act) and was rendered a major *ex lege* on 1 July

2007, sought to institute action more than one year thereafter.

The facts of the matter were, briefly, as follows:

- Mr Malcolm was born on 21 June 1987.
- In 1993, at the age of six, Mr Malcolm was diagnosed with stage 1 Hodgkin's Lymphoma and was admitted to the Red Cross Children's Hospital in Cape Town for treatment.
- It is alleged that while undergoing treatment in hospital he was, due to negligence on the part of the hospital and its staff, infected with Hepatitis B, which was subsequently diagnosed in October 1994.

- Mr Malcolm turned 18 on 21 June 2005. Action was instituted against The Premier of the Western Cape Provincial Government when summons was served on the defendant on 15 December 2008.
- Mr Malcolm was 21 years, five months and six days old at the time of service of the summons.

Section 11(d) of the Prescription Act provides that the period of prescription in respect of Mr Malcolm's claim was three years, commencing from when the claim became due, which was accepted as being in October 1994 when the diagnosis of the Hepatitis B infection was made. Mr Malcolm was, however, still a



minor upon expiry of this period and, therefore, by virtue of ss 13(1)(a) and (i) of the Prescription Act, completion of prescription was delayed until one year after becoming a major. The relevant sections provide as follows:

'If -

(a) the creditor is a minor...;

And

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a)... has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).' The issue that arose in the instant matter related to the interpretation of these provisions of the Prescription Act in light of the reduction of the age of majority from 21 to 18 with effect from 1 July 2007. Prescription commenced running in October 1994 as the Age of Majority Act 57 of 1972 provided that '[a]ll persons, whether males or females, attain the age of majority when they attain the age of twenty-one years.'

In terms of s 313 of the Children's Act (read with sched 4 of the Act) the Age of Majority Act was repealed on 1 July 2007 when s 17 came into operation.

The defendant raised a special plea of prescription on the following basis:

- The plaintiff reached the age of 18 on 21 June 2005 and the age of 21 years on 21 June 2008.
- By virtue of the coming into operation of s 17 of the Children's Act on 1 July 2007, the plaintiff became a major on this date, namely, the impediment of minority ceased to exist on this date.
- Consequently, the plaintiff had one year as from the latter date to institute action against the defendant, namely, summons had to be served on or before 30 June 2008.
- As summons was served only on 15 December 2008, the action had become prescribed.

The special plea was initially adjudicated on by Louw J. Per his judgment delivered on 18 January 2013, he upheld the special plea and dismissed the plaintiff's claim with costs. Although Louw J agreed with the contention that s 17 of the Children's Act could not and did not

have retrospective application in terms of the reduction of the age of majority from 21 to 18 years (ie, the reduction applied only as from 1 July 2007 onwards), he nevertheless agreed with the defendant's argument that this reduction was done with the legislative intent of affecting the plaintiff's right (to institute the action) 'in a specific manner and to a specific intent' and that the intended effect was 'to reduce the time available to a minor creditor to institute the action to one year after such a creditor reaches the *reduced* age of majority' (my emphasis). Consequently, Louw J held that the period of prescription in respect of Malcolm's claim had been completed on 1 July 2008 and the claim had, therefore, prescribed. With the leave of the court *a quo*, the plaintiff launched an appeal to the Supreme Court of Appeal. The appeal was argued on 21 February 2014 and judgment handed down on 14 March 2014.

The issue of the prescription of a claim in similar circumstances had previously arisen in the Supreme Court of Appeal in the matter of *MEC for Education, Kwa-Zulu-Natal v Shange* 2012 (5) SA 313

(SCA) (The matter related to an application for condonation for the plaintiff's non-compliance with the provisions of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002).

The court *a quo* had held that: 'When applying the Children's Act, it is clear that the rights which a child has in terms thereof, supplement the rights which a child has in terms of the Bill of Rights and all organs of state at any level of government are obliged to respect, protect and promote the rights of children contained in the Children's Act. In terms of the Constitution of the Republic of South Africa, the rights of children are of paramount importance. The applicant was a child at the time his cause of action arose and accordingly the Constitution applied to him.'

Consequently when s 17 of the Children's Act came into effect it impinged on the applicant's accrued rights. Condonation was, therefore, granted *inter alia* on the basis that 'a child whose cause of action arose before the commencement of s 17 of the Children's Act 38 of 2005 is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have been, had the age of majority not been changed.'

The Supreme Court of Appeal in *Shange* upheld the decision of the court *a quo*, however, it did so on a different basis which related to when the applicant (the respondent in the appeal) had become aware of the identity of the (joint) debtor for purposes of s 12(3) of the Prescription Act. Insofar as s 17 of the Children's Act was concerned and its effect on the running of prescription, it held that: 'There was therefore no need for the court below to have entered into the involved investigation of the effect [thereof]'. This issue, therefore, remained open.

However, in dealing with this specific issue in the matter of *Malcolm*, the Supreme Court of Appeal, per Wallis JA (Navsa, Shongwe and Theron JJA and Legodi AJA concurring), held that the arguments advanced in the court below overlooked the fact that the meaning of the word 'minor' in s 13(1)(a) of the Prescription Act had already been the subject of an earlier decision of the SCA in *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) where it had been held that 'it meant a person who had not yet turned 21, irrespective of whether they had achieved their majority. In other words being a minor for the purposes of the Act depended purely upon a person's *age* and not their *legal status*' (my emphasis).

The defendant (the respondent in the

"...being a minor for the purposes of the Act depended purely upon a person's age and not their legal status."

appeal) sought to argue that, in the light of the passage of s 17 of the Children's Act, the relevant age (for purposes of establishing 'minority' in the conventional as opposed to the legal sense of the term) should be held to be 18. Whereas the court was persuaded that the word 'minor' in s 13(1)(a) of the Prescription Act now means a person under the age of 18 years 'and to that extent [is a] departure from the decision in *Roux*' it went on to consider the date from which this altered interpretation took effect.

The court noted that in the enactment of the Children's Act and the consequent reduction of the age of majority 'Parliament thereby placed its imprimatur on the social changes that had occurred over a period of time prior to that date' but, crucially, that '[i]t is therefore from [the date of the enactment] ... that the interpretation of s 13(1)(a), and hence our law, changed'. The court acknowledged that 'when a change in the law of that nature occurs, it is necessary for the court, as a matter of interpretation, to determine whether and to what extent the change affects matters that have their origins in events prior to the change'.

The court held further that the situation *in casu* was not one that was covered by s 12(c) of the Interpretation Act 33 of 1957 (which, *inter alia*, provides that where a law repeals any other law, the repealing law shall not, save where a contrary intention appears, affect the previous operation of any law so repealed nor shall it 'affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed') as no Act had been repealed and the change in the legal position 'was triggered by an amendment to the legal age of majority [which] did not involve either the repeal or amendment of s 13(1)(a) of the [Prescription] Act'.

The court held that the new meaning of s 13(1)(a) did not automatically

operate in relation to all unexpired periods of prescription that were running when the change in meaning occurred. It noted that: 'Frequently [the] question [of whether a change to an existing law applied to matters having their origin in past events] is resolved by way of transitional provisions in an amending law'. There being no such transitional provision in this instance, after noting the principles applicable when a statute brings about a change in the law as laid down previously, the court held that the '*prima facie* rule of construction that a statute... should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used...seems...equally applicable to a change in the law resulting from a changed interpretation of a statute, where that altered interpretation is triggered by a change to another statute'. The court consequently held that, in so adapting this principle, 'there is a presumption against the change in the law operating retrospectively so as to create a new obligation or impose a new duty or attach a new disability in regard to events already past'.

The court considered that adopting the approach as contended by the respondent/defendant - to allow persons rendered majors by virtue of the reduction of the age of majority only one year from the date of the enactment of s 17 of the Children's Act to institute action - could result in considerable hardship to a number of potential plaintiffs, whereas '[n]o such prejudice confronts potential defendants if the effect of the change in the law is that it applies only to claims arising after 1 July 2007'. The court concluded by holding that: '[O]verall, the balance is tilted firmly in favour of the altered interpretation of s 13(1)(a) being applicable only to claims arising after 1 July 2007'.

The appeal, therefore, succeeded with costs and the order of the court *a quo* was altered to one dismissing the special plea of prescription with costs. In delivering this judgment the Supreme Court of Appeal has clarified the legal position of minors born prior to 1 July 2007 regarding the period they have to pursue accrued claims which arose prior to this date.

Kirstie Haslam BA LLB (Stell) is an attorney at DSC attorneys in Cape Town. DSC Attorneys were the attorneys of record for the appellant in the matter. □

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A hand in a white shirt points its index finger towards a world map. A dark blue rectangular box with the word "outsourcing" in white lowercase letters is positioned over the map, with the hand's finger pointing directly at it.

outsourcing

Picture source: Gallo Images/Thinkstock

Destination SA:

A preferred legal outsourcing destination

By
Richard
English

In 2011 *De Rebus* ran a feature on the state of the legal process outsourcing (LPO) industry in South Africa (2011 (Nov) *DR* 18). The article shed light on the status of the industry in global terms and the role South African LPO providers are playing in capturing market share. As South Africa is predominantly an outsourcing destination (rather than the originator), it may come as a surprise to many readers that the LPO model is, in fact, taking off among local enterprises as an alternative to traditional legal service frameworks.

The advent of the LPO industry and its proponents relied chiefly on cost reduction as its main driver, made possible simply by offshoring the service delivery locations to lower-cost countries such as the Philippines and India. This paradigm suited a market where a dogmatic approach to process was favoured over discretion or specialist skills. Outsourced services were generally linear in nature, with little margin for deviation from the 'rule book'.

This model still exists and is worth a reported \$2,4 billion (according to 2010 figures) (L Wood 'Research and Markets: The Global LPO Market is Expected to be Worth \$2.4 billion in 2012' (2011) *Business Wire*, March 11). The argument could well be made that it is here to stay. However, buyers of LPO services (traditionally law firms in developed Western countries) have come to realise, that in many instances, an unbending approach to process is not ideal. It is axiomatic among the legal fraternity that exceptions exist for every rule. Where a task requires specialised skill or discretion for its successful execution, the cost of the service becomes less of a decisive factor in its procurement. The word 'process' in LPO is increasingly being replaced by 'service' among providers, acknowledging the mainstream adoption of more flexible delivery models.

In South Africa, where outsourced legal service providers are a nascent feature of the legal landscape and new players are emerging, the country has become an ideal location for the delivery of services to legal enterprises based in the United Kingdom (UK), Canada, Europe and even Australia, for a host of factors. The rising popularity of our outsourcing providers was acknowledged in October 2012, when the Department of Trade and Industry (assisted by Business Process Enabling South Africa (BPESA)), was named best 'Offshoring Destination 2012' by the UK's National Outsourcing Association. It was a tremendous accolade and show of confidence, and indeed was repeated a few months later at the equivalent European Outsourcing Association Awards ceremony (see 'NOA award winners 2012 announced' <http://www.noaawards.com/press-releases/2012/01/2012-winners-announced/>)

outsourcemagazine.co.uk/noa-awards-2012-winners-announced/, accessed 2-6-2014).

Providers – some based in South Africa – traditionally served international clients only. They have first-hand experience of (and in some cases have led) significant innovations in service delivery, including workflow optimisation, pooled resourcing leading to greater efficiency and technology enablement. This expertise has been honed over the years to deliver value to the most demanding of clients. Crucially, the benefits afforded by these providers are increasingly relevant and available to the local South African market.

As previously stated, the key factor in facilitating the rise of the LPO industry was reduced costs. This was made possible by simply outsourcing services to a lower cost country. The question therefore arises: Aside from cost reduction, what are the other drivers behind companies sending work offshore?

The answer to that question lies in service delivery models offered by new model providers, which are by necessity based on optimal utilisation of resources, efficient workflow processes (including the six sigma 'lean' methodology), effective use of legal technology and quality assurance. As a result of these applications, legal process outsourcers are able to offer the market –

- improved process efficiency and access to leading technology (eg, contract drafting automation);
- scalability and flexibility of resource, as opposed to fixed resource costs that do not align with peaks in demand;
- improved turnaround times, for example in the creation of legal documents such as 'business as usual' contracts;
- improved management information and reporting, such as reporting metrics that cover unit costs and completion time; and
- alternative fee structures (including capped, fixed or unit priced fees).

These benefits are increasingly appealing to the domestic market, to the extent that the primary benefit of cost reduction (associated with offshoring to a lower-cost country) becomes a secondary consideration.

The first example of a South African organisation recognising the benefits of introducing LPO to its mix of legal service providers took the form of a large mining conglomerate. In 2012, specialists from our commercial and contracts team were seconded to its headquarters in Johannesburg to co-develop a contract-drafting and management-workflow process, with a view to outsourcing particular aspects of the service. The pilot was a success, with notable milestones including –

- contract drafting turnaround times being cut by 700%;
- improved adherence to in-house drafting protocols;
- improved visibility into and control over commercial and legal risks contained in new contracts; and
- improved productivity within the in-house legal team, whose members were able to commit their time to more strategically important tasks.

Recognising the wider benefits available, LPO services were introduced to other business units within the broader business and the relationship is now entrenched. Off the back of this strategy, the client's legal team was shortlisted in the categories of Innovation and Best In-House Legal Team at the 2013 African Legal Awards ceremony. Leaders within the in-house legal team are sharing their experiences with other similar corporations nationally. By all accounts, the idea that LPOs are relevant to the South African market is gaining traction.

It is not only multinational corporations that stand to benefit. Law firms of all sizes are showing interest. Smaller firms are interested in accessing scalable support for sophisticated functions such as technology assisted contract management, while larger firms are interested in the competitive advantage a relationship with an LPO provider might bring when bidding for large scale projects, where cost of delivery is a decisive selection factor.

What does this mean for the wider legal services market in South Africa?

The global financial crisis of 2008 was acutely felt in the UK and US, where LPO providers now find their most accessible market. However, lessons learned in those regions apply equally well to others and the backlash against the hourly bill, opaque fees and law firm protectionism has not receded as quickly as the memory of the economic crash. Lawyers in the UK are realising that change in their delivery model is imminent, either by their own volition or at the instance of key clients. South African lawyers have a unique opportunity to monitor the developments in these jurisdictions closely and emulate the successes wherever possible. This will secure their future when the inevitable happens and clients pick up the universal chorus of demanding more for less.

Richard English BA LLB (Rhodes)
Dip Global Strategic Outsourcing
(Middlesex University UK) is a non-practising attorney and associate director at Exigent Limited in Cape Town.

THE LAW REPORTS



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

May 2014 (3) *The South African Law Reports* (pp 1 – 320);
[2014] 2 *The All South African Law Reports* April
no 1 (pp 1 – 126); and no 2 (pp 127 – 250)

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

Abbreviations:

CC: Constitutional Court
GNP: Gauteng North High Court, Pretoria
KZD: KwaZulu-Natal High Court, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Arbitration

Making award an order of court: In *Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and Another* [2014] 2 All SA 227 (GNP) the applicant sought to have an arbitration award handed down by an arbitrator (the second respondent) made an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act).

The original dispute between the applicant and the first respondent, which was referred to arbitration, concerned the cancellation of an agreement between them. The primary issue referred for arbitration was whether the relevant notice of cancellation constituted a valid termination. The applicant sought a declaratory order that the contract had not been validly terminated. The arbitrator found that while the notice was not valid, the agreement was subsequently terminated with effect from

30 June 2008 by a notice of cancellation dated 28 March 2008.

The first respondent opposed the present application on a number of grounds, some of which will be referred to here. First, it contended that the application was premature as the matter had been referred to further arbitration which was pending; secondly, the award was not an award sounding in money and was unenforceable in its terms; and thirdly, the award could not be enforced as the applicant's claim for payment had prescribed.

Murphy J pointed out that s 31(1) of the Act provides that an award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court. An award which has been made an order of court may be enforced in the same way as any judgment or order to the same effect.

The court dismissed the first respondent's objection on the grounds that the application was premature and that the award was not final.

Secondly, the court held that there is no legal basis or principle supporting the respondent's argument that the court

should not make the award an order of court as 'it does not sound in money' – in the sense that payment is not ordered. The jurisdictional preconditions of s 31(1) of the Act require only the existence of an award, which is not defined in s 1 to exclude awards not sounding in money. In any event, the second arbitrator's costs award against the respondent is one sounding in money (in the sense that payment is ordered) which can be enforced; but the applicant requires a court order to do so.

On the issue of prescription, the court held that the right to have an arbitration award made an order of court and to enforce it prescribes, in terms of s 11(d) of the Prescription Act 68 of 1969, three years after the award is made. The award was made on 15 February 2012. Hence, the right to enforce it would prescribe only in early 2015, unless the running of prescription was interrupted or delayed in terms of the Prescription Act, in which event the period would be longer. Prescription thus posed no obstacle to making the award an order of court.

The application was allowed with costs.

Cession

Pactum de non cedendo: The facts in *Born Free Investments 364 (Pty) Ltd v FirstRand Bank Ltd* [2014] 2 All SA 127 (SCA) were as follows. The respondent, FirstRand, lent money to two companies, who borrowed R 49,2 million and R 25,1 million respectively. They were later placed under liquidation. FirstRand's claims were admitted by the liquidators, and it was a major creditor in each insolvent estate. The liquidators ceded the claims to the appellant, Born Free, which, as cessionary, sued FirstRand in the High Court. It alleged that FirstRand had repudiated the loan agreements which it had entered into with each of the two companies, causing the companies to suffer significant losses.

FirstRand denied the validity of the cession to Born Free on the basis that its contract with each of the two companies contained a *pactum de non cedendo* preventing the companies from ceding any of their rights under the agreement without FirstRand's prior written consent.

The crisp question raised on appeal was whether the right, title and interest in and to the claims in question were

capable of being ceded by the duly appointed liquidators of the two companies in view of the stipulation referred to above.

Born Free argued that the liquidators entered into each sale and cession in accordance with their duties in terms of the insolvency law and that the clause containing the *pactum de non cedendo* was in law inapplicable to and of no effect as against them because, so it argued, a *pactum de non cedendo* does not bind a liquidator who cedes a contractual right pursuant to his duties as liquidator.

Ponnan JA confirmed that a distinction must be drawn between a *pactum de non cedendo*, which prohibits the cession of an existing right, namely, one which pre-existed the conclusion of the *pactum*, on the one hand, and a *pactum de non cedendo* of a right which, by means of the *pactum* itself, was created *ab initio* as a non-transferable right, on the other hand. The question is, therefore, whether the rights which the liquidators had ceded to Born Free had been created *ab initio* as non-transferable rights. If they were, then it would follow that the cession in each instance was invalid and would thus be of no force or effect.

The court held that the clause which contains the *pactum de non cedendo*, was couched in fairly wide terms. The language could not have been clearer: 'You shall neither cede any of your rights nor assign any of your obligations under this agreement without our prior written consent'.

On the plain and ordinary meaning of the words used, it was clear that it was the intention of the parties to the agreements, when they concluded them, to render all rights acquired by the two liquidated companies under those agreements non-transferable. Accordingly, the cession of the claims of the companies against FirstRand to Born Free by the liquidators of the companies, was invalid and of no force or effect.

The appeal was dismissed with costs.

Company law

Ability to pay debts: In *Dipenaar NO and Others v Business Venture Investments No 134 (Pty) Ltd and Another* [2014] 2 All SA 162 (WCC) the first respondent, BVI, was the owner of a frail care centre situated in an upmarket security lifestyle village. The applicants sought an order declaring that a resolution of BVI's board of directors to commence business rescue proceedings and to place BVI under supervision, had lapsed and was a nullity. In the alternative, they sought the setting aside of the resolution on grounds set out under s 130(1)(a)(ii) and/or s 130(1)(a)(iii) of the Companies Act 71 of 2008 and an order placing BVI in provisional liquidation in the hands of the Master of the High Court. The applicants brought the application in their capacity, both as creditors of and affected parties in relation to BVI.

The crisp issue at stake was whether BVI was unable to pay its debts and whether it was, therefore, just and equitable to place it under final liquidation.

Boqwana J confirmed that the test to be applied in ascertaining whether a company is unable to pay its debts is whether it is commercially insolvent in the sense that it is unable to meet its day-to-day liabilities in the ordinary course of business. The court held that BVI had been able to demonstrate that it could meet its liabilities as they fell due, albeit those liabilities being paid on its behalf by its sole shareholder, and that it would remain buoyant after having met those obligations.

The court further reasoned that it would not serve the interests of the parties concerned to place BVI into final liquidation.

The application was accordingly dismissed.

Constitutional law

Warrantless searches: In *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) the CC was asked to consider

the constitutionality of s 32A of the Estate Agency Affairs Act 112 of 1976 (the EAAA) and s 45B of the Financial Intelligence Centre Act 38 of 2001 (FICA), which both provide for non-routine, warrantless searches.

Both s 32A of the EAAA and s 45B of FICA confer wide powers of warrantless search and seizure on regulatory bodies.

The applicant, the Estate Agency Affairs Board (the board), tried to use its statutory powers to search the business premises of the first respondent, Auction Alliance.

The court *a quo* held that both s 32A and 45B were unconstitutional and invalid.

All the parties to the present case agreed that the provisions were unconstitutional. However, a number of issues remained to be decided by the present court. First, should the declaration of invalidity be made retrospective? Secondly, should the declaration of invalidity be suspended, and if so, for how long? Thirdly, should there be a reading in to the existing wording of the two Acts under discussion?

Cameron J held that s 32A of the EAAA and s 45B of FICA are indeed unconstitutional and invalid.

However, the court pointed out that the declaration of invalidity is not retrospective. The declaration of invalidity was suspended for 24 months to afford the legislature an opportunity to cure the invalidity.

The order granted by the High Court, under which the board's auditors retain a mirror image of the data on Auction Alliance's computers, is extended for 30 days beyond the date of the CC's order to enable the board to apply for a warrant in respect of the data under the statutory provisions as they apply during the period under suspension.

The court further recommended the 'reading in' of a number of provisions into s 32A and s 45B in order to ensure that regulatory bodies supported by the EAAA and FICA are in the meantime allowed to exercise their search and seizure functions in a

way that meets constitutional scrutiny.

The court distinguished between warrantless routine inspections on the one hand, and warrantless 'non-routine' (or 'targeted') inspections, on the other. A 'targeted' inspection is based on a particular suspicion of wrongdoing.

The court drew an important distinction between the following two scenarios. First, statutory provisions that provide for warrantless routine inspections generally meet constitutional muster and are valid. Conversely, statutory provisions which provide for warrantless targeted inspections are unconstitutional and invalid.

In reaching its decision the court referred with approval to the earlier decision in *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) in which the CC invalidated provisions of the Customs and Excise Act 91 of 1964 which provided, *inter alia*, for warrantless searches of any premises at any time.

The declaration of invalidity of s 32A of the EAAA and s 45B of FICA made in the High Court was confirmed, but the terms of the High Court order were varied.

Contingency fees

Validity: The decision in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) concerned the constitutionality of the Contingency Fees Act 66 of 1997 (the Act). The High Court dismissed Bobroff's application in which it sought a declaration of unconstitutionality of the Act.

Bobroff's application to the CC for leave to appeal was dismissed. The CC held that it was the wisdom, not the rationality, of the legislature's distinction – regulating contingency fee agreements, but not champertous agreements – that was questioned. It held that courts cannot venture beyond rationality into reasonableness under the guise of rationality review, and dismissed Bobroff's application with costs. (For a more detailed discussion of the *Bobroff* case, see 2014 (May) *DR* 52.)

Insolvency law

Rehabilitation: In *Vengadesan NO v Shaik and Others* 2014 (3) SA 14 (KZD) the applicant, in his capacity as trustee of the insolvent estate of the late Ayob Shaik (the deceased) sought an order for the eviction of the first and second respondents (who were family members of the deceased) from certain immovable property that formed part of the estate of the deceased.

The present application turned on the question whether the applicant had the necessary *locus standi in iudicio* to bring the application because, so the respondents argued, the deceased would have been rehabilitated by effluxion of time on 14 July 2011, had he not died during January 2010.

Jeffrey AJ held that only an insolvent may be rehabilitated – a deceased insolvent's estate may not be. If an insolvent dies before ten years have passed from the sequestration of his estate, this bars his rehabilitation. In this regard the court relied on the provisions contained in ss 124, 127A and 129 of the Insolvency Act 24 of 1936.

The application order for eviction of the respondents was granted with costs.

National Credit Act

Section 129 notice: The decision in *Kubyana v Standard Bank* 2014 (3) SA 56 (CC) is of importance to both credit providers and consumers. In *Kubyana* the CC explained its earlier decision in *Sebola v Standard Bank* 2012 (5) SA 142 (CC).

Both *Kubyana* and *Sebola* dealt with the interpretation and application of s 129 of the National Credit Act 34 of 2005 (the NCA). At the heart of the controversy surrounding s 129 is the question what exactly is required before one can say that a s 129 notice has been properly delivered by a credit provider to a consumer.

In *Kubyana* the court held that if a consumer has elected to receive notices by way of registered mail, he must re-

spond to notifications from the Post Office requesting him to collect registered items unless, in the circumstances, a reasonable person would not have responded. A consumer will not be allowed to neglect to collect a notification from the Post Office to collect a registered item and then claim that the s 129 notice has not been delivered to him. (For a more detailed discussion of the *Kubyana* case, see 2014 (June) DR 38.)

Debt review: In *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) the appellants, Ferris, borrowed money from the respondent, FirstRand, to buy a home. This loan was secured by a mortgage bond over the property. Ferris fell into arrears with their loan repayments and applied to be declared over-indebted under s 86 of the National Credit Act 34 of 2005 (the NCA). The bank rejected the debt-restructuring proposals made by the debt counsellor but made no counter-proposal. The bank purported to terminate the debt review, but the s 86(10) notice was not properly delivered to Ferris, rendering it ineffective.

The magistrate's court made a debt-restructuring order on the basis sought by Ferris, including the debt owed to the bank. Ferris defaulted on the terms of the order and the bank instituted proceedings against Ferris to reclaim the money and have the property declared specially executable.

Ferris opposed the claim and the bank claimed summary judgment. Although the summary judgment was initially resisted, it was not properly prosecuted and default judgment was granted against Ferris.

Ferris applied for a rescission of the default judgment. The application was refused, as was Ferris' application for leave to appeal against that decision. Their petition to the SCA was also turned down, whereupon Ferris applied to the CC for leave to appeal.

Ferris claimed that the bank was not entitled to enforce the agreement, even if breached for a number of rea-

sons, *inter alia*:

- The debt review was not terminated properly because the s 129 notice was not properly delivered.
- Ferris substantially complied with the restructuring order.
- The bank was not entitled to enforce a credit agreement that is subject to a restructuring order and has been breached.

The court granted condonation on the basis that it was in the interest of justice to have legal certainty as to when a credit provider is entitled to enforce a credit agreement that is subject to a restructuring order and has been breached.

The court decided the application for leave to appeal on the substantive question whether there was a reasonable prospect of success.

Mosenke ACJ held that there was no mistake in the order made by the High Court. Ferris had breached the restructuring order, which entitled the bank to enforce the agreement without further notice (ss 88(3)(b)(ii) and 129(2)).

The argument that the debt review was not terminated is irrelevant because the bank is entitled to rely on the breach of the restructuring order.

The argument that Ferris 'substantially complied' with the order was also not tenable in fact or in law because, firstly, Ferris had paid only R 1 000 instead of the R 9 000 required in terms of the order; and secondly, it is doubtful whether the doctrine of substantial compliance to statutory requirements would apply to contracts or restructuring orders.

In regard to the replication, the bank based its initial claim on the termination of the debt review process, to which Ferris responded with the assertion that the notice was defective. Under those circumstances the bank was entitled to raise the breach in replication.

The court concluded that Ferris had failed to show that the default judgment was given in error under r 42(1)(a) or to show good cause by showing that they had a *bona fide* defence. Ferris failed to raise any substantive defence to

the claim under r 31 or under common law.

The application for leave to appeal was accordingly refused.

Debt counsellor: The decision in *Bornman v National Credit Regulator* [2014] 2 All SA 14 (SCA) concerned the cancellation of a debt counsellor's registration in terms of the National Credit Act 34 of 2005 (the NCA).

The NCA introduced a new legislative regime to afford consumers who are over-committed a 'second-chance' by being declared over-indebted and rescheduling their commitments. The NCA created the concept of a debt counsellor and established the National Consumer Tribunal (the tribunal).

The crisp facts in *Bornman* were that the tribunal conducted a hearing into the conduct of Bornman, an attorney who was registered in terms of the NCA as a debt counsellor. At the end of the hearing, Bornman was found to have contravened a number of his conditions of registration, as well as various provisions of the NCA and its regulations. His registration as a debt counsellor was cancelled in terms of s 150(g) of the NCA. He was ordered to refund to all of his past and current clients, or consumers, all amounts taken from his trust account as collection commission, or retainer, or legal fees, or under any other description as well as any other charge not provided for in terms of the fee guidelines.

Bornman appealed against the decision of the tribunal to the High Court. Both his appeal and his application for leave to appeal to the SCA were dismissed but leave to appeal was subsequently granted by the SCA.

Malan JA pointed out that s 86 of the NCA, read with reg 24, prescribes the procedure to be followed when a consumer applies for debt review. On applying to be declared over-indebted, a consumer must provide the debt counsellor with the information set out in reg 24(1)(b). The duties of the debt counsellor are then to deliver

a completed Form 17.1 to all credit providers and the credit bureau within five days. He must verify the information provided by the consumer and must determine, within 30 days, whether the consumer appears over-indebted. Once a determination is made, the debt counsellor must submit Form 17.2 to all affected credit providers and the credit bureau.

Bornman deviated from the procedure required by s 86, using an expedited process. His actions constituted a contravention of s 86 and reg 24. The tribunal was, therefore, correct in declaring that Bornman had breached his conditions of registration and also contravened ss 86(6), (7) and (8) of the NCA. Bornman's conduct was prohibited by the NCA.

Bornman was supposed to act in the best interests of the consumers whom he had counselled. One of the conditions of his registration as a debt counsellor required him to charge or recover fees only as provided for in the NCA and regulations, and not to receive fees, commission or any other remuneration where such income might compromise his independence as a debt counsellor. However, 10% of the monthly payments made by consumers was deducted and paid into Bornman's trust account as a collection fee. In accepting the collection fee, Bornman had acted in clear contravention of his conditions of registration.

The court confirmed the tribunal's order that Bornman had to repay all amounts deducted as collection commission, or retainer, or legal fees.

The appeal was accordingly dismissed with costs.

Prescription

Extinctive prescription: The facts in *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) were as follows. In 1993, when the plaintiff, Malcolm, was six-years-old, he was diagnosed with stage 1 Hodgkin's Lymphoma. He was admitted to the Red Cross Children's Hospital in Cape Town for treat-

ment. He alleged that while he was in hospital undergoing treatment there was an outbreak of Hepatitis B at the hospital and in October 1994 he was diagnosed with that disease. He ascribed his infection with Hepatitis B to negligence on the part of the hospital and its staff and sought to recover damages from the provincial government (the defendant) under whose auspices the hospital operated.

As Malcolm was a minor at the time of the expiry of the prescriptive period, completion of prescription was delayed in terms of ss 13(1)(a) and (i) of the Prescription Act 68 of 1969, the relevant portion of which provides that: 'If ... the creditor is a minor ... or ... (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) ... has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

Malcolm's claim was met with a special plea of prescription, which the court *quo* upheld.

On appeal Wallis JA pointed out that the issue in the present case arose from a change in the law relating to the age of majority that occurred after Malcolm became infected with Hepatitis B. At that time the age of majority was 21 years in terms of s 1 of the Age of Majority Act 57 of 1972. However, the age of majority was altered to 18 years by way of s 17 of the Children's Act 38 of 2005, which came into operation on 1 July 2007. On that day and by operation of law Malcolm attained his majority. The defendant contended that accordingly the impediment of minority referred to in s 13(1)(a) of the Prescription Act ceased to exist on that date, leaving Malcolm with one year in which to institute the action. The result of his not having done so was said to be that his claim prescribed one year later, on 30 June 2008.

The word 'minor' in s 13(1)

(a) of the Prescription Act means a person under the age of 18. The meaning applies only to claims arising after 1 July 2007.

The Children's Act too does not address this issue. This silence points in favour of the change in the law operating only in cases arising after the change occurred.

The appeal was accordingly allowed with costs.

• See also page 30.

Renaming of courts

New names and SALR's abbreviations: Consequent upon the commencement of the Superior Courts Act 10 of 2013, which created a single High Court with various divisions (see ss 6 and 50), a directive regarding the renaming of these divisions has been published (GN 148 in GG37390 of 28 February 2014). The editors of the South African Law Reports have adopted the following abbreviations to designate the renamed courts.

The names below are the official names from 23 August 2013. Except where indicated otherwise the English and Afrikaans abbreviations are the same.

- **ECG:** Eastern Cape Division, Grahamstown.
- **ECB:** Eastern Cape Local Division, Bisho.
- **ECM:** Eastern Cape Local Division, Mthatha.

• **ECP:** Eastern Cape Local Division, Port Elizabeth.

• **FB:** Free State Division, Bloemfontein.

• **GP:** Gauteng Division, Pretoria.

• **GJ:** Gauteng Local Division, Johannesburg.

• **KZP:** KwaZulu-Natal Division, Pietermaritzburg.

• **KZD:** KwaZulu-Natal Local Division, Durban.

• **LP:** Limpopo Division, Polokwane.

• **LT:** Limpopo Local Division, Thohoyandou.

• **MN:** Mpumalanga Division, Nelspruit.

• **NCK:** Northern Cape Division, Kimberley.

• **NWM:** North West Division, Mahikeng.

• **WCC:** Western Cape Division, Cape Town.

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, banking, children, civil procedure, company law, constitutional practice, consumer law, contract, criminal law, customary law, delict, evidence, execution, intellectual property and revenue.



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

LSNP ordered to continue with disciplinary inquiry

By
Nomfundo
Manyathi-
Jele

*Graham and Others v Law Society of the
Northern Provinces and Others (GNP)*
(unreported case no 61790/2012, 15-4-2014) (Mothle J)

In a recent decision, the North Gauteng High Court ordered that the Law Society of the Northern Provinces (LSNP) should resume its disciplinary hearing into the conduct of Ronald and Darren Bobroff of Ronald Bobroff & Partners Inc. The High Court judgment emphasised the role of statutory law societies. The question whether the LSNP had performed its duties was considered.

In June 2011, husband and wife Matthew and Jennifer Graham lodged a complaint with the LSNP of overcharging against their personal injury lawyers Ronald Bobroff and his son, Darren.

The Grahams, dissatisfied with the manner in which they allege the LSNP had dealt with their complaint, brought the application seeking relief, among others, that the court should take over the LSNP's disciplinary inquiry or allow it to continue under the court's supervision. The disciplinary inquiry instituted by the LSNP into the conduct of the Bobroffs, had been postponed indefinitely, pending the outcome of this application.

In this matter there were three applications for relief sought, namely, the main application, a counter application and leave to intervene in the proceedings. In the main application the Grahams sought to compel the LSNP to perform its duties in terms of the law in dealing with the Graham's complaint against the Bobroffs. In the alternative, and the court finding that the LSNP was unable to perform such duties, relief was sought for issuing of directives and placing the disciplinary inquiry concerning the Bobroffs under supervision or further in the alternative, directing that the inquiry be conducted by the High Court.

The Grahams also sought relief directing the Bobroffs to make certain outstanding information available and that the Bobroffs be suspended pending the conclusion of such proceedings. In the counter application, the Bobroffs sought

relief that the Grahams be interdicted from interfering with the disciplinary inquiry of the LSNP and that the adjourned inquiry be allowed to resume.

Background

On 4 September 2006 Matthew Graham, a plumber and member of the Discovery Health Medical Scheme (Discovery), was involved in a motor vehicle accident in which he sustained serious injuries. Following the accident, Jennifer Graham lodged a claim with the Road Accident Fund (RAF), assisted by Darren Bobroff.

Mr Bobroff lodged the claim against the RAF in the amount of R 2 million. The Grahams and the RAF agreed to settle the claim in the amount of R 1 979 952,69 all-inclusive plus costs. Mr Bobroff deducted R 858 689,05 for fees and party and party litigation costs, and paid out R 1 187 971,61 to the Grahams.

Discovery, which paid for Mr Graham's medical expenses, claimed payment for the expenses from the Grahams.

In October 2011 the Graham's demanded that the Bobroffs make certain information relating to the complaint available such as copies of the law firm's billing system and account transactions relating to the RAF payment on the Graham's trust ledger account. The Grahams later requested that the LSNP assist them in obtaining the information.

In February 2012 the LSNP's investigating committee held a hearing. The Bobroffs walked out of the hearing which proceeded in their absence. The investigating committee made recommendations to the LSNP council after its findings showed that there was a *prima facie* case of unprofessional or dishonourable or unworthy conduct that had been made against the Bobroffs and that the LSNP's monitoring unit should conduct an inspection at the Bobroffs' offices.

In June 2012 the LSNP issued charges to the Bobroffs and formally notified them of the hearing of its disciplinary

inquiry scheduled for 25 and 26 July. On 25 July, at the commencement of the disciplinary inquiry, the Bobroffs requested the recusal of all members of the disciplinary committee because they had had prior sight of the evidence before the scheduled hearing. The Bobroffs applied for and obtained a High Court order that evening, interdicting the LSNP from proceeding with the hearing, pending the finalisation of a review of the refusal by the members of the inquiry to recuse themselves. As a result of the interdict, the inquiry was postponed indefinitely.

The LSNP agreed to appoint a new disciplinary committee and the Bobroffs abandoned the review. In August 2012, the Grahams sent the LSNP a draft report compiled by accountant Vincent Faris, which was based on an extract from the Bobroffs' accounting records. In the report Mr Faris recommended that further inspection of the Bobroffs' trust accounts be conducted.

The Graham's case against the LSNP

In the main application, the Grahams sought relief against the LSNP, the first respondent, on the one hand and against the Bobroffs and their firm, the second to fourth respondents, on the other. The Grahams' case against the LSNP included the following accusations –

- the LSNP had 'demonstrated an unwillingness, unbefitting its statutory position, to expeditiously and diligently comply with its duty to investigate.' They stated further that the LSNP did not 'immediately institute an investigation in accordance with the recommendations by Mr Faris in his report', adding that the LSNP has failed to demand copies of documents from the Bobroffs including their electronic billing sheet records;
- the LSNP failed to implement the recommendations of its investigating committee that its monitoring unit be

instructed to conduct certain further investigations at the offices of the Bobroffs; and

- the LSNP was conflicted on the question of common law contingency fee agreements. The Grahams accused the LSNP of taking Mr Bobroff's side in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) by supporting the validity of common law contingency fee agreements (see 2014 (May) DR 52). They submit that the LSNP entered the debate in the *De La Guerre* matter in defence of common law contingency fee agreements, in support of Bobroff as its prime mover. This, according to the Grahams, cast a shadow on the role of the LSNP as a neutral arbiter in the conduct of the disciplinary inquiry.

In his judgment delivered on 15 April 2014 Mothle J said that it appeared that the LSNP had accepted the Constitutional Court's ruling that common law contingency fee arrangements were unlawful and there was no evidence to the contrary.

In defence of the charges, the LSNP contended that –

- the Grahams' application was premature;
- the exercise of its disciplinary powers is subject to review only on the grounds listed in s 6 of the Promotion of Administrative Justice Act 3 of 2000 and the Grahams had not sought to establish any of those grounds;
- the court, as a matter of policy, would not entertain an application by an aggrieved complainant for an attorney to be suspended or struck from the roll before the LSNP's investigation and prosecution of the complaint had run to its finality; and
- there were various flaws on which the application of the Grahams was based.

In terms of s 71 of the Attorneys Act 53 of 1979, the LSNP council may inquire into cases of alleged unprofessional, dishonourable or unworthy conduct on the part of any attorney, notary, conveyancer or candidate attorney. The council is empowered to summon any person who

may be able to give material information concerning the subject matter of the inquiry or who has in his or her possession and under his or her control any book, document, record or thing which has a bearing on the subject matter of the inquiry, to appear before it at the time and place specified in the summons.

The Grahams also demanded that the LSNP should appoint a retired judge to conduct the inquiry as well as an advocate to prosecute, so as to ensure equality of arms since the Bobroffs had the benefit of senior counsel defending them.

Relief sought against the LSNP

The Grahams' dissatisfaction with the LSNP was based mainly on four grounds, namely –

- failure to deal with the Faris report;
- the LSNP's position on common law contingency fee agreements;
- the electronic billing system; and
- allowing the Bobroffs to play possum and delays in dealing with the complaint.

The court found that there was no evidence suggesting that the LSNP had refused to investigate the Bobroffs' accounts as recommended in the Faris report. It said that the Faris report had come more than a year after the complaint had been lodged, and that the LSNP had referred it to the Bobroffs for their response which it had not yet received when this application was launched.

The court further found that the LSNP had discharged its duties regarding the Faris report as it had been referred to the disciplinary department to be dealt with 'in the normal course of the pending disciplinary inquiry'.

Mothle J also found that where a court is asked to intervene in a law society's disciplinary inquiry midway, that such intervention should be limited only to instances where there is sufficient evidence to justify the intervention. He said that this would be in instances such as where the disciplinary inquiry is unlaw-

ful, unreasonable or procedurally unfair to the extent that the aggrieved party may not receive relief in due course, should the disciplinary process by the law society be allowed to continue.

He stated: 'On the evidence before this court, I am of the view that this is not one of the instances where an intervention or even supervisory relief would be appropriate. The law society is being assailed for failing to accede to the demands of the Grahams' attorney. There may be merit in some of the concerns raised by the Grahams against the law society but most of these are premature.'

Declaratory order

The Grahams also sought a declaratory order against the LSNP to do all in its power to ensure that the public is protected from serious misconduct.

Outcome

The court ordered that –

- the application for a declaratory order as well as the relief sought to have the court take over the disciplinary inquiry or place the inquiry under the court's supervision be dismissed;
 - the disciplinary inquiry convene a sitting within 60 days from the date of the order;
 - the disciplinary inquiry conduct an inspection of the books of Ronald Bobroff & Partners Inc and compile a report for all the parties in the application, within thirty days from the date of the order; and
 - the Bobroffs must deliver the information and items to the LSNP and the attorneys representing the Grahams within 15 days from date of the order.
- An application for leave to appeal was due to have been heard on 11 June 2014. The Law Society of the Northern Provinces did not oppose the application.

Nomfundo Manyathi-Jele is the news editor at *De Rebus*.

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The SCA removes uncertainty with regard to the admissibility of extra-curial admissions by a co-accused

By
Arthur
Henry
Olsen

Litako and Others v S (SCA)
(unreported case no 584/2013, 16-4-2014)

The law has many areas that are unclear and require a lucid mind and analytical bent in order to see the wood for the trees. Sometimes our courts take an issue which the common law both eloquently and concisely defines, and with one judgment create considerable confusion and uncertainty, as evidenced below.

How many times has an attorney not consulted with a client and come away from the initial consultation confident that the client's version is reasonably possibly true only to be bedevilled, on receipt of the further particulars, with a delightfully incriminatory statement by a co-accused?

The law in respect of confessions has been clear in that s 219A of the Criminal Procedure Act 51 of 1977 provides that a confession shall be admissible only against the maker thereof, and the common law provided that admissions by a co-accused were only admissible against the maker thereof. Into this certainty stepped the Supreme Court of Appeal and slightly muddled the waters.

In *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) the court allowed the admission of an extra-curial admission made by one accused against all the accused in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. In *Litako and Others v S* (SCA) (unreported case no 584/2013, 16-4-2014), the Appellate Division paraphrased the approach in the *Ndhlovu* case and held that: 'The purpose of this Act is to allow the admission of hearsay evidence in circumstances where the interests of justice dictates its reception. If the interests of justice requires the reception of hearsay evidence the right of an accused person to challenge the admissibility of the evidence does not include the right to cross-examine the declarant' (*Litako* at para 29).

This created uncertainty because, al-

though the court did not explicitly say that the Law of Evidence Amendment Act replaced or removed the common law position, it was certainly implicit in the judgment of the court.

The above-mentioned judgment was met with much criticism from both academic writers and experts in the field of criminal law, with the totally correct and unassailable objection being raised that in doing so, the court had erred in changing and altering the common law in a manner that was on dubious constitutional footing since it infringed seriously on the accused's right to adduce and challenge evidence, which is implicit in his or her right to a fair trial.

In *S v Molimi* 2008 (3) SA 608 (CC) the Constitutional Court was faced with a similar type of matter but chose not to rule on the correctness of the approach adopted in the *Ndhlovu* case above.

In *Balkwell and Another v S* [2007] 3 All SA 465 (SCA) concern was expressed in a minority judgment as to the correctness of the approach enunciated in the *Ndhlovu* case. However, the effect was lessened by the tacit approval of *Ndhlovu* given by the SCA in *Mamushe v S* [2007] 4 All SA 972 (SCA). Although the aforementioned showed a slight shift in attitude for the better, in that the court warned that courts should be very cautious to admit hearsay evidence.

The result of all of this remained the admission of extra-curial admissions of one accused against another, and much trial time has been spent by prosecutors attempting to have such admissions declared admissible, despite the fact that our common law prohibits the admissibility of such evidence and solely because of the decision in the *Ndhlovu* case.

Fortunately the Supreme Court of Appeal recently reconsidered the matter in *Litako* and proceeded in a systematic manner to evaluate all the decisions

mentioned above and the English law in respect of the admissibility of co-accused admissions. At para 65 the court found that: 'The shifting of blame from one co-accused to another to avoid conviction is not uncommon in our criminal justice system. Furthermore, other than when one is dealing with vicarious admissions or statements made in furtherance of a conspiracy, neither of which is applicable in the present case, it is difficult to see how one accused's extra-curial statement can bind another. Co-accused, more often than not, disavow extra-curial statements made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others is ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such a statement is effectively nullified. The right to challenge evidence enshrined in s 35(3)(i) of the Constitution is thereby rendered nugatory. In this regard, the decision of the Canadian Supreme Court in *R v Perciballi* [2002] 2 SCR 761 is instructive.'

In addition, at para 67 in *Litako* the court said: 'One can rightly ask how the rights of an accused person to challenge evidence adduced against him can be more circumscribed under our new constitutional order than they were under the old regime. It has been suggested by commentators that s 3(1) has sufficient safeguards to ensure the preservation of fair trial rights, more particularly, that s 3 permits a court to admit hearsay evidence only if it "is of the opinion that such evidence should be admitted in the interests of justice". Considering the rationale at common law for excluding the use of extra-curial admissions by one accused against another, it appears to us that the interests of justice is best served

by not invoking the Act for that purpose. Having regard to what is set out above, we are compelled to conclude that our system of criminal justice underpinned by constitutional values and principles which have, as their objective, a fair trial for accused persons, demands that we hold, s 3 of the Act notwithstanding, that the extra-curial admission of one accused does not constitute evidence against a co-accused and is therefore not admissible against such co-accused.'

This judgment is of seminal impor-

tance for two major reasons. First it recognises that for too long extra-curial admissions have been the poor relation of confessions when it came to admissibility, with almost no safeguards in place. More importantly, an admission may be as incriminatory as any confession depending on its content and not its designation.

Secondly, that as a constitutional state under law the right of an accused to challenge and adduce evidence is integral to his or her right to a fair trial and

once that is effected, it cannot be said that he or she has had a fair trial and our courts will intervene timeously.

Arthur Henry Olsen LLB (Unisa) is an attorney at Cyster Borchards Attorneys in Cape Town. □

Constitutional law 101: The doctrine of the separation of powers

By
Kaelin
Govinden

*National Director of Public Prosecutions and Others v
Freedom Under Law (SCA) (unreported case no 67/14, 17-4-2014)*

One of the first things that you learn when you enter law school is that our democratic system of government is characterised by a system of checks and balances and a separation of powers between the legislature, the executive and judiciary. This is to ensure accountability, responsiveness and openness, and to prevent these three branches of government from usurping power from one another. This division of state power between three distinctive institutions was introduced by Montesquieu, who is generally credited with devising the modern concept of separation of powers. For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

'[There is no] liberty if the power of judging is not separate from legislative power and from executive powers. ... All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: That of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.' (S Woolman and M Bishop *Constitutional Law of South Africa* 2ed (Cape Town: Juta 2013) at 12-6).

On 17 April 2014 the Supreme Court of Appeal (SCA) delivered judgment in the matter of *National Director of Public Prosecutions and Others v Freedom Under Law (SCA)* (unreported case no

67/14, 17-4-2014) between the National Director of Public Prosecutions (appellant) and Freedom Under Law (respondent) and, in doing so, provided a subtle reminder of this fundamental principle of our constitutional democracy.

The first appellant in the matter was the National Director of Public Prosecutions (NDPP), advocate Nomgcobo Jiba, who was appointed on 28 December 2011 as the acting NDPP. The second appellant was advocate Lawrence Mrwebi (Mrwebi) who was appointed on 1 November 2011 as Special Director of Public Prosecutions as the Head of the Specialised Commercial Crimes Unit (SCCU) of the National Prosecuting Authority. The third appellant was the National Commissioner of the South African Police Service (the Commissioner), at the time of judgment being General Mangwashi Victoria Phiyega. The fourth appellant, who took centre stage in this matter, was Lieutenant General Richard Mdluli (Mdluli) who held the office of National Divisional Commissioner: Crime Intelligence in the South African Police Service (SAPS). The respondent, Freedom Under Law, is a non-profit company actively involved, *inter alia*, in the promotion of democracy and the advancement of respect for the rule of law in the Southern African region.

For purposes of this discussion, it is not necessary to present a detailed account of the facts. Suffice to say that the respondent launched an application in the court *a quo* seeking an order review-

ing and setting aside the following four decisions -

- the decision made by Mr Mrwebi to withdraw the charges of fraud and corruption that had been made against Mr Mdluli;
- the decision by Mr KMA Chauke, the Director of Public Prosecutions South Gauteng, to withdraw the murder and related charges made against Mr Mdluli;
- the decision by the Commissioner to terminate the disciplinary proceedings that had been instituted against Mr Mdluli; and
- the decision by the Commissioner to reinstate Mr Mdluli to office as Head of Crime Intelligence following his suspension.

In addition to the orders setting aside the four impugned decisions, the respondent also sought mandatory interdicts directing -

- the prosecution authorities to reinstate the criminal charges against Mr Mdluli and to ensure that the prosecution of these charges are enrolled and pursued without delay; and
- the Commissioner to take all steps necessary for the prosecution and finalisation of the disciplinary charges.

The court *a quo* did not limit itself to the setting aside of the impugned decisions. In addition it granted the mandatory interdicts as sought by the respondents. Both the NDPP and the Commissioner argued that these mandatory interdicts were inappropriate transgressions of the separation of pow-

ers doctrine. The SCA agreed with these contentions, explaining as follows:

'[The] doctrine [of separation of powers] precludes the courts from impermissibly assuming the functions that fall within the domain of the executive. In terms of the Constitution the NDPP is the authority mandated to prosecute crime, while the Commissioner of Police is the authority mandated to manage and control the SAPS. As I see it, the court will only be allowed to interfere with this constitutional scheme on rare occasions and for compelling reasons ... The setting aside of the withdrawal of the criminal charges and the disciplinary proceedings have the effect that the charges and the proceedings are automatically reinstated and it is for the executive authorities to deal with them. The court below went too far' (my emphasis).

The power conferred on our courts is irrefutably substantial. However, this

judgment by the SCA is a clear reminder that the power conferred on our courts should not be overstated as our judiciary is in the main limited to determinations of the constitutionality of laws made by the legislature and to the judging of the crimes or the disputes of individuals. This judgement also serves as a subtle reminder to all attorneys and legal advisers not only to consider carefully the relief being sought by their clients prior to instituting legal proceedings, but also to bear in mind and respect the limitation of powers placed on our courts in respect of the relief they may be entitled to provide in light of the facts and circumstances placed before them.

The independence of the judiciary entails more than merely an absence of undue influence, interference or control with the judicial function of the courts, but also contemplates a genuine accountability and meaningful relationship

between the judiciary and the executive under our law and the Constitution. While judicial activism will no doubt to some extent encroach on government policy and performance, the judiciary, like all other organs and institutions established under our Constitution, remains accountable under the law and, as demonstrated by the SCA in this case, must adhere to and respect the doctrine of separation of powers and must function in unison with other organs of state.

Kaelin Govinden LLB LLM (UKZN) is a candidate attorney at Cliffe Dekker Hofmeyr in Cape Town. □

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NEW LEGISLATION

Legislation published from
26 April to 23 May 2014

* Items marked with an asterisk are discussed later in the column.

PROMULGATION OF ACTS

Science and Technology Laws Amendment Act 7 of 2014. *Commencement:* 26 April 2014. GN321 GG37594/26-4-2014.
Division of Revenue Act 10 of 2014. *Commencement:* 26 April 2014. GN322 GG37595/26-4-2014.

Marine Living Resources Amendment Act 5 of 2014. *Commencement:* To be proclaimed. GN383 GG37659/19-5-2014.
South African Language Practitioners' Council Act 8 of 2014. *Commencement:* To be proclaimed. GN384 GG37660/19-5-2014.

Legal Metrology Act 9 of 2014. *Commencement:* To be proclaimed. GN385 GG37661/19-5-2014.

State Attorney Amendment Act 13 of 2014. *Commencement:* To be proclaimed. GN386 GG37662/19-5-2014.

Judicial Matters Amendment Act 14 of 2014. *Commencement:* To be proclaimed. GN387 GG37663/19-5-2014.

Special Economic Zones Act 16 of 2014. *Commencement:* To be proclaimed. GN388 GG37664/19-5-2014.

***National Credit Amendment Act 19 of 2014.** *Commencement:* To be proclaimed. GN389 GG37665/19-5-2014.

National Environmental Management: Air Quality Amendment Act 20 of 2014. *Commencement:* 19 May 2014. GN390 GG37666/19-5-2014.

COMMENCEMENT OF ACTS

Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act 35 of 2013. *Commencement:* 1 May 2014. Proc 27 GG37597/29-4-2014.

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 35 of 2013. *Commence-*

ment: 1 May 2014. Proc 28 GG37597/29-4-2014.

Independent Communications Authority of South Africa Amendment Act 2 of 2014. *Commencement:* 16 May 2014. Proc 31 GG37650/16-5-2014.

Electronic Communications Amendment Act 1 of 2014. *Commencement:* 21 May 2014. GN406 GG37670/21-5-2014.

Immigration Amendment Act 3 of 2007. *Commencement:* 26 May 2014. Proc R32 GG37679/22-5-2014.

Immigration Amendment Act 13 of 2011. *Commencement:* 26 May 2014. Proc R33 GG37679/22-5-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Attorneys Act 53 of 1979

KwaZulu-Natal Law Society: Amendment of the Rules (rule 3 and 15). GG37653/23-5-2014.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Registration of employer requirements. GN358 GG37629/13-5-2014.

Criminal Procedure Act 51 of 1977

Declaration of peace officers in terms of s 334: Inspectors appointed in KwaZulu-Natal in terms of s 81(1) of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 and inspectors and authorised officers appointed in the Northern Cape in terms of s 72 of the Northern Cape Gambling Act 3 of 2008. GN R407 GG37672/23-5-2014 and GN R408 GG37673/23-5-2014.
Cross-Border Road Transport Act 4 of 1998

Amendment regulations, 2014. GN R342 GG37614/6-5-2014.

Dental Technicians Act 19 of 1979

Amendment to the regulations relating to the registration of dental laboratories and related matters. GN R355 GG37626/12-5-2014.

Amendment to the regulations relating to continuing professional development of dental technologists and dental technician. GN R356 GG37627/12-5-2014.

Employment of Educators Act 76 of 1998

Improvement in conditions of service: Annual cost-of-living adjustment for educators employed with effect from 1 April 2014. GN357 GG37628/12-5-2014.

Immigration Act 13 of 2002

Immigration regulations. GN R413 GG37679/22-5-2014.

Liquor Products Act 60 of 1989

Amendment of regulations. GN R402 GG37669/23-5-2014.

Amendment: Wine of Origin Scheme. GN R403 GN37669/23-5-2014.

Names of generally known viticulture areas. GN R404 GG37669/23-5-2014.

Amendment: Limitation on the use of certain particulars in connection with the sale of liquor products. GN R405 GG37669/23-5-2014.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers. GN367 GG37643/15-5-2014.

Medicines and Related Substances Act 101 of 1965

Amendment to schedules. GN R352 GG37622/8-5-2014.

Regulations relating to a transparent pricing system for medicines and scheduled substances: (benchmark methodology). GN R354 GG37625/12-5-2014.

National Environmental Management: Biodiversity Act 10 of 2004

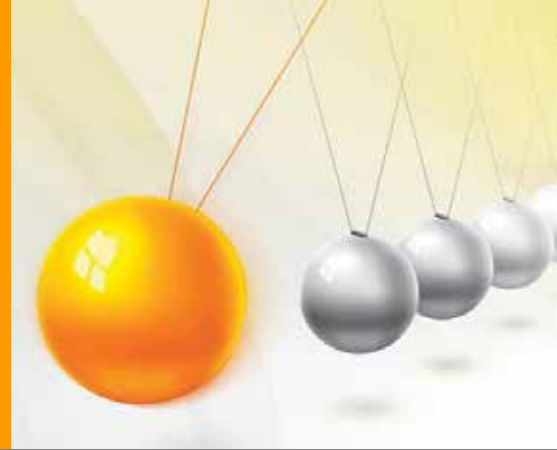
Amendments to CITES Regulations, 2014. GN R323 GG37596/29-4-2014.

Amendment to the threatened or protected species regulations, 2007. GN R324 GG37596/29-4-2014.

Biodiversity management plan for *Gypaetus Barbatus Meridionalis*. GN350 GG37620/8-5-2014.

Regulations regarding the phasing-out

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and management of ozone-depleting substances. GN351 GG37621/8-5-2014.

National Environmental Management: Waste Act 59 of 2008

National norms and standards for the remediation of contaminated land and soil quality. GN331 GG37603/2-5-2014.

Amendment to the list of waste management activities that have or are likely to have a detrimental effect on the environment. GN332 GG37604/2-5-2014.

National Health Act 61 of 2003

National Health Normative Standards Framework for Interoperability in eHealth. GN353 GG37624/9-5-2014.

Regulations relating to health care waste management in health establishments. GN R375 GG37654/23-5-2014.

National Regulator for Compulsory Specifications Act 5 of 2008

The compulsory specification for hot water storage tanks for domestic use (VC 9006). GN R362 GG37631/16-5-2014.

The compulsory specification for safety glass and other safety glazing materials: VC 9003. GN R363 GG37631/16-5-2014. Amendment of the compulsory specification for single capped fluorescent lamps (VC 9091). GN R379 GG37654/23-5-2014.

Nursing Act 33 of 2005

Creation of categories of practitioners. GN368 GG37644/15-5-2014.

Road Accident Fund Act 56 of 1996

Road Accident Fund Regulations, 2008: Adjustment of tariff. BN53 GG37653/23-5-2014.

South African Schools Act 84 of 1996

Approval of the regulations pertaining to the conduct, administration and management of the National Senior Certificate examination. GN R371 GG37651/16-5-2014.

Value-Added Tax Act 89 of 1991

Regulations issued in terms of s 74(1) read with para (d) of the definition of 'exported' in s 1(1) of the Act. GN R316 GG37580/2-5-2014.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Determination of amounts for the purposes of certain provisions of the Act. GenN365 GG37653/23-5-2014.

Draft legislation

Draft Shark Biodiversity Management Plan in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN331 GG37586/29-4-2014.

Proposed amendments to the draft demarcation regulations made under s 70 of the Short-term Insurance Act 53 of 1998. GN R325 GG37598/29-4-2014.

Proposed amendments to draft demarcation regulations under s 72 of the Long-term Insurance Act 52 of 1998. GN R326 GG37598/29-4-2014.

Draft regulations establishing Ministerial Advisory Committee on eHealth in terms of the National Health Act 61 of 2003. GN R328 GG37599/2-5-2014.

Proposed amendments to the regulations regarding control of the export of fresh fruits in terms of the Agricultural Product Standards Act 119 of 1990. GN R340 GG37606/9-5-2014.

Proposed amendments to the regulations regarding control of the export of fresh cut flowers and fresh ornamental foliage in terms of the Agricultural Product Standards Act 119 of 1990. GN R341 GG37606/9-5-2014.

Draft Road Accident Fund Benefit Scheme Bill, 2014 and rules and forms in terms of the Bill. GenN337 and BN50 in GG37612/9-5-2014.

Draft Road Accident Fund Benefit Scheme Regulations, 2014. BN338 GG37612/9-5-2014.

Proposed amendments to the regulations relating to the grading, packing and marking of onions and shallots intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GenN344 GG37630/16-5-2014.

Financial Services Board: Proposed amendments to the Johannesburg Stock Exchange Derivatives Rules. BN51 GG37640/15-5-2014.

Proposed occupational qualifications for registration on the qualifications sub framework for trades and occupations in terms of the National Qualifications Act 67 of 2008. GenN361 GG37649/15-5-2014.

Draft Built Environment Policy in terms of the Council for the Built Environment Act 43 of 2000. GenN370 GG37653/23-5-2014.

Regulations: The safe transportation of dangerous goods by road in terms of s 15(1)(e) and (3) of the Fire Brigade Services Act 99 of 1987 for comment. GenN379 GG37671/23-5-2014.

Proposed 2016 school calendar for public schools in terms of the National Education Policy Act 27 of 1996. GenN381 GG37680/23-5-2014.

SELECTED ASPECTS OF THE NATIONAL CREDIT AMENDMENT ACT 19 OF 2014

The National Credit Amendment Act 19 of 2014 was published in GN389 GG37665/19-5-2014 and will commence on a date to be proclaimed.

What are the purposes of the amendment Act?

The purposes of the amendment Act are to –

- amend the National Credit Act 34 of 2005;
- amend certain definitions in the National Credit Act 34 of 2005;
- provide for the alteration of the governance structure of the National Credit Regulator;
- empower the Chief Executive Officer to delegate certain functions to other officials of the National Credit Regulator;
- provide for the registration of payment distribution agents;
- tighten measures relating to debt counsellors and the conduct of their practices as debt counsellors;
- allow registrants to voluntarily cancel their registration;
- empower the Minister to issue a notice for the removal of adverse consumer credit information;
- provide for automatic removal of adverse consumer credit information;
- empower the National Consumer Tribunal to declare a credit agreement reckless;
- provide for the registration and accreditation of alternative dispute resolution agents; and to provide for matters connected therewith.

Changes to definitions (a selection)

The definition of 'mortgage' has been replaced. The new definition provides that a mortgage is a mortgage bond registered by the Registrar of Deeds over immovable property that serves as continuing covering security for a mortgage agreement.

A 'mortgage agreement' is defined as a credit agreement that is secured by the registration of a mortgage by the Registrar of Deeds over immovable property.

The National Credit Amendment Act has introduced 'payment distribution agents'. A 'payment distribution agent' is a person who, on behalf of a consumer that has applied for debt review, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Consumer Tribunal or an agreement.

The definition of 'prohibited conduct' has been amended. 'Prohibited conduct' is defined as an act or omission in contravention of the Act.

The second part of the definition of 'secured loan' has been amended. A secured loan is defined as an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person

- advances money or grants credit to another; and
- retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement.

Registration of credit providers: Threshold requirements

In terms of the amended s 42 the Minister, by notice in the *Gazette*, must determine a threshold for the purposes of determining whether a credit provider is required to be registered as a credit provider in terms of s 40.

Payment distribution agents

Section 44A has been inserted in the Act. It provides for the registration of payment distribution agents. Section 44A provides that a person may apply with the National Credit Regulator to be registered as a payment distribution agent and that a person must not offer or engage in the services of a payment distribution agent, or hold themselves out as being authorised to offer such services, unless the person is registered as a payment distribution agent. A consumer is not obliged to use the services of a payment distribution agent.

These agents must comply with education, experience or competency requirements (and the requirements of s 46). They must also maintain fidelity insurance and trust accounts and submit financial accounts as may be required by the National Credit Regulator for purposes of a financial audit.

Credit providers are not permitted to have any direct or indirect interests in the management or control or the business operations of a payment distribution agent (or debt counselling business).

Disqualification of natural persons (s 46)

The disqualification of certain natural persons applies to credit providers, debt counsellors and payment distribution agents. If a natural person is, for example, an unrehabilitated insolvent, he or she may not register as credit provider, debt counsellor or payment distribution agent.

Application for registration as credit provider (s 48)

The amended s 48, among others, provides that if a person qualifies to be registered as a credit provider, the National Credit Regulator must further apply the criteria prescribed in s 48, which include the commitments, if any, made by the applicant in connection with combating over-indebtedness and compliance with a prescribed code of conduct as well as affordability assessment regulations

made by the Minister on the recommendation of the National Credit Regulator. Section 48 empowers the Minister to prescribe criteria and measures to determine the outcome of affordability assessments provided for in s 48.

Automatic removal of adverse credit information (s 71A)

Section 71A was inserted into the Act. It makes provision for the automatic removal of adverse credit information. It, among others, provides that the credit provider must submit to all registered credit bureaux, within seven days after settlement by a consumer of any obligations under any credit agreement, information regarding the settlement where an obligations under such credit agreement was the subject of an adverse classifications, an adverse listing or a judgment debt. The credit bureaux must then remove any adverse listing within seven days after receipt of information regarding the listing from the credit provider.

Suspension of reckless credit (s 83)

The heading of s 83 'Court may suspend reckless credit agreement' has been substituted by the heading, 'Declaration of reckless credit agreement'. In terms of the amended s 83 any court or tribunal may in proceedings in which a credit agreement is being considered, declare that a credit agreement is reckless. In terms of the amended s 136 a complaint concerning an allegation of reckless credit agreement may be submitted to the National Credit Regulator.

Termination of an application for debt review (s 86)

Section 86(10) and (11) of the Act have been substituted. The amended s 86(10) (b) provides that no credit provider may terminate an application for debt review lodged in terms of the Act, if such application for review has already been filed in a court or in the Tribunal.

Prohibited charges (s 100)

Section 100 has been amended by the addition of subs (3) that provides that a person who contravenes s 100 by charging prohibited charges is guilty of an offence.

Sale of prescribed debt (s 126B)

Section 126B has been inserted in the Act. It provides that no person may

sell a debt under a credit agreement to which the Act applies and that has been extinguished by prescription under the Prescription Act 68 of 1969. No person may continue the collection of, or re-activation of debt which has been extinguished by prescription and where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.

Required procedures before debt enforcement (s 129)

Section 129 has been amended. The substituted subs (3) provides that subject to subs (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

Subsection (5) has been inserted in the Act. It provides that the notice contemplated in subs (1)(a) of the Act must be delivered to the consumer by registered mail or to an adult person at the location designated by the consumer.

The consumer must indicate in writing the preferred manner of delivery contemplated in subs 5. Proof of delivery contemplated in subs (5) is satisfied by –

- written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
- the signature or identifying mark of the adult person at the location designated by the consumer.

Registration and accreditation of alternative dispute resolution agents (s 134A)

Section 134A was inserted in the Act. It provides that the National Credit Regulator must register and accredit alternative dispute resolution agents.



Employment law update



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



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

Labour Court makes costs order against CEO in his personal capacity

In *Passenger Rail Authority of South Africa v Molepo* [2014] 5 BLLR 468 (LC), the respondent employee, who had been employed as the Chief Executive Officer (CEO) of the applicant's property division, was placed on special leave pending an investigation into his performance. During his period of special leave a meeting was held with him in which three options were discussed –

- converting his special leave into suspension pending the investigation;
- reaching a separation agreement; or
- appointing him as special adviser to the newly appointed CEO of the applicant's property division.

The respondent requested certain information about the special adviser position and was advised that he would be provided with a draft employment contract for consideration. The respondent continued to follow up on the status of the contract but was not provided with it. Eventually the respondent was instructed by the applicant's CEO to report for work in the position of adviser on real estate strategy. The respondent advised that he had never agreed to his redeployment into this role but had only agreed to consider the draft contract, which had not been provided to him.

The applicant's CEO responded and stated that this constituted a direct repudiation of their agreement. He communicated to the respondent that he had decided to terminate his employment on the basis that he had no interest in working for the applicant. The respondent alleged that he had been unfairly

dismissed and referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). During the CCMA proceedings, the applicant alleged that there had been no dismissal but that the respondent had repudiated his contract, and that such repudiation had simply been accepted by the applicant. The respondent denied the repudiation of his contract. The commissioner found that the respondent had been dismissed and that such dismissal was substantively and procedurally unfair. The respondent was reinstated to the position of CEO.

The applicant took the commissioner's finding on review to the Labour Court. The Labour Court found that the applicant had conceded that the respondent had been dismissed and yet it had led no evidence to justify the dismissal at the arbitration. Furthermore, the respondent's denial that he had repudiated the contract had not been challenged by the applicant during the arbitration proceedings. The Labour Court found that there was no basis to challenge the commissioner's finding that the dismissal was substantively and procedurally unfair and the review application was accordingly dismissed.

Mooki AJ furthermore expressed concern that the applicant had wasted public funds when litigating this matter. In this regard, the applicant had been ordered to pay wasted costs of the arbitration proceedings on a punitive scale, as well as the costs of a postponement of the review application because it had not adequately prepared for the matter. Furthermore, the applicant had changed its case on review and attempted to add another ground to the application. It had also given notice of its intention to appeal against an earlier order enforcing

the award, but had done nothing further. This was found to amount to a delaying tactic which had the effect of halting the expeditious resolution of disputes which the Labour Court seeks to achieve. Mooki AJ found that the abovementioned conduct should not be tolerated by the courts. He concluded that the applicant was a public entity and should not litigate 'willy-nilly' at the public's expense. He found that, in the circumstances, it was appropriate to order the applicant's CEO to pay the costs of the review application in his personal capacity. This was despite the fact that the applicant was a juristic person and the CEO was not cited as a party to the dispute. This said, the entire dispute had arisen from the CEO's actions, and Mooki AJ remarked that he may have held a different view if the CEO had not played any role in the dispute and the inappropriate manner in which it had been handled.

Time limits as per the practice manual of the Labour Court

In *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* [2014] 5 BLLR 516 (LC), the applicant sought an order staying the writ of execution that had been obtained by the respondent employee. The respondent argued that the applicant had no basis to stay the writ pending the outcome of the review as the applicant had been deemed to have abandoned the review by failing to file the record of proceedings within the prescribed time limit. This was on the basis that the practice manual of the Labour Court of South Africa provides that an applicant is deemed to have

abandoned the review if it has not filed the record of the arbitration proceedings within the prescribed period, unless the applicant has obtained the respondent's consent to the delay. In this case, the record was filed ten days outside the time limit set out in the manual and the applicant had not obtained the respondent's consent to the delay.

The Labour Court considered the fact that practice directives have been held to constitute guidelines only. Molahlehi

J, however, did not agree with this approach and found that, since the Judge President has been empowered to issue practice directives, these should be followed.

The time lines in the manual, therefore, should not simply be ignored. In this case, however, the applicant applied for condonation for the late filing of the record. Molahlehi J found that the power of a court to grant condonation where there has been non-compliance with the

time limits set out in a practice directive should be inferred, even if the practice directive does not expressly provide for this. It was found that the applicant had excellent prospects of being granted condonation for the late filing of the record and thus the application to have the writ of execution stayed pending the outcome of the review was granted.



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

Exceptional circumstances – consultation in terms of s 189 v compensation

Lebeya v Minister of Police and Another (unreported case no J728-14, 31-3-2014) (Lagrange J)

With 30 years of service, the applicant employee approached the court on an urgent basis seeking to interdict his employer, the South African Police Service (SAPS), from terminating his services until such time as the parties had engaged in consultation as envisaged in s 189 of the Labour Relations Act 66 of 1995 (LRA).

Intending to reduce the number of Deputy National Commissioners within the SAPS (a rank the employee occupied at the time), the second respondent (National Commissioner), advised the employee that he would be transferred to Head of South African Police Service Research Institute at the level of Lieutenant-General (a level the employee was currently at despite occupying the rank of Deputy National Commissioner).

This request was formalised in a letter addressed to the employee, dated 17 March 2014, wherein he was further advised that his failure to take up the post would render him 'redundant'. In a written response the employee accepted the offer on condition that his rank of Deputy National Commissioner remained the same and, therefore, his transfer would not be taken as either a promotion or demotion.

In reply the National Commissioner informed the employee that his refusal to accept the offer unconditionally rendered him redundant and that Human Resources would begin working out his exit package.

In a further letter to the employee's colleagues, the National Commissioner announced that the employee, and other employees, had not accepted their re-

spective new roles and would therefore be leaving at the end of March 2014.

On 24 March the employee's attorney wrote to the National Commissioner inquiring from her the basis, in law, whereby it was a 'natural consequence' that the employee's refusal to accept the new role, caused him to be redundant. In the absence of any reply from the National Commissioner or the SAPS, the employee sought recourse to the Labour Court.

Proceedings at court

Having satisfied itself that the matter was indeed urgent, the court, per Lagrange J, heard argument as to whether the employee has a right to have his termination suspended pending his employer holding consultations with him in terms of s 189.

The respondents' legal representative argued that under these circumstances it was not open for the employee to approach the court before being dismissed. If the employee wanted to challenge the fairness of his dismissal he could, after being dismissed, refer his dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), attend conciliation and if not settled, refer his dispute to either arbitration or to the Labour Court. Further to this, argued



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the respondents, the principle that the Labour Court should not hear an unfair dismissal claim under the guise of an interdict had been reiterated in a number of authorities.

In response, the applicant's legal representative argued that despite the decision to dismiss the applicant having already been taken, he remained employed until the end of March 2014. The right the employee therefore sought to enforce was the right to consult with his employer in circumstances where his intended dismissal was as a direct result of the employer's operational requirements.

The court began by noting that, while it had the authority to intervene in incomplete proceedings which may result in dismissal, it should do so only in exceptional circumstances. The question before the court was, therefore, whether the circumstances *in casu* could be considered to be exceptional.

It was clear to the court that if the applicant had challenged his dismissal after being formally dismissed and if it was found that his dismissal was procedurally unfair for lack of consultation, the employee would not be in the same position he would be in had he been given the opportunity to be a part of a

joint consensus-seeking process prior to dismissal.

Proper consultation could see the retrenchment being avoided or the employee being offered a suitable alternative position. Under both instances the employee would not be left without a job. However, in the absence of consultation, any subsequent and consequential finding that the employee's dismissal was unfair for lack of proper consultation, the only remedy open for the court to award (as would be the case for any dismissal which is found to be procedurally unfair but substantively fair) is compensation.

Therefore, consultation brought with it certain advantages which would be lost should the employer dispense with such process and could not be restored by granting an employee compensation following a finding that the retrenchment was procedurally unfair. Unlike other forms of dismissal, where any procedural defect in a dismissal is largely restored by a *de novo* hearing before an arbitrator or judge, it would be meaningless – where an employee is dismissed as a result of the employer's operational requirements – to achieve proper consultation after the employee had been dismissed.

The court went on to say:

'It is true, after his termination the applicant could complain that he was retrenched in a procedurally unfair manner. The procedural fairness of his retrenchment will, to some extent, be measured against the requirements of section 189, though that will not necessarily be determinative of the issue. If the applicant subsequently does proceed to challenge his retrenchment and succeeds only in establishing that it is procedurally unfair, he will not regain an opportunity to explore what alternatives that process might have yielded. He will be confined to payment of compensation as relief' (para 17).

In finding the employee had a clear right to consultation prior to his dismissal and on the basis that he remained in the employ of the SAPS, the court granted the interdict and thus prevented the respondents from dismissing the employee until such time as the parties had engaged in proper consultations as envisaged in terms of s 189. The court further held the respondents jointly and severally liable for the costs of the application.



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The role of candidate attorneys in the legal profession

By
Clement
Marumoagae

The purpose of this article is to acknowledge the launch, in October last year, of a forum for candidate attorneys, 'The Candidates' (the forum). The formation of this forum is a positive step towards the sustainability and growth of the attorneys' profession. This forum is competent to engage in the debate regarding the quality of the LLB degree. However, the forum should be structured in such a way that it does not become elitist, but is an inclusive body with adequate representation of candidate attorneys from public interest law firms, small and medium private law firms and commercial law firms. I specifically wish to address comments made by the guest speaker at the launch of the forum (2013 (Nov) *DR* 12). I will be arguing that those comments may perpetuate the stereotype that certain law firms employ candidate attorneys to advance their administrative duties without real effort to provide them with hands-on practical legal training to become well-rounded legal practitioners.

The Candidates

The forum was launched in Johannesburg on 2 October 2013. The objectives of this forum have been reported, among others, to:

- be a representative forum for candidate attorneys who want to be actively involved in the profession and not just be mere professional 'go-fers' (go fetch this and go fetch that);
- be a voice for those who are afraid to speak up, as well as provide the opportunity to promote and encourage integrity and uprightness;
- be a 'think tank' for young minds equipped with the knowledge to effect change, by sculpting a unified direction;
- provide hope and comfort that there are other candidate attorneys out there who are struggling too and that it is acceptable to ask for help;
- provide a platform for candidate attor-

neys where they can raise their concerns, experiences and lessons learnt freely, so that the forum can file a report to the respective law society to consider, comment on and act on these concerns if the need arises; and

- go into townships and educate the community on basic rights such as consumer protection, education, medical treatment and procedurally adherent arrests (*DR op cit*).

The legal fraternity at large is in a transitional period and debates regarding the weight and value of the current LLB degree are intensifying. As academics and practitioners are concerned about the LLB curriculum and its efficiency in producing competent candidates worthy to practise law, the forum will be well-suited to engage in this debate. Partners and directors of influential law firms have continually complained about graduates who leave universities with seemingly good grades but lack the substantive knowledge necessary to practise law. Some went as far as to point a finger at university law schools for failing to produce 'ready-made law graduates'. Nonetheless, 'the law society accepts that the LLB graduate will not emerge from university as a "ready-made" practitioner. However, it believes that all law graduates should be able to demonstrate an acceptable level of "generic" skills for application in all subject areas' (D Hawker '*Law degree crisis: five-year degree proposed*' ENCA 31-5-2013 (www.enca.com/south-africa/law-degree-crisis, accessed 2-6-2014)). There has been a concern about the quality of skills the LLB degree provides to students (Franny Rabkin '*Quality law graduates preferred to large numbers of ill-equipped graduates*' (www.ru.ac.za/latestnews/name,102969,en.html, accessed 2-6-2014)). It has been argued 'that there is a need to address issues of equality, particularly at LLB level, and to develop the higher-education system in order to produce knowledgeable, skilled and value-driven law students and pro-

fessionals' ('Report on LLB Summit: Legal Education in a Crisis?' 29-5-2013 held at Johannesburg (www.lssa.org.za/?q=con,320,LLB%20Summit, accessed 2-6-2014)).

Bridging the gap between theory learnt at university and practice, will continue to be one of the most spoken about issues for years to come. As such, the creation of a forum where candidate attorneys are able to meet and share their experiences with regard to the training they receive from their respective law firms could not have come at a better time. Both academics and legal practitioners have adopted a paternalistic approach to the debate regarding the efficiency of the LLB degree by not adequately engaging law students and graduates who are entering the legal profession. If indeed the LLB curriculum has a problem, such a problem cannot be fixed without proper engagement with the main stakeholders thereto, namely students. It is against this background that I believe the forum will play a pivotal role in providing a real platform for law graduates who are pursuing the attorneys' profession to engage issues that concern them. Neither the legal profession nor academia is willing to take the blame for the so called LLB crisis. Perhaps candidate attorneys, through this forum, can assist in pointing out where the problem really lies so that - if there is a problem at all - a solution can be found.

Furthermore, with reports compiled from the candidate attorneys' deliberations, law firms could develop a better understanding of their role as far as bridging the gap between theory and practice is concerned, which is a moral legal duty if we are concerned with the standard and quality of the legal profession.

Even though the forum is a welcomed positive step that can yield substantive results, one needs to caution against this forum being used as a gathering of elites from major law firms, thereby effectively excluding candidate attorneys at pub-

lic interest law firms and small private firms. For this forum to have a dignified reputation – as an institutional voice of all candidate attorneys in South Africa – it should be as broadly representative as possible. It is imperative that the agenda of the forum should be broad enough to discuss the varied challenges experienced by candidate attorneys at their diverse workplaces. Although the forum should not be turned into a trade union for candidate attorneys, it must nonetheless position itself to engage the profession through the law societies regarding issues of concern relating to candidate attorneys.

Candidate attorneys throughout South Africa are encouraged to affiliate themselves to the forum. They should be able to discuss challenges they are experiencing with regard to the legal training they are receiving – or not receiving – from their firms. Through this forum, one hopes that candidate attorneys will have the opportunity to discuss broad themes relating to practical training issues in order to compare the level and quality of legal training they are receiving from their principals including:

- how to consult properly with a client;
- an adequate way of recording client's instructions;
- management of client's expectations;
- research techniques;
- file arrangement and management;
- briefing counsel;
- how to conduct a trial properly;
- court etiquette;
- how to correspond properly with opponents;
- ethics required in legal practice;
- how to run a practice effectively;
- how to bill a client properly; and
- preparing for the admission examination.

In order for candidate attorneys to have adequate time to engage and share their views, it might be advisable to have fewer prominent speakers when the forum convenes. If this forum is truly for candidate attorneys, then candidate attorneys should spend more time discussing things among themselves as opposed to listening to keynote speakers who might not understand the working conditions that some candidate attorneys may be subjected to. Furthermore, those who are invited to speak should add value to the discussion, rather than give well-structured abstract views on the circumstances of candidate attorneys that are not founded on any practical basis.

At the launch of the forum, the speaker was reported to have spoken about the role of candidate attorneys in the legal profession. He is reported to have examined their role from two angles: 'First, what firms expect from candidate attorneys and, secondly, what a candidate attorney expects from himself or herself and what he or she wants to get out of it' (*DR op cit*). He is reported to have advised candidate attorneys to ensure that they equip themselves to pay attention to proper detail. I believe that this is sound advice that candidate attorneys should take to heart and ensure that they take their articles seriously in order to maximise their learning. Attention to detail should involve the proper taking of clients' statements, interest based discussions with principals about the applicable law, keenness to learn, capacity to improve all the time, minimising silly mistakes and continual reading and studying current law in all the areas of law. I do not agree with the speaker's view that the expectation of attention to detail includes the photocopying process, trial bundles, discovery process and pagination (*DR op cit*).

In my view, even though administrative work is part of the candidate attorney's learning process, it should nonetheless not be seen as the most decisive part of it. This perpetuates a stereotype that there are law firms that are not particularly interested in adequately training candidate attorneys, but rather use them as part of their administration work system. Candidate attorneys at these law firms become masters of photocopying machines. They run around serving and collecting documents without any real practical legal training. Further, these candidate attorneys are employed to boost these law firms' BEE ratings. However, I agree fully with him that the period of articles is an ideal time for candidate attorneys to learn and to ask questions at every opportunity, and they should not be afraid to make mistakes. However, they should avoid making the same mistake twice. Probably, the most important advice the speaker gave at the launch was that candidate attorneys should start networking, interacting with a variety of people and building good relationships.

Finally, in order for candidate attorneys to become efficient legal practitioners, law firms have a great responsibility to create a conducive learning environment that will allow for the smooth transferring of skills from principals to candidate attorneys. It is impor-

tant, therefore, that when such an environment is created, candidate attorneys take full advantage of it and learn to the best of their abilities.

Conclusion

A forum for candidate attorneys can play a leading role in safeguarding the interests of candidate attorneys in South Africa. It should be used to address concerns about the inadequate training of candidate attorneys by some law firms which may not be providing them with the practical training they need. The efficient training of candidate attorneys is a legal necessity for the survival of the attorneys' profession. As such, the legal profession and university law schools need to join hands to ensure that measures are put in place to capacitate new graduates to deal with the demands of the profession.

Clement Marumoagae LLB LLM (Wits) LLM (NWU) Diploma in Insolvency (UP) is an attorney at Marumoagae Attorneys in Itsoeng. □

Marina Genis
Clinical Psychologist

Forensic
Psychology Practice
Johannesburg

Criminal
(incl. Forensic
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Assessments)

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Tel: 082 452 2184

Fax: 086 6811 225

marinagenis@gmail.com
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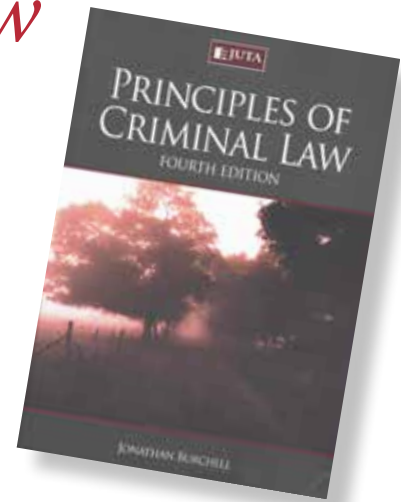
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Cape Town: Juta

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The fourth edition of this monumental work, *Principles of Criminal Law* is distinguishable from the previous edition in length, content and also appearance. In the preface the reason for this is adeptly explained, namely that the long chapter in its predecessor (ch 2) on the evolution of the South African criminal law has been omitted. This implies that a reader who needs a fuller or more comprehensive historical survey will, unfortunately, have to refer to a previous edition of this work. The same goes for the chapter on theories of punishment in the 2005 third edition (ch 4).

This accomplished publication is available both in print and in e-book formats (hyperlinked to the third edition of *Cases and Materials on Criminal Law*) which includes 347 extracts. This allows both students and legal practitioners to toggle between the rules, cases or statutory sources even in a portable and accessible format. Headnotes have meticulously been compiled, translated and included for case extracts and judgments originally delivered in Afrikaans.

The book consists of three parts, divided into numerous sections and no less than 88 chapters.

In the words of Professor Jonathan Burchell, a Fellow of the University of Cape Town, who has published widely in the fields of criminal law and also personality rights: 'There are considerable changes and improvements to the general principles section' in this edition in relation to the constitutional debate and academic exchange on the principle of legality following the *Masiya v Director of Public Prosecutions, Pretoria and Another* (Centre for Applied Legal Studies and Another, *Amici Curiae*) 2007 (5) SA 30 (CC) case (on the ambit of the common law crime of rape). The chapter on causation has required a re-working

following the Supreme Court of Appeal judgment in *Tembani v S* (2007) 2 All SA 373 (SCA) regarding the role of medical intervention. Revised discussions on the elements of robbery, criminal defamation, corruption and the civil forfeiture of assets are included. A consideration regarding the most recent version of s 49 of the Criminal Procedure Act 51 of 1977 is included to distinguish properly between private defence and public authority as defences, which is evident from the change to the positioning of the chapter dealing with this in comparison to previous editions.

Consent as a defence has also been revisited and controversial related issues such as euthanasia are examined in detail. The extensive changes as a result of the Child Justice Act 75 of 2008 are explained and critically evaluated. The author even pruned his own critique and examination on court cases which had a significant impact on the chapters dealing, *inter alia*, with provocation, child sexual experimentation, racketeering, sentencing discretion, common purpose liability and the recklessness (or volitional) element of *dolus eventualis*. Major changes have been made to the section on specific crimes. These are too many to mention here. Predominantly the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is 'to blame' for this. Also, organised crime, dealt with in one chapter in the third edition, has now been divided into seven separate chapters for easy reading.

Burchell is a top-class authority on criminal law.

All relevant judgments delivered up to the end of 2012 have been included and even important ones up to 4 October 2013. As in the previous editions, central principles/issues are highlighted in bold typeface and in digestible form in

each chapter, which is of tremendous assistance to practitioners. Even the evocative and enigmatic photograph used on the cover, taken by Suretta Venter, is exceptional and the final production has involved the contribution of a dedicated team of experts. The discussion of and comments in the book reflect the latest case law and obviously also the view of the author.

This edition required skill, efficiency, patience, dedication, invaluable knowledge and experience. It is interspersed with cryptic and enlightening commentary by the author. The author has managed to provide both practitioners and academics with a most useful and necessary handbook which can be recommended unreservedly. It is indeed an extraordinary accumulation of judicial thinking. One commiserates with the impecunious student/candidate attorney who is obliged to acquire this voluminous leviathan. This tremendous work has been prepared with precision and meticulousness and elicits nothing but profound respect for which the author can justly be applauded.

Llewelyn Curlewis LLM (Unisa) BLC LLD Cert Forensic Accounting (UP) is an attorney at Pieterse & Curlewis Inc in Pretoria. Dr Curlewis is the president of the Law Society of the Northern Provinces, a member of its criminal law committee and, vice-chairperson of the criminal law committee of the Law Society of South Africa.





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