

DEBTS – REACHING BEYOND THE GRAVE:

JULY 2013

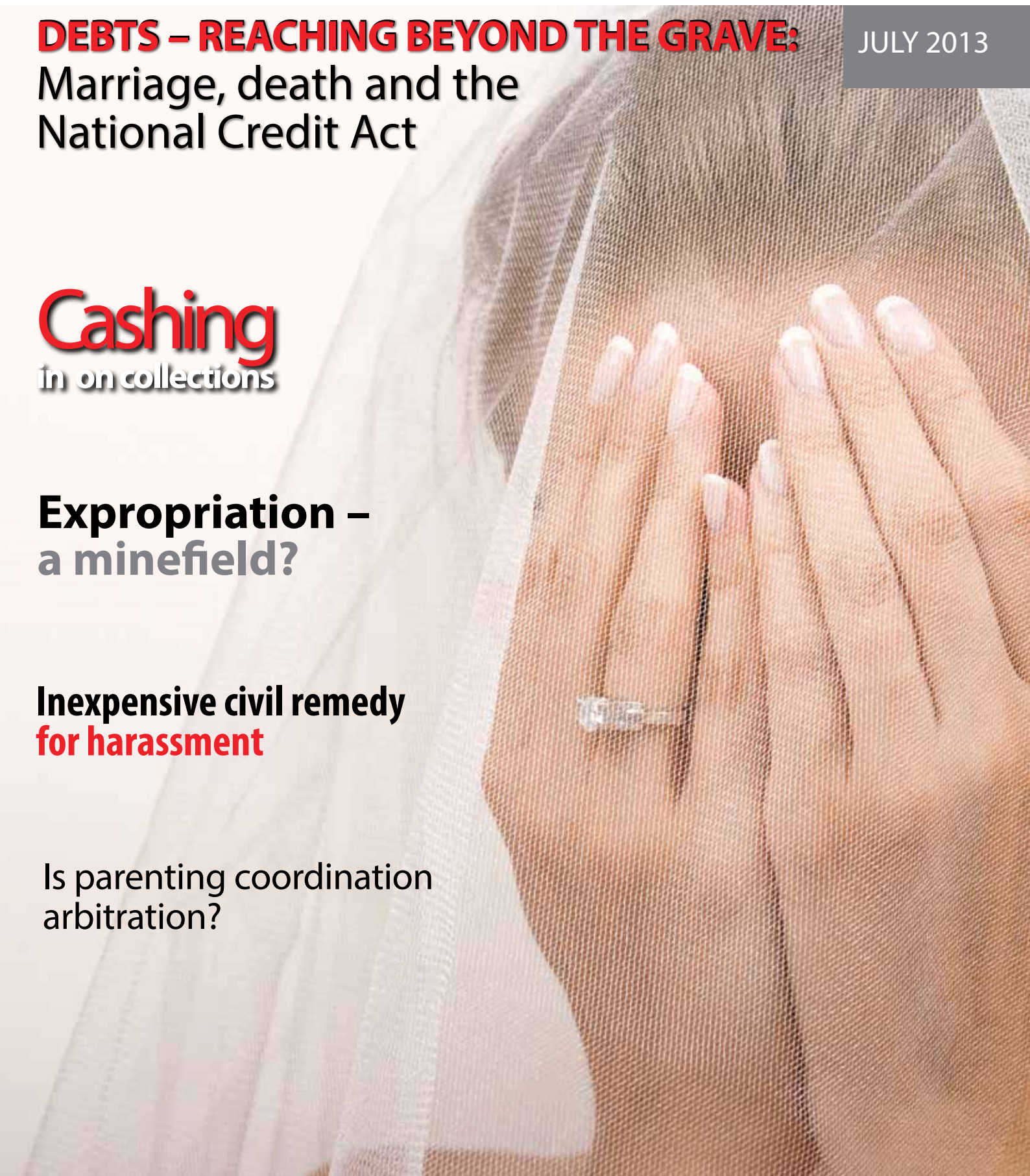
Marriage, death and the
National Credit Act

Cashing
in on collections

**Expropriation –
a minefield?**

**Inexpensive civil remedy
for harassment**

Is parenting coordination
arbitration?





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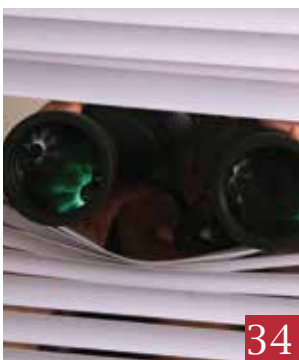
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Marriage, death and the National Credit Act

What implications does the National Credit Act 34 of 2005 have for marriages in community of property and deceased estates?

In exploring this question, Fareed Moosa considers the appropriate recipients of a s 129 notice under the Act and whether a deceased estate may be the subject of debt review proceedings.



30 Cashing in on collections

There is a tendency among some attorneys' firms that operate debt collection operations to recover the maximum allowable collection commission, thus effectively avoiding or lessening competition, maximising their recovery and prejudicing consumers and debtors, write Gerhard Buchner and CJ Hartzenberg.

34 Inexpensive civil remedy for harassment: The Protection from Harassment Act

The much-anticipated Protection from Harassment Act 17 of 2011, which recently came into operation, provides an inexpensive civil remedy for victims of harassment by, for example, abusive electronic communication via social media platforms, sexual harassment, stalking and school bullying. In this article, Sheethal Sewsunker provides an overview of the new Act.

38 Is parenting coordination arbitration?

There are differing views on whether parenting coordination constitutes arbitration and thus whether or not it contravenes the Arbitration Act 42 of 1965, which prohibits arbitration in matrimonial matters. Thus, according to Madelene (Leentjie) de Jong, the position of parenting coordination in South Africa requires clarity by the courts.

42 Promise to pay – prolonging prescription

It may be possible to draft an acknowledgment of debt in such a way that it becomes a negotiable instrument, thus extending the period of prescription. This could be the difference between a client being able to collect on a debt or not, writes Lalena Posthumus.

44 Expropriation – a minefield?

The Constitutional Court's recent decision in *Agri SA v Minister for Minerals and Energy* (CC) (unreported case no 51/2012, 18-4-2013) (Mogoeng CJ) offered an opportunity to clarify the meaning of the so-called 'property clause' in the Bill of Rights. Instead, argues Ben Winks, the judgment, which has major implications for expropriation in South Africa, raised more questions than answers.

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Farewell

This is a bittersweet moment for me as I pen my last editor's note for *De Rebus*.

By the time you receive this month's issue, I will have taken up a new post as group courts and law editor at the Times Media Group.

Editing *De Rebus* has been an extremely fulfilling role and a privilege.

I have thoroughly enjoyed the past two and a half years editing such an eminent journal that allowed me to interact with so many facets of the law on a daily basis.

As part of my role as editor, I was required to read articles that often considered a novel aspect of the law, as well as recent case law and new legislation. At times, I wondered how it was possible that I was being paid to do something I enjoyed so much.

I also had the opportunity to meet and liaise with a broad range of members of the legal profession and, most importantly, our readers, many of whom have taken the time to interact with me over the years and provide support and suggestions relating to the journal.

During my time as editor, the journal underwent changes in terms of design, style and content, which have been met with positive feedback.

I am incredibly proud of the journal we produced each month and grateful that I am able to leave on a high note.

We recently received the results of the reader survey we conducted earlier this year in an effort to improve the journal, which show that, although there is always room for further improvement, we are on the right track (see p 6 for an overview of the survey results).

The results show that over 93% of respondents rated the journal as excellent or good, and over 93% rated its content as well written, researched and presented.

The survey also provided valuable information about our readers' reading habits, their willingness to

pay for the journal if necessary, their thoughts on *De Rebus Digital* and their suggestions on avenues to explore to take the journal up a notch.

I will leave this information in the hands of the very capable *De Rebus* team, who will – after my departure on 14 June – be led by our deputy editor, Mapula Sedutla, who will be acting editor until a permanent appointment is made.

I want to thank our regular contributors and columnists, who have consistently provided interesting and high quality content for the journal and who have made my job all the more interesting.

I have also had an excellent relationship with the journal's Editorial Committee members, who play such an important advisory role and who have supported me during my term as editor. I, too, have received the support of the Law Society of South Africa's various committee members and its management team, of which I was a member, and which comprises a dedicated group of people I consider myself lucky to have had the opportunity to work alongside and learn from.

I would like my final words in *De Rebus* to be dedicated to the *De Rebus* team, who I have thoroughly enjoyed working with and who have made coming to work each day over the past two and a half years an absolute pleasure.




Kim Hawkey – Editor

Would you like to write for *De Rebus*?

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

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

Upcoming deadlines for article submissions: 22 July and 19 August 2013.

As my last edition of *De Rebus*, I am pleased that the articles in this month's issue cover a variety of topics, including debt collection, expropriation and harassment, as well as aspects of criminal law and family law. The July issue also contains a practice note on mergers and a number of news items, including reports on our recent reader survey, the future of the LLB degree, arbitration and public sector lawyers.

LETTERS

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

TO THE EDITOR

Legal Practice Bill – beware

The word 'congratulations' appears on the front cover of the April 2013 edition of *De Rebus* in relation to the Legal Practice Bill (B20 of 2012). It should have been replaced with the word 'beware'.

Your article on the public hearings on the Bill clearly contains serious warnings (2013 (Apr) *DR* 22). There are so many negative concerns about the proposed legislation that attorneys (and advocates) should oppose it in its present form, in a convincing manner.

Colin Mostert, attorney, Welkom

Responsibilities of CAs

I have been following the recent debate in *De Rebus* about the exploitation of candidate attorneys (CAs) and wish to respond to the letter 'CAs – lifeblood of firms' in the May 2013 issue (2013 (May) *DR* 6).

First, one cannot deny that exploitation occurs on a daily basis – not just in the legal profession, but in all jobs and professions, both in the public and private sectors. One has to be careful to generalise, however.

I served articles with a principal who did not play a passive role in my legal training and who prepared me for practice. Tutoring is one thing, acquiring the disciplines required is quite another – this you have to do on your own.

I was given the necessary instruction to point me in the right direction; however, I was not 'spoon fed'. It was made clear to me at the outset that acquiring information is achieved by research, research and more research. This is necessary to obtain the basic disciplines required to become a successful attorney.

As a CA, I took it upon myself to serve documents, often having to walk where

I needed to be as I did not have the use of a vehicle. This I did in order to familiarise myself with the necessary procedures, both in criminal and civil matters. I drafted my own documents and still do so. One wonders why it is seen as incomprehensible for a CA to be expected to draft and type.

As far as responsibilities are concerned, it is important for CAs to understand that being an attorney means carrying huge responsibilities on their shoulders for the rest of their professional life. Being asked to get to grips with this kind of responsibility early on is essential. CAs need to be shown that being an attorney is not about the glitz and glamour that is often displayed on television.

Regarding remuneration, CAs seem to miss the point that in the legal profession, and the private sector in particular, salaries are determined by the fees generated. A CA cannot expect to earn R 10 000 per month if he or she only generates fees of R 2 000 per month. CAs seem to lose sight of how their principals generate income.

Lastly, what is difficult to comprehend is how the writer of the letter referred to above expects the relevant law society to act without him or her being willing to commit to his or her version. Should the law society and the principal carry all the responsibility, while the CA is not willing to accept responsibility for what he or she is about to do? Certainly not. The writer would do well to remember that the law society cannot know what is going on inside every law firm – that is why it requires information from the complainant in the matter.

Werner Gillespie, attorney, Ladysmith

• Over the past few months *De Rebus* has received a number of letters on the topic of the relationship between CAs and prin-

cipals. Please note that correspondence in this matter is now closed. The debate on this topic is, however, expected to be taken further during the Legal Practice Bill (B20 of 2012) process – *Editor*.

Transformation and merit in black and white

Advocate Izak Smuts recently resigned from the Judicial Service Commission (JSC) due to differing views on 'the constitutional values, the constitutional role and duty of the commission'.

Mr Smuts had served on the JSC since September 2009, representing the advocates' profession.

In a statement following his resignation, he stated: 'Regrettably, the track record of the commission during the time in which I have served on it has been disturbing. ... The image of the commission has been tarnished in consequence.'

He further stated: 'The commission ... has left a trail of wasted forensic talent in its wake, which would be remarkable in a society rich in human resources, and is unintelligible in a society such as ours in which ... such resources are scarce' (I Smuts 'Why I'm resigning from the JSC – Izak Smuts' *Politicsweb* 12-4-2013) (www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=369581&sn=Detail, accessed 31-5-2013)).

According to Mr Smuts, this forensic talent lies in a number of advocates who have been rejected for judicial posts by the JSC. I note that most of those mentioned by Mr Smuts call themselves white and are male.

This suggests that this rare forensic legal talent cannot lie with anyone else, but Mr Smuts' fellow white (as they prefer to call themselves) male colleagues. In fact, this suggests that all the judges who have been appointed while he was serving on



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the JSC lack this forensic legal talent.

There is no doubt that we need transformation in the judiciary, but does this transformation mean race or gender transformation?

Deputy Judge President of the South Gauteng High Court, Judge Phineas Mojapelo, has stated that a comparison of the legal profession with the judiciary shows that racial transformation of the judiciary has gone almost 100% faster than that of the general legal profession.

As of 31 May 2012, out of the 237 judges, 34% were white and 66% were black (2012 (Dec) *DR* 54). This shows that the JSC has done tremendous work in pushing forward racial transformation.

Gender transformation, on the other hand, paints a somewhat bleak picture. Out of the 237 judges, almost 72% were male.

This suggests that we should rather focus on gender transformation of the judiciary and not on racial transformation. I am in no way suggesting that female judges, black and white, should be appointed to the Bench merely to improve statistics and I am sure that no female judge would be satisfied with her appointment if this was not based on merit, but was an effort to balance statistics.

One would then have to agree with Mr Smuts' reported assertion that: 'If you adopt the approach that transformation is simply a rote replacement of white male judges with black male and female judges, but you don't examine whether those you appoint embrace the constitutional values ..., then on the race and gender model you may be transforming the judiciary, but in reality you may be posing far greater dangers to our new society' (*Sapa* 'Smuts finds idea of merit "offensive"' *timeslive.co.za* 21-4-2013 (www.timeslive.co.za/local/2013/04/21/smutts-finds-idea-of-merit-offensive, accessed 31-5-2013)).

If we adopt this narrow approach to the transformation of the judiciary, our legal system is a danger to itself. We should be cautious of political individuals who wish to influence and undermine the independence and impartiality of our courts in the name of racial transformation.

Chief Justice Mogoeng Mogoeng is reported as saying that, when it comes to the appointment of judges, it is not about merit only: 'Merit does count, but it is not all about merit. Transformation is just as important' (C du Plessis 'Appointing judges not about merit alone - Mogoeng' *City Press* 9-4-2013 (www.citypress.co.za/politics/appointing-judges-not-about-merit-alone-mogoeng/, accessed 10-6-2013)).

Section 174(2) of the Constitution provides that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

In his recent article, 'The JSC must

redefine merit to advance judicial transformation', Professor Pierre de Vos argues that s 174(2) of the Constitution recognises that an elite all-white and all-male judiciary would not have the broader skills to hand down legitimate, well-informed judgments advancing and protecting the interests of the vulnerable and marginalised in society (<http://constitutionallyspeaking.co.za/the-jsc-must-redefine-merit-to-advance-judicial-transformation/>, accessed 31-5-2013).

In my view, the JSC should focus on recommending individuals who are committed to the values of our Constitution, who possess the highest degree of legal skills, with the necessary experience and ultimate independence and impartiality and, of course, individuals who will advance and protect the interests of the most vulnerable and marginalised in society. Transformation, whether race or gender based, should in no way supersede merit.

Mzukisi Ndabeni, attorney, Boksburg.

Free for all?

I am writing to express my contempt for the legal profession in this country.

The letter 'Raise the bar' by Mondli Myeni in 2013 (May) *DR* 4 has encouraged me to write this letter.

It is disgusting to see people who cannot talk and write proper English practising as attorneys and advocates, while others are employed in the public sector, wasting taxpayers' money. While this may sound controversial, it must be said.

The reason why I doubt we will not see another George Bizos or Kessie Naidu in this country is precisely because of the drop in standards in the legal profession. Ever since 1998, we have seen an oversaturation of legal graduates. Should this continue, we might as well start selling law degrees.

I come from a poor background. English is my second language, as it is for many - both black and white - in this country. Yet, I can speak and write English well. Why must others be allowed to study and then be allowed to pass when they are unworthy of this? The tendency of our universities to allow anyone to study and simply passing others must stop. Otherwise, we will see attorneys unable to secure employment in the legal profession.

The aim of studying is to find a job easily, not to stay at home with your law degree and admission certificate hanging on the wall.

Siya Mkhize, attorney, Durban

Thoughts on the LLB degree

I am a practising attorney, who began studying towards an LLB degree in 1999.

As a former four-year undergraduate student, I feel that the LLB degree sufficiently teaches a person the law, just as the MBChB degree is sufficient to teach a person to practise medicine.

The problem in this profession is that no business and writing skills are taught. We have no exposure to economics, finance and business management. This is a limitation for attorneys, as we run businesses. The LLB is more suitable for those wishing to become advocates.

I also believe that tertiary institutions must raise the entry requirements for admission to study towards an LLB degree and that the reason there are so many lawyers is partly due to transformation after 1994. This led to the new LLB degree and the requirements for admission were lowered.

In my opinion, many who did not get accepted into their first choice of degree at university settled for the LLB.

Further, universities were, in my view, churning out law graduates in order to obtain funding from government.

Therefore, the system is to be blamed. There was poor planning and we are now suffering as a result of the repercussions.

A good solution is to set out proper guidelines and enforce rules for principals to follow in training candidate attorneys.

A diligent lawyer is one who can identify facts, use the rules properly, have the confidence to appear in court, draft proper pleadings, write coherent letters and negotiate effectively. Of course, being capable of managing money is also important. These skills must be taught to candidate attorneys.

The practical legal training course should also be upgraded to teach candidates the necessary skills.

If the controlling body cannot do anything to better this profession, then who can?

I am also a commercial aeroplane pilot, which requires compliance with high standards. The pass mark for aviation theory is 75% and pilots have to continuously undergo training to keep proficient and up to date. Our skills are thus kept in check.

The same should apply to lawyers. A higher standard should be enforced, so that the profession remains of a high calibre.

Proper planning is therefore required in order to reform this great profession of lawyers.

Moosa Vardalia, attorney, Johannesburg



We've heard you

We recently received the results of the reader survey we conducted earlier this year in order to see how we could further improve the journal.

The results of the survey are extremely informative and provide us with valuable information about our readers: Who they are, their reading habits and preferences, and what they would like to see in their journal.

Readers also shared their views on *De Rebus Digital* and whether they would be prepared to pay for this version and/or for the hard copy of the journal, if necessary in the future.

Importantly, readers told us what else they would like to see in *De Rebus*, and provided suggestions for improving the journal.

Below is a summary of the survey findings.

Our readers

Nearly 75% of respondents indicated that they were practising attorneys, 9% were candidate attorneys and 16,3% were in law-related occupations; for example as legal advisers, law students, legal consultants or in academic, management or financial positions. Overall, 39,7% of respondents were 34 years or younger, 44,5% were aged between 35 and 54 and

15,7% were older than 54. More males (57,7%) than females (42,3%) participated in the survey.

The results indicate that *De Rebus* is read by a variety of people besides attorneys and candidate attorneys, such as law and other students; legal advisers; non-practising lawyers; advocates; law consultants and practitioners; journalists; academics; financial and human resource professionals; executive managers and legal administrators. Readers come from all economic sectors, have different focus areas in terms of the law and are employed in different organisations and practices.

Quality

Over 93% of respondents rated the journal as excellent or good, and 93% were of the opinion that *De Rebus* is well written, researched and presented. Younger readers rated the journal more positively than older readers.

Preferences

As the graph below indicates, readers rated the feature articles, news articles, practice and case notes, as well as the Law Reports and New Legislation columns, among the most valuable sections of the journal, in terms of regular read-

ing and relevancy.

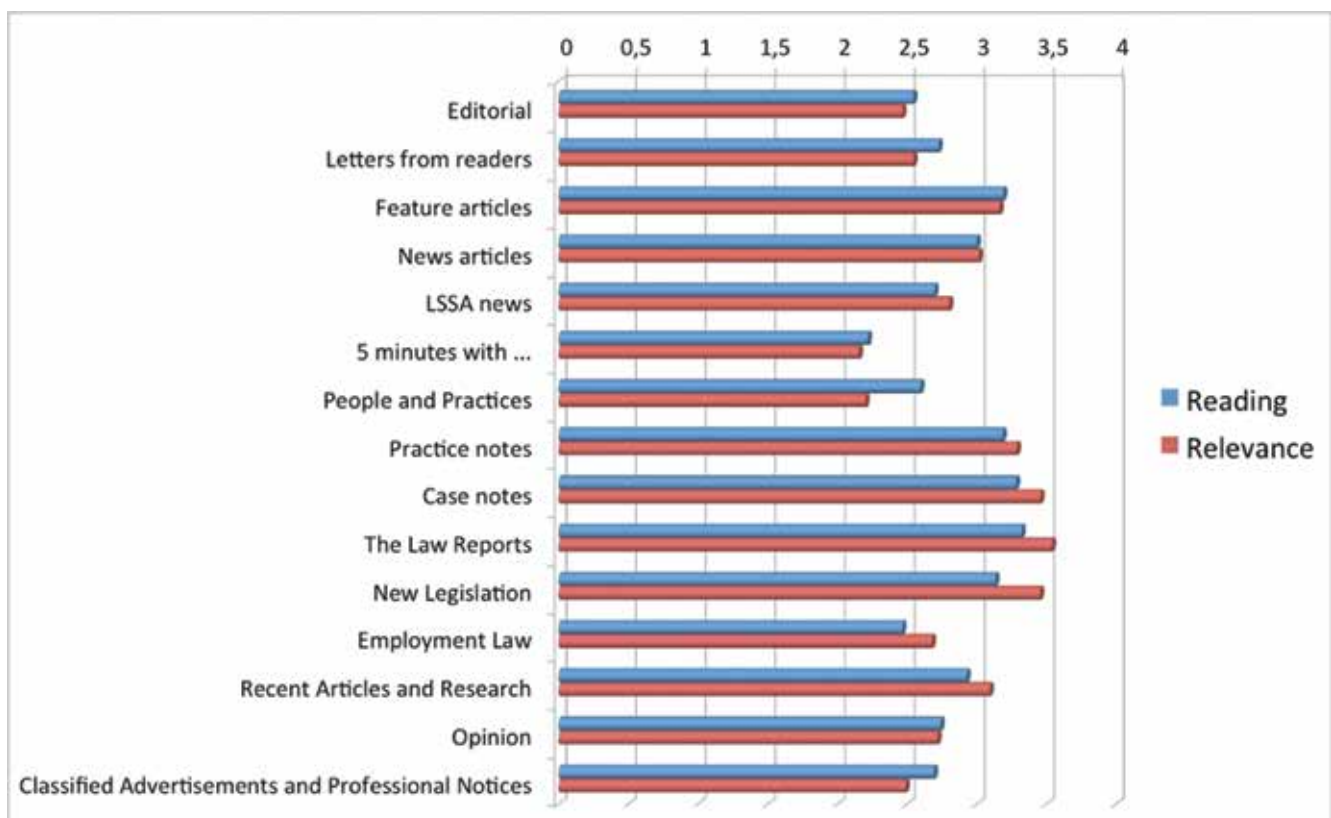
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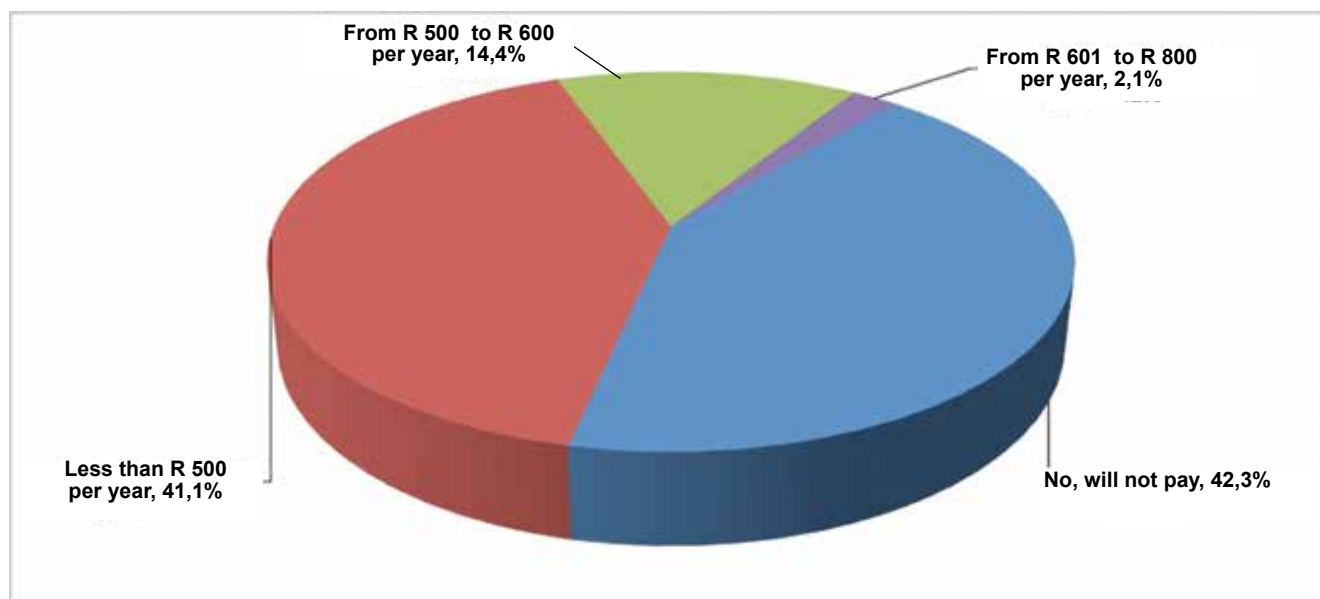
One third (33,6%) of respondents preferred *De Rebus* in digital format, compared to the 66,4% who preferred the hard copy format. The percentage of respondents per age group who preferred the journal in digital format decreased with age, while the percentage of respondents per age group who preferred the journal in print format increased with age.

Some readers suggested that the journal should be in digital format only and should be distributed by e-mail. This, according to them, would ensure that *De Rebus* contained up-to-date information, would make the journal cheaper due to the absence of printing costs and would make referencing easier. Some suggested that the journal should be made available in both formats, with the hard copy available at a price and the digital version free.

Paying for *De Rebus*

As set out in the graph on the next page, nearly half of the respondents (42,3%) indicated that they would not be prepared to pay for *De Rebus* should it no longer be free in future. Further, 41,1% of





respondents would be prepared to pay R 500 or less for an annual subscription, while 16,5% would be willing to pay more than R 500 for an annual subscription.

Improvements

Respondents were asked to give suggestions on how the editorial team of *De Rebus* could improve the journal. Various suggestions were received on the journal's format and content, which illustrated the diversity in readership of the journal and thus differences in opinion on what the content should entail and on what should be covered in the journal.

Of the respondents, almost 20% said there was no need for any improvements, while others provided suggestions on how to better *De Rebus*.

These are discussed under the headings below.

Electronic version

A number of readers requested smartphone and tablet applications, while others felt the online version needed to be more user-friendly. Those who wanted to access the journal from their mobile phones or tablets said that the online version should be specifically configured for such viewing. Some also expressed the view that, although they were in favour of the electronic version, they did not know 'how to use it properly'.

Many readers suggested indexes for previous copies; some suggested that these could be in electronic format, with an expanded search facility to assist with research.

Layout and design

Some readers described the layout and design of the journal as 'outdated' and in need of a new, more professional and modern 'look'. This came as a bit of a surprise to the editorial team as the journal underwent a major transformation in

March 2012 in order to give it a modern, fresh look and feel. At the time we received a tremendous amount of support from our readers for the redesign. We would, therefore, encourage readers to provide us with their views on this aspect of the survey.

Journal content

Readers expressed their desire for an increase in content focusing on day-to-day practice and their preference for articles with a practical, rather than an academic, approach.

In particular, many respondents suggested publishing regular articles in question-and-answer and step-by-step formats.

These could, for example, be used to guide inexperienced practitioners through legal processes, such as how to do an application, how to apply for liquidation, and how to evict someone from a property.

Similarly, readers asked for more practice management information, such as guidance on how to start a practice and run it successfully.

There were also requests for more content aimed at candidate attorneys and prospective candidate attorneys in particular, such as information on job hunting and aimed at preparing them for practice.

Respondents also asked for more interaction with their colleagues through the journal, to enable them to air their views; to ask for, or to give, advice; and to share experiences. This could, for example, take the format of a column where readers could voice their suggestions and/or complaints.

The survey results reflected diverse views on the information mix that should appear in the journal; for example, while some want more 'social' content, others

are strongly against this.

Many readers also suggested a 'lighter' section in *De Rebus* to include jokes about lawyers, funny anecdotes from court and/or a law-related comic strip.

Other suggestions included:

- Publish more international law-related news, for example on laws in other countries that could affect those in South Africa.
- More articles about 'everyday attorneys' and their practices. This could take the format of a profile of those in legal professions, like judges, advocates, lawyers, prosecutors and magistrates.
- Increase information about new publications, particularly textbooks.
- Publish an annual career guidance supplement.
- Include a section on the transformation of the profession.
- Publish information about business opportunities for practising members, such as projects calling for a panel of attorneys to provide legal services.
- Have a theme for each edition.

Going forward

The survey has provided valuable information on our readers' preferences and on how the journal can be further improved. The *De Rebus* Editorial Committee and editorial team are currently considering which of these suggestions to implement in order to make the journal the best it can be.

Tell us: Do you have any comments on the reader survey results? If so, send an e-mail to derebus@derebus.org.za.

Kim Hawkey,
kim.hawkey@derebus.org.za

The much-awaited LLB Summit, initiated by the South African Law Deans' Association (SALDA), the Law Society of South Africa (LSSA) and the General Council of the Bar (GCB), took place on 29 May.

Speakers who discussed the future of the LLB degree included LSSA co-chairperson Kathleen Matolo-Dlepu; acting Judge of the Constitutional Court Ronnie Bosielo; and chief executive officer of the Council for Higher Education (CHE), Ahmed Essop.

The summit's programme also included a panel discussion and breakaway group sessions.

Welcoming delegates, Ms Matolo-Dlepu said that the summit ought to address challenges related to the LLB. She added that the objective of the summit was to deal with the 'LLB crisis', to examine 'the root of the problem' and to make recommendations on how to improve the degree.

The four-year degree

During a keynote address, Judge Bosielo recalled that he had actively participated in the debates in the 1990s that culminated in the four-year LLB degree. He indicated that, at the time, he was a member of the Black Lawyers Association (BLA), which 'argued forcefully ... for the adoption of the four-year LLB degree'.

He added: 'The principle reason for that stance was simply because we were trying to address what were then serious problems encountered by law students from historically disadvantaged communities. One was that the length of the LLB degree ... was seen to be an impediment to those who did not have the financial resources ... We were concerned with the spread of lawyers in the country in ratio to the population of the country; the sad reality was that we had very few black lawyers in the country. The intention was that, by shortening the degree, perhaps we would open the doors for students from previously disadvantaged communities to enter university and come out within a very short period of time.'

Judge Bosielo believed that it was now time to evaluate the four-year degree and question if it was achieving the goals set 15 years ago and, if not, to identify where the problem lay and decide on what could be done to remedy the situation.

He said: 'It is universally accepted that ... the strength, ... vitality and vibrancy of any constitutional democracy depends largely on the quality, the pedigree and integrity of its lawyers. ... A weak legal profession will invariably produce weak judges. In my view, if the legal profession is populated by lawyers with low standards, ... this would be reflected in the structure of the judiciary.'

Judge Bosielo said that the legal profession needed to ask itself if it was

LLB summit: Legal education in crisis?



Judge Ronnie Bosielo said that it was time to evaluate the four-year LLB and question if it was achieving the goals set 15 years ago.

training and producing lawyers who believed in fairness, equality and justice. Further, the profession needed to ask if the current LLB degree was adequate and appropriate to train the lawyers who were needed today - lawyers who act ethically and who understand the Constitution and the future role they will have to play. In his view, lawyers should have the spirit of *ubuntu* and be willing to sacrifice, instead of being selfish; they should be socially conscious and develop the ethos of '*batho pele*'; and they must be prepared to serve the community.

He noted that the recent 'chorus of complaints' on the quality of LLB graduates, which claimed that graduates lacked broad skills, including writing, reading, ethics and an understanding of the Constitution, 'cannot be brushed aside'.

He added that it was 'comforting' that the 'real stakeholders', such as the GCB, the Society of Law Teachers of Southern Africa (SLTSA), the BLA, the National Association of Democratic Lawyers, the LSSA and SALDA had identified difficulties in the LLB degree.

He said that the world had changed into a global village and, therefore, the legal profession could not remain the same. The profession has no choice but to change its mindset - 'adapt or you will perish,' he said.

In closing, Judge Bosielo said that he was confident that the summit's delegates, given their spread of experience, would develop a solution to assist universities to produce lawyers who will be an asset to South Africa's democracy.

Perspectives on the LLB

In a panel discussion, representatives

from different law faculties and the legal profession discussed their perspectives on the degree. The panel comprised senior lecturer at the department of private law at the University of Cape Town, Dr Lesley Greenbaum; President of SALDA, Professor Vivienne Lawack; Vice-president of SLTSA, Professor Engela Schlemmer; representative of the GCB, advocate Leon Dicker; and the chief executive officer of the LSSA, Nic Swart.

Former co-chairperson of the LSSA, Krish Govender, chaired the discussion.

At the outset, Mr Govender said: 'A student is a product of a good society, community, parents or values The law faculty is not going to fix the student at the end of the day.'

He said that students needed to understand the context of law in the global village and where the law faculties fitted in. He said that the content and philosophy of the LLB degree should nurture a student to 'think outside the box' and be a better lawyer. He added that the LLB degree should produce graduates who will play a better role in society.

Dr Greenbaum said that, even though the four-year LLB degree was introduced to reduce costs and increase access to the law profession, 'the harsh reality is 22% of students complete the degree in four years,' she said.

She added that challenges students faced included the inadequacy of primary and secondary education, which left them unprepared for university, as they lack digital knowledge, literacy and numeracy skills.

Professor Lawack noted that students who obtained a BA Law or BCom degree prior to registering for an LLB degree had a higher completion rate in



Former co-chairperson of the LSSA, Krish Govender, chaired a panel discussion on perspectives on the LLB.



Lecturer at the department of private law at the University of Cape Town, Dr Lesley Greenbaum.

the minimum period compared to those who registered for the LLB degree as a first degree. She added that universities were aware that students lacked skills in areas such as ethics, legal knowledge and critical analysis. To curb this, she said that universities had made interventions, with varying degrees of success. She observed that there was a correlation between the low completion rate of the LLB in the minimum period and the inadequate schooling system.

Another challenge related to the degree, Professor Lawack said, was an absence of resources at universities, as law schools' subsidy level was at the lowest government funding band in education. She said that for every R 1 a law student received, a history student received R 2, an engineering student received R 3 and a life studies student received R 4.

She added that government perceived teaching law as 'cheap'. However, she said this was not accurate and more funding was needed to maintain law clinics and libraries, which she said were the 'laboratories of law schools'. She added that government should, therefore, increase legal education funding.

Professor Lawack said that the role of law clinics should be intensified and

clarified, and lawyers in practice should assist law schools by supervising cases at law clinics. She said that law students needed to cultivate a discipline that will enable them to generate new knowledge so that they are able to approach the problems and issues they will encounter when they graduate.

Professor Lawack recommended that the LLB degree be extended to a mandatory five-year period, but said that more law modules should not be included; the aim being to enable law students to acquire the required skills, with the possibility of introducing non-law modules to help students understand the context in which law is practised.

Professor Schlemmer was of the view that the effectiveness of the LLB degree must be reviewed. She suggested that students write an entrance examination prior to registering for the degree in order to assess their reasoning and deduction skills, because, she said, universities could not 'pretend to provide skills on a scientific level unless the student possesses the skills'.

She added that at some universities the dean's performance was dependent on the students' pass rate; therefore, students were 'spoon-fed' to prepare



Vice-president of the Society of Law Teachers of Southern Africa, Professor Engels Schlemmer.

them to write examinations. In turn, this meant that students did not understand complex legal concepts and were unable to understand legal problems.

Professor Schlemmer said the advantage of a postgraduate LLB degree was that it could provide students with skills, for example in the advanced law of succession, as there was 'little time for that' in the current LLB degree. She said that other advantages of the postgraduate LLB degree were that students would acquire an exit-level degree after three years and the government funding level would change.

Mr Swart said that the law profession needed lawyers with skills to apply the law, who are ethical, who understand the pressures of the profession and who un-



Chief executive officer of the Law Society of South Africa, Nic Swart.

derstand what is necessary to manage a successful practice. He added: 'Whatever the duration, we should have a degree that gives us value.'

Mr Dicker recalled that when he studied law, the dean of the faculty of law said that the faculty was not in the business of producing law mechanics, but was rather in the business of producing well-rounded jurists. He said: 'We should look at going back to the old model and prepare students for today's practice. The starting point would be to enable students to acquire the right culture and be able to perform duties that are required in practice. The GCB is in agreement with the LSSA that the period of the LLB degree should be extended to five years.'

LLB review

Mr Essop said that there had been a process of engagement between the CHE and the law deans, with the objective of reviewing the LLB degree. He said that some of the issues raised at the summit would be taken to the council.

He also referred to a survey on the LLB degree that was conducted by the CHE in 2010, but was not released. He said: 'There was a section in the survey that



President of the South African Law Deans' Association, Professor Vivienne Lawack.



Representing the General Council of the Bar, advocate Leon Dicker.



Chief executive officer of the Council for Higher Education, Ahmed Essop.

looked at the four-year degree and the inconsistency in the way the degree was presented. For instance, some universities require students to accumulate 480 credits per year, while others only require 120 credits.'

Mr Essop said that, while the CHE had authority to decide on the duration of the LLB in terms of the Higher Education Act 101 of 1997, academic integrity of the qualification would be attained through the support of the profession and the process of improving the LLB degree should be peer driven.

In order to have a better quality LLB degree, Mr Essop said the profession should ask:

- What is the purpose of the qualifica-

tion?

- What is the knowledge a student will gain through the qualification?
- What legal knowledge is a graduate expected to have?
- What underpins the qualification?
- What is the purpose of what the student is learning?
- Is what the student is learning related to legal challenges in the rest of the world?
- Is the duration of four years sufficient?
- Is a postgraduate degree a better route?

Mr Essop said the common perception that only students from previously disadvantaged schools did not complete the degree in regulation time was untrue.

He said that there was a need to assess issues of funding and staffing of law faculties, which would be looked at in a national degree review. Based on what the review finds, Mr Essop said that the CHE could make a case for additional resources in law faculties.

Resolutions

Following the group discussions during the summit, delegates requested the CHE to conduct a standard setting process for the LLB, to commence by 30 September 2013 and to be concluded by 30 June 2014.

Further, the exercise must include stakeholders in consultation with the steering committee of the summit.

The exercise will attend to -

- graduate attributes identified at the summit, such as knowledge of substan-

tive law, generic skills (for eg those related to language, literacy, numeracy, research, analysis and information technology), ethics and a commitment to social justice;

- workplace requirements;
- resources; and
- problem areas identified at the summit.

It was also resolved that standard setting for the degree will include wide consultation and ongoing liaison with the relevant stakeholders, and an LLB national task team will be convened to monitor this process.

The task team will be made up of two members from each of the following: SALDA, the GCB, the LSSA, the Justice Department, SLTSA, the Department of Higher Education and Training and any other relevant stakeholder. The task team will be convened by SALDA and the LSSA before 31 August 2013.

Further, the agenda of the task team will be set by the steering committee, taking into account the outcome of the summit.

The structure of the LLB, considering that the consensus at the summit was that the duration of the degree should be five years, as well the issue of funding, in particular with regard to law clinics, will be the first items on the agenda of the task team.

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The South African Legal Fellowship Network celebrated its ten years of existence with a seminar titled 'Transformation in the corporate legal sector in South Africa: Challenges and opportunities'.

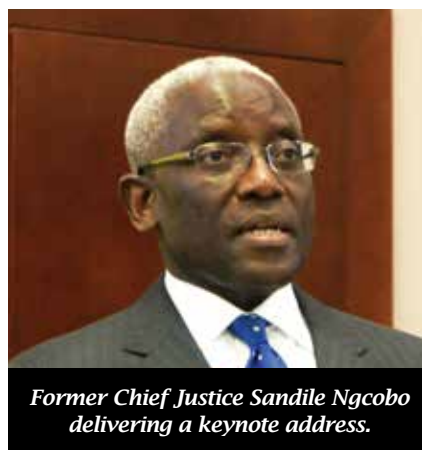
The seminar was held in partnership with the Cyrus R Vance Center for International Justice (Vance Center) at the University of the Witwatersrand's School of Law in May.

The programme included a keynote address by former Chief Justice Sandile Ngcobo and a presentation on the results of a recent survey on the demographic composition of corporate law firms by senior projects manager at research company Plus 94 Research, Veronica Dessein.

The programme also included three panel sessions on the topics of recruitment, training and development; black corporate law firms - challenges and opportunities; and the role of the corporate and government sectors (as clients) in advancing transformation.

Judge George B Daniels of the United States (US) District Court for the Southern District of New York delivered the concluding remarks at the seminar.

Necessary transformation



Former Chief Justice Sandile Ngcobo delivering a keynote address.

Time for transformation

Justice Ngcobo opened his address by saying that delegates were participating in a discussion on one of the most important topics that members of the legal fraternity have been required to apply their

minds to since the advent of the Constitution.

He noted that the seminar occurred at a time when there was a countrywide debate on the role that transformation should play in selecting judges; when a black advocate was accusing Cape Town attorneys of not affording him briefs in maritime law cases; and in the context of South Africa's increasingly interdependent economy.

He said that the country was viewed as a business gateway to Africa and, as a result, economists had predicted an increase in investment, which would require skilled corporate lawyers to deal with these developments. He added that this work was unlikely to be offered to previously disadvantaged individuals who lacked the necessary expertise due to the country's past.

He asked how the profession could ensure that these individuals also had access to these opportunities.

Transformation, in Justice Ngcobo's view, is the key to unlock these oppor-

tunities for previously disadvantaged and physically challenged individuals. This, in turn, would lead to exposure to these opportunities to black lawyers and to the selection of previously disadvantaged corporate law judges, who would be equipped to deal with such matters.

Why transformation is necessary

To demonstrate the need for transformation, Justice Ngcobo quoted from the preamble of the Constitution.

He added: 'We need to transform our society as envisioned by the Constitution that introduced a new constitutional order with values, which our democracy is made of. Human rights are at the heart of transforming our institutions, including law firms. We need to recognise that, at the eve of our democracy, we had one of the most unequal societies in the world, that included unequal employment opportunities. The Constitution has put in place measures that are designed to address matters of the previously disadvantaged so that they can enjoy what the country has to offer. ... Transformation is required by the Constitution.'

Transformation challenges

Justice Ngcobo said that it was encouraging to see that the policies and charters of some major law firms recognised the need for transformation; however, the pace of transformation was 'incredibly slow'. He added that previously disadvantaged individuals were still 'grossly underrepresented in major law firms'.

He highlighted the need to translate policies and charters into effective means of transformation so that black female lawyers were recruited. He questioned why experienced and qualified black female attorneys could not be retained over a long period of time at law firms. In his view, the environment in firms was not conducive to retaining black female attorneys.

He said that, although barriers at law firms for previously disadvantaged individuals had been removed and there were no prejudices in hiring, unofficial biases remained, which were deeply embedded in society. He added that this was one of the hurdles that undermined transformation. Justice Ngcobo acknowledged that biases would not 'disappear overnight', as this was 'too much to expect of human nature'.

Justice Ngcobo added: 'Stereotypes are a manifestation of prejudices of the past The challenge facing transformation is to address biases. It is one thing to proclaim transformation in policies; it is another to develop a strategy that focuses on recruiting previously disadvantaged women and have a work environment that will promote the transfor-

mation policies.'

Justice Ngcobo cited 'group favouritism' as a challenge relating to transformation. He said that, on the surface, there was nothing wrong with group favouritism, but this restricted the allocation of work. He added that group favouritism was compounded if the relevant decision-maker had a negative experience with a particular previously disadvantaged group.

'Everyone then gets painted in the same brush,' he said.

Justice Ngcobo advised law firms that, when making decisions, assigning work, evaluating employees, making promotions and setting standards, they should consider their past prejudices and judge individuals on their own merit.

He added that in most firms there tended to be a previously disadvantaged 'superstar', who was the 'ideal candidate for transformation'. He said the disadvantage of this was that other previously disadvantaged individuals were measured on the 'superstar's level' and not on their own merit.

Diversifying law firms

Justice Ngcobo said that clients were diverse and, therefore, 'as lawyers, we need to be diverse to attract these clients', adding that some firms recruited black female attorneys with the hope of attracting black economic empowerment deals.

In this regard, he said: 'The presence of black female attorneys may bring more work and opportunities, but is it sustainable? We overlook the vital need to create an environment that is conducive for women to work in. Firms tend to reduce transformation to money and ignore the social responsibility to remove prejudices.'

He added: 'Eventually, the previously disadvantaged individual will leave the firm. When [he] leave[s], people in the firm will say: "He was just not the right fit" or "he was not committed enough". Law firms fail to ask themselves what they could have done differently to retain the individual.'

Strategy for transformation

To develop a strategy that promotes transformation, Justice Ngcobo said: 'Experts say that an initiative that promotes transformation that is sustainable is a long process of systematic change. The change will either support or create barriers; therefore, the results must be shared and discussed. A transformation plan must be developed to include education and training to increase the ability to interact with people of different cultures and socio-economic structures. There must also be feedback on the training.'

In conclusion, Justice Ngcobo said that firms must be willing to bring their policies in line with transformation, adding: 'Flowery words and impressive websites will not do the job. The plan must have measurable goals. Firms must recognise that the same system that led to the success of the firm might be the very same thing that undermines transformation. The only thing[s] that should remain sacred are the core values of the firm; everything and anything else can be changed if it undermines transformation.'

Adding to Justice Ngcobo's comments on developing a strategy for transformation, Judge Daniels said that it was important for firms to note that transformation did not entail employing someone who failed to meet the firm's standards. He emphasised the need for firms to have a realistic assessment of what they were capable of and to recognise areas of weakness, so that these could be worked on.

In closing, Judge Daniels said that black practitioners should not expect law firms to make acquiring a job easy for them. He said: 'It is not meant to be easy. ... Stop thinking you should get the job because you deserve it; you should get it because you have earned it. Do not have a sense of entitlement.'

Demographics of corporate law firms

Presenting the survey findings, Ms Dessein said that the survey examined the gender, race and disability distribution of employees at large corporate law firms across various levels of employment (from candidate attorney level to managing partner/chief executive officer (CEO) level).

In selecting the participating firms, Ms Dessein said that Plus 94 Research had identified firms across South Africa with corporate law as their main source of business and which employed 20 or more legal professionals. She added that the final list consisted of 51 firms; however, only 12 firms agreed to participate in the survey.

Ms Dessein said that the findings showed that there were fewer females in senior positions compared to males across all race groups. She added that even though females made up 53,4% of legal professionals employed at the participating firms, they were employed in fewer senior roles.

She said that there were more than double the number of white females compared to black females. There were more white females in more senior positions; almost 26% of equity partners were white females, while 5% were black females. She said the only females at managing partner level were white and there were no female CEOs.

She added: 'There are more Indian females employed at senior levels as compared to black females (only 3,2% of black females are employed at salary partner level as compared to 10,7% of Indian females), but less compared to white females (22,5% of white females are employed at equity partner level). There are very few coloured females employed at senior levels (salary partner or more senior). ... Most black females are

employed at candidate attorney level; 23,6% at first year and 24,5% at second year.'

Ms Dessein said that males made up 46,6% of employees at the participating firms. She added that more than half of all males at firms were white and males dominated senior positions. She noted that 45% of salary partners, 53% of equity partners, 72% of managing partners and 80% of CEOs at the participating

firms were white males.

Finally, Ms Dessein said there were very few disabled lawyers employed in the participating firms, at 0,6%.

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Public sector lawyers – lawyers first, public sector employees second

During the inaugural annual GovLaw conference last year, it was decided that there was a need for legal advisers to share ideas and discuss issues related to day-to-day activities.

On 14 and 15 May the second GovLaw conference for government and special operations executives was held in Pretoria.

Some of the topics discussed were the Legal Practice Bill (B20 of 2012), unnecessary litigation, governance and service delivery.

Professionalism and establishing a national association

Jacques Wolmarans, chief state law adviser at the Office of the Premier in KwaZulu-Natal, said that, at last year's conference, it was confirmed that lawyers working for government were not just public servants, but remained officers of the court and should strive to maintain freedom, independence, integrity, impartiality and non-partisanship. Public sector lawyers serving the executive and the legislature must guard against being overly 'executive-minded' in their approach, he said.

Mr Wolmarans told delegates that, as lawyers working in the public sector, their employers must recognise that public sector lawyers are first lawyers and second public sector employees. This means that their roles and responsibilities as lawyers supersede those as public sector employees, he said, adding: 'As public sector lawyers, we must firstly, and always, serve and uphold the values and principles of constitutionalism and the rule of law in providing professional and non-partisan legal services and legal advice to government. We must ensure that we understand and apply these principles at all times.'

Mr Wolmarans noted that legal activism was important and lawyers in the public sector must play an activist role



Jacques Wolmarans, chief state law adviser at the Office of the Premier in KwaZulu-Natal, discussing the need for a national association for public sector lawyers.

and promote professionalism and empowerment of public sector lawyers. The only way to achieve this, in an organised manner, is by establishing one or more professional associations for lawyers specifically in the public sector, he said.

'Except for the KwaZulu-Natal Association of Public Sector Lawyers [KAPSL], no similar body currently exists anywhere in the country to cater specifically for lawyers working in the public sector,' he said, adding that KAPSL was an independent voluntary professional association regulated by its own constitution and members voluntarily bound themselves to a higher standard of conduct and ethics in the public sector.

According to Mr Wolmarans, there appeared to be a lack of interest in establishing an informal or formal collaboration of public sector lawyers. Possible reasons could be apathy; lack of time; fear; and, possibly, certain provisions of the Legal Practice Bill.

Mr Wolmarans said that aspects of the Bill interfered with the freedom of association of existing associations. He

referred to a speech by late former Chief Justice Arthur Chaskalson to the Cape Law Society annual general meeting in November 2012 (see 2013 (Jan/Feb) *DR* 13), in which he said: 'The Bill does not respect the freedom of lawyers to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.'

Mr Wolmarans said that the Bill possibly created a psychological restraint in the minds of lawyers working in the public sector in terms of joining or forming professional associations.

He said: 'We, as public sector lawyers, need to preserve and protect our independence and can best do this through our own independent voluntary professional association. It is important to note that no employee organisation or trade union currently represents lawyers specifically as a group or category in the public sector.'

Mr Wolmarans told delegates that if the public sector was organised in an association, it could have made well-considered input and could have represented a united front when public comments were sought on the document released by the Justice Department titled 'A framework for the transformation of the state legal service', which aims to address the requirement by the government for efficient, coordinated legal services to promote the values and obligations arising from the Constitution.

'If implemented, this policy framework ... could have far-reaching consequences and implications, especially for the provincial and local spheres of government and all legal personnel serving the executive branch of government. But, because we have not yet organised ourselves, we, as public sector lawyers, missed an important opportunity to put ourselves on the map. Decisions that directly affect us are being taken for us, because we do not



Okgabile Dibetso-Bodibe, chief state law adviser at the Office of the Premier at the North-West provincial government, addressed delegates on government litigation and its impact on the public.

have an association which speaks for us,' he said.

Litigation

Okgabile Dibetso-Bodibe, chief state law adviser at the Office of the Premier at the North-West provincial government, addressed delegates on government litigation and its impact on the public as litigants.

The following was asked by Ms Dibetso-Bodibe: 'Should civil litigation cost much more and take much longer than the ordinary citizens of this country expect, even in the advent of the Constitution and its entrenched Bill of Rights?'

She said that communities were the subject of litigation with government and government, being the biggest litigant, wielded 'financial muscle' against plaintiffs in matters against government.

'We can no longer legislate laws and forget that the Constitution is the supreme law above government and parliament and the provincial legislatures,' she said.

Public interest litigation

Ms Dibetso-Bodibe said that the beneficiaries of public interest litigation were the poor, vulnerable and marginalised sections of the community, who rarely had the money to pay for legal fees.

Public interest litigation can be entertained in terms of the Constitution, and s 34, read with s 38, provides an explicit guarantee of the right of access to justice coupled with relaxed *locus standi*, she added.

Ms Dibetso-Bodibe referred to several 'groundbreaking' cases with regard to public interest litigation, including:

- *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).
- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

Unnecessary litigation

According to Ms Dibetso-Bodibe, public sector attorneys sometimes did not realise that they were litigating against the community that pays taxes, stating that they should spend taxpayers' money wisely.

'This unnecessary litigation takes place when we, as government, do not understand who we are as litigant. We should be model litigants and behave as such.' Ms Dibetso-Bodibe added that bad cases should not be unnecessarily pursued. 'We should not litigate for the sake of litigating. Do not use delaying tactics when litigating and avoid personality-driven cases. Fight fairly. Every matter does not necessarily require a court order. If you can settle at the earliest point in time, then do that. Do not institute and/or pursue appeals unless the state believes that there exists a reasonable prospect for success.'

Inevitable litigation

Ms Dibetso-Bodibe said that the state was obliged to act as a model litigant in paying due regard to the expectations of the community and the court.

When litigation is inevitable, she advised delegates to –

- act consistently in handling claims;
- deal with claims promptly;
- focus on the core issues involved;
- ensure all relevant documents are presented to the courts;
- keep costs to a minimum;
- pay legitimate claims without litigation, including making partial settlements or interim payments where liability has been established; and
- manage litigation in a timely manner.

In conclusion, Ms Dibetso-Bodibe said: 'The reality of the judicial case flow management is that it is no longer viable to simply leave the management of a litigation matter to the parties to frame the dispute and conduct the case with minimal, if any, intervention from the

Bench. The ... public legal sector should be transformed to provide legal services of the highest standard to protect and safeguard the interest of the state and promote access to justice for all.'

Promoting good governance

Deputy Public Protector Kevin Malunga addressed delegates on the role of the Office of the Public Protector in promoting good governance in the public service.

Mr Malunga referred to the pillars of good governance, and spoke about accountability in respect of the Office of the Public Protector in particular.

'The idea is that there is a certain reporting line, where you can check whether the Public Protector is not encroaching on the mandate of, for example, the Auditor-General, the National Prosecuting Authority or the Special Investigating Unit [SIU]. There are a lot of areas of jurisdiction that are shared and it is perfectly normal for a parliamentarian to ask if one is not encroaching on the other.'

Other pillars of good governance he referred to included –

- constitutional compliance and the rule of law;
- participation;
- checks and balances that include constrained and diffused power;
- transparency, backed by freedom of the media;
- equality and inclusiveness;
- attention to human development;
- integrity with no tolerance of corruption in dealing with state resources; and
- credibility, legitimacy and a conciliatory approach to conflicts between government and citizens.

Mr Malunga said that the Public Protector was a national ombudsman-like institution and had moved away from being a 'mere complaints department' to an 'architect of good governance'.

The Public Protector has a reactive and a proactive mandate to ensure that state affairs are conducted with integrity and general good governance, he added.

Mr Malunga referred to s 182 of the Constitution and said that the mandate of the Office of the Public Protector covered all organs of state at national and provincial levels, including local government, and extended to state-owned enterprises, statutory bodies and public institutions. However, court decisions were excluded.

In a question-and-answer session following Mr Malunga's presentation, senior counsel at the SIU, Warren Moore, commented that the SIU and the Office of the Public Protector complemented each other and worked together in many instances. However, he said that there was no duplication of work.

Mr Moore said: 'The SIU works by proc-



Deputy Public Protector, Kevin Malunga.

lamation by the President to investigate a case. The SIU can do a wider or a more extensive investigation and it can go to court to, in some cases, claim damages. If the SIU works on the same case as the Public Protector, they keep in constant contact with one another and when the Public Protector releases its report, then the SIU makes sure not to duplicate its work and the SIU goes on with its investigation. We are complementary units and we have a good relationship with the Public Protector'.

Mr Malunga agreed with these comments.

Legal Practice Bill

Jan Stemmet, former co-chairperson of

the Law Society of South Africa (LSSA), and Busani Mabunda, chairperson of the LSSA's Constitutional Affairs and Human Rights Committee, discussed the Legal Practice Bill, as well as the Justice Portfolio Committee's public hearings on the Bill in February (see 2013 (Apr) DR 22).

'The parliamentary portfolio committee will have due regard to all the submissions when looking at the way forward. There are amendments that will be anticipated flowing from the draft Bill as presented by the Department of Justice and Constitutional Development,' Mr Mabunda said.

According to Mr Mabunda, the Bill is not purely about attorneys and advocates, but

is also about society and the impact the profession has on society in general.

In respect of legal advisers, Mr Mabunda told delegates: 'It could have been of assistance if we had looked at the possible effect or impact that the Legal Practice Act would have on legal advisers within the framework of the national government, as well as state-owned entities.'

- Views shared at the conference were those of the speakers and not their employers.

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Pretoria attorney Tshepo Confidence Mashile has won the 2012 LexisNexis Prize for Legal Practitioners for the best article by a practising attorney published in *De Rebus*.

He won the award for his article titled 'Parental rights and responsibilities, guardianship and same-sex parents,' published in 2012 (Aug) DR 32.

In his article, Mr Mashile unpacked the High Court judgment in *CM v NG* [2012] 3 All SA 104 (WCC), which dealt with guardianship and parental rights and responsibilities in the context of a same-sex relationship.

Mr Mashile believed the topic of parental rights and responsibilities was important as 'there has been a paradigm shift in the nature and content of parental authority in South Africa'.

'The child's best interests are now of paramount importance in every matter affecting the child,' he added.

He won an iPad and one year's free access to his choice of five online titles from LexisNexis.

Mr Mashile said that he was 'elated' at having been awarded the prize.

'I feel elated, having been chosen among a pool of writers and researchers in the legal field from all over South Africa,' he said.

Mr Mashile, 27, is an attorney at Ngwenya Attorneys in Pretoria. He specialises in civil and criminal litigation.

Edrick Roux has won the 2012 Juta Prize for Candidate Attorneys for his article titled 'Testators should be careful what they wish for,' published in 2012 (Sept) DR 30.

In his article, Mr Roux, who was a candidate attorney at MacRobert Inc in Pretoria at the time he penned the article, considers the question of whether it is sufficient for testators attempting to protect a bequest to insert a clause in their will providing that, should the beneficiary be married in community of property, the benefit received will form part of a separate estate.

De Rebus best article winners

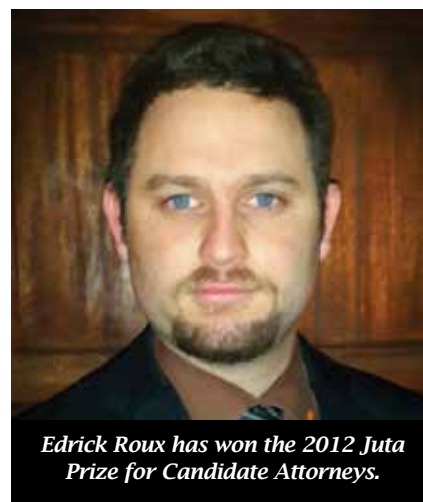


Tshepo Confidence Mashile has won the 2012 LexisNexis Prize for Legal Practitioners.

Mr Roux, 25, is a consultant for Price-waterhouseCoopers in its estates and trust advisory division in Johannesburg.

He won book vouchers to the value of R 8 500 from Juta.

'I am deeply honored to have been selected to win the prize and I am truly grateful to *De Rebus* for giving me the



Edrick Roux has won the 2012 Juta Prize for Candidate Attorneys.

opportunity to submit and publish my article,' said Mr Roux.

Mr Roux said that he was 'passionate' about the law of succession and trust law.

Kevin O'Reilly,

kevin@derebus.org.za

Who's Who Legal South African law firm of the year

Webber Wentzel has been named the South African law firm of the year by *Who's Who Legal* for the fifth time, and the third consecutive year.

The firm has also been listed as one of the top 100 law firms in the world.

Who's Who Legal is the official research partner of the International Bar Association, and the strategic research partner of the American Bar Association's section on international law. In a press release, senior partner at

Webber Wentzel, David Lancaster, said: 'It's gratifying to once again receive this recognition - not only in South Africa, but on a global scale'.

The winners are selected by the editors of *Who's Who Legal*, after a six-month research process. This includes feedback from practitioners, clients and sector experts.

Kevin O'Reilly,

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Corporate choices in international arbitration

The Queen Mary School of International Arbitration in London recently conducted a survey on international arbitration. During a presentation at the Arbitration Foundation of Southern Africa in Johannesburg, Colm Tonge, partner at PricewaterhouseCoopers (PwC), which sponsored the survey, highlighted important aspects of the research.

Mr Tonge said that the purpose of the survey was to introduce the topic of corporate choices in international arbitration. He added that international arbitration was resorted to when companies or corporations from different jurisdictions became engaged in disputes, which was occurring more frequently.

He said: 'There is no doubt that the volumes and the complexities of disputes internationally have increased and it is very clear that disputes will follow capital.'

If there is inward investment in countries, there will surely be international disputes over time, said Mr Tonge.

The survey

Discussing the research methodology, Mr Tonge said that the survey looked at international arbitration as an industry from the perspective of the buyer, namely general counsel or corporates. He said that the survey involved interviewing more than 100 corporate counsel, as well as in-depth interviews with those who had strong views and relevant experiences.

Mr Tonge said that the industries focused on were energy, financial services and construction.

The topics addressed by the survey were the suitability of arbitration as a process, the impact of the 2008 financial crisis, factors that influence corporates to pursue disputes, how external counsel is chosen and third party funding.

Suitability of arbitration

Mr Tonge said that the survey revealed that arbitration was the first-choice method of dispute resolution for respondents. He said: 'There is a common consensus out there that arbitration is the preferred form of resolution of these disputes. Whether that is factual or whether it is a myth remains to be seen. Based on the survey, we can see clearly that the first-choice method of resolving international disputes in more than half the cases is arbitration – that is as many as litigation, expert determination and mediation put together. It is also the least resisted one, with only 6% saying it is their least favourable form.'

Mr Tonge added that arbitration was preferred equally by claimants and respondents.



Colm Tonge, partner at PricewaterhouseCoopers, highlighted important aspects of a survey on international arbitration.

He said that in 2008 a survey was conducted to gauge industry satisfaction with arbitration and the results showed that 86% of participants felt that the process was good and fair, which was mirrored in the current survey. Mr Tonge said that arbitration was 'definitely the preferred form of resolution'.

In terms of arbitration preference in the different industries, Mr Tonge said that there was a 68% preference for arbitration as a first choice in the construction sector, while the financial services sector did not have a clear preference for arbitration. He added that in the energy sector there was a slight preference for arbitration. However, he said: 'When we look at whether arbitration is suitable for resolving disputes, all three industries had a pretty high approval rating for arbitration. ... This shows us that, although it is not the method that is used in financial services, it is believed to be a good one Maybe there is more potential for arbitration in financial services in future.'

Pursuing disputes

Mr Tonge said the survey showed that in more than half of the cases the ultimate decision-maker on whether or not to proceed with a matter was the relevant chief executive officer or board of directors, but the general counsel of the corporation had significant influence over other related decisions, such as whether or not to use outside counsel. In 71% of the cases general counsel was a key driver in the decision on whether or not to initiate formal proceedings.

In relation to internal decisions regarding arbitration matters, Mr Tonge said that a key factor in making that decision was the strength of the legal position, which 40% of respondents felt was key in deciding whether or not to pursue a matter, while 36% felt that the strength of the evidence was more important.

Adding to this, Mr Tonge said that legal costs did not seem as significant in the decision whether or not to initiate proceedings and, while costs were a concern, they were not an inhibiting factor in deciding whether or not to proceed with a matter.

Costs and international arbitration

On funding international arbitration, Mr Tonge said: 'Costs have been a major issue around international arbitration for some time. It has almost imperatively been proven that international arbitration can be more expensive than litigation – that is why costs are a recurring issue. Corporations are taking action to address this, and one of the ways they seek to reduce costs and delay – which are seen as the two difficult pillars of international arbitration – is to recruit in-house counsel that are specialists. ... There is more control over costs and delay timing if the matter is dealt with internally.'

He added that corporations were looking at alternative fee arrangements. He said that 61% of the survey respondents had some kind of capped fees or blended rates and a number had a basic fee, a discounted rate or a success fee that was either based on the result in damages or a percentage of the fee. He said that 10% of the respondents had a pure contingency fee arrangement.

Outside counsel

In terms of choosing outside counsel, Mr Tonge said: 'Overwhelmingly, past experience with the firm or the lawyer was the deciding factor. Personal knowledge of the lawyer being selected was also very significant, but slightly less important were other in-house counsel recommendations, the reputation of the firm, and the ranking of the firm.'

He said that in the construction industry it was important for the person selected to have industry experience – 56% of the respondents felt that this was the most important part of making this decision.

He added that in the energy industry it was less important for the person to have industry experience, while the financial sector considered it equally important for the person to have experience in arbitration and for the person to be a financial services expert.

Mr Tonge said that 88% of respondents felt that general counsel was the driving force in choosing outside counsel and general counsel influenced which mechanism should be used to resolve disputes at the drafting stage.

Influence of the financial crisis

Mr Tonge said that there was a false perception that the global financial crisis would lead to a significant increase in disputes.

'This has been disproven at this stage by the survey, in that there is no particular increase. There is no obvious correlation between the financial crisis and some of the difficulties in the euro-zone, and that probably reflects a pragmatic approach by financial institutions to resolve issues through negotiation rather than going the more formal route. Equally, it looks like the impact of the crisis on the choice of dispute resolution mechanisms used to settle international disputes is leaning towards arbitration. However, there is a concern around what is called "judicialisation", which means

... the lawyers run the process, having undue influence over the process, so that the ultimate end user may not be in control of the process.'

Conclusion

In concluding the presentation, Mr Tonge spoke about investment treaty arbitration. He said that, in terms of this, the oil, gas, mining, and energy and power industries had given rise to the most disputes, and they were the sectors where resource nationalism would play a role.

'Investment treaty arbitration involves governments and organisations fighting over, for example, a mining contract. A new government comes into power and does not honour the previous government's commitment and an investment treaty dispute arises,' said Mr Tonge.

Mr Tonge added that in these situations there was a disparity in the loca-

tion where the dispute arose and where the arbitrators were situated.

He said: 'By far, the majority of arbitrators are from western Europe and relatively few of the disputes are from there. ... A significant amount of the disputes is in sub-Saharan Africa, but relatively few of the arbitrators come from there. We are hopeful that this picture will change over time, but it probably will take time. For instance, 37% of disputes arise in South America, but only 12% of arbitrators come from there. These disputes are being resolved [by] arbitral bodies in western Europe.'

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On 29 May Minister of Justice and Constitutional Development Jeff Radebe gave the department's budget vote in parliament.

During his address, Minister Radebe said that a preliminary report on the assessment on the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal was expected to be completed by 31 March 2014.

In addition, he spoke on progress the department had made and challenges it faced.

Minister Radebe said that since 1994 parliament had passed 1 294 Acts, of which 148 were attributed to the justice sector.

These Acts focus on -

- building and strengthening state institutions that support constitutional democracy;
- transforming the judiciary and the justice sector;
- fighting crime and corruption; and
- broadening access to justice.

Transformation of the judiciary

The Justice Minister said that government had introduced 'radical' reforms aimed at strengthening the judiciary.

As an example, he cited the Constitution Seventeenth Amendment Act of 2012, which he said 'has broken new ground in our judicial landscape'.

Minister Radebe noted challenges facing the appointment of women judges. 'This is a matter of grave concern to government and the Judicial Service Commission,' he said, adding that 'drastic' steps were necessary to address this.

Minister Radebe highlighted an increase in the department's target for the allocation of briefs to legal practitioners from previously disadvantaged back-

grounds from 65% to 70%, which the department was optimistic would benefit more female practitioners.

Strengthening the criminal justice system

Minister Radebe stated that the Justice, Crime Prevention and Security (JCPS) cluster had changed its approach to fighting crime and corruption by working as a team. He said this was evident by the realisation of seven outputs of the cluster, namely -

- a significant reduction of serious crime;
- the criminal justice system was functioning more efficiently;
- corruption was being dealt with severely in a focused manner;
- perceptions about the work of the cluster were improving;
- border management had been prioritised;
- the population registration system had been improved; and
- a safe cyberspace had been made a focus area.

Minister Radebe said that the JCPS cluster had adopted a 'zero-tolerance' attitude towards rape, the violation of the rights of lesbian, gay, bisexual, transgender and inter-sex people, and other forms of violence against women.

He added that 57 regional courts had been identified as dedicated sexual offences courts.

The Justice Minister noted that a separate budget had been allocated to increase the capacity of these courts, which would be used for -

- creating additional regional magistrates' posts to increase the capacity of these courts;
- appointing additional personnel, including intermediaries;
- skills development programmes and social context training for regional magistrates and personnel of these courts;
- enhancing services and increasing the number of Thuthuzela Care Centres; and
- the installation and maintenance of technological equipment, such as closed-circuit television cameras, to ensure the integrity of the judicial process.

Minister Radebe said that the magistrates' courts were an 'important cog' of the judicial system as these were where the average citizen came into contact with the judicial system.

'It is for this reason that this is where the bulk of our budget and resources are concentrated,' he said.

The department's intention is to increase the civil jurisdiction of magistrates' courts and regional courts beyond their current thresholds, he added.

New courts

Minister Radebe noted the opening of the Ntuzuma Magistrate's Court. He added that the Limpopo High Court would be completed by June 2014, while the construction of the Mpumalanga High Court was expected to commence in July, and six new courts were planned for construction in the next three years.

Budget allocation

Minister Radebe reported that a total budget of R 16,7 billion had been allocated to the department for the 2013/14 financial year. Of this –

- R 5,8 billion has been allocated to the court services programme;
- R 3 billion has been allocated to the National Prosecuting Authority (NPA); and
- R 1,84 billion has been allocated to public entities and Chapter Nine institutions.

The Justice Minister said growth in 2013/14 was driven by –

- salary increases;
- investment in Thuthuzela Care Centres;
- investments in information technology (IT) upgrades and systems development; and
- additional capacity for Legal Aid South Africa, the Office of the Public Protector and the South African Human Rights Commission over the medium-term expenditure framework period.

A saving of R 230 million had funded the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence

Procurement Packages and the cost of finalising the Marikana Commission of Inquiry in 2013/14; as well as the assessment of the impact of the decisions of the Constitutional Court and the Supreme Court of Appeal; and the transformation of state legal services, said the Minister.

Minister Radebe said that the 2013 budget provided for –

- additional allocations of R 300 million in the 2013/14 financial year, R 400 million in 2014/15 and R 450 million in 2015/16 for investments in IT upgrades and systems development as part of the criminal justice system revamp;
- funding improvement on conditions of service in the department, the NPA, Chapter Nine institutions and public entities; and
- additional funding to increase capacity in Legal Aid South Africa (R 45 million), the Public Protector (R 24 million) and the South African Human Rights Commission (R 24 million).

In addition, in the next three years, the department planned to spend R 3,1 bil-

lion on construction of courts and infrastructure projects, R 96 million on day-to-day maintenance and R 291 million on rehabilitation of court facilities.

The Justice Department, the NPA and Legal Aid South Africa have been allocated R 249 million to reduce criminal case backlogs in regional and district courts.

The Justice Minister said the department envisaged spending –

- R 1,9 billion on public prosecutions;
- R 159 million on witness protection;
- R 116 million on asset forfeiture;
- R 305 million on the Special Investigating Unit; and
- R 1,36 million on Legal Aid South Africa.

In conclusion, Minister Radebe said that the department would transfer R 116 million to the South African Human Rights Commission and R 199 million to the Public Protector.

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The National Association of Democratic Lawyers (NADEL), in conjunction with law firm Cliffe Dekker Hofmeyr, hosted a competition law workshop on 8 June in Johannesburg.

Nick Altini, director and national practice head of the competition practice at Cliffe Dekker Hofmeyr, discussed restrictive practices, with a focus on collusion and case law developments; and attorney Chris Charter discussed mergers, with a focus on public interest issues.

In a panel discussion, Trudi Makhaya, deputy commissioner of the Competition Commission; Richard Murgatroyd from competition law consultancy RBB Economics, advocate Michelle le Roux and Mr Charter answered questions in relation to competition law.

Competition law workshop



From left: Trudi Makhaya, Richard Murgatroyd, Michelle le Roux and Chris Charter at a competition law workshop recently held in Johannesburg.

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

Details on the LSSA's further submissions on the LPB and response to the AFF submissions

The second set of submissions made by the Law Society of South Africa (LSSA) on the Legal Practice Bill (B20 of 2012) in May this year focused on responding to a number of questions raised by the Justice Portfolio Committee during oral hearings on the Bill, which were held in February. While the LSSA news column in the June issue of *De Rebus* (2013 (June) DR 11) provided a brief overview of the submissions, this article sets them out in detail.

Access to the attorneys' profession

In responding to questions on race and gender demographics for the attorneys' profession, the LSSA submissions provide statistics to illustrate progress made by black and female attorneys entering the profession, as well as initiatives taken to break barriers of entry for historically disadvantaged practitioners. The LSSA statistics show the current figures as follows, illustrating that the number of white male attorneys has dropped by 6% over the past five years, whereas the number of black male attorneys, as

well as black and white female attorneys, has increased by 2% in each case over the past five years.

Against this background, the LSSA provided graphs showing the numbers of first-year law students and final-year law graduates at universities, illustrating the demographics of candidates available to enter the profession. The LSSA also provided a graph of the demographics of candidates registering articles and admissions to the profession.

The LSSA noted that, although there has been a significant improvement in terms of historically disadvantaged candidates entering the profession over the years, progress has been slow and many challenges remain to improve the growth further.

Access to justice

The LSSA pointed out that small firms constitute the bulk of practising attorneys in South Africa - in excess of 75% - which was important for access to justice, as members of the public generally approached smaller firms for legal advice. In addition, other initiatives, such as the mandatory 24 hours per year of *pro bono* service by attorneys and the significant footprint of Legal Aid South

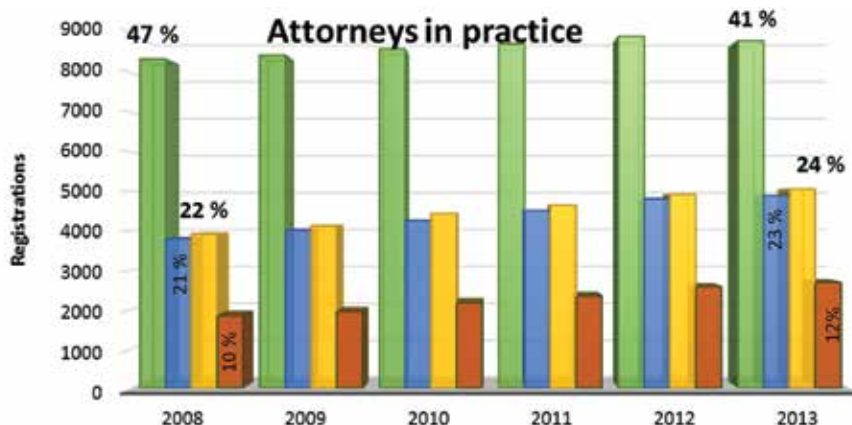
Africa, contributed to access to justice.

In dealing with the portfolio committee's observation that the current fee structures in the profession impede access to justice and its query regarding why a client is made to pay twice for a single assignment (for an attorney and an advocate), the LSSA noted that an advocate is a service provider to the attorney. In confirming its support for the retention of the Bar as a referral profession, the LSSA indicated that even a small firm is able to take on big and complex matters, knowing full well that it can rely on the readily available skills of advocates.

As regards the cost of counsel, the LSSA outlined the difference between the role of the attorney and that of counsel: 'The obligation to ensure the correctness of the advice vests with the attorney. The assurance that the work has been carried out diligently and without negligence is the responsibility of the attorney. The indemnity for anything that may go wrong in respect of the matter, including an opinion, is the sole responsibility of the attorney. Thus, the attorney acts as an insurer in matters of this nature. On a practical level, an attorney receives instructions, makes the initial assessment, narrows issues for consideration by counsel and then scrutinises the completed opinion in the interest of the client. Both parties, therefore, have a critical role to play, albeit in the same matter. Furthermore, it is the attorney that carries the indemnity cover for possible negligent advice leading to a loss by the client. This is singularly important for the protection of the public. The client, therefore, is provided with all the necessary protection by the attorney, while having access to the expertise of counsel. Essentially, what is paid for is a comprehensive service, not a duplication of services.'

Funding the South African Legal Practice Council

The LSSA indicated that if, on the one hand, the South African Legal Practice Council is the body that governs a South African national Bar or law society - as is the case in other countries, especially in the Southern African Development Community region - the profession has a re-



| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|---------------|------|------|------|------|------|------|
| White males | 8361 | 8460 | 8623 | 8746 | 8936 | 8824 |
| White females | 3800 | 4021 | 4255 | 4515 | 4816 | 4893 |
| Black males | 3917 | 4127 | 4440 | 4651 | 4925 | 5062 |
| Black females | 1844 | 1945 | 2178 | 2339 | 2575 | 2684 |

sponsibility to fund it. On the other hand, if the council is a stand-alone statutory body with no recognisable constituency – as is the case of the Independent Communications Authority of South Africa and the South African Broadcasting Corporation board, for example – then government would have the responsibility to fund it.

Disciplinary matters and self-regulation

The LSSA provided an outline of the current types and numbers of disciplinary matters being dealt with by the statutory provincial law societies, as requested by the portfolio committee. At the oral hearings, the committee had indicated that there was a perception that the law societies were ‘soft’ on their members. The LSSA stressed that it was important to note that the percentage of attorneys who are offenders is minuscule compared to the number of ethical and law-abiding attorneys. This was an important indicator for self-regulation.

The LSSA responds to the Attorneys Fidelity Fund submissions

The LSSA took the view that it would not make specific comments on the future of the Attorneys Fidelity Fund (AFF) and deferred to the board of control of the AFF to do so.

In the process of formulating its comments to the portfolio committee over many months, the LSSA invited the AFF to participate in the deliberations, and its chief executive officer and chairperson of the board (and others from management) sat in on the LSSA council meetings, as well as special meetings held to discuss the Bill. The process evolved over several drafts, which were, for the most part, made available to the AFF as and when the draft submissions were formulated. However, the LSSA pointed out to the portfolio committee that the submissions by the AFF were not made available to the LSSA

before they were presented to the committee and it was thus not possible for the LSSA to deal with their content before the hearing (see 2013 (Apr) DR 29).

The LSSA noted that some ‘misconceptions and inaccuracies’ existed in the AFF submissions and aimed to clear these up in a separate annexure to its May document, dealing specifically with the AFF’s oral and written submissions made in February.

In its introduction in the comments responding to the AFF, the LSSA stressed that the attorneys’ profession had lobbied parliament over 70 years ago for the creation of the AFF because attorneys realised and acknowledged that there were – and would always be – dishonest practitioners among them. The AFF was created to ensure that the public had confidence in using the services provided by attorneys.

Attorneys had initially made annual contributions to the AFF. When the AFF was strong enough so as not to require these contributions, attorneys made – and continue to make – token contributions in order to practise as sole practitioners, partners or directors. The reason was simple: The interest income of the AFF was so substantial that it simply did not need annual contributions from attorneys. If ever funds from trust interest become insufficient, attorneys can be held liable to boost them again via annual contributions.

As regards the nature of the funds in the AFF – which were referred to as ‘public funds’ at the portfolio committee hearings – the LSSA pointed out that, initially, as indicated above, the AFF was a fund to which attorneys contributed. Later, when trust fund interest was used to boost the AFF, such interest was, and still is, derived from deposits by the clients of attorneys. While such clients are members of the public, any view that such interest is ‘public money’ is, according to the LSSA, misdirected. The LSSA is of the view that legislation intended that such interest should vest in the AFF, and the AFF’s board has in the past been at pains to make it

clear that such interest paid over to the AFF belongs to it.

In dealing with the contention that there is a perception of a conflict of interest by attorneys serving on the AFF board, the LSSA highlighted the following:

‘In most companies, the major shareholders are directors of that very same company. That does not result in the shareholding directors depleting the company. Attorneys practising in incorporated companies find themselves in the same position. Attorneys, by the nature of their work, have an inherent ability to wear separate hats. The nature of the profession is one that takes care of the interests and assets of others. That is why the profession takes its own governance and that of the AFF so seriously.’

The LSSA agreed with the suggestion by the AFF that the fund should have the power to assert its institutional independence from the mainstream profession. However, the LSSA noted: ‘It is a separate entity, but there should always be rec-

ognition of the close relationship with the attorneys’ profession.’

The LSSA added: ‘If one accepts the position that the profession has a vested interest in the AFF and its ability to indemnify the public against theft by rogue attorneys (of whom the organised profession wants to rid itself), then one must accept that the governors of the regulatory structure who will comprise, among others, of a substantial number of attorneys, will have the preservation of the AFF at heart. This is all the more so, bearing in mind that it is they who effectively created the AFF in the first place, and maintained it to the position where it is today.’

The asset base of the AFF is worth more than R 3 billion.

- The full further submissions on the Legal Practice Bill and the response to the AFF submissions can be accessed on the LSSA website, at www.LSSA.org.za.

New director for Durban School for Legal Practice



Fahreen Kader, new director at the School for Legal Practice in Durban.

Fahreen Kader was appointed as the director of the Law Society of South Africa’s School for Legal Practice in Durban earlier this year.

Before joining the school, Ms Kader practised as an attor-

ney at Berkowitz Cohen Wartski, specialising in commercial, matrimonial and personal injury litigation in both the High Court and magistrate’s court. She lectured part-time at the University of KwaZulu-Natal in commercial law subjects.

Ms Kader completed her full-time tertiary education in 2003, attaining an LLB and a BSc (Industrial Psychology). During this time, she also lectured full-time at the University of KwaZulu-Natal.

She is a published author, having co-authored T Mongalo, C Lumina and F Kader *Forms of Business Enterprise* (Cape Town: New African Books 2004) and B Hansjee and F Kader *The Survivor’s Guide for Candidate Attorneys* (Cape Town: Juta Law 2010).

LSSA supports Public Protector; welcomes debate on accountability

On 15 May the Law Society of South Africa (LSSA) expressed concern at the tone of questioning of the Office of the Public Protector by members of the Portfolio Committee on Justice and Constitutional Development during public hearings on the Public Protector's budget and strategic plan for 2013/14 earlier in May.

'South Africa is a constitutional democracy and not a parliamentary democracy,' said LSSA co-chairpersons Kathleen Matolo-Dlepu and David Bekker in a press release.

They added: 'We are of the view that the recent line of questioning by portfolio committee members requesting the Public Protector to explain why she has investigated specific cases is wholly inappropriate. Parliamentary oversight is limited to how the Office of the Public Protector uses public moneys and to protecting and rendering assistance to the Public Protector in dealing with complaints. Parliamentarians, therefore, need to act and speak with circumspection when raising questions as regards the Office of the Public Protector, lest they confuse the public and themselves of the hard-won freedoms that gave rise to our constitutional democracy.'

The LSSA noted that, although parliamentarians stressed in hindsight that they were not questioning the Public Protector's sole discretion to make decisions as to what she should investigate, the fact that they did so impacted on the independence, dignity and impartiality of her office and on her ability to investigate matters without fear, favour or prejudice.

The LSSA added that the subsequent actions of the Deputy Public Protector, Kevin Malunga, in seemingly 'apologising' to parliament for the responses of the Public Protector, could be described as an attempt to ingratiate himself with those who may appoint the next Public Protector. 'This does not augur well for the future,' said the co-chairpersons.

The Justice Portfolio Committee issued a statement on 16 May pointing out that the LSSA had not been present at the hearings and should have acquainted itself with what happened before complaining about the tone of questioning by committee members.

'We are surprised by the assertion that the committee's questioning of the Public Protector as to why she investigated specific cases was inappropriate,' said committee chairperson Luwellyn Landers.

The committee believed that asking questions about whether her investigation into complaints about delayed court judgments was consistent with s 6(6) of the Public Protector Act 23 of 1994. As

the Public Protector claimed she did not have enough investigators, the committee believed that questioning her as to the appropriateness of investigating matters that should have gone to the Public Service Commission; the Commission for Conciliation, Mediation and Arbitration; or the Labour Court was appropriate, especially in the light of s 6(3) of the Public Protector Act, which allows the Public Protector to refuse to investigate such matters.

Mr Landers added: 'The law society believes our oversight is limited to "how the Office of the Public Protector uses public moneys and to protecting and rendering assistance to the Public Protector in dealing with complaints". We would, however, like to point out that this is not the wording of s 181(5) of the Constitution. Section 181(5) provides: "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the assembly at least once a year." In addition, s 9(2) of the Public Protector Act reads: "Nothing in this Act shall prohibit the discussion of a matter being investigated or which has been investigated in terms of this Act by the Public Protector".'

The committee stated that while it did not hold any brief for the Deputy Public Protector, it trusted that the LSSA had applied the rules of natural justice and the *audi alterem partem* rule and heard from Mr Malunga before reaching its conclusion that his letter to the committee could be described as an attempt to ingratiate himself with those who may appoint the next Public Protector. For the record, said Mr Landers, the committee would not appoint the next Public Protector, as that appointment should only be made after the general elections next year.

On 17 May Public Protector Thuli Madonsela issued a statement welcoming the LSSA's comments and indicated that she was encouraged by them. Regarding the issue of accountability to parliament, she reaffirmed her commitment to accountability to parliament and drew attention to s 8 of the Public Protector Act, which provides specific guidelines on how parliament may discuss her reports.

Section 8(1) of the Act provides that the Public Protector may, subject to the provisions of subs (3), in the manner he or she deems fit, make known any finding, point of view or recommendation in respect of the matter investigated by him or her.

Section 8(2)(a) provides that 'the Public Protector shall report in writing on activities of his or her office to the National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces'.

Section 8(2)(b) provides that reports of the Public Protector may be discussed by parliament under the following circumstances: 'He or she is requested to do so by the Speaker of the National Assembly; or he or she is requested to do so by the chairperson of the National Council of Provinces.'

Ms Madonsela pointed out that the provisions of s 9 of the Public Protector Act are clearly directed at the contempt of the Public Protector, not accountability by the Public Protector. In this regard, s 9(2) merely creates room for parallel proceedings in parliament on matters under discussion by the Public Protector.

Ms Madonsela thanked all those who were engaging in this matter because, she said, 'democracy is a dialogue'. She looked forward to the agreed platform where she, parliament and broader society would engage on the content of parliamentary accountability in a manner that took into account the entire provisions of s 181 of the Constitution.

She added that she intended to approach the Speaker and Deputy Speaker of parliament and the chairperson of the Justice Portfolio Committee to enhance relations with the committee.

In its press release, the LSSA welcomed the suggestion made at the parliamentary hearings that a public debate should be held to clarify the meaning of s 181 of the Constitution, and the relationship between the legislature and Chapter Nine institutions, including the Office of the Public Protector, against the background of South Africa's constitutional democracy.

Cooperation between the LSSA and the Public Protector

In the meantime, the LSSA met with the Office of the Public Protector in April and both bodies committed to upholding the values of the Constitution and the broad interest of the public and to support one another in the best interests of South Africa and its people. Initiatives would be put in place by the LSSA to support the work of the Public Protector by providing *pro bono* services by attorneys in serious cases that may emanate from the Office of the Public Protector.

Ms Madonsela indicated in her press statement that she was encouraged by the LSSA's commitment to partnering to promote a 'just and corrupt-free state' and ensuring that victims of administrative wrongs of the state get justice.



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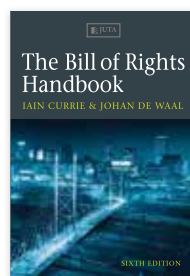


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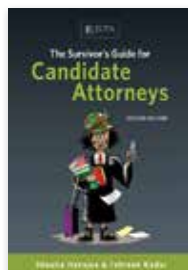


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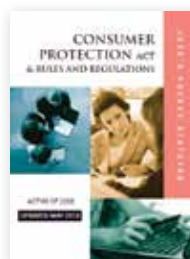


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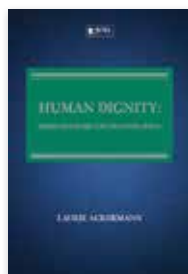


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People and practices

Compiled by
Shireen Mahomed

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



Tim du Toit Attorneys in Pretoria has promoted Alewyn Grové, Duain Naidoo and William Letsoalo to directors. Mr Grové practises in the firm's litigation department, Mr Naidoo practises in the conveyancing department and Mr Letsoalo practises in the litigation department.

From left: Alewyn Grové, Duain Naidoo and William Letsoalo.



DM Kisch Inc has appointed Adelhart Krüger as its new chairperson. Mr Krüger practises as a patent attorney specialising in electrical and electronic engineering, including telecommunications, computer and information technology related inventions and copyright. He began his career with DM Kisch Inc in 1983 and was appointed as a director in 1988.

Rooth & Wessels Attorneys in Pretoria has two new directors.



Marianne van Rooyen is in the litigation and banking law department.



Joseph Leotlela is in the litigation and court appearance department.



Tayob Kamdar has joined **Shepstone & Wylie Attorneys** in Johannesburg as a partner. Mr Kamdar will specialise in commercial, administrative and income tax litigation.



Ruard Buys joined **Mathews & Company Inc** in Cape Town, the legal advisory practice of Maitland, as a partner specialising in funds.



Paul Truter has been promoted to a director. He specialises in commercial law.



Amy Jones has been promoted to a senior associate. She specialises in commercial law.



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- Working with difficult clients

5 minutes with the South African Attorneys' Association

This month's column features the recently formed South African Attorneys' Association (SAAA).

The association's spokesperson and one of its founders, Praveen Sham, told us a bit more about SAAA.

What is SAAA?

SAAA is a voluntary organisation established, *inter alia*, to promote, on a national basis, the common interests of its attorney members, having regard to the interests of the public whom members serve; to safeguard and maintain the independence, objectivity and integrity of its members; to maintain and enhance professional standards; and to promote access to justice and the courts.

What does SAAA do?

The law societies and the Law Society of South Africa have three constituents - the National Association of Democratic Lawyers (NADEL), the Black Lawyers Association (BLA) and elected, non-NADEL and non-BLA, councillors. No voluntary association offering membership to the latter has until now existed and, consequently, there has been no vehicle for such members to express their views. There was, therefore, a need to create a voluntary association so that the views of such members could be articulated - hence SAAA was founded to address these needs, more especially where the constituents have differing views. In such circumstances, the elected councillors have had no mechanism to express their views.

When was SAAA established?

A national steering committee was established in July 2012 and in September 2012

a national management committee was formed.

Who can become a member of SAAA?

Membership is open to all attorneys and candidate attorneys, irrespective of colour, race, gender or creed, who are practising or non-practising members of any of the statutory law societies, and who subscribe to the principles in the SAAA constitution.

Where are SAAA's offices?

SAAA is in the process of setting up the required administration, including a website. Members will be kept informed on progress.

How does one become a member?

Application forms and copies of the constitution are available from the contact persons mentioned below.

Contact information

- Praveen Sham, e-mail: sham@shamandmeer.co.za
- David Bekker, e-mail: david@cn-law.co.za
- Jan Stemmet, e-mail: jan@stemmet.co.za
- Peter Horn, e-mail: horn-haarhoffs@icon.co.za

If you would like to see a specific organisation featured in the '5 minutes with ...' column, please send an e-mail to derebus@derebus.org.za.

De Rebus reserves the right to decide on which organisations will be featured in the column, including taking the initiative to approach organisations to be featured.

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By
Wikus
Steyl

1+1=3: A brief overview of merger requirements

One plus one makes three: That is the special alchemy of a merger or an acquisition.

For many attorneys, mergers and acquisitions might seem like a branch of the law that is in the purview of a select group of attorney firms.

This article provides basic guidance on what a merger involves and, hopefully, demonstrates that, just like the South African bush is not dominated by the 'Big Five' only, mergers can also be undertaken by smaller firms.

What is a merger?

While a firm may build market power through unilateral conduct, the easiest way for a firm to establish or enhance its market power is by acquiring or merging with other firms.

Section 12(1)(a) of the Competition Act 89 of 1998 (the Act) states that a merger occurs when one or more firms directly or indirectly acquire

or establish direct or indirect control over the whole or part of the business of another firm. This may be achieved through the lease or purchase of the shares, an interest or assets of the target firm, or an amalgamation or other combination with the other firm.

This definition covers horizontal, vertical and conglomerate mergers.

Briefly, these can be defined as follows:

- **Horizontal mergers:** The merger of two or more companies that are in direct competition with each other and which share the same product lines and markets.
- **Vertical mergers:** Where a customer and a company, or a supplier and a company, merge.
- **Conglomerate merger:** Where two or more companies that have no common business areas merge.

It is, however, the acquisition of control that is decisive and s 12(2)(a) to (g) of the Act

define at length the different categories of control.

Briefly, control is acquired, *inter alia*, when a firm –

- owns more than half of the issued share capital of another firm; or
- has majority votes in general meetings of another firm or has the ability to control the voting of a majority of those votes; or
- can appoint or veto the appointment of the majority of the directors; or
- has the ability to materially influence the policy of the firm.

Types of mergers

- **Small:**

A merger or proposed merger with a value at or below R 560 million and the annual turnover or asset value of the target firm is below R 80 million.

- **Intermediate:**

A merger or proposed merger with a value of between R 560 million and R 6,6 billion and the annual turnover or asset value of the target firm is between R 80 million and R 190 million.

- **Large:**

A merger or proposed merger with a value at or above R 6,6 billion and the annual turnover or asset value of the target firm is at least R 190 million.

The Competition Commission's (the commission's) website contains a merger threshold calculator, which assists in determining if a merger or proposed merger is small, intermediate or large.

Merger filing

Only in the event of intermediate and large mergers or proposed mergers, is it compulsory that the commission be notified thereof.

Section 13(1) of the Act states that a party to a small merger is not required to notify the commission of that merger unless, and within six months

after the implementation of the merger, the commission, as it is entitled to do in terms of subs (3), requires the parties to the merger to notify the commission thereof if, in the opinion of the commission, that merger –

- may substantially prevent or lessen competition; or
- cannot be justified on public interest grounds.

The commission has, however, published a notice stating that it will require notice of a small merger if, at the time of entering into the transaction, any of the parties or firms within their group are –

- subject to an investigation by the commission into prohibited practices; or
- respondents to pending proceedings referred by the commission to the Competition Tribunal relating to prohibited practices.

Should the commission act in terms of subs (3), a party to the merger may not take further steps in the implementation of the merger until it has wholly or conditionally been approved by the commission within 20 business days after all parties to the merger have complied with the commission's notification requirements.

The commission may extend the period it has to consider the proposed merger by a single period of no more than 40 business days, in which case the commission must issue an extension certificate to any notified party; or the commission must issue a certificate approving, either conditionally or unconditionally, the merger; prohibiting the implementation of the merger; or declaring the merger to be prohibited.

If the commission does not issue its certificate within the initial 20-business-day period or on the expiry of an extension period, the merger must be regarded as having been approved.

In instances of intermediate or large mergers, a joint

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merger notification in terms of r 27 of the commission's rules (the rules) or a separate filing in terms of r 28 must be made. Rule 28 deals with instances such as hostile takeovers and will not be discussed here.

Rule 27 requires that a merger notification in form CC4(1) be filed with the commission, which must declare the names of the primary acquiring and target firm and whether the merger is small, intermediate or large.

A statement of merger information in form CC4(2) must also be filed for each primary acquiring firm and the primary target firm, together with, but not limited to -

- a complete set of shareholders and their respective shareholding, including minority shareholders for the primary acquiring firm and of any firm that directly or indirectly controls the primary acquiring firm (a detailed organogram of the primary acquiring firm and its group will be useful);
- strategic documents of the

merging parties in relation to the affected markets, such as business plans, marketing documents, high-level strategic presentations and board minutes; and

- non-confidential versions of forms CC4(1), CC4(2) and the report on competition, if submitted.

The notifying party must provide proof of delivery of copies of the forms to every other party to the merger and, in terms of s 13A of the Act, to any registered trade union representing a substantial number of its employees; alternatively, if there are no such registered trade unions, employee representatives.

In terms of r 27(2), the prescribed merger filing fee of R 100 000 for intermediate mergers and R 350 000 for large mergers must be paid to the commission before the date of filing of the forms.

A case number, together with the date of receipt, will be issued to the notifying party.

Should the filing be incomplete, the commission may,

within five business days after receiving a large merger notification, or within ten business days after receiving notification of any other merger, deliver a notice of incomplete filing in form CC13(2) or a notice of complete filing on form CC13(1).

If neither form CC13(1) nor CC13(2) is delivered in this period, the filing will be deemed to be complete.

As most of the information provided to the commission will be confidential, the merging parties are advised to claim confidentiality by completing form CC7.

On completion of its investigations of small and intermediate mergers, the commission will issue its approving or prohibiting certificate.

If the merging parties do not agree with the commission's decision, they can appeal to the Competition Tribunal and, thereafter, if still not satisfied, to the Competition Appeal Court.

In terms of s 16(2) and (3) of the Act, the commission, in

the event of a large merger, will send its recommendation to the Competition Tribunal, the Minister of Trade and Industry and the merging parties, and the Competition Tribunal will take the final decision on the matter. If the merging parties do not agree with the tribunal's decision, they can appeal to the Competition Appeal Court.

Conclusion

This article is not an exhaustive list of merger requirements, but should, as stated above, show that mergers can be taken on by smaller firms with the assistance and guidance of the Act, the rules and the commission.

Wikus Steyl LLB (UP) Cert in Business Rescue (LEAD and Unisa) is an attorney at Savage Hurter Louw & Uys Inc in Johannesburg.






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Debts – reaching beyond the grave

By
Fareed
Moosa

Marriage, death and the National Credit Act

It is not uncommon for spouses married in community of property to borrow funds under a secured loan or to be mortgagors under a mortgage agreement in which they pledge their immovable property as security for a loan. In such instances, they are 'consumers' as defined in s 1 of the National Credit Act 34 of 2005 (NCA). The lender or mortgagee (as the case may be) is a 'credit provider' as defined (s 1) (see *ABSA Bank Ltd v Brown and Another*; *ABSA Bank Ltd v Van Deventer and Another* [2012] JOL 28445 (ECP)).

If one spouse dies, the joint estate terminates and control of it vests in an executor appointed to administer the estate. He or she is obliged to discharge the liability under the relevant 'credit agreement' as defined (s 1).

This article aims to discuss the implications of certain provisions of the NCA on marriages in community of property and deceased estates.

In particular, attention will, firstly, be focused on whether it is competent for a credit provider to issue a notice in terms of s 129 of the NCA to an executor alone for payment of a debt under a credit agreement, or whether, in order to be valid, it must be issued to both the executor *nomine officio* and the surviving spouse to whom the deceased was married in community of property.

Secondly, consideration will be given to whether a deceased estate may, pursuant to the receipt of such notice, be the subject of debt review proceedings.

Section 129 notice

Section 129 of the NCA stipulates that a credit provider may not commence legal proceedings against the consumer to enforce an agreement between the parties without first giving written notice of default to the consumer, proposing that the consumer may refer the credit agreement to a debt counsellor or alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date (see *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and the authorities cited therein).

In *ABSA Bank Ltd v Magiet NO* (WCC) (unreported case no 15967/07, 10-9-2009) (Le Grange J) Le Grange J held that a s 129 NCA notice must be given to an executor where the deceased was, at the time of death, a consumer.

The judge held, at para 18: 'If a credit agreement continues after the death of the debtor, the death of the debtor, in my view, does not nullify the creditors' burden of giving notice to the estate of the debtor if payments are not made in terms of the credit agreement.'

Lopes J in *Subramanian v Standard Bank Ltd* (KZP) (unreported case no 7008/11, 13-3-2012) (Lopes J) held, at paras 6 to 10, that notices that fall to be given under the NCA to spouses married in community of property must, in order to be valid, be given to both spouses. The judge held that the rationale for this lies in the fact that there is community of assets and liabilities between the spouses. Accordingly, the rights of both spouses are affected by the provisions of the NCA, such that 'it would accord with justice' for both to be given the relevant NCA notice.

However, a different view was adopted in *Motor Finance Corporation v Herbert* (WCC) (unreported case no 16098/2011, 24-4-2012) (Binns-Ward J).

In this matter Binns-Ward J commented, *obiter*, that the requirement imposed on credit providers in the *Subramanian* judgment was 'without foundation'.

Binns-Ward J opined that the question whether a spouse is entitled to a notice turns squarely on whether he or she qualifies as the consumer for purposes of the NCA. Only if the answer to this is in the affirmative does a duty arise on a credit provider to give notice to a spouse. Accordingly, since the defendant was the sole lessee under a 'lease' as defined (s 1), Binns-Ward J held that the credit provider was not obliged to give notice to the defendant's spouse to whom she was married in community of property.

I submit that, although Binns-Ward J was correct in stating that the NCA requires notice to be served on the consumer (as opposed to 'the spouse'), it is, with respect, incorrect to conclude that because a contract is concluded with one spouse, the other spouse is not a party thereto as 'the consumer'.

This runs counter to the provisions in ss 14 and 15 of the Matrimonial Property

Act 88 of 1984.

Section 15(1) of the Matrimonial Property Act empowers a spouse to unilaterally 'perform any juristic act with regard to the joint estate without the consent of the other spouse', except in defined instances dealt with in s 15(2) and (3), which require the consent of the other spouse. However, subject to an exception, such acts may be ratified *ex post facto* (s 15(4)).

Spouses married in community of property are joint debtors as regards both antenuptial and postnuptial debts (see *Du Plessis v Pienaar and Others* 2003 (1) SA 671 (SCA)).

Therefore, I submit that the approach adopted in the *Subramanian* case is correct. It not only 'accord[s] with justice', but also with the law governing marriages in community of property.

In addition, it accords favourably with the cumulative effect of the provisions in, *inter alia*, ss 3, 79(1), 86(5), 87(1) and 88(1) of the NCA.

Binns-Ward J reached his conclusion without considering the implications of these provisions.

'I submit that a s 129 NCA notice must be given to both spouses married in community of property, irrespective of whether the relevant debt is incurred by one of them acting alone.'



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Meeting the purpose of the NCA

The s 129 NCA notice cannot be effective in serving the statutory purposes contained in s 3 unless it is served on both spouses married in community of property. This is because, firstly, s 86(5) obliges a consumer who has applied for debt review protection to 'comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt rearrangement' (see *Seyffert and Another v FirstRand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA)).

In my view, this clearly contemplates the state of indebtedness of a joint estate and not that of the spouse married in community of property who concluded the relevant credit agreement.

It must also be borne in mind that, subject to certain exceptions, spouses married in community of property do not have an estate apart from the joint estate (see *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A)).

Secondly, the view espoused herein is further exemplified in s 79(1), read with s 87(1), of the NCA. A consumer is over-indebted if he or she is unable to satisfy financial obligations in a timely manner, having regard to his or her financial means, prospects, obligations and history of debt repayment (s 79(1)). A court hearing an application for a consumer's debt rearrangement is obliged to consider 'the consumer's financial means, prospects and obligations' (s 87(1)). (For a discussion on these provisions, see *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA)).

The community of debts in a marriage in community of property means that an inability to satisfy a debt amounts to a failure by both spouses to settle such debt, for which they are, in law, jointly liable.

Thus, I submit that the financial means, prospects, obligations and history of debt repayment referred to in the statutory provisions are those of both spouses in the joint estate, which, in turn, reinforces the view that 'the consumer', for purposes of the NCA, refers to both spouses married in community of property.

Fourthly, s 88(1) places a moratorium on a consumer incurring further debt in those circumstances where, for example, an application has been lodged under s 86(1) for debt review. I submit that the restriction on, *inter alia*, the right to apply for credit conferred by s 60 of the NCA cannot achieve the objectives of responsible debt incurrence envisaged by s 3(g), (h) and (i) unless it applies to both spouses married in community of property. It could not have been the legislature's intention that one spouse married in community of property be subject to this statutory limitation while the other

can freely incur further debt for which both are jointly liable. Such a state of affairs would, in my view, be absurd and run contrary to the stated objectives in s 3 of the NCA.

In light of the above, I submit that a s 129 NCA notice, in order to be valid, must be given to both spouses married in community of property, irrespective of whether the relevant debt is incurred by one of them acting alone. They constitute 'the consumer' for purposes of s 129.

Separate *personae*

The above applies equally to a situation where one spouse dies and an executor is appointed to the joint estate. Although the executor administers same, he or she does not become the *persona* of either the deceased or the surviving spouse. They are separate and distinct *personae* (see *Clarkson NO v Gelb and Others* 1981 (1) SA 288 (W) and WA Joubert (ed) *LAWSA* 31 (first reissue) at para 185).

The surviving spouse retains an independent legal personality so that he or she remains entitled to be served with all NCA notices separately, apart from the executor, in the same manner as he or she would have been during the deceased's lifetime.

The death cannot place the surviving spouse in a worse position than he or she would otherwise have occupied.

Failure to serve the NCA notice on both the executor and the surviving spouse, in my view, renders the service thereof materially, and thus fatally, defective. Any legal proceedings instituted pursuant thereto would, by virtue of s 130(4)(b) of the NCA, be susceptible to suspension pending compliance with the obligatory procedural requirement contained in s 129 (see *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD)).

It must also be borne in mind that an executor is not the representative of the surviving spouse.

There is no provision in law that deems notice to an executor of a joint estate as notice to the surviving spouse. Thus, notices served on such an official *nomine officio* do not constitute notice to the surviving spouse in his or her personal capacity and vice versa. Accordingly, a separate notice must be given, even if the surviving spouse is the executor or a co-executor. Alternatively, in such circumstances a single notice may be given, provided it expressly states that notice is given to the executor both in his or her capacity *nomine officio* and in his or her personal capacity as a consumer under the NCA.

Debt review

A further consideration necessitating that a separate s 129 NCA notice be issued to both the executor and the sur-

living spouse stems from the fact that each has the right to make an election regarding the different options referred to in s 129(1)(a).

Importantly, in my view, whereas the surviving spouse may apply for debt review, the executor may not.

Section 86(1) of the NCA provides: 'A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.'

The legislature's use of the singular 'a consumer' is to be distinguished from 'the consumer' used in, for example, s 129.

The joint estate terminates on death of a spouse married in community of property. I submit that the surviving spouse then becomes 'a consumer' for purposes of s 86(1) and is entitled to apply for debt review insofar as such portion of the debt for which he or she is liable in law is concerned. This is particularly so in view of the right of a credit provider under s 17(5) of the Matrimonial Property Act to sue the surviving spouse separately for the debt in question. This may occur where, for example, there are insufficient assets under the executor's administration to settle the debt concerned.

On the other hand, in my view, an executor is not empowered to initiate debt review proceedings as regards the deceased estate.

The trite principle of statutory interpretation is that effect must be given to the intention of the legislature, having regard to, *inter alia*, the language used in the enactment under consideration (see *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC)).

There are, to my mind, no provisions in the NCA evidencing a legislative intention that the right of a consumer to apply for debt review passes to his or her estate and, concomitantly, to an executor.

Firstly, the language used to define the various categories of 'consumer' refers only to 'the party', 'the mortgagor', 'the guarantor', 'the lessee' and 'the borrower' (s 1).

In *Magiet NO Le Grange J* pointed out, at para 13, that no reference is made to the executor of any such 'consumer' (nor, I submit, to his or her estate or successors in title).

Secondly, the NCA does not confer on every person all rights created by it. For example, the right to apply for credit (s 60(1)) is limited to '[e]very adult natural person, and every juristic person or association of persons'.

This provision makes no reference to the estate of any natural person, nor to his or her executor or successors in title.

Consequently, it may be inferred that the legislature did not intend to confer on every person all the rights embodied in the NCA.

In other words, certain rights are reserved for certain persons exclusively.

Thirdly, the definition of 'juristic person' (s 1) also does not refer to a deceased estate.

In addition, the Interpretation Act 33 of 1957 provides no assistance in this regard.

Fourthly, in *Commissioner for Inland Revenue v Emary NO 1961 (2) SA 621 (A)* it was held that, in the absence of a statutory provision casting a deceased estate in the mould of juristic personality, no such *persona* can be said to exist for purposes of a particular statute.

By parity of reasoning, in view of the NCA not conferring such *persona* on a deceased estate for its purposes, I submit that the right to apply for debt review cannot be said to exist for executors representing same.

I am fortified in the view expressed by s 35(12) of the Administration of Estates Act 66 of 1965, which provides that, after certain procedural steps are met in relation to the advertising and inspection of a liquidation and distribution account, an executor 'shall forthwith pay the creditors'. This is a peremptory obligation couched as a categorical imperative (see *Griffiths v Barclays Bank Trust Co Ltd (UK) NO 1986 (4) SA 1 (C)* at 2).

This indicates a legislative intention that there shall be an expeditious process of settling creditors' claims once the executor complies with the procedural

requirements imposed by s 35. This indicates the absence of a legislative intention empowering an executor to initiate debt review proceedings for the restructuring of debts forming part of a deceased estate. This is so because a debt review, if granted by a court, invariably leads to the postponement of the settlement of creditors' claims beyond the time frame contemplated by s 35. If the legislature intended to override this provision, then it can reasonably be expected that it would have enacted provisions in the NCA that expressly indicate this.

Conclusion

In conclusion, a deceased estate is not a legal or a statutory *persona*. It is an aggregate of assets and liabilities. The estate vests in the executor in the sense that the *dominium* and other rights, obligations and powers of dealing with same reside in him or her alone (see *Du Toit v Vermeulen 1972 (3) SA 848 (A)* at 856B).

The office of executor is a creature of the Administration of Estates Act. Its provisions regulate the rights, responsibilities and functions of this official. However, it does not perform an exclusive role in this regard. Other statutes are relevant too; for example, the Insolvency Act 24 of 1936 empowers an executor to apply for the voluntary surrender of a deceased estate. An executor acts *ultra*

vires if he or she performs an act beyond the scope of this statutory authority and any such act may be set aside.

I submit that Le Grange J in *Magiet NO* correctly concluded that an executor is entitled to receive a notice under s 129 of the NCA. However, the purpose of such notice is narrower than in the case of another consumer. Its purpose is simply to draw the executor's attention to the alternative dispute resolution mechanisms referred to in s 129(1)(a) in the event that the executor declares a dispute in relation to the credit agreement concerned.

In my view, it cannot serve as an invitation to an executor to refer the relevant credit agreement for debt review.

Consequently, until a legislative amendment is effected to the NCA or the Administration of Estates Act, I submit that sequestration under the Insolvency Act is an executor's only recourse if the estate under his or her administration is over-indebted and unable to satisfy its financial obligations timeously.

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Cashing in on collections

By
Gerhard
Buchner
and CJ
Hartzenberg

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The National Credit Act 34 of 2005 (NCA) aims, as part of its *raison d'être*, to promote a consistent enforcement framework relating to consumer credit. It provides, in s 3(d), that its purposes include protecting consumers by promoting equity in the credit market by balancing the rights and responsibilities of credit providers and consumers.

The Debt Collectors Act 114 of 1998 was enacted for similarly idealistic purposes, in introducing a Council for Debt Collectors and providing for the regulation and control of debt collectors' activities. Such regulation extends to the recovery of fees and remuneration by registered debt collectors.

Attorneys as debt collectors

With the unprecedented explosion of consumer debt during the mid-2000s, new opportunities presented in the field of debt collection.

A formidable industry emerged, with some firms of attorneys adopting business models whereby they establish debt collection operations run under the auspices of a corporate entity registered as a debt collector and which conduct business as such. Often such debt collector operations are staffed by specially trained personnel, including attorneys. Large call centres are established. Use is made of sophisticated debt collection techniques.

Invariably, there is a close association between the firm of attorneys and the debt collector entity. In some instances, the attorneys or their close family members effectively own the equity in such entities. Importantly, the attorneys exercise ultimate control over the activities of the debt collector entities. Such entities employ or align themselves in some form or manner with persons who trace defaulting consumers or debtors and cause them to commit themselves to a repayment plan, acknowledge their indebtedness and, often, consent to judgment.

Open to exploitation

In order to maximise recovery for the creditor (in many instances claims are ceded to the debt collector entity, which then seeks the recovery of debts in its own name and for its exclusive benefit), the debt collector and the attorney, it has become standard practice for such acknowledgments, undertakings and consents to include undertakings by the debtor to pay attorney-and-client or attorney-and-own-client costs, as well as collection commission. It is the latter type of undertaking that exposes vulnerable consumers to the risk of exploitation. Not all attorneys engaging in this

field of practice are guilty of exploiting consumers. However, by virtue of the nature of the business, such exploitation may sometimes be unwitting and be an unintended result.

In order for this kind of business to be profitable, and having regard to the relatively small size of typical consumer debts relative to fees recoverable by debt collectors (prescribed in annexure B to the Regulations relating to Debt Collectors, 2003) and attorneys' fees, the emphasis is on volume. This, in turn, promotes the use of standardised procedures and documentation, mass produced and processed. It is impossible for each matter to receive individual and meticulous personal attention.

The risks consumers are exposed to are exacerbated by the inability of the courts, particularly the magistrates' courts, to deal meticulously with the large volume of requests for default judgment routinely presented. Taxing masters are faced with similar difficulties with regard to the taxation of bills of costs and are often ill-equipped in terms of the requisite qualifications and experience to deal with bills of costs in a way that ensures consumers' rights are adequately safeguarded.

Regrettably, some practitioners perceive weaknesses in the system as an opportunity to exploit consumers and benefit themselves.

Contributing factors

Some of the causes contributing to this state of affairs are dealt with below. As will be emphasised, the provisions of ss 57 and 58 of the Magistrates' Courts Act 32 of 1944, which survived the enactment of the NCA and the promulgation of the new magistrates' courts rules (the rules), lie at the core of practices calculated to exploit defaulting consumers/debtors.

Chapter VIII (ss 56 - 60) of the Magistrates' Courts Act relates to the recovery of debts, defined as 'any liquidated sum of money due'.

Section 57(1) provides that if a debtor has received a letter of demand or has been served a summons claiming payment of a debt, the debtor may, in writing, admit liability for the amount of the debt and costs claimed, offer to pay the amount of the debt and costs for which he or she admits liability and to undertake payment of any instalment in terms of his or her offer and, further, to pay the collection fees for which the plaintiff is liable in respect of recovery of the debt by way of instalments.

He or she may further agree that, in the event of his or her failure to carry out the terms of the offer, the plaintiff shall, without notice to him or her, be entitled to apply for judgment in the amount of the outstanding balance of the debt and for an order for payment

'[S]uch exploitation may sometimes be unwitting and be an unintended result.'

of the judgment debt and costs in instalments or otherwise, in accordance with his or her offer.

In terms of s 57(2), if the debtor fails to carry out the terms of his or her offer, provided certain conditions are met, judgment may be granted against the debtor.

Section 58 provides for where the debtor, on receipt of a letter of demand or service on him or her of a summons claiming payment of any debt, consents in writing to judgment in favour of the plaintiff for the amount of the debt and costs. Provided certain conditions are met, again judgment may be granted against the debtor in terms of such consent.

These provisions have, to an extent, been ameliorated by ss 129 to 133 of the NCA, as well as the new rules, which came into effect on 15 October 2010. The legislature was clearly alive to the conflict between ss 57 and 58 of the Magistrates' Courts Act and ss 129 to 133 of the NCA. Recognition was given to such conflict in s 172(1) of the NCA, read with sch 1, on the basis that, to the extent that ss 57 and 58 of the Magistrates' Courts Act conflict with the NCA, the latter will prevail.

Sections 57 and 58 of the Magistrates' Courts Act provide that the clerk of the court shall (provided certain requirements are satisfied) grant judgment in terms of those provisions against the debtor.

Rule 12(5) of the rules provides that the registrar or clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of, or based on, an agreement governed by the NCA or the Credit Agreements Act 75 of 1980.

It is clear from the rules, however, that both ss 57 and 58 of the Magistrates' Courts Act are still firmly entrenched in the law and procedure governing the collection of debts, especially by way of legal proceedings. Practices based on these provisions remain intact and, in many instances, form the cornerstone of business models designed to maximise returns from debt collection operations.

One of the greatest risks consumers/debtors are exposed to is the over-recovery of costs, debt collectors' fees and

attorneys' collection commission. It is unfortunate that the legislature did not see fit to repeal ss 57 and 58 of the Magistrates' Courts Act entirely.

Indeed, it would appear that, with the repeal of the Credit Agreements Act, the position of consumers/debtors had, at least in one respect, been weakened: Section 57(2)(c)(ii) of the Magistrates' Courts Act provides that an order in terms of which the debtor is ordered to pay the judgment debt and costs in specified instalments, or otherwise in accordance with his offer, shall be deemed to be an order of the court, mentioned in s 65A(1).

Section 19(d) of the Credit Agreements Act provides that no court shall make an order referred to in s 65 of the Magistrates' Courts Act for enforcing compliance with any judgment for payment by any credit receiver of any amount payable in terms of, *inter alia*, a credit agreement that is an instalment sale transaction (as many credit agreements are). The effect of this before the repeal of the Credit Agreements Act by the NCA, with effect from 1 June 2006, was that a creditor would not be able to make use of the procedure in terms of s 57 of the Magistrates' Courts Act if his claim fell within the ambit of s 19(d) of the Credit Agreements Act.

The NCA does not contain a similar provision to s 19(d) of the Credit Agreements Act. The further effect of this was that the field of application of s 57 was substantially enlarged to the detriment of consumers.

According to recent press reports, a forensic audit by law firm ENS of over 40 000 employees of one of its clients revealed that 30% of them had garnishee orders in place. Some employees had as many as 12. It was found, according to the report, that 59% of the orders were defective or invalid.

Many attorneys make use of the services of field agents who obtain signatures from debtors on consents to judgment, emoluments attachment orders and the payment of costs on an attorney-and-client scale. For this, the field agent charges a fee and, in our experience, often obtains these signed consents from debtors under duress and sometimes by impersonating the sheriff of the court.

Guidance on collection costs

Regulation 47 of the regulations under the NCA (as amended) provides:

'For all categories of credit agreement, collection costs may not exceed the costs incurred by the credit provider in collecting the debt -

- (a) to the extent limited by part C of chapter 6 of the Act, and
- (b) in terms of -
 - (i) The Supreme Court Act, 1959,

- (ii) The Magistrates' Courts Act, 1944,
- (iii) The Attorneys Act, 1979; or
- (iv) The Debt Collectors' Act, 1998,

which ever is applicable to the enforcement of the credit agreement.'

The Attorneys Act 53 of 1979 does not deal directly with attorneys' fees or attorneys' collection commission.

Section 69(d) of the Act provides that the council of each law society is empowered to prescribe the tariff of fees payable to any practitioner in respect of professional services rendered by him or her in cases where no tariff is prescribed by any other law.

In *Blaikie-Johnstone v D Nell Developments (Pty) Ltd and Another* 1978 (4) SA 883 (N) a full court held that a bylaw of the then Natal Law Society that authorised its members to charge collection commission on payments collected at the rate of 10%, subject to a maximum of R 50 per amount collected, was *ultra vires* the then empowering legislation (Act 10 of 1907 (N)). Other law societies had similar bylaws.

In *Scotfin Ltd v Ngomahuru, Ex Parte Law Society of Zimbabwe: In Re Scotfin Ltd v Ngomahuru* 1998 (3) SA 466 (ZHC) it was held that the full extent of work done by the relevant attorney in respect of the collection of uncontested trade debts was not provided for in the tariffs pertaining to the magistrates' courts or the High Courts (of Zimbabwe), with the result that the Law Society of Zimbabwe was entitled to provide 'commission' on such work to be recovered by attorneys. The particular bylaw of the Law Society of Zimbabwe was therefore not *ultra vires* the empowering legislation (at 478G - 480B). The court, however, further held that, although it was permissible for a creditor to enforce a term against a debtor obliging the latter to pay either collection commission or attorney-and-client costs, he or she could not recover both of these. Smith and Gillespie JJ, delivering a joint judgment, held in this regard (having reviewed several judgments in which concerns were expressed relating to the recovery of collection commission):

'The scrutiny that has been given to the subject in this case reveals ... that there is an area of real concern and possible duplication of recoveries. This arises from the widespread practice whereby collection commission, when it is claimed from the debtor, is claimed in terms obliging the debtor to pay "costs of suit on a legal practitioner and client basis and collection commission". This claim no doubt is formulated because the agreement in terms of which collection commission is claimed almost invariably contains also an undertaking by the debtor to pay costs on the higher scale. ...

It must now be apparent that such a

formulation is entirely unacceptable. Collection commission is only claimable in respect of uncontested collections of trade debts. It is only validly provided for where a tariff provides no other fee structure. It must be claimed by the attorney from his client as an alternative to any other fees or disbursements Collection commission is designed to be a means of reward that does not require the complicated and expensive procedure of formulating, and even taxing, a bill of fees in respect of innumerable attendances not provided for in a tariff. The agreement for recovery for collection commission by a creditor from his debtor is calculated to ensure that the creditor is not the loser when the debt is finally recovered after resort to legal practitioners.

Attorney and client costs, in comparison, are those costs for which a client becomes liable to his attorney and which are not recoverable as between party and party in accordance with the normal order of costs of suit. All items that are allowed on the party and party bill will also appear on the attorney and client bill, although not necessarily at the same rate, but many items on the latter will not be permitted on the former. As is well known, costs are awarded at this higher rate only in exceptional circumstances. They may, however, be awarded

when there is agreement to such effect. The purpose of such agreement, quite obviously, is the same as the intention behind an agreement that a debtor will be liable to reimburse his creditor collection commission. It is to ensure that the creditor does not suffer the inevitable loss which will be incurred as a result of the taxation of a party and party bill, even though he recovers his costs' (at 481I - 482G).

It is noteworthy that there are differences in the fees prescribed for debt collectors (annexure B to the Regulations Relating to Debt Collectors, promulgated in GN 1120, 27 November 2009) and, more particularly, the maximum fee of R 348 on any instalment received by a debt collector from a debtor, and the maximum of such fee (commission) permitted by the bylaws of the various law societies (R 1 000).

The pressure of competition among attorneys, in principle, ought to have the effect that rates of collection commission are driven downwards and at levels lower than the maximum prescribed by the different law societies. However, because of the absence of an arm's length relationship between the attorneys and the debt collector entities over which they exercise control, and the fact that such debt collector entities often take cession of creditors' claims, the tenden-

cy is for attorneys to recover the maximum allowable collection commission from debtors, and thus effectively avoiding or lessening competition, maximising their own recovery and prejudicing consumers/debtors.

Conclusion

The NCA and the new magistrates' courts rules have, in some respects, ameliorated the position of defaulting consumers/debtors. In others, they have arguably weakened the position of such debtors. The bedrock of ss 57 and 58 of the Magistrates' Courts Act, on which debt collection through the courts is founded and which continues to facilitate exploitation of consumers/debtors, remains firmly in place, however.

Consideration should be given to repealing these provisions. Legislative reform with regard to the recovery of costs and collection commission is also urgently needed.

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Inexpensive civil remedy for harassment: **The Protection from Harassment Act**

By
Sheethal
Sewsunker

2 7 April 2013 marked more than just Freedom Day for South Africans, as the long-awaited Protection from Harassment Act 17 of 2011 (the Act) came into operation.

Victims of harassment by means of abusive electronic communication via social media platforms, such as Twitter, Facebook and Mxit; as well as sexual harassment; stalking; and school bullying, have greater protection following the enactment of the Act.

Mthunzi Mhaga, spokesperson for the Justice Department, is reported as stating that the legislation was introduced due to the significant increase in the number of harassment complaints (*eNCA* 'New Act could protect youth from harassment on social media' *eNCA* 30-4-2013 (www.enca.com/south-africa/new-act-could-protect-youth-harassment-social-media, accessed 2-5-2013)).



The Act essentially provides protection in the form of an inexpensive civil remedy against harassment that may not amount to a crime but which affects a person's rights to privacy and dignity.

The Act is said to give effect to the recommendations of the South African Law Reform Commission, which carried out an investigation into the legal framework governing stalking behaviour and domestic violence.

Application for a protection order

The application procedure is considered to be straightforward and no legal representation is required. Any person who feels that he or she is being harassed in any way is entitled to apply for an interim protection order in terms of s 2 of the Act, which enables anyone subject to harassment or any form of abuse to approach a magistrate's court for a protection order. The order provides immediate protection as it comes into effect immediately.

According to s 2(6) of the Act, supporting affidavits by those who have knowledge of the harassment may accompany the application.

CANDIDATE ATTORNEY FEATURE

In terms of s 14 of the Act, the order is applied for and issued by the clerk of the local magistrate's court where the applicant lives or works, or where the harasser lives or works, or where the harassment took place.

Luwellyn Landers, the chairperson of parliament's Portfolio Committee on Justice and Constitutional Development, is reported as stating that the complainant is not required to wait for the order to be served on the harasser or for the harasser to acknowledge receipt of the order in order for it to come into operation (*SAnews.gov.za* 'Anti-harassment law comes into effect' *South Africa.info* 25-4-2013 (www.southafrica.info/services/rights/harassment-250413.htm, accessed 1-5-2013)).

The order is to be served on the harasser by the sheriff or a peace officer and the onus to ensure that this is done is on the clerk of the magistrate's court and not the complainant.

Section 10(1)(a) to (c) of the Act provides that the court has the power to prohibit the alleged harasser from engaging in or attempting to engage in harassment; enlisting the help of another individual to engage in the harassment; or committing any other act as specified in the protection order.

The court may further impose any additional conditions in the order that it deems reasonably necessary to protect and provide for the safety or well-being of the complainant. With the aim of further protecting the complainant or a related person (any member of the complainant's family or household or any person in a close relationship with the complaint), the court may direct that the home or work address be omitted from the protection order.

Once the order is granted

As the order is of an interim nature, s 3(3)(c) of the Act provides that the harasser is afforded time to respond and show good cause and reason, on the specified return date, why the order should not be made permanent.

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Section 11(1)(a) of the Act provides that a warrant of arrest must be issued at the same time the order is granted. Section 11(1)(b) provides that the execution of the warrant is suspended pending any non-compliance with the order by the harasser. Should the harasser contravene the protection order and continue to harass the complainant, he or she will be deemed to be guilty of an offence, in which event the South African Police Service (SAPS) may immediately arrest the individual, who is then liable on conviction to a fine or imprisonment for a period not exceeding five years.

Additional protection

Business Day Live reports that: 'Implementation of the Act has been urgently needed to extend the protection of women, particularly those who are poor and cannot afford to take legal action to secure some level of protection from harassment' (W Hartley 'Harassment protection law finally put into effect' *Business Day Live* 29-4-2013 (www.bdlive.co.za/national/law/2013/04/29/harassment-protection-law-finally-put-into-effect, accessed 26-5-2013)).

Before the promulgation of the Act, protection orders could only be obtained by those experiencing physical, sexual or emotional abuse from a person with whom they had a domestic relationship in terms of the Domestic Violence Act 116 of 1998. This shortcoming in the legislation left people who were not in a domestic relationship exposed and unprotected from harassment.

Harassment

Harassment is not restricted to physical or verbal abuse. The Act includes a wide definition of 'harassment' to mean:

- Any direct or indirect conduct that causes harm or causes the complainant or a related person to believe that harm may be caused to him or her by behaviour such as following, watching, accosting and loitering outside of or near the building where the complainant resides, studies, works or carries on business.



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- Engaging in any verbal, electronic or other communication that is aimed at the complainant or a related person by any means, regardless if conversation ensues.
- The sending or delivery of written communication via letters, telegrams, packages, fax, e-mail; or the sending of other objects to the complainant or a related person; or leaving such written communication or objects in a place where they are likely to be found, given to or brought to the attention of the complainant.
- Any conduct that amounts to sexual harassment of the complainant or a related person. 'Sexual harassment' is defined in the Act as any 'unwelcome sexual attention from a person who knows or who reasonably should know that such attention is unwelcome'.

This may include unwanted sexual behaviour, suggestions, messages or remarks of a sexual nature that have the effect of 'offending, intimidating or humiliating the complainant or a related person'. Sexual harassment also includes the making of promises of reward for conforming to a sexual request or the punishment or threat of reprisal for refusing a sexual request.

The following people may apply for a protection order in terms of the Act:

- Anyone who believes he or she is being harassed by another individual.
- Any other person who has a material interest in the well-being of the complainant or a related person can apply for a protection order on his or her behalf. This must be done with the complainant's consent, unless the court is satisfied that he or she is unable to provide such consent.
- A minor under the age of 18, or anyone on behalf of the minor, may make an application to the court for a protection order. It is unnecessary to gain consent or assistance from the minor's parents or legal guardian(s).
- Anyone who is subject to harassment electronically, via the internet, social media sites, text messages or e-mail.
- Any individual who has applied for a protection order in terms of the Domestic Violence Act may also apply for protection from harassment under the Act.

Harassment in the digital age

The Act is sensitive to the differing requirements to combat harassment in the digital age. It caters for circumstances in which the complainant is unaware of the harasser's personal details or where the complainant is being subjected to abuse via anonymous threatening or offensive smses, Twitter messages or e-mails.

Sections 4(1)(b), 5(1)(b) and 6(1)(b) of the Act empower the magistrate's court to issue a directive and order electronic communications service providers to provide it with the full name, identity number and address of the harasser sending the text messages, tweets or e-mails. Further, it may order a member of the SAPS to carry out an investigation into the harassment, with the aim of obtaining the name and address of a harasser whose personal details are unknown to the complainant.

Conclusion

As with any new piece of legislation, the Act's implementation remains key to its success. People need to be educated about their right to be free from all forms of abuse and violence.

The Act is said to primarily benefit those who cannot afford legal remedies that are expensive and vulnerable groups, such as women, children and people with disabilities.

It is fitting that the Act came into operation on Freedom Day. This day is remembered as the day that marks the liberation of South Africa from a period of oppression and imprisonment at the hands of the apartheid government.

The Act is a stark reminder to all that abuse, violence and harassment will not be tolerated, but will be valiantly opposed.

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(Leentjie)
de Jong

Parenting coordination (which is also known as facilitation in the Western Cape and as case management in Gauteng) is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate, non-adversarial, court-sanctioned, private forum.

The primary purpose is to reduce the negative effects of divorce and family separation on children and to protect

and sustain safe, healthy and meaningful parent-child relationships.

A parenting coordinator will first attempt to facilitate resolution of disputes by agreement between the parties and, if this fails, the coordinator will often have the power to make decisions or directives regarding the disputes, which will be binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise.

The coordinator's role includes assessment, education, facilitation, case management, mediation and decision-making. It is argued by mediation organisations, such as the Family Mediators'



Association of the Cape (FAMAC), that when a coordinator issues a decision or directive, he or she does so based on his or her professional opinion and not as an arbitrator. This is because the coordinator is not required to afford the parties a hearing before issuing a directive and because a directive is not final and binding in the sense that an arbitration award is – it is only binding on the parties until set aside or reviewed by a court with jurisdiction in the matter.

Parenting coordination should not, therefore, be seen as a contravention of s 2 of the Arbitration Act 42 of 1965, which currently prohibits the use of arbitration in matrimonial matters.

Because a coordinator's role includes a wide range of functions, it follows that the terms 'facilitation' and 'case manage-

ment', which each describes only one function of a coordinator, are too narrow and should rather be replaced with the internationally accepted term 'parenting coordination'.

As parenting coordination is a relatively new form of alternative dispute resolution, the consistent use of the term 'parenting coordination' is also advisable for the sake of comprehensiveness of professional role development and consistency of practice across South Africa.

Appointment of a coordinator

In some divisions of the High Court a coordinator is appointed as a matter of course in divorce matters in which children are involved, while in other divisions a coordinator is appointed only in

matters that are chronically litigious and difficult to manage.

Parenting coordination should not, however, be overused, and a coordinator should be appointed only where the parties have clearly demonstrated their longer term inability or unwillingness to make parenting decisions on their own, to comply with parenting agreements and orders, to reduce their child-related conflicts, and to protect their children from the impact of that conflict.

In addition, there are chronically litigious and difficult cases where the parties appear to be addicted to conflict, turmoil and/or violence, such that effective parenting coordination will not be possible, and the only solution may be a very specific and rigid court order that leaves little or no room for interpretation.

In this regard, a coordinator should routinely screen prospective cases for domestic violence and decline to accept such cases if he or she does not have specialised expertise and procedures to effectively manage domestic violence cases involving imbalances of power, control and coercion.

Who to appoint as a coordinator

Although at present there are no national accreditation requirements for coordinators, a coordinator should be someone who is deemed to be suitably qualified by training, experience and education.

As far as training is concerned, a coordinator should, at least, have completed a basic 40-hour mediation training programme and be accredited by the National Accreditation Board for Family Mediators (NABFAM) through a local mediation organisation such as FAMAC, the South African Association of Mediators (SAAM) or the KwaZulu-Natal Association of Family Mediators (KAFAM).

In addition, a coordinator should preferably have specific training in the parenting coordination process, which should focus on, *inter alia* –

- the various functions of the coordinator and how to switch between these;
- issues that are appropriate and inappropriate for parenting coordination;
- characteristics of individuals who are suited and those who are not suited to participation in the parenting coordination process;
- when to refer parties to child protection services;
- how to draft, monitor and modify parenting plans;
- appropriate techniques for handling high-conflict parents, child alienation and domestic violence issues;
- when and how to use outside experts effectively;
- when and how to interface with the court system;
- grievance procedures; and
- possible ethical dilemmas.

As far as experience is concerned, a coordinator should have extensive practical experience with high-conflict families.

In practice, coordinators are mostly psychologists, social workers, mediators, family law attorneys or retired judges.

With regard to the selection of a coordinator, the parties may have the option of appointing one by agreement. If they cannot reach an agreement on the choice of a coordinator, the court might select a coordinator for the parties or a local mediation organisation could be authorised to select one. It is extremely important to match the right coordinator with the parties.

While mental health professionals are possibly better equipped to deal with children's issues, an attorney coordinator might get quicker results in persuading some parents to follow a suggested path of cooperation. For this reason, the appointment of both a mental health practitioner and a legal practitioner as co-parenting coordinators could be considered.

Basis of coordinator's appointment and scope of authority

The basis of a coordinator's appointment is either a court order, with or without the consent of the parties, or a parenting plan or settlement agreement between the parties that has been made an order of court.

The court order or relevant clause of the agreement or plan must clearly stipulate the scope of the coordinator's authority. In other words, it must set out whether the coordinator has decision-making authority or merely the ability to assist with the implementation and monitoring of the parenting plan between the parties. If it includes decision-making powers, the order or relevant clause must further indicate on which issues the coordinator may make decisions; for example, do these matters include only minor issues such as one-time changes in timeshare schedules, school activities, health care, child care and child-rearing practices, or do they include major issues, such as relocation and substantial changes to the parenting plan or court order regarding care and contact?

Parties, legal practitioners and the courts should be cautious about giving too much power to a coordinator, especially one who is not suitably qualified. The order or relevant clause should further set out the multiple functions of the coordinator, the manner in which a coordinator is to be selected, how disputes will be referred to the coordinator, whether the coordinator will have access to any persons involved with the family, whether the coordinator can make decisions or directives in the absence of a reluctant or uncooperative party, how decisions or directives will be commu-

nicated to the parties, the procedure to have a coordinator's decision or directive reviewed or set aside by the court, how the costs of retaining the services of a coordinator are to be paid, and how and when the parenting coordination process can be terminated by either of the parties or the coordinator.

Lastly, as some parties will attempt to have coordinators removed from their case simply because they disagree with a coordinator's decision or directive, it is suggested that the court order or relevant clause should grant quasi-judicial immunity to the appointed coordinator. Nevertheless, provision should be made for a grievance procedure that a disgruntled party may follow.

The parenting coordination process

At the commencement of the parenting coordination process, it is advisable for a coordinator to have both parties sign a written statement of understanding containing the parameters of the coordinator's authority and the other aspects of the parenting coordination work as set out in the court order or the parenting plan or settlement agreement in terms of which the coordinator is appointed.

In addition, the statement of understanding must set out clear rules for contact and engagement outside of scheduled parenting coordination sessions, such as the kind of communication that will be used; boundaries for the number, length and tone of messages allowed; absence of on-call services by the coordinator; and the response time for interactions between the parties and between the parties and the coordinator.

It is also important to state that there is limited confidentiality in the parenting coordination process and parenting coordination does not constitute therapy, psychotherapy, child-custody evaluation or legal advice.

It is advisable for a coordinator to meet with the parents individually at the outset to obtain a history of the relationship, screen for domestic violence or other reasons why the process might be inappropriate, and get information about the children involved and an idea of the relevant issues.

Thereafter, joint weekly meetings could be held with both parents and the coordinator until the initial issues have been resolved by the parties or decided on by the coordinator. The parties need to be notified in writing of all decisions made by the coordinator.

Although a coordinator is not neutral regarding the outcome of particular decisions, he or she must maintain impartiality in the process and take heed that the process does not become an adversarial battle between him- or herself and one of the parties.

Over time, as co-parenting communication and skills develop, the need for joint meetings usually decreases until they are needed once a month, once a year or on an as-needed basis.

The coordinator will also meet with the parties' children on an as-needed basis to explain the coordinator's role and to get to know them and to ascertain their feelings about the relevant issues.

Further, although the parenting coordination process is designed to operate outside the court house, it is advisable that there should be contact between a coordinator and the judge who is responsible for the coordinator's appointment in circumstances where a coordinator is having difficulty with any of the parties.

The parenting coordination process will be terminated when it is no longer effective or needed by the family, when the parties agree to remove the coordinator or when the court removes the coordinator from that role. Some of the most frequent reasons for removing a coordinator are allegations of bias, creation of conflict with the coordinator by refusing to pay his or her fees and dissatisfaction with a coordinator's directives.

Parenting coordination in South Africa

The first reported case dealing with parenting coordination is *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC). This case concerned disputes about the schooling, maintenance and other matters affecting the best interests of two children born of unmarried parents.

In the judgment, Davis J placed the judicial stamp of approval on facilitation by ordering that any dispute with regard to the payment of any medical expenses for the children or with regard to contact between them and their deceased father's family should be referred to a FAMAC-appointed facilitator, who would be entitled to facilitate these disputes and make rulings that were binding on the parties, unless the rulings were varied by a competent court or by the facilitator following a separate review. The court further ordered that the facilitator's costs should be shared equally between the parties unless the contrary was directed by the facilitator.

Through this order, a great deal of authority was assigned to the facilitator – not only was the facilitator authorised to make directives on the children's issues, but he or she was also given the authority to vary his or her rulings and to make decisions on how the facilitator's costs were to be apportioned between the parties.

It is therefore of the utmost importance that the facilitator be suitably qualified by training, experience and education to effectively handle this responsibility.

In another judgment of the Western Cape High Court, Gangen AJ, in *CM v NG* 2012 (4) SA 452 (WCC), ordered that a facilitator be appointed after the separation of same-sex partners, to assist them with joint decision-making, as well as the drafting of a parenting plan in respect of their child.

The court provided for a FAMAC-appointed facilitator when the parties could not agree on one, and ordered that the facilitator's costs should be shared equally between the parties unless directed otherwise by the facilitator. All disputes between the parties concerning the child's best interests were to be referred to the facilitator in writing and the facilitator's decisions were to be binding on the parties in the absence of a court order to the contrary.

However, in the recent case of *H v H* (GSJ) (unreported case no 2012/06274, 12-9-2012) (Sutherland J) the South Gauteng High Court was not prepared to grant a father's application for the appointment of a case manager to deal with and make decisions about certain post-divorce parenting conflicts between him and his former wife in respect of their child.

The case manager was previously appointed by the divorce court, with the consent of both parties, to assist in concluding a parenting plan. Despite the case manager's intervention, the parties

did not conclude a parenting plan and a clash of opinion on an appropriate nursery school for the child gave rise to the father's application.

Sutherland J held that no court had the jurisdictional competence to appoint a third party to make decisions about parenting for a pair of parents who are holders of parental responsibilities and rights in terms of ss 30 and 31 of the Children's Act 38 of 2005.

At para 7 of the judgment, he held: 'The notion of a "case manager" is one that derives from the practice of the courts and is not a label used in the Act.'

From the court's discussion of other cases in which case managers were appointed in the South Gauteng High Court, it appears that Sutherland J was of the opinion that a case manager can be appointed by agreement between the parties only and not on application by one parent.

The judge did not distinguish between the different roles of a mediator and a case manager and was of the view that the appointment of a decision-maker to break deadlocks was a delegation of the court's power that constituted an impermissible act and amounted to 'an arbitration of sorts'.

The judge did not accept the arguments on behalf of the applicant in support of the appointment, namely that s 7(1)(n) of the Children's Act, which pro-

vides that a court must weigh which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child, should be considered; that the power of the court as the upper guardian of minor children should be invoked; and that s 38 of the Constitution, which addresses the need for a court to craft a remedy for every right the Constitution confers, should be used.

The application was accordingly dismissed. The judgment has, however, been taken on appeal to the Supreme Court of Appeal.

The future of parenting co-ordination in South Africa

Until such time as the Supreme Court of Appeal delivers judgment in the *H* case, the position of parenting coordination in South Africa remains uncertain. Only time will tell whether FAMAC's argument, that parenting coordination does not amount to arbitration, or the opinion of Sutherland J, that parenting coordination does indeed amount to arbitration, will prevail.

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Promise to pay – prolonging prescription

By
Lalena
Posthumus

'When does an acknowledgment of debt amount to a promissory note?'

There is a significant intersection between the Bills of Exchange Act 34 of 1964, the Prescription Act 68 of 1968 and acknowledgments of debt.

Many attorneys regularly draft and use acknowledgments of debt in their practices. A claim arising from an acknowledgment of debt will prescribe in three years as it is an ordinary debt in terms of the Prescription Act.

However, it may be possible to draft an acknowledgment of debt in such a way that it becomes a negotiable instrument, thus extending the period of prescription.

This may be the difference between a client being able to collect on a debt or not.

Acknowledgments of debt

There are acknowledgments of debt that are only acknowledgments of debt; and others that amount to both an acknowledgment of debt and a promissory note.

The relevance of this distinction lies in s 11 of the Prescription Act, which provides:

'Periods of prescription of debts

The periods of prescription of debts shall be the following:

...

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of parliament provides

otherwise, three years in respect of any other debt.'

Whereas a debt arising from an acknowledgment of debt will prescribe in three years, a promissory note is a negotiable instrument, and a debt arising from a promissory note will prescribe after six years.

The question then is: When does an acknowledgment of debt amount to a promissory note?

A promissory note?

Section 87(1) of the Bills of Exchange Act contains the following definition of a 'promissory note':

'A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.'

There is no definition of 'negotiable instrument' in the Bills of Exchange Act. However, it is not disputed that a promissory note is a negotiable instrument.

All of the provisions of the Bills of Exchange Act apply to promissory notes, save for the sections mentioned in s 93(3) of the Act.

As negotiable instruments, they will fall within the prescription period specified in s 11(c) of the Prescription Act.

The elements identified in the above definition are important for recognising a promissory note, and for drafting one. The definition of a promissory note is substantially similar to that

of a bill of exchange and the case law on the above elements may be of assistance when drafting a promissory note.

What then constitutes the elements that determine what is required for a document to qualify as a promissory note?

These are discussed below.

- **Unconditional:** In order for a note to be negotiable, it must be unconditional. A condition is a term that makes an obligation to perform dependent on whether or not an uncertain future event happens (Dale Hutchinson (ed) *The Law of Contract in South Africa* (Cape Town: Oxford University Press South Africa Pty Ltd, 2009) at 448). For examples of where a note will be unconditional, see ss 2(3) and 9(2) of the Bills of Exchange Act.

- **Promise:** A promise is an undertaking to pay and cannot be anything less. It must be in the imperative form. In *LAWSA* 2ed (Durban: LexisNexis) vol 19 at para 17 it states: 'A promissory note should read "I promise to pay", "I agree to pay", "I undertake to pay" and so on.'

An undertaking to pay will not be implied, as seen in *Nawab Major Sir Mohammad Akbar Khan v Attar Singh* 1936 2 All ER 545 (PC).

It is this element that will change an acknowledgment of debt into a promissory note and, thus, close attention must be paid to ensuring that this element is complied with in order for an acknowledgment of debt to become a promissory note.

- **In writing:** According to s 3 of the Interpretation Act 33 of 1957, writing includes 'all ... modes of representing or reproducing words in visible form'.

- **Addressed by one person to another:** According to s 4(1) of the Bills of Exchange Act, the person to whom the promise is made must be named or indicated with reasonable certainty. It may be addressed to more than one person, but not in the alternative (s 4(2) of the Bills of Exchange Act).

- **Signature of the promissory:** The Bills of Exchange Act does not prescribe any particular form of signature, but the relevant case law gives some indication in this regard. Any mark that identifies the promissory will be sufficient.

- **On demand:** A note is payable on demand if it is expressed to be so, if it is payable at sight, if it is payable on presentation, or if no time for payment is expressed in it (s 8(1)).

- **A fixed future time or a determinable future time:** A note is payable at a fixed future time if it is expressed to be payable at a fixed period after the date or on or at the expiration of a fixed period after the occurrence of a specified event that, even though the time of happening may be uncertain, it is certain that it will happen (s 9(1)(a)).

- **A certain sum:** The amount must be certain or ascertainable *ex facie* the instrument. If it is necessary to look out-

side the document for the amount due, then the document is not a negotiable instrument (see *Hamman v Van der Merwe* [1947] 1 All SA 369 (SWA)).

According to s 7(1), an amount is certain although it is payable with interest, by stated instalments, where, on default in payment of any instalment, the whole amount becomes due by provision in the note, or according to a rate of exchange to be indicated or to be ascertained by the note.

- **Money:** The promise to pay must be for a sum of money and no other thing of value. Should there be any other thing of value promised, then the document containing the promise is not a promissory note (*LAWSA* 2ed (Durban: LexisNexis) vol 19 at 22).

- **To a specified person:** The person must be named or otherwise indicated in the bill with reasonable certainty (s 5(1)) (see *Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* 1986 (4) SA 488 (T)).

According to s 5(2), an instrument can be payable to two or more payees jointly or in the alternative.

- **Or his order:** A note will be payable to order if it is expressed to be so, or if it is expressed to be payable to a particular person and does not prohibit transfer or transferability of the note (s 6(3)).

- **Or to bearer:** A note is payable to bearer if it is expressed to be so or if the last endorsement is an endorsement in blank.

Case law: Future or determinable time

In *Salot v Naidoo* 1981 (3) SA 959 (NPD) the plaintiff sued the defendant via a provisional sentence summons based on a document described as an acknowledgment of debt, in terms of which the defendant undertook to pay the plaintiff a certain sum of money 'on or before' a certain time. The defendant pleaded prescription as a defence but the plaintiff argued that the acknowledgment of debt was a promissory note, was thus a negotiable instrument and had not prescribed in terms of s 11 of the Prescription Act.

The case was decided on the authority of the English case *Williamson and Others v Rider* (1962) 2 All ER 268, in which an agreement to pay 'on or before' a certain date was not considered to be a promissory note as defined in the English Bills of Exchange Act 1882 (which contained the same definition of 'promissory note' as the equivalent section in the South African legislation) because the money was not payable at a fixed or determinable future time. The reasoning was that the time in which the money was to be paid was limited, but not fixed.

The judge in the *Salot* case agreed with this reasoning and ordered that, because the acknowledgment of debt was not a promissory note, the claim had thus prescribed.

The court in *Weszak Beleggings (Edms) Bpk v Venter* [1972] 2 All SA 124 (T) also concluded that a document promising to pay 'on or before' or 'within' a certain date only limited the time when payment must be made, but did not fix it. Thus, the document did not fall within the definition of a promissory note.

Contrary to these cases is *Allwright v Gluck* 1962 (1) SA 562 (W), in which an acknowledgment of debt with a promise to pay 'not later than' a certain date was held to be a promissory note.

This case is difficult to distinguish from the cases mentioned above and the law is therefore not entirely clear on this issue.

It is advisable to avoid this type of language with regard to determining a time for payment.

Conclusion

When will an acknowledgment of debt qualify as a promissory note?

As FR Malan states:

'A promissory note is a promise. A promise is an undertaking to pay and involves more than an acknowledgment of debt with an implied undertaking to pay An acknowledgment of debt is not a promissory note but, coupled with an express undertaking to pay, it could be' (FR Malan *Malan on Bills of Exchange, Cheques and Promissory Notes* 4ed (Durban: Butterworths 2002) at 464 - 465).

The key is the wording of the acknowledgment of debt. An acknowledgment of debt must specifically comply with the definition of a promissory note in s 87(1) of the Bills of Exchange Act in order to be a promissory note, which means that it must contain the elements mentioned above.

An acknowledgment of debt will normally comply with most of these elements and very little adjustment is needed to draft a promissory note.

It is thus easy to convert an acknowledgment of debt into a promissory note.

When acting for a creditor, it is advisable when drafting acknowledgments of debt to consider including the elements required for a promissory note. This should obtain for your client three extra years before the claim will prescribe.

No attorney would like to be in the position of having to respond to a client's accusation of negligence for failing to ensure that the client's interests were best served by obtaining six years, instead of a mere three, before any claim under the document drafted by the attorney prescribes.

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By
Ben
Winks

Expropriation – a minefield?

Agri SA v Minister of Minerals and Energy (CC)
(unreported case CCT 51/12, 18-4-2013) (Mogoeng CJ)

The Constitutional Court (CC) recently delivered judgment in one of South Africa's first tests of transformative legislation aimed at fundamental economic reform.

The *Agri SA* case offered an opportunity to clarify the meaning of one of the most controversial provisions in the Bill of Rights, the so-called 'property clause'. Instead, it has arguably rendered the legal content and consequences of the clause more uncertain than ever.

Background

When the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) entered into force on 1 May 2004, it reformed the mineral rights regime in South Africa. The Act provides that the state, as custodian of these resources for the benefit of all South Africans, may grant, refuse and administer mineral rights and charge royalties for their exploitation.

The MPRDA introduced detailed transitional arrangements, including affording the holders of unused old order rights (rights to minerals in respect of which no prospecting or mining had yet commenced) a grace period of one year to apply for new order rights.

Before 1 May 2004, a company called Sebenza held coal rights in respect of certain farms, but it was wound-up before conducting any prospecting or mining. These rights were thus 'unused old order rights' under the transitional provisions of the MPRDA and, as Sebenza was not able to apply for new order rights in time, they expired on 1 May 2005.

Sebenza's liquidators deemed the coal rights expropriated and claimed compensation from the Department of Mineral Resources, which rejected the claim. *Agri SA* took cession of the claim and brought it to the North Gauteng High Court as a test case.

The High Court defined 'expropriation' as deprivation of property and acquisition of substantially the same property by the state. It found that the MPRDA not only destroyed pre-existing mineral rights but vested the substance of these rights in the state, thus effecting not only the deprivation, but also the expropriation, of unused old order rights, for which just and equitable compensation was payable.

The Minister of Mineral Resources appealed to the Supreme Court of Appeal (SCA), which agreed broadly with the High Court's definition of 'expropriation', but disagreed that the MPRDA had such an effect. It held that the essential 'right to mine', from which all mineral rights are derived, had always been vested in the state and allocated by it to private parties in differing degrees over the years. The SCA thus held that the MPRDA did not effect a blanket expropriation of mineral rights.

Agri SA approached the CC, which granted leave to appeal but subsequently

dismissed the appeal. Dissenting views were, however, expressed in a minority judgment and a separate judgment by Cameron J.

Majority judgment

The majority agreed with the High Court and the SCA on the definition of 'expropriation'. However, it disagreed with the SCA on the application of that definition to the MPRDA.

Whereas the SCA effectively found that Sebenza's mineral rights had not constituted property, the majority of the CC held that, before the MPRDA, the right to exploit minerals was inextricably linked to ownership of those minerals and the SCA's distinction between mineral rights and the 'right to mine' was unclear and misleading.

Originally, mineral rights included ownership of minerals and the right to exploit them. Even when the state assumed regulatory authority over mineral extraction, it could only permit mineral owners to extract them. When the state sought to compel mineral exploitation by third parties, it recognised mineral owners' proprietary interests by requiring the payment of royalties or by expropriating their mineral rights against payment of compensation. Moreover, the SCA had ignored the right not to mine as an essential component of mineral ownership.

Accordingly, the majority of the CC held that mineral rights were property with economic value.

The court found that the MPRDA deprived pre-existing mineral right holders of elements of that right, but such deprivation was not arbitrary in light of the objects of the MPRDA and the transitional arrangements.

The key question was whether such deprivation amounted to expropriation.

To establish expropriation, the majority held that the state must have acquired the 'substance or core content' of the property in question.

It approached 'acquisition' through a holistic and historical interpretation of s 25 of the Constitution, which it stated 'sits at the heart of an inevitable tension between the interests of the wealthy and the previously disadvantaged' and must be read 'with due regard to the gross inequality in relation to wealth and land distribution'. In this light, private property rights should not be over-emphasised at the expense of the state's social responsibilities.

The majority held that 'an overly liberal interpretation of acquisition' could blur the line between deprivation and expropriation, and undermine the constitutional imperative to transform the economy. Acquisition must be determined contextually in each case, considering the source, nature and content of the affected rights, as well as measures taken to interfere with them or preserve their essence.

Accordingly, the majority found that, although the MPRDA effected compulsory

deprivation of mineral rights and vested the state with custodianship over them, along with the power to grant to others what could previously only be granted by mineral right holders, the state did not thereby 'acquire' those rights, as it had not become the owner of mineral resources for its own benefit, but was their custodian.

Minority judgment

The minority agreed that the appeal should fail, but for different reasons. It was of the view that state acquisition was not an essential element of expropriation, but the state had, in any event, clearly acquired the powers previously held by mineral owners.

The minority argued that the conventional formalistic approach to expropriation was inappropriate for large-scale transformational legislation such as the MPRDA.

Applying an unprecedented approach, the minority held that the MPRDA must be interpreted in a manner that best accords with the spirit, purport and objects of s 25 of the Constitution.

By preserving old order rights for a limited time and affording their holders the exclusive competence to convert them into new order rights, the MPRDA had provided those holders with 'compensation in kind' for the loss of their mineral rights, which 'should be read as giving alternative legislative content to the just and equitable compensation provision for expropriation in section 25(3)'.

This approach would allow courts to 'cut to the chase' to determine whether 'compensation in kind' is just and equitable, 'without having to wrestle their way through the formalistic requirements for expropriation'.

It also allows for the possibility of proving that the 'legislative balancing' might not have been just and equitable and that further compensation might be payable.

Judgment of Cameron J

Cameron J concurred with the majority, except to the extent that he agreed with the minority that state acquisition, although a 'general hallmark' of expropriation, was not required in all cases.

Analysis

In my view, the majority judgment was correct in rejecting the SCA's approach and in holding that the MPRDA effected a deprivation of property.

With respect, however, in my view there are three difficulties with the majority's reasoning.

Criticism of the judgment

The first difficulty is the sweeping assumption that state acquisition is an essential element of expropriation. Although this appeared to be common cause between the parties, and was not rigorously interrogated by the lower courts, the CC was, for the first time, faced with defining this

important concept in the Bill of Rights. It is thus unfortunate that the minority's warning against adopting such a sweeping position was not heeded.

The second difficulty is the finding that the state did not acquire the mineral rights previously held by private parties. As the minority illustrated, the powers previously enjoyed by mineral owners are now substantially vested in the state. This is clearly 'acquisition' by the state.

The majority's reasoning that the state cannot be considered to have acquired property that it seeks not for its 'own' benefit, but for the benefit of the public is, with respect, unpersuasive. It is unclear what benefit the state could seek to serve apart from the public benefit. Expropriation presupposes the pursuit of a public purpose or public interest; otherwise it is unlawful and unconstitutional. In the absence of some definition and distinction of the 'private' interests of the state (which, arguably, cannot exist), it is unclear how expropriation could ever be established under the majority's approach.

The third difficulty is analysing acquisition as a matter of intent rather than effect.

The proper approach appears to be that acquisition is a question of 'whether', not of 'why', and that the state either has or has not acquired certain property, irrespective of what it plans to do with it.

The majority improperly imports the justification for acquisition into the analysis of whether an acquisition has occurred.

This features in the minority judgment too. The minority held that state acquisition, while not required to establish expropriation, in any event occurred, but it did not clearly commit to finding that the MPRDA effected an expropriation.

It eschews this inquiry entirely, deeming it unduly formalistic, and proposes an alternative, whereby the MPRDA is measured against the spirit and scheme of s 25 of the Constitution, and is found to be consistent with its prescripts of justice and equity.

It is unclear why the minority considered it necessary to conceive such an innovative angle to the application of the Bill of Rights when it could have achieved the same result through a more conventional analysis and, indeed, through s 36 of the Constitution.

Like the majority, it embarks on an exercise in justification, which is preceded by an acknowledgment of a limitation of rights. However, the word 'limitation', in this sense, is not used.

If the MPRDA effected an expropriation, as the minority seems to suggest, then a limitation of rights is revealed.

Section 25(2) of the Constitution states: 'Property may be expropriated only in terms of law of general application -

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of pay-

ment of which *have either been agreed to by those affected or decided or approved by a court*' (my emphasis).

Even if one accepts the proposition that the MPRDA provided just and equitable 'compensation in kind', it still falls foul of the standard set by s 25(2), as it was not 'agreed to by those affected or decided or approved by a court'.

It is not suggested that the guarantees in s 25(2) are immune from justified limitation, nor that it is impermissible to depart from the prescript that compensation be 'agreed to by those affected or decided or approved by a court'.

On the contrary, s 25(8) of the Constitution clarifies that no provision in s 25 'may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)'.

Far from unprecedented, this approach finds support 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) at para 110 and, more directly, in *Nhlabathi and Others v Fick* (LCC) (unreported case no LCC 42/02, 8-4-2003) (Bam P and Gildenhuis J) at paras 32 to 34.

The minority alludes to a similar approach in European human rights jurisprudence, but does not locate it in a limitations analysis. In any event, it applies the language and logic of justification to its inquiry, although using a less rigorous rubric than s 36(1).

Its approach is imprecise in tracing the contours of the right to property in a transformative context, and leaves it unclear whether or not the MPRDA limits property rights. Thus, the minority, more so than the majority, may have clouded, rather than clarified, the future interpretation and application of s 25.

In the separate judgment of Cameron J, he concurred with the majority that the MPRDA did not result in acquisition of that property by the state; however, he disagreed that state acquisition is an essential element of expropriation. It is not clear, therefore, whether and why Cameron J deems that the MPRDA did or did not effect an expropriation.

Implications for economic transformation and expropriation in general

It is arguable that a more cogent and consistent route was available to the CC, namely to find that the MPRDA -

- did effect an expropriation of pre-existing mineral rights;
- did not provide the precise specification of compensation promised in s 25(2);
- but constituted a reasonable and justifiable limitation of that right, given the importance of its purpose, the pursuit of

which was proportional in light of, among others, the transitional measures taken to minimise disruption.

In this way, the court could have provided a much-needed constitutional template for transformative economic reforms.

Instead, the majority effectively denies that s 25 of the Constitution applies to transformative legislation, while the minority proposes that it applies in imprecise spirit rather than in clear letter. The judgment is thus, with respect, unhelpful in charting a coherent jurisprudential course through the difficult project of ensuring equitable distribution and sustainable development of the nation's natural wealth.

An important instrument in the state's pursuit of reform is its power to expropriate, currently regulated by the Expropriation Act 63 of 1975. To replace this Act, a draft Expropriation Bill was published in March 2013. Apart from some concerning aspects, the draft Bill represents a workable basis for developing a comprehensive and constitutionally sound procedural framework for expropriation.

However, the judgment in the *Agri SA* case has rendered the draft Bill inadequate, as it is silent on the substantive content of expropriation, and does not define the concept.

The draft Bill recites the constitutional prescript that property may only be expropriated for a public purpose or in the public interest, but does not meaningfully define these terms.

This is critical, as a strict reading of the majority judgment in the *Agri SA* case creates the conundrum that, if indeed expropriation is undertaken 'for a public purpose or in the public interest', it is not expropriation at all, as the state has not 'acquired' the property.

Thus, currently, the draft Bill does not delineate the circumstances of its own application. The reason for its substantive silence is obvious: To date, the debate assumed a conventional understanding of expropriation and focused instead on how it should be exercised and how much compensation it should justify.

An authoritative judgment may have helped to frame future discussion. It is ironic, therefore, that the judgment delivered in the *Agri SA* case did not answer the questions raised, but rather undermined the existing understanding of expropriation, replacing it with far more questions than answers.

- See 2011 (July) *DR* 47 and 2011 (Nov) *DR* 40.

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THE LAW REPORTS

May 2013 (3) *The South African Law Reports* (pp 1 – 322); [2013] 2 *The All South Africa Law Reports* April no 1 (pp 1 – 124); and no 2 (pp 125 – 250)

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

ABBREVIATIONS:

GSJ: South Gauteng High Court
NWM: North West High Court, Mafikeng

SCA: Supreme Court of Appeal

WCC: Western Cape High Court

Advocates

Appointment as SC: The facts in *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) were as follows. Mansingh was a practising advocate in Johannesburg. She brought an application against, *inter alia*, the President of the Republic of South Africa, the General Council of the Bar (GCB) and the Johannesburg Society of Advocates (JSA) for the court to declare that the President did not have the power under s 84(2)(k) of the Constitution to confer the status of senior counsel (SC) on practising advocates.

The application was opposed by the President, the Justice Minister, the GCB, the JSA and the Independent Association of Advocates of South Africa. The Law Society of South Africa intervened, but, in essence, supported the application.

The court *a quo* held that the President had no power to confer SC status. The power to award the status of SC was a prerogative power of the king, queen or the President under previous constitutional dispensations. These powers had not been accorded to the President under the Constitution. It held that the power the Constitution accorded on the President to award 'honours' did not include the power to confer the status of SC on advocates. The court *a quo* thus

granted Mansingh's application.

On appeal to the SCA by the GCB and the JSA, Brand JA held that the Constitution bestows the power on the President to confer certain 'honours' on individuals. There is nothing in the broader context that compels a meaning of 'honours' that deviates from the one clearly indicated by the historical background of the provision contained in s 84(2)(k) of the Constitution. The court thus concluded that the power to confer honours, bestowed on the President by s 84(2)(k), includes the authority to confer the status of SC on practising advocates.

The appeal was accordingly upheld. With regard to costs, the court pointed out that this was one of those rare occasions where none of the parties had asked for the costs of appeal in its favour. As to the costs in the court *a quo*, the appellants did not ask for any order against Mansingh. In consequence, the SCA made no order in their favour either. Since no appeal had been lodged against the costs order in the court *a quo*, the court held that it must stand, despite the fact that all the respondents should have succeeded in the court *a quo* 'in warding off the declarator sought'.

• See 2013 (May) *DR* 10.

Company law

Deregistration and reinstatement: In *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC) the WCC held that reinstatement of registration under the Companies Act 71 of 2008 (the 2008 Act) does not have retrospective effect.

The facts in the case were as follows. Bright Bay Property Services (Bright Bay) sued the Moravian Church for specific performance in terms of an agreement. Under the agreement, the Moravian Church undertook to assist Bright Bay in obtaining licences and permits to mine on a farm owned by the Moravian Church. After the conclusion of the agreement, but before performance had taken place, Bright Bay was deregistered in July 2010. Bright Bay applied, in terms of s 73(6)(a) of the Companies Act 61 of 1973 (the 1973 Act), for reinstatement in January 2011 and was reinstated in February 2012.

Section 73(6)(a) contained the provision that, on restoration, a 'company shall be deemed to have continued in existence as if it had not been deregistered'.

While Bright Bay's application for reinstatement was pending, the 2008 Act came into force and repealed the 1973 Act. The 2008 Act, too, provides for reinstatement of a company (in s 82(4)), but does not contain a deeming provision like s 73(6)(a) of the 1973 Act.

As a defence, the Moravian Church claimed that Bright Bay had been deregistered and this had triggered a resolutive condition in the agreement.

The crisp question was which Act governed the reinstatement of Bright Bay – the 1973 Act or the 2008 Act?

Henney J held that it was the legislature's intention to do away with the retrospective effect of reinstatement. The legislature must be taken to have been aware of the express regulation of the retro-

spective effect in s 73(6)(a) of the 1973 Act. As a result, so the court reasoned, the legislature must, therefore, have taken a conscious decision not to re-enact it.

The court referred to the earlier decision in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ), in which Van Oosten J held that a High Court could exercise its inherent jurisdiction to validate an act of a company that it had performed in the period between its deregistration and reinstatement.

The court in the present matter rejected the decision in the *Fintech* case because, so it reasoned, there was no basis in law for the court to grant such relief. The legislature had not included the 1973 Act's retrospectivity provisions in the 2008 Act and, if a court were to validate acts performed between deregistration and reinstatement, it would in effect negate the legislature's intention. The 1973 Act had given courts and registrars the power to reinstate companies and, on reinstatement, they were regarded as never having been deregistered. However, courts and registrars never had the power to validate acts performed between deregistration and reinstatement.

The mining permit issued in the period that Bright Bay was deregistered was thus issued to a non-existent entity and was void.

Thus, Bright Bay could not compel the Moravian Church to perform under the contract. The court refused the relief requested in terms of the notice of motion for specific performance, with costs.

Personal liability of directors: In *Bellini v Paulsen and Another* [2013] 2 All SA 26 (WCC) the court was asked to pronounce on the meaning of the phrase 'conducting the business of a company recklessly and fraudulently', as enunciated in s 424 of the Companies Act 61 of 1973 (the Act).

The plaintiff, Bellini, was a creditor of a company in liquidation. The first and second defendants were directors of the company. The two directors (on behalf of the company) bought certain technology from Bellini. At all relevant times the directors were aware that the company was unable, and would never become able, to pay its debts to Bellini. Under cross-examination, the first defendant, who testified on behalf of the defendants, admitted to this.

Bellini sought to hold the directors liable for the debts and other liabilities of the company by virtue of s 424 of the Act.

Mansingh AJ held that, on the evidence presented, the first director had concluded an agreement through the

company at a time when it had no assets, no bank account and no means of paying any debt incurred on its behalf.

After the court examined the evidence, it held that the first director was untruthful in the relevant transactions. This conduct, in turn, constituted not only reckless conduct but the court also held that there was a 'wilful perversion of the truth with intent to defraud'.

The court further held that 'recklessness' must be given its ordinary meaning. It requires gross negligence in the form of *culpa lata* (not necessarily *dolus eventualis*), not only in relation to foreseen circumstances, but also to culpably unforeseen consequences, whatever they may be.

The two directors failed to act as reasonable business people. Their conduct, measured against the provisions of s 424(1) of the Act, constituted fraudulent and reckless management of the company's affairs.

The two directors were thus held liable to the plaintiff, in terms of s 424(1) of the Act, for the debts incurred by the company.

Contract law

Place of payment: In *Bush and Others v BJ Kruger Incorporated and Another* [2013] 2 All SA 148 (GSJ) the court held that payment by means of an electronic funds transfer (EFT) occurs when the party entitled to the payment actually receives the money in his or her bank account. The mere instruction by the transferor to his or her bank to transfer the money does not constitute payment.

The dispute between the parties arose from money advanced by the plaintiffs to the first defendant, a firm of attorneys, of which the second defendant was the sole member. When the plaintiffs sought repayment of the money, the defendants failed to oblige. There was no real dispute that the plaintiffs had advanced the money. However, the defendants alleged that the money was paid as an investment in property and the plaintiffs alleged that the money was paid to the defendants as part of a bridging finance transaction.

The agreement between the parties provided that the first

defendant had to repay the capital investment plus interest to the plaintiffs. The second defendant's bank account was situated in Pretoria. The plaintiffs' bank accounts were held in Johannesburg. The money had to be repaid by way of an EFT from the first defendant's bank account in Pretoria to the plaintiffs' accounts in Johannesburg.

One of the issues at stake was whether the GSJ, situated in Johannesburg, had jurisdiction to hear the matter. The aspect of jurisdiction, in turn, hinged on whether payment took place in Pretoria or Johannesburg.

Wepener J held that payment had to be effected in the plaintiffs' Johannesburg bank accounts and, therefore, in the GSJ's jurisdiction. Payment by an EFT occurs only when the party entitled to such payment receives it in his or her bank account. Payment would therefore only have been made and completed when the money became available in the plaintiffs' Johannesburg bank accounts.

The court rejected the defendants' reliance on earlier case law (*Salmon v Moni's Win-*



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eries Ltd 1932 CPD 127; *Blumberg v Sauer* 1944 CPD 74; and *Buys v Roodt (now Otto)* 2000 (1) SA 535 (O) in which it was held that payment takes place when the instruction for payment is given. This earlier case law dealt with cheques and the place of payment where the cheque was payable. The place of payment of a cheque and the place where a debtor instructs its bank to effect a payment in terms of an EFT is not the same. An act of effecting an electronic transfer in Pretoria does not, in itself, constitute payment. It is the receipt of money in the bank account of the recipient that constitutes payment.

Because the instruction to transfer the money had been given from a Pretoria bank account, while the accounts to which the money was to be transferred were in Johannesburg, the court had little difficulty in correctly identifying Johannesburg as the place where actual payment had to take place.

The court accordingly held that the GSJ had jurisdiction to hear the matter.

It granted judgment in favour of the plaintiffs and held the defendants jointly and severally liable for the amount borrowed.

Rei vindicatio. In *Rhooe v De Kock and Another* 2013 (3) SA 123 (SCA) the respondent sellers sold certain immovable property in George to the appellant buyer. The deed of sale was signed by both sellers, who were married in community of property and in whose names the property was registered. It contained a suspensive condition that a loan for the full purchase price, to be secured by a mortgage bond, would be obtained by the buyer before a certain date.

The buyer paid part of the price (R 400 000), but failed to obtain the loan in time.

The buyer and one of the sellers then attempted to extend the deed of sale. However, these amendments were not signed by the second seller. The agreement failed and the sellers sued the buyer to recover the property, relying on *rei vindicatio*.

The buyer argued that the sellers had to tender repayment of the R 400 000 he had paid them in order to complete their cause of action.

Cloete JA held that the sellers did not need to tender repayment of the money, as their cause of action (ie, the *rei vindicatio*) was complete without it.

The court pointed out that the buyer had a claim in unjustified enrichment for the money he had paid to the sellers.

The mere fact that the buyer would be entitled to repayment of the R 400 000 (absent a defence), in order to prevent the sellers being unjustly enriched, did not mean that the buyer was entitled to resist ejectment until the amount was repaid or tendered.

The court explained that, in those cases where the *rei vindicatio* was not available and there had been part performance under a void contract, a party would have no option but to sue for restitution. He or she then had to tender restitution of what had been received under the void contract.

Further, there was no mention of a lien in the present case.

The appeal was dismissed with costs.

Delict

Defamation – social media: In *H v W* [2013] 2 All SA 218 (GSJ) the court was asked to adjudicate on alleged defamation of the complainant by the respondent through the posting of personal information about him on social networking website Facebook.

The respondent, W, had posted an open letter to the applicant, H, on Facebook.

The following extract constitutes the gist of the letter: 'I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. ... Should we blame the alcohol, the drugs, the church ... ? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?'

H was separated from his wife and W had been H's close friend. H's estranged wife was residing with W. W claimed that she made the posting on Facebook not to defame H, but in order for him 'to reflect on his life and on the road he had chosen'.

H applied for an interdict to prevent W from posting any

similar letters on Facebook or any other similar social network. H also applied for an order directing W to remove the postings already made.

Willis J pointed out that at stake were the common law rights to privacy and freedom of expression, both of which are constitutionally protected.

It was noted that it is the duty of the courts 'harmoniously to develop the common law' in accordance with the principles enshrined in the Constitution.

The test for determining whether words have a defamatory meaning is whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.

The court held that the words in the posting were indeed defamatory.

Further, it held that it was not a valid defence to, or a ground of justification for, defamation that the published words may be true.

A distinction must always be made between 'what is interesting to the public', on the one hand, and 'what is in the public interest to make known', on the other. It was neither to the public benefit nor in the public interest that the words in question be published, even if it was accepted that they were true.

The court ordered W to remove all postings she had posted on Facebook or any other social media site on which she referred to H. She was also ordered to pay H's costs.

• See 2013 (May) DR 14.

Enrichment

Requirements for *condictio indebiti*: The facts in *MN v AJ* 2013 (3) SA 26 (WCC) were as follows. The parties were married in 1989. In June 1990 their union bore a daughter, N.

In 1995 the parties divorced and the respondent, AJ, was directed in terms of an order of court to maintain N by effecting payment of R 350 per month and to retain her on his medical fund. Between 1995 and June 2006 AJ paid the applicant, MN, a sum of R 50 050 in respect of the maintenance of N.

In June 2006 AJ underwent a paternity test, which conclusively showed that he was not N's biological father.

In July 2007 AJ obtained a court order to the effect that he was not the natural father of N. The order further deleted AJ's maintenance obligations towards N.

At the same time, AJ instituted action in the magistrate's court for recovery of the sum of R 50 050.

His claim was upheld and MN appealed against the order of the magistrate.

On appeal, Gamble J reasoned that AJ's particulars of claim lacked certain material allegations. In this regard, the court held that the particulars of claim failed to mention any enrichment of MN at his expense. They further contained no allegation that the payments were made without cause (*sine causa*) and were therefore unjustified.

There was little doubt that there was an error of fact on AJ's part, which rendered payment of the maintenance money *indebite*. However, he had to prove something additional in order to succeed with the *condictio indebiti*. He bore the onus of establishing the existence of all the elements of the enrichment action on which he relied.

This included setting up sufficient facts to justify an excusable error on his part in effecting payment of the amounts of maintenance to MN; further, that she had been enriched thereby and that his estate had been impoverished in the process.

The fact that AJ took several years to initiate the paternity tests indicated that he was indifferent as to whether or not the maintenance was due, and it could be inferred that he intended to pay the monthly maintenance whether or not he owed it.

The court concluded that, in the light of all the circumstances, AJ did not establish that his mistake was justified to the extent that it entitled him to 'judicial exculpation'.

He further failed to show that MN's estate had been enriched by the monthly maintenance payments.

Finally, the court reasoned that because AJ had approached the court *a quo* for relief under an equitable remedy, and given the fact that the money was paid for the maintenance of a child, it would not be fair to MN to order her to restore either the entire or a part of the amount to AJ.

MN's appeal was therefore upheld with costs.

Insolvency

Winding-up of company: In *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) the facts were as follows. The applicant, FirstRand Bank, applied for the winding-up of the respondent close corporation.

The close corporation raised a point *in limine*, namely that, bearing in mind that the application relating to the close corporation was issued after the commencement of the Companies Act 71 of 2008 (the 2008 Act), the expression 'solvent company' – or insofar as this applied equally to close corporations, 'solvent close corporation' – in item 9(2) of sch 5 to the 2008 Act, means a company that is 'actually (or factually) insolvent'.

As a result, so the close corporation argued, the onus rests on the applicant to prove that the close corporation is 'actually (or factually) insolvent', in the sense that its liabilities exceed its assets.

The close corporation further argued that the ordinary meaning of 'insolvent' was factual insolvency in the sense of an excess of liabilities over assets, as opposed to commercial insolvency or an inability to pay debt in the course of business.

The relevant part of s 344 of the Companies Act 61 of 1973 (the 1973 Act) provides that a company may be wound-up by the court if it is unable to pay its debts and it appears to the court that it is just and equitable that the company should be wound-up.

Section 345(1) of the 1973 Act provides that a company will be deemed unable to pay its debts in a number of circumstances, including if a creditor to whom the company is indebted in a sum over R 100 has served on the company a demand to pay the sum so due; or where a company on which a demand to pay a debt has been served has failed to pay the debt within three weeks; or where a sheriff has issued a *nul-la bona* return; or if it is proved to the satisfaction of the court that the company is unable to pay its debts.

In determining, for the purpose of s 345 (1), whether a company is unable to pay its debts, the court must also

take into account the contingent and prospective liabilities of the company.

Van der Byl AJ held that the 2008 Act distinguishes between the grounds for winding-up solvent companies, as set out in s 81; and the grounds for winding-up insolvent companies, as set out in ss 344 and 345 of the 1973 Act.

In determining the meaning of 'solvent' and 'insolvent', it must be borne in mind that commercial insolvency has always been relevant to the winding-up of companies.

The words 'solvent company' in item 9(2) of sch 5 to the 2008 Act refer to companies that are not actually insolvent or commercially insolvent. Such solvent companies are envisaged by part G of ch 2 to the Act. In contrast, an insolvent company, to which the grounds in s 344 of the 1973 Act apply, is one that is either commercially or factually insolvent.

Accordingly, so the court concluded, in the absence of an express provision, there is no indication in the 2008 Act that the legislature intended, particularly insofar as it left s 345 of the 1973 intact, to do away with the principle that a company (or close corporation) may be liquidated on the grounds of its 'commercial insolvency'.

The court accordingly dismissed the point *in limine*.

Land

Meaning of 'portion' of agricultural land: The appeal in *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) concerned the correct interpretation of s 3(d) of the Subdivision of Agricultural Land Act 70 of 1970 (the Act).

The commencement of the Subdivision of Agricultural Land Repeal Act 64 of 1998, which repeals the whole of the Act, has not yet been promulgated.

On 14 August 2008 the parties entered into a written agreement of lease of certain immovable properties, including two portions of the same piece of agricultural land.

Arlow, as the plaintiff, instituted an action against Adlem and another, as defendants, in the NWM, in which he claimed ejectment of Adlem, *inter alia*, on the basis that the lease was void as it contravened s 3(d) of the Act.

Adlem brought nine counter-claims, some of which were later abandoned.

The question for decision was whether the lease, in terms of which two portions of the same agricultural property was leased to Adlem, was valid as the consent of the Minister of Agriculture was not obtained prior to the conclusion of the lease.

Arlow argued that because the Minister's consent was not obtained, the lease was in contravention of s 3(d) of the Act and therefore void in as much as the property was agricultural land. The lease was for an initial period of nine years and 11 months and it conferred a right on Adlem to renew the lease for a further two successive periods of nine years and 11 months each.

Cloete JA held that the clear impression from reading the Act as a whole was that its object and purpose were to prevent subdivision of agricultural land into uneconomic units and, further, to prevent the use of uneconomic portions of agricultural land for any length of time.

The phrase 'portion of agricultural land', as referred to in ss 3(d) and 3(e) of the Act, must be interpreted as meaning a piece of land that forms part of a property (as opposed to the whole property) registered in the deeds registry.

Further, the prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease – as well as the granting of a right for an extended period in respect of the property.

In other words, the word 'portion' in, *inter alia*, s 3(d) must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the deeds registry, and not as having the meaning used in the deeds registry to describe the whole property.

Section 3(d) of the Act thus did not apply to the present lease since the whole of the property owned by Arlow was leased to Adlem.

The order of the court *a quo* was set aside and costs were awarded to Adlem. The matter was referred back to the High Court to continue with the trial.

Trusts

Sole trustee and beneficiary:

The court in *Groeschke v Trustee, Groeschke Family Trust and Others* 2013 (3) SA 254 (GSJ) was asked to pronounce on a number of questions relating to a trust. The one to be discussed here was whether it is possible for a sole trustee of a trust to become the sole beneficiary at the same time.

The facts were that Heinrich Groeschke (the father) founded a trust, with himself as sole trustee and his son, R, as capital and income beneficiary. The father and son later fell out. The father subsequently drafted, signed and lodged with the Master a resolution in which he removed R as a beneficiary, replaced by himself, and appointed a third person, B, as an 'alternative' trustee.

When the father passed away, R applied to the High Court for an order declaring the father's changes to the trust invalid.

Bester AJ held that there was authority that a trustee may be a beneficiary at the same time.

In deciding on the question whether a sole trustee of a trust could become its sole beneficiary, the court held that this would conflict with the principle that control of the trust property must be kept separate from its enjoyment, with the controller exercising control on behalf of another. However, an eventuality where the sole trustee also becomes the sole beneficiary would not invalidate a trust.

Section 7 of the Trust Property Control Act 57 of 1988 gives the Master the power to appoint co-trustees to any serving trustee. This power is vested in the Master notwithstanding the terms of the trust deed.

A distinction is thus drawn between the situation where the trust is created *ab initio* with only one trustee, who is also the sole beneficiary, and the situation where the sole trustee later, after the trust has already been established, becomes the sole beneficiary. The first situation occurred in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA), in which the court held that no trust had come into existence. The latter situation is what happened in the present case.

The court thus held that the father could be the sole trustee and the sole beneficiary at the same time.

R's application was dismissed with costs.

Wills

Freedom of testation: In *In Re BOE Trust Ltd and Others* NNO 2013 (3) SA 236 (SCA) the testatrix had bequeathed money to a trust with the sole purpose of providing bursaries to assist white students who had completed an MSc degree at a South African university and who intended to study towards a doctorate at an overseas university. Four South African universities were nominated to participate in the selection process.

The will further provided that if the trustees were unable to carry out the terms of the trust, the trust income must be distributed to certain charities.

Although the testatrix was informed that the racially discriminatory nature of the trust might jeopardise its validity,

she nevertheless decided to retain the word 'white' in her will.

All four of the universities declined to participate in the racially discriminatory nature of the bequest, but indicated that they would be prepared to participate if the word 'white' was removed from its conditions.

The trustees then approached the High Court for an order that the discriminatory word 'white' be deleted from the bequest, in order to make it acceptable to the universities and thereby allowing the purpose of the bursaries to be achieved.

The High Court held that the trust income must go to the charities stipulated in the will.

On appeal, Erasmus AJA confirmed the constitutional protection contained in s 25 of the Constitution.

Section 25 provides that no one may be deprived of property, except where the deprivation is done in terms of a law of general application. This section entrenches the

principle that no law may permit the arbitrary deprivation of property.

Freedom of testation is a basic principle of the law of testate succession.

The view that s 25 protects a person's right to dispose of his or her assets on death as he or she wishes was accepted by way of an *obiter dictum* in *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C); [2006] 3 All SA 373 (C).

However, freedom of testation is not absolute and the court is not obliged to give effect to the wishes of the testator if there is a rule of law preventing it from doing so.

The court held that the testatrix intended that, should it prove impossible to give effect to the provisions of the bursary bequest, the money had to go to the charitable organisations, thereby providing for foreseen eventualities.

The fact that the universities would not participate was an impossibility in respect of

the bursary bequest, which meant that the bequest had to go to the named charitable organisations in accordance with the wishes of the testatrix.

The appeal was dismissed. The costs of the appeal were ordered to be taxed as between attorney and client and were to be paid out of the funds of the trust.

• See 2013 (Jan/Feb) DR 54.

Other cases

Apart from the cases and topics referred to above, the material under review also contained cases dealing with administrative law, civil procedure, constitutional law, execution, insolvency, interdicts, interpretation of contracts, justice and security, labour law, land reform, local authorities, mining, motor vehicle accidents, novation, practice, tax, pensions, and trade and industry.



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THE KEY TO SUCCESS
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By
Chris
Shone

Is the best defence re-offence?

Humphreys v S (SCA) (unreported case no 424/2012,
22-3-2013) (Brand JA)

The recent judgment in the *Humphreys* matter by the Supreme Court of Appeal (SCA) raises interesting and potentially controversial issues.

In short, the SCA in this matter set aside the finding and conviction of the court *a quo* on murder, substituting this with a finding of culpable homicide.

As a consequence, the appellant's effective sentence of 20 years' imprisonment for murder and attempted murder was reduced to eight years for culpable homicide, to a limited extent backdated. The question is: How and why did this happen?

The facts

The appellant, Jacob Humphreys, operated a shuttle service for school children. In August 2010 he was driving a minibus when, at a railway line crossing, the minibus was hit by an oncoming train, killing ten children and seriously injuring four others. This happened because, ignoring warning signals, Mr Humphreys overtook a queue of cars waiting to cross the railway line.

During December 2011 the Western Cape High Court convicted Mr Humphreys of ten counts of murder and four counts of attempted murder. In all, the sentence was 20 years' imprisonment. The court found that he had acted with indirect intent, in that he had foreseen

the possibility of harm, but had nevertheless taken a risk. Mr Humphreys appealed to the SCA on both the conviction and the sentence.

Dolus

The SCA judgment hinged on the meaning of the term *dolus eventualis* in relation to the facts of the case. For a murder conviction, *dolus*, (intent) is one of the essential elements. However, intent comes in different guises, namely:

- *Dolus directus*, where the individual actually aimed to achieve a particular result.
- *Dolus indirectus*, where the individual desires to achieve a particular result but is aware that, in doing so, a secondary result will inevitably follow. There is a primary intention but there is a possibility that, in achieving this, a different indirect result may follow.
- *Dolus eventualis*, where the individual foresees the consequences of his or her actions but nevertheless proceeds, with the result that the foreseen consequences arise.

In legal parlance, *dolus eventualis* is equivalent to legal intent, which is sufficient for a conviction of murder. Culpable homicide requires negligence, not intent in any of the three guises. Absent intent, there cannot be a murder conviction. Absent negligence, there cannot be a conviction of culpable homicide.

Dolus eventualis

In the *Humphreys* matter, *dolus eventualis* was relevant. The test for *dolus eventualis* is twofold: First, did the individual subjectively foresee the possibility of the consequences of his or her actions (in the case of Mr Humphreys, the death of the children) and, secondly, did he or she reconcile him- or herself with this possibility.

On the first element, the SCA found against Mr Humphreys, confirming the judgment of the court *a quo*.

The SCA agreed with the court *a quo* and found that 'no person in his right mind can avoid recognition of the possibility that a collision between a motor vehicle and a train may have fatal consequences for the passenger of the vehicle'.

It is the second element of the test that became significant in the appeal to the SCA. That is, did Mr Humphreys reconcile himself with the foreseen possibility?

Mr Humphreys was the driver of the minibus. Therefore, did he foresee the death of the children, and his own death, by ignoring the warning signs, jumping the queue and crossing the railway track? Was it immaterial to Mr Humphreys that he, too, could have been killed by this action? Could this be inferred from his conduct? Legally speaking, could it reasonably be inferred that he subjectively foresaw that



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the train would hit the minibus with the resultant consequences?

The SCA

The SCA concluded that no such inference could be drawn from the facts. To do so would be tantamount to a finding that Mr Humphreys had taken his own death into the bargain or must have been 'indifferent as to whether he would live or die'. The SCA found that Mr Humphreys did not contemplate his death or that of the children. He had not, therefore, reconciled himself with the fact that a collision with the train was inevitable.

What the SCA concluded was that, in jumping the queue to cross the railway tracks as he did, he took a risk that he did not think would materialise. He did not believe, subjectively, that a train would hit the minibus.

Significantly, the SCA had an additional basis for finding that Mr Humphreys did not meet the requirements of *dolus eventualis*. The SCA found that, as Mr Humphreys had previously performed this 'queue jumping' and crossing manoeuvre successfully, it would appear that he could subjectively be confident that he would do so again. The consequences had not, subjectively, been foreseen. That he was clearly wrong did not detract from the fact that, for the purposes of the second element of the test for *dolus eventualis*, he had not reconciled himself with the possible consequences of his actions. Mr Humphreys had succeeded in crossing in such a manner before, at least twice, so he believed he could do so again. He was clearly wrong. However, this was sufficient to exclude a finding of intent on the basis of *dolus eventualis* - which is sufficient to avoid a conviction on a charge of murder, so the SCA concluded.

Analysis

The obvious question is whether the judgment would have been different had Mr Humphreys not previously jumped the queue successfully. It appears so. His 'success' in the court was based on the fact that he had succeeded with 'queue jumping' previously. However, what if he had never done this before?

If the first element of the test for *dolus eventualis* would have been met, objectively speaking, as it undoubtedly would have been, then it would appear that the second element would not have been met.

In short, it appears that Mr Humphreys' previous 'success' in 'queue jumping' counted in his favour. Thus, a murder conviction was not possible, despite there being ten dead and four seriously injured children.

In a subsequent case, local soccer player Bryce Moon was facing charges of murder, alternatively culpable homicide; attempted murder; driving under the influence; and reckless and negligent driving. This was as a result of an incident in which he knocked down a pedestrian. Mr Moon claimed he had swerved to avoid hitting another pedestrian, but the deceased ran into the road and hitting her was unavoidable. The *Humphreys* decision appears to have saved Mr Moon from a murder conviction.

Mr Moon was convicted of culpable homicide and acquitted on the other charges. Thus, *dolus eventualis* had no role to play. Sentence was a fine of R 60 000 or two years' imprisonment. His driver's licence was suspended for six months. Mr Moon has, however, been granted leave to appeal.

No doubt lawyers for South African musician Molemo 'Jub Jub' Maarohanyhe and Themba Tshabalala, who were con-

victed of murder and attempted murder after a motor vehicle collision they were involved in left four dead and two seriously injured, will be studying the *Humphreys* judgment to see if the 25-year sentence consequent on the murder convictions of their clients can be set aside. No doubt, they will focus on the fact that their clients had never committed such an act previously.

That is, there was no intent; certainly not in terms of *dolus eventualis*. They may well argue that there was no *dolus* under any of the three guises and, therefore, a conviction on a charge of murder cannot stand. They may argue that the collision was due to negligence, which is insufficient for a murder conviction.

If this argument is correct, Mr Maarohanyhe and Mr Tshabalala should have been found guilty of culpable homicide, not murder, and their convictions on the charges of murder should therefore be set aside and replaced with ones of culpable homicide, at a lesser sentence.

Conclusion

It almost appears that the best defence to a murder charge may, in fact, be prior conduct, which itself could have constituted an offence. This surely cannot be correct. But that is the law as it stands.

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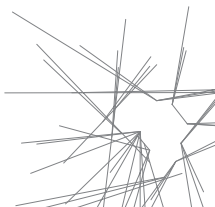
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NEW LEGISLATION

Legislation published during the period
22 April 2013 – 17 May 2013



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

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

BILLS INTRODUCED

Deeds Registries Amendment Bill B10 of 2013.

Sectional Titles Amendment Bill B11 of 2013.

Criminal Law (Forensic Procedures) Amendment Bill B9 of 2013.

COMMENCEMENT OF ACTS

Income Tax Act 58 of 1962, deduction tables as prescribed in terms of para 9(1) of the fourth schedule. *Commencement:* 1 March 2013. GN320 GG36404/26-4-2013.

***Use of Official Languages Act 12 of 2012.** *Commencement:* 2 May 2013. Proc10 GG36392/26-4-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Adult Education and Training Act 52 of 2000

Regulations on the assessment process and procedures for adult education and training (AET) National Qualifications Framework (NQF) Level 1. GN352 GG36463/15-5-2013.

Agriculture, Forestry and Fisheries Tariff Structure

Tariffs payable for import permits and export certificates for animals and animal products. GenN452 GG36432/10-5-2013.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations. GN R322 GG36416/26-4-2013.

Engineering Profession Act 46 of 2000

Publication of registration forms for registration. BN80 GG36443/10-5-2013.

Electricity Act 41 of 1987

Licence fees payable by licensed genera-

tors of electricity. GenN436 GG36418/3-5-2013.

Income Tax Act 58 of 1962

Date by which an employer must render a return (EMP501) as prescribed in terms of para 14(3)(a) of the fourth schedule to the Act for the period March 2012 to 28 February 2013 on or before 31 May 2013; and for the period 1 March 2013 to 31 August 2013 on or before 31 October 2013. GN354 GG36467/17-5-2013.

International Trade Administration Act 71 of 2002

Policy directive on the exportation of ferrous and non-ferrous waste and scrap metal. GenN470 GG36451/10-5-2013.

Marketing of Agricultural Products Act 47 of 1996

Amendment: Establishment of a statutory measure: Records and returns by processors and persons dealing in lucerne seed and lucerne hay and registration of processors, producers and persons dealing in lucerne seed and lucerne hay. GN R309 and GN R315 GG36393/26-4-2013.

Medicines and Related Substances Act 101 of 1965

Resolution approved by the Minister of Health: Medicinal use containing extracts of dry red vine leaf or extracts thereof. GN R321 GG36412/25-4-2013.

National Environmental Management: Biodiversity Act 10 of 2004

Biodiversity Management Plan for Pelargonium Sidoides in South Africa 2011 – 2020. GenN433 GG36411/26-4-2013.

National Environmental Management Integrated Coastal Management Act 24 of 2008

National Estuarine Management Protocol. GN341 GG36432/10-5-2013.

National Environmental Management: Waste Act 59 of 2008

National norms and standards for the remediation of contaminated land and soil

quality in the Republic of South Africa. GenN467 GG36447/10-5-2013.

Perishable Products Export Control Act 9 of 1983

Perishable Products Export Control Board: Imposition of levies on perishable products. BN66 GG36392/26-4-2013.

Perishable Products Export Control Board: Agricultural product standards. BN67 GG36392/26-4-2013.

Plant Breeders' Rights Act 15 of 1976

Amendment: Regulations relating to Plant Breeders' Rights. GN R311 GG36393/26-4-2013.

Plant Improvement Act 53 of 1976

Amendment: Regulations relating to Establishments, Varieties, Plants and Propagating Material. GN R312 GG36393/26-4-2013.

Amendment: South African Seed Potato Certification Scheme. GN R313 GG36393/26-4-2013.

Property Valuers Profession Act 47 of 2000

Amendment: Rules for the Property Valuers Profession, 2008. BN79 GG36432/10-5-2013.

Road Accident Fund Act 56 of 1996

Road Accident Fund Amendment Regulations, 2013. GN R347 GG36452/15-5-2013.

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN69 GG36392/26-4-2013.

DRAFT LEGISLATION

Draft Plant Breeders' Rights Bill for comment. GenN407 GG36392/26-4-2013.

Draft Plant Improvement Policy in terms of the Plant Improvement Act 53 of 1976 for comment. GenN409 GG36392/26-4-2013.

Draft Plant Improvement Bill for comment. GenN410 GG36392/26-4-2013.

Proposed Regulations under the Use of Official Languages Act 12 of 2012. GenN411 GG36392/26-4-2013.

Proposed Amendments to schs 1 and 2 of the National Environmental Management Act 107 of 1998. GenN412 GG36392/26-4-2013.

Draft amendment general regulations under the Medicines and Related Substances Act 101 of 1965. GN308 GG36400/22-4-2013.

Draft Electoral Amendment Bill, 2013

for comment. GenN425 GG36401/23-4-2013.

Draft Marine Living Resources Amendment Bill, 2013 for comment. GenN434 GG36413/25-4-2013.

Gas Amendment Bill, 2013 for comment. GenN443 GG36425/2-5-2013.

South African Council for Planners: Rules and draft code of conduct for registered persons in terms of the Planning Profession Act 36 of 2002. GenN445 GG36429/3-5-2013.

Proposed industry code and ombudsman scheme in terms of s 82(3)(a) of the Consumer Protection Act 68 of 2008 for comment. GenN451 GG36439/9-5-2013. Draft Lotteries Amendment Bill, 2013 for comment. GenN466 GG36446/8-5-2013.

Draft Revised Policy for the Allocation and Management of Fishing Rights. GenN473 GG36460/14-5-2013.

SELECTED ASPECTS OF THE USE OF OFFICIAL LANGUAGES ACT

The Use of Official Languages Act 12 of 2012 came into operation on 2 May 2013 (Proc10 GG36392/26-4-2013).

The Act has the following functions:

- To provide for the regulation and monitoring of the use of official languages by national government for government purposes.
- To require the adoption of a language policy by a national department, national public entity and national public enterprise.
- To provide for the establishment and functions of a National Language Unit.
- To provide for the establishment and functions of language units by a national department, national public entity and national public enterprise.
- To provide for monitoring of and reporting on use of official languages by national government.
- To facilitate intergovernmental coordination of language units.
- To provide for matters connected therewith.

Objects of the Act (s 2)

The objects of the Act are –

- to regulate and monitor the use of official languages for government purposes by national government;
- to promote parity of esteem and equitable treatment of the official languages of the Republic;
- to facilitate equitable access to services and information of national government; and
- to promote good language management by national government for efficient public service administration and to meet the needs of the public.

Application of the Act (s 3)

The Act applies to national departments, national public entities and national public enterprises (these concepts are defined in s 1).

Obligations in terms of the Act (s 4)

In terms of the Act, every national department, national public entity and national public enterprise must adopt a language

policy regarding their use of official languages for government purposes within 18 months of the commencement of the Act or such further period as the Minister of Arts and Culture may prescribe (any further prescribed period may not exceed six months).

Requirements for a language policy (s 4)

A language policy must –

- comply with the provisions of s 6(3)(a) of the Constitution;
- identify at least three official languages that the national department, national public entity or national public enterprise will use for government purposes;
- stipulate how official languages will be used, among other things, in effectively communicating with the public, official notices, government publications and inter- and intragovernmental communications;
- describe how the national department, national public entity or national public enterprise will effectively communicate with members of the public whose language of choice is not an official language or is South African sign language;
- describe how members of the public can access the language policy;
- provide a complaints mechanism to enable members of the public to lodge complaints regarding the use of official languages by a national department, national public entity or national public enterprise;
- provide for any other matter that the Minister may prescribe; and
- be published in the Government Gazette as soon as reasonably practicable, but within 90 days of its adoption.

Identifying three official languages (s 4)

In terms of s 4, a language policy of a national department, national public entity or national public enterprise must identify at least three official languages that the national department, national public entity or national public enterprise will use for government purposes.

In identifying the three languages, the following must be taken into account –

- the obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use; and
- status in accordance with s 6(2) of the Constitution.

Establishment of a National Language Unit (s 5) and language departments (s 7)

The Minister must establish a National Language Unit in the Department of Arts and Culture. The unit must be provided with human resources, administrative resources and other resources necessary for its effective functioning.

Further, every national department, national public entity and national public enterprise must establish a language unit and ensure that the language unit is provided with human resources, administrative resources and other resources necessary for its effective functioning.

Functions of language units (s 8)

Every language unit in a national department, national public entity and national public enterprise must –

- advise the responsible accounting officer or accounting authority on the development, adoption and implementation of the language policy;
- monitor and assess the use of official languages;
- monitor and assess compliance with the language policy;
- compile and submit a report to the Minister and to the Pan South African Language Board in terms of s 9;
- promote parity of esteem and equitable treatment of official languages of the Republic and facilitate equitable access to services and information;
- promote good language management; and
- perform any other functions that the Minister may prescribe.



Employment law update



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



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Agreements in full and final settlement

In *Ferguson v Basil Read (Pty) Ltd* [2013] 3 BLLR 274 (LC) the applicant, Ferguson, was faced with potential retrenchment and, as an alternative to retrenchment, signed an agreement with the respondent company in full and final settlement of all claims he might have arising from the termination of his employment.

As part of this settlement, Ferguson received two weeks' severance pay, one month's notice pay and an *ex gratia* payment of R 5 000.

Subsequent to entering into the settlement agreement, it came to Ferguson's attention that the company had commenced a new building project at Saldanha. Ferguson claimed that the settlement agreement he entered into was null and void as he had concluded the agreement based on a misrepresentation by the company that there was no work for him. He accordingly claimed that he was dismissed, that such dismissal was substantively and procedurally unfair and that he was entitled to compensation equal to 12 months' remuneration.

Ferguson alleged that the reason for him entering into the settlement agreement was that, on 26 February 2010, he was advised by the company's employee relations manager and the building contracts director that the Saldanha project had been cancelled and that he would, therefore, be retrenched. He argued further that, even if he had not been told that the project was cancelled, there was misrepresentation by omission in that he was not informed that the project would go ahead at a later stage and that there would potentially be work for him in the future.

The employee relations manager denied that he had told Ferguson that the project had been cancelled, but admitted that he met with Ferguson on 26 February 2010 to consult with him on the perceived need for retrenchment, possible alternatives and possible ways to avoid

dismissal. He contended that Ferguson understood that there was no work for him and chose to enter into a settlement agreement instead of proceeding with a consultation process. The company submitted that, while it was true that it had been awarded a contract to build a plant at Saldanha, the work on this project had not commenced at the time Ferguson's employment came to an end, as the company was awaiting the results of an environmental impact assessment, and thus there was no certainty that there would be work for Ferguson in the future.

The Labour Court, per Steenkamp J, found that it was probable that Ferguson was given the impression that he would be used on the Saldanha project. However, it was common cause that the project had not yet started and it could have created no more than a *spes* (hope) on the part of Ferguson. The court further held that, on the evidence before it, it was probable that Ferguson had been informed that there was no work for him at the time and thus the respondent needed to consult on the possibility of his retrenchment.

The court referred to the legal principles regarding misrepresentation and found that, for Ferguson to succeed with his claim, he would have to show that a false representation of fact was made, which was relied on and was material in the sense that it would have induced a reasonable person to enter into the agreement. Further, the false representation must have been intended to induce the person to whom it was made to enter into the agreement. Steenkamp J concluded that, on a balance of probabilities, Ferguson was not informed that the project had been cancelled. Therefore, there was no misrepresentation on which Ferguson acted when he entered into the agreement. In the circumstances, there was no dismissal, as Ferguson had voluntarily entered into an agreement to terminate his employment.

The claim was thus dismissed, with no order as to costs.

Promotion

The individual employees in *City of Cape Town v South African Municipal Workers' Union obo Sylvester, Mngomeni and Akiemdien and Others* [2013] 3 BLLR 267 (LC) applied for the position of senior foreman in the City of Cape Town's (the city's) department of solid waste management cleaning, but were unsuccessful.

At the time the matter came before the Labour Court, the case for Sylvester and Akiemdien was withdrawn as the city had undertaken to appoint them. The case therefore only concerned Mngomeni, who had scored 9 out of 20 for his written assessment, whereas the requirement was that he should have scored a minimum of 12 out of 20.

The employees had referred an unfair labour practice dispute related to promotion and, in terms of the arbitration award, the city was ordered to appoint the employees to the position of senior foreman with effect from 1 April 2010, with back-pay, by no later than 1 December 2010.

In making the award, the commissioner recorded that the city had conceded that Mngomeni had the relevant qualifications for the position and that he had been acting in the post for some time. The commissioner therefore held that it appeared that Mngomeni was 'good enough' to act in the role but not to be appointed permanently. This, the commissioner held, amounted to an unfair labour practice.

The city applied for the review of the award on the basis that, *inter alia* -

- there was no evidence to suggest that the city had acted in bad faith;
- the award did not explain why acting in a position gave an employee an entitlement to be appointed permanently;
- the commissioner disregarded the correct legal position that the city as employer had the managerial prerogative to make permanent appointments; and
- the commissioner committed a clear error of law in arrogating to himself the mantle of appointing authority.

The Labour Court, per Rabkin-Naicker J, held that it was incorrect to apply the standard of administrative review to the case at hand. Rather, fairness to both parties was the applicable yardstick and this the commissioner had applied. The commissioner had found that, in a situation where the post remained vacant for five years, the employee acted in that post without complaint and there was no evidence on how the assessment was marked or how the applicable pass mark was chosen, it was unfair not to appoint him permanently. The court held that this decision was reasonable and, hence, there was no basis for review. The application was dismissed with costs. The city was ordered to implement the award in respect of Mngomeni within 15 days of the order.



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By
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ABBREVIATIONS:

EL: *Employment Law* (LexisNexis)

ILJ: *Industrial Law Journal* (Juta)

SACJ: *South African Journal of Criminal Justice* (Juta)

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