

OCTOBER 2015

BREAKING THE GOLDEN EGG – THE PITFALLS OF WRITTEN ADMISSIONS IN S 37D OF THE PENSION FUNDS ACT



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for the plaintiffs – recent changes to
the **summary judgment** procedure

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understanding the correct interpretation
of r 34 of the uniform rules of court

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The mandament van spolie remedy

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30 Breaking the golden egg – The pitfalls of written admissions in s 37D of the Pension Funds Act

There are various protective mechanisms in place where retirement benefits are beyond the reach of creditors. Among these protective measures are the provisions of s 37A(1) of the Pension Funds Act 24 of 1956. The protection afforded by s 37A(1) is, however, not absolute and there are certain well-defined exceptions which are spelt out in s 37D of the Act. In this article, **Zamazulu Nkubungu** asks: What are the requirements in respect of deductions from a member's pension benefits due to the member's theft, fraud, dishonesty or misconduct?

34 Encumbering proceedings for the plaintiffs – recent changes to the summary judgment procedure

The origins of the summary judgment as a procedural remedy is well entrenched within our current legal system. In the article, **Eugene Dlamini** discusses the recent amendments to the summary judgment procedure in r 14 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa and what attorneys should know as it has the potential to encumber proceedings for the plaintiffs/applicants.

36 Dispossessed and unimpressed: The *mandament van spolie* remedy

Mandament van spolie is an old common law remedy commonly used by a person who has been dispossessed of goods without following due legal procedure. This article, written by **Valentine Mhunu**, seeks to answer the question whether the remedy of spoliation is available to a person who has been dispossessed of money, in the form of electronic funds, by his or her own bank. This article seeks to establish whether the aggrieved person may use *mandament van spolie* to claim back the funds that he or she has been dispossessed of by his or her own bank.

40 Know the rules! Understanding the correct interpretation of r 34 of the uniform rules of court

The Road Accident Fund (RAF) is a public entity established in terms of the Road Accident Fund Act 56 of 1996 as amended, to compensate victims of road accidents where serious injury or death arose as a consequence of wrong doing or fault. Central to the payment of a claim under the current legislative framework is the common law principle of delict where fault must be proven before a claimant is compensated. In this article, **Francois Robert van Zyl** discusses the correct interpretation of r 34 of the Uniform Rules of Court and Practice Directives in order to enhance and facilitate the speedy and justifiable settlement of claims.

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It's that time of the year again for AGMs and conferences

As we head towards the end of the year, this is the time when different organisations hold their annual general meetings (AGMs) or annual conferences. Practitioners may ask themselves, is there any value in attending these meetings, and is it really worth taking a day or two out of one's busy schedule to listen to speeches and seminars? In my view, attending annual conferences is a worthy exercise as practitioners have an opportunity to learn something new, which has the potential to enhance their practice. Over and above the educational benefit of these meetings, practitioners have a first-hand opportunity to network and discuss issues that are at the pulse of the profession.

Our October issue contains reports from the Southern African Development Community Lawyers' Association (SADC LA) annual conference, the Johannesburg Attorneys Association (JAA) AGM and the Law Society of South Africa and Legal Education and Development's first annual Practice Management Conference. One of the trending themes at the conferences was transformation.

The word 'transformation' seems to be South Africa's catch phrase, with many people focusing only on two of its approaches, namely race and gender. However, when the word is looked at holistically, one finds that all approaches of the word are interlinked. Meaning, there cannot be meaningful gender and race transformation if there is a lack of social, economic and political transformation.

The big question is: How does the legal profession ensure that holistic transformation takes place? Judge Thokozile Masipa, in her speech during the JAA demonstrated the answer to this eloquently. Judge Masipa compared two young previously disadvantaged fellows seeking articles: One, who attended private schools, speaks

impeccable English and obtained good grades. The other, who stays in a shack, funded his or her distance education through washing cars and speaks with a heavy African accent. She added that the youngster who lives in a shack, in many cases, does not stand a chance of securing articles as he or she does not conform to the world view of what an attorney should look like. On the other hand, the youngster with the good grades manages to secure articles, does extremely well and is an asset to the firm and is eventually made one of the directors. Judge Masipa asked: 'Is the transformation initiative successful? Not necessarily. Whether there has been real transformation will depend on what this fellow does with his knowledge and his success. If what he has gained from his firm only benefits him and his firm real transformation has not taken place. For real transformation to take place he would have to persuade his firm to empower more people from "previously disadvantaged backgrounds" or quit the firm and do the work of empowerment with or without his firm.'

The other trending theme that was discussed at the conferences was 'the law firm of the future'. During the SADC LA conference it was discussed that the law and law firms will be transformed by technological advances, but no more than other professions, and not more than law firms' clients will be. Also, the 'law firm of the future' must efficiently use technology as this will enable them to render better service to their clients and attract international clients. Other areas 'law firms of the future' will have to concentrate on are, demographics, specialisation and project management skills.

The above two topics are just some of the many issues and topics discussed at the AGM and conferences. It is clear that there is indeed real value and benefit to attending such meetings. For



Mapula Thebe - Editor

a full report on the above topics, in this issue, see:

- 'Using the law to strengthen good governance practices in the SADC region'
- 'Legal practice of the future discussed at practice management conference'
- 'Transformation discussed at JAA AGM'

2015 AGM venues and dates

- 16 October
KwaZulu-Natal Law Society
Durban Coastlands Hotel,
Umhlanga.
- 23 - 24 October
Black Lawyers Association
Emperor's Palace, Johannesburg.
- 29 - 30 October
Law Society of the Free State
Windmill Casino and Entertainment
Centre, Bloemfontein.
- 30 - 31 October
Cape Law Society
Flamingo Casino Complex,
Kimberley.
- 31 October
Law Society of the Northern
Provinces
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LETTERS

TO THE EDITOR

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Appointment of women to the judiciary in South Africa

I was privileged to attend the 2015 16th Annual South African Development Community Lawyers Association (SADC LA) conference in Tanzania where the issue of the appointment of women judges was discussed.

The conference received papers on perspectives from Zimbabwe, Malawi, Zambia and South Africa. The most depressing figures came from Malawi where there is a need for urgent and decisive intervention by the authorities at university and training level. Zimbabwe is notably leading by miles in comparison to other countries. It is also worth mentioning that it was acknowledged that all the appointments for women judges were done by President Mugabe prior to the establishment of the Judicial Services Commission.

What came across as a common factor was a need to ensure that whenever there are vacancies, women lawyers are given preference for appointment on condition that they satisfy the merit re-

quirement. It was emphasised that this was important to ensure diversity and bring gender sensitivity in the administration of justice among our people.

Tabeth Masengu from the University of Cape Town's Centre for Democratic Governance and Rights Unit presented statistics on the gender composition of the judiciary in South Africa and stated that she had interviewed women lawyers who have complained to her that they are not approached whenever there are opportunities for acting or permanent appointments.

The statement viewed objectively suggests that there is a sustained and determined campaign by male lawyers and judges to stop woman lawyers from ascending to the higher echelons of the judiciary in South Africa. This narrative has been propagated so many times, with no or little challenge, that we run the risk of it being accepted as truth. There are many male judges and lawyers who are committed to the transformation of the judiciary in all its facets.

I accordingly want to dispute the correctness of the statement and dare say that it is not supported by any empirical evidence. I honestly do not know of any

male judge, advocate or attorney who is against the appointment of women judges.

On the contrary, I know of many male judges and attorneys in South Africa particularly in the Black Lawyers Association who have approached women lawyers to avail themselves whenever there are opportunities for acting or permanent appointment. Regrettably the majority of the women lawyers approached always indicate that they are not available for various reasons, including, lack of security and impossible working hours that fail to take into account their particular personal and cultural circumstances.

Without wishing to be prescriptive about the steps required to tackle this malady, I think the time has come where women organisations, both in the legal profession and in the broader society, as well as other civil society organisations, to take up these issues and raise them sharply with the powers that be.

There is, as far as I know, nothing that prevents or prohibits the South African Women in Law Association, South African Women in Construction, African National Congress Women's League, IMBELEKO Foundation, women in business



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or politics from nominating women for appointment to the Bench. When permanent vacancies occur in the judiciary the Judicial Service Commission takes it on itself to communicate the advertisement with the organised professional and women organisations.

The fact that they have not done it yet says a lot about them as a group. I believe the time has come, in our country, where our women should stop accusing men of not doing things for them. They must rise and take their rightful place in the affairs of our society. I have not heard or read anywhere that there was a woman lawyer nominated and who failed to make it to the shortlisting purely on the basis that she is a woman. As a country we have committed ourselves to the values and principles of equality and fairness among all our people taking into account our history and the need to correct the injustices of the past. There is accordingly no doubt that our country needs women judges. We can only have them if they apply when posts are advertised or consent to being nominated when approached.

My experience with those that I interact with is that they have refused the nomination and do not apply whenever posts are advertised. Perhaps what is required is a need for our respective heads of the judiciary to put in place a policy that will accommodate the particular circumstances of our women lawyers and make the positions attractive to them.

I accordingly appeal to our women and judges to assist our country by conducting mentoring programmes to our women and black lawyers and assure them that there is nothing to fear.

What is needed is the courage to make a decision without fear, favour or prejudice in accordance with the demands of our Constitution.

Maboku Mangena, attorney,
Polokwane

• See SADC LA AGM news in this issue.

My two cents – BSC and NBS degrees

I am 83 years old and have heard that one is never too old to learn. I have, therefore, registered for two degrees, BSC and NBS. Said degrees are unique in as much as neither are taught at any university or formal institute of learning and are free of charge.

A bit of a discouragement is that the course lasts for a lifetime and no piece of paper is ever issued as proof of successful completion. There are no formal examinations, tests or assessments. However, one may be faced with a test every day.

Lastly and most encouragingly, one awards the degrees to oneself and you may have qualified for it already.

Those among us, who are not averse

to a tiny bit of misrepresentation, may simply add said degrees to their already existing list, while the more modest add the rider (working on it).

Okay, I hear you shouting: 'Get to the point old fart'. BSC stands for 'Basics Simple Clear' and NBS for 'No Bulls**t'.

JO van Schalkwyk, attorney,
Johannesburg (Still working on it)

PS: I almost forgot to mention that you may even regard said degrees as superfluous. I read in John Humphrys' book *Lost for Words* (UK: Hodder Paperbacks 2005) that some bright spark defined 'Lawyer's Syndrome' as: 'If we knew what they were talking about we wouldn't need them.'

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Compiled by Mapula Thebe, editor, *De Rebus*, mapula@derebus.org.za

Using the law to strengthen good governance practices in the SADC region

This year's annual Southern African Development Community Lawyers' Association (SADC LA) conference was held in Dar es Salaam, Tanzania from 20 to 23 August. The theme for the 16th annual conference was: 'Using the law to strengthen good governance practices and to facilitate social, economic and political transformation in the SADC region.'

The conference was attended by judges, law society and Bar leaders, practitioners, government officials, members of the academia, attorneys general and representatives from regional and national civil society organisations.

Delivering the opening address, President of the United Republic of Tanzania, Dr Jakaya Mrisho Kikwete, congratulated SADC LA for uniting law societies and Bar associations in the SADC region. He noted that the theme of the conference was befitting, timely and relevant. He said that social, economic and political transformation was important to all stakeholders in the region, as this will foster an environment and platform that will raise investor confidence. He added: 'Raising investor confidence will ensure economic growth in the region and ensure that the region is the destination of choice for investors. This is also one of the agendas of the Tanzanian government.'

President Kikwete urged attendees at the conference to protect the rights of the marginalised, namely, women and children, and not to lose sight of the important role the legal fraternity plays in this regard. He asked lawyers attending the conference to bring themselves closer to the ordinary people of their respective countries to ensure that they position themselves to assist with access to justice, adding that 'only then can the common man have access to justice'.

Using the law in the purpose of transformation

On the first day of the conference, a plenary session was held under the theme: 'Using the law to strengthen good governance practices and to facilitate social,



Delivering the opening address, President of the United Republic of Tanzania, Dr Jakaya Mrisho Kikwete, congratulated SADC LA for uniting law societies and Bar associations in the SADC region.

economic and political transformation in the SADC region. Chairman of the Commission for Human Rights and Good Governance of Tanzania, Bahame Tom Mukirya Nyanduga, presented the keynote address.

Mr Nyanduga said the law can be used as an additive for change in the development and transformation of society in the SADC member state countries, adding that the rule of law, separation of powers and freedom are the bedrock for social transformation. He noted that rule of law can achieve an effective balance of power in all arms of the state. 'The state must ensure that national reforms are put in place, fight corruption and allocate resources in the management of public entities, this will contribute to peace in a state,' he said.

Mr Nyanduga called on all lawyers to work with the relevant stakeholders to improve the rule of law in society, adding that the concept of the rule of law has many elements and can be looked at from a political angle, which would entail equal and similar justice for all. 'The rule of law is infused with human rights norms. ... The rule of law are a set



Chairman of the Commission for Human Rights and Good Governance of Tanzania, Bahame Tom Mukirya Nyanduga, speaking about how the law can be used as an additive for change.

of rules that state that all entities are accountable to the law. These rules should assist states with their decision-making procedure and enhance transparency.'

Speaking about corruption, Mr Nyanduga said that corruption by public officials for personal gain existed in all branches of government. He added that governments needed to be transparent to ensure accountability because 'rampant corruption wasted public resources and undermines the rule of law. Lawyers have to address the social needs of the people and citizenry and not be bystanders to ensure that public resources grow'.

Tokoloshi democracy

The second speaker of the plenary session; Director for Southern Africa Amnesty International, Deprose Muchena, spoke on social injustice. He said that income inequalities in the SADC region effect access to justice and that the law was a basis for economic transformation. 'Most countries reflect a *tokoloshi* democracy. People talk about it, but no one sees it,' he said.

Speaking on justice in the SADC region, Mr Muchena said: 'There is an as-

sault that is taking place across the region targeting freedom of expression. We have also seen police use excessive force that is taking away rights. There has been attack on powers of the state and human rights. All across Africa there are incidents of forced eviction. How have lawyers positioned themselves to defend the evicted?’

Mr Muchena said that the SADC Tribunal was meant to be an institution for the people of the region but presidents have privatised it. ‘We need to question why an important institution such as the SADC Tribunal was ended,’ he said.

Funding law societies and Bar associations

One of the breakaway secessions of the first day of the conference discussed funding law societies and Bar associations. Immediate past President of the East Africa Law Society (EALS), James Aggrey Mwamu spoke on the member based funding model.

Mr Mwamu said that the EALS does not rely on donor funding. He added: ‘The East Africa Law Society is the apex regional Bar association of East Africa. It was jointly founded in 1995 by a group of lawyers with the support of the leadership of the national Bar association of: Zanzibar Law Society, Uganda Law Society, Tanganyika Law Society, Law Society of Kenya, Kigali Bar Association and Burundi Bar Association. It has over 10 000 individual members and six institutional members. It is the largest Professional organisation in East Africa, with a specific focus on –

- the professional development of its members;
- promotion of constitutionalism;
- promotion of democracy and good governance;
- advancement of rule of law; and
- promotion and protection of human rights of all people in East Africa and beyond.’

According to Mr Mwamu the funding for EALS is based on individual subscriptions, institutional subscriptions, donor funding, as well as research and publi-



Speakers at the Funding and Sustainability for Law Societies and Bar Associations session, from left to right: SADC LA Treasurer and immediate past Co-chairperson of the Law Society of South Africa, Maxwell Boqwana; immediate past President of the East Africa Law Society, James Aggrey Mwamu; and Managing Director at REX Consulting Limited, Dr Eve Hawa Sinare.

cations. He said that members’ subscriptions have made the society independent from governments’ control and influence. Adding that donor funds are just a supplement rather than the primary source of funds and that this also helps reduce donor dependence.

The second speaker of the session on funding was Councillor of SADC LA and the Law Society of Botswana, Joseph Balosang Akoonyatse. Mr Akoonyatse began his presentation by speaking about the rule of law. He said: ‘The rule of law is recognised in all civilized world as a key principle of good and democratic governance. ... General consensus exists that the concept of the rule of law means no less than that – the law is supreme over all persons – no matter how wealthy and powerful they may be. The rule of law ensures that everyone “plays by the same rules” and that those that are otherwise mighty and powerful do not use arbitrary power to the detriment of the weak and vulnerable. Where there is no rule of law, there is chaos and anarchy – there is a survival of the fittest where you either eat or you are eaten. Who ensures the effectiveness of the rule of law? It is the legal profession.’

Mr Akoonyatse said that, while created by an Act, the Botswana Law Society does not receive any financial assistance from the government. ‘Since inception,

the society has self-financed its activities through membership fees, but this has not been enough, with the result that the society’s growth and capacity to carry out its statutory mandate has been limited by financial constraints. The financial challenge is further compounded by the fact that members of the legal profession employed by the government and statutory corporations are exempt from the payment of fees for practicing certificates and subscription.’

The third speaker of the funding session was advocate and Corporate Legal Consultant at Rex Consulting Limited, Dr Eve Hawa Sinare. She said that law societies are membership driven entities, they represent and support members to deliver high standards of professional competence through a wide range of services. ‘Law societies supervise and regulate the conduct of lawyers; represent the interest for lawyers – influence government, parliament and key stakeholders. Law societies work to improve the administration of justice, promote respect for the rule of law. They safeguard and maintain the core values of the legal profession’s independence,’ she said.

One of the delegates attending the session reminded those present that law societies need to ensure that members receive proportionate benefits for the subscriptions they pay.

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Perspectives on the role of the profession in promoting the rule of law and democracy

On the second day of the conference, a plenary session, sponsored by the Law Society of South Africa (LSSA), was held under the theme: 'National, regional and international perspectives on the role of the legal profession in promoting the rule of law and sustaining constitutional democracies'. LSSA Co-chairperson, Busani Mabunda, said the reason the LSSA sponsored the session was because South Africa is undergoing transformation of the legal profession. 'This is the best time to approach others, those at the heart of the profession, within the region to share their insights. ... We thought it was important to seize the moment and take the views of our brothers within SADC to help us formulate the Legal Practice Act,' he said.

Speaking on engaging with the state on legal profession legislation and issues of public and professional interest, perspectives from Kenya, Chief Executive Officer of the Pan African Lawyers Union, Don Deya, said: "The traditional role of a lawyers' association, at whatever level, (at least have one or a combination of):

- Regulation: Education, admission, setting and enforcing practice standards and rules, discipline, etcetera.
- Representation (of the profession): "Trade union" function; representing the profession to the government, the public and the global legal community, etcetera.
- Public Interest: Administration of justice, the just rule of law, constitutionalism, democracy and good governance, which includes the protection and promotion of human rights.'



Chief Executive Officer of the Pan African Lawyers Union, Don Deya, spoke on engaging with the state on legal profession legislation and issues of public and professional interest, perspectives from Kenya.



Law Society of South Africa Co-chairperson, Busani Mabunda, said that the conference was the opportune time to take views of those at the heart of the profession, within the SADC region, to help South African practitioners formulate the Legal Practice Act.

Mr Deya said that relations between lawyers' associations and governments are multi-faceted, dynamic and constantly evolving. 'The relationship may sometimes be conflictual, that is only natural. Ideally the relationship should have a healthy mix of co-operative and adversarial engagements,' he said.

Presenting her speech on ethics, from a Namibian perspective, Councillor of the Law Society of Namibia and SADC LA, Carol Williams, said that lawyers are referred to as sharks, however, this is only applicable to a few. Ms Williams added that there are many lawyers who are champions of human rights and who believe in the rule of law that is based on fairness and equality. She cautioned attendees that if lawyers do not resolve the public's problems using the rule of law, this will raise public dissatisfaction.

'The law and morality are linked; the law is based on moral principles of society. Lawyers should respect the moral ideas of the people. Law societies should not only be regulators but should also be educators and implement ethics. A lawyer that conducts his or her work ethically, will be of much value to society, this is what society expects of him or her. Lawyers are the first officers of the court. We all know what is wrong and right. Lawyers should not be seen to be misleading the court,' Ms Williams said.

Judge of the Supreme Court of Uganda, Lady Justice Prof Dr Lillian Tibatemwa-Ekirikubinza, delivered a speech, from the perspective of Uganda, on the role of professional and vocational educa-

tion in improving the quality of lawyers and enhancing the quality of service to the public. She said that for vocational law schools to be described as fit for purpose, they need to improve the quality of service. 'The public calls for quality assurance mechanisms in training, which should result into the products of professional and vocational law schools being described as fit for purpose. When a buyer makes known to the seller the particular purpose for which the goods are bought, there is an implied condition that the goods are reasonably fit for that purpose - the same should apply to graduates at our law schools,' she said.

Director General of the German Bar Association, Cord Brugmann, spoke on balancing the regulatory and representative roles of the law societies or Bar associations. He said that the written law is useless if there are no independent lawyers that are committed to serving their clients. 'Independence of lawyers should happen on an individual level. One of the aims of law societies and Bar associations, as self-regulators, should be steered towards public interest. In my view, representatives of the profession and regulators should not be the same as this will result in conflict of interest. ... Self-regulation is a clear indicator of democracy and adherence to the rule of law. Regulators have to remember that they do not have to be liked by their members and should stay within the scope of their duties,' he said.



Director General of the German Bar Association, Cord Brugmann, spoke on balancing the regulatory and representative roles of the law societies or Bar associations.



Partner and Head of the Strategy Practice at Möller PSF Group, Rob Millard, said the law and law firms will be transformed by technological advances, but no more than other professions, and not more than law firms' clients will be.

Increasing the potential of local law firms to advise clients on complex work in Africa

A session sponsored by the International Bar Association (IBA) Law Firm Management Committee, which was initially opened only for SADC LA individual members but later opened to all attendees at the conference, discussed law firm management in Africa. Partner and Head of the Strategy Practice at Möller PSF Group, Rob Millard, was first to address attendees during this session. At the onset, Mr Millard told delegates to bear in mind that a small law firm is not a little big firm.

Speaking about the law firm of the future, Mr Millard said the law and law firms will be transformed by technological advances, but no more than other professions, and not more than law firms' clients will be. He said that demographics will also play a big role in transforming the way law firms conduct business as the population gets

more youthful. 'Lawyers should profile the market they work in demographically versus others globally and figure out how this translates into growth potentially. This will also help the law firm determine the different needs of different demographic profiles and what this means for the goods and services the law firm provides,' he said.

According to Mr Millard the 'Big four' global advisory firms dwarf even the largest global law firms. He said that the world's largest law firms are quite small compared to the largest accounting firms. He asked: 'Are we going to see the global legal profession consolidate into about 20 "mega-firms?" What does that mean for mid-tier firms? Which firms will be the market leaders of the future and what will be the source of their competitive advantage?'

Mr Millard said that the key to a law firm growing its market share is specialisation. 'A firm should move from "we do everything" to "we are the best at ...". The key questions law firms should ask themselves are: What do we "want to be famous for"? How do we transition from a general to a specialist focus? How do we improve our skills in our specialist areas? How do we gain client trust that we can do this work well? What role should law societies/regulators play in this?' asked Mr Millard.

The second speaker of the session was partner at Luther Rechtsanwalts-gesellschaft and Co-chairperson of the Law Firm Management Committee of the IBA, Hermann J Knott. He spoke about success factors of law firms in Tanzania, which practitioners can apply in their different jurisdiction. He said that the size of law firms was not a goal by itself, but was necessary in order to handle several significant client matters at the same time; and build specialty teams/practice groups according to the relevant needs, for example, corporate, real estate, employment, administrative, tax, banking and litigation.

Mr Knott said that international clients expect law firms to specialise, add-

ing that international clients also want to see the experience a law firm has on a particular area of specialisation from previous cases. He noted that with efficient use of technology successfully, law firms will be able to render better service to their clients and attract international clients.

Another area that law firms need to pay attention to, but are currently not, is project management skills according to Mr Knott. 'Foreign investment projects are usually complex. Therefore the projects need to be properly planned and executed. Key action steps are: Preparation of step plan and time schedule accepted by all team members, team building, ensuring availability, role of project coordinator, one principal client contact, assignment of responsibilities. The competition among firms and similarity of substantive skills mean that it is not necessarily the same firm which will always be hired by the client for similar projects. Therefore opportunities have to be identified early on and the client relationship has to be maintained on a regularly basis,' he said.



Partner at Luther Rechtsanwalts-gesellschaft and Co-chairperson of the Law Firm Management Committee of the IBA, Hermann J Knott, spoke about success factors of law firms in Tanzania, which practitioners can apply in their different jurisdiction.

The President of SADC LA, Gilberto Caldeira Correia issued a list of resolutions from the 16th annual conference: Below are the resolutions from the three plenary and four parallel sessions that were held during the conference.

On using the law to promote good governance practices and to facilitate social, economic and political transformation in the SADC region, the following issues emerged:

- The rule of law, separation of powers and the protection of the fundamental

rights and freedoms of citizens are the bedrock of social, economic and political transformation in the SADC region.

- It is important for the SADC governments to fight corruption and allocate public resources in a transparent and equitable manner and create legal systems that address the challenges of discrimination, poverty and inequality.

- SADC governments must create justice delivery systems that allow access to justice by citizens and are in line with regional and international principles and best practices.

- SADC LA should work and collaborate with other like-minded organisations both regionally and internationally to promote good governance so as to fa-

Resolutions from the conference

cilitate the social, economic and political transformation of the SADC region and ensure the utilisation of public interest litigation including on the SADC Tribunal issue.

- SADC governments must borrow a leaf from other jurisdictions, including the Indian jurisdiction with regards to the promotion of social justice principles, including striking a balance between citizens' rights and their duties.
- The legal profession through SADC LA must take a leading role in ridding the region of repressive colonial legislation and in promoting fundamental rights and liberties.
- The challenge of rule by law as opposed to rule of law must be addressed and there should be efforts to ensure that laws are passed by parliaments and not through parliaments.
- SADC as an institution belongs to citizens and not to governments and that SADC leaders must therefore put the interests of the citizens first.
- Lawyers must play an important role in the creation of economic policies and in the process ensure that SADC states create laws that address challenges relating to illicit financial flows and human rights abuses in the natural resources sector.
- Lawyers have a role to play in regional integration and the achievement of the regional industrialisation strategy especially in the area of harmonisation of legal and fiscal regimes while promoting cross border legal practice.
- SADC regional leaders must accept the concept of peaceful transfer of power with a realisation that there is life after the presidency.

On funding and sustainability for law societies, the participants agreed that:

- Lawyers must take responsibility for the funding of their associations to ensure that as a profession, they have autonomy and are efficient and effective in delivering their mandate. To this end, donor funding must be supplementary and not be the main source of funding for law societies and Bar associations.
- The SADC legal profession must consider the East African Law Society membership funding model in which all lawyers who are members of the local law societies automatically become members of and are compelled to pay subscriptions to the East Africa Law Society.
- Law societies must be innovative and take up different fundraising initiatives, including, undertaking research, providing professional training, e-learning and crowd funding.
- Law societies must ensure that members get value for their money by providing tangible benefits for members in the areas of training, protection, representa-



President of SADC LA, Gilberto Caldeira Correia, speaking at the 16th annual conference.

tion and regulation. This includes identifying special interest areas that appeal to different categories of members such as young lawyers, senior lawyers, women lawyers and ensuring programming around those issues.

On international justice in Africa the following were identified as key issues:

- SADC LA and its constituent members must advocate for the domestication of the Rome Statute and for the strengthening of national judicial mechanisms to adequately handle international crimes.
- National jurisdictions should be empowered to prosecute international crimes through domestication of the Rome Statute in the spirit of complementarity.
- Fighting impunity requires political participation and commitment - all legal professionals must therefore commit themselves to fight impunity by engaging with the African mechanisms such as the African Court on Human and Peoples Rights and how to make them effective in addressing all issues of impunity.
- All legal professionals must work together to raise awareness with and for the people on justice in Africa.
- To curtail prolonged stays in office by African leaders and to avoid disintegration of nation states, stakeholders on the African continent such as the SADC LA, its constituent members and leading civil society organisations must consider amicable ways of engaging with heads of states with a view to encouraging them to adhere to the tenets of good governance and the rule of law and to leave office after their tenure.
- The SADC LA and its constituent members should encourage continued cooperative engagement between the African Union and the International Criminal Court in the mutually beneficial fight against impunity on the African conti-

ment in accordance with art 4(h) of the Constitutive Act of the African Union.

- SADC LA, its constituent members and civil society groups must compliment governments' efforts to meet their three obligations to promote, protect and fulfil the human rights of all particularly for vulnerable groups such as women and children.

On national, regional and international perspectives on the role of the legal profession in promoting the rule of law and sustaining constitutional democracies, the participants agreed that:

- There is need for lawyers to identify and understand the extended nature of government institutions that impact on law reform and the role of lawyers therein and not confine engagements to the executive arm of government.
- Law associations/societies and Bar associations must be clear about the reason for their existence and their role (regulation, representation) and develop strategic plans to help in achieving their goals.
- There is need to strategically deploy members in institutions such as national and regional/international boards and commissions that have a role in policy reform and implementation and ensure that the members that are so deployed remain accountable to the profession.
- Lawyers must focus on their role as service providers and in improving access to justice, defending the vulnerable in society and promoting the rule of law. As such training of lawyers through law schools must ensure that lawyers are equipped with relevant skills including those in public interest litigation and understanding of gender, women's rights and human rights.
- Law students must be placed with training partners and in internships so that they acquire practical skills early on in their training.
- Law societies must carry out constant surveys and research on member needs and expectations so as to maintain the relevance of the law society to its members.

On strengthening the legal profession in the region to ensure better judges, participants resolved that:

- Women must be encouraged to join the legal profession, to take up leading roles including high judicial and other public offices in order to be role models and to mentor young female lawyers.
- SADC LA and its constituent members must encourage the judiciary to address gender considerations in judicial appointments and in the adjudication of cases.
- SADC LA and its constituent members must advocate for better gender and diversity policies for law schools, judiciar-

ies and law societies, advocate and lobby for the inclusion of a significant number of women on the judicial appointment committees and for more women to be appointed as senior lawyers.

- SADC LA and its constituent members should play a more active role in the appointment of judges, advocate for and encourage governments to initiate legislative changes so as to provide for a more transparent and participatory process of appointing judges, on merit and by an independent and representative body.

- SADC LA and its constituent members must contribute to the standards, policies and practices for the appointment of judicial officers through conducting research and production of policy papers on best practices in the region and at the international level.

- SADC LA and its constituent members must insist on high professional and ethical standards among their members so as to grow a competent pool of candidates that are eligible for appointment to the judiciary through an independent, impartial and transparent process.

- SADC LA and its constituent members should provide more support to women who have the potential to be appointed to the judiciary and must be more proactive and train and strengthen members

in order to prepare them for appointments to the Bench.

On increasing the potential of local law firms to advise clients on complex work in Africa, it was observed and agreed that:

- Lawyers must realise that technology is changing the world and impacts on both lawyers and their clients' businesses and must therefore embrace technology and use it efficiently.

- African lawyers must identify economic and demographic trends that impact on their work including the growing middle class in Africa that acts as a pool for potential clients and a youthful population that translates into a potential workforce.

- The size of a law firm matters in that a bigger law firm entails the capacity to handle several significant client matters at the same time and do so efficiently and effectively.

- Specialisation is important because it improves efficiency and quality and in the process also decreases the risk of malpractice. There must be a time when a law firm moves from doing everything to being best at something.

- Knowing different languages has become an important skill and, therefore,

the acquisition of different language skills must be pursued in the same way as the attainment of technical legal expertise.

- Lawyers must have an understanding of different cultures, have an international character and cooperate with international firms through programmes such as seconding young lawyers for attachments and internships.

- Lawyers must acquire project management and business development skills as foreign investment projects are usually complex and require good client relationships; and each law firm must build a reputation, a law firm culture and law firm values in order to succeed.

The above resolutions and key issues discussed at the annual conference will direct SADC LA in its programming in the coming year. This will help in ensuring that member expectations are met, that the key challenges that SADC citizens are grappling with are addressed and that the SADC region is served by an efficient, effective and independent legal profession. The next SADC LA annual conference will be held in Cape Town, South Africa from 7 - 20 August 2016.



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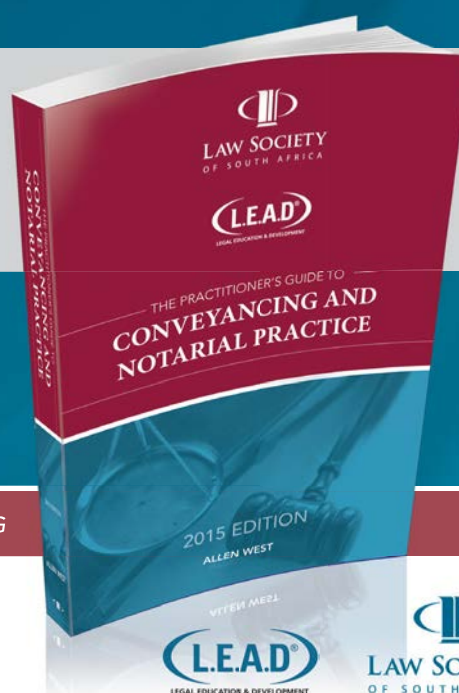
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Meeting between the President and Chief Justice

A seven-hour meeting between the judiciary and executive took place on 27 August at the Union Buildings in Pretoria.

President Jacob Zuma chaired the meeting between the National Executive and the judiciary in his capacity as Head of State. The meeting was at the request of Chief Justice Mogoeng Mogoeng.

President Zuma noted the 'historic' nature of the meeting. He stated that the meeting, requested by the Chief Justice, was a result of concern regarding public statements made questioning the integrity of the executive and judiciary. 'The judiciary and the executive each reaffirmed their commitment to the independence of the judiciary, the rule of law and the separation of powers all of which, underscore our constitutional democracy. We also reiterated our commitment to the institutional integrity of all arms of the state,' he said.

The following was agreed on at the meeting:

- Respect for the separation of powers and the integrity of the two institutions.
- To exercise care and caution with regards to public statements and pronouncements criticising one another.
- To promote the values and ethos of the Constitution. The arms of the state should not be seen to be antagonistic towards one another in public.
- The transformation of the judiciary

and the legal profession are at the heart of our constitutional enterprise and the parties have a responsibility to strive towards its achievement.

- In those instances where judges are believed to have conducted themselves unethically, other arms of the state, entities or members of the public should make use of the structures set up to address such concerns, and report them to the Judicial Conduct Committee of the Judicial Service Commission. Similarly complaints against magistrates must be reported to the Magistrate's Commission.
 - All have a duty to protect and promote the Constitution to all citizens as the supreme law of the land.
 - Court orders should be respected and complied with.
 - An obligation to the people of South Africa and to promote access to justice. A responsibility to the people of South Africa to uphold the Constitution.
 - The meeting as a foundation of future engagements to discuss issues that may arise from time to time.
 - The administration of the courts, access to justice and transformation identified as issues requiring specific focus in future engagements.
- The Chief Justice said: 'I confirm the statement read out by the president as being a true reflection of the undertakings we collectively made as we move forward towards making South Africa a better constitutional democracy for all

of our people. I reiterate that it was indeed an eye opener, an enriching exercise that can only bode well for both the executive, judiciary, the legislature and the entire populace of South Africa. I just want to reaffirm our collective commitment as a judiciary to executing our constitutional mandate only in a manner required of us by the Constitution and the law.'

In a media statement, the National Association of Democratic Lawyers (NADEL) welcomed the outcome of the meeting, saying that it was 'important that the President and the Chief Justice reassured the public that court orders should be respected and complied with. It is our view that failure to do so would lead to a general atmosphere within organs of state and the general public of ignoring judgments of the courts which would in turn lead to the illegitimation of the judiciary.'

Regarding transformation of the judiciary, NADEL said: '[O]ur views that both representivity and qualitative transformation are the cornerstone to realising the founding values of human dignity, equality, human rights and freedom'.

- See 'Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law' 2015 (Aug) DR 14.

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Women in law and society

The North-West University (NWU) held a one-day colloquium titled 'Women in Law and Society' in celebration of its 50 year anniversary and Women's Day. The colloquium was held in Johannesburg on 6 August.

Speakers at the colloquium included Dean of the faculty of law, Professor Nicola Smit; special adviser to Minister Susan Shabangu, advocate Joyce Maluleke; and Pretoria Bar advocate, Doctor Jannet Gildenhuys.

A critical discussion was held on where women find themselves today in law and society (as opposed to 50 years ago) and which challenges they still face.

Topics addressed included -

- women in the labour market;
- women in legal practice;

- the changed role of women in family law;
- domestic violence;
- gender equality and indigenous law; and
- corrective rape.

While giving an introduction to the first session, Senior Lecturer at NWU's faculty of law, Rolien Roos, said that every year more than 50% of law graduates are female. She added that what is of great significance is that between 90 and 100% of those who obtain their degrees with distinction are female. 'It is a wonderful story to demonstrate how far we have come over 50 years. But we should ask ourselves what happens to those 55% of law graduates that enter their professions, why do we not see 55% female managing partners in the

larger law firms? Why do we not see 55% practicing advocates, senior advocates or judges?' She questioned, adding that 'only a very naïve person would argue that we in South Africa have real substantive gender equality in 2015. Despite our wonderful Constitution, despite a whole month being named women's month, we are still faced with a number of problems regarding gender equality in South Africa'.

Women in the formal and informal economy

Professor Smit spoke on women in the formal and informal economy and looked at the progress made and challenges remaining. She said the gender gap had improved in the past decade in



Senior Lecturer at the North-West University's faculty of law, Rolien Roos, giving the welcome address at the university's one-day colloquium titled 'Women in Law and Society' in Johannesburg in August.

South Africa adding that equal opportunities and employment cannot, however, be said to exist as yet.

According to professor Smit, women can only take up their rightful space in workplaces if labour and social policies are mindful of prevalent stereotyping in society in general; women's double burden of paid and unpaid work and discrimination in employment opportunities, benefits and career progression.

Professor Smit further said: 'Although every decision maker and person of influence should be sensitive to women's rights it is, in particular, incumbent upon women in positions of authority and influence to be mindful of achieving the equal treatment of men and women in the world of work.'

Speaking on equal treatment entrenched in the Employment Equity Act 55 of 1998, professor Smit said that s 6(1) contains a list of 19 grounds on which unfair discrimination is prohibited. She added that the list corresponds to the one in the Constitution but adds three more grounds, namely, family responsibility, HIV status and political opinion.

Professor Smit added that the 19 grounds referred to are broadly constitutive of human identity. She added that in 2014, s 6(1) was amended to include the words 'or on any other arbitrary ground'.

'The limits on what might be considered to constitute an "arbitrary ground" are likely to prove controversial, especially given the close link drawn by the courts between discrimination and the concept of dignity. For example, relevance to workplace needs, commercial rationale or operational requirements, and lack of tertiary qualifications may not constitute "arbitrary" grounds – to the extent that they would ordinarily not affect a person's dignity – but may well

be irrational or capricious and therefore arbitrary,' she said, adding that this amendment was very significant for women.

Professor Smit referred to the *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust intervening)* 2000 (3) SA 529 (LAC), which she said illustrates the importance of the amendment very clearly. She said Ms Whitehead was a pregnant lady who applied for a senior position at Woolworths. She was told orally that she got the job. In the evening someone from Woolworths called her and she disclosed the fact that she was pregnant, the next day when she went to Woolworths she was told that there had been a mistake, she did not have the job as there was another candidate who still had to be interviewed. The job offer eventually went to a male candidate. Ms Whitehead argued that she was not appointed because of her pregnancy.

This case reached the Labour Appeal court (LAC). Professor Smit said at the LAC one of the judges stated that it was an absolutely rational thing to consider when someone applies for a senior position whether that person is pregnant or not. 'Now what the judge did not realise is that it is not a person who is pregnant, it is only a woman who is, and also that you are only pregnant for nine months, not for the rest of your life,' said professor Smit. 'If a judge at the LAC can find pregnancy as a rational ground to consider, then we are in trouble,' she added.

Professor Smit said the 2014 Amendment Act has specifically extended s 6 to include the concept of equal pay for the same or similar work and of work of equal value.

Professor Smit also said there are many women who do not return to work after maternity leave. 'The question is why, why is it difficult for women to take time off from work. It does not help to have labour protection, which is centred on the concept of a traditional employee if the majority of your population does not qualify as a formal sector employee,' she said.

Professor Smit concluded by saying that South Africa has a very progressive and wonderful legal framework regulating equality in the workplace. She said s 6 grants equal rights and opportunities to women and men regardless of a number of attributes. 'In South Africa we are at a very good place, we have all the legal provisions that are necessary for women to have equal opportunities. We do have political will but we also have significant challenges. Much more should be done about the mindset of people,' she said.

Corrective rape and transformative constitutionalism

Jurisprudence and ethics lecturer at

NWU, Alison Geduld, spoke on corrective rape and transformative constitutionalism.

She described 'corrective rape' as the rape of a person in order to cure him or her of their sexuality. According to Ms Geduld, lesbian women are in most of the reported cases the victims. She said the rapes are brutal in nature and have been fatal in some instances.

Ms Geduld said there were no national statistics on corrective rape cases, but ActionAid, a non-governmental organisation, has indicated that they deal with approximately ten new cases a week. Ms Geduld added that it was unfortunate that family collusion was involved in some of the cases where mothers get people to correctively rape their own children. Ms Geduld added that corrective rape was more prevalent in the townships where black lesbians are targeted because being a lesbian is seen as 'unAfrican' and 'unChristian'.

Ms Geduld said the law should be used as a vehicle to progressively transform the mindsets and social norms of society. She then went on to define what 'transformative constitutionalism' means. She said the late former Chief Justice, Pius Langa, said there is no uniform definition of transformative constitutionalism but that it is in keeping with the spirit of transformation that there should not be no single understanding of it. Ms Geduld added that the former Chief Justice said transformation is not only the responsibility of the court, but other arms of government should also play their role. She said there is no one common definition but that it envisions a change, from a divided South Africa to a more equal one.

Customary law, the constitutional protection and human rights

Special adviser to Minister Shabangu, advocate Maluleke, spoke on customary law.

She said that virginity testing violates privacy adding that there is no proof that virginity testing protects children. She did, however, add that not all children are forced to undergo virginity testing as some of them do so with the pride they have for their culture.

Ms Maluleke said that if parents force their children to undergo virginity testing, the children can go to the equality court or they could open a criminal case with police. She also said South Africa has many laws, which are not implemented simply because people do not know about them.

According to Ms Maluleke, many traditional practices have changed such as the rule that circumcision can now only be done during the winter holidays as healing is faster and is more hygienic, it

can no longer be done in summer. She added that circumcision had now been commercialised.

Another example that she gave about how tradition had changed was the practice of *ukuthwala*. Ms Maluleke said *uku-thwala* had become a crime adding that in the olden days it was very different. 'The men would never sleep with the young girls before first having discussions with the young girl's family. Even if we abolish *ukuthwala* in legislation, it and virginity testing would continue because it is seen as tradition,' she said.

• See 'Ukuthwala: Is it all culturally relative?' 2015 (Aug) DR 28 and the 'Criminal law report' in the Law Reports on 45 in this issue.

Access to justice remains an aspiration for rape survivors

Executive director of Tshwaranang Legal Advocacy Centre to end Violence Against Women, Nondumiso Nsibande, explained why access to justice remains an aspiration for rape survivors in South Africa. She said there was a culture of impunity in the country with low conviction rates, adding that low legal literacy levels on rights also played a part in low conviction rates.

Other challenges highlighted by Ms Nsibande included obstacles in accessing justice, poor investigating processes, negative attitudes and lost dockets.

Ms Nsibande said gender based violence (GBV) was one of the most pervasive human rights violations. She said, according to studies, it was evident that GBV had reached epidemic proportions in the country. The study found that –

- 77% of women in Limpopo;
- 51% of women in Gauteng;
- 45% of women in the Western Cape; and
- 36% of women in Kwa-Zulu Natal report experiencing some form of violence.

She added that over 78% of men in Gauteng have admitted to committing some form of GBV.

Ms Nsibande said data from the South African Police Service (SAPS) for 2013/2014 show that there were 62 649 sexual offences cases and a conviction rate of under 8%.

Similarly in the previous year, 66 387 sexual offences cases were recorded (SAPS Crime Statistics) and only 4 669 sexual offences cases resulted in conviction (National Prosecuting Authority, 2014) equalling an 8% conviction rate.

Speaking on policy and legislative framework, Ms Nsibande spoke on –

- Domestic Violence Act 116 of 1998, which provides for remedial measures for victims of domestic violence through the issuing of protection orders from magistrate's courts. This Act also allows



Special adviser to Minister Susan Shabangu, advocate Joyce Maluleke, speaking on customary law at the North-West University's colloquium on 'Women in Law and Society' in Johannesburg in August.

for a non-traditionalist approach to accessing justice and broadens the definition of domestic violence. She added that this Act also places specific legal obligations on the police regarding assisting in finding shelter and medical assistance.

- Sexual Offences Act 32 of 2007 provides for the creation of sexual offences and repeals the common law definition of rape. She said it offers special protection for children and persons with disabilities but added that implementation of this Act remains a huge challenge.

The judiciary and the changing role of women in family law

Family law lecturer at the Stellenbosch University, Doctor Debra Horsten, spoke on the changing role of women in family law and the response of the judiciary to this role. She said that women's role in society has been traditionally seen as running the home and caring for the family, and the man is seen as the breadwinner. 'These roles did start to change with the gender revolution and industrial revolution with women taking on paid employment. The first half of the gender revolution saw the weakening of the family structure with women taking on economic responsibilities with little relief from their family responsibility,' she said.

Doctor Horsten said South Africa has a patriotic, diverse and unequal society, which does not allow the gender revolution to be embraced. She added that in many households the gender revolution has either not started, with women dedicating all their time to child rearing and household chores, or it is in its first half phase.

Doctor Horsten asked what the judi-

ciary can do to try help this situation change. She said the preamble of the Constitution contains a transformative mandate for all spheres of government including the judiciary. 'Generally if parties are married, and the marriage ends either by death or divorce, the married woman generally finds herself in a better off position than she would have been had she merely been co-habiting. This is because the law attaches automatic consequences to marriage, one of which is spousal maintenance. In an unmarried co-habiting couple there are currently no automatic attachments in South African law and there is no claim should that relationship end. What is the judiciary doing about this? In the case of married couples the courts give protection to the other spouse. In the case of domestic partnership, it appears the courts are not offering protection to the partner, because the parties had the choice to marry but chose not to,' she said.

Women in legal practice

A panel discussion was held under the theme 'women in legal practice – 1965 to 2015 and beyond'. The panel consisted of Dr Gildenhuys; attorney and Director at C van Rooyen Attorneys, Celesté van Rooyen; Vice President of legal at Sasol, Castalia Moloi; and professor of international law at the University of Johannesburg, Mia Swart. All the women spoke about their positions, as well as some of the challenges they faced.

Ms van Rooyen said that when she first became an attorney people would always think that she was a secretary. She said that she loves what she does, and has a lot of passion for it adding that it took her a while to overcome the moral objections that she had in herself. 'I have not looked back once and thought no, what am I doing with my life?'

Pretoria Bar advocate, Dr Gildenhuys, spoke on women in the advocate's profession. She said the Bar was not for everyone. 'Not every woman is interested in a career at the Bar, the hours are severe, your programme is unpredictable, the stress is high, there are no benefits, you do not step into an established practice, you build one, one brief at a time,' she said.

Dr Gildenhuys said when she joined the Bar in 1999, 10% were women and that the number stayed at 10% for a number of years. 'According to the statistics from 2003 to 2013 there was a very constant growth of about 1% per year over 11 years. In 2003, there was 14% women at the Bar, in 2014, it was at 25%. One in every four advocates today is a woman. The constitution of the Pretoria Bar has a provision that at Bar council level, at least four members of the Bar council have to be women, the council consists of 18 members,' she said.

Dr Gildenhuys said the Pretoria Bar also exempts expecting mothers from paying Bar fees, for about four months if you apply, adding that this makes it a little bit easier to retain your chambers and to return to your practice after having taken maternity leave.

Dr Gildenhuys concluded by saying

that although progress is being made in the advocate's profession, there were levels that are lagging behind, such as the appointing of senior status. 'According to the statistics I have, as of the end of last year, only 5% of all silks in the country are women. I think it is also low because of the low number of women

on the Bench. The minute women got awarded silk, they are usually called to the Bench,' she said.

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The Legal Resource Centre (LRC) held the ninth Bram Fischer Lecture at the University of Johannesburg on 4 September. These lectures have taken place since 1995, with the first speaker being former President Nelson Mandela, to commemorate the life of Bram Fischer.

Bram Fischer (Abram Louis Fischer) was a key figure in the anti-Apartheid movement. One of the key actions he is remembered for is defending former President Nelson Mandela at the Rivonia Trial of 1963 and 1964, shortly after which he was arrested. Mr Fischer then went into hiding but was re-arrested and sentenced to life imprisonment and was released when sick and died in 1975 at his brother, Dr Paul Fishers', house in Bloemfontein. In 1967 Mr Fischer was awarded the Lenin Peace Prize, in 2003 the High Court of South Africa post humorously readmitted him to the roll of advocates, and in 2004 Stellenbosch University awarded him a post humorous honorary degree.

The ninth lecture to commemorate Mr Fischer was delivered by Beatrice Mtetwa. Ms Mtetwa is an internationally recognised Zimbabwean lawyer, being labelled by the *New York Times* as 'Zimbabwe's top human rights lawyer'. She is known for defending journalists and press freedom in her country. Ms Mtetwa is the only other African, former President Nelson Mandela being the other, to receive the French Ludovic-Trarieux International Human Rights Prize.

Ms Mtetwa started off her lecture by

stating that it was not going to be a lecture but rather a speech about her experiences in Zimbabwe, 'with a view to encouraging South Africans not to fall into the same trap that we fell into in Zimbabwe and the theme really is that we have to be constantly vigilant in the observance of the law and that we have to keep our eye on the ball.'

Ms Mtetwa made reference to the Magna Carta and said its theme had not changed in 800 years, people did not want others to lord their rule over them. However, from everyday experiences it is evident that the journey to that being a reality is still very long. She was adamant that people should constantly be vigilant in ensuring that the rights in the Constitution are enforced and not abused or neglected.

According to Ms Mtetwa, there was no colour to the people who fought against Apartheid, when human rights are violated there should not be an obsession with who is trying to enforce the rights. Ms Mtetwa added that: 'Apartheid was fought from all angles by all manner of people, including of course, the likes of Bram Fischer.' She went on to mention that when Zimbabwe gained its independence the white community in the country retracted from participating in public life. This was when it became easy to label people. Ms Mtetwa, however, reiterated that the battles against Apartheid, independence and democracy was

fought by many different people from many different angles.

Ms Mtetwa said leaders of South Africa should look back at the African National Congress's 'Ready to Govern' document and realise that when litigation is taking place in South Africa it is not to fight for the rights of an American or British citizen, but a South African, one who is being denied a right. The document states: 'The Bill of Rights will be enforced by the courts, headed by a separate newly created Constitutional Court, which will have the task of upholding the fundamental rights and freedoms of all citizens against the state or anybody or person seeking to deny those rights. The judges will be independent, and will consist of men and women drawn from all sections of the community on the basis of their integrity, skills, life experience and wisdom.' This means that what a court decides is final, if the outcome is not liked then there are ways of appealing. There should not be interdependence between the executive and the judiciary, the two are not supposed to influence each other, said Ms Mtetwa.

Ms Mtetwa said lawyers, human rights defenders and activists must persistently and without apology work towards attaining more transparency and accountability in life. She added: 'In Africa, corruption has become the bane of the entire continent.' She also said that economic growth has been stunted by cor-

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ruption and she very strongly believed that if nothing is done to ensure that corruption is rooted out then it would shame all the human rights defenders of the past, Bram Fischer being one of them. Ms Mtetwa went on to say: 'My view, in our country, certainly patronage has become the same as Apartheid. It is the same in my view because it is based on inequality, the same inequality that we saw in Apartheid.' This being that the system only gives to those who have power and their beneficiaries, however, Ms Mtetwa warned that anything that is based and built on inequality will eventually fall like a deck of cards.

South Africa should be cautious of the 'little things which will divide the nation'. Ms Mtetwa said in reference to the different interpretations of the recent Omar Al-Bashir case. She said that the case was based on the South African Constitution and taken to court based

on a South African statute that required the government to do certain things. Her 'bottom line' on the issue as a whole was that there was a court order given, which should have been complied with and enforced, not ignored. She said that by letting the government not comply with the court order it sets a precedence. 'If this kind of defiance is allowed to take root without the legal profession and civil society ensuring that the court orders are complied with, South Africa will be on its way to ruin,' she stated.

South Africa's electoral commission is one of the few commissions which still functions properly, according to Ms Mtetwa. It must therefore be protected against corruption, otherwise South Africa will have the same problems as Zimbabwe, where the line has become blurred as to where the electoral committee starts and the political parties end. With that in mind she advised all South

Africans to make sure that as the public prosecutor's (Thuli Madonsela) term comes to an end, South Africa should ensure that the person to take her place cannot be cowed into doing anything other than what the institution requires of him or her. The foundation has been laid out by advocate Thuli Madonsela, it must just be maintained.

Ms Mtetwa ended her lecture with a warning to all South Africans to not fall into the same trap, the trap of not dealing with defiance of the law that Zimbabwe fell into. South Africans should not take its eye off the ball and speak up when anything is being done that is not right in terms of the law and our Constitution.

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Legal practice of the future discussed at practice management conference

The Law Society of South Africa (LSSA) and Legal Education and Development (LEAD) held its first annual Practice Management Conference on 19 and 20 August at the Bytes Conference Centre in Midrand. The conference dealt with matters of everyday practice in regard to human resource management, financial management and marketing.

The opening address was given by Brendan Hughes, director of Infology. Mr Hughes said it was an opportunity to think about practice rather than work in practice. 'Futureproofing your legal practice is an important topic for lawyers to focus on in a time where change is accelerating, complexity is increasing and it is difficult to predict the future, five, ten or even 15 years down the line. It does not mean that we should stop trying to build strategies that see the profession trying to deliver the important role that it plays in society and at the same time remaining profitable and sustainable. The two need to work hand in hand,' he said.

Richard Scott, Co-chairperson of the LSSA welcomed delegates to the conference. Mr Scott said the programme dealt with many aspects of practice management in legal firms and that lawyers have to concern themselves with management and the problems associated with it. Mr Scott highlighted two aspects that stood out for him with regard to practice management. The first was information technology (IT) namely websites, e-mails, the



paperless office and the iCloud. The second critical change was the way clients dealt with law firms. 'Gone are the days where lawyers' fees were unchallenged. ... Clients are shopping around to get the best deal or services, and that requires lawyers to change the way they are delivered. ... We need to focus on their needs,' he said.

Mr Scott referred to the marketing of services in a law firm and how the speed

of delivering services is the number one priority, as well as the 'big' issue of fees. He said lawyers need to explain fees to their clients, so that their clients can understand them. He also added that lawyers needed to manage the people they work with as there was a need for the legal profession to have a more 'human face'. 'If staff and professionals work well together, the clients will see and return with further instructions,' he said.

Mr Scott added that lawyers needed to learn to manage themselves, however, they were not good with it as there had been a number of articles written about the rising misery in the legal profession. 'The way of life of many lawyers is toxic leaving them depressed, unhealthy and unhappy. There are law care helplines in the United Kingdom helping with stress Some of the stress triggers include failure to prioritising and delegating work, managing interruptions and procrastination... . We need to figure out how to manage our time so that overwhelming times do not become the norm, but rather isolated situations. I think that we need, as lawyers, to achieve a balance in our life.'

What will the legal practice of the future look like?

The keynote address was delivered by ENSafrica Chief Executive Officer, Piet Faber. He said it was not an easy task speaking about what the future of legal practice will look like, as nobody knew

what the future holds. Mr Faber said that lawyers needed to look at the major trends that are happening now and decide how they can position themselves to meet these challenges for the future.

Factors influencing the law firm of the future

Mr Faber summarised the five major factors that he thought would influence the legal practice of the future:

• *The rise of the client*

Mr Faber said since the global financial crisis in 2007/8 there has been a fundamental change in the interaction between clients and their lawyers. Many writers call it the 'more-for-less conundrum'. He said the legal in-house teams have gotten smaller, however, the best lawyers are sourced for in-house legal teams, which increased the capability of in-house legal departments. Mr Faber said in-house teams were strengthened, which meant that in-house lawyers could deal with a lot of the work themselves and only go to external lawyers if and when the need arose. Mr Faber said the alternative fee arrangement had become the norm and has changed the way clients work with lawyers. 'That unless law firms can adapt to that and could position themselves correctly, they will not meet the challenges therein,' said Mr Faber.

• *Change the business model of the legal industry*

Mr Faber said lawyers today are seeing a consolidation of the global market, a massive trend occurring is the consolidation of law firms, which means they are growing bigger. Mr Faber said the legal profession still remains the most fragmented profession in the world, but it would be best to look at accounting firms and how they have consolidated into the big four. He added that this same process is happening in the legal world. He added: 'What is the relevance to us you may ask? Well over the last two to three years in South Africa, you have seen an entry into our markets of some of these firms that have grown big and international firms are here and they are here to compete in this market and they come with consolidated firms with financial muscle ... and how do you position yourself for the future?'

Mr Faber also referred to the emergence of Legal Process Outsourcing (LPO) and virtual law firms, where firms no longer have offices but do everything online through the Internet. He also referred to the emergence of the 'contract lawyer', a lawyer who is not permanently on the books but works from home and is employed if and when he or she is required.

'These are some of the aspects that



ENSAfrica Chief Executive Officer, Piet Faber, discussed the law firm of the future at the Practice Management conference held in August.

influence the traditional business model and you need to adapt your practice,' Mr Faber said.

• *Profitability*

The third factor Mr Faber referred to was the impact on profitability and pressure on fees. 'This is going to force lawyers to look at their cost structures and how they provide the service very carefully,' said Mr Faber.

Mr Faber added that a deliberate distinction between the cost of product and overheads has to be made, because whenever profitability is under pressure, what lawyers tend to do is to cut their overheads. It is often misguided and as Mr Faber said, 'very often you need to spend more on various issues like marketing and business development'. He added that where the real cost lies, very often, is the cost of the department, namely, the way services are delivered to the client and if professionals were utilised in an effective way and if there were products available to make processes more efficient.

Mr Faber said lawyers will have to look at outsourcing of non-core services, for example, IT which does not have to be done in-house, but can be outsourced to an outside service provider.

• *Law firm staffing*

The demand of work-life balance demanded by younger practitioners was another influence that lawyers will be exposed to. Mr Faber said it was something that was here to stay and he added that law firms would have to start thinking about how they were going to organise a practice in a way to accommodate very talented lawyers who they have put a lot of developmental time into.

Mr Faber also referred to clients' resistance to pay for work done by junior attorneys. 'In the old days, a matter would come in and you would bring a

trainee or junior lawyer onto a matter, who does not really add value, but participated in the matter and then charged for the requirement. ... You have to find new innovative ways of training and developing your people,' he said.

• *Disruptive technologies*

Mr Faber said that the biggest factor that will influence the law firm of the future is technology and that it has opened up a whole new world and referred to e-learning, document automation and assembly as well as lawyer matching platforms. He added that artificial intelligence will become increasingly more important in the future.

What should a future practice look like?

Mr Faber told delegates that the practice of the future would have to become more client-focussed than in the past. 'In the past clients would come to the lawyer because they need the service. Lawyers used to sit back and wait for the phone to ring and wait for the appointment to be made and wait for the client to come to you. For the future legal practice, you have to become the strategic trusted adviser to your client and in order to do that you need to know your client's business inside out, know their industry and what legislative changes are coming down the line and you need to know way ahead of time how to alert and warn the clients as to what is likely to affect them so that your client feels that you are truly a business partner,' said Mr Faber. He added that it is easy to say but not so easy to do, especially when you are busy and time is limited.

Another aspect Mr Faber referred to was that of profitability and how lawyers would have to price for profits. No one can price for profits, unless you know and understand the costs structure. 'How many of us, on a matter, sit down and say: "This matter is going to cost me this much and if I want to make a profit, the fee on this matter has to be X". I think very few of us do it. I think most of us say, my hourly rate is X amount and I work by the hour More and more clients are demanding that the lawyer must figure out how much the cost will be, they want to know. They are no longer satisfied with you saying I do not know how long it is going to take, it is a litigation matter and can amount to any number of days and I charge by the hour. ... [T]he pressure will be on for lawyers to say how much a case will cost,' Mr Faber said.

Mr Faber also said lawyers will have to acquire project management skills and said it is an area that lawyers are not normally familiar with, but, lawyers will have to be project managers as well, in order to manage the matters in such a

way that they can bring it in on budget and realise their profit.

In his presentation, Mr Faber said firms have to accurately split work between high-end premium work and commoditised work. He said that you need to know your own business and know what you can charge at high end premium rates and what work is commoditised, that you have to find another solution for, either charging very little for it or you have to outsource it to an LPO.

He said firms will have to provide lawyer on demand services. 'It means that you may not have all the lawyers who do work for your clients on the books, you may have to contract them in for specific jobs. It is one way to meet the "more for less" conundrum,' Mr Faber said.

Mr Faber continued by saying that lawyers should look at having a dedicated back office in a lower cost environment, for example, the process-driven work (like accounting, IT, etcetera) to a low cost centre outside of where you normally practise your profession or you could alternatively, outsource the non-core functions to service providers or LPOs.

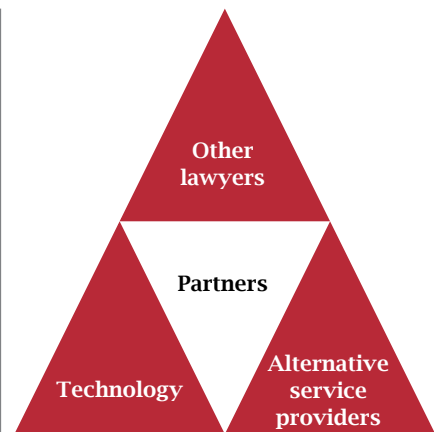
'I think the practice of the future would have to build relationships with

LPOs to leverage on the strengths of commoditised work and maintain client relationships. The big challenge with LPOs is that once I hand my client over to a LPO agent that they will annex the client. How do you make sure that your client remains your client and trust the LPO to do the low cost commoditised work,' said Mr Faber. He added that relationships have to be built to work that out.

Mr Faber said investing in technologies such as e-discovery, document automation, knowledge management and e-learning, would form part of the practice of the future.

Mr Faber said the law firm structure will have to include the following options for the future, namely, non-partner practitioners, flexible working arrangements, the firm will consist of a core firm with flexible on-call workforce as demand increases. 'In the graph [to the left], your core partners will be in the middle, the core of the firm. Then you will have other lawyers, namely, contract lawyers or lawyers available online. Then your alternative service providers, namely LPOs and then technology,' he said.

In conclusion, Mr Faber said the practice of the future must have client fo-



Graph: The future law firm structure

cus, good legal expertise, good business skills and the embrace technology. 'You will need all four components in place to meet the demands of the future,' said Mr Faber.

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In August, Deputy Judge President Phineas Mojaepelo delivered an address at the South African chapter of the International Association of Women Judges conference at Unisa titled 'xenophobia and South African law'.

With the recent upsurge of attacks on foreign nationals, Judge Mojaepelo noted it had placed this issue on the agenda. He also noted that South Africa's democracy was born 21 years ago, however, it has an adequate legal framework to deal with xenophobia, such as the Constitution which states: 'Everyone has the right to freedom and security of the person.'

Other legislation of relevance in dealing with xenophobia are the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Refugees Act 130 of 1998, the Protection from Harassment Act 17 of 2011 and the Immigration Act 13 of 2002.

Judge Mojaepelo noted these Acts prohibit things such as -

- discrimination on grounds of race, gender or disability;
- hate speech; and
- harassment.

Case law

Judge Mojaepelo noted the case of *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) at para 28 where the court held:

'The state, under international law, is obliged to respect the basic human

rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens.'

Judge Mojaepelo said that there is no law against xenophobia so it 'hides' behind other crimes such as murder, robbery, theft, assault, and defamation etcetera.

Another case Judge Mojaepelo noted was the much publicised case of *S v Smith en Andere* [2002] JOL 9242 (T), which saw the conviction of four North-east Rand police dog unit policemen who videotaped themselves assaulting two Mozambican men in 1998.

A more recent case reminiscent of the *Smith* case was that of Mozambican taxi driver, Mido Macia, who was dragged while handcuffed to a police van, which was heard in the Pretoria High Court on 25 August 2015. This incident was videotaped as well.

Judge Mojaepelo said Mr Macia's murder had an 'eerie reminiscence' of the murder of another Mozambican, Ernesto Nhamuave, who was set alight by a mob in 2008.

The role of law in curbing xenophobia

As no one was arrested for his murder, Judge Mojaepelo said: 'Justice failed him and his family'.

Judge Mojaepelo also noted the killing of another Mozambican, Emmanuel Sithole, who was attacked by men in Alexandra township in Johannesburg this year.

In the case of *Mamba and Others v Minister of Social Development* (T) (unreported case no 36573/08, 12-8-2008) (Makgoba J), Judge Mojaepelo said that: '[I]t is sometimes challenging, even to the courts, when it comes to the type of socio-economic remedy to be awarded when a constitutional infraction has been found'.

The applicants were foreigners who were victims of xenophobic violence and provided three months housing in a temporary camp as required under the Disaster Management Act 57 of 2002.

The government planned to dismantle the temporary camps on 15 August 2008. The applicants then approached the court to interdict the government from dismantling the camps. The court found that the government was not required to provide accommodation.

The application was dismissed with costs.

In *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) The appellants, Somali citizens, fearing xenophobia, left South Africa for Namibia. The Namibian authorities deported them to Somalia via South Africa. Once in South Africa they launched an urgent application for an interdict prohibiting the respondents forcing them to be sent to Somalia. They also sought to obtain a *mandamus* to force the Minister and Director-General of Home Affairs to facilitate the appellants' readmission to the Republic. Their application was dismissed.

The order of the court *a quo* was set aside by the Supreme Court of Appeal (SCA) and the respondents were directed to release the applicants from detention. The first applicant was allowed to remain in the country pending a decision on an application for asylum and the second applicant was allowed to remain in accordance with his status as a refugee.

Judge Mojapelo said: 'The case confirmed the right of foreign nationals, in the face of xenophobic attacks, not to be deported to dysfunctional home countries. This is an important right, which enjoys international recognition.'

Another recent case is that of *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 (1) SA 151 (SCA). In the *Somali* case, Musina spaza shop owners were told they would need a permit to continue operating. The police closed shops and confiscated stock of owners who did not produce permits. The police even closed businesses where valid permits were presented. The applicants, therefore, approached the High Court with an application of declaration –

- for their right to earn a living by self-employment;
- the right to apply for and to renew licences and permits in terms of the ap-

plicable legislation and land-use scheme; and

- that closure of businesses run by asylum seekers and refugees with valid permits were unlawful.

The SCA held that:

- asylum seekers/refugees are entitled to apply for or renew new business or trading licences; and
- the closure of businesses owned by refugees/refugees with permits is unlawful.

Judge Mojapelo said: 'This case has been lauded as a great victory for foreign national who run informal businesses as a means of living'.

In conclusion, Judge Mojapelo stated: 'We must apply the laws which are there so that as the judiciary we may play our part in confronting and combatting the ugly scourge of xenophobia'.

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Transformation discussed at JAA AGM

The Johannesburg Attorneys Association (JAA) held their 73rd annual general meeting at Sunnyside Park Hotel in Johannesburg on 9 September.

Guest speakers at the AGM included Wayne Duvenhage of Opposition to Urban Tolling Alliance, who discussed civil disobedience; Justice Thokozile Masipa who spoke about the role of the legal profession in effectively transforming the legal environment; and advocate Michael Kuper SC, who discussed the newly established China-Africa Joint Arbitration Centre.

Addressing the delegates, Judge Masipa said lawyers are the gatekeepers of our justice system and without them, there can be no justice system worth talking about. 'Without good solid lawyers, who have their hearts in the right place, whatever justice system may exist, can be of no use to anyone. We are fortunate to have a good Constitution in this country. That Constitution, however, will not avail us unless we have the right people to make that Constitution work for everyone in this country,' she said.

Transformation

Judge Masipa said there were numerous forums that dealt with the issue of 'transformation' and many initiatives have been tried with varied results. She said that since the start of democracy, the words 'transformation' and 'empowerment' had been bandied about in various circles, with different understanding of what the words really entail. Judge Masipa added that: 'Depending on the



Judge Thokozile Masipa discussed the role of the legal profession in effectively transforming the legal environment at the Johannesburg Attorneys Association Annual General Meeting in September.

meaning attached to transformation, some people might think we have transformed the legal profession to an extent that we can now pat ourselves on the back and relax, while others think that we still have a long way to go. I belong to the latter group.'

Judge Masipa said the large amount of university graduates may look impressive, but she asked where black graduates and women graduates go? 'We do not see enough of them in motion court, for example, and there are hardly any in commercial matters. Even though there may be a great number of previously

disadvantaged individuals entering the legal profession these figures should be viewed with caution as they may easily deceive us into thinking that we are doing the right thing and that we need do nothing more. While doing the right thing is important, we should also be doing things right by looking not only at numbers but at the quality of the people in the legal profession,' she noted.

Judge Masipa added that there had been a concern about the lowering of standards on the Bench. 'Whether we agree with the sentiment or not this is the kind of thing that should keep all of us awake at night because, if it is true it is an indictment on the legal profession. The very fact that someone has expressed such a concern should trigger an introspection and should motivate us to do something about it. If there is any truth in the concern above then, for the cause and the solution we need look no further than the legal profession, especially the Side Bar and the Bar, because that is where most members of the Bench come from. The quality of the Bench is merely a reflection of the quality one finds among practitioners. After all practitioners of today are the judiciary of tomorrow,' she said.

Judge Masipa said she was of the view that transformation and empowerment were inextricably linked. Transformation without empowerment is of no value to anyone and real transformation had to be coupled with a motivation and the willingness to empower. Judge Masipa referred to three examples aimed at transformation:

• *Mergers as vehicles of transformation*

Judge Masipa said South Africa had seen a number of mergers across the colour line and there were many reasons why law firms wanted to merge and compared mergers to a marriage where there is a sense of give and take. She said if one party felt that he or she was short changed, the marriage will not last. Lack of trust, meaningful communication and common vision is a deadly combination. Judge Masipa said that when it came to mergers, there was lack in the willingness to embrace change and the willingness to take risks.

• *Intake of candidate attorneys*

In her speech, Judge Masipa said more and more white law firms were selecting candidate attorneys from previous disadvantaged groups, which was a good thing. She said that competition between candidates was very high and newly qualified law graduates, irrespective of race or gender, would have to stand out when seeking articles at a good law firm.

Judge Masipa compared two young black fellows seeking articles, namely –

- the one whose parents sacrifice their time and money to ensure that he or she attend good private schools. He or she speaks impeccable English, with excellent grades and comes across as confident and obviously stands a better chance of competing with other similarly qualified youngsters from other race groups; and

- the other stays in Diepsloot in a shack with a single mother and four other siblings, the fellow who funded his or her education through distance education by washing cars and pushing trolleys for customers at a supermarket. This fellow speaks with a heavy African accent, his or her grammar is all wrong and he or she does not come across as confident.

'In many cases such a youngster does not stand a chance simply because he does not conform to the world view of what an attorney should look like. Now let us get back to the fellow who has been to a good private school, a good law school and obtained good grades. He manages to get articles in a good law firm. ... He does extremely well and is an asset to the firm. Eventually he is made one of the directors. ... Is the transformation initiative successful? Not necessarily. Whether there has been real transformation will depend on what this fellow does with his knowledge and his success. If what he has gained from his firm only benefits him and his firm real transformation has not taken place. For real transformation to take place he would have to persuade his firm to empower more people from "previously disadvantaged backgrounds" or quit the firm and do the work of empowerment with or without his firm. Sadly this rare-

ly happens. In fact there are numerous examples of blacks who refuse to brief black practitioners and women who refuse to brief other women. We have a serious challenge in that regard,' Judge Masipa said.

• *Briefing patterns*

Judge Masipa referred to *The Cape Bar's Model Policy on Fair and Equitable Briefing Patterns*, dated 8 March 2006 (www.capebar.co.za) where the Cape Bar recognised the existence of discriminatory briefing patterns and their negative effect on the profession and propose to do something to remedy the situation.

The Cape Bar aims: 'To facilitate the realisation of the full potential of black and women advocates, and by so doing, increase the race and gender composition of the Bar and the building up of a pool of experienced black and women candidates for appointment to the Bench' (at para 4).

Judge Masipa referred to para 5 in the document where the Bar intended to implement the policy, which states:

'In selecting counsel, all reasonable endeavours should be made to:

- (a) identify black and female counsel in specific practice and interest areas;

- (b) ensure that black counsel receive a fair and equitable share of briefs, having due regard to the number of briefs delivered to counsel in any one year, the nature and complexity of the work involved and the free value of such briefs;

- (c) regularly monitor and review the engagement of black and female counsel; and

- (d) regularly report internally on the extent to which the said measures have been implemented.'

Judge Masipa said she was encouraged about the information and that the Cape Bar recognised the problem and sought to do something about it. 'I do not know the current situation as I did not get the opportunity to research this, but, what is clear is that if the Cape Bar followed up on its intention a lot would have been done to make transformation a reality'.

With regard to the skewed briefing patterns, Judge Masipa said that they are shared by other advocates elsewhere and added that Advocates for Transformation (AFT), recently, raised concerns about the reluctance of the state, parastatals, state owned enterprises and private attorneys to give work to black counsel and to women. 'A senior member of the AFT bemoans the fact that big law firms, parastatals and some government departments do not brief women at all, especially black women. This, among other things, has forced a number of women to abandon their chosen profession,' she said.

Judge Masipa added that the Bar may assist in transformation but the Bar has a limited role in this regard as it is not a

briefing entity. The power to make the Policy on Fair and Equitable Briefing Patterns workable rests mainly in the hands of attorneys.

'Quite often one hears the excuse that black advocates and women advocates are not being briefed in meaningful work because they are lazy, they have no experience or they are just not capable of doing complex work. These are unfortunate misconceptions, which have no place in the modern South Africa. My question is: How are you going to know whether a person is lazy or incapable of doing work, if you do not give that person work? Similarly how is inexperienced counsel going to garner experience if no one will give him an opportunity to do so? What people seem to forget is that those lawyers, who today are in great demand because of their expertise, are where they are today because some time ago, someone dared to take a risk and give them work when they had no experience at all. No one was born with experience and there is no subject at school called experience Someone has to take a chance and a risk. For a risk it is. But it is a risk worth taking,' she said.

Ignorance and resistance to change

Judge Masipa said in her view resistance to change was stronger where there was ignorance. She said that a little explanation or reassurance to a client is often all that is needed to remove discomfort and fear of the unknown. Judge Masipa added that 'a party rarely loses a case because counsel is inexperienced. Yes, as a new practitioner, you will fumble and stumble (maybe to the irritation of the judge), but the next time you will do better and better until you get it right. That is how it is in life and that is how it is in every profession or trade. And that is how it is in law.'

In conclusion, Judge Masipa said the transferring of skills is needed for real transformation. 'We have the law on our side. In fact we are obliged by the Constitution to transform. We have adequate resources in this country but we must be willing to share them wisely. It does not matter how much we spend on the education and training of lawyers, if we do not follow this up with transfer of skills we are wasting our precious resources. We need a change of heart, we need to change our mind set and, we need commitment. We owe it to ourselves, to transform the legal profession and we also owe it to those who will come after us. If we do not, the coming generations will rightly accuse us of dereliction of duty and cowardice,' Judge Masipa said.

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

LSSA meets Brazilian and Chinese delegations as part of its BRICS Legal Forum agenda

At the end of 2014 then LSSA Co-chairperson, Max Boqwana, represented the Law Society of South Africa (LSSA) at the first BRICS Legal Forum in Brasilia, Brazil and signed the Brasilia Declaration, which outlines cooperation among the legal communities of the BRICS countries. Building on this initial contact, the LSSA hosted representatives of the Brazilian Bar Association and the China Law Society earlier this year.

LSSA Co-chairpersons, Busani Mabunda and Richard Scott met with the representative of the Brazilian Bar Association in South Africa, Saul Tourinho Leal, in August in Pretoria and signed a memorandum of understanding between the two organisations for mutual support and exchange of information. The Co-chairpersons paid a courtesy visit to the Brazilian Bar Association in September and Mr Mabunda will be attending the annual general meeting of the Brazilian Bar Association in November this year.

Also in August, the LSSA held two meetings with representatives of the profession in China. LSSA Co-chairperson Richard Scott chaired a meeting between LSSA representatives and academics from the East China University of Political Science and Law, which is organising the second BRICS Legal Forum to be held in Shanghai, China in October. The LSSA will be represented at the Forum



Law Society of South Africa (LSSA) Co-chairpersons Busani Mabunda (left) and Richard Scott (right) sign a memorandum of understanding on behalf of the LSSA with Brazilian Bar Association representative, Saul Tourinho Leal, in Pretoria in August this year.

by Co-chairperson Busani Mabunda and council members Krish Govender and David Bekker.

The Co-chairpersons also met, later in August, with the Bao Shaokun, Vice President and Secretary-General of China Law Society and other delegates in Sandton to discuss arrangements for the sixth Forum on China-Africa Cooperation (FOCAC) to be held in Cape Town in November, as well as developments around the China-Africa Joint Dispute Resolution Mechanism.

The objectives of the Brasilia Declaration

In order to foster and develop cooperation among the legal professions in the BRICS countries, the signatories to the Brasilia Declaration listed the objectives of the BRICS Legal Forum as follows:

- To promote legal diplomacy, bring together the legal communities of the BRICS member states for closer cooperation, and promote exchange of legal theory and practice.
- To use and develop law as an instrument of social change for development, as well as for building cooperation among the peoples of the BRICS nations, facilitate BRICS cooperation mechanisms, and explore more international space for the development of BRICS nations.
- To make joint efforts for the reinforcement and strengthening of the rule of law, social, economic and human rights.
- To cooperate in advancing the status of legal professionals, in developing the legal profession and the scope of its activities and in strengthening the activities of the legal profession and the judiciary in the BRICS countries.
- To interact with international legal associations worldwide for the purpose of advancing the objectives mentioned in the declaration.



From left: David Bekker, Krish Govender and Co-chairperson Richard Scott represented the LSSA at a meeting in Pretoria with Prof Du Zhichun (centre) and Prof Xia Fei (right) from the East China University of Political Science and Law, which is organising the second BRICS Legal Forum to be held in Shanghai in October. Also pictured is LSSA Chief Executive Officer, Nic Swart (back) and Prof Rushiella Songca, Executive Dean of the Unisa College of Law.

LSSA Council finalises position paper on the powers and functions of Public Protector's Office

In February this year the Law Society of South Africa (LSSA) held a colloquium on the powers and functions of the Office of the Public Protector in cooperation with the Centre for Human Rights at the University of Pretoria (see News 'Public Protector's findings not legally binding' (2015 March DR 6)). Since then, the LSSA Council has discussed the positions at the colloquium and in July this year it finalised its position paper on the powers and functions of the Public Protector's office, pending the issue being decided by the Supreme Court of Appeal and the Constitutional Court.

The position paper is available on the LSSA website at www.LSSA.org.za.

Overall outcome of the colloquium

The LSSA highlights the outcome of the colloquium discussions as follows:

- Findings of the Office of the Public Protector are issues of fact (that is, whether or not there was maladministration).



Public Protector Advocate, Thuli Madonsela, at the LSSA Colloquium on the Powers and Functions of the Office of the Public Protector earlier this year.

- Findings of the Office of the Public Protector are not binding. The only exception to this rule is when a government institution rejects the findings on

the basis of irrationality, or for an irrational reason. However, it is unclear at this stage how it will be determined if it was rejected on an irrational basis or not, and to whom it will fall to make this determination.

- Recommendations by the Public Protector are steps suggested to remedy the maladministration and can never be binding.

- Those in power should treat findings of the Office of the Public Protector with the respect and care they deserve and avoid using technical defences to flout these findings.

- The Office of the Public Protector must ensure that good governance will be valued above all else. This instils trust among the general public that corruption and maladministration in state and public entities will be exposed and dealt with appropriately. The Office of the Public Protector is an institution that should broaden access to justice for the poor and marginalised. Therefore, recognising that the Office of the Public

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Protector cannot be granted all-encompassing powers, it must still be able to execute its duties in such a way as to ensure maximum effectiveness, and promote a culture of respect to its findings.

- Only the Office of the Public Protector can determine what 'appropriate remedial action' is in each case.
- The onus falls on the Office of the Public Protector to have the imagination and creativity to determine the action that will achieve the desired result, regardless of whether there is authority or not.
- It is, therefore, important that the Office of the Public Protector does not get caught up in the debate regarding the binding nature of its findings, but to rather flesh out the appropriate remedial action and place its findings in the public domain. However, the ultimate decision as to whether government has abided by the Constitution will still rest with the courts.

The LSSA acknowledges that it is the role of the Office of the Public Protector, as a Chapter 9 institution, to strengthen constitutional democracy and promote a culture of accountability among state organs. It also recognises that the Office of the Public Protector must ensure ef-

ficient, cost-effective, transparent and accountable governance, and is tasked with providing an easy, accessible, and cost-free mechanism for the public to report maladministration and abuse of power.

However, as a key stakeholder in the legal arena the LSSA also respects the importance of the judiciary, its independence in handing down judgment in cases of public interest, and its power to effectively set precedents on issues of law.

In the light of the above, the LSSA stated its official position to be as follows:

- Respect for the Office of the Public Protector as a Chapter 9 institution must be created to support constitutional democracy.
- The LSSA supports the assertion that there is a definitive distinction between findings and recommendations by the Public Protector's Office.
- Findings of the Office of the Public Protector are not binding unless an organ of state rejects them on an irrational basis.
- Pending clarity on the interpretation of 'irrational basis', the LSSA will embrace the precedent set by the court that at first instance the findings are not bind-

ing. Whether an organ of state acted irrationally is still a matter to be decided by the courts on a case-by-case basis.

- The LSSA supports the fact that the Office of the Public Protector's main weapon, at the moment, is its power to place findings and recommendations in the public domain and appeal to the moral conscience of state organs.

The LSSA resolved to:

- Do its part to urge state organs to respect their obligations in terms of the Constitution when dealing with findings and recommendations from the Office of the Public Protector.
- Engage in discussions to explore means through which national respect for the Office of the Public Protector can be created and promoted.
- Engage in a consultation with the Office of the Public Protector to explore possibilities where the legal profession can be of assistance in improving the efficiency of the Office.
- Assist in creating and promoting a proper forum, consisting of all key stakeholders, for constructive interaction regarding findings and the appropriate implementation of recommendations.

Attorneys' profession pays tribute to Justice Thembile Skweyiya

Expressing the condolences of the attorneys' profession to the family and friends of retired Constitutional Court Justice, Thembile Skweyiya, who passed away on 1 September, Law Society of South Africa (LSSA) Co-chairpersons, Busani Mabunda and Richard Scott said Justice Skweyiya - who started his legal career as an attorney in 1968 - went on to serve the nation with great distinction as an anti-apartheid practitioner, advocate, judge of the High Court, as well as a Justice of the Constitutional Court.

They added: 'Justice Skweyiya has been widely regarded as the first African to obtain silk in South Africa. He practised as an advocate not only in the commercial sphere but increasingly in political, human rights and civil liberties matters, and represented South Africans across the ideological political spectrum who had been arrested and detained for opposing a racist and oppressive regime. Through his 13-year tenure (two as an Acting Judge) on the Constitutional Court Bench, Justice Skweyiya made an impact on the body of constitutional jurisprudence and indeed made significant and bold contributions to the development of our constitutional democracy.'

In fact, his 2009 judgment in *Leon Jo-*



Justice Thembile Skweyiya and his wife, Sayo Skweyiya, at his retirement ceremony at the Constitutional Court on 6 May 2014.

seph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) was described as an exciting development in South African jurisprudence, which in effect broadened the scope of application of administrative law procedural fairness to apply to decisions related to the public law duty of the state to provide

basic services effectively, efficiently and fairly and the concomitant public law right of people to receive those services in that manner. Some hailed this decision as signalling the re-emergence of the value of *Ubuntu* in the relationship between the government and its citizens.

The Co-chairpersons recalled Justice Skweyiya's words to law students at the Fort Hare University, where he was Chancellor: 'We should all be proud of the strength and independence of our judiciary. It is this independence which allows us all - judges, magistrates and lawyers - to uphold the rights of South Africans. He reminded us that the Constitution not only tells us what the law must be, it also tells us what kind of lawyers and jurists we must be:

"To be a lawyer in South Africa today you must act with integrity, and in doing so you will ensure that the judiciary remains independent and that the rule of law remains ... To be a lawyer in South Africa today means that you are committed to this ideal - that you will play your part in creating a democratic society where every person can realize the rights protected in the Bill of Rights."

Mr Mabunda and Mr Scott noted that indeed, Justice Skweyiya had been such a lawyer and such a judge.

Mr Mabunda, in his capacity as President of the Black Lawyers Association (BLA), said history would remember Justice Skweyiya as a renowned human rights lawyer who fought the battles of oppressed South Africans in spite of serious life threats both to himself and his family. 'He put lives and the plight of his fellow countrymen above his personal interests,' he said.

Mr Mabunda added that the BLA was deeply troubled by the void left in our society due to the death of this legal icon. 'The death of this legal giant came at the most crucial moment in the development of our legal jurisprudence post the Apartheid era.' He added, however, that BLA was comforted and consoled by the fact that Justice Skweyiya had left be-

hind his legal knowledge and expertise in the body of judgments handed down when he was on the Bench and in the rich legal jurisprudence he developed throughout his legal career as a selfless advocate of the oppressed.

KwaZulu-Natal Law Society president Manette Strauss said that, in his practise as an advocate – a first in the black community – and subsequently as a judge, Justice Skweyiya had manifested the qualities of integrity, impeccable honesty, a keen intellect and decorum, which underpinned the esteem, status and dignity of our courts. The modesty of his person and his abiding courtesy were his renowned attributes. She added: 'He practised his craft at a level to which his colleagues aspired to. In addition, the at-

tributes of fairness, independence and objectivity were particularly compelling in Judge Skweyiya as is evidenced in the high profile cases in which he appeared as counsel and other cases which he dealt with as a judge especially in respect of the constitutional prescriptions of socio-economic rights and accountability in governance.'

Ms Strauss added that Justice Skweyiya gave the law and, more broadly, the Constitution a liberal purpose of interpretation to enable the Constitution to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of our nation and in the articulation of its values.

LSSA to co-host 6th Forum on China-Africa Cooperation Legal Forum



Front from left: LSSA's Professional Affairs Manager, Lizette Burger; Special Director of Public Prosecutions, National Prosecuting Authority, SOCA Unit, advocate Thoko Majokweni; and Chief Executive Officer of the LSSA, Nic Swart. Back from left: Director: Administration, Office of the National Director of Public Prosecutions, George Maphutuma; Senior Manager: Response and Stakeholder Management, Foundation for Professional Development, Seconded to the National Prosecuting Authority, Genevieve Devereux; and Senior Legal Official, Ricardo Wyngaard.

The Law Society of South Africa (LSSA) was invited to a joint meeting with the Chinese Law Society and the National Prosecution Authority (NPA) on 17 August. The LSSA was asked to participate in co-hosting the 6th Forum on China-Africa Cooperation (FOCAC) Legal Forum set to take place towards the end of November 2015. The LSSA subsequently had a productive meeting with the NPA on

27 August to discuss their respective roles, as well as discuss what can be done collectively and individually for the successful co-hosting of the event. The event will bring together lawyers from the African continent and China to discuss, among others, the role of lawyers in facilitating trade.

Ricardo Wyngaard
ricardo@lssa.org.za

Assessment revolutionised at the School for Legal Practice

All students who attend the ten centres of the School for Legal Practice are subjected to the same, national assessment.

The School for Legal Practice has moved away from the examination method as the only way to test students in a practical legal training environment. The purpose is to use relevant methods that comply with the principles of fairness and authenticity as far as possible and that provide reliable results.

Although certain testing is still done by way of closed book testing, the ultimate test is a broad-based competency test, which the students sit for at the end of the programme. Students are given a case study in advance and are allowed to take in material. The questions are practice-based and testing competency in more than one discipline.

Further testing is done through observations during trial advocacy and casework, online testing and assignments.

On some occasions testing is done in groups, especially when 'firm' work is done.

The school has acquired valuable experience in assessment processes over the past few years, in an attempt to make a viable proposal for assessment in the new Legal Practice Act 28 of 2014 dispensation.

The assessment element is steered by, Bongi Nkohla, an attorney and director of the East London school since 2005.



People and practices

Compiled by Shireen Mahomed

Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Please also note that *De Rebus* does not include candidate attorneys in this column.

Phatshoane Henney Attorneys in Bloemfontein has two new promotions.



Ilze Strydom has been promoted to a director in the litigation department.



Stacey Bartlett has been promoted to a director in the property department.



WerthSchröder Inc in Johannesburg has appointed Kimberley Ross as an associate. She specialises in general, liability and insurance litigation.



Cliffe Dekker Hofmeyr in Cape Town has appointed Fatima Ameer-Mia as a senior associate in its technology, media and telecommunications practice.

Mkhabela Huntley Adekeye Inc in Johannesburg erratum.



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



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

PRACTICE MANAGEMENT

By
Zelda
Olivier

Normal practice or unsound and flawed routines

In *Margalit v Standard Bank of South Africa and Another* 2013 (2) SA 466 (SCA) the court stated that, in a claim against a conveyancer based on negligence, it must be shown that the conveyancer's mistake resulted from failing to exercise a degree of skill and care that would have been exercised by a reasonable conveyancer in the same position.

Many conveyancers operate with a staff complement consisting of secretaries, candidate attorneys and sometimes paralegals (non-qualified staff) to assist them in the drafting of documents and the general running of conveyancing matters and the conveyancing department.

Modern technology, like e-mail communication, has made it much easier for conveyancers and their staff to communicate with their clients and to streamline the running of a usually busy conveyancing department.

However, too much reliance on modern technology and your competent staff – who might indeed have extensive experience in the preparation and registra-

tion of conveyancing transactions – may open up your conveyancing department to unnecessary and expensive professional negligence claims.

The duties and responsibilities of the conveyancer

The responsibility for all conveyancing matters, from the date you receive the instruction to the date you finally pay out the proceeds to the seller, always lies with the conveyancer, who needs to properly supervise the registration of all transactions and the correct payment of the proceeds. A conveyancer can never be heard to say that any problem that has arisen is the result of an error or omission on the part of any of his staff members (John Christie *Fourie's Conveyancing Practice Guide* 2ed (Durban: LexisNexis/Butterworths 2004)).

It is, however, very clear from numerous professional indemnity claims reported to the Attorneys Insurance Indemnity Fund (AIIF) that conveyancers may have forgotten that certain func-

tions cannot be delegated to non-qualified staff. A quick study of the applicable legislation will show that there are certain responsibilities that must and should always remain in the hands of the conveyancer.

In terms of s 15 of the Deeds Registries Act 47 of 1937 (the Act), certain deeds can only be prepared by a conveyancer. This includes –

- deeds of transfer;
- mortgage bonds;
- certificates of title; or
- other certificates of registration.

All powers of attorney to transfer/mortgage, special or general powers of attorney, applications or consents, which are required to be lodged in the Deeds Registry, can be prepared by an attorney, notary public or a conveyancer. However, where such documents are prepared by a notary public or attorney, they must be countersigned by a conveyancer.

If one reads s 15A together with reg 44A of the Act, it is clear that a conveyancer, attorney or notary public who signs the prescribed preparation certificate on any document lodged for

registration accepts, in broad terms, the responsibility for the correctness of the information set out in that document, as well as miscellaneous other matters, such as taking the responsibility for verifying that persons acting on behalf of companies, close corporations, trusts and other associations are duly authorised to act and that such institutions have the power and capacity to enter into the transaction concerned.

As Leach AJ stated in *Margalit*, 'As I have said, a conveyancer should fastidiously examine all relevant documents' (at para 29) and: 'To avoid causing such harm, conveyancers should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, but it is the inevitable consequence of the obligations imposed by s 15(A) of the Act as read with reg 44, both of which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office' (at para 26).

In terms of the Justice of the Peace and Commissioner of Oaths Act 16 of 1963 (the Commissioner of Oaths Act) a Minister may appoint any person or designate the holder of any office as a commissioner of oaths. A list of such persons, which

includes an attorney, was published in GN 903 GG 19033/10-7-1998.

Section 7 of the Commissioner of Oaths Act provides:

'Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section ten prohibited from administering an oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation of such declaration.'

In terms of the regulations made under s 10 of the Commissioner of Oaths Act (GN R1258 GG 3619/21-7-1972 (Amended by GN 1648 GG 5716/19-8-1977, GN R1428 GG 7119/11-7-1980 and GN R774 GG 8169/23-4-1982)), 'an oath is administered by causing the deponent to utter the following words: "*I swear that the contents of this declaration are true, so help me God,*" or in the case of an affirmation: "*I truly affirm that the contents of this declaration are true.*"

Before a commissioner of oaths administers to any person the oath or affir-

mation prescribed by the regulation he or she shall ask the deponent –

- whether he or she knows and understands the contents of the declaration;
- whether he or she has any objection to taking the prescribed oath; and
- whether he or she considers the prescribed oath or affirmation to be binding on his or her conscience'.

Once the deponent acknowledges and confirms the above, the commissioner will administer the oath or affirmation, and the deponent will sign the declaration in the presence of the commissioner of oaths.

When certifying documents, a copy of a document, which must be certified as a true copy of the original, must be compared with the original document and the commissioner of oaths must make sure that the two documents are, in fact, the same. If the commissioner of oaths is sure that the copy is in fact a true copy of the original document and no unauthorised amendments have been made, he or she must stamp that he or she certifies that the document is a true copy of the original document and that there are no indications that the original document has been altered by unauthorised persons. Thereafter, the commissioner of oaths must append a signature together with his or her name and designation.



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Normal conveyancing practice

In order to establish the correct information relating to the parties involved in a conveyancing transaction (eg, the correct names, identity number, marital status, authority), which needs to be correctly reflected in any deed, conveyancers have developed several practices to source and verify this information. This includes, making certified copies of the parties' identity documents and requesting the parties to sign various affidavits confirming their marital status, insolvency status, identity number and various other information.

This practice has also developed around the additional requirements stipulated in the Financial Intelligence Centre Act 38 of 2001 (FICA). In terms of FICA, firms of attorneys are accountable institutions and must, therefore, comply with all the legal requirements of FICA. A conveyancer needs to take all appropriate steps to properly identify and verify all natural and artificial or juristic persons involved in the firm's conveyancing transactions. Such proof of identity and other information, which is required in terms of FICA, must be retained by the conveyancer for a period of five years.

Unsound and flawed routines

It is in the sourcing and verification of

this information that numerous conveyancing departments appear to have lost the plot. This may consequently result in a professional negligence claim.

When perusing conveyancing files relating to professional negligence claims reported to the AIIF, it is clear that conveyancers and/or attorneys have forgotten their duties when commissioning documents. Often this is all too evident from the prominent e-mails sent to clients, found in the conveyancing files and attaching the relevant documents and affidavits with a request to sign and return same to the conveyancer's office with copies of the client's identity document and other relevant documents.

Alternatively the client does indeed come to the conveyancer's office, but instead of meeting with the conveyancer, is greeted by the non-qualified staff member, who simply points out the places where the client needs to append his signature. Copies of identity and other relevant documents are accepted or made by the non-qualified staff member. The commissioning and certification of these documents are then done after the fact, which is in contradiction with the clear regulations made under the Commissioner of Oaths Act.

If the documents on which a conveyancer relies to ensure that the information in the deed is correct, are not properly commissioned or certified, then he can certainly not take responsibility for

the correctness of the information in the deed when signing the preparation certificate in terms of s 15A of the Act.

The accounting and payment of the proceeds is often also left to non-qualified staff and payment authorisations are not properly checked. This has often led to incorrect payments, payments to incorrect parties, fraud and falling prey to scams. The over-reliance on electronic communication has also opened conveyancers up to being scammed.

These unsound and flawed routines, some of which are common practice within the majority of conveyancing departments, have resulted in numerous professional negligence claims against conveyancers. In many cases, immovable property has been transferred without the proper authority or even without the knowledge of the true owner of such immovable property.

The practice of these unsound and flawed routines amounts to a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position.

Zelda Olivier LLM (NWU) is a senior legal adviser for the Attorneys Insurance Indemnity Fund in Centurion.

By
Jeanne-
Mari
Retief

Leading female leadership development

The Law Society of South Africa (LSSA) supports growth in the number of women heading firm management and women in the judiciary. Therefore, Legal Education and Development (LEAD) launched a pilot project in November 2014 to equip and empower female attorneys to understand certain key concepts of significant leadership. Through this initiative, LEAD wishes to strengthen leadership capacity in law firms for purposes of business growth and exceptional service to society. Following the success of the first programme an additional programme was scheduled for 2015, which will conclude in October.

Through this initiative and other social studies conducted by the LSSA, it has become clear that there are some stumbling blocks for women within the legal profession. Some of the challenges

identified through the LSSA's interaction with women in the profession include:

- Difficulty in balancing work and family.
- A need for flexi-hours and home-offices.
- Disrespect from male colleagues and clients.
- Inequality in promotions and salary scale.

Women often portray various roles (ie, wife, mother, attorney) and the challenge of balancing work and family becomes stressful at times. This leads to various women opting out of private practice to either become sole practitioners or pursue different careers within the legal profession.

Firms generally do not promote home-offices or working flexi-time. This could become a problem for women who would like to have children, since they do not want to take maternity leave for fear of halting their career growth and missing

out on opportunities. Those who already have children struggle to find the time to commit to both work and family.

Women tend to think differently than men when it comes to business and it seems that they tend to avoid confrontation and rather focus on working harder and putting in longer hours to achieve their career goals. However, from the programme, the general feeling still seems to be that men are promoted more often than women and women struggle to obtain the same salary scale as men.

Through the programme the LSSA acknowledges the challenges women face in the legal profession. The focus is on helping women face these challenges and equipping them with the skills to deal with it effectively.

It is important for women to be equipped with the right skills to help them become forward-thinking signifi-

cant leaders. Leaders who lead by example, think outside the box and embrace change. Leaders who effectively deal with challenges and still become great pioneers despite these challenges.

In order to achieve this, the LSSA aims to equip women with the business skills and the emotional intelligence needed to build successful careers and effectively manage each aspect of their lives.

As part of the programme, certain key business strategies are dealt with including –

- the importance of having a clear purpose;
- understanding the importance of a good team;
- knowing how to effectively manage the team;
- choosing the right people; and

- understanding the basic importance of strategising.

Other core principles of leadership are also dealt with to demonstrate the importance of building lasting success for their careers. These include Belbin profiling and sessions on leadership styles and how to deal with others that have different leadership styles.

Effective communication is another key element of the programme. It is important to know how to effectively communicate with others, how to handle confrontations and how to effectively work in a team environment.

Although women face certain challenges in the legal profession, it should not dissuade them from paving their way to leadership positions. By equipping women with the core skills necessary to

effectively manage various areas of their lives, understand core business principles and how to achieve success despite challenges, the LSSA hopes to make a significant contribution to women in law.

It is the LSSA's goal to inspire law firms to be leading firms in this area. Law firms that promote female leadership and the development of female leadership skills.

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

Jeanne-Mari Retief LLB LLM (UP) is a project consultant for Legal Education and Development in Pretoria. □



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Submissions will be considered for publication in LEAD's guides together with the firm's name and location.

E-mail Nic Swart at nic@LSSA.org.za with your submissions

Breaking the golden egg –

Picture source: Gallo Images/Stock



By
Zamazulu
Nkubungu

The pitfalls of written admissions in s 37D of the Pension Funds Act

The protection of pension fund assets against creditors has been a topic of debate in several countries. The ultimate risk faced by pension fund members and pension fund beneficiaries is the loss of retirement income. As a general rule, most countries have legislative means, which seek to protect pension fund members'

benefits. Accordingly, South Africa is no exception to the general global trend.

The current position in South Africa is that retirement or pension savings are protected from creditors. There are various protective mechanisms that place retirement benefits beyond the reach of creditors. Chief among these protective measures are the provisions of s 37A(1) of the Pension Funds Act 24 of 1956 (the Act). The Act effects such protection by

providing that 'no benefit provided for in the rules of a registered fund (including an annuity purchased ... by the said fund from an insurer for a member) ... shall ... be liable to be attached or subjected to any form of execution under a judgment or order of a court'.

The practical effect of the provisions of s 37A(1) is that it guards against the abuse of judicial process to attach the member's pension benefits. In essence,



dishonesty, fraud or misconduct by the member, and in respect of which –

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned'.

Notwithstanding the exceptions enumerated in s 37D, it is significant that contractual debts such as car loans or computer loans in respect of which the employee still owes a balance to the employer on the date of withdrawal from the fund, fall outside the purview of s 37D(b)(ii). Consequently, such contractual debts may not be deducted from the member's benefit payable in terms of the rules of the fund, but may be recoverable through other means, for example, by the employer instituting civil proceedings against the member in a court of law. Put differently, the employer desirous of recovering its debt from an indebted member can only obtain recourse through normal civil litigation.

Pertinently, s 37D(1) refers to 'a member' of a registered pension fund. 'Member' is defined in s 1 of the Act as meaning –

'... in relation to –

(a) a fund referred to in paragraph (a) or (c) of the definition of "pension fund organisation", means any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund ...'.

What are the requirements in respect of deductions from a member's pension benefits due to the member's theft, fraud, dishonesty or misconduct?

In terms of s 37D(b)(ii) of the Act, a fund may deduct from the member's benefits payable in terms of the rules of the fund any amount in respect of damages caused to the employer by the member as a result of theft, fraud, dishonesty or misconduct, provided –

scribed and may only be exercised in accordance with the requirements set out in ss 37D and 37A of the Act. In that regard, it may be worthwhile to refer to the provisions of s 37D, which provide as follows:

'37D. Fund may make certain deductions from pension benefits.

(1) A registered fund may –

...

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

(i) (aa) a loan granted by the employer to the member for any purpose referred to in section 19(5)(a); or

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19(5)(a),

to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule of that Act; or

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft,

s 37A protects a member's pension benefits from being reduced to satisfy a judgment or an attachment order against a member of a pension fund, it almost provides a general rule protecting pension fund benefits from, *inter alia*, attachment and execution. Its object is clearly to protect pensioners against being deprived of the source of their pensions.

The protection afforded by s 37A(1) is, however, not absolute. There are certain well-defined exceptions which are spelt out in s 37D of the Act. At the outset, s 37D(1)(b) entitles an employer the right to access pension fund benefits of the member in the hands of any fund. However, it is noteworthy that a pension fund's right to make deductions from a pension benefit remains highly circum-

- the member has admitted liability in writing, or
- judgment by a court of law has been obtained against the member.

The member's written admission of liability must be clear and unambiguous and should specifically allow for deductions to be made in respect of a wrongdoing committed by the member against the employer. This requirement poses a potential minefield. In practice, employers ought to be cautious that such admissions are lawful and admissible. Accordingly, a word of caution to the employers is perhaps merited. An admission must be made freely and voluntarily and without any undue pressure on the employee. Furthermore, the employer must ensure that the employee understands the consequences of his admissions. One can conceive of instances where employees purport to make admissions, only to recant these later on the grounds that pressure was brought to bear on them to admit. At any rate, such admissions may often result in criminal prosecutions. Needless to say, such admissions must be properly recorded, and the employer must preferably enlist the assistance of an independent third party, particularly an attorney.

The judgment by a court of law must relate to either of the following –

- a civil judgment sounding in money, namely, a judgment made consequent to a civil action and specifically awarding damages to the employer as compensation for the financial loss suffered; or
- a compensatory order made by a criminal court in terms of s 300 of the Criminal Procedure Act 51 of 1977, specifically allowing compensation to the employer for the financial loss suffered.

It goes without saying that in his application for such an order the employer must allege that some wrongdoing has been committed by the employee, which amounts to theft, fraud, dishonesty or misconduct in terms of s 37D(b)(ii). In practice, that is often preceded by a disciplinary process, held in accordance with the principles of law, against the employee.

The theft, fraud, dishonesty or misconduct should have been committed while the employee was still a member of the fund.

The issue that often raises some measure of confusion relates to instances where a member has resigned from the employer and terminates membership from that particular fund and transfers their pension fund benefits to a pension preservation fund administered by a different service provider. In other words, the benefits are held by a third party and no

longer the employer's pension fund. The question then often arises as to whether the provisions of s 37D(1)(b) apply? Put differently, in circumstances described, will the pension benefits enjoy the protection afforded by s 37A(1) of the Act?

ABSA Bank LTD v Burmeister and Others [2005] 3 All SA 409 (SCA)

Burmeister (first respondent) was formerly employed by ABSA as a manager at its branch in Springs, Gauteng. He resigned on 15 April 1997. Three months after his resignation, in July 1997 the pension fund benefits accruing to him were paid by the appellants pension fund, Absa Bank Pension Fund, to the Protector Pension Fund, a subsidiary of Old Mutual. The pension benefits were subsequently used to purchase a compulsory linked life annuity with Sanlam Life Assurance Limited. The annuity is administered by Sanlam Personal Portfolios (Pty) Ltd, (third respondent). In February 1998 Absa Bank (appellant) issued summons against Burmeister in the High Court, Johannesburg, claiming damages in the sum of R 1 765 269,05 being the loss it alleged it had suffered as a result of the latter's dishonest and fraudulent conduct while in its employ. Burmeister initially defended the action but did not appear in court on the day of the trial, 2 August 2000, and as a result a default judgment was granted against him in the sum of R 721 420,56. The judgment remained unsatisfied and on 25 March 2002 the sheriff purported to attach the life annuity to the extent of R 300 000. Burmeister sought an order to the High Court, for setting aside of the attachment. The court granted the order setting aside the attachment and dismissing the counter application with costs. The matter was appealed.

The crisp issue on appeal was whether s 37D(1)(b) extends to the third respondent, which was in control of the benefits. On appeal Scott JA stated the following:

'It emerges from the foregoing that "member" in section 37D(1)(b) includes a former member ... who has not received all the benefits that may be due to him or her from the fund. Expressed differently, a member remains such until he or she has received all the benefits and that person's membership is terminated according to the rules of the fund ...'.

The SCA held that the exception provided by s 37D(1)(b) affords an employer a right of access to pension fund benefits, which the other creditors do not have. The court further held that 'the registered pension fund' referred to in s 37D(1)(b) of the Act must be construed as a reference to the pension fund of which the ex-employee was a member at the time of his employment, namely, the fund which the employer participated and not some other fund to which the pension fund benefits may subsequently have been transferred. The appeal was dismissed with costs.

As was held in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 2 All SA 225 (SCA), trustees of a pension fund are not entitled to make any deduction in the absence of a written admission of liability by the member concerned or a judgment obtained by the employer against the member. As stated above, an employer should put in place mechanisms for obtaining proper written admissions from employees. Such processes must accord with the rules of natural justice. There should not be any room for suspicion that an employee was unduly influenced to make any admissions. Charges of undue influence an employee may make later, can be anticipated by proper process that is independently conducted by an independent attorney. Where such a due process has been established, it would be difficult for any employee to later disavow their written admissions.

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Encumbering proceedings for the plaintiffs –

recent changes to the summary judgment procedure

By
Eugene
Dlamini



The origins of the summary judgment as a procedural remedy is well entrenched within our current legal system, and can be traced back to 1855 when the British parliament enacted Order XIV under the Judicature Acts, in order to grant plaintiffs speedy relief against defendants who did not have a *bona fide* defence to claims (see *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para 29; see also SJ Van Niekerk, HF Geyer and ARG Mundell *Summary Judgment – A Procedural Guide* (Durban: LexisNexis 2012) at 1 – 6). The summary judgment procedure was first introduced into the South African statutory law by the Magistrates' Courts Act 32 of 1917, and later, by the Cape Supreme Court r 593 (which became r 22: See *Wright v McGuinness* 1956 (3) SA 184 (C) at 186 – 187), and received in the Transvaal through r 42 on 17 May 1957 in GN 687 GG 687/17-5-1957. Summary

judgment procedures, however, only became available in the Orange Free State in 1965. Despite summary judgment being statutorily entrenched in the magistrates' courts, its introduction in the Superior Courts was rather fragmented and its application lacked uniformity (Van Niekerk *et al* (*supra*) 2 – 8). Uniformity of application of the summary judgment procedure in the High Courts throughout South Africa was only achieved through r 32 when the Uniform Rules of Court (High Court Rules) were promulgated on 12 January 1965 (P Farlan & DE van Logerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta 2011) at B1 – 4).

With the above background, it is necessary to mirror the recent amendments to the summary judgment procedure in r 14 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa (Magistrates' Court Rules), which came into effect on 22 May 2015, as introduced by the Rules Board for Courts of Law Act 107 of 1985

in GN R318 GG38694/17-4-2015. Rule 14 of the Magistrates' Court Rules, prior to the amendment, was not substantially distinct in formulation from r 32 of the High Court Rules. Accordingly, most High Court decisions on r 32 find application in the Magistrates' Court. However, as will be seen below, the amendments to r 14 in Magistrates' Courts significantly depart from the summary judgment procedure as it applies in the High Courts, which, I submit, has the potential to encumber proceedings for the plaintiffs/applicants.

Defendant required to 'serve' a notice to defend as opposed to 'deliver'

In terms of the old r 14(1) and (2) of the Magistrates' Court Rules, a defendant was required to 'deliver' a notice of intention to defend before the plaintiff could apply for summary judgment. The same wording is found in High Court Rule 32.

The verb 'deliver' is defined in both r 2 of the Magistrates' Court Rules and r 1 of the High Court as serving a copy on the opposite party and filing same with the registrar or clerk of the court, as the case may be in the circumstances. 'Serving' a document essentially entails furnishing a copy of the relevant court document to a party who must acknowledge receipt thereof. 'Filing' occurs where the served document is handed to the clerk of court or the registrar and the said document is stamped by the clerk of court or the registrar as the case may be in the circumstances.

In terms of the amendment to r 14(1) and (2) a defendant is now only required to 'serve' the notice to defend before a plaintiff is entitled to apply for summary judgment. In other words, it is no longer a requirement for a defendant to file the notice of intention to defend with the clerk of court or the registrar, before a plaintiff is entitled to proceed to apply for summary judgment. It may be that the amendment dispenses with the requirement to file the notice of intention to defend before the plaintiff can apply for summary judgment to obviate the situation where the defendant has not filed their notice of intention to defend, or what is more often the case, has filed it but the notice has not found its way into the court file before the application for summary judgment is heard. To avoid any doubt in the court's mind, the plaintiff/applicant merely attaches the copy of the served notice to defend to the application to avoid the court questioning whether or not the action has been defended. The question is why a plaintiff would launch an application for summary judgment, when the matter has not been defended, as opposed to filing a request for default judgment. Could it be that the court will scrutinise a request for default judgment a lot more closely than an application for summary judgment, especially when the latter is unopposed? The rationale for dispensing with filing the notice to defend after having serving a copy of the notice on the plaintiff is not clear.

The procedure for bringing the notice to defend to the attention of the court is a departure from the practice in the High Court Rules. I submit that the amendment to r 14(1) and (2) was unnecessary as the plaintiff would have to be served with a notice to defend before moving a summary judgment application, as was required under the old r 14(1) and (2). The amendment has resulted in the lack of uniformity in the application of the summary judgment procedure in the magistrate's court and High Court.

Attaching of the notice to defend to the affidavit

The old r 14(2) has been re-organised

into sub-paragraphs (a) to (d). While the content of the sub-rule has been substantially maintained, it is relevant to note that a new r 14(2)(b) has been inserted. It must be highlighted that r 14(2)(b) does not have a corresponding sub-rule in r 32 of the High Court Rules, which requires a plaintiff to annex a copy of the served notice to defend to the affidavit in support of the application for summary judgment. Having annexed the served notice to defend, the plaintiff must go on to allege in the affidavit in support of the application that a copy of the served notice to defend is attached. The essential averments to be made in the affidavit in support of the application for summary judgment are set out in form 8 of Annexure 1 of the Magistrates' Court Rules. The rationale for attaching the notice to defend to the affidavit in support of the application for summary judgment in terms of r 14(2)(b) is not well understood. Rule 14(1) allows a plaintiff to apply for summary judgment only after having received a notice to defend. Rule 14(2)(b) has the potential to burden proceedings in circumstances where a plaintiff inadvertently omits to attach a copy of the notice to defend, and a defendant with no *bona fide* defence can now raise a 'technical point' of non-compliance with rules against the plaintiff. Faced with the technical point, a court may have to deal with the vexed question of whether or not failure to attach the notice constitutes 'substantial' non-compliance with the rules or non-compliance, which may be condoned under the new r 60(9) of the Magistrates' Court Rules, despite the notice to defend being part of the plaintiff's indexed and paginated bundle.

While a plaintiff who attaches a copy of the notice to defend to the affidavit will not have difficulty in proceeding with a summary judgment application, the same cannot be said for a plaintiff who inadvertently omits to attach the notice to defend. As r 14(2)(b) has no equivalent in the High Court Rules, I submit that different magistrates throughout South Africa will exercise their discretion inconsistently in deciding whether or not failure to attach the notice to the affidavit constitutes substantial non-compliance with the rules, which may or may not be condoned under the new r 60(9). The application of r 14(2)(b) will in all likelihood vary from magistrate's court to magistrate's court. Further, defendants may abuse the sub-rule both as a delaying tactic and a tool to counteract the expeditious resolution of disputes where a defendant does not have a *bona fide* defence and is indeed merely defending for the sake of delaying the process. The sub-rule in its current form affords defendants ample opportunity to play for time so as to impede the ad-

ministration of justice, in the process, defeating the very purpose of the summary judgment process.

Declaration under oath or affirmation

While the old form 8 limited the plaintiff to making a declaration under oath, the amended form 8 introduces a further declaration under 'affirmation'. Perhaps the aim in making provision for an affirmation was to ensure that form 8 complies with the regulations promulgated under s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act), published under GN R1258 GG3619/21-7-1972 (see Practice Management 'Normal practice or unsound and flawed routines' in this issue), which govern both the administration of oaths and affirmations. Regulation 1(1) and (2) provides for two types of declarations, viz, by means of an oath, and under affirmation (see *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T)).

Form 8 of the Magistrates' Court Rules is an 'affidavit', as read with r 14(2)(a), which provides that the plaintiff shall deliver an affidavit made by the plaintiff or by any person who can 'swear' positively to the facts verifying the cause of action. In *Caldwell v Chelcourt Ltd* 1965 (1) SA 304 (N) at 307 it was held that a document was not an affidavit as it was not a sworn document confirmed on oath. The court stated that the word 'affidavit' suggests a 'sworn document'.

Bringing form 8 in line with the regulations may have created a further legal problem. A plaintiff may elect to make the declaration in the affidavit under affirmation, as opposed to a declaration under oath. In interpreting s 9 of the Act, Colman J in *S v Opperman* 1969 (3) SA 181 (T) at 184 held that while affirmations must be read *eiusdem generis* with 'affidavit', they relate to the statements of persons who elect not to take oaths. Accordingly, an affirmation falls foul of the provisions of r 14(2)(a), which requires a plaintiff to 'swear' positively to the facts verifying the cause of action. In other words, the wording in form 8 is not consistent with the provisions of r 14(2)(a).

While the attempt may have been to bring form 8 in line with the Act and regulations, the form does not accord with r 14(2)(a). I suggest that the use of r 14(2)(b) be reconsidered, and form 8 be aligned with the r 14(2)(a) in order to achieve certainty in the summary judgment process.

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Dispossessed and unimpressed:



Picture source: Gallo Images/iStock

By
Valentine
Mhungu

The *mandament van spolie* remedy

M*andament van spolie* (spoliation) is an old common law remedy commonly used by a person who has been dispossessed of goods without following due legal procedure. This article seeks to answer the question whether the remedy of spoliation is available to a person who has been dispossessed of money, in the form of electronic funds, by his or her own bank. The situation arises when a person opens two accounts with the same bank and the bank unilaterally takes money from one account to settle a debt owed by the other account, belonging to the same person. It is common cause that in an instance where that person owes the bank, but has another account with a different bank, the bank would have to follow a procedure for claiming its money. However, as this arti-

cle seeks to investigate, a bank may find it convenient to transfer money from one account to another without following the long established legal process. This article seeks to establish whether the aggrieved person may use *mandament van spolie* to claim back the funds that he or she has been dispossessed of by his or her own bank.

Relevant law

Spoliation

'Spoliation' is a word derived from the possessory remedy better known as *mandament van spolie*. The remedy is there to guard against instances when a person takes the law into his or her own hands and resorts to self help instead of using due legal procedure.

It is an established principle of law

that where a person claims that his or her goods are in the possession of another person unlawfully, such an aggrieved person should not personally and by force take back the goods but use established legal procedure. Should the aggrieved person resort to self help by taking back his or her alleged property without a court order, a court may order that the person who resorted to self help return such property. A court may make this order regardless that the person to whom the property is being returned is a thief or a legitimate possessor.

A person who has been dispossessed of property without due legal procedure may apply to court to have the property returned to him. Before an application for spoliation is granted, the applicant must satisfy two elements. In the case of *Yeko v Qana* 1973 (4) SA 735 (A), it

was held that an applicant for spoliation remedy must satisfy the court that –

- he was in possession or had *quasi* possession of the property; and
- that the respondent deprived him of the possession forcibly or wrongfully against his consent.

The above mentioned requirements constitute both a requirement and defence for and against the remedy of *mandament van spolie*. A breakdown of this compound follows below.

Electronic money

Electronic money is monetary value registered in a person's account after the bank receives either a cash deposit or a transfer of credit value on behalf of its client. The electronic monetary value is: Redeemable for cash on demand, transferable and can be used as a means of payment.

The relationship between a bank and its client

The main business of a bank is to accept deposits for and on behalf of its clients. Subject to certain fees being deducted, the same amount received by the bank for and on behalf of its client is payable to the client on demand.

Even though the legal nature of money is such, that the bank owns the money after it receives a deposit, the beneficiary of the deposit still remains a possessor of the rights referred to above, namely –

- can demand that the electronic value be redeemed in cash;
- can use the electronic monetary value for payment; and
- can make transfers.

This constitutes a demonstrable right. The manifestation of the dispossession of the right in such a case will always entail the taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned.

Whatever occurs to the electronic monetary value of the bank's client is controlled by a contract between the bank and the client, as well as a mandate from the client. Thus, no funds can be transferred from the client's account without the client's instruction. An electronic fund transfer involves the movement of a credit balance from one bank account to another. This is brought about by the adjustment of the balances of the payer's and payee's accounts, after an instruction by a client to his or her bank to effect payment through an electronic medium. The instruction may be given by the bank's client electronically via an ATM, a point-of-sale facility or a personal computer.

Possession of the property

Michael Brindle and Raymond Cox (eds) *Law of Bank Payments* 3ed (UK: Sweet & Maxwell 2010) hold that electronic funds

transfers are not the same as transfer of property. They hold that when electronic funds are transferred, separate property rights are adjusted against the person making the payment and the person receiving the funds.

In the case of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) All SA 416 (A), it was held that since an incorporeal right cannot be possessed in the ordinary sense of the word, the possession is represented by the actual exercise of a right. Therefore, refusal to allow a person to exercise the right will amount to a dispossession of the right.

Possession need not have been exclusive possession. A spoliation claim will lie at the suit of a person who holds jointly with others. The client and his bank jointly control the funds in the client's account. In *Solar Mounting Solutions (Pty) Ltd vs Engala Africa (Pty) Ltd* (FB) (unreported case no 3717/2014, 5-9-2014) (Wright AJ) it was held that: 'Even though the applicant may not have had actual possession of the property complained of, it had a right of access to portions of the site'. Thus, there are instances in which use and enjoyment of a thing has an element of sufficient control to be said that the dispossessed person was in possession, which qualifies him or her to be protected through the application of *mandament van spolie*.

In matters concerning the dispossession of rights, the requirement of dispossession is satisfied by showing that a previously exercised utility has been disturbed. In that order, the emphasis of physical possession 'involve[s] rather strained reasoning'. For example, when a tenant is locked out, it is regarded as dispossession because his or her access rights have been disturbed. The dispossession of a right will always be manifested by the deprivation of an externally demonstrable incidence, such as the use arising from or being integral to the right in question. The case of *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) 634 (N), clearly demonstrates this point. In *casu*, the court examined the juristic nature of the rights of a holder of shares in a company. This was in order to determine whether the removal of its name from the share register constituted dispossession for the purpose of being able to obtain relief in terms of the *mandament van spolie*. The court held that *mandament van spolie* was available, in such an instance, because the act of removing the name constituted dispossession for the purposes of spoliation remedy.

Defences against spoliation

It does not follow that every claim of *mandament van spolie* will always be successful. A respondent has some defences available to him to avert a spolia-

tion claim. One of these defences include 'impossibility of return to *status quo ante*'. The spoliation remedy is primarily a possessory one and if repossession of the identical property is not possible (either because the thing was destroyed or because it had subsequently been alienated to a third party) the application for the remedy may not end in success.

Lawfulness

Included in one of the limited defences against the remedy of *mandament van spolie* is the defence of lawfulness. Where dispossession is effected by virtue of common law, a statutory instrument or contract, a claim for spoliation remedy will not be successful. Where a client opens a second account with the same bank, some banks conclude a contract with such a client which provides that, where one account is in arrears, the bank is allowed to transfer credit from the account with funds to the account in arrears. This kind of agreement is also similar to the common law operation of set-off.

A client is considered a creditor to the bank when there are funds in the client's account. The bank can also be a creditor when it grants a loan to its client. Set-off occurs whereby two persons who are mutually indebted to each other, extinguish their debts partially or wholly. Where the debts are of the same amount, the two parties' debts cancel each other. But where the amounts of the two debts differ, the bigger debt extinguishes the smaller one, as proportionally owed. Set-off can only be invoked when both claims are liquidated. It needs to be noted that where a client owes a bank it does not mean that the bank's claim against the client is always liquidated. A liquidated debt is one that is capable of speedy and easy proof (*Treasurer-General v Van Vuren* 1905 TS 582 at 589 and *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738 (F – G)). Set off can also be excluded by agreement in the contract between the bank and its client.

Identifiable

One of the common defences against spoliation is that the subject of dispute is no longer in existence or unidentifiable. Where such subject is mixed with other things such that it is no longer identifiable, it is referred to as *commixtio*. *Commixtio*, in the case of money, refers to instances whereby funds are mixed in a manner that renders it impossible to determine in whom the separate funds vest. A bank may also rely on the rule that once money is mixed with other money, without the owner's consent, ownership of it passes by operation of law. However, one should not lose sight of the fact that under the spoliation rem-

edy, the question of ownership is not in issue but the means through which dispossession takes place.

In *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C), despite the fact that dwellings had been destroyed together with the building material and such a situation posing a perfect defence of impossibility of restoration, the court ordered restoration. The court relied on *Zinman v Miller* 1956 (3) SA 8 (T) and *Jones v Claremont Municipality* 1908 (25) SC 651 to come to the conclusion that the remedy could be used in instances where restoration required something to be done in addition to repossession of the subject of dispute. The court in *Fredericks* went to the extent of ordering that if the original sheets of corrugated iron could not be found, the respondent should use sheets of similar size and quality as the original ones. Thus, the remedy does not only provide for restoration of the thing, sometimes repossession can require restoration of the thing to its former state. It is asserted that the remedy should not be absolutely precluded in instances where the property was suspiciously destroyed or alienated, so as to ensure that repossession could not take place; and ultimately to specifically exclude the possibility of instituting the remedy in those instances. Allowing such can have dire consequences for banks' clients because it can open avenues to unfair practices. Accordingly, I submit that if the property is fungible and can in principle easily be replaced as was illustrated in

Fredericks, the application of the *mandament* should not be completely barred.

Determination

In matters concerning the dispossession of rights, the requirement of dispossession is satisfied by showing that a previously exercised utility has been disturbed. Thus, when a bank decides to transfer a client's funds without having followed the demand procedure, the client's rights to transfer the previously held credit, making payments and redeeming the credit for cash on demand, are disturbed. In other words, dispossession occurs. The remedy of spoliatio should be granted to the client to allow an investigation of the facts of the dispute.

However, as highlighted above, the relationship between a bank and a client is also governed by the law of contract. If the underlying contract provides that the bank may consolidate two separate accounts, where the client owes the bank in one account, the client may not be granted the spoliatio remedy on the basis of the contract as well as by operation of set off (provided set off has not been expressly excluded).

Also, the defence that once the money has been transferred and mixed with the bank's monies cannot be identified, involves a rather strained reasoning considering what was held in the *Fredericks* case. In *casu*, it was held that the destruction of the spoliated property does not take away the availability of the spoliatio remedy. Sometimes repossession

can mean restoration of the subject of dispute to its former state and not necessarily the restoration of the exact thing but the original form. In that case, impossibility of restoration is not an absolute bar to the remedy. This applies in instances where property is deliberately aberrated to defeat this remedy. Thus, in instances involving property that can be easily replaced, as was illustrated in *Fredericks*, the application of the *mandament van spolie* should not be completely barred.

In all, the spoliatio remedy can be used only as a temporary measure pending the determination of the facts in dispute. For a client who wishes to recover his money permanently, I submit that the route of *actio Pauliana* and the *condictio sine causa* (the essence of which is beyond the scope of this article) should be followed as was held in the case of *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N).

Conclusion

The application of the above arguments can be used to protect the integrity of the banking system. It can also assist other regulatory authorities in providing consumers with adequate protection from unfair practices, fraud and financial loss.

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KEYNOTE SPEAKER:

DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE

DATE: FRIDAY, 09 OCTOBER 2015

TIME: 18H30PM FOR 19H00

DRESS CODE: FORMAL

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KNOW THE RULES!

By
Francois
Robert
van Zyl

Understanding the correct interpretation of r 34 of the uniform rules of court

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The Road Accident Fund (RAF) is a public entity established in terms of the Road Accident Fund Act 56 of 1996 (the Act) as amended, to compensate victims of road accidents where serious injury or death arose as a consequence of wrong doing or fault.

Central to the payment of a claim under the current legislative framework is the common law principle of delict where fault must be proven before a claimant is compensated. As a consequence, the historic trend has been to determine fault and the extent of compensation in the courts, through a highly litigious process, which has seen claimants appointing third party attorneys to claim against the RAF. The RAF in turn appoint legal representatives through a panel of attorneys to defend the matters over what is a considerably lengthy period of time.

According to the Road Accident Fund's Integrated Annual Report, R 22,2 billion has been paid out to victims of road accidents during the 2013/2014 general financial review. This amount excludes, but is not limited to, the legal costs relating to successful claimants via the court process, the panel attorney's fees in defending these matters, as well as the costs relating to witnesses and various expert evidence. One can therefore appreciate the regular increase in the fuel levy, which places an enormous strain on the public purse. It comes as no surprise that various measures have been put in place, such as amendments to the legis-

lation, Road Accident Fund Legislative Schemes, Uniform Rules of Court and Practice Directives in order to enhance and facilitate the speedy and justifiable settlement of claims.

One of these measures, in an endeavour to curb litigation costs, is contained in r 34 of the Uniform Rules of Court. Sub-rules 1,5 and 12 to this rule provides as follows:

'34(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim ...'

...

34(5) 'Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state -

(a) whether the same is unconditional or without prejudice as an offer of settlement;

(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;

(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

...

34(12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this sub-rule contained shall affect the court's discretion as to an award of costs.'

In the recently reported appeal matter of *Road Accident Fund v Mashala* (GP) (unreported case no A474/2012, 25-7-2014) (Kollapen J) handed down by the Gauteng Division, Pretoria, the court was called on to consider the proper interpretation and purpose behind r 34 of the Uniform Rules of Court. In this case, the respondent brought an action for damages against the appellant in terms of the provisions of the Act. The appellant opposed the action and both the merits and quantum of the respondent's claim were in dispute and when the trial proceeded, the court made an order separating the merits of the matter from the quantum. The trial, therefore, only proceeded on the issue of liability. On 8 March 2012 the court delivered judgment on the question of liability and made an order that the appellant be liable for 50% of all the damages that the respondent was able to prove, and in addition ordered the appellant to pay the costs of the hearing. The appellant thereafter brought an application in terms of r 34(12) for the court to reconsider the question of costs afresh and it premised such an application on the following grounds:

- That on 11 January 2012, the appellant's attorneys delivered a Notice of Offer of Settlement in terms of r 34(1) and r 34(5) in which the appellant offered to pay 50% of all damages proven by the respondent, as well as the costs of the action insofar as it pertains to negligence up to and including 11 January 2012.

- That considering on 8 March 2012 the court made an order, in respect of merits, identical to the terms of the tender, the court should have reconsidered the order of costs it had made on 8 March 2012 and it should have, in light of the offer of settlement, ordered the respondent to pay the costs of the hearing.

- In its judgment, on the application for reconsideration, the court concluded that r 34(1) of the Uniform Rules of Court deals with monetary claims and the only offer capable of settling a monetary claim was an offer for the payment of a sum of money. Accordingly an offer not sounding in money was not possible in terms of the rule and the appellant's offer of 11 January 2012 was not an offer sounding in money and, as such, it fell outside of what r 34(1) contemplated. On that basis, the court proceeded to dismiss the application for reconsideration.

- The central issue for determination in this appeal is whether the court *a quo* was correct in concluding that the offer of settlement made in terms of r 34(1) and r 34(5) fell outside the ambit of the rule. A related issue was whether, notwithstanding that the offer was made in terms of r 34(1), the common law is of relevance and is of possible application in determining the matter.

The court referred to the Supreme Court of Appeal decision in *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) where this court remarked that: 'The purpose behind the Rule is clear. It is designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. The rule is there not only to benefit

a particular defendant, but for the public good, generally.'

The court went further and cautioned that courts should take account of the purpose behind the rule and not give orders that undermine it. Accordingly in the context of litigation, the rule provides an incentive to the reasonable and prudent litigant who makes an informed and concerted effort to bring litigation to an end, as well as a disincentive to the intransigent and unreasonable litigant. The incentive lies in the risk attendant on the court exercising its discretion with regard to costs. A litigant faced with the choice of disputing liability *in toto* for making an offer of settlement may well, regard being had to the purpose of the rule, be said to bring to an end at least that part of the litigation by making an offer of settlement. Such an approach would be consistent with the purpose of the rule and may also be considered as advancing the public good. The court held that it would of course follow in such instances where the question of quantum remains unresolved, that an offer of settlement on liability could never be in precise monetary terms but could certainly be structured in terms capable of ascertainment. Arising out of this is the question of whether failure to make a specific monetary offer has the effect of taking the offer outside of the ambit of r 34(1) as the court *a quo* concluded. The court did not believe this to be the case.

If one has regard to the text of r 34(1), it does not encapsulate a requirement that the offer be one precisely sounding in money. If regard is had to the rationale of the rule, to enable a party to avoid future litigation, interpreting r 34(1) as requiring a precise monetary offer to be made, will have the effect of undermining the rule. The conclusions of the court *a quo* would mean that where separation of liability and quantum has taken place, no offer of settlement would be possible in terms of r 34(1) simply because it is

not an offer sounding in money. Such a result would not only undermine the rationale for the rule but would serve to encourage unnecessary litigation to the costs of litigants and the fiscus.

The court furthermore referred to the author Erasmus in the Superior Court Practice (P Farlan & DE van Loggerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta 2011) at B1 - 5), who makes the following observation:

'The object of the rules is to secure inexpensive and expeditious completion of litigation before the courts; they are not an end in themselves. Consequently the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus it has been held that the rules exist for the court, and not the court for the rules.'

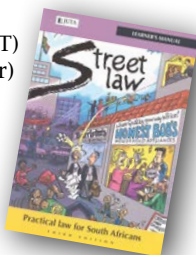
The court found on that basis, and even while accepting that the power of the court of appeal to interfere with the exercise of a true discretion is limited, the discretion was exercised on an incorrect principle, namely that the offer of settlement fell outside of r 34(1) and, therefore, the court *in casu* was entitled to interfere. The offer of settlement was, therefore, a competent one in both in terms of r 34(1) and the common law and if it was accepted it would have brought the litigation on the question of liability to an end on the same terms the court *a quo* found on 8 March 2012. Such an outcome would have justified the court, on reconsideration of the costs order it made, to avoid costs in favour of the appellant and as a result the appeal succeeded and the respondent was ordered to pay the appellant's costs in the first instance, as well as the costs of the appeal.

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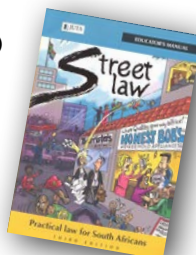
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THE LAW REPORTS

August 2015 (4) South African Law Reports (pp 329 – 643); [2015] 3 All South African Law Reports July no 1 (pp 1 – 129) and no 2 (pp 131 – 254); [2015] 3 August no 1 (pp 255 – 386) and no 2 (pp 387 – 521); 2015 (8) Butterworths Constitutional Law Reports – August (pp 887 – 1001)

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
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
NCK: Northern Cape Division, Kimberley
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Civil procedure

Superannuation of judgment if warrant of execution is not effected within three years: Section 63 of the Magistrates' Courts Act 32 of 1944 (the Act) provides among others that: 'Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court ...'. The issue arose in *Absa Bank Ltd v Snyman* 2015 (4)

SA 329 (SCA), [2015] 3 All SA 1 (SCA) where the appellant, Absa Bank, obtained default judgment in the magistrates' court against the respondent, Steyn, after he defaulted on loan repayment. On the same date, 18 December 2007, the appellant also obtained a warrant of execution against the mortgaged house of the respondent, which had been declared executable. Nothing happened concerning the warrant of execution, which was reissued on 18 December 2010 and served on the respondent in February 2011. Thereafter, the property was sold in execution after which the new owner proceeded to evict the respondent. The respondent challenged the validity of the execution and sale of the property to the new owner on the basis that the warrant of execution had been issued more than three years after the granting of default judgment.

On appeal to the High Court the WCC held, per Davis J (Blignaut J concurring),

that as judgment was granted on 18 December 2007 it superannuated at midnight on 17 December 2010 with the result that a reissue of the warrant of execution the following day on 18 December 2010 was not competent. That had the result that the reissued warrant of execution was invalid and could not bring about a valid sale in execution. A further appeal to the SCA was upheld, the court standing over the issue of costs. The matter was remitted to the High Court for verification whether in the meantime the respondent had not made payment, as it appeared that he did so. If that was the case it would affect superannuation of the judgment as the three-year period would start running from the period of the last payment and not the date of the court order.

Brand JA (Cachalia, Shongwe, Wallis and Petse JJA concurring) held that properly construed s 63 of the Act provided that a judgment sounding in money became

superannuated, unless the execution sale took place within three years of that judgment. As a result, the date on which the warrant of execution was issued, was of no consequence. Therefore, the date of reissue of a warrant of execution would not avoid execution once the three-year period from the date of judgment elapsed. Extension of the superannuation period could only occur by order of court, something which was not obtained by the appellant in the instant case. It followed that the question whether or not the reissue occurred on 18 December 2010 or on an earlier date was of no consequence. What was relevant was the date of the sale in execution, which in the instant case was 6 December 2011. That was clearly more than three years after the date of judgment on 18 December 2007.

Cohabitation

No reciprocal duty of support between partners in a



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cohabitation relationship: In *Steyn v Hasse and Another* 2015 (4) SA 405 (WCC) the first respondent, Hasse, was a married German national who spent most of his time in Germany. However, he owned a house in Somerset West in the Western Cape, in which he lived for four months in a year. He had a romantic relationship with the appellant, Ms Steyn and invited her to live in the house free of charge, also providing her with funds to run the house. Furthermore, he also gave her gifts. When the romantic relationship ended the first respondent requested the appellant to vacate the house but she did not. It was her contention that the first respondent promised her that she would live in the house for a period of ten years ending in 2017 and that if the romantic relationship were to end he would buy her a townhouse similar to the one she was renting before the relationship started. The magistrate held that there was no reciprocal duty of support between parties in a cohabitation relationship and as a result ordered her to vacate. An appeal against that decision was dismissed with no order as to costs, given that the appellant was an elderly person who was not in good health and was unemployed.

Goliath J (Schippers J concurring) held that cohabitation generally referred to people who, regardless of their gender, lived together without being validly married to each other. Cohabitants generally did not have the same rights as partners in marriage or civil union. Although no reciprocal duty of support arose by operation of law in the case of unmarried persons, there was nothing precluding such duty from being regulated by agreement. Nevertheless, the courts provided some measure of recognition to cohabitation and had on many occasions found that an express or implied universal partnership existed between cohabitants. A universal partnership existed when parties acted like partners in all material respects without expressly entering into a part-

nership agreement. The three essentials of such a partnership were –

- that each party contributed something to the partnership or bound himself or herself to do so;
- that the partnership would be carried on for their joint benefit; and
- the object should be to make profit.

In the instant case, it was not in dispute that the relationship did not comply with the essential requirements of a universal partnership. There was, therefore, no legal basis on which to find that there existed reciprocal rights and duties of support between the appellant and the first respondent.

Companies

Business rescue application that does not suspend liquidation of a company: Section 131(6) of the Companies Act 71 of 2008 (the Act) provides among others that if liquidation proceedings have already been commenced by, or against the company, at the time an application for business rescue is made, the application will suspend the liquidation proceedings until the court has adjudicated upon the application or the business rescue proceedings end.

In *Knipe and Another v Noordman NO and Others* 2015 (4) SA 338 (NCK) two companies, K and S, were placed under provisional liquidation, which was eventually made final. In the course of liquidation of the affairs of the companies their provisional liquidators, Noordman and others, entered into an agreement for the capturing, removal and sale of cattle belonging to the estate of the deceased Knipe senior (the father) but, which were grazing on the farms owned by the companies. The applicants, the Knipe brothers, launched an urgent application for an interdict prohibiting the capturing, removal and sale of the cattle. It was their contention that removal and sale of the cattle would destroy a *lien*, which the companies in liquidation, of which they were sharehold-

ers, enjoyed. Moreover, they had in the meantime also applied for a business rescue of the companies in question even though at the launch of the application it was over one and half years since the final winding-up order had been granted.

Mamosebo AJ dismissed the urgent interdict application with costs on an attorney and client scale. The court held that there was no urgency in the application as the applicants had plenty of time in which they could have launched it. Furthermore, the applicants had no *locus standi* as the farms belonged to the companies in winding-up and they were only shareholders. Moreover, an undertaking had been given to the effect that the proceeds of the sale would be deposited into a trust account for protection. On the issue of the relationship between winding-up and business rescue applications, the court held that liquidators had a duty and responsibility to look after the assets and affairs of the companies in liquidation. The fact that in the instant case the liquidators confirmed the existence of a *lien* and undertook to protect it underscored their responsibilities and *bona fides*. The legislature did not intend to create a situation where provisional liquidators would be disempowered to carry out their responsibilities. Since in this case a business rescue practitioner had not been appointed and the circumstances were different in that final liquidation was granted on the basis that it was just and equitable to do so, and not because the companies were in dire financial distress, the provisional liquidators could not be hamstrung by the business rescue application.

NB: The above case should be contrasted with *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd and Others* 2015 (4) SA 485 (KZD) where it was held that leave to institute legal proceedings should be obtained before instituting the proceedings and not sought as part of the main

application. It should, however, be noted that the latter deals with s 133(1)(b), and not s 131(6), of the Act.

Contracts

Mortgage bond may secure indebtedness relating to unjust enrichment claim: In *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] 3 All SA 42 (SCA) the appellant, Panamo, entered into a loan agreement with the respondent, Land and Agricultural Development (the bank), in terms of which money was advanced to the appellant to acquire agricultural land for development into an urban township. To secure repayment of the loan a covering mortgage bond was registered over the two properties in question. However, as it turned out the loan agreement was invalid for contravention of s 3 of the Land and Agricultural Development Bank Act 15 of 2002 (the Act), which makes provision making loans by the bank for among others the promotion, facilitation and support of commercial agriculture and food security and not township development. Furthermore, ss 66 and 68 of the Public Finance Management Act 1 of 1999 (the PFMA) provide that where a public institution, such as the bank, enters into a transaction that is not authorised by legislation governing the institution, it will not be bound by the transaction.

Two issues fell to be decided, namely, the validity of the loan agreement and also, if the agreement was invalid the mortgage bond could still be enforced on the basis of unjust enrichment. The GJ held per Claassen J that such was the position. An appeal against that decision was dismissed with costs by the SCA.

In the majority judgment Lewis J (Pillay, Willis JJA, Schoeman and Gorven AJJA concurring) held that the acquisition of agricultural land for the purpose of transforming it into an urban township was not only not consonant with the objects of the Act, but was also completely contrary to that which the bank was sup-

posed to achieve. Accordingly, the loan agreement was in contravention of the Act and invalid with the result that it could not be enforced. The issue of possible validity and enforcement of the second agreement, namely the mortgage bond, was dealt with by Gorven AJA in a concurring judgment, where it was held that even though the loan was void that did not mean that there was no other obligation secured by the bond. Assuming, without deciding, that the respondent had a valid claim for unjust enrichment, such would give rise to indebtedness. There was no reason for a mortgage bond not to secure a debt arising from an enrichment claim. The mortgage bond, in the instant case, was cast in the broadest possible terms enabling the respondent to recover payment from the appellant for a claim arising from 'whatsoever reason'. The wording of the mortgage bond conclusively showed that a basis existed for invoking the security to secure indebtedness, which did not have to arise from an agreement or even the terms of the mortgage bond. Therefore, the security afforded by the bond covered a lawful claim by the respondent which fell outside the terms of any agreement or the bond and could clearly cover a debt arising from an enrichment claim.

Criminal law

Child trafficking, rape and abuse or exploitation for sexual purposes: In *Jezile v S* (National House of Traditional Leaders and Others as Amici Curiae) [2015] 3 All SA 201 (WCC) the appellant Jezile was found guilty of human trafficking, rape, assault with intent to cause serious bodily harm and common assault by the court and sentenced to an effective 22 years imprisonment. That was after a group of males representing his family agreed with another group of males representing the complainant's family, to a marriage between the appellant and the complainant, a girl aged 14. The complainant refused to marry the appellant as she wanted to

continue with her schooling. Moreover, the appellant was a total stranger to her. The complainant's uncle, together with another man, literally grabbed her by her hands and took her by force to the appellant's home where she was forced to have sex with the appellant. After escaping she was tracked down and returned to him. Eventually the two left the village in the Eastern Cape for Cape Town where she was held in captivity, with the door and gates locked, so that she could not escape. Repeated raping took place and she was also assaulted for not being co-operative. At long last she escaped and reported the problem to the police.

On appeal to the High Court the convictions on counts of assault with intent to cause grievous bodily harm and common assault were set aside as they were found to be part of the offence of rape. However, an appeal against convictions and sentence on human trafficking and rape was dismissed. In a unanimous judgment Cloete, Saldanha and Yekiso JJ held that it could not be countenanced that practices associated with the aberrant form of the traditional practice of *ukuthwala* (forced marriage – essentially meaning grabbing a mate) could secure protection under the law, as the appellant sought to do. The court could not, therefore, even on the rather precarious ground of assertion by the appellant of a belief in the aberrant form of *ukuthwala* as constituting 'traditional' customs of his community, which allegedly led to a 'putative customary marriage', find that he had neither trafficked the complainant for sexual purposes nor committed rape without the necessary intention.

• See '*Ukuthwala*: Is it all culturally relative?' 2015 (Aug) DR 28.

Divorce

Validity of unregistered antenuptial contract: Section 86 of the Deeds Registries Act 47 of 1937 (the Act) provides among others that an antenuptial contract shall be

registered, failing which it shall be of no force or effect as against any person who is not a party thereto. The application of the section fell to be decided in *S v S* [2015] 3 All SA 85 (KZD) where before entering into marriage the parties gave their attorney an instruction and power of attorney, also signing a draft antenuptial contract, to execute an antenuptial contract and have it registered in terms of the Act. It was the intention of the parties to enter into a marriage out of community of property with no community of profit and loss but subject to the accrual system. When the parties divorced more than twenty years later, they discovered that the antenuptial contract had not been registered. As a result the plaintiff, Mrs S, contended that the marriage was in community of property, while the defendant husband took the view that as per the intention of the parties the marriage was out of community of property.

The High Court separated the issues and granted a degree of divorce, making ancillary orders relating among others to custody of the minor child. The question of the applicable matrimonial regime was decided at a lat-

er stage where Kruger J held that the marriage was, as per the intention of the parties, out of community of property, with no community of profit and loss but subject to the accrual system. It was clear from the provisions of s 86 of the Act that an antenuptial contract, which had not been registered was of no force or effect as against any person who was not a party thereto. The antenuptial contract would, however, be valid and binding as between the parties. That was because the unregistered antenuptial contract reflected the common intention of the parties at the time the contract was entered into. That had the effect that an informal antenuptial contract existed between the parties. The date of determination of the accrual system was that of *litis contestatio* and not the granting of a decree of divorce. The practical effect of *litis contestatio* was to expedite the trial and do much to limit the temptation to squander assets that some spouses seemed to find irresistible and also discourage the situation where a spouse deliberately delayed the proceedings in order to increase his or her claim when the divorce was eventually granted.



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Housing

Protection of vulnerable purchasers: Very briefly ss 21 and 22 of the Alienation of Land Act 68 of 1981 (the Act) provides among others that on insolvency of the seller the purchaser of a residential property who buys in terms of a contract that provides for payment of the purchase price in two or more instalments over a period of one year or more may, after making arrangements for payment of the balance, take transfer of the property. However, the sections do not have similar provisions for the protection of a purchaser who has paid the price in full but has not yet taken transfer at the time of the seller's insolvency. Such a purchaser simply loses out as the property falls into the insolvent estate.

In *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) the applicant, Ms Sarrahwitz (S), had paid the full purchase price for a residential property which she bought from Mr P (P), who promised to transfer it to her and instructed his lawyers to do so. However, there was an inordinate delay of some four years in effecting the transfer and when the estate of P was declared insolvent the property, which was still registered in his name, vested in the trustee of his estate, the respondent Maritz who refused to transfer it to the applicant. The High Court dismissed the applicant's claim for transfer of the property into her name. Leave to appeal to the full Bench of the High Court or alternatively the SCA having been denied, the applicant sought leave of the CC to appeal to it, raising the question of constitutionality of the common law and the Act for the first time on appeal. Leave to appeal was granted and the appeal upheld, with no order as to costs. The court followed the severance and reading-in approach with the result that the provisions of the Act were extended to apply to purchasers who had paid the purchase price for residential property in full but had not

yet taken transfer. The order did not have retrospective application to matters already finalised by then.

Reading the majority judgment Mogoeng CJ (Cameron and Froneman JJ concurring for totally different reasons in a separate judgment) held that it was difficult to conceive of an instance where the refusal to transfer a home to a vulnerable purchaser, who had paid the purchase price in full, coupled with inevitable homelessness, would not outweigh the advantage to creditors of the seller's insolvent estate. There was no rational basis for protecting a vulnerable instalment purchaser of a residential property who paid over a period of one year or longer, while leaving out an equally vulnerable purchaser who borrowed money to pay the full purchase price at once or one who did so in one instalment or several instalments within one year. So long as there existed a real risk within the legislative scheme for vulnerable purchasers to be rendered homeless, the scheme was under-inclusive, violated the right of access to adequate housing and limited purchasers' rights unjustifiably. The impugned provisions were unconstitutional to the extent that they excluded the transfer of a house from an insolvent estate to a vulnerable purchaser who had paid for it within one year even in circumstances where that exclusion was unjustifiable and could result in homelessness of the purchaser.

Parliament

Freedom from arrest for anything said in the National Assembly, Council of Provinces or any of their committees: Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2000 (the Act) allows the Speaker of the National Assembly (NA) or Chairperson of the National Council of Provinces (NCOP) or a person designated by them to order 'a staff member or a member of the security forces' to ar-

rest and remove any person creating or taking part in a disturbance during parliamentary, house or committee sittings. In *Democratic Alliance v Speaker of the National Assembly and Others* 2015 (4) SA 351 (WCC), [2015] 3 All SA 72 (WCC) the applicant Democratic Alliance, a political party and official opposition in the NA, sought a court order declaring the section inconsistent with the Constitution, and accordingly invalid, on the ground that s 58(1)(a) of the Constitution afforded cabinet members, deputy ministers and members of the NA a right of speech in the NA and its committees, and that s 58(1)(b) protected such members against, *inter alia* arrest, imprisonment or a damages claim 'for anything they said in, produced before or submitted to the Assembly or any of its committees'. Delegates to the NCOP, participating local government representative and members of the national executive were afforded the same privileges and powers by s 71 of the Constitution. It was argued that the section violated the constitutional privileges by permitting a member to be arrested for what he or she might say on the floor of the NA. The issue arose after members of another political party, the Economic Freedom Fighters (EFF), had been ejected from a joint sitting of the NA and NCOP for repeatedly interrupting the President's state of the nation address speech.

The High Court granted with costs an order declaring the section unconstitutional, suspending the operation thereof for 12 months during which Parliament was afforded the opportunity to remedy the defect. The order was referred to the CC for confirmation. Le Grange J (Cloete and Boqwana JJ concurring) held that inasmuch as Parliament was entitled to conduct its own affairs, the privilege of freedom of speech was vital to allow Parliament to perform its function of permitting unrestrained debate about matters of public importance. Section 11 of the

Act infringed a member's privilege of free speech and his or her privilege not to be arrested as protected under ss 58(1)(a) and 71(1)(b). The provision in s 11 was not envisaged by ss 58(2) and 71(1) of the Constitution and, therefore, did not pass the constitutional muster as it permitted a member to be arrested for what he or she might say on the floor of the NA. That violated a member's constitutional privilege of freedom of speech and freedom from arrest as guaranteed under ss 58(1) and 71(1) of the Constitution. The provision of s 11 was overboard and as a result constitutionally flawed.

NB: It should be noted that s 11 proscribed causing 'disturbance' and not 'making speech', the latter being duly protected. It would appear, therefore, that the case was decided on the facts that did not exist.

Limitation on broadcasting of unparliamentary conduct and grave disorder: Acting in terms of ss 57(1) and 70(1) of the Constitution, Parliament adopted rules and a policy relating to the broadcasting of parliamentary proceedings which provide, among others, that during incidents of grave disorder or unparliamentary conduct the parliamentary camera should focus on the occupant of the chair, meaning the Speaker of Parliament in the case of the National Assembly or the Chairperson in the case of the National Council of Provinces. This means that the grave disorder or unparliamentary conduct incident would not be given coverage, except that in the case of unparliamentary conduct occasional wide-range shots of the chamber are acceptable. The constitutionality of the rules and the policy was challenged in *Primedia Broadcasting Ltd and Others v Speaker of the National Assembly and Others* 2015 (4) SA 525 (WCC); [2015] 3 All SA 340 (WCC) were the applicants, Primedia Broadcasting and others, also sought an order declaring the use of the jamming device unconstitutional and invalid. All this

took place after an incident during the state of the nation address by the President during which members of an opposition political party, the Economic Freedom Fighters, were removed from Parliamentary precinct by the security agency and the service of electronic devices interrupted for a short period. In other words, the applicants wanted full live television and other electronic coverage of the disruption. The application was dismissed, each party being ordered to pay own costs.

Dlodlo J (Henney J concurring and Savage J dissenting) held that the rules and policy in issue survived the application of the proper test for reasonableness. Sections 59(1) and 72(1) of the Constitution authorised Parliament to take reasonable measures to regulate public access, including access of the media, to it. In other words the Constitution did not contemplate unrestricted access (free-for-all). It rather expressly reserved for Parliament the power to limit access by the public, including the media, to its proceedings, provided that the limiting measures were reasonable. There was no obligation on Parliament to broadcast conduct that clearly obstructed or disrupted its proceedings and unreasonably impaired its ability to conduct its business in an orderly and regular manner in a democratic society, simply because such conduct was not legitimate parliamentary business. When that was contrasted with the suggestion by the applicants that Parliament had to feed broadcasting visuals of the grossest behaviour and gravest disorder without limitation, the latter was and remained unreasonable.

Turning to jamming of electronic devices, it was held that the employment of any means, including the use of signal disruption, to protect the President, Deputy President and dignitaries against the potential threat, existing or perceived to be existing, while still outside the chamber and prior to the start of the address, was entirely jus-

tified and was therefore not unlawful.

Rei vindicatio

Claim for rei vindicatio not constituting debt or prescribing in three years: In *Absa Bank v Keet* 2015 (4) SA 474 (SCA) the respondent, Keet, entered into an instalment sale agreement with Eastvaal Motors for the sale of a vehicle, namely a tractor. Eastvaal Motors having ceded its right, title and interest in the agreement to the appellant, Absa Bank, the latter instituted proceedings for confirmation that the agreement had been cancelled as a result of breach of contract by the respondent who defaulted in payment of agreed instalments and also sought recovery of the vehicle. The respondent raised a special plea of prescription, alleging that as a period of three years had expired since the date on which final payment of instalments ought to have been made, the claim for payment of arrear instalments and recovery of the vehicle had prescribed. The GP, Pretoria per Fabricius J having upheld the special plea, an appeal against that decision was upheld by the SCA. The court made no order as to costs as the matter had essentially become moot since it was settled. That being the case the respondent withdrew his opposition to the appeal.

Zondi JA (Maya, Bosielo, Wallis JJA and Meyer AJA concurring) held that a debt was an obligation to do something, either by payment or delivery of goods or services. It was one pole of an obligation, which encompassed a right to receive and a corresponding duty to give. It was that which was owing or due, anything such as money, goods or services which a person was under obligation to pay or render to another. Therefore, there was merit in the argument that a vindicatory claim, since it was based on ownership of a thing, could not be described as a debt as envisaged in the Prescription Act 68 of 1969. The solution to the problem of prescription was to be found

in a distinction between a real right (*jus in re*) and a personal right (*jus in personam*). Real rights were primarily concerned with the relationship between a person and a thing while personal rights were concerned with the relationship between two (or more persons). The person who was entitled to a real right over a thing could, by way of a vindicatory action, claim that thing from any person who interfered with his right. Such a right was one of ownership and not personal.

Unlawful competition

Protection against unlawful competition: In *Mullane and Another v Smith and Others* [2015] 3 All SA 230 (GJ) the first applicant, Mullane, was a minority shareholder and director of the second applicant, Coleman Tunnelling. The first respondent, Smith, was also a minority shareholder and director of the second applicant, as well as its employee. When the possibility of acquisition of the second applicant by the third respondent, Bothar Boring, arose the first respondent was provided with the second applicant's confidential information to negotiate the deal that eventually failed. After certain allegations were made against the first respondent he resigned as a director of the second applicant and joined the third respondent. However, he did not leave empty-handed as he took all the information he required, which was copied from his office computer. The problem though was that the second applicant and the third respondent were direct competitors. As a result the applicants sought an interdict prohibiting the respondent from unlawfully utilising, communicating and/or publicising any of the second applicant's confidential information and/or trade secrets. The interdict was granted with costs.

Spilg J held that the right to protection from unlawful competition required a

wrongful interference with another's right as a trader. In order to succeed with an application for final interdict the second applicant had to demonstrate that –

- there was a wrongful act of competition or one which was pending;
- which was infringing or threatening to infringe its business goodwill; and
- no other suitable remedy was available.

In unlawful competition cases care had to be taken to recognise the erstwhile employee's right to utilise knowledge and skills acquired when moving to a new employer. In the instant case, the conduct of each of the respondents demonstrated a disregard for the second applicant's rights and a clear attempt to take unfair and wrongful advantage of inside knowledge that was otherwise protectable against filching or economic espionage. There was no reason why such protection could not be extended to issues of unfair competition.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with the act of insolvency, bias by presiding officer, breach of contract, business rescue proceedings, classification of health care products, consumer credit agreements, conveyancing, detention of illegal foreigners, dispute of fact, eviction of occupiers from leased property, improper approval of building plans by local government, interruption of extinctive prescription, liability for omission, *mandament van spolie*, objection to tax assessment, pension fund surplus, provision of temporary emergency accommodation by municipality, rape, right to legal representation during sentencing, right to life versus voluntary euthanasia, seaman's *lien* for wages, *Turquand* rule and winding-up of companies.



Pain and no gain – should there be compensation for innocent spouses against third parties?

By
Devon
Jenkins

DE v RH (CC) (unreported case no 182/14,
19-6-2015) (Madlanga J)

This story is by no means unique: High School friends become lovers, get married, have children and portray the picturesque middle-class suburban family... until one spouse steps outside of the marriage and commits adultery.

Such is the story of DE and RH. In this case the plaintiff's wife (Mrs H) moved out of the matrimonial home and instituted divorce proceedings against the plaintiff because the marriage had irretrievably broken down. The plaintiff alleged that the marriage had broken down because of an adulterous affair that Mrs H was having with the defendant. Mrs H alleged that her marriage had broken down prior to her relationship with the defendant and that she only became romantically involved with the defendant after she had left the marital home.

The plaintiff sued the defendant in the Gauteng Division, Pretoria (GP) for injury and insult to self-esteem (*contumelia*) and loss of comfort and society (consortium) of his spouse. The High Court agreed and awarded the plaintiff R 75 000 for damages with interest and costs.

The matter was taken on appeal by the defendant to the Supreme Court of Appeal (SCA) (*RH v DE* 2014 (6) SA 436 (SCA)) and later the Constitutional Court (CC). The SCA in considering the case, raised whether it was justified to have the delictual claim for adultery as a legal action in our law in the light of current societal norms, public policy and the changing *mores* of our society. The SCA also raised whether it was time to re-evaluate and develop the common law to bring it in line with constitutional values.

The SCA found that the action derived from the *action iniuriam* and based on adultery, which afforded an innocent spouse a claim for both *contumelia* and loss of consortium was no longer wrongful and did not attract liability and, therefore, should no longer form part of our law. The CC confirmed the SCA's decision.

Considerations by the courts:

• Public policy

In the judgment, the SCA took into account the changing attitude of South Africans towards adultery and the institution of marriage. While the SCA

recognised that the legislature should be primarily responsible for law reform, it recognised that courts are obliged to develop the common law to promote the spirit, purport and objectives of the Bill of Rights and to reflect the changing social, moral and economic fabric of society.

The SCA found that the *mores* of society or the legal convictions of the community are significant in determining wrongfulness of conduct in delictual liability – courts should have regard to the changing norms of society when determining wrongfulness.

Adultery is no longer a criminal offence; abolished due to lack of enforcement. South African courts apply a no fault principle to divorce actions, polygamous marriages are recognised, as well as civil unions. The traditional notion of the family has changed. These legal developments are all signs of a transformative public policy in a constitutional democracy. The moral fabric of society has changed and if our laws do not change with it, they will be archaic.

The SCA reasoned that the changing morals of modern society, nationally and internationally, no longer justified a delictual action against an adulterous third party. The CC ruled that these actions lack the delictual element of wrongfulness and must be abolished to bring the concept of wrongfulness in line with 'the community's general sense of justice'.

• Comparative law

The SCA also considered comparative common law jurisdictions that inherited the action from the English law and found that the action had been abolished. The reason for the abolition in these jurisdictions were mainly that the action was no longer aligned to the current considerations of morality; created grave disadvantages and that on a balance its continued existence could not be justified.

• The protection of the institution of marriage

On a purposive interpretation of the law, both the SCA and CC, explored whether the action actually achieved its purpose, which was to protect the institution of marriage. Both courts considered whether the abolishment of these actions would degrade the institution of marriage or, leave it more vulnerable as

they may serve as a justifiable deterrent against committing adultery.

After extensive consideration, the deterrence argument fell short on several points:

- Adultery is generally not planned, and even when it is, participants in an adulterous relationship continue on the basis that the infidelity would not be discovered.
- Criminal sanctions usually have more of a deterrent effect than civil claims – and yet the crime of adultery was abolished more than 100 years ago.
- Adultery is often the result of a deteriorating marriage and not the cause of it; as expressed by Mrs H in this case.

Ultimately marriage is an institution regulated by law, which creates enforceable legal duties, but the bedrock of marriage is founded in the personal morals of the parties who are charged to maintain that marriage. An action against a third party would do little, if anything at all, to fix an already broken marriage.

• The injured innocent spouse

The very notion of compensating an innocent spouse was analysed. Traditionally women were viewed as property of their husbands. Husbands could only divorce their wives with an act of parliament – thus infidelity was viewed as a terrible blow to a man's ego and, therefore, the need for compensation was justified. However, now divorces are no fault based and men can easily divorce an adulterous wife. Also there is more sympathy for an innocent spouse than shame in modern society. Society does not hold an innocent spouse in less esteem.

One would assume that the innocent spouse's feelings are more tarnished by their partner's infidelity than the conduct of the third party. After all, the guilty spouse was meant to be faithful and committed to a trusting relationship.

• Constitutional rights of dignity, privacy, freedom of association and children

In considering the matter, the SCA and CC found that the rights of the innocent spouse must be weighed up against that of the adulterous spouse and the third party. Each of the parties has the right to freedom of association, security and privacy.

This action unduly infringed on individual's rights to privacy and freedom of association. It forced parties to disclose their intimate interactions to the court in giving testimony and placing their private lives under a microscope. It intrudes into the consenting person's right to have a sexual relationship with whom-ever he or she chooses. It undermines the rights of a third party who did not undertake to be faithful to anyone. The children caught up in the middle of such a claim may also be subject to adverse publicity and emotional trauma.

Although the infringement of dignity suffered by the innocent spouse cannot be denied, it must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party and this, along with social norms

and the current attitude towards adultery, does not justify the continuance of these actions within our legal system.

Way forward

The SCA's judgment, was subsequently upheld by the CC, and abolished the claims for both *contumelia* and loss of consortium. The SCA also made no comment on other claims based on the *actio iniuriarum*, which relate or are connected to the institution of marriage such as the action for abduction, enticement and harbouring of someone else's spouse, which are still enforceable in law.

Also no comment was made by the SCA on the continued existence of the claim against a third party based on patrimonial harm suffered by the innocent spouse through the loss of consortium

of the adulterous spouse, which could include loss of supervision over the household and children and preferred to leave that as the subject for consideration for another day.

Given our transformative public policy and the judicial willingness to develop the common law, one can be sure that there is bound to be further development of this area of law in the near future.

• See also 'Delict' report in law reports 2015 (Jan/Feb) DR 53 and 'Adultery' report in 2015 (Aug) DR 45.

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By
Ananias
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Constitutional Court in *Mhlongo v S; Nkosi v S* (CC) (unreported case no 148/14, 149/14, 25-6-2015) (Theron AJ) restores common law position existed before *Ndhlovu and Others v S* [2002] 3 All SA 760 (SCA)

The Constitutional Court (CC) has restored the common law position that extra-curial statements against co-accused are inadmissible. The court held that admitting extra-curial admissions against a co-accused unjustifiably offends against the right to equality before the law. The court further held that if the extra-curial statements were excluded, there is insufficient evidence to secure convictions against the applicants.

Prior to the court arriving at its decision, the court questioned what the remaining case against the applicants was. It was very clear that at the close of the state's case, the only evidence against the applicants was the extra-curial statements of the co-accused. If the trial court had correctly declared the evidence inadmissible, the applicants may have been entitled to be discharged at that stage. In any event, at the end of the trial, the evidence as a whole was insufficient to ground the applicants conviction.

Traditionally the common law prohibited the admission of extra-curial statements against co-accused. This common law prohibition stemmed from English common law. *Halsbury's Laws of England* 4 ed (Durban: LexisNexis 1990) vol 11 (2) at para 1131 summarised the position of English common law as that: 'Where several persons are accused of an offence, and one of them makes a confession or an admission, that con-

fession or admission is evidence only against the party making it. Statements made, like acts done, by one of several accomplices or co-conspirators in pursuance of the common design, are evidence against the others, but statements which are not made in pursuance of the common design are evidence only against the makers.'

South African common law indicates that admission by one accused against a co-accused is inadmissible, even if it is made to a magistrate or peace officer.

The CC had jurisdiction – since there are constitutional issues involved in the case – namely, the right to equality before the law and to a fair trial. These are fundamental rights protected in the Bill of Rights. The issue at the heart of the appeal, was the constitutional tenability of the decision in *Ndhlovu*, which allows extra-curial statements to be admitted against a co-accused if it is in the interests of justice to do so, is a constitutional issue and is of significant public importance. Accordingly, it is in the interests of justice for the CC to intervene.

In *R v Barlin* 1926 AD 459 at 462 the Appellate Division confirmed that statements by an accused were admissible against their makers: 'The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made – in the sense that it has not

been induced by any promise or threat proceeding from a person in authority.'

Section 216 of Criminal Procedure Act 51 of 1977, before it was repealed, provided that: '[N]o evidence which is of the nature of hearsay evidence shall be admissible if such evidence would have been inadmissible on the thirtieth day of May 1961'. The effect of this section had been to prohibit, subject to defined common law exceptions, the admission of hearsay evidence.

In the *Ndhlovu* case, the main question before the Supreme Court Appeal (SCA) was whether an accused's extra-curial statements incriminating a co-accused, if disallowed at the trial, can nevertheless be used as evidence against the other accused. The court allowed the admission of an extra-curial admission made by one accused against all the accused as hearsay evidence in terms of s 3(1)(1) of the Law of Evidence Amendment Act 45 of 1988 even if it is disavowed by its maker. The reason behind this was that the probative value of an extra-curial admission depends on the credibility of its maker at the time of making it and not at the time he appears in court.

The common law rule that an extra-curial statement by an accused is inadmissible against a co-accused was relaxed in *Ndhlovu*.

Section 3 of the Law of Evidence Amendment Act 45 of 1988 (LEA Act) provides that 'hearsay evidence shall not

be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court having regard to –

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.’

Section 219A of Criminal Procedure Act 51 of 1977 provides that: ‘(1) Evidence of any admission made extrajudicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained –

(a) be admissible in evidence against such person if it appears from such document that the admission was made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and

(b) be presumed, unless the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission was made voluntarily by such person’.

In *Litako and Others v S* 2014 (3) All SA 138 (SCA) the accused were convicted principally on the basis of a statement made by the first appellant to a magis-

trate which, although exculpatory in respect of him, implicated the other appellants to a greater or lesser degree. The first appellant contested the admissibility of the statement, denying the truth of its content and that it had been freely and voluntarily made. Although the first appellant testified during a trial-within-a-trial held to determine the admissibility of his statement, he did not testify in his defence in relation to the merits of the case against him. The other appellants and their co-accused all testified and denied any involvement in the events on which the charges were based. The trial judge in his decision made reference to the judgment of *Ndhlovu* and *S v Molimi* 2008 (3) SA 608 (CC) as authority for admitting the statement by the first appellant as evidence against the others in terms of the provisions of s 3(1)(c) the LEA Act. In relation to the doctrine of common purpose, the court in *Litako* had regard to the decision of this court in *S v Mgedezi and Others* 1989 (1) SA 687 (A) and concluded that all of the accused had acted in concert in perpetrating the offences.

The SCA in *Litako* imposed a blanket exclusion of all extra-curial statements against co-accused. This was irrespective of the relevance of the evidence in question and the minor contribution it could have to the state’s case. The SCA recently held in *Machaba and Another v S* [2015] 2 All SA 552 (SCA) at para 23 that it has authoritatively held in *Litako* ‘that the extra-curial confession or admission of one accused is inadmissible as evidence against another accused’.

The common law position has long been in existence as in *R v Baartman and Others* 1960 (3) SA 535 (A) at 542 the Appellate Division considered the common law rule that an extra-curial statement of one accused was inadmissible against a co-accused. ‘It follows that Baartman and Kock were convicted because the trial court found on his confession that Honey [a co-accused] was one of the murderers, and that they had been in his company not long before and not long after the murder. In convicting Baartman and Kock the trial court excluded from its consideration the statements in Honey’s confession which directly implicated them, but it used the confession to establish an essential part of the chain of inference leading to their conviction, namely, that Honey had taken part in the murder. This was clearly wrong.’

The court in *Ndhlovu* seemed not to have had regard as to whether the LEA Act altered the common law. In interpreting a statute it cannot be inferred that it alters the common law unless there is a clear intention to do so. The CC in *Mhlongo* held that the LEA Act altered the common law in relation to hearsay evidence but it did not alter or intend to alter the common law in rela-

tion to the admissibility of extra-curial statements made by an accused against a co-accused.

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

The court held that differentiation between accused implicated by confessions versus admissions cannot be lawfully sustained. It is not designed to achieve any legitimate purpose. It is an irrational distinction that violates s 9(1). It cannot be saved by the an open and democratic society based on human dignity, equality and freedom limitations clause contained in s 36 of the Constitution because this limitation on the right to equality before the law is not ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

Section 15 (1) of the Canadian Charter of rights and freedoms provides that ‘... [e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’

Conclusion

Since there were some scholars who felt that the decision of the SCA in *Litako* to have imposed a blanket exclusion of all extra-curial statements against co-accused, irrespective of the relevance of the evidence in question and the minor contribution it could have had to the state’s case it left some questions unanswered. The CC has now brought this issue of extra-curial admission by an accused against a co-accused to finality. The CC has realised that admission of extra-curial admission against co-accused unjustifiably offends against the right to equality before the law and held that the interpretation adopted in *Ndhlovu*, that extra-curial admissions are admissible against co-accused in terms of s 3(1)(c) of the Evidence Amendment Act, creates a differentiation that unjustifiably limits the s 9(1) right of accused implicated by such statements, and as a result of that found that it was so fair and justifiable to restore the common law position that existed prior *Ndhlovu*. The current position now is very clear that should extra-curial statements be excluded, and the evidence left before the court is insufficient to secure convictions against an accused, he must be acquitted.

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By
Alan
Lewis

The invalidity of a taxpayer's objection

This article, will consider the legal basis on which the South African Revenue Service (Sars) may declare an objection to be invalid and identify the remedies, which are available to an aggrieved taxpayer.

In particular, it will consider the invalidity of an objection, where a taxpayer has allegedly failed to produce the necessary supporting documents. It will also consider the legislative requirements for a valid objection.

In conclusion, the article will illustrate the law by means of a case study.

The law

In terms of r 7(2), of the rules (GN R550 GG 37819/11-7-2014 in terms of s 103 of the Tax Administration Act 28 of 2011), which prescribe the procedure to be followed in lodging an objection and noting an appeal against an assessment (the rules), '[a] taxpayer who lodges an objection to an assessment must –

(a) complete the prescribed form in full;

(b) specify the grounds of the objection in detail including –

(i) the part or specific amount of the disputed assessment objected to;

(ii) which of the grounds of assessment are disputed; and

(iii) the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;

(c) if a SARS electronic filing service is not used, specify an address at which the taxpayer will accept delivery of SARS's decision in respect of the objection as well as all other documents that may be delivered under these rules;

(d) sign the prescribed form or ensure that the prescribed form is signed by the taxpayer's duly authorised representative; and

(e) deliver, within the 30 day period, the completed form at the address specified in the assessment or, where no address is specified, the address specified under rule 2.'

It is important to note that an objection must 'specify the grounds of objection *in detail* ...' (my italics). In simple terms, a taxpayer must set out the full story, warts and all.

In most cases, that would require preparing the grounds of objection, in a separately typed document, instead of simply inserting a brief description of

the grounds, on the notice of objection form, which Sars prescribes. There is no place for a 'Dear Sir' letter, addressed to Sars, asking it to allow the objection. 'Detail' means just what it says: Detail. An objection should contain the facts, and law, which will be presented to the tax court, and which would prove your case.

This rule, does not require a taxpayer to attach the supporting documents, to the objection: The taxpayer must simply specify them, in the objection.

Within 30 days of receipt of the objection, Sars may require the taxpayer to produce the additional substantiating documents necessary to decide the objection, as prescribed by r 8(1) of the rules. Presumably these documents, are the documents, which the taxpayer is obliged to specify in its objection, as referred to in r 7(2)(b)(iii), quoted above.

In terms of r 7(4), where a taxpayer delivers an objection, that does not comply with the requirements of sub-r 7(2), Sars may regard the objection as invalid, and must notify the taxpayer accordingly, and state the ground for invalidity in the notice. This notice must reach the taxpayer, within 30 days of delivery of the invalid objection.

The taxpayer's remedies: Notice of invalidity

Firstly, the taxpayer may submit a new objection, within 20 days of receipt of the notice of invalidity, or on application by the taxpayer, such extended period, which Sars may allow (r 7(5) of the rules). Secondly, tucked away in r 52(2)(b) of the rules, is a provision that allows an aggrieved taxpayer, to apply to the tax court, by way of a notice of motion, for an order declaring the objection to be valid.

The case study

I was recently consulted in a matter where Sars had issued a notice of invalidity to a taxpayer. After the consultation, it was agreed that a new objection would be prepared, and submitted to Sars, which would prove that he was indeed not a resident of South Africa, for the tax periods in question, and that consequently, he was not liable to tax in this country.

The grounds of objection set out in detail, the names and addresses of his foreign employers in China and Thailand; it also set out the fact that the taxpayer had lived abroad for a number of years,

and had only briefly visited family in South Africa during this time. The objection contained precise details of the taxpayer movements, as well as the details of the foreign taxes, which he had paid.

In support of his objection, the taxpayer attached copies of his employment contract, his certificate of employment, as well as his tax returns. He also tendered delivery of his rather voluminous passport, which reflected his movements during those tax periods.

In reply to his objection, Sars requested the following 'supporting information', so that it could 'process the objection' –

- the days that the taxpayer had spent in South Africa, on a company letterhead;
- the income he had received in South Africa, also on a company letterhead, and

- details of the days he had spent working in South Africa. In addition, Sars also wanted to know whether or not, the taxpayer had worked on a rotation basis.

Sars did not identify the legal provision, on which it based this request.

In the first place, this request was most unfortunate, as all of this information was contained in the detailed objection. All Sars needed to do, was read it.

Secondly, in the light of the grounds of objection, and the terms of r 8 of the rules, the request was legally invalid, as it requested documents, to which the taxpayer had not referred to in his objection. The only other document, which Sars could legally request, and which had not yet been supplied to it, was his passport, to which he had referred in the objection.

The taxpayer informed Sars accordingly, and in response, Sars issued a notice of invalidity, because he had failed to supply the documents, which it had requested. In my opinion, there was no legal basis on which to issue the notice of invalidity, as Sars could not demand the information, which it had requested.

In response to Sars notice of invalidity, the taxpayer could either pay the assessed taxes, or submit another objection, or seek an order from the tax court, confirming that his objection was valid. Before he could launch the application, common sense prevailed, and Sars allowed the objection.

It is most unfortunate to note that Sars' notice of invalidity, incorrectly informed the taxpayer, that he only had ten days, instead of 20 days, in which to submit another objection. It also failed

to inform him that he could approach the tax court for an order declaring his objection to be valid.

Conclusion

Taxpayer and tax practitioners must consider notices of invalidity carefully,

in light of both the grounds of the particular objection, and the provisions of r 7 of the rules.

A notice of invalidity may only be issued in certain prescribed circumstances. They may just find that the notice is without substance, and that the Tax

Court would in all probability agree with them, that the particular objection is indeed valid.

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NEW LEGISLATION



NEW LEGISLATION

Legislation published from
3 – 31 August 2015

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

BILLS INTRODUCED

Criminal Matters Amendment Bill B20 of 2015.

Public Service Commission Amendment Bill B21 of 2015.

Refugees Amendment Bill B19 of 2015.

COMMENCEMENT OF ACTS

Geomatics Profession Act 19 of 2013.
Commencement: 1 August 2015. Proc29 GG39052/3-8-2015.

Property Valuation Act 17 of 2014.
Commencement: 1 August 2015. Proc30 GG39052/3-8-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990

Amendment of standards and requirements regarding the export of dairy products. GN713 GG39099/14-8-2015.

Companies and Intellectual Property Commission

Accreditation of the Independent Music Performance Rights Association as a representative collecting society. GN680 GG39066/7-8-2015.

Construction Industry Development Board Act 37 of 2000

Best practices for contractor enterprises in Grades 5 to 9. BN163 GG39101/14-8-2015.

Electricity Regulation Act 4 of 2006

Renewable energy IPP procurement programme 2015 in terms of the Electricity Regulations on New Generation Capacity. GN733 GG39111/18-8-2015.

Financial Markets Act 19 of 2012

Amendment to the Strate Rules. BN174 GG39139/28-8-2015.

Health Professions Act 56 of 1974

Amendment of rules relating to the registration by medical practitioners and dentists of additional qualifications. BN164 GG39127/21-8-2015.

Long-term Insurance Act 52 of 1998 and Short-term Insurance Act 53 of 1998

Fit and proper requirements. BN158 GG39095/14-8-2015.

Magistrates' Courts Act 32 of 1994

Creation of magisterial districts and establishment of district courts in the Limpopo and Mpumalanga provinces (coming into effect on 1 December 2015). GN669-672 GG39055/4-8-2015.

Medicines and Related Substances Act 101 of 1965

Declaration of undesirable medicine. GN734 and GN735 GG39114/19-8-2015 and GN739 GG39121/20-8-2015.

National Credit Act 34 of 2005

Suspension of the implementation and enforcement of the Affordability Assessment Regulations for six months effective from 13 March 2015. GN756 GG39127/21-8-2015.

National Land Transport Act 5 of 2009

National Land Transport Strategic Framework in terms of s 34. GenN823 GG39092/13-8-2015.

Occupational Health and Safety Act 85 of 1993

Guidelines for Lift, Escalator and Passenger Conveyor Regulations, 2009. GN R763 GG39132/28-8-2015.

Petroleum Pipelines Act 60 of 2003

Amendment of regulations. GN R764-765 GG39142/28-8-2015.

Quantity Surveying Profession Act 49 of 2000

Amendment of guideline tariff of professional fees. BN170 GG39134/28-8-2014.

Rules Board for Courts of Law Act 107 of 1985

Amendment of the rules relating to the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa (rules 44 and 70). GN781 GG39148/31-8-2015.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Ndwedwe. GN745 GG39127/21-8-2015.

Establishment of a small claims court for the areas of Newcastle and Utrecht. GN747 GG39127/21-8-2015.

Establishment of a small claims court for the area of Port St Johns. GN746 GG39127/21-8-2015.

Superior Courts Act 10 of 2013

Proclamation of Phuthaditjhaba Circuit Court as one of the circuit court venues of the Free State Division. Proc35 GG39106/14-8-2015.

Value-added Tax Act 89 of 1991

Amendment of para 8 of sch 1 to the Act. GN R723 GG39100/14-8-2015.

Water Research Act 34 of 1971

Increase of rates and charges. GN719 GG39099/14-8-2015.

DRAFT LEGISLATION

Draft Public Service Regulations, 2015 in terms of the Public Service Act 103 of 1994. GenN800 GG39051/3-8-2015.
Draft Refugees Amendment Bill, 2015. GenN806 GG39067/6-8-2015.
Amendment of the Civil Aviation Regula-

tions, 2011 in terms of the Civil Aviation Act 13 of 2009 for comments. GN R706 GG39086/14-8-2015.
Draft Agricultural Product Standards Amendment Bill, 2015. GenN826 and GN712 GG39099/14-8-2015.
Amendment of the regulations relating to the registration by emergency care

practitioners of additional qualifications in terms of the Health Professions Act 56 of 1974. GN738 GG39120/20-8-2015.
Draft Merchant Shipping (Radio Installations) Amendment Regulations, 2015 in terms of the Merchant Shipping Act 57 of 1951. GenN875 GG39149/31-8-2015.



EMPLOYMENT LAW

Employment law update



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Can a party be joined to proceedings after conciliation?

In *Kunyuzo and Another v Ace Wholesalers (Pty) Ltd and Others* [2015] 7 BLLR 683 (LC), the Labour Court (LC) was required to consider whether a party that was not invited to conciliation could be subsequently joined to the proceedings. In the recent decision of the Constitutional Court (CC) in *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Others* [2015] 3 BLLR 205 (CC) (see also 2015 (March) DR 39) it was held that joinder in the absence of conciliation against the party concerned was not permitted. Steenkamp J considered this case but found that the facts in *Kunyuzo* were distinguishable from the facts in *Intervolve* and thus Steenkamp J reached a different conclusion to that of the CC.

What distinguished the *Kunyuzo* case from the CC decision in the *Intervolve* matter, was that this case involved employees who were dismissed prior to a transfer of a business as a going concern in accordance with s 197 of the Labour Relations Act 66 of 1995 (LRA). The employees alleged that their dismissal

was related to a transfer and thus was automatically unfair. The new employer, Temba Big Save CC, to whom the employees alleged that their employment should have transferred, was not a party to the initial proceedings. The employees, however, sought to join the new employer in the matter before the LC on the basis that it had a direct and substantial interest in the matter as their employment should have been transferred to Big Save in accordance with s 197.

Steenkamp J found that in the case of disputes arising from transfers of employment in accordance with s 197 of the LRA, the new employer may be subsequently joined as it has a substantial interest in the outcome of the dispute. This is particularly because should the employees seek reinstatement and be granted such relief, they would be reinstated to the new employer. To support this finding, Steenkamp J relied on the CC decision in *Western Cape Workers Association v Halgang Properties CC* 2004 (3) BCLR 237 (CC) in which it was held that the 'new employer' needed to be joined to the proceedings so that the new employer would be bound by a reinstatement order.

Steenkamp J was of the view that given the fact that the effect of s 197 is that

the new employer steps into the shoes of the old employer, the new employer should be joined to the proceedings. This view is supported by the finding of the Labour Appeal Court in *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 ILJ 953 (LAC) in which it was held that employees who have instituted proceedings against an old employer must pursue those proceedings against the new employer instead of the old employer where there has been a transfer of a business as a going concern as the consequences of s 197 is that the new employer assumes liability for all actions done by the old employer and thus the employees have a right against the new employer.

Steenkamp J accordingly granted the joinder application.

Requirements for suspension

In *Tsietsi v City of Matlosana Local Municipality and Another* [2015] 7 BLLR 749 (LC), the municipal manager was placed on suspension pending the outcome of an investigation into serious allegations of financial misconduct against him. The employee alleged that the suspension was unfair and sought an order declaring the suspension to be invalid, unlawful and of no legal force and effect as he alleged that a fair process had not been followed in suspending him and the allegations of misconduct were vague.

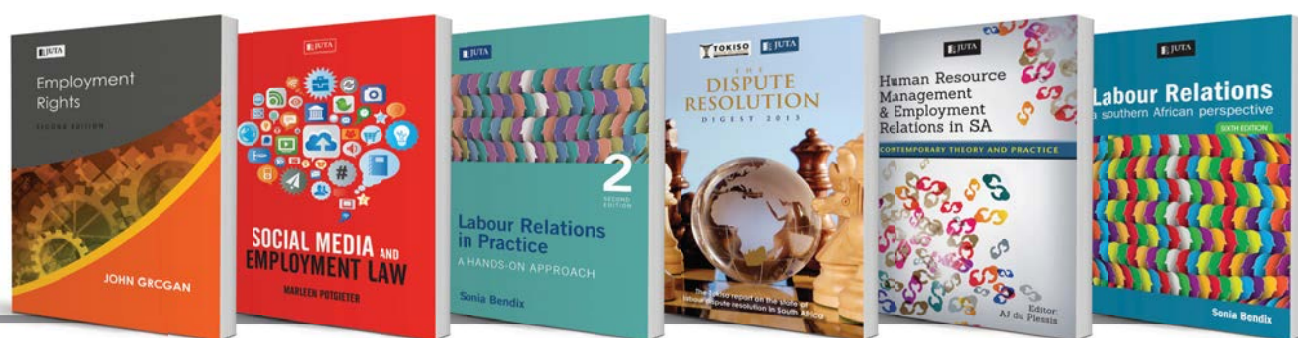
In this case, the employee was invited to make written representations as to the reasons why he should not be placed on suspension. He was also provided with a list of some of the allegations against him, which were in the process of being investigated. The employee did not make written representations within the required time frame as he alleged that he required further particulars from the employer in order to do so. Furthermore, the employee alleged that the suspension was defective as it did not comply with the municipal regulations,



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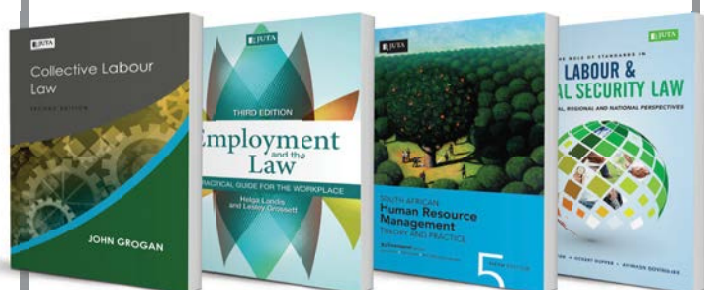
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which require that in order to place an employee on suspension the employer must have a reasonable belief that the employee may jeopardise the investigation. In this regard, the employee relied on two cases, in which it was held that municipal regulations require there to be a reasonable belief that the employee would jeopardise the investigation or be a threat to persons or property before such employee may be suspended. Rabkin-Naicker J held that the cases on

which the employee relied should not be interpreted to mean that the allegations of misconduct are required to be set out in detail. This is because suspension is a precautionary measure and not punitive in nature. The purpose of suspension is to carry out an investigation and protect the employer from suffering further harm. Only after such investigation is conducted would the employer be in a position to provide the employee with sufficient particularity as to the charges

against him or her. Furthermore, Rabkin-Naicker J held that the municipal regulations do not require the municipality to provide evidence that the employee may interfere with the investigation.

It was held that adhering to the employee's request for further particulars may actually jeopardise the investigation as the employee would be able to tamper with evidence and intimidate witnesses. Thus, the application to have the suspension declared unlawful was dismissed.



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Setting aside a settlement agreement

Cindi v Commission for Conciliation, Mediation and Arbitration and Others (LC) (unreported case no JR2610/13, 4-8-2015) (Molahlehi J).

Subject to s 145 of the Labour Relations Act 66 of 1995 (LRA), the Labour Court (LC) in terms of s 158(1)(g) has the power to review the performance of any function provided for in the LRA on any grounds that are permissible in law.

Relying on this section read with s 158(1)(j) of the LRA, the employee approached the LC to have a settlement agreement, concluded under the auspices of the Commission for Conciliation, Mediation and Arbitration, set aside on the basis that the conciliating commissioner unduly and improperly influenced her into settling her alleged unfair dismissal dispute.

The employee alleged that the commissioner 'inappropriately persuaded' her into signing the settlement agreement by advising her she had no prospects of success on the merits of her case. As a result of this advice the employee signed an agreement with her employer whereby it was agreed that the employee would receive R 1 825,20 from the 'Road Freight Agency Council'. This payment seemingly was in respect of the employee's outstanding leave pay held by the council.

On the strength of the decision in *Ka-*

sipersad v Commission for Conciliation, Mediation and Arbitration and Others (2003) 24 ILJ 178 (LC) the employee argued that the commissioner committed a misconduct by advising her on the substantive merits of her case and in so doing, improperly influenced her into entering the settlement agreement. The commissioner's misrepresentation, according to the employee induced her into signing the aforementioned agreement which, on a proper understanding of the merits of her case, she would not have done but for the commissioner's undue intervention.

The third respondent employer argued that the settlement could not be set aside as it had not been made an arbitration award in terms of s 142 of the LRA and in addition the agreement was not a ruling made by the commissioner but rather an agreement reached by the parties and merely recorded by the commissioner.

While the court accepted that in the *Kasipersad* case the court set aside a conciliation process, as well as the ensuing settlement agreement on the grounds that the commissioner in that case exercised an improper influence in persuading the employee to withdraw his case, there had been other judgments which held that a settlement agreement, which was not made an arbitration award in terms of s 142, could not be set aside on review. On this point the court quoted, at para 15, with approval from the decision in *Malebo v Commission for Conciliation Mediation and Arbitration* (LC) (unreported case no JR1508/2009, 15-4-2010) (Lagrange AJ).

Molahlehi J also referred to other authorities wherein the LC set aside a conciliation process having found the commissioner committed a reviewable act in allowing a consultant into proceedings, but did not set aside the settlement agreement, which was reached by the parties themselves under circumstances where the conciliating commissioner did not unduly influence either party into settling the dispute.

With reference to the *Malebo* case and other similar judgments, the court held:

'I align myself with those decisions that say that a settlement agreement that has not been made an arbitration award in terms of s 142 of the LRA cannot be reviewed. In my view the correct analysis of cases similar to the present is to appreciate that the Commissioner in facilitating a settlement agreement has no decision-making powers. In this respect it may well be that during the facilitation process the Commissioner improperly influences one of the parties in arriving at a settlement agreement. In that case the settlement agreement would be invalid because it would have been improperly concluded. However, whatever the role and influence the Commissioner may have had in the conclusion of the agreement, the outcome remains the decision of the parties and not that of the Commissioner.'

In my view, the third respondent is correct in its contention that the remedy in challenging the agreement that came into existence due to the alleged undue influence by the Commissioner, lies in the common law principles of contract. It is in this regard trite that the validity of an agreement in terms of the general principles of contract can be challenged under the following grounds:

- impossibility of performance.
- duress and/or undue influence.
- misrepresentation and/or fraud.'

The court also observed that in seeking to set aside an agreement, an applicant could not rely on the merits of his or her dispute which gave rise to the settlement agreement, as what the employee attempted to do *in casu*, but was limited rather to the aforesaid considerations.

From the above quote it seems that under these circumstances the appropriate recourse open to a party who wants to set aside an agreement reached at conciliation, would be to pursue the same recourse one would embark on to set aside a contract on one or more of the common law grounds listed above.

The court dismissed the application to review and set aside the settlement agreement with no order as to costs. □

By
Meryl
Federl

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
<i>AJHRLJ</i>	African Human Rights Law Journal	University of Pretoria	(2015) 15(1)
<i>DJ</i>	De Jure	University of Pretoria	(2015) 48(1)
<i>EL</i>	Employment law	LexisNexis	(2015) 31.3
<i>ILJ</i>	Industrial Law Journal	Juta	2015 vol 36 July
<i>JJS</i>	Journal for Juridical Science	University of the Free State	(2014) 39.2
	LitNet Akademies (Regte)		(2015) 12 (2)
<i>PLD</i>	Property Law Digest	LexisNexis	(2015) June
<i>SAJCJ</i>	South African Journal of Criminal Justice	Juta	(2015) 28.1
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2015) 3

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Nkosi, T 'Where ignorance is bliss tis folly to arrest, or is it?' (2015) 3 *TSAR* 662.

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Botha, M 'Permission to alter a window in a sectional title scheme – who has the say?' (2015) June *PLD* 6.

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By
Bouwer
van
Niekerk

The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight

Much has been written in the press and elsewhere about the recent judgment of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (WCC) (unreported case no 16703/14, 8-7-2015) (Desai J) – the highly publicised matter concerning the ostensible abuse of emolument attachment orders (EAOs) by micro-lenders and debt collectors. An in depth study about the morality and legality of the EAOs falls outside the ambit of this article. Rather, this article will evaluate the court's reasoning as to how it concluded that, in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 (NCA) applies, s 45 of the Magistrate's Courts Act 32 of 1944 (MCA) does not permit a debtor to consent in writing to the jurisdiction of a magistrate's court other than that in which that debtor resides or is employed.

In the judgment, the court pointed out that the most disturbing feature of the matter was the manner in which micro-lenders forum shopped for courts to entertain their applications for judgment and the issuing of EAOs. It was common cause that the micro-lenders obtained most of their orders from courts located great distances from where the debtors resided and worked. It was argued and accepted that by doing this, the debtors were denied their rights to access the courts and enjoyment of the protection of the law.

In considering the issue of jurisdiction, the court found that the legislative provisions that are relevant are:

- Section 45 of the MCA, which provides for circumstances in which parties may consent to the jurisdiction of a court to determine any action that is otherwise beyond its jurisdiction.
- Section 65J(1)(a) of the MCA, which provides that an EAO must be issued from the court of the district where the employer of the judgment debtor resides, carries on business or is employed.
- Section 90(2)(k)(vi)(bb) of the NCA, which provides that the provision of a credit agreement is unlawful if it expresses on behalf of the consumer a consent to jurisdiction of any court seated

outside the jurisdiction of a court in which the consumer resides or works.

- Section 91 of the NCA, which provides that a credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement that contains a provision that would be unlawful if it were included in a credit agreement.

The court found that s 45 and 65J of the MCA cannot be read together. The court held that, due to the fact that s 65J(1)(a) stipulates that EAOs may be issued from the court of the district where the employer of the judgment debtor resides, carries on business or is employed, the narrow provisions of s 65J cannot be reconciled with the broad provisions of s 45.

The court also found that '[i]t is a well-established principle in law that where two provisions are contradictory, the provision that is specific trumps the provision that is general. In this case, the provisions of section 65 are specific in that they govern emoluments attachment orders. Accordingly, section 65J quite clearly trumps section 45.'

The court furthermore found that the broad approach taken by s 45 directly contradicts and undermines ss 90 and 91 of the NCA, as the underlying rationale to the limitation of jurisdiction contained in ss 90 and 91 is the protection of consumers. Thus, s 45 of the MCA undermines the objects or purposes of the NCA.

In addition, the court found that the fact that the NCA's jurisdiction provisions trump s 45 is also supported by the following:

- The interpretative principle that states that when the provisions of a later Act are inconsistent with the provisions of an earlier Act, the later Act supersedes the earlier provisions. The NCA came into force on 1 June 2006, while s 45 of the MCA came into force in July 1945.
- The NCA establishes a protective regime aimed at preventing the exploitation and abuse of consumers. The broad consent provided for in s 45 of the MCA fails to protect consumers. In the circumstances it is clear that s 45 of the MCA is inconsistent with ss 90 and 91 of the NCA and is trumped by the latter provisions.

Taking cognisance of the above, the

court found that if s 45 is properly interpreted in the context of the MCA (and also in light of the Bill of Rights), it does not apply to causes of action based on agreements covered by the NCA. 'It follows that when a debtor admits that he or she is liable for a debt and consents to an EAO, section 45 does not permit that debtor to consent to the jurisdiction of a court outside of the district where the debtor works or resides.'

Although I agree with the eventual finding of the court, I am of the opinion that the court had an ideal opportunity, in addition to the above, to consider and incorporate the findings made in *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP). In this case, the court had among others to, consider in which magistrate's court a debt counsellor must bring an application for debt counselling on behalf of an over-indebted consumer. This is significant, as the consumer's rights were evaluated in the context of the NCA and in respect of agreements that are governed by the NCA. Similarly, in the case under discussion, the ruling that the court made was also in the context of proceedings brought by a creditor for the enforcement of any credit agreement to which the NCA applies.

In the *National Credit Regulator* case, the court dealt with the question of jurisdiction as follows:

'The general rule regarding jurisdiction is "*actor sequitur forum rei*". The plaintiff (or applicant) ascertains where the defendant (respondent) resides, goes to his forum, and serves him with the summons (notice of motion) there". Having regard to this general rule, an applicant must bring his or her application in the magistrate's court that has jurisdiction in respect of the person of the respondent.'

The court then proceeded to deal with s 28 of the MCA – the section that deals with jurisdiction in respect of persons.

Section 28(1) reads as follows: 'Saving any other jurisdiction assigned to a court by this Act *or by any other law*, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other;' (my italics). In interpreting this section, the court found that the debt counsellor must refer the matter to the appropriate

magistrate's court, to wit the one that has jurisdiction in respect of the person of the consumer. The reasoning was that this is so due to the fact that the essential purpose of the debt review procedure is to protect the consumer who is over-indebted or to whom reckless credit has been granted.

Due to the fact that the use of EAOs

necessarily implies that a consumer is either over-indebted or someone to whom reckless credit has been granted or both, coupled with the fact that those agreements are governed by the NCA, I am of the opinion that the reasoning by the court in the *National Credit Regulator* case is exactly akin to the reasoning that the court (in the case under discussion)

should have, in addition to its reasons, included in making its ruling pertaining to jurisdiction.

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A guide to the Protection of Personal Information Act

By Elizabeth de Stadler and Paul Esselaar

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In the last years of the 20th century, as we took our first uncertain steps into the information society in which we live today, data protection legislation was the initial jurisprudential effort to address the potential abuses heralded by computers to the privacy of our information. Accelerated exponentially by the advent of the Internet and cellular technologies, the very rapidly developing jurisprudence facilitating the protection of the fundamental human right of privacy has been the cornerstone in shaping law relating to novel applications of technology in the 21st century. In South Africa, the recognition of privacy as a fundamental human right was enshrined in our Constitution in 1996. Regrettably, the mechanisms for the protection of this constitutional right would only become a reality 20 years thereafter, with the likely commencement of the Protection of Personal Information Act 4 of 2013 (POPI) in 2016.

Consistent with the lamentable reticence to embrace technology as part of their daily lives and therefore our law, South African lawyers have generally taken the enactment of POPI extremely lightly. With very few exceptions, South African lawyers are not properly equipped to deal with the enormous impact that the Act will have on their own practices, let alone advice that they may be required to provide to clients. It is against this background that the publication of the first book on POPI is to be welcomed.

The authors are to be congratulated on providing a concise and easy to read explanation of POPI, which addresses numerous key points and frequently asked questions relating to the processing of personal information. Their explanations of the law are also supplemented by 'rules of thumb' that are helpful in establishing some of the essential actions

to be taken in complying with POPI and alerting readers to provisions of POPI that may be unclear and potentially in conflict with existing law.

In addition, the authors have provided useful references to guidelines and other information published in jurisdictions that are more mature than South Africa in protecting personal information. This is important as it can be confidently predicted that the Information Regulator will take into account the constitutional imperative to consider and, where appropriate, apply laws developed in other jurisdictions. In many instances lawyers will be well advised to consider the detailed guidelines and approaches taken in other jurisdictions to the processing of personal information.

Due to the dynamic nature of the protection of personal information, the rapid rate at which technologies disrupt current concepts of processing of information and the development of a novel legal concepts (such as 'Do not track', 'The right to be forgotten' and the right not to be subject to geolocational surveillance) as well as the rulings that can be expected from the regulator. It will be necessary for the authors to revise the publication regularly, if it is to remain relevant. In doing so the authors are encouraged to address the importance of information security in the protection of privacy of information. Information security has developed as a direct response to data protection legislation in those countries that took the initial steps in this direction some 30 years ago. It is a discipline, which is not confined to technologists, and the development of the discipline has been a collaborative effort between technologists, lawyers and other subject experts. Therefore, while the authors indicate the importance of collaboration with technologists in a useful annexure to their commentary entitled

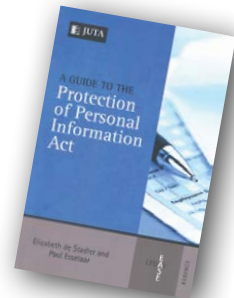
'POPI checklist', it must be recognised that addressing the information security issues will be critical to the achievement of compliance with POPI. Further, if responsible parties are serious about the protection of personal information, they will have to develop information security skills as a core competency within their organisations. These changes will, as the authors have emphasised, require ongoing training.

This book is a must read for all lawyers. Our professional duty to protect the confidentiality of client information is identical in principle to the protection of personal information. Unfortunately, the safeguards developed for paper and text have little or no application in electronic communications and records. Commentaries on the subject make the point that the protection of the privacy of information is impossible without information security.

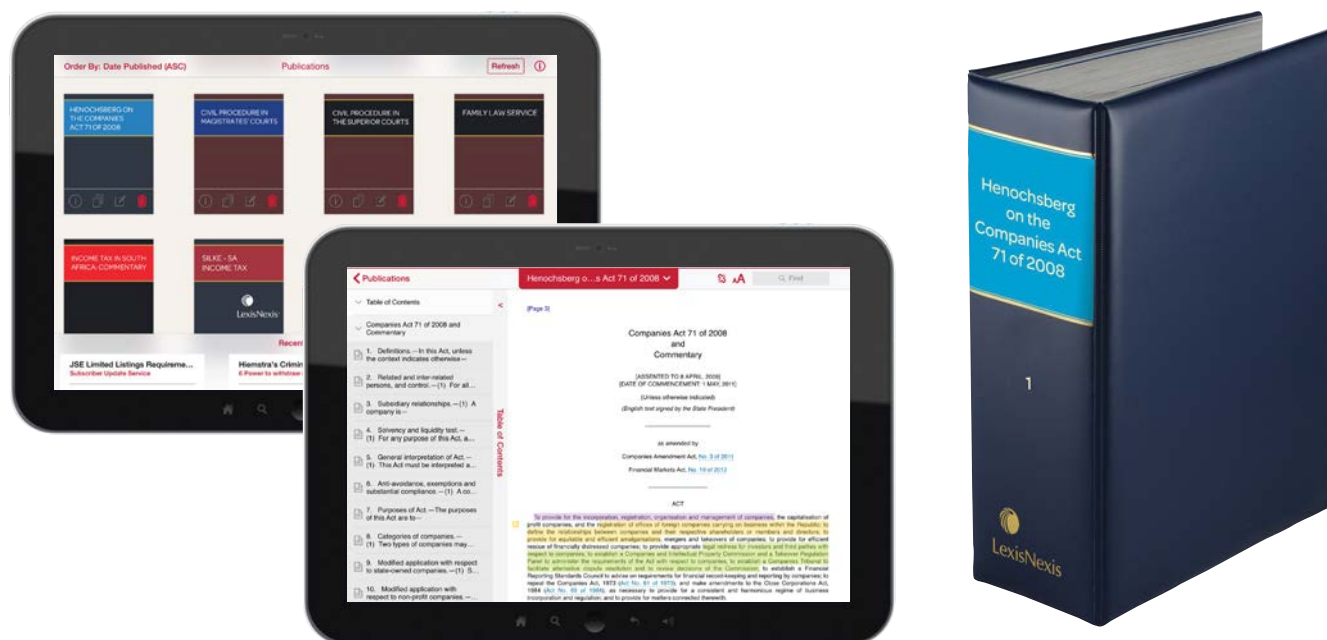
It is also a book that should be recommended by lawyers to their clients. While lawyers can assist clients in identifying and addressing their compliance obligations, it is the processors of personal information themselves that have to develop the appropriate safeguards for the protection of information.

From an educational perspective the book provides material not only for businesses but also those universities who are seeking to introduce information and communications technology law in general, and in particular the protection of personal information, into their curriculae, in preparing our future lawyers for the realities of the 21st century.

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