

SEPTEMBER 2015

PERSPECTIVE ON EAOS – A PROBLEM OR AN ABUSE?

Examining s 40 of the
Mental Health Care Act:
Unlawful arrest and detention

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shaping the new
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Elevating
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Celebrating 25 years of the School for Legal Practice





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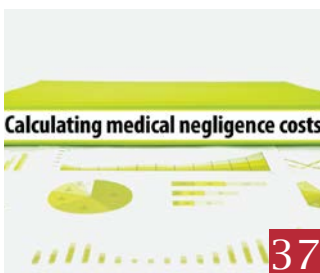
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FEATURES

30 Perspective on EAOs – A problem or an abuse?

In this article, **Arnoud van den Bout** writes that it is wise to first obtain the context of a problem before calling for corrective action in the form of stricter legislation or additional regulation. It is no use putting in place more rules when a problem can be addressed by the existing framework. There are problems in the debt collection industry. However, these problems do not seem to constitute an abuse.

34 Examining s 40 of the Mental Health Care Act: Unlawful arrest and detention

Violence committed by individuals with mental illness is a problem in the community. It was foreseeable that the legislature would introduce measures intended to prevent such violence. Section 40 of the Mental Health Care Act 17 of 2002 deals with the apprehension and detention of violent persons suffering from mental illness. In this article, **Moffat Ndou** discusses s 40 and how it should be implemented.

37 Calculating medical negligence costs

When dealing with a claim for future medical expenses in a personal injury claim, one finds that future medical expenses are sometimes subdivided into further categories namely, surgical expenses, emotional and psychiatric expenses and future treatment, such as medication. The question of future surgical expenses proves to be a problem as it entertains the probability of the occurrence of an uncertain future event. In this article, **Rina Pienaar** and **Prof Antonie van Gelder** discuss the correct way of calculating the costs of an uncertain event.

40 Elevating *culpa* to crime

Murder has a culpa-cousin, in the form of culpable homicide, but for assault, there is no culpa variant. **Safia Karriem** asks why not? As murder has a culpa-cousin and not assault, it begs the question as to the rationale for such different treatment in our law. Both with assault and murder, a form of violence or force is perpetrated against the body of a human being. With the simple distinction that the one crime results in death while in the other not. It merits the rhetorical question as to whether the death of the one victim in relation to murder and the survival of a victim in regard to an assault, is sufficient to justify the fact that murder has a negligent cousin in the form of culpable homicide and assault does not.

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Legal Practice Act: What's happening now?

Since the enactment of the Legal Practice Act 28 of 2014 in September 2014, reasonable progress has been made. To recapitulate, the organised legal profession has entered the transitional phase of the Legal Practice Act. During this phase, the National Forum on the Legal Profession (NF), which was established in terms of ch 10 of the Legal Practice Act – which was enacted earlier this year – is tackling its tasks to iron out all issues and ensure a smooth handover to the envisaged Legal Practice Council (LPC). The NF will be in existence for a period not exceeding three years from February 2015. This transitional phase is the first phase of implementing the Legal Practice Act, with the second phase following once the NF has completed its duty.

Practitioners will be glad to hear that the work of the NF is well under way. The NF has made headway in the process by establishing four working committees to deal with different aspects during the period. The NF has met twice out of its four mandated meetings this year, with another meeting set for 19 September.

Some issues that the NF does not have to deal with, but which the profession must engage with, include s 35 of the Act which governs fees in respect to legal services and the issue of multidisciplinary practices, which has an enabling clause in the Act under s 6(5)(i).

As regards fees, the Rules Board must determine tariff fees for litigious and non-litigious legal services rendered by practitioners, juristic entities, law clinics or Legal Aid South Africa. The Act envisages a legal practitioner providing the client with a cost estimate notice, in writing, specifying all particulars, including –

- the likely financial implications including fees, charges, disbursements and other costs;
- the practitioner's hourly fee rate and an explanation of the right to negotiate the fees;
- an outline of the work to be done in respect of each stage of the litigation process, where applicable;

- the likelihood of engaging an advocate, and an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise; and
 - if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime.
- The estimate must be in writing and must also be explained verbally to the client. Non-compliance by a practitioner with the process can be construed as misconduct and the client is not required to pay any legal costs until the LPC has reviewed the matter and made a determination regarding amounts to be paid.

From the side of the profession, these requirements have raised the following:

- No distinction is made between litigious and non-litigious costs. Therefore, non-litigious work will be bound to the litigious tariffs for the interim.
- It is important to distinguish between bigger commercial clients and individuals.
- It appears as if the Act confuses assessment of fees and setting tariffs.
- A global cost estimate is impractical and unreasonable. Should a fee estimate rather be based on an hourly agreed tariff?
- Classifying failure to provide and explain a written mandate as misconduct appears to be unduly harsh.
- Subsection 11 dealing with non-compliance could be utilised as a delaying tactic by clients to pay their bills.

As already published in previous issues of *De Rebus*, this is an important time as the profession makes its way towards the new dispensation and practitioners are encouraged to make input to the process. This phase will, in essence, determine the future shape of the organised legal profession.

Do you have a question related to the Legal Practice Act or a view on s 35?

If you would like clarity or have a question related to the Legal Practice



Mapula Thebe – Editor

Act or its process, please send your query to derebus@derebus.org.za. *De Rebus* will respond to your query in future publications.

- See LSSA news article 'National Forum starts shaping the new dispensation' in this issue.

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 21 September and 19 October.

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LETTERS

TO THE EDITOR

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

Administration of deceased estates and the accrual system.

The recent article by Clement Marumogae titled 'The beginning of the end – dissolution of marriage by accrual system' 2015 (July) *DR* 36 refers.

Although the author touches on very important practical aspects of the accrual system, should a marriage end in divorce, it struck me how little attention was devoted to possible scenarios where a marriage ends with the death of a spouse.

Making the accrual system applicable to a marriage out of community of property, does not only have benefits. Dealing mainly with the administration of deceased estates, I was confronted with this scenario more than once. A marriage of this kind can have devastating effects for a surviving spouse, especially where the estate of the latter was the one with the bigger growth. This becomes evident in cases of a second or later marriage where a person dies intestate. The children of the deceased (which are not the children of the surviving spouse) will be-

come entitled to the proceeds of 50% of the nett growth in the estate of the surviving spouse after deducting the value of the estate of the deceased. This means that the surviving spouse might have to realise certain of his or her assets, which can include a house, farm or investment, assets that might be important for his or her future survival.

Even where a person dies with a will excluding the surviving spouse and leaving his or her entire will to his or her children from a previous marriage, these heirs will have a claim for the 50% of the growth in the estate of the surviving spouse.

In calculating the claim, it will of course be considered where the money with which the surviving spouse had acquired the asset(s) came from. Was it obtained with an inheritance benefit or by means of a compensation benefit? Was the asset excluded from the accrual system *ab initio*? All these examples will constitute a scenario where assets will not be taken into account for purposes of ascertaining the 'growth' in the estate of the surviving spouse. Matters can get complicated.

In general, I do not find it advisable for

couples to enter into a second or further marriage by way of antenuptial contract where the accrual system will be applicable. More often than not, these spouses already have a family of their own whom they want to benefit from their deceased estates. It is obvious that the estate of the surviving spouse can suffer damages in cases as set out above, at the cost of the eventual heirs of the surviving spouse. This could not have been the objective for instituting the Matrimonial Property Act 88 of 1984. The main purpose was to come to the aid of spouses who did not have the opportunity to amass an estate of their own, at the dissolution of a marriage (in either of the two ways envisaged by the Act) without having to marry in community of property.

A complete article by an expert dealing with problematic results that might arise from the accrual system (including applicable recent law reports) will be appreciated.

Milda Stanton, attorney, Pretoria

Silver lining

With the recent developments in the



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Road Accident Fund (RAF) it is hard to believe that there still are officials employed at the RAF who really strive to finalise matters amicably.

After the implementation of the 'new' Act many practitioners, including myself, were sceptical as to how the matters would be dealt with at the RAF.

During 2014 I dealt with a matter of a claimant who sustained severe injuries leaving him totally disabled. I do not find it necessary to go into details pertaining to the merits and the quantum aspects of this claim.

The claim was dealt with by Willem Pretorius and Annamarie Hammond of the Pretoria office of the RAF, who contacted our offices, requested certain additional information and documentation. After our offices furnished them with the relevant additional documentation and information, several meetings were scheduled between writer hereof and the aforementioned officials of the RAF, where after the matter was settled amicably within a period of two years after the dreadful accident.

Both Mr Pretorius and Ms Hammond dealt with the matter professionally.

So it seems that even the RAF has a silver lining.

Carli Lundy, attorney, Nelspruit



Book announcement

The practitioner's guide to medical malpractice in South African Law

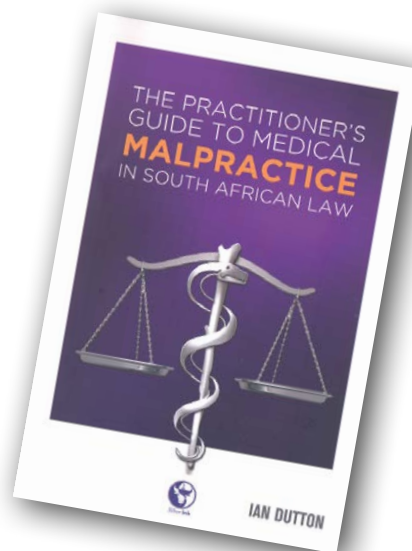
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Constitutional rights education on the spotlight at national colloquium

The Department of Justice and Constitutional Development in partnership with the Foundation for Human Rights held a two-day national colloquium on constitutional education and awareness. The colloquium was held at the St George Hotel in Kempton Park at the end of July.

The director-general of the Justice Department, Nonkululeko Sindane gave the welcome address and the purpose of the colloquium. She said that while there have been a number of initiatives to promote awareness and knowledge of the Constitution, studies reveal that many who live in the country, in particular the marginalised groups, are not aware or have little knowledge of the Constitution and Bill of Rights, adding that they have limited or no access to the Constitution.

Ms Sindane said the aim of the colloquium was to –

- discuss how best to coordinate public awareness of the Constitution and human rights education;
- identify and coordinate existing projects relating to constitutional literacy and draw from experiences to inform future projects;
- build greater awareness and knowledge of the Constitution and human rights; and
- identify solutions to the problem of lack of access to the Constitution.

The keynote address was given by Deputy Justice Minister, John Jeffery, who said that government had put particular emphasis on improving constitutional awareness and on promoting constitutionalism and social justice so as to contribute to social cohesion.

Deputy Minister Jeffery said the Justice Department has allocated R 73 million in the 2015/16 financial year to this 'crucial' focus area to ensure awareness of the relevance of constitutional democracy and the rights and obligations of persons in this regard.

According to Deputy Minister Jeffery, the Justice Department is entrusted with promoting constitutional development on behalf of the state. 'The Department's mandate, derived from the Constitution, is twofold. On the one hand, it seeks to provide a framework for the effective and efficient administration of justice and to ensure that all people in South Africa are and feel safe ... the Department promotes constitutional development through the development and implementation of legislation and programmes that advance and sustain constitutionalism and the rule of law



Judge President of the Gauteng Division of the High Court, Dunstan Mlambo, speaking on the role of the judiciary in a constitutional democracy at a national colloquium on constitutional education and awareness held in Kempton Park in July.

and support nation building and social cohesion,' he said.

Deputy Minister Jeffery said constitutional awareness entails actively informing people of their rights. He added that making justice accessible and raising constitutional awareness means shaping programmes in such a way that they have the most effect. 'The reality is that many people live in rural areas and not all are literate. Even for those who are literate the Constitution is not always that easy to understand. One has to therefore tailor-make constitutional awareness programmes in a way that reaches people,' he said.

The role of the judiciary in a constitutional democracy

Judge President of the Gauteng Division of the High Court, Dunstan Mlambo, spoke on the role of the judiciary in a constitutional democracy. He said that he believes that the interaction of judges with civil society is imperative for deepening society's understanding of what the judiciary is meant to be doing.

Judge President Mlambo said there is a changed context to the one South Africa (SA) experienced in the immediate post-1994 era, adding that that was the honeymoon period. 'We wanted to show

everyone that we had devised a new constitutional order and we sought to ensure that we would uphold the Constitution and Bill of Rights ... the establishment of the Constitutional Court as the apex court was one of these examples, as well as ensuring a transparent appointment process. Another aspect we worked hard on in the immediate post-1994 era was to assert the right to life principle. This was expressed in the abolishment of the death penalty,' he said.

Judge President Mlambo said the honeymoon phase, however, soon evaporated. He said violent crime became the order of the day, at times threatening the international investment in SA. Courts began to challenge the abolishment of the death penalty, which went hand in hand in questioning the relevance of the Constitution regarding a perceived lenient treatment of violent criminals.

Judge President Mlambo said it is human nature to find a scape goat when there are problems and added that it was important for the judiciary to seize the opportunity to embark on constitutional education programmes by educating people about the right to life.

According to Judge President Mlambo, there is a perception that the country has two justice systems, one for the rich and one for the poor. 'As a judiciary I think we need to do more so that we get to understand what drives this perception and what we can do as a judiciary to ensure that we stop this presumption and assist in embedding the understanding of the Constitution. He added that the judiciary, on its own, was disadvantaged in running constitutional literacy programmes adding that the work lies in the larger segment of society, which is better accessible to others.

Judge President Mlambo said that at most of the engagements that he is invited to, it is all the who's who's that attend the functions adding that the ordinary person in the streets who would probably benefit most at the engagements are never invited. 'If we can engage on those grassroot levels, I am certain it will go a long way in changing the mindset of the justice system,' he said.

Judge President Mlambo said the Constitution clearly provides that the courts are independent and are only accountable to that Constitution. He added that no person or organ of state may interfere with the function of the court and that organs of state must assist and protect the courts to ensure their independence, impartiality, dignity and accessibility. 'The separation of powers means that

the judiciary functions independently of the other two arms of government but more importantly. Our task as the judiciary is to apply the Constitution, this is neither simple nor easy but it is a constitutionally mandated duty,' he said.

Constitutional education from universities to communities

Professor of human rights law at the University of Pretoria, Christof Heyns, spoke on constitutional education from universities to communities. Professor Heyns said there were two methods of learning about the Constitution today involving participation. The first was through the South African National Schools Moot Court Competition and the second was through community service by students.

Professor Heyns said moots have become an extremely popular and effective form of human rights education worldwide – and South Africans have to a large extent taken the lead on that front. 'In 1992, a number of South Africans started what is now the All-African Human Rights Moot Court Competition. This competition is in its 23rd year and almost all African universities participate in the competition,' he said.

Professor Heyns said there are approximately 'one million students in the universities of South Africa. Although many of them face problems, they are a relatively privileged part of our community. In my view we should as a country – and as universities – follow a policy of "no degree without community service". In one way or another, all students – including law students – should perform some form of community service. We know medical and engineering and some other disciplines already do this, but we need to expand this and every student must get the opportunity before he or she graduates. We need to work out the details – who knows, law students can for example serve as coaches for the schools moot – but the principle should be clear. Moreover, an organisation must be established to give students the opportunity to go to less-resourced areas during their holidays to renovate schools and clinics.'

Presenting on the Justice Department's constitutional and human rights education programme, deputy chief law advisor at the Department, Ooshara Sewpaul said 60 000 copies of the Constitution (in English) were printed and distributed to national departments; municipalities; universities and schools; Parliament; resource centers; churches etcetera, adding that 2 000 copies of the Constitution, at R 30 per copy, were printed in each of the official languages and distributed on request.

Ms Sewpaul added that 580 000 copies



Professor of human rights law at the University of Pretoria, Christof Heyns, spoke on Constitutional education from universities to communities at a constitutional education and awareness colloquium in July.

of the slimline Constitution (in English) were printed and distributed to all Grade 12 learners in public schools through the Department of Basic Education and that an additional print run of 50 000 copies was produced to meet requests and were circulated at departmental events.

Ms Sewpaul noted that 1 000 Braille copies of the Constitution costing approximately R 1 300 per copy were also produced and distributed through departmental and community events. These copies will also soon be distributed to, among others, libraries at universities, municipalities, and the community and to institutions for the blind.

A right is of no assistance to its bearer, if the bearer is ignorant of such a right

Speaking on behalf of Legal Aid South Africa, its chief legal executive, Patrick Hundermark, said that it is an accepted principle that a right is of no assistance to its bearer, if the bearer is ignorant of such a right. 'It is therefore imperative for any organisation entrusted with the protection of constitutional rights, to ensure that the public is aware of these rights,' he said.

Mr Hundermark said Legal Aid South Africa has as one of its strategies, the implementation of community education and outreach programs to educate communities about their rights and responsibilities. He added that in the nature of their work, the creation of awareness of constitutional rights permeates every piece of work that they do for their clients.

Mr Hundermark then outlined part of

their program to educate communities about their rights and responsibilities –

Criminal legal aid delivery

- Prison clinics – these are clinics conducted at correctional centres by Legal Aid South Africa (Legal Aid SA) to educate both sentenced inmates and remand detainees about their rights and to provide assistance to those who are not legally represented.
- Visits to secure care facilities – these visits target children in conflict with the law so that Legal Aid SA can educate them about their rights and provide legal representation to those that may not be legally represented.

Civil legal aid delivery

- Community Outreach programmes – Legal Aid SA practitioner's regularly visit community structures such as civic bodies, as a way of gaining access to a wider audience for human rights education.
- Civil legal aid clinics – these are events or lectures conducted by Legal Aid SA's civil units to highlight specific human rights issues.
- Self-help modules – Legal Aid SA has a large body of self-help documentation available on its website as a further resource available to the public.

Mr Hundermark said there were also programmes focused on children. These are:

- Fair play events – every justice centre has to partner with a local school for purposes of conducting a fair play event. These events are aimed at educating children about the value of respecting the rights of others, and being fair in one's dealings with your fellow citizens.
 - Posters – Legal Aid SA's communications department, in conjunction with justice centres ensures that posters dealing specifically with children's rights are placed in strategic places.
 - Radio and television broadcasts – Legal Aid SA's practitioners regularly participate in radio and television discussions dealing with human rights. In some areas, radio stations have allocated permanent slots where listeners can phone in for advice with issues affecting their rights.
- Some of the recommendations from the audience included –
- Translating the slimline Constitution into all languages.
 - Making 2016 the 'Year of the Constitution' as the 20th year of the Constitution is celebrated.
 - The adoption of 'Constitution Week'.
 - Looking at whether an audio version of the Constitution is needed.

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Project to address gender transformation of the legal profession launched



Front from left to right: Noxolo Maduba, Nolundi Nyati, Joyce Maluleke, Harshna Munglee, Brigitte Mabandla, Roseline Nyman, Faathima Mahomed, Seehaam Samaai, Pearl Andrews, Ntibidi Rampete, Keketso Maema, Fazoe Sydow, Chandre Brown and Prof Waheeda Amien. Back from left to right: Nonoza Potelwa, Patrick Jali, Ashraf Mahomed and Lucrecia Seafire were at the launch of the National Association of Democratic Lawyers' research project focused on gender transformation of the legal profession in Cape Town in July.

The National Association of Democratic Lawyers (NADEL) has launched a research project focused on gender transformation of the legal profession. The project was launched in Cape Town on 25 July. The theme for the project launch was 'NADEL Moving the Women Agenda Forward'.

Through this project, NADEL aims to conduct interviews, produce a research questionnaire, as well as draw insight and advice on the issue of gender transformation. The research findings will be contained in a report, that NADEL will use to advocate for transformation of the profession, which will be circulated to the relevant government departments, as well as professional bodies.

The keynote speaker at the launch was former Justice Minister, Brigitte Mabandla, who spoke on the journey of struggle for gender justice and equality in South Africa.

Ms Mabandla started off by locating South Africa's journey for gender justice in the global context. She said that since the ratification by the United Nations Member States to Convention for the Elimination of Discrimination Against Women (CEDAW) in 1979 onwards, the status of women in the world had improved. 'Notwithstanding reservations of many countries who acceded to CEDAW, the global impact was emancipatory for women. According to CEDAW has enabled the development of global networks of

progressive people for the advancement of human rights. After the adoption of CEDAW a number of platforms were created enabling smart networking for research institutions and solidarity among populations of our various countries. State parties to such treaties are enabled to collaborate productively. Significantly, today in developing countries such as South Africa, Rwanda, Liberia, Mozambique, Zimbabwe, Namibia and others, women are part of government decision making structures as well as part of business enterprise. As part of the community of nations, South Africa has acceded to CEDAW and is committed to international programmes such as the Beijing Declaration and Platform for Action which is recast as Beijing+20,' she said.

Ms Mabandla said lessons of the post-1994 project of advancing women's human rights in the form of realising substantive equality under the Constitution and that of women's overall socio-economic development should be instructive in the search for transformative solutions for the legal profession, adding that it is indisputable that the state is committed to advancing women's socio-economic empowerment.

Ms Mabandla said the well-documented struggles of women in the past 80 years has provided a solid foundation for organised resistance by women in South Africa. 'In the past 35 years there has been intense push for women's emancipation and development. The dynamic

assertion of women against apartheid in the 80s is well documented', she said.

Ms Mabandla spoke about how the Malibongwe Conference of 1989 laid the foundation for a firm inclusion of women's rights and developing post-Apartheid policies affirming gender justice, adding that it was attended by formations of women from both inside South Africa and from exile.

According to Ms Mabandla, the period 1990 - 1994 should be remembered as a time when women across the political, racial and class divides worked together for gender justice. 'I want you to remember that the importance of this period is the fact that ordinary women's voices in the discourse of transformation and Constitution making was sought and accommodated. The Women's Coalition was established as a forum for consensus building among stakeholders and uniting women for the common good. Without doubt, there were inherent tensions among stakeholders and that was to be expected, and notwithstanding these tensions the Coalition held together. As such, the legacy of struggle networks and the continued work of gender activists are assets upon which we should build,' she said.

Speaking on the concept note of the research project being launched, Ms Mabandla said it presented a wide scope of work, including a review of policy, legislation and interventions undertaken by state actors and others. She added that mainstreaming gender equality re-

mained a big challenge and that she was hoping that a working definition of this issue would be developed.

Ms Mabandla said law reform should relate to society at large adding that the project of repealing apartheid legislation is being done and transformational legislation relating the new policies have in large parts been promulgated. She commended NADEL for organising the project and said that it was timely and has the potential of being a game changer for other professions and/or the business sector.

Ms Mabandla concluded her speech by saying: 'It is a fact that, notwithstanding a heritage of strong professional bodies, legally qualified women are not as easily recognised for their ability as their male counterparts are in state agencies, the private sector and at tertiary institutions. This is not intended to undermine the significant gains made over the years, the pace has been slow and this is the problem. The public discussions of recent judicial hearings at the JSC was focused on the women candidates precisely because of the concern of having fewer women on the Bench when in fact the country has qualified women candidates. A lingering question for me is the impact that women have on a system that is built on patriarchy and what is to be done to ensure that the women in the profession become change agents and should continue not just as individuals but as a critical mass that must transform the legal and judicial system for the public good. I am, therefore, of the view that as our democracy matures our focus for transformation should be on greater inclusion of women. We should place greater focus on the transformative trajectory of changing perspectives and entrenching values of equality in action. The outcome of such research should help us understand the impediments to progress and how these can be overcome. The study will be invaluable to the state as it may contribute to the on-going policy review processes in state departments.'

The need for gender transformation

Director at the Justice Department, advocate Joyce Maluleke, spoke about the need for gender transformation in South Africa. Ms Maluleke said that many women imagined that the battle for social justice was won when the Constitution became supreme law of the land, because it is intended to be 'transformative' in nature and the promotion of gender equality is a central part of the Constitution's quest for a society based on equal enjoyment of all human rights, freedoms and life opportunities.

Ms Maluleke said injustices against women generally and especially those

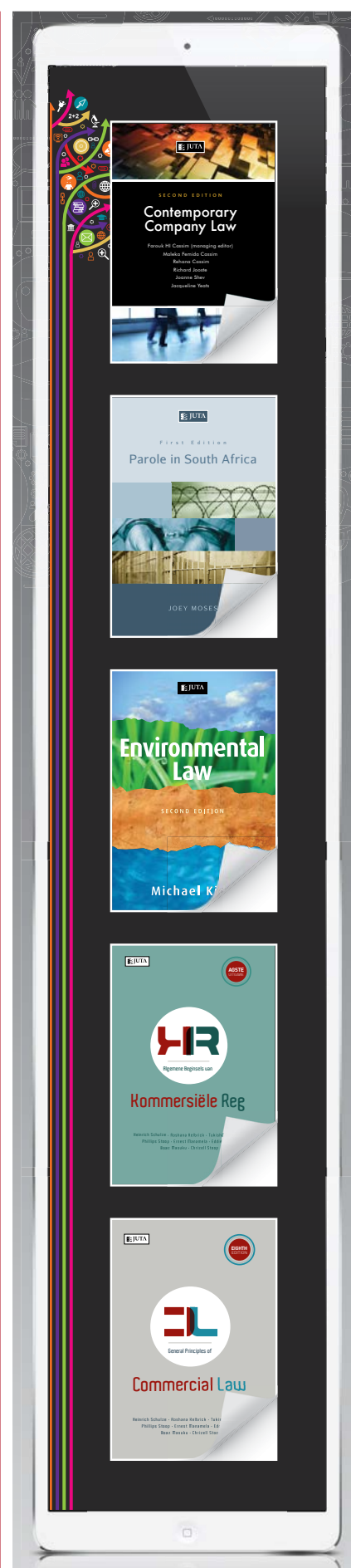
women at the intersection of race and gender, has virtually disappeared. 'This includes all laws and formal policies that precluded women from entering any occupation or profession of their choice, owning property or engaging in any business venture. However, the whole world remains patriarchal, with men dominating all aspects of life - from the family to politics, business and the workplace, including the legal profession. Patriarchy is the philosophy underpinning women's subordination on the one hand and male supremacy on the other, often referred to as the oldest form of discrimination in the world and a truly international phenomenon,' she said.

Ms Maluleke said dislodging the legacy of patriarchy and masculinity, the foundations of sexism, simply goes against the grain of the existing power brokers and thus is considerably more challenging because the social patterns of exclusions and disadvantages that women experienced in the past remain a systemic feature of the South African social and economic landscape. 'That is why always before the Judicial Service Commission (JSC) interviews; you will hear debates about women's lack of experience to be appointed as judges. What is experience and who decides?' she questioned.

According to Ms Maluleke, the failure to systematically identify, address and remove the under lying causes of discrimination, results in continued imbalances and inequalities between men and women and between races within the country.

Ms Maluleke said there has been and still is a great deal of confusion defining transformation and gender transformation. 'Before one can identify, measure and tackle transformation, especially gender transformation, it is necessary to understand transformation and gender transformation. The *Oxford Dictionary* defines transformation in an organisational context, as a process of profound and radical change that orients an organisation in a new direction and takes it to an entirely different level of effectiveness. Unlike "turnaround" (which implies incremental progress on the same plane) transformation implies a basic change of character and little or no resemblance with the past configuration or structure,' she said.

She added: 'This is not the situation with the legal profession within its encompassing context. The legal profession has gone through a turnaround not transformation: Black people still get a raw deal. At the conclusion of apartheid, the legal profession, especially the judiciary for the purpose of continuity survived the political transition almost entirely intact; while the legislative and executive branches of government were replaced, the only innovation in respect



of the judiciary was the creation of a Constitutional Court, which would serve as the highest court of appeal for constitutional members and the JSC to oversee transformation on the Bench. At the conclusion of apartheid, the South African judiciary was almost exclusively white and male, now impressive strides have been made.'

Ms Maluleke concluded by saying that the transformation of the legal profession is not all about representation only that leads to women having to assimilate to a system not designed for them.

The research project

NADEL national executive committee member and project team coordinator, Sehaam Samaai, set out the aim, purpose and objectives of the project. She stressed that the South African legal profession did not have the luxury of another 100 years to rectify the imbalances.

Ms Samaai said the project aims to facilitate dialogue sessions between and with women lawyers and legal professionals in the legal profession with the objective of stimulating robust debates and identifying key issues and challenges facing the legal profession in respect of gender transformation.

She added that the dialogue sessions will focus on the increased efforts required to promote the integration of women in the legal profession and the creation of an enabling environment for women to pursue a career in law.

'A national research survey will also be conducted with the support of progressive organisations on the challenges facing women lawyers 20 years after democracy and compile a comprehensive report on its findings for further deliberations by relevant decision makers,' she said.

Ms Samaai added: 'An analysis of the 20 years of Democratic Governance indicates that considerable progress has been made in respect of the formal recognition of gender equality and the promotion of women's rights in particular. In order to give effect to the rights enshrined in the Constitution in respect of gender equality we need to begin an examination and reflection on the mainstreaming of gender equality and women's rights and whether women within



Former Justice Minister, Brigitte Mabandla, at the launch of the National Association of Democratic Lawyers' research project focused on gender transformation of the legal profession in Cape Town in July.

the legal profession are experiencing substantive equality within the workplace.'

Ms Samaai said the transformation of the legal profession is essential in order to ensure transformation of the judiciary as well as transformation within our society. 'The legal profession is but a microcosm of our society and so as we reflect on the challenge of gender transformation and equality as a country, we within the legal profession are required to reflect inwards on our own development in order to ensure that we reflect outwardly the vision of the Constitution,' she said.

She added: 'Discussion, research and advocacy is needed in order to assist in identifying key issues and challenges in respect of gender transformation within the legal profession. We aim to facilitate a paradigm shift where the impetus is not merely on numbers as an indicator of transformation, but where women and gender equality find substantive rights enjoyment, protection and promotion.'

NADEL will draw from existing research conducted in order to structure and guide its own research endeavors and to guide dialogue and engagements over the next months. Its aim is to engage with the other professional bodies such as the Black Lawyers Association, the South African Women Lawyers Asso-

ciation, the General Council of the Bar, as well as the law societies to enable wide participation and input from members of the legal profession.

The project will culminate in a research report that aims to confirm existing assumptions in respect of barriers to gender transformation and to also identify possible barriers, as well as explore possible areas of intervention and methodologies that can be implemented in order to advance substantive gender equality and transformation of the legal profession.

The first dialogue session

Dialogue sessions will also be conducted within the nine provinces with lawyers and legal stakeholders. The first such session was held in Cape Town on 1 August. According to Ms Samaai, more than 60 women lawyers attended the session.

Topics that were discussed included the meaning of transformation and whether it meant different things for different people, the barriers that impeded female and black lawyers, as well as recommendations to bring about change.

The women lawyers present indicated that the following aspects have to be addressed in order to promote transformation and realise gender transformation -

- transforming institutional cultures, which entrenches sexism, patriarchy and discrimination by tackling it honestly and boldly;
- transforming institutional systems that are rooted in patriarchal and colonial legacies including males in leadership positions within these structures to champion gender transformation;
- men to be included in dialogue discussions to address the discriminatory practices;
- increasing opportunities for mentorship and confidence building for black women lawyers; and
- cooperation and support by critical institutions such as government, Chapter 9 institutions, Legal Aid South Africa, Bar councils, law societies, etcetera.

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The plight of human rights defenders

The Foundation for Socio-Economic Justice, the International Commission of Jurists, the Lawyers for Human Rights and a number of other organisations hosted a welcome back dinner for the recently released Swazi human rights lawyer Thulani Maseko and the *Nation* magazine editor, Bheki Makhubu, at the Kutlwanong Democracy Centre in Pretoria on 16 July.

The dinner was attended by civil society representatives and the wives of Mr Maseko and Mr Makhubu. The keynote address titled '[t]he price paid by human rights defenders' was presented by human rights lawyer, advocate George Bizos.

Mr Makhubu and Mr Maseko were charged and convicted for contempt of court for articles they wrote in the *Nation* magazine in Swaziland. The articles criticised Swaziland's former Chief Justice Michael Ramodibedi. It was widely believed that the imprisonment of the two was an attempt to silence their criticism of the judiciary and the Swazi monarchy.

The pair spent 15 months in prison before the Supreme Court overturned both their convictions and sentences on 30 June 2015.

Judicial activism

Mr Bizos said judges, human rights lawyers and journalists who were concerned about the actions of the apartheid government were victims of calculations to silence them, suppress them, jail them or execute them.

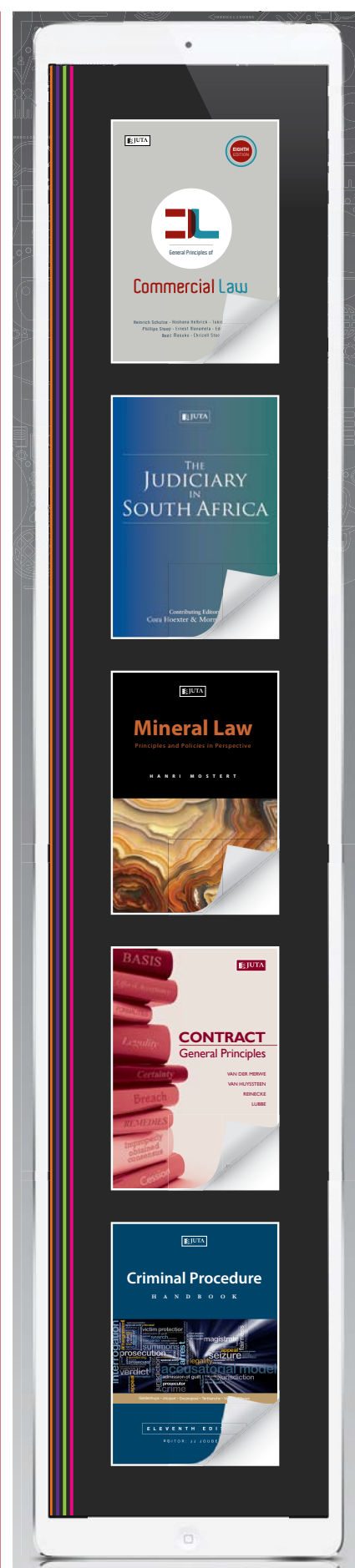
According to Mr Bizos, the pre-Apartheid government applied Roman-Dutch Law and in the latter part of the century English law influenced them. 'The rights guaranteed by the Magna Carta were generally respected by colonised South Africa. The judges who were appointed after the establishment of South Africa as a state respected the rule of law, despite the fact that many of the laws of the time were unjust relating to the lives, property and freedom of non-white people. A fierce dispute raged between those who applied the black-letter of the law as it was (even if this had unjust consequences), and those who argued that the principles of natu-

ral justice must be applied when making judicial decisions.'

Mr Bizos said the right to vote is one such illustration, adding that the coloured people of the Cape initially had a right to vote for a limited number of parliamentarians, who had to be white. 'The Constitution of the Union of South Africa provided for the supremacy of its parliament consisting of an assembly and a senate. The Constitution could not be amended without a two-thirds majority of the combined Houses of Parliament and Senate,' he said.

He added: 'The government led by Dr DF Malan, elected in 1948, took steps to remove the coloured people from the voters' roll, despite not having a two-thirds majority and maintaining that the provision of the Constitution was impliedly revoked when South Africa became an independent state in the early 1930s. Action was taken by representatives of the coloured people to declare that the legislation passed by Parliament was invalid. The Court of Appeal, consisting of five white judges, held that the legislation depriving them of the vote was invalid. The Apartheid government did not accept the correctness of the decision of the Court of Appeal and passed an Act declaring Parliament as a court of appeal capable of a ruling. The Court of Appeal again declared the legislation invalid. The Apartheid government would not give up and in order to get a two-thirds majority, they passed legislation to increase the number of senators substantially so that they could get the two-thirds majority in Parliament to deprive the coloured people of their right to vote. The representatives of the coloured people again went to court contending that the packing of the Senate was invalid, that it was passed in bad faith, and was not binding.

'The government had an answer: They increased the number of judges on the Court of Appeal by increasing the number from five to 11 and packing it with six additional judges who were unashamedly close to the politicians who appointed them. They were appointed for the specific purpose of overruling what the five judges had previously decided. The majority of the newly constituted court of 11 judges voted ten for and one against. The only dissenting



judge was Oliver Schreiner who held that in his view the packing of the court was an unlawful stratagem. He was considered one of the outstanding judges, and was expected to be appointed Chief Justice, which the Apartheid government blocked. Ultimately, the vast majority of the people of South Africa, and more particularly the disenfranchised blacks, Indians, coloureds and Chinese had no option but to accept what Judge Shreiner considered trickery.'

Mr Bizos said that during Apartheid, numerous tools were used to suppress non-white people including the tactic of 'detention without trial' for human rights activists. He said activists could be detained for three months at a time without a trial, and were often released and then thrown back on the same day. Other tactics included house arrest and banning order, whereby people were banned from attending gatherings or moving outside one's home. 'A number of attorneys were banned, detained, forced into exile, and prevented from doing legal work. There was also the enactment of Acts by Parliament and Executive Proclamations, depriving persons of the right to vote, to own property, to move about the country without a pass, preventing them from attending certain schools and marriages between persons of different colour, and many other ways', he said.

Mr Bizos said a number of the judges set aside proclamations and, to the great annoyance of the government, would declare that such laws could not be laws, because they were not just.

Mr Bizos then spoke about human rights defenders who furthered the cause of judicial activism. Speaking on the two human rights lawyers he knew, the late Former President Nelson Mandela and Bram Fischer who he said 'sacrificed their freedom in defending the rights of all people in South Africa'.

Mr Bizos said President Mandela was constantly being persecuted by the law. He added that there was an incident where President Mandela was not recognised as an attorney by a magistrate. Mr Bizos said an attempt was further made to disbar him after he was convicted of having taken part in the defiance campaign in the early 1950s. The court dismissed the application to have him disbarred, because even though he had been convicted of an offence, there was no moral turpitude in the commission of the offence and it did not mean that his participation could prevent him from continuing to be a member of an honourable profession. Despite his conviction of participating in the defiance campaign, he was given a suspended sentence.

'President Mandela was also arrested on a charge of treason in 1955 and was acquitted in 1961. His practice as an



Human rights lawyer, advocate George Bizos giving the keynote address at the welcome reception of Swazi human rights lawyer Thulani Maseko and the Nation magazine editor, Bheki Makhubu at the Kutlwano Democracy Centre in Pretoria in July.

attorney in partnership with Oliver Tambo was seriously affected by this. He was then sentenced to five years imprisonment in 1962 for organising a strike and leaving the country without permission. In 1964 he was sentenced to life imprisonment on numerous charges of sabotage. He spent 27 years in prison. Because I was both his friend and his lawyer, I visited him regularly on Robben Island. Some of us even became *persona non grata* for the numerous political cases that we did. Although threatened and deprived of citizenship for 22 years, I continued to take on these political cases. Cases which have shaped my life. One such case I took on was that of my friend Bram Fischer,' said Mr Bizos.

Mr Bizos said Mr Fischer was not only one of the greatest lawyers he knew but was also one of the greatest victims of the Apartheid regime. 'On 23 September 1964 Bram was arrested after much suspicion on behalf of the security police, and charged under the Suppression of Communism Act [44 of 1950]. He was considered a traitor of Afrikaner nationalism. Bram refused to leave to London on bail, on the advice of many of his colleagues. He believed that South Africa was his home and he could not leave it permanently. He was too honourable for his own good,' he said.

Mr Bizos added that during the latter half of the Rivonia Trial, it became apparent that the security police had concrete evidence revealing that Mr Fischer was one of the senior leaders of the Communist Party and was actively involved in the underground movement. He was ultimately disbarred and convicted of the charges brought against him. 'I was

one of his lawyers in the trial with Sydney Kentridge acting as my senior. Bram was released from prison many years later to the home of his brother on very strict conditions when he was diagnosed with terminal cancer. He died soon afterwards. He led a very hard life, defending his beliefs,' he said.

Mr Bizos noted that during the trial, Mr Fischer made the following statement: 'There must be a rational and purposive relationship between law and morality, and particularly between law and justice. The law must have a morally defensible content. ...Your laws do not have that content. I am therefore not obliged to obey them.' Mr Bizos added that despite the harsh consequences for his beliefs, Mr Fischer maintained his courage throughout the trial and the remaining years of his life. 'He was one of the key contributors to our non-racial democracy,' he said.

Speaking on the activism of judges during Apartheid, Mr Bizos said judges are generally encouraged to avoid becoming or giving the appearance of being committed to a political party or policy. He added that judges are bound by their oath of office to not show prejudice against particular persons or groups of persons and that they should not make offending comments against generally accepted moral standards. 'They should avoid gratuitous controversy,' he said.

The judiciary and the executive

Mr Bizos also spoke on the relationship between the judiciary and the executive. He said he believes that it is the principle of constitutional supremacy that will dictate the interaction of the judiciary and the executive when dealing with the separation of powers in relation to judicial activism.

Mr Bizos said: 'Often the power of the judiciary is criticised as "counter-majoritarian", as it is not elected; but it is the task of the courts to uphold the Constitution. That task is entrusted to them by our Constitution. There is no doubt that the exercise of judicial review, where the laws of Parliament or the conduct of the executive are set aside, is potentially imposing and may even overwhelm. In crucial times, it can indeed "determine the destiny of a nation", in Justice Mokgoro's words. The power of the courts will be impotent if organs of state have the choice to disregard court orders.'

Mr Bizos added that a complementary interaction between the judiciary and the executive needs to be fostered, rather than a competitive one. He added that if there is no co-operation between the judiciary and the executive, in Former Chief Justice Mahomed's words, 'the courts could easily be reduced to paper

tigers with a ferocious capacity to snarl and roar but no teeth with which to bite and no sinews to execute their judgments, which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom and pious poetry... Judges, in such circumstances, would visibly be demeaned. But much worse: Human rights could irrevocably be impaired and civilisation itself dangerously imperilled'. He said this interaction will be the determinant of the protection of human rights defenders.

In conclusion, Mr Bizos said even where you have a Constitution like ours, where you have a duly elected and legitimate government, where you have an independently appointed judiciary, it does not mean that you should no longer protest or *toyi-toyi*. 'We need to receive the baton passed on from human rights defenders before us to continue to strive for a country that sees the rights of all being realised. As to what the future holds ... I would like to believe that the institution of the judiciary and Chapter 9 institutions are sufficiently strong to withstand the challenges to come and with the support of civic society to prevent any compromises. As for the continent and abroad, South Africa must continue to set the example,' he said.

Mr Makhubu's jail experience

Mr Maseko and Mr Makhubu also had a chance to share their experience of jail. In his speech, Mr Makhubu started off by saying that being out of prison has been a bit of an overwhelming experience. 'We were sitting in jail literally doing nothing and disconnected from the real world. Sometimes you think that people will forget about you and move on. I did not know that so many people were concerned about our welfare and it was



The Nation magazine editor, Bheki Makhubu, sharing his experience in prison at his and Swazi human rights lawyer, Thulani Maseko's welcome reception in Pretoria in July.

really mind blowing to see all the support and words of encouragement that we received when we left jail on 30 June. I would like to thank everyone because I do not think that things would have played out the way they did without the pressure put on the Swazi government,' he said.

Mr Makhubu said that when they were charged with contempt of court a year ago, former Chief Justice Ramodibedi 'was doing what any sane person should have done, well in the eyes of the authorities in Swaziland, to shut us up and put us in prison because we were writing too many articles complaining about the way Swaziland is run. I believe and know that he had the full support of government in what he did to us and that is why the things that happened went on despite blatant evidence that the whole thing was being manipulated, it was more politics than everything,' he said.

Mr Makhubu said that their charges kept changing. They were charged with contempt of court for breaking the *sub judice* rule but were convicted for contempt of court for scandalising the court because they could not sustain the charge of *sub judice* because their comments had nothing to do with a matter that was in court. 'We commented on an issue where someone was denied a right to legal representation that was the [gist] of our article and as the trial went on, it became clear that the charge was wrong but they needed to convict us so they changed the charge along the way,' he said.

Mr Makhubu reminisced about the day he was charged. He said that he was in South Africa when he received a call from his wife saying the police were looking for him. 'I had the option of not going back to Swaziland but I felt very angry at Ramodibedi for what he was doing, because him and I had been having a run in for five years, I had serious problems with the way he was issuing judgments and his arguments in his court judgments. I just felt that he was abusing the court process,' he said.

Mr Makhubu said what was supposed to be a contempt case that could have taken a day, maybe a week at most, took three months because they were throwing everything at Ramodibedi, essentially to give him the message that he was not going to walk all over the pair as he pleased.

Mr Makhubu considers judges to be very powerful people, perhaps even more powerful than presidents because of the power of their word and the responsibility that they have. 'In Swaziland the judiciary had unfortunately forgotten how important their function is. To take someone to jail is a very serious decision and it is not one that should be taken lightly because to take someone to

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prison is to change their life completely, even if they are guilty,' he said.

Mr Makhubu added that one of the biggest problems in Swaziland was that what the judges had tended to do was to issue judgments without giving a good reason for the decision, 'as if issuing a judgment is an administrative function.' Mr Makhubu appealed to all judges to not forget the seriousness of their decision when sending someone to jail. 'Do not send them to prison if there is any doubt that he may not have done the crime because you are destroying a life,' Mr Makhubu pleaded.

'Ramodibedi might be gone but we must remember that he did not do all that he did in isolation to the Swaziland government. They were also in on it. The political system in Swaziland is rotten and one of the things that the authorities in Swaziland had done was that they needed the judiciary to sustain the promises of Swaziland,' he said.

Mr Makhubu said the previous judges appointed at the then Swaziland Court of Appeal who were a mix of South African judges as well, tended to issue decisions that contradicted what government wanted so they fixed it and eventually all those judges had to go. 'They then

brought in African judges. They were boasting about how African and non-white and how beautiful the Bench now was. Well, that is how we ended up in jail. We went to jail because after the Africanisation of the Bench, judges were taking decision for political experience and not on evidence or on law. But because it was important politically to take people to prison,' he said.

Mr Makhubu said he did not think that it was over. 'Has the judiciary been cured since Ramodibedi has left? I think not. I think the only reason why things have turned out the way they are is because it had become a total embarrassment where the country stood internationally, and it was shutting doors for Swaziland with neighbours and international countries, something needed to be done. I do not think that the judiciary has got an action plan or strategy on how to do things right or how to do things competently. Maybe they have learnt not to be too rash on taking people to prison. As society, we need to keep the judiciary under constant pressure. We need to keep writing those articles and pointing out where the judiciary has erred,' he said.

Mr Makhubu said he was a strong believer in the Swaziland constitution. He

added that the government of Swaziland needed to be reminded of the values in the constitution. 'When the Swaziland constitution came into operation in 2005 some of the people in Swaziland's government who are in power argued that we could not have the constitution over rule the king and that the king cannot be told what to do by a piece of paper. In other words, they were trying to rub-bish the constitution even though it was law. The constitution made it difficult for them to do the things they wanted to do,' he said.

In conclusion Mr Makhubu said he would continue to ask for constitutionality in Swaziland, adding that central to constitutionalism is the judiciary. 'In Swaziland they say the constitution is there but there is a reluctance to give effect to the Bill of Rights to freedom of speech, to freedom of assembly and all those other things that give us dignity and peace of mind and the ability to make informed decisions on our own lives,' he concluded.

• See 2015 (Aug) DR 11.

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Justice Department on target with establishment of sexual offences courts

The Minister of Justice and Correctional Services, Michael Masutha, officially opened the Schweizer-Reneke Sexual Offences Court in the North West province on 22 July.

The opening of this sexual offences court brings the total number of courts that have been upgraded into sexual offences courts to six.

According to Minister Masutha, the court will have specially trained officials and equipment that will assist to reduce any chance of secondary trauma for victims of sexual violence.

In 2013/14 the Justice Department committed itself to establishing 57 sexual offences courts and, to thereafter, continue to gradually and progressively establish additional sexual offences courts.

On 23 August 2013, the first sexual offences court was opened in Butterworth in the Eastern Cape. Twelve sexual offences courts are targeted for completion during this financial year.

At the launch of the Schweizer-Reneke Sexual Offences Court, Minister Masutha said that hardly a week after the launch of the first sexual offences court in Butterworth, a serial rapist who had been

terrorising the community for over four years was convicted and sentenced to 25 life terms for the murders and rape of over 23 elderly women and children collectively. He added that this clearly demonstrates the efficiency of the courts and aggressive stance adopted by police, prosecutors and the judiciary.

Minister Masutha also said the Justice Department has enacted various measures to deal with all forms of gender based violence including sexual offences. 'Some of the progressive legislations include the Domestic Violence Act 116 of 1998; Older Persons Act 13 of 2006, Children's Act 38 of 2005, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Prevention and Combating of Trafficking in Persons Act 7 of 2013. In addition to these acts, President Zuma assented the Judicial Matters Second Amendment Act 43 of 2013 in January 2014 to enable me, in consultation with the Chief Justice and the judiciary, to designate certain courts for the purposes of dealing with sexual offences and related matters,' he said.

In conclusion Minister Masutha shared the Justice Department's success in re-

spect of sexual violence cases on the Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 for the previous financial year. He said the overall sexual offences verdict indicates improved conviction rates. 'Of the 6 165 cases finalised with a verdict, 3 887 (63%) cases were finalised with a guilty verdict. As compared to the previous financial year, the conviction rate has increased from 59,6% to 63%. This rise can be attributed to the re-introduction of the sexual offences courts, which provides specialised services on sexual abuse cases,' he said.

Clarity on new Amendment Act

Meanwhile the Justice Department's Deputy Minister, John Jeffery wrote an article on the new Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), which has been reported on broadly by the media. Deputy Minister Jeffery wrote the article due to many misconceptions about the Act. In the article he explains that the new legislation does not lower the age of

consent to sexual acts to 12 years, the age of consent is still 16 years and has not changed.

Deputy Minister Jeffery further explained that the main aim of ss 15 and 16 of the Act is to protect children, between the ages of 12 and 16 years, from sexual exploitation by adults. However, the new legislation also ensures that children between the ages of 12 and 16 who are involved in consensual sexual acts with each other, will no longer be criminally prosecuted for it.

The article reads: 'Before the amendments came into operation, children who consensually were involved in sexual activities with each other could be investigated, criminally charged and prosecuted

for such activities. Sexual activities could range from kissing and hugging to intercourse – and everything in between. This was set out in sections 15 and 16 of the Act.'

Deputy Minister Jeffery said the law needed to be changed because the provisions of ss 15 and 16 were challenged in the Constitutional Court and found to be unconstitutional.

According to the article, in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) the court found that ss 15 and 16 of the Act infringed an adolescent's right to human dignity and privacy and were not in the best interests of the child, there-

fore, ss 15 and 16 were found to be unconstitutional insofar as they criminalise consensual sexual conduct between adolescents.

The evidence before the court stated that South African children reach physiological sexual maturity during adolescence, between the ages of 12 and 16 years. They undergo various changes in their transition to adulthood and during adolescence, children ordinarily engage in some form of sexual activity, ranging from hugging and kissing to intercourse.

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Communications Minister's legal adviser in good standing

The Law Society of the Northern Provinces (LSNP) has issued a press release stating its concern regarding media reports suggesting that Communications Minister Faith Muthambi's legal adviser, attorney Lugisani Mantsha, was struck from the roll of attorneys on application by the LSNP in 2007 and that he was, therefore, not regarded as a credible witness before the Communications Portfolio Committee.

This statement made by the Democratic Alliance (DA) failed to mention the fact that Mr Mantsha was subsequently found to be fit and proper to practise as an attorney and was

readmitted as an attorney by the High Court on 8 December 2011.

The DA's Gavin Davis had stated that this revelation meant that any legal advice Mr Mantsha gave Minister Muthambi can be discredited, including the removal of three SABC board members earlier this year.

Mr Mantsha had appeared before the Communications Portfolio Committee last month alongside Minister Muthambi, to overturn Parliament's legal opinion that the removal of three SABC board members was unlawful.

The three board members – Rachel Kildass, Ronnie Lubisi and Hope Zinde – were fired earlier this year after Minister Muthambi expressed unhappiness with

the board after sensitive matters were leaked to the media.

The removal of the board members prompted Parliament's Communications Portfolio Committee to seek legal opinion on the validity of Minister Muthambi's decision.

The LSNP stated that Mr Mantsha has in fact been registered with the LSNP since December 2011 as a practising attorney and is in good standing with the law society.

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2015 annual general meetings

The six constituent members of the Law Society of South Africa will have their annual general meetings on the following dates:

Province	Date	Venue	Contact person
KwaZulu-Natal Law Society	16 October	Durban Coastlands Hotel, Umhlanga commencing at 2 pm.	Engela Pienaar (033) 345 1304
Black Lawyers Association	23 – 24 October	Emperor's Palace, Johannesburg.	Lutendo Sigogo (015) 962 0712
Free State Law Society	29 – 30 October	Bloemfontein – Windmill Casino and Entertainment Centre.	Christina Marais (051) 447 3237/8
Cape Law Society	30 – 31 October	Kimberley – Flamingo Casino Complex.	Thergesari Roberts (021) 443 6700
Law Society of the Northern Provinces	31 October	Sun City commencing at 9 am.	Hester Bezuidenhout (012) 338 5949

The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2016.

Nomfundo Manyathi-Jele
nomfundo@derebus.org.za

PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

Hogan Lovells in Johannesburg has four new appointments.



Abie Phooko has been appointed as an associate in the employment law department. He specialises in employment law.



Chantal Murdock has been appointed as an associate in the mining department. She specialises in commercial litigation and assists with mining regulatory.



Kevin Pietersen has been appointed as a partner in the mining department. He specialises in corporate commercial law and litigation.



Clinton Pavlovic has been appointed as a senior associate in the mining department. He specialises in mining law, corporate law, commercial law and litigation.

Cliffe Dekker Hofmeyr in Johannesburg has two new appointments.



Hunter Thyne has been appointed as a director in the finance and banking department.



Deepa Vallabh has been appointed as a director to head cross border mergers and acquisitions for Africa and Asia in the corporate and commercial department.



Gildenhuis Malatji Inc in Pretoria has appointed Stefani Smith as a director in the property law and conveyancing department.

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

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



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

National Forum starts shaping the new dispensation

The National Forum on the Legal Profession (NF) – established in terms of ch 10 of the Legal Practice Act 28 of 2014 will meet for the third time on 19 September since its launch in February this year (see 2015 (May) *DR* 12).

The NF met in Centurion on 18 July for its second meeting since that section of the Act came into operation. It is scheduled to meet at least four times a year and its first report to the Justice Minister was due early last month.

At the July meeting, the NF membership was confirmed and it was resolved that members would not have alternates as the Act did not allow for these. NF members who cannot attend a meeting can present written comments and discuss these with the chairperson, Kgomotso Moroka SC and deputy chairperson, Max Boqwana.

The NF has the duty to set in place the framework to ensure a smooth transition from the current dispensation to the Legal Practice Council (LPC). In order to deal with its extensive list of tasks, which it should complete in 24 months (with an option to approach the Minister for a further year's lifespan). To best utilise the time and skills of the members of the NF, four working committees have been established and the NF members divided into these committees are to start work immediately. An Executive Committee comprising the chairperson, Ms Moroka, Mr Boqwana and the executive officer will oversee the work of the NF and its committees, and report to the Minister at the required intervals.

The **four committees** are as follows:

The **Admin and Human Resources Committee** will deal with the administration and staffing aspects, as well as stakeholder relations. Its first duty was to consider applications for the positions of chief executive and financial officer, which were expected to be filled in August, in consultation with the Justice Director General. The rest of the staff complement would follow. The NF has been provided office space in Centurion, in the same building as the South African Law Reform Commission, but independent from the Justice Department. This committee will also deal with the issue of a consolidated database of all legal practitioners – attorneys and advocates – that will comprise the rolls of the new LPC.

It is critical that practitioners ensure that their details are current and complete with their present regulatory body (for attorneys, that will be your current provincial law society) to ensure that they are captured on the roll at the LPC once it comes into being. The committee will draft a handover plan from the current dispensation to the new dispensation.

Admin and Human Resources Committee members

Lutendo Sigogo	Law Society of South Africa (LSSA): Black Lawyers Association (BLA)
Dali Mpofu SC	General Council of the Bar (GCB)
Dumisa Ntsebeza SC	Advocates for Transformation (AFT)
Krish Govender	LSSA: National Association of Democratic Lawyers (NADEL)
Janine Myburgh	LSSA: Cape Law Society (CLS)

The **Governance Committee** will consider the structure of the LPC and delegation of powers to the provincial councils, as well as the areas of jurisdiction of the latter. In addition, it will make recommendations on the election of members to both the national and provincial councils. The complex issue of funding of the new structures will also be considered by this committee and proposals made to the Minister.

Governance Committee members

Jan Stemmett	LSSA: Law Society of the Northern Provinces (LSNP)
Jan Maree	LSSA: Free State Law Society (FSLs)
Martha Mbhele	LSSA: BLA
Abe Mathebula	Attorneys Fidelity Fund (AFF)
Jurgens Prinsloo SC	National Forum of Advocates (NFA)
Thina Siwendu	Minister's nominee
Greg Harpur SC	GCB
Willem van der Linde SC	AFT
Dumisa Ntsebeza SC	GCB
Thami Ncongwane SC	GCB

The **Rules and Code of Conduct Committee** will develop a code of conduct, as well as rules relating to disciplinary bodies, the lodging of complaints against legal practitioners and any other rules. These must all be gazetted for comment. In the course of its work, the committee – and all the other committees – may come across aspects of the Act, which may not translate well into the implementation. This committee will be responsible for proposing amendments to the Act, if necessary.

Rules and Code of Conduct Committee members

Jan Stemmett	LSSA: LSNP
Janine Myburgh	LSSA: CLS
Jurgens Prinsloo SC	NFA
Mark Hawyes	National Bar Council of South Africa (NBCSA)
Lutendo Sigogo	LSSA: BLA
Thina Siwendu	Minister's nominee
Greg Harpur SC	GCB
Manette Strauss	LSSA: KwaZulu-Natal Law Society

The **Education, Standards and Accreditation Committee** will deal with various aspects of and the rules relating to practical vocational training, competency-based examinations/assessments and institutions that will qualify to conduct assessments. The rules must be gazetted for comment. It will also make recommendations on the right of appearance of candi-

date legal practitioners. Other aspects that it may consider are the LLB degree, compulsory post-qualification professional development and practice management, foreign qualifications, as well as the mobility between the branches of the profession as the Act permits easy movement between the roll of attorneys and the roll of advocates.

Education, Standards and Accreditation Committee members

Jan Maree	LSSA: FLS
Brian Nair	Legal Aid South Africa
Prof Managay Reddi	South African Law Deans Association
Mark Hawyes	NBCSA
Abe Mathebula	AFF
Ismail Jamie SC	GCB
Dali Mpofo SC	GCB
Willem van der Linde SC	GCB
Krish Govender	LSSA: NADEL
Martha Mbhele	LSSA: BLA

Ugandan delegation visit

A delegation of Ugandan members of parliament visited the Law Society of South Africa's (LSSA) Legal Education and Development division (LEAD) in July on a study visit to South Africa. The delegation, comprising members of the Ugandan Legal and Parliamentary Affairs Committee, was visiting various African jurisdictions to investigate training of legal practitioners and how to improve the quality of practitioners entering practice in Uganda.



The Ugandan delegation was led by committee Vice Chairperson, Baka Stephen Mugabi (front, centre) and the LSSA was represented by Strike Madiba, the President of the Law Society of the Northern Provinces, (front, second from the right).



SADC LAWYERS' ASSOCIATION

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About The SADC Lawyers' Association:

The Southern African Development Community (SADC) Lawyers' Association (SADC LA) was established in 1999 in Maputo, Mozambique and is an independent and voluntary association comprising the law societies and bar associations from the 15 member states of Southern Africa called the Southern African Development Community (SADC).

The SADC LA works to promote human rights and the rule of law without fear or favour in the SADC region as well as promote the practice of law and the development of the legal profession. It is the only existing association of all the law societies, law associations and bar associations in the SADC Region. It is, therefore, the authoritative collective voice of the legal profession in Southern Africa and is best placed to lead, coordinate and implement advocacy, litigation and training activities for and with SADC legal professionals.

The SADC LA has implemented several advocacy activities around the suspension of the SADC Tribunal, promoted topical legal issues at high-profile annual conferences, conducted a series of in-country and regional trainings for lawyers to build their capacity in the promotion and protection of human rights, law firm management and contract negotiation, developed and popularized SADC prison guidelines, and conducted training and observation exercises around elections observation to name a few activities. Each legal professional is therefore guaranteed to find something of interest and relevance within the SADC LA programmatic areas.

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- Preferred seating during the Annual Conference and General Meeting Opening Ceremony; and
- Meeting and Photograph Opportunities with the Guest(s) of Honour at the Annual Conference and General Meeting.

(3) Increased Visibility: Online Lawyers' Database – for every year in which the individual member is current on their subscription payments, the member will be featured (name, picture, contact details, areas of practice/expertise) in a SADC Lawyers' Database.

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Swift Code: FIRNZAJJ
Proof of Payment should be sent to prudence@sadcla.org

The membership application form can be obtained from the SADC LA website at <http://www.sadcla.org/new1/node/75> or you can email prudence@sadcla.org to get the application form.

From pilot project to more than just a legal education institution

The LSSA's School for Legal Practice celebrates a quarter century of training candidate practitioners

In 1988 the Council of the then Association of Law Societies (ALS) – the forerunner of the Law Society of South Africa (LSSA) – resolved to launch a pilot course for a six-month, full-time legal training school in Pretoria in 1990. The aim of the pilot was to investigate an alternative to articles of clerkship. At that stage, Keith Wilson was the President of the ALS, Prof JC van der Walt was the Director of Legal Education and Tony Hutchinson chaired the ALS's Standing Committee on Legal Education. The Attorneys Fidelity Fund (AFF) would provide the funding for the school and no tuition fees would be charged.

During 1989 the planning for the school was completed. Nic Swart, an attorney and senior law lecturer, was appointed to design and implement the pilot project together with various sub-committees and members of the profession. Objectives were formulated, syllabi and material compiled, instructors appointed and a marketing campaign launched. The venue for the first school was made available free of charge for the first year by the then Transvaal Law Society – now the Law Society of the Northern Provinces (LSNP) – on the seventh floor in the Medforum Building in Pretoria.

The pilot school opened its doors on 15 January 1990 with 51 candidates who had been recruited to participate in the project. All but one of the candidates had been accepted as candidate attorneys by law firms prior to commencement of the programme.

This year sees the 25th anniversary of the establishment of the School for Legal Practice, which now has ten centres across the country, including a distance-training centre in cooperation with the University of South Africa (Unisa), and which provides training to some 1 200 candidate attorneys a year.

'This has been a wonderful, life enriching experience. We must pay tribute to the profession, our students over the years and all others who have had faith in the undertaking. It has always been possible to overcome the challenges we have faced by knowing that we have the support of those who are infinitely passionate towards the profession, education and transformation,' says Mr Swart,



Chief Executive Office of the LSSA and Director at Legal Education and Development (LEAD).

The aims of the school are to ensure that the candidate attorney will, after completion of the course –

- have a basic knowledge of the learning areas that have been identified;
 - have the necessary expertise to solve a given legal problem with the minimum supervision;
 - be able to integrate various skills and apply these particular skills in the execution of various tasks;
 - be able to develop their basic skills further in practice;
 - have a knowledge of the correct approach and the ethical norms that are required of an attorney, and understand and be able to apply these in practice.
- This aim includes the nurturing of constitutional imperative values that will promote the image of the profession.

The pilot succeeds and the school starts in earnest

The results of the first group of learners in the Attorneys Admission Examination in August 1990 exceeded all expectations when compared with the results of candidates who had not attended the school. In a survey conducted after the school was established, it was found that the majority of the principals of candidates who attended the school rated the performance of their candidates in practice considerably better than other candidates.

The ALS Council and the AFF decided to repeat the pilot course in 1991 and Mr Swart was appointed as the Director of the School for Legal Practice and Director of Practical Legal Training. Fifty-nine candidates attended the school that year.

At its AGM in March 1991, the ALS resolved that two school intakes should be implemented the next year to create more opportunities for candidates to attend the school. In July that year the AFF approached the universities to assist with the expansion of the school to other centres in the country.

Two school courses were presented in 1992 accommodating 96 candidates.

At its AGM in March that year, the ALS decided to establish a school in Cape Town in cooperation with the University of Cape Town (UCT) and granted permanent status to the Pretoria School.

A tuition fee of R 2 000 was introduced and the structure of the school course was changed to provide for three modules –

- introduction and criminal court practice;
- civil court practice; and
- commercial matters.

Candidates were expected to write an examination after each module.

The School for Legal Practice in Cape Town was opened in January 1993 on the UCT campus with Eric Liefeldt as its first director.

With 91 candidates attending the school in Pretoria in 1993, Unisa agreed

to make the main building of its campus in Sunnyside available to the ALS to serve as accommodation for its legal education department and the Pretoria School. The Pretoria School moved from the Medforum Building to the Old Main Building at the Unisa Sunnyside campus – its ‘home’ since then – on 1 December 1993. The legal education department of the ALS (LSSA) also moved to the campus.

The Attorneys Amendment Act 115 of 1993 was introduced in terms of which a candidate who satisfactorily attended the school would be entitled to a reduction in the period of articles of clerkship by one year. The candidate could also sit for the admission examination without having secured articles.

The AFF resolved to support the launch of a school in Durban in conjunction with the University of Natal (Durban) – as it was then – and the school in Durban opened in January 1994 on the campus of the university with ML Pillay as its first director.

That year the duration of the school course was extended to five months in order to provide more time for practical work, and greater emphasis was placed on human rights practice, as well as on practice management and administration.

Steps were taken to cooperate more closely with the law faculties of the local universities. Although the ALS awarded its own certificate of merit to those candidates who distinguished themselves at the school centres, it was hoped that the universities would recognise attendance for the purpose of a postgraduate university qualification.

‘From the early 1990s we started receiving an overwhelming number of applications. The profession needed to consider ways in which to extend access, *inter alia*, by creating more centres. It was decided to launch a night school course in Pretoria. This concept proved to be a great success and was partly responsible for ensuring that opportunities for all who applied, exist. The night school assists those who have to earn a living during the day and attend the school at the same time in the evenings,’ explains Mr Swart.

1994 saw the establishment of the first night school course at the Pretoria school attended by 64 candidates. The Pretoria School was now running courses during the day and in the evenings. The Pretoria Bar decided to encourage its pupils to attend parts of the night course while senior members of the Bar acted as instructors in supreme court practice.

That year, more than 600 candidates had the opportunity to attend the school countrywide; substantially more than the 51 four years earlier.

The management committee of Unisa approved, in principle, to cooperate with



The Pretoria School moved to the Old Main Building at the Unisa Sunnyside campus – its ‘home’ since then – on 1 December 1993.

the ALS as far as the running of a distance training centre of the school was concerned. The ALS Council approved the establishment of a school centre in Johannesburg and a trust fund for legal education was established with the aim of attracting donations for postgraduate legal education.

The night school concept expanded in 1995 with two night school courses presented at the Pretoria School and night schools started at the Durban and Cape Town Schools.

The Johannesburg School was opened on the 7th floor, Hunts Corner, Eloff Street, Johannesburg on 18 April 1995 with Ilze Lombaard as the first director. Michelle Beatson, an ex-student of the Pretoria School, took charge of the Johannesburg School in November that year.

1995 also saw the Board of Control of the Distance Training School, constituted in terms of a cooperation agreement with Unisa, meeting for the first time in July 1995 and Emil Boshoff was elected as the Chairperson.

On 30 November 1995 the ALS Council took a firm stand in favour of the permanent status of the school.

The School for Legal Practice caught the attention of various foreign entities and a number of foreign visitors started visiting including, Judge Anel Silungwe, of Namibia, as well as representatives of the College of Law, England; Mozambique Law Society; the French government and a Dutch University.

The school centre in the Free State opened its doors in Bloemfontein on 6 June 1996 with Willlem Spangenberg as

director and offering a night course only.

The AFF contributed an amount of R 1 million for financial assistance to disadvantaged learners at all the school centres.

The established school centres in Pretoria and Johannesburg were presenting two night courses in addition to two day courses by 1996 and the Cape Town School presented two day courses for the first semester that year.

In conjunction with other role-players, the ALS investigated the establishment of a school in the Eastern Cape and in October 1996 a decision was taken to establish the school in East London. That school centre opened on 15 January 1997 – exactly seven years after the first centre had opened in Pretoria – and Andiswa Ndoni, a past student of the Pretoria School, was appointed as the first director.

In 1997 the school centres provided the opportunity to more than 1 200 graduates to attend the School for Legal Practice. The number of applications far exceeded the number of places available.

A new structure for the school was designed providing for more intensive training in litigation skills and legal writing. A fourth module was added to provide for structured business management training and training in commercial litigation formed part of the third module.

The proposal for a four-year LLB degree was accepted by all stakeholders in 1998.

With the launch of the ALS’s successor, the LSSA, in March 1998 which provided for representation of the Black Lawyers

Association (BLA) and the National Association of Democratic Lawyers (NADEL) on the Council representing the attorneys' profession, the school's constitution was amended to make provision for BLA and NADEL on the Board of Control.

That year the school conducted the Qualified Lawyers Transfer Test on behalf of the College of Law in the United Kingdom.

A centre in Polokwane, Limpopo, was opened on 2 February 1998 with Adriaan Anderson, acting dean of the Law Faculty of the University of the North and an ex-student of the Pretoria School was appointed as the first director. He was succeeded by Anelia Dodd on 29 June 1998.

The school participated for the first time in the International Counselling Competition and came second in the national round in 1998. That year, leading members of the Young Lawyers Division of the American Bar Association visited the school during September. They provided training in interviewing and drafting techniques and equal opportunity law.

On 1 October 1998 the Council of the LSSA approved the opening of a school centre in Port Elizabeth and this centre opened its doors in January 1999 offering only one night course per year. The first director was attorney Eugene van der Berg.

On 1 September 1999 at the school in East London Andiswa Ndoni was succeeded as director by Nosipo Matanzima.

The turn of the century saw the School for Legal Practice represented at the South African Qualification Authority (SAQA), the Sector Education and Training Authority (SETA) council and SETA Legal Services Chamber by Emil Boshoff, Mr Swart and Michelle Beatson.

Recognising the need for modernisation, updated assessment methods – which provided for interviews, pre-testing and assignments – were introduced in 2000 for practice management and drafting of contracts.

Military legal practitioners received training at the school and persons from other institutions followed their example.

Gail Kemp and Liesl Skelton were appointed as the new directors of the Cape Town and Port Elizabeth centres respectively.

The school expanded its horizons in 2001 by offering training to a greater section of lawyers than before, including those at Legal Aid South Africa, the Assets Forfeiture Unit and Financial Services Board.

As part of the School for Legal Practice's process to promote a strong sense of professional responsibility, the Standing Committee on Legal Education approved a Declaration of Professional Responsibility to be made by all candidates on completion of the school course. For the first time in 2001, candidates signed and confirmed the public declaration.

Assessment in computer literacy and training in English business writing were introduced in that year.

The LSSA was the first training provider to be accredited by the POSLEC SETA (now the SASSETA), and the 'candidate attorney' learnership was the first learnership to be introduced in 2002 in terms of the Skills Development Act 97 of 1998.

Aspects of gender law, was introduced as a new topic in the school curriculum and the joint commercial training course with the Law Society of Ireland was presented for the first time in Pretoria in March and in Durban in November that year.

Also, for the first time in 2002, the numeracy skills of candidates attending the school were tested and interventions planned where relevant.

Mr Swart explains: 'The school discovered that some graduates lacked numeracy and literacy skills. The LSSA commissioned research by units at UCT and Unisa, which confirmed our earlier finding. Unfortunately this forced us to allocate valuable training time to numeracy and English writing, competencies that should be acquired at an earlier stage.'

PLT and CLE merge to create LEAD

At the end of 2002, after the death of the director of Continuing Legal Education (CLE), Renate de Klerk, the LSSA's Practical Legal Training (PLT) and CLE divisions were merged and the LEAD division was launched on 19 May 2003. Mr Swart became the LEAD Director, a position which he continues to hold.

Raj Daya, a Port Elizabeth attorney and later LSSA Chief Executive Officer, was appointed as the Port Elizabeth centre director in 2003.

Also that year, learners of the school were the first to enter into learnerships in terms of the Skills Development Act with a grant of R 2 million made available by the then POSLEC SETA.

In 2004 the LSSA Council and AFF finally approved the establishment of a distance-based school in cooperation with Unisa. 'The distance model serves various purposes. It enhances access for persons who are financially, geographically or otherwise unable to attend a residential course. More numbers can be taken without a substantial increase in operational cost,' said Mr Swart.

Skills assessment was taken a step further with the publication of learner and instructors' assessment guides.

2005 saw a number of new school centre heads appointed including Mohini Murugasen (now a High Court judge) in Durban, Nohlanga Motaung in Johannesburg, Simla Budhu at the new distance training centre, Yvonne Sinclair in Pretoria, Mokgadi Mabilo in Polokwane and Andrew Morathi in Potchefstroom.

Other important initiatives that year, included –

- the approval of new assessment model for entry to the profession;
- the review of the LLB and legal education panels were appointed and commenced with their work; and
- a skills transfer programme was introduced.

Vaneetha Dhanjee was appointed as director of the Port Elizabeth School in the place of Mr Daya, who became CEO of the LSSA in 2006.

The Potchefstroom centre opened its doors in 2006 with Andrew Morathi, an ex-student of the Cape Town centre, as director.

Social responsibility (*pro bono*) training and initiatives took place in Mamelodi, Pretoria West, Cape Town and Polokwane and the school directors made social responsibility a mandatory part of the school's programme.

In 2008 Chandika Singh, Vaneetha Dhanjee and Lionel Lindoor were appointed as directors of the Johannesburg, Durban and Port Elizabeth School centres respectively and Ursula Hartzenberg was appointed in Pretoria.

The school continues to refine its training and a new assessment programme was approved in 2011 with a focus on skills testing.

The introduction of e-learning in recent years has been an exciting development for the school. Mr Swart explains: 'Training and assessment can be conducted on a national platform, which promotes standardisation, IT skill and cost savings. This year two subjects will be offered online while at least one element of assessment will be completed through the Internet. Instructors and students interact on the e-learning platform and assignments are provided and submitted on this basis. Due to its nature, the school can, however, never become a complete online intervention. Most practical skills can best be learned through close observation and interaction.'

E-Learning is now accepted as an integral part of learning initiatives. 'It also creates the opportunity for persons who are not at the school to receive part of the training,' says Mr Swart.

Marlene Steyn was appointed as director of the Potchefstroom centre and Dilshaad Gani was appointed at the LSSA-Unisa Distance centre.

In 2014 Fahreen Kader was appointed as the director of the Durban centre and Durban attorney Raj Badal took the reins as chairperson of the SCLC from Sasolburg attorney Abe Mathebula.

In 2014 the various centres of the School for Legal Practice provided training to 1 461 candidates. Of these, 55% were female and 85% were black.

Through the years, the School for Legal Practice has hosted delegation and



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visitors from numerous countries and jurisdictions, but particularly those from the South African Development Community region with which it has shared its experiences and to whom it has offered its assistance. It has also provided training for numerous institutions outside the attorneys' profession including the Financial Services Board, Gauteng Education department, SASOL, the Public Service Administration, the Office of the Premier of Limpopo and Legal Aid South Africa

'The school is much more than a legal education institution. Law graduates from different backgrounds come together and develop organisational, interpersonal and leadership skills. Judging from the success that many of our graduates have achieved in their professions, this programme should be a non-negotiable for our future dispensation,' says Mr Swart.

Comments about the school

We spoke to a few people who either worked at the School for Legal Practice or were former students, this is what they had to say.

Judge President Ephraim Mokgoba founding chairperson of the Polokwane School board, instructor and first Judge President of the Limpopo Division of the High Court: 'The School for Legal Practice has brought a new dimension in legal practice. When I first got involved in 1998 when the Polokwane School for legal practice was established, we realised that the caliber of students who came there came without any practical knowledge. But the school was able to prepare them on the practical aspects of attorneys' work so that when they start practising as candidate attorneys, they do not struggle like people straight out of university and they quickly grasp how things work in the attorneys' profession. As instructors, and I am sure all those involved, we really feel proud of the products of the school.'

Judge Tati Makgoba former school student and current judge of the Gauteng High Court: 'First, I join others to extend my convivial congratulations to the LSSA on this milestone achievement. I attended the school course from January to June 1994. The course equipped all who went through it with the confidence to enter the environment of legal

practice. Over the years, the programme has produced outstanding women and men, who have risen to serve our country with honour and integrity. This has been through the school's ability to attract specialists in various fields as course facilitators. But LEAD's success narrative would be incomplete without mention being made of its founding and long-term Director, Mr Swart. Mr Swart imprinted on the course, the sensitivity of his character, his inspirational leadership and the depth of his intellect. My very best wishes in the years to come.'

Judge Legodi Phatudi former student and instructor and current judge of the North Gauteng High Court: 'I got to know of LEAD when I completed my education at university. The school is basically a bridge between the substantive law which one learnt at university and the practical application of the law. When I attended the school, it gave me the opportunity to get exposed to the practical work which one would have gained in ten years'. I learnt a lot, it expanded my knowledge and experience, and taught me to be patient, vigilant and hard working. Should this school cease to exist, that would be the saddest thing in the legal profession.'

Busani Mabunda former student and current LSSA Co-chairperson and President of the Black Lawyers Association: 'LEAD has produced a substantial number of graduates who have ultimately become practitioners and who are playing leadership roles. I also attended the school and I am proud to be celebrating 25 years of its existence. The fact that I am sitting as the Co-chairperson of the LSSA, is a clear testimony of what the school is capable of and the kind of caliber and leadership which it can produce and has produced. There are a substantial number of people who are in the judiciary who once attended this school. We are very proud of this school.'

Michelle Beatson, former school director of the Johannesburg centre and current LSNP Council member: 'LEAD has been an integral part of, not only my legal education, but my motivation to continue practising law in very trying times. The education received through LEAD and the support by specifically its CEO have been instrumental in forming my career and determining my life path. Congratulations LEAD and continue with the astounding work.'



Oregan Hoskins, former LEAD student and current president of the South African Rugby Union with Legal Education and Development Director, Nic Swart at a school function in 2007.

Oregan Hoskins, former student at the first pilot course in 1990 and current president of the South African Rugby Union: 'I learnt an enormous amount from fellow attendees who came with varied and rich experience from different institutions in our country. The diversity of people, language and culture taught me more than the lecturers could ever teach. I just wish that we could exploit our diversity in a positive way to the benefit of our society.'

Aneesa Mahomed former student, attorney and school instructor: 'It has been an honour and a privilege to be involved with LEAD initiatives. I started off as a student and have walked quite a distance and may there be a further 25 years going forward.'

Nkhensani Manyike candidate attorney and former student: 'There is a gap between theory and what happens in practice. Having studied part time, I experienced that gap and luckily for me, because I was working, I actually picked up that what I am studying is highly theoretical. When I looked at what lawyers do, it was far removed from what is happening in reality. I was always worried about how I was going to cope when I first stepped into a legal practice on the first day as a candidate attorney because what I had was pure theory and just principles. I was glad that we had a school which would bridge that gap for me. When you look at a medical degree, they do practicals during varsity, but you never have that in law. Going to the School for Legal Practice helped me bridge that gap.'

*Barbara Whittle, Communication Manager, Law Society of South Africa
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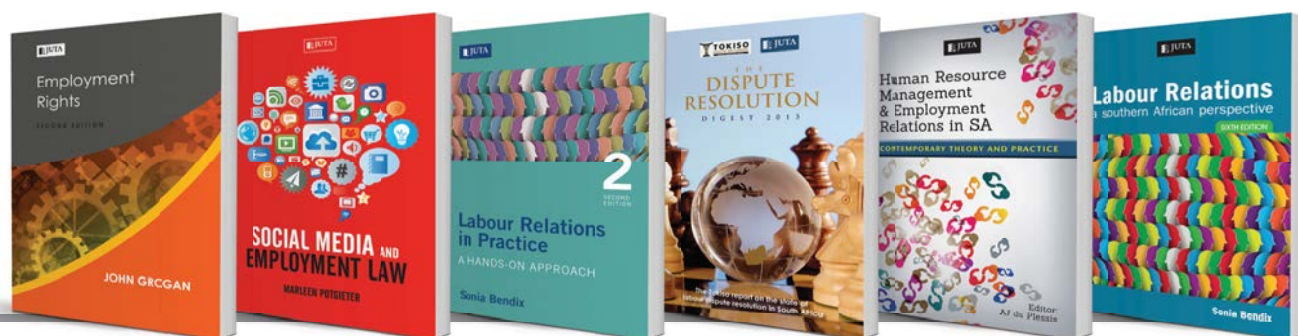
From left: Judge President Ephraim Makgoba, Judge Legodi Phatudi, Busani Mabunda, Aneesa Mahomed and Nkhensani Manyike.



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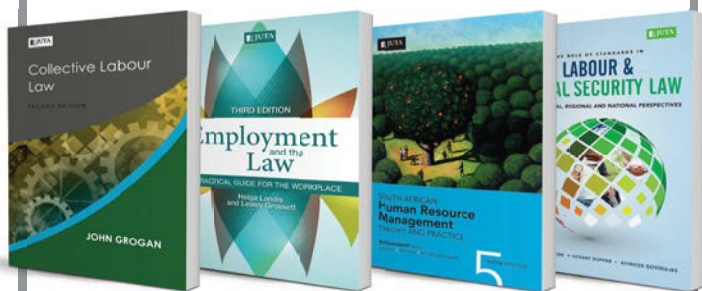
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By
Robert
dos
Santos

The lazy man's suretyship: Are unlimited debts of limited application?

Due to the extensive use of suretyship agreements within South Africa, certain terms have become standardised through years of repeated application. It is questionable, however, whether the frequency of use has led to an oversimplification of certain terms, causing some suretyship agreements to fall short of the most basic principles of early suretyship law.

Creation of a surety

Suretyship agreements are accessory contracts in that their existence is contingent on a debt or obligation (principal debt) existing or coming into existence between a debtor and a creditor. It is, therefore, necessary that one party, the debtor, be obligated to another, the creditor, for a valid suretyship to be created.

Prior to the commencement of s 6 of the General Laws Amendment Act 50 of 1956, suretyship agreements were regulated by common law and were capable of being entered into orally. Among the various reasons for the enactment of s 6, the legislature sought to protect the parties to suretyship agreements and avoid unnecessary litigation by codifying the law regarding the formation thereof. Section 6 therefore states that: 'No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety...'

Section 6 affords parties a level of

protection and certainty by requiring the terms of suretyship agreements to be embodied in a written document. What terms the legislature required to be contained in the written suretyship agreements, however, has been left to the courts to expand.

The meaning and extent of 'terms'

Providing clarity to the meaning and extent of 'terms' within s 6, Miller JA held the following in *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345: 'Confining myself to the word ['terms'] when used in relation to a contract of suretyship, it is manifest that, for example, identification of the principal debt and debtor is not only a term of the contract but is essential to the creation of the surety's liability ... It is a term of the contract in the true sense, in that it both defines and limits the surety's obligation under the contract and determines the extent or scope of the rights and obligations of the parties.'

In the case of *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) Trengrove AJA held at 7 that '... the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt, must be capable of ascertainment by reference to the provisions of the written document, supplemented, if necessary, by extrinsic evidence of identification other than evidence by the par-

ties (namely the creditor and the surety) as to their negotiations and consensus.'

The above dictums have been upheld in numerous subsequent judgments with Van Der Merwe AJ summarising the current position in the recent case of *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 (5) SA 523 (GSJ) as follows: 'The essential terms of the contract of suretyship are the identity of the creditor, the identity of the debtor, the identity of the surety, and the nature and amount of the principal debt. Failure to complete the essential terms of the suretyship agreement means that the contract is invalid for failure to comply with statutory formalities.'

The courts have repeatedly stated that an explicit reference to the parties or the principal debt is not necessary and that it is sufficient for the suretyship agreement to make broad reference to the parties or principal debts. It is, therefore, not necessary to cite the precise debt on which the suretyship is created, but is sufficient to state, for example, that the surety is in respect of a guarantee or guarantees entered into or to be entered into between the debtor and the creditor. Extrinsic reference may thereafter be utilised to identify the particular guarantee and the extent of its liability when the surety is called on to perform. This position is practically necessary as parties may enter into numerous debts before and after the commencement of the suretyship agreement. It is not always possible, at the entering into of a

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suretyship agreement, to forecast which debts will become due and what their extent will be. By identifying the group or category of the principal debt, however, the parties are afforded a degree of certainty in determining where the debt may arise.

It is important to note that while extrinsic reference is possible, such reference is only to be made where a party or principal debt has been identified within the suretyship agreement and such party or principal debt requires extrinsic reference to provide clarity thereon, and not as an action to supplement the terms of the suretyship agreement. The failure to incorporate an essential term of a suretyship agreement will render it invalid. Parties may not thereafter make reference to negotiations or consensus to incorporate terms not initially provided for.

Setting out the principal debt with sufficient particularity

It is not uncommon to be presented with a suretyship term, of varying formulations, which reads as follows: The surety shall be liable for the due and punctual payment and performance by the debtor of all debts and obligations of whatsoever nature and howsoever arising, which the debtor may now or in the future owe to the creditor (the standard term). The standard term is often followed or preceded by a reference to an identified principal debt or debts that exist or may come into existence between the parties. While there is no closed list on possible identified principal debts, reference is often made to guarantees, credit agree-

ments, bonds, cessions of debt, loans, promissory notes, bills of exchange, cheques, moneys advanced, credit facilities, novated debts, damages, etcetera. By making reference to an identified principal debt and incorporating such into the terms of the suretyship agreement, the parties are defining the nature of the principal debt and establishing the basis on which the suretyship has been created.

A brief reading of the standard term may make it seem innocuous and routine, however, the possibility arises that where the standard term is not supplemented by reference to an identified principal debt, there may be non-compliance with s 6 in that the nature of the principal debt is not stated. In addition, where the standard term is not limited by reference to an identified principal debt, the surety's exposure to debts and obligations is effectively unlimited, making it difficult if not impossible to define and limit the surety's obligations and to determine the extent or scope of the rights and obligations of the parties. Application of an unqualified standard clause would therefore lead to sureties being held liable for debts not envisaged by them and uncertainty between the parties.

Unlimited in obligations, liability and time

An additional hardship, which sureties may suffer is that suretyship agreements may be unlimited in liability and time. It is acceptable for parties to enter into suretyship agreements where the surety's exposure to liability is unlimited and the creditor's consent is required for the release of a surety. A suretyship agree-

ment containing an unqualified standard term, an unlimited liability clause, and a clause restricting the release of the surety would in effect render a surety liable for an unlimited set of obligations, to an unlimited amount, and for an unlimited period of time. The combination of such terms would at face value appear to subvert the protection due to sureties contemplated in *Fourlamel*, as well as negate the intention of the legislature in enacting s 6 in theoretically rendering a surety liable *ad infinitum*.

An essential term

Accordingly it may be necessary for the nature of the principal debt or debts to be identified by reference to the categories or groups thereof in order for a valid suretyship to come into existence and that by only making reference to any debt of whatsoever nature and howsoever arising may fail to identify the nature of the principal debt. As the creation of a suretyship is premised on the existence of a principal debt, it would appear necessary that an essential term establishing the creation of the suretyship itself be incorporated within the suretyship agreement in light of s 6. In addition, setting out the nature of the principal debt or debts remedies the mischief, which the legislature sought to cure in its departure from oral suretyship agreements, defines and limits the surety's obligation under the contract, and determines the extent or scope of the rights and obligations of the parties.

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Outsourcing by legal practitioners

Outsourcing of services, products or functions has become prevalent in today's contemporary business. This practice has proven to be effective, but it also brings risks that must be recognised and managed. It has become a key component of many businesses including law firms, partnerships and sole proprietors. With the rapidly changing political, economic, sociological, technological and legal environment, most entities outsource their services, products or functions to third parties or vendors *vis-a-vis* using in-house solutions. Practitioners in the legal fraternity are not an exception to this practice.

Following on our previous article in 2015 (July) *DR 29* titled 'Find the problem before it finds you', it is our intention to start tackling certain areas of the practices with the aim to assist practitioners with those areas of their businesses that require attention, and specifically to assist newly qualified practitioners who intend practising or just started practising for their own account. This article tackles the area concerned with outsourcing of certain functions/activities.

What is outsourcing?

There are many definitions given to outsourcing, but the following definitions have found favour with us:

Investopedia (www.investopedia.com/terms/o/outsourcing.asp, accessed 11-8-2015) defines outsourcing as: 'A practice used by different companies to reduce costs by transferring portions of work to outside suppliers rather than completing it internally'.

The Business Dictionary (www.businessdictionary.com/definition/outsourcing.html, accessed 11-8-2015) on the other hand defines outsourcing as: 'The contracting or subcontracting of noncore to up, personnel, time, and facilities for activities in which a company holds competitive advantage'. It goes on to reflect further on the concept of outsourcing to say: 'Companies having strengths in other areas may contract out data processing, legal, manufacturing, marketing, payroll accounting, or other aspects of their businesses to concentrate on what they do best and thus reduce average unit cost'.

In outsourcing, the company effectively relies on someone else, outside of

the company, to run certain functions/activities on its behalf. The expansion of outsourcing over the years, and the anticipated continued existence and expansion, as well as the risks associated with outsourcing, have necessitated the publication of this article.

While outsourcing in broad terms can go through a spectrum of functions/activities, including portions of the core functions of a business, we intend to deal mainly with the non-core functions/activities of the legal business in this article. Outsourcing has mainly been noted in the areas of information and communication technology (ICT) and accounting services (AS) within law firms and practitioners. The former includes services such as e-mail accounts administration, systems and software user support services, files or records management services, among other services. T Kern & L Willcocks 'Exploring relationships information technology outsourcing: The interaction approach' (2002) 11 *European Journal of Information Systems* 3 defined 'information systems outsourcing' as 'a process where an organisation decides to contract out or sell the firm's IT assets, people and/or activities to a third party supplier, who in exchange provides and manages assets and services for an agreed fee over an agreed time period'. The latter may include accounting services that comprise of the preparation of financial statements and other related accounting records, including trust accounting records.

Looking at the foregoing paragraphs, it is clear that when a firm outsources some of its functions/activities, the third party runs with that portion of the outsourced function, however, the responsibility and accountability cannot be outsourced, and remains with the practitioner. For example, outsourcing of ICT does not absolve the practitioner of his or her responsibility to maintain a trusted system with integrity in order to produce reliable information, nor does an outsourced party become responsible for preparation of proper and reliable accounting records. Instances have been found where a practitioner will blame incorrectness of records on an outsourced party, this should not be the case. This, therefore, reflects that the risks associated with the functions/activities are not outsourced and remain the risks of

the outsourcing party, the practitioner. This requires of practitioners to carefully consider the benefits and risks that the outsourcing arrangement may bring for them. The below paragraphs address some of the elements that practitioners should consider when deciding whether or not to outsource.

Who can and when to outsource?

Practitioners mainly outsource certain functions/activities in order to pay more attention to the core business and to grow their businesses. Any legal practice can outsource some of its functions/activities, more especially the non-core functions, irrespective of its size. Legal practices' main focus should be in providing legal services to its clients. However, in doing so, some functions become necessary in order to ensure compliance with legislation, rules and regulations. For example, while a practitioner is mainly concerned with providing the legal services, the practitioner is also required by legislation and rules and regulations to maintain and extract accounting records on the trust account, while other legislation may also require preparation and issuance of annual financial statements for the business. The practitioners make use of information technology (IT) systems to adhere to the requirements of these pieces of legislation.

The environment in which any practice operates comprises of the internal and external factors. This requires of practitioners to do a strengths, weaknesses, opportunities and threats (SWOT) analysis. Strengths and weaknesses are internal to the practice, while opportunities and threats are external. This analysis is a step towards identifying risks and opportunities for the practice. Risks are events that can negatively affect the objectives of the practice, while opportunities are those events that can enhance the achievement of the objectives.

Merits and demerits of outsourcing

As the saying goes 'every side of a coin has another side', and so outsourcing has its merits and demerits, which require consideration in making a decision on whether to outsource or insource.

Merits of outsourcing

- Where practitioners do not have the necessary expertise to run the IT function or any other function within the practice they may hire third parties/vendors with such expertise to carry out the function on their behalf. Since these vendors possess the necessary skills, knowledge and competences, their use may result in effective and efficient completion of the tasks at hand. For instance practitioners that prepare accounting records using outdated accounting packages may opt to contract third parties that host efficient and modern accounting packages.
- Outsourcing certain non-core functions may enable the practice to focus on its core activities.
- Outsourcing may reduce overhead costs associated with running operations within the practice. The practice may save on time, effort and infrastructure hence ultimately reducing overhead costs.
- When operations of a practice become uncontrollable due to capacity constraints or any other reason, outsourcing may help to overcome such challenges. Where the practice is growing or its client base is growing amid infrastructure constraints, then outsourcing may salvage it from such constraints.
- If ICT and AS are outsourced, the practitioner gets a level of comfort regarding the independent preparation of accounting records. For this comfort to be realised, collusion between in-house staff members and third parties should be carefully managed.

Demerits of outsourcing

- Outsourcing of services could result in exposure of confidential information. This could adversely affect the reputation and therefore requires close management.
- Outsourcing may be viewed to limit the growth/development prospects of internal staff.
- Outsourcing, if not properly managed, may create an environment of redundancy within the practice staff, which could result in other employees losing interest and ultimately affecting the quality of their work.
- Poorly constructed outsourcing contracts could cost the practice instead of bringing benefits for the practice. Contracts may not contain confidentiality and/or penalty clause where the service provider fails to provide the required level of service.
- Poor administration of outsourcing contracts and over-reliance on service providers.
- Practitioners may outsource to unreliable third parties who have a long-standing relationship with them and therefore

conceal the wrong-doings of the practitioner/practice, thus misleading the users of the information coming out of the reporting.

It is imperative that each practitioner carefully studies the requirements of the practice in order to decide whether or not to outsource its functions/activities.

What are some of the key considerations for a practitioner deciding on whether to outsource or not to outsource function/activities?

- Is the practice finding it difficult to meet its clients' needs and other stakeholder's needs due to resources being tied up in non-core functions? Is this difficulty posing a threat to client and stakeholder satisfaction? In other words, are products/service offerings compromised?
- Does the practice have growth ambitions or is the practice experiencing growth in terms of their service/product offerings and/or coverage? Is the firm therefore experiencing capacity constraints?
- Is the practice's staff not well equipped and/or empowered to perform the duties effectively and efficiently?
- Is the practice experiencing challenges based on operational and/or administrative issues?
- Does the practice lack the expertise necessary to ensure growth of the practice?
- Does the practice engage in important non-recurring projects/service/product generation but no resources to handle them?
- Is it financially non-viable for the practice to employ in-house resources to deal with non-core functions?
- Does the practice find itself in an environment where it is difficult to compete for client base?
- Does the practice have the appetite for risks that may be posed by outsourcing?

If the answer to the above questions is yes, then the practitioner may consider outsourcing certain components of its business, thereby releasing some of the tied resources to focus on the main service offerings. The list of considerations is endless, and the practitioner should consider as many factors as possible within the context of the environments in which they operate in making the decision.

It is important that management of the practice manage their third party contractual obligations and relationships in outsourced functions/activities. The following considerations should be made in this regard –

- practitioner(s) should ensure proper

oversight over the outsourced functions/activities, the responsibility and accountability for the functions remains theirs;

- practitioner(s) should conduct in-depth due diligence reviews on third parties or vendors to determine their competence and suitability. The due diligence should, among others, ascertain by how far the third party understands the legal fraternity, the legislation governing it, the requirements of that legislation and applicable rules and regulations, other clients that the third party has serviced in the past and currently servicing, the reviews of other clients of the third party, etcetera;
- document service level agreements outlining duties, obligations and responsibilities of each of the contracting parties;
- alignment of service offerings by the third party with internal policies and procedures, which in turn, should not be in conflict with applicable legislation;
- a clear understanding of whether the contracted party will render the services themselves or if they would further source a service provider as that would have an impact on the cost of outsourcing;
- confidentiality agreements between the parties as practitioners are bound by legislation to maintain confidentiality; and
- ongoing oversight of third parties and their activities. This may become vital where third parties engaged by practitioners are implicated in activities that may damage the image of the practice.

The considerations suggested in the foregoing paragraphs should form part of the risk assessment that the practitioner should perform in engaging third parties. Practitioners are referred to 2015 (July) DR 29, dealing with the key components of Enterprise Risk Management. Readers are further referred to 2015 (July) DR 23 dealing with the Legal Process Outsourcing.

In conclusion, challenges faced by practices are different, and therefore the responses to these may also differ. In employing the best solution to suit your circumstances, each practitioner should consider their own environment, the risks posed by those environments, the possible solutions and their potential to fail. It is not always feasible for a practitioner to do everything, outsourcing options are there to be explored and carefully managed to yield the anticipated returns.

Outsourcing can be good or bad, your decision must be informed.

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Perspective on EAOs – A problem or an abuse?

By
Arnoud
van den
Bout

It is wise to first obtain the context of a problem before calling for corrective action in the form of stricter legislation or additional regulation. It is no use putting in place more rules when a problem can be addressed by the existing framework.

In most sectors of the economy, including the attorney's profession, problems exist. Some of these problems could constitute abuse.

Several articles have been published in *De Rebus* on the subject of debt collection. Most of these articles have approached the matter from a negative perspective, such as the article titled 'The debt collection scandal' (2015 (May) *DR* 32). Broad statements are made against debt collection attorneys and their field agents, which are in my opinion unwarranted.

From the outset I want to make it clear that I support that abusers should be sniffed out and dealt with. But it is prudent to understand the context of a problem prior to finding solutions. Context should not be assumed from popular media articles or following journalists who love to sensationalise events.

Background information

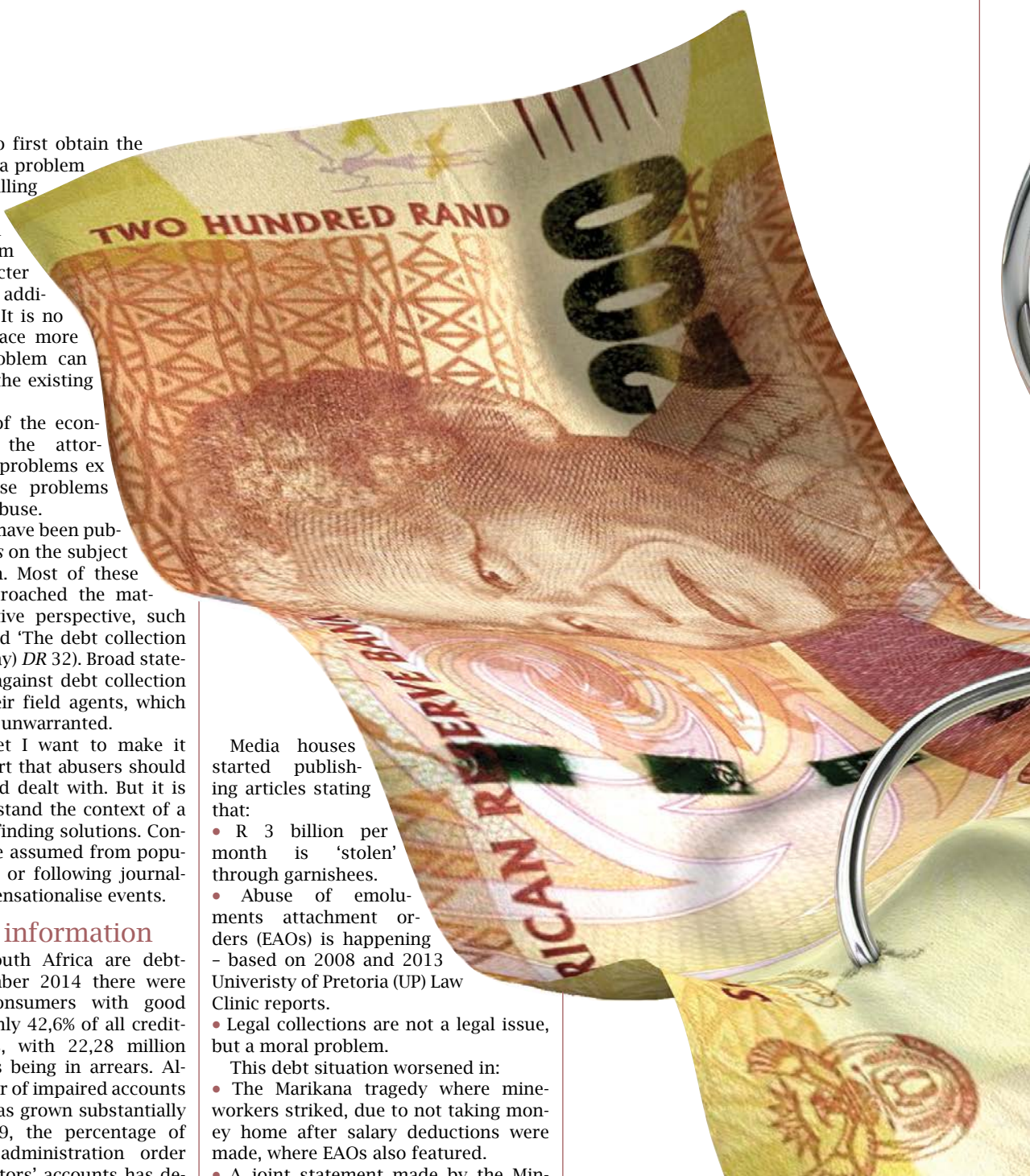
Consumers in South Africa are debt-ridden. In December 2014 there were 12,58 million consumers with good standing, being only 42,6% of all credit-active consumers, with 22,28 million credit agreements being in arrears. Although the number of impaired accounts as a percentage has grown substantially since March 2009, the percentage of judgments and administration order taken against debtors' accounts has declined substantially to 2,4% (inversely to the growth in impaired records) in the same period.

Media houses started publishing articles stating that:

- R 3 billion per month is 'stolen' through garnishees.
- Abuse of emoluments attachment orders (EAOs) is happening – based on 2008 and 2013 Univeristy of Pretoria (UP) Law Clinic reports.
- Legal collections are not a legal issue, but a moral problem.

This debt situation worsened in:

- The Marikana tragedy where mine-workers striked, due to not taking money home after salary deductions were made, where EAOs also featured.
- A joint statement made by the Minister of Finance and the Chairperson of the Banking Association of South Africa (BASA statement) after the Mari-



kana tragedy wherein they, *inter alia*, declared that their members commit not to use:

- EAOs;
- consent to jurisdiction (s 45 of the Magistrate's Courts Act 32 of 1944 (MCA)) in an EAO context and that only a court who has jurisdiction over the consumer as per s 28 of the MCA should be approached for a judgment for the purpose of obtaining an EAO.

- Public figures like Bobby Godsell stating publicly that 'court-ordered deductions from South African workers' wages

to repay debt to creditors should be banned' (Rene Vollgraff 'Don't let employer collect debts, says Godsell' 4-11-2013 Mail & Guardian (www.mg.co.za/article/2013-11-04-ex-anglogold-ceo-godsell-wants-ban-on-garnishee-orders/, accessed 14-8-2015)).

- Subsequent legislation changes proposed regarding the National Credit Act 34 of 2005 and the MCA in order to address perceived problems with the EAO process.

Stakeholders involved with the legal debt collection market including the Law Society of South Africa, Association of Debt Recovery Agents, Debt Collectors Council, Micro Finance South Africa, Garnishee Auditors, Credit Bureaux and Credit Ombud subsequently (in 2013) drafted a Code of Conduct to address these perceived abuses of EAOs.

The code contains commitments like:

- EAOs should only be used as last resort in respect of unsecured loans six months after default.
- A system should capture EAOs, issue compliance certificates, obtain consents to EAOs, provide the consumer with a consumer friendly document and provide contact numbers.
- Blank consent to EAO forms may not be used under any circumstances.
- Only an attorney or a debt collector may obtain a consent to judgment.
- In terms of fees and costs; only *mora* interest and not contractual interest to be added onto a judgment, that only party-and-party fees may be applied for and that different interpretations of the *in duplum* rule would be allowed for the time being.

- In terms of existing EAOs compliance certificates be issued for each, that a R 1800 cost cap be effected, that fixed repayment plans be provided to consumer, and that a cap of 40% be put on what can be taken from a salary through EAOs.

Interestingly enough, (I stand to be corrected) none of the above parties to the above Code of Conduct formally accepted it, although one or two of the bigger debt collection attorneys did implement it at huge cost. It seems that some of the bigger credit providers now require compliance from their collectors when handing out new service level agreements.

Fact finding mission

The various media articles, BASA statement and subsequent actions by regulators had a dramatic impact on legal collections in South Africa.

Due to possible reputational risk, major credit providers stopped their instructions to do legal collections against consumer debtors.

Not only made the process far more difficult to manage, but it cost more and limited potential income that could be derived from legal collections as a business model. The only way it could still be possible was with extremely small margins through pursuing volumes, through which lower fixed unit costs could be pursued.

The UP Law Clinic published two reports on the matter at the end of 2013, namely *The incidence of and undesirable practices relating to 'garnishee orders' - a follow up report* (<http://archivedpublicwebsite.up.ac.za>) (UPLC 1) and *Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues* (http://issuu.com/onelaw/docs/onelaw_-_1) (UPLC 2).

The UPLC 1 report focused

its research on shortcomings and irregularities in the EAO process and to determine the size of the EAO market.

It found, *inter alia*, that:

- There was uncertainty with stakeholders involved with regards to the interpretation of s 45 of the MCA and regarding the interpretation and application of the *in duplum* rule.
- There was lack of uniformity in the handling of EAOs in magistrate's courts. There were shortcomings in the process, like the difficulty in determining the authenticity of a debtor's signature on forms and in determining the reasonableness of installment size, blank/incomplete forms, lack of affordability

Picture source: Gallo Images/istock

tests being done on debtors, as well as different interpretations on procedure from court personnel, attorneys and other stakeholders.

- There were irregularities with regard to legal costs claimed from debtors, in that fees are not capped, amounts of costs did not correlate with the debt, interest was charged on interest, interest was charged on fees.
- There was lack of knowledge and fraud by clerks of court.
- Incorrect apportionment of payments occurred.

The report also investigated sources such as StatsSA, databases of garnishee administrators and Persal and Persol to determine the size of the EAO market.

It concluded that statistically 6,6% of formal private sector employees and 12,2% of public sector employees had at least one EAO against their salaries. The total amount of EAOs in the country was estimated to be about 435 084 EAOs for the private sector and 240 034 for the public sector. These numbers of EAOs included those issued in relation to maintenance orders, administration orders, and for the repayment of debt. The number of EAOs was accordingly found to be vastly smaller than those mentioned by the media and various regulatory or controlling bodies.

It seems that there was no baby to throw out with the bath water so to speak (2013 (March) DR 22). It begs the question whether this knowledge would have changed the regulators initial approach towards the problem.

The UPLC 2 report focused its attention on issues such as court jurisdiction, court practice uniformity, oversight and handling of interests, fees, costs and charges in relation to legal collections. It dealt more with technical difficulties experienced between stakeholders in the EAO process and recommended that:

- A cost cap be introduced, which should relate to the outstanding debt amount.
- The format of the EAO be amended to include more information.
- Institutional court capacity constraints should be addressed.
- Training, Uniform Rules on supporting documents was needed as well as clarity on the scope of discretion of courts.
- An overall regulatory body for debt collection be instituted.
- Judicial oversight is not recommended. Jurisdiction rules should be clarified.
- Law societies should provide guidelines in respect of allowable fees.

Econometrix published a report on the matter in 2013 (*Economic impact and implications of abolishing or limiting the use of emolument attachment orders as a form of legal collection by credit providers in South Africa* (http://issuu.com/onelaw/docs/onelaw_-_3/1)). It determined

the economic impact of limiting/discontinuing the use of EAOs.

It found regarding the economic costs of non-collection of debt that:

- The cost of slow and non-collection of debt is passed on as a cost to other borrowers and causes a burden to the banking system and to other citizens in good standing.
- Ultimately it slows economic growth and creates unemployment.
- The effect on the economy is that there will be an increase in real rate of interest. The estimated cost for the current level of slow and non-payments is R 9,7 billion (0,29% of GDP) and loss of 72 800 jobs annually.
- Regulation in recent years has steadily moved responsibility for debts from borrowers to credit providers.

The conclusion of the report was that –

- a comprehensive ban/limiting the use of EAOs is not an effective way of addressing the real or alleged problems associated with EAOs, reckless or unscrupulous lending and/or excessive, unscrupulous, ignorant or misinformed borrowing; and

- there is a substantial economic imperative to foster an environment where responsible lending and borrowing is the order of the day and that borrowers are incentivised to honour their debt obligations. EAOs play an important role in this process.

Effect on the legal collections market

The arguments of abuse of EAOs were centred on –

- perceived volumes of EAOs in the country;
- that it only seemed to protect the micro lending industry;
- that the *in duplum* rule was unclear and being abused; and
- that consent to jurisdiction (s 45 MCA) was abused.

All above ‘so-called’ bases for abuse were disproved in the abovementioned reports. Notwithstanding the publishing of these reports media agencies persisted in the original message that there was ‘widespread abuse’, quoting numbers such as R 3 billion per month that were being taken through EAOs from consumers.

None of the constraints implemented by regulatory powers were alleviated. Instead, courts made it consistently more difficult to obtain consent judgments and issue EAOs.

The constraints have caused legal collections to become ineffective, putting the whole credit life cycle at risk. I presume that this is one of the contributing factors to the problems that African Bank currently experiences.

Market forces currently at play in the legal collections market are:

- The pendulum against a lending bubble and collectors –
 - different interpretations of legislation;
 - emotional media reporting; and
 - different stakeholders expectations.
- The pendulum against collectors by credit providers –
 - enormous input costs before return, where legal debt collectors can only operate if they offer a ‘no success, no fee’ arrangement;
 - time duration of legal process; and
 - legal costs that can only be collected by legal debt collectors at the end of the collection process.

Conclusion

There are problems in the debt collection industry. However, these problems do not seem to constitute an abuse.

The voices who call for corrective action in the form of stricter legislation or additional regulations should take heed. Broad statements should be avoided when the context is not understood. There is no use in putting in place more rules when a problem can be addressed by the existing framework.

Hopefully the Western Cape High Court will provide some clarity to some current court procedure problems and help the debt collection industry to recover (*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 JJ)).

Even though debt collection might not be a favoured subject, it is and still remains a necessity in an economy that relies on the availability of debt.

- In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (WCC) (unreported case no 16703/14, 8-7-2015) (Desai JJ) the court held that the current system of EAOs is unlawful, invalid and inconsistent with the Constitution as it does not provide for judicial oversight. The judgment will now go to the Constitutional Court for confirmation. The respondents have applied for leave to appeal the judgment and have approached the Constitutional Court with a separate application.

- See also 2015 (Aug) DR 3.

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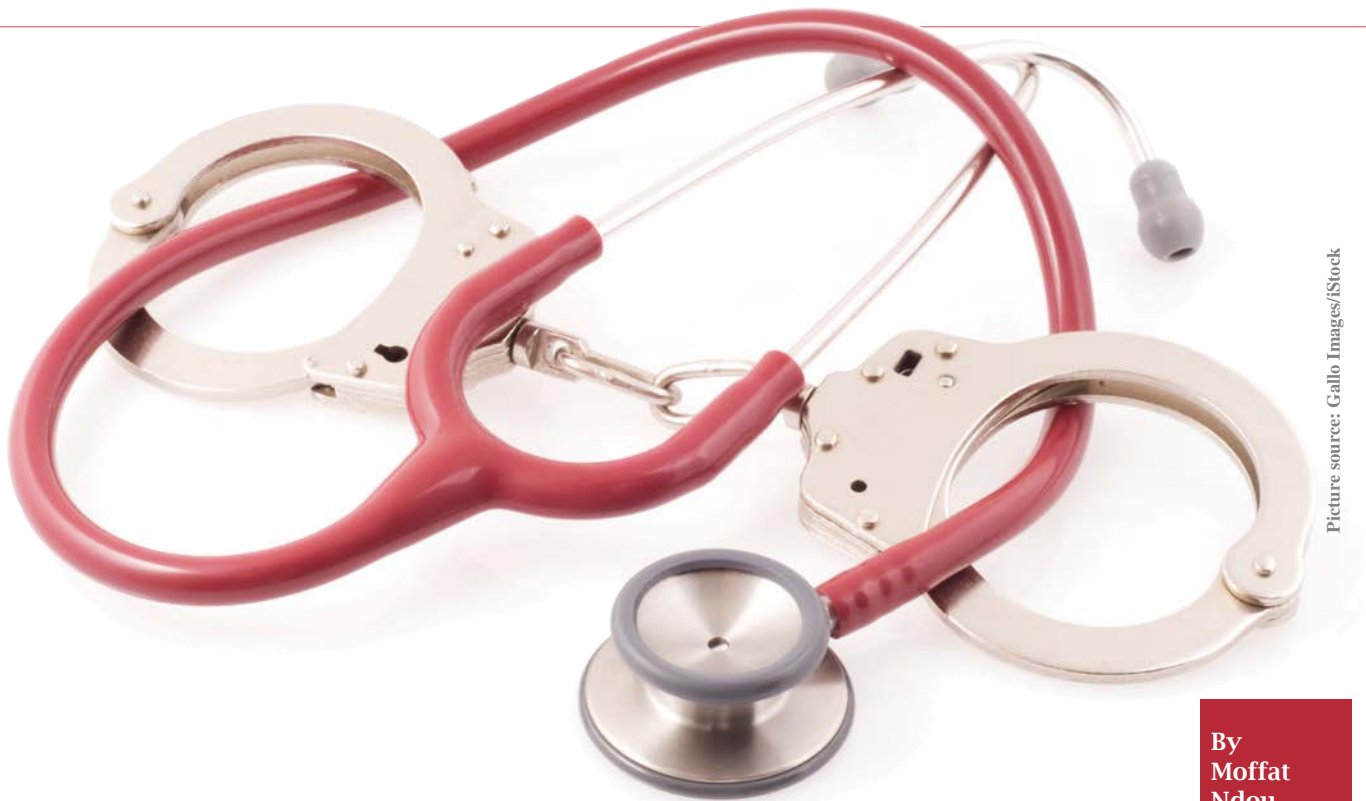
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By
Moffat
Ndou

Examining s 40 of the Mental Health Care Act: Unlawful arrest and detention

Violence committed by individuals with mental illness is a problem in the community. It was foreseeable that the legislature would introduce measures intended to prevent such violence.

Section 40 of the Mental Health Care Act 17 of 2002 (the Act) deals with the apprehension and detention of violent persons suffering from mental illness is such a measure.

However, it is important to guard against the abuse of such measures as it has consequences, one of which is a civil remedy for unlawful apprehension and detention. The remedy is discussed in detail in this article.

Section 40 of the Act

In terms of s 40 of the Act, if a member of the South African Police Services (SAPS) has reason to believe, from personal observation or from information obtained from a mental health care practitioner, that a person due to his or her mental illness or severe or profound intellectual disability is likely to inflict serious harm to himself, herself or others, the member must apprehend the person and cause that person to be –

- taken to an appropriate health establishment administered under the aus-

pices of the state for assessment of the mental health status of that person; and

- handed over into custody of the head of the health establishment or any other person designated by the head of the health establishment to receive such persons.

If a mental health care practitioner, after the assessment of the mental health user (mental health care user does not only refer to a person receiving care, treatment and rehabilitation services, it also refers to a prospective mental health care user, which includes any person suffering from mental illness) referred by a member of the SAPS, is of the view that the person apprehended is due to mental illness likely to inflict serious harm to himself, herself or others, must admit the person to the health establishment for a period not exceeding 24 hours for an application for involuntary services to be made; or if unlikely to cause harm, he or she must release the person immediately. The application for involuntary services must be made within the 24-hour period after the person is apprehended and if such application has not been made, the mental health care user must be discharged.

It is clear that s 40 of the Act makes provision for a lawful infringement of a person's liberty. However, failure to comply with the provisions of s 40 may

give rise to civil claims for damages –

- first, for unlawful apprehension of a mentally ill person by the SAPS; and
- second, the unlawful detention of a mentally ill person by the head of the establishment or the SAPS. (Landman AA & Landman W A *Practitioner's Guide to the Mental Health Care Act* 1ed (Cape Town: Juta 2014) at 19.)

General principles applicable to unlawful arrest and detention by members of SAPS

It is trite law that when it is proved that there was an arrest, the onus rests on the defendant to justify an arrest (see *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) at para 14). The Bill of Rights guarantees the right of security and freedom of the person, which includes the right 'not to be deprived of freedom arbitrarily or without just cause' (s 12(1)(a) of the Constitution). There are two relevant provisions dealing with arrest by members of the SAPS. The first is s 40(1) of the Criminal Procedure Act 51 of 1977 (CPA), which authorises an arrest without a warrant. The other is s 43 of the CPA, which provides that a magistrate may issue a warrant for the arrest of any

person on the written application of the Director of Public Prosecutions, a public prosecutor or commissioned members of SAPS. Any arrest by a member of the SAPS and the consequent detention in conflict with the provisions of the CPA is unlawful, unless it is specifically authorised in terms of any other laws. Section 40 provides such authority to apprehend and detain mental health care users.

Any detention following an unlawful arrest would be unlawful. The detention of a lawfully arrested person would be unlawful if (the list is not exhaustive):

- The person is detained for a period exceeding the 48-hour period without being brought before the lower court (s 50(1) of the CPA).
- The person is detained in a maximum security section while, he or she was an awaiting prisoner (see *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC)).
- The person continues to be detained after his or her conviction had been set aside.

Unlawful apprehension of mental health care users

Before a member of the SAPS is authorised to apprehend a mental health care user he or she must have had reason to believe that a person due to his or her mental illness or severe or profound intellectual disability is likely to inflict serious harm to himself or herself or others. The reason must be based on –

- personal observation; or
- information obtained from a mental health care practitioner.

Section 40 provides a wide discretion on members of the SAPS to decide whether to apprehend persons suffering from mental illness. The implication of this section is that, any member of the SAPS may apprehend any person, provided they have reason to believe and such reason was based on personal observation or from information obtained from a mental health care practitioner.

I submit that failure to comply with the provisions of the Act, would lead to the apprehension being unlawful and the party apprehended will have a civil remedy for damages. The infringement of s 40 may occur in any of the two ways:

- The member of the SAPS may intentionally decide to apprehend a person without any reason to believe that the person is likely to inflict serious harm to himself or herself or others. Section 40 of the Act should be viewed in light of the authority of members of the SAPS to arrest persons in terms of the CPA. Members of the SAPS do not have the authority to apprehend any person without limitation.
- Even if a member of the SAPS has 'reason to believe', it might be an unlawful apprehension if such reason cannot be

objectively justified. In *Vumba Intertrade CC v Geometric Intertrade CC* 2001 (2) SA 1068 (W) at 1071 F-H, the court, in interpreting the phrase 'reason to believe' in respect of s 8 of the Close Corporation Act 69 of 1984, made the following observations:

'Although the phrase "there is reason to believe" places a much lighter burden of proof on an applicant for security than for instance, "the court is satisfied", the "reason to believe" must be constituted by facts giving rise to such belief. A blind belief or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to does not suffice'. There must be facts that the member of the SAPS must rely on, that indicate that there is a reason to believe that the person is likely to inflict serious harm to himself, herself or others. I submit that it is not sufficient that the member of the SAPS had 'reason to believe'; it must be a belief which is objectively based on facts giving rise to such belief. This is only relevant to a belief based on personal observation of a member of the SAPS.

Any infringement of s 40 of the Act would mean that the SAPS is liable for unlawful apprehension of a mental health care user.

Unlawful detention

After the mental health care user is apprehended, the member of the SAPS must ensure that the mental health care user is handed over into custody of the head of the health establishment. The head of the health establishment must decide whether the person apprehended is due to mental illness likely to inflict serious harm to himself, herself or others, in which case the mental health care user must be detained for a period not exceeding 24 hours; or unlikely to cause harm, in which case the mental health-care user must be released immediately. If the head of the establishment decides to detain the mental health-care user, he or she must bring an application for involuntary services. If the application for involuntary services is not made within 24 hours, the mental health care user must be discharged.

From the reading of s 40 of the Act, it is clear that the detention of a mental health care user is unlawful if he or she –

- is detained but is not likely to inflict serious harm to himself, herself or others; or
- is detained for more than 24 hours without an application for involuntary services.

If the head of the establishment detains a person, whether intentionally or negligently, not qualifying in terms of s 40 of the Act, it will amount to an unlawful detention. This is regardless of the legality of the apprehension by the

member of the SAPS. If the mental health care user qualifies to be detained, the detention should not be for more than 24 hours, unless an application for voluntary services is made within 24 hours. The detention of a person for more than 24 hours would be a violation of s 40 of the Act and s 12 of the Constitution. The Constitutional Court, in *Zealand*, found the detention of a lawfully arrested prisoner in a manner that violated s 12 of the Constitution amounted to an unlawful detention.

Section 50 of the CPA provides guidance in understanding the prohibition of the detention of mental health care users for a period exceeding 24 hours without an application for involuntary services. In terms of s 50 of the CPA, any person arrested and not granted bail must be brought before a lower court as soon as reasonably possible, but not later than 48 hours, after the arrest. If the arrested person is detained for more than 48 hours without being brought to the lower court as soon as reasonably possible, he or she has a claim for unlawful detention (see *Mashilo and Another v Prinsloo* [2013] JOL 30300 (SCA)). The same principle applies to the detention of mental health care users for a period exceeding 24 hours.

There is also a possibility of the SAPS detaining a mental health care user after the apprehension. Section 40 of the Act only authorises the SAPS to apprehend and handover the mental health care user to the head of the health establishment. Detention of mental health care users by the SAPS would be in breach of s 40 of the Act and such detention would be unlawful.

Conclusion

The apprehension and detention of mental health care users must be done in terms of s 40 of the Act. Failing to comply with the provisions of s 40 exposes the parties, involved in the apprehension and detention of mental health care users, to a possible claim for unlawful apprehension and detention. A comparison can be drawn with the claim for unlawful arrest and detention in respect of failure to comply with the provisions of the CPA. Failure to comply with the provisions of the CPA in the arrest and detention of a person would amount to an unlawful arrest and/or detention, unless the arrest and/or detention can be justified. The same principles apply to the apprehension and detention of mental health care users in terms of s 40 of the Act.

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Calculating medical negligence costs

By Rina Pienaar and Antoine van Gelder

Picture source: Gallo Images/Stock

When dealing with a claim for future medical expenses in a personal injury claim, one finds that future medical expenses are sometimes subdivided into further categories namely, surgical expenses, emotional and psychiatric expenses and future treatment, such as medication. The question of future surgical expenses proves to be a problem as it entertains the probability of the occurrence of an uncertain future event.

In *GC Bester v Dr van der Westhuizen* (FB) (case no 4045/08, 10-4-2015), it was necessary to quantify such a claim for future surgical costs for a plaintiff who carried a high risk of recurrent bowel obstructions. In accordance with data obtained from research studies, the expert surgeons expressed the chance of future surgery as a percentage. They stated that – provision should be made for the 20% probability of a lifetime cumulative risk of developing recurrent intestinal obstruction and the cost of surgical re-intervention, reparative abdominal surgery and related care, which are estimated to engender costs of R 125 000 per event. For purposes of this discussion we have excluded alternative management options relevant to the management of bowel obstruction. The discussion that follows should be seen in context of

the above scenario where the medical experts agreed to the plaintiff having a 20% chance of a recurring bowel obstruction, which would cost her R 125 000 and that the quantification result would be the amount for which the defendant should be liable. A suggestion to simply calculate $20/100 \times 125\,000/1$ (= R 25 000) failed to satisfy several questions, among others:

- What is the basis for using such a formula?
- What are we calculating and for what exactly would the defendant be paying?
- In addition, in the event of such a future surgical event realising, why would the plaintiff be penalised by receiving only 20% of the surgical costs?

The correct way of calculating the costs of an uncertain event is not foreign to scientific and statistical principles. The emphasis should be on the difference between the pre-morbid chance of surgery and the post-morbid chance of surgery, or put differently the effective increase in risk suffered by the plaintiff. Risk is normally quoted in two ways, relative and absolute, creating some confusion as to the 'correct' use. The correct use depends on one's interest – in the case of public health, one is interested in the absolute number of cases in a population. So, for example, if there is a doubling of cases of measles this year compared

to last year (relative increase 2X) it tells nothing about the number of cases to be treated. For this, one needs to know the absolute number of how many cases there were last year. If there were 100 cases last year, then a doubling says this year there are 100 more cases than last year. However, if 10 000 cases occurred last year, a doubling means there are 10 000 more cases this year. This number of cases would be a considerable burden on health services.

In clinical medicine and therapeutics one is interested in how much better one treatment is relative to another. Comparing by means of a ratio is therefore appropriate: 'Treatment A is twice as effective (or 100% better) than treatment B', is more meaningful than to say 'in the study of 100 people, 30 on treatment A lived longer than five years compared to 15 on treatment B.' When faced with the latter information one almost automatically asks the question 'how much better is treatment A than treatment B' leading to the more meaningful answer given by the relative risk calculation: 'It's twice as effective' or '100% better.'

When applying the above formula to the research results of the surgeons in the above scenario, the estimate by the medical expert surgeons was that 20% (proportion of people in need of surgery, expressed as percentage) of patients in a

similar situation as the plaintiff will develop bowel obstruction possibly in need of surgery in the next ten years. It is widely accepted among medical experts that healthy people without previous abdominal surgery (ie, the abovementioned plaintiff's pre-morbid state) less than 1% of people being similar to a pre-morbid plaintiff will develop obstruction (one can assume 0,5%, which is a worst case estimate as it means five per 1 000 people over 60 years of age get bowel obstruction spontaneously).

Motulsky (Motulsky *Intuitive Biostatistics* 2ed (New York: Oxford University Press 1995)) explained that one way 'to summarise the data results is to calculate the difference between the two proportions.' The difference is $20\% - 0,5\% = 19,5\%$. The latter difference is formally called the attributable risk, but the terms 'actual risk increment' and the 'absolute risk increase' are also used. So what does this 19,5% risk increment or increase mean? Further, according to Motulsky, it is 'often more intuitive to think of the ratio of two proportions rather than the difference.' This ratio is termed the relative risk.

The relative risk for the above plaintiff is therefore calculated as:

Risk with damage: 20%

Risk without damage: 0,5%

Relative risk: $= 20\% / 0,5\%$

$= 4\ 000\%$, or 40 times more.

A relative risk between 0,0 and 1,0 means the risk decreases with exposure to risk factor. A relative risk greater than 1,0 means that the risk increases. A relative risk $= 1,0$ means that the risk is identical in the two groups.

Taking the above into consideration it is concluded that the above scenario should be interpreted as follows:

A relative risk of 1X would have been the same risk before and after the complicated surgery. A risk of 2X, would undeniably be a risk more likely than had the surgery not been complicated. Just as a risk of 0,5X would have been a post-morbid risk undoubtedly less likely than had the surgery not gone wrong. In fact, in this calculation the risk by the damage is increased by much more than merely doubling, the risk is 40 times more after the damage caused by the surgery than before.

The American courts are on the right path in finding a solution regarding the correct determination of an increased risk. Various American courts have determined that a relative risk of two passes the 'more likely than not' criterion, which is known as the 'more likely than not' rule. (*Reference Manual on Scientific Evidence* 3ed at 570 <http://www.fjc.gov>, see also <http://schachtmanlaw.com>). The manual used by the American courts clarified the above issues by stating that: 'To determine the proportion of a disease that is attributable to an exposure, a researcher would need to know the incidence of the disease in the exposed group and the incidence of disease in the unexposed group.'

The attributable risk is therefore calculated as:

$$AR = \frac{(\text{incidence in the exposed}) - (\text{incidence in the unexposed})}{(\text{incidence in the exposed})}$$

The above formula is applied to the above scenario. The risk of the plaintiff of developing obstruction in ten years time, before injury was that of a normal person of her age, estimated to be 0,5%. The risk of developing obstruction in ten

years after injury is 20% according to the medical expert surgeons. The calculation of the risk attributable to the exposure to the complicated surgery (risk expressed as a percentage) is therefore:

$$AR = \frac{20\% - 0,5\%}{20\%}$$

$$AR = \frac{20\% - 0,5\%}{20\%}$$

$$AR = 97,5\%$$

It is, therefore, argued that if the court should find that a proportional allocation based on the increased risk of bowel obstruction should be made, it therefore means that the proper factor, which should be used is that part of the risk attributable to the contribution of the injury to her present risk. Therefore, an allocation for future risk should be multiplied by a factor of 0,975 (or 97,5%) (ie, $97,5/100 \times R\ 125\ 000/1$). The defendant should be liable for R 121 875 as opposed to the unsupported amount of R 25 000.

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RETHINK. REINVENT.





Elevating *culpa* to crime

By
Safia
Karriem

It is trite law that *mens rea* (either *dolus* or *culpa*) is an indispensable element for a crime that pertains to the infliction of bodily harm. This could sustain a charge of either assault or murder, depending on the result that eventuated. For both crimes, intention is a necessary element. However, murder has a *culpa*-cousin, in the form of culpable homicide, but for assault, there is no *culpa* variant. Why not?

As murder has a *culpa*-cousin and not assault, it begs the question as to the rationale for such different treatment in our law. It could be argued that public policy dictates that where the unlawful negligent conduct of an accused, which causes the death of another human being, the accused be subject to criminal responsibility. If public policy is indeed employed as a basis for such inequitable treatment, then the dictates of public policy should be interrogated and the soundness or otherwise be scrutinised.

Both with assault and murder, a form of violence or force is perpetrated against the body of a human being. With the simple distinction that the one crime results in death while in the other not. It merits the rhetorical question as to whether the death of the one victim in

relation to murder and the survival of a victim in regard to an assault, is sufficient to justify the fact that murder has a negligent cousin in the form of culpable homicide and assault does not.

It is often said that murder is the ultimate crime, and it is hard to argue against it. However, the injuries that a victim could suffer post an offensive event can in many instances be debilitating, have severe physical, psychological, censor and/or mental consequences. Blindness, deafness, quadriplegia, mental incapacitation, or life-long medical problems can substantially impede one's quality of life. In certain instances, this could be to such an extent that death could sometimes be seen to have been a more graceful outcome.

It is not only the victim that suffers, but in most instances, the immediate relatives such as the spouse, descendants and parents are affected directly and substantially. Where the victim is rendered a paraplegic and mentally disabled, a pleasurable healthy productive relationship is no longer possible between the victim and his or her relatives. For all practical purposes, in these circumstances, the children could effectively be regarded as having lost their parent.

Now, there is merit to the counter-argument that with *mens rea*, the guilty, or otherwise of the offending mind is in question, not the outcome or results of the offensive conduct. However, if public policy demands that murder has a *culpa*-cousin, it must necessarily have had regard to the outcome of the offending conduct, and not solely focused on the guilty mind. If this were not the case, then why does assault not have a negligent comparator?

I submit that in certain instances, the conduct of an accused could be so grossly negligent in causing injury to another person, that it offends one's sense of fairness and justice if such an accused is not held to criminal account. This is more so, if the victim suffered substantial injuries and his or her family are affected directly.

It might be apposite to beg the question from the opposite side, 'why does public policy not dictate that the infliction of bodily harm has a *culpa* variant?' There are obviously instances where the level of negligence is so low, as constituting a travesty of justice to render such conduct a crime. However, it is argued that in some instances, the degree of negligence is so high, though short of intent, that public policy should dictate

that the accused be visited with criminal accountability.

The anomaly between assaults not having a negligent comparator such as murder could be illustrated by the following two examples:

- Example one: Accused (A1) intentionally smacks his victim (V1), causing the latter to only suffer superficial physical pain.
- Example two: Accused (A2), while being grossly negligent, discharges his fire arm, striking and rendering his victim (V2) a quadriplegic and to suffer and irreversible mental disability.

Currently in our law, A1 will be found guilty of the crime of assault. However, A2, irrespective of the fact that V2 has sustained significantly more debilitating and severe injuries than V1, will not be guilty of any crime. V2, notwithstanding the fact that he will be suffering substantially more than V1, will not have the benefit of seeing A2 suffering criminal redress, solely on the basis that A2 lacked intention, though grossly negligent. In our law, culpable homicide and a certain contempt of court are the only two crimes in respect of which the form of culpability required is negligence. In other words assault is a common law crime for which there is no negligence component present. It may be cited as a common law principle, which is reaffirmed by the above. It is just to show how the crime flowing from culpable homicide, where victims survive, and result in any other common law crime is not covered by a negligence crime. CR Snyman *Criminal Law Casebook* 4ed (Durban LexisNexis 2008) at 209.

The anomalous results find further practical demonstration with motor vehicle accidents. For this purpose, I refer to the case of *S v Humphreys* 2015 (1) SA 491 (SCA) see 2013 (July) DR 54. In this case, the accused was transporting scholars in his taxi; through the gross negligent conduct of the accused, a mo-

tor vehicle accident occurred where ten of the scholars died and four sustained mild to severe injuries. Due to the fact that assault, as oppose to murder, has no *culpa* comparator, the accused was found guilty of culpable homicide in relation to the victims who died, and not guilty of any crime in relation to the scholars that survived. This is and will continue to be the case, notwithstanding the degree of an accused's negligence and the severity of the injuries, which the victims may have suffered. This case most practically demonstrates the lack of legal soundness of not having a *culpa* variant for assault.

There is a fine line between *dolus eventualis* and *luxuria*, both in relation to the test itself and application thereof. The test for the two is clearer in relation to the applicable principles, but the application thereof often blurred the lines. As a reminder (or Criminal Law 201 refresher), with *dolus eventualis*, the accused subjectively foresees the possibility of his victim being killed in the process, and reconciles himself with such possibility. However, with *luxuria*, the accused subjectively foresees the possibility of his victim being killed in the process, but dismisses the possibility (also in practice referred to as 'taking it to the Bar'). It is very onerous on the state, and in most instances, exceptionally difficult to prove that an accused reconciled himself with a particular outcome as opposed to taking it to the Bar. Should the state fail to prove the former in an assault case, the accused will be acquitted.

In the Canadian and American legal systems, as with the South African law, the only negligent crime that involves the infliction of bodily injury is culpable homicide. The English legal system bears close ties with the South African law, both from a historical and jurisprudential point of view. Curiously, the English law makes provision for criminal negligence. In the case of *R v Bateman*

(1925) 28 Cox CC 33, the judge remarked that: 'In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment'.

I submit that the English law doctrine of criminal negligence should be introduced into our South African law. This is not to say that all negligent conduct should attract criminal liability. However, the test for criminal accountability in respect of negligent conduct is stated very succinctly in the last stated case.

All that is required to determine whether negligent conduct should be visited with criminal redress is to measure the degree of negligence. This should ensure that where the gross negligent conduct of an accused amounting to reckless disregard for the well-being of his fellow subject, attracts criminal sanction. It will also see thereto that the anomalies outlined above are properly addressed, without perpetrating an injustice towards an accused.

I, therefore, submit that there is a *lacuna* in our law insofar as it pertains to gross negligent conduct having the effect of inflicting serious bodily harm to a victim. The unfairness outlined above, clearly demonstrate that there are instances where the degree of an accused's negligence is so high and one's sense of justice is offended, that the severity of the unlawful conduct cries out for criminal sanction. I submit that assault, as with murder, should be adjoined with a *culpa*-comparator, perhaps called 'negligent infliction of bodily harm'.

Safia Karriem LLB Postgraduate diploma in Law (UWC) is a magistrate in Cape Town. □



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THE LAW REPORTS



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July 2015 (4) *South African Law Reports* (pp 1 – 328);
[2015] 2 *All South African Law Reports* June no 1 (pp 517 – 656);
and no 2 (pp 657 – 744); [2015] 3 *All South African Law Reports* July
no 1 (pp 1 – 130); and no 2 (pp 131 – 254)

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
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law – damages

Administrative action exercised negligently: In *Trustees, Simcha Trust v De Jong and Others* 2015 (4) SA 229 (SCA); [2015] 3 All SA 161 (SCA) the court was asked to consider under which circumstances an aggrieved party will be entitled to compensation in terms of s 8(1)(c)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (the Act).

The facts were as follows: The appellant, the trust, submitted building plans for a hotel for approval to the City of Cape Town (the city), which was the 18th respondent in the present appeal. After the

plans were approved and the trust started with the construction work, the first 17 respondents, who were the immediate neighbours of the site where the construction work took place, successfully interdicted the trust from proceeding with the construction work. It was trite that the building control officer who approved the building plans, did not perform his duties properly and that the plans should not have been approved.

In the court *a quo* the trust's claim for damages against the neighbours and the city in terms of s 8(1)(c)(ii) of the Act was dismissed.

On appeal, Navsa ADP held that parties who are aggrieved by an administrative action must adhere to the procedure and the remedies provided for in s 8(1) of the Act, before they consider instituting a claim in terms of s 8(1)(c)(ii). It explained that a court will only consider a claim for compensation in terms of s 8(1)(c)(ii) once the alternative remedies (for example, remittal of the mat-

ter for reconsideration to the relevant administrative body) have been exhausted.

The court will further only consider a claim for compensation in terms of s 8(1)(c)(ii) in exceptional cases. In this regard the court in *Simcha Trust* referred with approval to the decision in *Gauteng Gambling Board v Silver Development Ltd* 2005 (4) SA 67 (SCA) where the court explained the concept of 'exceptional cases' as 'upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary'.

Finally, the court held that the law of delict remains at the disposal of the affected party.

The appeal was accordingly dismissed with costs.

Auctions

Vendor bidding: The decision in *Hansa Silver (Pty) Ltd and Others v Obifon (Pty) Ltd t/a The High Street Auction Co* 2015 (4) SA 17 (SCA) concerns

the validity of sale agreements entered into pursuant to vendor bidding at a public auction.

The third to fifth appellants, the sellers, were the owners of a game lodge. The respondent, High Street, conducted business as an auction house. In 2011 the sellers gave a written mandate to High Street to sell the lodge by public auction or private treaty. In terms of the mandate a reserve price of R 25 million was fixed. In terms of the mandate the sellers appointed High Street or its agent to bid on their behalf at a public auction, up to the reserve price. The mandate was to endure until 1 January 2012.

The lodge was offered for sale at an auction held in November 2011. The auction was conducted on behalf of High Street by one Van Reenen (the auctioneer). High Street's rules of the auction were contained in a document signed by the auctioneer. The document stated that the rules complied with s 45 of the Consumer Protec-

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tion Act 68 of 2008 (the CPA) and the regulations promulgated under the Act. The following rules of the auction are of specific significance for purposes of the present discussion: 'Unless otherwise announced, all lots are sold subject to a reserve price and to a five day acceptance period in favour of the seller ; [and] ... unless otherwise announced, [High Street and the auctioneer] are entitled to bid on behalf of the seller up to the reserve price.'

The auction was advertised in *The Auctioneer* where the above-mentioned rules of the auction were published, including that the auctioneer had the right to bid on behalf of the owner.

At the auction the second appellant, Ichikowitz, bought the lodge on behalf of the first appellant, Hansa Silver, (collectively the purchasers) for a price of R 20 million after the sellers had agreed during the auction to reduce the reserve price to R 20 million. Pursuant to the auction, sale agreements were signed by the purchasers and the sellers. The purchasers later attacked the validity of the agreements and the auction and claimed repayment of the commission that it had paid to High Street. The central issue was whether the sale agreements were invalidated by bids of the auctioneer on behalf of the sellers. The court *a quo* held that they were not invalid.

On appeal to the SCA, Van der Merwe AJA held that so-called 'vendor bidding', that is, bidding by an auctioneer on behalf of the seller, is not permissible under common law in the absence of a reserve price. Vendor bidding is also prohibited in terms of s 45(4) and (5) of the Consumer Protection Act 68 of 2008, unless advance notice was given by the auctioneer to prospective bidders that the sale will be subject to a 'reserved or upset price' or 'a right to bid by or on behalf of the owner or auctioneer'. Contemporaneous identification of vendor bidding is not required.

However, if the failure to identify a vendor bid as such were to constitute a misrepresentation, an auction sale may

in terms of general principles of contract be rescinded if the misrepresentation were material and induced the sale.

The SCA confirmed the validity of certain sale agreements entered into pursuant to a public auction where vendor bidding took place up to the reserve price, as allowed by the rules of auction. Applying the applicable law to the circumstances of the present case, the SCA concluded that no material misrepresentation inducing the sale had been established, and therefore, that the court *a quo* correctly dismissed the purchasers' case that the said agreements were invalidated by vendor bidding.

The appeal was thus dismissed with costs.

Company law

Reinstatement of deregistered company: In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) the court held that the reinstatement of a deregistered company has full retrospective effect, also in relation to corporate activities during deregistration.

The salient facts were as follows: The appellant, Newlands, sold shares to the respondent, Peninsula, and the latter paid for the shares with certain equipment. Newlands later purported to cancel the sale and the dispute was referred to arbitration, with the arbitrator upholding Peninsula's claim to the shares. Later it came to Peninsula's attention that Newlands had been deregistered before the commencement of the arbitration for failing to submit annual returns, and this caused Peninsula to apply to the Companies and Intellectual Property Commission (CIPRO) for the reinstatement of Newlands' registration in terms of s 82(4) of the Companies Act 71 of 2008 (the Act). After Newlands was reinstated, Peninsula applied to the WCC for an order that the reinstatement was of retrospective effect, thus validating the arbitration proceedings. The court granted the order, but gave leave to Newlands to appeal to the SCA where the

issue at stake was identified as follows: Whether the SCA had jurisdiction, on the basis of its inherent power, to examine the legality of the share sale agreement.

On appeal Brand JA held that the SCA's inherent power did not extend so far as to allow it to assume jurisdiction over a matter where legislation gave it no jurisdiction over the matter. The SCA's jurisdiction was governed by s 16(1)(a) of the Superior Courts Act 10 of 2013, and in terms of that section, only if the court of first instance granted leave to appeal an issue, would the SCA have jurisdiction over the issue. Here the High Court had refused leave to appeal on the legality point, and consequently the SCA had no jurisdiction to determine it.

The failure by the legislature to re-enact the express retrospectivity provision of the previous Companies Act can at most be a pointer to the interpretation of the new provision. While a change of wording usually indicates a

change of intent, this is less significant where the new provision is contained in a completely new Act with its own scheme. The word 'reinstatement' that replaced 'reregistration' supports the notion of retrospectivity. Reinstatement without any retroactive effect would serve no practical purpose.

The court further held that there is no logical basis for partial retrospectivity. The only meaning s 82(4) can have is that reinstatement has automatic retrospective effect in relation to property and activities.

The administrative reinstatement of a company under s 82(4) does not affect the availability of relief under s 83(4). A court can grant relief in relation to the dissolution of a company 'at any time' after the dissolution of a company, even after administrative reinstatement. Any person prejudiced by the retrospective effect of reinstatement can thus approach the court to ameliorate the consequences.



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Finally, the SCA confirmed the order of the court *a quo*, but held that an order specifically validating the arbitration proceedings was unnecessary in view of the automatic complete retrospectivity. The appeal was thus dismissed with costs.

• See 2013 (Aug) DR 38.

Construction guarantee

Effect of fraud: In *Group Five Construction (Pty) Ltd and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng, and Others (Lombard Insurance Co Ltd as third party)* [2015] 2 All SA 716 (GJ) the facts were that a certain joint venture (the JV) concluded a contract of work with the first respondent, the MEC, in terms of which the JV had to build a hospital. The appellants, Group Five, are the signatories to an indemnity in favour of the second respondent, Lombard Insurance. Lombard Insurance, in turn, signed a performance guarantee for the completion of the contract by the JV, in favour of the MEC.

The relevant clause of the guarantee provides that 'the Guarantor [Lombard Insurance] undertakes to pay the Employer [the MEC] the Guaranteed sum of the full outstanding balance upon receipt of a first written de-

mand from the [MEC] to [Lombard] ... calling up the [guarantee] stating that ... [t]he agreement has been cancelled *due to the [JV's] default* ... The demand *shall enclose a copy of the notice of cancellation*' (my italics).

The MEC sent a letter of demand to Lombard Insurance, calling up the guarantee. The MEC claimed that the JV has become dissolved and has no intention of completing the hospital. As a result, so the MEC argued, it (the MEC) had 'tacitly accepted the repudiation of the agreement' by entering into a new construction contract with another contractor.

The JV argued, firstly, that the MEC's letter of demand incorrectly claimed that the contract between the MEC and the JV had been cancelled because of non-performance by the JV. Secondly, it further argued that this incorrect claim of cancellation amounted to fraud and that, as a result, the guarantee has to be set aside.

Satchwell J confirmed that the beneficiary of a guarantee must comply with the 'absolutely clear' conditions of the guarantee. This is also known as the 'doctrine of strict compliance'. In the present case, the guarantee clearly requires a written notice of cancellation, since the letter of demand provides the MEC 'shall enclose a copy of the notice of cancellation'.

The court further held that a 'tacit acceptance' by the MEC of the JV's alleged repudiation of the contract did not constitute a written notice of cancellation.

The guarantee further required that the letter of demand had to claim that the agreement had been 'cancelled due to the JV's default'.

In the present case, the MEC presented a letter of demand in full knowledge that the contract had not been cancelled due to the default of the JV. The letter of demand contained untruths, which were known to be untruths at the time it was written by the MEC. The letter of demand was based on fraud and the guarantee was accordingly set aside.

Group Five were thus excused from their liability in terms of the indemnity. The court made no order as to costs.

Note: Although our courts had in the past in passing acknowledged the exception of fraud as a possible ground to escape liability under letters of credit and payment guarantees, the decision in *Group Five Construction* is, to the best of my knowledge, the first South African decision in which the court has actually applied the fraud exception against a beneficiary. Earlier South African case law merely acknowledged the existence of the fraud exception by way of an *obiter dictum*.

Contract

Enforcement of sale: In *Venalex (Pty) Ltd v Vighraha Property CC and Others* [2015] 2 All SA 645 (KZD) the facts were as follows. The applicant (the purchaser) contended it bought immovable property from the respondent (the seller). The purchaser sought orders declaring the agreement binding, directing the seller to do all things necessary on its part to bring about transfer of the property to the purchaser, and for costs.

The purchaser took occupation of the property. The price was secured, and transfer of the property ought to have taken place. But for some reason, which contradicted by the seller - the

purchaser puts down to 'seller's remorse' - the seller did not wish to proceed with the sale. It, accordingly, adopted the view that there was no binding agreement with the applicant because it was a company already in existence when the original agreement was signed. The seller's argument was primarily that the signatories for the purchaser had not purported to represent the purchaser, an existing company at the time. They had sought to conclude a pre-incorporation contract as contemplated by s 21 of the Companies Act 71 of 2008 (the Act). Because the purchaser was already at the time incorporated it did not qualify as a company entitled to ratify the agreement and take on the rights and obligations of purchaser under it.

The purchaser approached the court on the basis that, while it was correct that it was intended that a company would be 'formed', and that it would take on the mantle of purchaser, and receive transfer of the property, there was no reason to jump to the conclusion, as the first seller had, that the relevant contractual provisions contemplated the engagement and implementation of the provisions of s 21 of the Act. The purchaser argued that on a fair and proper construction of the provisions of the contract what was contemplated was a *stipulatio alteri*, which envisaged the rights and obligations of the purchaser in terms of the contract being taken up either by a company already incorporated or by one not yet incorporated.

Olsen J held that the three businessmen who signed the contract on behalf of the purchaser acted in their individual capacities, but stipulated for the substitution of a company in their place if that could be achieved by a fixed date. The question as to whether the company was one which existed or did not exist at the time of conclusion of the contract was, therefore, irrelevant. The remaining question was whether the contract itself rendered it relevant, with the result that only a company incorporated

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after the conclusion of the original agreement could take on the rights and obligations of the purchaser under the agreement. The court could not find support for the latter contention.

The application was thus successful and the court ordered the agreements to be binding and valid.

Delict

Interference with contractual relationship: In *Pick 'n Pay Retailers (Pty) Ltd v Liberty Group Ltd and Others* 2015 (4) SA 241 (GP) the court was asked to consider whether the conduct of a shop owner, Masstores, unlawfully interfered with the contractual relationship between another shop owner, Pick 'n Pay, and the landlord, Liberty, of the shopping centre where Masstores and Pick 'n Pay were tenants.

Liberty leased part of its Midlands Mall in Pietermaritzburg (the mall) to Pick 'n Pay, a supermarket chain. The lease agreement stated that Liberty would not allow another supermarket or food store to operate in the mall (the exclusivity agreement). Pick 'n Pay contended that Masstores (the fourth respondent) intended selling food from its existing Game store in the mall. Pick 'n Pay argued that this would change the Game Store into a 'supermarket' in violation of the exclusivity agreement, and constitute unlawful interference by Masstores in its contractual relationship with Liberty. Pick 'n Pay accordingly sought an interim interdict against Masstores (prohibiting interference) and the other respondents, including Liberty (prohibiting breach of contract).

Fourie J confirmed that it is trite that the delict of unlawful interference with a contractual relationship exists when a third party's conduct is such that a contracting party does not obtain the performance he or she is entitled to *ex contractu*. Inducement and a breach of contract are not prerequisites to a successful action.

The court held that Masstores conduct would constitute at least an attempt to unlawfully and intentionally interfere in the contractual relationship between Liberty and Pick 'n Pay which, if allowed to continue, would mean that Pick 'n Pay would not obtain the performance it was entitled to *ex contractu*, namely to enjoy the right of exclusivity. The elements of the delict were therefore established.

The court accordingly ordered that an interim interdict be issued in terms of which Liberty was prohibited from acting in breach of its contractual obligations to Pick 'n Pay by permitting and/or consenting and/or allowing Masstores to operate a Game FoodCo within the existing Game Store at the mall. Liberty was further ordered to preserve the *status quo* as it was before the introduction of a Game FoodCo pending the outcome of arbitration proceedings.

The costs of the application were thus reserved.

Medical negligence: In *Khoza (on behalf of minor child Z) v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government* [2015] 2 All SA 598 (GJ) the court was asked to consider the possible medical negligence

of the nursing staff of Chris Hani-Baragwanath Hospital, which is a state hospital.

The plaintiff was Khoza, who claimed damages from the defendant on behalf of her minor son. Her son suffered from a severe neurological disability. According to the plaintiff, her son's condition was due to medical negligence during the course of his delivery in the maternity ward at the state hospital.

The issues for determination were whether there was any act or omission on the part of the medical staff during the period between 11:15 pm on 24 May 2008 until the infant was delivered at 5:20 am the following morning, which amounted to negligence, and if so, whether such negligence caused or contributed to the injury or whether the injury was due to some other cause.

It was common cause that the plaintiff was placed on a cardio-topographic monitoring machine (a CTG), which is used to detect foetal distress. Some of the fundamental aspects of this case concerned whether the CTG was in fact monitored, the relevance of the disappearance of a number of the CTG reports and whether the records that were available had been tampered with.

Spilg J held that where a CTG is used, its recordings are regarded as the key evidence. Sections 13 and 17 of the National Health Act 61 of 2003 require not only that the records of hospitals and clinics be maintained and safely stored, but also that adequate controls of access are put in place. The failure to produce the CTG records without an adequate explanation resulted in the inadmissibility of hear-


say testimony. That poses a problem for the plaintiff who still bears the onus of demonstrating negligence. The court considered whether any inference could be drawn of negligence on the part of the medical staff. It reasoned that even without drawing inferences from the failure to produce the CTG traces, the defendant's nursing staff failed in their duty to monitor the mother and foetus, either properly or at all.

Negligence having been established, the final question was whether the failure to monitor would have averted the injury or whether it would have occurred in any event. It was found that the injury could have been avoided with proper monitoring.

The defendant was ordered to pay 100% of the plaintiff's proven damage plus costs of suit.

Negligent omission: In *The South African Hang and Paragliding Association and Another v Bewick* [2015] 2 All SA 581 (SCA) the court was asked to pronounce on the potential delictual liability for a negligent omission.

While on holiday in the Western Cape, the respondent (the plaintiff), a United Kingdom citizen, decided to take a tandem paragliding flight. Arrangements were made with an entity that offered such service, and the plaintiff was paired with an experienced paragliding pilot to do a flight outside Hermanus. Just after take-off, the paraglider experienced a wing collapse. This, in turn, resulted in a collision with a hill, which left the plaintiff paralysed in a wheelchair. She instituted action in the High Court, claiming damages



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from, among others, the pilot and his employers, the South African Hang and Paragliding Association (the defendants).

The plaintiff's claim against the defendants was based on the following factual averments. Paragliding within South Africa fell under the direction and control of the two defendants. Tandem paragliding for reward was illegal and the two defendants were aware that such illegal activity was going on. The defendants were under a legal duty to take reasonable steps to terminate and prevent this illegal activity, but had negligently failed to do so. Had the defendants done so, the flight during which the plaintiff sustained her injuries, would not have occurred.

The High Court found the defendants liable, jointly and severally, for such damages as the plaintiff might prove.

On appeal Brand JA pointed out that the plaintiff's case was based on an omission or failure by the defendants to do something as opposed to a positive act. Negligent conduct manifesting itself in the form of a positive act, which causes physical injury raises a presumption of wrongfulness. By contrast, in relation to liability for omission and pure economic loss, wrongfulness is not presumed and depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination according to criteria of public and legal policy consistent with constitutional norms.

Wrongfulness, in turn, depends on whether or not it would be reasonable, having regard to considerations of public and legal policy, to impose delictual liability on the defendant for the loss resulting from the specific omission. The first question was whether or not tandem paragliding for reward was indeed illegal. The court examined various legislative enactments and concluded that albeit unintended, tandem paragliding for reward, remained illegal at the time of the accident.

The next question was why the defendants would be

responsible for the enforcement of those statutory provisions. The court assumed for the sake of argument, that the first defendant was statutorily obliged to suspend the licences or to refuse the annual renewal of the licences of paragliding pilots who undertook tandem paragliding for gain.

The next question was whether the defendants' omissions were wrongful in the delictual sense. In this case, the question of wrongfulness depended on whether, in all the circumstances, it would be reasonable to impose legal liability on the defendants. The court answered that question in the negative. The extension of delictual liability in the circumstances of this case was not regarded as reasonable.

The appeal was thus upheld with costs, and the High Court's order was replaced with one in terms of which the plaintiff's claim was dismissed.

Euthanasia

Voluntary active euthanasia:

In *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP) the emotionally charged but sensitive issue of euthanasia arose for decision. The applicant was a lawyer by profession. He had freely and voluntarily and without undue influence requested the court to authorise that he be assisted in an act of suicide. He was terminally ill and had stage four cancer. The level of cancer that the applicant suffered from was not in dispute. The applicant died on the day the present court made its order. He had suffered intractably and had a severely curtailed life expectancy of some weeks only. He applied to the court to allow him to die with dignity and painless by way of doctor-assisted suicide.

Fabricius J pointed out that the current legal position is that assisted suicide or active voluntary euthanasia is unlawful (see *S v De Bellocq* 1975 (3) SA 538 (T) at 539D; *S*

v Marengo 1991 (2) SACR 43 (W) at 47 *a - b*; and *Ex parte Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A)).

In a lengthy and wide ranging judgment that cut across various issues of morality, law and constitutionality, including the right to die with dignity, the court granted the applicant an order allowing a willing medical practitioner to assist him in committing suicide by the supply or administration of a lethal substance.

For space considerations I will merely list the main issues that the court addressed in allowing the present application –

- the current legal position;
- the constitutional imperatives that required, in the context of the relief sought, the development of the prevailing common law, in particular the right to die with dignity as an adjunct to the right to human dignity;
- concerns about the legalisation of active voluntary euthanasia;
- developments in foreign jurisdictions regarding the concept of euthanasia; and
- the parties' arguments for and against the granting of the application.

The court emphasised that its order must not be read as endorsing the proposals of the draft Bill on End of Life as contained in the Law Commission Report of November 1998 (Project 86) as laying down the necessary or only conditions for the entitlement to the assistance of a qualified medical doctor to commit suicide.

Finally, the court expressed the wish that, having regard to the importance of legal certainty regarding the present topic, it will be preferable (and no doubt this will occur in due course) that the CC pronounce on the relevant principles. At least eight judges will have sufficient time to consider all relevant aspects and they are also assisted by qualified law clerks to do the necessary research.

- See 2015 (June) *DR* 4 and 2015 (July) *DR* 23.

Law of succession

Administration of estates:

In *Nedbank Ltd v Steyn and Others* [2015] 2 All SA 671 (SCA) 17 applications for default judgment came before the GP, in which the plaintiffs were all commercial banks. At least one of the defendants in each case was the executor/executrix of a deceased estate. In each case, the cause of action relied on was a loan to the deceased, secured by a mortgage bond. Apart from an order for payment of the amount owing under the loan agreement, the plaintiff in each case sought an order declaring the properties mortgaged executable and also applied for the issue of writs of execution in respect of the properties.

The High Court ordered all the applications for default judgment to be removed from the roll, in order to enable the plaintiffs to comply with the provisions of the Administration of the Estates Act 66 of 1965 (the Act). The effect of that order was that the plaintiffs would have to start proceedings all over again and that, in consequence, the applications were effectively dismissed. The appellant, Nedbank, in the present matter was the plaintiff in six of the applications.

In refusing to grant default judgment, the court below held that Nedbank had instituted action against the executors or executrices in the deceased estates under common law, instead of adopting the claims procedure provided for by ss 29, 32, 33 and 35 of the Act. That decision was in direct conflict with the conclusion arrived at in *Nedbank Ltd v Samsodien* NO 2012 (5) SA 642 (GSJ), which case the court *a quo* held was wrongly decided.

The issue on appeal was whether the provisions of ss 29, 32, 33 and 35 of the Act preclude a creditor from its common-law right to institute action against the deceased estate for payment in terms of a loan agreement.

Brand JA pointed out that in the *Samsodien* case, Samsodien was also the executrix

in a deceased estate. When Nedbank instituted action against the estate by way of summons, she raised the special plea that the procedure adopted by Nedbank was incompetent in that it should have followed the claims procedure laid down in the Act instead. However, the court held that the claims procedure does not deprive a creditor of its common law right to enforce a claim against the deceased by way of action against his estate, with the result that the special plea was unfounded. Brand JA agreed with that view, confirming that the procedure laid down in the Act does not preclude the plaintiff from instituting an action in common law against the estate.

The six appeals were upheld and the High Court's orders set aside. No order as to costs was made.

Trusts

Removal of trustee: The crisp facts in *Kidbrooke Place Management Association and Another v Walton and Others* NNO 2015 (4) SA 112 (WCC) were that Walton and Badenhorst were the trustees of a trust that owned land in Hermanus. The trust was indebted to a bank and Walton and Badenhorst executed a scheme to settle it. They procured the establishment of a company whose shares they owned in their personal capacity; as trustees they caused the trust to sell erven to the company on favourable terms and at below market value. The company then on-sold the erven to third parties and settled the trust's debt to the bank with the proceeds, keeping what remained as profit. This and other indiscretions caused the beneficiary of the trust – a management association – and one other person to apply for the removal of Walton as a trustee. Badenhorst had by then resigned. The removal was sought in terms of s 20(1) of the Trust Property Control Act 57 of 1988 (the Act) and the common law, for breach of fiduciary duty.

At stake were the following three issues:

- whether only a beneficiary of a trust could claim the removal of one of its trustees;
- whether a trustee's purchase of immovable property from a trust needed to be confirmed by a court; and
- under which circumstances does the common law permit a court to remove a trustee from his or her office.

Binns-Ward J decided these issues as follows. First, s 20(1) of the Act permitted any person with an interest in the trust property to apply for the removal of a trustee. In terms of the common law any person with a sufficiently direct interest in the subject of the litigation would also have standing to apply for this relief.

Secondly, a trustee's purchase of immovable property from a trust indeed needs to be confirmed by a court.

Thirdly, a court can remove a trustee where this would be for the welfare of the beneficiaries and in the interests of the trust estate. It was not necessary for there to be a finding of dishonesty, gross inefficiency or untrustworthiness on the part of the trustee concerned.

The application for the removal of Walton as a trustee was granted. Walton was to pay the costs of suit.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with champerty, civil procedure, constitutional law (the separation of powers and the review of rulings by the Speaker), contempt of court, criminal procedure, discoveries, evidence, insolvency, labour law, marriage, medical aid schemes, motor vehicle accidents, practice and revenue.



By
Muhammad
Patel

Illicit outflow of capital from South Africa eliminated by statutory duties placed on directors

Kukama v Lobelo and Others (GSJ) (unreported case no 38587/2011, 12-4-2012) (Tshabalala J)

In this article a simple illustration is first given of the concepts of semi-privatisation and privatisation. Secondly, common law duties and fiduciary duties of directors under the Companies Act 71 of 2008 (the Act) are discussed. Lastly, the case of *Kukama v Lobelo and Others* (GSJ) (unreported case no 38587/2011, 12-4-2012) (Tshabalala J) is cited in terms of the far-reaching ramifications on directors in light of deterring directors from engaging in illicit outflow of capital activities.

In discussing illicit outflow of capital activities, with specific focus on South Africa, the spot light is shone upon directors. This article is relevant to legal practitioners working off a set of facts which raises questions over a director/s delinquency. This article further encourages legal practitioners to apply the provisions of the Companies Act 71 of 2008 (the Act) cited herein. Lastly, legal practitioners are recommended to study the *Kukama* case when assessing director/s delinquently and expand on the Judgment of this precedent setting case when preparing/drafting papers. In light of the sixth Thabo Mbeki Africa day, it is crucial to highlight a recent study by the Global Financial Integrity (GFI) entitled *Illicit Financial Flows from Africa: Hidden Resource for Development* (www.gfintegrity.org), which estimated total illicit outflows from the African continent across the span of 39 years at around \$ 1,8 trillion. Further, the top five countries with the highest outflow measured were: Nigeria (\$ 89,5 billion), Egypt (\$ 70,5 billion), Algeria (\$ 25,7 billion), Morocco (\$ 25 billion), and South Africa (\$ 24,9 billion). Furthermore, the African Union High Level Panel on Illicit Financial Flows from Africa, headed by the former South African President, Thabo Mbeki, recently issued a report stating that Africa loses around \$ 60 billion annually due to illicit financial outflows. The report has also established that most illicit financial flows are facilitated through trade mispricing.

Illicit outflow comprises of trade mispricing, bulk cash movements and smuggling,

among other *modus operandi*, all of which are formed to move money out of Africa with the object of avoiding taxes.

The debate surrounding the issue of semi-privatisation and privatisation, provides for interesting legal analysis in light of the illicit outflow of capital by directors under the Act.

Semi-privatisation

An interesting and relevant example of semi-privatisation can be found in South Africa in regard to Eskom, the 'main' electricity provider of South Africa. Semi-privatisation is best illustrated in terms of a public-private partnership (PPP).

A PPP is defined as 'a contractual arrangement between a public sector institution and a private party in which the private party performs an institutional function or uses state assets and assumes substantial financial, technical and operational risk in the design, financing, building and or operation of the project, in return for a benefit' (Ivan Grobbelaar *The privatisation of the electricity industry in South Africa* (unpublished LLM thesis, University of Pretoria, October 2010) 72).

A PPP is beneficial for governments such as South Africa as it limits risks and prevents the illicit outflow of capital as witnessed in cases of full privatisation because the state is privy to the operations conducted under a PPP.

Privatisation

Privatisation is the transfer of assets to the private sector rather than a transfer merely of activities. (OECD 'Privatisation in the 21st Century: Summary of Recent Experiences' www.oecd.org) Privatisation is not an evil proposition if appropriate checks and balances are put in place. These checks and balances consist of carefully drafted legislation in company and tax law respectively.

Common law and statutory fiduciary duties on directors

The common law in South Africa places

on directors fiduciary duties. Some of these duties are -

- to act in the best interests of a company;
- prevent a conflict of interest;
- act within the limitations of power; and
- exercise powers for the purpose for which they were conferred and maintain an unfettered discretion.

In the South African context the Act makes provision for directors' statutory duties. Section 76 of the Act lists the statutory fiduciary duties of directors. A few sub-sections of this provision are s 76(2)(a) of the Act - which create a statutory duty on a director to avoid a conflict of interest and s 76(3)(a) of the Act - which places on directors a duty to act in good faith and for a proper purpose.

In light of the above provisions, directors will refrain from running companies fraudulently because they would be aware that if they breach their statutory fiduciary obligations they may face civil or even criminal liability.

Director's liability for breaching fiduciary duties

If directors breach their statutory duties they would be held liable under s 77 of the Act. A provision to be considered also is s 218(2) of the Act which reads: 'Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention'. This subsection makes provision for civil liability if one suffers any loss or damage and is wide enough for one to institute action against a director or anyone else that acts inappropriately by taking part in illicit outflow of capital schemes.

In addition, consideration is to be given to corporate governance in the form of the King III report. One of the key principles of the report is 'social transformation and redress', which would 'give rise to greater opportunities, efficiencies, and benefits, for both the company and society' (Corporate Governance King III report www.pwc.co.za/en/king3/, accessed 31-8-2014). If the King

III report is applied then multinational corporations would have a duty to contribute positively to society.

Case law

The *Kukama* case is a precedent setting case in which the first order of delinquency against a director was made in terms of s 162 of the Act. It is not necessary to discuss the facts of the case but rather some provisions of the Act as highlighted in the case.

Section 162(5)(c)(i) of the Act reads: 'A court must make an order declaring a person to be a delinquent director if the person - (c) while a director - (i) grossly abused the position of director'. My view is that a director grossly abuses his position by participating in illicit outflow of capital activities.

A finding of delinquency against a director has far-reaching effects. This is because under s 69(8)(a) of the Act, a director can be disqualified if he or she is found delinquent under s 162 of the Act. The time period in which a director will be disqualified for grossly abusing his or her position under s 162(6)(b)(i), is to be decided by a court, by factoring in conditions limiting the application of the declaration to one or more particular categories of companies and under

s 162(6)(b)(ii), a period of seven years from the date of a court order, or such longer period as determined by the court at the time of making the declaration, subject to subs 11 and 12 in terms of the Act.

It is common knowledge that multinational corporations operate in South Africa and that parastatals such as Eskom may soon be semi-privatised. Further, many private entities carry out business in South Africa and the provisions in the Act reflect that we have done what is necessary insofar as deterring directors from carrying out illicit outflow of capital activities.

Conclusion

Regardless of whether directors act in a semi-privatised or privatised entity they will face civil or even criminal liability if found guilty in participating in illicit outflow of capital activities. Directors in South Africa must take heed of their statutory fiduciary duties under the Act and be mindful not to be pronounced delinquent as in the *Kukama* matter.

The far-reaching effect of the *Kukama* case is that apart from disqualification a director may face a more severe sentence at a courts discretion. The only problem that may be encountered in enforcing the

provisions of the Act and the common law is in situations where the companies involved in illicit financial outflows are not domiciled in South Africa, as South African company law will not be applicable to such companies. However, it is quite common for the mispricing that leads to illicit financial outflows to be facilitated by a South African subsidiary of a multinational company, which means that the South African company law will be applicable to such a subsidiary, as the company is neither an external nor a foreign company in that context.

Finally, the African countries that suffer most of the illicit financial outflows should consider adopting similar company law rules as the ones applicable in South Africa and should, in particular, consider extending 'standing rules' to empower those acting in 'the public interest' with right of action in company law in order to protect the interests of the companies concerned.

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RETHINK. REINVENT.

Launching business rescue applications in liquidation proceedings – (successfully) flogging a dead horse?

By
Bouwer
van
Niekerk

Richter v Absa Bank Limited (SCA) (unreported case no 20181/2014, 1-6-2015) (Mhlantla, Leach, Pillay JJA, Fourie and Dambuza AJJA).

A potentially far-reaching decision regarding the launching of business rescue proceedings in liquidation proceedings was handed down on 1 June 2015 in the Supreme Court of Appeal in *Richter v Absa Bank Limited* (SCA) (unreported case no 20181/2014, 1-6-2015) (Mhlantla, Leach, Pillay JJA, Fourie and Dambuza AJJA).

The appeal was concerned with the issue as to whether it is competent to apply for business rescue in terms of s 131 of the Companies Act 71 of 2008 (the Act) after a final liquidation order has been granted against a company. The appellant appealed against the decision of the court *a quo*, which found that it was not competent to apply for business rescue after a final winding-up order had been issued. In deciding this issue, the court's primary focus was on the interpretation of 'liquidation proceedings' within the context of s 131(6) of the Act, which interpretation would ultimately determine the outcome of the appeal.

Sub-sections 131(1) and (6) of the Act provide that:

'(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

...
(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for.'

In interpreting the concept 'liquidation proceedings', the court placed significance on the fact that s 131(1) of the Act entitles affected persons to apply to court for an order placing a company under supervision and commencing business rescue proceedings at any time. The court then extrapolated on this by pointing out that s 131(7) also empowers the court, when considering an applica-

tion for business rescue, to grant orders provided for in subs 131(4) and (5) at any time during the course of liquidation proceedings.

The court then turned its attention to the meaning of 'liquidation'. It pointed out that '[g]enerally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end, and the assets thereof, if any, are redistributed'.

The court continued by pointing out that the position on the granting of a final order of liquidation is that the company continues to exist; it is merely the control of its affairs that is transferred from the director(s) to the liquidator(s). In terms of s 348 of the Companies Act 61 of 1973, liquidation by the court commences on presentation to it of the application for the winding-up, and continues until the affairs of the company have been finally wound up and the Master's certificate to that effect is published in the *Government Gazette*, thus dissolving the company.

The gist of the court's thinking is contained in para 12: 'I do not think the phrase "liquidation proceedings" in any way alters the significance of what is meant by liquidation. In terms s 136(4) of the Act if liquidation proceedings have been converted into business rescue proceedings, the liquidator is regarded as a creditor of the company to the extent of any outstanding amounts owing to him or her for any remuneration due for work performed, or compensation for expenses incurred before the commencement of business rescue proceedings. Under s 1(1) and sch 5(9) of the 1973 Act, which applies to liquidation of insolvent companies, the definition of "liquidator" includes a provisional liquidator and a final liquidator. Consequently, the conversion of liquidation to business rescue even after a final liquidation order has been granted, was clearly envisaged by s 136 (4)'.

In discussing the practicalities of its decision, the court then formed the view that it would be fairly easy to contemplate instances, after the issue of the final winding-up order, which could lead to circumstances where the company improves drastically, to the point where

it would become profitable, should it be allowed to trade. It sights examples of the company being awarded a contract previously tendered for, securing of funding for future projects and the subordination of claims by major creditors. Accordingly, the court remarked that '... in the scheme of things, where, during liquidation, evidence becomes available that business rescue proceedings will yield a better return for shareholders and creditors and jobs will be retained, there could be no reason to deny business rescue only because a company is in final liquidation. Indeed, to allow it to do so would fall into the very scheme of business rescue envisaged by the Act and fulfil the objectives of providing for revival of a financially distressed company with all its attendant social benefits'.

During argument, the respondent raised various concerns with what it termed a 'liberal interpretation' of s 131(1) of the Act. The concerns included repetitive disruptions and uncertainly resulting from various affected parties launching business rescue proceedings (even at different times), a company's capacity (or lack thereof) to conduct effective business and conclude and implement contracts under final winding-up conditions and the revision of business control to the very directors who may have caused the company's financial distress (thereby putting the proverbial rabbit in charge of the lettuce).

The court conceded that these concerns are valid, but was not persuaded to revert to what it termed 'an unduly restrictive approach' in interpreting the Act. It dealt with these concerns thus: 'The simple answer is that a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved.

'There is no sensible justification for drawing the proverbial "line in the sand" between pre and post final liquidation in circumstances where the prospects of success of business rescue exist. The legislature did not do so and to restrict business rescue to those cases in which a final winding up order has not been granted is inimical to the Act'.

On a cursory reading the judgment may tend to offend the insolvency practitioner; surely it could not have been the intention of the legislature to allow for applications for business rescue to be made at any time before the dissolving of a company? Surely such a state of affairs can only harm the self-evident legal belief that interpretations of statutes should lead to, or at the very least advance, legal certainty? Where can we find any certainty in liquidation proceedings

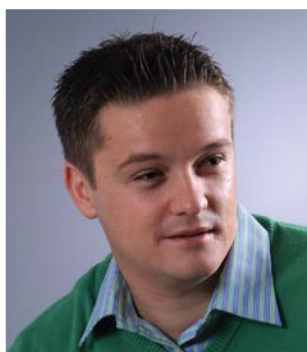
if any Joe Soap can apply to place a company under supervision at any (even an advanced) stage of being wound-up?

However, one must keep in mind that it is not the purpose of the courts to clarify what it believes the thinking of the legislature ought to have been. If the wording of the Act is clear and unambiguous, it must be interpreted as such. Should it perceive its mandate to extend further than that, the judiciary will run the risk of meddling in another sphere

of government. That, and the unavoidable allegations of disregarding the separation of powers that accompany such meddling, is something that the judiciary should best avoid.

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NEW LEGISLATION



NEW LEGISLATION

Legislation published from
1 – 31 July 2015

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PROMULGATION OF ACTS

Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015. Commencement: 7 July 2015. GN593 GG38977/7-7-2015.

Eskom Special Appropriation Act 7 of 2015. Commencement: 6 July 2015. GN590 GG38974/6-7-2015.

Eskom Subordinated Loan Special Appropriation Amendment Act (2008/09-2010/11 Financial Years) 6 of 2015. Commencement: 6 July 2015. GN589 GG38973/6-7-2015.

Financial and Fiscal Commission Amendment Act 4 of 2015. Commencement: 7 July 2015. GN592 GG38976/7-7-2015.

SELECTED LIST OF DELEGATED LEGISLATION

Collective Investment Schemes Control Act 45 of 2002

Capital requirements with which a manager of a collective investment scheme in participation bonds must comply. BN138 GG39003/17-7-2015.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Minimum level of pension of the compensation fund. GN658 GG39044/31-7-2015.

Construction Industry Development Board Act 38 of 2000

Amendments to the standard for uniformity in construction procurement. BN136 GG38960/10-7-2015.

Consumer Protection Act 68 of 2008

Memorandum of agreement entered into between the National Consumer Commission and the Independent Communications Authority of South Africa. GenN701 GG38986/10-7-2015.

Continuing Education and Training Act 16 of 2006

National policy on community colleges. GN569 GG38924/3-7-2015.

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN687 GG38957/6-7-2015.

Financial Markets Act 19 of 2012
Prescribed fees. BN137 GG38998/17-7-2015.

Health Professions Act 56 of 1974

Regulations relating to qualifications which entitle medical laboratory scientist to registration. GN604 GG38991/15-7-2015.

Legal Metrology Act 9 of 2014

Amendment of regulations relating to the tariff of fees charged for services rendered in terms of the Act by the National Regulator for Compulsory Specifications. GN643 GG39025/24-7-2015.

Liquor Products Act 60 of 1989

Amendment of the Mead Regulations. GN R630 GG39017/24-7-2015.

Amendment of the wine of origin scheme. GN R628 GG39017/24-7-2015.

Medicines and Related Substances Act 101 of 1965

Annual single exit price adjustment of

medicines and scheduled substances for the year 2016. GN601 GG38988/13-7-2015.

Mine Health and Safety Act 29 of 1996
Regulations relating to explosives. GN R584 GG38970/10-7-2015.

National Environmental Management Act 107 of 1998

Regulations for admission of guilt fines. GN R635 GG39024/24-7-2015.

National Environment Management: Waste Act 59 of 2000

Amendments to the list of waste management activities that have or are likely to have a detrimental effect on the environment. GN R633 GG39020/24-7-2015. Regulations regarding the planning and management of residue stockpiles and residue deposits from a prospecting, mining, exploration or production operation. GN R632 GG39020/24-7-2015.

National Nuclear Regulator Act 47 of 1999

Fees for nuclear authorisations. GenN737 GG39025/24-7-2015.

National Regulator for Compulsory Specifications Act 5 of 2008

Amendment of regulations relating to the payment of levy and fees with regard to compulsory specifications. GN644 GG39025/24-7-2015.

Natural Scientific Professions Act 27 of 2003

Amendments to fields of practice. GenN680 GG38924/3-7-2015.

Social Assistance Act 13 of 2004

NEW LEGISLATION

Amendment of regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance. GN R621 GG39007/21-7-2015.

Tax Administration Act 28 of 2011

Incidences of non-compliance by a person in terms of s 210(2) of the Act that are subject to a fixed amount penalty in accordance with ss 210(1) and 211 of the Act. GN597 GG38983/10-7-2015.

DRAFT LEGISLATION

Draft community broadcasting support scheme under the Broadcasting Act 4 of 1999 and the Electronic Communications Act 36 of 2005. GenN676 GG38947/1-7-2015.

Proposed regulations relating to human milk banks in terms of the National Health Act 61 of 2003. GN R577 GG38945/3-7-2015.

Proposed list of particular trees and groups of trees that will form part of the list of Champion Trees in terms of the National Forests Act 84 of 1998. GenN664 GG38924/3-7-2015.

Draft Public Service Commission Amendment Bill. GenN686 GG38956/3-7-2015.

Proposed regulations relating to foodstuffs for infants and young children in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. GN R591 GG38975/7-7-2015.

Proposed adjustment of fees in respect of the cost of an assessment in terms of regulations 3(2)(a) of the Road Accident Fund Regulations under the Road Accident Fund Act 56 of 1996. GN594 GG38979/9-7-2015.

Proposed amendments to the Strate rules in terms of the Financial Markets Act 19 of 2012. BN135 GG38960/10-7-2015 and BN142 GG39025/24-7-2015.

Proposed fees payable for the operation on public roads of an abnormal vehicle and the conveyance of an abnormal load in terms of the National Road Traffic Act 93 of 1996. GenN702 and GN600 GG38987/13-7-2015.

Proposed amendment of general regulations made in terms of the Medical Schemes Act 131 of 1998. GN603 GG38990/14-7-2015.

General regulations relating to medical devices and in vitro diagnostic medical devices in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN602 GG38990/14-7-2015.

National road traffic regulations in

terms of the National Road Traffic Act 93 of 1996 for comment. GN R607 GG38997/17-7-2015.

Draft co-operatives administrative regulations, 2015 in terms of the Co-operatives Act 14 of 2005. GN634 GG39019/24-7-2015.

Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of s 24G of the National Environmental Management Act 107 of 1998 for comment. GN R636 and 637 GG39024/24-7-2015.

Draft Copyright Amendment Bill. GN646 GG39028/27-7-2015.

South Africa maritime and aeronautical search and rescue regulations, 2016 in terms of the South African Maritime and Aeronautical Search and Rescue Act 44 of 2002 for comment. GenN753 GG39033/30-7-2015.

Draft regulations relating to minimum uniform norms and standards for provincial teacher development institutes and district teacher development centres in South Africa in terms of the National Education Policy Act 27 of 1996. GN657 GG39038/31-7-2015.



EMPLOYMENT LAW

Employment law update



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The right to use sleeping facilities on work premises during a picket or lockout

In *Rooiport Developments (Pty) Ltd v Association of Mineworkers and Construction Union and Others* [2015] 6 BLLR 641 (LC), the Labour Court, per Lallie J, considered, *inter alia*, an application declaring that striking workers were not entitled to occupy sleeping quarters on

the work premises for the duration of a strike and lockout.

The employer, Rooiport Developments, operates a diamond mine in the Northern Cape. After failed wage negotiations, the Association of Mineworkers and Construction Union (AMCU) issued the employer with a 48-hour strike notice, in response to which, the employer issued a lock out notice effective from the commencement of the strike. The

main issue that the court had to decide was whether the striking workers had a right to occupy the sleeping facilities on the employer's premises.

The employer argued that the striking workers did not have the right to occupy the sleeping facilities, as employees are not entitled to use the sleeping facilities when they are not working. The employer relied on the fact that the workforce is divided into three teams that work

different shifts. The employer contended that the employees are only allowed to occupy the sleeping facilities during their active duty cycle.

AMCU argued that the striking workers did have the right to use the sleeping facilities, as only half of the beds are occupied during a shift. AMCU relied on the contention that the employees had designated beds and left their personal belongings in the sleeping facilities even during their off days. Forcing the striking employees to vacate the sleeping facilities would force them to give up the protected strike as some lived as far as 280 kilometres from the employer's premises.

Looking at the totality of circumstances, the court found that the striking workers were only entitled to use the sleeping facilities when they were on active duty. This was evident from the fact that there are 350 employees and only 80 beds. It was clear from the circumstances that the striking workers lived at home on their off days.

The relevant picketing rules furthermore provided that accommodation during picketing would be determined by the terms and conditions of employment, which existed before the strike and picketing – no new rights were created. As AMCU did not succeed in proving that the striking workers had a right to use the sleeping facilities when not on active duty, there was no basis for the employer to be forced to create this right when they were on strike. There is accordingly no obligation on an employer to enhance striking employees' right to picket and to make their strike more effective. The court accordingly declared that the striking workers had no right to

make use of the sleeping facilities on the employer's premises for the duration of the strike and lockout.

The importance of considering employees' personal circumstances when changing working hours

In *Jordex Agencies v Gugubele NO and Others* [2015] 6 BLLR 600 (LC), the Labour Court (LC) had to consider on review the fairness of a dismissal for misconduct where, following a change in operating hours, an employee was dismissed for leaving work early in order to catch the last bus home. The Commission for Conciliation, Mediation and Arbitration (CCMA) had found that the dismissal had been both procedurally and substantively unfair and had ordered that the employee be reinstated and paid an amount of R 2 750.

For a period of four years the employee, a cleaner, was allowed to leave work early in order to catch the last bus home. The employer then changed its working hours so that the end of the working day was a half an hour later than before.

The change in working hours was implemented in order to accommodate couriers, who often arrived at the end of the day. However, as a cleaner, the employee had nothing to do with the couriers. The commissioner was therefore not convinced that the employee had committed misconduct: She left early in accordance with her usual working hours for the purpose of catching the last bus home.

With regard to procedural fairness, the employee was told at the disciplinary enquiry that as her witnesses were family

members and not from the employer's company, they could not testify. The commissioner found that the dismissal was procedurally unfair, as the chairperson's actions amounted to a refusal to allow the employee to call witnesses in her defence.

On review the LC, per Lallie J, held that an employer's power to regulate work practices is not without boundaries. The court pointed out that although an important factor in deciding the reasonableness of work practices is the effect on service delivery, here the working hours were changed in relation to a part of the business that did not effect the dismissed employee. The court held that the employer should have 'taken into account the [employee's] personal circumstances, her needs and circumstances, including family obligations and transport arrangements when changing hours of work'. The court pointed out that it was common cause that the employee had for four years left the workplace early in order to catch the last bus home, therefore, by changing working hours without consulting her, the employer forced her to breach the new work practice in order to get home. The LC found therefore, that the commissioner's decision that the dismissal had been substantively unfair, was not an unreasonable one.

With regard to procedural fairness, the LC held that the commissioner had erred in concluding that the employee was denied a chance to respond to the allegations against her. However, based on the substantive unfairness of the dismissal, the CCMA's award was not set aside and the application for review was dismissed.



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Time period for referral to arbitration

SAMWU obo KI Manentza v Ngwathe Local Municipality and Others (LAC) (unreported case no JA56/13, 24-6-2015) (Setiloane AJA with Waglay JP and Dlodlo AJA concurring).

Section 191(5) of the Labour Relations Act 66 of 1995 (LRA) reads:

'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the request of the employee if ...'

When does an employee's 'dies' (time period allowed) in which to refer their dispute to arbitration commence?

Does it automatically begin to run when either the certificate of none resolution is issued or when 30 days have lapsed since the dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council – whichever event occurs first.

Alternatively does the word 'or' in the

first line of the above section give an employee the option of deciding when his *dies* begins; either the employee can choose to refer his dispute to arbitration after 30 days from when he referred his dispute has expired (in which case the *dies* begins at the expiry of the 30 day period) or the employee can wait for the certificate to be issued, irrespective of whether this happens after the expiry of the 30 day period, (in which case the *dies* begins from date of certificate).

These questions formed the basis of the enquiry before the Labour Appeal Court.

Background

On 10 February 2003 the employee referred an unfair dismissal dispute to the bargaining council. Conciliation was set down for 3 April 2003 on which date parties agreed to extend the process for a further seven days. At the end of the extended period the employee requested

the council to issue a certificate of non-resolution yet the council erroneously set the matter down for arbitration. A certificate was eventually issued on 15 April 2004.

On 24 June 2004 the employee referred his matter for arbitration. At arbitration proceedings the municipality raised certain points *in limine* the primary one for purposes of this judgment was that in the absence of conciliation being held within 30 days from when the dispute had been referred to the council, the employee had to have applied for arbitration within 90 days from the expiry of the 30 day period, yet he only did so months later. As such the employee was out of time when referring his dispute to arbitration, which meant the bargaining council did not have jurisdiction to hear the matter.

Having regard to the fact that the employee referred his dispute to arbitration within 90 days from when the certificate of non-resolution was issued, the arbitrator found the council did have jurisdiction.

On review the municipality's argument found favour before Cele J who set aside the arbitrator's ruling having found the employee's referral was outside the prescribed time frame and, therefore, he needed to apply for condonation.

SAMWU on behalf of the employee appealed against the judgment.

It was argued on behalf of the employee that the word 'or' in s 191(5) gave the employee two options in respect of when he could apply for arbitration; either when the 30 day period from when his dispute had been referred to conciliation had lapsed 'or' subsequent to affording both parties an opportunity to settle at conciliation, the employee could wait for the certificate of non-resolution to be issued before deciding to refer his dispute to arbitration.

Therefore, the *dies* to refer his dispute to arbitration commenced in accordance with the employee's choice.

In support of this interpretation it was argued that s 191(5) should be read with ss 135 and 136 of the LRA.

Section 135(5) places an obligation on

the CCMA or bargaining council to issue a certificate once conciliation fails or at the end of 30 days from when the dispute had been referred or at the end of any further agreed period.

Section 136(1)(a) and (b) obliges the CCMA or council to arbitrate a dispute when a certificate has been issued and the referral to arbitration was made within 90 days from the date reflected on the certificate.

On a reading of these sections an employee is entitled to receive the certificate (as per s 135) and thereafter he has 90 days to refer his dispute to arbitration (as per s 136). Against these submissions it was argued that once the employee referred his dispute to arbitration on 24 June 2004, which was within 90 days of the certificate being issued, the council was competent to arbitrate the dispute.

The LAC held that the employee's entitlement to refer his dispute to arbitration was not underpinned by any election made by the employee; his entitlement is realised at the occurrence of either of the two jurisdictional preconditions, whichever came first. Thus if an unfair dismissal dispute is conciliated within 30 days of it being referred to the CCMA, the employee's right to refer their matter to arbitration accrues once the certificate is issued. The lapse of the 30 day time period post conciliation bears no effect on such a right. Likewise if 30 days lapse from when the employee referred his dispute to the CCMA and before the matter is conciliated, the employee accrues his right to refer his dispute to arbitration at the expiry of the 30 day period and any subsequent conciliation process has no bearing on this right or entitlement. For this reason the time period in which to refer his matter to arbitration automatically commences once the right accrues. This interpretation, according to the LAC was consistent with the purpose and spirit of the LRA.

The court further drew distinction between ss 191 and 135 read with s 136. The former section deals specifically with disputes relating to unfair dismissals and unfair labour practices while the latter two sections deal with general disputes and matters of mutual interest.

In support of this, the court highlighted material differences between the sections. In s 191 there was no obligation on a commissioner to issue a certificate once conciliation failed or at the end of 30 day period as is the case in s 135. In addition, there is no requirement in s 191 that parties may agree to an extension of the conciliation process, as contemplated in s 135.

These differences reinforce the fact that an employee in an unfair dismissal dispute automatically acquires the right to refer his dispute to arbitration after the expiry of the 30 day period.

By implication the difference in the wording of s 191 as compared to s 135 read with s 136 meant that unfair dismissals and unfair labour practice disputes should not be included when reading s 135 and s 136, for in doing so would lead to material contradictions. Following this conclusion the LAC held that any support the employee placed on s 135 and s 136 to argue its case was misplaced.

The question then arose as to what time frame an employee claiming an unfair dismissal had to refer his dispute to arbitration. The relevance of this question stemmed from the court's finding that s 136, (which does stipulate a 90 day time period to refer a dispute to arbitration) did not encompass disputes contemplated in s 191 and whereas s 191(5) did not provide for any time frame in which to refer a dispute to arbitration.

The court held that there was no reason why the time period set out in s 191(11), which required an employee claiming an automatically unfair dismissal to refer their dispute to the Labour Court within 90 days from when conciliation fails or from when the 30 day period has lapsed; should not be read into s 191(5).

Thus the court held that an employee to a dismissal dispute had 90 days from when the certificate of non-resolution was issued or from when the 30 day period lapsed, whichever occurred first, to refer their dispute for arbitration.

The appeal was dismissed with no order as to costs. □

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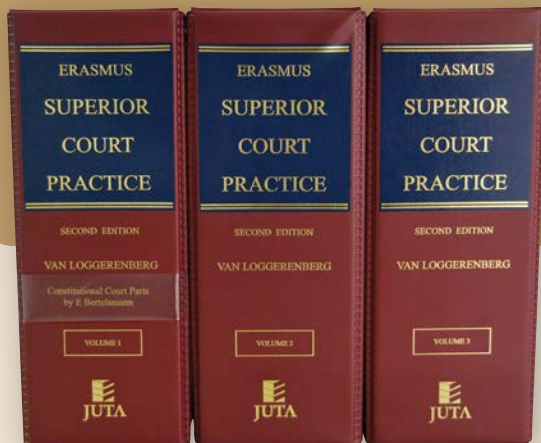
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