

SEPTEMBER 2014

THE OLD AND THE NEW: A CONCISE OVERVIEW OF THE IP LAWS AMENDMENT ACT



Business rescue:
The position of secured creditors

Attorneys' profession responds to **RABS**

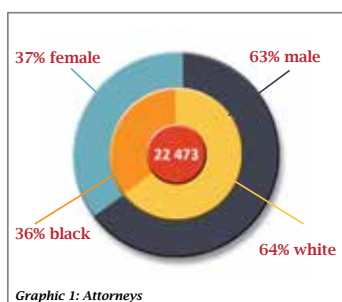
Can you trust your client's memory?
(Or will anyone trust yours?)



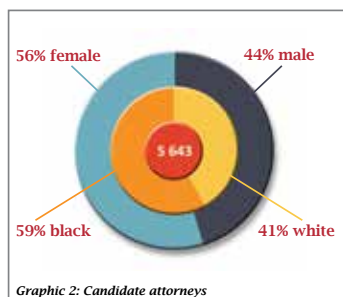
ENSafrica | Africa's largest law firm

[ENSafrica.com](https://ensafrika.com)

ens AFRICA



20

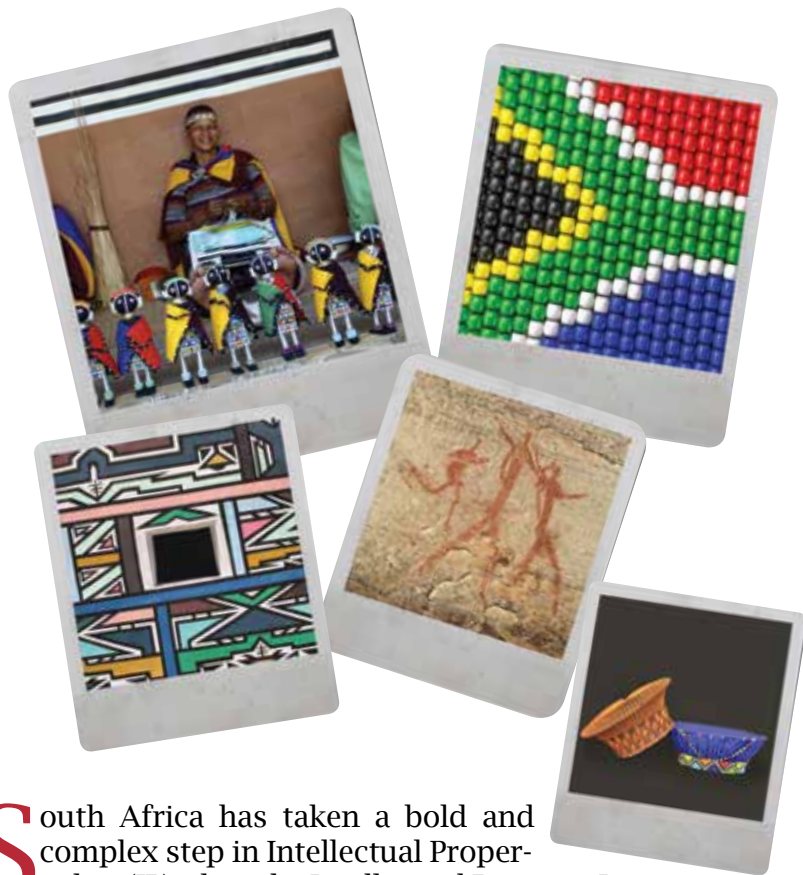


Regular columns

Editorial	3
• The devil in the data	
Letters to the editor	4
News	
• Attorneys' profession responds to RABS	6
• LEAD empowers SAWLA members through DoJ	14
• Two-year prison sentence for Swazi lawyer	15
• LEAD donates school uniforms	17
• 2014 annual general meetings	18
LSSA news	
• The attorneys' profession in numbers	20
People and practices	22
Practice note	
• Fidelity Fund gets statutory private prosecution powers	23
Practice management	
• Can you trust your client's memory? (Or will anyone trust yours?)	24
The law reports	37
Case note	
• A warning to all maintenance court officials	43
New legislation	45
Employment law update	48
Recent articles and research	52
Opinion	
• Security clearances before appointing the National Prosecuting Authority	54
Books for lawyers	56

FEATURES

28 The old and the new: A concise overview of the Intellectual Property Laws Amendment Act



South Africa has taken a bold and complex step in Intellectual Property law (IP) when the Intellectual Property Laws Amendment Act 28 of 2013 (the Act) comes into operation which will create new forms of IP which had no protection previously. André van der Merwe discusses the new forms of IP and why protection may be problematic in respect of interpretation for both practitioners and the courts.

34 Business Rescue: The position of secured creditors

If company B goes into business rescue and secured creditor A does not have the largest voting interest, and is thereby unable to direct the business rescue process, a simple reading of s 152(1)(e) and s 152(2) of the Companies Act 71 of 2008 would imply that a business rescue plan diminishing the security of the secured creditor can be adopted by a 75% vote of all creditors who voted. This situation is, however, mitigated by s 154(1) of the Act, but the extent of the mitigation is not clear. Dominique Wesso analyses whether the position of a secured creditor, whether large or small in respect of voting interest, is protected?

EDITOR:

Mapula Thebe

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

PRODUCTION EDITOR:

Kathleen Kriel – *BTech (Journ) (TUT)*

NEWS EDITOR:

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

SUB-EDITOR:

Kevin O' Reilly – *MA (NMMU)*

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

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

ISSUE EDITOR:

Barbara Whittle

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

DE REBUS ONLINE: www.derebus.org.za

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

De Rebus editorial staff use the **LexisNexis online product:** MyLexisNexis. Go to www.lexisnexis.co.za for more information.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

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

Classifieds supplement: Contact: Kathleen Kriel

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

ACCOUNT INQUIRIES: David Madonsela

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

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

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

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

SUBSCRIPTIONS:

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

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

Cover price: R 80 each

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

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

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

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



LAW SOCIETY
OF SOUTH AFRICA

© Copyright 2014:

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



Member of
The Audit Bureau of
Circulations of Southern Africa

The devil in the data

The phrase 'lies, damn lies and statistics' has often been used to bolster weak arguments. I make this disclaimer upfront for readers who may have this reaction when scanning the statistics providing an overview of the attorneys' profession on page 20 of this issue. The profession has, like other institutions, veered from not capturing race and gender statistics for various reasons, to providing tentative information since 2008. It has been only in the past few years that concrete figures have begun to emerge on the attorneys' profession.

These statistics show a profession that is changing slowly year on year. This year, of the 22 400 practising attorneys, 36% are black and 37% are women. If we compare ourselves to other professions – such as the chartered accountants and engineers – we appear to be doing reasonably well. The South African Institute of Chartered Accountants indicates that of the 36 113 chartered accountants, 21% are black and 32% are female, and the Engineering Council of South Africa records that of the 14 800 registered professional engineers, 12% are black and 3% women.

Numbers, percentages as well as real or perceived prejudices aside, change is slow for a number of reasons, the most obvious being that it takes at least four years of academic study – and university law faculties have told us that most law graduates take five years – to complete an LLB degree, and then generally two years' articles before candidates can join the profession as attorneys. So it takes five to seven years to produce an attorney.

The vital importance of data and statistics comes into play when tracking

trends and developments in the profession; without them it will be difficult to identify interventions needed for various reasons, from transformation to education. It is imperative that the profession has an efficient national database and a good knowledge bank of empirical data to carry it into the transitional discussions under the National Forum that will debate, negotiate and implement the framework for the legal profession under the future Legal Practice Council. Both the Forum and the Council will require proper, solid and reliable information in order to make informed decisions and set achievable, realistic targets.

In addition to the statistics relating to attorneys, the Forum and Council will also have to add to those the statistics and trends for the advocates' profession. On the one hand, the General Council of the Bar has data for its members, which number some 2 500. On the other, the Justice Department will need to provide the data from the roll of advocates which numbers several thousand, many of whom are not members of the GCB and who may be working in government, at parastatals or may be members of the National Bar Association (formerly the Independent Advocates Association). In recent press reports the Department has acknowledged that the roll in its possession is not complete. This needs to be addressed as a matter of urgency in the interests of the National Forum discussions, but particularly for the public – who have the right to know whether the counsel engaged on their behalf is, in fact, an advocate admitted by the High Court.

The Legal Practice Council has, among its objects, to facilitate the realisation of the goal of a transformed and

restructured legal profession that is accountable, efficient and independent. It must also achieve the purposes of the Bill, which include, among others, providing a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld.

The Council must put in place measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the country. It must develop programmes in order to empower historically disadvantaged practitioners, as well as candidate practitioners.

In carrying out the above, it must also report annually to the Minister on –

- the number of new candidate legal practitioners registered ... and the number of new legal practitioners enrolled with the Council ...;
 - the effectiveness of the training requirements for entry into the profession;
 - measures adopted to enhance entry into the profession, ...; and
 - progress made on the implementation of the above developmental programmes to empower historically disadvantaged legal practitioners and candidate legal practitioners.
- To carry out these aspects of its mandate, the Legal Practice Council will require a reliable national database and a knowledge bank of statistics, trends and other relevant data, current and historical, in order to make, measure and report proper progress.

- See page 20.

'The vital importance of data and statistics comes into play when tracking trends and developments in the profession; without them it will be difficult to identify interventions needed for various reasons, from transformation to education.'

LETTERS

TO THE EDITOR

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

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

Are you entitled to obtain a copy of a deceased person's will from the Master of the High Court's office?

I bring the following relevant information for the attention of practitioners.

Section 5 of the Administration of Estates Act 66 of 1965 provides as follows:

5. Records of Master's office, etc

1) *Each Master shall*, subject to the provisions of regulations made under section 103, *preserve of record in his office all original wills*, copies of wills certified in terms of section 14 (2), written instruments, death notices, inventories and accounts lodged at his office under the provisions of this Act or any prior law under which any such documents were lodged at the office of the Master, Orphan Master or registrar of deeds in the province concerned, and such other documents lodged at his office as the Master may determine.

2) *Any person may at any time* during office hours inspect any such document (except, during the lifetime of the

person who executed it, a will lodged with the Master under section fifteen of the Administration of Estates Act, 1913 (Act No. 24 of 1913)), and make or *obtain a copy thereof* or an extract therefrom, *on payment of the fees prescribed* in respect thereof: Provided that any executor, trustee, tutor or curator, or his surety, may inspect any such document or cause it to be inspected without payment of any fee' (my emphasis).

Recently, relying on this section, I applied to the Master's Office for a copy of such a will and duly paid the prescribed fee. Instead of receiving a reply from the Master, together with the copy, I received a letter from the Deputy Information Officer at the Department of Justice, advising me as follows:

'Your request to have access to documents held by the Department of Justice specified by yourself as:

The Last Will(s) and Testament(s) of the Late X that have been lodged with the Master of the High Court.

Having carefully considered your application and having applied my mind thereto, I regret to inform you that I am unable to provide the documents as requested for the reasons set out below in

terms of the Last Will(s) and Testament(s) of the late X, the requested documents contain personal information (such as names) of those whose details are on the document.

I consider that the disclosure of those documents could be highly detrimental to the individuals involved and could reasonably be expected to endanger their lives or physical safety. Notwithstanding the need for disclosure in the light of the factors already referred to.

I refuse this request, first because, it would constitute an unreasonable disclosure of highly personal information in terms of s 34(1) of [the] Promotion to Access to Information Act 2 of 2000.

Secondly, because its disclosure could reasonably be expected to endanger the lives or physical safety of the individuals whose details are on those documents.

The documents also contain information that was supplied in strict confidence by a third party. The information was supplied after their confidentiality was guaranteed, so we are unable to breach our understanding.

Further, the nature of our work and need to obtain information from various third parties, to enable us to carry

out our function in the public interest, may be jeopardised by the disclosure of information supplied in confidence. This request is therefore refused in terms of s 37(1)(b) of the Promotion of Access to Information Act.

The above decision has been carefully considered in terms of the Promotion of Access to Information Act.

Kindly be advised that you can lodge an appeal in terms of the provisions of s 74(1) of the Promotion of Access to Information Act within 180 days of receipt against this decision to the Minister of Justice Deputy Information Officer'.

The Promotion of Access to Information Act applies to 'the exclusion' of the Administration of Estates Act and supersedes this Act where there is a conflict between the two.

It would, therefore, seem that it is quite possible to frustrate an inquiry by an attorney into the affairs of an estate.

Mervin Messias, attorney,
Johannesburg

Do you have something that you would like to share with the readers of *De Rebus*?

Then write to us.

De Rebus welcomes letters of 500 words or less.

Letters that are considered by the Editorial Committee to deal with topical and relevant issues that have a direct impact on the profession and on the public, stand a chance to be awarded the 'Letter of the Month' prize sponsored by LexisNexis.

Send your letter to:
derebus@derebus.org.za



A PLACE TO MASTER THE LAW

The School of Law at the University of KwaZulu-Natal (UKZN) offers Masters degrees in various specialized legal fields. The Programmes are designed to ensure that the candidates undertaking them acquire an in-depth and practical knowledge in specialist areas.

Coursework Masters Programmes offered:

- Advanced Criminal Justice
- Business Law
- Childcare and Protection (inter-disciplinary: Law and Social Work)
- Constitutional Litigation
- Environmental Law
- Labour Studies
- Maritime Law
- Medical Law
- Taxation

All Programmes are available as a part-time option.

Closing date for applications: 30 November 2014.

Late applications: 10 December 2014.

Contact us: Tel: +27 (0) 31 260 3046

Email: lawpostgrad@ukzn.ac.za

Web: <http://law.ukzn.ac.za>



INSPIRING GREATNESS

Attorneys' profession responds to RABS

The Transport Department published a revised version of the Road Accident Benefit Scheme Bill, 2014 (RABS) in GenN337 GG37612/9-5-2014 and called on interested persons to submit comments. The deadline for comment was extended for a further 90 days from the original deadline of 8 July 2014.

An earlier version of the Bill had been published for public comment on 8 February last year. Following receipt of public comments, the Bill was redrafted. New regulations, rules and forms were

also drafted to enable a better understanding of how the proposed scheme would operate.

The Bill provides for a new no-fault benefit scheme and a new administrator called the Road Accident Benefit Scheme Administrator (RABSA), which will replace the current Road Accident Fund (RAF) and compensation system administered by it.

It is proposed that the current adversarial system be replaced with a scheme that is based on principles of social security and social solidarity. The key change proposed by the draft legislation is a

move away from the insurance - based system of compensation that has been largely unchanged in South Africa since its inception in 1946, to a system of defined and structured benefits.

In 2014 (Aug) DR 10, we covered one of the RAF workshops, which formed part of the public consultation process. In this article, *De Rebus* covers the organised attorneys' profession's submissions on the Bill by looking at submissions made by the Law Society of South Africa (LSSA), the Black Lawyers Association (BLA) and the Law Society of the Northern Provinces (LSNP).

Submissions by the Law Society of South Africa (LSSA)

In its introductory comments the LSSA points out that the Transport Department claims to have implemented the recommendations of the Satchwell Commission, which the LSSA says is only partially correct. 'Whilst the Satchwell Commission did recommend a system of no-fault compensation, it also recommended that the common law rights to look to the wrongdoer for compensation not covered by the scheme be retained and that road accident victims who are catastrophically injured be awarded life enhancement benefits (general damages) by the statutory scheme. The current draft Bill does neither of these things. In s 29 it abolishes the common law right entirely, leaving the injured person with no right to compensation other than in terms of RABS and it makes no provision for any payment for pain and suffering, loss of amenities of life, disability, disfigurement or psychological shock, regardless of how seriously the claimant is injured and the impact this may have had on his or her life,' the LSSA states.

The LSSA also notes that the RABS Bill places great emphasis that available resources will now be directed to the provision of healthcare services in the emergency, as well as acute rehabilitative phases of treatment and notes that of critical importance is appropriate treatment immediately post-accident. The

LSSA also notes that essential to providing such treatment is the promulgation of a healthcare tariff acceptable to the private sector, failing which road accident victims will merely queue up with the rest of the population in the hopes of accessing already 'over-stretched, under-resourced and poorly administered public healthcare facilities'.

The LSSA notes that the tariffs have yet to be published in draft form for comment as provided for in s 55 and it is unknown whether any consultation has taken place with the public or private healthcare sectors on acceptable tariffs.

The LSSA stressed that the RABS Bill abolishes, entirely, the fault based system of road accident compensation that has been in place since 1946 and imposes a system of no fault benefits as part of a comprehensive social security system. The LSSA goes on to query where this leaves the innocent road accident victim.

'The road accident victim, who also contributes to the Road Accident Fund levy as a driver, commuter, passenger and/or consumer, has had his or her civil law rights to be compensated for harm suffered as a result of another person's fault completely abolished ... Thus, those who utilise the roads for profit are protected at the expense of the commuter, passenger and pedestrian. The wrongdoer escapes from any financial responsibility for the consequences of

this or her negligence. Even those guilty of a criminal offence are protected,' it states.

The LSSA goes on to highlight the fact that, in contrast to the complete financial indemnity enjoyed by the wrongdoer, a road accident victim has access only to the limited benefits provided in terms of the RABS Bill, which the Transport Department points out is not intended to be compensation for the harm suffered, but social welfare as part of the general welfare benefits provided by the state. 'This leaves the injured party or a deceased breadwinner's family, through no fault of their own, without any right to fair and equitable compensation from the wrongdoer or the wherewithal to recover financially or to have some of the amenities of life lost in the accident restored to them. To add insult to injury, the wrongdoer, if injured in the same accident, receives exactly the same benefits,' the LSSA said.

The LSSA stressed that this is an entirely different scenario for the Constitutional Court to consider and added that should RABS be enacted with the abolition of common law rights, the LSSA will consider challenging the current s 29 as unconstitutional.

The LSSA noted that the Bill states that if the injured person or deceased breadwinner was not legally present in the country, the Road Accident Ben-

'The road accident victim, who also contributes to the Road Accident Fund levy as a driver, commuter, passenger and/or consumer, has had his or her civil law rights to be compensated for harm suffered as a result of another person's fault completely abolished'

efit Scheme Administrator (RABSA) is required only to pay for 'emergency' healthcare services. 'The definition of emergency services in the current 2005 Amendment Act excludes any treatment not necessary to save a person's life. This is repeated in the pre-authorisation provisions of the Bill and Forms. A seriously injured person can spend many weeks in hospital after 'emergency' treatment. This is not covered. Should that person die, there is no compensation for funeral benefits. The application of the new visa regulations is already the subject of constitutional challenge. It is anticipated that this provision in the RABS Bill will follow suit,' the LSSA states.

According to the LSSA, the current draft Bill excludes any liability on the part of the administrator for any medical or legal costs to prepare and to submit a claim or an appeal or to meet any requirement of the Act.

The LSSA compared this section with the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), where similar provisions are enacted. However, the LSSA notes, an injured workman can still, in many instances, rely on the assistance of his or her employer in order to lodge a claim, whereas the road accident victim is on his or her own.

'The obtaining of the required medical reports will be a costly exercise which many claimants will be unable to afford. The forms and procedures are complicated. The exclusion of liability to compensate for the costs involved is aimed at excluding attorneys or any other professional from assisting accident victims in lodging and processing claims against the administrator,' the LSSA stated.

Furthermore, the LSSA noted that the RABS Bill states that a medical service provider who wishes to claim direct for services, is obliged to submit a claim with full details of the accident, including the registration details of all vehicles involved, the names addresses and contact details of all drivers and witnesses and the part they played in the accident, the names and contact details of all witnesses and the details of the South Af-

rican Police Service station investigating the accident. It noted that it is very unlikely that this information would be readily available, particularly when emergency and acute phase treatment and services are provided.

The LSSA pointed out that the RABSA has far-reaching powers and discretion in regard to all benefits provided in terms of RABS and noted that the claimant will have no recourse to independent professional advice in pursuing a claim. 'He or she will have to be advised by the very body against which they claim. In the event of a dispute on the benefits to be awarded, the dispute is referred to an internal appeal body consisting of employees of the administrator. There is no appeal to the courts from any decision made by either the administrator or the appeal body,' the LSSA stated.

Commenting on the Bill the LSSA said that RABS makes provision for the following benefits:

- Healthcare services (Part A).
- Income support benefits (Part B).
- Family support benefits (Part C).
- Funeral benefits (Part D).

Healthcare services

The LSSA views this provision in the Bill as follows -

- a cumbersome system of claiming for payment and pre-authorisation prior to the RABSA being liable is likely to result in delays;
 - an impractical provisions for direct claims by suppliers;
 - nature and extent of treatment solely within the discretion of the administrator; and
 - tariffs not yet published for comment.
- The LSSA stated that the reality is that the injured party will be billed and if he or she is not able to pay, then private institutions and practitioners will not be prepared to render anything but emergency treatment.

The LSSA believes that the injured party will thus be denied the freedom to choose the nature and extent of treatment and services from a medical practitioner of his or her own choice and at an institution of his or her own choosing. 'If, as with the 2005 Amendment Bill, the tariff eventually promulgated will be so low as to render it impossible for the private sector to participate, then such tariff will also be vulnerable to constitutional attack for the same reasons advanced in the original case brought by the LSSA. That challenge was upheld,' the LSSA said.

Income support benefits

Pertaining to the income support benefits in the Bill, the LSSA highlighted the following:

- No lump sums.

- Maximum payment R 13 738,75 per month that can be reduced, in the administrator's discretion, by deemed residual earning capacity regardless of actual employment.

- No compensation for the first 60 days and only payable from age 18 to 60 years.

- Confusing provisions as to whether compensation is payable to those economically inactive at the date of injury or unable to prove an income.

- Must submit claim and medical report at own cost.

- Can be suspended or terminated at the administrator's discretion.

- The benefit terminates on death.

According to the LSSA, excluded from any income support benefit are persons who are deemed not to be ordinarily resident in South Africa who, by definition are those who are absent from the Republic for a period of longer than six months per year for the three years preceding the road accident or any consecutive three-year period thereafter.

In order to claim temporary income support benefits, an injured person is obliged to claim as provided for in the rules by lodging a RABS 3 (temporary) or 4 form (long-term) together with proof of pre-accident income (such as tax returns or salary slips) and proof of inability to perform his or her pre-accident work or earn an income and that that inability is caused by a road accident.

In terms of s 36 (4) the claim must be accompanied by a medical practitioner's report compiled after conducting a physical examination confirming that the inability to work relates to injuries sustained in the accident and stipulating the period that the incapacity is likely to endure. The claimant must also confirm that his inability to work relates to injuries sustained in the accident and, should he be unable to do so, such confirmation may be provided by any other person with knowledge of the reasons of the inability to earn an income.

If the claimant is impecunious and received treatment at a public health facility, the RABS 7 will have to be completed by employees of the public health ser-

'The LSSA believes that the injured party will thus be denied the freedom to choose the nature and extent of treatment and services from a medical practitioner of his or her own choice and at an institution of his or her own choosing.'

'It is assumed that the intention of the Bill is not to deny compensation for loss of income to persons economically inactive at the time of their injury, regardless of their circumstances and the nature of the injuries suffered.'

vice. The LSSA noted that currently there are not enough doctors to treat injured people, let alone fill in forms. Under the current Act, hospitals charge a fee for the completion of a RAF 1 form. If records are also required, this costs in the region of R 550 from a provincial hospital and more from private hospitals and practitioners. These costs are usually paid for by the attorney representing the claimant.

According to the LSSA, on this basis alone, the loss of income benefit is likely to prove inaccessible to a vast number of injured road accident victims. The benefit payable for temporary income support is subject to a 60 day threshold and is capped at 75% of the pre-accident income cap (currently prescribed in terms of the regulations at R 219 820 per annum) for those employed and/or able to prove an income as referred to in s 36(2) (a) and (b) of the Act. Thus, the maximum compensation for loss of income is R 13 738,75 per month.

Section 36(3) provides that injured persons who are unemployed or unable to prove an income are deemed to earn the average annual national income (currently prescribed in terms of the regulations at R 43 965 per annum or R 3 663,75 per month). However, although s 36(5)(b) says that the injured person's deemed income must be used for the calculation of the benefit for persons referred to in s 36(3) (those not economically active or unable to prove an income), s 36(5)(d) also says that the amount of the temporary income support benefit (for all claimants) must be calculated in accordance with the formula provided in sch 1.

The LSSA went on to point out that there is no provision in sch 1 to calculate the benefit for persons referred to in s 36(3). The formula applies only to injured persons referred to in s 36(2)(a) and (b) of the Act.

The LSSA submitted that: 'It is assumed that the intention of the Bill is not to deny compensation for loss of income to persons economically inactive at the time of their injury, regardless of their

circumstances and the nature of the injuries suffered. If this were not so, then the Bill would have further far-reaching and devastating consequences, which are immediately obvious in the case of children, students and young adults who might be about to embark on a career but are injured before they become economically active, and who are rendered permanently unemployable by the injuries sustained. The denial of any compensation to them for lost earning capacity is manifestly unjust, particularly when coupled with the denial of common law rights and bearing in mind that for those able to afford insurance, such loss is uninsurable in terms of disability cover.'

For those entitled to claim income support benefits, there are yet further restrictions. Once the maximum entitlement is established, the administrator is entitled to determine whether, in its opinion, the injured party has a residual earning capacity and the amount thereof, which the administrator deducts from the maximum monthly entitlement, regardless of whether the injured claimant is employed or not. For this purpose, the claimant can be referred to an occupational therapist chosen and paid for by the administrator. According to the LSSA, because the residual income capacity is deducted from the maximum amount due in terms of the formula (as opposed to the actual prior income), then, should the residual income capacity be more than R 13 738,75 per month, no claim will be allowed, even if an actual loss has been suffered.

'The maximum period for which temporary income support benefit is paid is two years. Thereafter an injured party has to apply for long-term income support benefits. In either case no person under the age of 18 will receive any income support benefit, nor will any person over the age of 60 be paid, regardless of the facts,' stated the LSSA.

All benefits are paid in monthly installments and will terminate on the death of the beneficiary, meaning that if the beneficiary was a sole breadwinner, his or her dependants will be left destitute.

According to the LSSA any decision made by the administrator regarding income support benefits could only be challenged by referral to an internal appeal tribunal comprised of employees of the administrator. The jurisdiction of the courts to adjudicate a disputed decision of the administrator has been ousted.

The LSSA believes that the wide discretion that vests in the administrator in many aspects of the claims procedure, the fact that none of the decisions made by the administrator are subject to appeal to the courts, the fact that the administrator is accountable to itself (and the Minister) only, the fact that the claimant will have no independent pro-

fessional adviser will leave him or her vulnerable to being denied compensation and/or caught up in a bureaucratic labyrinth for years on end without any sanction or recourse.

Family support benefits

The LSSA highlighted the following points regarding the family support benefit:

- No lump sum payments.
- Support limited to 15 years maximum regardless of age of dependants.
- Children supported to age 18 only.
- No support paid to dependants resident abroad.
- Surviving spouse's income deducted from maximum amount due, not amount actually lost.

Firstly, the LSSA pointed out that no family support benefit is paid to a dependant who is not ordinarily resident in the country. 'This is an extraordinary and inexplicable provision in that the exclusion does not apply to the residency of the breadwinner but that of the dependant. If a breadwinner supports a child who is for some reason or another resident in another country (for perhaps study purposes or a child in the care of a South African parent in terms of a divorce order who may be resident overseas but who is still entitled to child support) then that child is denied any benefit, regardless of the fact that the deceased may have had a legal obligation to pay, and did so. This appears to be an irrational exclusion and may be vulnerable to constitutional attack, especially as it affects the rights of a child to support and discriminates against a child on an arbitrary ground,' the LSSA stated.

The LSSA noted that these claims are limited to 15 years, maximum, pay out. However, as the caps apply to the deemed salary of the deceased breadwinner and surviving spouse (unlike the current Act where the caps apply to the annual loss) if both the deceased and the surviving spouse earn more than the pre-accident income cap, or are 'deemed' to have earned the average annual national income, there will be no claim for loss of support, despite the fact that a loss might have arisen.

'The LSSA noted that any benefit terminates upon the death of the beneficiary. This means that, should a breadwinner die, his family will be left destitute.'

'In determining the amounts of family support, the pre-accident income of the deceased breadwinner, less taxation, may not exceed the prescribed pre-accident income cap and may not be less than the prescribed average annual national income. In addition, the pre-accident income of the surviving spouse less taxation is taken into account, also limited to the pre-accident income cap,' stated the LSSA.

There is a limit on the period of support for a surviving spouse to 15 years or until age 60, whichever period is the shortest, and a dependant child is only entitled to family support until age 18, regardless of whether the deceased would have supported that child longer.

Funeral benefits

The LSSA noted that there is a flat rate payment of R 10 000 made to either the family or a funeral director.

The LSSA feels that the amount awarded may be inadequate to cover the costs of transporting the body of a deceased migrant worker back to the family for burial. Furthermore, it notes that the family of an 'illegal' foreigner killed in an accident is denied any compensation for the costs of repatriating the body or the funeral.

Benefit review

The LSSA noted that any benefit terminates upon the death of the beneficiary. This means that, should a breadwinner die, his family will be left destitute. Under the current legislation, an incapacitated breadwinner is paid a lump sum, which money can be invested to provide

for his family's wellbeing after his or her death. This facility is denied under the current Bill.

The administrator also has wide powers to review, suspend or terminate benefits if it is of the opinion that the beneficiary is no longer entitled to receive the benefit. The administrator may thus, at any time, terminate the continued entitlement to any benefit should a beneficiary fail to comply with a condition imposed or should a beneficiary fail to comply with a request to attend an interview or furnish a statement or document or written consent to access records or should a beneficiary furnish 'false' or 'misleading' information.

Claims procedure

According to the LSSA, the vast majority of claimants will have to submit and process a claim unaided and will also have to deal with all inquiries and requests from the administrator without professional help. There is no mechanism in the Bill to enforce prosecution of a claim and the jurisdiction of the courts on disputing any decision has been ousted.

Claims lapse and time periods

The Bill provides that a claimant has three years to claim a benefit from the time when that person has knowledge of the facts giving rise to the claim. Persons under a disability have until one year after the impediment has ceased to exist. This follows the Prescription Act.

In terms of s 48, the administrator has 180 days (six months) to accept or reject a claim during which period inter-

est does not run. No sanction is available to a claimant should the administrator fail to process any claim, nor is there any recourse to any outside body or court.

The LSSA believes that this lengthy period to respond to claims will actively discourage health service providers from rendering treatment with a view to claiming direct. It will also leave the claimant without any income support benefits for an extended period.

The LSSA submitted that there should be some method to enforce claims other than an internal tribunal that only sits to consider disputes once claims have been adjudicated.

Dispute resolution

A beneficiary has thirty days to appeal any decision of the administrator in the manner set out in the rules, failing which there is no further recourse. The appeal is to an internal tribunal body comprising three employees of the administrator who may affirm or reverse any decision made by the administrator, refer any issue raised to a medical or other expert for an opinion and/or refer any issue to a medical or other expert for final determination.

The appeal body has 180 days after lodgment of an appeal to inform the appellant of the outcome provided that, when a claim is deemed to have been rejected after the administrator has failed to deal with it for a period of 180 days, the appeal must be determined within 30 days.

The decision of this appeal body is final and binding with no right of appeal to the courts.

Submissions by the Black Lawyers Association (BLA)

In its submissions, the BLA stated that a majority of its members' clients are indigent or live below the poverty line and are not in a position to fund their RAF claims adequately or at all. As a result, almost all the RAF claims are conducted on a contingency basis where the legal practitioner funds the case on the understanding that, at the successful finalisation of the case he or she will be reimbursed his or her disbursements. These disbursements cover a number of aspects like payment to experts for medico-legal reports, travelling, accommodation, subsistence allowance and other related expenses.

The seriously injured road accident victim's case may require financial assistance of more than R 100 000. The practitioners assist their clients financially on the understanding that they will recover the expended disbursements. The

fact that the current road accident system pays the award to the client through the legal representative and that the RAF covers the claim's costs and disbursements, in a way, guarantees that the practitioner will get the costs and the disbursements associated with running the claim. Taking away the guarantee will adversely affect road accident victims.

The BLA highlighted the fact that a number of the provisions which are to be introduced by RABS will make it fundamentally impossible for victims of road accidents to be placed in the position they would have been had it not been for the accident.

'What makes matters even worse is that the victims of the road accident will not have recourse against the wrongdoer as the common law right in this regard has been ousted. The BLA welcomes the positive changes which are to be ushered

in by the enactment of the new legislation herein. We are, however, worried by those provisions which will bring hardships to our members, practitioners at large and the victims of road accidents; and all those who will both be affected and feel the effects of such accidents,' stated the BLA.

The BLA believes that the scheme brings about major changes to the victims of road accident. 'One of the most important changes it brings is that contrary to the current Road Accident Fund Amendment Act where you have to establish fault on the part of the other driver (insured driver), RABS will be a no-fault based system. Victims need not prove negligence on the part of the insured driver. The no-fault scheme also has problems of its own,' stated the BLA.

The BLA highlighted the following problems with the Bill -

Right to social security

According to the BLA, the road accident scheme or system, as a social security agent, derives its mandate or authority from s 27(c) of the Constitution which states that '[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

The BLA believes that under the circumstances, the provisions of the RABS Bill, in as far as social security responsibilities are concerned, should comply with the direction of the Constitution.

Access to courts

The BLA said that s 34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The BLA stressed that the rights of road accident victims to have their dispute resolved in a fair, public hearing is covered by this section of the Constitution. 'Such disputes include delictual disputes and/or non-pecuniary damages disputes. Under the circumstances it will be unconstitutional for the RABS Bill to deny road accident funds victims a legal recourse to be compensated for non-pecuniary loss from both the scheme itself and the wrongdoer,' it stated.

According to the BLA, s 28 of the Bill outlines the scenarios where the wrongdoer is not protected by the scheme and the administrator is not liable to provide the benefit to the injured. This will, in terms of subs (1) occur in the event that the bodily injury or death was caused by or arose from the use of a vehicle to perpetrate a terrorist activity. The Bill however, does not define what constitutes a 'terrorist activity'.

The BLA noted that the Bill states that an injured person who is in the country illegally will not be protected by the scheme save with respect to the emergency healthcare services. The BLA stated that this is absurd because serious criminals will be protected by the scheme; save in the event of terrorism which in any event will not be easy to prove. 'The illegal foreigners deserve full healthcare services. The benefit of a person who is illegally within the country may be limited by excluding income support benefits and the family support benefits; these benefits or any other social benefits applicable can be afforded him or her from his or her country of origin. The person who is illegally within the country should be entitled to non-pecuniary damages. He or she should also be liable to compensate his or her victim for non-pecuniary damages,' the BLA stated.

The BLA believes that under the circumstances, the provisions of the RABS Bill, in as far as social security responsibilities are concerned, should comply with the direction of the Constitution.

'In terms of s 29 of the Bill the owner or driver of a vehicle involved in the road accident, or the employer of the driver will not be liable in respect of bodily injuries or death of any person caused by or arising from a road accident. We are of the view that this section should read as follows: 'Subject to the provisions of s 28 no civil action for damages shall' noted the BLA in its submissions.

Reasonable and equitable

The BLA said that it found the scheme to be unreasonable and inequitable on the following grounds:

In terms of reasonableness, the BLA believes that the scheme places the victim of a wrongful and unlawful driving of a motor vehicle in the same position as the culprit. At times, the perpetrator may be placed at a better place than the victim.

The BLA highlighted that the benefit is not subject to an inflation adjustment and that the pre-accident income cap per year is R 219 820. 'If the Bill is passed into law in its current form, road accident compensation will be profitable to criminal drivers who willfully disregard road safety. It is unreasonable and against public policy that the victim of a crime gets the same or less protection from the law compared to the perpetrator,' the BLA stated.

In terms of equity, the BLA stated that the principle of equity demands that people should be afforded the quality of fairness and impartiality. Therefore, the principle requires that everyone should be treated fairly and equally. The BLA quoted s 9(1) of the Constitution which provides that 'everyone is equal before the law and has the right to equal protection and benefits of the law.' According to the BLA, victims of road accidents should also be treated as equals before the law and should be entitled to equal protection and benefits of the law. 'One of the protections which the victims of road accidents are entitled to is a delictual compensation for pain and suffering caused by the wrongdoer and/or its substitute - the scheme in this regard. This right can only be limited by a law of

general application which is reasonable and justifiable in an open democratic society based on dignity, equality and freedom. The RABS Bill does not meet this standard because the Bill is not the law of general application. It will apply only to victims of road accidents. All other victims who are subjected to personal injuries will continue to be compensated for the non-pecuniary damages by the culprits. For instance, victims of medical negligence, rail transport and assault will continue to exercise and enjoy their common law right in this regard,' the BLA stated.

'We therefore submit that it is beyond reasonable doubt that the Bill and the constitutional provisions are clearly incompatible and as such same must be re-drafted in order to comply with the constitutional requirements,' said the BLA.

According to the BLA, s 31(2)(c) limits the number of times an individual may receive medical treatment at the expense of the scheme. It disregards the personal circumstance of an individual injured person.

Section 31(2)(f) closes doors for new medical practitioners because it requires a 'service provider who ... normally provides the healthcare service'. According to the BLA, it will be difficult to establish if a medical practitioner normally provides the particular healthcare service.

Section 32(1)(f), which deals with pre-authorisation in respect of non-emergency healthcare, will - according to the BLA - undoubtedly result in unnecessary delays and undue hardship for the injured to get the necessary treatment.

The BLA believes that s 33(1)(b) is unfair because it denies the injured victim quality medical treatment and it ignores the reality that an ordinary resident, who was involved in an accident in South Africa, may after leaving the country, fall ill from the injuries of the accident which occurred within the country. The BLA proposes that the administrator must, in the event of healthcare provided outside the Republic, limit its costs to the reasonable amount payable within the Republic for similar treatment received outside the Republic.

The BLA was in agreement with the LSSA that the provisions under the income support benefit in ss 35(1) and (2) (a) read with s 39(1) and (2), take away the benefits from the youth who are studying on scholarships abroad and people who have employment contracts which require them to spend six months abroad and six months at home.

The BLA further stated that ss 36(1) (a) and (3) read with s 37(1)(b)(i) do not take into account the potential of the injured, his or her career path, possible promotional increases and the economic circumstances.

The BLA reiterated the views of the LSSA that the amount of R 10 000 for fu-

Ever considered doing your
LLM or LLD @
Faculty of Law, Potchefstroom Campus
of the North-West University?

We offer **quality** legal education and **focused** research
while remaining **involved** in our community.

The following LLMs are offered by means of coursework:

- Comparative Child Law
- Environmental Law and Governance (also MPhil for non-lawyers)
- Estate Law
- Import and Export Law
- Labour Law

The research LLM and LLD are offered in all fields

Prerequisite for LLM: LLB or equivalent four year law degree.

Prerequisite for LLD: LLM

Apply or book your place at our

Postgraduate Open Day in Potchefstroom on
24 September 2014 at PC-LLM@nwu.ac.za or PC-LLD@nwu.ac.za.

More information on the LLMs and LLD available at
<http://www.nwu.ac.za/content/application-master-doctorate-studies>.

Postdoctoral research fellowship(s) are available annually

Visit <http://www.nwu.ac.za/post-doctoral-fellowship>
or e-mail Willemien.DuPlessis@nwu.ac.za.

Closing date for applications: 30 November 2014

DID YOU KNOW?

Approximately 1800 hours are required to complete a masters degree,
the course work and dissertation can be completed over 2 years.
Seminars are offered for full-time as well as part-time LLM students
in Potchefstroom in block sessions and over
weekends on Fridays and Saturdays.



neral costs is unreasonably low. It added that this section disregarded the cultural practices and customs of the majority of the citizens of the country. 'To the majority of our people funerals must be dignified. They bury their loved ones with love and dignity. Further, a funeral is for the whole family and community; it is not a private ritual. In the majority of African funerals, the mourners must eat, there must be a coffin and a tombstone. Under the circumstances we find that the appropriate funeral expenses should not be less than R 25 000 per funeral,' the BLA said.

The BLA stated that it does not support s 51 of the Bill as the section denies the claimants the opportunity to investigate and submit their claims to the administrator properly. 'The South African legal system has a rich body of jurisprudence in respect of personal injury claims and legal practitioners who can provide this

service efficiently. This section is unreasonable because it expects lay people to comply with the technical Act of parliament. We find this section to contradict the spirit and the Constitution which encourages that people should be given access to justice. Section 51 closes this door,' the BLA stressed.

The BLA said that s 52 was not acceptable as it exonerated RABSA employees from their wrongdoing. 'Such negligence may result in the claimant losing his or her benefit. The scheme must take responsibility for its wrongdoing. Examples of such wrongdoings could be a prescription at the hands of the scheme when the claimant had complied with the necessary requirements,' the BLA said.

Finally, the BLA recommended that the Bill should also cater for the following circumstances -

- The innocent victim of a motor vehicle accident should be eligible for non-pecu-

niary compensation.

- Non-pecuniary compensation for catastrophic injuries or impairment should not be limited or capped.
- There should be a cap for non-catastrophic injuries.
- The wrongdoer should only be entitled to the category of benefits listed under s 30 of the Bill.
- Participants in organised motor racing; criminals driving away from the police or any other law enforcement agencies and who happen to be involved in an accident, and a person who willfully places himself in danger of being injured by a motor vehicle with the intention of benefiting from the scheme, should be excluded from benefiting from the scheme.

Submissions by the Law Society of the Northern Provinces (LSNP)

The LSNP said that there can be no question that the Bill seeks to impact severely on the enforceable common law and fundamental rights guaranteed by the Constitution, not only of all future road accident victims, but also of a multitude of stakeholders that are directly and indirectly affected by the injuries and/or death of victims. The LSNP said that the direct effect of the Bill is the following -

- The victim of a road accident is completely deprived of his hitherto actionable common law right to enforce recovery of actual damages suffered as a result of unlawful actions of another. (The source of the liability of the RAF in terms of the present dispensation remains the common law rights of the victim in terms of the law of delict).
- The recoverable Rand value of the innocent victim's claim is drastically reduced.
- The victim is to be effectively deprived of the right to access legal representation to recover as much of his or her actual damages as possible.
- The victim is to be subjected to the mercy of a bureaucracy in accessing a system of benefits which already offers substantially less than what is presently his right to recover. This is to be done against a background that such bureaucracies at present perform dismally in ensuring that the intended beneficiary has access to the intended benefits. The poor administrative performance of the

Road Accident Fund and the Compensation Commissioner is well documented.

- The right to bodily integrity of the victim in the context of future medical treatment is to be severely compromised, insofar as the Bill seeks to allow the administrator to dictate what medical treatment is to be administered to the victim and even which medical practitioners are to administer such treatment.
- The motivation for affecting the rights of innocent victims in this drastic manner is to extend the proposed benefits to the very persons that have caused the injuries of the victims.

The LSNP said that it found it disconcerting that members of the public have been informed of the Bill in a 'somewhat sugar-coated manner.' It said that the information given to the public was factually incorrect, adding that it was unaware of publications by either the RAF or the Transport Department which are more informative in any meaningful way.

The LSNP suggested that a more informative campaign on the Bill should be launched and that the public should be informed that the Bill effectively deprives the vast majority of its members of the option of obtaining legal representation to enforce their rights.

The LSNP fears that the rights of citizens are to be severely curtailed without reliable factual and present-day investigation into the actual necessity to curtail such rights; the actual causes for the necessity; and whether the system pro-

posed will be capable of being managed effectively reducing the total expense of road accident compensation by any significant margin as well as whether the system proposed by the Bill will actually be capable of being implemented.

The LSNP went on to state that it was unaware of recent, if any, feasibility studies published regarding the application of the scheme proposed by the Bill in a country with difficulties as unique as South Africa, adding that it was foreseen that the administrative costs of the system would far exceed the present system, especially in respect of the employment and training of sufficient staff. It pointed out that, at present, very little of the investigation of a claim is done by the claims handlers of the RAF. The victim is usually assisted by an attorney who investigates and submits proof of

'The victim is to be effectively deprived of the right to access legal representation to recover as much of his or her actual damages as possible.'

the accident, injuries as well as the impact of the accident on the victim's employment.

The LSNP was of the view that the proposed system would deny the administrator of such assistance, multiplying its investigative duties. Furthermore, many victims live in remote areas of the country with limited access to transport and communication. It is assumed that to execute its duties and assist claimants effectively, the administrator would have to be geographically much more accessible than the RAF.

'Government would be remiss in the execution of its duties, if it were not to take cognisance of the performance of such a system in practice, prior to replacing a system which provides equitable compensation to victims, with an inefficient procedure,' stated the LSNP.

The LSNP reiterated the LSSA's views regarding the appeals tribunal. The LSNP stated that there can be no question that the intended appeal tribunal would be called to determine factual disputes. 'Insofar as s 49(2) of the Bill intends the appeal tribunal to consist of solely officers of the administrator, it does not begin to make any pretence of independence and impartiality. The review jurisdiction afforded by the Promotion of Access to Justice Act does not include the determination of such disputes. It follows that these provisions are plainly unconstitutional,' it stated.

'Section 32 of the Bill essentially sought to introduce a system of preferred healthcare providers, who would presumably be appointed without input from any persons or representatives protecting the interests of victims.'

The LSNP was also in agreement with the LSSA regarding the non-liability for illegal aliens clause. The LSNP said that it should be borne in mind that s 29 of the Bill sought to strip the road accident victim of his common law remedies against his wrongdoer. According to the LSNP, the effect of s 28(4) is to offer the illegal alien only medical care in return, and his dependants (who might be children) nothing.

'The unreasonableness of the limitation is exacerbated in an instance where the dependants are legally present in the Republic. The provisions unreasonably offend ss 9 (equality clause), 12 (freedom and security of the person), 22 (freedom

of trade occupation and profession), 25 (property), and 28 (children) of the Constitution,' stated the LSNP.

According to the LSNP, ss 32, 33 and 34 dealing with contracted healthcare services, treatment plans, pre-approval and forced healthcare, represented a complete disregard of the right to bodily integrity of the victim and are irreconcilable with s 12(2) of the Constitution.

Section 32 of the Bill essentially sought to introduce a system of preferred healthcare providers, who would presumably be appointed without input from any persons or representatives protecting the interests of victims. Section 34 entitles the administrator virtually to take control of the bodily integrity of the victim, prescribe treatment to be undergone and, in terms of s 33(3), designate the medical service provider at whose mercy the victim is to subject himself.

Regarding s 35(1), which disentitles all persons not ordinarily resident in South Africa from any income protection, irrespective of the citizenship of the victim and s 35(2) which deprives a victim if they have been absent from the Republic in excess of six months per year for a period of three years preceding the accident, the LSNP noted that this made an astonishing inroad into the rights of the victim, bearing in mind that he is simultaneously deprived of redress against his wrongdoer.

'The deeming provision in s 35(2)(b) subjects the victim to the same fate if he or she fails to submit proof of residency within a reasonable time of being requested to do so. Once established that a reasonable time has elapsed, it appears that the victim remains so disentitled, irrespective of the reason for his failure,' the LSNP stated.

According to the LSNP, the provision holds considerable peril for many South Africans who, by virtue of a lack of employment opportunities in South Africa, are forced to work outside the borders of the country.

The LSNP was of the view that, on the face of it, the deprivation seemed arbitrary and was a flagrant disregard of the equality clause in s 9 of the Constitution, adding that it was doubtful whether the deprivation would pass constitutional muster at the hands of the equality clause in respect of foreigners legally but temporarily present in the country.

Income support benefits

According to the LSNP, ss 36(3) 36(4)(b) appeared to entitle persons who were economically inactive immediately before the accident to temporary income support benefits, subject only to the fact that their injuries would have prevented them from working if they had been employed.

The LSNP noted that this provision ap-

'The LSNP added that lay persons would have limited to non-existent knowledge of the principles of administrative justice and would lack the knowledge and skill to effectively conduct PAJA litigation.'

peared to be gratuitous and hardly in line with the purpose of the Bill to relieve the effects of an accident. 'Bearing in mind that various classes of claimants (persons younger than 18, older than 60, and persons not ordinarily resident), whose actual income have been affected by accidents are deprived of benefits, the extension of the benefits to economically inactive persons seems unjustified,' it stated.

The LSNP believed that the difficulty in adopting the system provided for in terms of COIDA is that that system is designed for persons employed formally making the determination of benefits relatively simple. Pre-incident income is determined by simple reference to salary. 'Road accident victims are not necessarily employed. Victims include children, self-employed persons and persons informally employed, as well as persons still at the beginning of their career paths,' the LSNP noted, adding that 'the system proposed does not cater for child victims whose income earning capacities have been destroyed. It is unlikely that even a reasonable percentage of the parents of minor children will ever be able to finance a proper investigation to show that their injured children will eventually become entitled to benefits when they reach normal income earning age. Insofar as they are economically inactive at the time of the accident, they appear to be sentenced to forever be receiving benefits relevant to the average annual national income.'

According to the LSNP, these benefits make the Bill open to constitutional attack by virtue of a gross violation of the equality clause in terms of s 9 of the Constitution and the children's clause in s 28. The LSNP added that it was obvious that the exclusion from income support benefits of persons younger than 18 and older than 60 years was open to attack in terms of the equality clause and the children's clause.

Family support benefits

The LSNP was in agreement with the LSSA and the BLA that s 39 of the Bill introduced a further, apparently arbitrary,

deprivation of benefits to dependants who are not ordinarily resident in the Republic.

It said that this provision is unlikely to pass constitutional muster.

In conclusion, the LSNP stressed that it foresaw difficulties with the claims and appeal procedures as the claimant was principally responsible for submission and proof of his or her claim.

Because of the necessity to safeguard against fraud and the notorious inefficiency of bureaucratic systems, the LSNP foresaw that claimants are likely to have their limited benefits 'unacceptably delayed' as they get tied down in paper wars with the administrator.

According to the LSNP, unlike in the

present system, the victim would not be able to approach an attorney willing to work on contingency and to finance medico-legal reports. The LSNP added that lay persons would have limited to non-existent knowledge of the principles of administrative justice and would lack the knowledge and skill to effectively conduct PAJA litigation.

Insofar as the Bill's intention to provide an effective and equitable compensation system to alleviate the impact of road accidents on victims, the LSNP foresaw a severe danger that the proposed Bill would accomplish exactly the opposite.

The LSNP concluded by stating that it could not and did not support the Bill.

'The insult to injury is that the administrator is absolved of virtually all responsibility in terms of s 52 of the Bill. It is unclear why this particular organ of state should enjoy such a privileged position.'

- The full submissions by the LSSA, BLA and LSNP can be accessed on the LSSA website at www.LSSA.org.za under 'Legal practitioners' LSSA comments.
- See 2014 (Aug) DR 10.

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

LEAD empowers SAWLA members through DoJ



Sawla delegates from the North West at the training session provided by LEAD on behalf of the Justice Department. With them are trainers Adv Moksha Naidoo (left) and Adv Ismail Hussain SC, who dealt with labour law and litigation techniques respectively. In the front, third from right, is Ntibidi Rampete, Director at the Gender Directorate of the Justice Department.

The Law Society of South Africa's Legal Education and Development division (LEAD), in cooperation with the Justice Department's Gender Directorate, has provided training to women lawyers who are members of the South African Women Lawyers Association (Sawla) in ten centres across the country. Training was provided in litigation techniques, labour law, insolvency, the new Companies Act and business rescue at various centres.

Delegates included candidate attorneys, attorneys, state attorneys, advocates, family advocates, directors, deputy directors, researchers, legal advisers, registrars from the courts and magistrates.

The Justice Department's Gender Directorate is involved in several empowerment programmes – one of which is in conjunction with Sawla – aimed at facilitating gender transformation in the legal profession.

Barbara Whittle, Barbara@lssa.org.za

LLB MBA

Most powerful letters in the alphabet.

The GIBS MBA is the only Executive MBA in South Africa ranked by the prestigious *Financial Times* Executive MBA ranking. For lawyers who mean business.

**Gordon Institute
of Business Science**
University of Pretoria

www.gibs.co.za/ftmba

Two-year prison sentence for Swazi lawyer

There has been an uproar since July regarding the conviction and sentencing of Swazi human rights lawyer, Thulani Maseko and the editor of monthly publication, *The Nation* magazine, Bheki Makhubu, for articles published in the February and March 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 vehicle inspector for executing his duties. Criticism was directed mainly at the country's Chief Justice Michael 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 (see 2014 (May) *DR* 15).

The pair was 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 the option of a fine. The sentence was backdated to 17 and 18 March 2014, the dates that they were taken into custody. The court also fined *The Nation* and Independent Publishers E50 000 each, payable within one month from the date of the sentencing.

The Southern African Development Community Lawyers' Association (SADC LA) immediately issued a media statement in which its president, Kondwa Sakala-Chibiya, says that SADC LA is appalled by the sentence. She also states that SADC LA believes that the sentence is contrary to Swazi case precedent, that it is not commensurate with the nature of the offence they were convicted of, and that it is also incompatible with international law.

Ms Sakala-Chibiya added that SADC LA finds the sentence repressive and a deliberate limitation on the exercise of fundamental rights and freedoms not only by the accused, but by the Swazi people as a whole. 'So while the judgment purports to protect the dignity of the Swazi courts and stability of the country, it instead appears to be a crackdown on dissent,' she states. Ms Sakala-Chibiya highlights the fact that freedom of expression is a fundamental human right guaranteed in Article 24 of the Constitution of Swazi-



Protesters outside the High Commission of Swaziland in Pretoria picketing against the arrest and imprisonment of Swazi human rights lawyer, Thulani Maseko and editor, Bheki Makhubu on 30 July.

land Act 001 of 2005 as well as in major international human rights instruments to which Swaziland is a party, and in customary international law.

According to Ms Sakala-Chibiya, in his judgment, Simelane J justified the sentence as a means of deterring the 'unacceptable unfortunate and increasing trend of the accused persons writing scurrilous articles that have the propensity of tarnishing the reputation, authority and dignity of the courts ... The courts have an obligation to discourage such conduct in the interest of the stability of our country.'

Ms Sakala-Chibiya states: 'Also of concern is that a 30 May 2014 Supreme Court of Swaziland decision in *Swaziland Independent Publishers (Pty) Ltd & Another v King* [2014] SZSC 29 set aside a High Court sentence for a contempt of court conviction, which had imposed a E 400 000 fine suspended over a five year period if the appellants paid E 200 000 within three days, failure of which the 2nd appellant, namely Bheki Makhubu, would be imprisoned for a two-year term. Instead, the Supreme Court ordered that the appellant be sentenced to a term of only three months' imprisonment, which would be suspended for

three years on condition that the appellant is not convicted for the same offence during that period.'

Ms Sakala-Chibiya adds that contempt of court is a common law offence in Swaziland; that the Supreme Court of Swaziland is the final court of appeal and exercises appellate, supervisory and review jurisdiction over all subordinate courts, including the High Court in terms of articles 146, 147, 148 and 149 of the Swaziland Constitution. She noted that, in view of the above-cited decision of the Supreme Court, it would logically follow that the maximum sentence that the High Court should have imposed on Mr Maseko and Mr Makhubu for the conviction should have been three months' imprisonment. 'In this regard, the two-year sentence without an option of a fine is a departure from what is binding case precedent in Swaziland,' she states.

Ms Sakala-Chibiya also called on Swazi authorities to afford the pair a speedy appeal and the right to be released on their own recognisance should they appeal their conviction and sentence.

Meanwhile, the Right2Know Campaign held a protest picket outside the High Commission of Swaziland in Pretoria on 30 July. The protest was held to voice

Professional Office Suites overlooking the High Court

Estelle
082 300 3993
(011) 511 5335
estelle@billiongroup.co.za



Ready to have a look?



50 sqm - 5000 sqm



Bespoke Space Planning

the Campaign's 'outrage at the blatant attacks on freedom of expression and a free press in Swaziland.'

The Campaign's media freedom and diversity spokesperson, Julie Reid told *De Rebus* that the aim of the protest was to plead with the South African government and all Chapter Nine institutions to put pressure on the Swaziland government to drop the charges.

The director of the Centre for Human Rights at the Faculty of Law of the University of Pretoria (UP), Professor Frans Viljoen, also called on the South African government to take suitable measures to exert pressure on the Swaziland government to ensure that Mr Maseko, who is a UP graduate, be released from prison.

In a media statement, Prof Viljoen pointed out that Mr Maseko had graduated with a Master's degree in Human Rights from the University of Pretoria in December 2005. After graduation, he returned to Swaziland to work as a lawyer and human rights activist. In 2011 Mr Maseko received the Vera Chirwa Award from the Centre awarded to a graduate who has made a significant difference to the protection of human rights in his or her home country.

Mary da Silva from Lawyers for Human Rights Swaziland (LHRS) has told *De Rebus* that the sentencing was 'bitter sweet'. She said that the LHRS has always known what they were up against and that the sentence was a pronouncement of their fears and a vindication of their views that the Swazi government is out to clamp down on human right lawyers in that country.

Ms da Silva said that Mr Maseko had been smiling the whole way through the sentencing and that those present - especially the attorneys - drew strength from him. She added that Mr Makhubu's family had some hope that the pair would not go back behind bars as they were not aware of the political affiliation of the case. Their worst case scenario was that they expected that the pair would be found guilty and sentenced to a few months in jail, backdated to March, which would mean no further jail time. Ms da Silva said that it had been heartbreaking to see Mr Makhubu's wife break down after the sentencing. 'His family was shattered,' she said.

'The conviction has helped make the world take notice of what is going on in Swaziland. It has opened people's eyes, even the citizens of this country. People used to think that to be in a "war" there must be violence, but now they realise that we have been in a "war" for a while,' said Ms da Silva.

When asked about the state of the legal profession generally in Swaziland, Ms da Silva said that attorneys are worried about the profession. 'They realise that



Swazi human rights lawyer, Thulani Maseko, was awarded the Vera Chirwa Award from the Centre for Human Rights at the Faculty of Law of the University of Pretoria in 2011 in recognition of the protection of human rights in his home country.

the justice system can be manipulated easily. There is too much uncertainty. They are asking themselves what they are doing and if they even still have a profession. It is unfair on the other judges to be painted with the same brush. There is just so much uncertainty on the outcome of even the simplest of matters because you do not know which way it will go or which judge will preside over your matter,' she said.

According to Ms da Silva, because there is no parole system in Swaziland, the pair will serve two thirds of their two-year sentence, as eight months in prison is viewed as a year in that country. She added that they were given until 8 August to appeal the sentence, which they have done.

Mr Maseko has also written a letter from his prison cell to President Barack Obama appealing for support from the American government. In the letter, he asks the United States (US) to put pressure on Swaziland's King Mswati III to agree to constitutional talks. He also pleads with the US to target sanctions against the King.

Ms da Silva said that they had not received a formal response to the letter from President Obama but added that the letter was a topical issue among delegates at the US-Africa leaders summit in August. 'The secretary of the LHRS, Siphso Gumede was there. We will have to wait and see what comes of the letter,' she said.

Tanele Maseko, Thulani Maseko's wife, has told *De Rebus* that the biggest difficulty that her family has faced since

LEAD donates school uniforms

March is financial. She added that Mr Maseko is the sole bread winner and having him in jail for so long has been extremely difficult. Ms Maseko added, however, that her family has been receiving remarkably overwhelming support from all corners, adding that she thought that after the sentencing of her husband, people would give up and the case would lose momentum. 'I was so wrong. People want to assist further. I get a lot of phone calls daily asking what kind of support I need and how they can assist. The people in Swaziland are living in fear though and do not want to be seen to be helping us,' she said.

Ms Maseko said that she felt bad for the legal profession and for the Swazi media. She stated that the verdict has sent a message that Swazi citizens should not express how they feel. 'I particularly feel sorry for students studying law and journalism. Where will they work? In Swaziland you cannot express how you feel because you never know who will come knocking on your door and take you to jail. I feel sorry for our children because our justice system is such a circus,' she said.

Mr Maseko has been moved from the Sidwashini Prison in Swaziland's capital, Mbabane, to Big Bend Prison, in the East of the country. Ms Maseko believes that he was moved because of the letter to President Obama. 'The people in power thought that the officers at Sidwashini Prison helped him smuggle the letter out. They also moved him to frustrate him and break his spirit by isolating him from his family and friends. Big Bend Prison is about 150 to 200 kilometers away from home and I can no longer visit him every day,' she said.

Ms Maseko is hoping that world leaders and influential people raise the alarm and put pressure on Swaziland to release the pair and to put an end to the situation. 'Thulani is not phased about being in jail. All he wants is that, when he comes out, things would have changed. The fight is not about him, it is much bigger than him; it is about the rights of Swazi citizens and them being able to express themselves fully and freely without landing in jail. He is a man of justice and he has always believed that in the end, good will overcome bad. It is only a matter of time,' she said.

• See 2014 (May) DR 15 and 2014 (Aug) DR 16

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

On 1 August the Courses and Distance Education section of the Legal Education and Development (LEAD) division of the Law Society of South Africa donated 15 school uniforms to children at Boschkop Primary Farm School in Pretoria.

The donation was part of its social responsibility programme. The Courses and Distance Education manager, Nomsa Sethosa, told *De Rebus* that the aim of the donation was to put a smile on the children's faces and to assist them. She added that going forward, her depart-

ment would donate two school uniforms per child per year and that it would also buy them birthday and Christmas gifts.

When asked how this particular school was chosen, Ms Sethosa said that she visited the school last year and was touched that all the children in a particular grade did not have access to school uniforms.

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



The children of Boschkop Primary Farm School receiving their uniforms from the Courses and Distance Education section of LEAD.

Erratum

Hussan Goga, the Chairperson of the LSSA's Deceased Estates Trusts and Planning Committee, was incorrectly identified as being the Chairperson of the LSSA's Property Law Committee in the caption to the photo with Chief Master Lester Basson in 2014 (Aug) DR 15. It was the LSSA's

Deceased Estates, Trusts and Planning Committee which met with the Chief Master. The Chairperson of the LSSA's Property Law Committee is Selemeng Mokose.

The confusion that this may have caused is regretted.

2014 annual general meetings

Five of the six constituent members of the Law Society of South Africa will hold their annual general meetings later this year:

	Date	Venue	Contact person
KwaZulu-Natal Law Society	17 October	Durban Coastlands Hotel	Engela Pienaar (033) 345 1304
Black Lawyers Association	17-18 October	Cape Town Lagoon Beach Hotel	Lutendo Sigogo (015) 962 0712
Law Society of the Free State	30-31 October	Welkom (Venue to be confirmed)	Christina Marais (051) 447 3237/8
Cape Law Society	31 October – 1 November	Port Elizabeth Boardwalk Convention Centre	Thergesari Roberts (021) 443 6700
Law Society of the Northern Provinces	8 November	Rustenburg Sun City	Hester Bezuidenhout (012) 338 5949

- The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2015.

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

Make a difference – become a mentor to a newly qualified and or PDI attorney

LSSA/LEAD's Mentoring in Legal Practice Programme



Accelerating the professional development of attorneys

LEAD is looking to expand its mentors' base of experienced attorneys to transfer legal skills to newly qualified and previously disadvantaged attorneys (mentees). Once we have sufficient mentors, we will advertise for mentees.

A mentor is an attorney with at least eight years' experience in a specific area* who can engage with a mentee to develop his/her legal skills and confidence to practise. A mentee is a newly-qualified attorney or attorney from a previously disadvantaged background.



Contacts

Tel
+27 (0)12 441 4600

Fax
+27 (0)86 550 7098

E-mail
mentorship@elms-lead.org.za

Website
www.elms-lead.org.za

Register online to be a mentor or mentee at www.elms-lead.org.za



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

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

Its general functions are set out in section 16 of the Sheriffs' Act. It also plays an indirect role in the appointment of sheriffs through its control over the issuing of Fidelity Fund Certificates, without which a person is not entitled to function as a sheriff.



Looking for a Sheriff?

Visit our website and utilise the "Locate a Sheriff" button or try our new Mobi site directly from your smartphone
It's quick, easy and convenient

www.sheriffs.org.za

Online complaints form

In keeping with the times and technology the SABFS has now made service delivery even easier for our stakeholders. We have developed an online complaints form which is accessible on our website. The complainant need only visit our website, complete the online complaint form and an email will be sent directly to our complaints clerks.

[Link to web page http://www.sheriffs.org.za/complaint-reporting-form](http://www.sheriffs.org.za/complaint-reporting-form)

This process will speed up the time in which a complaint would reach our office.

**Coming
SOON**

Sheriff's search via sms

We'll be launching our "SHERIFF SEARCH FUNCTION" via SMS soon!
Look out for further details on our website.



South African Board for
SHERIFFS
Upholding the Dignity of Those We Serve

If you have any queries, complaints or compliments please contact us.

SOUTH AFRICAN BOARD FOR SHERIFFS- 88 LOOP STREET, CAPE TOWN 8000
T: 021-4260577, F: 021-4262598, E: contact @sheriffs.org.za

www.sheriffs.org.za

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

The attorneys' profession in numbers

There are currently some 22 400 practising attorneys and 5 600 candidate attorneys.

Of the attorneys, 64% are white and 36% black (including African, coloured and Indian);

- 37% are women; of which 13% are black women.

Graphic 3 reflects the figures from 2008 to 2014 and shows that, whereas white male attorney numbers have grown only marginally (and the total of white male attorneys has dropped 7% from 2008 to 2014), black male attorneys have shown 1% growth from 3 800 to 5 357. Women attorneys have shown a

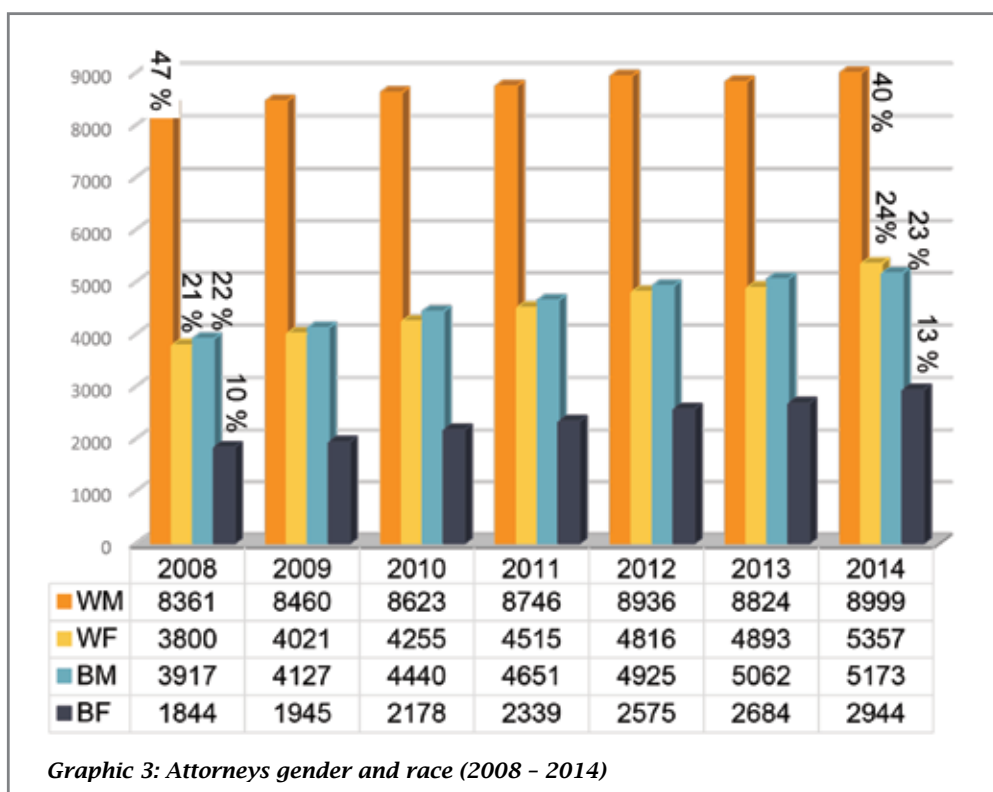
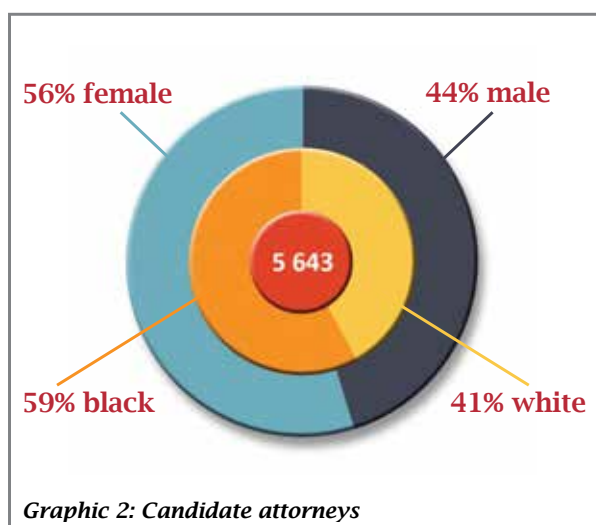
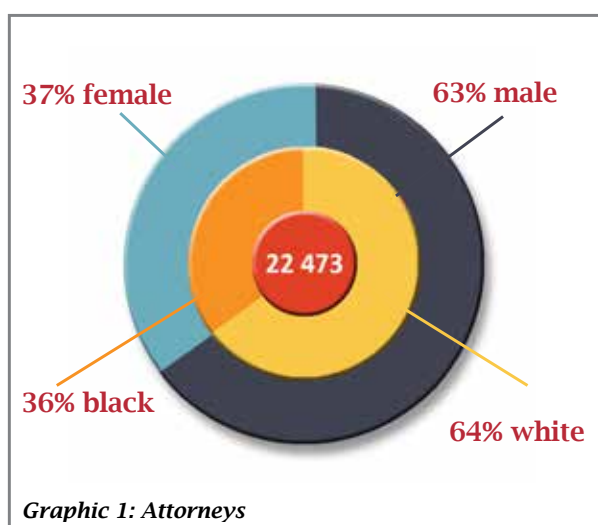
3% growth generally.

Race statistics are not available for the attorneys' profession prior to 2008.

Current candidate attorney figures show a different picture:

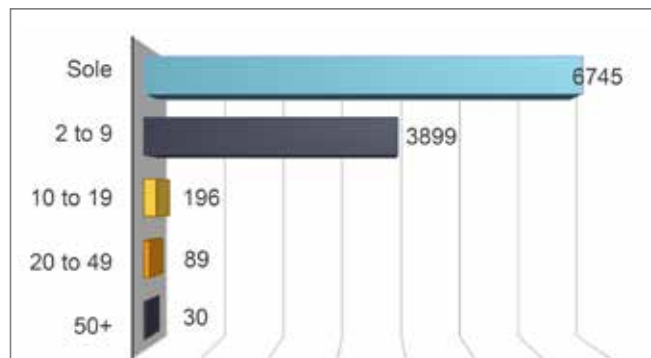
- 56% are females
- 59% are black.

Seventeen percent of candidate attorneys are white males, whereas 32% are black females. Black male and white female candidate attorneys are 27% and 24% respectively.



Law firms

There are 10 959 law firms in South Africa – 62% of these are sole practitioners and 35% have between two and nine attorneys. Only some 30 firms have more than 50 attorneys.



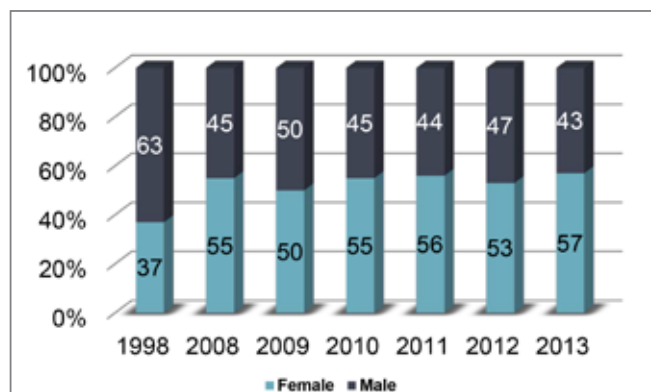
Graphic 4: Law firms in 2014

Attorneys admitted

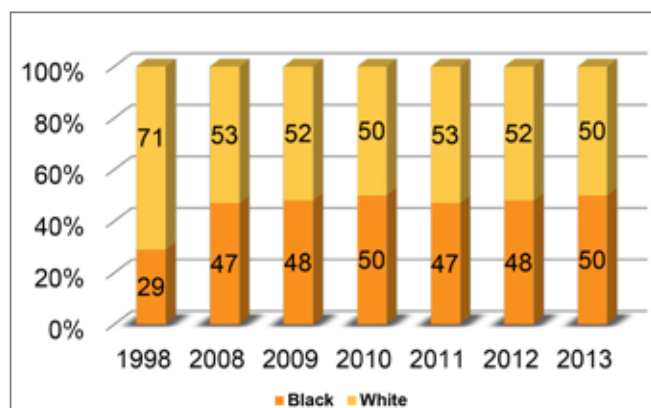
An average of 1 590 attorneys have been admitted to the profession per year over the past ten years. Last year, 57% of there were women and half of those admitted were black. Generally, for the past four years, more women have been admitted to the profession than men, and the number of black attorneys that are admitted varies between 47% and 50%.

Figures for 1998 show that, sixteen years ago, 63% of attorneys admitted that year were male and 71% were white.

So generally, over sixteen years there has been a 20% increase in female attorneys and a 21% increase in black attorneys admitted to the profession.



Graphic 5: Attorneys admitted (gender)

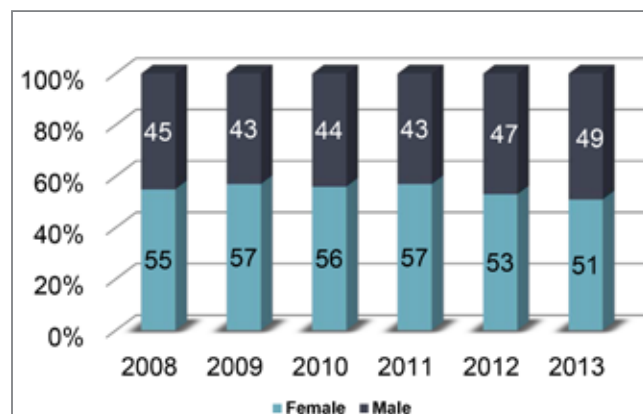


Graphic 6: Attorneys admitted (race)

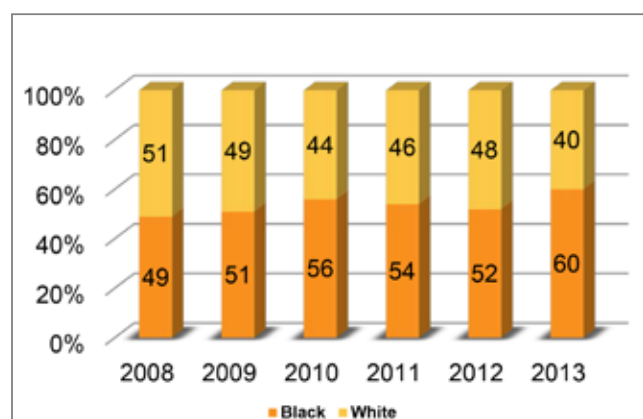
Articles registered

The statutory provincial law societies have registered an average of 2 016 contracts of articles per year. The current year (between April 2013 and April this year) has seen the largest number of articles registered to date, being 2 595. The lowest figure was recorded between 2010 and 2011, when only 1 793 contracts of articles were registered.

Sixty percent of the articles registered in the current year were for black candidates and 51% were for female candidates. The number of articles for female candidates has been the lowest this year since 2008, whereas articles for black candidates have increased from 49% in 2008 to 60% this year.



Graphic 7: Contracts of articles registered (gender)



Graphic 8: Contracts of articles registered (race)

Statistics South Africa Mid-year population estimates - July 2014:

Statistics South Africa estimates the population of South Africa to be 54 million as at July 2014.

- 51% of the population is female;
- 49% male;
- 91.5% is black (80,2% African; 8,8% is coloured and 2,5% is Indian); and
- 8,4% is white.

The StatsSA Quarterly Labour Force Survey (April to June 2014) puts the working-age population at 34,3 million. The labour force stands at 20,2 million; of which 10,7 million are employed in the formal sector.



People and practices

Compiled by Shireen Mahomed

Hogan Lovells in Johannesburg has three new appointments.



Ernie Lai King has been appointed as a partner to head the firm's China tax practice. He specialises in international tax, mergers and acquisitions and dispute resolution.



Leishen Pillay has been appointed as a senior associate in the commercial department. He specialises in technology, media and telecommunications law.



Nicholas Veltman has been appointed as a senior associate in the mining department. He specialises in mining law, construction and engineering.



Tabacks Attorneys in Johannesburg has appointed Doctor Cithi as a director. He focuses on employment law.



Would you like to write for *De Rebus*?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners.

Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final.

In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere, including websites.

For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

- Please note that the word limit is 2000 words
- Next submission dates: 22 September and 20 October 2014.

LEGAL ADVISER DURBAN CENTRAL Nedbank Business Banking

Nedbank is driven to offer employees exceptional prospects through its commitment as an organisation that truly cares. Our high-performance culture ensures a place where you can thrive and where excellence is recognised and rewarded. The ideal candidate will be an admitted attorney with four years' relevant commercial experience, basic banking product knowledge, commercial skills as well as computer skills (MS Office). The incumbent will take responsibility for drafting and managing legal risks pertaining to documentation and procedures, providing legal opinions, presenting training courses and keeping clients updated on relevant legal issues.

To apply please email a detailed CV to lisadv@nedbank.co.za, quoting ref no NED10203. If you do not hear from us within 30 days after the closing date, please assume that your application has been unsuccessful.

Closing date for all CVs: 26th September 2014. The appointment will be made in line with Nedbank's employment equity policy.

MAKE
THINGS
HAPPEN



NEDBANK

Fidelity Fund gets statutory private prosecution powers

By
Moshoeshoe
Toba

The Judicial Matters Amendment Act 42 of 2013 came into effect in January this year. One of the amendments it effected was the insertion of s 46A into the Attorneys Act 53 of 1979 (the Attorneys Act). This new section confers powers of statutory prosecution on the Board of Control of the Attorneys Fidelity Fund (AFF) that, until this year, have been the preserve of the councils of the statutory provincial law societies.

In terms s 76 of the Attorneys Act:

'Any society may, by any person authorised thereto in writing by his or her president, institute a prosecution for any offence in terms of this Act or of any regulation made thereunder, and the provisions of the laws relating to private prosecutions shall apply to such prosecution as if a society is a public body.'

The AFF never had the same powers as the law societies' councils in terms of s 76. However, because of the escalating rate of claims paid year on year, the AFF deemed it fit to leverage on the prosecution of attorneys accused of theft of trust money as part of its risk mitigation tools. It did so by rebuilding and strengthening relations with strategic stakeholders in the law enforcement and criminal justice system, namely the National Prosecuting Authority (NPA) and its relevant business units, as well as the South African Police Service (SAPS) and its relevant units dealing with commercial crime. It also lobbied for legislative intervention in the

form of the Judicial Matters Amendment Act as part of risk mitigation.

The operation of statutory prosecuting power contained in s 8 of the Criminal Procedure Act 51 of 1977 (CPA) has a direct bearing on the implementation of the new s 46A of the Attorneys Act.

The new s 46A acknowledges the following:

'Notwithstanding the provisions of section 76, the board of control may, by any person authorised thereto in writing by the chairperson, and upon written notice to the society of the province concerned, institute a private prosecution for the misappropriation or theft of property or trust money, and the provisions of section 8 of the Criminal Procedure Act, 1977 (Act No.51 of 1977), and any other law relating to private prosecutions shall apply to such prosecution as if the board of control is a public body.'

The CPA requires that all processes be issued in the name of the private prosecutor, and in the case of the AFF, the Board of Control assumes that title. In the lower courts, a charge sheet or summons must be used and in the higher courts, the indictment.

As regards security and costs by the private prosecutor, security applies only to private individuals in terms of s 7 of the CPA. The AFF, which is deemed a public body in terms of the new s 46B of Attorneys Act, is exempted. The various costs of the process which would necessarily be attributable to s 7 private prosecutions – ranging from fees prescribed under the rules of court for the service or execution; costs

and expenses incurred for prosecution and appeal thereof; accused's costs where the charge is dismissed or he or she is acquitted – are expressly excluded by the legislature in terms of the CPA. If the accused is found not guilty and discharged, the AFF will be exempt from punitive cost in terms of s 16 of the CPA.

There are many benefits in the process, if properly managed, to harmonise the stakeholder relations in the system. The approach which the AFF and NPA would adopt must be strategic by leaving key sensitive cases to the prosecuting authority. This will augment the already established relations which are based on cooperation, knowledge, skill and capacity building; deterrence to steal trust money; and ultimately the preservation of the AFF as the custodian of public funds

in the broader social security system.

It is also worth noting that the insertion of s 46A in the Attorneys Act builds the foundation for the new dispensation envisaged in the Legal Practice Bill (LPB). A similar provision can be found in article 63(1)(i) of the LPB. The difference between s 46A of the Attorneys Act and art 63(1)(i) of the LPB is that no written notice needs to be served on the Legal Practice Council as is currently required with regard to the relevant provincial law society.

Moshoeshoe Toba Blur (Vista) LLB (University of the Free State) Cert in Forensic and Investigative Auditing (Unisa) is a non-practising attorney and Manager: Prosecutions at the Attorneys Fidelity Fund.

Cyril Muller Attorneys

incorporating

**Willie Wandrag
Costs Consultants**

Economic reality dictates that few, if any, are in a position to disregard the expense of litigation and attempts to maximise costs recovery on behalf of successful litigants or to limit the exposure of the less successful have served to highlight the degree of speciality required in this field. To assist attorneys in this regard, Cyril Muller Attorneys offer professional and efficient solutions to these aspects of litigation.

Should you require assistance with any of the following, be it between parties to litigation or as between the attorney and his client, we would be pleased to oblige:

- the drawing, taxing, opposing of bills of costs;
- the fixing of security for costs; or
- any advice regarding aspects of costs and charges.



Contact: Cyril or Willie

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

Can you trust your client's memory? (Or will anyone trust yours?)

By
Ann
Bertelsmann

Looking at many claims reported to the Attorneys Insurance Indemnity Fund (AIIF) my answer would be 'no' to both the above questions. In fact, most practitioners could also answer the question 'Can you trust your own memory?' in the negative.

What are the possible consequences of these memory failures?

They can and often do give rise to disputes, usually about –

- fees and disbursements;
- the nature and scope of the mandate; the client's instructions to/requests for information from the practitioner;
- the practitioner's requests to the client for information/documentation/cooperation;
- whether or not communications have taken place or have been received; and
- agreements to settle matters.

What can be done to minimise or resolve such disputes?

Here are at least three ways that these disputes can be minimised or resolved before they turn into professional indemnity (PI) claims:

1. Sign comprehensive letters of engagement during the initial engagement process.
2. Make proper file notes.
3. Write follow-up confirmation letters.

Letters of engagement

Letters of engagement are professional mandates, signed by both parties, which give certainty to both attorney and client and govern most of their interactions. That way, a client accepts what he or she can and cannot expect from an attorney

and also what an attorney can expect from a client.

An engagement letter is a contract that defines the legal relationship between a professional firm and its client. It spells out the scope (and limits), as well as the terms and conditions of the engagement. Importantly, it sets out the agreement on billing rates and policies.

In many jurisdictions, letters of engagement are mandatory.

Why is a letter of engagement necessary?

Very importantly, it provides documentary proof in the event of a dispute. It goes without saying that this contract will protect an attorney from clients who keep shifting the goalposts. By the same token, it protects the client, for example, where an attorney fails to carry out the mandate as agreed, fails to keep the client advised of developments or overcharges the client.

In a paper for the American Bar Association conference in 1998, Phil J Shuey wrote: 'All fee agreements should be in writing and every matter should have a fee agreement or letter of engagement. ... Avoid future misunderstandings or conflicting recollections by assuring that both client and firm understand what financial arrangements exist in the matter.' Shuey also makes the point that '[f]ee disputes are one of the leading causes of malpractice actions'. (PJ Shuey 'Financial Arrangements' (1998) (www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/w98shuey1.html, accessed 31-7-2014)).

Janice Purvis notes that the most common client complaints in New South Wales relate to disputes about legal costs.

She adds that 'where solicitors bring proceedings to recover unpaid costs and disbursements, all too frequently they are met with a cross claim alleging professional negligence arising from the conduct of the matter' (J Purvis 'Pursue, don't sue, to recover unpaid costs' (2009) *Law Society Journal* 48 (www.lawcover.com.au/filelibrary/files/Publications/Lsjarticles/LSJApril09.pdf, accessed 31-7-2014)).

The South African experience is the same as those in America and New South Wales.

What needs to go into the engagement letter?

Some of the essentials are:

- Who are the parties?
- An explanation of the scope of legal work to be undertaken.
- An explanation of what aspects/potential aspects are not undertaken (for example tax advice on a commercial transaction).
- What the practitioner can expect from the client and *vice versa*.
- Who in the practice will deal with the matter.
- Preferred method and frequency of communication (this can be very helpful, in particular to avoid the situation where your client telephones your offices for updates or with additional information on a daily basis).
- An explanation of fees and disbursements to be charged and billing practices.
- Deposit required.
- Payment terms.

- Holding and investing the client's money.

It is important to amend the engagement letter as circumstances change. Of course any amendments must be agreed to and signed by both parties.

Every practice will have its own ideas about what should be included in the document and the style/format used. It is recommended that a firm adopts a standard form that is adaptable to the individual situation. A firm may wish to have a shortened version for new matters taken on for existing clients.

Case study

Attorney A acted for Mr B, who suffered a fractured pelvis when a taxi collided with his vehicle. Some four years post-accident (on the steps of court) the Road Accident Fund (RAF) tendered settlement of Mr B's claim arising from his bodily injuries.

It was then that Mr B queried why the RAF was not including a tender for the material damages to his vehicle. He subsequently sued Attorney A for allowing his material damages claim to become prescribed.

It was then that Attorney A would have benefitted from having a letter of engagement stipulating the scope and limits of his mandate.

For more information on letters of engagement and some examples, see 'Risk Management Tips' on the AIIF's website www.aiif.co.za and also Thomas Harban's article 'Letters of Engagement and the CPA' *Risk Alert Bulletin* 5/2011.

Non-engagement letters

If an attorney decides not to take on a matter, it is recommended that a letter

of non-engagement is sent to the client. This should be written in plain language, clearly and concisely informing the client that the firm is not accepting the mandate. Where applicable, ensure that the letter contains a warning about any applicable prescriptive period. (See example letter below.) It is essential to ensure that the letter is received by the addressee.

Example non-engagement letter

Dear Sir

CONSULTATION 24 JUNE 2014: POSSIBLE CLAIM AGAINST _____.

After consideration, we have concluded that our law firm will not represent you in this matter.

This letter is not intended to be an opinion concerning the merits of your case.

Please take note that there may be strict time limitations within which you must act in order to protect your rights in this matter. Failure to institute an action within the required time may mean that you could be barred forever from pursuing your action. Therefore, you should immediately contact another lawyer to obtain legal representation.

We enclose all of the documents that you provided for our consideration.

Thank you for your interest in our firm.

Yours faithfully,



Today's competitive labour market requires skills beyond the traditional LLB. The **LLM programme in International Law** at **UJ** opens doors to an international career and to many exciting employment opportunities...including working on transboundary cases at an international organization such as the United Nations, the Red Cross or working in the field of human rights or at an international law firm. The programme consists of modules in **International Criminal Law/International Humanitarian Law; International Human Rights Law and International Environmental law.**

Students will be lectured by **top experts in the field** as well as expert guest lecturers. The course coordinator is an **internationally recognised academic** who has taught in Europe and the UK. Internships at international courts, institutions and local human rights organisations can be arranged. Lectures take place after 18h00. An average of 65% for the LLB is required for admission but some flexibility exists. A student will be reimbursed for tuition fees on completion of the course within one year (T's&C's apply).

UJ Law also offers postgraduate Master of Laws (LLM) degree programmes in the following specialist areas: **Banking Law; Commercial Law; Corporate Law; Drafting and Interpretation of Contracts; Human Rights; International Commercial Law; Labour Law and Tax Law.**

Enquiries: Phaladi Magongoa
phaladim@uj.ac.za | 011 559 3843 | www.uj.ac.za/law

DO YOU WANT A
Career
WITHOUT
BORDERS

LLM – International Law
University of Johannesburg



RETHINK. REINVENT.

Closing the engagement

It is a good idea to advise the client in writing, that the mandate has been completed – perhaps together with the final account. This could protect a firm against possible allegations that they were supposed to take related matters further. Also, remind the client of any further steps that need to be taken. For example, where a claim against the Road Accident Fund (RAF) has been finalised, enclose the undertaking and confirm that the client will be responsible for claiming from the RAF in future for any medical expenses incurred. Again, ensure that this letter is received by the client.

Proper file notes

All advice to and discussions with a client and other parties should be recorded in writing, clearly and unambiguously. These notes should form a comprehensive record of all interactions. First prize is a contemporaneous file note and confirmation of the discussions in a letter or e-mail, but either of these is better than neither.

Do you make file notes of:

- All consultations and meetings with the client and other parties?
- All telephone discussions with the client and other parties?
- Discussions with counsel? (An insured attorney whose client alleged that he allowed her RAF claim to prescribe said that counsel advised him that the claim would not succeed. He had no file notes and therefore nothing to support his version.)

Do your notes include –

- date, type, length of the communication;
- identity of the parties involved;
- information received;
- questions asked and answers received; and
- advice given?

Are your file notes –

- succinct, but covering all important issues;
- easily understandable; and
- as contemporaneous as possible?

What are the advantages of recording everything in writing?

IM Hoffman offers good advice on keeping a record of instructions. Ms Hoffman states: 'Even where you obtain express instructions from your client, the client may deny giving you those instructions. ... If you do not receive written instructions, keep a file note of the oral instructions and write to the client to confirm the oral instructions. ... The desirability of written instructions in a settlement situation is common sense. All of us

have second thoughts about bargains we strike.' (IM Hoffman *Lewis & Kyrrou's Handy Hints on Legal Practice* 2ed (Durban: LexisNexis 2014) 24).

Advantages of file notes:

- They can be retained as evidence in the event of a dispute.
- They are essential for proper billing and drawing up bills of cost.
- They provide a record for you in conducting the matter.
- If anyone needs to take the file over or answer a query in your absence, they will easily and quickly know what has happened previously.

Purvis has this to say: 'When a professional negligence claim is made against a solicitor, the first and most obvious starting point of the investigation is the solicitor's file. A properly-managed file should clearly and unambiguously tell the story of the matter and its conduct, and form a useable trail in the provision of answers to the allegations. ... A properly-managed file will ensure good client service, enable you to properly bill the matter and minimise the mistakes that can cause conduct and professional negligence claims against solicitors' (J Purvis 'Does your file tell the story?' (2008) *Law Society Journal* 40) (www.lawcover.com.au/filelibrary/files/Publications/Lsjarticles/LSJOctober08.pdf, accessed 31-7-2014)).

The importance of making file notes must not be underestimated. Both professional and support staff should be expected to make comprehensive notes of all interactions with clients and other parties. The firm's minimum operating standards document should provide for this practice and your firm should have checks, balances and sanctions, to ensure compliance.

Of course, it is acknowledged that times are changing. Because of increased reliance on mobile telephones, most telephone discussions take place away from the attorney's desk and when attorneys are on the move – making strictly contemporaneous file notes almost impossible. Clever practitioners will have to find innovative ways of dealing with this. Any additional time spent making notes is well worth it in the long run. The alternative could well be hours spent out of the office defending your firm against PI claims. Remember also that you may lose out on fees for the work done if your client's claim against you succeeds.

Follow-up confirmation letters

It is good practice to follow up any discussions with a letter or e-mail confirming clearly and unambiguously what was said and decided. This is similar to minutes of a board meeting. If no contrary response is received, this tends to confirm the correctness of what you have written and you can accept that you and the recipient are 'on the same page'. You must, however, be as sure as possible that the letter has been received.

Case study

Mr Y had a claim for extensive building renovations to Mr Z's house. Mr Z was not satisfied with the workmanship and raised this as a defence. After much negotiation, attorney A settled Mr Y's claim for 50% of the amount claimed. Mr Y thereafter brought a PI claim against attorney A, alleging that the matter had been settled without his agreement.

Attorney A said that he had met with Mr Y and fully discussed the pros and cons of settling the matter or proceeding with litigation. On attorney A's version, Mr Y had agreed to the settlement because he was short of cash and urgently needed to buy materials for another project that he was involved in. Attorney A had made no file notes in this regard. He had also failed to confirm these instructions in writing. It is his word against Mr Y's.

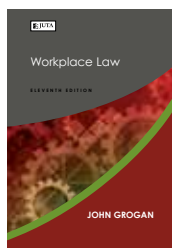
Having a signed engagement letter and written records of interactions (preferably confirmed in a letter to the client) are good ways of ensuring that any 'lapses' in your or your client's memory present no threat to your practice.

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



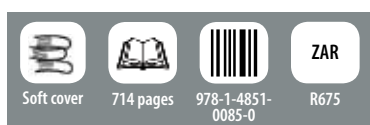
LEGAL RESOURCES from Juta Law

Legal information solutions you can trust.



Workplace Law (11th edition) *J Grogan*

This well-established book is a practical guide through areas such as discipline and dismissal, unfair labour practices, employment equity, collective bargaining and industrial action. The 11th edition has been revised with the latest case law and covers the significant 2014 amendments to the LRA, EEA and BCEA.



Dismissal (2nd edition) *J Grogan*

Dismissal comprehensively deals with all the circumstances in which dismissals arise and are challenged, with examples drawn from recent case law and the new amendments to labour laws. The procedural requirements governing dismissal and the remedies available to unfairly dismissed employees are also described in detail.

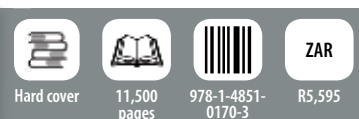


Taking Effective Witness Statements **Afneem van Doeltreffende** **Getuieverklarings**

(LegalEase: Essence series)

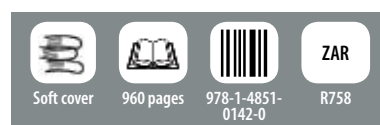
H Lochner

This book provides practical guidance about every stage of the statement-taking process, from preparing the witness before a statement is taken, through observing the body language of the witness during the interview, to compiling a post-interview report.



Statutes of South Africa (2013/14) *Juta's Statutes Editors*

This publication provides a complete record of South African Acts of Parliament. It comprises an updated and consolidated collection of Acts as at 1 April 2014 and an index to the national and provincial Acts and regulations. Subscribers receive free email alerts to legislation as promulgated during the previous week and a quarterly newsletter providing a consolidated record of legislative changes.



Land Reform (Juta's Property Law Library) *JM Pienaar*

Land Reform covers all legal developments from 1991 until July 2013. The book addresses the topics of state and private land, as well as the urban and rural contexts. Applicable legislative measures and policy documents are discussed and major court decisions are analysed.



The Judiciary in South Africa *C Hoexter, M Olivier (Contributing Editors)*

The Judiciary in South Africa is the first publication to provide a general survey of the judiciary as an institution. The book offers a detailed and expert account of the most important aspects of the judiciary in South Africa, both now and in the past.

Prices incl. VAT, excl. delivery and are valid until 31 December 2014.

Contact Juta Customer Services | Tel: 021 659 2300 | Fax: 021 659 2360 | E-mail: orders@juta.co.za

www.jutalaw.co.za



@jutalaw



Juta Law

JUTA
L A W



The old and the new:

A concise overview of the Intellectual Property Laws Amendment Act

By
André van
der Merwe

The Intellectual Property Laws Amendment Act 28 of 2013 (the Act) will come into operation on a date to be fixed by the President by proclamation.

The Act in effect creates new forms of Intellectual Property (IP) and these and their protection can be viewed as *res nova* because no protection has previously existed for these particular forms of IP. However, these new forms of IP and their protection may be problematic in respect of interpretation for both practitioners and the courts in due course.

Flowing from the Indigenous Knowledge Systems (IKS) Policy (this policy did not prescribe the exact form of protection) accepted by Cabinet in 2005, the Department of Trade and Industry (DTI) drafted and published the Intellectual Property Laws Amendment Bill (IPLAB) in December 2007 for comment. The IPLAB adopted the general approach of creating new forms of IP (namely, indigenous or traditional IP of various kinds) by amendment of certain IP Acts – as opposed to *sui generis* legislation.

The IPLAB was subjected to wide and strenuous criticism by the legal profession, especially by IP legal practitioners (as well as a judge of the Supreme Court of Appeal). The fundamental reason for this criticism was that the IPLAB aimed to provide protection for manifestations of indigenous or traditional cultural expressions (TCEs) as various species of IP. This would be achieved by introducing such new species of IP into South Africa's well-established IP Acts by amendment of such Acts, which new species did not rightly belong in, or properly fit into these IP Acts.

These critics had consistently proposed that the proper form of protection for traditional knowledge (TK) and TCEs would be *sui generis* legislation (as opposed to IP law-based legislation), *inter alia*, because TK and TCEs cannot always meet the requirements set by the relevant IP Acts.

Another reason was that TK/TCEs have been created or developed for community, cultural and heritage reasons and not primarily for commercial use. These have been in existence for many years (even centuries) and may last in perpetuity – in contrast to IPRs that generally have a limited lifetime. The concept of 'protection' in indigenous communities implies safeguarding the continued existence and development of TK/TCEs in a cultural, community and spiritual context. IPR systems protect not only 'property' but also 'private' property which is a concept that often clashes fundamentally with concepts held by indigenous communities – who hold that TK/TCEs are part of a community heritage that cannot readily be owned by one person

and that certainly cannot be bought or sold, *inter alia*, because it is part of their culture.

From an international perspective, South Africa is supportive of the developing countries' positions at the World Intellectual Property Organisation (WIPO), namely that the preferred form of protection should be *sui generis* legislation. This is based on the above-mentioned rationale – in contrast to IP law-based legislation as supported by the developed nations. To date, WIPO has not reached consensus on this dichotomy; nor agreed to full and proper definitions of these concepts.

In respect of nomenclature, WIPO and the international community have accepted the clear distinction between TK, on the one hand, that includes aspects of technical knowledge or technology residing in indigenous communities (eg, plants and plant-based medications) and TCEs, on the other hand (eg, literary, musical, artistic, dramatic and spiritual expressions/works that are part of the cultural life and heritage of indigenous communities). This distinction has not always been properly understood or ap-

'The concept of "protection" in indigenous communities implies safeguarding the continued existence and development of TK/TCEs in a cultural, community and spiritual context.'

plied in South Africa, or in the IPLAB. Accordingly in the Act, these terms are used rather loosely and interchangeably. It is assumed that the intention of the Act is not to protect TK *per se* because the IP Acts that are amended do not protect knowledge or concepts *per se* (such as in the Patents Act), but instead provide protection for TCEs such as performances, copyright works, (registered) designs and trademarks, respectively.

Notable events leading to the IPLAB

The IPLAB was subjected to three procedures during the course of its legislative passage, namely:

- Regulatory Impact Assessment (RIA) – This investigation was carried out in 2011 by an independent private sector body to determine the impact that the IPLAB would have if passed into law. The RIA report concluded that the costs of implementing the provisions of the IPLAB would outweigh the benefits.
- Consultation with the National House of Traditional Leaders (NHTL) – This consultation was carried out in 2013. How-

ever, the NHTL refused to receive any submissions from interested parties, and accepted and approved the IPLAB without any comment or reservation(s).

- Approval by the National Council of Provinces – This procedure required a sitting of a select committee of each of the nine provincial legislatures. At the Gauteng Provincial Economic Committee, for example, about 15 reasoned submissions were made in opposition to the IPLAB, and only one (unreasoned) submission in favour thereof. In spite of this, the Gauteng Provincial Legislature came to the conclusion that it was in favour of the IPLAB.

- ARIPO 2010 Swakopmund Protocol – During 2010, the member states of the African Regional Intellectual Property Organisation (ARIPO) adopted this Protocol. This Protocol is a *sui generis* legal document for protecting TK and TCEs separately, namely without reference to any legislative Act.

It provides an excellent basis for *sui generis* legislation, on the one hand, and on the other hand, shows that South Africa will now, by virtue of the Act – and unfortunately – be completely out of line with all its neighbouring states in protecting its TK/TCEs.

- 'Wilmot' Private Member's Bill – In 2013, an opposition member of the National Assembly, Dr Wilmot James, of the Democratic Alliance, tabled a Private Member's Bill based on a *sui generis* model, but the DTI Portfolio Committee decided that it could not entertain two simultaneous and conflicting Bills of this kind, and removed it from its agenda.

The Act and its various aspects

The Act, by way of summary, includes amendments to the following IP Acts, *inter alia*, for the protection and commercialising or licensing of various manifestations of indigenous knowledge (IK) as a species of IP:

- Performers' Protection Act 11 of 1967 – to provide for the recognition and protection of performances of traditional works.
- Copyright Act 98 of 1978 – to provide for the recognition and protection of indigenous works, and to provide for recording IK and indigenous works.
- Trade Marks Act 194 of 1993 – to provide for the recognition and registration of indigenous terms and expressions as trade marks; to provide for the recording of indigenous terms and expressions, and for this purpose to provide a further part of the trade marks register; and to provide for further protection of geographical indications.
- Designs Act 195 of 1993 – to provide for the recognition and registration of

indigenous designs; to create for this purpose a further part of the designs register.

- To establish a National Council for IK; national databases for recording of IK and indigenous works; a national trust for IK and a national trust fund for IK for purposes of commercialising and licensing of IK and for receiving royalties or benefit sharing.

In further detail, the amendments to these IP Acts (mainly appearing in the Copyright Act) are based largely on the introduction of new definitions and concepts of which the most relevant are set out below (generally using the precise wording of the Act):

Amendments to the Performers' Protection Act

Amendments to this Act include the introduction and/or amendment of existing definitions in respect of the Copyright Act, noting that certain works are capable of being performed, and include musical, dramatic, dramatico-musical works and traditional works.

Notable sections are the following:

- **Section 8A** – provides that the provisions of this Act shall, except as otherwise provided, apply to a performance of a traditional work. Nothing in the expected provisions shall be construed as conferring any rights to any person in respect of intellectual property which is not a performance of a traditional work.
- **Section 8B** – provides that the Commission for Intellectual Property and Companies (CIPC) must accredit institutions which have the necessary capacity to adjudicate any dispute arising from this Act and in respect of the performance of traditional works. Such adjudication must take into account existing customary dispute resolution mechanisms.
- **Section 8C** – provides that the National Council for Indigenous Knowledge shall function as the council for performances of traditional works under this Act.

Amendments to the Copyright Act

This Act has been amended more extensively than the others, and its amendments in various respects apply to the other Acts either directly or *pari passu*.

Important definitions to note: The first and fundamental definition to note is that of 'indigenous community' which is 'any recognisable community of people originated in or historically settled in a geographic area or areas located within the borders of the republic, as such borders existed at the date of commencement of this Act, characterised by social, cultural and economic conditions that distinguish them from other sections of

the national community, and who identify themselves and are recognised by other groups as a distinct collective'

This definition also appears in the amended Trademarks Act and the amended Designs Act, but it does not appear in the amended Performers' Protection Act.

Although unintended, would other South African cultural groups such as Afrikaner people, for example, qualify within the scope of this definition?

If so, would they be able to obtain protection in terms of the Act for particular cultural terms, songs and literature dating back many years?

Another question is whether a foreign indigenous community, such as the New Zealand Maori people, for example, apply for protection of its HAKA wording and performance? It appears from this definition that, because of its limitation to communities within the borders of South Africa, foreign communities would be excluded. Would this place South Africa in breach of its obligations under the Paris and Berne Conventions, respectively, and in respect of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)? Such obligations include the obligation on the State to grant to nationals of other member countries the same rights as granted to South African nationals. However, the Minister may, in terms of s 28N provide that any provision of the Act may apply to a specified country. Until and unless the Minister has made such provisions applicable to all the relevant member countries, South Africa will be in breach of these international obligations.

- For more definitions see '*Know your jargon*' at the end of the article.

Sections to note:

- **Section 28A** – The provisions of this Act shall, except as otherwise provided, insofar as they can be applied, apply to traditional works.
- **Section 28B** – Reference is made to *registration* of a right in respect of a derivative indigenous work (my emphasis).
- **Section 28C** – Provision is made for databases to be kept in the offices of the registrars of *patents*, copyright, trade marks and designs for indigenous knowledge as part of existing intellectual property registers, where applicable (my emphasis).



- **Section 28D** – An indigenous community is deemed to be a juristic person.

- **Section 28E** – The nature of copyright in traditional works, and hence the infringing acts, are set out in this section (and are otherwise as set out in the Copyright Act before its amendment), subject to any rights in respect of the traditional work acquired by any person prior to the commencement of this Act.

- **Section 28F** – The term of copyright, for a derivative indigenous work, shall be 50 years from the end of the year in which the work was first communicated to the public with the consent of the author, or the date of the death of the author or all authors concerned, whichever term expires last. The term of copyright for an indigenous work shall be in perpetuity (as will the term of copyright for any work vesting in the state in terms of the provisions of this Act).

- **Section 28G** – Any person who intends to acquire rights in respect of an indigenous work (corresponding to the acts listed in s 28E) must comply with s 28B(4) and conclude a benefit-sharing agreement with the indigenous community. This section also lists acts that are considered not to be acts of infringement, namely use without obtaining prior consent of the copyright owner, if it is for the purpose of –
 - (a) private study or private use;
 - (b) professional criticism or review;
 - (c) reporting on current events;
 - (d) education;
 - (e) scientific research;
 - (f) legal proceedings; or
 - (g) the making of recordings and other reproductions of indigenous cultural expressions or knowledge for purposes of their inclusion in an archive, inven-

tory, dissemination, for non-commercial cultural heritage safeguarding purposes and incidental uses:

Provided that only such excerpts or portions as reasonably required are used and that the copyright owner's name is acknowledged'.

- **Section 28I** – A National Trust for Indigenous Knowledge is established that shall establish a National Trust Fund for Indigenous Knowledge. The trust shall be responsible for the promotion and preservation of indigenous cultural expressions and knowledge including awareness and training thereof, as well as commercialisation and exploitation.

- **Section 28J** – Copyright shall not be transmissible by assignment, testamentary disposition or operation of law; except in certain limited circumstances.

- **Section 28K** – The CIPC shall accredit institutions to adjudicate disputes arising from this Act in the first instance, and such adjudications shall take into account existing customary dispute resolution mechanisms. An appeal to the High Court shall be possible in respect of a decision arising from such adjudication (as if it were a decision of a single judge).

- **Section 28L** – The Minister of Trade and Industry shall establish a National Council for Indigenous Knowledge, *inter alia*, to advise him or her on any matter concerning indigenous cultural expressions or knowledge; and to advise the Registrars of Patents, Copyright, Trade Marks and Designs on any related matter.

- **Section 28N** – The Minister shall have the power to comply with international agreements, by notice in the *Government Gazette* to provide that any provisions of this Act may apply to a specified country either in a general or a limited manner.

- **Section 39A** – The Minister shall have the power to provide so-called guidelines on any aspect of the IP-

LAA. He or she already has the power to provide regulations under these (four) IP Acts.

The ownership of copyright in respect of a derivative indigenous work shall vest in the author, while ownership of copyright in respect of an indigenous work shall vest in the relevant indigenous community(-ies). However, in certain circumstances, it may vest in the national trust to be administered for the benefit of the relevant indigenous community(-ies).

Amendments to the Trade Marks Act

Notable definitions are: 'Indigenous community' and 'indigenous cultural expressions or knowledge' that have the identical definitions as set out in the Copyright Act.

"Indigenous term or expression" means a literary, artistic or musical term or expression with an indigenous or traditional origin and a traditional character, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which is regarded as part of the heritage of the community'.

"Derivative indigenous term or expression" means any term or expression forming the subject of this Act, applied to any form of indigenous term or expression, recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous term or expression was derived before or after the commencement of this Act'.

"Traditional term or expression" includes an indigenous term or expression and a derivative term or expression' (these latter three definitions are *pari passu* parallel with the corresponding definitions set out above in the Copyright Act).

- For other definitions see 'Know your jargon' at the end of the article.

Sections to note are:

- **Section 43B(1)** – A traditional term or expression shall be capable of constituting a certification mark or a collective trade mark, or a geographical indication.

- **Section 43B(3)** – In order to be registrable as a certification or collective trade mark, a traditional term or expression must meet the 'capable of distinguishing' criterion.

- **Section 43B(8)** – A traditional term or expression or geographical indication shall be registrable only (a) if it is a derivative indigenous

'The question finally is whether South Africa would be prepared in future to step away from the Act if it proves unworkable or unsuccessful; and whether it will be prepared, in principle, to follow a sui generis legal approach in years to come?'

term of expression or geographical indication and it was created on or after the commencement of this Act; or (b) the traditional term or expression or geographical indication was passed down from a previous generation.

- **Section 43E** – The term of protection of derivative indigenous terms or expression and geographical indications shall be ten years (renewable); and for an indigenous term or expression and geographical indications shall be in perpetuity.

Amendments to the Designs Act

Notable definitions are: 'Community protocol' – see the definition set out above in the Copyright Act – here it refers to indigenous cultural expressions or knowledge and indigenous designs. "Indigenous community" is identical to the definition set out above in the Copyright Act. 'Indigenous design' means an aesthetic or functional design with an indigenous or traditional origin and a traditional character, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which design is regarded as part of the heritage of the community'.

"Derivative indigenous design" means any aesthetic or functional design forming the subject of this Act, applied to any form of indigenous design recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous design was derived before or after the commencement of this Act'.

'Traditional design' definition (these latter three definitions are *pari passu* parallel with the corresponding definitions set out above in the Copyright Act).

Sections to note include the following:

- **Section 53B(3)** – No right in respect of a derivative indigenous term or expression or knowledge, or a derivative indigenous design, shall be eligible for registration





unless prior informed consent has been obtained from the relevant authority or indigenous community, disclosure of the relevant term or expression has been made to the Commission, and a benefit-sharing agreement has been concluded.

- **Section 53B(2)** – A derivative indigenous design shall be registrable if it is new, namely, if it does not form part of the state of the art. However, if it is subject to a release date, application for registration needs to be made within two years of the release date.

- **Section 53E** – The maximum term of protection of an aesthetic derivative indigenous design shall be 15 years and for a functional derivative indigenous design the term of protection shall be ten years. The term of protection of an indigenous design shall be in perpetuity.

Concluding remarks

South Africa has taken a bold and complex step in a particular direction that has been strongly opposed by the majority of IP attorneys and jurists in South Africa. It will be difficult to implement the provisions of the Act and such implementations will come at considerable cost to the taxpayer and to indigenous communities.

Whether such a complex Act is required will continue to puzzle attorneys and jurists for years to come especially when practitioners and the courts have to grapple with its provisions and its new forms of IP. Whether indigenous communities will use the provisions of the Act to a large extent is also a question. One view is that no amendment whatsoever of any IP Act was required for indigenous communities to protect and commercialise their TK/TCEs.

It is a pity that the Government, after much debate and argument, has seen fit to stay with its IP law-based approach

in protecting TCEs, in effect creating new forms of IP that may not be readily recognised by the courts especially when it comes to enforcement of these rights (or in opposition/validity litigation). In addition, South Africa has decided to provide relatively short terms of protection for so-called derivative indigenous works, terms or designs – as opposed to the longer terms that *sui generis* legislation could provide instead of the IP law-based approach. Substantively and procedurally some of the aspects or steps taken by the government in bringing this Act into law may be challenged constitutionally. This would be embarrassing – to say the least – after all the submissions and warnings in response to the IPLAB.

The question finally is whether South Africa would be prepared in future to step away from the Act if it proves unworkable or unsuccessful; and whether it will be prepared, in principle, to follow a *sui generis* legal approach in years to come?

The entire book on this topic has yet to be written. It is understood that the Department of Science and Technology is engaged in preparing *sui generis* legislation for protecting TK, no doubt in respect of the technology aspects.

It remains to be seen where South Africa will be heading in this legal field, and how the application of the Act will unfold. It is to be hoped that *sui generis* legislation in respect of TCEs may yet be a possibility.

- See also 2014 (June) *DR* 23.

Know your jargon – definitions pertaining to the Copyright Act

- **“Community protocol”** means a protocol developed by an indigenous community that describes the structure of the indigenous community and its claims to indigenous cultural expressions or knowledge and indigenous works, and provides procedures for prospective users of such indigenous cultural expressions or knowledge or indigenous works, to seek the community’s prior informed consent, negotiate mutually agreed terms and benefit-sharing agreements’. This definition also appears in the amended Trade Marks Act and the amended Designs Act.

- **“Indigenous cultural expressions or knowledge”** means any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied, passed on between generations, and tangible or intangible forms of creativity of indigenous communities, including, but not limited to –

- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives, words, signs, names or symbols;

- (b) musical or sound expressions, such as songs, rhythms, or instrumental music, the sounds which are the expressions of rituals;

- (c) expressions by actions, such as dances, plays, ceremonies, rituals, expressions of spirituality or religion, sports, traditional games, puppet performances, and other performances, whether fixed or unfixed; or
- (d) tangible expressions, such as material expression of art, handicrafts, architecture, or tangible spiritual forms, or expressions of sacred places’.

This definition also appears in the amended Trade Marks Act and the amended Designs Act.

- **“Indigenous work”** means a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community’.

- **“Derivative indigenous work”** means any work forming the subject of this Act, applied to any form of indigenous work recognised by an indigenous community as having an indigenous or traditional origin, and a substantial part of which, was derived from indigenous cultural expressions or knowledge irrespective of whether such derivative indigenous work was derived before or after the date of commencement of this Act’.

- **“Traditional work”** includes an indigenous work and a derivative indigenous work.

- **“Author” of an indigenous work** means the indigenous community from which the work originated and acquired its traditional character’.

- **“Author” of a derivative indigenous work** means the person who first made or created the work, a substantial part of which was derived from an indigenous work’.

Definitions pertaining to the Trade Marks Act

- **“Geographical indication”** – In as far as it relates to indigenous cultural expressions or knowledge, means an indication that identifies goods or services as originating in the territory of the Republic or in a region or locality in that territory, and where a particular quality, reputation, or other characteristic of the goods or services is attributable to geographical origin of the goods or services, including natural and human factors’.

- **“Community protocol”** – See the definition set out above in the Copyright Act but here it refers to ‘indigenous cultural expressions or knowledge and indigenous terms or expressions or geographical indications’.

- **“Council”** – Identical to the definition set out above in the Copyright Act.

André van der Merwe BSc (UP) BProc LLB (Unisa) is an attorney at DM Kisch Inc in Johannesburg. □



If you've got a law degree,
it would be a crime not to
make money off it.

As a qualified attorney, you're also fully qualified to become a member of the only financial services company created by professionals, for professionals, and completely owned by its South African members. Apart from insurance, investment and healthcare solutions tailor-made to your specific needs as a professional, as a valued PPS member you also share all the company's profits* – which were upwards of R4.2 billion last year alone. We don't want to lay down the law, but calling PPS today is a pretty good idea.

For more info, SMS 'DR' and your name to 42097, consult a PPS product-accredited financial services adviser or visit www.pps.co.za.



FOR PROFESSIONALS
SINCE 1941

THE KEY TO SUCCESS LIES IN SHARING IT.

PPS offers unique financial solutions to select graduate professionals with a 4-year degree. PPS is an authorised Financial Services Provider.

**Members with qualifying products share all our profits.
Standard SMS rates apply.*



Business rescue: The position of secured creditors

By
Dominique
Wesso

Unilateral deprivation of rights

If company B goes into business rescue and secured creditor A does not have the largest voting interest, and is thereby unable to direct the business rescue process, a simple reading of s 152(1)(e) and s 152(2) of the Companies Act 71 of 2008 (the Act) would imply that a business rescue plan diminishing the security of the secured creditor can be adopted by a 75% vote of all creditors who voted. This situation is, however, mitigated by s 154(1) of the Act, but the extent of the mitigation is not clear.

Section 154(1) provides that 'a business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it' (my emphasis).

Prima facie this means that a creditor has to accede to the discharge before such a provision in a business rescue plan will be valid. However, it has been submitted that the ability of an individual creditor not to accede to the business rescue plan is doubted in light of the fact that s 150(2) of the Act provides that a business rescue plan can provide for a discharge of debts and that the body of creditors vote for its implementation and thereby accede to it (see P Delpont *Henochsberg on the Companies Act 71 of 2008* (Durban: LexisNexis 2014) at 532 (2)).

This issue was considered in the case of *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZP). In the *DH Brothers* case the business rescue plan made provision for the discharge of 75,75% of the claims of all creditors. If acceded to, this would mean that all creditors, including those with secured claims, would not be able to recover 75,75% of their claims. The applicant alleged that this amounted to a compulsory cession that was unlawful in terms of s 154(1) of the Act. A 'compulsory cession' occurs when a creditor is compelled by a business rescue plan to relinquish its right to recover a certain proportion of its claim.

In considering whether a plan of this nature is valid, the court referred to the presumption against any legislative deprivation of rights (*DH Brothers* at para 67). In terms thereof, there is a presumption that when taking away existing rights the legislature does not intend to change existing law more than is necessary, there is a presumption against any forfeiture of rights and that where such forfeiture is made provision for, the provision must be restrictively interpreted (*DH Brothers* at para 26).

In light of this, the court held that where a business rescue plan makes provision for the compulsory cession of rights, and where the cedent does not voluntarily accede to the cession, such a business rescue plan will not be valid (*DH Brothers* at para 67).

This means that where a business rescue plan makes provision for the discharge of a creditor's claim, whether the creditor holds a large or a small percentage of the voting interest, the business rescue plan will be invalid as a result of the provision and, therefore, unenforceable against those creditors who opposed the business rescue plan.

If the finding in the *DH Brothers* case is accepted as being correct, a secured creditor cannot be deprived of his or her claim by virtue of a majority adoption of a plan that makes provision for the entire or partial discharge of his or her claim unless he or she acceded to such a discharge.

The 'binding offer' - s 153(1)(b)(ii) of the Act

Section 153(1)(b)(ii) of the Act provides that where there is a failure to adopt a business rescue plan, an affected person(s) can make a 'binding offer' to purchase the voting interest of any person(s) who opposed the adoption of the business rescue plan. The value of the voting interest will be the value that the person(s) could reasonably have expected to obtain at liquidation as determined by an independent expert.

In the case of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) (*Kariba*) the court considered the nature of this 'binding offer'.

The court explained that in order to determine the meaning of 'binding offer' it is necessary to consider the term within the statutory context that it appears (*Kariba* at para 23). Section 5(1) of the Act provides that the Act must be interpreted in a manner that gives effect to its purpose as set out in s 7 of the Act. Section 7(k) provides that one purpose of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. Chapter 6 of the Act, in which s 153(1)(b)(ii) occurs, creates a framework within which this purpose can be given effect to.

The court held that while a normal contractual offer is made freely and can be withdrawn at any time, an offer made in terms of s 153(1)(b)(ii) creates a legal obligation that is binding on the offeror and the offeree and cannot be withdrawn at the insistence of either party.

The court held that this interpretation of 'binding offer' accords with the purpose of the Act and the provisions in Chapter 6 in that it facilitates the adoption of a business rescue plan (*Kariba* at para 29).

The court goes further and explains that the offeree still enjoys the protection of the Act after it has been bound by the offer. The offeree is protected by s 152(1)(b)(ii) which provides that the offeree cannot receive less than it would have for its claim at liquidation (*Kariba* at para 32). Furthermore, the business rescue plan cannot be implemented until the offeror has paid the offeree for its claim; however, it can be adopted prior to payment. If the offeror has failed to make payment then the business rescue plan will not be capable of implementation and the offeree will not be barred from enforcing its rights (*Kariba* at para 34).

This discussion is relevant to the position of a secured creditor, because in some cases, the claim for which the offer is made would be subject to security in favour of the secured creditor. *Prima facie*, if a 'binding offer' is made for a secured claim then the secured creditor will lose its rights to call up and enforce said security.

The constitutionality of the effect of a s 152(1)(b)(ii) was also considered in the *Kariba* case.

The applicant in the *Kariba* case contended that the 'binding offer' constituted an unlawful deprivation of his property.

The court in the *Kariba* case accepted the finding in *First National Bank of SA Ltd t/a WesBank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a WesBank v Minister of Finance* 2002 (4) SA 768 (CC) (*FNB*) that a claim for payment and the right to exercise a vote at a statutory meeting convened for the purposes of voting on a business rescue plan constitutes property in terms of s 25(1) of the Constitution.

Section 25(1) of the Constitution provides that no one may be deprived of his or her property except in terms of a law of general application, and no law may permit the arbitrary deprivation of property.

The court in the *Kariba* case further referred to the *FNB* case, in which it was held that a law arbitrarily deprives a person of his or her property where sufficient reasons are not given for the deprivation and where there is not a rational relationship between the purpose of the deprivation and the manner in which the deprivation is employed (*FNB* at para 100).

The court in the *Kariba* matter held that, in light of the finding in the *FNB*

case, the deprivation of a creditor's rights in terms of s 152(1)(b)(ii) does not amount to an unconstitutional deprivation of property. The provision amounts to a law of general application and serves a compelling and legitimate governmental purpose being the revitalisation and rescue of a viable company – which accords with the purpose of the Act. The deprivation is also not arbitrary since s 152(1)(b)(ii) makes provision for adequate compensation determined by an independent expert – taking into consideration whether the creditor is secured, preferent or concurrent (*Kariba* at para 46).

If the finding in the *Kariba* matter is accepted as being correct, one can conclude that a secured creditor will be deprived of its secured claim when a binding offer is made and that this deprivation will be lawful. The court in the *Kariba* matter recognised the fact that the term 'property' in the Constitution is not specifically defined, but also highlighted the fact that the Constitutional Court had in a number of cases found that personal rights as well as incorporeal rights fall within the ambit of 'property' as provided for in s 25 of the Constitution (*Kariba* at para 44).

In light of the finding in the *Kariba* case, the secured claim of a secured creditor – be it secured by way of a personal or a real right – will be subject to the 'binding offer' provided for in s 152(1)(b)(ii) of the Act.

The nature of a 'binding offer' was again considered in the case of *DH Brothers*. The court in *DH Brothers* held that *Kariba* was wrong in its interpretation of the term 'binding offer' for a number of reasons.

Firstly, the Act does not refer to a set of rights and obligations. The court in *DH Brothers* explained that if the leg-

islature had intended to create a set of statutory rights and obligations, it would have done so expressly in the provision. If this was the legislature's intention it would have included a deeming provision in terms of which the offeree would be deemed to have accepted the offer once made by the offeror (*DH Brothers* at para 40).

The court went on to say that the term 'binding offer' could not have the meaning ascribed to it by the court in the *Kariba* matter because the provision itself speaks only of the offeror and not the offeree. Furthermore, the ordinary meaning of the word 'offer' implies that it emanates from one party only and requires acceptance to give rise to legal obligations. The term 'offer' has a specific and settled legal meaning which the court presumes the legislature was aware of (*DH Brothers* at para 41).

Although the word 'offer' is qualified by the word 'binding', the court is of the opinion that this does not create a legal obligation on both the offeror and offeree, rather it places an obligation on the offeror only (*DH Brothers* para 42). This is justified on the basis that the offer has to be binding on the offeror to avoid the situation where an offer can be tabled and retracted at every meeting of creditors with the aim of unduly delaying the business rescue proceedings – this interpretation accords with the time-bound nature of the business rescue procedure (*DH Brothers* at para 43).

Secondly, the court in the *DH Brothers* matter held that the interpretation of the term 'binding offer' in the *Kariba* case is not correct because it contradicts certain provisions of the Act (*DH Brothers* at para 46).

Thirdly, the purposive approach followed by the court in the *Kariba* matter does not justify interpreting the provi-

sions of Chapter 6 of the Act in such a way that it leads to an acceptance of a business rescue plan at all costs (*DH Brothers* at para 54).

On this issue, the court in *DH Brothers* concludes by making the following statement at para 60:

'[I]t is my view that the "binding offer" of s 153(1)(b)(ii) is an offer which cannot be withdrawn by the offeror. It is open to acceptance or rejection by the opposing creditors to whom it is made. If accepted, it gives rise to an agreement of purchase and sale. ... The acceptance or rejection need only take place once the value has been finally determined. ... The voting interests are transferred on payment of the determined sum. Once this has taken place, the voting interests are settled and the vote on the plan can take place.'

If the decision in the *DH Brothers* case is correct then the position of the secured creditor, whether large or small in respect of voting interest, is protected since it cannot be deprived of its secured right simply by means of a 'binding offer'. A secured creditor has to accede to the discharge in order for it to be valid.

This interpretation of s 153(1)(b)(ii) accords more readily with the law relating to offer and acceptance than does the interpretation in the *Kariba* matter. If the legislature intended for the provision to veer so significantly from the existing law, as suggested in the *Kariba* matter, it would have done so more clearly.

Dominique Wesso BA (Politics Philosophy Economics) LLB (Stellenbosch University) is a candidate attorney at Cliffe Dekker Hofmeyr in Johannesburg.

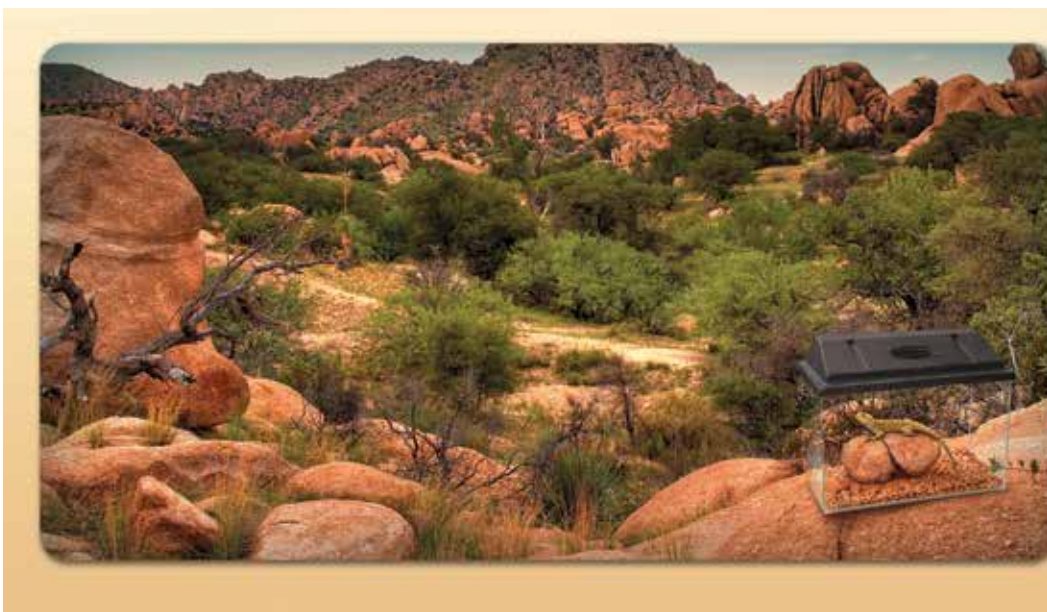


There's no place like home.

We have our place.

They have theirs.

Visit nspca.co.za for more about the hazards of capturing and breeding exotic animals.



THE LAW REPORTS



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

July 2014 (4) The South African Law Reports (pp 1 – 317); [2014] 2 The All South African Law Reports June no 1 (pp 493 – 634); and no 2 (pp 635 – 726); 2014 (6) Butterworths Constitutional Law Reports June (pp 641 – 739); and 2014 (7) July (pp 741 – 867)

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

Abbreviations:

CC: Constitutional Court
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Electronic communications: The facts in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* [2014] 2 All SA 559 (GP) were that the first respondent, Link Africa, was the holder of an electronic communications network services

(ECNS) licence granted by the Independent Communications Authority of South Africa (ICASA), in terms of the Electronic Communications Act 36 of 2005 (the Act). Link Africa alleged that the licence conferred various statutory powers on it under ss 22 and 24 of the Act, enabling it to construct and maintain an electronic communications network consisting of fibre optic cables. It sought to exercise those powers by deploying its patented technology in the applicant's municipal area.

The applicant, the municipality, in turn, sought to prevent Link Africa from con-

structing and developing its network. It contended that ss 22 and 24 of the Act did not entitle Link Africa to construct its network without the municipality's consent. It also contended that Link Africa's decision to construct its network fell to be reviewed and set aside. In the alternative, the municipality contended that ss 22 and 24 of the Act are unconstitutional and invalid.

Avvakoumides AJ held that the municipality's argument regarding the necessity for its consent was unfounded. The court rejected the municipality's submission that a local authority must give

its consent before s 24 powers are exercised by an ECNS licensee.

The court further accepted that a decision by an ECNS licensee to exercise the powers afforded to it in terms of s 22(1), amounts to administrative action under the Promotion of Administrative Justice Act 3 of 2000.

It was this decision by Link Africa to exercise its powers that the municipality wanted to review. However, Link Africa submitted that the municipality's attempts to review its (Link Africa's) decision in the present case were fatally flawed due to unreasonable delay. It further



BRITISH CITIZENSHIP LAW - CLAIMS VIA ANCESTRY OR TERRITORY

Specialists in claims to British nationality via UK ancestry, anomalies or links to an ex British territory, eg. Swaziland, Rhodesia & Nyasaland, Kenya. We find ways to get a child citizenship. For a free quote contact Alex Finch (MA Cambridge, LLB). Instructions or referrals welcome. See website link below.

• SA phone: 010 500 9812 • Email: info@passportia.org • Website: passportia.org/sa •

submitted that the municipality's submissions blurred the distinction between appeal and review. The court agreed with the submissions made by Link Africa because the municipality took more than four months after it was first informed by Link Africa of its decision to seek a review of the latter's decision. It further provided no reason for the delay, even after Link Africa raised the question of an unreasonable delay.

Finally, the court also dismissed the municipality's alternative application that the court ought to declare ss 22 and 24 of the Act unconstitutional because these sections do not require the landowner's (the municipality's) consent and that it therefore permits arbitrary deprivation of property in contravention of s 25 of the Constitution.

The court held that not all deprivations of property are arbitrary and that the municipality had failed to explain why the deprivation of property occasioned by Link Africa's decision is arbitrary.

The application was dismissed with costs.

Attorneys

Disciplinary inquiry: The case of *Graham and Another v Law Society, Northern Provinces and Others (Road Accident Fund Intervening)* 2014 (4) SA 229 (GP) concerned an application by complainants who were dissatisfied with the pace of the respondent law society's disciplinary inquiry into the applicant's complaint of overreaching by their attorneys, the second respondent, Ronald Bobroff & Partners Inc (RBP).

Mr Graham was injured in a motor-vehicle accident and the RBP deducted fees of R 860 000 from Graham's Road Accident Fund (RAF) settlement of R 2 million. The Grahams' application turned on an alleged laxness and bias in the Law Society of the Northern Provinces' (LSNP) investigation of the complaint against RBP. The Grahams applied for an order for the court to either supervise or take over the inquiry itself. The Grahams also sought to

compel RBP to make available outstanding documents relating to the complaint. The Grahams based their allegations against the LSNP on a number of grounds, only two of which will be referred to here. First, that there was a conflict of interest as a result of a position it took in an earlier matter; and secondly, that the LSNP allowed RBP to dissemble (play possum) by feigning ignorance of the issues raised in the complaint.

First, Mothle J approved the RAF's application to intervene because it (the RAF) had a legitimate interest that funds intended to compensate victims of traffic accidents were not wasted by overreaching attorneys.

Secondly, the Grahams failed to establish that the LSNP's conduct in the earlier litigation justified a finding of a conflict of interest in the present inquiry against RBP. Making such a finding before the conclusion of the inquiry would in any event be premature.

Thirdly, the court held that RBP was not required to disclose its defence either during the inquiry before the present court, and the Grahams' allegation that the LSNP was allowing RBP to play possum, as well as the ancillary charge of undue delay in the prosecution of the complaint were premature and unfounded.

The circumstances surrounding the application simply did not call for an intervention or take-over of the investigation by the court.

The court accordingly ordered that the LSNP be allowed to complete its inquiry. Because the Grahams' application succeeded in part (with regard to access to certain documents), the court ordered that each party pay its own costs.

• See also 2014 (Aug) DR 6; 2014 (July) DR 40; and 2014 (June) DR 3.

Close corporation

Reinstatement after deregistration: The facts in *Missouri Trading CC and Another v ABSA Bank Ltd and Others* 2014 (4) SA 55 (KZD) were as

follows. The applicant, Missouri Trading CC (Missouri) was deregistered in terms of s 82(3) of the Companies Act 71 of 2008 (the Act) as a close corporation due to its failure to submit annual returns. Thereafter, this deregistration unknown, the first respondent, Absa Bank Ltd (Absa) in 2011 successfully applied for the winding-up of Missouri. Liquidators were appointed and immovable property of the estate was sold to a third party. Missouri was then reinstated to the Registrar of Companies under s 82(4) of the Act. Missouri applied for a declaration that the winding-up orders were void. At stake was the question whether reinstatement was retrospective to the date of deregistration.

Koen J held that the reinstatement of a company under s 82(4) does not operate retrospectively. This is deduced from the absence of an express provision which provides for retrospectivity, as well as the fact that reg 40(6) requires the filing of outstanding returns and not also returns in respect of the period of deregistration. Accordingly the close corporation 'would survive only from the date of reinstatement...'. The court further held that a court order under s 83(4) declaring the dissolution of the close corporation to have been void can be used only if the act of deregistration was void. Such an order would operate retrospectively. In the present case deregistration was clearly lawful and justified, and such an order could therefore not be made.

The court declared the provisional and final winding-up orders valid and binding. It further confirmed the appointment of the liquidators and declared all actions by them valid, including the sale of the close corporation.

The application was accordingly dismissed with costs.

Constitutional law

State tenders: The facts in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Corruption Watch and another as amici curiae)* 2014 (6) BCLR 641 (CC) turned on the determination of a 'just and equitable' order in the context of a government procurement contract that had been declared constitutionally invalid. In an earlier decision between the same parties (reported under the citation of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (the merits decision); *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC)), the CC declared a procurement tender award – for the distribution of social grants – constitutionally invalid, but suspended its declaration pending the determination of a just and equitable remedy. The present decision expounded the parameters of what would constitute a 'just and equitable' order.

The appellant, Allpay, was an unsuccessful tenderer for the countrywide payment of social grants to beneficiaries. The tender was awarded to Cash Paymaster. Allpay alleged that the award of the tender by the South African Social Security Agency (SASSA) was unconstitutional. The tender was one of the largest in South Africa's history and was for the provision of social grants to some 15 million beneficiaries.

In the merits decision Allpay proved a number of technical and other irregularities in the tender and procurement process, including SASSA's non-assessment of the functionality of the black economic empowerment (BEE) component of Cash Paymaster.

In determining a 'just and equitable' order, the present court confirmed that the

contract between SASSA and Cash Paymaster for the payment of social grants was invalid.

Froneman J held that the tender process had to be re-run. However, in initiating and implementing a new tender process, there had to be no disruption to the payment of existing social grants to beneficiaries.

The declaration of invalidity was accordingly suspended pending the decision by SASSA to award a new tender after the new tender process had been completed. SASSA was ordered to initiate a new tender process for the payment of social grants within 30 days of the present court's order and that the new payment process must be made for a period of five years.

The new process further had to ensure that when a tender is awarded and a re-registration process is required –

- no lawful existing social grant is lost;
- the payment of lawful existing grants is not interrupted; and
- personal data obtained in the payment process remains private.

The court further ordered that a new and independent Bid Evaluation Committee and Bid Adjudication Committee must be appointed to evaluate and adjudicate the new tender process. Their evaluation had to be made public by filing a status report with the Constitutional Court Registrar on the first Monday of every quarter of the year until the payment process is completed.

The issue was whether the inquiry into the question of what is 'just and equitable' is a multi-dimensional one. The court held that a 'just and equitable' remedy did not always lie in a simple choice between ordering correction and maintaining the existing position. It may sometimes lie somewhere in between, with competing aspects assessed differently.

The order in the present case was such a multi-dimensional order. The court provided detailed instructions of how the new tender process

should take place. Only some of these instructions are dealt with here.

The court held that when the new tender is awarded, it must be for the same period as the original tender. If the new tender is not awarded, the declaration of invalidity of the current tender will be further suspended until the five-year period for which the contract was initially awarded, has been completed.

The court also ordered SASSA and Cash Paymaster to carry out a number of further duties, the most important of which is that Cash Paymaster must, within 60 days of the completion of the five-year period for which the contract was initially awarded, file with the Constitutional Court an audited statement of the expenses incurred, the income received and the net profit earned under the completed contract.

Finally, the court held that Cash Paymaster's report must be verified by SASSA by an independent audited statement.

Contract law

Floor-plan agreements: The decision in *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* [2014] 2 All SA 654 (SCA) brought to head a protracted and heated debate in South Africa on the question whether floor-plan agreements are valid. The debate reached a crescendo after the decision in *Nedcor Bank Ltd v ABSA Bank Ltd* 1998 (2) SA 830 (W) in which the court held that the floor-plan agreement in that case, which reserved ownership for purposes of security, was simulated, and thus invalid.

The facts in *Roshcon* were that the appellant, Roshcon (Pty) Ltd (Roshcon), placed an order for five Nissan trucks with a Nissan dealer, Toit's Commercial (Pty) Ltd (Toit's). Toit's purchased the trucks from Nissan Diesel (SA) (Pty) Ltd (Nissan SA). The purchase price was financed by the second respondent, FirstRand Bank, trading as WesBank (WesBank), by way of a floor-plan agreement with Toit's.

In terms of the floor-plan agreement WesBank bought

the vehicles from Toit's and thus became the owner of the trucks. Roshcon required that the trucks be fitted with specialised cranes. Toit's instructed the respondent, Anchor Auto Body Builders CC (Anchor), to fit the trucks with the cranes and Nissan SA delivered the trucks directly to Anchor for this purpose. Toit's failed to meet its obligations to WesBank in terms of the floor-plan agreement and was placed under provisional winding-up. WesBank, in its capacity as owner of the trucks, claimed them from Anchor and sold them to third parties. WesBank relied on the supplier agreement, which it had concluded with Nissan SA, and on the floor-plan agreement with Toit's to assert its ownership and the right to sell the trucks.

The court *a quo* dismissed Roshcon's application for an order that it was the lawful owner of the trucks. It rejected Roshcon's argument that both the supplier and the floor-plan agreement were simulated transactions and, as a result, that the reservation of ownership clause in favour of WesBank was void. It also rejected Roshcon's argument that WesBank be estopped from asserting ownership in the trucks.

On appeal to the SCA, Shongwe JA held that, for a court to declare a transaction a simulation, it has to look at the facts of each particular case. The fundamental issue in deciding whether a transaction is simulated, and therefore void, is whether the parties intended the agreement they had entered into should have effect in accordance with the agreement's terms.

The court confirmed that parties are allowed to arrange their affairs and draft their contracts in such a way as to avoid statutory provisions, provided the agreement does not result in a simulated transaction.

The reservation of ownership in favour of WesBank contained in the floor-plan agreement between Toit's and WesBank represented the parties' real intention and was valid and enforceable against third parties.

Importantly, the court held that the decision in the *Nedcor* case (*supra*) in which the court held that the floor-plan agreement was simulated, was clearly wrong.

Roshcon also raised an alternative argument that WesBank be estopped from asserting ownership in respect of the two trucks in possession of Roshcon as well as the three trucks already in possession of WesBank. The court pointed out that the requirements for proving estoppel are:

- A representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner or was entitled to dispose of it.
- The representation by the owner must have been made negligently in the circumstances.

In the present case the trucks were delivered directly by Nissan SA to Anchor on Roshcon's request. WesBank could not have made any representation to Roshcon, and the court rejected Roshcon's reliance on estoppel.

The appeal was thus dismissed with costs.

Criminal law

Organised crime: In *National Director of Public Prosecutions v Salie and Another* [2014] 2 All SA 688 (WCC) the applicant, the National Director of Public Prosecutions (NDPP), sought a forfeiture order in terms of ss 48(1), 50(1)(a) and (b) and 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA) of certain property owned by the respondents, Salie. The property included three immovable properties and a motor vehicle.

The NDPP contended that, on the probabilities, all of the property had been acquired from the proceeds of contraventions of s 2 (keeping a brothel) and s 20(1)(a) (knowingly living wholly or in part on the earnings of prostitution) of the Sexual Offences Act 23 of 1957. The gist of Salie's defence was that she was running legitimate massage parlours at three premises. She further contended that

she did not know whether any of the masseuses had sexual intercourse with their clients for money, and if they did, that that was their private business and had nothing to do with her.

Section 48(1) of POCA provides that if a preservation of property order is in force, the NDPP may apply to the High Court for an order forfeiting to the state all or any of the property that is subject to the preservation of property order. Sections 50(1)(a) and (b) provide that the court shall, subject to s 52, make an order applied for under s 48(1) if the court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in sch 1 of POCA or is the proceeds of unlawful activities.

Breitenbach AJ accepted the NDPP's contention that there was no evidence that, from 2006 onwards, Salie had any income from legitimate sources with which to service the loans she had taken to acquire the three immovable properties and the motor vehicle, and consequently the money she used to make the necessary repayments emanated from the three brothel businesses. All the property was found to be the proceeds of unlawful activities because they were assets which Salie was able to retain using the money which she made in connection with or as a result of the operation of the three brothels and her consequent contraventions of ss 2 and 20(1)(a) of the Sexual Offences Act.

Because Salie argued that forfeiture of any of the property would be disproportionate and consequently infringe the right not be arbitrarily deprived of property in s 25(1) of the Constitution, the court had to consider whether proportionality applies to the forfeiture to the state of the proceeds of unlawful activity under POCA.

In this regard the court held that both s 18(1) and s 50(1)(b) of POCA are directed at preventing people from benefiting from the fruits of crime. Once the jurisdictional requirements for a confiscation order or a forfeiture or-

der relating to the proceeds of unlawful activities are met, both of these two subsections confer on the court a discretion as to whether or not to make any such order at all and, if so, the extent of the benefit to be confiscated or the property to be forfeited to the state. Therefore, the considerations relevant to the exercise by a court of its discretionary powers to determine whether to make a confiscation order in terms of s 18(1) are also relevant to the exercise by a court of its discretionary powers to determine whether to make an order for the forfeiture of the proceeds of unlawful activities and, if so, to fix the extent of the proceeds to be forfeited. The said considerations are elements of a proportionality inquiry.

The court concluded that proportionality is indeed a requirement for the forfeiture to the state of the proceeds of unlawful activity under POCA and the forfeiture order was granted.

Credit law

In duplum rule: In *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA); [2014] 2 All SA 527 (SCA) the court was asked to consider the parameters of the *in duplum* rule (the rule).

The facts were as follows. A company, Winskor, concluded a loan for short-term bridging finance with Slip Knot for the shortfall in funding a property-development project. The appellants, the Paulsens, bound themselves as sureties and co-principal debtors for the repayment of the loan by Winskor to Slip Knot. Winskor defaulted and Slip Knot sued the Paulsens for the principal debt plus interest. The interest payable in terms of the agreement exceeded the capital amount. The High Court allowed the full claim, but on appeal to the full Bench, the claim was limited to payment of the capital and R 12 million in interest. On appeal, the court held that the amount of interest allowed was restricted by the operation of the *in duplum* rule.

The Paulsens appealed to

the SCA and argued that the credit agreement between Winskor and Slip Knot was void because Slip Knot had not been registered as credit provider in terms of the National Credit Act, 2005 (the NCA). Slip Knot raised a cross-appeal contending that it was entitled to additional interest, which accrued after summons was issued.

Wallis JA considered the relevant provisions in the context of the NCA as a whole and decided that the loan agreement was not subject to the NCA and that s 89(2)(d), therefore, did not apply to the loan agreement. The agreement was excluded from the ambit of the NCA because if qualified in terms of s 4 as a large credit agreement made to juristic person. There was thus no duty on Slip Knot to register as a credit provider.

The agreement was not a profit-sharing agreement but a normal loan. Consequently the *in duplum* rule, which restricts the amount of interest payable to the amount of the capital outstanding, applied.

The loan was a so-called mezzanine finance arrangement in terms of which bridging capital is loaned to a party for a short period. Due to the high risk involved, interest rates are usually fairly high.

The amount of interest recoverable was limited to the capital amount of R 12 million, even though it was payable in a lump sum.

The fact that the interest had reached the *duplum* before the sureties (the Paulsens) were sued, was no reason for not permitting it to commence running again, once litigation had commenced in accordance with the ordinary application of the rule.

The appeal was accordingly dismissed while the cross-appeal succeeded.

Indigenous law

Proof of marriage: The facts in *Murabi v Murabi and Others* [2014] 2 All SA 644 (SCA) turned on a dispute between two women, the appellant, the first wife, and the first respondent, the second wife, respectively. Both claimed to have been validly married to a Mr Murabi (the deceased).

At the time of his death, the deceased was married to both the first wife and the second wife; one by customary rite and another by civil rite. The civil marriage was contracted with the second wife on 2 August 1995.

The first wife sought an order declaring that -

- the civil marriage between the second wife and the deceased was invalid; and
- the customary marriage concluded with her (the appellant) in 1979, and for which she obtained a marriage certificate in 1991, was valid.

When the deceased died in 2011, the first wife attended at the offices of the Master of the High Court, to report the death as contemplated in s 7(1)(a) of the Administration of Estates Act 66 of 1965. There she discovered that the death had already been reported by the second wife and that she (ie, the second wife) had been appointed as the executrix of the deceased's estate.

The court *a quo* held that the first wife had failed to establish the existence of the customary union asserted by her and dismissed her application with costs. The court also declared the second wife the only surviving spouse of the deceased.

On appeal to the SCA, the first wife's argument was that the existence of her customary marriage was borne out by the certificate of its registration issued to her in 1991, which constituted conclusive proof of such marriage. Accordingly, so she argued, such conclusive proof could be rendered invalid only if there was countervailing evidence to show that it was obtained by fraud, whether by the holder or any other person.

Petse JA held that one of the critical dates in determining the validity of customary and civil marriages of indigenous people, is 2 December 1988, when s 22 of the Black Administration Act 38 of 1927 was amended by the Marriage and Matrimonial Property Law Amendment Act 3 of 1998.

Prior to 2 December 1988 an African man was compe-

tent to enter into a civil marriage despite the fact that he had another wife or wives by customary marriage. After 2 December 1988 a man is not competent to enter into a civil marriage if he has taken wives by customary marriage. Any ensuing civil marriage is null and void.

The certificate of registration of the first wife's customary marriage that was obtained in 1991 constitutes *prima facie* proof of a valid customary marriage in the absence of evidence disputing its authenticity. The first wife was, therefore, legally married to the deceased.

The deceased was not competent to conclude a civil marriage, during the subsistence of the customary marriage with the first wife. The civil marriage with the second wife was, therefore, null and void and the appeal was allowed with costs.

Insolvency law

Effect on right to cancel contract: The facts in *Ellerine Brothers (Pty) Ltd v McCarthy Limited* 2014 (4) SA 22 (SCA) were as follows. The appellant, Ellerine, the lessor, leased business premises to a company, the lessee, which in turn sub-leased part of the premises to the respondent, McCarthy; the sub-lessee. The lessee failed to pay the rent to the lessor and the latter notified the lessee that the lease would be cancelled unless the breach was remedied within seven days.

Five days later, and before the seven-day period had expired, a third party lodged an application for the winding-up of the lessee. While the application was pending, the lessor delivered a letter cancelling the lease with immediate effect. However, the lessor and the liquidators assumed that the cancellation of the contract had not been effective and that the lease was, therefore, still in effect. Their assumption was based on the backdating of commencement of winding-up to the time the application was lodged. They argued that case law supported the view that, once liquidation ensues, the

right of the other party to cancel the contract is lost. The liquidators ceded the lessee's rights to collect rental under the sub-lease to the lessor.

When the lessor sued the sub-lessee for amounts due under the sub-lease, the sub-lessee argued that there could not have been a valid cession because the sub-lease automatically terminated when the lease was cancelled. The court had to determine whether the cancellation of the lease was valid. If it was, there were no rights that the liquidators could have ceded to the lessor.

The High Court held that the lease had been validly cancelled and that the lessor thus had no claim against the sub-lessee.

On appeal to the SCA, Van Zyl AJA held that liquidation or sequestration does not in general affect the continued existence of uncompleted contracts as the liquidator simply 'steps into the shoes of the insolvent'. Insolvency affects only uncompleted contracts if the liquidator decides not to abide by the contract – the other contracting party cannot insist on specific performance by the insolvent.

Insolvency proceedings do not prevent the other contracting party from cancelling the contract, either in terms of a contractual stipulation (*lex commissoria*) or under a common-law right of cancellation following the insolvent's breach of contract.

The distinction drawn in other cases between a completed or 'accrued right to cancel' and a right to cancel which only matures after the commencement of liquidation is unhelpful. The question is simply whether there was an effective and enforceable right at the time of cancellation.

Section 37 of the Insolvency Act 24 of 1936 provides the liquidator with a right to decide whether to continue with or cancel a lease in which the insolvent is the lessee. Section 37, therefore, does not materially change the common-law position and none of its provisions prevent

the lessor from exercising a right to cancel.

The cancellation of the lease was thus valid and had the effect of also terminating the sub-lease. The liquidators had no right under the sub-lease that could be ceded to the lessor.

The appeal was dismissed with costs.

Sale of land: In *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC); *Botha and Another v Rich NO and Others* 2014 (7) BCLR 741 (CC), the court was asked to pronounce on the question whether a purchaser of immovable property has a right to specific performance and thus claim the transfer of the property if more than half of the purchase price has been paid under an instalment sale.

The salient facts were as follows. Botha had concluded an instalment sale agreement to buy immovable property from a trust. A cancellation clause stated that breach by Botha would entitle the trust to cancel the agreement and retain all payments made. After Botha had paid three-quarters of the purchase price, she began to default on the instalments. The trust sued for cancellation of the contract and eviction of Botha from the property. Botha demanded transfer of the property in terms of s 27(1) of the Alienation of Land Act 68 of 1981.

The High Court allowed the trust's claim and ordered cancellation of the contract and eviction of Botha.

After a number of unsuccessful appeals, Botha appealed to the Constitutional Court. The issues placed before the court were –

- whether the trust was obliged to register the property in Botha's name against registration of a mortgage bond in the trust's favour; alternatively,
- whether enforcement of the forfeiture clause by the trust was unconstitutional, given that 50% of the purchase price had been paid, and, if so, whether Botha was entitled to restitution of the money paid.

Nkabinde J held that earlier case law in which it was decided that s 27(1) did not afford a purchaser a right of specific performance were incorrect. Although s 27(3) mentions only cancellation as a remedy for a seller's failure to transfer the property to the buyer after it had paid at least 50% of the purchase price, the buyer retained her common-law remedy of specific performance. Even though the *exceptio non adimpleti contractus* was in theory available to the trust, the principle of reciprocity had to be relaxed where its application would be unfair. The court emphasised that it was in the interest of fairness that the transfer of the property to Botha be made conditional on payment of the arrears and the outstanding municipal rates, taxes and service fees.

The court further held that to grant cancellation to the trust and forfeiture of the instalments paid by Botha where more than three quarters of the purchase price has been paid is a disproportionate penalty for the breach committed by Botha.

Botha was accordingly entitled to transfer against registration of a bond in favour of the trust, provided all arrears were brought up to date at or before transfer.

The appeal was upheld with costs.

Wills

Fideicommissum: The case of *Erasmus NO v Estate Late Booysen* 2014 (4) SA 1 (SCA) (also reported under the citation of '*NE*' *NO v Estate Late 'BCB'* [2014] 2 All SA 635 (SCA)) concerned the interpretation of two separate wills of two different persons. These two persons were the great-grandfather and great-great-grandmother of a minor child, Jonique. The great-grandfather was the father of Jonique's paternal grandfather. The great-great-grandmother was the mother of that great-grandfather. Jonique's father, Josua Booysen (Josua) had predeceased his father, the late Barend Christiaan Booysen (the deceased). The deceased was a fiduciary

of *fideicommissa* established by the respective wills of his father (ie, Jonique's previously mentioned great-grandfather) and grandmother (ie, Jonique's previously mentioned great-great grandmother).

The appellant was Nicolette Erasmus, the mother and surviving natural guardian of Jonique, who was 14 years old at the time when the appeal was heard by the SCA.

The issue for determination in both the High Court

and on appeal to the SCA, was whether Jonique could inherit a farm, as a fideicommissary, when her father had predeceased the deceased. The High Court held that Jonique could not.

Willis JA held that where a testator creates a *fideicommissum* consisting of a fiduciary, a first fideicommissary and a subsequent fideicommissary, and where the first fideicommissary dies before the fiduciary, the property

concerned will pass to the second fideicommissary.

The appeal was accordingly allowed and the costs of the present appeal were to be paid by the estate of the deceased.

OTHER CASES

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with

administrative law, banking, civil procedure, education, insolvency, legislation, local authorities, motor-vehicle accidents, pensions funds, practice, road fines, sectional titles and transport.



LEAD seminars

Diarise the dates to sharpen your skills or explore a new area of practice.

For more information and to download the brochures and registration forms, visit www.LSSALEAD.org.za or contact the seminars division at e-mail: seminars@LSSALEAD.org.za or call (012) 441-4613/4644/4608.

Children's Act 38 of 2005 and Divorce Litigation

Presenter: Riani Ferreira

East London: 2 October

Cape Town: 13 October

Durban: 14 October

Bloemfontein: 16 October

Midrand: 17 October

Court Annexed Mediation

5-day workshop

New rules, new opportunities for attorneys

Pietermaritzburg: 6-10 October

Deceased Estates Update

Presenter: Ceris Field

Bloemfontein 30, 31 October

Johannesburg: 24, 25 November

Pretoria: 27, 28 November

Divorce Orders and Retirement Funds

Presenter: Andrew Mothibi (Liberty Life)

Cape Town: 29 September

Bloemfontein: 6 October

East London: 20 October

Drafting of Contracts (Advanced Content)

Presenter: Coenraad Snyman

Bloemfontein: 1 - 3 October

Durban: 3 - 5 November

Education Law

Presenter: Paul Colditz and Jaco Deacon

Cape Town: 25 September

East London: 14 October

Durban: 15 October

ISLP'S Commercial Law Training Programme

Building Law Firm Capacity to Service Commercial Law Transactions

Presented in co-sponsorship with the International Senior Lawyers Project (ISLP)

Johannesburg: 20 to 24 October

Durban: 27 - 31 October

Legal Costs

Presenter: Alet Lubbe

Durban: 1 October

Cape Town: 3 October

A warning to all maintenance court officials

By
Naleen
Jeram

Mthimunya v Minister of Justice and Constitutional Development and Others (GP) (unreported case no 61876/2012, 9-5-2014) (Hiemstra AJ)

The High Court in *Mthimunya v Minister of Justice and Constitutional Development and Others* (unreported case no 61876/2012, 9-5-2014) (GP) (Hiemstra AJ) handed down a far-reaching judgment affecting the rights of maintenance creditors. The issue in dispute was the negligent conduct of the maintenance officials at a particular magistrate's court which resulted in the plaintiff (the mother of the children entitled to the maintenance benefit) not being able to attach a pension benefit paid to the debtor (the father). This note briefly examines the significance of the judgment and its practical consequences.

The plaintiff sued the Minister of Justice and Constitutional Development (first defendant) in his capacity as political head of the Department of Justice, and the National Prosecuting Authority (second defendant) in its capacity as the employer of the various maintenance officers that dealt with the matter (fourth, fifth, sixth, and seventh defendants respectively). The plaintiff's claim was based on the fact that the maintenance officers, acting in the course and scope of their employment, had negligently and unlawfully failed to take steps in terms of the Maintenance Act 99 of 1998 to attach a pension benefit in order to secure a valid maintenance claim.

In order to understand the impact of the judgment, it is necessary to sketch briefly the facts giving rise to the claim.

The father was employed as a teacher and was required to pay maintenance to the plaintiff in respect of his two minor children. In about 2006, the father resigned from his employment and was entitled to a pension benefit payable by his pension fund. According to the plaintiff, she had on numerous occasions informed the maintenance officers that the father had resigned and was entitled to a benefit payable by the fund.

Thereafter, she approached a senior magistrate at the court to ensure that her claim was prosecuted and that the pension benefit was attached. However, she was erroneously informed by the magistrate that pension benefits were not capable of attachment.

From the judgment, it is not clear why the maintenance inquiry was not finally resolved, but on 6 June 2006 a criminal case was enrolled in respect of the arrear maintenance liability. This matter was postponed on several occasions. The magistrate recorded that the father had failed to pay maintenance as he was awaiting his pension benefit but at that stage arrear amounts had been paid in full. As a result, the matter was withdrawn by the state. It subsequently emerged that this was also incorrect in that the debtor was still R 900 in arrears.

The plaintiff had on several occasions requested the various maintenance officers at the court to attach the pension benefit in order to secure her claim. During the evidence of the maintenance officials, it emerged that they were not fully aware of the remedies available in terms of the legislation with regard to the attachment of pension benefits. Moreover, it appeared as if the maintenance officials were under the impression that the father, on receipt of his pension benefit, would settle the arrear maintenance amounts. The maintenance officials could also not provide an explanation as to why criminal proceedings had been instituted instead of using the extensive civil remedies provided for in legislation.

By March 2007, the father's bank account was in overdraft. It emerged that he had made 24 withdrawals ranging from R 2 000 to R 8 000 and all of these withdrawals were made at the automatic teller machine at the Carousel Sun Casino. Hereafter, another criminal inquiry was held and on 28 October 2009 he was convicted of the criminal offence

for failing to pay maintenance. At that stage, the arrear maintenance amounted to R 24 500. He was sentenced to a fine of R 2 000 or 2 years' imprisonment. However, the court further ruled that the arrears of R 24 500 were 'written off'. No reasons were provided as to why these amounts were written off. Thereafter, no steps were taken by the state to appeal the ruling nor was the decision reviewed. As a result, the plaintiff could not recover the arrear maintenance owed.

Hiemstra AJ was not satisfied with the conduct of the various maintenance officials and outlined the various statutory duties placed on them. The court concluded that the maintenance officials had been grossly negligent. As a result, the plaintiff had suffered pure economic loss in the amount of the arrear maintenance due of R 24 500. The court concluded that, as a team of maintenance officers, they had neglected to take steps provided for in legislation and consequently, the employer, and the Minister of Justice were held liable for their unlawful and negligent omissions. The court, in this instance, opted not to make any orders against the maintenance officers in their personal capacities.

This ruling should send a clear message to all maintenance officials to remind them of their important duty to implement and fulfil the maintenance rights of the various maintenance creditors.

Retirement funds: Benefits payable on termination

In the context of retirement funds, benefits payable by employment-based pension or provident funds are normally payable on the termination of the employment contract. In terms of our law, it is well established that a pension benefit may be attached in order to secure a claim for arrear maintenance. Our courts have expanded this right and held that a

pension benefit may also be attached to secure a future maintenance claim of the creditor, where there is a reasonable fear that the debtor may default on his or her future payments (see *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D), *Magewu v Zozo and Another* [2003] 7 BPLR 4859 (C), *Soller v Maintenance Magistrate, Wynberg and Others* [2006] 1 BPLR 53 (C), and *Burger v Burger and Another* [2007] 2 BPLR 50 (D)).

Where orders are to be made against retirement funds, the fund/s must be clearly identified and the amount to be attached must be specified. It must also be noted that the maintenance amount deducted from the pension benefit payable by the fund is subject to tax. Moreover, the method of payment (whether payment should be made to the court or some other mode of payment) should be contained in the order. The common practice is for the fund to pay the maintenance ordered as a capitalised lump sum to the court, which in turn, pays the maintenance creditor on a monthly basis.

Maintenance officers or debtors and their representatives, in any maintenance

inquiry, can contact retirement funds or their administrators directly to establish membership and current benefit values. It is important to note that a private retirement fund is a separate juristic person and registered as such in terms of s 4 of the Pension Funds Act 24 of 1956 (and State funds are established in terms of various Acts of Parliament). The participating employer in the fund (the employer of the debtor) is a distinct separate entity from the fund and hence any order made against the employer is not binding on the fund.

The practical difficulty facing many maintenance claimants (unlike the plaintiff in this case) is that often they are not aware that the member (maintenance debtor) has left service and is entitled to a benefit payable by the retirement fund. Where a maintenance inquiry is in progress or about to be instituted, and the member has left service, the maintenance creditor may then request the fund to withhold the benefit pending the outcome of the inquiry. Opinion is divided on whether the fund may legally withhold the benefit in these circumstances. On the strength of rulings by the courts in accepting that there can be a claim for

future maintenance (including the strong emphasis on courts taking all possible steps to protect the rights of children) and the approach taken by the courts and the Pension Funds Adjudicator on the issue of withholding of benefits to secure the employer's claims pending civil or criminal proceedings, one can make a compelling argument supporting the withholding of the benefit pending the maintenance inquiry. Thus, maintenance creditors, to secure any future order granted by the court, may request the fund to withhold the benefit.

Maintenance officials and maintenance claimants should familiarise themselves with the legal requirements relating to the attachment of pension benefits. The failure to do so on the part of maintenance officials may result in adverse consequences for the maintenance officials personally and their respective employers.

Naleen Jeram BA LLM (UCT) is a senior legal adviser at a long-term insurer and an Adjunct Professor at the University of Cape Town. □

Win an iPad mini and one year's free access to LexisNexis Practical Guidance



The winner of the 2014 LexisNexis Prize for the best article contributed to *De Rebus* by a practising attorney will receive an iPad Mini, as well as 12 months free access to LexisNexis Practical Guidance.

The first of its kind in South Africa, LexisNexis Practical Guidance is a web-based solution that provides users with online access to guidance notes, checklists and forms and precedents authored by expert practitioners in their field, as well as trusted LexisNexis commentaries, legislation and case law.

Practical Guidance content is structured around key topics within each practice area and focuses on providing users with practical information on the "what-to" and "how-to" questions, complimenting existing LexisNexis commentaries that can be accessed for deeper research.

The following conditions apply to entries.

The article should not exceed 2 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.

- The article must be published between 1 January 2014 and 31 December 2014.
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

Any queries and correspondence should be addressed to:

The editor, *De Rebus*, PO Box 36626, Menlo Park 0102

Tel: 012 366 8800, Fax: 012 362 0969, Email: derebus@derebus.org.za

IC006/14



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

NEW LEGISLATION

Legislation published from
25 June – 25 July 2014

BILLS INTRODUCED

Legal Aid Bill B8 of 2014.

Attorneys Amendment Bill B9 of 2014.

PROMULGATION OF ACTS

Restitution of Land Rights Amendment Act 15 of 2014. *Commencement:* 1 July 2014. GN526 GG37791/1-7-2014.

Property Valuation Act 17 of 2014. *Commencement:* To be proclaimed. GN527 GG37792/1-7-2014.

Customs Duty Act 30 of 2014. *Commencement:* On the date on which the Customs Control Act 31 of 2014 takes effect in terms of s 944(1) of that Act. GN552 GG37821/10-7-2014.

Customs Control Act 31 of 2014. *Commencement:* To be proclaimed. GN582 GG37862/23-7-2014.

Customs and Excise Amendment Act 32 of 2014. *Commencement:* On the date on which the Customs Control Act 31 of 2014 takes effect in terms of s 944(1) of that Act. GN583 GG37863/23-7-2014.

COMMENCEMENT OF ACTS

Infrastructure Development Act 23 of 2014. *Commencement:* 10 July 2014. Proc44 GG37824/10-7-2014.

Sheriffs Act 90 of 1986, ss 2, 3, 4(a) and (c), 5 (to the extent that it inserts s 6A) and 6A. *Commencement:* 18 July 2014. Proc R48 GG37841/18-7-2014.

Sheriffs Amendment Act 14 of 2012, s 16. *Commencement:* 18 July 2014. Proc R48 GG37841/18-7-2014.

Employment Equity Amendment Act 47 of 2013. *Commencement:* 1 August 2014. Proc 50 GG37871/25-7-2014.

SELECTED LIST OF DELEGATED LEGISLATION

Basic Conditions of Employment Act 75 of 1997

Determination: Earnings Threshold –

Employees earning in excess of R 205 433,30 are excluded from ss 9, 10, 11, 12, 14, 15, 16, 17(2) and 18(3) of the Act with effect from 1 July 2014. GN531 GG37795/1-7-2014.

Amendment of sectoral determination 11: Taxi sector, South Africa. GN537 GG37813/9-7-2014.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011. GN R565 GG37842/18-7-2014.

Compensation for Occupational Diseases and Injuries Act 130 of 1993

Transfer of Class 13 employers (iron, steel, artificial limbs, galvanising, garages, metals, etcetera) to Rand Mutual Assurance. GenN565 GG37826/14-7-2014.

Constitution of the Republic of South Africa, 1996

Transfer of administration and powers and functions entrusted by legislation to certain cabinet members. Proc 47 GG37839/15-7-2014.

Financial Markets Act 19 of 2012

Financial Services Board: Directive and Guideline 1 of 2014: Regulation of Exchanges. BN68 GG37805/11-7-2014.

Financial Services Board: Amendments to the Johannesburg Stock Exchange (JSE) Derivatives Rules. BN69 GG37805/11-7-2014.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Repeal of regulations relating to mayonnaise and other salad dressings. GN R553 GG37829/11-7-2014.

Immigration Act 13 of 2002

Financial or capital contribution for business in respect of business visa and permanent residence permit. GN560 GG37837/15-7-2014.

Undesirable business undertakings in relation to an application for business visa. GN561 GG37837/15-7-2014.

Business qualifying for reduction or waiver of capitalisation requirements as determined to be in the national inter-

est in relation to a business visa. GN562 GG37837/15-7-2014.

Undesirable business undertakings in relation to an application for corporate visa. GN563 GG37837/15-7-2014.

Income Tax Act 58 of 1962

Persons who must furnish an income tax return for the 2014 year of assessment. GN506 GG37767/25-6-2014.

Magistrates' Courts Act 32 of 1944

Variation of notices creating magisterial districts and establishing district courts for Gauteng and North West Provinces (variation of effective date from 1 August 2014 to 1 December 2014). GN570 GG37847/18-7-2014, GN572 GG37849/18-7-2014 and GN573 GG37850/18-7-2014.

National Environmental Management Act 107 of 1998

Regulations to phase-out the use of Polychlorinated Biphenyls (PCBs) materials and Polychlorinated Biphenyl (PCB) contaminated materials. GN R549 GG37818/10-7-2014.

National Environmental Management: Air Quality Act 39 of 2004

Regulations regarding Air Dispersion Modelling. GN R533 GG37804/11-7-2014.

National Environmental Management: Integrated Coastal Management Act 24 of 2008

Regulations pertaining to the control of use of vehicles in the Coastal Area. GN R496 GG37761/27-6-2014.

Management of public launch sites in the coastal zone. GN R497 GG37761/27-6-2014.

National Environmental Management: Protected Areas Act 57 of 2003

Norms and standards for the management of protected areas in South Africa. GenN528 GG37802/7-7-2014.

National Health Act 61 of 2003

The Health Infrastructure Norms and

Standards Guidelines. GN512 GG37790/30-6-2014.
Emergency medical services regulations. GNR585 GG37869/24-7-2014.

Pension Funds Act 24 of 1956

Prescribed financial statements applicable to the different categories of funds. BN77 GG37844/18-7-2014.

Pharmacy Act 53 of 1974

South African Pharmacy Council: Fees payable to the Council under the Act. BN75 GG37830/18-7-2014.

Prescribed Rate of Interest Act 55 of 1975

Prescribed rate of interest (9% as from 1 August). GN R554 GG37831/18-7-2014.

Property Valuers Profession Act 47 of 2000

Amendment of rules for the property valuers profession. BN70 GG37805/11-7-2014.

Public Finance Management Act 1 of 1999

Regulations prescribing standards of generally recognised accounting practice. GN R551 GG37820/10-7-2014.

Public Service Act 103 of 1994

Amendment of sch 1 to the Act. Proc43 GG37817/8-7-2014.

Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support: R 224 120 as from 31 July 2014. BN83 GG37854/25-7-2014.

Rules Board for Courts of Law Act 107 of 1985

Amendment of Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa (r 3-6, 9, 12-14, 18, 22-23, 25, 28, 28A, 55-56, 58, 60 and Annexure 1). GN R507 GG37769/27-6-2014.

Small Claims Courts Act 61 of 1984

Establishment of small claims courts for the areas of Lulekani and Phalaborwa. GN543 GG37805/11-7-2014.

Establishment of a small claims court for the area of Stilfontein. GN544 GG37805/11-7-2014.

Establishment of a small claims court for the area of Umzinto. GN544 GG37805/11-7-2014.

South African Civil Aviation Authority Levies Act 41 of 1998

Amendment of a determination made by the South African Civil Aviation Authority imposing a fuel levy on the sale of aviation fuel. GN R511 GG37781/30-6-2014.

South African Schools Act 84 of 1996

Amended national norms and standards for school funding. GN569 GG37846/18-7-2014.

Tax Administration Act 28 of 2011

Duty of reporting financial institutions to keep the records, books of account or documents in terms of s 29 and in the form in terms of s 30. GN508 GG37778/27-6-2014.

Returns to be submitted by third parties by certain dates in terms of s 26. GN509 GG37778/27-6-2014.

Rules promulgated under s 103 of the Act, prescribing the procedures to be followed in lodging an objection and appeal against an assessment or a decision subject to objection and appeal referred to in s 104(2) of that Act, procedures for alternative dispute resolution, the conduct and hearing of appeals, application on notice before a Tax Court and transitional rules. GN550 GG37819/11-7-2014.

Water Research Act 34 of 1971

Water Research Fund: Increase of rates and charges. GN566 GG37843/17-7-2014.

Water research levy: Increase of rates and charges. GN567 GG37843/17-7-2014.

Draft legislation

Proposed amendment of the regulations regarding control of the export of grains in terms of the Agricultural Product Standards Act 119 of 1990. GenN452 GG37760/27-6-2014.

Proposed amendment of the regulations regarding control of the export of feed products in terms of the Agricultural Product Standards Act 119 of 1990. GenN453 GG37760/27-6-2014.

Proposed amendment of the regulations regarding control of the export of fresh vegetables in terms of the Agricultural Product Standards Act 119 of 1990. GenN454 GG37760/27-6-2014.

Proposed amendment of the regulations regarding control of the export of animal products and processed products in terms of the Agricultural Products Standards Act 119 of 1990. GenN512 GG37783/4-7-2014.

Draft regulations made under ss 5(1) and 107(2) of the Financial Markets Act 19 of 2012. GN R522 GG37784/4-7-2014.

Draft regulations in terms of the Spatial Planning and Land Use Management Act 16 of 2013. GenN526 GG37797/4-7-2014.

Proposed amendments to the JSE listing requirements in terms of the Financial Markets Act 19 of 2012. BN66 GG37800/4-7-2014 and BN84 GG37867/25-7-2014.

Amendment of regulations made under s 70 of the Short-term Insurance Act 53 of 1998 for comments. GN547 GG37805/11-7-2014.

Amendment of regulations made under s 72 of the Long-term Insurance Act 52 of 1998 for comments. GN548 GG37805/11-7-2014.

Draft national atmospheric emission reporting regulations in terms of the National Environmental Management: Air Quality Act 39 of 2004. GenN572 GG37830/18-7-2014.

Proposed amendments to the JSE debt listing requirements in terms of the Financial Markets Act 19 of 2012. BN72 GG37836/14-7-2014.

ENHANCE YOUR CASH FLOW!

Debit your client's account with what he owes you, through our payment commitment system, especially created for Attorneys.

STRATCOL
debit orders
enhance your cash flow

Tel: 0861 787 282
marketing@stratcol.co.za

www.stratcol.co.za



financial intelligence centre

REPUBLIC OF SOUTH AFRICA

UPDATE NOTICE TO ALL ATTORNEYS IN SOUTH AFRICA

REGISTRATION WITH THE FINANCIAL INTELLIGENCE CENTRE

The Financial Intelligence Centre (the Centre) reminds all attorneys of their obligation to register with the Centre in terms of s 43B of the Financial Intelligence Centre Act 38 of 2001, as amended (the FIC Act).

Approximately 10% of all attorney firms still need to register with the Centre. The period for accountable and reporting institutions to register with the Centre ended on 01 March 2011. Each branch of an attorneys firm will be regarded as a separate accountable institution and is required to register separately with the Centre. When an accountable institution is registered with the Centre it enables them to use the internet-based reporting portal on the Centre's website.

All institutions registered with the Centre are also required to update their registration details via the Centre's electronic registration platform only. The Centre has issued Directive 01 advising the same. This is to ensure that the Centre has up-to-date information on all registered institutions.

When an attorneys firm registers with the Centre, a username and password are selected which are recorded on the Centre's systems. These login credentials may only be used by the person who originally registered them on the Centre's system. No one else may use these login credentials to submit reports, which are required in terms of the FIC Act, to the Centre. If the individual no longer holds the position he /she held at the time of registration with the Centre, the attorneys firm must ensure that new login credentials are obtained. The Centre has issued Directive 01 advising the same.

REPORTING TO THE CENTRE

The Centre obtains information in the form of reports which are filed with it in accordance with the following sections of the FIC Act, as mentioned above –

- s 28 (cash threshold reporting);
- s 28A (terrorist property reporting); and
- s 29 (suspicious and unusual transaction reporting).

Where the abovementioned persons/institutions fail to submit these reports to the Centre, intelligence data needed to fulfill its mandate is lost to the Centre.

Where an attorneys firm becomes aware of a reporting failure to the Centre it has to mitigate the loss of intelligence data to the Centre by informing the Centre in writing of the failure and request an engagement with the Centre to discuss relevant mitigation factors.

CASH THRESHOLD REPORTING (S 28)

Attorneys are reminded of their obligation to file cash threshold reports with the Centre in terms of s 28 of the FIC Act. Section 28 of the FIC Act requires that accountable and reporting institutions must within two business days, report to the Centre the prescribed particulars concerning a cash transaction concluded with a client in excess of R 25 000 which –

- is paid by the accountable institution or reporting institution to the

client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or

- is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.

TERRORIST PROPERTY REPORTING (S 28A)

Section 28A requires an accountable institution, listed in Schedule 1 to the FIC Act, to file a report with the Centre if the accountable institution knows that it possesses or controls property linked to terrorism. It is important to emphasise that the knowledge about the origins and ownership of the property in question should be gained with reference to an objective set of circumstances or facts (as opposed to a suspicion that may be formed by those persons involved in the day to day running of an accountable institution or business).

When filing a report with the Centre in terms of s 28A it is an offence to continue dealing with that property in any way.

Reports to the Centre in terms of s 28A should be made by means of internet-based reporting provided by the Centre on the Centre's website at www.fic.gov.za

SUSPICIOUS AND UNUSUAL TRANSACTION REPORTING (S 29)

The obligation to report suspicious transactions to the Centre in terms of s 29 of the FIC Act applies to all businesses in South Africa, including attorneys. Even though some businesses are actively reporting suspicious and unusual transactions to the Centre, our experience to date is that some attorney firms are not filing suspicious transaction reports with the Centre.

The FIC Act requires the following persons to report in terms of s 29 to the Centre –

- a person who carries on a business of an attorney;
- a person who is in charge of or manages an attorneys firm; or
- a person who is employed by an attorney.

The requirement to report suspicious or unusual transactions applies to all attorneys practicing as single practitioners or as part of an attorneys firm. By reporting suspicious and unusual transactions to the Centre, attorneys will indirectly and, at times, directly help the fight against crime. This can lead to a more safer and stable business operating environment which encourages and improves investor confidence.

FEEDBACK AND ENQUIRIES

Enquiries may be sent to the Centre by e-mail to: fic_feedback@fic.gov.za or to the FIC Compliance Contact Centre on 0860 222 200.

Kindly consult the Centre's website at www.fic.gov.za to keep abreast of further developments.

FINANCIAL INTELLIGENCE CENTRE
AUGUST 2014

Employment law update



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



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

Poor work performance of senior manager on probation

In *Palace Engineering (Pty) Ltd v Ngcobo and Others* [2014] 6 BLLR 557 (LAC), the Labour Appeal Court (LAC) considered the fairness of a dismissal of a senior manager for poor work performance. In this case, the employee was employed as the chief operations officer in terms of a three-year contract. The employee was subject to a six-month probation period and his employment contract stated that his appointment could be reviewed after two months if he failed to perform to the employer's required standards. He was also required to meet a performance target of R 100 million per year for sourcing new infrastructure work. Prior to the commencement of his employment, he was required to submit a business plan documenting how he endeavoured to achieve the performance target. He did not submit this plan and was informed that he should not report for duty. The employee challenged this decision by the employer and after some correspondence between the employer and the employee's attorneys it was agreed that the employee would commence employment and would be required to reach the performance target.

The employee's performance was carefully monitored and after three performance evaluations and the employee having failed to meet his monthly targets, an inquiry into his performance was convened. The chairperson of the

inquiry recommended that a new target be set which was only a percentage of the initial target and that he be granted additional time to improve and reach the new target. The employer did not follow the chairperson's recommendation in its entirety but agreed to reduce the employee's performance target and to extend the period in order to enable him to meet this revised target. The employee continued to fail to meet the target and was accordingly dismissed.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the CCMA the employee did not dispute the reasonableness of the target of R 100 million per annum and agreed that it was achievable. He, however, argued that he had been unable to source new business because he lacked the necessary tools of the trade and resources to generate business. However, under cross examination, he conceded that the lack of tools accounted only for 10% of his performance challenges. This said, the employee had drawn up a business plan after he had already become aware of the tools of the trade and resources at the company and personally set his target as R 1 million per month; and yet had failed to achieve this.

The arbitrator found that the employee's performance had been impacted on by the lack of tools of the trade and personnel. She also found that the employee's performance had been dependent on a number of external factors such as available contracts, capacity to apply for contracts and the significant time taken

for tenders to be awarded. Thus, the dismissal was found to be substantively and procedurally unfair and compensation equal to six months' remuneration was ordered.

On review, the Labour Court considered the employer's argument that it was not required to provide the employee with the same degree of supervision, guidance and training that is required for lower skilled employees as the employee occupied a senior position. It also considered the fact that the employee was on probation at the time. In this regard, the court held that a fair process still needed to be followed with probationary employees, notwithstanding that employers have a degree of latitude when it comes to the reason for the dismissal on the basis of poor work performance. The Labour Court found that the dismissal was substantively unfair, but that the employer had followed a fair process with the employee. In the circumstances, the compensation awarded was reduced to three months' remuneration.

The employer took the matter on appeal to the LAC and argued that the employee's seniority and the fact that he did not even reach the targets he had set for himself were not properly considered. The employer further argued that when an employee is on probation, the reasons for the dismissal may be less compelling.

Molemela AJA of the LAC held that the evidence supported the arbitrator's finding that the employer's business was dependent on a number of factors and that the employee's performance was

Juta Labour Title Offers

25% OFF
selected titles

20% OFF
Labour Mini-Library

2FOR1
FREE online access!

Juta Labour Law Solutions discounts & offers on selected titles

25% OFF

selected print titles & posters



20% OFF

Juta's Pocket Statutes Labour Mini-Library (5-volume set)



2FOR1

Free online access to key labour Law solutions with selected CD-ROM OR online subscriptions



Brace your business for the new laws governing labour!

New releases by top authorities in their field covering the most significant amendments to the LRA, EEA and BCEA in 40 years!

Offers end 30 November 2014. No further discounts apply.

See further details on these special offers and our recent labour law releases online.

www.jutalaw.co.za



@jutalaw



Juta Law

JUTA
L A W

impacted on by a shortage of tools of the trade and support staff, as well as a shifting of the goal posts by the employer. The court held that the employee was not given proper support and his efforts were negatively impacted by poor administration. As regards the seniority of the employee, the court found that although senior employees are expected to know the standards that are expected of them and conform to those standards, this does not mean that an employer is relieved of the duty of providing proper resources to assist the employee in meeting the required standards. It was also pointed out that the employer failed to follow the recommendations of the chairperson of the inquiry. In this regard,

the performance target was not reduced to the extent recommended by the chairperson and the employee was granted a shorter period in which to improve his performance.

The court pointed out that even when employees are on probation, the employer is required to offer guidance and discuss apparent shortcomings with them. Furthermore, the employee's employment contract set out twelve key performance areas and yet the employee was evaluated only on one performance area, that is the performance of a set target. It was also found that the employer did not seriously consider the employee's representations during the inquiry into his poor performance. The court found

that although a probationary employee may be dismissed for 'less compelling reasons', this does not mean that the employer does not need a fair reason for the dismissal. The onus is still on the employer to prove that the dismissal was substantively fair and the court concluded that the employer had failed to do so. The employee's dismissal was accordingly found to be substantively unfair and the appeal was dismissed.



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

Chamber of Mines obo Members v AMCU and Others (unreported case no J99/14, 23-6-2014) (Van Niekerk J)

The Chamber of Mines, a registered employers' organisation, launched an urgent application seeking to interdict the members of the first respondent, the Association of Mineworkers and Construction Union (Amcu), from engaging in industrial action in pursuit of their wage demands. The matter came before Cele J who granted an interim interdict on 30 January 2014.

On the return date, before Van Niekerk J, Amcu brought a counter-application challenging the constitutional validity of s 23(1)(d) of the Labour Relations Act 66 of 1995 (LRA).

On 10 September 2013 the Chamber, acting on behalf of gold mining companies (Harmony, AngloGold Ashanti and Sibanye Gold in these proceedings) entered into a wage agreement with three trade unions, National Union of Mineworkers (NUM), Solidarity and UASA. It was specifically recorded that in terms

of s 23(1)(d) of the LRA, the agreement would be extended to employees who were not members of the abovementioned unions. It was further recorded that each company had one workplace for purposes of s 23(1)(d).

Section 23(1)(d) reads:

'A collective agreement binds -

...

(d) employees who are not members of the registered trade union or trade unions party to the agreement if -

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

The contentious issue regarding the merits of the interdict application was the definition of 'workplace' as defined by s 213 of the LRA and which reads:

'... the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation'.

It was common cause that each employer had more than one mining site. It was also accepted that Amcu was the majority union in five mining sites, (three owned by AngloGold, one by Sibanye Gold and one by Harmony).

Relevant to this application was s 65(1)(a) of the LRA, which states that no person may engage in strike action if they are covered by a collective agreement

(in this case the wage agreement) which prohibits strike action. The Chamber argued that Amcu was prevented from embarking on strike action in pursuit of higher wages in terms of s 65 read with s 23(1)(d).

Amcu argued that each mining site constituted a single workplace despite being owned by one employer, and as such, any strike action they embark on would not be hit by the provisions the Chamber sought to rely on.

In applying the definition of a workplace to the merits at hand, the court held that each employer operated one workplace despite having various mining sites. In support of this was the unchallenged evidence from the Chamber setting out reasons why each site is not independent of another and used common resources managed centrally at each entity's head office. On this basis the court confirmed the interim order.

Constitutional issue

In its counter-application Amcu, according to the court, sought to challenge s 23(1)(d) on the basis that it unduly prevented trade unions - whose members were covered by a collective agreement which neither they nor their union were a part of - from engaging in collective bargaining and embarking on strike action in support of a matter of mutual interest, both of which are constitutionally guaranteed rights set out in s 23 of the Constitution.

Amcu further argued that the section under review offended the principle of legality in that it gave private actors the power to bind unwilling parties in the absence of an independent authority to ensure that such power is exercised fair-

ly and that decisions are not taken arbitrarily or capriciously. Furthermore any decision taken by the private actors was not subject to review by a court of law.

In narrowing Amcu's argument, the court held that the central determination it was called on to make was whether s 23(1)(d) unduly limits the right to strike.

The court began by saying that the mere fact that an organ of state is constrained by the doctrine of legality when exercising public power, does not mean that the conduct of private parties may not have consequences on third parties. Section 23 does not concern itself with the exercise of public power, but rather it enables the decision of private parties to have a legal consequence to third parties. This, in the court's view, did not in any way harm the rule of law.

In deciding whether s 23 unduly limited the right to strike, it became necessary for the court to have regard to s 36 of the Constitution. An application of s 36 required a court firstly to determine the purpose of a provision that limits a right in the Constitution (this can be determined by asking whether the law in question serves a legitimate government

purpose) and secondly to consider the impact of the law on the affected right (the proportionality analysis).

With regard to the first part of the inquiry, the court held that s 23(1)(d) imbued the internationally accepted principle of majoritarianism, which is the specific model of collective bargaining the legislature adopted.

Against this background, Van Niekerk J, at para 71 held:

'The limitation arising from s 21(1)(d) read with s 65(1)(a) flows directly from its purpose. The very purpose of s 23 is to bind non-parties in the workplace in respect of collective agreements concluded by majority trade unions. Binding non-parties is not an inadvertent effect of s 21(1)(d) - on the contrary, that is its central purpose. Similarly, the purpose of s 65(1) is *inter alia* to prohibit strikes and lockouts over issues in respect of which a collective agreement prohibits industrial action. There are no less restrictive means of achieving the applicable purposes. If the parties were precluded from extending collective agreements in terms of s 23(1)(d), the specific purpose of the provision could

not be achieved. What would remain is the ordinary common law principle that contracting parties are bound by their own agreements. As I have indicated, this would fundamentally undermine the broader purpose of the provision, which is to ensure functional, orderly and stable collective bargaining.'

The court went on further and found the application of s 23(1)(d) only limited Amcu's members' right to strike with regard to issues covered in the wage agreement and for the duration of the agreement. Therefore, the limitation of the right to strike was proportional and hence met the second part of the inquiry prescribed in s 36.

On this basis the court dismissed Amcu's counter-application with no order as to costs and confirmed the rule *nisi* with costs.

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

Send your question to
derebus@derebus.org.za

2014 Juta Law Prize for Candidate Attorney Article

Tablet Device & online *Essential Legal Practitioner Bundle* worth R20 000

Juta Law, in conjunction with *De Rebus* are again offering a prize for the best published article submitted by a candidate attorney during 2014. Valued at almost R20 000, the prize consists of a 32GB tablet with wi-fi & 3G PLUS a one-year single-user online subscription to *Juta's Essential Legal Practitioner Bundle*.

Submission conditions:

- 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 2014.
- The *De Rebus* Editorial Committee will consider all qualifying contributions and their decision will be final.

Queries and correspondence must be addressed to:

The Editor, *De Rebus*, PO Box 36626, Menlo Park 0102 • Tel: (012) 366 8800, Fax (012) 362 0969 • Email: derebus@derebus.org.za

www.jutalaw.co.za

JUTA
L A W

Recent articles and research

By
Meryl
Federl

ABBREVIATIONS:

DJ: *De Jure* (University of Pretoria Law Faculty)

SALJ: *South African Law Journal* (Juta)

Child law

Du Plessis, E, Van der Walt, G and Govindjee, A 'The constitutional rights of children to bodily integrity and autonomy' (2014) 35.1 *Obiter* 1.

Pickles, C 'Approaches to pregnancy under the law: A relational response to the current South African position and recent academic trends' (2014) 47.1 *DJ* 20.

Company law

Subramanien, D "'Unconscionable abuse" – section 20(9) of the Companies Act 71 of 2008 *Ex Parte Gore NNO* 2013 (3) SA 382 (WCC)' (2014) 35.1 *Obiter* 150.

Constitutional law

Kruger, R 'The (in)significance of the common law? Constitutional interpretation and the *Mansingh* judgments' (2014) 131.2 *SALJ* 233.

Phooko, MR 'What should be the form of public participation in the lawmaking process? An analysis of South African cases' (2014) 35.1 *Obiter* 39.

Swanepoel, CF (Neels) 'The judicial application of the "interest" requirement for standing in constitutional cases: A radical and deliberate departure from common law' (2014) 47.1 *DJ* 63.

Consumer law

Delport, H 'Problematic aspects of the Consumer Protection Act 28 of 2008 in relation to property transactions: Linked transactions, fixed-term contracts and unsigned sale agreements' (2014) 35.1 *Obiter* 60.

Contract law

Dafel, M 'Curbing the constitutional development of contract law: A critical response to *Maphango v Aengus Lifestyle Properties (Pty) Ltd*' (2014) 131.2 *SALJ* 271.

Credit law

Marais, EJ 'The constitutionality of section 89(5)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman & Others*' (2014) 131.2 *SALJ* 215.

Roestoff, M and Van Heerden, C 'Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers: Recent case law *Nedbank Ltd v Swarthoof* Unreported Case No 708/2012 (ECP)' (2014) 47.1 *DJ* 140.

Criminal law

Stevens, GP 'Assessing the interpretation of the elements of "dispose" and "child" for purposes of establishing the offence of concealment of birth. *S v Molefe* 2012 (2) SACR 574 (GNP)' (2014) 35.1 *Obiter* 145.

Cyber law

Hamann, B and Papadopoulos, S 'Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa' (2014) 47.1 *DJ* 42.

Mawdsley, RD 'Legal issues involving student cyber speech in the United States' (2014) 47.1 *DJ* 1.

Delict

Fagan, A 'Aquilian liability for negligently caused pure economic loss – its history and doctrinal accommodation' (2014) 131.2 *SALJ* 288.

Neethling, J and Potgieter, JM 'Wrongfulness and delictual liability for rugby injuries: *Roux v Hattingh* (SCA)' (2014) 131.2 *SALJ* 44.

Discrimination law

McGregor, M and Germishuys, W 'The taxonomy of an "unspecified" ground in discrimination law' (2014) 35.1 *Obiter* 94.

Environmental law

Paterson, A and Mkhulisi, M 'Traversing South Africa's conservation and land reform objectives – lessons from the Dwe-sa-Cwebe Nature Reserve' (2014) 131.2 *SALJ* 365.

Family law

Bonthuys, E 'The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: An argument for change' (2014) 131.2 *SALJ* 439.

Calvino, LR and Iyer, D 'Advancing the rights of heterosexual life partners in respect of loss of support *Paixão v Road Accident Fund* 2012 JDR 1749 (SCA)' (2014) *Obiter* 35.1 162.

Louw, A 'Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child *Ex parte MS* 2014 JDR 0102 Case No 48856/2010 (GNP)' (2014) 47.1 *DJ* 110.

International criminal law

Woolaver, H 'Prosecuting international

Open access law journals:

- **African Human Rights Law Journal:** www.chr.up.ac.za/index.php/about-the-journal.html
- **De Jure published by the University of Pretoria:** www.dejure.up.ac.za/
- **Potchefstroom Electronic Law Journal:** www.nwu.ac.za/p-per/volumes
- **Law, Democracy & Development is the journal of the Faculty of Law at the University of the Western Cape:** www.ldb.org.za/current-volume.html

crimes in South Africa: Interpreting the requirement of the accused's presence in South African territory under the implementation of the Rome Statute of the ICC Act' (2014) 131.2 *SALJ* 253.

Labour relations

Malan, K 'Constitutional perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*' (2014) 47.1 *DJ* 118.

Musukubili, F and Van der Walt, A 'The Namibian labour dispute resolution system: Some lessons from South Africa' (2014) *Obiter* 35.1 126.

Sharrock, R 'Relative bargaining strength and illegality *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 (5) SA 205 (WCC)' (2014) *Obiter* 35.1 136.

Van Jaarsveld, F 'Die reg op kollektiewe bedinging: Belangrike verwickelinge' (2014) 35.1 *Obiter* 108.

Marriage law

Marumoagae, MC 'The regime of forfeiture of patrimonial benefits in South Africa and a critical analysis of the concept of unduly benefited' (2014) 47.1 *DJ* 85.

Obituary

O'Regan, K 'In memoriam: Arthur Chaskalson' (2014) 131.2 *SALJ* 461.

Pension law

Mhango, MO 'Constitutional challenges in the implementation of a compulsory pension fund: The case of Lesotho' (2014) 131.2 *SALJ* 408.

Property law

Kruger, M 'Arbitrary deprivation of property: An argument for the payment of compensation by the state in certain cases of unlawful occupation' (2014) 131.2 *SALJ* 328.

Van Schalkwyk, LN 'Is die rede vir die beslissing in *Knox NO v Mofokeng and Others* 2013 4 SA 46 (GSJ) regtens korrek?' (2014) 47.1 *DJ* 101.

Religious discrimination

Henrico, R 'The role played by human dignity in religious-discrimination disputes' (2014) 35.1 *Obiter* 24.

Trust law

Nel, E 'An interpretive account of unconscionability in trust law' (2014) 35.1 *Obiter* 81.

Meryl Federl BA *Higher Dipl Librarianship (Wits)* is an archivist of historical papers at the University of the Witwatersrand. E-mail: Meryl.federl@wits.ac.za

Please note that copies of the articles mentioned in this feature are not supplied by the author, but may be obtained from the publishers of the journals, or a law library.

Which journals would you like to see featured in this column?

Forward your suggestions to derebus@derebus.org.za



DE REBUS digital

De Rebus is the SA Attorneys' Journal. It is published monthly for the benefit of practising attorneys and candidate attorneys.

De Rebus Digital is an exact replica of the print version and is available to everyone with access to a computer, laptop or tablet.

Can you afford not to have this valuable information at your fingertips?

Subscribe to this free service by e-mailing your name and e-mail address to kathleen@derebus.org.za



Security clearances before appointing the National Prosecuting Authority

By
Brenda
Wardle

On 5 July 2014 President Jacob Zuma announced that, after careful consideration of all matters, he had decided to institute an inquiry into whether or not the National Director of Public Prosecutions (NDPP) Mxolisi Nxasana, was fit to hold office.

The President, in instituting the inquiry, was acting pursuant to the provisions of s 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998 (NPA Act). Mr Nxasana, like his predecessors, was appointed in terms of s 179 of the Constitution, such appointment being for a period of ten years.

This will be the second inquiry, since the initial one was preceded by the Ginwala Commission of Enquiry, which had been set up to investigate whether Adv Vusi Pikoli was fit to hold office. It was the appointment of Adv Menzi Simelane as NDPP, following the Ginwala Commission, which caused the Democratic Alliance to challenge Mr Simelane's appointment in court. The Supreme Court of Appeal (SCA) declared the appointment of Mr Simelane irregular and invalid and subsequently referred the matter to the Constitutional Court for a confirmation of the declaration of invalidity.

The Constitutional Court reached conclusions on a number of issues, among others, was the fact that the 'fit and proper' requirement of an NDPP, with due regard to conscientiousness and integrity, was not a matter to be determined according to the subjective opinion of the President.

The Constitutional Court reiterated the requirement set out in the SCA that the 'fit and proper' requirement was a jurisdictional prerequisite, which ought to be determined objectively. The court further stated that the rationality requirement obliged the court to evaluate the relationship between the means and the end in the appointment process. The court also held that there had to be

a nexus between each step taken in the decision-making process and the final decision itself, in order for the rationality requirement to be satisfied. The court dealt at length with the rationality requirement of both administrative actions and (by necessary implication) executive decisions and held that the doctrine of separation of powers (commonly, and very often referred to as the *trias politica* doctrine), found very little, if any applicability to the *Simelane* matter.

In the end, the Constitutional Court agreed with the SCA's finding that the appointment of Mr Simelane was unconstitutional, especially in view of the scathing attack and the recommendations of the Ginwala Commission, which were followed by the recommendations of the Public Service Commission, the latter which were reportedly ignored by the then Justice Minister, Enver Surty.

Section 12(6)(a) of the NPA Act proceeds thus:

'The President may provisionally suspend the National Director or Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office -

- (i) for misconduct;
- (ii) on account of continued ill-health;
- (iii) on account of incapacity to carry out his or her duties of office efficiently; or
- (iv) *on account thereof that he or she is no longer a fit and proper person to hold the office concerned*' (my emphasis).

Section 179 of the Constitution refers to a single National Prosecuting Authority (NPA) consisting of an NDPP, appointed by the President as a member of the Executive and Directors of Public Prosecutions, and prosecutors as determined by an Act of parliament (in this instance the NPA Act).

The position of Mr Nxasana, on the limited facts available, relates to him not

having disclosed that he was once on trial for murder. There are also further allegations of two other assault cases against him. One would have thought, or in fact expected, that following the decision in *Simelane*, the appointment of an NDPP would have been approached with some degree of diligence and care, as the President is bound by the decision of the Constitutional Court.

Allegations of political interference and delayed action notwithstanding, it appears doubtful or perhaps even highly unlikely, especially in the light of reports of alleged recent assault charges, that Mr Nxasana would be successful in arguing that he is indeed such a fit and proper person. From a contractual breach perspective he would appear to be well within his rights to argue that he had a legitimate expectation that his contract as NDPP would have continued for the remainder of the ten-year term.

The other difficulty which arises with Mr Nxasana, is that he is alleged to have tendered information on a disciplinary infringement by the KwaZulu-Natal Law Society, yet failed to see the relevance of and mentioning the murder charge, notwithstanding the fact that it appears highly unlikely that he would be denied clearance by virtue only of a matter he was acquitted on.

There are also other worrying allegations in the media that many other incumbents at the NPA do not or did not have the requisite security clearance. This leads one to ask the question why then there would be differential treatment, given the fact that s 9 of the Constitution affirms the right to equality with equal benefit to the law.

Similar concerns have been raised around police officers who have criminal convictions, as well as some with falsified qualifications still in the employ of the South African Police Service. A few years ago there were rumors about many staff members of the South African National Defence Force who were yet to

be vetted. Given the fact that these individuals are privy to classified information on a daily basis, would it be safe to ask whether or not our institutions are compromised?

The real danger here is the unscrupulous persons and even rogue operatives from within and outside our borders who operate below the radar. These people can easily gain employment and obtain whatever information they require in their field of choice, in the full knowledge that security clearance in South Africa sometimes takes as long as six years. There are many who are already aware that, even where required, vetting does not precede appointment and that, in some strange way, people appear to be assumed to qualify for clearance by being appointed provisionally while vetting takes place. This means that by the time the report comes back, the proverbial horse might have long bolted.

In an advertisement for Aspirant Prosecutor Training published earlier this year, it was categorically stated in the advertisement that:

'Successful candidates will be subjected to a security clearance at least up to a level of Top Secret. Appointment to these posts will be provisional, pending the issuing of security clearance. If you cannot get a security clearance, your appointment will be reconsidered/possibly terminated. Fingerprints will be taken on the day of the interview.' (www.npa.gov.za/Uploaded-Files/Aspirant%20prosecutor%20training%20(recruitment%20ad)%20June2014.pdf, accessed 7-8-2014.)

At a cursory glance, it would appear that the entry requirements for aspirant prosecutors are indeed unnecessarily onerous and might therefore be *ultra vires* the NPA Act.

The Minimum Information Security Standards Document (MISS) was approved by Cabinet as the national information security policy on 4 December 1996. Under classification, all official matters which are exempted from disclosure or which require the application of security measures, must be classified as either, 'Restricted', 'Confidential', 'Secret' or 'Top Secret'.

The problem I foresee with the advertisement for the aspirant prosecutors programme is that it refers to security clearance 'at least' up to a level of 'Top Secret', which is the highest level attainable. Is there really a need for prosecutors to pass such stringent vetting and if it is indeed justifiable, how many of them currently hold 'Top Secret' clearance? Under the definitions section of the MISS Document, 'Top Secret' is defined as a level of classification given to information that can be used by malicious/opposing/hostile elements to neutralise the objectives and functions of institutions and/or the state. It further states that 'Top Secret' classification refers to instances where the compromise of such information can lead to the discontinuance of diplomatic relations between states and can result in the declaration of war.

The establishment of the NPA by the Constitution was a critical step towards ensuring that the prosecution of crime in South Africa moved away from its oppressive nature of the past towards a discretionary but credible prosecutorial institution with sufficient checks and balances. However, the history that has marred the appointment of NDPPs has been jagged.

In terms of the MISS Document political appointees, for example, Directors General and Ambassadors, etcetera are not vetted unless the President requests that they be vetted or the relevant contract otherwise so provides. However, all other levels from the lowest to Deputy Director General level, inclusive of anyone who should have access to classified information, must be subjected to vetting. It is, after all, the President's prerogative to decide whether or not to confirm the appointment notwithstanding problems with security clearance. All eyes of course will be on the recommendations of whoever will be appointed to chair the commission of inquiry into the fitness of Mr Nxasana to hold office.

Brenda Wardle LLB LLM (Unisa) is a legal analyst in Johannesburg.



SUITE OF OFFICES AVAILABLE TO LEASE IN BRYANSTON

Prime office suite available in Bryanston.

Strauss Scher Inc (property lawyers) and Petersen Hertog & Associates (commercial, litigation and labour lawyers) are looking for like-minded and energized colleagues to occupy an office suite on the top floor of our new building.

The building is under construction, adjacent to Nestlé's Head office in Bryanston with easy access to Nicolway Shopping Centre, top restaurants, banks, Virgin Active gyms etc. A suitable professional firm will have the (optional) opportunity to share entrance, prestigious reception and facilities.

Occupation date : 1 October 2014
Size : 120 m² (adjustable)
Address : 4 On Anslow Office Park
 4 Anslow Road, off Grosvenor Road
 Lyme Park, Bryanston

For more details contact : Hilton – 083 212 4990
 Julian – 083 227 1329
 or
 hilton@petersenhertog.co.za
 erina@petersenhertog.co.za
 julian@strausscher.co.za
 tanya@strausscher.co.za

or, click on the developers website:

<http://www.brydensgroup.com/profile.html>



Mediation in Family & Divorce Disputes

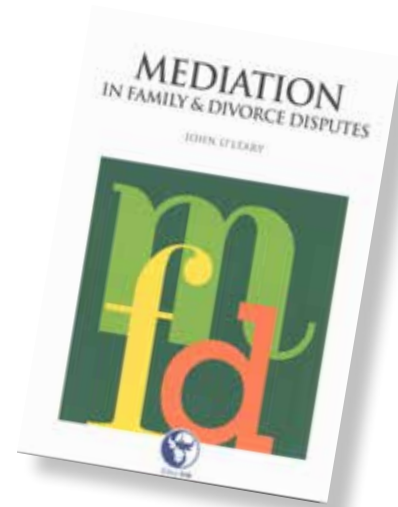
By John O'Leary

Cape Town: Siber Ink

(2014) 1st edition

Price: R 240 (incl VAT)

86 pages (soft cover)



The process of mediation within any context can be daunting for all the parties involved, including the mediator. Therefore, a concise and easy-to-use manual such as this is a very welcome addition to South Africa's law libraries.

While mediators receive training to prepare themselves for the management of other people's disputes, it is very important to have a quick reference guide that one can refer to before entering into negotiations. This book has three parts, each dealing with what the author believes are the most important and useful aspects of mediation: Preparation; the mediation process itself; and the 'wider context' (being the law and processes behind mediation).

It is imperative for any mediator to understand the principles and instructions in this book – and whether one is an experienced mediator or a newcomer to the field – the author has created a platform on which either can improve their skills. The book's lessons are also universal and, if used correctly, can be applied to dispute resolution and even everyday confrontational challenges faced by almost any professional in any field.

Finally, the book is not only aimed at the third party (the mediator) but also at the parties to the dispute themselves. This wise approach emphasises the importance of all parties participating in the mediation process and following the rules and guidelines of mediation to achieve the best possible result.

Overall, *Mediation in Family & Divorce Disputes* is easy to read and understand. It covers everything one would need to know to run a successful mediation and is sure to become a leading resource in its field. It is an indispensable book for mediators and legal professionals within the field of family law and is also potentially useful to professionals in management and human resources.

Annelie du Plessis is an attorney at ProBono.Org in Johannesburg.

Book announcements

Land Reform

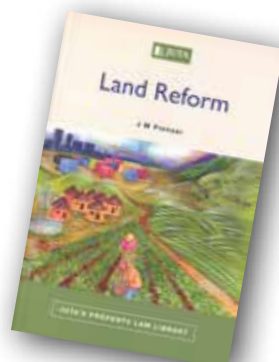
By Juanita Pienaar

Cape Town: Juta

(2014) 1st edition

Price: R 758 (incl VAT)

918 pages (soft cover)



South African Constitutional Law in Context

By Pierre de Vos and Warren Freedman (Eds)

Cape Town:

Oxford University Press

(2014) 1st edition

Price: R 499,95 (incl VAT)

805 pages (soft cover)





Guidance you can trust.

“I need to quickly make decisions and offer advice that is accurate and clear.”

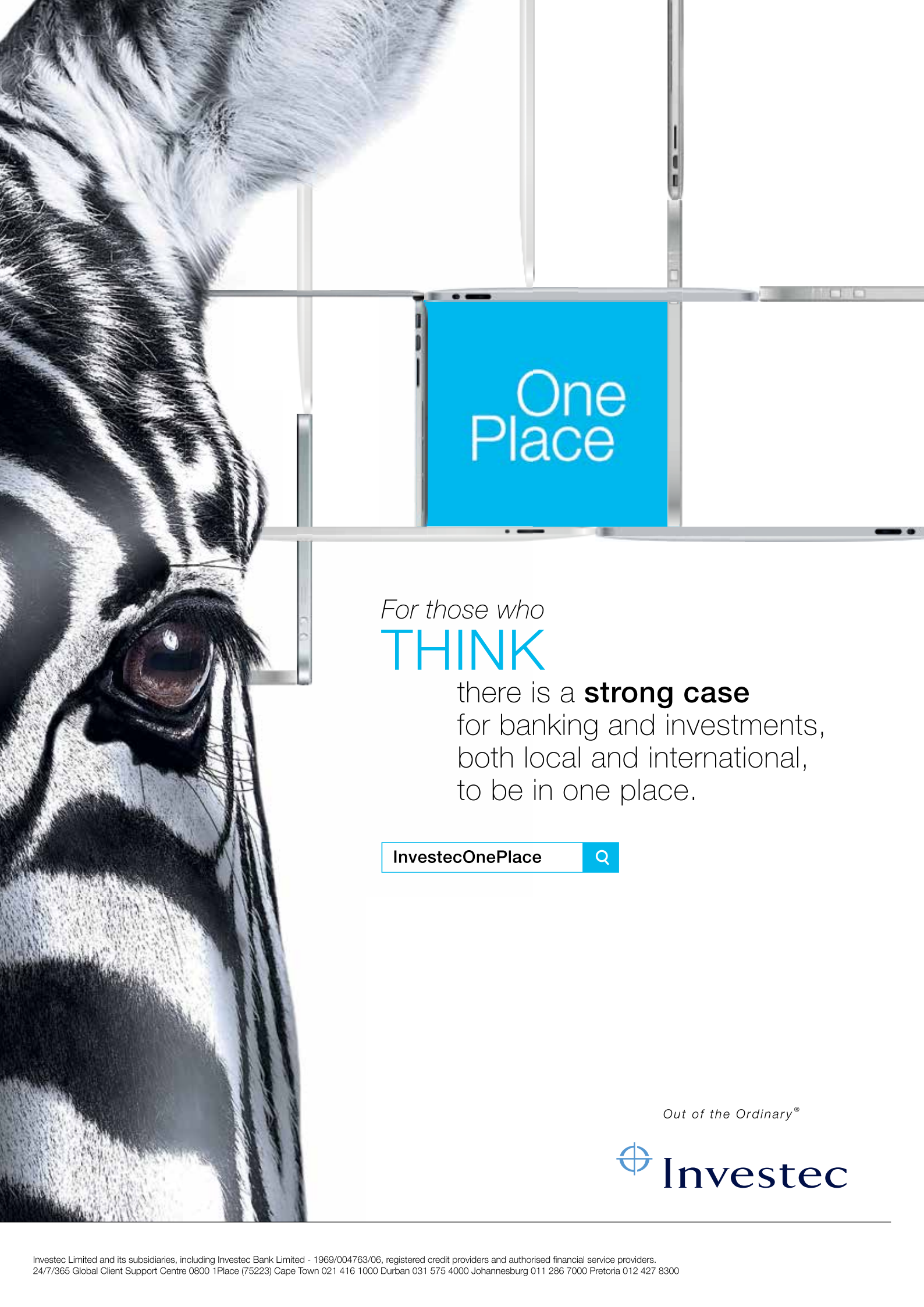
Practical Guidance provides clear direction on Family Law in South Africa. An essential easy-to-use online tool that will help you to deliver up-to-date information rapidly, with the confidence that your counsel is based on relevant law.

Within Practical Guidance Family Law, you will find content dealing with Marriage, from the engagement and drafting an Antenuptial Contract to variation of a marriage regime and everything in between. The section dealing with Divorce covers, amongst others, the procedures to follow when instituting divorce proceedings, the consequences of divorce and rescission, suspension and variation of orders and you will also find content dealing with Maintenance and Children.

The practical aids available, such as precedents of Antenuptial Contracts, checklist for instituting proprietary claims for divorce and Parental responsibilities and rights agreement, will save you hours of drafting time and ensure that your precedents are of top quality.

Request a demo or sign up for your free trial: www.lexisnexis.co.za/practicalguidance





One
Place

For those who

THINK

there is a **strong case**
for banking and investments,
both local and international,
to be in one place.

InvestecOnePlace



Out of the Ordinary®

 **Investec**