


AUGUST 2015



## **UKUTHWALA: IS IT ALL CULTURALLY RELATIVE?**

**Why are South African  
lawyers remaining in  
the dark with POPI?**

**Fight back and you  
might be found guilty:  
Putative self-defence**

**Interested about the  
interest in debt?  
The *in duplum* rule  
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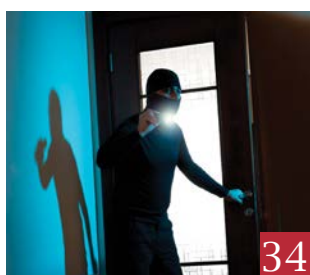
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This year we celebrate 21 years of our democracy and one of the fundamental ideals set out in the Preamble of the Constitution is the attainment of a society based on social justice. The practice of *ukuthwala* has been thrust into the spotlight by a criminal appeal case of *Jezile v S and Others* (WCC) (unreported case no 127/2014, 23-3-2015). **Diana Mabasa** discusses the landmark judgment delivered by a full Bench of the Western Cape Division, where the court held that *ukuthwala* is no defence to crimes of rape, human trafficking and assault with the intent to do grievous bodily harm.

### 31 Why are South African lawyers remaining in the dark with POPI?

Our increasing dependence on information and communications technologies has brought new risks, which simply cannot be ignored by anyone in our society. This article, written by **Mark Heyink**, confines itself to the issue of risk to personal information and the duties of lawyers in this regard. South African lawyers have an important role to play, but regrettably lawyers have been, at best, reticent in embracing the information revolution and the benefits that it holds for the profession.

### 34 Fight back and you might be found guilty: Putative self-defence

Putative self-defence has been propelled into the South African limelight, particularly due to the Oscar Pistorius trial and the defence strategy adopted by his legal team. **Sherika Maharaj** discusses South African case law pertaining to the legal principals relating to this defence.

### 38 Interested about the interest in debt? The *in duplum* rule revisited

In the recent Constitutional Court case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) the *in duplum* rule, which is largely what the case was about, was discussed. But what happens if a court can no longer pass judgments on the facts but only on the law? **Kerron Edmunson** discusses the *in duplum* rule and asks if a court can only consider the law and not the facts, then how would the court distinguish cases from one another and make the most proportionate and reasonable finding?

### 42 I don't want your money honey – Recognition of Customary Marriages Act

There is a certain scope for confusion, or at least uncertainty as to whether s 10(2) of the Recognition of Customary Marriages Act 120 of 1998 provides for spouses in a subsisting customary marriage in community of property, who later contract a marriage with each other under the Marriage Act 25 of 1961, to enter into an antenuptial contract. **Magdaleen de Klerk** discusses how this, in effect, changes the matrimonial property system applicable to their marriage without same being sanctioned by the court.

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

De Rebus editorial staff use online products from:

- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta.** Go to: www.jutalaw.co.za.

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

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

#### ADVERTISEMENTS:

**Main magazine:** Ince Custom Publishing

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

**ATTORNEYS' MAILING LIST INQUIRIES:** Gail Mason

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

#### SUBSCRIPTIONS:

General, and non-practising attorneys: R 838 p/a

Retired attorneys and full-time law students: R 644 p/a

Cover price: R 88 each

Subscribers from African Postal Union countries (surface mail):

R 1 332 (VAT excl)

Overseas subscribers (surface mail): R 1 626 (VAT excl)

**NEW SUBSCRIPTIONS AND ORDERS:** David Madonsela

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# Debt collection system to be changed

**I**n trying to curtail the abuse of the debt recovery procedure system, the Department of Justice and Constitutional Development released a statement to say that it is finalising the Magistrates' Courts Amendment Bill. This comes after a recent judgment in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (WCC) (unreported case no 16703/14, 8-7-2015) (Desai J) where Desai J ruled that the current system of emoluments attachment orders (EAOs) is unlawful, invalid and inconsistent with the Constitution as it does not provide for judicial oversight.

The Bill will soon be available on the department's website for further consultation before it is submitted to Parliament for consideration and enactment.

The University of Stellenbosch Legal Aid Clinic brought a court application, on behalf of 15 applicants, to have certain provisions of the Magistrate's Courts Act 32 of 1944 (the Act), which deal with EAOs, declared unconstitutional and invalid because they do not provide for judicial oversight over the authorisation and issuing of EAOs. The applicants also sought clarity on whether s 45 of the Act permits a debtor to consent to the jurisdiction of a court other than

the one in which the debtor resides or is employed in respect of the enforcement of a credit agreement to which the National Credit Act 34 of 2005 applies.

It is clear from the judgment that proper procedure, in terms of s 81 National Credit Act, was not followed in issuing credit to the 15 debtors, which is why they defaulted in their payments. The judgment also highlights the incorrect measures taken by the micro-lending industry to collect debt. In the judgment, Desai J states that 'in respect of the present applicants, the clerk of the court issued EAOs attaching their earnings without any evaluation of their ability to afford the deductions to be made from their salaries and without deciding whether or not the issuing of an EAO itself would be just and equitable. The whole process of obtaining the EAOs was driven by the creditors without any judicial oversight whatsoever.'

The judgment will now go to the Constitutional Court for confirmation. In its press statement, the Justice Department said: 'Until such time that the Constitutional Court gives final judgment on the matter, creditors and their attorneys countrywide are urged to take this judgment seriously and ensure that judgments and EAO's are obtained with due regard to the sentiments expressed in



Mapula Thebe - Editor

the Stellenbosch matter and to have those which have not been legally obtained, rescinded.'

The respondents have applied for leave to appeal the judgment and have approached the Constitutional Court with a separate application.

## 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](mailto: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](http://www.derebus.org.za)).

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

• Upcoming deadlines for article submissions: 17 August and 21 September.

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# LETTERS

## TO THE EDITOR

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

### A tip for candidate attorneys applying to be admitted as an attorney

I received a letter from the Law Society of the Northern Provinces (LSNP) informing me that I had to pay membership fees in the amount of R 3 021 for the 2015 financial year as I had been admitted in May. I assumed that this was a typographical error and contacted the LSNP to confirm same. They informed me that I indeed had to pay R 3 021 for the 2015 financial year ending on 30 June 2015 and that I would again have to pay the same amount for the 2016 financial year. This begs the question as to how it can be expected of a newly admitted attorney to pay such a substantial amount for being admitted for a period of two months.

The LSNP subsequently informed me that they no longer calculate the membership fees for newly admitted attorneys on a *pro rata* basis. I fail to understand why we should be paying membership fees for a period in which we were not practicing as admitted at-

torneys. This is clearly a disadvantage and unfair practice to any newly admitted attorney (who arguably are not earning a substantial salary and still have, *inter alia*, student loans to pay off), especially those that are admitted closer to the end of the financial year. Therefore, my advice to any candidate attorneys who are drafting their applications to be admitted, attempt to get a date as close to the new financial year as possible and save R 3 021.

**Anjelica Chedraoui**, attorney,  
Klerksdorp

### Response from the LSNP

I refer to the letter from Ms Chedraoui and wish to confirm that it is in fact correct that a special concession had previously been made by the Council of the Law Society of the Northern Provinces (LSNP) to newly admitted attorneys in that attorneys, who were for the first time admitted and for a period of less than six months of the financial year of the LSNP, commencing on 1 July of each year (ie, from 1 January until 30 June), were only held liable for half of the

amount of annual subscriptions payable by its members.

This concession was, however, withdrawn approximately three years ago, as part of cost saving measures, which became necessary for the LSNP, due to its drastically reduced income. I am, however, happy to report that the Council again reinstated the previous concession, effectively from 1 January 2015. The invoices issued to the members concerned, did not reflect the reduced amount and an appropriate adjustment will, therefore, be made to all newly admitted attorneys who became liable for the payment of such fees during the period 1 January 2015 until 30 June 2015 for the 2015/2016 financial year.

It has never been policy to allow members to pay membership fees on a *pro rata* basis and Council is of the view that the amount of annual membership fees payable by members of the LSNP, cannot be regarded as excessive for a practising attorney.

**Thinus Grobler**, Director, Law Society of the Northern Provinces, Pretoria



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# Court criticised over 'Al-Bashir' judgment

**I**n June 2015, Sudan President Omar al-Bashir attended the African Union (AU) Summit hosted in South Africa.

In 2009 and 2010 the International Criminal Court (ICC) issued warrants of arrest for President Al-Bashir following his indictment for crimes against humanity and genocide committed in Darfur, Sudan between 2003 and 2005. Because of South Africa's accession to the Rome Statute of the International Criminal Court in November 2000, this makes the country a state party to the court.

On 13 June 2015, the evening of President Al-Bashir's arrival in South Africa, the Southern Africa Litigation Centre made an urgent application to the Gauteng Division, Pretoria, for the arrest and surrender of President Al-Bashir. The court ordered the South African government to prevent Al-Bashir from leaving the country until the application had been heard. Judge Hans Fabricius ordered the Department of Home Affairs to ensure that all points of entry and exit be informed that President Al-Bashir was not allowed to leave until the conclusion of the application. However, on 15 June President Al-Bashir left South Africa for Sudan while the matter was still being heard in court.

One reason for the court's decision is that heads of state do not enjoy immunity from Rome Statute crimes.

The Rome Statute also states that countries are obliged to arrest and surrender a person sought by the ICC. Article 89 of the Rome Statute provides that a state, faced with a request to arrest and surrender a person, 'shall ... comply with requests for arrest and surrender'. The statute also provides directives for how a state should deal with competing requests for the arrest and surrender of a person, as well as the procedural modalities for giving effect to the obligation to arrest and surrender.

In terms of art 86 of the statute, state parties shall 'cooperate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court'. To facilitate the ICC's prosecution, the government was obliged to arrest President Al-Bashir as soon as he landed in South Africa.

The government has come under immense criticism for disregard for the rule of law for defying the court order. Others have, however, criticised the judiciary for being 'puppets of international courts'.

*De Rebus* spoke to the outreach coordinator for Kenya and Uganda public information and documentation section of the ICC, Maria Kamara, who said the ICC has been following the developments regarding President Al-Bashir's visit to South Africa closely, and noted with concern that he was not arrested and was allowed, according to reports, to leave the country (before the end of the AU summit) in violation of both South Africa's obligation under the Rome Statute and the ruling of the South African High Court, which had ordered him to be prevented from leaving South Africa, pending its ruling on the request to arrest him.

Ms Kamara said the ICC also noted that the South African High Court ruled on 15 June 2015 that President Al-Bashir should have been detained pending his surrender to the ICC and that the ICC's Pre-Trial Chamber made clear in its decision on 13 June, that 'there exists no

ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar al-Bashir to the court, and that the competent authorities in the Republic of South Africa are already aware of this obligation.'

Ms Kamara said nevertheless, South Africa is and remains an important state party to the ICC Rome Statute, and the court looks forward to constructive engagement and strengthened cooperation with it.

'Following the reports of President Al-Bashir's return to Sudan without arrest, it is eventually for the ICC's Pre-Trial Chamber to make a legal determination on whether South Africa has failed to comply with the ICC's request for cooperation contrary to the provisions of the Rome Statute and whether such a finding should be communicated to the Assembly of States Parties (ASP) and to the United Nations Security Council (UNSC) for the ASP and the UNSC to adopt any measures they deem adequate,' she said.

When asked how the ICC felt about the perception that the ICC is targeting and 'bullying' African countries, Ms Kamara



*The International Criminal Court in the Hague.*

Picture source: Gallo Images/Stock



said the ICC's focus is not on a specific continent, country, party or community. But that its mission is to prosecute the perpetrators of the most serious crimes and to establish justice for the benefit of victims and of future generations.

'Saying that the ICC is focusing on Africa is focusing on 20 suspects, instead of seeing Africa in the face of thousands and thousands of victims. Of the court's ongoing nine investigations, five were referred to the ICC by the concerned African states parties themselves (Uganda, Democratic Republic of the Congo, the Central African Republic I and II, and Mali) recognising the inability to address the crimes at stake and two were referred by the United Nations Security Council (Darfur and Libya) where African states are represented,' she said.

Ms Kamara said in addition, Côte d'Ivoire had voluntarily accepted the jurisdiction of the ICC, giving the prosecutor the possibility to open an investiga-

tion. Ms Kamara added that in Kenya, it was the political scene that prevented the Kenyan authorities from self-referring the post-elections violence to the ICC, so the ICC prosecutor opened an investigation, with the Chamber's authorisation, but only after thorough discussions with the Kenyan authorities.

Ms Kamara said preliminary examinations on other continents, including in Afghanistan, Georgia, Guinea, Palestine, Iraq, Colombia, Honduras and Korea were also currently being conducted by the Office of the Prosecutor at the ICC.

'The court has always benefited from the professional experience of Africans. Four out of the 18 current judges of the court are African. A number of Africans occupy high-level positions at the court, such as the positions of first vice-president and the ICC prosecutor. The court would not exist without the strong support of African states and civil society who were actively involved in the court's

establishment. Thirty-four African states have now ratified the Rome Statute, making Africa the most represented region in the court's membership', she said.

The matter is currently ongoing as the government has shown interest in appealing the decision.

- To read a full analyses on the whole saga in an article by University of Pretoria law professor, Dire Tladi, who is also special adviser to International Relations Minister Maite Nkoana-Mashabane, titled 'The duty on South Africa to arrest and surrender Al-Bashir under South African and international law: Attempting to make a collage from an incoherent framework' go to [www.derebus.org.za](http://www.derebus.org.za)

- See LSSA news 'Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and rule of law' in this issue.

Nomfundo Manyathi-Jele  
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**T**he Cuban Five were in South Africa recently. They came to the country to thank South Africans for the role they played in their release.

*De Rebus* had the opportunity to attend an alliance international symposium, which was held in Braamfontein and spoke on the role of international solidarity as a tool for justice focusing on the case of the Cuban Five and the way forward.

The event was attended by a number of representatives from different South African trade unions who delivered speeches. The general ambiance was joyful with delegates breaking into struggle song and dance after every speaker.

The Cuban Five spoke about their experience in prison and Elizabeth Palmeiro, wife of Ramón Labañino and Antonio Guerrero junior, son of Antonio Guerrero, spoke about their experiences as members of the family with loved ones in prison for such a long time.

The first of the Cuban Five to speak

was Rene Gonzalez. He said it has been a very long journey but that he would not change anything about it as it has been a great experience meeting so many 'awesome' people who are so full of love and spirit and who care so much for Cuba.

Mr Gonzalez shared the experiences that took him to the United States (US) in 1990.

'I went to Cuba as a five-year-old child in 1961. When I was seven years old, Havana was shaken when someone came from Miami on a boat with a canon and shot at a hotel in Havana. I remember planes coming from Florida to burn the Cuban cane fields. I remember Cubans being abducted by gangs from Florida. So, when I was approached by the Cuban government to go back to my country of

birth and infiltrate the troops in Miami that had been inflicting damage on the Cuban society, I did not hesitate, neither did my four brothers.

'So I had to go back to the US, which I had never thought about. I joined an organisation, which comprised of all kinds of guys including old CIA agents and pilots from Cuba. In 1998 the Cuban government decided to share with the US government information it had on the plots of terrorisms in Miami. Fidel [Castro] asked Nobel Prize winner Gabriel Márquez to go talk to then US president, Bill Clinton, to open a channel of communication and trust between the two countries. Mr Márquez went to Washington and as a result of that conversation, in May 1998, the FBI sent a delegation

## Cuban Five comes to South Africa



*The Cuban Five, Rene Gonzalez, Ramón Labañino, Antonio Guerrero, Gerardo Hernández and Fernando Gonzalez at an alliance international symposium held in Braamfontein in early July.*





*Elizabeth Palmeiro, wife of Cuban Five Ramón Labañino speaking of her experience while her husband was in jail at a symposium held in Braamfontein on 2 July.*

from Washington to Havana, which met with Cuban officials in order to share information and start working against terrorism. They met for three days. Before leaving the country they promised the Cuban party that they would go to Washington and analyse the information and will then go after the terrorists. But the fact is, four months after the meeting we were arrested. Somehow the meeting, which could have led to the corporation of the two countries against terrorism, led to the anti-terrorist guys being arrested and the terrorists remaining free in Miami; free to keep committing their crimes and that is how the case of the Cuban Five started,' he said.

Speaking on the trial, Mr Labañino started by saying: 'Thanks to solidarity, we are here today.' He said that the trial was a very long one, which lasted about seven months. He then pointed out some crucial issues of the trial. Mr Labañino said the trial was held in Miami and that the prosecutors in the case acted as criminals as they changed everything in the trial, which led to them misguiding the jury. 'They lied, when we were arrested we were taken straight to the FBI headquarters where we had a conversation where they tried to convince us of becoming snitches for the Americans. They told us to forget about Fidel Castro and that he would abandon us. They told us to forget about the revolution as it would do nothing for us. They offered us new identities, and an island in the Caribbean, they offered us money and anything we wanted.'

Mr Labañino said from 12 September 1998 to 17 December 2014 the US government always tried to break them through their families, especially their wives. 'For instance, Hernández's wife could never come visit him, René's wife too, who was even arrested because they asked her to cooperate with the govern-

ment and she refused. They told him, "René if you do not cooperate with us, remember your wife is in Miami. She was subsequently arrested and spent three months in jail".'

Mr Labañino added that everything in their case was classified. Their lawyers had to pass security clearance and not just anybody could be their lawyer. All the evidence was placed in a high-security room in Miami. 'Even a recipe book that they found in my house was classified,' he said.

Mr Labañino said they filed approximately ten motions asking the US government to move the trial out of Miami but their request was denied. 'The judge in our case acted as another prosecutor. Every motion we filed was denied. Every motion the US filed was approved,' he said.

## Who are the Cuban Five?

The Cuban Five intelligence officers – Gerardo Hernandez, Ramón Labañino, Fernando Gonzalez, Antonio Guerrero and René Gonzalez – were arrested in the US in September 1998 and convicted of crimes ranging from espionage to murder.

The five were sent to the US as part of a network to investigate the activities of militant Cuban exile groups plotting to overthrow Fidel Castro's regime. They were later convicted in Miami of conspiracy to commit espionage, conspiracy to commit murder, acting as an agent of a foreign government and other illegal activities in the US.

One of the Cuban Five was released in 2011 (René González), one in February 2014 (Fernando González), and in December of the same year, the US swapped the remaining three members for an American intelligence officer held by Cuba, after most endured 16 years of incarceration.

Their sentences ranged from 15 years to life. The trial of the Cuban Five attracted widespread controversy, because it was held in Miami, where Cuban dissidents were viewed as heroes. Various organisations issued separate reports, in the years to come, expressing concerns about the fairness of the trial.

## The charges

Mr Labañino said the Cuban Five were charged with conspiracy charges. 'These are the kind of charges commonly used when they know they do not have evidence, when they know they cannot prove anything. For you to get convicted of conspiracy the only thing the government needs to do is to say that there is an agreement between two or three people to do something,' he said adding that the punishment for conspiracy charges is life sentence.

Mr Labañino said he is grateful the truth will eventually come out. He said

that is the one thing that this trial taught him and that he is grateful for that lesson.

The five were sentenced as follows:

- Mr Hernández, two life sentences plus ten years;
- Mr Labañino, one life plus 18 years;
- Mr Guerrero, one life plus ten years;
- Mr Fernando González, 19 years; and
- Mr René Gonzalez, 15 years.

In subsequent months, they were moved to five separate prisons scattered across the US.

Gerardo Hernández said they were all sentenced differently because of the different charges or counts against them. He said the first 17 months of their incarceration were spent in solitary confinement.

Mr Guerrero discussed the appeal process. He said that they were sentenced in 2001, which was when they submitted their appeal application. Mr Guerrero said in an historic and unprecedented victory in 2005 the three-judge panel of the 11th Circuit issued unanimous decision, overturning the convictions of the Cuban Five. A new trial was ordered within 18 months.

## Family experience

Ms Palmeiro said her husband and the rest of the Cuban Five had to leave without saying anything to their families for obvious reasons as it was part of their job. 'They gave up everything, their careers and seeing their children grow in Cuba. When we learnt what they were really doing, our lives changed drastically,' she said.

Ms Palmeiro said when her husband was arrested, her youngest daughter was only one, and the eldest was five. 'I had to become mother and father to my daughters. In the middle of all this we had to start a new life. We had to educate the community about the Cuban Five case and explain to them that my hus-



*Antonio Guerrero junior, son of Cuban Five's Antonio Guerrero spoke about growing up without a father at a symposium on the role of international solidarity as a tool for justice.*



band was not a spy and that he was a good person,' she said.

Ms Palmeiro said they knew from the beginning that it was a political trial because any other person in this situation would have been deported from the US.

'In this long period of time some people died like Rene's brother and father. Gerardo's mom also died, and some took ill. It was not enough for the US government to just deal with them, they used us too to cause more suffering and pain. There were children, mothers and fathers involved, as well as us, their wives who also spent many years incarcer-

ated, but in a different kind of prison. Although we were "free", our souls were in prison with them,' she added.

Mr Guerrero junior told those in attendance that he was 14 years old when his dad was arrested, adding that it was very hard to grow up without the presence of his father. He did, however, say that he was still growing and that he was grateful that his dad was with him now.

## Communism

Retired Constitutional Court justice, Zac Yacoob, said that the Cuban Five case was an example of utilising the law in

making sure that justice is met and they are released. He added: 'What happened here is a broad definition of communism. There is no evidence that they committed any act of violence, they were acting on behalf of the Cuban government so that the government can take action on murderers. Everything that happened in apartheid political trials here in South Africa, happened in the Cuban trial.'

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**T**he Constitutional Court and the British High Commission in Pretoria recently held a reception to mark the 21st anniversary of the South African Constitution and the 800th anniversary of the Magna Carta. The event took place at the Constitutional Court in Braamfontein in June.

Speakers at the event were Chief Justice Mogoeng Mogoeng; Judge of the High Court, Queen's Bench Division of England and Wales, Lady Justice Maura McGowan; Deputy Chief Justice, Dikgang Moseneke and British High Commissioner to South Africa, Judith Macgregor. The speakers spoke on the themes of democratic values, rule of law and human rights as enshrined by the respective documents.

In the welcome address Ms Macgregor said the two documents were iconic adding that they both laid down the foundations of the rule of law, democracy and human rights in the respective countries 'and indeed are seen as models of constitutional frameworks across the world.'

Ms Macgregor said the Constitution marked the dawn of a new South Africa, based on democratic principles, the protection of human rights and the rule of law. 'For the first time in the history of South Africa, all the citizens of the country were afforded equal rights and freedoms, which are protected by law,' she said.

'The sealing of the Magna Carta on 15 June 1215 marked the first step on the UK's journey towards parliamentary democracy and respect for individual rights, a foundation for democratic values and for many of the rights and freedoms today. In sealing the Magna Carta, King John had to accept that his subjects were citizens for the first time, giving them rights, protections and security,' she added.

Justice McGowan said both documents represent agreements borne out of political strife and a desire to improve and secure the rights of those affected, not just temporarily but permanently. 'Although the Magna Carta was a concession forced

## SA and UK compare notes and celebrate the Constitution and Magna Carta



*Deputy Chief Justice, Dikgang Moseneke, British High Commissioner to South Africa, Judith Macgregor, and Chief Justice Mogoeng Mogoeng, at the recent celebration of the Magna Carta and Constitution at the Constitutional Court.*

from a reluctant king at the point of a sword and the people affected by its improvements were just a small number of noblemen,' she added.

Justice McGowan said today both documents are seen as social contracts that assist or enable society to function in the best interests of all and not just a few and that they ensure that the most fundamental right, the protection of the rule of law, is available to all.

Justice McGowan said that South Africa had a 'web of mutually supporting rights' because it started with a blank page and drafted a Constitution intended to meet every eventuality. She added that not that any constitution can, but in circumstances where it cannot foresee a problem or provide an answer, South Africa has created a living mechanism to deal with those unforeseen problems.

Justice McGowan said the Constitution starts with '[w]e, the people of South Africa,' while the Magna Carta started with 'John, the King'. She said this was a reflection of the consensus that the Constitution represents.

'[The] Magna Carta is not a constitution, although the Americans used it as a blue print for theirs. It was certainly not the first written or codified expression of the rule of law. It is a totem that has inspired and guided the development of the common law and the spirit behind the drafting of statutes in our jurisdiction ever since,' she said.

Justice McGowan added that there are only a few clauses of the Magna Carta that have survived and their spirit remains at the core of the UK justice system. She said clause 39, which speaks on the right to be tried by one's peers was one of them. 'It was not a jury that was intended then or even contemplated. It just meant that noblemen tried noblemen. But it has become the totem for the jury system, which we hold so important. In any criminal allegation serious enough to attract a sentence of six months imprisonment or longer we have the right to be tried by our peers, our fellow citizens as a jury. Will that remain? The current Lord Chief Justice, Lord Thomas, amongst many others, has



raised the question of whether jury trial can or should continue in complex fraud cases. Equally, would an accused person in a notorious case of sexual abuse choose trial by a judge alone rather than jury if available? The position may change after all this time,' she said.

Justice McGowan said the Magna Carta had the double jeopardy rule that the Constitution has but that it had been modified, 'because Parliament felt that scientific advances, in particular, have meant that if there is new and compelling evidence, an acquitted person should be tried again for the same crime', she said.

Justice McGowan noted the importance of Clause 40 and its effect on the development of rules of practice. 'Clause 40 promised that justice would not be sold or delayed or denied. The author of that clause could never have imagined how it would survive into the 21st century. That clause has the greatest impact on our system of justice, both criminal and civil,' she said.

Justice McGowan said Clause 40 states: 'To none will we sell justice' adding that 'and we do not'. Justice McGowan questioned whether the costs involved in bringing an action meant that we sell justice in the sense that only the very wealthy can afford to buy in, to be involved in litigation?

'We are determined to bring costs down, we are working towards greater efficiencies. In criminal cases Lord Justice Leveson, President of our Queens Bench Division has recently produced a report on how we can reduce costs and make the process in crime more efficient. Can some preparatory hearings be done on paper or electronically? Can some defendants play a part in their cases by remote link rather than being brought to court every time?' she asked.

Justice McGowan said there is constant improvement and adaptation of the civil procedure rules to try reduce the burden of costs for litigants. 'We are looking at forms of alternative dispute resolution and mediation. We must innovate and use technology and any other means to make the system more efficient and less costly. Vitrally we must remember that we can cheapen our costs but never our values,' she said.

Speaking on Clause 40 of the Magna Carta, which makes reference to justice not being delayed to anyone, Justice McGowan said in some cases courts will enforce their orders, even if it means stopping an individual action or defence. She added that the efforts to prevent delay means that the rights of all litigants in the system are equally important and one slow or mismanaged case cannot hold up the progress of the many others in the queue.

Paraphrasing Clause 40, Justice McGowan said '[t]o none will we deny



*Judge of the High Court, Queen's Bench Division of England and Wales, Lady Justice Maura McGowan at the celebration of the Magna Carta and Constitution at the Constitutional Court recently.*

right or justice'. She said the UK courts continue to introduce special measures to enable complainants in sexual abuse cases, especially children, to participate more fully in the trial in which they are an integral part, either as a witness or an accused. 'We are redesigning the entire way in which we approach such cases. Preparatory hearings are an opportunity to assess what special measures should be put in place for defendants or witnesses. The accused are now tried in a way that is intended to enable them to understand as much as is possible of what is happening, to play as much of an active part in their own trial as possible. Equally we have special measures for witnesses, ranging from screens and anonymity to their giving their evidence through an intermediary and over a live video link or even by pre-recorded interviews by police officers and cross examination by counsel but conducted well in advance of the trial, at a time when the witness has a much better chance of remembering the evidence they are there to give,' she said.

Justice McGowan said trial by ordeal, for witnesses or accused is not fair and in some cases may amount to the denial of justice to victims and defendants. She added: 'We are working to improve the training of judges and advocates to ensure that the vulnerabilities of witnesses and defendants through old age or youth, through physical or mental disability never again means that they are denied justice.'

Deputy Chief Justice Moseneke said that when the South African Constitution was drafted, the drafters looked at the Indian, German, Canadian and American constitutions for ideas on how to go

about drafting it. He added that they also looked at the Magna Carta.

Deputy Chief Justice Moseneke said the Constitution marks the end of bondage for many South Africans, and that it is testimony of a new world. 'Our Constitution is legitimate, it is our covenant and we are bound by it,' he said.

Chief Justice Mogoeng started his speech by asking: 'Why do we celebrate the Magna Carta? Have we forgotten what they did to us?' But added that these documents (Magna Carta and the Constitution) came into being for a reason and that people should not forget that.

The Chief Justice asked whether what was committed to be done in the documents had been done. He added that Clause 40 of the Magna Carta had elements of s 145 of the Constitution, which reads: 'To no one will we sell, deny or delay justice.'

Chief Justice Mogoeng said the public's perception is that justice is only available to the rich. He added that there is also criticism of the judiciary. Chief Justice Mogoeng said the judiciary cannot be blamed for people not being able to pay for justice. He added that the budget of Legal Aid South Africa should be increased as it is currently very low and there were many people that cannot access attorneys.

Chief Justice Mogoeng pleaded with the Law Society of South Africa and the General Council of the Bar to assist by compelling their members to take on *pro bono* cases.

Chief Justice Mogoeng asked what it was that needed to be done to ensure that the Bill of Rights has a meaning for all South Africans. He added that the Magna Carta was a wonderful document from the beginning, which was designed to address a political crisis of that time but that it failed as implementation was a problem.

'A document is useless unless it is given practical implementation,' he said. He added that those who the Magna Carta was drafted for (as well as the world) only benefited from the document many years later. 'We cannot allow the Constitution to go this route,' he said, adding that 'we must all own up to our responsibilities and ask ourselves what it is that I can do to bring about change'.

- If you would like to learn more about the Magna Carta go to: [www.youtube.com/watch?v=7xo4tUMdAmw](http://www.youtube.com/watch?v=7xo4tUMdAmw)

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# Swaziland court orders immediate release of human rights lawyer

**S**wazi human rights lawyer, Thulani Maseko and the editor of monthly publication, *The Nation* magazine, Bheki Makhubu, have finally been released from prison. They were released on 30 June.

On Tuesday 30 June the Supreme Court of Swaziland ordered the immediate release of Mr Maseko and Mr Makhubu after upholding their appeal against their conviction on contempt of court charges.

Mr Maseko and Mr Makhubu had been charged and convicted with contempt of court in March 2014 after they criticised the judiciary of Swaziland and then Chief Justice Michael Ramodibedi in two articles published by *The Nation* magazine. The successful appeal meant that the pair were acquitted of all charges, and could go home to their families after spending 15 months in jail.

The pair were arrested for articles published in the February and March 2014 editions of the magazine. The articles were critical of Swaziland's governance and judicial system as they criticised the arrest of the country's chief government vehicle inspector for executing his duties. Criticism was directed mainly at the country's former Chief Justice Ramodibedi, for issuing a warrant of arrest for the inspector on the basis that he had given a ticket to the driver of a government vehicle who was transporting a judge without the required authorisation.

The pair were found guilty of contempt of court by Swaziland High Court Judge Mpendulo Simelane on 17 July. They were sentenced to a two-year prison term on 25 July without an option of a fine. The sentence was backdated to 17 and 18 March 2014, the dates that they were taken into custody. Mr Maseko was due for release on 16 July, while Mr Makhubu was due to be released on the 17th.

*De Rebus* spoke to Mr Maseko who said that he was very happy to be out of jail but added that the problems of the country were still there. 'Being out does not take the reason why we were put in jail away,' he said.

Mr Maseko said the Supreme Court was supposed to meet in May but could not convene because the former Chief Justice was taking care of his own affairs and no one could be directed to sit at the court in his absence.

Sharing his experience in jail, Mr Maseko said when he was moved from Mbabane Prison to Big Bend Prison, the heat in Big Bend was unbearable as he was moved in summer. He said the prisoners



*From left, The Nation Magazine Editor, Bheki Makhubu, and human rights lawyers, advocate George Bizos, and Thulani Maseko, at a welcome reception for Mr Makhubu and Mr Maseko in Pretoria.*

were woken up at 5am every day to bath and eat and get ready to be dispatched for prison work at 7am. 'I resisted and did not do any work. I told them that I cannot do any of the work there as none of it was in line with any of my interests. I am interested in human rights and the law. Carpentry, garden work etcetera had nothing to teach me or expand my skills,' he said.

When asked whether he thinks the firing of Chief Justice Ramodibedi had anything to do with their release, Mr Maseko said: 'I keep thinking of the way people are saying our arrest was brought about by the former Chief Justice. I think this is unfair as he did not act alone. Government was also involved and our release has nothing to do with him now being fired. We had a wonderful legal team, there was no way that the government would succeed in the appeal. International organisations also put a lot of pressure on the Swaziland government such as the Law Society of South Africa (LSSA), the [Southern African Development Community] SADC Lawyers Association, the Commonwealth Lawyers Association and a few others who demanded for our release. There was also local pressure from within the country. It is because of them that we were released,' he said.

Mr Maseko said it is back to business as usual for him. He returned to practise as an attorney at his law firm, but added: 'I was away for 15 months though, a number of my clients happened to find services elsewhere,' he said.

*De Rebus* asked Mr Maseko if there

were any hard feelings and whether he would sue the Swaziland government. He said 15 months seems like a long time but that we must not forget that former President Nelson Mandela was in jail for 27 years. 'I have no reason to be bitter or angry. President Mandela said that you must be able to stand up for what you are fighting for no matter what and to also be able to face the consequences of your actions when fighting against and going against something. What we complained about was correct, I have no regrets. We are also not done as we will keep talking. Who knows, maybe more jail time awaits me,' he said. He added that he is currently consulting with his lawyer about whether or not he will sue purely because what happened to him and Mr Makhubu was unfair, and not because he is bitter about it.

Tanele Maseko, Mr Maseko's wife, told *De Rebus* that hearing that her husband would be coming home was simply amazing, adding that she was overwhelmed by excitement. Ms Maseko said that she has a three-year-old son who used to constantly ask her where 'Daddy' was and when he was coming home, '... and I could not explain to him, seeing that he was very young'. She added that their son is now 'over the moon, and always wants to be where Daddy is, doing anything that Daddy does'.

Ms Maseko said it was a very difficult and emotional experience having her husband in jail. She added that when birthdays or anniversaries came, 'it was extremely sad and lonely moments, because when it comes to those issues, my



husband is always hands on, in terms of preparations or planning wonderful surprises.'

The secretary general of the Law Society of Swaziland, Nkosinathi Manzini, said that Mr Maseko and Mr Makhubu's release came about during their appeal. 'During the proceedings the Directorate of Public Prosecutions did not oppose the appeal as it is believed that the conviction was unsupportable and that Judge Mpendulo Simelane, who presided over their criminal trial in the High Court, should have recused himself,' he said.

Mr Manzini said the Supreme Court started sitting last week and that this was the first available opportunity to deal with their matter on appeal.

Mr Manzini added that if the state, via the Director of Public Prosecutions's office, says their matter was not properly handled and should not have been convicted then this is a ground for a civil suit but it is up to Mr Maseko and Mr Makhubu whether they want to pursue such a claim.

'Their release is good for the image of the country because their case was also being followed by the international community and was also before the International Labour Organisation in Geneva as an example of how the country treats those who exercise freedom of speech,' said Mr Manzini.

## Reaction on the release

Executive secretary of the SADC Lawyers Association (SADC LA), Makanatsa Mokonses, told *De Rebus* that she welcomes the release. She said that SADC LA believes that it is a vindication for Mr Maseko and Mr Makhubu and the generality of the human rights movement in the SADC region. 'The two, together with the SADC LA and the LSSA had from the beginning insisted that the charges were a form of harassment and that the conviction was malicious,' she said.

The National Association of Democratic Lawyers (NADEL) said the appeal proceedings were a remarkable and most welcome turn of events. 'It is reported that in the appeal hearing, the prosecutor began proceedings by indicating that he would not be opposing the appeal on the basis that the Director of Public Prosecutions believed that the conviction was "unsupportable". He accepted that the prosecution had failed to make out a case in the High Court, and stated that the application for the High Court judge's recusal on the grounds that he was personally connected to the case should have been granted,' NADEL said in a press release.

NADEL added that the Supreme Court hearing was an acknowledgment of the deficient legal reasoning adopted by the High Court, and a vindication for Mr Maseko and Mr Makhubu whose articles



*From left, The Nation Magazine Editor, Bheki Makhubu, and his wife, Fikile Makhubu, with Tanele Maseko, and her human rights lawyer husband, Thulani Maseko, at a welcome reception for Mr Makhubu and Mr Maseko in Pretoria.*

sought to expose corrupt and unfair conduct on the part of the Chief Justice and other members of the judiciary.

NADEL President, Max Boqwana said: 'While Maseko and Makhubu's appeal is a welcome victory for them and their families, this can be seen only as the first step in securing the integrity of the judiciary in Swaziland. In keeping with NADEL's previous resolutions to demand the immediate release of Comrades Bheki Makhubu and Thulani Maseko, we need to intensify our campaign for international solidarity with the people of Swaziland. We call on all democratic forces in our country, our continent and internationally to engage in campaigns to force the Swazi Kingdom and its government to adhere to democracy and the rule of law as set out in the African Charter for Human and People's Rights,' he said.

The Centre for Human Rights at the University of Pretoria (UP) has also welcomed the court order. Mr Maseko is a 2005 *alumnus* of the Centre for Human Rights and the 2011 laureate of the centre's Vera Chirwa Award for human rights activism.

In a press release UP said: '... their imprisonment was an attempt to stifle free speech and criticism of the judiciary in Swaziland, an undemocratic country where the rule of law has largely been replaced by royal rule'.

According to the press release, director of the Centre for Human Rights, Professor Frans Viljoen, is delighted at the outcome of the appeal but lamented the long duration of their imprisonment before their rights were vindicated. 'While the Supreme Court's order has to be welcomed and affirms that some remnant of the rule of law is alive, it does not detract from the fact that political interference and arbitrariness in the application of the law largely renders the rule of law in Swaziland illusory,' he said.

## The Swaziland judiciary

Meanwhile, former Chief Justice Ramodibedi, the former Justice Minister, two high court judges and a registrar have been either arrested, suspended or fired.

The former Chief Justice Ramodibedi

and former Minister of Justice and Constitutional Affairs Sibusiso Shongwe were indicted in a scheme to defraud the Swaziland Revenue Authority (SRA) by handing down a judgment that they did not owe taxes.

Former Justice Minister Shongwe was also arrested for defeating the ends of justice and theft of a court file which was in respect of an application by the Anti-Corruption Commission (ACC) for his arrest. The original court file with all original court documents was found in his house in his bedroom when the ACC conducted a search and seizure at his house. He was then subsequently fired as Justice Minister.

Judges Jacobus Annandale and Simelane were arrested for defeating the ends of justice. The charges against Judge Annandale were subsequently withdrawn and he is back at work, whereas Judge Simelane was suspended and is still under suspension. Judge Annandale was charged with the role he played in trying to rescind the warrants of arrest against the Chief Justice and Judge Simelane. Judge Mpendulo, who appeared in almost all the charges was charged together with the Chief Justice for his involvement in the Chief Justice and the SRA saga. He was charged with corruption and obstructing the course of justice.

The registrar of the High Court, Fikile Nhlabatsi, was also arrested for the same offences as Minister Shongwe because she is the one who handed the court file to him, she was suspended but has since been recalled to work.

Mr Manzini said former Chief Justice Ramodibedi could not be arrested because they felt that since he was a foreign national and with diplomatic immunity it would not be prudent to just arrest him.

'Furthermore the police stated that they feared that he could harm himself or those with him inside the house if they used force to enter into the house because he had two official guns provided by the state for his own security with him. The other reason was a consideration that he should be impeached first and be removed as a judge before he could be arrested.'



His impeachment proceedings were subsequently held and he was found guilty of gross misconduct and was fired on 17 June for misconduct.

The former Chief Justice has since left Swaziland for South Africa through the Oshoek Border. His current location is unknown. He has a son that is based in Johannesburg who fetched him from Swaziland.

When asked what he thinks of the Swaziland judiciary and whether he thinks

things will start getting better going forward, Mr Manzini said: 'The Swaziland judiciary had been taken over and operating like a Mafia by the fired Chief Justice and the former Minister for Justice, judgments were sold to litigants, and this tarnished the image of the judiciary. With Ramodibedi and Shongwe gone from their powerful positions I do believe that the country is on the mend now and things will get better.'

Mr Manzini said that he is of the view

that the arrests have shown that it does not matter what position you occupy, when you abuse your power, the law will finally catch up with you and you will be dealt with.

• See 2014 (Sept) DR 15, 2014 (Aug) DR 16 and 2014 (May) DR 15.

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## Latest statistics on the legal profession

**T**he latest statistics released by the Law Society of South Africa's (LSSA's) Legal Education and Development (LEAD) division show that overall the number of practising attorneys in South Africa has gradually risen in the last decade from 16 412 in 2005 to 23 712 in April 2015.

The report includes statistics on law degree registrations and graduations, articulated clerks, admitted attorneys and permanent judges.

### University statistics

The report shows that in the last six years, 2012 had the most university first year LLB, BA Law and BCom Law registrations with 7 839 enrolled, compared to 6 503 enrolments in 2015.

According to the report, the highest number of LLB graduates recorded was in 2014 where there was a total of 4 150 graduates. Of these, 2 318 were African and 2 382 were female. In 2013 there were only 3 778 graduates, which reflected a drop from the 3 809 LLB graduates the previous year.

There are currently 4 928 final year LLB students compared to 4 660 last year. Most of the students enrolled for 2015 are African (2 933) and 2 090 of them are male, this is the highest

number since 2004. In addition, 6 503 first year students enrolled for a law degree (LLB, BA Law or BCom Law) this year. This shows a decline in comparison to 2010, 2011 and 2012 which had 7 330, 7 188 and 7 839 registrations respectively.

### Attorney statistics

There were 15 004 male practicing attorneys as at March 2015, compared to 8 708 female attorneys. White people dominate the number of practicing attorneys at 14 694, with Africans coming in second at 5 336.

As of 1 April 2015, there were 3 060 articles registered, compared to 1 993 in 2005. While there are over 4 000 graduates from 2014, only 3 060 articles were registered between 1 April last year and 1 April 2015.

There were 2 524 attorneys admitted in 2014, more than 1 000 more than 2013 where 1 506 attorneys were admitted. Last year, 1 416 of the attorneys admitted were female. Of the total admitted, 1 185 were white and 856 were African, with 26 categorised as 'other'.

### Permanent judges

Looking at the statistics on the number of permanent judges in the country. As of 30 April there were 239 permanent judges, of these -

- 104 were African;
- 24 were coloured;
- 24 were Indian;
- 87 were white;
- 81 were female; and
- 158 were male.

African males make up 28,87% of permanent judges on the judiciary.

### Magistrates

The report also provides information on the number of magistrates in the country. As of 30 April 2015 there were 1 568 magistrates employed, of these -

- 664 were African;
- 615 were white;
- 144 were Indian;
- 145 were coloured;
- 923 were male; and
- 645 were female.

• The full report can be found on the Law Society of South Africa's website ([www.LSSA.org.za](http://www.LSSA.org.za)) under 'About the LSSA', under 'About the attorneys' profession'.

• Not all universities were able to provide all the relevant information.

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## Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law

**L**aw Society of South Africa (LSSA) Co-chairpersons, Richard Scott and Busani Mabunda, attended a press conference by Chief Justice Mogoeng Mogoeng on 8 July 2015 to support the judiciary in its call for respect for its independence and for the rule of law. The press conference was also attended by Gcina Malindi SC representing Advocates for Transformation and the National Association of Democratic Lawyers (NADEL). Mr Mabunda was present also in his capacity as President of the Black Lawyers Association (BLA).

At the unprecedented press conference, the Chief Justice – together with Deputy Chief Justice Dikgang Moseneke, the President of the Supreme Court of Appeal, Justice Lex Mpati, and Judges President, Deputy Judges President and senior judges – said the Heads of Court and senior judges of all divisions had requested him, as head of the judiciary, to meet with President Jacob Zuma to point out and discuss the dangers of the repeated and unfounded criticism of the judiciary. ‘Criticism of that kind has the potential to delegitimise the courts. Courts serve a public purpose and should not be undermined,’ said the Chief Justice.

President Zuma responded immediately via a press statement indicating that he would attend to the matter. The President reasserted his own commitment and that of the executive to the independence of the judiciary and its role as the final arbiter in all disputes in society. At the time of this issue going to press, the meeting date between the President and the Chief Justice was still to be announced.

In his statement on behalf of the judiciary, the Chief Justice noted that a judge’s principal article of faith is to adjudicate without fear favour or prejudice. ‘When each judge assumes office she or he takes an oath or affirmation in the following terms: To be faithful to the Republic of South Africa; to uphold and protect the constitution and the human rights entrenched in it; to administer justice to all persons alike without fear favour or prejudice and in accordance with the Constitution and the law. To judges this obligation and the oath are sacred.’



*LSSA Co-chairpersons Richard Scott and Busani Mabunda, as well as Gcina Malindi SC (back), attended the press conference by the Chief Justice in mid-July in support of the judiciary. The Chief Justice was also supported by more than 20 senior judges, including the Judges President. In front are, Judge Jake Moloi (left), from the Free State High Court, and Judge Mjabuliseni Madondo, from the KwaZulu-Natal High Court.*

He added that, in terms of the Constitution, no arm of the state is entitled to intrude on the domain of the other. However, the Constitution requires the judiciary ultimately to determine the limits and regulate the exercise of public power.

‘Judges like others should be susceptible to constructive criticism. However, in this regard, the criticism should be fair and in good faith. Importantly the criticism should be specific and clear. General gratuitous criticism is unacceptable,’ said the Chief Justice. He acknowledged that judges, like other mortals, err, but he said that several levels of courts – through an appeal mechanism – serve a corrective purpose when judges make a mistake. Moreover, judgments were often subjected to intensive peer and academic scrutiny and criticism.

The Chief Justice rejected the notion that in certain cases judges had been prompted by others to arrive at a predetermined result. He added that, in a case in which a judge did overstep, the general public, litigants or other aggrieved or interested parties should refer the matter to the Judicial Conduct Committee of Judicial Service Commission.

With regard to the issue of court orders being ignored, the Chief Justice stressed that the rule of law, in simple

terms, meant that everybody – whatever their status – is subject to and bound by the Constitution and the law. He warned: ‘As a nation, we ignore it at our peril. Also, the rule of law dictates that court orders should be obeyed. Our experience by and large is that court orders have been honoured by others arms of state. The few instances of where court orders have not been complied with, whatever the reasons, have the effect of undermining the rule of law.’

### Support by the profession

The LSSA has stressed the support of the attorneys’ profession for the judiciary on an ongoing basis. Soon after the Gauteng High Court judgment in the *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] JOL 33405 (GP) (the ‘Bashir’ matter), the LSSA raised its serious concern at the clear trend emerging of undermining the rule of law and disregarding court orders. ‘Generally, this has been a concern for some time, but the clear flouting of our constitutional and international obligations and the order of the Gauteng High Court in the events surrounding the African Union Summit, have been a glaring manifestation of this



trend,' said Mr Scott and Mr Mabunda. They added: 'The LSSA commends our judiciary for its independence and the strong stance taken in protecting the rule of law without fear, favour or prejudice.'

NADEL publicity secretary, Gcina Malindi, urged the government to consider itself bound by international agreements, especially the ones that have been enacted into law by national legislation. 'NADEL express its disappointment that an order of court was disregarded.'

BLA said the action by the government was a serious cause of concern and 'as the Black Lawyers Association we find it highly depressing that our government openly disregarded the rule of law seemingly with impunity'.

After the Chief Justice's press conference, the KwaZulu-Natal Law Society (KZNLS) welcomed the public and unprecedented stance by judicial officers as a testament to the nation and to the world, that the judiciary will stand firm to protect and perpetuate its independence. 'The KZNLS is gravely concerned over the unfounded criticism levelled at the judiciary. It unequivocally supports the judiciary in its commitment to the rule of law.'

Similarly, the Cape Law Society (CLS) publically supported the initiatives spearheaded by the Chief Justice, the heads of court and senior judges in support of the rule of law as a fundamental principle of our constitutional democracy. 'We believe that this initiative will go a long way towards restoring the public image of the judiciary and the relationship between the executive, legislature and the judiciary,' said CLS President, Ashraf Mahomed.

In a statement, Law Society of the Northern Provinces (LSNP) President, Strike Madiba, said: 'The LSNP unreservedly and unconditionally supports the statement by the Chief Justice Mogoeng Mogoeng and condemns this unwarranted and baseless attack on the judiciary.' He also noted that the Constitution and the judiciary are the main democratic bulwarks for freedom-loving South Afri-

cans. Judicial authority is vested in the courts, which are independent and subject to the Constitution and the law, and must apply the law impartially without fear, favour and prejudice. An order or decision issued by the courts binds all persons to whom and organs of state to which it applies.

## The 'Al-Bashir' matter

In condemning the flouting of the Gauteng High Court order in the 'Al-Bashir' matter in mid-June following the African Union Summit in Johannesburg when Sudanese President Al-Bashir was allowed to enter and leave the country in contravention of an International Criminal Court (ICC) warrant for his arrest for war crimes and the Gauteng High Court judgment that he should not be permitted to leave pending his handing over to the ICC, the profession also expressed its concern at the government's disregard for its obligations as a signatory to the Rome Statute of the ICC, which was domesticated in our Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

In a press statement following the Gauteng High Court judgment, LSSA Co-chairpersons, Busani Mabunda and Richard Scott said: 'We express our serious concern at the trend by African leaders - including our government - to emasculate regional and international instruments and tribunals set up to protect human rights and the victims of human rights abuses. This is evident in the attitude adopted towards the International Criminal Court and the SADC Tribunal, and the lack of progress in granting criminal jurisdiction to the African Court on Human and Peoples' Rights.'

They added: 'The threat to withdraw from the Rome Statute is akin to the developments that have taken place at SADC Tribunal level, where heads of states have agreed to change the protocol to deprive members of the public from the right to approach the court for redress if their own courts do not provide such. The protocol now provides only for interstate access, namely access

by states only, not individuals. These developments do not bode well for the African Court's expanded jurisdiction.' The LSSA launched an application in the Gauteng High Court on 19 March 2015 to declare the actions of the President, as well as the Ministers of Justice and International Relations and Cooperation in voting for, signing and planning to ratify the SADC Summit Protocol in 2014 as it relates to the SADC Tribunal, to be unconstitutional. The responding affidavit by the state had not been filed by mid-July despite three extensions.

The LSSA urged government to consider its stance carefully in the 'Al-Bashir' matter and also its obligations when it accedes to and domesticates international treaties; particularly in the light of the collapse of the SADC Tribunal. This would have serious ramifications for us as South African and regional citizens.

In responding to the 'Bashir' judgment, the BLA pointed out that, in not adhering to the judgment the government had violated the principle of legality. Firstly, by virtue of South Africa being a signatory to the Rome Statute it had domesticated the statute and consequently was obliged to arrest people who contravened the provisions of the statute. 'In a clear contrast to what was expected of South Africa, to arrest President Omar Al-Bashir, they paraded him on national TV as a hero disregarding their international obligation in as far as the Rome Statute is concerned,' said the BLA.

Secondly, the government had undermined the valid court order by allowing President Al-Bashir to leave the country when the High Court ordered that he should not leave the country pending finalisation of the case on whether he should be arrested or not.

BLA also expressed its concern at the continued reluctance on the part of government to support regional, continental and international tribunal structures that are meant to protect the lives and rights of the peoples of Africa. BLA noted: 'The people of Sudan must be afforded justice by the international structure if their national justice systems do not protect them. In this regard the government of South Africa failed the people of Sudan and the continent as a whole.'

NADEL too noted with deep concern and trepidation the events relating to President Al-Bashir's entry into and departure from South Africa, as well as the government's actions (or omission to take action) contrary to the terms of the court order.

'We must remind ourselves that the proceedings before the ICC aim to provide justice for the people of Sudan for the untold levels of atrocities, including wanton murder, visited upon them; and for the estimated 1,8 million people in Darfur who were internally displaced.



*Chief Justice Mogoeng Mogoeng (centre) flanked by Deputy Chief Justice Dikgang Moseneke (left) and the President of the Supreme Court of Appeal, Justice Lex Mpati, at the press conference in July when he requested a meeting with President Zuma to discuss the dangers of the repeated and unfounded criticism of the judiciary.*



The warrants of arrest issued by the ICC for President Al-Bashir must be located in context,' said NADEL publicity secretary Mr Malindi. He added: 'The children, our brothers and sisters in the Sudan, need our help and empathy. As South Africans we cannot remain complicit nor

silent. NADEL calls upon the South African government, the African Union and the people of Africa in general, and the international community to fight for justice for the millions of people in Darfur sooner rather than never. After all, justice delayed is justice denied.'

NADEL urged the government of South Africa to consider itself bound by international agreements, especially the ones that have been enacted into law by national legislation.

• See news article 'Court criticised over 'Al-Bashir' judgment' in this issue.

## First quarterly meeting held with MEC

**T**he Member of the Executive Council (MEC) for the Gauteng Department of Health, Qedani Mahlangu, has been mandated by the Gauteng Premier, David Makhura, to convene quarterly discussions with all professional boards to establish ways in which the relationship of the boards and the Gauteng Provincial Government can be strengthened. During the discussions, the MEC will share the province's strategy regarding the work that will be done to transform, modernise and re-industrialise Gauteng and obtain the views of the boards.

The first of these meetings took place on 7 July and various boards were represented. The discussion covered a wide range of issues, including skills transfer, job creation and training.

A further meeting will be held towards the end of November 2015.



*Member of the Law Society of South Africa's Personal Injury committee, Benock Shabangu, Member of the Executive Council for the Gauteng Department of Health, Qedani Mahlangu, Law Society of South Africa Co-chairperson, Busani Mabunda, Professional Affairs Manager, Lizette Burger, and Law Society of South Africa Co-chairperson, Richard Scott at the first quarterly meeting held on 7 July.*

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- The article should not exceed 2000 words in length and should comply with the general *De Rebus* publication guidelines.
- The article must be published between January and December 2015.
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# People and practices

Compiled by Shireen Mahomed

**Mkhabela Huntley Adekeye Inc** in Johannesburg has new promotions and appointments.



Wendel Bloem has been promoted to a director in the litigation department.



Kagiso Kgatla has been appointed as an associate in the competition law department.



Ehi Enabor has been promoted to an associate in the litigation department.



Emmanuel Tivana has been promoted to an associate in the commercial law department.

**Cliffe Dekker Hofmeyr** in Johannesburg has two new appointments.



Chris Baird has been appointed as a director in the corporate and commercial department.



Ian Burger has been appointed as a director in the corporate and commercial department.

**Smith Ndlovu & Summers** in Cape Town has two promotions and one new appointment.



Phillipa King has been promoted to a senior associate.



Katherine Handley has been appointed as an associate.



Clarice Arendse has been promoted to an associate.

**Cox Yeats** in Durban has three new promotions.



Jason Goodison has been promoted to a partner in the commercial law department. He specialises in general, commercial law, commercial litigation and mining law.



Peter Barnard has been promoted to a partner in the construction, engineering and infrastructure law department. He specialises in construction law.



Jason Moodley has been promoted to a partner in the labour law department. He specialises in labour law.



**Klagsbrun Edelstein Bosman De Vries Inc** in Pretoria has five new appointments.

Front (from left): Sandra Lambrechts has been appointed as an associate in the estates department. Mareon Basson has been appointed as an associate in the corporate and commercial department.

Back (from left): Werner Dreyer has been appointed as an associate in the litigation department. Danie Jacobs has been appointed as a director in the commercial litigation department. Hugo Struwig has been appointed as a director in the tax department.

Please note in future issues five or more people featured from one firm, in the same area, will have to submit a group photo.

Please also note that *De Rebus* does not include candidate attorneys in this column.



# The new sectional title legislation

## Some noteworthy features of the 'tricky trio'

By  
Tertius  
Maree

**W**hen the Sectional Titles Act 66 of 1971 came into effect, South African law had, for the first time, recognised the concept of 'vertical ownership' of land, land previously having been measured only on a horizontal plane in accordance with Roman Law principles.

The offices of the surveyor general as well as the deeds registries, both falling under the then Department of Land Affairs, had to adapt radically to accommodate this transformation.

One aspect that proved to be problematic was the examination, approval and filing of rules of sectional title schemes. The deeds registries were prepared to assume responsibility only for the physical storage of the rules, without accepting any responsibilities for examining and/or approving the contents of such rules, which they regarded as falling outside the ambit of their customary functions. Accordingly, the need for scrutinising the rules for legality, both as regards the contents and the validity of the adoption procedures, remained unresolved, this hiatus continuing also during the currency of the later Sectional Titles Act 95 of 1986.

During 1999 in *DeeltitelForum*, a column in *Die Burger* newspaper, the possibility of appointing an ombudsman for sectional title disputes, the functions of whom could also include scrutiny, approval and safe-keeping of rules, was raised for the first time.

This article was noticed by Dr Edwin Conroy, then a member of Parliament and the idea was adopted by Parliament. Upon discussion with Land Affairs and the Chief Registrar of Deeds, it was seen as a solution of the consistent rules problem as well as the matter of disputes and other management issues. It was also decided that the dispute resolution service should be extended to other forms of 'community schemes' and tenders were invited for drafting the required legislation. Legislation was eventually promulgated during 2011 but has currently not yet taken effect.

### The Sectional Titles Schemes Management Act 8 of 2011

This statute is intended to deal with the management aspects of sectional title

schemes only, as extracted from the current Sectional Titles Act. While it retains the nature of these aspects as previously found in the Sectional Titles Act, it is not identical in all respects, as far as the wording, layout and even the contents are concerned. It is also clear that while the intention had been made known not to modify the currently prescribed rules, these will inevitably have to be amended in order not to be at variance with the contents of the Act.

### Extension of developer's right to extend

One example of such differences is found in s 5(1)(c) –

'may, upon unanimous resolution by the owners, enter into a notarial agreement to extend the period stipulated in the condition referred to in section 25(1) of the Sectional Titles Act'.

This provision, allowing the extension of a developer's right to extend the scheme, is –

- found in an entirely new section, at a different location;
- provides an entirely new power for the body corporate, namely to extend the time limit of a developer's right of extension by a unanimous resolution, implemented by means of a notarial agreement.

### Subdivision and consolidation of sections

Further examples are the provisions regarding subdivision and consolidation of sections in s 7(2), which are now categorised under the heading 'Trustees of body corporate' and as far as content is concerned, now specifically refers to applications made by owners, different to the wording found in s 21 of the current Sectional Titles Act wherein no application procedure is mentioned.

### Extensions of a section

The provisions in the Management Act regarding extensions of sections also present tricky snares for trustees in s 5(1)(h) –

'[... the body corporate] must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act'.

This provision is dangerous for three reasons:

- The use of the word 'must' rather than 'may' as in the other subsections of s 5 suggests that the members, when presented by such application, may perhaps have no discretion in the matter and are thus compelled to pass the required special resolution. This would not be a sensible provision and was probably not what the drafter had intended, but is likely to lead to some disputes and can eventually only be eliminated by an order of court, unless an appropriate amendment is made by the legislature.
- Secondly, the provision suggests that the provision takes effect only if and when an owner should apply for consent to extend his section. If he does not so apply, nothing seemingly needs be done. It therefore suggests that there is no duty on an owner to apply. Currently, the current Act, states in s 24(3) –

'If an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall with the approval of the body corporate, authorized by a special resolution of its members, cause the land surveyor or architect to ...'

Making it clear that the duty rests on the owner to procure the consent of the members by special resolution before proceeding with the extension project and have it surveyed and registered, and that the members are not compelled to grant their consent.

- Different to other provisions, no reference whatsoever is made to a specific section in the Sectional Titles Act, which must also be complied with. This may create an impression that the special resolution is all that is necessary. This is of course not the case because the survey and registration aspects dealt with in s 24 of the Sectional Titles Act must still be complied with, including the consents required from bondholders. In fact, it will be seen that the procedures set out in the current version of the Sectional Titles Act remain basically unchanged.

Trustees should accordingly tread very carefully when dealing with extension of sections and other matters requiring registration in terms of provisions of the Sectional Titles Act.

### General meetings, proxies, voting

General meetings were previously not touched on in the Act, but regulated entirely by the provisions of the Man-



agement Rules. Section 6 in the Management Act now deals with several aspects of meetings. Section 6(1) is interesting in that it states that:

‘The meetings of the body corporate must take place at such time and in such form as may be determined by the body corporate.’

What does ‘in such form’ mean? Could it be intended to refer to meetings conducted electronically such as by Skype? And the provision diverts entirely from the norm that such practical items should be contained in and governed by the rules, and accordingly affects the current Management Rules.

The provisions of s 6 also impacts materially on the position under the current rules in that –

- s 6(5) stipulates that a person may not act as a proxy for more than two members, whereas no limit is imposed currently;
- s 6(7) stipulates that when votes are counted in number, each member has one vote, whereas the current position is that a member has the number of votes according to the number of units held by the member; and
- s 6(8) determines that: ‘Where the unanimous resolution would have an unfairly adverse effect on any member, the resolution is not effective unless that member consents in writing within sev-

en days from the date of the resolution.’ Potentially this could undermine many attempted resolutions as the resolution would ostensibly be null and void if not consented to within seven days.

Conversely, some resolutions could ‘slip through’ without the required consent having been obtained.

The reason for this is the uncertainties that could arise from the phrase ‘would have an unfairly adverse effect’ resulting in consents not being asked for – and objections perhaps being raised at a later stage?

### Community Schemes Ombud Act 9 of 2011

It was decided to adopt the name ‘Community Schemes Ombud Service’ for the legislation, which would include sectional title schemes, home owners’ associations, retirement schemes, share block schemes and time share schemes. The term ‘ombud’ was preferred due to its perceived gender neutrality, notwithstanding the fact that the ‘-man’ in ‘ombudsman’ did not indicate gender in its language of origin, Swedish.

The relevant legislation was promulgated in 2011 at the same time as the Management Act, with which it is inter-linked. The two statutes have not yet become operational and will do so once the regulations for both are in place and

the office of the Chief Ombud is ready to function. The Chief Ombud has been appointed in the person of human rights lawyer, Themba Mthethwa, who has taken office in Pretoria with an initial staff of 100. Apart from a ‘start-up’ contribution of R 40 million by government, the service is required to become financially self-sufficient, funded principally by a levy on all schemes in South Africa, and by fees payable by persons/entities making use of the service. The calculation and collecting of such levies from bodies corporate and tariff of costs payable by contesting parties must still be disclosed in the regulations, which are to be published.

The actual handling of disputes will be dealt with by local adjudicators appointed for various areas.

Any person or party affected by a dispute in respect of a community scheme arising from matters relating –

- financial issues;
  - issues of conduct;
  - governance;
  - conduct of meetings;
  - management issues; or
  - access to information or documents;
- may apply to the Ombud in terms of s 38 to have the dispute adjudicated. The appointed adjudicator will have powers including –
- requiring parties to provide evidence;



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- inviting third parties to submit submissions; and
- to inspect physical elements and documents.

The adjudicator will be empowered to enforce compliance with the above and his ensuing order will be enforceable as a court judgment and may be appealed against to a High Court, but only in respect of a question of law. The adjudicator is obliged to report to the Chief Ombud.

A further function of the Chief Ombud, and one which I predict may become a

more important one than the resolution of disputes, will be the examination, approval or otherwise, and filing and preservation of rules and rule amendments of sectional title schemes. The assessment of rules is a highly skilled task and would require well-trained personnel, which is a matter of some concern.

### The Sectional Titles Act

This current statute will remain, but focussed exclusively on the survey and registration aspects of sectional titles, the management issues having been

stripped out and moved to the Sectional Title Schemes Management Act.

As part of managing sectional title schemes, and as pointed out, it will nevertheless be important for trustees and managing agents to remain aware of certain provisions in the Sectional Titles Act.

**Tertius Maree BA LLM (Cum Laude) (Stell)** is an attorney at Tertius Maree Associates in Stellenbosch.

By  
Justine  
Krige

## Preventing the wool being pulled over consumers' eyes: The consumer goods and services industry code of conduct and ombud

**T**he draft consumer goods and services industry code of conduct was published for public comment on 3 October 2014. On 30 March, the final consumer goods and services industry code of conduct (code), including the Consumer Goods and Services Ombud (CGSO), was prescribed by the Minister. This code and the CGSO are intended to compliment consumers' existing basket of rights under the Consumer Protection Act 68 of 2008 (CPA).

### South African industry codes

In terms of s 82(2) of the CPA, the Minister may prescribe an industry code regulating the interaction between or among persons conducting business within an industry, or between an industry and consumers. To date, only two industries have issued codes of conduct in terms of this provision. The first is the automotive industry South African Automotive Industry Code of Conduct (SAAICC) and second is the consumer goods and services industry, which is addressed below.

### The code and the CGSO

The code and the CGSO were established as a guide for the minimum standards of conduct expected of suppliers of goods and services when engaging with consumers, and to assist in resolving disputes that arise between consumers and industry members in terms of the CPA. It therefore, operates in addition to the CPA, rather than as an alternative. The code applies to all participants involved in the supply chains that provide, mar-

ket and/or offer to supply goods and services to consumers, including, for example, importers, distributors and retailers in the clothing, food and beverage, tobacco, cosmetics, hospitality and leisure industries, as well as many others.

The code is premised on a self-funding model of regulation that requires industry participants to register and pay membership fees. While this will certainly solve any potential funding problems, the extent to which individuals and businesses buy into this model remains to be seen. In order for the objectives of the code to succeed it will be necessary for industry players and other stakeholders to become involved, and for a culture of participation to develop.

### The code

The purpose of the code is to raise standards of good conduct in the industry and educate consumers as to their rights. The code, therefore, has a strong emphasis on transparency, effective process and education of suppliers and consumers, alike.

The code places an obligation on all participating individuals and businesses in the goods and services industry to, among other things -

- establish an internal complaints handling process;
- ensure that the relevant staff in their business have adequate knowledge of the CPA; and
- to keep adequate records of complaints and how such complaints were addressed.

This aims to highlight the importance of general compliance with the spirit

and purport of the CPA by participants and their staff on a daily basis. This increased level of awareness is certainly a step in the right direction.

### The CGSO

In terms of s 82(6) of the CPA, if an industry code provides for a scheme of alternative dispute resolution and the commission considers that the scheme is adequately suited to provide alternative dispute resolution services, the commission may recommend that the scheme be accredited as an 'accredited industry ombud'. The code has done just that through the establishment of the CGSO (which will be funded by subscription fees payable).

The purpose of the CGSO is to provide a scheme of alternative dispute resolution that is specific to the goods and services industry. The code sets out the powers and functions of the CGSO, and the complaints process to be followed in laying a complaint with the CGSO. A clear process and strict time lines have been set out in the code which, if complied with, will hopefully lead to the swift resolution of consumer complaints. In simple terms, once a complaint has been laid with the CGSO, it will carry out the necessary investigation and make a recommendation. The CGSO may refer the matter for mediation. Neither the complainant nor the participant shall be bound to accept the recommendation. If the matter is resolved as a result of both parties accepting the recommendation, the CGSO may submit such findings to be made an order of court in order to add a layer of legal enforceability to the



resolution. The CGSO is also mandated to keep comprehensive records of all complaints, and to compile an annual report including information on complaint types and businesses being complained about. This will hopefully assist in identifying systemic and recurring problems that participants need to address.

As the code was drafted for industry and by industry participants, it will hopefully be more relevant and effective for them than the general provisions of the CPA, particularly as one of the criteria to be used to resolve disputes by the statutory regulators is consideration of the applicable industry code and guidelines. In this regard, it is noteworthy that the code specifically states that the CGSO's staff members conducting alternative dispute resolution should have, appropriate to the subject matter of the complaint and the level of the CGSO process: Qualifications and experience in law, commerce, industry and dispute resolution, knowledge of the tech-

nical aspects of the goods and services provided in the industry and an understanding of the CPA. This should provide participants and consumers alike with a level of comfort that the matter is being dealt with by a suitably qualified person who has the relevant technical expertise.

In terms of s 82(7) of the CPA, the National Consumer Commission still has an obligation to monitor the effectiveness of any industry code. This oversight mechanism is absolutely key in order to ensure that it functions effectively, and can be amended progressively as issues are identified that require attention.

## Conclusion

It is likely that South Africa will have a greater number of industry codes in the future. As the code and CGSO are still in their infancy, no complaints have yet been laid and/or dispute resolution conducted following the outlined procedure to date. However, it is hoped that the code and the CGSO will assist in creat-

ing greater certainty for consumers and suppliers. In addition, the introduction of the CGSO as an alternative dispute resolution mechanism for the good and services industry may have the effect of alleviating the strain experienced by the already over-burdened Consumer Commission.

However, while, a far-reaching and empowering piece of legislation (from a consumer-perspective), as with many existing policies and dispute resolution mechanisms in South Africa, the powers and effects are only as good as the structures and people in place. The SAAICC has already had some success in resolving disputes arising in its industry at the appropriate level. Hopefully, the same will be said in due course for the code and the CGSO.

Justine Krige *BSocSci LLM (UCT)*  
is an attorney at Cliffe Dekker  
Hofmeyr Inc Cape Town. □

By Lydia  
Craemer  
and Meryl  
Federl

# Finding free legal information on the internet

**T**his guide is based on a presentation given by Lydia Craemer at a workshop organised by the Organisation of South African Law Libraries (OSALL) in 2014. The guide has been compiled for new candidate attorneys who may find that the online resources that they accessed at university are not as comprehensive as those they now access at their employers. This guide is also for legal professionals who may not be aware of what has become available for free online over the past ten years. We also alert legal professionals to the hazards they may encounter when using the internet to find free legal information. Using Google and government websites is usually not a good idea unless you can definitely tell whether or not the information provided is up to date and authoritative.

## Cases handed down in South African courts

You can use Southern African Legal Information Institute (SAFLII) to find many of the post-1994 cases from the various courts. SAFLII is an online repository of legal information from South Africa (SA) that aims to promote the rule of law and judicial accountability by publishing legal material for open access in line with the objectives of the global free access to law movement.

- All Constitutional Court (CC) cases

handed down from 1995 onwards are available on [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za), as well as on [www.saflii.org](http://www.saflii.org). The CC website also provides access to *a quo* cases from the relevant High Court and Supreme Court of Appeal (SCA), court papers and pleadings for CC cases.

- Cases from the SCA are available on [www.supremecourtappeal.gov.za](http://www.supremecourtappeal.gov.za), as well as on [www.saflii.org](http://www.saflii.org) (from 1984 onwards). The SCA website itself is useful for finding out what cases are coming up for hearing and which ones have been refused appeal and struck off or dismissed – see the 'Bulletin section'.
- A number of High Court cases from around SA are available on [www.saflii.org](http://www.saflii.org) – each collection has a different year range.

It is important to understand that SAFLII is dependent on the various registrars around the country to send them cases as they are handed down. Recent cases are usually uploaded within days of SAFLII receiving the case from the respective registrar. However, the case may not appear on SAFLII immediately because it is either being typed by the court's typing pool or it is being transcribed. It is important to note that court orders are not available on SAFLII.

If you find that a recent case is not on SAFLII, Jura or LexisNexis, you can ask for it to be retrieved from offsite storage and this may take up to two weeks.

You will also need a case number – if you have the names of the parties, these can be retrieved from court rolls on [www.saflii.org](http://www.saflii.org) according to the relevant court. Cases may also be retrieved from various websites belonging to statutory bodies such as –

- South African Revenue Service – [www.sars.gov.za](http://www.sars.gov.za).
- Pension Fund Adjudicator – [www.pfa.org.za](http://www.pfa.org.za).
- Competition Commission – [www.comcom.co.za](http://www.comcom.co.za).
- National Consumer Tribunal – [www.thenot.org.za](http://www.thenot.org.za).
- South Africa Human Rights Commission – [www.sahrc.org.za](http://www.sahrc.org.za).
- Public Protector – [www.pprotect.org](http://www.pprotect.org).

Links to the above bodies and other government-related bodies are available on [www.gov.za](http://www.gov.za).

If you have read about a case in a news article you can Google the name of the case, however, it is important to understand that newspaper articles may not always contain the precise parties' names. Also, SAFLII and other websites are likely to have redacted the exact party name if it is regarded as private, for example, cases involving the Road Accident Fund and family law cases. It will, therefore, be difficult to find the case unless you know all the other relevant information such as the date, the court or the judge. On occasion, the date might be vague or



unspecified and no mention is made of the judge's name or the court in which the case was heard.

Websites of human rights non-governmental organisations may often upload the case if they represented one of the parties or even if they think the case might be of interest in general. For example, human rights cases such as those covering evictions and housing matters, refugees and environment may be found on the following websites:

- Centre for Environmental Rights, Cape Town – [www.cer.org.za](http://www.cer.org.za).
- Refugees Rights Law Clinic, UCT – [www.refugeerights.uct.ac.za](http://www.refugeerights.uct.ac.za).
- Section 27, Johannesburg – [www.section27.org.za](http://www.section27.org.za).
- Legal Resources Centre – regional offices [www.lrc.org.za](http://www.lrc.org.za).
- Lawyers for Human Rights – regional offices – [www.lhr.org.za](http://www.lhr.org.za).
- Socio Economic Rights Institute Johannesburg [www.seri-sa.org](http://www.seri-sa.org).

## Judgments and comments

To find out how judgments have been dealt with, or commented on, or to see where journal articles have been cited, SAFLII also provides LawCite at [www.saflii.org.za/LawCite/](http://www.saflii.org.za/LawCite/). This is an automatically generated international legal case and journal article citator. LawCite will help you to locate and find a copy of a decision, see how a decision has been subsequently dealt with and find other materials such as journal articles about a decision. It will also help you to see how journal articles have been cited by other journal articles and cases.

## Looking for legislation

A new website [www.lawssofsouthafrica.up.ac.za](http://www.lawssofsouthafrica.up.ac.za) containing free online consolidated South African legislation – with 'point-in-time' or historical versions, was launched in 2013. The University of Pretoria's Law Library, with start-up funding from the Constitutional Court Trust, undertook a project to consolidate the South African legislation (the Acts and Regulations from Parliament) and to supply this information free to the public. The service still receives some funding from the Constitutional Court Trust, and for the rest it is dependent on the legal profession for funding.

The Acts and regulations documents from the University of Pretoria's website are also made available freely on the SAFLII website. In addition, the database includes point-in-time or historical versions of the Acts and by using this facility you can see what an Act contained at any point-in-time. At this stage the website is a work in progress and does not yet contain all the Acts, however, over 250 Acts have been completed and are available on the website.

## Other sources of legislation

### • Government websites

Government websites containing legislation are mainly neither up-to-date nor consolidated. Although the legislation on these government websites may 'look' very similar and indeed be the legislation that is found on the legal publishers' websites such as Sabinet, Juta or LexisNexis and show some amendments, often the government department concerned has neglected to keep the legislative material up to date. As a result legislation on many government websites is not up-to-date. The website rarely states 'last amended by date.'

### • Government Gazettes

Sometimes government websites only load the *Government Gazette* (GG) containing the original Act. Any GG is merely a snapshot of what the Act looked like on that date. The Act is very likely to have been amended subsequently, but there is no way of knowing that unless you search for all the GG relevant to that Act. Even then the Act may have been amended by an Act that has another title or more generic title like 'General Law Amendment'. This is why it is important to use consolidated legislation.

For GG see [www.gov.za](http://www.gov.za) – 'Documents section' and the Government Printing Works website ([www.gpwonline.co.za](http://www.gpwonline.co.za)). There is no charge for the service at the Government Printing Works but you will need to register. Usually the gazettes are published on the website within a day of their publication.

### • Bills

To find out how a Bill becomes an Act see: <https://pmg.org.za/bills/explained/>. When you read a news article about new legislation, make sure that what the journalist is referring to is indeed an Act and not a Bill. While a Bill might have been passed in Parliament, it might still be awaiting signature by the president – this can take some time. For the status of Bills, see <https://pmg.org.za> or [www.parliament.gov.za](http://www.parliament.gov.za) under 'Legislation'.

### • By-laws

By-laws found on a municipality's website are not always published with a date and often the website does not say whether the by-law has in fact commenced or not. In order for a by-law to commence, (as well as other legislation, be it provincial or national), the date of commencement must be gazetted – that is, it must be published in a *Government* or *Provincial Gazette* with a commencement date. Beware – even if a by-law is published on a municipality's website, it does not mean the by-law has commenced. When an Act states under the section 'Short title and commencement'

'... This Act is called the ... Act and takes effect on a date determined by the President by proclamation in the *Gazette*', this means the date will be published in a GG at a later stage. Otherwise the Act is assumed to have started on the date of publication of the GG.

### • Green and white papers

If you are looking for green and white papers see [www.gov.za](http://www.gov.za) – 'Documents section'.

## Law journals

There are three different websites you can search for law journal articles published in SA:

- South African Legal Periodicals Index – [www.constitutionalcourt.org.za/uhtbin/webcat](http://www.constitutionalcourt.org.za/uhtbin/webcat), then select iSalpi. This is a free database.
- Johannesburg Society of Advocates library – See 'Library Section' – [www.johannesburgbar.co.za](http://www.johannesburgbar.co.za). This is a free database.
- Sabinet – [www.journals.co.za](http://www.journals.co.za). This is a free database.

Take note that the first two databases only contain references, and not the full text of articles in journals and only covers journal issues that were published from 1980 onwards.

However, more and more journals are providing free access online and besides using the websites listed below you can also use the Sabinet website ([www.journals.co.za](http://www.journals.co.za)) to search most of the law journals published in SA all at once (articles published from 2000 onwards). In order to view the list of the law journals that Sabinet includes in their SA ePublications database, click on the tab 'Law collection' (this collection of law journals published in SA includes both subscription-based and open access journals, but not all of them).

You can search by author, keyword, year, title of the journal article, journal title amongst other fields when you use the Sabinet website. If you are interested in a certain journal you can then view the article and if it is an open access journal you will be able to download the content at no cost. If the journal is subscription-based, your institution or law firm will have to pay a Sabinet subscription in order to view the article.

To access older law journals (published in South Africa) there is also an archive of older journal articles available at The African Journal Archive ([www.ajarchive.org](http://www.ajarchive.org)) is a Sabinet Gateway project in conjunction with the Carnegie Corporation. There are some law journals on the platform that can be accessed free of charge.

## Open access legal journals in SA

- *African Public Procurement Law Journal* is published by the Faculty of Law, Stellenbosch University <http://applj>.



journals.ac.za/pub (from 2014, volume 1 onwards).

- *African Human Rights Law Journal* is published by the Centre for Human Rights, University of Pretoria [www.ahrlj.up.ac.za/](http://www.ahrlj.up.ac.za/) (from 2001 onwards).

- *De Jure* is published by the School of Law, University of Pretoria: [www.dejure.up.ac.za/](http://www.dejure.up.ac.za/) (since 2011).

- *Journal for Juridical Science* is published by the Faculty of Law, University of the Free State: <https://africansunmedia.snapplify.com/product/journal-for-juridical-science-382>.

- *Law, Democracy & Development* is published by the Faculty of Law at the University of the Western Cape: [www.udd.org.za/current-volume.html](http://www.udd.org.za/current-volume.html) (from the first issue in 1997).

- *LitNet Akademies* (Regte) – [www.litnet.co.za](http://www.litnet.co.za).

- Potchefstroom Electronic Law Journal is published by the School of Law, North West University [www.nwu.ac.za/p-per/volumesarchivehtml](http://www.nwu.ac.za/p-per/volumesarchivehtml) (from 1998 volume 1 onwards).

- *Speculum Juris* is published by the Nelson R Mandela School of Law, University of Fort Hare [www.speculumjuris.co.za/articles](http://www.speculumjuris.co.za/articles) (from 2005 onwards).

The full text of an academic article may also be found on institutional repository of a university if the author worked at the university at the time of publication. More and more universities in SA are publishing dissertations, journal articles and research papers online on their respective websites. For a comprehensive list see [www.opendoar.org/countrylist.php#South%20Africa](http://www.opendoar.org/countrylist.php#South%20Africa).

## How to keep abreast of legal developments in SA

### • Contents pages of SA journals

Sabinet Reference allows you to set up e-mail alerts or RSS feeds on the SA ePublications. These alerts will inform you when a new issue is loaded on the platform. For more information on this service, which is free, visit <http://reference.sabinet.co.za>.

### • Legal policy and legislative developments

There is also a service called Sabinet Law ([www.sabinetlaw.co.za/](http://www.sabinetlaw.co.za/)) that is available free of charge and that provides legislation and policy related information in the main gathered from Parliament and government websites.

## Further reading

You can also access the following free guides on how to find and use legal information in SA:

- Shirley Ann Gilmore. *PULP GUIDE: Finding legal information in South Africa* (3rd ed) (Pretoria: University Law Press: 2014) [www.pulp.up.ac.za/pdf/2014\\_07/2014\\_07.pdf](http://www.pulp.up.ac.za/pdf/2014_07/2014_07.pdf).

- Amanda Barratt and Pamela Snyman. *Researching South African Law*. This was updated by Redson Edward Kapindu in March 2010 and is available on [www.ny-lawglobal.org](http://www.ny-lawglobal.org)

- SAFLII guide – [www.lawlibrary.co.za](http://www.lawlibrary.co.za)

- A guide on how to search SA ePublications <http://reference.sabinet.co.za>

Lydia Craemer BA HDip Lib (Wits) is current Chairperson of OSALL and Librarian at Johannesburg Society of Advocates library, Johannesburg and Meryl Federl BA HDip Lib (Wits) is an archivist at the Johannesburg Society of Advocates, Johannesburg. □

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C001/15



By  
Ann  
Bertelsmann

# Who's got your back?

**I**t does not matter whether you are a candidate attorney, associate, single practitioner or a director in one of the larger law firms, you are always vulnerable to claims by your clients or third parties who are affected by errors or omissions that you might make in practice.

These claims are a reality and are on the increase, not only in South Africa, but also in other international jurisdictions like the United Kingdom (see 2015 (February) *Risk Alert Bulletin* 2).

In a previous article, 'Is your firm at risk for claims by clients or third-parties' (2014 (May) *DR* 26), we published some South African professional indemnity (PI) claim statistics and in a subsequent article, 'A PI claim's waiting to happen' (2014 (July) *DR* 20), we looked at some of the things that can go wrong in practice and lead to such claims.

What can you do to protect yourself or your practice against such claims and their sometimes devastating financial and reputational effects?

Common sense dictates that practices need to protect themselves by –

- minimising the risk of making mistakes and of claims-prone situations occurring;
- effectively managing the situation when problems or mistakes do occur; and
- ensuring that they have adequate insurance cover against the consequences of unavoidable mistakes.

## Two important, protective steps in minimising the risk of making mistakes

### *Step 1: Use Minimum Operating Standards (MOS)*

In previous articles we have strongly recommended that every practice has its own MOS as a primary risk management tool, *inter alia*, to minimise the risk of PI claims. **The MOS is your shield against your own mistakes and omissions and those of others employed in the practice.** But what if the practice you work in does not have MOS, and refuses to put any in place?

If you are a director or partner, you might be able to persuade your co-directors/partners to introduce MOS – or to upgrade existing ones – and you should do whatever you can to do so. **Remember that all directors or partners are jointly and severally liable for any damages suf-**

**fered by clients or third parties as a result of the running of your practice.**

If you are employed in any other capacity, your powers of persuasion may well be limited. Fortunately for you, you will not bear the financial brunt of any claims brought against your firm. However, **your own reputation (and your continued employment) are at stake.** You need to make sure that you protect yourself by avoiding unnecessary errors. You can start by **drawing up your own MOS and checklists for the type of matters that you deal with.**

The MOS are your biggest ally. Stick to these standards. Ensure that everyone you work with is familiar with your standards and adheres to them. This applies especially to your personal assistant, filing clerk and anyone to whom you delegate work.

Your MOS should provide rules, checks and balances for aspects of your work such as –

- drafting and signing letters of engagement;
- file order;
- communications with client and others;
- filing;
- the making (and content) of file notes;
- diary management;
- document checking and management;
- delegation;
- handling correspondence and filing;
- settlement negotiations;
- billing; and
- handling of client complaints.

In this regard, you may wish to consult the *Risk Management Tips* document available on the Attorneys Insurance Indemnity Fund (AIIF) website at [www.aiif.co.za](http://www.aiif.co.za).

### *Step 2: Engage the help of colleagues*

A mentor, more senior staff members and your peers can be valuable sources of support for many reasons. Support staff can also be very useful allies. Use them all – and reciprocate. The following are some possible ways that this can be done:

- Discuss your more difficult matters or aspects of law/procedure that you are uncertain about, with one or more colleagues or a mentor. They may raise perspectives that you had not thought of. They may have come across a similar situation in one of their own matters and be able to point you in the right direction.
- Ask a colleague to proofread and check important documents. A fresh pair of

eyes can pick up errors more easily than your tired eyes can. A fresh approach and perspective may provide valuable input into the final document.

- Agree to audit one another's files. Again, fresh eyes can often pick up oversights and problems that you have overlooked or have a blind spot about. This could save you from potential embarrassment at best – or even worse – a PI claim. For a full discussion of file audits please read the article on file audits in 2014 (May) *Risk Alert Bulletin* 4, which can be found at [www.aiif.co.za](http://www.aiif.co.za).

- Train and use your support staff. Insofar as you have control over this, carefully select your staff. Train them well to ensure that they do provide the support you need. They need to be made to understand the value that they add in the smooth running of your practice – and the dire consequences of their failure to adhere to standards. They can be an invaluable resource and safety-net, providing back-up in checking documents, reminding you of important dates and timelines and timeously bringing important correspondence to your attention. It must be stressed that all support staff must be properly supervised and should not be left alone to do the work of a lawyer.

**NB:** A large proportion of attorneys' PI claims stems from a failure by support staff to understand their role and to appreciate the consequences of their actions or inaction. For example, we have seen several claims arising out of assistants' having filed away notices of bar, without bringing them to the practitioners' attention.

- Ask for help. If you are struggling with your workload, enlist the help of a more organised colleague to give you guidance on better time-management and how to prioritise effectively. If you genuinely have an unmanageable workload, say something to someone who can help. Or if you are in a position to choose, either do not take on additional work or delegate the work to someone else.

If you suffer in silence and work excessively long hours or cut corners to keep up, the quality of your work is likely to suffer and the chances of making mistakes increase.

- Ask for information.

- Your librarian (if you have one) can be a valuable research resource. Otherwise, try the KwaZulu-Natal (KZN) Law Society Library, which has opened its doors to the whole profession. (E-mail their helpdesk at [help@lawlibrary.co.za](mailto:help@lawlibrary.co.za)).



- The South African Legal Information Institute (SAILI) also provides free on-line access to legal information, including case law at [www.saili.org](http://www.saili.org).

- The Law Society of South Africa (LSSA)'s website also has helpful information at [www.LSSA.org.za](http://www.LSSA.org.za).

- The Attorneys' Development Fund (ADF) can assist in suggesting suitable computer programmes to help new practitioners in setting up their systems (see [www.adfonline.org.za](http://www.adfonline.org.za)).

- LEAD (the education wing of the LSSA) runs many helpful courses at a minimal charge ([www.LSSALEAD.org.za](http://www.LSSALEAD.org.za)).

- The Attorneys Insurance Indemnity Fund (AIIF) may also be able to assist with your queries about avoiding claims and managing claims-prone situations. You can contact the AIIF at (012) 622 3900.

• Register your firm and your time-barred matters with Prescription Alert, who offer the use of a computerised diary back-up system at no cost to you. See [www.aiif.co.za/prescription-alert](http://www.aiif.co.za/prescription-alert).

### Managing the situation when problems or mistakes do occur

• If this is within your control, be sure that your practice has a complaints handling procedure. This may ensure that

a client's complaint is effectively dealt with before a claim is made.

• If you realise that an error has occurred, immediately report this to a senior person. Usually, the longer you leave the problem, the worse it gets. There may be a way to salvage the situation and at least mitigate the risk. For example, if you allowed a default judgment to be taken against your client, you may be able to have the judgment rescinded at minimal cost.

• If an error has occurred and there is the risk of a claim, immediately notify the AIIF. They can assist you in looking at ways to mitigate the risks and will, in certain circumstances, even assist in providing funding towards risk mitigation.

### Insurance cover for claims

Where the trust money of a member of the public has been misappropriated by an attorney or his staff, the Attorneys Fidelity Fund (AFF) will only provide compensation to them as a last resort - once your practice and all its directors' or partners' estates have been fully ex-cused. **This means that your business and personal estates are at risk.**

At present, all practices and practising attorneys enjoy a certain automatic, primary level of PI cover through the AIIF.

**Your practice is at risk for payment of the deductible (excess) and any claim payments insofar as they exceed the applicable limit of indemnity.** (See the schedules to the master policy at [www.aiif.co.za/policy](http://www.aiif.co.za/policy).) You will probably also have to spend non-billable hours attending consultations and hearings. More importantly, your reputation is at risk and no insurance cover can fix this.

You are advised to retain the services of **experienced brokers**, who can arrange the most appropriate cover for your 'top-up' professional indemnity (in excess of the PI cover provided by the AIIF) and misappropriation of trust money by staff. (This insurance will be in addition to your general business cover, such as cybercrime policies, office insurance and keyman policies, to name but a few.)

Implementing some of the above ideas and recommendations will go at least part of the way towards protecting you and will hopefully remove some of the anxiety and uncertainty often associated with legal practice.

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



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**RETHINK. REINVENT.**



By  
Vincent  
Faris

# How important is practice management?

**T**here can be no doubt that the global economic meltdown impacted everyone in one way or another. Law firms too have not escaped the impact. My experience tells me that the impact has been particularly harsh on the smaller firms and/or those firms that were and may still be dependent on one service activity. Statistics of the composition of South African professional law firms indicate that 90% of firms comprise four partners/directors or less. The larger firms are managed in a typical style as one would expect of a corporate entity with a multi-million rand turnover and an appropriate staff structure to support the size. This means that such firms have been able to absorb the economic decline and direct their activities accordingly. The smaller firms have not been able to do so because they have not had the foresight and/or the leadership structures to not only address the economic decline but continue to grow. The whole profession has experienced, and in many instances are still experiencing, what I refer to as 'the profit squeeze'.

## What is the profit squeeze?

The answer is very easy. Revenue (fee income), has not kept pace with the increase in overheads, which means that profitability has declined. The decline in revenue is due to a number of factors, *inter alia*:

- Increased competition within the profession from new entrants into the profession.
- External competition from the banks, accountants and other institutions rendering services that have traditionally been rendered by the legal profession.
- More pressure and demands from clients for service delivery and lower fees.

We have all experienced the effects of increased costs. The cost structure of law firms consists mainly of expenses that are fixed irrespective of the level of economic activity, such costs being rentals, employee salaries and benefit contributions. While these expenses can be controlled they are an essential part of the infrastructure and cannot easily be reduced. We are all aware of the pressure to increase employee emoluments, but at the same time we face many cost increases, which are beyond our control such as power and fuel.

How then, given the current economic climate, can a law firm grow, and what role, if any, can or should practice management play?

## Components of practice management

Practitioners should realise that they are running a business and not a charitable organisation. It is acknowledged that attorneys are not trained as managers and prefer to do what they are trained to do and enjoy doing, namely to practice law. Given the economic climate mentioned above, however, practitioners need to spend more time on managing their practices. What then should practitioners do? Sustainability and profitability of the firm demands that fundamental business processes and principles are applied. These principles and processes are not new. As each practice will differ depending on its service activities, its geographical situation, its size and its human and financial capital resources, it is essential to understand and identify the components that are to be managed. The common and most important components that will apply to a greater or lesser extent to all firms are: Strategy, marketing, financial, human resources, administration, partnership matters and management structures. Information technology has become more important in the recent past and continues to require more attention and resources. These components are of course not the only ones and the components impact on one another. For purposes of this article, I briefly deal with some of these components.

## Strategic management

Future strategy is vital to the sustainability of the firm. This will require a critical review of the firm and its activities that is usually done with a strengths, weaknesses, opportunities and threats (SWOT) analysis exercise. Such an exercise will address, *inter alia*, the clients' needs, the services rendered, the community being serviced, the strengths, weaknesses, opportunities and threats not only of the firm itself but also of the individuals making up the professional, support and administrative staff of the firm. The exercise will identify the future direction that the firm should take, and will require discipline and commitment from all staff. Of course, for such an exercise to be meaningful it will be necessary to review the firm's past performance, recognising that the past cannot be changed but the future can be planned. In this regard it may well be advisable and necessary to prepare cost centre analyses of departmental service

activities and/or fee earners. However sensitive such an exercise may be, it will identify the profitability of each cost centre, which will be a meaningful tool in determining the future services to be rendered.

## Marketing

There can be no doubt that the face of business has changed, not only due to the advances in technology but more specifically as a result of the transformation that has taken place since 1994, and is still taking place today and will continue to take place in the future. This being the case, firms should be more conscious of the need to not only expand their client base and the services that are rendered, but also ensure that management communicates regularly with the ever-changing decision makers of its existing clients. Marketing is about creating an aura of professionalism at all levels within the firm and externally in the business and social community; it is about client service and service delivery. The marketing function is accordingly one in which all staff, irrespective of their positions in the firm, should be involved. The goodwill and word of mouth referrals that are generated should result in existing clients, as well as potential new clients, queuing at the front door for professional advice and services.

## Financial management

If profitability is to be, not only, sustained but also to grow then the management of the financial resources of the firm is an imperative. This can only be achieved if an intelligent assessment of the future financial path of the firm is prepared in a budget. The budget will of course depend on the future strategy of the firm and will detail the financial performance expected of fee earners and departmental service activities. Detailed analysis of the past performance will form the basis for the future projections not only of the fee revenues but also of the anticipated expenditure. Abnormal and non-recurring income and expenses of the past will be ignored when preparing the future levels of such items and it may well be necessary to perform zero-based budgeting principles for service departments where the past performance is not appropriate. Once the income and expense budgets have been prepared it will be possible to prepare cash flow projections and following on there from statements of the



financial position (balance sheet). The ultimate goal must be the comparison of the budgets and projections with actual performance, the identification of variances, both positive and negative, and the management decision-making that should take place thereafter.

## Other management components

As mentioned above there are numerous other components of the practice that will need management. It is not possible in a short article of this nature to deal with all of the components. It needs to be mentioned, however, that the total remuneration paid to all employees, irrespective of their classification as professional, support or administrative staff, (excluding partners' profit share/directors' emoluments), usually comprises between 45% to 55% of the total expenses of a firm. This being the case, the management of staff and the productivity thereof is an essential management function involving not only their remuneration but also their hopes, needs, aspirations and desires.

## Summary, recommendations and conclusions

It should be patently clear that in order to survive and grow (no real growth is a recipe for decline and possibly disaster), practitioners operating in large or small firms including sole practitioners will have to devote more time to man-

aging their firms' affairs. Management is important and it is suggested that the management team consider the following actions:

- Review the firm's terms of business in accepting mandates so that cash flow can be maximised and improved and the level of book debt reduced from current levels, which are likely to be in excess of 90 days. The terms of business should in any event be included in an engagement letter detailing, *inter alia*, what the hourly rates are for the various levels of staff engaged on the mandate, the disbursements that will necessarily be incurred in executing the mandate and how payment of the fees and disbursements is to be made.
- Review the operational, administrative and financial systems and procedures of each department and/or fee earner to identify excess or idle capacity so that overall rationalisation can be implemented. In this way capacity can be created and tasks assigned to free senior staff to devote more attention at higher hourly rates to more lucrative mandates.
- Prepare detailed budget and cash flow projections with regular comparisons between actual and budgeted performance.
- Ensure regular communication with senior executives and decision makers of existing and potential clients.
- Break away from the office environment for a properly structured strategic

planning exercise, if necessary by engaging an external facilitator.

- Review the time recording and fee debiting systems and procedures, all of which will impact on the fixed and working capital funding requirements of the firm.
- Review the structure of the firm, the compensation, salaries and other benefit arrangements between partners/directors and senior professional staff.
- Ensure that the firm is not dependent on one major service activity or on one major client.

All of the above assumes that the trust and business accounting records are kept up-to-date without which most of the management functions will fail.

The secret of success for a modern-day law firm, be it a multi-disciplinary incorporated practice, a partnership, a smaller structure or a sole practitioner is: Work smarter and quicker by creating capacity.

- Practitioners will be well advised to attend a two-day practice management conference, hosted by the Law Society of South Africa, on 19 and 20 August 2015 at the Bytes Conference Centre, Midrand, Johannesburg, where a number of international and national speakers will present on a variety of practice management topics.

**Vincent Faris CA (SA) is a forensic accountant and auditor in Pretoria.** □



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## Practice Management for Attorneys

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DE REBUS - AUGUST 2015



# *Ukuthwala:* Is it all culturally relative?

By  
Diana  
Mabasa



Picture source: Gallo Images/iStock



One of the fundamental ideals set out in the Preamble of the Constitution is the attainment of a society based on social justice. This ideal will remain a pipedream if the dehumanisation, sexist exploitation and suffering of black women and girls under patriarchal tyranny are allowed to continue under the guise of custom, in particular *ukuthwala*. The practice of *ukuthwala* has been thrust into the spotlight by a criminal appeal case of *Jezile v S and Others* (WCC) (unreported case no 127/2014, 23-3-2015). In a landmark judgment delivered by a full Bench of the Western Cape Division, the court held that *ukuthwala* is no defence to crimes of rape, human trafficking and assault with the intent to do grievous bodily harm.

This judgment can be applauded as an example of where the experience of a black girl sensitised judges to the harm that can be caused by a cultural practice. Oppression is a beast with many faces and *ukuthwala* is a classic example of overlapping forms of oppression on the grounds of age, race, gender and culture. Black women are uniquely situated at the focal point where these exceptionally powerful and prevalent systems of oppression come together, resulting in gender specific, and race specific harm. It is this, multi-layered harm that is highlighted by the concept of intersectionality.

The next section briefly summarises the facts and findings of the judgment – which comprehensively deals with the meaning and history of *ukuthwala*. It then demonstrates the importance of this judgment by linking it to intersectionality, in particular to highlight the plight of those multiply burdened. It concludes that such rethinking will lead to significant social change and realisation of constitutional ideals for black women and children.

## Facts and the findings of the court

In a nutshell, the criminal appeal case is about whether the cultural practice of *ukuthwala* is a defence against the crimes of rape, human trafficking and assault with the intent to do grievous bodily harm. The facts appear from the judgment. It records that during December 2009, the appellant, a 28 year old male, residing in Philippi, went to a rural village in the Eastern Cape in search of a bride. He was specifically looking for someone around 16 years of age, with no children (at para 5).

Early in January 2010 he noticed the complainant who was then 14 years old, and decided that she would make a suitable wife. At this point he was a complete

stranger to her. She was still at primary school and had just commenced Grade 7. She was residing with her extended family and maternal grandmother, since her father was deceased and her mother was working in another town (at para 6).

On the same day that the appellant first saw the complainant, he requested his family to start traditional *lobola* negotiations with the complainant's male family members. These negotiations were concluded in one day. The following morning the complainant was called to a gathering where only male members of the two families were present. She was informed of the impending marriage. Her uncle and another man then took her by the hand to the house of the appellant, who had never been introduced to her (at paras 7 – 8).

The complainant was instructed to change into *amadaki* (which is attire especially designed for a new bride or *makoti*). An amount of R 8 000 was paid as *lobola* and various traditional ceremonies were performed. She was now the appellant's customary law wife (at para 9).

Desperately unhappy, she fled from her new marital home a few days later and hid in a forest, and then at another house. She was found and promptly returned to the appellant by her own male family members. She was beaten with a sjambok by the appellant and his uncle for refusing to put back on the *amadaki*.

Shortly thereafter she was taken to Cape Town in a taxi by the appellant, completely against her will. She refused to have sexual intercourse with the appellant and he simply proceeded to rape her, severely beating her in his attempts to subdue her. After she had been raped seven times, suffered open, septic wounds as a result of the assaults, she managed to escape to a nearby taxi rank where two women assisted her by taking her to the nearest police station. She was deeply traumatised (at paras 10 – 29).

The appellant was charged with the offences mentioned above, and convicted in the magistrate's court. On appeal he raised as one of his defences that he was in a customary marriage with the complainant, and that it is an integral part of *ukuthwala* that the 'bride' may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected of her to do so (at para 52).

In light of the important cultural and constitutional implications raised by this defence, the court invited several organisations and experts on the practice of *ukuthwala* in customary law to assist as *amici curiae*, and to present oral submissions. These organisations include the National House of Traditional Leaders, the Women's Legal Centre Trust, the Centre for Child Law, the Commission

for Gender Equality, the Rural Women's Movement, Masimanyane Women's Support Centre, and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities.

The court was mindful of the fact that the South African Law Reform Commission (SALRC) is currently investigating the practice of *ukuthwala*, its impact on girls, as well as the appropriateness and the adequacy of the current laws on *ukuthwala*.

## What is *ukuthwala*?

In a summary of all the evidence presented by the *amici*, the court found that there is a distinction between the traditional understanding of *ukuthwala* and the current prevailing practice of the custom. It noted that customary law posits both regular and irregular means of initiating and concluding a customary marriage. *Ukuthwala* is one such irregular method which would, if the precepts of the custom were correctly followed, eventually lead to the conclusion of a valid marriage under the customary law. It was described as a method instigated by willing lovers to initiate the marriage negotiations by the respective families where there was some form of resistance to the marriage by the parents. The idea is to circumvent obstacles to the proposed marriage such as extreme parental authority, or where the man is unable to afford payment of the *lobola* in full, or where a woman objects to an arranged marriage and would rather marry a lover of her choice.

*Ukuthwala* in its traditional form is a collusive strategy by the willing lovers to secure marriage negotiations. In this form it has been described as 'innocuous, romantic and a charming age-old custom'. Certain essential requirements must be met –

- the woman must be of marriageable age, which in customary law is usually considered to be childbearing age;
- consent of the parties is necessary;
- as part of the process the parties would arrange a mock abduction of the woman at dusk. She would put up a show of resistance for the sake of modesty but in fact would have agreed beforehand to the arrangement;
- the woman would then be smuggled into the man's homestead and placed in the custody of the women folk to safeguard her person and reputation;
- the father of the man would then be informed of the presence of the woman in his homestead and of his son's desire to marry her;
- sexual intercourse between the couple is strictly prohibited during this period; and
- the man's family would then send an invitation to the woman's family to in-



form them that they wish to commence marriage negotiations.

It was highlighted by the experts that in customary law no marriage is possible without the consent of the woman's parents. If her family rejected the proposal she had to be returned to her home along with the payment of damages for the unsuccessful *ukuthwala* (at paras 72 – 74).

However, over time the practice has mutated and taken on a pernicious form in flagrant disregard of fundamental rights of the girl. In what the court termed *ukuthwala* in its 'aberrant' form, young women or girls are abducted and subjected to violence, including sexual abuse and assault to coerce them into submission. This is criminal conduct under the guise of custom (at paras 75 – 76).

It often occurs with the agreement of the girl's parents and family, who are paid a fee, improperly described as '*lobola*' for permission to abduct their daughter. This is often the case where the family is trapped in a cycle of poverty and poor socio-economic circumstances. It is endemic in certain rural villages in South Africa.

The practice was denounced as an extreme and fundamental violation of women and girl's most basic rights, including the right to dignity, equality, life, freedom and security of the person, and freedom from slavery. It was condemned as 'sexual slavery under the guise of a customary practice' – made possible only because of the patriarchal nature of customary law (at para 78).

The High Court correctly rejected the appellant's reliance on the aberrant form of *ukuthwala* as justification for his criminal conduct. The appeal was dismissed.

## *Ukuthwala* and intersectionality

This case clearly demonstrates that *ukuthwala* negatively affects only young, black women and girls. Since the interests of this group is not well-served by formalism the time has come for the rethinking of conventional approaches to law and policy that affect this group. I suggest that intersectionality as developed in critical race theory (CRT) should be considered as the basis of any legislative intervention that concerns this vulnerable group.

CRT is a race conscious critique of oppression and injustice, and the role of law in maintaining and perpetuating these. Intersectionality analyses the combined effect of race and gender discrimination to articulate a particular perspective: That of women who suffer as a result of multiple forms of oppression. It was first introduced into the legal lexicon by African American law professor Kimberlé Crenshaw. Subsequent critical race feminists like Patricia Hill Collins, Patricia Williams and Angela Harris have gone to great lengths to demonstrate that being black and female subjects women to a particular kind of harm, which requires a particular kind of intervention. Intersectionality is the tool they recommend for such intervention. An intersectional approach to law and policy reform will combine the effects of race and gender discrimination to assist in delivering effective strategies for the security and well-being of those historically marginalised as a result of race and gender.

In view of the current investigation by the SALRC into the practice of *ukuthwala* the cogent support for the multi-dimensional approach championed by

intersectionality must be considered in shaping advocacy and public policy for this group.

## Conclusion

This year we celebrate 21 years of our democracy. It is perhaps appropriate to look back and consider the very first case decided by the Constitutional Court, *S v Makwanyane* 1995 (3) SA 391 (CC) at para 262 where Mohamed J wrote:

'What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

The question is: Why are we still tolerating patriarchal social structures and harmful cultural practices that cause and reinforce inequality, which disempowers young girls by robbing them of an education, robbing them of dignity and of an opportunity to free their potential guaranteed in the Constitution? Does it mean that the contrasting future aspired to remains just that, an aspiration?

This article emphasises the continued importance of intersectionality in any law and policy initiatives for black women and girls. It can be an effective strategy to combat oppression and to bring about social justice. In the coming of age of our democracy the time has come to demand just such an approach for the simple reason; race matters, gender matters, and black girls matter.

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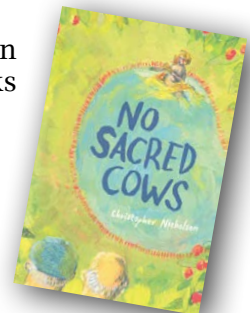
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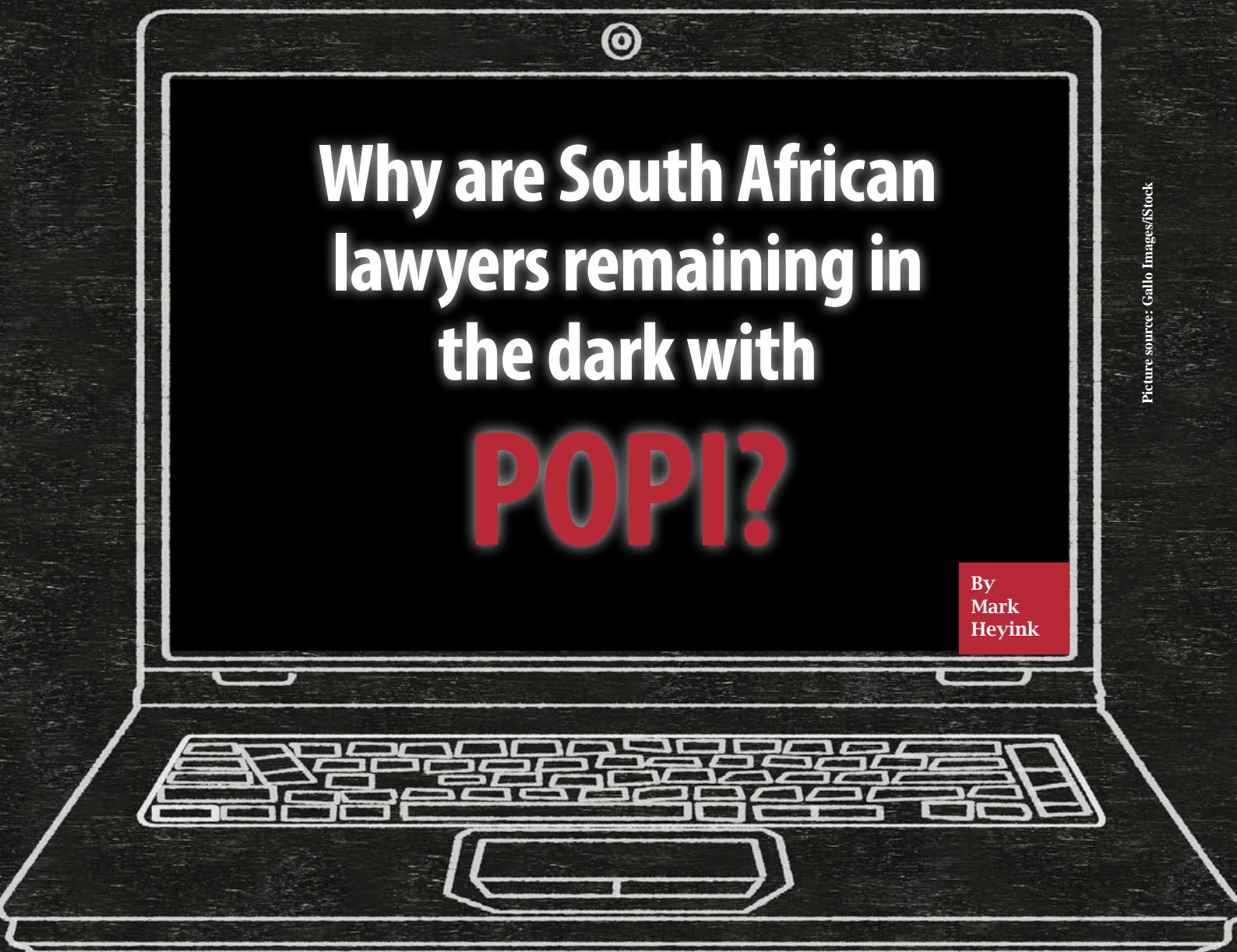


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# Why are South African lawyers remaining in the dark with POPI?

By  
Mark  
Heyink

## The Internet: A massive force for good

The Internet has revolutionised our society, changing our commercial and social activities far more rapidly than any changes in human history. It promises to be a massive force for good in the world, democratising knowledge, revolutionising education, increasing political and business transparency, creating completely new economies (and jobs) and facilitating time and cost efficiencies in existing economies unthought of ten years ago.

Our increasing dependence on information and communications technologies has, at the same time, brought new risks, which simply cannot be ignored by anyone in our information society. This article confines itself to the issue of risk to personal information and the

duties of lawyers in this regard. We have an important role to play but regrettably South African lawyers have been, at best, reticent in embracing the information revolution and the benefits that it holds for us as a profession. As importantly, we have been apathetic in accepting responsibility for and have largely failed to discharge our professional duty to take the measures necessary to ensure the confidentiality and integrity of client information processed in electronic form.

## The threat to privacy of personal information

The right to privacy is a fundamental human right, enshrined in s 14 of our Constitution. The ever accelerating ability to process increasingly large volumes of information about individuals has long been seen as one of the major threats that the information revolution holds to

our society. For decades there have been privacy directives and privacy legislation published globally, aimed at establishing appropriate protections against the abuse of personal information. Today privacy is the most burning jurisprudential issue globally and pervades the political, economic, societal and technological landscape, shaping approaches to existing and new law in the information society at every turn. Aside from its purely jurisprudential importance data privacy has been identified, by the *Harvard Business Review*, as one of the issues business cannot afford to ignore in 2015. Protecting personal information is not only our duty as lawyers but is simply good business.

## Why are South African lawyers ignoring privacy?

The threat to our privacy already affects



us and our loved ones profoundly, it adversely affects our clients, and it threatens to adversely affect our practices unless we wake up to the reality of the 21st century. The question that must be posed to South African lawyers is why we are ignoring this threat? In assessing compliance with our professional and statutory duties we must make the effort to understand these jurisprudential developments that are critical to legal practice in the 21st century.

Without understanding the legal requirements governing data messages (electronic communications and electronic records), established in the Electronic Communications and Transactions Act 25 of 2002 (ECT Act), and the conditions for lawful processing of personal information established in the Protection of Personal Information Act 4 of 2013 (POPI), as well as the background to these legislative instruments, it is simply impossible to understand the threats to personal information in cyberspace or to determine how to combat them.

My experience is that very few lawyers in South Africa have read the provisions of these Acts, let alone tried to understand them. Despite this failure, lawyers who have chosen not to understand the laws and practices governing the digital world, typically still use information and communications technologies on a daily basis to process their clients and their own business information, with little regard to their professional obligations of maintaining confidentiality and integrity in the information. This approach is simply irreconcilable with practising law in the 21st century.

## Duties of lawyers

Some lawyers are happy to remain in the dark about their duty to protect client information. Some may point to the fact that the operative parts of POPI have not been proclaimed to have commenced. I doubt though that any will seriously dispute their obligation to uphold the Constitution. The point being that rights to privacy do not derive from POPI but from the Constitution and the obligation to safeguard personal information has already long been regarded as a corporate obligation globally. Indeed s 76 of the Companies Act 71 of 2008 requires that we conduct our businesses with the degree of care, skill and diligence that may reasonably be expected of us. If we use information and computing technology (ICT) we should be mindful of the risks of doing so and are obliged to take appropriate measures to guard against harm that the risks threaten (the reasonable man test).

The rights that our clients have in this regard are already firmly established in our law. POPI merely provides the frame-

work for the enforcement of these rights with particular relevance to the processing of personal information and establishes offences applicable when processing violates this constitutional principle. We also need to acknowledge that while the purpose of POPI is to establish the safeguards for the confidentiality and integrity of personal information, its stipulations correspond directly to and reflect our professional obligations to maintain the confidentiality and integrity of our client's information, an obligation which has been established for centuries.

As lawyers, we have always dealt with paper and text (and continue to do so) and have developed appropriate safeguards to the protection of confidentiality and integrity. These safeguards will still apply as POPI is not confined to electronic information but covers information in paper and text as well. Similarly we have to develop, establish and maintain appropriate safeguards to the processing of information in electronic form.

## Information security

It is accepted that most lawyers will, through their general understanding of law and a careful reading of appropriate legislation be able to deal with the legal principles applicable to the protection of personal information. However, this understanding has to be expanded to incorporate appropriate information security principles, which are the foundation for safeguarding of electronic communications and records.

The basis of appropriate information security is to be found in information security standards (many of which are internationally recognised) that may be generic or apply to a particular sector, profession or industry. While law societies and Bar associations in many jurisdictions provide guidelines in this regard (as does the Law Society of South Africa (LSSA)), there are no specific standards that are obligatory to the legal profession. This having been said, the International Standards Organisation provide a comprehensive framework for information security and in particular ISO27001 (which deals with the establishment of an information security management system) and ISO27002 (which deals with the control measures that need to be considered in protecting information) these are a good starting point from which the 'how' of protecting personal information needs to be considered. Measuring our conduct against these established practices is what is contemplated in s 19 of POPI, which requires the implementation of generally accepted information security practices.

The issue of information security has for some time been regarded as a legal

obligation and the report entitled 'The Emergence of Cybersecurity Law' prepared for the Indiana University Maurer School of Law in February 2015 examines the growing field of cybersecurity law. It stresses the importance of lawyers practicing in ICT and related law to properly understand cybersecurity and the law which is developing around cyberspace.

As information and communications technologies increasingly impact on numerous areas of substantive and administrative law, it is critically important that aspiring lawyers are properly educated in the appropriate disciplines to prepare themselves for practice in the 21st century at tertiary level and that greater efforts are made to assist in the education of practising lawyers through practical legal training and other forms of education. Certainly, for any lawyer who professes expertise in privacy, the protection of personal information and ICT law generally, the failure to understand the reality of how we safeguard information in the 21st century is a yawning hole, which renders the 'legal' advice provided by these lawyers as, deficient at best, and quite probably dangerous.

## Practical issues

The first issue for any conscientious lawyer to consider is how he or she complies with the obligations to ensure the confidentiality and integrity of client information. Certainly if they cannot do this within their own organisations, providing advice to their clients would be inappropriate. To do so lawyers must understand relevant law, which entails at the very least proficiency and understanding of the ECT Act, POPI and the Promotion of Access to Information Act 2 of 2000. They will also need to understand what technologies are appropriate in the processing and safeguarding of client information, what processes have to be established (in the form of policies, procedures, standards and guidelines) governing the proper use of the technologies employed by them and ensure that their people are properly trained and can adhere to these processes. Unless an appropriate organisational infrastructure (often referred to as an information security management system) is established, complying with POPI and achieving appropriate levels of security will, at best, be difficult, and in all likelihood, impossible to achieve.

From a business perspective it must be recognised that not only are lawyers responsible parties in respect of their clients' personal information, but most practices will also be instructed by institutions (responsible parties) and be expected to act as operators in the processing of personal information. In this regard there is a statutory obligation on



responsible parties to enter into written agreements with operators that require minimum levels of information security be established safeguarding the processing of personal information. Lawyers who fail to meet this minimum threshold may find themselves losing clients as a result.

## Electronic signatures

While not a statutory requirement of POPI, from a practical perspective, the use of advanced electronic signatures (or digital signatures which provide a commensurate reliability) are one of the practical steps that can be taken in safeguarding electronic information, both in its communication and storage. It is beyond the scope of this article to deal with electronic signatures in any detail but guidance to this important issue can be found in the Guideline on Electronic Signatures for South African Law Firms published by the Law Society of South Africa (see [www.lssa.org.za](http://www.lssa.org.za)).

## Conclusion

The reality is that neither the professional bodies nor legal practices generally have paid much attention to their obligations in terms of POPI. This failure poses considerable risk to the personal information of clients, individual legal practices and the reputation of the profession as a whole.

The LSSA can and has begun to address the issue, but there is a significant amount of work, which is still required by our professional bodies. Lawyers who might see this as an excuse for their own failure to comply with POPI, are mistaken. It is critical that they develop the core competencies required to comply with their professional duties and, as importantly, to provide the advice that client's will seek from them.

- See 2014 (Dec) *DR* 20.

## The Law Society of South Africa Guidelines

The question may be asked what has the Law Society of South Africa (LSSA) done relating to the protection of personal information?

Despite the apathy of the profession, in 2013 the LSSA organised and presented a road-show to deal with the protection of personal information, which was held at six different centres though the country. This was not as well attended as one would have expected considering the impact POPI has on both the practice of law and the advice that we will be expected to provide to our clients.

The LSSA has also commissioned and has published on its website ([www.lssa.org.za](http://www.lssa.org.za)), among others, guidelines addressing the:

- 'Protection of Personal Information for South African Law Firms'.
- 'Information Security for South African Law Firms'.
- 'Electronic Signatures for South African Law Firms'.

These guidelines are intended to create a foundation on which initiatives by lawyers to address these issues can be based. They also provide extensive references to materials that will be of assistance.

More recently the LSSA's Executive Committee commissioned a report on its information and communications technology obligations in fulfilling its mandate in terms of the new Legal Practice Act 28 of 2014. Among the issues addressed in the report (and highlighted as a priority) is assisting lawyers in discharging their legal obligations in terms of POPI. This will result in a far better understanding of information management, information security and the protection of personal information.

It should also have the 'knock-on'

effect of ensuring the accuracy and value of advice provided by lawyers to their clients in this regard, particularly relating to the information security interventions that are a non-negotiable facet of the protection of personal information.

It was also recommended that the LSSA and the provincial law societies collaborate with one another in developing a code of conduct, as contemplated in POPI, defining the specifics of what is required in the normal course of practice in the protection of information generally and personal information in particular. This will establish a minimum threshold that, if achieved, will allow lawyers to demonstrate compliance with their professional obligation to safeguard confidentiality and the integrity of client information, which to a large extent is, by definition, personal information.

Of course the LSSA and provincial law societies are themselves also subject to POPI and it is essential that in this transitional period compliance with POPI is addressed by the National Forum of the legal profession looking forward to the future governance of the legal profession under the Legal Practice Council.

After reporting to the LSSA's Executive Council a further meeting with the directors of each of the provincial law societies and those responsible for their administration, was held. While the discussion encompassed issues in addition to compliance with POPI, the importance and urgency of engaging with lawyers to facilitate appropriate approaches to compliance with POPI, was stressed.

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# Fight back and you might be found guilty:

## Putative self-defence

By  
Sherika  
Maharaj

Picture source: Gallo Images/iStock



**P**utative self-defence has now been propelled into the South African limelight particularly due to the Oscar Pistorius trial and the defence strategy adopted by his legal team. A cautious perusal of the South African case law has set out concrete legal principles pertaining to this defence.

### *The end of the fairytale, but not the fairytale ending*

The sports star was charged with the murder of his model girlfriend. The world wanted to know what happened and why it happened. In his plea explanation in respect of the charge of murder the accused described the incident as 'a tragic one which occurred after he had mistakenly believed that an intruder or intruders had entered his home and posed an imminent threat to the deceased and him'. He armed himself with a firearm and stated further: 'The discharging of my firearm was precipitated by a noise in the toilet which I, in my fearful state, knowing that I was on my stumps, unable to run away or properly defend myself physically, believed to be the intruder or intruders coming out of the toilet to attack Reeve and me'. In a judgment delivered on 11 and 12 September 2014 by Masipa J in *S v Pistorius* (GP) (unreported case no CC113/2013, 12-9-2013) (Masipa J) she dealt with putative private defence as the second possible defence argued by his legal team in her judgment. She stated further that: 'In this case there is only one essential point of dispute and it is this: Did the accused have the required *mens rea* to kill the deceased when he pulled the trigger?' It was held that viewed in its totality the evidence failed to establish that the accused had the requisite intention to kill the deceased, let alone with premeditation. The accused had intention to shoot at the person in the toilet but states that he never intended to kill that person. The court also held that there was nothing in the evidence to suggest that his belief that his life and the life of the deceased was in danger, was not honestly entertained. The accused was convicted of culpable homicide.

### **Private versus putative private defence - what is the difference?**

Private defence is a defence excluding unlawfulness, which is judged objectively and 'putative' or 'supposed' private defence, relates to the mental state of the accused.

Where the accused raises the defence of private defence, the judicial inquiry commences with an examination of the unlawfulness or the lawfulness of the ac-

cused's conduct. If the conduct is lawful, then an acquittal results. If the conduct is unlawful, then the inquiry might not end there. Provided a foundation is laid for the 'putative' private defence, then the court proceeds to examine whether the accused genuinely, albeit mistakenly, believed that he or she was acting in lawful private defence (where the charge requires intention to be proved) or whether this belief was also held on reasonable grounds (where negligence is sufficient for liability). The use of force in private defence is justified if it was reasonably necessary to repel an unlawful invasion of person, property or other legal interest, and the test of whether an accused had acted justifiably is an objective one. Putative private defence on the other hand could be raised successfully to show lack of intention where an accused had acted defensively in the honest but erroneous belief that his life or property was in danger.

In *S v De Oliveira* 1993 (2) SACR 59 (A), the appellate division held that the difference between private defence and putative private defence was significant: A person who acted in private defence acted lawfully, provided his account satisfied the requirements laid down for such defence and did not exceed its limits. In putative private defence it was not lawfulness which was in issue, but culpability. If an accused honestly believed his or her life or property to be in danger but objectively viewed were not, the defensive steps he or she took could not constitute private defence. If in those circumstances he or she killed someone his or her conduct was unlawful. His or her erroneous belief that his or her life or property was in danger may well exclude *dolus*, in which case liability for the persons death based on intention will also be excluded, at worst for him or her, he or she could then be convicted of culpable homicide. The appellant was convicted of murder and two counts of attempted murder. The appellant's wife had alerted the appellant to the fact that there were unknown men outside the house. The appellant took his firearm and fired six shots towards the driveway. One shot hit a long standing employee of the appellant injuring him and another shot hit one of the employee's friends killing him. The appellants defence was putative self-defence. The appellant did not testify in his defence. It was held that in the instant case where the appellant had not testified as to his state of mind at the time of the shooting, whether he had an honest belief that he was entitled to act as he did had to be determined with regard to such other evidence as reflected on his state of mind, and inferential reasoning. It was further held that there was no indication that any attack on the house or its occupants was im-

minent and the appellant was in a state of comparative safety; in these circumstances it was inconceivable that a reasonable man could have believed that he was entitled to fire at or in the direction of the persons outside in defence of his life or property.

In *S v Naidoo* 1997 (1) SACR 62 (T) the accused was charged with the murder of his father after he mistakenly believed that he was about to be burgled and discharged his firearm killing his father. He had been the victim of previous burglary attempts at his home. The accused raised the defence of putative self-defence. The court accepted that the accused did not have any intention to kill his father. The accused conceded that he foresaw as a distinct possibility that whoever was outside the door would be killed by his shot, that he had sufficient intention to kill in the form of *dolus eventualis* to sustain a conviction for murder. The court held that in order to sustain the conviction the state had to prove that there was a perception on the part of the accused that he acted unlawfully at the time. The state argued that the accused could not escape conviction on the ground of putative self-defence. It was held that if a person believed that he was under attack and the force which he applied to resist the putative attack was reasonable and necessary to ward off the attack, then he did not have the necessary knowledge of wrongfulness, which would constitute the *dolus* necessary to sustain a conviction for murder, but he could be convicted of culpable homicide. Regarding the factual question as to whether the state had proven beyond a reasonable doubt that the accused did not believe that he was entitled to shoot in the manner in which he did, it was held that objectively, a reasonable man in the position of the accused would not have fired the fatal shot aimed in the direction which he did. Taking the accused circumstances it was accepted that the accused believed that the force he used was commensurate with the perceived threat, and reasonably necessary to ward it off. Held that the accused in firing the shot did not have the necessary knowledge of wrongfulness to sustain a conviction of murder, but that he had acted negligently in the circumstances as perceived by him and was therefore guilty of culpable homicide.

In *S v Sataardien* 1998 (1) SACR 637 (C) the accused was charged with murder. He raised the defence of putative self-defence. The deceased assaulted the accused and, thereafter, threatened to kill him and the accused under the impression that the deceased was reaching for his firearm, drew his own firearm and shot in the direction of the deceased's hand. This shot was fatal.

The Western Cape Division, Cape



Town held that: 'One had to regard the accused's state of mind subjectively and the court had to place itself, as far as possible, in the position of the accused at the time of the events'.

The court further held that insofar as culpable homicide was the negligent cause of death, an objective reasonableness test applied in such a case: Did the accused reasonably believe that he was in a situation that warranted private defence, and was the act of retaliation performed by him reasonable under the circumstances? In determining these questions the court had to avoid being an 'armchair critic'. It was held that the accused had honestly believed that his life was in danger and accordingly had not had the intention to kill the deceased and further that the accused had acted reasonably under the circumstances and thus also not caused the death of the deceased in a negligent manner.

In *S v Dougherty* 2003 (4) SA 229 (W), the Gauteng Local Division, Johannesburg held that if an accused person honestly but erroneously believed that his or her conduct in killing another was justified then *dolus* was excluded. The court further held that the legal position could be understood with greater clarity once one accepted that the Latin word '*dolus*' did not mean simply 'intention' but meant 'evil intent' or something analogous thereto. The state of mind relevant to a determination of *dolus* must not, of course be confused with motive. The court held that the test for justification, although objective (and even taking into account the qualifications, in particular the subjective situation in which an accused person finds himself or her-

self) had to be a high one. The appellant had shot and killed the deceased and injured another in circumstances where he had been afraid for his life. Objectively viewed, it had not been necessary for the appellant to have inflicted the injuries in question in order to protect his life. He acted unreasonably in shooting at the deceased as he had done. The deceased was unarmed at the time and clad only in shorts. While the court should not adopt an 'armchair view' the objective test was measured against the standard of a reasonable person. A reasonable person in the situation in which the appellant had found himself would not have fired the volley of shots, but would have aimed a non-fatal shot or shots to bring his suspected attackers down and would have aimed with an intention to kill only if it had become clear that he, the appellant, had not shot to kill he would probably have been killed himself. It was held that the appellant should have been found guilty only of culpable homicide.

### The SCA has spoken

In *S v Joshua* 2003 (1) SACR 1 (SCA) the court held that the appellant who had been convicted of several counts of murder and attempted murder, had shot at certain of the deceased and the complainant in one of the attempted murder charges, while they did not objectively pose a threat to him, but while he thought he was in danger of an imminent attack from them. It was held that at worst for the appellant he should have been convicted of culpable homicide on the murder counts. He had believed erroneously that he was still in danger of being attacked by them and that he accord-

ingly had been entitled to retaliate, when in fact they were turning or had turned sideways, probably in an endeavour to escape. His erroneous belief that his life had been in danger excluded *dolus*.

In *Coetzee v Fourie and Another* 2004 (6) SA 485 (SCA) the first respondent and his father, the second respondent, proceeded against the appellant for damages allegedly suffered as a result of a shooting. It was held that the appellant had shot the first respondent believing his life to be in danger, but that none of the facts taken alone or cumulatively necessarily indicated that the appellant had been in danger of an imminent attack. If the appellant had felt threatened the circumstances required at least a warning to be given by the appellant that he felt under threat before he was justified in shooting the first respondent. A firearm was a potentially lethal weapon, which should be discharged in the direction of a person only as a last resort. The appellant was found to be negligent in the circumstances.

### Conclusion

It would appear that a successful reliance on the defence of putative self-defence is largely dependent on the facts of each case and the belief of the accused viewed subjectively at the time of the commission of the offence.

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# Interested about the interest in debt?

## The *in duplum* rule revisited

By Kerron  
Edmunson

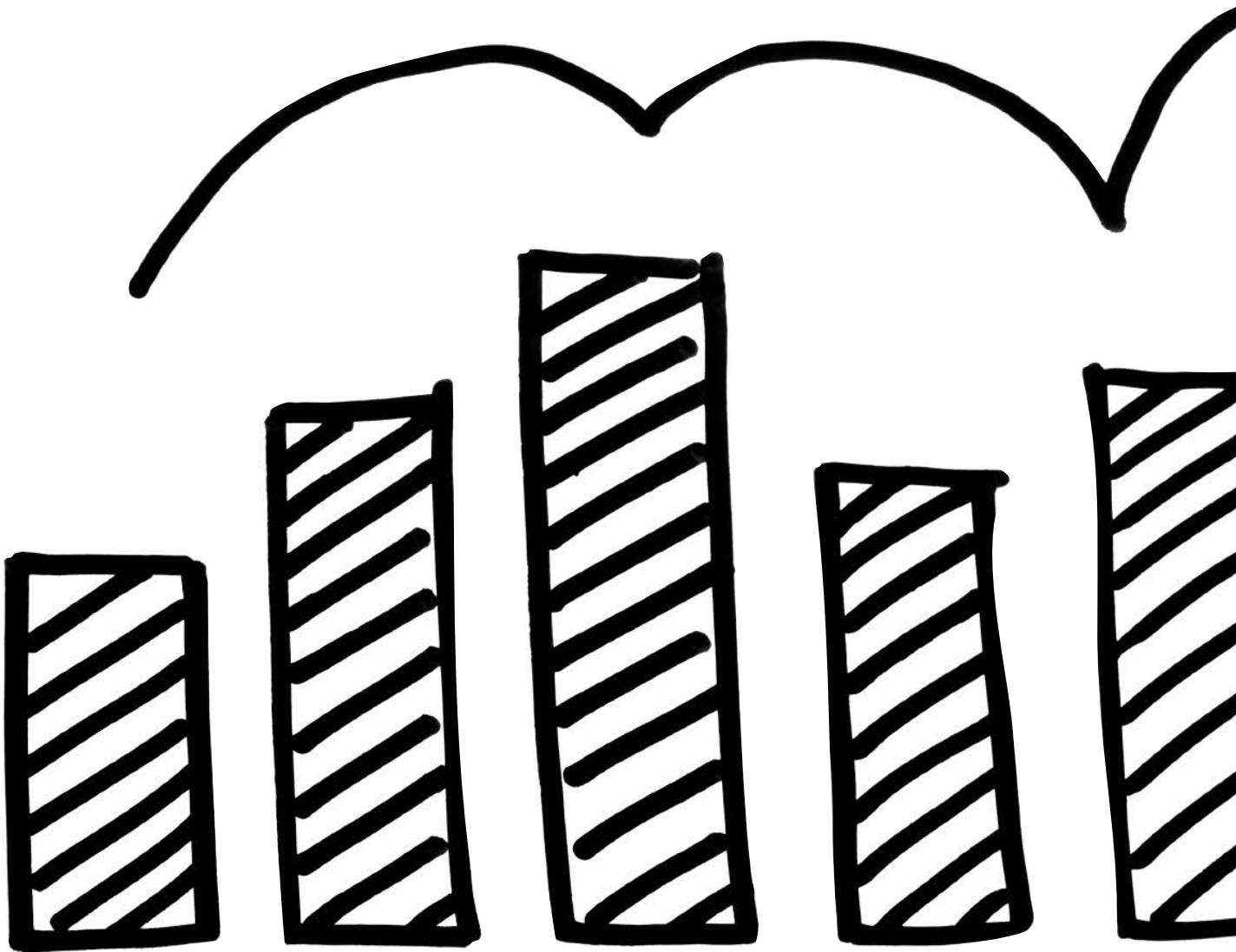
**T**he pronouncements of Madlanga J in the recent Constitutional Court case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) got me thinking about the *in duplum* rule, which is largely what the case was about, but also about what happens if a court can no longer pass judgments on the facts but only on the law? And what if, as in this case, it is not the debtor who is impoverished by the conduct of the debtor, but the creditor? If a court can only consider the law and not the facts, then how does the court distinguish cases from one another and make the most proportionate and reasonable finding – and this despite the clear statement by the presiding judge that: ‘In any

given case this court has to make a value judgment on whether the point of law is indeed “arguable”’ (*Paulsen* at para 23).

Is this where the courts are going? Are the principles established on *in duplum*, which underpinned the previous law on the matter in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) rendered invalid by the stroke of a pen, removing the role that courts have had in creating common law for decades? The extremely sensible statement in that case, which has been in force since 1997, sums the position as follows: ‘It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accu-

mulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection *pendente lite* against interest in excess of the double. Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it. A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process’ (*Oneanate* at 834 B – F).

Picture source: Gallo Images/iStock





Does the lender now have to carefully measure interest and time, to ensure that he sues just before the *in duplum* rule kicks in, an archaic rule that no ordinary consumer will know about but which is ostensibly designed to protect us all from Shylocks, from William Shakespeare's *Merchant of Venice*, even when we ourselves, having borrowed the money on terms that we agreed to, have made no attempt to repay? Do we now have to rely on courts to pursue debts

that are due, owing and payable when recalcitrant debtors fail to pay even when the value of their assets exceeds the value of their debt by some orders of magnitude? Forcing the creditor to spend

almost as much of the debt to enforce his right to repayment of his loan? When did our Constitution make our right to the courts apply only for the perceived weak and 'un-stoutboned' debtor – a perception, which in and of itself, must necessarily require the exercise of discretion or assumption by the court? (Cameron, J in his dissenting judgement, appears to have coined the phrase 'stout-boned' to describe two parties evenly matched in commercial strength, exercising their rights to contract on terms that they are agreed on, in pursuit of what he called 'big profits'. The phrase took the fancy of Madlanga, J, who repeated it several times in the majority judgement.)

According to Madlanga J, who wrote the majority judgment in *Paulsen*, '... there are persuasive competing public interest considerations that are at the opposite end of those on which *Oneanate* relied. And I am going to conclude that *Oneanate* was wrong in developing the common law in these circumstances. Why do I say it was wrong? Where public policy considerations do not chart the path of desired common-law development with sufficient clarity, courts are not suitably placed to take the leap and make a judgment call one way or the other. To do otherwise, courts may find themselves straying into terrain that may well be legislative in nature. That would be at variance with the separation-of-powers doctrine' (*Paulsen* at para 56 – 57).

The application of the court's interpretation of the separation-of-powers doctrine in *Paulsen* does not entirely reflect that of other courts, including *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) (at 804 para 60), where the court said in a constitutional dispensation, the doctrine of separation of powers is not fixed or rigid. 'The courts are duty bound to develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.'

The main judgment is also in this regard at odds with the concurring judgment of Moseneke DCJ in which he says, 'Developing the *in duplum* rule, a common-law norm that has always been under the oversight of the courts, will not encroach on any exclusive terrain of Parliament' (*Paulsen* at para 115).

The *in duplum* rule is not cast in





stone, it is part of the common law. The courts have in the past, required amendment to legislation by imputing meaning or applying it in certain circumstances in a particular way to give effect to the required outcome – one that promotes equity and fairness. The long list of cases in this regard need not be cited. The Constitutional Court is the very place we all go to find fairness and proportionate treatment.

The judge in *Paulsen* acknowledges this duty on the court by reference to ss 34 and 39 of the Constitution in saying: 'I am not suggesting that this court should be servile and not do its duty in accordance with s 39(2) of the Constitution. Where it is appropriate for it to develop the common law, it must,' (*Paulsen* at para 58). But the judge then proceeded to decline the opportunity to do so, by overturning *Oneanate* and claiming to do so, namely, to refuse to allow interest on a debt to run *pendente lite* when it might exceed the double, on the basis that: 'To hit all debtors in this manner would surely have an undesirable, chilling effect' (*Paulsen* at para 63). Having considered the possibility that a recalcitrant debtor may in fact reduce the debt he owes to the creditor to almost nothing by the passing of time and the application of inflation, the judge continues to defend the debtor who is not 'stout-boned'.

He does so to such a degree that he casts all debtors as weak, impoverished, set on, and bullied by giant-like and financially strong creditors, '[t]o allow for uncapped, and possibly exorbitant, interest to run *pendente lite* grants a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage.

And this is made possible by the sheer imbalance in financial muscle. By allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite* we risk rendering the debtors' right of access to courts tenuous, if not illusory' (*Paulsen* at para 68).

In so doing, the judge takes no account of the number of situations in which loans are made by one person to another or one entity to another outside the framework of legislation, because that is what friends and family do for one another, or that is what smaller enterprises without audited balance sheets and vast asset registers are able to access reasonably easily. The judge ignores even those instances where those financial institutions have taken risk, sought security, put forward a contract for consideration, and still come off second best. In this, he differs greatly in his judgment from that of dissenting judge Cameron J.

Interestingly and by contrast with this position, Madlanga J does believe that while courts should not interrogate the common law, it behoves the courts to determine how financial institutions can be controlled in tough economic times, as he sternly remarks: 'Another purpose of the *in duplum* rule was to enforce sound fiscal discipline upon creditors by serving to disincentivise lending money to a bad risk. Given that the recent global financial crisis (which has affected South Africa no less than many other countries) arose in large part from a failure of fiscal discipline, this concern is still quite relevant. As with the larger purpose of protecting debtors, *Oneanate's* suspension of the *in duplum* rule *pendente lite* serves to weaken the effectiveness of the rule in incentivising fiscal discipline

among creditors,' (*Paulsen* at para 82).

The *in duplum* rule sought, in its original form, to prevent the greedy creditor from taking not only his pound of flesh, but any blood, muscle or other body parts – to prevent the greedy Shylock from punishing Antonio by death when he failed to repay his lender. This rule dates back so long ago that it is hard for most of us to read it in its original form, let alone understand it in the electronic marketplace, and in the global village. The fact is that not all debtors are 'stout-boned', and not all creditors are financial institutions; not all debtors are ignorant, naïve and preyed on; and not all creditors are wealthy.

The *Paulsen* case has, however, ensured that courts will in future, be reluctant to delve too deeply into the facts and circumstances, which lie behind the masks of pitiful debtor and grasping creditor, and must now paint all creditors with the same brush, as Shylocks.

This article is borne out of the frustrations experienced in an actual case which has proceeded since 1995 in the High Court, KwaZulu-Natal Division, and which will now reduce the creditor's ability to recoup a twenty-year old debt (in essence a loan by one friend to another made possible by cashing in his pension fund), by half.

- See law reports under 'Interest' of this issue.

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# I don't want your money honey – *Recognition of Customary Marriages Act*

By  
Magdaleen  
de Klerk

There is a certain scope for confusion or at least uncertainty as to whether s 10(2) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) provides for spouses in a subsisting customary marriage in community of property, who later contract a marriage with each other under the Marriage Act 25 of 1961, to enter into an antenuptial contract thereby in effect changing the matrimonial property system applicable to their marriage without same being sanctioned by the court.

Section 10 of the Act reads as follows:  
'Change of Marriage System –

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the

marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.'

## Interpretation of s 10(2) of the Act

It was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular

provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

## Purpose of the Act

Having regard to the law before the Act was passed (and as stated in the preamble) the object of the Act is, *inter alia*, to provide for equal status of spouses in customary marriages.

## Context – other relevant provisions of the Act

Section 7 of the Act reads as follows:

'Proprietary consequences of customary marriages and contractual capacity of spouses –

...  
(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and Sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2)...

...  
(5) Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.'

Section 8 of the Act reads as follows:

'Dissolution of customary marriages –



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(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.'

Section 20 of the Matrimonial Property Act 88 of 1984 reads as follows:

'Power of court to order division of joint estate -

(1) A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.

(2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit.'

Section 21 Matrimonial Property Act reads as follows:

'Change of Matrimonial Property System -

(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that -

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change, order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

## Language of the provisions

Section 10(1) of the Act specifically provides for spouses between whom a customary marriage already subsists to contract a civil marriage with each other.

Section 10(2) provides that such a civil marriage is in community of property unless such consequences are specifically excluded in an antenuptial contract, which regulates the matrimonial property system applicable to their marriage.

Taking the subsisting customary marriage into account any contract by which the spouses' future matrimonial property system is regulated would be a post-nuptial contract.

In *Honey v Honey* 1992 (3) SA 609 (W) Du Plessis J held that in terms of our common law parties to a marriage cannot by postnuptial agreement change their matrimonial property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes CJ

phrased the rule thus: 'Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an antenuptial contract be varied by a post-nuptial agreement between the spouses.' It was further held that the contract between the parties 'purporting to vary their antenuptial contract [was] void and unenforceable as between the parties *inter se*'. It is further evident from the heading of s 10(2) of the Act (to wit 'change of marriage system') that same provides for to a change from a customary marriage to a civil marriage.

Section 21 of the Matrimonial Property Act (which was made applicable to monogamous customary marriages by s 7(5) of the Act), on the other hand as is evident from the heading, (to wit 'change of matrimonial property system') provides for the change of the matrimonial property system applicable to the spouses marriage.

If the spouses want to change their matrimonial property system that existed as a result of the first customary marriage that would apply as from date of their second civil marriage, they would have to approach the court in terms of the provisions of s 21 of the Matrimonial Property Act for the change of their matrimonial property system before entering into a notarial contract by which their future matrimonial property system is regulated.

## Results - a sensible meaning

The mere fact that the spouses contracted a marriage (for a second time) in terms of the Marriage Act does not by itself terminate or divide the joint estate created by entering into a customary marriage in community of property.

The spouses can also not at the same time be married in community of property as a result of the customary marriage and out of community of property as a result of the civil marriage as these matrimonial property regimes are mutually exclusive.

In *Ex Parte Menzies Et Uxor* 1993 (3) SA 799 (C) at 813 King J held:

'Community of property in a joint estate may be dissolved either -

(a) by the death of one or both of the spouses;

(b) by divorce;

(c) by an order of division; or

(d) by a change in the matrimonial property system in terms of s 21 of the Matrimonial Property Act...'

In *Zulu v Zulu and Others* 2008 (4) SA 12 (D) Hugo J held: 'Where a person is married in community of property, all assets, save for those expressly excluded therefrom, form part of a joint estate and each spouse enjoys an equal undivided share of such joint estate. During the subsistence of the marriage the

spouses thereto cannot by agreement divide the estate in such a way that their assets become separate property of the individual spouses and nor can one of the parties transfer his undivided half share of the estate.'

It is evident from the aforesaid that during the subsistence of the marriage the spouses cannot by agreement change their matrimonial property system nor can they terminate and/or divide the joint estate in such a way that their assets become separate property of the individual spouses.

The only way to accomplish this is by way of an application to court in terms of the provisions of ss 20 and 21 of the Matrimonial Property Act.

## Conclusion

If s 10(2) of the Act is interpreted to provide for spouses in a subsisting customary marriage in community of property, who later contract a marriage with each other under the Marriage Act, to enter into an antenuptial contract thereby in effect changing their matrimonial property regime without it being sanctioned by the court same would militate against the provisions of ss 20 and 21 of the Matrimonial Property Act, which provisions were specifically made applicable to monogamous customary marriages.

Such construction would also undermine the purpose of the Act. In this regard instances can exist where a wife in a subsisting customary marriage is not on equal footing with her husband to contract with him when entering into a second civil marriage, *inter alia*, due to her and her children's financial dependence on her husband.

The possibility further exists that other persons, namely, creditors of the spouses would be prejudiced if the spouses could without the intervention of the court amend their matrimonial property regime.

It is trite law that the presumption is that the legislature does not intend to alter the existing law more than necessary.

As is apparent from a reading of the above quoted provisions, s 10(2) of the Act does not provide for spouses in a subsisting customary marriage in community of property who contract a second marriage with each other under the Marriage Act to enter into an antenuptial contract thereby changing the matrimonial property system applicable to their marriage without making an application to the court to approve a written contract that will regulate the future matrimonial property system of their marriage.

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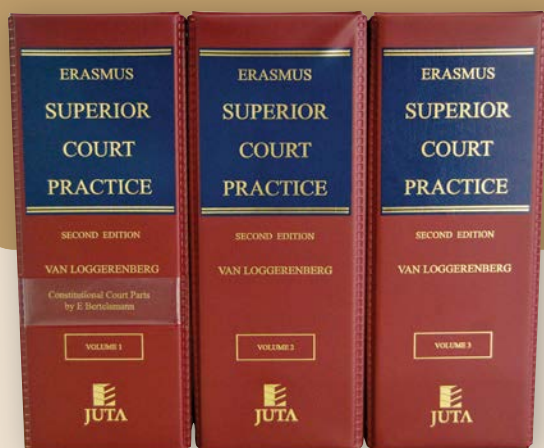
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# THE LAW REPORTS

June 2015 (3) South African Law Reports (pp 313 – 649); [2015] 2 All South African Law Reports May no 1 (pp 251 – 386) and no 2 (pp 387 – 515); 2015 (5) Butterworths Constitutional Law Reports – May (pp 509 – 652); 2014 (2) Competition Law Reports (pp 339 – 543)

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

CAC: Competition Appeal Court

CC: Constitutional Court

ECP: Eastern Cape Local Division, Port Elizabeth

GJ: Gauteng Local Division, Johannesburg

GP: Gauteng Division, Pretoria

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

## Adultery

**Whether oral sex constitutes adultery:** In *PV v AM* 2015 (3) SA 376 (ECP) the plaintiff, PV, and his wife, IV, were married to each other in 2000 and divorced in 2009. After the divorce, PV instituted a claim for damages against the defendant, AM, seeking compensation under the following heads –

- loss of love and consortium;
- *iniuria*;
- patrimonial loss;
- medical expenses; and
- legal expenses.

The action against the defendant, who was the plain-

tiff's uncle, was instituted after failure of the marriage between the plaintiff and his wife as a result of the defendant having oral sex with her. The defendant contended that as oral sex was not sexual intercourse, it did not constitute adultery and was, therefore, not sufficient to support a claim for damages for loss of consortium and *iniuria*. After separation of the issue of merits from the quantum, the court upheld with costs the plaintiff's claim on the merits and postponed the issue of the quantum of damages for determination at a later date.

Revelas J held that a technical and narrow approach to the definition of adultery, which confined it to the usual consensual sexual intercourse between man and woman, could only lead to absurdity and unfairness. Doing so would offend the equality prescripts of s 9 of the Constitution in that parties to a same-sex marriage would not have the same rights with regard to adultery as parties

to a heterosexual marriage. The limitations presented by the strict definition of adultery, which was confined to sexual intercourse had been recognised and corrected in the criminal law of rape and sexual-assault cases where s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 outlawed oral sex (penetration of genital organs into or beyond the mouth of another person). Therefore, the conduct under consideration (oral sex) constituted adultery. Adultery was an injury to the reputation, dignity and emotional welfare of the innocent person. In the instant case, the plaintiff had established that as a result of the defendant's conduct he suffered a loss of consortium and *iniuria* and was accordingly entitled to damages as he would be able to prove to have suffered.

**Note:** The case should be read in the light of *RH v DE* 2014 (6) SA 436 (SCA) (discussed 2015 (Jan/Feb) *DR* 53) where the SCA held that

the High Court should have dismissed the claim for loss of consortium because the marriage had already broken down when adultery first took place and, therefore, did not have to decide what the position would have been had the marriage not already broken down. However, in relation to the claim for *contumelia* the court held that while the award of damages under that heading was perhaps correctly granted by the High Court, the SCA would in the exercise of its right to develop the common law entirely abolish the innocent spouse's action for adultery based on the *actio injuriarum*. Accordingly, in the light of the changing *mores* of the society the delictual action based on adultery had become outdated, could no longer be sustained and was, therefore, abolished. However, the SCA expressly refrained from commenting on *actio injuriarum* based claims relating to abduction, enticement and harbouring someone's spouse or a claim against a third party for pat-

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rimonial loss suffered by the innocent spouse.

An appeal against the decision of the SCA was dismissed, with no order as to costs, in *DE v RH* (CC) (unreported case no 182/44, 19-6-2015) (Madlanga J) where the CC held per Madlanga J (Mogoeng CJ, Cameron J concurring judgment) that the delictual claim for loss of consortium and *contumelia* was particularly invasive of and violated the right to privacy as it often involved abusive, embarrassing and demeaning questioning of the adulterous spouse who suffered the indignity of having personal and private life placed under a microscope, as well as being interrogated in an insulting and embarrassing manner. Likewise, in order to defend a delictual claim based on adultery, the third party was placed in the invidious position of having to expose details of intimate interaction, including sexual relations, with the adulterous spouse. As a result the rights of the adulterous spouse and third party to privacy, freedom of association, freedom and security of the person were compromised. Public policy dictated that the act of adultery by a third party be found lacking of wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium. It was, therefore, not reasonable to attach delictual liability to it.

## Attorneys

**Prescription period of claim for refund of fees charged in terms of invalid contingency fee agreement:** The facts in the case of *Levenson v Fluxmans Inc* 2015 (3) SA 361 (GJ) were that in February 2006, the applicant, Levenson, instructed a law practice, the respondent, Fluxmans Inc, to institute a claim for damages against the Road Accident Fund (RAF). The parties concluded a contingency fee agreement in terms of which the respondent would charge a fixed fee of 22,5% and value-added tax (VAT) on the amount recovered from the RAF. The action was settled in May 2008 in the amount

of some R 4,8 million. The respondent sent a statement of account showing that their fees were in the amount of some R 1,1 million, inclusive of VAT. The applicant complained about the fee as being excessive but the respondent insisted that it was reasonable. In April 2014 and after media coverage of the case of *Ronald Bobroff & Partners Inc v De la Guerre and Another* 2014 (3) SA 134 (CC), which held that contingency fee agreements, which did not comply with the Contingency Fees Act 66 of 1997 were invalid, the applicant wrote a letter to the respondent asking for a review of the fees charged. As that was not done the applicant approached the High Court for an order declaring the contingency fee agreement invalid and a return of overcharged fees. In the alternative, he sought a new itemised bill of costs showing the fees due to the respondent. The respondent contended that as their bill of costs was given to the applicant in 2008, his claim prescribed after three years, which was in August 2011.

Windell J granted a separation of the issue of merits from the quantum and held that the claim had not prescribed. The question of the quantum of the claim was postponed *sine die*. The respondent was ordered to provide an itemised bill of costs within 20 days of the making of the court order. The court held that until he became aware of the decision of the CC in the *De la Guerre* matter in April 2014, the applicant did not have knowledge of the facts from which the debt arose. Until then he merely suspected that the fees were not correct. Suspicion could not be equated with knowledge and was insufficient for the running of prescription to commence. For there to be knowledge, the belief had to be justified. The respondent acted as the applicant's attorney and were duty-bound to properly represent and advise him. They failed to advise him that the contingency fee agreement was illegal, invalid and unenforceable. The date of acquiring the requisite

knowledge was April 2014 when the minimum facts necessary to launch the application came to his knowledge.

• See 2014 (July) DR 37 and 2014 (July) DR 40 for the *Bobroff* judgment.

## Companies

**Relief from oppressive and unfairly prejudicial conduct:** Section 163(1) of the Companies Act 71 of 2008 (the Act) provides among others that: 'A shareholder or director of a company may apply to court for relief if –

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant.'

In terms of subs 2 a 'court may make any interim or final order it considers fit, including –

... appointing directors in place of or in addition to all or any of the directors then in office'.

In *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA); [2013] 3 All SA 111 (SCA) the appellant, Grancy Property, a minority shareholder in Seena Marena Investments (SMI), sought the appointment of two objective and independent directors to determine if it was necessary to investigate the affairs of SMI and in that event, conduct the investigation themselves. That was after the appellant alleged that the majority shareholders and directors of SMI, being the respondents Manala and Gihwala, had misappropriated large sums of money out of the coffers of the company in the form of directors' remuneration and fees, and had also made other unauthorised payments to themselves, to the exclusion of the appellant. The WCC per Henney J dismissed the application.

An appeal against that order was upheld with costs by the SCA. Petse JA (Mthiyane DP, Nugent, Lewis and Tshiqi JJA concurring) held that in line with the decision of the House of Lords in *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324

([1958] 3 All ER 66 (HL) at 342) the concept 'oppressive' denoted conduct that was 'burdensome, harsh and wrongful', which would include lack of probity or good faith and fair dealing in the affairs of a company, to the prejudice of some portion of its members. The extensive nature of the remedy for which the section provided was underscored by the inclusion of the element of unfair disregard of the applicant's interests. Accordingly there was much to be said for the proposition that the section had to be construed in a manner, which would advance the remedy that it provided for rather than limit it. In determining whether the conduct complained of was oppressive, unfairly prejudicial or unfairly disregarded the interests of the applicant, it was not the motive for the conduct complained of that the court had to look at but the conduct itself and the effect it had on the other members of the company. The provisions of the section were of wide import and constituted a flexible mechanism for the protection of a minority shareholder from oppressive or prejudicial conduct. The list of orders that a court could make was non-exhaustive and open-ended.

## Constitutional law

**Right to open justice:** In the *City of Cape Town v South African National Roads Authority and Others* 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA) the respondent, South African National Roads Authority (Sanral), was an organ of state tasked with the duty, among others, to design, construct, manage and maintain national roads country-wide. In the performance of its mandate Sanral sought to introduce electronic tolling on roads in Cape Town and accordingly awarded a tender to Protea Parkways Consortium (PPC) to do the tolling. The appellant, City of Cape Town (the City), which opposed the tolling, instituted proceedings in the WCC to have the tender reviewed and set aside. As negotiations relating to finalisation of the contract between



Sanral and PPC were still in progress and also because there was another tender relating to financing of the tolling system, Sanral applied for an interlocutory order preventing disclosure of certain documents to members of the public until it (Sanral) had filed its answering affidavit. The purpose was to prohibit members of the public, who were largely taking side with the appellant, from having access to the specified documents until Sanral's version, as contained in its answering affidavit, was also available. The basis of the sought prohibition was confidentiality and secrecy. The interlocutory application was dismissed with costs by Binns-Ward J. While the decision of the High Court was correct up to that stage, the court went further, erring in the process, and granted an order that Sanral was not interested in and did not ask for. The court held that r 53(1)(b) and r 62(7) the Uniform Rules of Court were subject to the English law 'implied undertaking rule', which had been accepted as part of South African law.

Applying the 'implied undertaking rule' the High Court held that no person would be permitted, unless authorised by Sanral or the court on application, to disseminate, publish or distribute any part of the administrative record (the alleged confidential part of the court file) before the hearing of the main review application. It was against that part of the judgment that the appeal was made and granted by the SCA with costs.

Ponnan JA (Saldulker, Zondi JJA, Van der Merwe and Gorven AJJA concurring) held that the 'implied undertaking rule' was not part of South African law. Moreover, it was inconsistent with the Constitution in a number of ways. The foundational constitutional values of accountability, responsiveness and openness applied to the functioning of the judiciary as much as to other branches of government. As a general rule litigants were prejudiced when their proceedings were not held in public. It would be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule, to be inaccessible and unpublished. The right to public courts did not belong only to the litigants in any given matter but also to the public at large. Open justice was required by s 32 of the Superior Courts Act 10 of 2013. Without openness the judiciary lost legitimacy and independence it required to perform its function. Accordingly, court proceedings should be open unless a court ordered otherwise. The right to open justice included the right to have access to papers and written arguments, which were an integral part of court proceedings. It was vital that the public be able to have access to court records prior to the hearing so that they could follow the proceedings in open court. Without prior access to the papers the proceedings would have less meaning for them.

## Costs

**Costs de bonis propriis.** In the matter of *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) the plaintiff (Lushaba) sued the defendant MEC for Health, Gauteng for damages suffered as a result of medical negligence on the part of staff of a provincial hospital. As a result of delayed caesarean section performed on her, her baby suffered severe brain damage. The court found in her favour and in the course of that judgment issued a rule nisi calling on certain persons to show cause why an adverse costs order (costs *de bonis propriis*) should not be made against them personally as a result of the way in which they conducted the case. While there were a number of ways in which the persons concerned were found not to have conducted litigation satisfactorily, by and large it was the decision to defend the action in the first case while there was no defence at all, which attitude the court found unacceptable.

Robinson AJ held that the defendant's attorney in the employ of the state attorney's office, one EM, a senior legal administrative officer

in the legal services section of the Department of Health, Gauteng, a certain JM and Dr C, a medical practitioner employed as a medico-legal adviser by the same department, had to pay 50% of the costs incurred on attorney and client scale *de bonis propriis*. The court further ordered that were the defendant to pay the costs, she was directed to recover 50% thereof from the named three persons.

It was held that costs *de bonis propriis* were not easily awarded but that would be done when there was negligence in a serious degree. They were awarded for conduct, which substantially and materially deviated from the standard expected of the legal practitioner, such that his clients could not be expected to bear the costs or because the court felt compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples of such conduct were dishonesty, obstruction

of the interests of justice, irresponsible and grossly negligent conduct, gross incompetence and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care. The authorities cautioned that costs orders *de bonis propriis* should only be awarded in exceptional circumstances. A legal adviser or legal representative was not to be punished with a costs order for every mistake or error of interpretation. However, there was a limit, which was crossed when one encountered the degree of indifference and incompetence, which was evident in the instant case where litigation was continued in circumstances where -

- there was no defence exhibited in the defendant's expert report;
- no defence was pleaded;
- no defence was advanced at the trial;
- the three persons concerned were unaware of any defence; and



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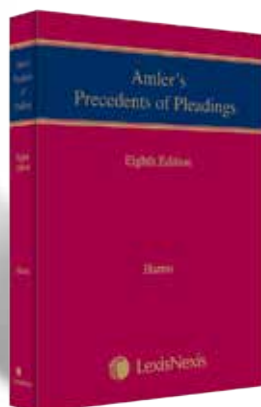
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- the three persons concerned were reckless as to the facts of the case.

## Divorce – assets in a family trust

**Whether assets in a discretionary family trust form part of joint estate (alter ego):** In *WT and Others v KT* 2015 (3) SA 574 (SCA) before his marriage to the respondent, KT, the appellant, WT, created a trust which bought property and registered it in its name. A few years later WT and KT married each other in community of property. When the marriage failed and the parties divorced in 2010, KT claimed that the property belonging to the trust was part of the joint estate as a result of which she was entitled to a 50% share thereof. The GJ per Lamont J held that the property of that discretionary family trust formed part of the joint estate. An appeal against that decision was upheld with costs by the SCA.

Mayat AJA (Lewis, Bosielo, Pillay and Mbha JJA concurring) held that WT and KT never owned the property of the trust in equal shares prior to the marriage, nor was it established on the probabilities that they ever concluded any agreement relating to the purchase of the property. Moreover, notwithstanding suggestions to the contrary, it was common cause that WT had procured the establishment of the trust as well as the purchase of the property prior to the marriage to KT, without the participation of KT and without any significant financial contribution from her. A court concerned with a marriage in community of property had no comparable discretion as envisaged in s 7(3) of the Divorce Act 70 of 1979 to order redistribution of property in the case of a marriage out of community of property, to include the assets of a third party (a trust in the instant case) in the joint estate. In any event s 12 of the Trust Property Control Act 57 of 1988 specifically recognised, as a matter of law, in this context that trust assets held by a trustee did not form part of the personal property of such trustee.

## Income tax

**Preservation order:** Section 163(1) of the Tax Administration Act 28 of 2011 provides among others that the South African Revenue Service (Sars) may make an *ex parte* application to the High Court for a preservation order prohibiting any person from 'alienating, encumbering, dissipating [or] dealing in any manner whatsoever that will cause a decrease in the value of all their assets, whether specified in the order or not.' Such order was granted at an interim stage in *Commissioner, South African Revenue Service v Tradex (Pty) and Others* 2015 (3) SA 596 (WCC) against the second respondent, Mrs Wiggett, and two companies, the first respondent, Tradex, and the third respondent, BWA, which companies were owned and controlled by her. That was after the financial affairs of the three respondents remained in disarray for a number of years during which no tax returns were filed or tax paid. It was the position of the applicant Sars that all three respondents owed large sums of money in unpaid income tax and value-added tax (VAT). The application for confirmation of the interim preservation order was dismissed with costs, subject to continuation of *caveats* that had been registered against some of the properties owned by the respondents in favour of the applicant.

Rogers J held that a preservation order could be made if it was required to secure the collection of tax, even if such tax was not currently due and payable. It was sufficient if it appeared that tax in a currently unquantified amount was likely to be due and payable. Preservation of assets was required to secure the collection of tax if it would confer a substantial advantage in the collection of the tax. It was only authorised in order to prevent any realisable assets from being disposed of or removed if the disposal or removal would frustrate the collection of tax.

The applicant was required to show that there was a material risk that such assets,



which would otherwise be available in satisfaction of tax would, in the absence of a preservation order, no longer be available. The question whether a preservation order was required and whether the court should exercise its discretion to grant one called for a consideration of the specific terms of the order sought by the applicant and could not be decided in the abstract. In the instant case a preservation order was not required to secure the collection of tax as it had not been shown that the respondents would deal with their assets in a manner adverse to the applicant such as by distributing dividends, paying unreasonable salaries or engaging in other suspicious transactions.

## Interest

**In duplum rule:** In the case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) in 2006 a certain company, Winskor, received a loan in the amount of R 12 million from the respondent, Slip Knot Investments. As trustees of a trust, which held shares in Winskor the appellants, Mr and Mrs Paulsen (the Paulsens), stood surety for the loan whose terms were that interest would run at the rate of 3% per month, which translated into 43% per annum. A year later the company defaulted on repayments. When legal proceedings were instituted against the appellant in 2010 the total amount sought was R 72 million, being the capital amount of R 12 million and R 60 million in interest. The WCC granted judgment against the appellants. An appeal to the full Bench achieved limited success in that interest was limited to R 12 million in terms of the *in duplum* rule. A further appeal to the SCA was dismissed with costs. The majority of the court held per Wallis JA that whereas the *in duplum* rule limited accumulation of interest to the extent of the capital amount, the R 12 million in the instant case, on the authority of *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA);

[1998] 1 All SA 413 (SCA) (the *Oneanate* case) once legal proceedings were instituted to recover a debt the *in duplum* rule was suspended with the result that interest started accumulating without limit. For that reason the SCA upheld the respondent's cross appeal, granting judgment in its favour in the amount of R 72 million, just as the High Court did. As a result the appellants applied for leave to appeal to the CC against the decision of the SCA.

The main judgment was read by Madlanga J (Jafta and Nkabinde JJ concurring) while the majority judgment, which was the concurring judgment, was read by Mosenke DCJ while Cameron J delivered a dissenting judgment. Madlanga J granted leave to appeal and ordered the appellants to pay the respondent –

- the capital amount of R 12 million;
- interest on the capital amount at the rate of 3% per month, up to a maximum of R 12 million (the *in duplum* rule); and
- interest on the judgment debt (consisting on R 12 million capital amount and R 12 million maximum accumulated interest) limited to a maximum on R 24 million.

The court held that the *in duplum* rule was a long-standing and well-established part of South African law, which provided that interest ceased to accrue once the total of unpaid interest equalled the amount of the outstanding capital. The overarching purpose of the rule was to protect debtors from being crushed by the never ending accumulation of interest on the outstanding debt. By suspending the application of the *in duplum* rule *pendente lite* the *Oneanate* case indiscriminately targeted all debtors regardless of whether they were defending the claim in good faith or not. To hit all debtors in that manner would definitely have an undesirable chilling effect. Some debtors, despite a genuinely held belief that they had a valid defence, could sooner opt to settle a claim than face the potentially financially ruinous interest that would again commence to

pile up once a court process was served. Therefore, the *Oneanate* case principle inhibited rather than promoted the right of access to courts as provided for in s 34 of the Constitution. To many consumers astronomical interest would mean the difference between economic survival and complete financial ruin. To allow for uncapped, and possibly exorbitant, interest to run *pendente lite* granted a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. Allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite*, created a risk of rendering the debtor's right of access to courts tenuous, if not illusory.

- See feature article 'Interested about the interest in debt? The *in duplum* rule revisited', as well as 2014 (Sept) DR 40.

## Local government – compliance with court order

**Mandamus obliging responsible functionaries to ensure that municipality comply with court orders:** In the *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* [2015] 2 All SA 251 (SCA) at the time of taking transfer of owner-

ship of property in the centre of Johannesburg by the 183rd respondent, Changing Tides (CT), the property was unlawfully occupied by poor and homeless people. CT wanted to renovate and upgrade the property and accordingly sought eviction of the unlawful occupiers. The eviction order was granted by the GJ per Claassen J. As part of the eviction order, the court ordered the appellant City of Johannesburg (the city) to provide suitable temporary accommodation to the occupiers. About a year later the city had still not provided the accommodation, citing lack of resources to do so. With the eviction date looming the occupiers approached the High Court for a *mandamus* requiring the city and its functionaries namely the executive mayor, municipal manager and the director of housing, to comply with the order and provide the required temporary accommodation. By agreement between the parties Lamont J granted an order requiring the city to provide that sought accommodation and report on progress made regarding the nature and location of that accommodation, as well as a list of occupiers who qualified for it. That order was also not complied with. Finally the matter came before Satchwell J who ordered the city and its functionaries to comply with

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the order regarding provision of temporary accommodation and also answer a very long list of questions relating to past, present and future arrangements of the city to deal with the provision of temporary accommodation in general to all persons who had been evicted and how that had been dealt with and was financed. An appeal against the order of Satchwell J was upheld by the SCA in relation to the duty to report on the long list of questions posed but dismissed with costs regarding the *mandamus* against the city and its functionaries to provide temporary accommodation.

Van der Merwe AJA (Brand, Maya, Willis JJA and Schoeman AJA concurring) held that while it was true that the functionaries were not cited in the initial application for the city to provide temporary accommodation, a party that initiated legal proceedings against a municipality could not be expected to act on the assumption that if the litigation was successful the municipality would not comply with the order against it. CT was under no obligation to cite the functionaries in the eviction application. Only when the city failed to comply with the order of Claassen J did the need arise to look to the functionaries, which was the purpose of the enforcement application before Lamont J. The decisive consideration was the principle of public accountability, a founding value of the Constitution, which was central to the constitutional culture. Constitutional accountability could be appropriately secured through a variety of orders that the courts were capable of making, including

a *mandamus*. Accordingly, the appeal against the *mandamus* had to fail.

## Rescission of judgment

**A non-party that is prejudicially affected by judgment may apply for its rescission:** The facts in *Mabuza v Nedbank Ltd and Another* 2015 (3) SA 369 (GP) were that the applicant, Mabuza, was the registered owner of immovable property. She received a loan from the second respondent, Brusson Finance (BF), the property serving as security. However, BF acted fraudulently by causing the applicant to sell and transfer the property to it instead of serving as security for the loan provided. Thereafter BF sold the property to Steyn in respect of which the financing bank, the first respondent Nedbank, registered a mortgage bond. When Steyn failed to repay the bond, the first respondent obtained default judgment against him and had the property declared executable. As a result the applicant approached the High Court for an order rescinding the default judgment, which order was granted with costs.

Mavundla J held that although the applicant was not a party to the default judgment she nevertheless had a direct and substantial interest in the matter by virtue of the fact that the immovable property concerned was initially registered in her name but was fraudulently transferred out of her name into the name of the second respondent. She nevertheless continued to occupy the property. If the default judgment were not rescinded, her right and title to the property,

as well as occupancy, would be prejudicially affected. Like any contract or order of court a transaction could be set aside on the ground that it was fraudulently obtained or obtained by mistake where the error was *justus*. In the instant case, the second respondent obtained ownership of the property from the applicant by fraudulent means, which justified rescission of default judgment granted to the first respondent.

## Unlawful competition

**Restrictive horizontal practice of dividing the market, substantial lessening of competition and retail price maintenance:** In the case of *Competition Commission v South African Breweries Ltd and Others* 2015 (3) SA 329 (CAC); [2014] 2 CPLR 339 (CAC) the first respondent, the South African Breweries (SAB), was the dominant firm in the clear-beer and other alcoholic beverages production market in the country, controlling some 80% - 90% share of the market. It distributed its products through wholly-owned depots, which accounted for some 90% of the market share while the remaining 10% was done through appointed distributors (ADs). The first respondent had 'exclusive distribution agreements' with ADs, each of which confined the activities of an AD to a specified area (territory). The appellant, Competition Commission, challenged the validity of the 'exclusive distribution agreements' on a number of grounds, alleging that they infringed the provisions of the Competition Act 89 of 1998 (the Act). The pre-

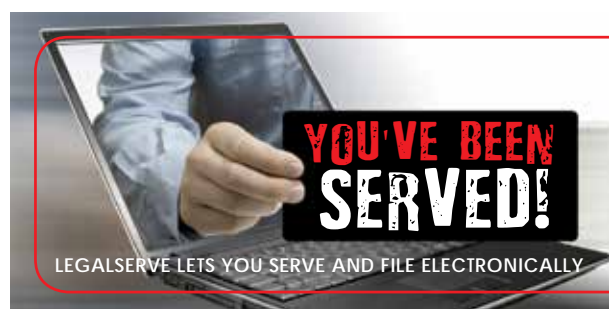
sent discussion will be confined to the challenges that the agreements -

- constituted restrictive horizontal practices;
- were a substantial lessening or prevention of competition; and
- amounted to the practice of retail price maintenance.

The Competition Tribunal found against the appellant on all complaints. As a result the appellant appealed to the Competition Appeal Court (CAC), which dismissed the appeal with costs. Davis JP and Rogers AJA (Molemela AJA concurring) held that the characterisation approach that was required in terms of the Act to determine if there was a prohibited restrictive horizontal practice related to the enquiry whether -

- the parties were in a horizontal relationship; and if so
- there was direct or indirect fixing of a purchase or selling price, division of markets or collusive tendering within the meaning of s 4(1)(b) of the Act.

The key characterisation question was whether an arrangement or agreement which possessed both vertical and horizontal elements stood to be examined under one or other or both of s 4(1)(b) or s 5 of the Act. The agreements in this case were entered into between the first respondent and the ADs. The core relationship between the ADs and the first respondent remained to be described as of a vertical nature that was between a producer of a product and distributors thereof, which was also its true economic nature. Therefore, once the characterisation principle was applied, there could not have been a restrictive horizontal practice.



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Section 5(1) expressly referred to the effect of substantially lessening or preventing competition in a market. Therefore, some likely effect on price, output and/or quality of product, which diminished consumer welfare had to be shown to exist in order to trigger the application of the section. In the instant case the evidence did not support the case of a significant lessening or prevention of competition as a result of an exclusive territorial system of distribution.

The essence of the practice

of retail price maintenance was the imposition by the supplier on its distributors of a price at which goods were to be resold with the minimum price on pain of a sanction for non-compliance. The elements of imposition and inducement entailed some conduct by the supplier directed at ensuring compliance with the minimum price. In the instant case the contracts between the first respondent and the ADs were quite explicit in allowing the latter to charge prices below the listed prices. Moreover,

there was no enforcement of compliance therewith by way of sanction.

### Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with admissibility of pointing out, business rescue, commencement of extinctive prescription, enforcement of consumer credit agreement, enforcement of order of lower court, expert opinion evidence, lawfulness of levying of electrical service charge

by landlord, liability for omission, liability of auditor, meeting of creditors of a university which is in liquidation, prescription of a claim against attorney, reinstatement of a consumer credit agreement, reinstatement of registration of a company, review of executive action, termination of consumer credit agreement, validity of Islamic marriage and validity of procurement agreement concluded without ministerial approval.



## NEW LEGISLATION



# NEW LEGISLATION

Legislation published from  
1 – 30 June 2015

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### BILLS INTRODUCED

Eskom Subordinated Loan Special Appropriation Amendment Bill B17 of 2015.

Eskom Special Appropriation Bill B16 of 2015.

Rates and Monetary Amounts and Amendment of Revenue Laws Bill B15 of 2015.

### PROMULGATION OF ACTS

**Banks Amendment Act 3 of 2015.** *Commencement:* 29 June 2015. GN 561 GG38942/29-6-2015.

### SELECTED LIST OF DELEGATED LEGISLATION

#### Agricultural Product Standards Act 119 of 1990

Amendment of the standards and requirements regarding control of the export of plums and prunes. GenN501 GG38844/5-6-2015.

Fixing of inspections fees for potatoes. GN458 GG38844/5-6-2015.

#### Architectural Profession Act 44 of 2000

Framework for professional fees guideline and professional fees guideline. BN121 and BN122 GG38863/12-6-2015.

#### Auditing Profession Act 26 of 2005

Inspection fees payable to the Independent Regulatory Board for Auditors. BN119 GG38863/12-6-2015.

#### Deeds Registration Act 47 of 1937

Amendment of regulations. GN R547 GG38922/30-6-2015.

#### Employment Equity Act 55 of 1998

Code of good practice on equal pay/remuneration for work of equal value. GN448 GG38837/1-6-2015.

#### Financial Intelligence Centre Act 38 of 2001

Exemption in terms of the Act. GN461 GG38844/5-6-2015.

#### Income Tax Act 58 of 1962

Agreement between South Africa and Belize for the exchange of information relating to tax matters. GN449 GG38839/5-6-2015.

Agreement between South Africa and Mauritius for avoidance of double taxations and prevention of fiscal evasion with respect to taxes on income. GN471 GG38862/17-6-2015.

#### Labour Relations Act 66 of 1995

Amendment of rules for the conduct of the proceedings before the Commission for Conciliation, Mediation and Arbitration. GenN498 GG38843/3-6-2015.



**Merchant Shipping Act 57 of 1951**

Merchant Shipping (Safe Manning, Training and Certification) Amendment Regulations, 2015. GN R544 GG38912/25-6-2015. Merchant Shipping (Eyesight and Medical Examination) Amendment Regulations, 2015. GN R543 GG25-6-2015.

**Mineral and Petroleum Resources Development Act 28 of 2002**

Regulations for petroleum exploration and production. GN R466 GG38855/3-6-2015.

**National Environmental Management: Air Quality Act 39 of 2004**

Amendment to the list of activities which result in atmospheric emission which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions ecological conditions or cultural heritage. GenN551 GG38863/12-6-2015.

**National Regulator for Compulsory Specifications Act 5 of 2008**

Amendment of compulsory specification for small arms shooting ranges – VC9088. GN518 GG38877/19-6-2015.

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

Conditions for payment of e-tolls (Gauteng Freeway Improvement Project). GN524 and GN525 GG38884/17-6-2015. Publication of tolls. GN524 GG38884/17-6-2015.

**National Railway Safety Regulator Act 16 of 2002**

Determination of safety permit fees. GenN663 GG38930/30-6-2015.

National Railway Safety Permit Regulations, 2015. GN R549 GG38929/30-6-2015.

**Occupational Health and Safety Act 85 of 1993**

Incorporation of safety standards. GN R528 GG38887/19-6-2015, GN R542 GG38905/24-6-2015.

Driven Machine Regulations, 2015. GN R527 GG38887/19-6-2015 and GN R540 GG38905/24-6-2015.

**Rules Board for Courts of Law Act 107 of 1985**

Amendment of rules regulating the conduct of proceedings of the Magistrates' Courts of South Africa (Rule 1(4) and Annexure 1). GN R545 GG38914/30-6-2015.

**Sectional Titles Act 95 of 1986**

Amendment of regulations. GN R548 GG38923/30-6-2015.

**Small Claims Courts Act 61 of 1984**

Establishment of a small claims court for the area of Sterkstroom. GN468 GG38856/3-6-2015.

Establishment of a small claims court for the area of Tiyani. GN467 GG38856/3-6-2015.

Establishment of a small claims court for the area of Barkly East. GN523 GG38883/17-6-2015.

Establishment of a small claims court for the area of Flagstaff. GN522 GG38883/17-6-2015.

Establishment of a small claims court for the area of Kakamas. GN521 GG38883/17-6-2015.

**DRAFT LEGISLATION**

Second publication of draft regulations under ss 5(1) and 107(2) of the Financial Markets Act 19 of 2012. GN R457 GG38845/5-6-2015.

Draft biodiversity management plan for 11 critically endangered (CR) and four endangered (EN) Encephalartos species in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN503 GG38844/5-6-2015.

Revised draft code of good practice on the employment of persons with disabilities in terms of the Employment Equity Act 55 of 1998. GenN581 GG38872/12-6-2015.

Draft regulations prescribing the atmospheric emission licence processing fee in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN550 GG38863/12-6-2015.

Regulations relating to a transparent pricing system for medicines and schedule substances (draft dispensing fee for pharmacists) in terms of the Medicines and Related Substances Act 101 of 1965. GN R511 GG38876/15-6-2015.

Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comments. GN R520 GG38882/15-6-2015.

Draft Refugees Amendment Bill, 2015. GenN591 GG38893/19-6-2015.

Draft South African Television Content Regulations in terms of the Independent Communications Authority of South Africa Act 13 of 2000. GN532 GG38890/18-6-2015.

Draft South African Music Content Regulations in terms of the Independent Communications Authority of South Africa Act 13 of 2000. GN531 GG38890/18-6-2015.

Draft Regulations on review of limitations of fees and interest rates in terms of the National Credit Act 34 of 2005. GenN655 GG38911/25-6-2015.

Draft Codes of Good Practice on Broad Based Black Economic Empowerment for the Tourism Industry in terms of the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013. GenN657 GG38915/30-6-2015.

Draft amendment regulations in terms of the Electronic Communications Act 36 of 2005: Processes and procedures for individual licences. GenN662 GG38921/26-6-2015.

Draft amendment regulations in terms of the Electronic Communications Act 36 of 2005: Processes and procedures for class licences. GenN658 GG38917/26-6-2015.

Draft amendment regulations in terms of the Electronic Communications Act 36 of 2005: Standard terms and conditions for class licences. GenN661 GG38920/26-6-2015.

Draft amendment regulations in terms of the Electronic Communications Act 36 of 2005: Standard terms and conditions for individual licences. GenN659 GG38918/26-6-2015.

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By  
Nomfundo  
Manyathi-  
Jele

# Referral rule of Attorneys Act not unconstitutional

*Noordien v Cape Bar Council and Others* (WCC)  
(unreported case no 9864/2013, 13-1-2015) (Schippers J)

**S**chippers J gave judgment dismissing Abubaker Noordien's application for leave to appeal to a full Bench of the Western Cape division of the High Court, or the Supreme Court of Appeal (SCA) against a judgment handed down by the Cape High Court on 13 January 2015.

In that order the court dismissed, with costs, the application for declaratory orders that the referral rule and s 83(1) and 83(3) of the Attorneys Act 53 of 1979 are unconstitutional.

## Background

The respondents to this matter were the Cape Bar Council; General Council of the Bar; Cape Law Society; Law Society of South Africa (LSSA); Minister of Justice and Constitutional Development and the Independent Association of Advocates of South Africa. According to the January judgment, the applicant is a former independent advocate. He was struck from the roll of advocates by the Cape High Court on 30 August 2013. The court found that he –

- is not a fit and proper person to practise as an advocate because he lacks the necessary qualities of honesty and integrity;
- had admitted that he was guilty of serious misconduct, more specifically, dishonesty, perjury and lying to a magistrate; and
- had deliberately taken steps to circumvent the referral rule, which is an offence under s 9(2) of the Admission of Advocates Act 74 of 1964.

In the notice of motion the applicant, who appeared in person, sought 27 declaratory orders, which include orders declaring that –

- all legal practitioners are equal before the law;
- direct and indirect discrimination is prohibited;
- the principle of legality, the interests of justice and the rule of law apply in this case;
- the Constitution is the supreme law;
- all public power is subject to the rule of law; and
- the Constitutional Court 'is charged with determining the boundaries when interpreting an Act of Parliament'.

## The court process and striking off applications

In essence, the applicant sought an order in the following terms declaring that –

- the court process in striking off applications is unconstitutional;
- the referral rule is unconstitutional on the grounds that it is overbroad, discriminatory and uncompetitive;
- s 83(1) and 83(8) of the Attorneys Act are unconstitutional on the basis that these provisions are unfairly discriminatory, and infringe the rights to dignity, freedom of trade, occupation and profession, and access to court.

In the January judgment Schippers J found that the founding affidavit made no mention about the respects in which the process in striking off applications is unconstitutional. He also found that the provisions of the Constitution, which that process allegedly violates, were also not identified and the respondents had to guess what features of the striking off process are allegedly unconstitutional and then speculate about which provisions of the Constitution might be implicated.

'In addition, if the process followed in striking off applications limits any right under the Constitution, such limitation may be justifiable under s 36. The respondents would then be entitled to place facts before the court to show that the limitation is justified. However, they cannot do so because the applicant has laid no foundation in his papers for the challenge that the striking off process is unconstitutional,' Schippers J stated in the judgment adding that 'in short, there is no basis, factual or otherwise, for this challenge'.

The court held that it was clear from the applicant's papers that his real complaint was that he should not have been struck off the roll. Schippers J added that the applicant had thus not made out a case to challenge the constitutionality of the process followed in a striking off application and the relief claimed on this ground must fail.

'Aside from this, it is clear both from the papers in this case, and the judgment in the striking off application, that the applicant's right to just administrative action under s 33 of the Constitution

and the provisions of the Promotion of Administrative Justice Act 3 of 2000, as well as his right of access to court under s 34 of the Constitution, were not threatened at all, let alone infringed,' the judgment reads.

## The referral rule

In his January judgment, Schippers J stated that the Appellate Division and the SCA have held that the referral rule – that advocates may not take instructions directly from lay clients and can do so only with the intervention of an attorney – is fundamental to the advocates' profession. He explained that the applicant admitted that he accepted R 1 500 directly from a member of the public to reinstate her son's bail, without a brief from an attorney. 'In the founding affidavit he challenges members of the Bar to render this service in the regional court for R 1 500 and says that it is worth at least R 10 000. Despite his acknowledgment that the sum of R 1 500 was a fee, he states, "I can never accept that the above R 1 500 can be seen as fees but rather, [an] affordable donation for the good deed that was agreed to by myself,"' Schippers J stated.

According to Schippers J, the applicant said that the member of the Cape Bar who investigated the complaint against him, 'had his own agenda' and that he 'orchestrated and concocted' the allegations in the complainant's affidavit, to justify the applicant's removal from the roll of advocates. Schippers J added that the applicant said that the first respondent, 'is using and abusing the referral rule to get rid of its competition and not really to help the public.' With reference to *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA), 'the applicant submits that the rule is overbroad because there are less invasive means to protect public money. He contends that the referral rule is not in the public interest because it deprives the underprivileged and previously disadvantaged citizens of direct access to the services of an advocate,' Schippers J stated.

The court held that the purpose of the referral rule is to protect members of the public because advocates do not hold trust accounts. He added that it does so



effectively and that it is not designed or implemented in order to deny disadvantaged citizens access to advocates or to courts. 'Moreover, the referral rule applies regardless of whether the advocate is a member of an established Bar or the independent Bar,' he states.

Schippers J said there were no facts to support the applicant's claim that the first respondent had invoked the referral rule in order to eliminate competition, and 'not really to help the public.' 'On the contrary, in the applicant's case the rule was applied precisely to protect the public. The applicant informed the court in his striking off application that his *modus operandi* was this: He took money directly from members of the public (who were obviously unprotected because the applicant had no trust banking account). He then paid an attorney part of the money in order for the latter to pretend that he was the instructing attorney. In the case of both the complainants the attorney had not even met any of them. The attorney furnished an affidavit to the first respondent confirming that he did not instruct the applicant,' the judgment states.

## Section 83 of the Attorneys Act

Schippers J held that s 83(1) of the Attorneys Act provides that no person other than a practitioner (defined as an attorney, notary or conveyancer) shall practise or hold himself out as a practitioner or perform any act, which he is prohibited from performing in terms of any regulations made under s 81(1)(g). He added that s 83(8) makes it an offence for a person other than a practising practitioner to draw up certain documents such as agreements relating to immovable property and the dissolution of a partnership, wills, memoranda and articles of association of a company, and documents relating to proceedings in a civil court.

Schippers J further held: 'It is difficult to determine from the founding affidavit upon what facts the applicant relies for the attack on s 83 of the Attorneys Act. He says that in criminal cases there is no need for two practitioners; that a divided Bar is not necessary to maintain the high standards in the legal services

market; and that s 83(1) and (8) of the Attorneys Act is unconstitutional "*because it discriminates against advocates and reserves jobs for attorneys*," as an advocate is not included in the definition of "*practitioner*" in the Attorneys Act. It thus appears that the basis of the challenge to the impugned provisions of the Attorneys Act is that they uphold the referral rule and prevent the applicant from doing certain work which attorneys may do.'

The third and fourth respondents accepted that there was differentiation between advocates and attorneys, adding that there is a rational basis for the differentiation – the need to regulate the legal profession and to protect the public.

'The need to regulate advocates and attorneys is self-evident. Each group has its professional bodies which –

- determine the rules by which members must conduct their practices;
- take action to ensure that members adhere to the rules;
- scrutinise and where appropriate, take action regarding applications for membership of the profession; and
- generally see to the interests of members and the profession.

'Broadly speaking, the advocate is a specialist in forensic skills and giving expert advice on legal matters and does not accept work directly from the client. The advocate has no direct financial dealings with the client and may not practise in partnership with another advocate. The attorney has more general skills and is often qualified in conveyancing and notarial practice, has direct links with the client, is allowed to practise in partnership and is responsible to keep trust funds,' Schippers J stated.

In his answering affidavit former LSSA Co-chairperson, David Bekker, made on behalf of the third and fourth respondents, he stated that services rendered by advocates and attorneys are fundamentally different. 'For example, advocates play no role at all in the following areas of law which are crucial to the economy: property transfers; negotiation and conclusion of commercial agreements; ... and the establishment of intellectual property rights,' Schippers J said.

'[Mr] Bekker states that the organised attorneys' profession unequivocally sup-

ports the retention of a divided Bar and the referral rule, not for historical reasons but because experience has shown that the division has a number of important benefits to the public. These include the emergence and development of a body of courtroom specialists in forensic skills, providing members of the public with expert advice across all areas of the law, promoting competition by providing access to such advice other than by establishing large firms, maintaining long-standing relationships with lay clients and ensuring the independence of the Bar,' Schippers J noted.

The first, second, third and fourth respondents opposed the leave to appeal application. The fifth respondent said it would abide by the decision of the court and the sixth respondent was not represented neither did it file any papers in the main application.

Schippers J said s 17(1) of the Superior Courts Act 10 of 2013 states that leave to appeal may be granted only, *inter alia*, where the court is of the opinion that the appeal has a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.

According to the court, the grounds of appeal are basically that the court erred in –

- dismissing the applicant's challenge that the referral rule is unconstitutional;
- in finding that the attack on the impugned provisions of the Attorneys Act is unfounded; and
- in holding that these constitutional challenges have become academic with the promulgation of the Legal Practice Act 28 of 2014.

'In my opinion an appeal has no reasonable prospect of success; neither is there any compelling reason why an appeal should be heard', he said.

The leave to appeal was refused and the applicant was ordered to pay the costs of the second, third and fourth respondents on the attorney and client scales, including costs of two council where so employed.

Nomfundo Manyathi-Jele NDip Journ (DUT) BTech Journ (TUT) is the news editor at De Rebus.



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# Companies – in what circumstances will they be required to furnish security for costs?

By Ian Chadwick

*Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd*  
(SCA) (unreported case no 20156/2014, 1-6-2015)  
(Ponnan and Mbha JJA)

Prior to the advent of the Companies Act 71 of 2008, a defendant, confronted with a claim brought by a company of dubious financial standing, was able to invoke the provisions of s 13 of the previous Companies Act 61 of 1973 and bring an application requesting the court to order provision for the security for the costs of the pending action. Section 13 stated: 'Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given'.

There is no similar provision for security for costs in the 2008 Act. The common law position, since 1828 when *Witham v Venables* (1828) 1 Menzies 291 was decided, is that an *incola* plaintiff cannot be compelled to give security, whether rich or poor, solvent or insolvent. The position changed later when it was held that if the court was satisfied that an action was reckless or vexatious, and in order to prevent abuse of process, the court has a discretion to require the plaintiff to provide security for costs. See, *inter alia*, *Ecker v Dean* 1938 AD 102 at 110. In *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* 2007 (6) SA 620 (SCA) the court summarised the distinction to be drawn between the common law and the law which prevailed in terms

of s 13. The court observed that under the common law (the reckless and vexatious requirement) the court would only order security 'sparingly' and 'only in very exceptional circumstances'.

However, the Supreme Court Act (SCA) noted in the recent case of *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd* (SCA) (unreported case no 20156/2014, 1-6-2015) (Ponnan and Mbha JJA) that in the case of *Mears v Pretoria Estate and Market Co Ltd* 1907 TS 951 at 956 Innes CJ had stated with regard to such applications that 'this is a question of practice, which this court is justified in setting for itself'. The SCA further noted that in the case of *Lombard v Lombardy Hotel Co. Ltd (In Liquidation)* 1911 TS 866 the court, when referring to the above statement in *Mears*, stated at 877: 'And if that be so, there can be no doubt as to what the practice should be. Where a company is in liquidation it is sufficient ground for ordering security to be given; and when the company has everything to gain and nothing to lose, as in the present case, it would be putting a premium upon vexatious and speculative actions if such practice were not adopted'.

Prior to the decision in the *South African Breweries* case there were, as the court in this case noted, several decisions of the high court which are 'discordant'. The court referred, *inter alia*, to *Haitas and Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (GSJ) and *Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd* (unreported case number 2011/31664, 14-12-2011) (GSJ). The *Haitas* decision adopted what may

be regarded as a liberal interpretation of the common law; and the *Ngwenda Gold* case the contrary. In the *South African Breweries* case the SCA appears to have preferred the liberal approach.

In the last mentioned case the court, while noting that absent s 13 there can no longer be any legitimate basis for differentiating between an *incola* company and an *incola* natural person, went on to hold after reviewing various authorities that where the facts of the case indicate that the action is frivolous and vexatious the court should not hesitate to order security for the respondent's costs if satisfied that the shareholders of the company are funding the litigation in a manner that allows them to hide behind the corporate veil of the company. The court remarked further that in deciding whether the action is frivolous and vexatious it is not necessary to undertake a detailed investigation of the merits of the case. The court accordingly upheld the court a *quo's* finding that the plaintiff be ordered to provide security for the defendant's costs.

The *South African Breweries* case will no doubt be of assistance to practitioners in providing advice to their clients who may be sued by a company as to the prospect or otherwise of obtaining an order for security for costs and serves to clarify the uncertainty which has hitherto prevailed on this question.

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# Employment law update



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



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## Employees vs independent contractors

In *Phaka and Others v Bracks and Others* [2015] 5 BLLR 514 (LAC), the Labour Appeal Court (LAC) considered whether the nature of the relationship between the alleged employer, UTI, and certain 'owner-drivers' was that of employment or an independent contractor arrangement. In this case, UTI had implemented an empowerment scheme about 30 years ago in terms of which certain individuals resigned from their employment with UTI and rendered courier services to UTI in terms of an independent contractor arrangement. UTI had initially provided financial assistance to the individuals to enable them to purchase a vehicle with which to render the services. Over time, some of the individuals acquired more vehicles and engaged other drivers to assist with rendering the services. The owner-drivers then challenged the empowerment scheme and referred an unfair dismissal claim to the National Bargaining Council for the Road Freight Industry. The arbitrator found that the bargaining council did not have jurisdiction to determine the dispute as the owner-drivers were not employees. This ruling was upheld by the Labour Court on review.

The matter was then taken on appeal to the LAC. In determining whether or not the owner-drivers were employees, the LAC (per Murphy AJA, Waglay JP and Setiloane AJA) considered the following factors, which were indicative of an independent contractor relationship –

- the contract between UTI and the owner-drivers expressly provided that it was not an employment relationship;
- the individuals acquired their own vehicles to render the services (albeit with financial assistance from UTI);
- the individuals were not paid a salary but were paid on presentation of invoices, which were subject to VAT; and

- the individuals were entitled to engage their own employees to assist in rendering the services.

On the other hand, the individuals were required to wear uniforms provided by UTI and to work specified hours as determined by UTI. Furthermore, the individuals were under the supervision and instructions of UTI and in many instances reported to the same managers that they had reported to when they were employees of UTI. However, what was found to be more important than the element of supervision and control in determining whether or not there was an employment relationship was the terms and conditions that the parties contractually agreed to.

In this regard, Murphy AJA concluded that regard had to be had to the terms of the contract, which expressly provided that it was an independent contractor relationship and thus the intention of the parties was for there not to be an employment relationship. He found that the level of control in relation to the routes, hours of performance, vehicle maintenance and branding were essential requirements to the nature of the services being performed and that these limitations on the owner-drivers' control should not change the relationship to that of employment. It is important to note that UTI also deducted PAYE from the 'owner-drivers' which is usually a factor indicative of an employment relationship. However, this was not considered as a factor indicative of an employment relationship as it was found to be an obligation imposed by income tax legislation.

## Insubordination and insolence

In the case of *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* [2015] 5

BLLR 484 (LAC), an employee was dismissed for gross insubordination and poor work performance following an altercation that she had with the managing director after over R 6,000 was deducted from her salary in respect of unauthorised calls. The employee referred an unfair dismissal to the Commission of Conciliation, Mediation and Arbitration, which upheld the dismissal. On review, the Labour Court (LC) set aside the award after finding that the employee had been guilty of insolence and not gross insubordination and that the sanction of dismissal was accordingly too harsh. The LC referred to *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) in which insolence had been found to be offensive, disrespectful, cheeky and rude conduct while insubordination amounts to resistance or defiance of authority, disobedience and refusal to obey an order. In this regard, the LC found that while it is probable that the employee was confrontational and disrespectful, this did not amount to insubordination as the employee was not given an order to desist from her behaviour. Furthermore, her conduct was provoked by the employer unlawfully deducting amounts from her salary without giving her an opportunity to be heard and make representations. The LC found that more weight should have been placed on the employer's conduct and it consequently granted compensation equal to ten months' remuneration.

The Labour Appeal Court (LAC) (per Kathree-Setiloane AJA, Musi JA and Murphy AJA) held that the LC had incorrectly found that in order to be guilty of insubordination there must be a refusal to obey an instruction. It was held that there is a fine line between insolence and insubordination and that insolence can become insubordination if there is a challenge to the employer's authority. The employer alleged that the employee had accused the Managing Director (MD) of being 'unprofessional' and 'not an MD'. However, the employee denied this and the only person to give evidence to this effect was the MD himself. The LAC found that the commissioner had erred in not rejecting the MD's testimony in this regard.

After considering the surrounding circumstances of the employee's conduct, the LAC concluded that the employee had not been acting defiantly as she had been trying to discuss the deduction from her salary and there had not been a persistent deliberate challenge to her employer's authority. It was held



that whether an employer is guilty of insubordination depends on the following factors –

- the wilfulness of the defiance;
- the reasonableness of the orders defied; and
- the actions of the employer prior to the alleged act of insubordination.

The LAC held that acts of insolence and insubordination do not justify dis-

missal unless they are serious and wilful. In addition, provocation by an employer prior to the act of insubordination or insolence may be a mitigating factor when determining the seriousness of the offence and in such circumstances dismissal may be too harsh a sanction. It was concluded that the commissioner erred in finding the employee guilty of gross insubordination. The LAC conclud-

ed that the conduct was not serious or wilful and thus the sanction of dismissal was too harsh in the circumstances regardless of whether the conduct amounted to insolence or insubordination and a warning would have sufficed.

The court did not interfere with the compensation which the LC awarded to the first respondent, namely ten months' compensation.



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

## Affordability of disciplinary procedure Question:

The employer is a sole proprietor with only one employee. This employee commits a serious offence. The employee, however, emphatically denies the complaint. The employer wishes to dismiss the employee and wants to continue with the required disciplinary procedures or by means of a formal disciplinary hearing.

The employer, however, does not have the financial means to appoint an attorney or labour consultant to attend to the disciplinary process or inquiry/hearing, neither can the employer find any person (whether family or friend) to act (or who is willing to act) as an independent chairperson or person to facilitate the process.

What does the employer stand to do in a matter of this nature, and especially taking into consideration the under mentioned:

- The rules of natural justice requires 'the other party must be given an opportunity to be heard', which is also applicable to disciplinary procedures.
- The rules of natural justice are, however, two folded, and also includes that no person may be 'the judge in his or her own case'.
- The chair must be independent and impartial (not bias).

How does one then conduct and go about in avoiding to be and/or act as judge, jury and executioner during such a disciplinary process or hearing (thus conducting the role of both 'prosecutor and judge' during the disciplinary process or hearing)?

## Answer:

In my experience many attorneys, as well as officials from both employer organisations and trade unions, hold the view that procedural fairness can only be achieved when the internal disciplinary hearing mimics court proceedings. This view is incorrect.

To elaborate; sch 4(1) of the Code of Good Practice: Dismissals, which speaks to pre-dismissal procedural requirements, is instructive to the question and reads:

'Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'

While the Code is considered a guideline, s 188(2) of the Labour Relations Act 66 of 1995 (LRA) places an obligation on any person who is adjudicating the procedural fairness of a dismissal to 'take into account any relevant code of good practice issued' under the LRA.

In addition to sch 4 the explanatory memorandum, which accompanied the draft Labour Relations Act stated the following with regard to pre-dismissal procedures:

'The draft Bill requires a fair, but brief, pre-dismissal procedure ... . [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.'

Both sch 4(1) and the memorandum were discussed in *Avril Elizabeth Home for the Mentally Handicapped v The Commission for Conciliation, Mediation*

*and Arbitration & Others* (2006) 27 ILJ 1644 (LC).

Van Niekerk AJ, as he then was, having regard to sch 4(1) held:

'It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the "criminal justice" model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. ...

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. ...

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. ... The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.'

Referring to the aforementioned memorandum the court held:

'On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex "charge-sheets", requests for particulars, the application of the rules of evidence, legal arguments, and the like.'

Following this approach the Supreme Court of Appeal in *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) held:

'The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal.'

Against this background and returning to the question, my advice would be that



the employer inform the employee of the allegations that needs to be discussed, inform the employee of the date on which these discussions will take place (rule of thumb is that 48 hours' notice be given to the employee to prepare for the discussions unless this would be unreasonable), on the day the employer discusses with the employee the evidence he or she has, which supports the conclusion that the employee is guilty of the allegations put to the employee. Once the employer does so, the employee would be given an opportunity to defend his or her action. Should the employee want to bring in witnesses who can attest to the employee's version then the employer should allow this.

Thereafter, the employer must make

a decision as to whether the employee is guilty of the misconduct and if so, to determine an appropriate sanction and inform the employee of same.

The only rule of natural justice applicable to pre-dismissal processes, is the *audi alteram partem* – the opportunity to be heard; that is in essence what an arbitrator focusses on in deciding whether a dismissal is procedurally fair.

I do wish to state that the above process would only be acceptable in the absence of an agreement, be it in terms of an employment contract or collective agreement, which prescribes a different procedure to be followed. In the public sector there is a collective agreement, which prescribes the procedure that needs to be followed when instituting

disciplinary action against senior managers. This process sets out certain time frames for when a disciplinary hearing should take place in relation to when the employee was charged, it allows for both employee and employer to be represented by an attorney or advocate and stipulates that the chairperson be an independent person. Failure to follow this process could well lead in any subsequent dismissal being declared procedurally unfair.

Do you have a labour law-related question that you would like answered?

Send your question to  
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By  
Warren  
Sundström

## CCMA conciliation a pre-requisite for adjudication in the Labour Court

*Pillay v Automa Multi Styrene (Pty) Ltd (LC)*  
(unreported case number JS 1658/14, 9-6-2015) (Mosime AJ)

Having been dismissed from his workplace the applicant referred an unfair dismissal dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA) in which he claimed that he was victimised because of information he had discovered, which he believed amounted to fraud. Before the matter was set down for conciliation the applicant approached the Labour Court (LC) and filed a statement of case claiming that his dismissal was automatically unfair and based on racial discrimination, white nepotism and sexual harassment. The dispute was conciliated at the CCMA and categorised as a dispute envisaged in terms of s 187 of the Labour Relations Act 66 of 1995 (LRA) – victimisation on the basis of a protected disclosure. The matter was certified as unresolved and the certificate issued by the commissioner indicated that the matter may be referred to the LC for adjudication. It was common cause that at the time the conciliation hearing took place the applicant had already lodged a statement of case at the LC, which was based on the same cause of action.

On becoming aware of this, the respondent applied for the applicant's statement of claim to be dismissed on the basis that it was premature and the applicant did not have the necessary authority to refer the matter to the LC at the time which he did. The respondent contended that in terms of s 191 of the LRA the applicant was obliged to first refer the matter to the CCMA and only once a certificate of outcome had been issued or a period of 30 days had elapsed since

the date of his referral to the CCMA, could the applicant have approached the LC. The respondent contended that these requirements were peremptory in every scenario involving a dismissal dispute and as such the applicant had not followed the correct procedure and his application was, therefore, irregular and the LC lacked jurisdiction to hear the matter. In addition the respondent relied on s 157(4)(a) and (b) of the LRA, which sets out that the labour court may refuse to determine any dispute, other than an appeal or review, if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

In determining the present matter, the court considered and followed the decision of the Labour Appeal Court in *Intervale (Pty) Ltd and Another v National Union of Metalworkers of South Africa obo Members* (2014) 35 ILJ 3048 (LAC), which held that the LC does not have jurisdiction to entertain a dispute in circumstances where such dispute was not first referred to conciliation. In *Intervale* the court held that '... the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication', and in the absence of conciliation a litigant is not entitled to refer a dismissal dispute to the LC. It is significant to note that National Union of Metalworkers of South Africa (NUMSA) lost on appeal and challenged this aspect at the Constitutional Court, but were unsuccessful.

In the present case the applicant attempted to refer a dispute to the LC

without exhausting the conciliation process or allowing a 30 day period from the date he referred the matter to the CCMA to elapse. The court held that the applicant had not fulfilled the prerequisite conditions required in s 191(5) of the LRA and as such he had not required the competence to refer the matter to the LC at the time which he did. The court held that even if the applicant's statement of case at the LC was deemed to be a separate dispute to the one he had referred to the CCMA, the applicant would still have had to refer the matter to the CCMA and attempt to resolve the dispute through conciliation, or to allow a 30 day period to elapse, before the LC could entertain his dispute. The court therefore found that the applicant's statement of case was premature and lacked competence and should be dismissed. The court further found that the respondent had acted reasonably by advising the applicant of his defects and allowing him an opportunity to withdraw his statement of case before applying for it to be dismissed. The applicant, however, was found to have acted unreasonably and prejudicially in refusing to withdraw his application and persisting with the matter, and as such costs were awarded against the applicant.

• McLaren's Attorneys appeared for the respondent in the above matter

Warren Sundström BA LLB (Unisa) is an attorney at McLaren's Attorneys in Johannesburg.





By  
Meryl  
Federl

# Recent articles and research

## List of journals indexed in this issue of *De Rebus*

**Obiter:** *Obiter* (2015) 36.1 (Faculty of Law – Nelson Mandela Metropolitan university)

**SAJHR:** *South African Journal Human Rights* (2015) vol 31.1 (Juta)

**SALJ:** *South African Law Journal* (2015) vol 132.2 (Juta)

**SLR:** *Stellenbosch Law Review* (2015) vol 26.1 (Juta)

## Access to justice

**Dugard, J** 'Closing the doors of justice: An examination of the Constitutional Court's approach to direct access, 1995 – 2013: Political rights since 1994' (2015) 31.1 *SAJHR* 112.

## Administrative law

**Govender, K** 'Malfeasance, administrative justice and the right of access to health-care services: An assessment of *MEC for Health v Kirkland Investment (Pty) Ltd* 2014 (5) BCLR 547 (CC)' (2015) 36.1 *Obiter* 178.

**Hoexter, C** 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132.2 *SALJ* 207.

## Constitutional Court

**Magaya, I, Cooke, M, Macchelli, P and Chamberlain, L** 'Constitutional Court statistics for the 2010 term' (2015) 31.1 *SAJHR* 205.

**Viljoen, J, Magaya, I, Ongeso, JP, Ndebele, C, Grant Tungay, SJ, Samaradiwakera-Wijesundara, C, Cooke, M and Chamberlain, L** 'Constitutional Court statistics for the 2011 term' (2015) 31.1 *SAJHR* 219.

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**Van Staden, M** 'The case of the Speluncan Explorers in the South African Constitutional Court' (2015) 36.1 *Obiter* 1.

## Child law

**Karels, M and Pienaar, L** 'Determination of criminal capacity for child offenders – interfacing the procedural requirements of the Child Justice and Criminal Procedure Act' (2015) 36.1 *Obiter* 57.

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**Naude, T and Koep, C** 'Factors relevant to the assessment of the unfairness or unreasonableness of contract terms: Some guidance from the German law on standard contract terms' (2015) 26.1 *SLR* 85.

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**Kelly-Louw, M** 'The overcomplicated interpretation of the word "may" in sections 129 and 123 of the National Credit Act' (2015) 132.2 *SALJ* 245.

**Steyn, L** 'Reinstatement of a home mortgage bond by paying the arrears: The need for appropriate legislative reform' (2015) 26.1 *SLR* 132.

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**Makiwane, PN** 'Restorative justice: Bringing justice for crime victims?' (2015) 36.1 *Obiter* 79.

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**Spies, A** 'Relevance and importance of the *amicus curiae* participation in *Mayelane v Ngwenyama* [Discussion of *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)]' (2015) 26.1 *SLR* 156.

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dren *M v Minister of Police* 2013 (5) SA 622 (GNP)' (2015) 36.1 *Obiter* 164.

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**Botha, MM** 'Revisiting an old friend:



What constitutes "a matter of mutual interest" in relation to a strike? A tale of two recent cases *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members* (2014) 35 ILJ 983 (LAC); and *Vanachem Vanadium Products (Pty) Ltd v National Union of Metal Workers of SA* case no J 658/14' (2015) 36.1 *Obiter* 194.

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**Dafel, M** 'The directly enforceable Constitution: Political parties and the horizontal application of the bill of rights: Political rights since 1994' (2015) 31.1 *SAJHR* 56.

**De Vos, P** 'It's my party (and I'll do what I want to)': Internal party democracy and section 19 of the South African Constitution: Political rights since 1994' focus (2015) 31.1 *SAJHR* 30.

**Fowkes, J** 'Right after all: Reconsidering New National Party in the South African canon: Political rights since 1994' (2015) 31.1 *SAJHR* 151.

**Raboshakga, N** 'Towards participatory democracy, or not: The reasonableness approach in public involvement cases: Political rights since 1994' (2015) 31.1 *SAJHR* 4.

**Spies, A** 'Considering the impact of *amicus curiae* participation on feminist litigation strategy: Political rights since 1994' (2015) 31.1 *SAJHR* 136.

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**Tuba, M and Mbiriri, E** 'A case for title insurance in the South African property-registration system' (2015) 36.1 *Obiter* 95.

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## Socio-economic rights

**Bilchitz, D** 'Are socio-economic rights a form of political rights?: Political rights since 1994' (2015) 31.1 *SAJHR* 86.

**Liebenberg, S** 'Toward an equality-promoting interpretation of socio-economic rights in South Africa: Insights from the egalitarian liberal tradition' (2015) 132.2 *SALJ* 411.

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**Sonnekus, JC** 'Bewoningsreg (habitat) – aard van die regsobjek en die effek daarvan op die registrasie van die reg' (2015) 26.1 *SLR* 63.

## Trade mark law

**Subramanien, D** 'Narrowing of the "own name" defence *Hotel Cipriani SRL v Cipriani (Grosvenor Street) Limited* [2008] EWHC 3032 (Ch); [2010] EWCA Civ 110; [2013] EWHC 70 (Ch)' (2015) 36.1 *Obiter* 210.

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**Sonnekus, JC and Schlemmer, EC** 'Covering bonds, the accessory principle and remedies founded in equity – not self-evident bedfellows' (2015) 132.2 *SALJ* 340.

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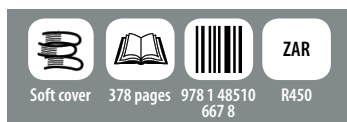
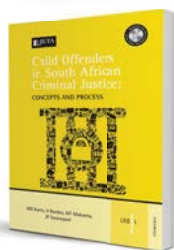
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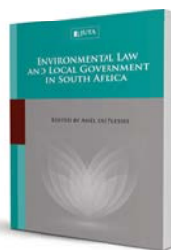
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M Karels, V Basdeo, MT Mokoena, J P Swanepoel

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## Environmental Law and Local Government in South Africa

A du Plessis (Managing Editor)

*Environmental Law and Local Government in South Africa* is the first work to extensively analyse South African environmental law and policy for local government. This detailed yet accessible collection of theoretical scholarship and real-life examples presents different features of the interface between local government and environmental law. 32 authors collectively answer the question: What is the role of local government in moving South Africa towards a sustainable future, considering the dictates and scope of environmental law?



## Forensic Investigation: Legislative Principles and Investigative Practice

R Zinn, S Dintwe

*Forensic Investigation: Legislative Principles and Investigative Practice* examines how forensic investigations should be conducted in South Africa, with reference to local legislative principles and scientific processes.



## The Law of Divorce and Dissolution of Life Partnerships in South Africa

J Heaton (Editor)

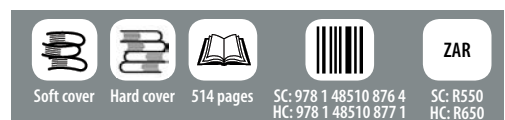
Written by a team of subject specialists, this book provides a detailed exposition and analysis of the law relating to the termination of civil unions, civil marriages, customary marriages, Muslim marriages and Hindu marriages by divorce. It also offers an in-depth discussion and analysis of the law relating to the dissolution of life (domestic) partnerships.



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M Paleker for the South African Board of Sheriffs

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A Price, M Bishop (Editors)

*A Transformative Justice: Essays in Honour of Pius Langa* pays tribute to this remarkable man and lawyer. The book comprises three sections: a series of personal tributes to Justice Langa; reflections on the work of the Constitutional Court under Langa's leadership; and explorations of a variety of specific themes in his judgments, writings and speeches. Also available in hard cover format as *Acta Juridica* 2015.

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