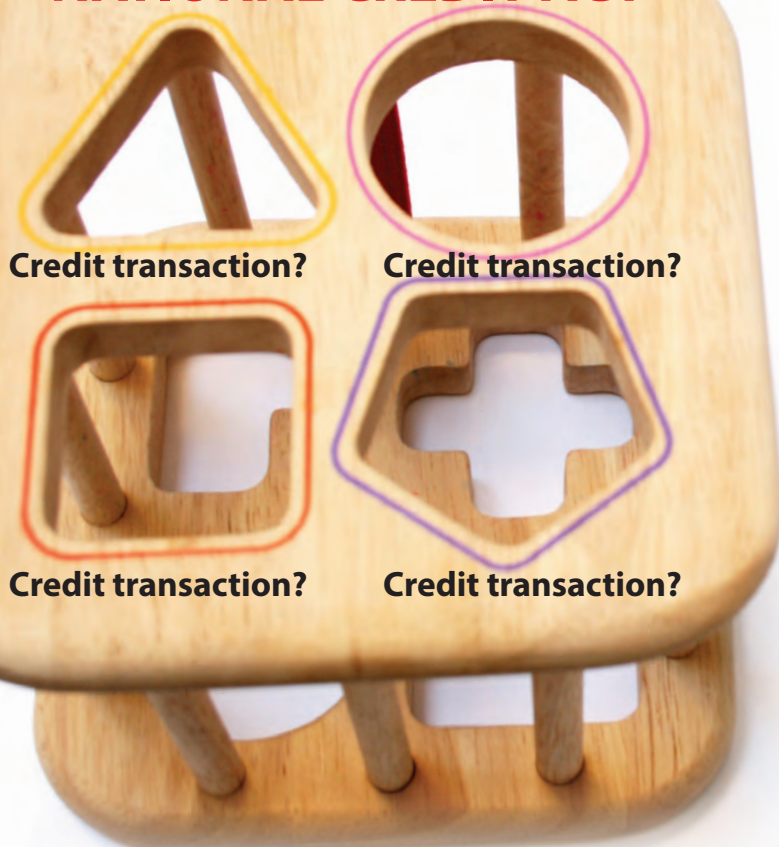


NATIONAL CREDIT ACT



A MATTER OF INTERPRETATION

Acknowledgments of debt
and the National Credit Act

Rescued by a **referee**

Rectifying the **Mvumvu** disparity

Catch 22 – Directors' duties under s 129(7) of the
Companies Act





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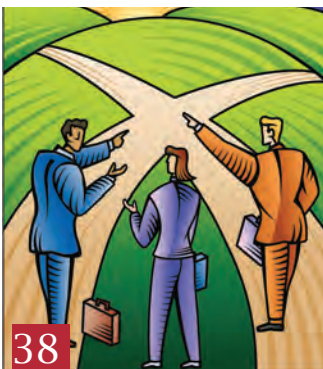
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Following the public hearings on the Legal Practice Bill (B20 of 2012) in February, the Justice Department recently presented its responses to the public's oral and written submissions on the Bill to the Justice Portfolio Committee. In this article Kim Hawkey provides a summary of the department's presentation to the committee.

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Legal practitioners often have to decide whether to institute proceedings by application or by summons initiating action or trial proceedings. Selecting the wrong option may have drastic consequences for clients, who may receive an adverse order without having fully exercised their right to be heard. According to Vuyo Mkwibiso, it is thus crucial to determine whether a real, genuine or *bona fide* dispute of fact exists.

42 Catch 22 – Directors' duties under s 129(7) of the Companies Act

The board of directors of a company in financial distress that has not filed for business rescue has a duty to advise affected persons that the company is financially distressed and to provide reasons why it has not filed for business rescue. This duty may, however, place the board between a rock and a hard place, writes Dirk Kotze.

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One of the issues highlighted during the recent public hearings on the Legal Practice Bill (B20 of 2012) was the standard of quality in the legal profession, which is intrinsically tied to the current debate on the value of the LLB degree.

One of the oft-quoted views expressed during the oral submissions to the Justice Portfolio Committee on the Bill was by former General Council of the Bar deputy chairperson Izak Smuts, who said:

'In our country ... you can get a law degree for toffee. There is a massive over-production of under-skilled people and, regrettably, ... there is any number of legal graduates who ought to be excluded from practice because, if you look at what Deputy Judge President Mojapelo says, they offer a disservice rather than a service to their clients.'

Mr Smuts was referring to an extract of a speech by Deputy Judge President of the South Gauteng High Court, Judge Phineas Mojapelo, published in the December 2012 issue of *De Rebus* (2012 (Dec) DR 56).

Judge Mojapelo, an initial proponent of shortening the length of the LLB degree, conceded that the result was a failure and it was time to revert to a postgraduate LLB with initial non-legal courses.

In our letters section this month, Nic Swart, chief executive officer of the Law Society of South Africa and director of its Legal Education and Development division, notes that '[t]here is widespread concern about the LLB and the skills demonstrated by law graduates'.

I too have previously written about the quality of the LLB in this column and the topic has featured on many pages of this journal before. This concern is shared by many others, which has triggered a national summit on the degree to be held later this month to discuss its future. The summit, titled 'LLB summit: Legal education in crisis?', will focus on problems around the LLB curriculum, quality assurance, new models for legal education and community service. Its aim is to ensure that adequately prepared law graduates move from law faculties into the legal profession.

Increasing accessibility to the legal profession is another of the Legal Practice Bill's aims; however, all stakeholders seem to be clear that this cannot happen at the expense of quality. There has also been an acknowledgment that the four-year degree has not achieved its aim of opening access to the profession – a recent joint statement announcing the summit states that students from privileged backgrounds often chose to do the LLB as a second degree, 'the value of the first degree in developing generic skills

A+ or F- for the LLB?

making them the group more favoured by employers' (see 2013 (Mar) DR 12).

In his letter, Mr Swart identifies some of the problems associated with the quality of the LLB, including that, for various reasons, many have not enjoyed equal training and professional development opportunities at academic and practice levels. Many could not obtain access to more advanced development (and many are still having difficulty in doing so). Several education providers are seriously lacking resources, he adds.

In another letter published in this issue, an attorney writes that it is not the LLB *per se* that is problematic – the real issue is that universities 'allow anyone to study'. Therefore, there are more law graduates than jobs available in the market, he says. The solution, he adds, is that the pass mark for matric should be raised and people should only be allowed to study law if they obtain a certain average in matric, and the LLB should only be attempted after completing another degree. Further, the solution to producing competent attorneys is to ensure they receive proper training while completing articles, he says.

These two letters highlight the importance of considering legal education holistically, with both pre- and post-LLB training playing a significant role in developing a competent attorney. The problems in the school education system are well known, while recent pages in *De Rebus* have revealed less than ideal training experiences of candidate attorneys, some of whom claim they are obstructed from attending the compulsory practical legal training lectures (see 2013 (Mar) DR 4).

While the inadequacies with the LLB have been identified and debated for a number of years, the profession cannot afford to delay implementing the necessary changes to rectify the situation – the consequences are dire, as highlighted by Judge Mojapelo and others.

Poor quality legal education leads to poor quality justice and will, in turn, lead to a weakened justice system.

It is therefore hoped that the summit results in a firm, clear plan for the way forward so that the shortcomings of the degree are addressed swiftly.

Practitioners play a crucial role in attaining justice for clients, the public in general, as well as society as a whole. In a recent judgment, the Supreme Court of Appeal, for example, acknowledged that the legal profession could be dis-



Kim Hawkey – Editor

tinguished from other professions in the sense that 'the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice' (see p 10).

Tell us: What are your thoughts on the LLB degree? E-mail your comments to derebus@derebus.org.za and nic@lssalead.org.za

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

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Upcoming deadlines for article submissions: 20 May and 18 June 2013.

LETTERS

TO THE EDITOR

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

Improving performance

I noted Jacques Botha's letter 'The LLB and a culture of mediocrity' in the March *De Rebus* (2013 (Mar) DR 5).

The profession, by definition, must concern itself with standards of performance at both entry- and post-admission levels.

It is true that many in our country have not enjoyed equal training and professional development opportunities at academic and practice levels, for different reasons. Many could not obtain access to more advanced development (and many are still having difficulty doing so). Further, several education providers are seriously lacking resources.

There is widespread concern about the LLB degree and the skills demonstrated by law graduates, as well as support for the suggestion of an extended LLB degree. Scientific research, for example, has pointed out deficiencies in literacy and numeracy.

A national summit of stakeholders will be held in May to discuss solutions for the way forward. The summit is a joint initiative of the profession and law faculties.

As far as professional development is concerned, the Legal Practice Bill (B20 of 2012) makes provision for a mandatory system. This will enhance the professional growth of practitioners and assist them in keeping abreast of developments.

In addition to its extensive product list, the Legal Education and Development division of the Law Society of South Africa is constantly looking at creating new op-

portunities of growth for attorneys from previously disadvantaged backgrounds. The Synergy Link mentorship and commercial and tax law programmes are examples.

To ensure that training becomes more accessible, attempts are made to provide training electronically and to provide DVDs containing presentations on key topics.

Nic Swart, chief executive officer, Law Society of South Africa and director of its Legal Education and Development division

Raise the bar

I am writing this letter to give my view on the LLB degree. Prior to 1998 another degree had to be finished prior to studying towards an LLB degree. This was a good idea as it ensured that only intelligent people were able to study law. However, today we have the situation where some pretty 'dubious' characters (regardless of race) graduate and call themselves attorneys.

With regard to Jacques Botha's letter 'The LLB and a culture of mediocrity' in the March *De Rebus* (2013 (Mar) DR 5), Professor Jonathan Jansen, who the author refers to, is right – it is not good to lower academic standards. The LLB degree is not the problem – the issue is that our universities allow anyone to study. Therefore, there are more law graduates than jobs available in the market. In this country it makes no difference whether or not a job seeker has a university degree.

I am an admitted attorney and I was unemployed for two years before I started my own practice, which is not going too well. What perturbs me is that our law societies merely act as watchdogs and do not assist and protect attorneys from other service providers like debt collectors. What also concerns me is the fact that Legal Aid South Africa refused to give me even one client, despite the fact that it deals with the bulk of criminal law matters. To ensure standards are raised, the pass mark for matric should be increased and people should only be allowed to study law if they obtain a certain average in matric. Further, the LLB should only be attempted after completing another degree. In addition, to ensure the survival of small law firms, Legal Aid South Africa should give work to all attorneys on its roster.

Further, the solution to producing competent attorneys is to ensure they receive proper training while completing articles.

In order for candidate attorneys to become competent attorneys, the law societies should play a proactive role in ensuring that candidate attorneys are properly trained, perhaps by arranging more training sessions and closely monitoring their progress.

Principal attorneys should write mandatory monthly reports about their candidate attorneys, which should be submitted to the law societies concerned.

Mondli Myeni, attorney, Pietermaritzburg



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CAs - lifeblood of firms

The letter in the March 2013 edition of *De Rebus* titled 'Protection of candidate attorneys' refers (2013 (Mar) DR 4).

The courage of the writer has inspired me to share my experience of exploitation suffered as a candidate attorney (CA).

I served articles at a firm that has been in practice for almost 25 years. Despite the firm's success, I was remunerated at the same rate as a farm worker in the Western Cape.

There is a fiction that CAs are simply at the firm to gain work experience or fill 'learnership' positions and therefore should receive a low wage. This is complete hogwash because CAs are the lifeblood of most law firms. They are overburdened with responsibility and, in addition, are often required to use their own vehicles to travel to and from court or to serve and file documents, without compensation. In most small law firms they act as messengers, answer telephones, copy documents, do typing and other secretarial work and, in some instances, function as both the firm's secretary and the CA. This is the case because they are a dime a dozen in this oversaturated market.

This state of affairs takes place with the law society's knowledge and tacit consent. CAs regularly voice their concerns to members of the ethics committees at practical legal training lectures. For the law society to insist on an affidavit from an individual with no bargaining power before they can take action is appalling. The individual the CA is required to lay a formal complaint against is the same person who pays his salary and who will later be required to certify that he is fit and competent to practise as an attorney in order to get admitted.

I agree with the letter writer's sentiments that the law society is a 'toothless tiger'. People need to understand that the law society is run like a business. In my view, it is

not an independent, impartial body and can hardly protect CAs because its disciplinary committees are constituted of practising attorneys, who may themselves perpetuate the same injustices that they are tasked with preventing. Since the principals who exploit CAs are mostly colleagues and possibly friends with law society members, it is not difficult to see why the law society is reluctant to intervene in these issues.

It is seldom realised that a law degree costs a substantial amount of money to attain. I paid almost R 100 000 to get a degree, with one textbook costing on average R 400. After four years of studying, most CAs earn a pittance of approximately R 2 000 (fixed for the two-year period). Further, nobody will hire you if you do not have a vehicle. Thus, one spends four years to achieve a degree and is then subjected to modern slavery for a further two years. How is one supposed to afford this? A disadvantaged member of society has little hope of thriving in this elitist profession.

My experience of articles sucked the enthusiasm I had for the profession and broke my spirit. It is no wonder that so few graduates complete articles and why so many enter the private sector rather than work in a law firm. It really is disgraceful for members of a profession who swear to uphold the law to treat other human beings in such an unlawful and immoral manner. Students need to think twice before pursuing a career in law as it is far from what the media portrays. Perhaps CAs need to form a union, which will hopefully conscientise and mobilise members of this profession.

Candidate attorney,
Durban

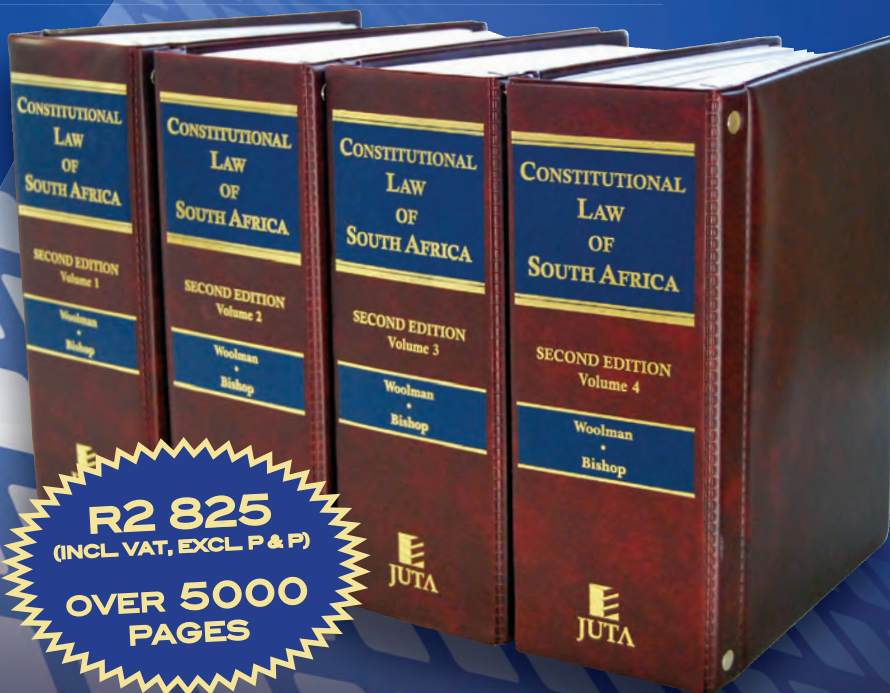
- The author of this letter has asked to remain anonymous. The editor is satisfied as to the author's identity.



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New practice manual for the Labour Court

A new practice manual for the Labour Court came into effect on 1 April. The manual was modelled on similar ones that apply in various divisions of the High Court and it sets out guidelines on the standards of conduct expected of those who practise in the court.

The directive aims to promote access to justice to those who are served by the Labour Court and to promote consistency in practice and procedure.

The manual is not, however, intended to substitute the rules of the Labour Court; it is to be used for the application of these rules in the daily functioning of the court. The provisions of the manual also apply flexibly to promote their purpose.

Further, the directive seeks to obtain uniformity among judges in respect of practice rulings, although no judge is bound by practice manuals and the manual was not intended to limit judicial discretion. Rather, it sets out what is to be expected in the normal course of events.

Failure to comply with its provisions will be met with an applicable sanction, which may include an order for costs *de bonis propriis*.

Topics covered in the manual include dress code, mode of address and introduction, court sittings, format of legal process, referrals in terms of r 6 and trial procedures, motion procedures, urgent applications, contempt of court, general provisions, application for leave to appeal, archiving files and *pro bono* exemptions.

Below are some highlighted points from the manual. A full version of the document can be found at www.justice.gov.za/labourcourt/pracdir/2013-practice-manual.pdf.

Trial procedures

Dress code and mode of address

The manual sets out specific dress codes for attorneys, junior and senior counsel. Those who are not properly dressed run the risk of not been 'seen' by the presiding judge.

According to the manual, judges of the Labour Court are to be addressed in the same manner as judges of the High Court (ie, 'my Lady' or 'my Lord').

Default judgments

The practice manual states that default judgments will ordinarily be dealt with by a judge in chambers. The manual further states: 'An application for default

judgment must be made after the expiry of the *dies* for the filing of a statement of the response in terms of r 6(3)(c) of the rules of the Labour Court and form 1, which must be delivered to the registrar' (10.1.2). The default judgment must be handed in with an affidavit prepared by the applicant to which he confirms the points set out in 10.1.3. Once the registrar has placed the application before the judge in chambers, and if the judge is satisfied that the requirements for default judgment have been met, the judge will grant judgment. If the judge is not satisfied that the requirements for default judgment have been met, the judge may issue a ruling as to any further requirements that the applicant must meet, and may require the applicant to appear in court, lead evidence or provide any document the judge may require in support of the applicant's claim.

Pre-trial conferences and set downs

Point 10.4.1 states that, except for matters that are selected for case management, a pre-trial conference must be held and minutes of the conference are to be filed in the time limit prescribed by r 6(4)(a). If the issue in dispute relates to an alleged unfair dismissal for operational requirements, some of the aspects to be addressed are:

- The applicant must indicate whether he admits that there was a need to retrench. If not, he must state the basis for failure to admit this. The respondent must give a response thereto.
- If the applicant contends there were alternatives to retrenchment, he must state what these alternatives were. The respondent must give a response thereto.

If the issue in dispute relates to an alleged unfair dismissal for participation in unprotected strike action, some of the aspects to be addressed are:

- The applicant must indicate whether he admits to participating in strike action. If he admits to this, he must indicate whether the strike was protected or unprotected.
- If the applicant argues that dismissal was inappropriate, he is required to set out the factual basis for this. The respondent must give a response thereto.

If the issue in dispute relates to an alleged automatic unfair dismissal, the aspects to be addressed are:

- The applicant is required to set out on what basis he contends the dismissal to be automatically unfair.

- If the applicant contends that the dismissal is based on discrimination, he must set out the basis for so contending. The respondent must give a response thereto.

- If the respondent admits that there was discrimination, but argues that the discrimination was fair, he must set out the basis for this. The applicant must give a response thereto.

Settlement agreements and draft orders

The manual states that if parties to a trial enter into a settlement agreement before the trial date, the registrar must be informed as soon as the settlement agreement is finalised. The settlement agreement will be made an order of court only if –

- the representatives of all parties are present in court and confirm the signature of their clients and that their clients want the settlement agreement to be made an order of court, or
- if proof is provided to the satisfaction of the judge of the identity of the persons who signed the settlement agreement and that the parties want the settlement made an order of court.

Also, if the parties to a trial have settled a dispute on terms set out in a draft order, a judge will only make the draft order an order of court if –

- the representatives of all parties are present in court and confirm that the draft order correctly reflects the terms agreed on, or
- proof is provided to the satisfaction of the presiding judge that the draft order correctly reflects the terms agreed on.

Motion proceedings

Applications to review and to set aside arbitration awards and rulings

According to the manual, if an applicant fails to file a record in the set period, the application will be regarded as withdrawn, unless the respondent has consented to an extension of time. If the respondent refuses to give consent, the applicant may apply to the Judge President in chambers for an extension of time. Applications under ss 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 should not be brought in respect of proceedings that are incomplete.

Heads of argument

The manual sets out that the filing of heads of argument in unopposed mo-

tions is not a requirement for setting a matter down. The heads of argument need not be filed unless the judge directs that they should be filed. In opposed motions, unless otherwise stated in the notice of set down, the applicant must deliver heads of argument at least 15 days prior to the hearing of an opposed application. The heads of argument must be clear, concise and without unnecessary elaboration. If a party fails to file heads of argument timeously, the court may make a punitive costs order against it and may, in certain circumstances, strike the matter from the roll.

Postponements

Point 11.7 states that an application will generally not be postponed; when it is, it will be postponed to the roll of the presiding judge in the same week or at some future date. If both parties agree to a postponement, this shall be recorded in writing by them and shall be filed together with the relevant practice note. The written agreement to postpone must set out the grounds for such agreement being necessary.

Urgent applications

The manual explains that in Johannesburg there is a duty judge designated for hearing urgent applications for each week of the year. The week commences

on Sunday at 6 pm and terminates the following Sunday at 6 pm. Those who wish to make an urgent application must contact the registrar (the after-hours number of the duty registrar is 082 462 0508); they must not approach a judge or a judge's secretary for this reason.

The standard time for making an urgent application, whether during term or in recess, is 10 am on Tuesdays and Thursdays. If an urgent application cannot be brought at these times, it may be made on any other day of the week at any time, but the applicant in the founding affidavit must set out facts justifying this. However, this does not apply to applications for interdicts in respect of strikes and lock-outs that are contended to be unprotected, or to applications to interdict acts of violence or any unlawful conduct that may occur during industrial action.

Applicants seeking interdicts in respect of strikes or lock-outs that are contended to be unprotected are to do so under the provisions of s 68(2) and (3) of the Labour Relations Act.

Applications for leave to appeal

The manual states that a copy of any application for leave to appeal filed in terms of r 30 must be served on the judge's sec-

retary or, if the judge's secretary is not available, on the secretary of any other judge in the seat where the matter was heard. Within ten days of filing the application, the party seeking leave must file its submissions in terms of r 30(3A) and the party opposing the leave must file its submissions five days thereafter. The application for leave to appeal will be decided by the judge in chambers on the basis of the submissions filed in terms of r 30(3A), unless the judge directs that the application be heard in open court. The application for leave to appeal must be filed with the registrar in charge of appeals.

Pro bono exemption

Point 17 states that: 'In matters where one or both of the parties are represented by practitioners acting *pro bono*, a judge may grant an exemption from the full or partial application of the relevant portions of this manual, including issuing directives regarding, *inter alia*, the preparation of the record, indexing and pagination of the papers and the conduct of pre-trial conferences, as well as the need to file heads of argument.'

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Mentorship to count as *pro bono*

The *Pro Bono* Committee of the Law Society of South Africa (LSSA) has agreed that in certain circumstances mentorship will count as *pro bono* services.

LSSA chief executive officer, Nic Swart, told *De Rebus* that 'mentorship is an important element in the profession' that provides valuable growth and it is hoped that, through this, attorneys will be encouraged to make themselves available as mentors.

Mr Swart said that in future mentorship will most likely count significantly towards earning continuing professional development points.

The application of the mentorship will take the form of a written contract with reports to LSSA's Legal Education and Development (LEAD) division.

'Mentees gain confidence from mentorship, especially when it is on a one-on-one basis,' said Mr Swart.

The mentorship should not be less than 20 hours and mentors will not be remunerated.

Mentors will need to have been in practice for not less than ten years and mentees for not more than two. The mentees also cannot be from the same firm as the mentor.

Marissa van Niekerk, coordinator for the LSSA *Pro Bono* Committee, said this would allow for necessary skills transfer.

LEAD is currently in the process of developing a database of mentors. The database will help LEAD to match mentees to mentors. The database will also allow for the matching of mentees with mentors when the former require training in specific fields of law, said Ms van Niekerk.

Ms van Niekerk added that the mentorship programme would also offer mentees practical skills, such as how to conduct themselves in court, how to keep a diary and the correct attire to be worn.

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Reader survey iPad winners



De Rebus Editorial Committee member, Mohamed Randera, drawing the names of the winners.

De Rebus would like to thank all those who participated in our reader survey.

Congratulations to Neil Harty and Quinton Combrink, who have each won an iPad 3 loaded with a year's free online access to the *Essential Legal Practitioner Bundle* from Juta, while John Rüttsch and Craig Berg have each won an iPad 4 loaded with a year's subscription to a limited content library of LexisNexis online publications.

SCA overturns decision on silk

The Supreme Court of Appeal (SCA) has overturned a North Gauteng High Court order declaring that the President had no power in terms of s 84(2)(k) of the Constitution to confer senior counsel (SC), or 'silk', status on advocates.

The court, in a decision delivered on 15 March (*General Council of the Bar and Another v Mansingh and Others* (SCA) (unreported case no 417/2012, 15-3-2013) (Brand JA)), found that 'there is nothing in the broader context which compels a meaning of "honours" that deviates from the one clearly indicated by the historical background of the provision. ... [T]he power to confer honours bestowed upon the President by s 84(2)(k) includes the authority to confer the status of senior counsel on practising advocates.'

Section 84(1) of the Constitution provides that the President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of head of state and head of the national executive, while subs (2)(k) provides that the President is responsible for conferring honours.

The respondent, Johannesburg advocate Roshnee Mansingh, has, however, told *De Rebus* that she had applied to the Constitutional Court for leave to appeal the SCA decision.

Background to the matter

The above order was the result of an application to the High Court by Ms Mansingh, who was of the opinion that the President's power to confer honours in terms of s 84(2)(k) did not include the power to grant advocates SC status, and that there was no other legal source for such power.

Six respondents were cited in the application, namely the President, the Justice Minister, the General Council of the Bar, the Johannesburg Society of Advocates, the Independent Association of Advocates of South Africa and the Law Society of South Africa (LSSA) because of the interest they may have in the matter. All of the respondents, bar the LSSA, opposed the application. The LSSA stated that it would abide by the court's decision.

The High Court granted the order requested by Ms Mansingh and declared that the President had no such power to confer SC status.

The SCA

The General Council of the Bar and the Johannesburg Society of Advocates approached the SCA to appeal the High

Court judgment. The respondents in the court *a quo*, save for the LSSA, stated that they would abide by the SCA's decision.

The appellants' argument was that the power to confer SC status on practising advocates fell in the ambit of s 84(2)(k); alternatively, even if it could not be accommodated under the honours power in s 84(2)(k), it was authorised by s 84(1) as an auxiliary power necessary to carry out a function of the President as head of state.

The court noted that, in the appeal, the LSSA was 'no longer content to abide the decision of the court, but actively supported Mansingh's case'.

The narrow issue before the SCA was whether the President had the power to confer the status of silk on practising advocates under the Constitution, which the court noted turned 'exclusively on the interpretation of s 84 of the Constitution'.

The court emphasised that it was not called on to decide questions relating to whether the institution of silk is a 'good thing or a bad thing', whether it should be abolished or retained, whether or not it is worthy of protection, and whether or not the President should or ought to have such a power.

Interpretation of s 84(2)

The court therefore approached the matter from the perspective of a proper interpretation of s 84(2) and considered a number of Constitutional Court decisions on constitutional interpretation.

It noted that the first step was to establish the literal meaning of 'honours'. In this regard, the court held that 'on a purely linguistic basis', the concept of honours bears a meaning wide enough to include the conferral of silk.

Historical context

The court then undertook an in-depth examination of the historical context of awarding SC status in South Africa.

The court noted that, while s 82(1) of the interim Constitution made no express reference to prerogative powers, it specifically bestowed powers on the head of state 'which clearly owed their origin to the royal prerogative', such as the power to pardon and relieve offenders and the power to confer honours.

'The cardinal difference is, however, that unlike its predecessors, s 82(1) of the interim Constitution did not contain a catch-all provision which preserved unlisted prerogative powers. This approach, as we know, has also been adopted in s 84(2) of our Constitution,' the court said.

It held that the drafters' intention seemed to be plain – the intention was not to abolish prerogative powers or to

diminish the function of the head of state previously derived from the royal prerogative but, insofar as executive powers derived from the royal prerogative were not incompatible with the new constitutional order, they should be codified and maintained.

As a result of this finding, the court held that the historical context 'therefore seems to support the appellants' argument that the power "to confer honours" contemplated in s 84(2)(k) of the Constitution must be afforded its traditional content, which included the power to appoint silks'.

Broader context

In considering whether there was anything in the broader context that indicated a meaning of s 84(2)(k) that was inconsistent with that provided by the historical perspective, the court pointed out a number of incorrect findings by the court *a quo*. These included the High Court's finding that the historical perspective was of lesser, if any, importance as the Constitution represented a clean break from the past in order to avoid adopting concepts into the Constitution that were not based on the will of the people of South Africa. The SCA held that this reasoning departed from the 'wrong premise' and therefore led to the 'wrong conclusion':

'Although it can be accepted as a general principle that the Constitution intended a break with the unacceptable features of the past, that principle can hardly find application in a case where the very language used indicates an intent to preserve past practices' (at para 28), adding:

'The fact that s 84(2) confers some of the former royal prerogative powers on the President and that they include the power to confer honours, is beyond debate.'

The only question, the court stated, was whether the codified prerogative power to confer honours included the power to appoint silks. The answer did not depend on the court's abstract perception of 'the will of the people', but on the proper interpretation of 'honours', *inter alia*, against its historical background.

Another finding of the court *a quo* that the SCA dismissed was that the absence of awarding SC status on the presidency's website meant that it was not an honour in terms of s 84(2). In this regard, the SCA found:

'The mere fact that silk is not included in the national orders on the website of the presidency plainly does not in itself exclude silk from "honours". President [Jacob] Zuma ... deposed to the fact that

he regards silk as an honour; that the website of the presidency is created and managed by his administrative personnel; and that his administrative personnel cannot possibly define the contents of his constitutional powers to confer honours.'

The court added that there was no reason in principle why the term 'honours' in s 84(2)(k) should be limited to national orders: '[T]he meaning of honours is wide enough to take many forms. Once this is accepted, the inquiry whether silk constitutes honours cannot be answered with reference to the characteristics of national orders. One cannot answer the question whether apples and pears are both fruit by looking at the characteristics of an apple, which is a fruit, and conclude that a pear is not a fruit because it does not share the characteristics of an apple.'

Finally, the SCA disagreed with the High Court's reasoning that, as the President does not award honours akin to SC status on members of other professions, SC status is not an honour in terms of s 84(2)(k):

'While the historical context supports the appointment of senior counsel as being included in the President's power to confer honours, the same cannot be said of other professions. The reason for this historical distinction is probably that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice, which in turn is properly the concern of the head of state' (at para 31).

The SCA dismissed a further argument raised by Ms Mansingh during the appeal proceedings, that the institution of silk infringed the rights of non-silks contained in s 9 (equality) and s 22 (freedom

of trade, occupation and profession) of the Constitution. The SCA noted that this argument was 'devoid of any basis of fact' and seemed to demonstrate 'confused reasoning'.

SCA's finding

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 and the appeal was upheld.

- The full judgment can be found at www.derebus.org.za under 'Documents'.
- See 2012 (Aug) DR 44, 2012 (Mar) DR 5 and 2011 (June) DR 8.

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Whither the SADC Tribunal?

The Southern African Development Community (SADC) Tribunal was the subject of a recent colloquium hosted by the SADC Lawyers' Association (SADC LA) and the SADC Community Council of Non-Governmental Organizations (SADC - CNGO).

The theme of the colloquium, which took place in Johannesburg, was 'Whither the SADC Tribunal?'

Speakers at the conference included executive director of the SADC - CNGO, Boichoko Ditlhake; Zimbabwean Deputy Justice Minister, Obert Gutu; director of the Africa Regional Programme of the International Commission of Jurists, Arnold Tsunga; registrar of the East African Court of Justice, Professor John Eudes Ruhangisa; chief registrar of the Economic Community of West African States Community Court of Justice (ECOWAS Court), Tony Anene-Maidoh; Chief Justice of Tanzania, Mohamed Chande Othman; executive director of the Southern Africa Litigation Centre, Nicole Fritz; President of the Law Association of Zambia, James Banda; Professor Michelo Hansungule from the University of Pretoria Centre for Human Rights; Botswana attorney Onalethata Kambai; and programme manager of poverty development at SADC - CNGO, Glen Farred.

Below is a summary of a report that was compiled on the colloquium.

Background

The SADC Tribunal commenced operations in 2005 and was established by SADC member states in terms of art 9



Delegates of the colloquium on the Southern African Development Community Tribunal.

of the SADC Treaty in order to 'ensure adherence to and the proper interpretation of the provisions of [the SADC] Treaty and subsidiary instruments and to adjudicate upon such dispute as may be referred to it' (art 16(1) of the SADC Treaty).

In August 2010 the SADC Summit of Heads of State and Government took a resolution to suspend the tribunal pending a review of its role, functions and terms of reference.

It was in this context that the conference was held to offer a platform for legal practitioners, researchers, government officials, civil society and labour association representatives to discuss the short-, medium- and long-term solutions to overcome the status quo.

The objectives of the colloquium included to -

- enable participants to interrogate strat-

egies to enhance access to justice for SADC citizens;

- strengthen past and ongoing tribunal initiatives; and
- identify means, capacities and strategies to save the tribunal.

Fighting for the tribunal

Mr Ditlhake said that members of civil society should continue to fight against the decision of the 32nd SADC Summit of Heads of State and Government to reduce the tribunal to an interstate court. He stated that an awareness campaign was planned for the purpose of collecting five million signatures from citizens of the region as a sign of their disapproval of the decision, which restricted access to justice.

In conclusion, Mr Ditlhake highlighted that a good vision of justice rested on respecting the separation of powers and

accountability. He added that the rule of law should not come from the vision of governments but rather from the endeavour of citizens of the region and civil society.

Despite the fact that the decision to suspend the tribunal stemmed from Zimbabwe's refusal to comply with the tribunal's decisions, the country's Deputy Justice Minister Gutu said: 'When citizens have exhausted all national remedies at their disposal, they must be allowed to appeal to [a] national judiciary body such as the SADC Tribunal.'

He added that the decision to reduce the tribunal to an interstate court was a step backwards since it restricted the meaning of human rights. He therefore urged those at the colloquium to reflect on the current situation affecting the tribunal and to come up with a tangible way forward.

East African Court of Justice

In the second session of the colloquium, Professor Ruhangisa recalled that the motivation to establish the East African Community was to foster cooperation and development among member states. He said that he played a part in establishing the East African Court of Justice.

Professor Ruhangisa noted the similarities in problems experienced by the two regional organisations and stated that there was, therefore, something to learn for SADC, for example in respect of sovereignty of member states. He highlighted some features of the East African Community that could not be found in SADC, such as the superiority that community law enjoys above national law, especially regarding the enforcement of judgments in the region.

Professor Ruhangisa further reflected on internal and external factors that impacted on the effectiveness of a regional court. Internal factors include the experience, competence, skills, integrity, independence and impartiality of judges; and transparency in the appointment of judges. The external factors he pointed out were the need for political support – arguing that lack of enforcement of a court's decisions was generally an expression of a lack of political support from governments – and the accessibility of the court. Contrary to the position in SADC, he pointed out that the East African Community had neither set up a condition nor a cost fee for accessibility. He added that geographical location would naturally limit the accessibility of courts.

In response to questions raised during plenary discussions, Professor Ruhangisa emphasised the need to educate and assist citizens to understand the meaning of justice. On the issue of a lack of political support, his view was that it was important not to rely on politicians'

promises in cases involving the government, but rather to opt for lobbying as a better strategy.

In conclusion, he emphasised the role that civil society must play to support the regional court.

ECOWAS Court

Mr Anene-Maidoh provided an overview of the rationale for the establishment of the ECOWAS Court, which is responsible for resolving disputes among member states regarding interpretation and application of the provisions of the ECOWAS Treaty. He said that although the ECOWAS Court was initially an interstate court, its jurisdiction had been extended in January 2005 to give citizens of the community access to the court, especially regarding human rights issues.

Mr Anene-Maidoh noted that the court's mandate was fluid and indeterminate, and represented a bigger opportunity to uplift fundamental rights.

In addition, he said that the ECOWAS Court had some organisational features that the tribunal may borrow, such as –

- exhaustion of local remedies, which is not a precondition to approach the court;

- independence and transparency of the appointment of judges, guaranteed by the involvement of a small judiciary council and the chief justices of member states; and

- the prevalence of the regional court decisions in relation to domestic ones.

In conclusion, Mr Anene-Maidoh recalled the role civil society played in the extension of the mandate of the ECOWAS Court and urged civil society in the SADC region to keep fighting the decision to limit the tribunal's jurisdiction.

What now?

During the third session of the colloquium, Ms Fritz said that the Southern Africa Litigation Centre had worked closely with SADC LA, as well as a number of civil societies in the region, in a bid to secure the revival of the tribunal. Further, through the Pan African Lawyers Union and the centre, she said, a request had been made to the African Court on Human and Peoples' Rights (African Court) to provide an advisory opinion on the legality of the tribunal's suspension and legal issues relating to the tribunal. Ms Fritz concluded by saying that although advisory opinions were not legally binding on states, the aim was to engage in further discussions with governments of the region.

Professor Hansungule stressed that political will went beyond signatures and ratifications of protocols; it required the implementation of the tribunal's decisions. He added that there was a need for civil society to engage with SADC justice ministers and 'fight for what they believe

is right'. He observed experiences in the inter-American and European human rights systems and said that, although initially both systems were the result of a political process, enforcement mechanisms took into account human rights as time passed. He added that, although the process to establish a court was often political at its inception, this should not prevent the tribunal working independently and delivering efficient decisions to uplift human rights.

Professor Hansungule added that there were many viable options for citizens of the region besides the tribunal, such as the enforcement mechanisms set up in the United Nations system, the African Charter on Human and Peoples' Rights and the Common Market for Eastern and Southern Africa Treaty, which promote the protection of human rights. However, he cautioned that the existence of these optional methods should not be taken as a reason to consider that the case for the tribunal was lost.

In response to questions raised during the plenary session, Professor Hansungule pointed out that experiences from other continents were relevant for Africa in the context of human rights. He said that, for instance, the African supranational courts could learn from the effective enforcement of judgments delivered in the European Court of Justice. He added that these regional courts made 'practical sense' to the people, as they were close to victims.

Importance of the tribunal

During the fifth session of the colloquium, Mr Kambai said that it was important to consider the motivation behind the tribunal's establishment, which was 'to strengthen democratic governance, human rights, the rule of law and adherence of the principles of separation of powers within the region'.

He emphasised the difference between the rule of law and rule by law. He said that the former implied that power must be exercised in respect of fundamental principles entrenched in law, including human rights, while the latter suggested that the power may be exercised in any way, provided it was in accordance with the law, which could mean violating human rights. He said that apartheid was an example of rule by law, as there were some laws that could not be legitimated but were used to oppress South Africans. He added that the decision on the curtailment of the tribunal was another example of rule by law.

Mr Kambai suggested that should the tribunal be reinstated, factors such as a credible system of accreditation of lawyers should be in place, judges should be appointed full-time, the tribunal should be funded by member states and the issue of sovereignty should be regulated.

In conclusion, he called for formal cooperation among regional courts to enable the enforcement of laws across regions.

Mr Farred, during his presentation, elaborated on the tribunal from a socio-economic and development perspective. He pointed out interactions between development and human rights issues. In his view, fundamental rights with implications for development, such as access to education, clean water and food for children, should be regarded as justiciable.

In respect of the Millennium Development Goals, he stated that of all countries in south Saharan Africa, only Botswana was likely to achieve its objectives by 2015.

Mr Farred concluded by saying that the debate on the tribunal must go beyond pure legal perspectives and spark discussion on how to include socialised content in the SADC Treaty. He said that there was a need to renegotiate the social contract between SADC citizens and heads of state and governments.

Last Tarabuku, member of the Zimbabwe Congress of Trade Unions, representing the Southern African Trade Union Co-ordination Council, said that his organisation was opposed to the decision of reducing the tribunal to an interstate court. He added that it was

necessary to look at human rights issues from a labour perspective and to tackle issues related to decent working conditions and social security.

Working together

During a plenary discussion on the second day of the colloquium three main ideas were developed. These were:

- There was a need to improve strategies to involve lawyers at the domestic level in lobbying to obtain the reinstatement of the tribunal.
- Strategies must be implemented to find ways of impacting the knowledge of the region's citizens regarding the correct understanding of the rule of law.
- Discussions should go beyond lawyers' organisations and include different sectors of society that have an interest in the reinstatement of the tribunal.

Delegates were divided into groups to deal with these ideas.

The way forward

The groups recommended that SADC lawyers be involved in lobbying for the reinstatement of the tribunal. Further, it was necessary to lobby at an international level with strategic organisations and there was a need to establish alliances with stakeholders formally regis-

tered at a national level. The groups also mentioned that there was a need for lobbying strategies to be revised, as previous ones had not been effective. Should the tribunal be reinstated, the groups recommended that the tribunal should have a human rights and economic mandate and must be independent. They also recommended that civil society should engage with various governments of the region in order to convince them to reinstate the tribunal.

The groups suggested the following:

- Civil society should embark on an awareness campaign to sensitise citizens of the region about the issue.
- Working conditions of judges should be improved.
- Tribunal decisions must be enforced.
- The accessibility of the tribunal be improved by creating sub-registries in the region.

• See also 2013 (Jan/Feb) *DR* 24; 2012 (Oct) *DR* 3, 5, 10 and 13; 2012 (Apr) *DR* 14; 2011 (Sept) *DR* 12 and 15; and 2011 (Apr) *DR* 9.

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Managing Intellectual Property recognises local law firm



From left to right: Simonne Moodie, Erik van der Vyver, Bastiaan Koster, Christine Strutt, Rowan Joseph and Sandra Clelland accepting their award.

Intellectual property (IP) law firm Von Seidels has been awarded the South Africa IP Firm of the Year award for 2013 by international IP magazine *Managing Intellectual Property* (MIP).

Associate publisher of *MIP*, Ali Jawad said: 'The awards are presented to the firms behind the most innovative and challenging IP work of the past year. The awards ceremony recognises the leading firms from major jurisdictions around the world.'

According to Bastiaan Koster, managing partner of Von Seidels: 'While this recognition has come as somewhat of a

surprise to us, we are very pleased with the recognition of having established ourselves as one of the leading IP firms in South Africa.'

Mr Koster added that Von Seidels was a specialist patent and trade mark firm established in 2007. 'Von Seidels has a strong patent team, which includes electronic, chemical, mechatronic and civil engineers, as well as chemists and a pharmacist,' he said.

Mr Koster told *De Rebus* that he believed IP would continue to play an important role in the well-being of businesses. 'It will remain an important asset on the balance sheet of most businesses, but IP must be managed strategically so that companies have appropriate protection for their brands and new innovations,' he said in this regard.

Five partners of the firm travelled to London for the award ceremony on 17 April. Other companies in the running for the award were Adams & Adams, Bouwers Inc, De Chalains and Spoor & Fisher. In 2011 and 2012 the award was won by Adams & Adams.

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New ruling on advertising keywords

The Law Society of the Northern Provinces (LSNP) has issued a ruling notice on keyword advertising on search engines and the internet.

In the notice, the LSNP states that, in addition to its marketing and advertising rules, it advises members, firms of attorneys and incorporated firms not to make use of the internet or internet search terms, engage in any advertising method, attempt to attract clients by means that can be reasonably considered to refer to, or make use of -

- the names or surnames of another attorney, firm of attorneys or incorporated practice, unless those names or surnames are reasonably connected to the advertising members;
- any website name of another attorney, firm or incorporated practice; or
- any phrase or term that is the trade mark of another attorney, firm of attorneys or incorporated practice.

Members, firms of attorneys and incorporated firms must also cease using any phrase or term when advised in writing that a trade mark application is pending in respect thereof.

Members must 'immediately desist from' any of the above transgressions on notice to them by another attorney, firm of attorneys or incorporated practice, or by the LSNP.

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South African law coming to grips with cyber crime

On 4 and 5 April the Lex Informatica 2013: Cyber Law, ICT Law and Information Ethics Conference was held in Pretoria. Deputy Minister of Justice and Constitutional Development, Andries Nel, gave a keynote address at the conference on the topic 'Advancement of cyber law in Africa and globally'.

Mr Nel said that there were various initiatives on the African continent to improve cyber security and combat cyber crime.

He referred to a draft convention on the establishment of a legal framework for the use of cyber security, which is 'currently receiving attention under the auspices of the African Union'.

'In September 2012 the draft convention on cyber crime was approved by the fourth African Union Conference of Ministers responsible for Information and Communications Technology,' Mr Nel said.

He added that the objective of the convention, which is expected to be in force by 2014, was to 'harmonise legislation relating to e-transactions, development of personal data protection, cyber security promotion and the fight against cyber crime'.

Deputy Minister Nel also referred to several cyber crime cases that have made their way through South African courts and concluded: 'These examples illustrate that cyber threats are real, but also that the seriousness with which our Justice, Crime Prevention and Security cluster is taking these threats is not virtual; it is very real.'

Social media and misconduct

Lenja Dahms-Jansen from law firm Bowman Gilfillan spoke on social media and misconduct.

Ms Dahms-Jansen said that the posting of disparaging or offensive comments on online social media sites by employees had been recognised as a fair reason for employers to dismiss them.

'The Commission for Conciliation, Mediation and Arbitration is prepared to consider what an employee says on his or her social media profile in determining

the substantive fairness of a dismissal,' she added.

'Employees who make derogatory, harassing or discriminatory remarks on social media do so at their own peril,' Ms Dahms-Jansen said.

She also cited four cases as examples in this regard, namely:

- *Sedick and Another v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA).
 - *Fredericks v Jo Barkett Fashions* [2011] JOL 27923 (CCMA).
 - *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA).
 - *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA).
- With the increasing use of online social media, she stated that employers should be aware of the following legislation:
- The Protection of Personal Information Bill (B9B of 2009).
 - The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.
 - The Electronic Communications and Transactions Act 25 of 2002 (ECT Act).
 - Section 6 of the Employment Equity Act 55 of 1998.

Ms Dahms-Jansen said that every company engaging in social media, or that had employees engaging in social media, should have a social media policy in place that includes –

- clear guidelines on acceptable and unacceptable social media use;
- a distinction between personal and professional social media use;
- guidelines on the risks of social media to personal and professional brands;
- consequences of breaching the social media policy; and
- a clear indication of who owns the social media accounts, content and followers.

'Social media is still an underdeveloped area of law ... How our courts will deal with issues arising out of social media usage is still, to a large extent, uncertain, but normal rules of fairness and equity will apply to all instances of social media misconduct,' Ms Dahms-Jansen concluded.

Online defamation

University of South Africa Professor San-

ette Nel spoke about online defamation and the right to freedom of speech and defamation in the context of social media.

She also discussed the recent case of *H v W* (GSJ) (unreported case no 10142/12, 30-1-2013) (Willis J).

'The print media always had rules and regulations pertaining to what they publish, but ... there is no regulation on ordinary people and they do not realise that once they publish something on the internet, they publish it for purposes of publication and there should also be certain rules and regulations that apply to them,' Professor Nel said.

In the *H v W* case the respondent posted a defamatory message on Facebook relating to the applicant. The applicant sought an interdict restraining the respondent from posting certain information on social media websites and removing postings already made. The applicant was substantially successful in the matter and the respondent was ordered to remove all postings that she had placed on Facebook that referred to the applicant, and to pay the applicant's costs.

In coming to its decision, the court noted that the common law needed to develop in respect of remedy where infringements of privacy take place on social media.

Spam

Sylvia Papadopoulos from the University of Pretoria's law faculty spoke on the topic 'The changing face of spam regulation in South Africa'.

Ms Papadopoulos noted that South African law dealt with spam across a number of pieces of legislation.

Prior to the enactment of the Consumer Protection Act 68 of 2008, the only legislation directly regulating spam in South Africa was s 45 of the ECT Act, she said.

Ms Papadopoulos added that the Protection of Personal Information Bill, when enacted, would also deal with aspects of spam.

However, she said that having different pieces of legislation dealing with spam was problematic.

Cyber crime – a South African perspective

Sizwe Snail from Snail Attorneys spoke on cyber crime in South Africa and vari-

ous sections of the ECT Act dealing with different types of cyber crime.

Mr Snail noted that the ECT Act would be amended by the Electronic Communications and Transactions Amendment Bill, 2012.

It is being proposed that there will be maximum penalties from 12 months' to ten years' imprisonment, alternatively a fine of R 10 million, for people who contravene s 86(1) to 86(3), said Mr Snail. 'The fines are now serious, it appears as if cyber criminality is now a reality,' he added.

Mr Snail noted that there were other statutory remedies that could apply to cyber crime, including the Prevention of Organised Crime Act 121 of 1998 and the Financial Intelligence Centre Act 38 of 2001.

In concluding, Mr Snail said: 'I believe that the ECT Act is very good and is a noble endeavour by South Africa. I do, however, believe that our South African courts should try and test the ECT Act now so that we can have case law that we can follow.'

Kevin O'Reilly,
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New judge for the Constitutional Court

In April President Jacob Zuma appointed advocate Mbuyiseli Madlanga as a judge of the Constitutional Court, with effect from 1 August 2013.

'I congratulate advocate Madlanga SC on this appointment and wish him all the best in this new role of promoting constitutional justice in our country,' President Zuma said in a press release announcing the appointment.

Regarding the position, Mr Madlanga, 51, told *De Rebus*: 'Sitting on the Bench of the highest court in the country is not only a daunting task but a challenge. Challenges always appeal to me.'

He added: 'I have one goal, and that is to administer justice as best I can in accordance with the Constitution.'

Regarding foreseeable challenges, Mr Madlanga said: 'Although the court has been in existence for just under 19 years now, its jurisprudence is still developing. Further development of the jurisprudence is itself a challenge.'

Mr Madlanga was a judge of the High Court from 1996 to 2001. He was appointed deputy chairperson of the Competition Tribunal in 2009 and as a member of the Judicial Service Commission in 2010, a position he held until resigning when he accepted the nomination for the Constitutional Court Bench.

Mr Madlanga has previously served on the Constitutional Court as an acting judge between August 2000 and May 2001. He has also been an acting judge of the Supreme Court of Appeal between 1998 and 1999, and was acting Judge President of the then Transkei High Court between 1999 and 2000.

Mr Madlanga is currently the chief evidence leader of the Commission of Inquiry into the Marikana tragedy.

• See also 2013 (Mar) DR 6.

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Juta Prize for Candidate Attorneys

De Rebus is pleased to announce that Juta Law is offering an annual prize for contributions of articles by candidate attorneys published in *De Rebus* in 2013. The **Juta Law Prize for Candidate Attorneys** will be awarded for the best article contributed by a candidate attorney. The 2013 prize is R7500 in book vouchers OR a 12-month single-user subscription to the online *Juta's Essential Legal Practitioners Bundle* to the value of R10 380.

The following conditions apply to entries:

- The article should not exceed 3 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.
- The article must be published between 1 January and 31 December 2013.
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

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Knowledge management is power

Many people, including attorneys, are often looking for better ways to conduct their day-to-day business. One of the tools to achieve this is knowledge management, which was the topic of the recent Janders Dean's Legal Knowledge and African Innovation Conference - Africa, which was held in Johannesburg on 15 March.

At the event international and domestic speakers addressed delegates on knowledge management, international law firm growth and mergers in legal firms.

Knowledge management, a concept that arose approximately two decades ago, can be defined as 'a discipline that promotes an integrated approach to identifying, capturing, evaluating, retrieving and sharing all of an enterprise's information assets' (Michael ED Koenig 'What is KM? Knowledge management explained' *KM World* 4-5-2012 (www.kmworld.com/Articles/Editorial/What-Is-.../What-is-KM-Knowledge-Management-Explained-82405.aspx, accessed 2-4-2013)).

Strategic knowledge management and innovation in law firms

In a keynote address, David Fitch, director of global knowledge management at law firm Latham & Watkins in London, said that the 'time was right' for knowledge management, which could be used as a strategy in response to difficult market conditions.

Since the financial crisis, law firms have been in a tough market, he said, adding that the message from partners and clients was for legal providers to deliver more value for less cost, while maintaining the same quality of service. Law firms were coming under pressure to do things differently, such as moving away from hourly rates to other fee arrangements, like fixed fees and value-based billing. In addition, there is an increasing demand for 'value adds', like direct access to know-how, training, and online content and services.

Citing from recent survey results, Mr Fitch added: 'Price is becoming a primary driver of clients' decisions as to whether to engage particular firms or not.'

Mr Fitch told delegates that knowledge management was a strategic priority and one of a number of strategies used as a response to difficult market conditions. The goal, besides making life easier for attorneys, is improving service and response times, which ultimately relates to supporting the business in terms of profitability,



Keynote speaker at the Janders Dean's Legal Knowledge and African Innovation Conference - Africa, David Fitch.

he added. It is a benefit to support innovation and business change, he said, adding that knowledge management drove efficiency, standardised products, dealt with risk issues, brought in business, protected margins and added value and support to key client relationships.

Knowledge management framework

Mr Fitch referred to a knowledge pyramid or framework, with five levels of knowledge management, representing current knowledge management in most law firms, although he noted that it was not a 'one-size-fits-all' approach for all firms. He said to legal practitioners: 'The key is to put down the foundation and allow yourself to build depth and complexity to the programme over time and to recognise that each group will have different knowledge management priorities, and your role is to support the creation of those priorities but then align them to your firm's goals and client demand, which is a challenge.'

This framework is illustrated below, together with a brief outline of each aspect.



- **Current awareness:** This entails keeping attorneys up to date with legal, business and regulatory developments and supporting attorneys to develop a better understanding of their clients and the sectors in which they operate.

- **Precedents:** The term precedent here refers to capturing and storing good examples of previous transactions and being able to organise and classify these accordingly for future use. This avoids situations where attorneys have to 'reinvent the wheel' in every transaction.

- **Standard forms:** This involves providing attorneys with standard forms and templates to increase efficiency, quality and consistency, and to reduce costs.

- **Practice notes:** This entails providing high-value 'how to' practice notes, which *inter alia* retain the firm's intellectual capital and bring together market experience with substantive legal knowledge.

- **Training:** This element relates to fostering a culture of learning and continuing professional development in order to develop attorneys with the highest calibre of technical expertise and commercial acumen.

Getting attorneys on board

Mr Fitch said that in his firm knowledge management was managed internally with an initiative providing for one hour spent on approved knowledge management translating into one billable hour. 'The annual pace is 1 900 hours and that includes client billable hours, *pro bono* hours and knowledge management hours. Since the project was launched last year, we have 500 active knowledge management projects and the projects are reviewed like any other piece of work.'

Law firm strategic planning

In a panel discussion on the importance of having a strategic roadmap in knowledge management, panellists discussed how the size and nature of the law firm influenced a knowledge management strategy.

Gareth Cantin, professional support lawyer at local law firm Werksmans Attorneys, said: 'The entry in the South Africa market by a lot of international law firms has changed the knowledge management space in South Africa. It was uncommon to have a knowledge management department in South Africa, but a lot of firms are seeing the value and efficiency gains in knowledge management.'

According to Tammy Beira, partner and director of knowledge at law firm Bowman Gilfillan, knowledge management is easier to manage in a smaller firm because asset sharing happens naturally in that environment. 'When one moves into a bigger organisation, with the sheer size and growth,

logistical and territorial differences, one needs a more structured organisational institutionalisation of knowledge,' she said.

Ms Beira added that a roadmap and a strategy was necessary for a knowledge management team beginning the process. 'This is to understand what the priorities and issues are that one needs to deal with in the firm. There should be a buy-in from the firm and, to get the buy-in, you must articulate your ideas. Great participation and implementation is needed and the knowledge management team needs to understand what the projects are and continually evaluate these.'

On this element, Mr Cantin said: 'Executive buy-in, once it is there, means that it is easier to get knowledge management off the ground. Everyone is then interested in the projects and sees the need for them. It does take time for people to note the difference but, once they do, then they accept it more easily and will start contributing towards the systems in place.'

Ms Beira added: 'We sit down with the different practice areas and discuss what their strategy is from a knowledge management perspective. The practice area articulates what it needs, for example, training necessities, forms, etcetera. You must have a centralised plan but it must be brought down to the practice area as that is where the relevance is.'

Case studies

Kgothatso Mamabolo, knowledge management specialist at mining company Kumba Iron Ore, cited the company's 'lessons learned' knowledge management programme as an example of a knowledge management programme in action. The programme is used when an instruction is received to work on a project and there is no person to refer to for previous knowledge. 'With the database, we can refer to the expertise and experiences of project managers. The knowledge is used to pick up on trends and improve on the processes in the company and every project manager submits a report on a phase of the project when it is completed.'

Ms Beira referred to her firm's internal blog about the Companies Act 71 of 2008 as another example. 'It was an opportunity for innovation in a knowledge management sense. It is a creative way to interpret things and how to deal with difficult challenges in complex law and it has proved to be successful.'

Ms Beira added: 'You have to be flexible and agile but be open to ideas emerging from the business. You have to be mindful of opportunities.'

Knowledge management and international law firm growth

Tara Pichardo-Angadi, head of knowledge (Europe, Middle East and Africa region) at law firm Norton Rose, said that many local



Tara Pichardo-Angadi, head of knowledge (Europe, Middle East and Africa region) at law firm Norton Rose; Justin North, director at Janders Dean; and Tammy Beira, director of knowledge management at law firm Bowman Gilfillan.

law firms were merging with international firms, essentially to provide clients with a global service. She said that this had implications for firms' knowledge management, which had to be 'global', adding that some of the risk-related elements to consider when sharing knowledge globally were:

- Policy reasons for not being able to share certain information with one another. Also, sharing confidential client information could cause a problem when sharing information across member firms in different countries.
- In terms of privilege, different rules and information may apply when sharing information in different countries.
- Different data protection rules apply to different systems and local data protection rules can affect a knowledge management system.

What clients want, need and value

In a panel discussion, Justin North, director of Janders Dean, said that a knowledge manager's clients were the associates, partners and others in the firm, and it was necessary to understand their needs, requirements and behaviours.

Samantha Hogben, assistant general counsel at gold producer AngloGold Ashanti, said that the company worked with a number of law firms; however, what set some apart was that they understood how the company operated and what its needs were. In addition, what made a firm attractive was knowing their approach to certain issues and having a level of certainty when working with it.

Ms Hogben commended a London law firm that corresponds with her only when there is an important issue at hand. 'The e-mail is addressed straight to me and comes from the senior partner and the senior partner will only correspond with us when there is an issue that will impact our business. We receive no other e-mails from that law firm. When I see an e-mail from them, I open it as I know it contains something important.'

Ms Hogben added that 70% of the e-mails she received from law firms did not pertain to the field in which she works.

Haydn Davies, a partner at local law firm Webber Wentzel, said that knowledge is what attorneys offered and client feedback in this regard was thus important. 'Knowledge is what we know and who we know, and we share those concepts in our firm. Client feedback is very important. You might think the deal went off well and that there were no difficulties, but it might be different from the client's point of view,' he said.

Jonathan Lang, head of the Africa Group at Bowman Gilfillan, said that the firm had regular interviews with clients to obtain their feedback. He added that this took place in a neutral environment.

Ms Hogben noted that, compared to international firms, not as many South African firms asked for client feedback. 'If I cannot talk to the members of the firm directly, then there will not be a relationship. Personal contact is the key,' she said.

Mr North concluded by saying that it was important to understand clients' needs before implementing any knowledge management strategies in an attorney firm.

Conclusion

In conclusion, Mr North said: 'Business intelligence is knowledge management. Knowledge management is about what we know. Simple as that. What we know about our client, what we know about each other, what we know about our industry, what we know about our previous work, what we know and how we are going to use that information or that knowledge to make money or to make our people happier or to retain staff. Information about clients is vital and has to be a part of your knowledge roadmap and strategy.'

Kathleen Kriel,
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People and practices

Compiled by Shireen Mahomed

Werksmans Attorneys has ten promotions.



Jannie de Villiers has been promoted to director in the commercial department in Cape Town.



Jeremy Gobetz has been promoted to senior associate in the litigation department in Johannesburg.



Dylan Cunard has been promoted to director in the commercial department in Cape Town.



Matodzi Ramashia has been promoted to senior associate in the commercial department in Johannesburg.



Louise Bick has been promoted to director in the *pro bono* department in Johannesburg.



Daleen Malan has been promoted to senior associate in the tax department in Cape Town.



Aarthi Ramdhin has been promoted to senior associate in the commercial department in Johannesburg.



Sifiso Mhlungu has been promoted to senior associate in the litigation department in Johannesburg.



Bossau Boshoff has been promoted to senior associate in the litigation department in Cape Town.



Danielle du Plessis has been promoted to senior associate in the litigation department in Johannesburg.



Cox Yeats Attorneys in Durban has appointed Jason Moodley as an associate. He specialises in labour law.

Farrell Inc Attorneys in Durban has appointed two professional assistants.



Tyrone Pienaar specialises in labour law.



Ingrid Altenkirch specialises in civil litigation.

Ashersons Attorneys in Cape Town has two new partners.



Andrew Goldschmidt specialises in alternative dispute resolution, franchise law and general commercial law, among others.



Tamasen Maasdorp specialises in wills and estates, commercial litigation, family and property law.

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.

Schindlers Attorneys in Johannesburg has appointed four partners.



Craig Green specialises in commercial law and corporate litigation.



Dean Wright specialises in civil law, commercial and corporate litigation.



Lee Binneman specialises in general commercial agreements, labour law, family law and litigation.



Chantelle Gladwin specialises in commercial litigation, body corporate evictions, corporate restructurings and corporate taxation matters.

Cliffe Dekker Hofmeyr in Johannesburg has five new appointments.



Mohsina Chenia has been appointed as a director in the employment law department.



Hugo Pienaar has been appointed as a director in the employment law department.



Andrea Taylor has been appointed as an associate in the employment law department.



Nicholas Preston has been appointed as a senior associate in the employment law department.



Tricia Erasmus has been appointed as an associate in the *pro bono* and human rights department.



On 24 June John Ian Simon will have been practising as an attorney for an uninterrupted period of 60 years. He is currently a consultant at **Abrahams & Gross Inc** in Cape Town. Mr Simon received a lifetime achievement award in 2011 from the Cape Law Society and also served on the Company Law Committee of the Law Society of South Africa.



2013 Prize for Legal Practitioners



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The winner of the 2013 LexisNexis Prize for the best article contributed to *De Rebus* by a practising attorney will receive an iPad with one year's free access to their choice of 5 online titles. Benefit from a single online service, that gives you access to information relevant to your business, in your time, when and where you need it.

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- All South African Law Reports 1947 to present
- Labour Law Reports
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5 minutes with

the Johannesburg Attorneys Association

This month *De Rebus* news editor Nomfundo Manyathi-Jele spoke to the former chairperson and current convenor of the Public Relations Committee of the Johannesburg Attorneys Association (JAA), Jacques Tarica, about the association.

What is the JAA?

The JAA is the largest voluntary attorneys' association in South Africa. It represents the interests of attorneys practising in the greater Johannesburg area (including Soweto), as well as Randburg and Sandton, and ensures that the voice of our constituency is heard by the organised profession (including the law societies) and by government (including parliament).

What does the JAA do?

The JAA represents our constituency in every conceivable forum. Our sub-committees cover almost every field of law. These include involvement in –

- case flow management meetings at the South Gauteng High Court;
- the South Gauteng High Court IT Committee;
- the South Gauteng High Court Library Committee;
- the Property Committee;
- the Personal Injury Committee;
- monthly meetings regarding the civil regional courts in Johannesburg, Randburg and Germiston;
- making recommendations regarding the small claims courts in Johannesburg and Randburg;
- meetings with the regional office of the Justice Department; and
- monthly meetings regarding the Johannesburg and Randburg magistrates' courts.

In addition, one of the projects we aim to launch this year is a mentorship programme for candidate attorneys.

When was the JAA established?

The JAA was formed in 1943.

Who can become a member of the JAA?

The following persons are eligible for membership –

- attorneys practising in the Johannes-



The JAA committee: Front row (from left), Nakka de Klerk, Hoosen Sader, Jacques Tarica and Nomsa Khumalo. Back row (from left) Yusuf Wadee, Anton Theron, Ronald Bobroff, Philemon Magalego, Nicci Sauli-Koren, Anthony Berlowitz and Angela Williams.

burg area and any attorney, wherever his office may be situated in the Gauteng area, whose practice requires attendance in the Johannesburg area;

- attorneys employed by such attorneys; and
- candidate attorneys serving articles of clerkship with such attorneys.

How does one become a member of the JAA?

Any practitioner or candidate attorney eligible for membership can contact Angela Williams at the JAA's main office (see right for contact details).

The current membership fees are R 350 per annum for attorneys and R 175 for candidate attorneys.

What is the JAA's current membership?

We currently represent more than 3 300 members.

Where are the JAA's offices?

The JAA's main office is situated at the South Gauteng High Court (room 28). We also have satellite offices at the Johannesburg Magistrate's Court (room G104) and at the Randburg Magistrate's Court (room F020). These offices provide practitioners and members of the public with photostating, telephone and fax facilities at nominal charges. The office at the

Randburg Magistrate's Court is shared with ProBono.Org, with whom we have launched a joint initiative regarding *pro bono* work in divorce, maintenance and domestic violence matters.

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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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NATIONAL CREDIT ACT

Credit transaction?

Credit transaction?

Credit transaction?

Credit transaction?

A MATTER OF INTERPRETATION

Acknowledgments of debt
and the National Credit Act

By
Ariana
Omar



Picture source: Gallo Images/Thinkstock

The National Credit Act 34 of 2005 (NCA) was introduced to create a fair, transparent, accessible and responsible credit market in South Africa, aimed at protecting consumers (s 3 of the Act).

The NCA places the onus on credit providers to ensure that its substantive and procedural requirements are met, failing which, the credit provider could be subject to civil and/or criminal liability.

One aspect of the NCA that remains unsettled is its application to acknowledgments of debt (AODs). In the past the courts have decided matters on a case-by-case basis. However, recent case law suggests that the nature of the debt evidenced by the AOD is the determining factor when deciding if the AOD is governed by the NCA.

Acknowledgments of debt

An AOD is a written contract between a debtor and a creditor in terms of which they agree that the debtor will undertake unconditionally to pay an existing debt to the creditor on the terms set out in such AOD (*Adams v SA Motor Industry Employers* 1981 (3) SA 1189 (A)).

AODs provide for efficient enforcement of debts by creditors, in accordance with public policy in South Africa.

Section 8(1) of the NCA provides that an agreement constitutes a 'credit agreement' if it is, *inter alia*, a 'credit transaction'. A 'credit transaction' includes an agreement in terms of which payment of an amount owed by one person to another is deferred and any charge, fee or interest is payable to the credit provider in respect of the agreement, or the amount that has been deferred (s 8(4)(f)).

If an AOD constitutes a credit agreement for purposes of the NCA, it would need to meet various additional procedural requirements. Failure by the creditor to meet these requirements may lead to a court declaring such AOD void and could possibly lead to the imposition of administrative and civil penalties on the creditor, as well as criminal liability.

Case law

In the High Court case of *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP) the plaintiff and the defendant had entered into a sale of goods agreement in terms of which a sum of money was owed by the defendant to the plaintiff in respect of the goods sold. As an amount of money was owed by the defendant to the plaintiff on the due date for payment, the two parties concluded a written AOD. In the AOD the defendant acknowledged that she was indebted to the plaintiff for the unpaid amount under the sale of goods agreement concluded between them and undertook to pay the

debt on the due date stipulated in the AOD.

In terms of the AOD, the defendant undertook to pay the principal debt under the sale of goods agreement, plus the costs of negotiating and preparing the AOD, to the plaintiff on the due date. If the defendant failed to pay the debt on this date, she was liable to pay the amount under the AOD plus collection commission and the plaintiff's legal fees in enforcing the AOD.

The defendant failed to pay the debt on the date and, accordingly, the plaintiff applied to court to sue on the AOD. The defendant argued that the AOD constituted a credit agreement in terms of s 8(4)(f) of the NCA and that the plaintiff had failed to comply with the procedural requirements of the Act.

The court applied the definition of a 'credit transaction' in terms of s 8(4)(f) to the AOD and held that the AOD provided for deferment of payment to the due date, plus 'at least a fee or charge' (the costs of preparing the AOD) in terms of the AOD (the *Carter Trading* case at para 17). Accordingly, the AOD fell within the definition of a credit transaction and was subject to the NCA.

In the High Court case of *Rodel Financial Service (Pty) Ltd v Naidoo and Another* [2011] JOL 26799 (KZP) the court had to decide whether an AOD in relation to a written discounting agreement constituted a credit agreement in terms of the NCA. The written discounting agreement between the applicant and the respondents provided that the respondents were obliged to pay certain amounts to the applicant on the due dates. The parties had concluded an AOD in terms of which the respondents acknowledged that they were indebted to the applicant for the amounts owing under the discounting agreement and for discounting fees in respect of the amount owed. When the applicant tried to enforce the AOD in court, the respondents argued that the AOD was subject to the NCA and the applicant had failed to comply with the procedural requirements of the Act.

In the *Rodel* case the court relied on case law to conclude that a discounting agreement did not constitute a credit agreement and, accordingly, a discounting fee was not interest for purposes of the NCA. Applying the definition of a credit transaction to the AOD, the court concluded that the AOD did not meet the definition as there was no interest charged. The court supported its conclusion by stating that the AOD could not constitute a credit transaction as it evidenced a discounting agreement, which was not a credit agreement (the *Rodel* case at para 11.6).

In both the *Carter* and *Rodel* cases the courts adopted a definitional approach to the interpretation of AODs for purposes of the NCA. If an AOD met the requirements of a credit transaction in terms of s 8(4)(f), it would be subject to the NCA. In the *Rodel* case, however, the court looked not only to the definition of a credit transaction, but also to the underlying debt evidenced by the AOD. In the 2012 case of *Grainco (Pty) Ltd v Broodryk NO en Andere* 2012 (4) SA 517 (FB), however, there was a significant shift in the approach to AODs.

In the *Grainco* case the parties agreed to settle a claim for damages and, accordingly, agreed to conclude an AOD in terms of which the defendants acknowledged their obligation to pay agreed damages (plus interest) to the plaintiff on a future date stipulated in the AOD. When the plaintiff approached the court to enforce the AOD, the defendants argued, *inter alia*, that the AOD constituted a credit agreement in terms of the NCA and that the plaintiff had not complied with the procedural requirements of the Act. The plaintiff, in response, argued that it could never have been the intention of the legislature for an agreement with a claim in damages as its *causa* to be regulated by the provisions of the NCA.

The court agreed with the plaintiff and stated that the AOD did not fall within the business of money-lending and credit in the ordinary sense of the word. The court stated that the preamble of the NCA, which emphasises the importance of regulating consumer credit, made it clear that an AOD providing for an agreed deferral of damages could not have been contemplated by the NCA, as an interpretation that allowed for the inclusion of such an AOD would lead to an 'absurdity so glaring that it could never have been contemplated by the legislature' (at paras 7.2 – 7.4).

In the *Grainco* case the court looked first to the debt evidenced by the AOD to

'[R]ecent case law suggests that the nature of the debt evidenced by the AOD is the determining factor when deciding if the AOD is governed by the NCA.'

'It might be argued that the court in this matter ought to have justified how interpreting the AOD as a credit transaction could lead to absurdity, injustice or inequity.'

determine whether it was a credit agreement for purposes of the NCA. Only if such underlying debt constituted a credit agreement would the court have proceeded to apply the definition of a credit agreement to the AOD.

Discussion

While the approaches by the courts in the *Carter* and *Rodel* cases were definitionally dependent, the court adopted a more purposive approach to statutory interpretation in the *Grainco* case, emphasising the purpose of the NCA.

It might be argued that the court in this matter ought to have justified how interpreting the AOD as a credit transaction could lead to absurdity, injustice or inequity. In my view, a more rigorous jurisprudential analysis would have strengthened the reasoning in this case.

One way the court could have strengthened its reasoning would have been to rely on reasoning by analogy. In particular, the court could have looked to the provisions in the NCA dealing with credit guarantees – agreements that are, arguably, similar in nature and purpose to AODs.

A credit guarantee in terms of s 8(5) of the NCA is a type of credit agreement whereby a person guarantees the obligations of another consumer arising under

a credit facility or credit transaction.

In terms of s 4(2)(c) of the NCA, a credit guarantee will be subject to the provisions of the NCA only if the credit facility or credit transaction to which such credit guarantee relates is governed by the NCA. As the existence of the credit guarantee is dependent on the existence of the debt under the credit facility or credit transaction, it follows that a credit guarantee should not be subject to the provisions of the NCA if the debt to which it relates is not subject to the Act.

Broadly speaking, both credit guarantees and AODs provide the creditor with a form of security in relation to the debt due. In the case of a credit guarantee, the security is the ability by the creditor to hold the provider of the credit guarantee liable for the payment of the debt; with an AOD, the creditor may sue in court for payment of an existing debt, evidenced by an unconditional AOD, without resort to extrinsic evidence as it is a liquid document. I suggest that, had the court in the *Grainco* case adopted reasoning by analogy and likened the treatment of credit guarantees to AODs, its purposive argument would have been grounded in the text of the NCA.

Setting aside the difficulties in the reasoning in the *Grainco* case, the court in this matter appears to have adopted a two-step approach to the determination of whether an AOD is subject to the provisions of the NCA, namely –

- whether the AOD evidences the existence of a debt that is a credit agreement for purposes of the NCA and, if it does,
- whether the AOD meets the definition of a credit transaction, in which case it will constitute a credit agreement for purposes of the NCA.

Moving away from the case law, a more fundamental problem remains with regard to the application of the NCA to AODs in general. One of the primary aims of the Act is to prevent the provision of 'reckless credit' by credit

providers. A credit agreement is reckless if, *inter alia*, at the time the agreement was concluded, despite the preponderance of information available to the credit provider indicating that the conclusion of the credit agreement would make the consumer over-indebted, the credit provider proceeded to conclude the agreement with the consumer.

In my view, almost invariably, parties conclude AODs because of the debtor's high likelihood of not paying a debt on the due date. Accordingly, at the time when the parties conclude an AOD, the debtor is likely to be over-indebted. If the court considers an AOD to be a credit agreement, it is possible for such AOD in these circumstances to constitute reckless credit. This could lead to a court always suspending the force and effect of AODs on the ground of reckless credit.

Conclusion

The shift in approach by the courts, as seen in the *Grainco* case, is a welcome change in the law. It is, arguably, in accordance with South African public policy as it serves to provide clarity and certainty in the law of contract, which is important for commercial transactions.

However, it is contended that the success of this approach, as opposed to the definitionally dependent one in the older cases of *Carter* and *Rodel*, depends on the ability of the courts to base their purposive reasoning in the provisions of the NCA. A possible solution might be reasoning by analogy.

A broader problem that remains is the application of the NCA to AODs in circumstances where the AOD constitutes reckless credit. This problem casts doubt on whether the legislature intended AODs to be subject to the provisions of the NCA in the first place.

Ariana Omar *BBusSci LLB (UCT)* is an attorney at ENS in Cape Town. □

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financial intelligence centre REPUBLIC OF SOUTH AFRICA

ATTORNEYS MUST REPORT SUSPICIOUS AND UNUSUAL TRANSACTIONS

The Financial Intelligence Centre (the FIC) reminds all attorneys of their obligation to report any suspicious or unusual transactions to the FIC.

The FIC is the South African national centre for developing and disseminating financial intelligence to law enforcement and intelligence agencies, the South African Revenue Service, and other local and international agencies.

The FIC uses the financial information it receives to identify the proceeds of unlawful activities, with a view to combatting money laundering activities and the financing of terrorism. Suspicious and unusual transaction reports (known as STRs) are an essential element in helping the FIC to identify suspected criminal activity and the potential proceeds of crime.

The obligation to submit STRs to the FIC in terms of section 29 of the Financial Intelligence Centre Act, No. 38 of 2001, as amended, applies to all businesses in South Africa, including attorneys. The obligation is imposed on any person who:

- Carries on a business;
- Is in charge of a business;
- Manages a business; or
- Is employed by a business.

While STRs are being submitted by some businesses, the FIC is concerned that some attorneys are not filing STRs to the FIC. This obligation applies to attorneys trading as sole proprietors as well as a group of attorneys.

Examples of transactions that could be suspicious within the attorney's practice include:

- Receiving a large cash deposit from a client who claims to be purchasing property and thereafter cancels the purchase and requests the money to be deposited into a different bank account
- An attorney who provides advice to clients on how to set up various businesses through which the proceeds of crime can be filtered to conduct business
- A client of an attorney who is found to be using a false identity when buying or selling property
- An attorney who assists a client in laundering the proceeds of crime by establishing various offshore corporate entities in countries with weak banking and company formation regulatory requirements
- An attorney who receives and transfers cash through his trust account apparently for the benefit of commercial clients, when they are in fact funds being transferred or received in respect of the shipment of drugs
- Attorneys who establish corporate entities on behalf of clients where after assets are purchased with money derived from the proceeds of crime in the name of such entities to hide the identity of the true owner
- A client who requests an attorney to refund him and split the re-payment by paying the money into multiple accounts of different account holders
- Unscrupulous attorneys who know that certain clients are criminals and allow crimes to be committed, thus allowing money to be laundered through their accounts and claim that they are bound by attorney-client privilege.

Whenever a person submits an STR it does not mean that one cannot proceed with the transaction. The FIC Act in fact protects persons who submit reports to the FIC. In addition to protection against legal liability, the identities of those involved in making a report to the FIC remain confidential.

Failure to comply

Failure to report suspicious or unusual transactions could lead to action being taken against the offending attorney and employees of the firm of attorneys, which could result in imprisonment of up to 15 years or a fine of up to R100 million.

By reporting suspicious and unusual transactions to the FIC, attorneys are helping in the fight against crime. This will contribute to a safer and more stable business operational environment, thereby encouraging and improving investor confidence.

How to submit STRs

Visit the FIC's website – www.fic.gov.za – and click on the Reporting button.

For further information, call **0860 222 200** or e-mail us at fic_feedback@fic.gov.za.

10 *a decade of identifying
the proceeds of crime*

Rescued by a referee

By
Riaan
Odendaal

There are some matters that many litigation lawyers dread due to the nature of the dispute and the wide ambit of the issues in dispute. One such matter forms the basis of this article.

The dispute in question was between opposing factions of a voluntary association (a church) and the background to the dispute stretched over several decades.

The parties had already approached the court on several occasions for urgent final relief. After perusing the relevant court papers, it became clear that the presiding judges' hands were bound each time. The presiding judges were unable to satisfactorily resolve the real underlying dispute between the parties due to the magnitude of issues that were in dispute.

A real dispute of fact

Rule 6(5)(g) of the Uniform Rules of Court for the High Court states that a presiding judge has the following options available where there is a real dispute of fact that cannot properly be decided on the papers –

- refuse the application;
 - refer specific issues for oral evidence; or
 - refer the matter to trial.
- The particular challenge in the matter under discussion lay in the fact that virtually all the material facts were in dispute. The

probabilities were stacked in the respondent's favour to raise a successful defence due to the application of the so-called 'Stellenvale rule' (where there is a dispute as to the facts in motion proceedings for a final order, the order should only be granted if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such an order), in terms of which the court generally accepts the respondent's version where there is a *bona fide* dispute of fact in motion proceedings where a final order is sought (see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168 relating to the court's discretion in this regard and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235).

However, in my opinion, jurists should not necessarily always opt for a course of action because it will probably result in a win. On consideration of a possible all-encompassing solution to the parties' dispute, it was clear that very little would be gained, especially where the members of the church were concerned, should the application merely be dismissed.

The possibility of obtaining a costs order in favour of the respondent was also in doubt, because the courts appear at times to be reluctant to make cost orders in similar matters for fear of inhibiting reconciliation between the members of the church. Further, it would be more expensive to resolve parties' disputes in court by way of oral evidence or trial. Also, any counter-applications would probably be doomed to failure for the same reasons as the main application.

Relief through a referee?

Readers may not be aware of a relatively unknown procedure that proved useful in this matter. It provides that the court in a civil matter may, in terms of s 19 *bis* of the Supreme Court Act 59 of 1959 (the Act), refer, with the consent of the parties, to a referee for investigation and a report –

- matters that require extensive examination of documents or scientific, technical or local investigation that may not conveniently be conducted by the court;
- matters that relate wholly or in part to accounts; or
- any other matter arising in such proceedings.

This provision was designed to enable civil proceedings to be conducted more expeditiously in circumstances where the court would otherwise be delayed, inconvenienced or at a disadvantage (see *The Law of South Africa* 2ed (Durban: LexisNexis) vol 11 at para 479).

According to DE van Loggerenberg, s 19 *bis* covers the same ground as the English Rules of the Superior Courts Ord 36, although the English version is considerably wider in its scope (DE van Loggeren-

berg *Erasmus Superior Court Practice* (Cape Town: Juta 2011) at A1 – 38C).

It is important to note that the referee does not usurp the role of the judge by resolving the dispute between the parties, but only assists the court in investigating the facts on which the court's ultimate decision will be based (see *The Law of South Africa* 2ed (Durban: LexisNexis) 1 at para 566). The referee's position could therefore be likened to an assistant referee or linesman's position in a game of rugby.

The court may adopt the referee's report in whole or in part or may return it to for further investigation. The report, or any portion thereof that is adopted by the court, has the effect of a finding by the court (s 19 *bis*(2)).

The referee has certain powers in terms of s 19 *bis* and the inquiry is to be conducted in a manner prescribed by a special order of court or by the rules of court (s 19 *bis*(3)). The referee may also summon witnesses and is empowered to compel the production of evidence (s 19 *bis*(4)).

Any failure by a person to appear and give evidence or produce any document or thing before a referee or who refuses to cooperate is guilty of an offence and is liable on conviction to a fine or imprisonment for up to three months. Any witness who knowingly gives false evidence at an inquiry is guilty of an offence and liable on conviction to the penalties prescribed by the law of perjury (s 19 *bis*(5)(a) and (b)).

The referee's remuneration and reasonable expenditure is taxable and are costs in the cause. The referee has a lien over the report until due and adequate remuneration has been paid or secured (see *Adam and Others v Dada and Others* 1912 NPd 109).

The potential benefits to the justice system, judges and litigants by engaging this relatively obscure procedure can be far reaching in terms of the time, money and expertise required to adjudicate a dispute.

However, the parties must consent to the procedure before the court may use it. This requirement limits the court's use of the procedure and has been criticised in the past (see *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) at 69C – E).

Perhaps it is time for parliament to amend the section to remove this constraint.

Conclusion

In the matter referred to above, the parties agreed to appoint a referee to investigate specific issues that were stipulated in an order of court. The court appointed a retired judge to act as referee and the process is continuing.

Riaan Odendaal BProc LLB (UFS)
is an advocate at the Cape Bar.



- Mr Odendaal acted for the respondent in the matter referred to in the article.

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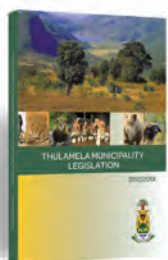
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Rectifying the *Mvumvu* disparity

By
Decide
Makhubele

The Road Accident Fund (Transitional Provisions) Act 15 of 2012

The Road Accident Fund (Transitional Provisions) Act 15 of 2012 (the transitional Act) came into operation with effect from 13 February 2013. The transitional Act was introduced to address the Constitutional Court judgment in *Mvumvu and Others v Minister of Transport and Another* 2011 (2) SA 473 (CC).

The Constitutional Court in the *Mvumvu* case confirmed the Western Cape High Court decision (*Mvumvu and Others v Minister of Transport and Another* [2011] 1 All SA 90 (WCC)), in which the court declared that ss 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996 (the RAF Act), as they stood prior to 1 August 2008, were inconsistent with the Constitution and thus invalid.

The *Mvumvu* case

Mvumvu was one of three applicants who sustained bodily injuries in motor vehicle collisions before 1 August 2008. The applicants approached the Constitutional Court seeking confirmation of the High Court's declaration of invalidity and leave to appeal against the ancillary order limiting the amount of compensation they may claim to what is recoverable under the Road Accident Fund Amendment Act 19 of 2005 (the amendment Act).

Mvumvu lodged a claim against the Road Accident Fund for compensation for the serious injuries she suffered as a result of the collision. The fund admitted liability, but maintained that *Mvumvu* was not entitled to any compensation over the R 25 000 it had already paid for her medical bills. Her claim was limited to R 25 000 in terms of s 18(1)(b) of the RAF Act because the driver of the taxi in which she was a passenger was solely to blame for the collision and the taxi was unlicensed. *Mvumvu* also lost her job as a result of the injuries sustained in the collision.

Section 18 of the RAF Act provides:

'(1) The liability of the fund or an agent to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall, in connection with any one occurrence, be limited, excluding the cost of recovering the said compensation, and except where the person concerned was conveyed in or on a motor vehicle other than a motor vehicle owned by the South African National Defence Force during a period in which he or she rendered military service or underwent military training in terms of the Defence Act, 1957 (Act No. 44 of 1957), or another Act of parliament governing the said force, but subject to subsection (2) -

(a) to the sum of R 25 000 in respect of any

bodily injury or death of any one such person who at the time of the occurrence which caused that injury or death was being conveyed in or on the motor vehicle concerned -

(i) for reward; or
(ii) in the course of the lawful business of the owner of that motor vehicle; or
(iii) in the case of an employee of the driver or owner of that motor vehicle, in respect of whom subsection (2) does not apply, in the course of his or her employment; or
(iv) for the purposes of a lift club where that motor vehicle is a motor car; or

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R 25 000 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment, the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage.

(2) Without derogating from any liability of the fund or an agent to pay costs awarded against it or such agent in any legal proceedings, where the loss or damage contemplated in section 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), in respect of such injury or death -

(a) the liability of the fund or such agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the fund or such agent, or the amount of R 25 000 (whichever is the lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Act ... '

The applicants contended that the above section violated their rights to equality, dignity and security of the person, effective remedy, as well as to health care and social security.

Court's findings

The court found that the provisions of s 18 'indirectly' discriminated against black people in a manner disproportionate to other races because most people using public transport, such as taxis and buses, are black. The





Picture source: Gallo Images/Thinkstock

'The court found that the provisions of s 18 "indirectly" discriminated against black people in a manner disproportionate to other races because most people using public transport, such as taxis and buses, are black.'

court thus found that the discrimination was based on one of the listed grounds in s 9(3) of the Constitution, namely race.

The court's reasoning was that other victims who were also passengers like the applicants enjoyed full compensation for their loss only because they fell outside the targeted categories. It was found that the section thus had a disparate impact – it targeted those workers and the class of people who use public transport such as taxis and buses.

The court found that by placing a cap of R 25 000 on certain claims, s 18 undermined the purpose of the RAF Act.

The RAF Act constitutes social security legislation, with its primary object described as 'to give the greatest possible protection ... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle' (*Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A)).

There was no evidence to show that the limitation imposed by s 18 was 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It was thus found that the impugned provisions were inconsistent with s 9(3) of the Constitution.

Court's decision

The court declared ss 18(1)(a)(i), 18(1)(b) and 18(2) of the RAF Act, as they read before 1 August 2008, inconsistent with the Constitution and invalid. The court suspended the order of invalidity for 18 months from the date of the court order to enable parliament to cure the defect.

Remedy

If a court finds a challenged legislative provision to be inconsistent with the Constitution, s 172(1) of the Constitution obliges it to declare the provision invalid to the extent of the inconsistency. Thereafter, the court must make an order that is just and equitable, which may include limiting the retrospective effect of the invalidity order or its suspension.

The court in this matter noted that, unless the interests of justice and good government dictate otherwise, the applicants were entitled to the remedy sought because they were successful. The court suspended the retrospective effect of the declaration of invalidity to apply to the date of the court order only in the event that parliament failed to remedy the defect by the deadline. Further, the court held that the declaration of invalidity would not apply to claims in respect of which a final settlement had been reached or a final order granted.

The court weighed the competing interests of the parties whose rights were violated and the interests of good government. It was found that the interests of the respondents weighed above those of the applicants. The respondents pro-

vided evidence that showed that an order of invalidity with unlimited retrospective effect would increase the fund's financial liability by approximately R 3 billion and would pose a serious threat to the sustainability of the fund, which had a deficit of over R 40 billion.

Transitional Act

Section 2(1) of the transitional Act gives third parties the option to choose whether their claims should be dealt with in terms of the RAF Act or in terms of the transitional Act, subject to the amendment Act. A third party must make this choice in the prescribed form within one year of the transitional Act taking effect, failing which his claim will automatically be subject to the transitional Act.

The advantage provided by the transitional Act is that it covers compensation for proven special and general damages above R 25 000, subject to the amendment Act. The Acts read together cover claims for loss of support, past loss of earnings, future loss of income and medical expenses.

In my opinion, a better option for a third party would be to choose the transitional Act route because the third party can claim compensation for general damages of more than R 25 000, provided a serious injury assessment report indicating a serious injury, as contemplated in reg 3 of the Road Accident Fund Regulations, 2008, is submitted within two years of the transitional Act taking effect.

Prescription

It is of paramount importance for attorneys and third parties to be aware of prescription when dealing with motor vehicle accident claims. The transitional Act provides a two-year prescription period from the date on which it came into operation for a third party to lodge a serious injury assessment report when claiming compensation above R 25 000 for general damages (s 2(1)(b)(i) of the transitional Act). However, if the third party is subject to an impediment contemplated in s 23(2) of the RAF Act (post-amendment) or s 13(1)(a) of the Prescription Act 68 of 1969, the period of one year referred to in s 2(1) of the transitional Act will commence running when the impediment ceases to exist. In terms of s 23(2), prescription of a claim for compensation does not run against a minor, any person detained as a patient in terms of any mental health legislation and a person under curatorship. This means that if a third party falls in the categories of persons mentioned in s 23(2), the relevant prescription period in s 2(1) of the transitional Act will commence running when the impediment ceases to operate; for instance, where a minor becomes a major.

Jurisdiction

The transitional Act brought changes to the RAF Act that will affect jurisdiction in terms of quantum in some litigated claims. Due to the changes introduced by the transitional Act, some claims litigated in the magistrate's court will be moved to the High Court.

In this regard, s 2(1)(e)(ii) of the transitional Act provides:

'(e) A third party who has, prior to this Act coming into operation –

...

(ii) instituted an action against the fund in the magistrate's court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period.'

Conclusion

The transitional Act brings relief to victims of the provisions of s 18 of the RAF Act whose claims for compensation against the fund were limited to R 25 000. Unfortunately for those third parties whose claims were settled or who obtained a final court order prior to the amendment cannot claim under the transitional Act. In principle, a court order and a settlement agreement that comply with the court rules are binding between the parties. A limited claim in which settlement was reached or a final court order was made before 13 February 2013 is therefore not covered by the transitional Act.

It must be borne in mind that parliament removed the limitation in s 18 of the RAF Act because it was unconstitutional and unfair. However, the amendment Act does not apply retrospectively in respect of the limited claims in question. This means third parties whose collisions occurred before 1 August 2008 remain governed under the RAF Act irrespective of the amendment Act taking effect from 1 August 2008.

Parliament decided that those whose claims arose before the amendment must continue to suffer the inequality. In my view, it is questionable as to why parliament did not include the retrospective effect in the amendment. By speculating, one may conclude that parliament was aware of the inequality but it had to make a decision that would sustain the fund.

Decide Makhubele LLB (University of Limpopo) is a claims handler at the Road Accident Fund in Durban.



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Justice Department responds to Legal Practice Bill submissions

By
Kim
Hawkey

Following the public hearings on the Legal Practice Bill (B20 of 2012) in February, on 19 and 20 March the Justice Department (the department) presented its responses to the public's oral and written submissions on the Bill to the Justice Portfolio Committee (the committee). This is a summary of the department's presentation to the committee.

The department was represented by deputy chief state law adviser responsible for policy development, JB Skosana; chief director of legislative development, Lawrence Bassett; and acting deputy director-general of legislative development and secretary for the Rules Board for Courts of Law, Raj Daya.

While the department prepared a detailed 85-page response to the issues raised in the submissions, during the presentation to the committee, the department focused on the broad themes highlighted in the submissions.

A copy of the department's detailed response can be found at <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/wbHvXApVhQpUcV2jv7VoFTGzhw1p-SX3XDK3gdc1fkdl/mtime:1363939964/files/docs/130319summary.doc>.

For a comprehensive summary of the oral and written submissions, see 2013 (Apr) *DR* 22 and 38.

Mr Skosana informed the committee that the current version of the Bill represented 'a fundamental shift' from previous versions and was a 'compromise Bill' derived from extensive consultation with various stakeholders. Mr Bassett added that the Bill would 'democratise' the current structures in the legal profession, which was an evolutionary process.

Independence and ministerial appointments to the council

In terms of the Justice Minister's power under the Bill to appoint three members of the 21-member South African Legal Practice Council (the council), Mr Bassett said that the department did not believe that the appointment of these three members would affect the independence of the profession, noting that government had a duty to promote the public interest. Further, he highlighted that a safety mechanism was built into the Bill in that the council could remove any of its members if it was of the opinion that the member was undermining the integrity of the council.

The department added that, to further alleviate concerns in this regard, consideration could be given to including provisions similar to those in the Independent Communications Authority of South Africa Act 13 of 2000.

'If there is this concern that the Minister's appointees are going to impact negatively on the independence of the profession, ... a possibility that could be put forward for the committee's consideration is to have a look at the ICASA Act ... One could have a look at building in some of those features ..., that appointees may not be public servants, they may not be the holders of any other remunerated position under the state, they may not be members of parliament or any provincial legislature or any municipal council and may not be office bearers or employees of any party, movement or organisation of a party political nature ..., ' Mr Bassett said in this regard.

Committee member Dene Smuts proposed that the reference to 'the Minister' be substituted with 'the judiciary' and that the regulation of legal practitioners should properly fall under the judiciary to ensure its independence. She suggested that the 'instrumentality' to do this could be the Office of the Chief Justice or a judicial council, which had been proposed previously. She added that such a council would set judicial policy and should appoint the three appointees in question, or at least two of them, to the council, as well as the legal services ombud (the ombud), which would ease some of the concerns regarding the independence of the profession.

Committee member Steve Swart agreed with this proposal and noted that it could tie in with the Minister's powers to dissolve the council in terms of the Bill.

However, committee member John Jeffery highlighted that a problem with the Chief Justice appointing members to the council was that, unlike the Minister, he was not accountable to the electorate and responsible for ensuring accessibility to the legal system. Committee members Makgathatso Pilane-Majake, Sheila Shope-Sithole and Nkosi Patekile Holomisa also supported the involvement of the Minister in the nomination of appointees to the council.

Mr Daya noted that the Office of the Chief Justice could be 'compromised' if tasked with the responsibility of making appointments in matters which 'could come before the very court' and, 'for the very basis of the separation of powers, the appointment from the office of the Minister is a more feasible option'. Ms Smuts conceded this and emphasised the possibility of creating a judicial council, which could take over the roles of the Minister as provided for in the Bill.

Dissolution of the council

Mr Skosana said that it was necessary to provide for the Minister to dissolve the council in order to address the reality that the statutory body may become dysfunctional.

'There must be one person ... who takes that responsibility for putting order back,' Mr Skosana said. Mr Bassett added: 'The reality is that statutory bodies do become dysfunctional and one has to think about this; one cannot just wish away or delete this provision. ... Something has to be in place to address the possibility.'

Mr Bassett said that the issue was how best to put in place checks and balances to ensure the power was not used arbitrarily. Additional checks and balances, such as further recourse to the ombud, could be introduced in this regard.

Mr Swart noted that he was 'very concerned' that the provision threatened the independence of the profession, adding that consideration should be given to the preferable option of referring the issue to the ombud. He said that he would like the checks and balances in this regard 'significantly strengthened'. Mr Holomisa, however, stated that it was unlikely that the Minister would use the power arbitrarily.

Committee member Debbie Schäfer was of the opinion that it was necessary to rework the section to avoid the Minister abusing this power, stating that it was 'unacceptable' that a small minority of the council may be able to 'hijack the process'.

Representation of attorneys and advocates on the council

Mr Skosana said that the department viewed the request for parity of representation between attorneys and advocates on the council as a non-issue, as there were many more attorneys in the country than advocates. 'It is only democratic that they have greater representation on the council,' he said.

Fusion of the profession, fees and access to justice

The committee discussed the fusion of the profession and the implications for legal fees, with committee member Mario Oriani-Ambrosini advocating for the abolishment of the split Bar and the division between senior and junior counsel.

Ms Smuts said that an evolutionary approach to the fusion of the profession was probably the best option, adding that the need for a separate advocates' profession had been 'well articulated' in certain of the presentations made to the committee during the hearings and elsewhere.

Dr Oriani-Ambrosini, however, emphasised that the Bill was 'a last resort' at reforming the legal profession and parliament must 'do what was right for the people' and not serve the interests of the profession alone.

Ms Schäfer noted that high legal fees were not necessarily the direct result of

a split Bar and that safeguards, such as the cab-rank and referral rules, existed. Mr Swart agreed that the two branches of the profession should remain separate. In terms of access to justice, Dr Oriani-Ambrosini noted his concern that consumers of legal services, the general public, had not made input on the Bill. If the Bill did not properly address access to justice, he said the committee would have failed in carrying out its duties.

Dr Oriani-Ambrosini added that the distinction between senior and junior counsel 'undermined the concept of equality before the law', and gave credence to a group of practitioners on the basis of the number of years in practice rather than competence.

'We must consider very seriously - not in the interests of lawyers, but in the interest of the people who we are to protect - getting rid of this absurd antiquity of a split Bar and division between junior and senior counsel if we are all equal before the law,' he said.

Dr Oriani-Ambrosini added that there were a number of elements that made a lawyer good or a bad, including affordability. He said that a bad lawyer would not become a good lawyer simply by the number of years he had been in the profession. The hierarchical system of the legal profession in South Africa served the interests of the profession, not the citizenry, he emphasised.

Dr Oriani-Ambrosini said that it was necessary to 'bring back true market dynamics' and to eliminate the perception that some were better than others and, hence, the fees of some should cost more than others. He added that legal matters tended to be interrelated and cut across many specialist fields, which indicated that the future was aimed towards specialisation - hence the advent of large firms that pulled together a variety of specialist skills. The legislature should therefore encourage the profession's transformation in this direction, he said, adding that single proprietorships were 'no longer viable' from a competency point of view.

Mr Holomisa remarked that if one party in a matter was represented by senior counsel and the other by less experienced junior counsel, there would be no equality. Mr Swart echoed the sentiments in respect of inequality and said that this was particularly true in criminal cases, for example in situations where an inexperienced prosecutor faced an experienced senior counsel. However, he added that it was important for the committee to consider that the conferment of silk was an honour and its award was a presidential prerogative, which had been recognised by the Supreme Court of Appeal. The fees charged by senior counsel was a separate issue, he added.

Mr Daya noted that the current draft of the Bill did not retain any reference to rankings in terms of status.

The committee decided not to deal with the issue of fusion in depth as no case for it had been made out in the Bill. However, it was generally agreed that increasing legal fees were of concern and this was a primary motivator for the Bill and transformation of the profession.

Fee structures

In respect of fee structures, Mr Skosana said that confusion had been created in the media - the Minister's reference to capping of fees related to matters in which the state had an interest and thus the Minister had advocated for setting parameters in relation to what government paid for legal services in that context. He added that the department did not consider anything 'untoward' in this.

However, Ms Schäfer responded that there had been no misunderstanding in respect of the Minister's statements - the Bill provided for regulations 'which were open to the capping of fees'.

Committee chairperson Luwellyn Landers asked if the current fee structure in the profession was determined by market forces. Mr Swart said that, generally, there were more fixed fees for attorneys than advocates; advocates' fees seemed to be dictated by market forces more than those of attorneys.

Dr Oriani-Ambrosini added that, even though there were no guidelines for advocates' fees, there was a general understanding between advocates that fees were not to be capped without the approval of colleagues, which was 'a highly uncompetitive' practice, 'typical of a cartel'. There was a need to re-examine the Bill in the light of existing uncompetitive practices, especially as clients had no power to negotiate these fees, he said.

Ms Pilane-Majake said that leaving the market to determine legal fees contradicted the intention of the Bill to ensure affordable legal fees.

In respect of attorneys' fees, Mr Daya said that it was necessary to have a mechanism to protect the public from those practitioners who saw it as a right to charge 'injurious' fees in non-contentious matters.

Ms Schäfer asked the department why a maximum fee cap should be allowed and not a minimum limit, and why tariffs were permitted for litigious matters, but not non-litigious ones. 'If clients are prepared to pay more, why should they not?' she asked. Mr Daya responded that, in terms of the current rules, when a person was sued or brought an application before court, there were distinct tariffs attorneys and advocates were al-

lowed to charge to take a matter to trial stage, which were reviewed by the Rules Board from time to time. These were developed to enlighten the public on what fees were chargeable and to make attorneys and advocates aware of what they could charge.

He added that it was problematic that there were no guidelines to address the fees chargeable in 'a whole range of matters' that were non-litigious. He added that the Competition Commission had viewed such guidelines as anti-competitive.

Mr Swart referred to the provision in the Bill relating to a fee structure for attorneys and asked if the legislated provisions providing for rules relating to tariffs would be repealed. Mr Daya replied that the Rules Board would continue to make rules on litigious matters that go before court; it was also considering introducing fee tariffs for advocates and had received certain requests in this regard.

Mr Skosana conceded that there was a need for further discussion on the issue of fees.

Funding and model of the council

Mr Skosana told the committee that the department was of the view that the council and regional councils should be funded by the profession, which was consistent with the profession's desire for independence. The government was only committed to funding the Transitional South African Legal Practice Council (the transitional council), and an initial cost analysis had indicated that this would cost approximately R 2 million.

Ms Pilane-Majake supported the model proposed by the department, while Ms Schäfer said that there was 'no sense' in the department's position. 'You want to have your bread buttered on both sides - you want the profession to fund the model and you want to say how they will do it. You are wanting to prescribe their fees, you are wanting to prescribe community service, you are wanting to prescribe how many regional councils they can have and where they can have them, but they must fund it. ... Those principles contradict each other completely,' she said.

Mr Bassett responded that in the past the attorneys' profession was not in favour of an accreditation model.

Mr Daya added that, based on his experience as former chief executive officer of the Law Society of South Africa, attorneys had objected to this model as it simply retained the status quo, with a unifying body at the top.

He added that there should not be concern that 'an enormous amount of

money' would be spent on 'breaking up the regional councils'.

Transfer of voluntary associations' assets

Mr Skosana said that the assets of organisations established in terms of statute were intended to be transferred to the council and not those of voluntary associations, which could only be dealt with on a 'negotiated basis'.

Further, under the current dispensation, some of the voluntary organisations performed regulatory functions; the Bill thus contemplated the possible transfer of those functions to the council when the Bill came into effect.

Ombud

Mr Skosana noted that there had been suggestions in the submissions that the ombud be appointed by the Chief Justice or the Judicial Service Commission, but the department continued to support the President appointing the ombud. However, the department may consider putting in place additional measures to strengthen the checks and balances to ensure the power is not exercised in a manner that undermines the independence of the ombud, he added.

Attorneys Fidelity Fund (AFF)

Mr Skosana said that it was the department's view that the process of nominating attorneys to the AFF board should be regulated outside of the Bill, by the profession.

Mr Jeffery referred to the provisions of the Bill relating to ministerial appointments to the council and the AFF board, and stated that it was important to define 'competence' and 'incapacity'. Dr Oriani-Ambrosini agreed, adding that it was necessary to establish a framework to assess competence.

Ms Schäfer questioned why the Minister should be vested with powers in the Bill to prescribe where the AFF board could invest funds, to which Mr Skosana responded that the provision was based on the notion that the funds were aimed at protecting the public, and government therefore had an interest on behalf of the public. Ms Schäfer said the Minister could perhaps specify that a certain amount be invested and ensure that it was in a secured fund, but it was not appropriate for him to prescribe where the funds should be invested.

In response to a question from the committee, Mr Bassett said that the department had no serious objections to the proposal to cap individual claims payable by the AFF.

Rules and regulations

Mr Skosana said that the arguments against the Minister's powers to make

regulations under the Bill were 'properly addressed' by parliament's oversight powers.

It was, however, important to distinguish between merely technical regulations, which would not require parliament's approval, and fundamental regulations, such as those related to the independence of the profession, which must be approved by parliament.

In this regard, Ms Pilane-Majake asked how the department intended to distinguish between these two types of regulations. It was of concern that there was the possibility that regulations which should have the input of parliament may not receive this, she said.

Direct briefing of advocates

With regard to the ministerial powers to create regulations on the referral rule under the Bill, the department highlighted that the instances in which it was permissible for an advocate to be briefed directly needed to be debated further. Mr Skosana advised the committee that the intention was to create ease of access to justice, with the details and parameters relating to this aspect to be fleshed out in the regulations at a later stage.

Ms Schäfer remarked that it was of concern to insist that attorneys hold Fidelity Fund certificates, yet advocates could be allowed to carry out similar functions without holding a certificate.

Mr Daya agreed with this and said it should be 'impossible and illegal' for a practitioner to accept public money without such a certificate. He added that the instances in which advocates could deal with the public directly required further consideration and debate and brought with it certain responsibilities, such as an understanding of and training in trust law practice.

Dr Oriani-Ambrosini asked whether, from the moment the Bill came into effect, an advocate would be permitted to take briefs directly from clients. Mr Daya replied that advocates could not accept direct briefs until the Minister had made regulations on the issue. It was anticipated that, at the stage of drafting the regulations, further debate would ensue. The provision had been inserted in the Bill to create an enabling environment that, if not created, would have required the Bill to be tweaked at a later stage.

Dr Oriani-Ambrosini remarked that over the past 13 years, parliament had spearheaded the transformation of several sectors in the country by adopting 'extraordinary reforms' in legislation. The department's response with regard to the determination of regulations related to this provision was thus unsatisfactory. He added that parliament's

responsibility was to determine this outcome and not leave it to the Minister. Ms Smuts said that, while she supported the evolutionary approach, this Bill was 'one of a kind' and the evolutionary approach did not apply throughout and that it was necessary to relax the referral rule.

Committee member Luzelle Adams noted that the wording of this provision in the Bill created the assumption that the Minister's discretion may be applied in deciding whether or not to enact any regulations on the referral rule. She asked the department's representatives whether there were any thoughts on the content of the regulations and whether any draft regulations had been prepared.

Mr Skosana replied that no thoughts had been formed yet and no drafts drawn up with regard to the regulations. It was envisaged that the process would be initiated by the council and the profession, he said. The Bill was structured in a way that it afforded discretion for certain regulations – some may be made and some must be made, he explained.

The transitional council

Mr Skosana noted that the same concerns expressed with regard to ministerial appointees, independence and parity of representation on the council applied to the transitional council. From the department's perspective, the latter would deal with the immediate business necessary to ensure there would not be a vacuum in regulating the profession. The ministerial role was, therefore, 'more direct' at this stage.

Ms Schäfer questioned what would happen if at the end of the term of the transitional council agreement had not been reached on the election process for a new council. Mr Bassett said that the Bill provided for an extension of its initial period. Mr Daya added that there was an arbitration clause in the Bill that could be resorted to. He said that the rationale behind not leaving too many options open for decisions not being reached was to 'force the parties to be serious about reaching the decisions that they need to within the time frame'.

Mr Jeffery added that 'the pressure is necessary' to force a determination by the transitional council in light of how long it had taken to come to 'an agreement of sorts' on various issues in the Bill.

At the end of the session, Mr Landers concluded by saying to the department's representatives: 'I will ask you to keep looking at the Bill, with a view to improving it.'

- The audio recording of the sitting can be found at www.pmg.org.za/node/36707 (day one) and www.pmg.org.za/node/36745 (day two).




Which road to choose?

Action OR Application

Picture source: Gallo Images/Thinkstock

By
Vuyo
Mkwibiso



Attorneys are often faced with the difficult choice of whether to institute legal proceedings by application on notice of motion supported by affidavits, or by summons initiating action or trial proceedings.

The differences between application and action proceedings are well known and will not be elaborated on in this article. The most salient distinction is that action proceedings envisage the presentation of facts and evidence verbally in court during a trial, whereas application proceedings envisage the presentation of facts and evidence in affidavits that will be read by a judge before hearing arguments in court on the issues raised in the affidavits.

Application proceedings are usually heard in court shortly after their initiation, whereas action proceedings may be heard several years after their initiation. Application proceedings are usually disposed of more expeditiously than action proceedings. As a result, application proceedings are generally cheaper and lead to a relatively speedy resolution of disputes compared to action proceedings.

Material disputes of fact – options

Application proceedings are not recommended where a litigant foresees that his opponent will raise material disputes of fact in an answering affidavit in response to his founding affidavit. If a material dispute of fact arises when comparing the founding and answering affidavits, the judge hearing the application will be faced with the following choices (see r 6(5)(g) of the Uniform Rules of Court for the High Court), which must be made in a judicious manner:

- Dismiss the application if the litigant who initiated the proceedings foresaw or ought reasonably to have foreseen, before initiating the proceedings, that a dispute of fact would arise.
- Refer the material dispute of fact to oral testimony if it can be disposed of easily and speedily without affecting any other issues in the case.
- Refer the entire matter for trial and order that the notice of motion stand as a simple summons, that the founding affidavit stand as the plaintiff's declaration, that the answering affidavit stand as the defendant's plea, and make any other order relating to the conduct of the proceedings as a trial.

Legal practitioners usually have to weigh the risk of having a client's case dismissed because a material dispute of fact was reasonably foreseeable, on the one hand, and obtaining speedy relief for the client by choosing application proceedings over action proceedings, on the other.

Where application proceedings are initiated, it seems that some respondents choose (presumably on legal advice) not to deal with the merits of the application but merely request the judge hearing the matter to dismiss the application on the ground that the dispute should have been referred to court by way of action proceedings, for one or another technical reason. As will be seen from the cases analysed below, the courts will usually interrogate the alleged dispute of fact to determine whether it meets the test for the existence of a material dispute of fact.

Relevant case law

As far back as 1949, in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), the courts have held that the crucial question is whether there is a real dispute of fact. The principal ways in which disputes of fact arise are when –

- the respondent denies material allegations made in the applicant's founding affidavit and further produces positive evidence to the contrary in the answering affidavit;
- the respondent admits the facts and evidence in the applicant's founding affidavit, but alleges additional facts and evidence that the applicant disputes;
- the respondent alleges that he has no knowledge of the facts deposed to in the founding affidavit and puts the applicant to the proof of those facts; and
- the respondent states that he can lead no evidence to dispute the truth of the applicant's statements but puts the applicant to the proof thereof by oral evidence subject to cross-examination.

In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) the Supreme Court of Appeal (SCA) held at para 13: 'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.'

The SCA held that bare denials are not acceptable where the facts deposed to lie purely in the knowledge of the litigant deposing to the answering affidavit. Further, the SCA held that where an applicant sets out chapter and verse in his founding affidavit, '[e]ach material averment must be met and answered appropriately not enveloped in a fog which hides or distorts the reality'. The SCA overturned two decisions of the High Court in the matter and granted the order sought by application proceedings on the ground that the respondent had not raised real disputes of fact.

Recently, in *Naidoo and Another v Sunker and Another* (SCA) (unreported case no 126/11, 29-11-2011) (Heher

JA), the SCA again had to address the issue whether a real, genuine or *bona fide* dispute of fact had been raised in application proceedings. The owners of certain premises in KwaZulu-Natal had initially issued summons in the magistrate's court against the tenants in an action in which they claimed, and were ultimately awarded, damages for unlawful occupation. The owners subsequently approached the High Court by way of application proceedings for an order evicting the tenants. The tenants opposed the application but failed to raise disputes of fact.

The SCA rejected the tenants' argument that, because certain defences had been raised in other courts, those defences should have been considered by the court hearing the application even though they had not been pertinently raised in the answering affidavit. The SCA also rejected the tenants' argument that the High Court should have given them the opportunity to cross-examine the owners in order to establish certain facts. The court held that the tenants had not set out the import of the evidence they sought to elicit by way of cross-examination, they did not explain why that evidence was not otherwise available, and they had failed to satisfy the court that there were reasonable grounds to believe that the evidence in question would be elicited through cross-examination. As a result, the SCA confirmed the High Court's order granting eviction.

In *SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC) the South African Football Association dismissed an employee for poor work performance four months after he was employed on

a three-year contract as a senior official reporting to the chief executive officer. The employee approached the Labour Court by way of application proceedings, claiming damages for unlawful termination of the employment contract. Although the employee's founding affidavit was detailed about the manner in which his services had been adequate, the employer's answering affidavit did not deny material allegations, was deposed to by someone who did not have personal knowledge of the facts, was not accompanied by confirmatory affidavits from those who had personal knowledge, and was held to be vague and general. The employer's answering affidavit specifically stated that the employee's allegations would not be dealt with in any detail, since the employee ought to have brought the proceedings as trial or action proceedings as a result of reasonably foreseeable disputes of fact.

The Labour Appeal Court found that a dispute of fact will be held to exist on the basis of what is alleged in the answering affidavit in comparison to the founding affidavit. The court further held that allegations that were not denied would be regarded as having been admitted. The court was of the view that the employer had been incorrectly advised that any claim for legal damages for breach of contract should be initiated by way of action proceedings. According to the court, this was not a basis for refusing to fully deal with the merits of the employee's claim.

Conclusion

From the cases referred to above, it is clear that failing to deal with the merits

of an applicant's claim in application proceedings based on some technical ground may have drastic consequences as a respondent may suffer an adverse order being granted without having fully exercised his right to be heard.

Legal practitioners are urged to familiarise themselves with the applicable principles regarding disputes of fact before advising their clients on how to oppose legal proceedings brought as applications supported by affidavits.

In summary, only real, genuine or *bona fide* disputes of fact will be entertained by the courts before a decision is made to dismiss an application or refer it to trial or for oral evidence on a limited issue. Bare denials are not sufficient to establish disputes of fact, unless the facts in question are peculiarly in the knowledge of the applicant and the respondent has no knowledge of those facts.

In order for a litigant to argue that disputes of fact were reasonably foreseeable, those disputes must be set out in the answering affidavit, which must set out the basis on which it is alleged that the disputes were reasonably foreseeable. The existence of letters and e-mails or other court proceedings based on similar facts between the same parties, in which the alleged disputes of fact were raised, will be insufficient.

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Catch 22

Directors' duties under s 129(7) of the Companies Act

By
Dirk
Kotzé

Financial distress

Picture source: Gallo Images/Thinkstock

It is trite that the ultimate fate of a financially distressed company that is unable to pay its creditors is liquidation.

Once in liquidation, and should creditors elect to proceed with an insolvency inquiry, the directors of the company might, in appropriate circumstances, be faced with uncomfortable questions, such as:

- Why did the board not inform the stakeholders and creditors timeously that the company was financially distressed?
- Why did the board not resolve to place the company under business rescue?

Positive duty to advise affected persons

The relevance of these questions is found in the duty imposed on the board of directors in s 129(7) of the Companies Act 71 of 2008 (the Act), which states: 'If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person setting out the criteria referred to in section 128(1)(f) that are applicable to the company, and its reasons

for not adopting a resolution contemplated in this section.'

The resolution referred to is the one to begin business rescue proceedings. Simply stated, if a company is in financial distress and it has not filed for business rescue, there is a positive duty on its board of directors to advise the affected persons – creditors, shareholders and employees of the company – that the company is financially distressed, and to advance reasons why it has elected not to file for business rescue.

The language in this section is not directory, but peremptory, and it is sug-

gested that once the requirements set out in the definition of 'financial distress' in s 128 of the Act are met (*de facto* and commercial insolvency foreseen in the ensuing six months), the board has a positive duty to act.

Not only must it inform stakeholders that the company is in financial distress, but it must also advance reasons why it has not adopted a resolution and filed for business rescue.

Consequences for failing to comply

A further question that arises is whether a failure of the board to comply with this duty in terms of s 129(7) will have adverse consequences for the board, especially in circumstances where the company is eventually liquidated and creditors suffer huge losses as a result of unpaid claims, which could have been lessened if this duty had been met.

The answer to this question is by no means straightforward.

At the outset, s 129(7) does not contain any sanction if the board fails to comply with this duty, nor does the Act provide any specified time limits in which such compliance must occur. In my opinion, the main reason for the absence of a sanction is the fact that such notice to creditors will in all likelihood be tantamount to commercial suicide by a company, as its creditors may no longer be willing to supply goods and services on favourable credit terms, if any at all. Banks and financial institutions will, in all likelihood, withdraw all credit facilities or at least substantially reduce such facilities.

Does this mean that the board could simply ignore this duty if it has reason to believe that the company is financially distressed? In my view, the answer should definitely be 'no'.

Although I do not propose that a failure to comply with this duty will automatically lead to the directors being liable for losses suffered by creditors in a liquidation scenario, the following should be kept in mind:

- Firstly, s 218(2) of the Act makes it clear that '[a]ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention'.

Thus, for instance, an aggrieved shareholder (who continued to invest his money in a financially distressed company while not having been informed of its financially distressed status) and a creditor (who continues to supply goods and/or services to a financially distressed company while being unaware of its financially distressed status) might well choose to claim their losses from the directors of

the company should the company end up in liquidation.

- Secondly, a failure to comply with this duty, in conjunction with other relevant evidence, may lead to a conclusion that the directors of the company acted recklessly and with gross negligence.

Section 424 of the previous Companies Act 61 of 1973 (which still applies under the new company law regime) and the judicial pronouncements thereon (eg, *Philotex (Pty) Ltd and Others v Snyman and Others*; *Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA)) make it clear that directors will be held personally liable for the debts of a company if they traded recklessly.

When the *Philotex* judgment was handed down, this duty did not exist and under the new company law regime it could well be argued that a failure to comply with this duty is an important factor from which an inference of 'recklessness' can be made in the event of a company continuing to trade and incur huge debts in a financially distressed scenario. Filing for business rescue could certainly, in appropriate circumstances, be regarded as a reasonable step that a board could and should have taken to prevent the losses being incurred by creditors and shareholders.

- Thirdly, the failure to act in terms of s 129(7) of the Act could also lead to an inference that a director acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by s 22(1) of the Act (ie, recklessly, with gross negligence, with intent to defraud or for any fraudulent purpose). This may lead to personal liability for any loss, damage or costs sustained by the company (see s 77(3)(b) of the Act).

Conclusion

Taking into account the risks involved, directors should at least take note that a failure to comply with s 129(7) may, in appropriate circumstances, lead to personal liability for the debts of the company. The real challenge for the board, however, is that it faces difficult consequences whichever way it acts in this regard.

It will be interesting to see how the courts will interpret this provision, which, due to its possible adverse commercial consequences, is not likely to, in isolation, lead to personal liability, but will in appropriate circumstances be an important factor when considering reckless trading.

Dirk Kotzé BA LLB (Stell) LLM (Unisa) is an attorney at Dirk Kotzé Attorneys in Stellenbosch.



'[S]uch notice to creditors will in all likelihood be tantamount to commercial suicide.'



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

THE LAW REPORTS

March 2013 (2) *The South African Law Reports* (pp 1 – 324); [2013] 1 *The All South African Law Reports* February no 1 (pp 253 – 380) and no 2 (pp 381 – 510)

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

ABBREVIATIONS:

CC: Constitutional Court
GNP: North Gauteng High Court, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Advocates

Application for striking off:

In a matter that generated a fair amount of media attention, 12 advocate members of the Pretoria Society of Advocates were found guilty of unprofessional conduct by the Bar council of the society, on their own admissions. Their conduct consisted of double briefing and overreaching. Various sanctions were imposed on them by the Bar council, which also applied to the GNP for orders noting the disciplinary action taken. It also applied for the name of a thirteenth advocate member to be struck from the roll of advocates. The General Council of the Bar (GCB) intervened and sought orders striking the names of all the advocates involved from the roll.

In the court *a quo* six of the 13 advocates' names were struck off the roll. The remaining seven advocates had further sanctions imposed on them by the court. The court also ordered the advocates to pay various amounts to the Road Accident Fund (the fund). The GCB appealed against the orders in respect of the advocates who were not struck from the roll, con-

tending that they ought to have been. There was also a cross-appeal by the six advocates who were struck from the roll, who contended that it was not competent for the court to order them to make payments to the fund, and that they ought not to have been struck from the roll.

The appeal to the SCA has been reported as *General Council of the Bar of South Africa v Geach and Others; Pillay and Other Related Matters v Pretoria Society of Advocates and Another; Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA); [2013] 1 All SA 393 (SCA).

The SCA, per Nugent JA, pointed out that the inquiry before the court fell to be conducted in two stages. The first inquiry was whether the court *a quo* misdirected its inquiry. Only if it did, would the court move to the second stage.

The misconduct alleged to have been committed by the advocates in this case related to matters involving claims against the fund. Suffice to mention that the court held that the advocates charged a fee as if they had been instructed to conduct a trial when, on their own versions, they knew this was not true.

Section 7(1)(d) of the Admission of Advocates Act 74 of 1964 allows a court to suspend any person from practising as an advocate or to order that his name be struck

from the roll of advocates if the court is satisfied that he is not a fit and proper person to continue practising as an advocate.

There are three steps in the inquiry whether such action should be taken. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities (a factual inquiry). Second, it must consider whether the person concerned is not a fit and proper person to continue to practise. This involves weighing up the conduct complained of against the conduct expected of an advocate and, to this extent, is a value judgment. Third, the court must inquire whether, in all the circumstances, the person is to be removed from the roll of advocates or whether an order of suspension from practice would suffice.

Only the court *a quo*'s findings on the third stage were controversial. At the third stage of the inquiry, the sanction that should be imposed lies in the discretion of the court. The present appeal was directed solely to whether the court *a quo* properly exercised its discretion at this third stage.

The exercise of this discretion involved two inquiries. The first was to establish the material facts and the second to evaluate those facts towards the correct objective. Only if the court had incor-

rectly conducted the inquiries could the SCA interfere with its decision. After it had examined the record, the SCA held that it could not conclude that the court *a quo* had committed any misdirection in exercising its discretion in the inquiry.

As to the court *a quo*'s orders of repayment to the fund by those advocates struck from the roll, the SCA held that once the court had struck the advocates off the roll, the GCB's disciplinary powers over them were exhausted. The orders in this regard were set aside.

Aside from this, both appeals were dismissed.

Attorneys

Duty of attorney to client:

In *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA); [2013] 1 All SA 471 (SCA) the appellant client had instructed the respondent law firm (the firm) on 17 March 2006 to institute a third party claim against the Road Accident Fund (the fund) on behalf of her minor son for damages resulting from injuries sustained in a motor vehicle collision that occurred on 28 August 2005.

The client and the firm had entered into three written agreements, which gave the firm the mandate to investigate, process, lodge and prosecute the claim to finality. They also contained the fee arrangements between the par-

ties. The firm lodged the claim with the fund on 27 February 2007 and, on receiving no response, issued and served summons on 12 December 2007. On 16 May 2008, after the pleadings had closed, the attorneys applied for a trial date. Subsequently, the matter was enrolled for trial on 1 February 2010. The trial date was allocated some months later. In October 2009, after the firm had notified the client about the trial date, she terminated the firm's mandate and took her file to another firm of attorneys.

The client was successful at trial, but five days later sued the respondent firm for damages she allegedly suffered due to loss of interest she claimed could have accrued on the capital sum of R 2 560 099 if the firm had lodged her claim timeously; that is, 14 and a half months earlier. The client argued, *inter alia*, that it was an express, alternatively implied, term of the agreements between the parties that the firm would carry out its mandate with the due skill, care, diligence and professionalism expected of a specialist firm of attorneys who held themselves out to be experts and specialists in the field of personal injury claims and third party matters. She alleged that, in accepting the mandate, the attorneys tacitly undertook to prepare, formulate, collate, submit and prosecute her claim against the fund with due diligence and expedience and within a reasonable time.

Bosiolo JA held that, as the client relied on the three written agreements with the firm, her claim was contractual and not delictual.

The primary issue to be decided on appeal was whether it could be said that the conduct of the firm involved, by delaying the finalisation of the claim by 14 and a half months, amounted to a failure to measure up to the conduct expected of a reasonable attorney acting with due care, skill and diligence. In the absence of clear evidence to prove what a reasonable attorney in the position of the

firm, faced with a similar case under similar circumstances, would have done, the court was unable to conclude that the firm had failed to act with the necessary care, skill and diligence ordinarily expected from a reasonable attorney. Moreover, none of the agreements concluded and signed by the parties stipulated any specific time frames in which the firm was expected to finalise the claim. In argument, it was contended on behalf of the client that, in the circumstances, the delays were so unreasonable that it justified the inference of negligence on the part of the firm (*res ipsa loquitur*).

However, the court held that this was not a case of *res ipsa loquitur*. That expression comes into play only if the accident or occurrence would ordinarily not have happened unless there had been negligence.

The client failed to make out a case entitling her to the relief sought. The appeal was dismissed with costs.

Class action

Availability of class action: In *Mukkadam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA) the court considered the circumstances in which a so-called 'opt in class action' will be permissible.

The appellants were purveyors of bread. They purchased bread from one or other of the respondents (who were major producers), added their margins and distributed mainly to informal traders, through whom the bread reached consumers. For some time in the Western Cape, the respondents engaged in practices prohibited by the Competition Act 89 of 1998. Essentially, they engaged in coordinated fixing of prices, fixing of discounts that were given to distributors such as the appellants, and they agreed not to deal with one another's distributors.

The appellants alleged that they, and about one hundred other distributors of bread in the Western Cape, suffered financial loss as a result of the prohibited conduct, particularly the fixing of discounts

they would receive, and they wished to pursue claims for damages in a class action. They applied to the WCC to certify the institution of a class action on behalf of themselves and other affected distributors for recovery of their losses. The application was dismissed by the court *a quo*.

On appeal to the SCA, Nugent JA pointed out that in the earlier case of *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) he had joined with Wallis JA in recognising class actions as a permitted procedural device for pursuing claims, where the case calls for it, so as to permit those who are wronged to have access to a court.

In the *Children's Resource Centre Trust* case the court listed the requirements for such a class action to be certified. The applicants for certification need to, *inter alia*, satisfy a court, where a novel cause of action is sought to be established, that the claim is at least legally tenable, albeit that the court is not called on to make a final determination as to the merits of the claim, and that a class action is the most appropriate means for the claims to be pursued. Failing that, the certification of a class action holds the potential to be only oppressive to the proposed defendants.

The class action the appellants wished to pursue in this case was one sometimes called an 'opt in' action; that is, the class to be represented in the action is confined to claimants who come forward and identify themselves as such. In the present case, this had to be done by written notification to the appellants' attorney. Once the class is confined to claimants who choose positively to advance their claims, and are required to come forward for that purpose, there is no reason why they are not capable of doing so in their own names, and they do not need a representative to do so on their behalf.

An opt in class action – one where the class to be represented is confined to claim-

ants who come forward and identify themselves – will be permitted only in exceptional circumstances. However, nothing exceptional was shown in the present case.

The claim for certification of a class action was unsuccessful and the appeal was dismissed.

In view of the novelty of the claim, and its close association with the *Children's Resource Centre Trust* case, in which the main points were in any event argued on behalf of the respondents, the court deemed it just that each party pay its own costs.

Company law

Section 424 of the 1973 Companies Act: In *Fourie v FirstRand Bank Limited and Another* [2013] 1 All SA 291 (SCA) the appellant, Fourie, was an accountant employed by an auditor, Du Preez.

The first respondent, FirstRand, was a financial institution, which sued Fourie and Du Preez for payment of R 10 million, plus interest and costs. Du Preez later committed suicide and the second respondent was appointed as the executor of his deceased estate and was substituted as a party to the action in his stead.

FirstRand's action against Fourie arose from financial statements prepared by him on behalf of a business that was subsequently found to be insolvent. Based on the statements submitted by Fourie, FirstRand advanced R 10 million to the insolvent business.

FirstRand's action was based on s 424 of the Companies Act 61 of 1973 (the Act); alternatively, on the basis of the *actio legis aquiliae*.

As against Du Preez, FirstRand claimed that he was liable in delict for the same amount, jointly and severally with Fourie, on the basis that he was vicariously responsible for the wrongdoing of the latter.

The court *a quo* found in favour of FirstRand on the basis of the main claim in terms of s 424. The delictual claim against the executor was, however, dismissed with costs.

On appeal to the SCA, Brand JA pointed out that

s 424 of the Act provides for a declaration by a court that any person who was knowingly a party to the carrying on of any business recklessly or with fraudulent intent should be personally responsible for all or any of the debts or other liabilities of the company.

The financial statements prepared by Fourie constituted fraudulent misrepresentations, which induced FirstRand to lend money to the insolvent business. Fourie's attempts to argue that FirstRand's employees should have been 'more careful' were rejected.

A further argument raised by Fourie was that s 424 of the Act requires a causal link between the fraudulent or reckless conduct of the company's business and its inability to pay. However, earlier case law confirmed the general principle that s 424 does not require proof of a causal link between the relevant conduct and the company's inability to pay the debt. Besides, in this matter the link between the fraudulent statements and the debt could 'not be denied'.

The appeal was accordingly dismissed with costs.

Contract law

Acceptance of tender bid: The facts in *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA); [2013] 1 All SA 266 (SCA) were as follows. The appellant, Maxi, sued the respondent, the post office, in the High Court, claiming damages allegedly suffered as a result of the latter's repudiation of an agreement between the parties.

The appellant's case was that in July 2003 the parties concluded a written agreement in terms of which Maxi undertook to provide guarding services for the post office in three regions. In January 2004 the post office wrote a letter to the appellant that constituted a repudiation of that agreement, which repudiation was accepted by Maxi. As a result of the post office's breach of the contract, Maxi suffered damages in the sum of about R 14 million.

The post office denied that the agreement relied on by

Maxi ever came into existence. It argued that, although the post office had informed Maxi that it had been awarded the tender to provide security services, the contract between them was never finalised. The court *a quo* decided in favour of the post office.

The critical issue on appeal was whether the letter of acceptance sent by the post office to Maxi constituted an unconditional acceptance of Maxi's offer as contained in its tender.

The SCA, per Brand JA, held that the letter of acceptance contained a stipulation that rendered Maxi's appointment 'subject to' the successful finalisation and signing of a formal contract. Parties in such circumstances often reach agreement by tender (or offer) and acceptance while there are some outstanding issues that require further negotiation and agreement. Case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional on consensus being reached, after further negotiation, on the outstanding issues. In that event, the law will recognise no contractual relationship, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and the outstanding issues would merely be left for later negotiation. In this event, if the parties failed to reach agreement on the outstanding issues, the original contract would prevail.

The court held that the term 'subject to' in the letter of acceptance was generally understood in the contractual context to introduce some or other condition. It further held that the post office's communication to Maxi did not constitute an unconditional acceptance of the tender; but that it was intended by the post office and accepted by Maxi as a counter-offer. The agreement Maxi relied on never came into existence.

The appeal was thus dismissed with costs.

Delict

Factual causation: *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) concerned an application for leave to appeal against a decision of the SCA (*Minister for Correctional Services v Lee* 2012 (3) SA 617 (SCA)) overturning a decision of the WCC (*Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC)).

The High Court declared the respondent, the Minister, liable for delictual damages suffered by the applicant, Lee, as a result of contracting tuberculosis (TB) while in detention at maximum security prison Pollsmoor Prison. Having rejected Lee's claim on a narrow factual point on the application of the test for causation, the SCA upheld the Minister's appeal and absolved her from liability.

Primarily, the case concerned whether Lee's detention and the systemic failure to take preventative and precautionary measures by correctional services' authorities caused Lee's TB. The complaint was that the unlawful detention and specific omissions violated Lee's rights to freedom and security of the person and to be detained under conditions consistent with human dignity, as well as to be provided with adequate accommodation, nutrition and medical treatment at state expense.

The question was whether the causation aspect of the common law test for delictual liability was established and, if not, whether the development of the common law was necessary to prevent an unjust outcome.

The CC, per Nkabinde J, held that existing law did not require, as an inflexible rule, the use of 'the substitution of notional, hypothetical lawful conduct for unlawful conduct in the application of the "but-for test" for factual causation'. There was thus nothing in South African law that prevented approaching the question of causation simply by asking whether the factual

conditions of Lee's incarceration were a more probable cause of his TB than would have been the case had he not been incarcerated in those conditions.

The crisp question was whether causation was established on a balance of probabilities on the facts of each case. It would be enough to satisfy probable factual causation where the evidence established that Lee had found himself in the kind of situation where the risk of contagion (with TB) would have been reduced by the prison authorities' proper, systemic measures. In the circumstances, there was a probable chain of causation between the negligent omissions by the responsible authorities and Lee's infection.

There was no requirement that Lee had to adduce further evidence to prove, on a balance of probabilities, what the lawful, non-negligent conduct of the Minister should have been. All that was required was 'the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether, upon such a hypothesis, [Lee's] loss would have ensued or not'.

Leave to appeal was accordingly granted and Lee's appeal was upheld.

Interest

Tempore morae: In *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga, and Others* 2013 (2) SA 259 (SCA) the third respondent, the government of the Republic of South Africa, as represented by the first and second respondents, purchased land destined for land restitution. The appellant, the seller of the land, applied to the High Court for the respondents to be ordered to furnish the seller with a written undertaking for payment of the purchase price within seven days of being called on to do so; and to pay interest in respect of the delay in transfer and the commensurate delay in payment of the purchase price.

Before the application was heard, the purchaser furnished the undertaking and transfer

was effected. However, the application proceeded in respect of the unresolved issue of the interest claimed. The High Court, in dismissing the application, reasoned that interest was not the proper measure for damages, but that the seller would have to prove his damages by demonstrating the overall financial loss occasioned by the delay. That is, by also taking into account the benefits of its remaining in occupation of the land during the period of default.

On appeal, the SCA held that it was true that *mora* interest was a species of damages and, while there were circumstances in which 'the interest-bearing potentialities' of money played a part in the computation of damages, here the liability to pay interest fell into the category described in *Union Government v Jackson and Others* 1956 (2) SA 398 (A) as 'a consequential or accessory or ancillary obligation ... automatically attaching to some principal obligation by operation of law'.

The court *a quo* had thus misconceived the inquiry. The courts have accepted that a party deprived of the use of his capital for a period of time had suffered a loss and, in the normal course of events, such a party would be compensated for his loss by an award of *mora* interest. Accordingly, the respondents were, on an application of common law principles, in *mora* and an obligation to pay interest to the appellant on the purchase price had accrued.

The court further pointed out that the gist of the respondents' case was that they were somehow excused from performing their contractual obligations because of a lack of funds. The conduct of the respondents' officials was 'disquieting' and led to the public purse being much poorer, since, while the purchase price remained unpaid, interest accrued at R 84 931 per day. To this had to be added the costs of 'ill advised' and, in the context of the emotionally charged constitutional imperative of land redistribution, 'morally unconscionable' litigation.

The appeal was accordingly allowed with costs.

National Credit Act

Forfeiture of property and rights: The central issue in *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) was whether s 89(5)(c) of the National Credit Act 34 of 2005 (NCA) was consistent with the right not to be arbitrarily deprived of property in s 25(1) of the Constitution.

Section 89(5) of the NCA provides:

'If a credit agreement is unlawful in terms of this section ... a court must order that -
(a) the credit agreement is void as from the date the agreement was entered into;
(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated -
(i) at the rate set out in that agreement; and
(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and
(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either -
(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
(ii) forfeit to the state, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.'

The first respondent, Opperman, was a Namibian farmer. In 2009 he lent a friend, Boonzaaier, R 7 million for property development. They concluded three written loan agreements. Opperman was not registered as a credit provider at the time of providing the loan, as required by the NCA. He was not in the business of providing credit, was unaware of the requirement to register and had no intention of violating the NCA.

The court *a quo* found that s 89(5)(c) was unconstitutional because it denied an unregistered credit provider

the right to restitution of money lent, without affording a court the discretion to consider whether restitution would be just and equitable.

The National Credit Regulator appealed against the declaration of constitutional invalidity. Opperman opposed the appeal and requested the CC to confirm the order of the court *a quo*.

In the CC, the questions to be answered were:

- What is the correct interpretation of s 89(5)(c)?
- Does s 89(5)(c) deal with property for the purposes of s 25(1)?
- Does the provision amount to arbitrary deprivation of property?
- Does it contain a constitutionally permissible limitation of the right protected in s 25(1)?
- Depending on the above, what is the appropriate remedy?

The CC, per Van der Westhuizen J, held that the most plausible meaning of s 89(5)(c) was the one provided by the court *a quo*. The High Court interpreted the provision to mean that the rights of the credit provider to recover any money paid must either be cancelled, unless the court concludes that doing so would unjustly enrich the consumer, or forfeited to the

state if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer. These were the only two possibilities. The section thus deprived a credit provider of the right to claim restitution, based on unjustified enrichment, of money paid to a consumer in terms of an unlawful agreement.

In the circumstances of the case, the recognition of such a restitutionary right as property under s 25(1) was 'logical and realistic', and the deprivation thereof arbitrary since sufficient reasons had not been given for it.

Section 89(5)(c) did not provide an acceptable limitation (in terms of s 36(1) of the Constitution) of the right not to be deprived of property arbitrarily. It was inconsistent with s 25(1) of the Constitution and thus invalid. The court, however, made it clear that the order of invalidity would have no effect on cases already finalised.

The appeal was dismissed with costs.

• See also 2013 (Jan/Feb) *DR* 56.

Limitation of lender's right to charge service fees: The facts in *National Credit Regulator v Standard Bank of South Africa Limited* [2013] 1 All SA 335 (SCA) were as fol-

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lows. The respondent bank's business included granting home loans to customers. Before the National Credit Act 34 of 2005 (NCA) came into operation, the Usury Act 73 of 1968 regulated the fees the bank could charge for the administration of loans. When the NCA came into operation it introduced an upper limit on service fees that might be charged on home loans. The bank argued that the limit imposed on administration fees under the Usury Act did not survive the transition to the NCA so far as extant home loans were concerned, with the result that administration fees on those loans ceased to be regulated. The appellant, the National Credit Regulator (the regulator), applied to the High Court for an order restraining the bank from charging administration fees on those loans in excess of the maximum amount set under the Usury Act, alternatively declaring the bank to be entitled to no more than that amount. The regulator's application was dismissed.

The SCA, per Nugent JA, pointed out that under the NCA a credit agreement, such as a home loan, must not require payment by the borrower of any money or other consideration except, among others, a service fee, which must not exceed the prescribed amount relative to the principal debt.

'Service fee' is defined to mean 'a fee that may be charged periodically by a credit provider in connection with the routine administration cost of maintaining a credit agreement'.

Given the general spirit of consumer protection of the NCA, it would be highly unlikely that the Act envisaged the termination of the regulation of such fees on existing loans. Further, the court noted that the transitional provisions in sch 3 to the NCA made it clear that the drafter was 'well aware that the regulation of existing agreements required to be provided for'.

The appeal was accordingly upheld with costs. The court ordered that the bank could not charge an administration fee on housing loans that

existed at the time the NCA came into operation that was in excess of the fee provided for in terms of the Usury Act, unless and until that fee is amended under the powers conferred by s 105(1) of the NCA.

Suretyship

Effect of marital status on validity of suretyship: The facts in *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA) were as follows. The appellant, Strydom, who was married in community of property, had executed an unlimited deed of suretyship in favour of the respondent, Engen, for the debts incurred by Soutpansberg Petroleum (Pty) Ltd (Soutpansberg), of which he was a director.

When Soutpansberg was subsequently liquidated and Engen, invoking the suretyship, sought to recover from Strydom, the latter, *inter alia*, raised the defence that since his wife had not consented to signing the deed of suretyship, the deed was invalid by virtue of s 15(2)(h) of the Matrimonial Property Act 88 of 1984 (the Act). The High Court rejected this argument and granted Engen's application for judgment against Strydom based on the suretyship.

Strydom appealed to the SCA. A further issue that arose was whether Mrs Strydom was a necessary party to the litigation, such that her non-joinder would non-suit Engen.

The relevant part of s 15(2)(h) provides that a spouse who is married in community of property 'shall not without the written consent of the other spouse ... bind himself as surety'.

However, s 15(6) of the Act provides that the prohibition contained in s 15(2)(h) does not apply where the spouse who signs the suretyship did so in the ordinary course of his profession, trade or business.

Wallis JA, in a majority judgment, pointed out that whether a deed of suretyship was executed in the ordinary course of business is a question of fact. Further, it was for the person who relied on the protection afforded by s 15(2) to show that he had

not bound himself in the ordinary course of his business. Where, as in the present case, the business was carried on through a company, the question to be answered was whether the surety's involvement in that business was his business and whether the execution of the suretyship was in the ordinary course of the surety's business, not the business of the company.

Strydom worked at the very core of Soutpansberg's business. His activities in relation to Soutpansberg, of which he was appointed director, clearly constituted his business, with the result that he was unable to show that he was entitled to the protection afforded by s 15(2).

As to whether Mrs Strydom should be joined, the question was whether she had a direct and substantial – and not merely financial – interest in the suretyship and its

validity. Her interest, which existed only by virtue of the fact that she was married to Strydom, was clearly of the latter sort: Although the execution of the suretyship by her husband was a potential source of financial prejudice to her, she was not party to it and had in fact been opposed to its execution.

It was thus unnecessary to join her as a party to the present proceedings and the appeal was dismissed with costs.

Other cases

Apart from the cases referred to above, the material under review also contained cases dealing with administrative law, education, motor vehicle accidents, practice, revenue, and the winding-up of companies.



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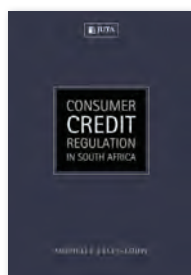


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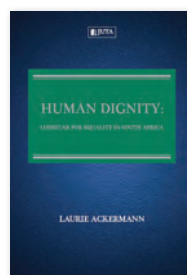
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BILLS INTRODUCED

Africa Institute of South Africa Act Repeal Bill B6 of 2013.
Children's Amendment Bill PMB1 of 2013.
South African Human Rights Commission Bill B5 of 2013.
Geomatics Profession Bill B4 of 2013.
Special Economic Zones Bill B3 of 2013.

PROMULGATION OF ACTS

Constitution Seventeenth Amendment Act, 2012. *Commencement:* To be proclaimed. GN72 GG36128/1-2-2013.

COMMENCEMENT OF ACTS

Competition Amendment Act 1 of 2009, s 6. *Commencement:* 1 April 2013. Proc5 GG36221/8-3-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Basic Conditions of Employment Act 75 of 1997

Sectoral determination 12, forestry worker sector, South Africa. GN168 GG36224/8-3-2013.

Civil Aviation Act 13 of 2009

Airport slot coordination regulations, 2012. GN R128 GG36175/22-2-2013.
Civil aviation regulations, 2011. GN R164 GG36218/8-3-2013.

Child Justice Act 75 of 2008

Designation of area of jurisdiction of the Matlosana One Stop Child Justice Centre. GN R130 GG36179/22-2-2013.

Companies and Intellectual Property Commission

Renewal of accreditation of Southern African Music Rights Organisation (SAM-

RO) as a collecting society in terms of reg 3(1)(b) by the Companies and Intellectual Property Commission. GenN158 GG36183/1-3-2013.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Annual increase in medical tariffs for medical services providers, pharmacies, ambulances and hospital groups. GenN214 - GenN222 in GG36242/15-3-2013 - GG36250/15-3-2013.

Rules, forms and particulars to be furnished in terms of the Act. GN197 GG36254/15-3-2013.

Classification of industries. GenN225 GG36225/15-3-2013.

Construction Industry Development Board Act 38 of 2000

Standard for contractor performance reports for use on construction works contracts (grades 2 - 9). BN20 GG36190/25-2-2013.

Standard for indirect targeting for enterprise development through construction works contracts. BN21 GG36190/25-2-2013.

Deeds Registries Act 47 of 1937

Amendment of regulations. GN R195 GG36240/14-3-2013.

Health Professions Act 56 of 1974

The ethical rules of conduct for practitioners registered under the Health Professions Act. BN26 GG36183/1-3-2013.
Health Professions Council of South Africa: Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications. BN31 GG36225/15-3-2013.

Income Tax Act 58 of 1962

Fixing of rate per kilometre in respect of motor vehicles for the purposes of

s 8 (1)(b)(ii) and (iii) of the Income Tax Act. GN145 GG36192/27-2-2013.

Determination of the daily amount in respect of meals and incidental costs for purposes of s 8 (1). GN148 GG36198/28-2-2013.

Area demarcated by City of Cape Town as urban development zone. GN147 GG36195/27-2-2013.

Higher Education Act 101 of 1997

Amendments to the Institutional Statute: Nelson Mandela Metropolitan University. GN146 GG36194/27-2-2013.

Marine Living Resources Act 18 of 1998

Recognition of organisations as interest groups in terms of s 8. GN135 GG36183/1-3-2013 and GN180 - GN184 GG36225/15-3-2013.

Marketing of Agricultural Products Act 47 of 1996

Establishment of statutory measure and determination of international market development and local consumer education levies on stone fruit. GN153 GG36207/8-3-2013.

Medical Schemes Act 131 of 1998

List of registered medical schemes. GenN141 GG36171/20-2-2013.

Merchandise Marks Act 17 of 1941

Proposed prohibition on the use of certain words and emblem related to Fédération Internationale de Football Association. GenN208 GG36225/15-3-2013.

National Heritage Resources Act 25 of 1999

Provisional protection as a national heritage resource: Martin Melck House, Evangelical Lutheran Church and Saxtöne's House. GN136 GG36183/1-3-2013.

Nuclear Energy Act 46 of 1999

Regulations regarding the qualifications of inspectors. GN R177 GG36226/15-3-2013.

Nursing Act 33 of 2005

Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration in the category of auxiliary nurse. GN R169 GG36230/8-3-2013.

Regulations regarding fees and fines payable to the South African Nursing Council. GN R170 GG36231/8-3-2013.

Regulations relating to the approval of and the minimum requirements for the education and training of a learner leading to registration in the category of staff nurse. GN R171 GG36232/8-3-2013.

Regulations regarding an appeal against decisions of the South African Nursing Council. GN R172 GG36233/8-3-2013.

Regulations relating to the accreditation of institutions as nursing education institutions. GN R173 GG36234/8-3-2013.

Regulations relating to the approval of the minimum requirements for the education and training of a learner leading to registration in the categories of professional nurse and midwife. GN R174 GG36235/8-3-2013.

Amendment of regulations relating to the particulars to be furnished to the council for keeping the register for nursing practitioners; the manner of effecting alterations to the register; and certificates that may be issued by the council. GN R175 GG36236/8-3-2013.

Categories of practitioners in terms of s 31(2) of the Act. GN R176 GG36237/8-3-2013.

Projects and Construction Management Act 48 of 2000

Rules and procedures for the nomination of council members and appointment of committees and sub-commit-

tees. BN22 GG36183/1-3-2013.

Rules for inquiry into alleged improper conduct. BN23 GG36183/1-3-2013.

Professional conduct to be adhered to by persons through the code of conduct. BN24 GG36183/1-3-2013.

Public Service Act 103 of 1994

Amendment of Public Service Regulations, 2001. GN R131 GG36184/1-3-2013.

Sectional Titles Act 95 of 1986

Amendment of regulations. GN R196 GG36241/14-3-2013.

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

National routes 1 and 4: Publication of the amounts of toll for the different categories of motor vehicles, and the date and time from which the toll tariffs shall become payable. GN124 GG36172/20-2-2013.

National route 4: Hans Strydom Interchange (Pretoria) to the Gauteng/ Mpumalanga Border and Maputo Development Corridor toll roads: Publication of the amounts of toll for the different categories of motor vehicles, and the date and time from which the toll tariffs shall become payable. GN125 and GN126 GG36172/20-2-2013.

Huguenot, Vaal River, Great North, Tsitsikamma, South Coast, North Coast, Mariannhill, Magalies, N17 and R30/R730/R34 toll roads: Publication of the amounts of toll for the different categories and time from which the toll tariffs shall become payable. GN127 GG36172/20-2-2013.

National Route 17: Springs and Ermelo toll road: Publication of date and time from which toll tariffs will become payable. GN165 GG36219/8-3-2013.

DRAFT LEGISLATION

Proposed amendments to the Johannesburg Stock Exchange derivatives, inter-

est rate and currency rules in terms of the Securities Services Act 36 of 2004. BN16 GG36165/22-2-2013.

Administrative Adjudication of Road Traffic Offences Amendment Bill, 2013 for comments. GenN142 GG36173/20-2-2013.

Draft control of use of vehicles in the Coastal Area Regulations in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GenN150 GG36183/1-3-2013.

Draft management of public launch sites in the Coastal Zone Regulations in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GenN151 GG36183/1-3-2013.

Draft Children's Amendment Bill. GenN164 GG36196/27-2-2013.

Draft regulations prescribing the atmospheric emission licence processing fee calculator in terms of the National Environmental Management Act: Air Quality Act 39 of 2004. GenN171 GG36207/8-3-2013.

Draft National Land Transport Amendment Bill, 2013 for comment. GenN189 GG36214/8-3-2013.

Draft strategic stocks petroleum policy and draft strategic stocks implementation plan in terms of the National Energy Act 34 of 2008. GenN192 GG36220/8-3-2013. Draft regulations on appointment and conditions of employment of senior managers in terms of the Local Government: Municipal Systems Act 32 of 2000. GN167 GG36223/7-3-2013.

Draft credit rating agency rules in terms of the Credit Rating Services Act 24 of 2012 for comment. BN33 GG36252/15-3-2013.



AN APPEAL



PBO No: 930 007 621

NPO Registration No: 000-704 NPO

Avril Elizabeth Home

When next you draft a will for a client please remember to include a bequest to the

AVRIL ELIZABETH HOME

(Bequests are exempt from estate duties.)

P O Box 40155, CLEVELAND 2022
Tel: (011) 822-2233 Fax: (011) 828-6084

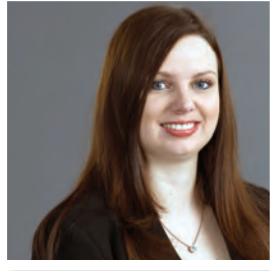
The Avril Elizabeth Home, established in 1969, cares for 160 intellectually disabled persons in residential care and 20 in day care.

All support will be gratefully appreciated.

Employment law update



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



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

Polygraphs

The applicant in *DHL Supply Chain SA (Pty) Ltd v De Beer NO and Others* [2013] 1 BLLR 20 (LC) was involved in the warehousing and distribution of cigarettes. The third respondent employees, Dube and Masinga, were employed as cage loaders with six other employees. During June 2008 DHL noticed a substantial increase in stock losses. Approximately R 14 500 worth of stock was lost over a period of five days in June 2008, despite high levels of security. No one knew exactly how the stock was removed or where it went. The video surveillance did not show any employees removing stock and no employees were caught with stock in their possession.

All eight of the employees who were on duty at the time the stock losses occurred were sent for polygraph testing. The employees had a clause in their contracts of employment obliging them to undergo polygraph testing. Six of the employees passed the polygraph test, but Dube and Masinga failed. Following a disciplinary inquiry, Dube and Masinga were dismissed.

They contested the fairness of their dismissals at the relevant bargaining council and the commissioner held that their dismissals were procedurally fair but substantively unfair and ordered their reinstatement with back pay. In doing so, the commissioner examined the law on polygraph testing and held that the result of such a test is merely one evidentiary fact to be considered. It cannot, in itself, prove guilt. In the absence of the polygraph result, the evidence against the employees was that –

- they worked on the days the stock went missing;
- they were among a group of eight employees who had access to the stock;
- the stock had a high street value; and
- the stock loss dropped off considerably once Dube and Masinga were dismissed on 28 August 2008.

These factors did not convince the commissioner that the employees were guilty, particularly because the

evidence showed that the theft did not stop completely and, since the employees' dismissals, DHL had suffered about R 10 million worth of stock loss in 2009. What could have happened was that the real culprits were 'lying low' for a while, and additional security measures could also have accounted for the reduction in stock losses.

DHL took the matter on review to the Labour Court and argued, *inter alia*, that the commissioner committed a reviewable irregularity in that she failed to look at the evidence holistically and allow the most probable inference, namely that Dube and Masinga were involved in the stock losses.

The Labour Court, per Boqwana AJ, held that the test was whether the commissioner's decision was reasonable. If she failed to take account of a relevant factor or did not apply her mind to the issues, the decision would be unreasonable. The court accepted that evidence other than the polygraph test results was put before the commissioner. However, these factors did not circumstantially point to the guilt of Dube and Masinga. Therefore, without the polygraph test results it was not possible to point to any evidence that separated Dube and Masinga from the employees who were not dismissed. The court further confirmed that the commissioner was correct when she asked whether there was any other evidence supporting a guilty finding, and she correctly found there was not.

In the circumstances, the review application was dismissed with costs.

Fixed term employment contracts

In *Morgan v Central University of Technology, Free State* [2013] 1 BLLR 52 (LC) the applicant applied to the Labour Court in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, alleging that his employment contract was unlawfully terminated.

He claimed that he was entitled to damages equal to the amount of salary he would have earned if the employment con-

tract had not been unlawfully terminated, namely an amount equal to 48 months' remuneration. The applicant had been employed as deputy vice-chancellor: Resources and operations in terms of a five-year fixed term contract of employment from 1 January 2010 to 31 December 2014.

On 20 December 2010 the respondent gave the applicant notice of its intention to terminate the employment contract with effect from 31 December 2010, thus 48 months prior to the agreed expiry date.

The Labour Court, per Daniels AJ, held that to succeed in a claim for damages, the following must be proven –

- the existence of a contract;
- the breach or repudiation of the contract;
- damages;
- a causal link between the breach and damages; and
- that the loss was not too remote.

The employment contract provided that either party was entitled to terminate the contract by giving the other three months' written notice. In the event that the respondent terminated the contract on notice, it was required to follow a substantively and procedurally fair process. The contract expressly provided that the contract could be terminated for misconduct, medical unfitness, operational requirements or incompetence. (The respondent terminated the employment contract on the basis of the applicant's performance and an unfair dismissal claim was referred to the Commission for Conciliation, Mediation and Arbitration in this regard.) The respondent did not give the applicant the required three months' notice and thus, in the alternative, the applicant claimed damages equal to the amount of remuneration that he would have earned during the notice period, being three months' remuneration.

This case was distinguished from *Buthlezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC), in which the court was, in principle, prepared to award compensation for the balance of the contract. In that case the contract had been silent on its early termination and did not contain a notice provision.

The Labour Court also considered previous cases in which it was held that, where an employment contract has a notice clause in terms of which the contract may be terminated prior to the expiry date, the quantum of damages at common law is limited to what the employee would have earned during the notice period.

Daniels AJ went on to say that, even if this was incorrect, the applicant had failed to prove that he had suffered damages beyond the notice period. This was because the applicant had obtained alternative employment approximately one week before the notice period would have ended and therefore could not prove damages beyond the notice period.

Daniels AJ also considered the fact that the applicant had stated that he did not

accept the respondent's repudiation of the contract; however, by accepting alternative employment, the applicant had demonstrated that he had accepted the repudiation as he had made it impossible to abide by the contract.

The Labour Court concluded that there was no basis to award more than three months' remuneration. Further, the applicant took up alternative employment before the three-month notice period had lapsed and thus he was awarded three

months' remuneration less the salary he would have earned during the period of notice actually given and one week's remuneration in respect of the week in which he commenced alternative employment.



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

Benefit to employees

Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (LAC) (unreported case no DA1/11, 21-2-2013) (Musi AJA)

Can an employee who refers an unfair labour practice dispute concerning benefits to the Commission for Conciliation, Mediation and Arbitration (CCMA) lay claim to the benefit only where it is an entitlement in terms of a contractual or statutory right?

The Labour Appeal Court (LAC) in this matter, in examining past jurisprudence, considered the different approaches to answering this question.

Background

In response to a downturn in the economy, the appellant employer introduced an early retirement scheme to its employees. As part of the employer's initiative, those employees whose applications to join the scheme were successful would go on early retirement and receive two months' additional pay and a further *ex gratia* payment. With over 24 years' service, the third respondent employee was refused entry into the scheme. She referred an unfair labour practice dispute in terms of s 186(2)(a) of the Labour Relations Act 66 of 1995 (LRA) to the first respondent, the CCMA.

Section 186(2)(a) of the Act states:

"Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee ...'

The second respondent arbitrator dismissed the employer's challenge that the CCMA did not have jurisdiction to hear the

matter. In arriving at his findings, the arbitrator relied on certain decisions in which it was held that an unfair labour practice dispute relating to benefits did not have to be based on a pre-existing right. The arbitrator went on to find that the employer's conduct, in refusing the employee membership to the scheme, was unfair and ordered it to pay the employee the amounts she would have received had she been accepted into the scheme, totalling more than R 123 000.

On review, the matter came before the Labour Court, per Cele J, who dismissed the employer's application. He found that the arbitrator's decision fell within the band of reasonableness.

The employer then approached the LAC for relief.

The LAC

Counsel for the employer argued that s 186(2)(a) of the LRA could not be used by employees to create rights that did not exist and that the section was intended to give an employee recourse where he claimed unfair conduct by the employer with regard to an existing right.

The employee's representative argued that the section in question was introduced to rescue employees who had no other remedy to address their employer's alleged unfair conduct, either in the LRA or at common law.

In support of the employer's argument was the decision in *Hospersa and Another v Northern Cape Provincial Administration* [2000] JOL 6301 (LAC), in which Mogoeng AJA stated:

'It appears to me that the legislature did not seek to facilitate, through item 2(1)(b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). ... A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable.'

(Prior to amendments brought about by the Labour Relations Amendment Act 12 of 2002 the provision relating to benefits was item 2(1)(b).)

Over the years, this approach found favour in subsequent Labour Court and LAC decisions.

In 2004, in the matter of *Department of Justice v Commission for Conciliation, Mediation and Arbitration and Others* (2004

25 ILJ 248 (LAC), the court found that the provision in the LRA relating to benefits sought to give content to the constitutional right to fair labour practice and, as such, when an employee refers a dispute relating to benefits, he is in effect exercising a right founded *ex lege*. Therefore, according to the LAC, the issue of the claim being a rights' dispute or a mutual interest dispute fell away.

The LAC in the present matter considered the Labour Court decision in *Protekon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2005) 26 ILJ 1105 (LC), in which Todd AJ, in agreeing with the principle that an employee could not rely on s 186(2)(a) to create new rights, as set out in the *Hospersa* case, went on to find that it did not follow that an employee may enjoy the protection of this section only if his claim is based in contract or statute. According to the Labour Court, the section imposed an obligation on employers, when dealing with benefits, to act fairly under circumstances where they are obliged to do so contractually or statutorily, as well as under circumstances where the employer uses its discretion in deciding whether or not the employee should be granted a benefit. Therefore, when faced with a claim of this nature, the CCMA has jurisdiction to decide whether or not the employer's actions were fair.

Following this approach, the LAC in the present matter held:

'In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment, "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *Hospersa*, [*G4S Security Services v NASGAWU* (LAC) (unreported case no DA3/08, 26-11-2009) (Tlaletsi AJA)] and [*Gauteng Provinsiale Administrasie v Scheepers and Others* [2000] 7 BLLR 756 (LAC)] postulate a different approach, they are, with respect, wrong.'

The appeal was dismissed with costs.

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



THE PRACTITIONER'S GUIDE TO CONVEYANCING AND NOTARIAL PRACTICE

WELCOME AND INTRODUCTION TO LEGAL EDUCATION AND DEVELOPMENT (L.E.A.D)

LEAD, a division of the Law Society of South Africa (LSSA), understands the needs of a modern-day law practice. A variety of methods to access high-quality learning activities are offered to attorneys, candidate attorneys and support staff. These include a practical law school and a range of courses, certificate and diploma programmes, seminars and workshops which are conducted at training centres, online or via distance learning.



Practitioner's Guide To Conveyancing And Notarial Practice (2013 Update)

By AS West Chief: Deeds
Training, Pretoria

In terms of section 2(1)(a) of the Deeds Registries Act 47 of 1937, it is the duty of the Chief Registrar of Deeds to exercise supervision over all the deeds registries and to bring about uniformity in their practice and procedures. Uniformity is brought about by the issuing of circulars as well as the yearly conference of Registrars, where contentious issues are discussed and deliberated and a uniform practice resolved upon (see section 2(1D)).

With this as background, I commenced in 1993 with the writing of articles in *De Rebus* on conveyancing issues, which culminated into my first book called *Articles on Conveyancing for the Attorney*, and eventually evolved into *The Practitioner's*

Guide to Conveyancing and Notarial Practice, the latter having been updated on numerous occasions. In 2008 market research showed that an electronic version of the book was required and, for that reason, it was deemed necessary to issue the second edition in hard copy and in an electronic format. It was also found that the loose-leaf format of the book is not conducive for daily use, thus the newly bound book together with the electronic reading version.

As with the first book and its successor, I have tried to remain true to my initial intention, which is to create uniformity in practice, as difficult as it might be. I have, where possible, substantiated the statements made or the examples provided with reference to authority, in the form of case law, conference resolutions, circulars, etc.

This book remains a practical guide for the practitioner and student and is not intended or claimed to be a legal treatise, and cannot cater for all facets of conveyancing. I have, however, endeavoured, as far as possible, to concentrate on the most important issues, for the day-to-day occurrences.

Human Dignity: Lodestar for Equality in South Africa

By: **Laurie Ackermann**

Cape Town: **Juta**

(2012) 1st edition

Price: R 595 (incl VAT)

462 pages (soft cover)

In the 1950s, former African National Congress (ANC) President Chief Albert Luthuli said that the struggle in South Africa was not so much about the ANC coming into power, as it was the recognition and realisation of human dignity for African people, who were brutalised first under colonial rule and then under apartheid.

Through his own realisation, former Constitutional Court Justice Laurie Ackermann gives expression to Chief Luthuli's thoughts in this book. It came as no surprise that, at the dawn of democracy in 1994, President Nelson Mandela invited the author to join the first Bench of the Constitutional Court.

The book traces the theoretical background to human dignity, equality and non-discrimination as constitutional legal concepts; provides a provocative treatment of human dignity and equality in the Constitution; locates the role of human dignity when the equality and non-discrimination rights in the Constitution are applied horizontally between subjects of the state; and concludes with a remedy in the sphere of restitutionary or remedial equality.

The central theme is around a hypothesis, which the author posits as the 'logico-grammatical criterion of reference or attribution', to give intelligible meaning to the concept of 'equality'. In terms of this hypothesis, legal concepts such as equality and non-discrimination, when applied to human beings, invariably raise the questions: Equality of what? In respect of

what are all human beings equal and in respect of what may no one be discriminated against? In the view of the author, the answer is human worth or human dignity.

In essence, the author makes the point that the legal concepts of equality and non-discrimination as basic constitutional human rights, accorded to all citizens, would be meaningless unless their practical application and limits are spelt out.

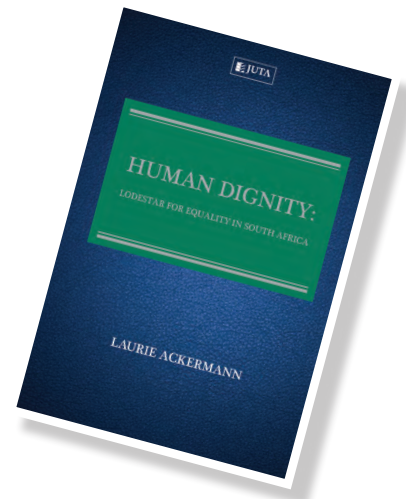
To support his hypothesis, the author refers to certain theological views in the so-called Abrahamic religions (Judaism, Christianity and Islam), German and Canadian jurisprudence ('to establish the norms that apply in open and democratic societies based on freedom and equality') and the works of philosophers such as Immanuel Kant, Bernard Williams, Amartya Sen, Ronald Dworkin and John Rawls to demonstrate the resultant influence on the concept of human dignity and the legal development of equality and freedom.

The author justifies the link between law and philosophy and his reliance on Kant's ethical thought of human dignity because, through Kant, he was able to discover what was so obscene about apartheid.

Following on the development of personality rights, the author puts forward compelling arguments to locate human dignity, together with freedom and equality, as founding values in the Constitution, although he admits that the main difficulty would be where to draw the outer limit of the right and value of human dignity.

He devotes an entire chapter to the tension or conflict between rights of private subjects in the horizontal application of the Bill of Rights and argues that, although the rights to freedom and privacy would trump the right to equality and non-discrimination in the horizontal sphere, this could change once the legal relations of private subjects move into the public domain.

Finally, the author argues that the pri-



vate law principles of unjustified enrichment could provide a remedy for restitutional equality under the Constitution in favour of those who are still disadvantaged by unfair discrimination that occurred in the past at the expense of 'innocent' beneficiaries who were unjustifiably enriched.

A single line in the report of a Prussian police agent who broke into Karl Marx's London flat, which read: '[T]he whole world comes and goes through his room,' inadvertently became one of the greatest tributes to the intellect of the revolutionary German philosopher. Retaining the analogy, the author's systematic and theoretically enriching arguments on equality jurisprudence are revolutionary and create a tiny eye in a needle through which the evolution of South African society must pass in the search for and realisation of human dignity.

This book is compulsory reading for constitutional law practitioners, jurists, legal academics and those who wish to take up the author's invitation to contribute to the development of South Africa's constitutional jurisprudence.

Krish Naidoo is an attorney at Cliffe Dekker Hofmeyr in Johannesburg.

Book announcements

The Protection of Human Rights in South Africa

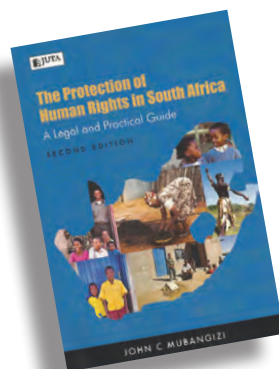
By John C Mubangizi

Cape Town: **Juta**

(2013) 2nd edition

Price: R 350 (incl VAT)

269 pages (soft cover)



A Basic Guide to Civil Procedure in the Magistrates' Courts

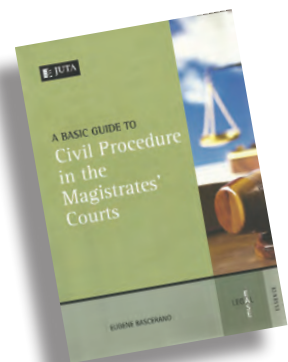
By Eugene Bascerano

Cape Town: **Juta**

(2013) 1st edition

Price: R 375 (incl VAT)

259 pages (soft cover)



Commercial Mediation: A User's Guide

By John Brand, Felicity Steadman and Christopher Todd

Cape Town: Juta

(2012) 1st edition

Price: R 245 (incl VAT)

135 pages (soft cover)

At last, a handbook for commercial mediators written by experienced South African mediators.

One would expect from these authors a seminal work and the reader will not be disappointed.

The opening words of the preface are pertinent: 'Mediation has arrived in the civil justice system. It is here to stay.'

The authors point out that not only does this reality follow international trends, but the South African courts and legislature are alive to the potential and need for mediation as a dispute resolution mechanism. This recognises, too, that mediation is part and parcel of South African customary law, at the core of which is the concept of *ubuntu*.

The book commences with a background, creates perspective, moves on to a description of the key characteristics of mediation and deals with the nuts and bolts of the process. The combined practical experience of the authors clearly manifests itself.

Although exponents of the process, they make it clear that mediation is no panacea. They face head-on the concerns of segments of the legal fraternity that mediation threatens their livelihood. This is debunked by showing the positive role that lawyers can play in the mediation process, which in commercial mediation

calls for their active involvement. Coupled with this is the warning quoted in the book from a 1983 issue of the *Journal of Legal Education*, which I have rephrased as: If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow for human inclinations toward collaboration and compromise to flourish, rather than stirring proclivities for competition and rivalry, they will not be at the centre of the most creative social experiments of our time (Dereck Bok 'A flawed system of law and practice training' (1983) 33 *Journal of Legal Education* 570, cited in Simon Roberts & Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (United States of America: Cambridge University Press 2005) at 48).

How to decide on whether or not to submit to mediation, what circumstances favour it and when it is not appropriate are discussed. The perception that proposing mediation to clients or an opposing party is a sign of weakness is also addressed. Much of this has to do with the absence, at this stage, in South Africa of a strong mediation culture in commercial disputes. With time, and as court-referred mediation becomes entrenched in the civil justice system, this perception will diminish.

Practical issues, such as choice of venue, setting up the venue and related is-



sues, are dealt with, as is the running of the mediation and the role of the lawyer.

The ethics of the mediation process are also clearly spelt out.

Listed among the appendices are 49 statutes that currently provide for mediation in one form or another (this figure has subsequently increased to 51). Templates are also provided for agreements to mediate.

For those with no or limited knowledge of mediation, this book will provide a clear, practical insight into the workings of the process. To experienced mediators, it offers a back-to-basics reference, particularly where the process gets stuck, as is sometimes the case.

All in all, a book to be highly recommended as a necessary addition to the library of all lawyers.

Charles Cohen is an attorney at Charles H Cohen Attorneys in Johannesburg.



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As an online publication, JOL is updated daily with at least 6 new cases. Judgments received from the courts are published within weeks of being handed down. A special "Hot off the Bench" segment allows you access to the latest judgments selected for this specific feature, within 24 hours.

The "What's New?" feature on JOL contains documents apart from judgments, which may be of interest to customers.

Examples of these documents are as follows:

- A grid that lists the new names of the High Courts in South Africa
- President Zuma's Cabinet Announcement
- Certain official press releases from the courts
- Topical Court Orders

Another new feature is the "HOB Judgment Alerts" which was previously only available to OSALL subscribers. This service gives customers a short summary of the most recent Hot off the Bench judgment, together with an indication of the legislation that it involves.

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