

SEPTEMBER 2013



NON-EXISTENT PLAINTIFF
Dealing with misdescriptions in citations

Pension interest and divorce
KvK and Another – a critique

Weighing the risk
Revisiting various risk-mitigating mechanisms

Preparing for the future
University law clinics training candidate attorneys

Retiring beyond the
normal or agreed age

Legal profession pays tribute to
late former Chief Justice Pius Langa



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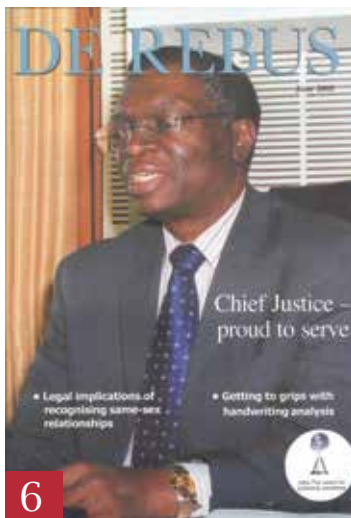
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In *HUV Cape Spice v Hotspice Sauces CC* (WCC) (unreported case no 22227/2010, 10-5-2011) (Louw J) the respondent, Hotspice, was placed under provisional liquidation by Louw J. Fareed Moosa's article questions the correctness of the principle established by the judge. The article submits that this principle ought not to be followed by a subsequently constituted court.



26 Pension interest and divorce *K v K and Another* – a critique

In this article, Johann Davey argues that if an order issued by the court granting the decree of divorce does not incorporate a s 7(8) order, another court cannot subsequently assign a percentage of the pension interest to a non-member spouse, except and unless the requirements for the variation of such a court order are met.

30 Revisiting various risk-mitigating mechanisms

Ntupang Magolego writes about the different options of risk-mitigating mechanism available to attorneys, namely – sureties, guarantees, warranties, indemnities and insurance.



34 Preparing for the future University law clinics training candidate attorneys

Universities now also focus on introducing law graduates to the legal fraternity. They do so by recruiting candidate attorneys who are then allocated supervisors to train and prepare them for the practice of law. Clement Marumoagae discusses the option of serving articles at university law clinics.

38 Retiring beyond the normal or agreed age

Where there is no indication of incapacity, poor performance or misconduct, an employer is often tempted to allow a 60-year-old person to continue working after retirement age has been reached. On the other hand, an employer sometimes has a person in his or her employ that cannot keep going until retirement age. Leicester Adams questions whether the employer is entitled to force his or her employee to retire, in both these circumstances – whether it is at the age of 60 or 65 – or any age in between.

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Mapula Sedutla - Acting editor

Fraud: Could joint initiative be the answer?

options for consideration, such as the creation of a statutory body comprising lawyers and non-lawyers as an alternative to using the Rules Board for purposes of determining fees. The committee has also asked the department to include experience as one of the determining factors to be taken into account when fees are structured.

The latest working document of the Bill, as of 1 August, can be found on www.lssa.org.za.

The Law Society of South Africa (LSSA) and *De Rebus* support the Road Accident Fund's (RAF's) initiative to eradicate fraud and unethical behaviour by attorneys and other role players. However, it should be noted that the fraud is not one sided. The RAF's advert on p 21 is a clear message that the fund is on a drive to root out corruption; the same message should be applicable to the RAF's own staff as the entire chain of corruption must be eradicated.

This is an opportunity for the LSSA and the RAF to open communication channels so that unethical actions by attorneys detected by the RAF are brought to the attention of the provincial law societies. In as much as the public makes complaints against attorneys to the fund, if the matters are not brought to the attention of the provincial law societies, there will be a delay in dealing with the unethical attorneys, which will further exacerbate the situation turning it into a vicious cycle as the unethical attorneys continue with their practice. The LSSA does not condone unethical behaviour by attorneys and agrees that fraudsters should be prosecuted.

Legal Practice Bill – latest

During the months of July and August the Bill has been scrutinised by the Justice Portfolio Committee so that all contentious issues could be interrogated. The chairperson of the committee, Luwellyn Landers, has said that no final decisions had been taken on any issue in the Bill and the committee would be considering various options that have been made.

One of the clauses that has been flagged by the committee for further deliberations is clause 34, which deals with the fee structure. The committee has, meanwhile, asked the Justice Department to prepare proposals or

za. This document contains an edition to clause 35 with sub-clause (3) under the 'Alternative option' headline and also contains a sub-clause (4) under the 'Further option' headline.

The committee has resolved the issue of advocates taking briefs direct from the public. It has agreed to recommend that advocates who take this direction will be required to have Fidelity Fund certificates and comply with other regulations, which the Justice Minister will make in consultation with either the envisaged National Legal Practice Council or the Legal Practitioners' Fidelity Fund Board. The committee has pointed out, however, that this would not entail advocates providing legal services that have traditionally been exclusively provided by attorneys.

Mr Landers has indicated that his committee was confident that the Bill will be before the National Council of Provinces in September.

Tribute to Justice Langa

On p 6 we pay tribute to the late former Chief Justice Pius Langa. Chief Justice Mogoeng Mogoeng, on behalf of the judiciary; the co-chairpersons of the Law Society of South Africa, Kathleen Matololepu and David Bekker; the National Association of Democratic Lawyers; the Black Lawyers Association; and the General Council of the Bar all said that one of the attributes Justice Langa will be remembered for was his humility. I too can attest to that as on meeting him for the first time at an event I attended, as he was about to introduce himself, I proceeded to tell him that there was no need for him to introduce himself as I knew who he was. He then said to me: 'Please allow me the pleasure of introducing myself, just this once'. This shows that he was more than a title, the fact that he was a former Chief Justice did not take away from the humble person he was.

Nip and tuck

While *De Rebus* will continue to be a source of information for the profession, the Law Society of South Africa, as a whole, has been met with budgetary constraints. This means that the journal will have a limit on the number of pages printed each month. Shorter articles that are practical in nature will be given priority. Unfortunately the two featured '5 minutes with ...' columns on p 17 and p 18 will be the last in the series.

Another item that will be removed from the journal is the 'People and practices' section. As of January 2014 the column will be combined with the admissions into a 'careers' supplement. Law firms wishing to send through promotions and appointment notices will be charged a minor fee per placement in the supplement. This will also assist *De Rebus* to cover its cost of printing the supplement.

Would you like to write for *De Rebus*?

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

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

Upcoming deadlines for article submissions: 16 September and 21 October 2013.

LETTERS

TO THE EDITOR

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

Legal Aid SA subscribes to equal opportunity in judicare allocation

I am writing in response to Mondli Myeni's letter, 'Raise the bar', that was published in the May *De Rebus* (2013 (May) DR 4).

In pursuit of our vision and mandate to ensure equitable access to justice through provision of legal services to the poor, it comes naturally for Legal Aid South Africa to uphold protection of human rights in all spheres of society.

As such, and by the very nature of our business, we have a zero tolerance against any form of discrimination in our business dealings – be it with our clients, stakeholders or staff – on the basis of class, race, gender, sexual orientation, age or any other form of prejudice.

Legal Aid South Africa is committed to compliance with the legal framework relating to equity and fairness. Our judicare accreditation system, which sources legal services from private legal practitioners, utilises a transparent automated system to allocate briefs, having regard to the principles of equity, BEE, fair distribution of fee income and matching the experience of the practitioner with the requirements of each case.

In his letter, Mr Myeni says we refused to give judicare instructions to him; however, we have no record of him as an accredited judicare practitioner on our system.

Legal Aid South Africa has put measures and policies in place to ensure that our judicare allocation subscribes to equal opportunity and is equitably represented.

Bongani Mahlangu,
regional communications practitioner,
Legal Aid South Africa –
KwaZulu-Natal region

Complaints against attorneys

Because I believe attorneys tend to take themselves too seriously, I would like to draw my colleagues' attention to something stated on the website of the Law Society of the Northern Provinces under the heading 'Complaints Against Attorneys'. The second sentence of that page reads as follows: 'The Council reiterates its commitment to protect the public against unprofessional and irresponsible members of the attorneys' profession and is prepared to investigate a complaint which is *not* submitted to it in good faith and which falls within its jurisdiction' (my emphasis).

I am sure that responsible members of the attorneys profession are shocked at the types of complaints which are now being lodged!

Charles Beckenstrater,
attorney, Johannesburg

Response by the LSNP

It was an unfortunate error made on our website, which has now been rectified.

Thinus Grobler,
director, Law Society of the
Northern Provinces

Auditors' acceptance letters for trusts

It is standard practice for attorneys to request auditors to provide them with letters of acceptance of appointment as accounting officers of trusts in cases where the trust deeds provide for the auditing of trusts. The standard letter indicates that the auditor accepts his or her appointment and that he or she will

also advise the Master of the High Court immediately should he or she no longer act as an auditor.

It is not uncommon practice for attorneys to request auditors to provide them with letters where the names of the trusts are left open, or where the registration of the trust is only intended.

Recently complaints were received from the Master that auditors do not fulfil their obligations in terms of the undertaking given to the Master. In particular, they do not advise the Master when they cease to act or when they have not performed any form of service for the previous 12 months. The auditors' standard response usually is that they were not aware of the fact that they were actually appointed by the trustees or the attorney representing the founder of the trust.

The Independent Regulatory Board for Auditors (IRBA) has resolved to take disciplinary steps against accountants who do not advise the Master when they cease to act as auditors for a trust or where they have not performed any services for the previous 12 months.

Attorneys should be aware of this practice and should take care to inform an accounting firm that they have in actual fact been appointed and/or that the trust has been formed and, if necessary, provide the accountant with the trust deed as well as a copy of the letter of authority once issued, obviously coupled with all the contact particulars of the relevant trust and trustees.

Daan Mostert,
member: Investigating committee,
Independent Regulatory Board
for Auditors





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Legal profession pays tribute to Justice Langa

The legal profession is mourning the loss of former Chief Justice Pius Langa (74) who died on 24 July 2013. A memorial service was held for Justice Langa on 1 August at the Durban City Hall and he was buried on 3 August after a service at the same hall.

The former Chief Justice was born in Bushbuckridge on 25 March 1939. He was admitted as an advocate of the Supreme Court of South Africa in 1977 after obtaining his BL and LLB degrees from the University of South Africa. He practised at the Natal Bar and attained the rank of senior counsel in January 1994.

Justice Langa, together with ten others, were appointed as the first judges of the Constitutional Court. He became its Deputy President in August 1997 and in November 2001 he became the Deputy Chief Justice of South Africa.

Justice Langa was appointed as Chief Justice and head of the Constitutional Court in June 2005 and served until his retirement in October 2009.

Justice Langa was a founding member of the National Association of Democratic Lawyers (NADEL) and served as its president from 1988 until 1994.

Tribute from the judiciary

In a media statement on behalf of the judiciary, Chief Justice Mogoeng Mogoeng expressed his 'deep sadness' at the passing. He said Justice Langa's 'enormous contribution' to the development of South Africa's jurisprudence was known and appreciated worldwide.

Chief Justice Mogoeng said: 'He served the nation with great distinction not only as Senior Counsel, President of NADEL, and Justice of the Constitutional Court but also in his capacity as Deputy Chief

Justice and later as Chief Justice of the Republic ... One of his most valuable contributions was to help develop a judiciary-led court administration model, which would strengthen the institutional independence of the judiciary in this country. Additionally, he together with some of the world's leading jurists developed the Bangalore Principles on Judicial Ethics which are now embraced by almost all judiciaries in the world'.

Justice Mogoeng said that Justice Langa will be missed for his wisdom, humility and passion for judicial independence and constitutional democracy.

Tribute from the LSSA

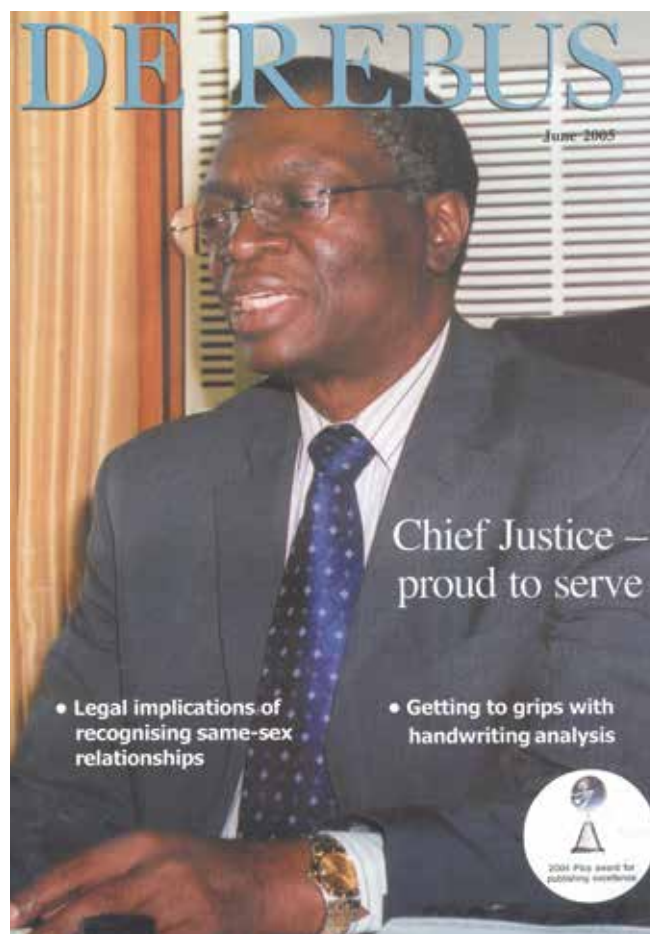
The Law Society of South Africa (LSSA) said that it was deeply saddened at his death. In a press release, its co-chairpersons Kathleen Matolo-Dlepu and David Bekker said that the LSSA acknowledges Justice Langa's role as a founder member of NADEL - one of the LSSA's six constituent members - and his leadership of NADEL as its president from 1988 to 1994.

Ms Matolo-Dlepu and Mr Bekker said: 'As a human rights lawyer, his practice as an advocate focused on the struggle against the apartheid system. As the first black African Chief Justice of South Africa, he headed a transforming judiciary and legal profession with strength, humility and dignity.' They added that Justice Langa's passion for the training and further education of the judiciary in general were evident in his role in establishing the South African Judicial Education Institute.

Tribute from NADEL

NADEL said that Justice Langa's contribution to the justice system of South Africa can never be over-emphasised.

In a press release it said: 'Comrade Pius, as he was known to NADEL, began



making his contribution to the development of the justice system in South Africa long before he became Chief Justice. In his capacity as an activist, legal representative to political prisoners and advocate of human rights he strove for justice for all.

The principles contained in our Constitution are those he lived by, worked by, and those he imparted to the many young lawyers to whom he was mentor, teacher, and inspiration'.

It added that what NADEL members will cherish most was his constant availability to give NADEL guidance and support and that it would also greatly miss his quiet strength, humility and wisdom.

NADEL described him as a man of principle who never wavered from his convictions.

Tribute from the KZNLS

The KwaZulu-Natal Law Society (KZNLS) said, in a press release, that in his practise as an advocate and subsequently a judge, Justice Langa 'manifested the qualities of integrity, impeccable honesty, a keen intellect and decorum which underpins the esteem, status and dignity of our courts'.

The KZNLS said: 'Judge Langa gave the law and, more broadly, the Constitution a liberal purpose of interpretation to enable the Constitution to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of our nation and in the articulation of its values'.

Tribute from the BLA

The Black Lawyers Association (BLA) said that Justice

Langa's death was a great loss to the legal profession worldwide. It said that Justice Langa served with great zeal and determination adding that his uncompromising contribution towards the development of constitutional jurisprudence and the law would go a long way in the legal system.

The BLA said that it would remember Justice Langa for his 'clear and incisive' approach to law as he, at all times, dispensed justice without fear, favour or prejudice.

Tribute from the GCB

The General Council of the Bar (GCB) has described Justice Langa as a 'true son of Africa'. In a press release the GCB said: 'Justice Langa has left an indelible mark in the constitutional jurisprudence of our country. He has helped South Africa to carve for itself a respected place in the world constitutional democracies. His humility as a person will be difficult to match. His legal acumen will remain a beacon for every lawyer to emulate and his legacy one that we as lawyers and as nation must protect.'

The GCB said that Justice Langa was a recipient of the Sydney and Felicia Kentridge Award. The award is conferred by the GCB to a person in recognition of dedication and excellence in service to law in Southern Africa.

Tribute from the Justice Department

The Justice Minister, Jeff Radebe, delivered a speech at Justice Langa's memorial service. Minister Radebe described Justice Langa as 'a jurist who has contributed

so much to our democratic transformation and our jurisprudential maturity' and 'an encyclopedia of our legal system'. Minister Radebe said that most of the work that he did for his clients was done *pro bono*.

Minister Radebe said: 'He left this world a better place. Through his tireless contributions to the constitutional development of our country, we are proud to share with both long-established and new democracies our experience in constitution-making. Justice Langa assisted other states to fine-tune their own constitutions when he sat at the Constitutional Review Committee of Zimbabwe, in Rwanda, Tanzania and as Commonwealth Envoy to the democratisation of the Island of Fiji, playing a role in the Lesotho elections for the Southern Africa Development Community, as a member of the police board on the transformation of the police, as a member of the review of health legislation, and the list is endless.'

Minister Radebe said that Justice Langa had a rare listening gift. He said that on one occasion Justice Langa was invited to speak, but he chose to rather listen to the audience than to speak. He put his prepared notes aside and allowed the audience to raise questions about how the wheels of justice turn. 'This to him was fulfilling,' said Minister Radebe, adding that 'by this single action, he destroyed the perception that the law is about the rich and the famous. He also demonstrated that the law can also be a strategic weapon in eradicating poverty and engendering the empowerment of the

poor. It is a law that should be at the forefront of addressing the socio-economic rights of shelter, healthcare, food water, social security education and housing, land and the environment.'

Minister Radebe said that Justice Langa was concerned that many South Africans had no clear understanding of how the law works because with many of the letters from the public that the Constitutional Court received, there was no likelihood that their issues could be addressed by the court.

Minister Radebe said that Justice Langa instructed his staff to respond to all the letters regardless of their legal merit. 'Such was his concern for the ordinary man that he wanted all to find solace and satisfaction in an institution which many of our people fear,' he said.

Minister Radebe said that in 2007 Justice Langa initiated a nine-month long training programme for aspirant women judges. He said that the objective of the training was to deal with the serious shortage of women on the Bench and women were encouraged to make themselves available for the vacancies in the High Court.

Tribute from government

In delivering the eulogy at former Chief Justice Langa's funeral, President Jacob Zuma said South Africa had lost a patriot, a freedom fighter and an accomplished jurist who dedicated his life to making the country a better place for all, especially the poor and downtrodden.

President Zuma said: 'Given Justice Langa's expertise and accomplishments in both the struggle for liberation and professionally, it was not surprising that former President Nelson Mandela appointed him, together with ten other judges, to serve in the then newly-established Constitutional Court of South Africa at the dawn of freedom and democracy ... Being an activist at heart, this particular judge saw the Bench as another site of struggle. He championed transformation, espousing the notion of transformative constitutionalism'.

President Zuma said that in one of his gender-sensitive judgments, Justice Langa found that the male-oriented rule of customary law dealing with succession had to be declared unconstitutional. 'His judgment affirmed the social, legal and political importance of customary law in democratic South Africa and insisted on its equal status, while simultaneously affirming that customary law rules were subject to the discipline of the Constitution which espoused equality for all, both men and women', he said.

President Zuma said that while others talk of building a better Africa and a better world, Justice Langa gave this vision practical meaning. 'He worked beyond our borders to advance the cause of freedom, justice, equality, peace, stability, human rights, democracy and the rule of law.'

Nomfundo Manyathi-Jele,
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how can we help you? ■

Legal heads tackle unemployment

The 26th annual labour law conference was held at the Sandton Convention Centre last month. This year's theme: 'Employment, the economy and growth: The implications for Labour Law,' examined the impact of the prolonged global economic crisis on labour law and the need for the South African economy and labour market to develop tools to address these challenges. The conference was jointly organised by the universities of Cape Town, the Witwatersrand and Kwa-Zulu-Natal.

Speakers at the conference included Judge President of the Labour and Labour Appeal Court, Basheer Waglay, governor of the Reserve Bank, Gill Marcus and the deputy director-general for labour policy and industrial relations at the Department of Labour, Les Kettledas.

Judge Waglay delivered the official welcome and opening address where he highlighted the issue of youth unemployment and also spoke about the changing role of the labour court system. He said that the South African youth found it difficult to secure employment.

He said that the labour courts were facing the judicial challenge of how to balance rights with decent work while recognising business competitiveness and added that the country already had a relatively stable framework that should provide for stability.

Judge Waglay said that, traditionally, fair labour practice was the sole responsibility of the labour court. 'This responsibility for fair labour practice originates from the Constitution and is shared by the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils', he said. Judge Waglay said that because labour practices were continually evolving, new laws needed to be created to deal with this changing type of worker. 'This means that the labour court system now has to deal with issues arising from labour matters which it did not have to deal with previously, such as employee-related fraud', he said. Judge Waglay further said there should be no room for violence and intimidation as the Constitution provided a framework for parties to protect their interests, in the form of the courts, the CCMA and collective bargaining that created a platform for discussion and debate.

Mr Kettledas presented the ministerial address on behalf of the Labour Minister, Mildred Oliphant. During this address, he indicated how the Labour Department viewed the current labour unrest. Mr Kettledas said that the International Labour Organisation's Global Employ-



Judge President of the Labour and Labour Appeal Court, Basheer Waglay, delivering the opening address and welcome at the 26th Annual Labour Law Conference in Sandton.

ment Report of 2012 indicated that 400 million jobs would be needed in the next decade to avoid a further increase in unemployment, adding that in many regions there had been a growth in the number of workers who were in vulnerable employment and the majority of these workers were women.

Mr Kettledas said growth estimates for the South African economy had been revised downwards to 2%. He said that while there had been a small increase in employment in the first quarter of 2013, the number of unemployed had since increased even more. 'There are now 4,6 million unemployed persons in the South African labour market and of these unemployed, about 2,3 million are discouraged work seekers, people who have given up hope of finding work,' he said.

Mr Kettledas said at the end of March 2013, unemployment in South Africa was at 25,2%, adding that youth unemployment was at 41%. 'We know that youth unemployment is a global problem, but in South Africa the scale of the problem is much bigger,' he said. Mr Kettledas added: 'The only bright light to be seen is that 646 000 jobs have been gained from early 2011 to the end of March 2013. But we should remember that 1 million jobs were lost during the recession in 2009'. He said that over the past three years, South Africa had experienced an increase in strikes and in the number of workdays lost due to strike action. He said that the average loss of workdays due to strike action had been 3 million over the 2011 to 2012 period.

'In the context of these challenges, it is appropriate to reflect on the implications for labour law. One of the purposes of the Labour Relations Act [66 of 1995] is, after all, to advance economic devel-

opment. The same purpose is contained in the Basic Conditions of Employment Act [75 of 1997]'.

Mr Kettledas said that, while labour legislation should support economic growth and employment, it was important to recognise that the law was not focused on securing employment for people. He added that labour legislation was mainly concerned with providing employees with basic protection against unfair labour practices, unsafe working conditions and a decent living wage.

Mr Kettledas said that there had been many calls over the past year for a review of labour legislation and that 'many seem to think that simply changing the law will solve all our labour market problems'. He added that it was not that simple. 'Labour relations involve buyers and sellers in a highly contested terrain. In South Africa, this terrain still bears the burden of a legacy of oppression and racial discrimination and there continues to be extreme income and wage inequalities,' he said.

Mr Kettledas said that achieving the necessary social and economic objectives will be a challenge that goes well beyond the law, particularly given the competing interests of reducing mass unemployment, raising living standards and closing the earnings gap.

He said that South Africa was currently in the middle of a major process of amending a number of labour laws and introducing a new Employment Services Bill 38 of 2012. He added that the Basic Conditions of Employment Amendment Bill 15B of 2012 was passed in the National Assembly in June this year and that the Labour Relations Amendment Bill 16 of 2012, the Employment Equity Amendment Bill 31 of 2012 and the Employment Services Bill were still in the parliamentary process.



Deputy director-general for labour policy and industrial relations at the Department of Labour, Les Kettledas at the recent 26th Annual Labour Law Conference.

Mr Kettledas said that in July Minister Oliphant released the Unemployment Insurance Amendment Bill 35 of 2012 for tabling in the National Economic Development and Labour Council and for public comment. He added that the Labour Department was also working on amendments to the Occupational Health and Safety Act 85 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Mr Kettledas said that the legal amendments were intended to have two effects; to improve security of employment for vulnerable workers and to improve social protection. He said that the proposed amendments to the Unemployment Insurance Act 63 of 2001 aim to extend the coverage of the Act in order to improve benefits and the legal framework for active labour market measures.

Mr Kettledas said the events of 2012 were a reminder of the difficult history of labour relations in South Africa. He said the strikes in the mining and road freight sectors and the protest action by farm workers in the Western Cape were a reminder of how important labour relations were to the country and to the economy, adding that despite these setbacks, South Africa should not lose sight of the progress made in the labour relations system.

He said that last year's events highlighted the critical need to -



Governor of the Reserve Bank, Gill Marcus delivered the keynote address at the 26th Annual Labour Law Conference held recently.

- strengthen respect for our legal dispensation;
- ensure adherence to processes and procedures that govern labour relations on a day-to-day basis in workplaces; and
- pursue fundamental rights in the workplace.

Mr Kettledas said: 'This is not a challenge for labour law. It is a challenge to better implementation of law, improved understanding of law and upholding the values that underpin our law - including the value of dialogue and non-violent solutions to workplace conflict. In dealing with these challenges, labour law will

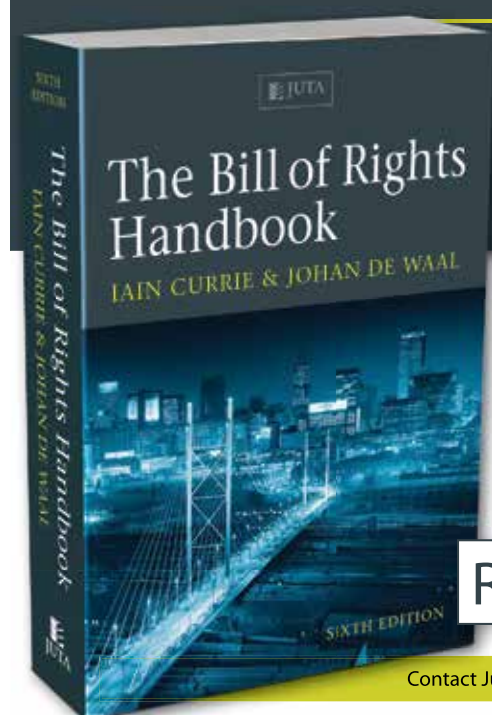
have to provide the framework within which solutions are found. Our laws can also serve as a resource to assist in resolving problems, but it will not be a magic bullet. If we lean too heavily on legal solutions to what are fundamentally social and socio-economic challenges, we will not be creating sustainable solutions.'

Governor Marcus delivered the keynote address on 'Employment and the economics of job creation' in which she outlined the relationship between the economy and the labour market. She said that South Africa has had an unemployment crisis for the better part of three decades.

Governor Marcus said that, following the enactment of the Labour Relations Act, the number of days lost to strike action fell sharply with about one million strike days a year on average from 1996 to 2007. 'Since 2007, however, the number of strike days lost have increased sharply and strike activity has also become more violent. More recently, there has been a sharp increase in illegal or unprocedural strikes. Today, many labour intensive sectors are characterised by high levels of tension, which are not conducive to investment, job security or employment creation', she said.

*Nomfundo Manyathi-Jele,
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Sexual offences courts to be re-established

Justice Minister Jeff Radebe has released a report on the outcome of intensive research done by the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (Mattso). Mattso was commissioned to investigate the viability of re-establishing sexual offences courts in June 2012. Minister Radebe said that the report was one of the initiatives that seeks to bring improvements in the manner the courts deal with sexual offences cases.

At the media briefing Minister Radebe said that the concept of sexual offences courts was first introduced in the country at the Wynberg regional court in Cape Town in 1993. He said the pilot project was aimed at responding to and preventing the increasing figures of rape cases reported in the area at the time. 'The pilot project proved to be a huge success as it maintained the conviction rate of up to 80% over a period of a year. This became a strong motivation for the National Prosecuting Authority (NPA) to establish further sexual offences courts around the country,' he said.

Minister Radebe said that in 1999 the NPA first established sexual offence courts in Mdantsane, Soweto, Bloemfontein, Durban, Parow and Grahamstown and by the end of 2005, there were 74 sexual offences courts countrywide. 'Two of the main achievements of the sexual offences courts were an increase in conviction rates and a decrease in turnaround time from the date of report to the police up to the finalisation of the case', he said.

Minister Radebe said that although the courts recorded 'considerable success', there were a number of challenges that led to their demise. Some of the challenges were –

- a lack of a specific legal framework to establish these courts;
- a lack of a dedicated budget;
- poor visibility of these courts in remote areas;
- restricted space capacity in courts;
- a lack of training of court personnel; and
- a lack of a monitoring and evaluation mechanism developed specifically for the management of these courts.

Minister Radebe said that despite the above challenges, nine of these sexual offences courts continued to operate in various areas of the country, which included Port Elizabeth, Durban, Johannesburg, Kimberly, Welkom, Bloemfontein,

Wynberg, Parow and Moretele. He added that a number of courts were also dedicated to prioritise sexual offences related matters by the regional court presidents and that the Justice Department also put in more resources into these courts in order to reduce secondary victimisation.

The Minister said that the Mattso findings show that the current court system requires special courts to ensure an adequate response to the special needs of sexual offence victims.

Mattso findings

Minister Radebe said that, after numerous deliberations and analysis of the research, the task team came to the conclusion that there were sufficient grounds and a compelling need for the re-establishment of the courts. It found that the courts were in line with the ethos of the objects of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which seek to afford complainants of sexual offences the maximum and least traumatising protection.

The task team found that the re-establishment of the courts will reinforce the establishment of a victim-centred court system that is prompt, responsive and effective. The courts were also found to be successful in the –

- reduction of secondary victimisation;
- improvement of skills of court personnel;
- reduction of the cycle time in the finalisation of sexual offences cases; and
- contribution to the efficient prosecution and adjudication of these cases.

'The task team also found that most of the specifications of the Blueprint for Sexual Offences Courts are still recognised as an international best practice model, and therefore ought to be retained,' said Minister Radebe.

Minister Radebe said that the task team found that, of the 567 courts sitting as regional courts (including circuit courts), 49 were resourced closest to the sexual offences model in that they have at least two waiting rooms available. A further 106 courts were also resourced close to the model in that they have a waiting room specifically dedicated to child witnesses, but do not necessarily have a second waiting room. 'The audit further revealed that many of these courts were capacitated with the required human resources such as the re-

gional magistrate, prosecutor, intermediary, interpreter and court operations clerk,' he said.

Recommendations

Minister Radebe said that the task team made several recommendations that would see the successful implementation of the sexual offences courts. These recommendations include:

- An upgrade of existing dedicated sexual offences courts into sexual offences courts.
 - An investigation to determine the feasibility of merging the various specialised/dedicated victim support services and one-stop centres into a model one-stop centre that will function to optimise the performance of the sexual offences courts.
 - A feeding scheme for child witnesses must be investigated for possible introduction in these courts and be properly costed.
 - An integrated monitoring and evaluation framework must be developed to ensure the effective and efficient inter-sectoral management of the sexual offences courts.
 - A South African qualifications authority accredited training programme to capacitate all functionaries involved in the administration of sexual offences courts.
- Minister Radebe said that the task team also developed a court model that introduces the necessary resources for the adjudication of sexual offences cases, especially those involving children and persons with mental disabilities. In terms of this model, courts offering these services must have the following resources:
- A proper screening process to identify cases that fall within the sexual offences category.
 - Case-flow management that is custom-made for sexual offences.
 - A special room from which the victim will testify, which must have minimal furniture and decoration.
 - A private waiting room for adult witnesses.
 - A private waiting room for child witnesses.
 - Victim support services.
 - Designated court clerks.
 - A group of specialist presiding officers who have experience in criminal law matters and who have undergone specified training on child development, working

with mental disabilities and the dynamics of sexual offences.

- A court preparation programme for witnesses to prepare them for court and to provide debriefing after they have testified.

- A debriefing programme for court personnel.

'The task team was also specific in its recommendation of equipment that is necessary for the efficient functioning of the sexual offences courtroom. These include:

- A two-way closed circuit television system to enable the child to identify the accused from the testifying room.

- A separate monitor for the presiding officer to ensure increased visibility of the image and control of the system.

- A large screen monitor for the other members of the court.

- A monitor in the testifying room for purposes of allowing the victim to identify the accused,' said the Justice Minister.

Minister Radebe said that the personnel requirements for each court included -

- a presiding officer;
- two prosecutors;
- an intermediary;
- an interpreter;
- a designated court clerk;
- a designated social worker;
- a legal aid practitioner; and
- a court preparation/victim support officer.

Minister Radebe said that work for the implementation of the recommendations had already commenced as the Justice Department had already identified 57 regional courts for upgrading and equipment with modern technology to operate as sexual offences courts. 'This work has commenced in the 2013/14 financial year. We believe that these sexual offences courts will help address the growing challenge of sexual offences in the country, particularly against vulnerable groups,' he said.

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De Rebus Digital is on the rise.

In December 2009, *De Rebus* launched *De Rebus Digital* as a trial run. In the article 'De Rebus Digital in action' (2009 (Oct) DR 10) we reported on statistics on the readers, however, the latest analysis by the Digital Publications website shows that *De Rebus Digital's* readership is growing.

Analysis from 20 June 2013 to 29 July 2013 shows that our unique visits have grown to 3 570 and our page views for the month was 162 325.

Over 16% of visitors to the *De Rebus Digital* site view pages for over 15 minutes and most of our readers access *De Rebus Digital* through the monthly mailer that we send out.

Visits to *De Rebus Digital* come from 38 countries. South African readers top the list with 2 792 and the United Kingdom follows with 965. Namibia is top of the African countries with 52 readers and Botswana with 10 readers; there are also readers from Australia, Brazil, Japan, Ireland and India.

The recent issue was downloaded as a PDF document by 354 people and 12 of our readers have forwarded the journal to their friends.

Readers can find archived issues of *De Rebus Digital* from December 2009 on the *De Rebus* website at www.derebus.org.za.

De Rebus Digital is available to all attorneys, candidate attorneys and law students. To receive your electronic issue, free of charge, every month, e-mail Kathleen Kriel at kathleen@derebus.org.za.

Kathleen Kriel,
kathleen@derebus.org.za

2013 annual general meetings

The six constituent members of the Law Society of South Africa will have their annual general meetings on the following dates:

- The Cape Law Society: 1 - 2 November at the Pavilion Conference Centre at the V&A Waterfront in Cape Town.
- The Law Society of the Free State: 24 - 25 October at the Kopano Nokeng Conference Centre in Bloemfontein.
- KwaZulu-Natal Law Society: 18 October at Coastlands on the Ridge Hotel in Durban.
- The Law Society of the Northern Provinces: 9 November at Sun City.
- The Black Lawyers Association: 18 - 19 October in Durban (venue to be finalised)
- The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2014.



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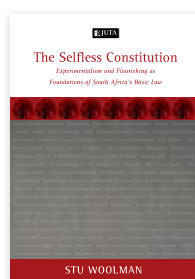
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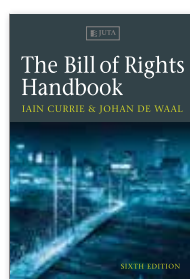
latest titles



The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's

Basic Law | Stu Woolman | ISBN: 978-1-4851-0007-2 | Soft cover | 648 pages | PRICE: R395

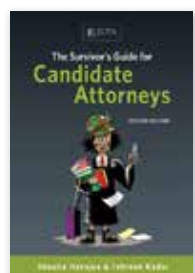
This book first challenges you to do something difficult indeed: forget the metaphysics and the politics of 'free will' and 'freedom'. After weaving together recent revelations in neuroscience, empirical philosophy, behavioural psychology and development economics, the book then demonstrates why only a politics that promotes experiments in living and the enhancement of individual capabilities is likely to produce the egalitarian pluralist social order to which our Constitution aspires. Its trenchant analysis of South Africa's institutions and case law shows us how far we have come – and how far we still have to go.



The Bill of Rights Handbook (6th edition)

I Currie, J de Waal | ISBN: 978-0-7021-9999-8 | Soft cover | 902 pages | PRICE: R645

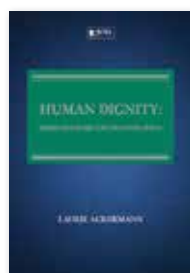
The Bill of Rights Handbook provides a comprehensive account of almost two decades of South African Bill of Rights jurisprudence. The book's detailed coverage of all aspects of Bill of Rights jurisprudence and practice has made it the standard reference work for this important area of law.



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B Hansjee, F Kader | ISBN: 978-1-4851-0031-7 | PRICE: R325 | Soft cover | 234 pages

The second edition of this practical guide provides all the information required by candidate attorneys when starting articles – from working with principals, counsel and clients – to etiquette, actions and applications. The book also contains handy checklists for court work, and an updated directory comprising over 100 pages of useful contacts.



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L Ackermann | ISBN: 978-0-7021-9901-1 | PRICE: R595 | Soft cover | 462 pages

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

LSSA comments on draft National Credit Amendment Bill

The Law Society of South Africa (LSSA) supported a number of amendments proposed by the draft National Credit Amendment Bill 2013 in its submissions to the Department of Trade and Industry in July 2013. However, the LSSA also pointed out a number of flaws in the Bill.

The LSSA pointed out that the grounds that render an applicant not to be a fit and proper person to be a debt counsellor should be listed. The LSSA agreed that a person may not be registered as a debt counsellor if he or she is an unrehabilitated insolvent. However, the LSSA noted that it was not clear why a rehabilitated insolvent may not be registered as a credit provider and this should be reconsidered.

In terms of s 40(4) of the National Credit Act 34 of 2005 (the Act) a credit agreement concluded by an unregistered credit provider is void and receives the same far-reaching treatment as that meted out to other unlawful agreements provided for in s 89 of the Act. Therefore, this cannot be a one-sided decision and a registrant must have the right to be heard before such a decision is taken. The LSSA was not in support of the amendment.

The LSSA pointed out that, in terms of the current s 83 of the Act, it was not clear on whom the onus of proof of reckless lending rested. The LSSA sug-

gested that s 83 should be amended to provide for this. In terms of the s 83A proposed in the Bill, a consumer would be able to approach the tribunal with an application to declare a credit agreement as reckless. However, according to the LSSA, the procedure and administrative processes of such an application should be clarified in the Bill.

The LSSA expressed concern that the tribunal would not be as accessible to consumers as magistrates' courts, which are easily accessible throughout the country. The LSSA added that the proposed addition of s 83A may create uncertainty as regards the appropriate forum. The consumer would, for instance, be entitled to approach the tribunal while the matter was already in court. The possibility of 'forum shopping' could also not be excluded.

The LSSA stressed that s 83A was unnecessary as there are currently sufficient provisions and processes for consumers to approach the courts for relief.

As regards unlawful credit agreements, the LSSA pointed out that, in the matter of *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC), the entire s 89(5)(c) of the Act was declared unconstitutional and invalid. The LSSA suggested that consideration should be given to appropriate penalties in respect of unlawful credit agreements.

On the procedures preceding debt-

enforcement, the LSSA was of the view that there should be personal delivery of s 129 notices. It added that s 129(3) should not be deleted, as it contains a form of protection to the consumer. The deletion of the subsection would be to the detriment of the consumer.

The proposed subs (1A) in the draft Bill was not supported by the LSSA, which expressed concern that, should debt counsellors be entitled to make use of agents for administrative tasks only, a position might arise where debt counsellors and credit providers would not be allowed to make use of the services of attorneys to represent them in court. This would be unacceptable.

The LSSA raised its concern about s 8A, which states: 'A debtor who has applied for a debt review must not be regarded as having committed an act of insolvency' as being too widely drafted. 'Surely it is only the application for debt review that should not be used as establishing an act of insolvency on the part of the debtor? If there are other facts that establish an act of insolvency, they can be used. The case law is clear that an application for or an order of debt rearrangement under the Act does not bar an application for sequestration. The phrase should therefore read: "An application for debt review or order granted in terms thereof shall not be regarded as an act of insolvency".'

Submissions made for increase in monetary jurisdiction of the magistrates' civil district and regional courts

In July this year the Law Society of South Africa submitted two options to the Justice Department for an increase in the monetary jurisdiction of the magistrates' civil district and regional courts, one from the Cape Law Society (CLS) and a second from the KwaZulu-Natal Law Society (KZNLS).

The CLS indicated that:

- The jurisdiction of the district courts should be increased to R 300 000 and that of the regional courts to R 1 million.
- The range of the regional courts' jurisdiction should be from R 300 001 to R 1 million, and not for claims that would ordinarily fall within the district courts' monetary jurisdiction, unless two claims are instituted in the same summons where at least one of the claims is within the regional courts' jurisdiction. In such a case, the court should then have jurisdiction to consider a claim that falls within the district courts' monetary jurisdiction.

- The tariff of fees should be increased in order to compensate attorneys adequately for the increase in responsibility when dealing with matters of a high claim value in the regional court.

The KZNLS was of the view that the monetary jurisdiction of the district courts should be increased only to R 200 000 and that of the regional civil courts should range from R 200 001 to R 400 000. However, the KZNLS suggested that if there were a counter-claim below the lowest amount of the regional courts' jurisdiction (a counter-claim that falls within the jurisdiction of the district court) then the regional court should have jurisdiction to hear that counter-claim.

The KZNLS's rationale was that, if the regional courts have jurisdiction in claims in convention to R 400 000, there would be a tendency for such actions to be instituted in the regional courts rather than in the district courts, which

have jurisdiction over the persons of the defendants. They would have to travel further to the regional courts as they are situated in the larger towns and cities, making litigation more costly. They argue that this would also reduce the work load for country attorneys.

However, this would not necessarily be the case, given the fact that the High Court already has this jurisdiction and it has divisions in the larger cities. With the increase in establishment of regional courts around the country, this will have the positive effect of having claims instituted in courts closer to the areas in which defendants reside and the cost of litigating would be reduced.

- The full submissions by the LSSA can be accessed on the LSSA's website at www.LSSA.org.za under 'Legal practitioners' LSSA comments in the left-hand navigation bar.

Law societies sign MoUs with FIC

At the end of July the four statutory provincial law societies – the regulatory bodies for attorneys and the supervisory bodies in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA) – signed memoranda of understanding (MoUs) with the Financial Intelligence Centre (FIC) in terms of s 45(1D) of FICA.

'The MoUs are a significant step for the legal profession in South Africa. The provincial law societies have now taken on the additional mantle of supervisory bodies in terms of the FIC Act, which increases their regulatory functions over attorneys. This is indicative of a commitment to professionalism and ethical behaviour among practising attorneys,' said David Bekker, co-chairperson of the Law Society of South Africa and chairperson of its FIC committee in a press release issued on the signing of the MoUs.

Practising attorneys are obliged to register with the FIC in terms of s 43B of FICA.

'We believe that approximately 10 000 attorneys' firms should be registered with the FIC,' said Murray Michell, director of the FIC in the press release. He added: 'We urge practising attorneys who are not yet registered with the FIC to do so.'

Attorneys are regarded as accountable institutions in terms of FICA. Besides having to register with the FIC, as accountable institutions they are also obliged to report suspicious and unusual transactions (STRs) to the FIC. The reporting of STRs is geared towards drawing the FIC's attention to financial transactions that may suggest the possibility of criminal activity, so that further investigation can take place if necessary.

'We are aware that attorneys are particularly vulnerable to the possibility of being used by criminals,' said Mr Michell. 'Trust accounts are an obvious target for the laundering of money. Attorneys could, for example, find themselves unwittingly facilitating criminal behaviour when involved in the transfer of a property bought with illicit funds.'

Any business activity that appears to be suspicious should similarly be reported. So, too, when a practising attorney suspects that his or her client's property may be linked to terrorist activities.

A number of other compliance obligations apply to practising attorneys, including the appointment of a compliance officer, the training of staff and the duty to keep record of transactions.

Mr Bekker noted: 'In their roles as supervisory bodies, the provincial law societies will undertake to train practitioners and keep them up to date regarding communication from the FIC. The law societies will also undertake to carry out regular random inspections of attorneys.'

'We are thrilled to welcome the law societies into our fold,' said Mr Michell. 'The FIC has concluded 12 MoUs with other supervisory bodies. We look forward to fruitful collaboration in the years ahead.'



The director of the Financial Intelligence Centre, Murray Michell, signs memoranda of understanding with the provincial law societies: Top left, with the vice-president of the Law Society of the Northern Provinces, Dr Llewelyn Curlewis; top right, the president of the Cape Law Society, Koos Alberts; bottom left, the president of the Law Society of the Free State, Johann Fouché, and bottom right, the president of the KwaZulu-Natal Law Society, Richard Scott.

Your FICA questions answered on DVD

The LSSA has produced a DVD to assist practitioners in complying with the Financial Intelligence Centre Act 38 of 2001 (FICA). Presented by senior attorney Dr Angela Itzikowitz, and including comments and guidance from the Financial Intelligence Centre (FIC), the DVD will guide law firms in complying easily with the requirements. Price: R 120 (VAT and postage included).

The DVD can be ordered from Siphon Mdluli at tel: (012) 441 4611 or e-mail: siphon@LSSA.org.za.

Not registered with the FIC?

As per item 1 of sch 1 to FICA all practitioners who practise as defined in s 1 of the Attorneys Act 53 of 1979 are regarded as accountable institutions. 'Practise' is defined in the Attorneys Act to mean practise as an attorney, notary or conveyancer. This means that the conducting of such business must be a regular feature of the business of such entity or individual.

The view of the Financial Intelligence Centre (FIC) is that the requirement rests on each firm of attorneys to be registered, and not individual attorneys working in a firm. Where an attorney practises as a sole proprietor the attorney is required to register as an accountable institution. Electronic registration is the preferred method of registration with the FIC. The guidelines on registration, available on the FIC website at www.fic.gov.za, must be followed when registering, as all processes and requirements are explained clearly.

- Alternatively call the FIC Compliance Centre for assistance at 0860 222 200.

Pretoria Synergy Link forged

Maponya Inc has undertaken to act as a 'transferring firm' under the LSSA's Synergy Link empowerment initiative to Pretoria firm Ndhima Attorneys. Areas of empowerment will cover Road Accident Fund matters, mining, tax and family law. The link will run from August until November 2013 and again from February to March 2014.



Baitseng Rangata, chief executive officer at Maponya Inc, welcomes Kuhlula Ndhima of Ndhima Attorneys. The two firms are transferring skills under the LSSA's Synergy Link initiative.

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People and practices

Compiled by Shireen Mahomed

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

Venn Nemeth & Hart and **GDLK** merged in August. The new firm is now Venns in Pietermaritzburg.



Chairperson Guy Smith.



Chief executive officer Doc Louw.



Livingston Leandy Inc in Durban has appointed Michael Anthony Nolan as a director.



Wright Rose-Innes Incorporated in Johannesburg has appointed Ravi Morar as a director. He specialises in general litigation, commercial and corporate law.

Cox Yeats in Durban has appointed three new associates.



Jenna Padoa specialises in commercial law.



David Vlcek specialises in commercial litigation, construction and infrastructure law.



Randhir Naicker specialises in business law and medical schemes.



Shepstone & Wylie in Durban has appointed Alistair Beaumont as an associate partner. He specialises in commercial litigation, primarily insurance, banking and property related litigation.

Bradley Conradie Attorneys in Cape Town has two new appointments.



John MacRobert has been appointed as a consultant.



Darcy Du Toit has been appointed as a consultant.

Werksmans in Johannesburg has one new appointment and one promotion.



Jannie de Villiers has been promoted to director.



Natalie Scott has been appointed as a director in the banking and finance department.



The Imber group of law firms has formed an association with Futchter Attorneys, Warrick de Wet and Fourie Stott in Durban. From left: Ryan McGarvie, Mark Futchter, Callen Houareau, Ronallda Pillay, Eilene Bekker, Amelia Perumal, Andre Botha, Vicky Stott, Cuan Lott, Stuart Fourie and Warrick de Wet.



5 minutes with

the Christian Lawyers Association

In this month's column, *De Rebus* news editor Nomfundo Manyathi-Jele spoke to the chairperson of the Christian Lawyers Association (CLA), advocate Reg Willis, about the association.

What is the CLA?

The CLA is a religious, professional, interdenominational and non-profit making association constituted to further the objectives set out in its constitution.

What do you do?

The objectives of the CLA are, *inter alia*, to share the Christian faith among the legal profession, while offering Christian fellowship, support and counselling to members of the profession. In so doing, the CLA encourages members of the profession to develop and apply a biblical Christian world view in their communities and society at large.

The CLA seeks to influence lawyers in favour of Judeo-Christian values and to promote Judeo-Christian ethics by lawful, proper and appropriate means. The CLA believes that God is calling on the legal profession, and related stakeholders, to take up a far greater responsibility in our nation than ever before. We believe that the association has a vital role to play in the unfolding destiny of South Africa and Africa.

The CLA and its members are actively involved in projects that promote righteousness, morality and justice. In so doing, Christian lawyers are able to contribute to the stability and development of their communities and the nation as a whole.

When was it established?

The CLA was established in 1992 and celebrates its 21st anniversary this year.

Who can become a member?

Anybody who subscribes to the Christian faith and the objectives of the CLA may apply for admission as a member or associate member. Our members include judges, magistrates, prosecutors, advocates, attorneys, salaried lawyers employed in the public and private sector, legal advisers, academic lawyers, candidate attorneys, pupil advocates, and law students. Persons, bodies or organisations can also apply for associate membership.

How does one become a member?

There are five categories of membership:

- Full membership: This type of membership is open to judges, magistrates, prosecutors, advocates, attorneys, salaried lawyers employed in the public and private sectors, legal advisers and academic lawyers.
- Student membership: This type of membership is open to law students.
- Candidate attorney and pupil advocates: This type of membership is open to candidate attorneys and pupil advocates.
- Associate membership: This type of membership is open to any person, body or organisation deemed by the board to be eligible and who subscribes to the objectives of the CLA. Interested parties may apply for admission as an associate member and the board's decision as to the application shall be final.
- Honorary members. Any person who has rendered or is rendering some special service to the CLA may, in the discretion of the board, be invited to be an honorary member regardless of whether such a person is a member of the legal profession.

A person shall be eligible for membership in any of the above categories if he

or she is a Christian believer who supports the objectives of the CLA

To apply for membership, interested parties must submit a completed online membership form and wait for the CLA to contact them.

What are your membership fees?

The current membership fees are as follows:

- Full members and associates: R 3 000 annually or R 300 per month
- Candidate attorneys, advocate pupils and retired members: R 1 000 annually or R 100 per month
- Students: Once-off payment of R 100 until qualified.

Do you have offices in each province or just a national office?

The CLA has a small national office in Pretoria staffed by the national director and communication administrator.

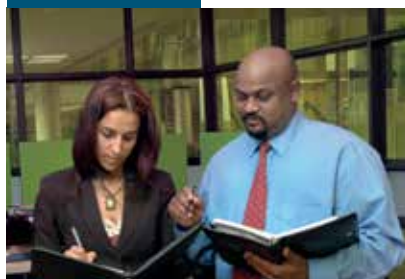
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www.christianlawyers.co.za

Nomfundo Manyathi-Jele,
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5 minutes with the Pietermaritzburg Attorneys Association

This month *De Rebus* editorial secretary, Shireen Mahomed, spoke to the first female chairperson of the Pietermaritzburg Attorneys Association (PAA), Ashika Singh, about the association.

What is the PAA?

The PAA is a voluntary association representing the interests of attorneys in the Pietermaritzburg region – which includes Howick, Mooi River, Impendle, Himeville, Bergville, New Hanover, Camperdown, Richmond and Umvoti. Our executive committee is made up of eight members who ensure that the concerns and issues raised by our constituency are promptly addressed.

What does the PAA do?

Our motto 'serving the legal profession' captures the spirit of our association. We assist our members by:

- Liaising with the KwaZulu-Natal High Court, the regional and district magistrates' courts as well as the deeds and masters' offices.

- Establishing close relations with government and parastatal organisations.
- Creating a forum for discourse and interaction between attorneys, advocates, local academia, the magistracy and the judiciary.
- Providing presentation at the monthly case-flow management meetings with the chief magistrate to resolve any issues and disputes.
- Promoting legal education.
- Keeping our members informed of changes in the legal procedure.
- Making representations to the KwaZulu-Natal Law Society (KZNLS) on matters affecting our members.
- Holding social events for member interaction.
- Notifying our members of beneficial opportunities.

The PAA also has numerous public outreach programs and we annually donate to different charities. Law students are also encouraged through the PAA's sponsoring of prizes for academic achievements.

When was the PAA established?

Our organisational predecessor, the Pietermaritzburg Legal Circle was established in the mid-seventies. The Law Society of South Africa's spirit of transformation and cooperation was embraced, resulting in the PAA being established on 29 November 2006.

Who can become a member of the PAA?

All attorneys who are practising in the Pietermaritzburg region and who are members of the KZNLS are invited to join us.

How does one become a member?

Application for membership can be made to the secretary of the PAA, Srish Partab, who will forward a membership application form and will register new members on the mailing database. Our current membership fees are R 75 per annum.

What is the PAA's current membership?

The PAA currently has over 200 members.

Where are the PAA offices?

Our monthly meetings are held at the offices of members of the executive committee. We have been allocated a room in the new civil magistrate's court, which is currently under construction.

Contact information

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E-mail: pmbattorneys@gmail.com



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Shireen Mahomed, shireen@derebus.org.za



By
Michele
van Eck

The efforts standards

How hard should you try?

The purpose of commercial contracts is to record the obligations of one party in relation to another. These obligations should be set out with some level of certainty. But what often happens is that certainty is diminished through the use of the efforts standards, which includes the use of terminology such as 'best efforts' or 'reasonable efforts' or variants of these. It should be noted that the terms 'effort' and 'endeavour' can be used interchangeably. In using these efforts standards the question is: How hard should a party try to fulfil such an obligation?

Currently the South African courts still have to make a determination on whether there is a difference between reasonable and best efforts when fulfilling an obligation and, should a difference exist, exactly what such a difference may entail.

As a starting point it appears obvious that, if the normal grammatical meanings of the words are applied, there will be a different meaning to the words 'reasonable' and 'best'. The mere fact that the words in isolation appear to have different meanings does not necessarily imply that such words would result in a different level of fulfilment of obligations. When interpreting the meaning of such words it is important to consider these meanings in the context of the document in which they appear.

Should the courts interpret the meaning of these terms they would likely apply the following principles to assist in establishing the meaning of the words (SJ Cornelius *Principles of the Interpretation of Contracts in South Africa* 2ed (Durban: LexisNexis 2007) at 119 – 122):

- Words are used in their ordinary sense.
- A court will take judicial notice of the ordinary grammatical meaning of the words.
- Words are used precisely and exactly.
- The same word or expres-

sion in the same contract has the same meaning.

- Different words or expressions indicates different meanings.
- There are no superfluous words in a contract.

How this will be applied in South Africa remains unclear, however, it can be reasonably concluded that, should the principles of interpretation be applied, there will be a difference in the meaning of reasonable efforts and best efforts.

In order to obtain further clarity on this matter, the courts may take notice of decisions in foreign jurisdictions. Although the purpose of this article is not to go into an in-depth discussion of these decisions, it is worth noting that there is significant commentary on this matter. Only a selection will be discussed in this article to illustrate the difference between the efforts standards.

An English court case, *Rhodia International Holdings Inc v Huntsman International LLC* [2007] EWHC 292 (Comm) at para 33, provides some clarity on the requirements for the efforts standards. The court summarised the difference between the efforts standards as follows: 'An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can.'

There have been a number of decisions in the United States of America relating to the difference between the two effort standards. It would be far too voluminous to address all these matters in this article; however, it appears that the conclusion can be drawn that there is a different requirement for the fulfilment of reasonable efforts versus that of best efforts. What is also apparent is that it is generally accepted that best efforts is a more onerous obligation to fulfil than that

of reasonable efforts. There is still some uncertainty exactly what the best efforts standard requires (Kenneth A Adams 'Understanding "Best Efforts" and its Variants (including drafting recommendations)' *The Practical Lawyer* August (2004).

In a British Columbia Supreme Court decision, *Atmospheric Diving Systems Inc v International Hard Suits Inc* (1994) 89 BCLR (2d) 356 (SC) the court attempted to clarify the effort required when a party uses his best efforts. Some of the principles can be summarised as:

- Best efforts would impose a higher obligation than reasonable efforts.
- Best efforts include doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
- The meaning of best efforts is not endless and should be approached in the light of the particular contract, its purpose and the parties.

The term best efforts does not seem to imply that a party should put itself in a commercially detrimental position, but it does, however, appear that it would include that everything that can be done should be done. As highlight-

ed in the *Atmospheric Diving Systems* case, the extent in which best efforts will be fulfilled is to be linked to the context of the contract, the language used and the intention of the parties.

Due to the uncertainty of the use of the efforts standards, the best approach is probably not to use the efforts standards at all, but this may not always be practical. Kenneth A Adams suggests that, should the efforts standards be used, then the terms reasonable efforts and best efforts should be defined in the contract (*supra*). This may be a solution in limiting the uncertainty surrounding the efforts standard, but does not clarify how the courts would interpret the effort standards.

In conclusion, special care should be taken when using the effort standards in contracts or any other legal instrument. This should not only apply to transactions that have an international element to it, but also to those with a purely South African application.

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By
Mabitsela
Elijah
Ramonyai

State Liability Amendment Act

Process of attachment

In terms of s 3 (2) of the State Liability Amendment Act 14 of 2011 (SLAA), that came into operation on 30 August 2011, the state attorney or attorney of record appearing on behalf of the department concerned, must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order.

A final order against the department for the payment of money must be satisfied –

- within 30 days of the date of the order becoming final; or
- within the time period agreed on by the judgment creditor and the accounting officer of the department concerned (s 3(a)(i) and (ii)).

The accounting officer of the department concerned must make payment in terms of the final order and payment must be charged against the appropriated budget of the department concerned (s 3(b)(ii)).

If a final court order against a department for the s 3(b)(ii) payment of money is not satisfied within 30 days of the date of the order becoming final or the time period agreed on, the judgment creditor may serve the court order on

- an executive authority and accounting officer of the department;
- the state attorney or attorney of record appearing on behalf of the department concerned; and
- the relevant treasury (s 3(4)).

The relevant treasury must, within 14 days of service of the final court order, ensure that the judgment debt is satisfied or that acceptable arrangements have been made with the judgment creditor, should there be inadequate funds in the vote of the department concerned (s 3(5)).

If the relevant treasury fails to ensure that judgment is satisfied or acceptable arrangements have been made in terms of subs 5, the registrar or clerk of the court concerned must, on the request of the judgment creditor, issue a writ of execution in terms of the applicable rules of court against movable property owned by state and used by the department concerned (s 3(6)).

The sheriff of the court must pursuant to the writ of execution attach, but not remove, movable property owned by the

state and used by the department concerned. 'The sheriff and the accounting officer of the department concerned, or an official of his or her department designated in writing by him or her, may, in writing, agree on the movable property owned by the state and used by the department concerned that may not be attached, removed and sold in execution of the judgment debt because it will severely disrupt service delivery, threaten life or put the security of the public at risk' (s 3(7)(a) and (b)).

According to s 3(7)(c) '[i]f no agreement referred to in para (b) is reached, the sheriff may attach any movable property owned by the state and used by the department concerned, the proceeds of the sale of which, in his or her opinion, will be sufficient to satisfy the judgment debt against the department concerned'.

The sheriff of the court may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt. This can be done if there is no application by any party having any material and direct interest for stay in execution on the grounds that execution will severely disrupt service delivery, threaten life or put the security of the public at risk, or is not in the interest of justice.

If the above application is brought by the department concerned, the application must contain a list of movable property and the location thereof, compiled by the department concerned, that may be attached and sold in the execution of judgment debt.

This Act has brought sweeping changes and imposes enormous duty on creditors executing against the state. It is no longer possible for a creditor to issue a normal writ and proceed against the state without following the provisions of the Act as outlined above. In a point form, creditors should follow the following method:

- The state attorney or attorney of record must notify the department concerned in writing within seven days after a court order sounding in money against a department.
- The amount ordered by the court should be paid within 30 days.
- If the court order is not satisfied, the creditor may serve the order on the – executive authority and accounting officer of the department;

– state attorney or attorney of record appearing on behalf of the department concerned; and

– relevant treasury.

- The relevant treasury must satisfy the court order within 14 days or make acceptable arrangements.

• If the court order is not satisfied and acceptable arrangements are not made, the registrar or clerk may issue a warrant against the movables owned by the state. The sheriff must attach but not remove the goods. The sheriff and the state officials must agree on movable property owned by the state that may not be attached, removed or sold because it will disrupt service delivery, threaten life or put public safety at risk.

- If no agreement is reached, the sheriff may attach any movable property owned by the state and used by the department concerned.

• The sheriff of the court may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt.

It must be noted that the SLAA does not provide a definition for 'state'. In this regard it might be necessary to rely on the following definition of 'organ of state' provided for in the Constitution:

'Organ of state' means –

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functional or institution –

- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

It can be argued that, by necessary implication, the SLAA applies to organs of state.

The author could not find any decided case that deals with this aspect of the Act and it will be left up to the courts to give clarity as to whether all organs of state can invoke the provisions of the SLAA.

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Non-existent plaintiff

Dealing with misdescriptions in citations



In *HUV Cape Spice v Hotspice Sauces CC* (WCC) (unreported case no 22227/2010, 10-5-2011) (Louw J) the respondent, Hotspice, was placed under provisional liquidation. This order was subsequently made final by Moses AJ in *HUV Cape Spice v Hotspice Sauces CC* (WCC) (unreported case no 22227/2010, 2-12-2011). The applicant was a sole proprietor owned by Plotz, a German citizen, whose *locus standi* was founded on a judgment awarded in the Western Cape High Court by Le Grange J in *HUV Cape Spice v Hotspice Sauces CC* (WCC) (unreported case no 6650/04, 9-1-2009). That judgment was for damages arising *ex contractu* and was awarded to the plaintiff cited therein as 'HUV Cape Spice, a private company with limited liability duly incorporated and registered as such, in accordance with the companies law of Germany, with registration number 1804626808 and having its principal place of business at AM-Hafen 3, 25548, Kellinghusen, Germany'. Plotz testified that he was a director of the plaintiff company and represented it in its contractual dealings with Hotspice.

After Le Grange J handed down judgment it became known that the plaintiff was non-existent. No attempt was then made to amend the plaintiff's citation. In his founding affidavit in the liquidation application, Plotz averred that his sole proprietorship was the party to the contract forming the subject matter of the trial before Le Grange J and that it was, thus, the true plaintiff. He contended that the plaintiff's citation as a company was a misdescription. He averred that, in accordance with uniform rule 14, it ought to have been cited as a sole proprietorship registered under German law (for a discussion on this rule, see *Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) and the authorities cited therein).

Plotz insisted that he was clothed with *locus standi* for purposes of the liquidation application since his sole proprietorship had a direct and substantial legal interest against Hotspice (see *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA)). He contended that the damages awarded by Le Grange J gave rise to a *vinculum juris* (see *Wilde and Another v Wadolf Investments (Pty) Ltd and Others* 2005 (1) SA 354 (W) at 357I - 359F), which Louw J ought to regard as being in favour of the sole proprietorship, despite its details not being formally pleaded as part of the plaintiff's citation in the summons in the *HUV Cape Spice* case. This contention found favour with Louw J, who held at paras 13 and 14:

'In this case the evidence demonstrates that it was the

business as a sole proprietorship that acted throughout as the plaintiff in the action and that the description of the plaintiff as a private company with a limited liability duly incorporated and registered as such in Germany, was in fact, nothing more than an incorrect description of the entity HUV Cape Spice, a business conducted under that name and owned by Plotz. The issue in this application is whether the applicant is the judgment creditor in terms of the judgment of Le Grange J. The evidence in this case shows that this is indeed the case and that the applicant is in fact the same entity as the plaintiff and is therefore, the judgment creditor. The applicant therefore has the necessary *locus standi* to bring this application ...'

The gist of Louw J's rationale is contained in the following extract (at para 12):

'The description of a party to a suit does not immutably determine the nature and identity of a party. The law reports are replete with instances where the incorrect description of a party was allowed, in the absence of prejudice to the other parties involved, to be changed to reflect the true state of affairs. See for instance, *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (NPD).'

In effect, Louw J granted an order substituting the sole proprietorship as the judgment creditor in the *HUV Cape Spice* case. Crucially, this was done notwithstanding the absence of an application for leave to amend the incorrect citation in that action.

This decision is significant because it serves as authority for the proposition that – in any proceedings where a judgment is sought to be enforced, whether by liquidation or otherwise – if the presiding officer is satisfied that the judgment concerned contains a misdescription of a litigant owing to its incorrect citation in the pleadings filed in the case to which the judgment relates, then it shall be competent for such officer, even in the absence of an application for leave to amend those other pleadings, to receive evidence on affidavit as regards the true identity of the intended litigant in such other action and then to determine same authoritatively.

By virtue of the doctrine of *stare decisis* (see *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC)) the principle established by Louw J has precedential value, except to the extent that it is found to be wrong (see *Collett v Priest* 1931 AD 290) because, for example, it was arrived at on 'some manifest oversight or misunderstanding' (see *Bloemfontein Town Council v Richter* 1938 AD 195 at 232 cited with approval in *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) at 452). This article questions the correct-

ness of this principle and, with respect to Louw J, submits that this principle ought not to be followed by a subsequently constituted court.

Judicial proceedings are governed by the rules of court that 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (s 34 of the Constitution ...)' (see *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301H). The Supreme Court Act 59 of 1959 defines 'plaintiff' as 'includes any petitioner or other party who seeks relief in civil proceedings'. See also the definition of 'party' in uniform r 1. Uniform r 17(1) provides that 'every person making a claim against any other person may sue out a summons or a combined summons' and r 17(4) prescribes the manner in which a plaintiff is to be identified. Uniform r 18(4) states that 'every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim'.

The object of these rules is to ensure that a plaintiff furnishes sufficient details so as to prove its *locus standi in judicio* (see *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (N) at 543C; and *Spoornet v Watson* 1994 (1) SA 513 (W) at 514G). This position applies equally to proceedings governed by the magistrates' courts rules (see the *DF Scott (EP) (Pty) Ltd* case at 3011 – 302A).

Where a pleading contains an error, this can be rectified only by amendment effected by adhering to the prescribed procedure (see uniform rule 28 and magistrates' courts rr 7 and 55A).

In order to ensure that the real disputed issues are defined in pleadings and ventilated in court, a misdescription of a litigant may, in certain circumstances, be rectified. In the *Four Towers Investments* case a full Bench appeal court (per Galgut DJP) held (at 43G – H) that 'an application for amendment will always be allowed unless it is *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement. One of the grounds upon which it has been held that an amendment will cause prejudice that cannot be compensated for is when the late grant of the amendment will deprive the opposing party of a defence which would otherwise have been available to it.' An example of such defence is prescription (see *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A)).

Where a misdescription involves the citation of a *persona* that exists but is not the true creditor or debtor, two possibilities arise:

- First, the misdescription may consist of using the wrong name for the party

concerned. In such instances an amendment is permissible, since this is not tantamount to a substitution of that party (see *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963 (3) SA 11 (O); *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C); *Golden Harvest (Pty) Ltd v Zen-Don CC* 2002 (2) SA 653 (O); *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W)).

- Secondly, where the wrong party sued or was sued, an amendment may be refused since a substitution of the wrong party with the correct creditor or debtor is sought to be effected. In such instances one is not dealing with a misdescription *stricto sensu* but rather with an instance where the real party is not before the court (see *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA); *Hip Hop Clothing Manufacturing CC v Wagener NO and Another* 1996 (4) SA 222 (C); *L & G Cantamessa v Reef Plumbers, L&G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56).

Where a misdescription involves the citation of a non-existent *persona*, such pleading is a nullity *ab initio*. This is because such *persona* lacks legal personality and therefore cannot sue or be sued (see *Friends of the Sick Association v Commercial Properties Pty Ltd and Another* 1996 (4) SA 154 (D&CLD); *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369J – 370A; *Van Heerden v Du Plessis* 1969 (3) SA 298 (O) at 304A – G). In the *Four Tower Investments* case Galgut DJP stated that a process is not invalid in every instance where a litigant is a non-existent party. To this end the court held, at 45B – C, that '[w]hether a process is a nullity or not will depend on the facts of the case, and on the authorities it seems that it may be a question of the degree to which the given process is deficient. As I see it, however, the fact on its own that the citation or description of a party happens to be of a non-existent entity should not render the summons a nullity'. Galgut DJP concluded (at 47E) that 'if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a non-existing entity or indeed to an existing but uninvolved entity.'

In casu the court found that the appellant's incorrect citation as a private company instead of as an existing close corporation was, on the facts, a mere misdescription caused by its attorneys relying on the appellant's incorrect description in the lease agreement that formed the basis of the suit. Accordingly, Galgut DJP allowed the application for leave to amend.

In the *HUV Cape Spice* case, Louw J (at para 12) relied on the principle enunciat-



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ed by Galgut DJP at 47E as the basis for finding that the plaintiff's incorrect citation in this case amounted to a misdescription capable of being rectified. For present purposes I shall assume this finding to be correct. Consequently, and without effecting a formal amendment to the citation of the plaintiff in that action, the judge held that Plotz's sole proprietorship was, for all legal purposes, to be regarded as the plaintiff and judgment creditor in that action. On this basis, he held that Plotz had *locus standi* in the liquidation application.

In so doing, Louw J effectively metamorphosed the nature and identity of the non-existent company that actually pleaded as plaintiff with that of a sole proprietorship not referred to at all in the pleadings. It must also be borne in mind that the character of the newly introduced party is in law wholly different to that of the substituted juristic entity. With respect, this decision is wrong.

In as much as a misdescription of a litigant cannot be rectified, except in the manner prescribed by the court rules, South African law does not permit a court to recognise any person as party to legal proceedings except someone who is cited as a litigant thereto in the process initiating such legal proceedings (or any amendment thereto) (see *Imperial Bank Ltd v Barnard NO and Others* (unreported case no 349/12, 28-3-2013) (Mpati P)).

An analysis of Louw J's judgment reveals that he failed to consider the degree of deficiency and prejudice caused to the other litigant by reason of the effective substitution, both of which are considerations emphasised by Galgut DJP in the *Four Tower Investments* case on which Louw J relied. This failure is no doubt attributable to the fact that, unlike Galgut DJP, Louw J was not seized with an application for leave to amend in which such considerations play a pivotal role.

In the *Imperial Bank Ltd* case at para 8, Mpati JA held that 'a late amendment which has the effect of introducing a new cause of action or new parties would inevitably cause prejudice to the other party in the action, as it would defeat an otherwise good defence of prescription.'

At para 10 the judge went further and held that: 'For prescription to be interrupted by service of a summons on the debtor, therefore, the entity claiming payment of the debt must be the creditor. Where the claimant cited in the process by which payment is claimed is not the creditor, service of the process will not interrupt prescription.'

The cause of action in the *HUV Cape Spice* case arose in or about 2003. Consequently, any application for leave to formally amend the plaintiff's citation pursuant to the error regarding same being uncovered after Le Grange J handed down judgment in 2009 would in all probability have failed.

Finally, a cardinal shortcoming in Louw J's decision is the failure to reconcile his decision with that of Galgut DJP in the *Four Tower Investments* case (at 43B - C) in which the latter was at pains to point out that a trial court is *functus officio* once judgment is granted so that only a court of appeal can grant leave to amend pleadings in circumstances where an error in the citation of a party is uncovered after judgment is handed down by the trial court.

I therefore submit that it was not within the powers of Louw J to grant an order having the effect of amending the misdescribed plaintiff in the *HUV Cape Spice* case and thereby effectively substituting Plotz's sole proprietorship as the judgment creditor. His decision in this regard is therefore, with respect, unsound in law.

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Pension interest and divorce

K v K and Another – a critique

By
Johann
Davey

The appellant and the first respondent in *K v K and Another* [2013] JOL 30037 (WCC) were married in community of property during 1978 and divorced on 8 September 2005.

At the time of their divorce, the appellant was a self-employed estate agent. The first respondent was a member of the second respondent (Cape Municipal Pension Fund).

In terms of the judgment, the appellant had sued the first respondent for divorce and the first respondent 'did not oppose the divorce nor the relief that was sought in respect of the joint estate', which included a division of the joint estate on the basis that each spouse retained a specified immovable property.

The divorce order made no mention of the first respondent's pension interest or of any other asset forming part of the joint estate,

other than the parties' two immovable properties.

The appellant, who had apparently fallen on hard times subsequent to the divorce and had become destitute, subsequently applied to the High Court on an urgent basis for an order declaring her 'entitled to a 50% share in the first respondent's pension and/or provident funds' as at the date of their divorce. She also applied for an amendment of the divorce order to provide for such entitlement and for ancillary relief.

The appellant averred in her founding papers that the first respondent had never disclosed to her that he was a member of the second respondent and that the attorneys who represented her in the divorce action did not advise her of her rights as regards to any such pension interest.

The first respondent denied this and, according to the judgment (being the court of appeal), averred in his opposing affidavit that the appellant 'had deliberately chosen not to make any claim to it because of the concomitant responsibility it would have placed on her to have disclosed her earnings in the estate agency and to have dealt with his claim to a share therein. The first

respondent claimed that had the appellant sought a share in the pension interest in the divorce summons, he would have resisted the claim' (at para 10).

The court *a quo*, per Louw J, dismissed the application. The judgment reads: 'The court *a quo* found that the first respondent's version about why the pension interest had not been dealt with in the divorce order did not amount to a bold or uncreditworthy denial ...'.

The court *a quo*, however, granted the appellant leave to appeal.

It appears the court had decided that the factual disputes regarding the division of the joint estate and the first respondent's denial of the appellant's allegations as regards her knowledge of his pension interest were of no consequence as '[i]t was common cause in the appeal that this contention had essentially crystallised the dispute between the parties, namely, whether, by operation of law, the joint estate of the appellant and the first respondent at the time of the divorce included the pension interest and whether the appellant had an entitlement to a share therein' (at para 11).

Having considered the submissions by the *amicus curiae* and the first respondent's counsel, the court (per Saldanha J,



PENSION
INTEREST

with Traverso AJP and Ndita J concurring) held as follows in para 32: 'I am of the view that where parties who were married to each other in community of property in subsequent divorce proceedings do not deal with a pension or provident fund interest which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture, each of them nonetheless remain entitled to a share in the pension or provident fund to which the other spouse belonged to and such share is to be determined as at the date of divorce by virtue of the provisions of section 7(7)(a) of the Divorce Act 70 of 1979'.

The court therefore upheld the appeal

and issued the following declaratory order: 'It is declared that the applicant is entitled to a 50% share of the first respondent's pension and/or provident funds (the "pension funds") valued at 8 September 2005.'

Critique of the court's judgment and order

The finding that there is an automatic accrual of a pension interest on divorce:

The consequence of the judgment, which effectively provides that former non-member spouses who were married in community of property and who divorced after the introduction of s 7(7)(a) in 1989, remain entitled to a 50% interest of their former spouse's pension interest (as at the date of the divorce) in the absence of a forfeiture order or a

settlement agreement providing otherwise, may well be that many such non-member spouses may now wish to institute proceedings against their former spouses for payment of their 50% share of the pension interest.

The judgment is likely to cause many former 'member-spouses' (and their legal representatives) sleepless nights.

However, I submit that the judgment is erroneous and that the correct legal position is that, although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only becomes entitled to such a share thereof as a court may assign in terms of s 7(8).

While it is correct that a pension interest is deemed to be part of the assets of a joint estate and must be taken into account when the joint estate is divided, I submit that s 7(7)(a) does not provide any basis for the finding that if the spouses 'do not deal with a pension or provident fund interest, which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture' the non-member spouse automatically becomes entitled to 50% of the member spouse's pension interest.

Section 7(7)(a) of the Divorce Act provides: 'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the *pension interest* of a party shall, subject to paragraphs (b) and (c), *be deemed to be part of his [or her] assets*' (my emphasis).

I submit that s 7(7)(a) merely provides that the pension interest (as defined) of a member spouse is deemed to form part of the assets of the joint estate, which includes the immovable, movable property and other incorporeal assets, which stand to be divided.

Put differently, the value of the respective spouse's pension interest in a pension or provident fund as at date of divorce must be added to the value of the other immovable, movable and incorporeal assets in the estate.

I also submit that if the legislature intended to grant a non-member spouse an automatic share of a member spouse's pension interest, subject to a forfeiture order or a renunciation of such a right by the non-member spouse in terms of a settlement agreement, s 7(7) would have been worded very differently and s 7(8) would not have provided that a court granting a decree of divorce 'may make an order that' a percentage of a pension interest is assigned to a non-member spouse.

A division of the joint estate simply means that each party becomes entitled to an equal share of the joint estate, as is envisaged in s 20(1) of the Matrimonial



Picture source: Gallo Images/Thinkstock

Property Act 88 of 1984, which provides: 'A court may ... order the immediate division of the joint estate *in equal shares* or on such other basis as the court may deem just' (my emphasis).

Although it is correct to say that 'where parties were married in community of property a division of the joint estate automatically ensued' on divorce, and that, failing a forfeiture order in terms of s 9 of the Divorce Act, each party becomes entitled to a 50% share of the joint estate, this does not mean that on divorce each party automatically becomes entitled to a half share in each and every asset forming part of the joint estate – for example the house, holiday flat, motor cars, furniture and investments.

The difficulty with the court's finding is apparent from the inherent question it poses as regards the other assets forming part of the joint estate – that is, if 50% of a pension interest automatically accrues to a non-member spouse on divorce, what is the position regarding all the other immovable, movable or incorporeal assets that actually form part of the assets of the joint estate?

The finding that a s 7(8) order is not required for the accrual of a pension interest:

The court heard various arguments regarding the decision in *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O), where the court, per Musi J, held that a party in divorce proceedings must apply for and obtain an order in terms of s 7(8) of the Divorce Act in order to obtain a share of the member spouse's pension interest.

The judgment reads: 'Mr Burger to the contrary argued that the finding of Musi J ... was wrong for a number of reasons, amongst others, that ... section 7(7)(a) stood by itself and there was no basis for reading into the statute a requirement that there had to be an endorsement of the right in terms of section 7(8) before section 7(7)(a) was operative. Moreover, he submitted section 7(8) dealt with the endorsement to protect an interest or a right and not with the conferral of the right' (at para 21).

In the matter of *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA) (which is not referred to in the judgment) the Supreme Court of Appeal, per Maya JA, held as follows at para 8: 'A pension fund's right to make deductions from a pension benefit is highly circumscribed and may be exercised only as expressly provided by s 37D and s 37A of the PFA [Pension Funds Act 24 of 1956]. Relevant for present purposes is s 37D which, in s (1)(d)(i), allows a fund to "deduct from a member's benefit or minimum individual reserve, as the case may be ...

any amount assigned from such benefit or individual reserve to a non-member spouse, in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979" ... The first respondent's entitlement, if any, must therefore derive from the provisions of s 7(7) and s 7(8) of the Divorce Act, which deal with the pension benefits of a divorcing member of a pension fund'.

I submit that the SCA's *dicta*, read with the relevant statutory provisions, constitutes a finding (or at the very least a very strong intimation) that although a pension interest of a member spouse is deemed to form part of the assets that constitute the patrimonial benefits of the marriage, a non-member spouse becomes entitled to a percentage of the pension interest only when it is assigned to him or her in terms of s 7(8).

The finding that the parties did not deal with the pension interest:

Although the judgment does not expressly stipulate that spouses need to expressly deal with a pension interest in a written settlement agreement, I submit that, in view of the genuine factual dispute regarding the division of the joint estate and the reasons why no specific mention was made of his pension interest in the divorce order, it can be the only basis on which the court could have upheld the appeal.

In my opinion, the provisions of s 7(7)(a) do not lend themselves to an interpretation that the parties must deal with a pension interest in a written settlement agreement, failing which 50% of a pension interest automatically accrues to the non-member spouse in the absence of a forfeiture order. Such a finding is further not in accordance with the well-established legal principles and practice regarding the division of the joint estate.

The division of the joint estate is normally left in the hands of the spouses. While spouses may agree (or be advised) to record their decision regarding the division of the estate in a settlement agreement (which may then be incorporated in the divorce order in terms of s 7(1) of the Divorce Act), they need not do so and there are probably hundreds of thousands of divorce orders in existence in which the court had simply ordered a division of the joint estate.

I therefore submit that, in view of the factual dispute regarding the division of the joint estate, the court should either have dismissed the appeal or have referred the matter back to the court for the hearing of oral evidence if such an order was appropriate in view of the pertinent facts and applicable legal principles. The first respondent may rightfully

wonder why his version regarding the division of the joint estate was considered immaterial.

The import of the order granted

It is not clear what exactly the import and practical effect of the order is, namely: 'the applicant is entitled to a 50% share of the first respondent's pension and/or provident funds (the "pension funds") valued at 8 September 2005'.

Aside from the fact that the order does not refer to the first respondent's pension interest as at the date of the divorce, it is to be noted that, as the first respondent had in fact retired and used his pension benefits to purchase an annuity, no such pension interest existed as at the date of the order.

Conclusion

In my opinion the judgment is erroneous, but it does underscore the fact that the present legal uncertainty resulting from the various (and often conflicting) reported judgments regarding the import of s 7(7)(a) and s 7(8) on the rights of non-member spouses, needs to be clarified by the Supreme Court of Appeal or by the legislature.

I submit that the correct legal position is (or should be) that although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse becomes entitled only to such a share thereof as a court may assign in terms of s 7(8).

I submit that such a dispensation will provide certainty as regards the claim a non-member spouse has to a pension interest of a member spouse and will be in line with the so-called 'clean-break' principle, which the legislature sought to introduce with the amendments to s 37D of the Pension Funds Act.

It is, however, clear from the *Eskom* decision that the judgment has no impact on retirement funds (ie, pension funds, provident funds or retirement annuity funds), as a retirement fund may not, by virtue of the provisions of ss 37A and 37D of the Pension Funds Act, deduct any portion of a member's pension interest in the absence of a s 7(8) order.

In my view, if an order issued by the court granting the decree of divorce does not incorporate a s 7(8) order, another court cannot subsequently assign a percentage of the pension interest to a non-member spouse, except and unless the requirements for the variation of such a court order are met.

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Suretyship

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Weighing the risk

Revisiting various risk-mitigating m

Insurance

Almost all human actions or activities have the potential to bring about damage and/or loss. In contract law, there are various mechanisms available that serve to reduce the exposure and probability of loss resulting from some of these activities. On a daily basis lawyers are confronted with the task of advising clients on which mechanisms to impose in order to minimise loss. It is important for a lawyer who has been tasked in this way to have a clear understanding of the nature and effect of each risk-mitigating mechanism so that clients are adequately protected against risk. This article aims to elucidate on suretyships, guarantees, warranties, indemnities and insurance as means of mitigating or reallocating risks.

Suretyships

Suretyship is one of the frequently utilised risk-mitigating mechanisms in South Africa. In essence a suretyship contract entails an agreement in which a surety agrees to be bound to a creditor for the obligation of another, being the principal debtor. A suretyship is a contract and therefore the parties to it – the surety and the creditor – must conclude an agreement and the normal requirements for concluding a valid contract must be complied with. In terms of the General Law Amendment Act 50 of 1956, a suretyship contract must be in writing, and further to this, in terms of the National Credit Act 34 of 2005 (NCA) a suretyship agreement, which is referred to as a credit guarantee in the NCA, will be regulated by the NCA, provided the principal agreement to which the suretyship/credit guarantee relates is a credit agreement to which the NCA applies.

Therefore, a written contract where A agrees to be bound to B as surety with C, for the due performance by C of its obligations arising out of C's agreement with B, will be a valid suretyship contract. The purpose of a suretyship contract is therefore to protect the creditor against the loss associated with the risk of non-performance by the principal debtor.

Once a valid suretyship contract is concluded, there will be two debtors who are liable and bound for the same debt – that is, the principal debtor and the surety – and there will be two separate agreements, namely the main agreement between the creditor and the principal debtor and the suretyship agreement between the creditor and the surety. In practice these two agreements are usually embodied in one document. The validity of a suretyship contract is dependent on the validity of the main agreement between the creditor and the principal debtor, and another characteristic of a suretyship contract is therefore that it has an auxiliary nature.

The principal debtor remains liable for the obligations arising out of the main agreement, and the surety's obligations kick in when the principal debtor fails to perform his or her obligations under the main agreement.

Guarantees

The words 'guarantee' and 'suretyship' are constantly used interchangeably, but these two terms are distinct and have different effects. In a legal sense, a guarantee is a form of security in terms of which a guarantor agrees to make payment to a beneficiary –

- if a principal defaults in the performance of some or other obligations to the beneficiary that the principal undertook (demand guarantee); or
- in order to ensure that the principal's payment to a beneficiary is received on time and for the correct amount (letter of credit).

A typical example of a demand guarantee is a performance guarantee, a practice usually found in the construction industry, in which a guarantor (usually a financial institution) agrees to give security for the due performance of a principal's obligations under a construction contract between the principal (the financial institution's client) and the beneficiary, by issuing a guarantee in favour of the beneficiary that will be presented to the guarantor for payment. In other words, A and B enter into a contract in which B must construct a building for A, and as security for the due performance of the building construction by B, C provides A with a guarantee.

At first glance a demand guarantee can be confused with a suretyship, however, a closer examination will reveal that this is not the case. The main difference between this guarantee and a suretyship is that a demand guarantee is a separate and independent contract from the underlying contract between the principal and the beneficiary. The validity of a demand guarantee contract is not affected by the validity or not of the underlying contract between the principal and the beneficiary. In other words, if the construction contract between the principal and the beneficiary is found to be invalid, this will not invalidate the demand guarantee contract as it is a distinct and separate contract.

Another difference between a suretyship and a demand guarantee is that the due performance of the obligations under the underlying contract in case of a suretyship contract (ie, the principal agreement between the principal debtor and the creditor) can be the liability of either the principal debtor or the surety. In other words, a suretyship contract entails that the surety will be held liable for the due performance of the obligations of the principal debtor under the principal agreement. This is not the case with a demand guarantee. A demand guarantee

does not entail that the guarantor will be held liable for the due performance of the obligations under the underlying contract between the principal and the beneficiary. Therefore, the principal remains the only party liable to perform under the underlying contract, for example, the principal is the sole party that must perform the obligations under the construction contract; a demand guarantee does not make the guarantor liable for this obligation.

Other examples of demand guarantees are –

- tender guarantees – where a guarantor provides the prospective buyer or the person procuring the service or goods (the beneficiary) with a guarantee that serves to ensure that the bidder (the principal) will accept the tender award if selected and also that the bidder has the financial means to perform the work procured;
- retention guarantees – where a guarantor provides a beneficiary with a guarantee for the amount of money to be retained by the beneficiary for a specified amount of time to safeguard against defective work by the principal; and
- advance payment guarantees – where a guarantor provides the beneficiary with a guarantee that serves to safeguard the advance payment that the beneficiary has made to the principal.

A letter of credit is also a guarantee contract, and it is usually employed in international trade transactions. In this case, a purchaser in, for example, South Africa enters into a sale agreement with a seller in Australia, and for payment of the purchase price, bank A (the purchaser's bank) issues a letter of credit that the seller can present for payment. The seller does not have to demand payment from the purchaser first before presenting the letter of credit for payment. The letter of credit therefore serves as the first mode of payment, as opposed to being accessory or secondary. Again the letter of credit is a separate contract and is not dependent on the underlying sale agreement between the purchaser and the seller.

A guarantor is obliged to perform in terms of the issued guarantee, be it a demand guarantee or a letter of credit, on compliance with all the formalities by the beneficiary. These formalities are usually that the beneficiary must present the guarantee for payment, together with all the required documents.

A guarantee then serves to safeguard the beneficiary against loss associated with the risk of non-performance or improper performance by the principal (in case of a demand guarantee) or the risks of non-payment (in the case of a letter of credit).

Warranties

A warranty is a contractual term in which one party gives an undertaking to another

party that specific facts or conditions are true or will happen. Warranties can be contractual – that is, expressly agreed to by the parties to a contract; or implied by law – that is, warranties that form part of a contract, without the parties expressly agreeing thereto, but by virtue of the law (such as those implied by the Consumer Protection Act 68 of 2008).

Warranties can also be either a promissory warranty or an affirmative warranty. A promissory warranty is when one party gives an assurance to the other party that a fact is presently true and will continue to be true. An example of this kind of warranty is when A gives B an undertaking that he or she is in possession of a valid licence to operate a particular business and will throughout the existence of the contract be in possession of the licence. An affirmative warranty is when one party gives an assurance to the other party that a particular statement of fact is true and may be relied on. A typical example of an affirmative warranty is when A gives B an undertaking that he or she has the authority necessary to enter into an agreement with B.

Warranties serve, first, to elicit information from the parties in a contract and, secondly, they serve to reallocate risk between the parties in that the liability of the party giving the warranty is extended beyond what would normally be the case had the warranty not been provided. Non-compliance with a contractual warranty is a breach of contract and the non-defaulting party can cancel the contract, claim specific performance, where possible, or claim damages. The Supreme Court of Appeal in the matter between *Mastersspice (Pty) Ltd v Broszeit Investments CC* 2006 (6) SA 1 (SCA) held that a breach of a warranty can mean breach of a term that gives rise to a claim for damages, or a term whose material breach gives rise to a right to cancel, and that it is necessary in every case to examine the terms of the contract closely in order to determine whether a breach of a warranty gives rise to a claim for cancellation of a contract or a claim for damages.

Consequences of non-compliance with a warranty implied by law will be governed by that law, for example, in terms of the Consumer Protection Act, non-compliance with a warranty implied by this Act is that a non-defaulting party (a consumer) has a right to return the goods, or a right to have the goods replaced or repaired.

Indemnities

An indemnity agreement can be described as a contractual undertaking between two parties in terms of which one of the parties in a contract is exempted from loss that may occur as a result of a specified event.

Indemnity agreements can be structured in various forms; it can be formu-

lated in a manner in which one party indemnifies another party against losses incurred as a result of the indemnified party's own acts and/or omissions, or it can be that one party indemnifies another party against losses except those that occur as a result of the indemnified party's own acts and/or omissions. Indemnities can also come in a form where one party indemnifies another party against liabilities to or claims by a third party. It may also occur that each party to a contract indemnifies the other(s) for losses occasioned by the indemnifier's breach of the contract. An indemnity may be included as one of the clauses in some or other contract, for example, it may be one of the clauses in a loan or a sales contract, or it may be embodied in a separate contract, known commonly as a hold harmless contract.

Indemnities can be used in circumstances where a breach of warranty may not necessarily give rise to a claim in damages. For example, in a sale of a business, the seller may provide a disclosure letter in terms of which the warranties that the seller has given in the sale agreement are restricted or qualified. In such an event, it would be prudent for the buyer to request an indemnity for loss that the buyer may suffer due to the effect of the qualified or restricted warranty, for example if a seller gives a warranty that there is no litigation pending against the sold business and then, in a disclosure letter, the seller discloses one litigation pending against the sold business, the buyer will not be able to claim damages for losses arising from the disclosed litigation. However, the buyer can safeguard himself or herself against loss as a result of this disclosed litigation by requesting an Indemnity from the seller in this regard.

Another important aspect that needs mentioning with regard to indemnities, is that prescription in relation to the indemnity clause will start to run from the date on which the indemnifier refuses to honour the indemnity and therefore the claim may remain valid for an extended period of time.

Indemnities can be drafted in a general form without specifying the amount to be paid, or it can be drafted with a stated amount. In other words, A may agree to indemnify B for losses that B may suffer as a result of a pending litigation, or A may agree to indemnify B in the amount of, for example, R 500 000 for losses that B may suffer as a result of a pending litigation. This latter indemnity may give rise to a claim for debt, as opposed to a claim for damages, which will be the case under the former indemnity.

Therefore, as stated above, the purpose of an indemnity is to safeguard a party against loss that may occur as a result of a specified event.

Insurance

Insurance contracts should also be mentioned since insurance, by its nature, acts as a risk-transfer mechanism in that the financial risk of the insured is shifted and transferred to the insurer. The insured is covered by contributing a premium to the insurer. Therefore, in the event of a financial loss, the insured is entitled to compensation subject to the terms and conditions that are in place in the particular insurance contract.

Insurance can either be indemnity insurance or non-indemnity insurance. With indemnity insurance the insured will be compensated by the insurer for the damage that the insured may suffer

as a result of the occurrence of the event insured against. A typical example of this kind of insurance is insurance against theft of property. With non-indemnity insurance, the insurer will receive a pre-determined amount of money from the insurer on the occurrence of the event insured against, an example of this being life cover insurance.

The crux underpinning an insurance contract is that the insured is protected from financial loss associated with the event insured against. An insurance contract might be confused with an indemnity contract/clause discussed above, but the fact that the insured must contribute a premium in order to be protected by insurance, which is not the case

with an indemnity, this distinguishes insurance contracts from indemnity contracts/clauses.

Conclusion

The above discussion may be summarised as demonstrated in the table below.

Even though all these mechanisms all serve one purpose, which is to reallocate and/or mitigate risk, they all have different requirements and each with a different effect. These mechanisms are not mutually exclusive and may, where possible, all be utilised in one transaction, thus providing extensive and comprehensive security against risk.

Type of risk-mitigating mechanism	Example	The risk being mitigated	The effect
Suretyship	A is indebted to B for a loan amount, and C agrees in a written contract to stand surety for the debt in case A does not repay the loan.	The loss that B may suffer as a result of non-payment by A.	In the event of non-payment by A, C will be held liable for the repayment of the loan.
Guarantee	A and B enter into a building construction contract, and as security for the due performance of B's obligation under the building construction contract, bank C issues a guarantee in favour of A (demand guarantee).	The loss that A may suffer as a result of non-performance or defective performance by B.	In the event of non-performance or defective performance by B, A can present the guarantee for payment of the amount specified in the guarantee.
	A and B who are in two different countries enter into a sale agreement, and bank C issues a letter of credit in favour of B for the payment of the purchase price by A.	The loss that B may suffer in case A fails to pay the purchase price.	B does not have to demand payment of the purchase price from A, and can simply present the letter of credit for payment.
Warranty	A gives B a warranty that A has the required licence to operate a particular business.	The loss that B may suffer should A not be in possession of the required licence.	B may claim damages for the loss suffered or may even cancel the contract under which the warranty was given.
Indemnity	A agrees to indemnify B in the event that A does not have the licence to operate a particular business.	The loss that B suffers as a result of A not having the licence to operate a particular business.	B may claim the loss as a debt or as damages, depending on the wording of the indemnity.
Insurance	Insurance company A agrees to compensate B for a financial loss that B may suffer due B's asset being stolen, against payment by B of regular premiums to insurance company A.	The financial loss that B may suffer as a result of the occurrence of the event insured against, for example; theft of B's asset.	The insurance company will pay B the amount of financial loss that B proves to have suffered.
	Insurance company A agrees to compensate B with a fixed amount of money on B being disabled, against payment by B of regular premiums to insurance company A.	The non-financial loss that B may suffer as a result of the occurrence of the event insured against (B becoming disabled).	The insurance company will pay B the fixed amount.

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University law clinics play an important role in training law graduates for the legal profession. Law clinics are traditionally understood to have two main objectives: Teaching law students the practice of law; and providing free legal services to indigent members of the community. However, they are now also focusing on introducing law graduates to the legal fraternity. They do so by recruiting candidate attorneys who are then allocated supervisors – clinicians who are lawyers within those law clinics – to train and prepare them for the practice of law. It is important that such candidate attorneys receive adequate supervision within these law clinics.

Recruiting candidate attorneys

Law clinics are playing their part in assisting poor people to access justice by utilising the services of candidate attorneys. This process provides candidate attorneys with important legal training, 'because in reality upon graduation from law school, graduates do not possess the necessary practical skills that will enable them to practice law' (K Tokarz, P Maisel, RF Seibel, AS Lopez 'Towards Universal Clinical Education: Why the Time is Ripe for Requiring Clinical Courses for all Law Graduates', www.nyls.edu/user_files/1/3/4/15/1009/Mandatory%20Clinical%20Legal%20Education%20draft%20Sept%2021%202010-1.pdf, accessed 2-8-2013).

Prof David McQuoid-Mason stated that: 'In 1993, the Attorneys Act [53 of 1979] was amended to allow candidate attorneys ... to obtain practical experience by undertaking community service rather than serving articles in an attorney's office. Candidate attorneys may perform community service at law clinics accredited by provincial law societies, including clinics funded by the Legal Aid Board. The clinics are required to employ a principal (an attorney with sufficient practical experience) to supervise law graduates in the community service program. The candidate attorneys appear in the district courts and the principal in the regional and High Courts. Interns

who have been articulated for more than a year may also appear in the regional courts' (D McQuoid-Mason 'The Supply Side: The Role of Lawyers in the Provision of Legal Aid – Some Lessons From South Africa' in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007) at 107; www.penalreform.org/wp-content/uploads/2013/06/rep-2007-access-africa-and-beyond-en.pdf; accessed 2-8-2013).

It is important for law clinics to prepare candidate attorneys for the legal profession and develop them to be competent legal practitioners who possess the necessary expertise required by the profession. It is also crucial for clinicians to create an environment within law clinics that will enhance the learning capacity of candidate attorneys. Clinicians should always encourage a good work ethic among candidate attorneys and ensure that they understand the value of efficiency when carrying out their prescribed duties.

Candidate attorneys should be trained to carry out their duties with pride and serve their indigent clients with utmost professionalism, dignity and interest. They should be made to understand that the mere fact that the majority of their clients are poor, does not mean they deserve substandard legal services. In order to render dignified service and help indigent clients access justice, candidate attorneys should be made aware of the required values and skills of the legal profession, which include, among others –

- competent representation;
- promotion of justice;
- fairness and morality;
- improving the standards of the profession; and the quality of legal services and, most importantly,
- professional self-development.

Law clinic as an alternative

Most students in their senior year of study at various law schools often desire to work for one of the established commercial firms. Such a desire is motivated by a variety of reasons, which include, among others –

- the way such law firms market themselves;
- the type of clients they have;
- the salary that they are able to provide to their candidate attorneys;
- the candidates' poor backgrounds; and
- their desire to improve the socio-economic conditions of their respective families.

One of the major reasons that might induce a law graduate to opt for a big commercial firm is the debt that he or she might have incurred to cover his or her university fees. The above, however, does not apply to all law graduates, as not all of them can be considered and hired by big commercial firms for a variety of reasons. These include, among others –

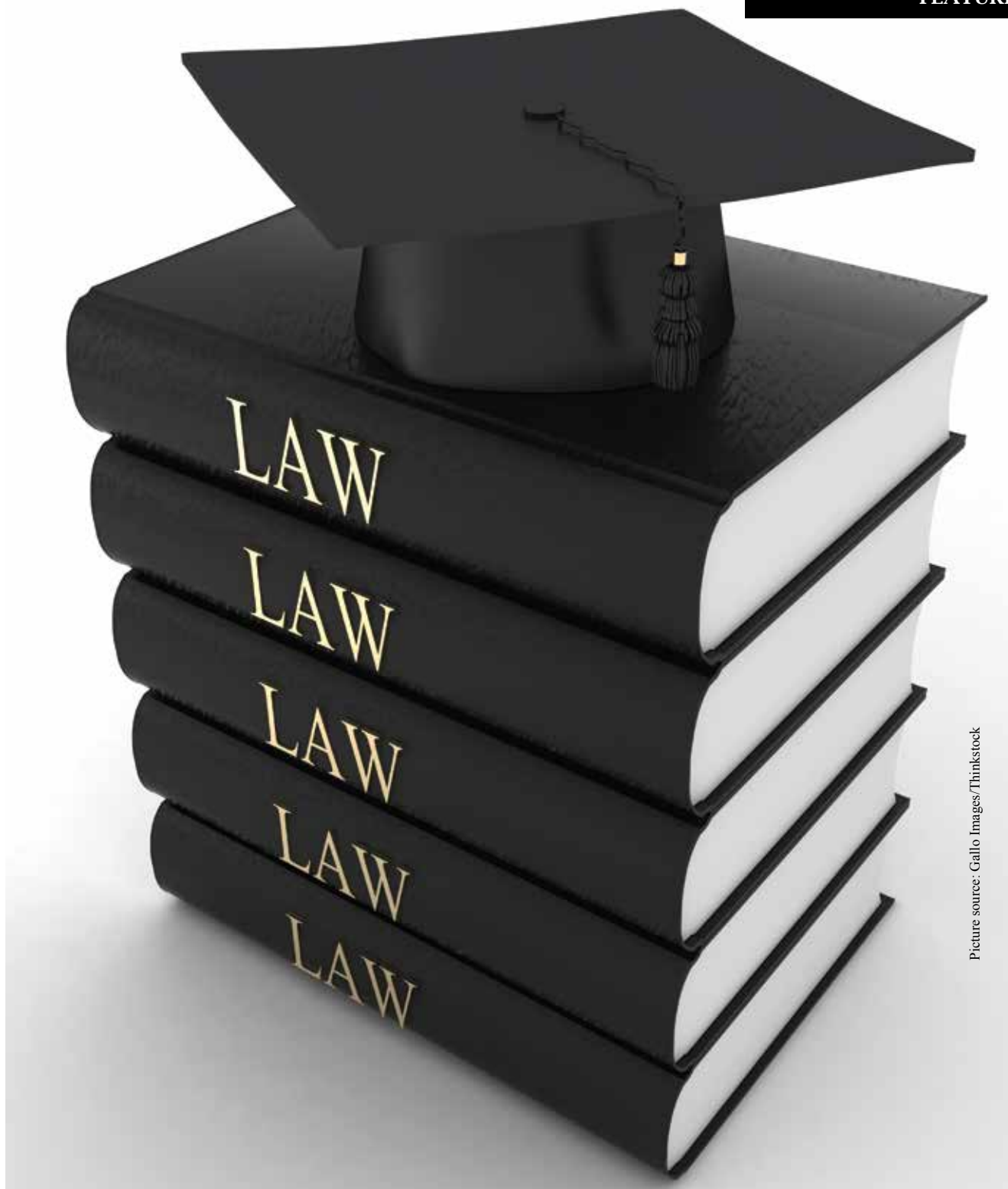
- attainment of poor grades;
- racial and class considerations;
- language barriers;
- the objective to meet employment equity standards, or
- not having a driver's licence.

As such, Legal Aid South Africa and various law clinics have positioned themselves as viable alternatives to big and medium commercial firms and, at times, also as the first choice for law graduates to serve their articles of clerkship.

Access to the legal profession, especially by black law graduates, has been a subject of much controversy for a number of years. In 1995, professor Hugh Corder made the following observations:

'Although there has never been a formal exclusion of black South Africans from legal professional or educational ranks, and although there have been prominent examples of black lawyers who have assumed a leading role in professional and political circles, access to professional qualification for black South Africans has always been much harder than for whites' (H Corder 'Establishing Legitimacy for the Administration of Justice in South Africa' (1995) 6 *Stellenbosch Law Review* at 206).

It has also been further argued that: 'Many black graduates, burdened by perceived substandard law degrees at racially exclusive universities and by racial misconceptions that the skills of black lawyers mainly limited them to criminal practice, were unable to secure articles



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of clerkship with law firms or pupillage with advocates, thereby being denied entry to the legal profession. Likewise, the legal profession was primarily a (white) male bastion, with the entry of women having been constrained through invisible societal barriers' (J Bodenstein 'The Role of University-Based Law Clinics in the Provision of Legal Aid in South Africa', www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Antwerpen_2007/Conference_Papers/The_Role_of_University-Based_Law_Clin-

[ics_in_the_Provision_of_Legal_Aid_in_South_Africa.pdf](http://www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/Antwerpen_2007/Conference_Papers/The_Role_of_University-Based_Law_Clin-ics_in_the_Provision_of_Legal_Aid_in_South_Africa.pdf), accessed 2-8-2013).

Private and commercial law firms have consistently been criticised for hiring black candidate attorneys as a 'public interest gesture to provide training and some commercial law exposure to a few blacks rather than a serious effort to retain these blacks as professionals who would ascend to partnership' (LR Pruitt 'No Black Names on the Letter Head - Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michi-*

gan Journal of International Law 545 at 572). They have also been criticised for hiring black candidate attorneys in order to comply with their black economic empowerment (BEE) targets.

However, in reality, even though there are concerns in this regard, there has been improvement as far as retaining black candidate attorneys on merit is concerned in commercial firms. It cannot be disputed that, in South Africa, candidate attorneys' recruitment and employment have been characterised by class,

racial and social considerations as well as other forms of discrimination (W de Klerk 'University Law Clinics in South Africa' 122 *SALJ* (2005) 944). De Klerk has also argued that 'law clinics continue to provide a valuable alternative route into the profession for black law graduates'. It is therefore pleasing to see candidates of other races also being hired to serve articles at these law clinics.

Law clinics are involved in public interest work and rely heavily on candidate attorneys to advise and provide legal solutions to indigent members of the public and also to represent them in court. This initiative exposes candidate attorneys to real practice of law and allows them to experience the profession at large. Candidate attorneys serving articles in law clinics are given the responsibility of solving and attending to their clients problems under the supervision of clinicians. As such, they are allowed to make mistakes and learn from them, unlike in private and commercial firms where the room for mistakes is limited because of the money involved.

By becoming more professional and through the kind of practical training they provide, some law clinics have succeeded in attracting the best law graduates who consider them as their first choice to serve articles. The University of the Witwatersrand law clinic, which I have personal experience of, has for example become more professional in recent years by acquiring the services of a receptionist, typist, office manager, filing assistant and the creation of a trust account. It also has a basket system that allows ease of communication within the clinic.

Law clinics, through their clinical legal education mandate, are in a position to create a platform for candidate attorneys to understand and 'recognise the injustices in society and in the legal system, to appreciate the role they can play in challenging social injustices and in reforming the legal system, to make society and the legal system more just' (S Wizner and JH Aiken 'Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice' 2004) <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1296&context=facpub>, accessed 2-8-2013).

Supervision of candidate attorneys

I am of the opinion that, in order to provide efficient legal services to the poor, candidate attorneys in law clinics should be trained adequately to increase their competencies and skills, such as –

- interviewing;
- problem solving;
- negotiating;
- drafting;

- counselling;
- communication; and
- research skills.

Research skills are particularly important to candidate attorneys as they should possess strong substantive law knowledge. This will further enhance and strengthen their understanding of procedures and the rules of the various courts in which they practice. Those entrusted with teaching these skills should also explain clearly the importance thereof in order to successfully practise law. Candidate attorneys should also understand how to manage a file and how to adequately interact with corresponding attorneys. In order to provide adequate supervision, clinicians should generally be equipped in the areas of law that they practise.

It is essential that the relationship between the candidate attorney and the clinician is healthy and professional at all times and creates an environment that will assist a candidate attorney to ultimately be admitted into the legal profession. This is important because:

'The graduate and the practicing attorney sign a contract that contains an exchange of promises: The graduate or "candidate attorney" pledges to use diligence, honesty, and confidentiality, while the supervisor or "principal" agrees to provide proper instruction in the areas of legal practice, ethics, and understanding ... Finally, the principal agrees to use [his or] her best efforts to assist the attorney in gaining admission, assuming successful completion of the period of articles' (P Maisel 'An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys' 20 (2004) 4 *Georgia State University Law Review* 977 at 983).

Clinicians should be able to provide candidate attorneys with 'contextualised understanding of the law and its operation, the awareness of the lawyer's community responsibility, and the practical and ethical skills to protect the interests of their clients and of the broader community' (R Hyams and B Naylor 'Innovation in Clinical Legal Education: Educating Lawyers for the Future', www.altlj.org/images/downloads/monographs/2007_clinical-legal-education-intro.pdf, accessed 5-9-2013). It is my opinion that law clinics are indeed better positioned to provide such values to candidate attorneys as they are closely linked with the communities that most of these candidate attorneys are members of. As such, the need for quality and hands-on supervision of candidate attorneys cannot be overemphasised. Indeed, the quality of mentoring and supervision of candidate attorneys is a key ingredient in preparing candidate attorneys to become competent lawyers. The matter

of proper supervision goes beyond the clinician's suitability to training candidate attorneys, it involves the clinician's ability to guide candidate attorneys on how to manage their workload. It is therefore important that clinicians who are employed by law clinics should possess some expertise in the field of law.

Conclusion

It is advisable for candidate attorneys and their supervisors to develop a relationship of trust and formulate a timetable on when they would meet to discuss files that candidate attorneys are working on. However, it might not be practical for clinicians and candidate attorneys to meet regularly given the clinicians' responsibilities towards students, their research and lecturing requirements at the law school. Notwithstanding these challenges, clinicians should make themselves available to supervise candidate attorneys effectively and check their work regularly.

It might be advisable, however, for candidate attorneys not to rely too much on clinicians in order to develop the independence and autonomy that will strengthen their learning and will make them valuable to potential employers. I am of the view that clinicians should also liaise with their colleagues who are retired or even in private and commercial practice to develop programmes aimed at training candidate attorneys in some of the aspects that are not part of the law clinic structure, such as billing clients.

Finally, I note with concern that the Legal Practice Bill (B20 of 2012) defines a legal practitioner as a mere attorney and advocate and does not include clinicians practising at law clinics. Furthermore, this Bill defines an attorney as a legal practitioner practising with a Fidelity Fund certificate, which effectively excludes clinicians at law clinics as well as attorneys practising at Legal Aid South Africa. It must be noted that s 84(8) of the Attorneys Act exempts attorneys with full-time employment by Legal Aid South Africa from obtaining a Fidelity Fund certificate. It is not clear whether or not clinicians and legal aid practitioners are regarded as legal practitioners by this Bill, however, the necessary amendments should be effected in order to include them within the confines of the Bill before it is passed in parliament.

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Retiring beyond the normal **or** agreed **age**

By
Leicester
Adams

As an employer, one is often faced with a situation in which an employee has reached retirement age, but is still willing and able to continue working in a competent and efficient manner.

Where there is no indication of incapacity, poor performance or misconduct, an employer is often tempted to allow a 60-year-old person to continue working after retirement age has been reached. On the other hand, an employer sometimes has a person in his or her employ who cannot keep going until retirement age. In both these instances, the question arises as to whether the employer is entitled to force his or her employee to retire – whether it is at the age of 60 or 65 – or any age in between.

The short answer to this question is that, in terms of s 187(2)(b) of the Labour Relations Act 66 of 1995 (LRA), a ‘dismissal based on age is fair if the employee has reached the normal or agreed retirement age for people employed in the same capacity’. In other words, an employer is entitled to insist that an employee retires when he or she reaches the retirement age, as agreed between the employee and the employer, or when he or she reaches the age at which other employees of this employer normally retire.

Ideally, the retirement age should be written into the contract of employment. The employment contract should specifically provide that the employee will retire at the age of 60 or 65, or any other age for that matter. This clear provision in the employment contract requires the employee to retire at the age provided for, and entitles the employer to, for example, ‘dismiss’ an employee on turning 60. The legal difficulty relating to compulsory retirement is taken care of simply by writing the retirement age into the employment contract as the agreed option.

In the absence of an express agreement between the employer and the employee relating to the retirement age, the employer is nevertheless entitled to insist that the employee retires at the company’s normal retirement age. Whether a company has a normal retirement age for its employees will obviously depend on the facts. For example, a policy that employees are required to retire at age 65, which is applied consistently over a number of years, would be sufficient evidence of the normal retirement age. If the company has a long, established practice of employees retiring on the retirement date stipulated in the provident fund rules, then that date would normally be accepted as the normal retirement age. This was the case and the finding in the matter of *Ivor Michael Karan t/a*

Karan Beef Feedlot and Another v Randall [2010] JOL 24897 (LC). Needless to say, the onus is on the employer to prove the facts that determine the normal retirement age of the company.

In the absence of sufficient evidence that 60 is the normal retirement age, an employer’s insistence that the employee retires at that age, would amount to a dismissal that is automatically unfair in terms of s 187(1)(f) of the LRA.

A further question then arises: In the absence of an agreed or normal retirement age, can an employee insist on continuing to work for as long as he or she is able to do so? Put differently, would an employer be entitled to ask a competent employee to retire in the absence of any of the other lawful grounds for dismissing an employee, such as incapacity, poor performance, misconduct or operational requirements?

This is unlikely to take place. More often than not, human resources departments of companies ensure that contracts of employment include the retirement age. Alternatively, one often finds that, over time, established companies have developed policies that indicate when employees must retire. It would accordingly be relatively easy for the employer to prove its ‘normal retirement age’ in these circumstances.

However, in the absence of a policy that indicates that employees are required to retire at a particular age, a 70-year-old person cannot be dismissed on the basis of his or her age. This would amount to an automatically unfair dismissal based on age. Therefore, an employee could in theory carry on working indefinitely if there is no agreed or normal retirement age.

But a scenario could also arise where an employee continues to be employed by an employer after he or she has reached the normal or agreed retirement age. This scenario presented itself in the *Randall* case, which incidentally was overruled on the facts of the matter by the Labour Appeal Court (LAC) (see 2013 (March) *DR* 47).

In this matter, the employee continued working past the normal retirement age of 60. When he was almost 63 years old, the company notified him of his retirement. In proceedings before the Labour Court, the employee alleged that he had been discriminated against based on his age and that his dismissal was automatically unfair in terms of the provisions of the LRA.

The courts considered the two conflicting schools of thought concerning the position of an employee who has reached a normal or agreed retirement age, but is allowed to stay on.

In the LAC matter, *Karan t/a Karan Beef Feedlot v Randall* [2012] 11 BLLR

1093 (LAC), the court had the following to say at paras 19 and 20: ‘There are two plausible arguments concerning the application of section 187(1)(f) and 187(2)(b) in this matter. The first is that where there is a normal or agreed retirement age and the employee has reached that age, the employer shall enjoy the protection prescribed in section 187(2)(b) from that date and at any time thereafter. He or she would be entitled to terminate the employment of the employee on the grounds of age. The second scenario is that, when there is an agreement reached between the employer and employee before the latter has reached the normal or agreed retirement age, to determine a new retirement age, the employer would enjoy the protection of section 187(2)(b), should he/she terminate the employment of the employee, once the new agreed retirement date is reached.’

In the end the LAC did not deem it necessary to decide on the merits of the first argument. However, the court *a quo*, adopted the second approach. It found that, since there was no evidence that the employee had been retained beyond 60 for a specific period or until he had completed a specific task, the company had unilaterally imposed the retirement day. The Labour Court found that the employee had been dismissed solely on the grounds of his age and that this constituted an automatically unfair dismissal.

On appeal, the court found that a valid agreement had been concluded between the employer and the employee stating that the new retirement age would be as and when stated by the employer. The principle to be extracted from this case in both the court *a quo* and the court of appeal is that once an employee is allowed to continue working past the retirement age, whether agreed or normal, and no agreement is reached between the employer and the employee relative to a new retirement date and/or age, the employer would not then be able to dismiss the employee subsequently on the basis of his or her age. That would be an automatically unfair dismissal.

Accordingly, it is prudent for an employer to retire an employee when he or she reaches retirement age. In the event that an employee is required to continue working beyond retirement age, there should be a specific agreement on what the new retirement age would be.

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THE LAW REPORTS



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July 2013 (4) *The South African Law Reports* (pp 1 – 318); [2013] 2 *The All South African Law Reports* June no 1 (pp 501 – 628); and no 2 (pp 629 – 710)

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

ABBREVIATIONS

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

Banking law

Contravention of s 11: In *Dulce Vita v Van Coller and Others* [2013] 2 All SA 646 (SCA) the court held that a contract underlying a scheme that contravenes s 11 of the Banks Act 94 of 1990 (the Act) is not necessarily void and therefore unenforceable.

The facts were as follows: Bluezone Property Investments (Bluezone) was a company that conceived and promoted the Spitskop Property Development Scheme (the Spitskop scheme). Blue zone was incorporated to carry on business by means of various property syndication schemes. A public property syndication scheme in terms of which the promoters withhold certain prescribed information from investors is unlawful (see N459/GG 28690/30-3-2006 (notice 459)).

It was trite that Bluezone and their representatives did not disclose certain prescribed information regarding the Spitskop scheme to investors and potential investors. The Spitskop scheme was later liquidated.

The court *a quo* held that because the Spitskop scheme was taking money (deposits) from the general public, while not registered as a bank, the agreements in terms of which the investors invested in the Spitskop scheme were unlawful and void *ab initio* and thus not enforceable against the liquidators of the Spitskop scheme (the respondents).

On appeal the court was asked to pronounce on two questions: Whether the Spitskop scheme contravened s 11 of the Act, which prohibits any person from conducting the business of a bank unless it is a public company and is registered as a bank in terms of the Act. If the answer to the first question is yes, the second question is whether the contravention of s 11 and notice 459 resulted in the agreements in terms of which the investors invested in the Spitskop scheme being unlawful and void *ab initio*.

As far as the first question, regarding the contravention of s 11 of the Act, is concerned Southwood AJA pointed out that the primary business of a bank is defined in the Act as 'the acceptance of deposits from the general public as a regular feature of the business in question'.

The court held that the word 'deposit' is broadly defined. By receiving payment for the debentures, the Spitskop scheme accepted deposits unlawfully and in contravention of s 11 from the general public as a regular feature of its business.

As to the second question regarding the status of agreements concluded in terms of the Spitskop scheme, the court held that there is no provision in the Act that a public property syndication scheme is unlawful if the promoter raises funds by accepting loans against the issue of debentures in contravention of the Act.

In this regard the court referred with approval to the earlier decision in *Gazit Properties v Botha and Others* NNO 2012 (2) SA 306 (SCA) in which the court held that a contravention of the Act does not result in the illegality of the agreements in terms of which deposits are made.

The court reasoned that the fact that the legislature visits non-compliance with s 11 and notice 459 with a hefty fine and/or imprisonment, serves as proof that it does not want to burden non-compliance with the additional sanction of being unlawful.

It further pointed out that there is no provision in the Act that a public property syndication scheme is unlawful if the promoter raises funds by accepting loans against the issue of debentures in contravention of the Act.

The court held that the word 'deposit' is broadly defined. By receiving payment for the debentures, the Spitskop scheme accepted deposits unlawfully and in contravention of s 11 from the general public as a regular feature of its business.

It found that the court *a quo* erred in finding that the Spitskop scheme was unlawful and that the agreements entered into were null and void *ab initio*.

The appeal was accordingly allowed with costs.

Cession

Cession of real right: The facts in *Page Automation (Pty) Ltd v Profusa Properties CC t/a Homenet OR Tambo and Others* 2013 (4) SA 37 (GSJ) were as follows. The plaintiff (Page Automation) is a supplier of office equipment. OEP Financial Services (OEP) are financiers. In October 2008 the first defendant (Profusa Properties) entered into a five-year rental agreement with OEP for the hire of certain office equipment. The second and third defendants (the sureties) acted as sureties and co-principal debtors with Profusa Properties in terms of the rental agreement. In January 2010, as a result of Profusa Properties defaulting on its rental obligations, OEP ceded its right, title and interest to the rental agreement to Page Automation.

Page Automation argued that, in its capacity as cessionary, it could step into the shoes of OEP and exercise the rights in terms of the rental agreement as if it were OEP. Page Automation subsequently instated action against Profusa Properties (as well as the sureties) for various claims, including arrear rentals.

Profusa Properties argued that, first, Page Automation has no right to claim for rentals after the date of cession as the agreement of cession does not provide for the cession of future rentals; and secondly, that because ownership cannot be ceded, ownership still vests in OEP rather than Page Automation who accordingly has no *locus standi* to claim delivery of the equipment.

Heaton-Nicholls J held that –
• although only personal rights – and not real rights (for example, ownership) – are in principle capable of being ceded, our courts have increasingly acknowledged that commercial realities demand a more streamlined mode of delivery free from the archaic requirements that accompany the traditional modes of transfer; and
• it is necessary that the law of cession be developed in accordance with the *obiter dictum* in the decision in *Caledon & Suid-Westelike Distrikte Eksekuteurs-kamers Bpk v Wentzel en Andere* 1972 (1) SA 270 (A).

Applied to the facts of the present case, the court held that the rights that OEP ceded to Page Automation included ownership of the equipment concerned and that delivery and transfer of ownership thereof took place on cession.

Page Automation's claim for delivery of the equipment therefore had to succeed with costs.

Company law

Reinstatement of deregistered close corporation: In *ABSA Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC) Absa Bank (Absa)

l lodged an unopposed application for the reinstatement of a deregistered close corporation, Voigro Investments 19 CC (the CC). It further applied for a declaratory order to vest the CC with its assets with retrospective effect.

The facts that led to the present application were as follows: The CC failed to lodge annual returns and was deregistered. Absa was a secured creditor of the CC. Absa obtained judgment against the CC as it was in arrears with the repayment of a mortgage loan. The property was attached in execution.

However, Absa then discovered that the property had already been sold in execution to satisfy a claim for arrear rates by the Knysna Municipality. The property was sold well below its market value of R 200 000. Although the sheriff executing the warrant had informed Absa of the attachment and impending sale in execution, the information was not processed in time.

Absa argued that deregistration by the Companies and Intellectual Property Commission (CIPRO), which was intended to punish non-compliant entities, effectively deprived it of its security in terms of the mortgage bond. Absa further argued that a court application under s 83(4) of the Companies Act 71 of 2008 (the 2008 Act) was the only way to restore the company's status and its security. Section 82(4), which entails an application to CIPRO, was of no avail to Absa as it was unable to comply with the prescribed requirements for such an application.

The crisp issue was whether s 83(4) of the 2008 Act applies to a company or close corporation deregistered under s 82(3).

The court *a quo* held that it could not order the reinstatement of a company's registration under s 83(4) if the company's name was removed from the register under s 82(3) for failing to submit

its annual returns. It pointed out that s 83(4) is intended for companies that have been dissolved following their liquidation. It accordingly dismissed the application for reinstatement and set aside the provisional winding-up order.

On appeal before a full Bench, Rogers J held that s 83(1) provides expressly that the removal of a company's name from the register results in the dissolution of that company. There is no basis in the 2008 Act to limit dissolution to companies or close corporations that have been liquidated.

Consequently, a court order under s 83(4) declaring the dissolution of a company to have been void, can also be made in respect of a company that was deregistered for failure to submit annual returns. The court's power under s 83(4) is not a power to review, which can be exercised only if the removal of the company's name from the register was irregular or unlawful. A common reason for orders under the similarly worded s 420 of the Companies Act 61 of 1973 was to discover assets.

The court ordered the dissolution to have been void, ordered the CIPRO to restore the CC's name to the register and declared that it was re-vested with its assets and liabilities as at the date of deregistration. The court declined the request that the order be made with retroactive effect as if the CC had not been deregistered.

The CC was ordered, on re-registration, to pay the costs of the applicant.

• See 2013 (Aug) DR 38.

Constitutional law

Mineral rights – expropriation: In *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) a company (Sebenza) was the holder of coal rights on different portions of the farm Goedeheop. On 1 May 2004, the commencement date of the Mineral and Petroleum Resources Development Act 28 of 2002 (the

MPRDA), Sebenza lost its mineral rights; such rights then vesting in the people of South Africa under the custodianship of the Minister of Minerals and Energy.

Sebenza ceded its right to compensation for the loss of the coal rights to Agri SA. Agri SA contended that the very enactment of the Act constituted an expropriation and, accordingly, that it was entitled to compensation from the minister for the expropriated rights.

The minister argued that the mineral rights were not expropriated, but merely regulated on behalf of the people of South Africa by the minister as custodian. It did not vest in the state, which is a requirement for expropriation. The minister further argued that this should be classified as a deprivation in terms of s 25(1) of the Constitution. Accordingly, so the minister argued, no compensation was payable to Agri SA. The North Gauteng High Court held that the deprivation amounted to expropriation and that Agri SA was entitled to compensation. On appeal to the Supreme Court of Appeal it was held that neither deprivation nor expropriation took place, and the decision of the High Court was set aside.

On appeal to the Constitutional Court the crisp question was whether Sebenza's mineral rights, which it possessed during the subsistence of the Minerals Act 50 of 1991, were expropriated when the MPRDA took effect.

Mogoeng CJ held that, before the commencement of the MPRDA, a holder of mineral rights like Sebenza could prospect, mine, sterilise or freely sell or lease such rights. When the MPRDA came into force it terminated the ability to sterilise or freely sell the rights, but otherwise left them intact. It thus concluded that a law of general application, which was not arbitrary, had deprived Sebenza of its rights.

Next, the court considered the question whether the deprivation allowed by the MPRDA

constituted expropriation. The court defined expropriation as an acquisition by the state of the substance of what was deprived, for a public purpose or in the public interest. Expropriation is subject to compensation. However, in the present case, the state had not acquired Sebenza's entitlements to freely sell or lease or sterilise the rights on the coming into force of the MPRDA. Accordingly, so the court reasoned, there had been no expropriation.

The court was at pains to emphasise that its decision should not be interpreted to mean that expropriation in terms of the MPRDA is never capable of being established. Provided that a case of expropriation is properly pleaded and argued, it will be possible for expropriation to take place in terms of the MPRDA.

• See 2013 (July) DR 44 and 2013 (Aug) DR 42.

Motion of no confidence in the president:

In *Mazibuko NO v Sisulu and Others* NNO 2013 (4) SA 243 (WCC) the court was asked to interpret s 102(2) of the Constitution. Section 102(2) provides for the resignation of the president if the majority of the national assembly passes a motion of no confidence in the president.

In the present case the applicant (who is the leader of the official opposition in parliament) brought an urgent application that the first respondent (the speaker) be directed to ensure that a tabled motion of no confidence in the president be scheduled for debate and a vote before the national assembly on or before the last day of its annual sitting. The applicant alleged that 'procedural machinations' frustrated the scheduling of the debate and argued that, notwithstanding the national assembly rules not providing for breaking the resulting deadlock, the speaker had a residual power to order scheduling of the debate.

Davis J held that there was a constitutional right to move a motion of no confidence in the president. This motion could be brought not only by a majority party, but also by a minority party that sought to garner support for the motion from members across the floor of the house. The right of an elected representative to bring a motion, whether in the form of a Bill or in the form of a motion of no confidence in the president, as envisaged in s 102 of the Constitution, captured the animating spirit of South Africa's democracy, which was not to be reduced to the view of a transient majority.

The court further held that a motion of no confidence in the president has to have an inherent urgency because, for example, it raises matters of profound national interest and importance. The debate had to take place, and the majority could not subvert this right by delaying its initiation for an unreasonable time.

However, while the judiciary was entitled to direct parliament to operate within constitutional boundaries and to refrain from subverting the expressly formulated idea of a motion of no confidence, it could not trespass into legislative terrain by dictating to parliament when and how it should arrange its order of business. How the right envisaged in s 102 of the Constitution would be enforced was a matter for parliament to decide, not the courts.

The court pointed out that, as the national assembly rules presently stood, unless the motion of no confidence in the president was supported by the majority party, it could not be debated. This position was incompatible with the Constitution in that the majority could subvert the right of the minority to have a debate as envisaged in terms of s 102 of the Constitution. The rules did not provide for the enforcement of this right enjoyed by the party proposing the motion; it did not provide for the necessary deadlock-

breaking mechanism.

The speaker of the national assembly did not have a residual power to schedule such a debate. It was also not for the court to dictate when exactly a debate should be held; courts had to leave it to parliament to determine how to allow the right to be vindicated. Again, such a position was incompatible with the national assembly's constitutional obligation to ensure that such motion be debated. Rules should be provided to ensure that the national assembly made the determination as to when this occurs. The *lacuna* created by the absence of a rule allowing a minority party to vindicate the right to debate a motion of no confidence was a matter for the Constitutional Court to address.

The application was accordingly dismissed. The court decided not to make a costs order because it held that the applicant was correct to bring the present application.

Right to information: The facts which led to the litigation in *BHP Billiton PLC Inc and Another v De Lange and Others* [2013] 2 All SA 523 (SCA) enjoyed a high level of media attention and public interest. The facts of the case were as follows: The third respondent (Eskom) is the sole provider of electricity in South Africa. Eskom concluded long-term contracts with the appellant (BHP) for the supply of electricity to two aluminium smelters that belong to BHP. In terms of the contracts the smelters are entitled to receive electricity for a fixed period at a lower rate than the standard tariff.

The first respondent (De Lange) is a financial journalist with Media 24, a newspaper and media group. De Lange (as representative of Media 24) requested certain information from Eskom under the Promotion of Access to Information Act 2 of 2000 (PAIA) regarding Eskom's contracts with BHP. Media 24 first requested information from Eskom on 30 June 2009. Eskom

communicated its refusal of the request on 29 July 2009. On 18 September 2009 Media 24 lodged a refined, follow-up request. Eskom then provided some of the information, but refused to disclose everything.

On 18 March 2010 Media 24 successfully applied in the court *a quo* for the information that Eskom refused to supply. Although Eskom abided by the court's decision, it persisted in its refusal to disclose the information. BHP decided to appeal the decision.

The appeal raised a number of issues, three of which merit discussion here:

- First, the point *in limine* taken by BHP that Media 24's second request for information was out of time and consequently it was precluded from asserting its right of access to information under PAIA.

- Secondly, the grounds for refusing the request insofar as they relate to the disclosure of the signatories to, and the dates of commencement and termination of the two contracts.

- Thirdly, the court was also asked to pronounce on the question whether the information that BHP sought to protect was already in the public domain.

In a majority decision the SCA dismissed BHP's appeal. Mthiyane DP held that the question whether a request is out of time is one of fact. Because Media 24's two requests were not the same, Media 24's application to the court *a quo* does not fall foul of the 180-days limit. The 180 days started running only on the date when the second request for information was refused.

The court pointed out that BHP refused access to information based on ss 36(1)(b), 36(1)(c) and 37(1)(a) of PAIA. The first two sections provide for the mandatory protection of commercial information of a third party (here: BHP). The third refers to the mandatory protection of certain confidential infor-

mation and the protection of the confidential information of a third party.

It further pointed out that a party who relies on the above provisions to refuse access has to establish that it will suffer harm as contemplated in ss 36(1)(b) and (c). That party (BHP) must adduce evidence that harm 'will and might' happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information, not the requester.

BHP failed to adduce evidence of the likelihood of harm should the information be disclosed. The information that BHP sought to protect (that is, its pricing formula) was available in a report compiled by a third party and was therefore already in the public domain. The appeal was dismissed and Media 24 was granted access to the information.

(Note: In a well-reasoned minority judgment Leach JA pointed out that the information that Media 24 requested in its second request was also requested in terms of its first request. Because Eskom's refusal to provide the information was communicated to Media 24 on 29 July 2009, the Media 24 application to the court *a quo* on 18 March 2010 was, in fact, out of time. The minority held that BHP's point *in limine* should have succeeded and the appeal should have been allowed.)

Consumer Protection Act

Municipalities: Validity of ministerial deferral of implementation: The facts in *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) concerned a ministerial deferral of the implementation of certain provisions of the Consumer Protection Act 86 of 2008 (the CPA).

Item 2(3) of sch 2 of the CPA provides for the incremental implementation of the CPA. More specifically, it provides that the CPA's ap-

plication to non-high-capacity municipalities may be deferred at the instance of the Minister of Trade and Industry. The effect of this would be to bar residents of such lower-capacity municipalities from seeking redress under the CPA for unsatisfactory municipal services.

The applicant (Afriforum) challenged two notices of the minister exempting medium- and low-capacity municipalities from parts of the CPA on the grounds, *inter alia*, that they were unauthorised and thus inconsistent with the doctrine of legality/rationality, and that the minister was in any event *functus officio* after the publication of the first notice. The notices, the first of which was subsequently revoked by the minister, were issued just over six months apart in 2011, and the second had the effect of extending the period of deferment.

Victor J emphasised that municipal services are at the centre of quality of life for all citizens, and their rights as consumers against municipalities cannot be deferred in perpetuity in absence of an express legislative provision allowing it.

Schedule 2 of the CPA specifically envisages the incremental effect of the Act, and in the context Afriforum's submission that once the minister made a deferment, he could issue no further notice, had to fail. The minister was thus entitled to extend the period of deferment. However, the minister could not defer basic consumer rights without being precise. He would have been able to determine by examining the available records which services were lacking and which municipalities were incapable of complying with the CPA and, in the light of this, his failure to list individually each municipality requiring deferment instead of exempting an entire category was inexplicable.

The minister's decision to publish the notices was thus not rationally connected to the facts before him, he had transgressed the principle

of legality and the second notice accordingly fell to be set aside on that ground. The minister was directed to publish a fresh notice listing every municipality requiring deferment. Because both parties have succeeded and failed on the various issues, the court held that each party is to pay its own costs.

Contract

Authority of agent to bind juristic person: In *Africast (Pty) Ltd v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ) the court considered a number of aspects relevant to the law of contract, only one of which will be mentioned here. The dispute between the parties concerned the proper interpretation of a written contract signed by representatives of the parties, and a determination of the existence of authority of the defendant's signatories to bind it (Pangbourne) at the time when the contract was signed.

Sutherland J held that there is no principle of law that compels a juristic person to confer authority on its agents in a specific way. There are thus no formal rules or legal principles according to which a juristic person has to go about in conferring authority on an agent. The existence of authority is a question of fact. In the present case Pangbourne's signatories did have authority to sign the contract.

The plaintiff's claim was dismissed on other grounds.

Execution

Sale in execution of immovable property: The applicant in *Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ) is the executor of the estate of his late mother. The applicant sought an order declaring the sale in execution of a property that belonged to his mother null and void and directing the Registrar of Deeds to reregister the property in the name of the estate of his mother. At the time of the deceased's death her property was bonded to the fourth respondent, First Rand Bank.

The bond fell in arrears while the applicant was in the process of finalising the estate. First Rand Bank was informed that its claim would be paid on the final conclusion of the estate. First Rand Bank nevertheless proceeded to serve summons for the arrears on the bond, and subsequently also the writ of execution at the deceased's address, without the applicant being aware of these steps taken by First Rand Bank. The property was sold in execution to the second respondent, who, in turn, sold it to the first respondent. It was only after the property was registered in the name of the first respondent that the applicant became aware of the sale in execution. The applicant successfully launched an application for a rescission of the default judgment.

The crisp issue before the present court concerned the rights of *bona fide* purchasers of property at sales in execution (here the second and first respondents) where the judgment in terms whereof the sale in execution was effected has been subsequently rescinded. It also concerned the validity of the transfer of immovable property to a chain of successive purchasers under such circumstances.

Van der Merwe AJ referred with approval to the decision in *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) in which the court explained the abstract theory of the passing of ownership. The decision in *Legator McKenna* implies that the transferor of ownership must be legally competent to transfer the property. As a result, the court in *Knox* held that the present sale in execution constituted a nullity. The result of an invalid sale in execution is not only that the underlying sale agreement concluded at the sale is invalid, but also that the real agreement is defective, since the sheriff did not have authority to transfer the property to the second respondent pursuant to the purported sale in execution of the prop-

erty. The transfer of the property to the second respondent was accordingly invalid, as was the subsequent sale and transfer of the property by him to the first respondent. The *nemo plus iuris* rule also applied to the real agreement in respect of the second sale.

The court held that the applicant is in principle entitled to claim vindication of the property.

Local authority

Disconnection of electricity supply: The facts in *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC) were as follows. The applicant (Ms Rademan) was a resident of the respondent municipality (the municipality), which includes the Free State town of Kroonstad. Ms Rademan became upset by the municipality's poor service delivery. She stopped paying her municipal rates, but continued to pay her electricity account. The municipality decided to disconnect her electricity supply because of her failure to pay part of her consolidated municipal account.

A magistrate's court ordered the re-connection of her electricity supply because the municipality did not first obtain a court order before disconnecting Ms Rademan's electricity supply. On appeal the High Court and later also the SCA held that no court order is necessary to disconnect a rate payer's electricity supply.

Zondo J held that the single account for municipal services rendered by the municipality represented a single consolidated debt, and consumers were liable for payment in full of the entire debt as reflected in their consolidated accounts. Any lesser payment would be allocated to the reduction of the consolidated debt, and consumers were precluded by the applicable bylaws from electing how the account would be settled if it were not settled in full or if there were arrears.

If a consumer, like Ms Rademan, elected to pay for certain components of her con-

solidated account but not for others, she would be contravening the conditions of payment as set out in the bylaws, and would place herself in default. The municipality would then be entitled to cut off her electricity supply, or for that matter, the supply of any other service. Accordingly the municipality had lawfully cut off Ms Rademan's electricity supply because of her failure to pay her rates.

Sale

Warranty against latent defect: In *Banda and Another v Van der Spuy and Another* 2013 (4) SA 77 (SCA) the owners of a house with a leaking thatched roof sold the house without disclosing the fact that the repairs to the roof had not properly rectified the defect. The question was whether the sellers' fraudulent concealment of the latent defect nullified the effect of a *voetstoots* clause. In an alternative claim the buyers claimed damages for the sellers' alleged misrepresentation that they are in possession of a valid guarantee for the repair work to the roof.

Central to the inquiry as to the requisite knowledge of the defects on the part of the sellers was a consideration of the undertaking given by the sellers to the buyers in the addendum to the contract of sale, which was found to be misleading and fraudulent since the time period for which it had been furnished had expired. A further factor to establish the *bona fides* of the sellers' belief in the adequacy of the repairs to the roof was the fact that they continued to enjoy insurance cover over the roof, subsequent to the roof being repaired.

Swain AJA held that the sellers' 'willful abstention' from ascertaining certain facts from their insurer to satisfy their belief in the adequacy of the roof showed that they did not hold an honest belief in the adequacy of the repairs, and that this, together with the sellers' fraudulent conduct in not disclosing the absence

of a valid guarantee for the repairs, indicated that they knew about the structural defects in the roof, which they were obliged to disclose to the buyers. It was clear, however, that they were not aware that the leaks were caused by the inadequate roof pitch.

The court further held that a leaking roof was a latent defect which rendered a house unfit for habitation. The fact that the sellers were aware of only one of the factors that caused the leakage, namely the inadequate roof design, and not also the inadequate pitch, did not affect the fact that their conduct was fraudulent. Their fraudulent conduct resulted in the forfeiture of the protection of the *voetstoots* clause in respect of the latent defect.

Finally, the court held that the buyers were entitled to the difference between the purchase price of the house

and its value with the defective roof.

In regard to the alternative cause of action, namely the misrepresentation of a valid guarantee, the court held that its purported existence had induced the buyers to pay the agreed purchase price, and that their appropriate claim would thus be the reasonable cost of repairing such defect.

The appeal was accordingly upheld with costs.

Other cases

Apart from the cases and topics that were discussed above, the material under review also contained cases dealing with administrative law, attorneys, civil procedure, contract law, damages, delict, education, estoppel, local authorities and revenue.



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Clearance certificates

Does the municipality's lien survive the transfer?

City of Tshwane Metropolitan Municipality v Mathabathe and Another 2013 (4) SA 319 (SCA)

The question whether a municipality's lien survives the transfer was put to counsel by the Bench of the Supreme Court of Appeal in the matter of *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA).

The facts are briefly as follows:

Thomas Mathabathe, the then owner of Erf 1080 Kosmosdal, granted Nedbank, the mortgagee, a power of attorney to sell his property by public auction. Auction Alliance was appointed as the auctioneer. Mr Lawrence made an offer to purchase the property, which offer was accepted by Mr Mathabathe.

The conveyancers instructed to attend to the registration of transfer of the property applied to the appellant, the City of Tshwane Metropolitan Municipality (the municipality) to issue them with the requisite clearance certificate contemplated by s 118(1) of the Municipal Systems Act 32 of 2000 (the Act).

The municipality issued a statement recording that the total amount due was R 162 722,26, which included what had been termed as 'historical debt', that is, debt due to the municipality for services prior to the two years envisaged in s 118(1)(b) of the Act.

The conveyancers' endeavours to persuade the municipality to exclude the amount of the historical debt were unsuccessful. The municipality sought an undertaking from the conveyancers that the historical debt will be paid to the municipality on the date of registration of the property into the name of the purchaser, or within a reasonable time thereafter (ie, 48 hours).

Mr Mathabathe and Nedbank applied to the North Gauteng High Court to order the municipality to issue a statement limited to the amounts due for municipal services during the two years preceding the date of application for the certificate and to issue a certificate on payment of that limited amount.

The municipality opposed the application and, in a counter-claim, sought the

relief that Mr Mathabathe and Nedbank be ordered to pay the historical debt and that the transferring attorneys provide the municipality with an undertaking to pay such debt.

The matter was heard by Gooddey AJ who granted the relief sought by Mr Mathabathe and Nedbank and dismissed the municipality's counter-claim. The municipality sought and was granted leave to appeal, which appeal was limited to the dismissal of the counter-claim.

The SCA, in dismissing the appeal, discussed the provisions of ss 118(1) and 118(3) of the Act. Section 118(1) provides as follows:

'A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate -

(a) issued by the municipality or municipalities in which that the property is situated; and

(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.'

The court ruled that s 118(1) is, accordingly, a veto or embargo provision with a time limit, and that s 118(3), which provides that '[a]n amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property' is a security provision without a time limit.

In his judgment Ponnann JA. referred to the judgment of Nugent JA in the matter of *City of Cape Town v Real People Housing Limited* 2010 (5) SA 196 (SCA).

In the *Real People* judgment, Nugent JA found that 'they [the municipalities] are assisted to fulfil that obligation [to collect money that becomes payable to them] so far as debts relate to fixed property in two ways. First they are given security

for repayments of the debt, in that it is a charge against the property concerned. And secondly, municipalities are given the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances'.

The court also referred to the judgment of Brand JA in *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) where it was stated that s 118(3) 'is on its own wording an independent, self contained provision' (at para 8).

In summary:

- Municipalities are obliged to issue a clearance certificate on payment of any amounts due in connection with that property for municipal fees, property rates, municipal taxes, levies and duties limited to two-year period preceding the date of application (s 118(1)).
- Municipalities have a lien 'having the effect of a tacit statutory hypothec ... and no limit is placed on its duration outside of insolvency ... so that a municipality enjoys preference over a registered mortgage bond on the proceeds of the property'.

The answer to the question posed is therefore 'yes'.

A purchaser of immovable property, not bought from an insolvent estate, can no longer accept that, on registration of transfer, he or she acquires the property free of any municipal debt.

Municipalities can, after issuing a clearance certificate and the transfer of the property to the purchaser, enforce its lien against the purchaser, sell it and apply the proceeds of the sale to settlement of its debts in preference to the claim of any mortgagee.

This of course also creates a problem for financial institutions advancing loans to acquire properties on security of the registration of a mortgage bond.

The phrase *caveat emptor* is very fitting in these circumstances. One of the judges in the *Mathabathe* case was of the opinion that it would not be difficult for any purchaser to approach the municipality to ascertain whether there are any historical debts due. With respect, I do

not believe that it is as easy as it sounds. Recordkeeping by municipalities often leaves a lot to be desired and the information is not as readily obtainable as it should be.

A further concern is what would happen if municipalities were only to discover the historical debt sometime after a clearance certificate has been issued and the property in question has been transferred? Can it now claim that, at the time of issuing a clearance certificate, it was unaware of the historical debt but has only now discovered it? In my opinion this creates legal uncertainty and confusion.

In the light of the above, I am of the opinion that conveyancers will now be duty bound to obtain a complete statement from the municipality reflecting the current debt (ie, for the two years

preceding the application) and the historical debt and to advise the purchaser thereof. This could, of course, scupper any sale agreement where the seller is forced to sell its property and the purchase price is not sufficient to cover both the existing bond and the total amount owing to the municipality. The answer would then be to sequestrate such a seller, which would create a further charge on the proceeds of the sale.

I am of the opinion that municipalities have also added to this uncertainty by not creating their debts as diligently as one would expect and, in this regard, I would like to quote Yacoob J in the matter of *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Lo-*

cal Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC) who observed: '[T]he applicants emphasise that a municipality cannot sit by and allow consumption charges to escalate regardless and in the knowledge that recovery will be possible whenever the property falls to be transferred. They are right. The municipality must comply with its duties and take reasonable steps to collect the amounts that are due.'

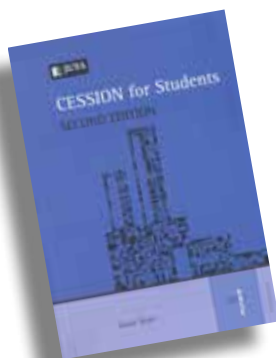
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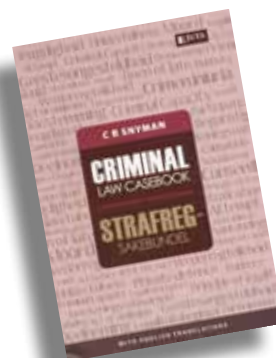
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BILLS INTRODUCED

Lotteries Amendment Bill B21 of 2013.
Electoral Amendment Bill B22 of 2013.
South African Weather Service Amendment Bill B23 of 2013.
Merchant Shipping (International Oil Pollution Compensation Fund) Bill B19 of 2013.
Merchant Shipping (Civil Liability Convention) Bill B20 of 2013.
Electronic Communications Amendment Bill B17 of 2013.
Independent Communications Authority of South Africa Amendment Bill B18 of 2013.
Insurance Laws Amendment Bill B16 of 2013.
Mineral and Petroleum Resources Development Amendment Bill B15 of 2013.

COMMENCEMENT OF ACTS

Correctional Matters Amendment Act 5 of 2011, s 9 (as far as s 9 relates to s 49G of the Correctional Services Act 111 of 1998). *Commencement:* 1 July 2013. Proc21 GG36621/1-7-2013.
Taxation Laws Amendment Act 24 of 2011, s 13(1). *Commencement:* 1 July 2013. GN463 GG36627/2-7-2013.

PROMULGATION OF ACTS

South African Maritime and Aeronautical Search and Rescue Amendment Act 5 of 2013. *Commencement:* 27 June 2013. GN676 GG36610/27-6-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Products Standards Act 119 of 1990
Regulations relating to the grading, packing and marking of malting barley intended for sale in the Republic of South Africa. GNR 443 GG36587/21-6-2013.

NEW LEGISLATION

Legislation published during the period
18 June – 19 July 2013

Animal Improvement Act 62 of 1998
Amendment of regulations. GN R492 GG36667/19-7-2013.

Basic Conditions of Employment Act 75 of 1997

Amendments of sectoral determination II: Taxi sector, South Africa. GN455 GG36619/1-7-2013.

Determination: Earnings threshold. GN456 GG36620/1-7-2013.

Amendment of sectoral determination 14: Hospitality sector, South Africa. GN458 GG36624/1-7-2013.

Collective Investment Schemes Control Act 45 of 2002

Determination of an instrument that may be included in a portfolio of a collective investment scheme in property. BN126 GG36575/21-6-2013.

Construction Industry Development Board Act 38 of 2000

Construction industry development regulations, 2013. GN R464 GG36629/2-7-2013.

Department of Agriculture, Forestry and Fisheries

General policy on the allocation and management of fishing rights, 2013 (sch A) and 2013 fishery specific policies for demersal shark, hake handline, KwaZulu-Natal prawn trawl, oyster, squid, traditional linefish, tuna pole-line and white mussel (sch B). GenN750 GG36675/17-7-2013.

Identification Act 68 of 1997

Replacement of green, bar-coded identity documents with identity cards: Roll-out programme. GenN728 GG36648/11-7-2013.

Income Tax Act 58 of 1962

Agreement between the Government of the Republic of South Africa and the Government of Gibraltar for the exchange of information relating to tax matters. GN484 GG36649/11-7-2013.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Regulations relating to foodstuffs for infants and young children. GN R433 and GNR 434 GG36579/18-6-2013.

Health Professions Act 56 of 1974

Health Professions Council of South Africa: Substitution of the annual fees. BN134 GG36637/12-7-2013.

Housing Consumers Protection Measures Act 95 of 1998

National Home Builders Registration Council (NHBRC): Amendment to

rules regarding NHBRC fees. BN146 GG36666/19-7-2013.

Marine Living Resources Act 18 of 1998

Declaration of the Prince Edward Islands marine protected area. GN426 GG36575/21-6-2013.

Regulations for the management of the Prince Edward Islands marine protected area. GN R422 GG36572/21-6-2013.

Merchant Shipping Act 57 of 1951

Merchant shipping (safe manning, training and certification) regulations, 2013. GN R432 GG36578/18-6-2013.

Merchant shipping (radio installations) amendment regulations, 2013. GN R457 GG36623/1-7-2013.

National Environmental Management: Biodiversity Act 10 of 2004

Alien and invasive species regulations. GN506 GG36683/19-7-2013.

National list of invasive species. GN507 GG36683/19-7-2013.

Publication of prohibited alien species. GN508 GG36683/19-7-2013.

Publication of exempted alien species. GN509 GG36683/19-7-2013.

National Payment System Act 78 of 1998

Designation of the Southern African Development Community integrated regional electronic settlement system as a designated settlement system. GenN749 GG36666/19-7-2013.

National Railway Safety Regulator Act 16 of 2002

Determination of safety permits fees under s 23(2)(a) of the Act. GN R470 GG36635/5-7-2013.

National Research Foundation Act 5 of 1998

Declaration of research institutions. GN480 GG36637/12-7-2013.

Nursing Act 33 of 2005

Fees payable to the council in terms of the regulations regarding fees and fines payable to the South African Nursing Council. GN R452 GG36606/28-6-2013.

Regulations relating to the conducting of inquiries into alleged unfitness to practice due to disability or impairment of persons registered in terms of the Act. GN R490 GG36671/15-7-2013.

Occupational Health and Safety Act 85 of 1993

Occupational health and hygiene approved inspection authorities: List of basic equipment, list of tertiary institutions for legal knowledge examination and re-

porting format. GN R442 GG36586/28-6-2013.

Pharmacy Act 53 of 1974

South African Pharmacy Council: Fees payable to the council under the Act. BN138 GG36661/12-7-2013.

Project and Construction Management Professions Act 48 of 2000

South African Council for the Project and Construction Management Professions: Rules relating to payment of annual fees for registered persons. BN125 GG36569/18-6-2013.

Property Valuers Profession Act 47 of 2000

Amendment of rules for the property valuers profession, 2008. BN135 GG36637/12-7-2013.

Public Finance Management Act 1 of 1999

Borrowing powers of water boards listed under sch 3, part B of the Act. GN502 GG36666/19-7-2013.

Public Service Act 103 of 1994

Establishment of the municipal infrastructure support agent: Administration and operations. GN R469 GG36634/5-7-2013.

Quantity Surveying Profession Act 49 of 2000

South African Council for the Quantity Surveying Profession: Requirement with which a voluntary association shall comply in terms of the Act in order to qualify for recognition under s 25 of the Act. BN139 GG36663/12-7-2013.

South African Council for the Quantity Surveying Profession: Rules for the procedure of nomination of council members. BN140 GG36663/12-7-2013.

South African Council for the Quantity Surveying Profession: Quantity surveying programme accreditation guideline. BN141 GG36663/12-7-2013.

South African Council for the Quantity Surveying Profession: Code of professional conduct. BN142 GG36663/12-7-2013.

South African Council for the Quantity Surveying Profession: Academic routes to registration for candidate quantity surveyor. BN143 GG36663/12-7-2013.

Road Accident Fund Act 56 of 1996

Road Accident Fund regulations, 2008: Adjustment of tariffs. BN130 GG36592/28-6-2013.

Rules Board for Courts of Law Act 107 of 1985

Amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (r 31(5)). GN R471 GG36638/12-7-2013.

Amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (r 49). GN R472 GG36638/12-7-2013.

Skills Development Act 97 of 1998

Amendment of the sector education and training authorities (SETAs) grant regulations. GN R486 GG36655/15-7-2013.

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

National route 4: Platinum toll road: Publication of the amounts toll tariffs. GN505 GG36678/19-7-2013

Standards Act 8 of 2008

Standards matters. GN503 GG36666/19-7-2013.

Tax Administration Act 28 of 2011

Income Tax 2013: Notice to furnish returns for the 2013 year of assessment. GN451 GG36603/28-6-2013.

Draft legislation

Draft Public Service Commission Amendment Bill for comment. GenN611 GG36563/18-6-2013.

Disaster Management Amendment Bill for comment. GenN637 GG36580/19-6-2013.

Draft Constitution Nineteenth Amendment Bill (Private Member's Bill on judicial appointments) for comment. GenN674 GG36608/28-6-2013.

Draft Administrative Adjudication of Road Traffic Offences Amendment Bill, 2013 for comment. GenN677 GG36613/28-6-2013.

Draft Conservation of Agricultural Resources Amendment Bill, 2013 for public comment. GenN673 GG36605/2-7-2013 and GenN727 GG36647/9-7-2013.

Draft regulations relating to the performance of compulsory community service and draft rules to provide for minimum standards for places where compulsory community services are to be performed in terms of the Veterinary and Para-Veterinary Professions Amendment Act 16 of 2012 for comment. GenN682 GG36614/5-7-2013.

Draft Financial Management of Parliament Amendment Bill for comment. GenN702 GG36631/3-7-2013.

Proposed amendments to the Johannesburg Stock Exchange equities rules in terms of the Financial Markets Act 19 of 2012 for comment. BN132 GG36636/5-7-2013.

Draft Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill. GenN725 GG36645/9-7-2013.

Proposed amendment to the regulations relating to the grading, packing and marking of dry beans intended for sale in the Republic of South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN R493 GG36667/19-7-2013.

Proposed Unemployment Insurance Amendment Bill for comment. GenN738 GG36674/19-7-2013.



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Employment law update



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Affirmative action

In *Naidoo v Minister of Safety and Security and Another* [2013] 5 BLLR 490 (LC), the respondent had an employment equity plan (the plan) in place that provided for rigid targets based on the assumed demographics of the country as reflected in the 2001 census report. Although the census report reflected that 51% of the country was made up of women, the plan only set a 30% target for representation of females at the time. Furthermore, the plan contained a formula to be applied to determine numerical targets that created a ranking order, with African males being the most favoured. The effect of the plan was that African males were advanced in the workplace to the detriment of other categories in the designated groups.

Naidoo, an Indian female police officer, applied for the position of cluster commander: Krugersdorp. Following assessments, Naidoo received the second highest score. The candidate with the highest score was recommended for another cluster commander position, and Naidoo was recommended for appointment to the position of cluster commander: Krugersdorp because her position would address 'gender equity'. The third-rated candidate for the position was A du Bruin and TS Maswanganyi, an African male, was rated fourth.

The recommendation to appoint Naidoo was, however, not accepted by the national selection panel, *inter alia*, on the basis of the inherent requirements of the job, the experience of the candidate in the environment, the fact that it would not enhance employment equity, and that it would not be consistent with service delivery objectives. The national panel was further of the view that there had been bias on the part of the provincial panel and thus the assessments carried out by the provincial panel were largely disregarded. Instead, the national

panel decided that Maswanganyi had to be appointed.

Naidoo subsequently lodged a grievance, which was not addressed to her satisfaction, and she then instituted proceedings in the Labour Court (LC), contending that she was unfairly discriminated against since the plan created an absolute barrier to the advancement of females and the way in which the plan was applied, was arbitrary and unfair. The respondent argued that the appointment was not entirely dictated by the plan and it was entitled to take affirmative action measures consistent with the purposes of the Employment Equity Act 55 of 1998 (the EEA).

The LC, per Shaik AJ, noted that, in general, appointment decisions fall within the prerogative of management but that this prerogative is constrained by the law. Courts may therefore interfere with the exercise of this prerogative where

- it is exercised irrationally, capriciously or arbitrarily;
- amounts to unfair discrimination; or
- where the decision-makers fail to apply their minds.

The court noted that the EEA prohibits unfair discrimination but provides that it is not unfair to implement affirmative action measures whereby members of designated groups are preferred to achieve substantive equality. It accepted that the plan targeted persons from designated groups. However, the court found that it also created barriers that undermined the purpose of achieving a diverse workforce broadly representative of the South African community. Therefore, while the attainment of substantive equality and equitable representation might require groups within the designated category to be advantaged over others, this must always comply with the requirements of the Constitution.

In the court's view, the use of national demographics was in conflict with the

EEA, which requires goals to be based on the proportion of the economically active population who are suitably qualified. The effect of the formula in the plan to determine the numerical targets to be reached was that it made provision for the appointment of Indian females at lower levels, but it excluded Indian females entirely from higher levels. The distribution of Indian females at level 14 at the time was zero and the ideal distribution was zero, meaning that it was impossible for Naidoo and other Indian females to progress to level 14 and beyond.

The respondent argued that Africans were under-represented while the ideal of zero female Indians had already been achieved. However, the manner in which the targets were calculated would always produce a zero target for Indian females, which created an absolute barrier for Indian females.

Shaik AJ held that, in many respects, the numerical targets in the plan were quotas rather than targets. As the quota had been satisfied in the case of Indians, they were regarded as being over-represented and thus completely excluded from consideration. This did not create equitable representation within each occupational category and level as required by the EEA. Furthermore, the plan did not accord with s 9 of the Constitution as all groups other than African males would be discriminated against until the target in respect of that group had been achieved. This created a ranking order between members of designated groups, which is not provided for in the EEA.

Considering the basis on which the national panel rejected Naidoo's recommendation for the post, the court found that there was no basis to conclude that Naidoo was incapable of performing the duties of the role concerned as she had the ability, potential, qualifications and experience to function in the position. The court accordingly rejected the respondent's argument that the appointment of Maswanganyi was based on the inherent requirements of the job. The court also rejected the argument that Maswanganyi's appointment was based on his ability in comparison to Naidoo's ability and that the decision was based on the need for service delivery.

The overall effect of affirmative action measures in the plan was therefore severely limiting to women in general, in particular to Indians and Coloureds. The court held that no one group within the designated group should be preferred to such an extent that it results in disadvantage being suffered by other categories in the designated groups, since this

has the potential for inter-group contestation and may create a new pattern of advantage.

In the circumstances, the court held that Naidoo was unfairly discriminated

against and the court ordered her retrospective appointment to the position of cluster commander, together with payment of the difference in remuneration that she would have received had she

been appointed instead of Maswanganyi. Compensation equal to 12 months' remuneration was also ordered, as well as costs.



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

No transfer of authority to transfer employee

The Minister for Public Service and Administration and Another v Kaylor (LAC) (unreported case CA18/12, 11-6-2013) Davis JA (Tlaetsi ADJP and Coppin AJA concurring).

The respondent employee was, in 2009, appointed as a chief director: business development at the Public Administration Leadership and Management Academy (PALMA) in Cape Town.

Sometime towards the latter part of 2010 the second appellant, the director general of PALMA, issued a directive whereby the respondent was instructed to take up the position of chief director: quality assurance in Pretoria.

The respondent appealed to the first appellant for proper consultation before the decision to transfer her was finalised. In response to this, the respondent met with the second appellant to discuss issues regarding her proposed relocation and also the restructuring of the organisation, in terms of which the respondent was to take up the position in Pretoria.

Unhappy with the outcome of her meeting with the second appellant, the respondent referred a dispute concerning a unilateral change to terms and conditions of employment to the relevant bargaining council. In the absence of any settlement being reached at conciliation, the respondent successfully obtained an interim order staying the enforcement of her transfer pending the finalisation of an application to review the transfer directive issued by the second appellant.

The respondent launched her review application in terms of s 158(1)(h) of the Labour Relations Act 66 of 1995, which provides:

'The Labour Court may - (h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.'

The court *a quo*, per Steenkamp J (*Kaylor v Minister of Public Service and Administration and Another* (2013) 34 ILJ 639 (LC)), found that, in reviewing a decision involving the state as an employer, the doctrine of legality applied. In terms of this doctrine, public officials could only exercise powers and perform duties that have been conferred on them by law. Furthermore, any application of such powers must be exercised in a manner that is not arbitrary, unreasonable, irrational or procedurally unfair.

Applying this to the merits at hand, the court found that the second appellant did not properly consult with the respondent prior to issuing the transfer directive and, secondly, in terms of the relevant sections in the Public Service Act 30 of 2007 (PSA), it was only the first appellant who was authorised to make the appointment *in casu*. While the PSA allowed the first appellant to delegate this power to the second appellant, the court did not find any evidence that such delegation had taken place.

Having made these findings, the court *a quo* set aside the transfer directive. The court further ordered the second appellant to engage in meaningful consultation with the respondent and to consult with the first appellant and heads of other departments outside of PALMA to offer the respondent a suitable alternative position, which could be in another governmental department situated in Cape Town. Should the second appellant be unsuccessful in finding the respondent an alternative position, the court ordered the parties to enter into retrenchment consultations.

On appeal the Labour Appeal Court (LAC) examined both the merits of the matter as well as the findings made by the Labour Court.

On the first finding, that is, whether there was a duty on the second appellant, before issuing the transfer directive, to consult with the respondent and if so found, whether proper consultation had taken place, the LAC held:

'It is not permissible in terms of the LRA [Labour Relations Act 66 of 1995] for an employer, such as first and second appellant, to decide to place an employee in a new post without any meaningful consultation. See *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Service and Others* (2008) 29 ILJ 2708 (LAC) at para 61 and 69, where Zondo JP (as he then was) said: "A decision to transfer an employee that is made before the em-

ployee can be heard is generally speaking unlawful and invalid in law".'

Turning to the merits of the case the LAC held: 'In short, there was no consultation which was sufficient to justify the conclusion that the appellants had acted fairly and in a manner which is permissible in law, which term incorporates the right to procedural fairness and the concomitant right to be consulted in such circumstances.'

With regard to the legal position concerning who was authorised to transfer the respondent and whether such authority had been delegated to another, the LAC held:

'The power to appoint public servants to departments in the public service and transfer employees from one post or position to another post or position in the same or any other department is a power which, in terms of the Public Service Act, resides with the "executive authority", which as was already noted, means the Minister responsible for the particular department. In terms of s 42A(1)(a) of the Public Service Act, first appellant may delegate to second appellant any powers which had conferred upon him by the Act. In terms of s 42A(7), any delegation of such a power shall be in writing.'

Did the second appellant obtain the necessary authority from the first appellant when issuing the transfer directive?

In answering this question the LAC concurred with the findings of the court *a quo*, in concluding there was inadequate proof to accept that the first appellant delegated his authority to the second appellant when the latter issued the directive.

The LAC therefore confirmed the findings of the court *a quo* and, in doing so, dismissed the appeal. However, on the issue of remedy, the LAC held the Labour Court 'overreached the scope' of the relief it ordered. The LAC found that there was nothing before the court *a quo* for it to accept that the second appellant was authorised to offer the respondent employment in other departments. The LAC replaced the remedy with an order that the second appellant engage in consultations with the respondent in seeking an alternative position for her and further consult with the first appellant with regard the possibility of the respondent being placed in other governmental departments.

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

By
Chris
Kotzé

Debt collection

Repealing ss 57 and 58 of Magistrates' Courts Act will be shortsighted

I write this opinion piece in reaction to the article 'Cashing in on collections' by Gerhard Buchner and CJ Hartzenberg in the July issue of *De Rebus* (2013 (July) DR 30). As of late quite a number of people have been calling for the repeal of ss 57 and 58 of the Magistrates' Courts Act 32 of 1944 which, in my opinion, offer some of the few remaining effective tools for the debt collector. It seems that the main reason for calling for the repeal of these sections is the behavior of unscrupulous attorneys and debt collectors who exploit debtors.

I am of the opinion that repealing these sections would be rather shortsighted and could affect not only attorneys and debt collectors negatively, but could also be seriously prejudicial to creditors who are suffering heavily under new consumer legislation in South Africa.

Firstly, the National Credit Act 34 of 2005 (NCA) requires creditors to produce original credit applications when issuing summons and applying for default judgment. Quite a number of creditors with branches throughout the country could not produce these applications due to various reasons, one being that debtor A applied for the credit facility in Pretoria in, for example, 1981 and since then he or she has moved to many different towns in South Africa. Debtor A only defaulted on his or her payments in 2010 and the creditor is now expected to produce the original application. When the account was opened in 1981, the NCA was not a consideration and therefore no effort was made to ensure compliance with its provisions.

Secondly, the new magistrates' courts rules, the introduction of the regional court and changes to the scales in the fee structures have seriously affected attorneys. Not only have claims from R 100 001 to R 300 000 now been included in the regional courts' jurisdiction, resulting in much lower fees for attorneys handling these claims on a party-and-party basis, but, due to the fact that the fee scales have changed, most debt collectors and attorneys dealing with claims for amounts that used to fall under scale B or C now have to do the same work on scale A tariff, resulting in huge losses for the firms.

The argument offered to counter these losses has been that the difference should be collected from the creditors,

but unfortunately their positions have also been overlooked in making this proposal. Many creditors are small businesses or professional sole practitioners, for example, medical practitioners. Considering that a medical practitioner has a small claim of less than R 1 000, it does not seem like much but, if he or she has 50 or a 100 debtors owing R 1 000 each it is quite a considerable amount. These professionals look for attorneys or debt collectors who are willing to collect these debts on the basis that all the legal fees should be collected from the debtor, which – in all fairness – is understandable.

Attorneys and debt collectors try to collect these accounts in the shortest possible time and in the cheapest possible way. The current rules are without teeth and are open for exploitation by 'clever' debtors. Some attorneys, for example, do not resort to issuing warrants of execution at all, the reason being that the costs involved in paying the sheriff and the results of any auction usually favour only the sheriff and no one else. Another problem is that many debtors are finding ways to institute interpleader summonses, resulting once again in such an escalation in costs as to render the sale in execution process useless to creditors.

The only option left is a s 65A (1) procedure, which is, to say the least, not very effective. Not only do attorneys struggle to get the sheriff to personally serve the s 65A(1) notice on time and on the debtor personally, but they also have to issue a warrant for arrest due to the debtor not showing up in court. This procedure is, once again, of little value as nothing happens to the debtors who should be arrested. They are usually warned a number of times to appear in court on a different date and, when they eventually do appear, they come unprepared without any proof of income or expenses. The matter has to be postponed, starting the whole process of issuing another warrant of arrest again. There has been instances where a warrant of arrest has been issued for the same debtor at least six or seven times and attorneys have to carry the sheriff's costs for this. Should the debtor eventually appear in court, there simply is no way of knowing whether he or she is telling the truth and attorneys will most likely have to accept their word and the installment they offer

to pay, unless, by some miracle, attorneys can obtain some knowledge regarding their finances that will enable them to obtain a better offer.

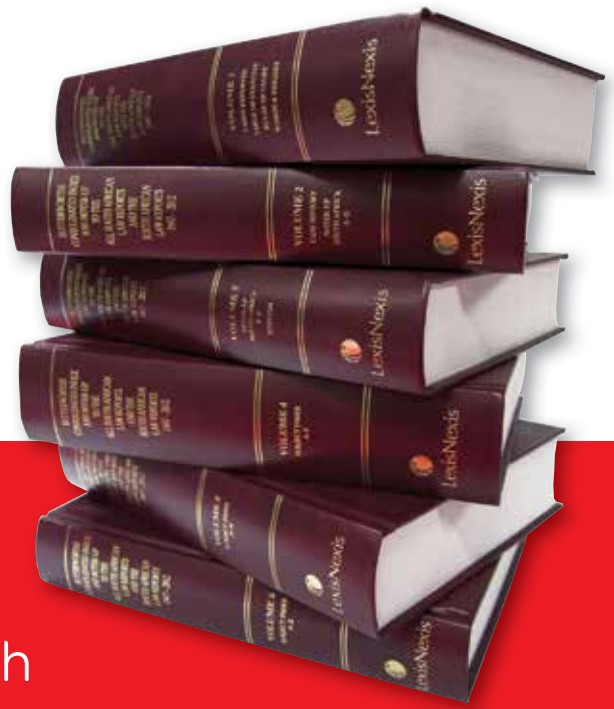
Regarding the reason for charging collection commission, as mentioned in the article, I am of the opinion that this has not been fully considered. Consider an attorney having to receive payment of R 100 per month on a debt of R 4 000 in his or her bank account. He or she will have to identify the transaction, allocate it to the correct file and make payment to the creditor, again with a relevant entry in his or her books. I have always considered it rather poor compensation for all the work associated with these tasks – attorneys are able to charge only R 10 for all this work. If a debtor had made a once-off payment, as he or she should have, then attorneys would not have been entitled to charge collection commission.

In my opinion, the s 58 procedure in particular is one of the only good tools available to collect debt, not only for the debtor but also for the attorney and client. It is usually a much faster process, therefore limiting the interest that the debtor will have to pay. It also cuts out a big part of the formal debt collection process and consequently all the associated processes, notices and sheriff's fees. I am of the opinion that this process also protects debtors, since they are usually unaware of the fact that they will end up paying for all the warrants of arrest, etcetera, if they ignore the court appearances.

I do not have an answer for the problem of dealing with unscrupulous attorneys and debt collectors who exploit debtors, but I would suggest introducing safeguards to protect or limit against exploitation rather than repealing legislation that is effective. Why not include a notice in emoluments attachment orders drawing debtors' and employers' attention to relevant sections of the NCA dealing with the percentage of an employee's salary that may be deducted and referring them to someone who will be able to advise them on the legality of the court order and the fees charged.

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