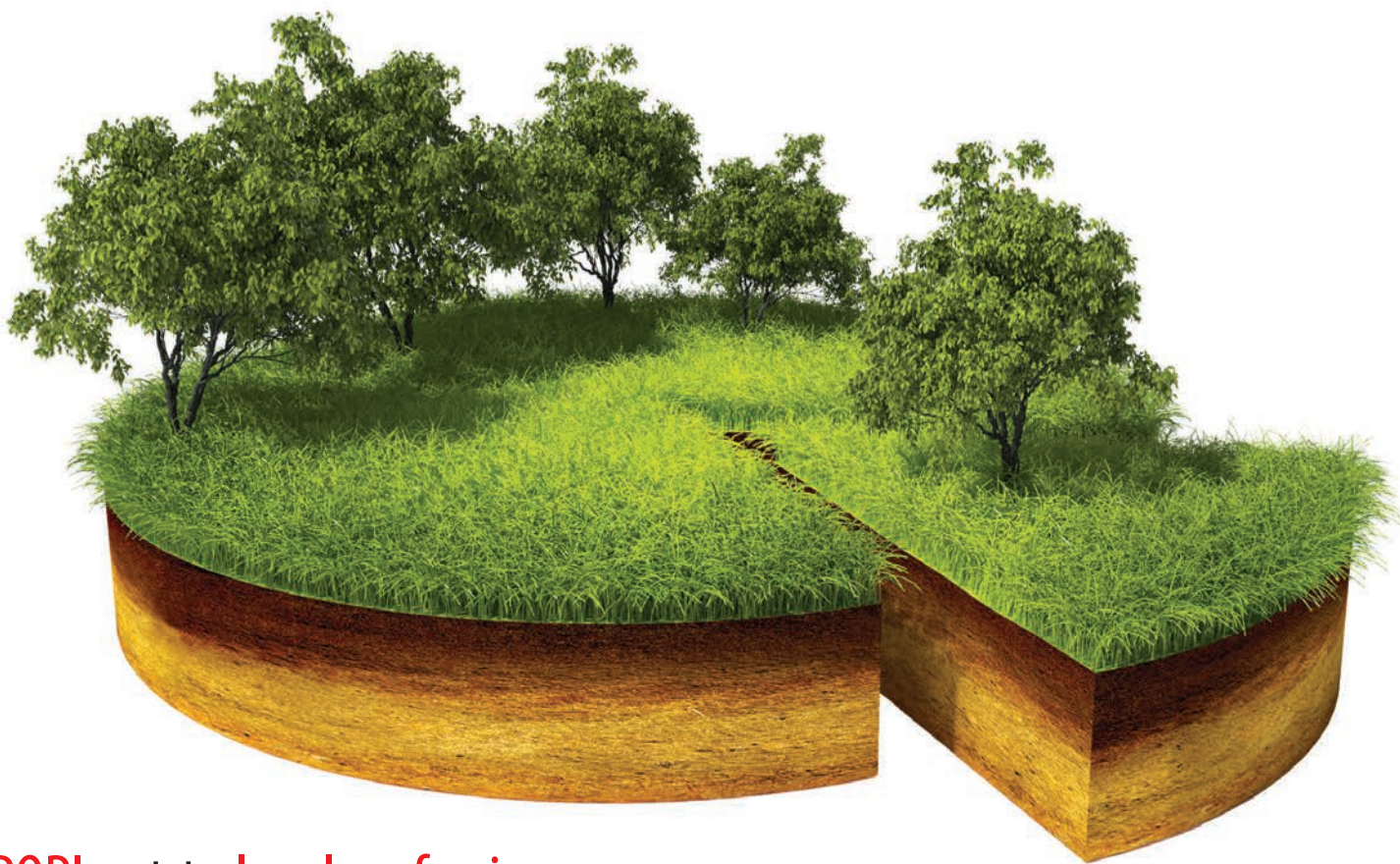


OCTOBER 2016

HAVING A SLICE OF PIE – UNDERSTANDING THE ACT



POPI and the **legal profession**:
What should you know?

Thuli Madonsela recipient of
LSSA Truth and Justice Award

Pro Bono Help Desk
launched

Pro bono legal
practitioners **acknowledged**

Virtual evidence in courts – a concept
to be considered in South Africa?

Rescission applications and
suspension of orders

National Forum
update

BLA SC Women
Empowerment Summit



SAWLA and **JAA** AGM



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The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 was promulgated to provide for the prohibition of unlawful occupation and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without permission of the owner or person in charge of such land. In this article, **Mohammed Moolla** discusses the Act and various considerations to be aware of.

28 Rescission applications and suspension of orders



Many civil litigation practitioners may recall their first instruction to bring an application for rescission of an order of the High Court and the comfort that the plain wording of r 49(11) of the Uniform Rules of Court at the time appeared to present to them.

Michael van Kerckhoven writes that the law relating to suspension of court orders that are the subject of an application for rescission has historically been mired in confusion.

30 Virtual evidence in courts – a concept to be considered in South Africa?

Courts are pre-eminently human creations and serve two primary functions in society, namely, they resolve disputes and deliver justice to litigants. A virtual court is the use of technologies that provide for hearing and trials with participants in distant areas, in which the physical location of the courtroom does not dictate the process or the conduct of the proceedings. **Dr Izette Knoetze** discusses the concept of dealing with virtual evidence in courts and case law pertaining therein.

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This article, written by **Johan Moorcroft** is intended as an introduction to aspects of the Protection of Personal Information Act 4 of 2013 (the Act), which will come into operation (save for ss 39 to 54, 112 and

113 that came into operation in 2014 in anticipation of the establishment of a regulatory framework) on a date to be proclaimed. Chapter VIII of the Electronic Communications and Transactions Act 25 of 2002 will be repealed when the Act comes into operation.

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LPC: What practitioners stand to lose

As the National Forum on the Legal Profession continues to work earnestly on its mandated functions, and as the profession moves closer to the formation of the Legal Practice Council (LPC), the question that arises is: What will happen to all the functions and benefits legal practitioners currently enjoy that the LPC will not be mandated to perform? To answer this question, it seems obvious that practitioners should form an organisation to look after their professional interests.

At the recently held Johannesburg Attorneys Association annual general meeting, President of the Law Society of the Northern Provinces, Anthony Millar, discussed this very issue. Mr Millar noted that reading from the preamble of the Legal Practice Act 28 of 2014 (LPA); it shows that the Act will protect everybody but legal practitioners. He added that the Act is regulatory in nature and does not deal with the many functions that the statutory law societies and other voluntary associations such as the Law Society of South Africa (LSSA) deal with. An important question Mr Miller also raised was: How will legal practitioners interact with the LPC? (see p 5)

Mr Millar went on further to state that it was necessary for practitioners themselves to establish promote and fund a broad-based professional association which can -

- act in their professional interest;
- represent them in various forums;
- act as their spokesperson nationally and internationally; and
- position the legal profession as the champion of the rule of law and a protector and promoter of constitutional rights.

Some practitioners may question the need for a professional interest body,

especially if formulating such a body may entail having to part with money to fund the body. However, the profession needs such a body because if such a body does not exist, the profession stands to lose the following:

- Receiving a copy of *De Rebus*, which is an authoritative and reliable source of information and the only source of legal content for some practitioners who cannot afford a library.
- Receiving information on changes that will affect their practices.
- The public will not have a point of reference to seek the services of legal practitioners.
- Legal practitioners will not be able to directly interact with the LPC on matters that will affect the profession, the public and their practices.
- The monitoring, reviewing and influencing of legislative and policy processes.
- Promotion of the profession through initiatives such as the Wills Week.
- The fulfilment of post-qualification professional development or continuing professional development in terms of s 6(5)(e) and (h) may be unaffordable if it is commercialised.

The above is not an exhaustive list of what legal practitioners stand to lose if a professional interest body is not formed. Many other risks will arise if such a body is not formulated. It is evident that a professional interest body is not a 'nice to have' but a necessity.

New staff member

De Rebus would like to welcome Kgomoiso Ramotsho to its team. She has been appointed as news reporter and takes over from Nomfundo Manyathi-Jele who has joined the communications department of the LSSA.



Mapula Thebe - Editor

Would you like to write for *De Rebus*?

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

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- Please note that the word limit is 2000 words.

- Upcoming deadlines for article submissions: 17 October and 21 November 2016.

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Transformation – the continuing debate

The South African Women Lawyers Association (SAWLA) held its annual general meeting (AGM) in August. The main topic discussed was transformation of the legal profession.

Director of Legal Services at the Department of Justice, Motshabi Setlhako-Madiehe, delivered the keynote address. Ms Setlhako-Madiehe said legal professionals needed to work together to form a perfect union that will ensure that the justice system is accessible to all, especially those that are underprivileged.

Manager at the Attorneys Development Fund, Mackenzie Mukansi, spoke about the opportunities available for female legal practitioners. He advised female legal practitioners to not be like their male counterparts. 'Women tend to spend too much time wanting to be like men, do not be like us, do not aspire to be like us. Keep your nurturing spirit. Do not be your worst enemies, do not compete against each other,' he said.

Panel discussion on transformation

President of the Black Lawyers Association, Lutendo Sigogo, noted that the rule of law is guaranteed through the legal profession. He added that transformation of the legal profession should be viewed as equitable distribution of work with the reflection of the countries demographics from university to the work environment. 'In respect of work, the demographics of the country should be reflected in the profession and the Bench,' he said.

With respect to gender transformation in the profession, Mr Sigogo said it begins with ensuring that female students who study law complete their degree. 'It is not enough that female students



Provincial Chairperson, Nomahlubi Khwinana, welcomed delegates at the AGM.

are accepted at university. If they are to complete their degrees so that females are well represented in the profession, they should be assisted to afford their tertiary fees. For instance, SAWLA could partner with a financial institution to provide such scholarships,' he added.

Mr Sigogo noted that female legal practitioners are still faced with having to leave practice when they go on maternity leave. He said SAWLA needs to find a mechanism to ensure that women who go on maternity leave are still able to practice when they return to the firm. He went on further to say that SAWLA should address the lack of female representatives in the leadership of the profession, as the figure of female leaders in the profession is 'unacceptably low'.

Lucrecia Seafield, from the Foundation for Human Rights, began her address by stating that there has been a significant change in the number of women in the profession and the Bench post-Apartheid. 'As much as there has been change in the number of females in the

profession, when we debate the issue of transformation, we need to understand that transformation is not the promotion for positions that women are not qualified for,' she added.

Ms Seafield went further to ask: 'Why do we need transformation? Is it a nice to have? That is not why we need it. Transformation is in fact a constitutional imperative and it should continue to be one. There are other reasons why we need transformation as it adds to diversity, which in turn assist the profession and the Bench in understanding issues pertaining to women.'

Ms Seafield highlighted the fact that there is still little mentoring for women entering the profession. 'We should look at how to make mentoring others an obligation or one of the criteria for remaining in the profession. Every year in August we debate the issue of transformation in the profession, it is time we take action and take this issue beyond the month of August. Each generation has a mission; our generation has betrayed its mission. We did not make



President of SAWLA, Noxolo Maduba, delivered the opening remarks.



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the profession better for women entering the profession. It is a shame that the profession is not better than we found it 20 years ago,' she added.

Deputy National Director of Public Prosecutions, Nomvula Mokhatla, said that in a nutshell transformation means access and exposure.

Resolutions from the AGM

The following resolutions were made fol-

lowing the closed session held during the AGM:

- Members of SAWLA in all provinces will participate in the initiative of providing sanitary towels at schools.
- The National Executive Committee is to conduct road shows in all provinces.
- The recently reviewed strategy plan document will be circulated to the members.
- The General Secretary, Nolukhanyiso

Gcilitshana, is to follow up on the issue of the formulation of the professional interest body.

- The provincial structures are to launch the student chapter of SAWLA.

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Separation of power defines ethical boundaries between South Africa's law makers

Former President of South Africa, Kgalema Motlanthe, spoke at the 74th Johannesburg Attorneys Association annual general meeting (AGM) on 7 September, at the Sunnyside Park Hotel, in Johannesburg. Mr Motlanthe discussed the topic 'Judiciary, an executive encroachment of each other's domain, fact or fiction?' He said the topic, without a doubt, called to mind the achievement of democracy and its foundational tenets. He said the topic asks to navigate the ethics and institutional values that structure contemporary democracy and form the blue print of the way society functions, and plays the role – including rights and responsibilities – of each citizen.

Mr Motlanthe said the separation of powers defines ethical boundaries required between the three arms of state, namely, the legislature, executive and judiciary. Each setting out to map functions, form responsibilities and oversee that each of the three arms of state becomes individually responsible for law making, execution and obligation. 'This doctrine was initially developed as a way to form a critical distinction and oversight between the different modes of government, ensuring that power is never abused and always kept in check,' he said.

Mr Motlanthe said: 'The reason why we have separation of powers, is to make sure that there are checks and balances, so that power is never centralised in the hands of one arm or the other of the state.' He added that in modern democracy the idea of separation of powers has become synonymous with the definition of democratic governance. He referred to Deputy Judge President of the Gauteng Local Division, Johannesburg, Judge Phineas Mojapelo, when he gave the mean-



Former President of South Africa, Kgalema Motlanthe, speaking at the 74th Johannesburg Attorneys Association annual general meeting held in Johannesburg on 7 September.

ing of separation of powers and said it differs across geographical arenas, and also cautioned that complete separation is not possible. He said, however, it should be strived for, in terms of ethical and moral obligation as outlined by the Constitution.

Mr Motlanthe quoted English philosopher and physician, John Locke's *Two Treatises of Government* (Filiquarian Publishing 2007), saying 'because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its

making and execution, to their own private advantage.'

Mr Motlanthe said even though constitutional democracy is a process, which is moving at a snail's pace, the beauty of it clearly states that if one steps wrong at the foot of law, they will be held accountable. He said it showed the strength of the democracy, and added that the legal fraternity should educate citizens on the basic aspects of the Constitution. Teach citizens that their rights and, democracy will thrive, however, he added it needed the participation of all citizens and not just that of lawyers. He said citizens must know and demand that such rights are not taken from them under any circumstances.

Mr Motlanthe also said that the executive members in Parliament must be educated. He referred to a discussion he heard on one occasion at the National Assembly, where it was noted that executive members and members of Parliament are elected by the people, but that judges are not elected. He said it was questioned why judges seemed to have the final say on matters in dispute. He said the principle of judicial review must be popularised so that people understand that on the act of ensuring compliance to the Constitution and law, the judiciary is not above the other two arms of state.

He added that in terms of the processed law, the legislature passes laws, the executive has to implement it and the judiciary has to adjudicate the dispute.

President of the Law Society of the Northern Provinces, Anthony Millar, said that while the public and legal practitioners have been patient with the transformation process of the legal profession, 20 years later it has not been completed. He said it was a source of concern, how-



President of the Law Society of the Northern Provinces, Anthony Millar, speaking at the JAA annual general meeting.

ever, it was not all bad, as there is the Legal Practice Act 28 of 2014 (LPA) that will be implemented on 1 February 2018.

Mr Millar quoted the preamble in the LPA that its purpose is to: 'Provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic, to provide for the establishment, powers and functions of a single South African Legal Practice Council and provisional councils in order to regulate the affairs of legal practitioners and to set norms and standards, to provide for the admission and enrolment of legal practitioners, to regulate the professional conduct of legal practitioners so as to ensure accountable conduct'.

Mr Millar said reading from the preamble of the Act, shows that it will protect everybody else but legal practitioners. He said the Act is regulatory and does

not deal with the many functions that the statutory law societies and other voluntary associations such as the Law Society of South Africa (LSSA) deal with. He asked what is going to happen to those functions? Who is going to fulfil them? How will legal practitioners interact with the new practice council that is coming to operation?

Mr Millar said at the present stage the National Forum on the Legal Profession is tasked with implementing the LPA. He said there is going to be nine provincial councils (one in each province), and they will be headed by the Legal Practice Council. He added that the assets and income of the four provincial law societies will then have to provide resources for the nine councils. He said there is a possibility that the free insurance that the legal profession receives, through the Attorney Insurance Indemnity Fund might also be lost as early as next year. This means that practitioners will have to pay approximately R 7 000 extra just to stay in practice.

Mr Millar said the LSSA and provincial law societies recognise the need for an independent body to represent the interest of the legal profession outside the scope of the legal practice council. 'Since 2014 the LSSA has continuously addressed this need and strategic planning sessions and discussions and has prepared working papers and reports to its council on this issue,' he said.

Mr Millar said it was necessary for legal practitioners themselves to establish, promote and fund a broad-based professional association, which can -

- act in their professional interest;
- represent them in various forums;
- act as their spokesperson, nationally and internationally; and
- position the legal profession as the champion of the rule of law, and as protector and promoter of constitutional rights.

Another speaker, National Director of ProBono.Org, Erica Emdon, said that ProBono.Org was set up as a non-



National Director of ProBono.Org, Erica Emdon, was also a guest speaker at the 74th Johannesburg Attorneys Association annual general meeting held on 7 September.

government organisation. She said the idea was to bring the private professional to do civil work, and fill the gap and serve people who cannot afford legal fees. She said that legal practitioners needed to transform the profession and build a culture of *pro bono* and added that practitioners must want to do *pro bono* work.

Ms Emdon asked why legal practitioners are not encouraged by finding interesting things they can and want to do as part of their *pro bono* services?

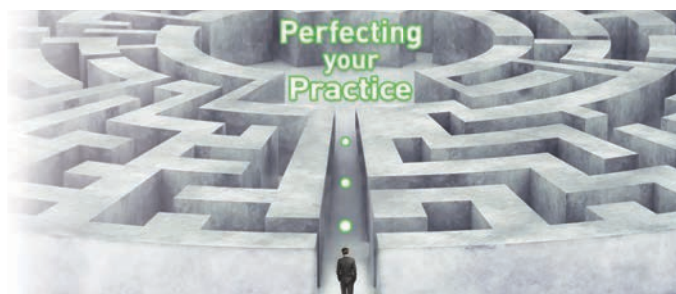
She urged legal practitioners to extend the access to justice by doing more *pro bono* work.

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BLA SC Women Empowerment Summit

President of Black Lawyers Association Student Chapter (BLA SC), Edmund Ramaholi, said the student chapter is looking up to the mother body (Black Lawyers Association (BLA)) to start advancing transformation they purport to stand for, and understand the struggle of women. Mr Ramaholi was welcoming guests at the Women's Empowerment Summit that was held on 3 September at the Professional Provident Fund headquarters in Parktown, when he said the structure of their organisations, starting with the BLA, have more men in leadership than women. He added that it was a general problem, even in society, where women have been overlooked by men, because society is patriarchal.

Mr Ramaholi further said, there were still reservations in the profession to explicitly trust women into positions of power. He said there were always questions regarding women's ability to do work and women were never included in important discussions, but instead given minor positions in the organisation. He pointed out, that he and other men who attended the summit wanted to engage with women to understand their struggle and stand side-by-side in the transformation process. 'Women are the best people to tell us or to narrate their stories to us, as men it is about time we listen without prejudices, [and] understand the position women find themselves in,' he said.

Candidate attorney and former BLA SC president, Nape Masipa, agreed with his successor and said it was about time BLA SC had a female president, as women can equally be good leaders, and lead with distinction.

Mr Masipa criticised South African men for being agents of patriarchy and for normalising gender violence and said that men in society, as well as in the corporate world have normalised gender violence. He said he was saddened by the reason that, when he goes to the criminal courts, in eight out of ten cases, the deceased are women.

He went on further to state: 'As men when we dream, we dream of having big law firms, and when we get them, we take women and make them the faces of our companies to secure government



President of Black Lawyers Association Student Chapter, Edmund Ramaholi, welcomed guests to the Women Empowerment Summit that was held on 3 September in Johannesburg.

tenders and then we call it women empowerment.'

Advocate Brenda Madumise-Pajibo, told female candidate attorneys that black people must stand up for one another. She said she was pleased that the summit was taking place not so long after Women's month. 'The month where by the country interrogates, acknowledges and celebrates the role women played and continue to play,' she said.

Ms Madumise-Pajibo said because a person is a woman or a poor woman, that does not make her a second class citizen in South Africa (SA). She said it all started with the women of 1956 who marched to the Union Buildings. 'Women fought for equality and not to be treated like second class citizens, and men cannot tell women how to feel, but rather walk side-by-side with women and listen to what women have to say,' she said.

Ms Madumise-Pajibo shared her experience as a black woman in the legal profession. She said it was difficult when she was studying law at Wits University. She said black law students were not allowed to reside on campus, but instead they were built a residential home outside campus in Soweto. She added that they were also not allowed to use the university's library to study for exams. She said black students had to fight for things to change

and to be allowed to have access to the things they wanted, adding that the battle is now for the current generation. Ms Madumise-Pajibo advised BLA SC, that if they want to thrive in their battles, they needed to be authentic, honest, truthful and not be hypocritical and pretentious. She said the BLA must be an organisation for all lawyers. It should be kept in mind that 'not all of us in the profession are attorneys [and] advocates,' she said.

Ms Madumise-Pajibo said BLA was led as an African National Congress type organisation, where they are preoccupied with elective conferences and choosing leaders. She said the organisation must take a good look at the current situation in SA and warned that if they continued running it like they do, the organisation will be in trouble. She said as a result women who are in the organisation will end up leaving out, because they cannot fight the way men do. She noted that she still believed in the organisation and that it can add value to the lives of people who want to be in the legal profession, but only if the organisation changes its direction. 'Let us stop being hypocritical and pretentious, you might not challenge



Guest speaker, Advocate Brenda Madumise-Pajibo, at the Black Lawyers Association Student Chapter's Women Empowerment Summit held on 3 September in Johannesburg.



Attorney at Cliffe Dekker Hofmyer and member of the Black Lawyers Association National Executive Committee, Mongezi Mphahlwa, speaking at the Women's Empowerment Summit on 3 September.

the organisation because you might not get a position, but rather not get it and be truthful to yourself,' she said.

Ms Madumise-Pajibo said when the organisation speaks about empowering women, they must apply action to words and not just talk. She said the BLA must fight for black lawyers to get briefs and open practices, and that legal practitioners must question how things are done in the private sector, like they do in the public sector. 'We all go to the government and want the government to give us work as lawyers, and it is dog eat dog world in government at the moment but in the private sector no one bothers to [ask why only] white law firms [receive work],' she said.

Ms Madumise-Pajibo said if black lawyers want to deal with inequality and poverty it has to start among themselves.

Ms Madumise-Pajibo thanked the men who attended the summit. She said it was important that they attended, because issues and challenges women face need to be discussed with men present. She said the older generation in the legal profession are pinning their hopes on the current generation to continue fighting for what is right and said her generation is still trying to pave the way for the younger law generation in the private sector, to make it is easier for them to acquire jobs.

Law graduate from the University of South Africa, Katlego Shole, did not agree with the statement made by Ms Madumise-Pajibo, that her generation of lawyers, did enough to help Mr Shole's generation. She said the older generation rather 'chickened' out and failed them. He said they should have been 'brutal' when handling matters in the legal profession.

Mr Shole said the generation of Ms Madumise-Pajibo, must use the struc-

tures that South African Broadcast Commission, Chief Operating Officer Hlaudi Motsoeneng uses. 'Go to the government and demanded that 90% of their work be given strictly to black lawyers and go to corporate companies and demand that at least 60% of work be given to black lawyers,' he said.

Mr Shole said it was the only way there can be prominent black law firms. He said the older generation lacked strategies. 'Black lawyers know the law and the loop holes but they are not doing anything, organisations such as BLA and Advocates for Change are not doing much to empower black lawyers,' he said.

Mr Shole said it is hard to be a graduate in the legal profession and that it is equally hard to find articles.

In response Ms Madumise-Pajibo said she believes they did the best they could and told guests at the summit, that she and other advocates, namely, advocate Thuli Madonsela wanted to formulate a charter that states that 60% of work be given to black female lawyers. She said even after their efforts of consulting with law societies and producing a report they did not achieve what they wanted to, however, she believes that the new Legal Practice Act 28 of 2014 will take the profession to a new light.

Ms Madumise-Pajibo also said black lawyers need to unite and ask why they are not given jobs in corporates, she gave an example that most black lawyers own shares in private companies such as MTN and Sasol but they never ask why those companies do not hire more black lawyers. She said they must use the power that they have to change the situation. She said all that needs to happen, is for

the legal profession to give opportunities to young lawyers.

Attorney at Cliffe Dekker Hofmeyr and member of the BLA National Executive Committee, Mongezi Mphahlwa, said women must lead in empowering themselves. He said that it cannot be left to men to empower women. He said women understand more about the struggle they go through and can help men better understand what needs to be done, for women to be empowered. 'What are women doing to empower themselves?' he asked. 'It cannot be said that women are incapable to rise up and take their rightful place beside their male counterparts,' he said.

Mr Mphahlwa said women sometimes do not rise up to the opportunity, and that when they need women to volunteer themselves and take opportunities, they are nowhere to be found. He asked why women rather choose to be supportive of a male counterpart rather than women themselves being leaders?

Gauteng Local Division and Tax Court in Johannesburg, Judge Margie Victor, was also a guest speaker at the summit. She said women of all generations must unite to make gender equality become a reality by the year 2030. She said there is an important role for women in the legal profession, especially those who are on the Bench to accelerate the gender equality goal by mentoring in the field of law.

Judge Victor said mentoring is timeless and that mothers are the most important mentors. But said there has to be mentoring in the professional work field. She said mentoring can help students in aspects such as -

- achieving excellence in the current work place;
- strengthening skills;
- giving them an opportunity to prepare for higher office; and
- assisting with opportunities to be assessed as suitable candidates for higher office.

Judge Victor also said networking is important in the legal profession. She said candidate attorneys can be exposed to other practitioners in the legal profession and that it might help when they want to do articles or look for a job.

Judge Victor called for mentoring to be systemic and that both mentor and mentee must be fully involved in the programme. She said both in law and politics, women in higher positions must be able to provide internships, and pass on skills to the younger women and that senior attorneys must be incorporated into the mentoring system, so that they could facilitate it.



Gauteng Local Division and Tax Court Judge, Margie Victor, speaking at the Women's Empowerment Summit held in Johannesburg.

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Pro bono legal practitioners acknowledged

ProBono.Org held their third annual *pro bono* awards ceremony, on 6 September at Constitutional Hill in Johannesburg.

Master of ceremonies, columnist at the *Daily Maverick*, freelance radio talk show host at 702 and communications officer at Jesuit Refugee Service Southern Africa; Gushwell Brooks; said the awards were a way for the people in the profession to come together, celebrate and acknowledge the *pro bono* work legal practitioners do. He encouraged the legal profession to give back to society on a sustainable and long term basis.

Mr Gushwell also announced that it was the tenth anniversary of ProBono.org, he said it signified that ProBono.Org has become a permanent fixture in making sure the legal profession continues with *pro bono* work.

Keynote speaker and Vice Chairperson of the Johannesburg Bar Council, advocate Dali Mpofu SC, firstly congratulated the nominees. He said *pro bono* work was important, but admitted that it is an area that is neglected.

Mr Mpofu commended the partners and ProBono.Org, who are involved in assisting the poor who have no access to justice. He said in his view, the *pro bono* system needs to be overhauled.

Mr Mpofu said the biggest problem



Vice Chairperson of the Johannesburg Bar Council, advocate Dali Mpofu SC, Dali Mpofu SC (back row), with the 2016 ProBono.Org Awards Winners.

confronting South Africa (SA) is the issue of historical inequality. He said historic inequality breathes present day injustice and added that any quest for justice that overlooks the historical inequality is doomed to fail, especially in a country such as SA.

Mr Mpofu said *pro bono* simply means the public good, and said that legal professionals render services to the public at large when doing *pro bono* work. He said the quest for *pro bono* practitioners and other legal practitioners is to provide universal access to justice.

Mr Mpofu said some of his acquaintances would often ask why they should waste their time with artificial solutions, such as *pro bono* and not change society and bring economic equality, so that no one would be in need of *pro bono* services or why the state should provide for people who do not have access to justice. He said that he sympathised with such views, as the reality is that they have to employ medium and short term solutions to heal SA's 'sick' society, while waiting for the 'promised land'. He added that the reality is that only a small percentage of SA people can afford even the most basic legal services. He pointed out that in constitutional terms, the issue can be situated in the well-known foundation values, such as equality, rule of law and restoration of human dignity.

Mr Mpofu further said it can specifically be located in ss 34 and 35 of the Constitution, he said although the textual heading given to s 34 of the Constitution read 'access to courts' he has always favoured that the issue should be approached as access to justice, at a broader level. He said that access to jus-

tice is good for the public, if it discouraged violence and anarchy. It is then in society's collective interest that all members of the public should prepare court-based solutions to their legal disputes.

Mr Mpofu said the Legal Practice Act 28 of 2014 (LPA), gives a good starting point for such examination in the point of view of legal practitioners. He quoted the LPA's preamble that reads, 'bearing in mind that access to legal services is not a reality for most South Africans; and in order to ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld; to ensure that legal services are accessible.'

Mr Mpofu further referred to s 3: 'The purpose of the Act is to broaden access to justice by putting various mechanism including putting measures to rendering of community service by candidate legal practitioners and practising legal practitioners.' He said in his view, any effort to overhaul, revamp or improve the current system of *pro bono* must include, but not be limited to, an attempt to breathe some life into those provisions of the LPA, bearing in mind that one of its key objectives is access to justice.

Mr Mpofu said if the profession gets the exercise right, it would go a very long way in addressing present frustration experienced by those who cannot wait to see the outbreak of the culture of legal extensions to the poor and economically disadvantaged, who are mostly black people, women and other economically vulnerable groups.

Although Mr Mpofu said he resigned from the National Forum on the Legal Profession (NF) that oversees the transi-



Vice Chairperson of the Johannesburg Bar Council, advocate Dali Mpofu SC, delivering the keynote address at the third annual ProBong.Org Awards ceremony held on 6 September in Johannesburg.



Chairperson of ProBono.Org, Andy Bester, speaking at the third annual ProBono.Org Awards ceremony.

tion period of the LPA, he proposed that organisations such as ProBono.Org and others, take a keen and direct interest in how the NF, and its successor, the Legal Practice Council will approach the fulfilment of the promises contained in the LPA. He said s 3 referred to community service, and he suggested that it must include law faculties and law students.

Mr Mpofu stated that it was the most crucial aspect of building a new culture, it must start with the youth, as their minds have not been contaminated by habit. He said if one is involved in community service culture at the entry level of the legal profession, they are more likely to carry it through the days of practice. 'It is self-evident that to get it right the survival and urgent expansion of the system cannot only rely on voluntarism and public spiritedness of an individual alone,' he added.

Mr Mpofu said the economic system in SA is characterised by commercialism, self-centeredness and the so-called survival of the fittest. He added that a regulatory framework was needed, and that it must make it impossible and render as unprofessional conduct to go on for years, without having rendered a measurable *pro bono* service to those in need. He urged that the details of the framework must be discussed as a matter of urgency by all who are concerned. He pointed out that the LPA, is providing the legal profession with a

unique new platform to discuss on such matters. 'The new rules for membership of the legal profession must specifically cater for righting most of the wrong in the current system of the *pro bono* services,' he said.

Mr Mpofu highlighted that correcting the *pro bono* system can only be done if the legal profession is prepared to take the bitter lessons from the current dispensation. He said the *pro bono* system currently placed in the advocates' profession is highly deficient and ineffective. He added that it was an opportunity for the legal profession to use the present foundation to rebuild the *pro bono* system.

The winners were announced in the following categories:

- **Most impactful case or initiative:** Norton Rose Fulbright SA - *Residents of Arthursstone Village v Amashangana Tribal Authority and Others* (GP) (unreported case no 17978/15, 8-6-2016) (Van Niekerk AJ).
- **Firm without a dedicated *pro bono* department:** Cullinan & Associates, Cape Town.
- **Firm with a dedicated *pro bono* department:** Fasken Martineau.
- **Constitutionalism award - media** (this category had two winners): Niren Tolsi and Sipho Kings.
- **Advocate award:** Isabel Goodman.
- **Juta award to a law student at a university law clinic:** Ashley Seckel.
- **Legal Aid South Africa award** (this category had two winners): Tsepiso Matubata and DNABiotec.
- **Law Society of the Northern Provinces award:** Juvon Prinsloo - Juvon Prinsloo Attorneys.
- **National Director's special mentions -**
 - Ngwako Raboshakga - Alexandra Law Clinic (ENSAfrica);
 - Bricks Mokolo - Orange Farm Human Rights Advice Centre;
 - Henk Strydom - Strydom Attorneys;
 - Baitseng Rangata - Maponya Attorneys;
 - Jeff Phahlamohlaka - Bowman Gilfillan; and
 - advocate Kate Hofmeyr.

Chairperson of ProBono.Org, Andy Bester, congratulated the winners. He said ProBono.Org's duties are to match the needs of people who need *pro bono*



The winner of the Law Society of the Northern Provinces (LSNP) award, Juvon Prinsloo of Juvon Prinsloo Attorneys, and the President of the LSNP, Anthony Millar.

services with skilled practitioners in particular areas. He said practitioners do an important job on a daily basis, dealing with individuals and their particular problems, listening to their stories and accessing what to do with them.

Mr Bester said they deal with people who mostly do not know how the legal process works, he added, however, that *pro bono* practitioners give their time to listen and also to explain the processes to the public. He said one other function of ProBono.Org was to ensure that people know what to take to the *pro bono* practitioners, and to ensure that people understand their rights.

Attorney Juvon Prinsloo of Juvon Prinsloo Attorneys, said winning the award so early in her career was an amazing feeling. She said the award will not affect the way she is going to receive her *pro bono* clients.

She said doing *pro bono* work brings something special to her firm and in the process of helping people, she is also learning.

- See news article 'Pro bono help desk launched' on p 16.

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Mandela Institute at Wits School of Law makes history

In the week of Nelson Mandela's birthday the Mandela Institute at Wits School of Law hosted the first international conference in South Africa (SA) on court-annexed mediation entitled 'Court-annexed mediation: Successes, challenges and possibilities'. South Africa has recently adopted a pilot project on court-annexed mediation in a number of magistrates' courts. The purpose of the conference was to analyse the mediation rules pertaining to the project, its successes, failures and possibilities.

Speakers at the conference included the Deputy Chief Justice of Namibia, judges from SA and Uganda, heads of law societies, state attorneys, advocates, academics and pioneers in mediation from Nigeria, England and Australia.

The conference organisers welcomed the rules as a move in a positive direction by the executive, but concluded that major changes were needed in order for the rules to be more effective. The changes suggested include:

- Extending mediation to all courts, including the High Court.
- That court-annexed mediation be made compulsory and be given free to indigent communities who cannot afford the current tariff.
- That more resources be put into mediation by the executive. This includes better infrastructure and training of permanent mediation support staff.
- It was also recommended that the SA



From left to right: Centre for Effective Dispute Resolution mediator, Felicity Steadman; Chairperson, Minister's Advisory Committee on Court-Annexed Mediation, Judge Cassim Sardiwalla; Judge at the Court of Appeal and Constitutional Court of Uganda, Justice Geoffrey Kiryabwire; Deputy Chief Justice and Judge President of the High Court of Namibia, Justice Petrus Tileinge Damaseb; Wits School of Law and conference convenor, Dr Mohamed Alli Chicktay; Patelia Attorneys, Ebrahim Patelia (behind), and Aina Blankson, LP, Nigeria Kehinde Aina.

judiciary work together with the executive in developing court-annexed mediation in SA.

The SA court system denies access to justice to millions of South Africans who cannot afford litigation and it is time consuming. Delaying access to courts would in effect deny access to justice. Not only does mediation save time and money it also enables parties to determine the outcome of their own disputes. In essence it gives parties self-ownership

of the outcome of their disputes and ultimately dignity. It is essential that the rules be amended to give effect to the constitutional values and the protection of the fundamental rights of all South Africans.

*Dr Mohamed Alli Chicktay,
Wits School of Law*

2016 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	14 October	Durban – Coastlands Hotel, Umhlanga commencing at 2 pm. Time and venue may change.	Riona Gunpath (033) 345 1304.
Free State Law Society	20 – 21 October	Clarens – Protea Hotel.	Christina Marais (051) 447 3237/8.
Black Lawyers Association	21 – 22 October	Kimberley – Gala Dinner incorporating Second Annual Godfrey Pitje Memorial Lecture, Flamingo Casino; and the AGM will be held at Mittah Seperepere Convention Centre (MSCC).	Lutendo Sigogo (015) 962 0712.
Cape Law Society	4 – 5 November	Cape Town – Century City Conference Centre commencing at 8.30 am.	Thergesari Roberts (021) 443 6700.
Law Society of the Northern Provinces	19 November	Sun City commencing at 9 am.	Hester Bezuidenhout (021) 338 5949.

The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2017.

Trusts discussed at FISA conference

Tax Ombud Judge Bernard Ngoepe said the corrupt use of public funds gives tax payers an excuse not to pay tax.

He was speaking about ethical behaviour, at the Fiduciary Institute of Southern Africa's (FISA) sixth annual conference that was held on 25 August at the Sandton Convention Centre.

Judge Ngoepe said revenue authorities are tasked with collecting maximum amount of tax due to the state and that the tax payers are obliged to comply with applicable tax laws and pay taxes due on time.

However, he added that it has been argued that one of the sources of a positive disposition on the part of the taxpayers is the force of good ethics. 'An integral part of good ethics is honest, and a sense of civic duty,' he said.

Judge Ngoepe said tax authorities have to have immense powers to fight fraudulent conduct and in doing so the tax payers would be hesitant to open up to a tax authority with a dubious and unethical track record.

Judge Ngoepe commended the South African Revenue Service (Sars) on ensuring that tax payer's money is being used to benefit the society by building schools and infrastructure. He said it heightens a sense of civic and moral duty. He pointed out that the Tax Ombud can help tax payers if they are being exploited and abused by tax authorities.

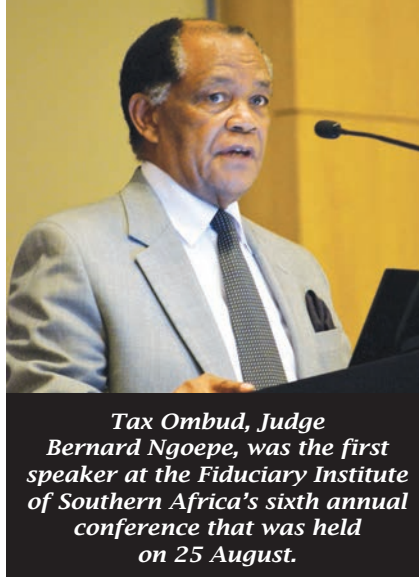
Tax consequences of emigration

Attorney in the tax law and private clients department of ENSAfrica, Hanneke Farrand spoke about tax consequences of emigration.

Ms Farrand noted that she dealt with a lot of issues when people want to emigrate and added that legal practitioners must advise their clients to plan properly when emigrating. She further stated that attorneys must advise their clients of three important points, namely:

- What their tax consequences are if leaving?
- Exchange control issues.
- Issues that may arise in the country that they are going to.

Ms Farrand said depending on whether or not you are a resident in a specific



Tax Ombud, Judge Bernard Ngoepe, was the first speaker at the Fiduciary Institute of Southern Africa's sixth annual conference that was held on 25 August.

country, a specific jurisdiction brings a certain disclosure obligation.

Ms Farrand further said when one plans on ceasing to be a South African (SA) tax resident they need to know about the 'exit charge', and the one charge is a deemed disposal of assets on a date immediately before a day on which the person ceases to be a resident at expenditure equal to market value.

She said there are capital gains and losses that are included, in annual tax return for tax year ending on a date immediately before a person ceases to be a resident and added that subsequent tax years will only disclose SA sourced income and capital gains and that non-residents will be taxed on their South African sourced income and capital gains only as subject to relief in terms of applicable Double Taxation Agreements (DTA).

Freedom of testation

Professor François du Toit of the private law department at the University of the Western Cape made a presentation about freedom of testation in light of recent off shore developments. He said SA law holds freedom of testation in high regard and that a testator's wishes must be carried out. 'Freedom of testation entails that a testator is free to dispose of his or her property as they see fit and that a beneficiary who believes that they

received less in terms of testator's or a beneficiary who has been disinherited cannot approach the courts and ask the court to change the will of a testator who passed away,' he said.

He also spoke about the discriminatory clause and explained that race, religion, gender and ethnicity are often the topics of such clauses. He referred to several cases where the courts found these clauses to be unacceptable but stressed that the courts – in all these case – reconfirmed that freedom of testation is a fundamental principle in our law.

Separation of control and enjoyment in trust

Lecturer of family law and law of trusts at the department of private law at University of Free State, Professor Bradely Smith, spoke about the separation of control and enjoyment in trust and said that legal practitioners must warn trustees and testators to be weary of veil piercing at face value. He said the core idea of the trust is that there must be a separation of ownership or control of trust assets, from enjoyment of trust benefits.

Prof Smith referred to *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) and said the principle was 'reinforced' by s 12 of the Trust Property Control Act 57 of 1998 (TPCA) that states 'trust property shall not form part of the personal estate



Attorney in the tax law and private clients department of ENSAfrica, Hanneke Farrand, spoke about tax consequences of emigration.



Lecturer at the private law department at the University of the Western Cape, Professor François du Toit, spoke about freedom of testation.

of the trustee except insofar as he as the trust beneficiary is entitled to the trust property.' He stressed that it was vitally important for trustee-spouses to ensure compliance with the core idea of trust so as to minimise risk at divorce.

Abuse of trust in divorce matters

Attorney and member of the Law Society of South Africa's Gender Equality Committee, Amanda Catto, spoke about a controversial issues that occur in family courts, dealing with abuse of trust in divorce matters. She focused on matters, which include a sham and alter ego in the context of the divorce.

According to Ms Catto, legal practitioners, when dealing with the abuse of trust, have to confine to determining whether the trust is a sham, and if the trust ever existed and considering the beneficiary ownership of the assets held in a trust validly established has vested.

Ms Catto said the concept of alter ego is messy and used interchangeably between the sham concept and the beneficial ownership concept.

Research on the TPCA

Lecturer in private law at the University of the Western Cape, Dr Latiefa Albertus, spoke about research she conducted on law reform in relation to trusts. She said her research, which was an academic exercise, was to identify aspects of trust law where statutory regulation is not in place.

However, she was required, to analyse the provisions of the TPCA and to make recommendations for legislative reform in this regard.

Her presentation focused on three aspects namely –

- the definition of trustee;
- when a trustee is authorised to act; and
- amendment of a trust in terms of s 13 of the TPCA.

Dr Albertus briefly discussed her research into each of these aspects, the interviews she had with role players in the trust industry and the recommendations she made for reform.

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Section 7C discussed

In a session at the FISA conference, chartered accountant and FISA Gauteng Regional Head, Cheryl Howard, discussed s 7C of the 2016 Draft Taxation Laws Amendment Bill. In her presentation Ms Howard said the taxation of trusts had long been on the radar of National Treasury, however, when the Minister of Finance announced in February that the taxation of interest free loans was coming in, it was not what was expected.



Lecturer of family law and law of Trusts at the department of private law at University of Free State, Prof Bradley Smith discussed separation of control and enjoyment in trusts.

Ms Howard discussed some issues that had come up at the workshop with the Department of Treasury on 16 August, the week before the conference took place. She added that the department explained the intention of implementing the section and said that there was a serious concern regarding the 'inequality of a result of ownership of assets' as opposed to the 'inequality of income'. She said that Sars was very concerned about the inequality, solely from estate duty and donations tax and kept on the basis that people were hiding their wealth by putting them into trusts and the growth was not being taxed. Ms Howard said that workshop attendees pointed out that income was being taxed, which included, capital gains tax, but the department

was adamant that this section was needed to fix the problem as far as the wealth side was concerned.

Ms Howard gave a brief explanation of s 7C and said it applied to –

- natural persons where that persons and a trust are connected persons; or
- companies who are connected person in relation to such natural persons or to the trust.

Ms Howard highlighted concerns in regard to s 7C, namely –

- double taxation;
- distributions to beneficiaries;
- retrospectivity;
- offshore trusts;
- the office rate of interest; and
- cash flows.

Ms Howard went on to give further points from the Department of Treasury's point of view:

- The primary motivation in support of the proposed legislation would appear to be the perceived avoidance of estate duty through the use of interest free loans.
- The intention is to include all loans, existing and future. It is, however, recognised that trust structures other than those adopted for the perceived avoidance of estate duty are in place and cognisance will be taken thereof. To this end the exclusion of employee share trusts, public benefit organisations, special trusts and the like is being considered.
- It is not intended to effectively double tax the benefits flowing from trusts funded in this manner. Either the new s 7C or the existing attribution rules will be applied to the case in point, not both.
- Concern on the part of National Treasury that capital gains tax is not a replacement for estate duty and to this end 'growth assets' fall outside the attribution rules. Proposed legislation is a way of addressing this rather than placing reliance on the common law and the debate around the nature of interest free



Attorney, Amanda Catto, spoke about a controversial issues that occur in family courts.



Lecturer in private law at the University of the Western Cape, Dr Latiefa Albertus, spoke about research she conducted on law reform in relation to trusts.

loans and the foregoing of interest that can be challenged in court.

- Constitutional issues such as the application of Sharia Law and the imposition of interest are recognised and will be considered.
- National Treasury is willing to work with industry representatives, hears the concerns being raised and is not dismissive of the importance of trusts in our law.
- However, the view remains within National Treasury that the proposed legislation is required. To this end the normal legislative process will be followed and s 7C, in a workable form with due recognition being given to the representations and input received from interested parties, will be adopted.

Ms Howard added that on promulgation, the section will come into operation on 1 March 2017 and will be applicable to years of assessment commencing on or after that date.

Ms Howard concluded by saying that clients should not overreact and rush to terminate their trusts. 'Trusts that were set up purely for tax purposes will have to be reconsidered as the reason for their existence will probably fall away, but in all instances the cost and other benefits



FISA Gauteng Regional Head, Cheryl Howard, discussed s 7C of the 2016 Draft Taxation Laws Amendment Bill.

of having a trust need to be considered before a decision can be made to terminate the trust.'

Report from the Master of the High Court

Master of the High Court, advocate Lester Basson, discussed regulatory developments and statistics from his department.

Mr Basson said statistics show that there is a discrepancy between the number of deaths in South Africa and the number of deceased estates registered and noted that it was a concern that an approximate amount of 33% of deaths reported went through the master's office or the magistrate's office. Mr Basson said 66% bypassed the administration process and a possible explanation could be traditional arrangements, however, he could not say for sure, but added that traditional arrangements did not take care of bank accounts or any other item that needs to be registered in the government office.

Mr Basson said there was a lot more work that could be done in the deceased estate industry if a broader look is taken as there is a lot of potential in deceased estates.

Mr Basson said he was most excited about the degree of progress in the utilisation of the electronic systems, data and the way that deceased estates are processed. In 2012, 1,4% users utilised the Paperless Estate Administration System and that figure now stands at 78,5% for the January to June 2016 period. Mr Basson said the department is working hard to upgrade the processes and to make it better. The department was going to start addressing waste and get into a situation where a better service is delivered.

Mr Basson also advised of the number of estates registered with wills. In the period of January to June 2016, 74 693 estates were registered and only 17 273 were registered with wills, which amounts to 23%. Mr Basson said that this was an area that needed to be focussed on. 'People die without wills. In 2015, 23% died with wills,' he said. Mr Basson added that many estates could be sorted out quicker if there was a will in place and that the profession could use this as an opportunity for business.

Mr Basson also referred to reg 910 and said that work was being done to make certain legal changes that will allow the Minister of Justice to make regulation in terms of the Administration of Estates Act 66 of 1995 (Estates Act).

In reg 910, Mr Basson said that only certain institutions are allowed to administer deceased estates. From a governance point of view, it is too narrowly defined as it is confined to practising attorneys and auditors. 'Chartered account-



Master of the High Court, advocate Lester Basson, discussed regulatory developments and statistics from his department.

ants are not auditors and do not qualify under the regulation,' he said.

According to Mr Basson, the current General Laws Amendment Bill that is serving in its final phase before being passed in Parliament is 'enabling a provision in terms of s 103 of the Estates Act that allows the Minister of Justice to make regulations regarding the Estates Act. Where currently the origin of reg 910 is in the Attorneys Act [53 of 1979], which has then since been repealed and replaced by the Legal Practice Act [28 of 2014], which has no provision for a regulation around deceased estates administration. We want to amend the statutory provision to provide for a regulation in the Estates Act. We can just about tick that box, because that whole process has just about gone through Parliament. ... The Minister of Justice will be in a position to make a regulation similar to regulation 910 as to govern who can administer estates. The criteria that we say should be used when the Minister accredits or allows people to administer estates to broaden the base, not excluding, but broader than attorneys. Where such a person or entity should have a tertiary qualification, must belong to a professional body and that this professional body must require continuous professional development from its members and where there is an indemnity and a backup in the event of wrong doing so that we can minimise the risk so that we can entrust the administration of estates to people who are competent, capable and guaranteed to be governed,' Mr Basson said.

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Pro Bono Help Desk launched

On 3 July the Law Society of the Northern Provinces (LSNP) held an event at the Gauteng Local Division of the High Court in Johannesburg to launch a *Pro Bono* Johannesburg Help Desk at the same court.

The LSNP introduced a *Pro Bono* Scheme in 2008 whereby free legal services are made available to indigent persons who cannot otherwise afford the services of attorneys. In terms of this scheme, all 13 000 members of the LSNP are available on a compulsory basis, to render legal services under the scheme for at least 24 hours per year free of charge.

Opening the proceedings, President of the LSNP, Anthony Millar said it has been proposed that members of the Bar should make themselves available for the *Pro Bono* Scheme and that the leaders of the Bar have put the proposal to its members.

Judge President of the Gauteng Local Division of the High Court, as well as Chairperson of the Board of Directors for Legal Aid South Africa (Legal Aid SA), Dunstan Mlambo, noted that the profession should not take access



Judge President of the Gauteng Local Division of the High Court, as well as Chairperson of the Board of Directors for Legal Aid South Africa, Dunstan Mlambo, speaking at the launch.

to justice for granted. He added that as much as Legal Aid SA assists the indigent, the profession should also help so that Legal Aid SA could double its initiative.



President of the Law Society of the Northern Provinces, Anthony Millar, delivering his address.

• See news article 'Pro bono legal practitioners acknowledged' on p 10.

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PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

Mervyn Taback Inc in Johannesburg has two new promotions.



David Woodhouse has been promoted as chairperson in the employment law department.



James Cross has been promoted as chief executive officer in the environmental, health and safety law department.

Hogan Lovells in Johannesburg has one promotion and one new appointment.



Mike Ngomane has been appointed as an associate in the business rescue and insolvency department.



Krevania Pillay has been promoted to an associate in the commercial litigation, forensic investigations, white collar crime and fraud department.

Garlicke & Bousfield Inc in Durban has two appointments.



Bongani Mgaga has been appointed as the chief executive officer.



Sanelisiwe Nyasulu has been appointed as the *pro bono* officer.



Bowmans in Johannesburg has appointed Joe da Silva as a partner in its Africa-wide governance, compliance and investigations practice.

National Forum to propose separate voters' rolls for attorneys and advocates for first Legal Practice Council elections

The National Forum on the Legal Profession (NF) held its sixth plenary meeting on 3 September.

At the meeting, the NF continued to grapple with the rules for legal practitioners, the staffing and costs relating to the Legal Practice Council (LPC), as well as where provincial councils and committees will be located in the new dispensation.

The NF must make recommendations to Justice Minister, Michael Masutha, before 1 February 2017. It had agreed at its meeting in April this year to recommend nine provincial councils, as well as an additional six committees at each High Court seat where there is no provincial council, to the Minister (see 2016 (June) DR 22). At the meeting on 3 September, the committees were further defined

when the NF agreed that each committee would comprise of two legal practitioners (an attorney and an advocate), a third legal practitioner nominated by the relevant provincial council, as well as two staff members. The purpose of the committees is to provide access to practitioners and to members of the public in places where there are no provincial offices or councils of the LPC.

As regards elections, some progress was made in that it was resolved that, for the first election of the LPC, there would be separate voters' rolls for attorneys and advocates. Attorneys would vote for the ten practising attorneys on the LPC and advocates would vote for the six practising advocates. This would be reviewed after the first election when the LPC would consider whether there should be one voters' roll.

The mechanics of how the elections would be conducted, how diversity and skills mix of councillors will be ensured and whether there is an opportunity in the Legal Practice Act 28 of 2014 (the LPA) for a body such as an electoral college, will still be discussed. In the meantime the NF is researching elections in other jurisdictions, particularly in African jurisdictions.

Although the issue of foreign legal practitioners does arise in the NF discussions, the LPA makes provision that the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the LPC, and having regard to any relevant international commitments of the government, make regulations with respect to foreign legal practitioners. It is, therefore, not within the scope of the NF to do so.

MENTORSHIP LINK

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Greatness...an invitation to join the LSSA LEAD Mentorship Programme

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Not all mentorship arrangements work out for a variety of reasons, however, those that do work, work very well. With your help, our mentorship programme will achieve greatness and sustainability for the profession.

To facilitate the process, LEAD will **match mentors** with appropriate **mentees** and, thereafter, monitor and report on progress, successes and results. |

I invite experienced attorneys to become mentors by signing up on www.LSSALEAD.org.za and share their knowledge and experiences with attorneys from other firms. Contact mentorship@LSSALEAD.org.za

As an additional vote of thanks, the LSSA will recognise each successful mentorship through publicity in *De Rebus* and on the website.

Message from
Nic Swart: CEO LSSA
and Director LEAD



LAW SOCIETY
OF SOUTH AFRICA



A three-person team – which includes attorneys Jan Stemmett and Lutendo Sigogo, as well as advocate Elizabeth Baloyi-Mere – was tasked to start drafting the submissions to the Minister.

Advocates Elizabeth Baloyi-Mere and Roseline Nyman were appointed to the NF earlier this year in the place of Dali Mpofu SC and Thami Ncongwane SC.

The subcommittees of the NF continue to meet regularly to deal with the tasks allocated to them.

The **Administration and Human Resource Committee** has commenced negotiations with the statutory provincial law societies for the transfer of staff and assets to the LPC.

The **Rules and Code of Conduct Com-**

mittee has drafted the Code of Conduct. Some of the issues being discussed include whether the rules relating to advocates with trust accounts should be aligned with those for attorneys rather than with those for advocates. One example is whether they should be permitted to charge a collapse fee.

After some consultation, the committee agreed that the Code of Conduct would state that all legal practitioners – attorneys and advocates – would robe in the lower courts in the new dispensation.

The **Governance Committee** is discussing provincial councils and committees, and the allocation of functions to these. It is also investigating elections

and voting. This committee has a further subcommittee – the Costing Committee – which is working with external consultants investigating various cost scenarios for the new structures.

The **Education, Standards and Accreditation Committee** is working on finalising a position on practical vocational training (articles and pupillage) in the new dispensation.

The next meeting of the NF plenary will be on 26 November.

*Barbara Whittle,
Communication Manager, Law Society of
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Thuli Madonsela recipient of LSSA Truth and Justice Award

The Law Society of South Africa (LSSA) has awarded outgoing Public Protector, Thuli Madonsela, with its inaugural Truth and Justice Award.

The award was presented to Ms Madonsela on 7 September at the Sheraton Hotel in Pretoria. The ceremony was attended by, among others, Deputy Judge President of the Gauteng Division of the High Court: Pretoria, Aubrey Ledwaba; the Co-chairpersons of the LSSA, Jan van Rensburg and Mvuzo Ntyesi and the presidents of the constituent members of the LSSA.

In his address, Judge Ledwaba said that it was a privilege for him to be part of the inaugural function. He added that the Office of the Public Protector, as well as the other Chapter Nine institutions were established to strengthen constitutional democracy, to promote the rule of law and to ensure proper separation of powers.

Judge Ledwaba said the Office of the Public Protector was a trusted institution in our democracy. 'It therefore necessitates that the person heading the Office of the Public Protector be a person of high moral integrity and one with impeccable legal knowledge to enable the institution to provide civil society with the only mechanism, other than costly private litigation, of ensuring that government acts lawfully, guided only by the Constitution and the law,' he said.

Judge Ledwaba added that Ms Madonsela knew she was being watched and scrutinised, knew there were critics and sceptics, knew there were noises that tried to intimidate her, but she ignored all and focused on her mandate.



Co-chairpersons of the Law Society of South Africa, Jan van Rensburg and Mvuzo Ntyesi handing over the inaugural Truth and Justice Award to Public Protector, Thuli Madonsela.

'You sidestepped the dangers presented and pursued your goal of protecting the public,' he said. He concluded by encouraging her to apply to become a judge: 'When I looked at the list of shortlisted applicants for six positions of the Judges in the Gauteng High Court I thought I would see your name, but I hope what I have just said would inspire you to seriously consider applying when vacancies are advertised,' he said.

In his tribute, Mr Ntyesi said that Ms Madonsela's strong commitment to the fight against corruption cannot be

doubted or questioned, adding that the position that she has maintained as Public Protector has affirmed South Africa's constitutional principles and values.

'I remember when there were arguments about the binding nature of the Public Protector's remedial actions and recommendations. You were almost the sole voice standing your ground that the remedial actions of the Public Protector were binding. On this you were vindicated by the Constitutional Court and the Supreme Court of Appeal. Indeed you bravely fought this principle,' he said.

Mr Notyesi shared Judge Ledwaba's sentiments and said that he personally could not wait to see her among the candidates for judicial appointment.

In his message of support, Black Lawyers Association (BLA) president, Luteondo Sigogo, said that the BLA was 'truly proud of you as your no nonsense approach helped the country as we now know that the remedial decisions of a public protector are binding. You defended our Constitution and the rule of law with all your heart and soul.'

In her address Ms Madonsela dedicated the award to her staff and lawyer and freedom fighter, Priscilla Jana. She expressed her confidence in the Public Protector team carrying on with any outstanding work with the same determination they have displayed over the years,

in the pursuit of service excellence. 'As I prepare to clear my desk, my team and I are constantly fielding questions about the fate of some on-going investigations that might not be finalised by the time I leave office. We have been consistent in pointing out the work I have been credited for is the product of shared resolute leadership, constantly evolving systems, a committed, purpose-driven team that has been learning and growing together, bound by shared values, including a resolute commitment to ethical governance, accountability and responsiveness to all persons,' she said.

Ms Madonsela said that of all the awards presented to her, the closest to her heart were those of humbling recognition from her peers in the legal field. These included the latest one, the Gen-

eral Bar Council of South Africa's Sydney and Felicia Kentridge Award, received in 2015, and the South African Women Lawyers Association Award, received at the beginning of her term of office.

Ms Madonsela concluded by appealing to legal practitioners to consider rendering their services on a *pro bono* basis to the needy. She argued that most of the people, who had disputes against the state, did not have the financial muscle to litigate.

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za

Bar Association of Sri Lanka learn about the legal infrastructure in South Africa

The American Bar Association's Rule of Law Initiative (ABA ROLI) conducted a study tour to South Africa (SA) for several key leaders from the Bar Association of Sri Lanka, the Sri Lankan judiciary, the Sri Lankan Ministry of Justice and the Sri Lankan Attorney-General's Office in August.

The delegation had the opportunity

to meet with the Chief Executive Officer of the Law Society of South Africa (LSSA), Nic Swart, as well as LSSA chairperson of the Constitutional Affairs committee and immediate former LSSA Co-chairperson, Busani Mabunda.

The purpose of the study tour was to examine the outcomes, successes and weaknesses in SA's approaches to addressing Apartheid and its legacy, the

role of the legal profession in ensuring access to justice for minority populations, and the role of the profession in promoting rule of law, including accountability.

At the meeting, Mr Swart and Mr Mabunda explained how the LSSA and the legal system in SA work and the delegation learnt about the current legal infrastructure in SA.



The delegation consisted of (from left): Nayomi Wickramaratne; Vasana Wickremansa; Probodha Ratnawardena; Kanagasabai Ratnavale; Indika Demuni de Silva; Ruchira Sugathy Gunasekera; Jennifer Rasmussen; Angel Sharma; Tiernan Mennen; Representative of the Sri Lankan High Commission in South Africa. Seated from left: Nic Swart; Busani Mabunda; Marie Abeyratne; Jayantha Jayasuriya; Annilingam Premashankar.

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za

Financial transactions on investment of trust funds on behalf of clients

The profession approached the Financial Services Board (FSB) for guidance on whether financial transactions by attorneys involving the investment of trust funds are subject to the Financial Advisory and Intermediary Services Act 37 of 2002 (the Act).

In a notice to members, the statutory provincial law societies said the FSB had indicated that:

- The Act is wide in terms of its application and includes all persons who give advice and/or render intermediary services to a client in relation to a financial product. An attorney could be such a person.
- The Act does not affect attorneys who confine their activities to the practising of law. However, if they render financial services to the extent that such activity becomes a regular feature of their practice/business, those attorneys will become subject to the Act and need to apply for a licence.
- 'Regular feature of business' is not defined and must be given the ordinary common law meaning of the expression. It is important to note that this expression cannot merely indicate dealings with clients on a regular basis in the sense of 'daily' or at least frequently.

The FSB made the following guidelines available to the profession:

- The Registrar agrees that an attorney carrying on the business of an investment practice, where funds, are invested on behalf of clients, pursuant to an investment mandate (without there being any underlying transaction), would be required to obtain authorisation under the Act, if it, as a regular feature of its business, renders a financial service in respect of a financial product.
- It is the Registrar's understanding that attorneys accepting funds in trust on behalf of clients and their subsequent

dealing therewith in terms of s 78(2A) of the Attorneys Act 53 of 1979, merely invests client funds in a separate trust account in order for the client to obtain the interest for the duration that the client's funds must be kept in trust by an attorney. The money invested remains part of the trust assets in the attorney's trust account.

The Registrar further understands that such an investment in a separate interest-bearing account for the benefit of a client, does not equate to the conclusion of an agreement between the client and the particular banking institution where the client's money is invested. It amounts to an agreement between the attorney and the bank for the investment of a client's money in what can be termed a 'ring-fenced' portion of the attorney's trust account.

Accordingly, money disinvested in terms of a s 78(2A) investment has to be paid back into the attorney's general trust account together with the interest earned thereon for credit of the client.

An attorney's activities, if they fall within the scope of s 78(2) as understood by the Registrar and form part of the ordinary business of an attorney, would not fall within the ambit of the Act.

However, if the attorney furnishes advice in respect of any financial product or performs any act referred to in the definition of 'intermediary services' that results or may result in a client entering into a transaction in respect of a financial product, it will have to be authorised under the Act.

- The Registrar agreed that, if an interim investment in terms of s 78(2A) was made, but after completion of the underlying transaction, the client instructs the attorney to retain the monies on investment on his or her behalf or make a new investment and the monies are not earmarked for any other transaction except to invest, consideration should be given

thereto whether such investment would be subject to the Act.

The statutory provincial law societies have urged attorneys to ensure their compliance with the Act. They outlined the procedure to be followed if a licence is required, which are:

- An application for a licence as a financial service provider must be submitted to the Registrar of Financial Services (the Registrar). The application can be completed online.
- The application must be supported by information to satisfy the Registrar that the applicant complies with the relevant fit and proper requirements in respect of personal character qualities of honesty and integrity, competence, operational ability and financial soundness. The documents include reference letters from previous employers or product suppliers reflecting the nature and extent of experience gained, certified copy of qualification, business description and financial projections or budget.
- An application fee is payable prior to the submission of the application and proof of payment must accompany the application form.
- Non-individual applicants with more than one key individual or representative are required to appoint a compliance officer.
- The Registrar may either grant the application, if the applicant and its key individual(s) comply with the relevant requirements of the Act or refuse the application, if the application is non-compliant.
- The Registrar may impose conditions and restrictions on the exercise of authority granted by the licence, having regard to the factors listed in the Act.

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LSSA submission on the Courts of Law Amendment Bill

The Law Society of South Africa (LSSA) has made submission on the Courts of Law Amendment Bill, B8-2016. It says that it supports the underlying objective of remedying the legal and oversight defects relating to emolument attachment orders.

The LSSA has, however, shown concern that some of the proposed amendments are overly prescriptive and will impede on the judicial oversight func-

tion of the courts. In the submission it states: 'The Bill should be reviewed in its entirety and the LSSA recommends that the Bill has to be withdrawn from the parliamentary process to allow all stakeholders sufficient time to consider the adverse implications thereof and to avoid the need for lengthy debate and/or delays in the parliamentary chambers.'

In the submission, the LSSA states that it supports changes aimed at address-

ing legal defects, but cautions strongly against the introduction of measures that will compromise the power of a magistrate to provide judicial oversight.

The full submission document can be found on the LSSA website.

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LSSA observer report on the Local Government election 2016

The Law Society of South Africa (LSSA) observed over 400 voting stations on 3 August. All LSSA observers were admitted attorneys and were trained by electoral law experts.

The LSSA observed that the elections were, on the whole, free and fair.

All LSSA observers observed on a voluntary basis and committed their own time and expenses to the mission. They visited three or more voting stations, namely, the station where they were registered first, followed by a second station of their choice and a last station of their choice where they observed the counting process.

The largest representation of stations observed was in Kwa-Zulu-Natal, Gauteng, and the Western and Eastern Cape, with a smaller representation in the other provinces. The national observations show that the environment around most voting stations on Election Day was positive and peaceful with minimal occurrences and irregularities. Irregularities observed were referred to the Independent Electoral Commission (IEC) to investigate.

The LSSA has commended the IEC on a job well done and recognises the important role it plays in protecting and promoting our democracy.

To view the full report on the elections go to www.lssa.org.za



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Does your practice have an effective risk management plan?

By
Ann
Bertelsmann

No matter how large or how small any business is, it is essential to have a risk management plan in place. In this regard, attorneys' practices are no different from any other businesses – although some of the types of risk will of course differ.

The starting point for legal practices, is to analyse the business and professional risks inherent in the practice. It may be helpful to categorise risks as either internal or external.

A practice has no control over external risks, for example, a downturn in the economy, but plans can be put in place to mitigate the negative effects, in the event that the external risk materialises. On the other hand, internal risks and risk-prone situations can be avoided, to a large extent, with effective risk management interventions.

This article focuses only on professional and reputational risks in a legal practice.

Being professionals – just the same as doctors or engineers – attorneys have professional risks that are specific to their profession. They can be held liable to their clients or third parties who suffer harm if anything goes wrong in the course of their professional practice. They also carry a serious responsibility and risk in holding money in their trust accounts on behalf of the public or clients. Any breach of their professional duties and responsibilities could lead to professional indemnity (PI) claims or claims for theft or misappropriation of trust money.

Receiving claims from clients and the public is a distinct possibility. Every year the Attorneys Insurance Indemnity Fund NPC (AIIF) receives between 400 and 500 claims notifications from attorneys' practices where clients allege that they have suffered a loss as a result of things going wrong in the handling of their legal matters. The Attorneys Fidelity Fund (AFF) receives an average of 870 claims per year by the public, for misappropriation or theft of their trust money by attorneys' practices.

Traditionally, the most common risk areas that cause claims are –

- ineffective delegation and supervision;
- ineffective diary and calendar systems; and
- conflicts of interest and absence of uniform practice rules within the firm – such as those dealing with scam and

fraud prevention, billing, engagement procedures, file audits and document management.

Risk management procedures and interventions to minimise these risks, should therefore be incorporated into attorneys' risk management plans.

Practitioners' attention is specifically drawn to the following two problem areas:

- **Scams:** These should be a major cause of concern for the profession, because we hear of attorneys' practices being scammed – almost on a daily basis. It is astonishing how many firms fall for these scams. Be vigilant and do not trust anyone. Educate staff and make sure that your rules and procedures close as many loopholes as possible. For more information about these scams, see the AIIF website (www.aiif.co.za/latest.html).
- **Certification of documents:** Because many claims are made against attorneys arising from problems with certification and witnessing of documents, the AIIF has imposed an additional 20% loading on the excess for this.

Extract from the AIIF NPC, Professional Indemnity Insurance Policy for 2016/2017:

'20. Where the Dishonest conduct includes:

- a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or
- b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false;

The Excess payable by the Innocent Insured will be increased by an additional 20%.'

Some of the risks can be transferred by way of adequate insurance cover. Unfortunately most of the risks are not insurable. Insurance gives some financial peace of mind, but it is not enough on its own. It certainly does not fix reputational damage. Non-recoverable financial losses include the non-payment of fees by the dissatisfied client, insurance excesses and billable time spent out of the office with insurers and their counsel, as well as in court and enquiries. Commercial insurers also take your claims experience into account when calculating premiums.

What are the risks and consequences associated with professional claims?

Reputational risks

- Dissatisfied clients may not instruct your firm again.
- Unhappy clients or members of the public may warn everyone, not to use your firm.
- Details may be published in the media or in court documents.
- Your practice could possibly be sequestered or liquidated.
- Where there is theft or misappropriation of trust money, criminal charges may be brought against the perpetrator, who may be suspended or struck off the roll.
- Complaints to and possible disciplinary hearings by the relevant law society may lead to suspension or striking off the roll.
- Staff morale could be negatively affected.
- A possible breakdown in the relationship between the partners/directors, and the dissolution of the practice could follow.

Financial risks if you are uninsured or hold inadequate levels of cover

All South African practices have automatic cover for professional indemnity claims through the AIIF. This is subject to a policy that can be found on the website (www.aiif.co.za/about-us.html). The amount of cover is limited and not all types of claims are covered. (Your practice may need to privately buy additional PI cover (known as top-up cover) through your own broker or insurer. There is also an excess payable.)

The AFF protects the public (not the firm) by compensating them for misappropriation of their trust money by an attorney or his or her staff – but only if the practice and its directors or partners are unable to refund them. So there is no protection for the partners or co-directors and they are jointly and severally liable. They could even lose their private property. (The practice can protect itself and its directors or partners by buying cover for misappropriation of funds.)

Dealing with a professional indemnity claim can also place a severe emotional and psychological strain on the practitioner and staff involved.

Once you have established what your

main risks are, you will be in a position to develop a risk management plan. If you do not have such a plan in place and do not know where to begin, there are numerous helpful books and internet articles on the topic. It may also assist you to read the document entitled 'Risk Management Tips' and also other risk management related articles on the AIIF's website (www.aiif.co.za/risktips.html).

Plans on their own are of little value unless they are implemented properly and, where appropriate, filtered down to all your staff.

The importance of assessing the gaps in your practice's risk management

A risk management plan cannot remain static and will have to be updated and adapted regularly, to ensure that it remains relevant and effective. The risks facing a practice or any other business are constantly changing with new risks emerging from time to time.

It is important that your practice keeps up to date with all legal developments and threats to the profession, for example, current scams and frauds perpetrated on legal practitioners.

One way of assessing some of the gaps that may be present in your risk management, is to complete the risk management self-assessment questionnaire, which should be completed online, or downloaded from the AIIF website (www.aiif.co.za/selfassform.html).

Risk Management self-assessment questionnaire

Please note that the AIIF NPC, professional indemnity policy for 2016/2017 provides as follows:

'23. Once the Insured has notified the Insurer, the Insurer will require the Insured to provide a completed Risk Management Questionnaire and to complete a claim form providing all information reasonably required by the Insurer in respect of the Claim. The Insured will not be entitled to indemnity until the claim form and Risk Management Questionnaire have been completed by the Insured, to the Insurer's reasonable satisfaction and returned to the Insurer.'

Definition:

'XXIV Risk Management Questionnaire:

A self-assessment questionnaire, which can be downloaded from or completed on the Insurer's website (www.aiif.co.za) and which must be completed annually by the senior partner or director or designated risk manager of the Insured as referred to in clause 5.'

The AIIF strongly advises all attorneys' practices, as part of their risk management plan, to have Minimum Operating

Standards (MOS) in place and to ensure that all staff members have access to them and are trained to follow their required procedures and standards.

The MOS should cover –

- professional standards and practice-related office procedures like management of trust and business money;
- delegation;
- supervision;
- drafting;
- client care;
- billing;
- file notes;
- document retention;
- filing; and
- diary and engagement management.

If your practice has a regularly updated plan, which is effectively implemented, you should have greater peace of mind, your risk of claims should be substantially reduced and your client's should be happier.

Ann Bertelsmann BA (FA) LLB (Wits) HED (Unisa) was the legal risk manager for the Attorneys Insurance Indemnity Fund in Centurion. Ms Bertelsmann has recently retired. □

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Having a slice of PIE – *understanding the Act*

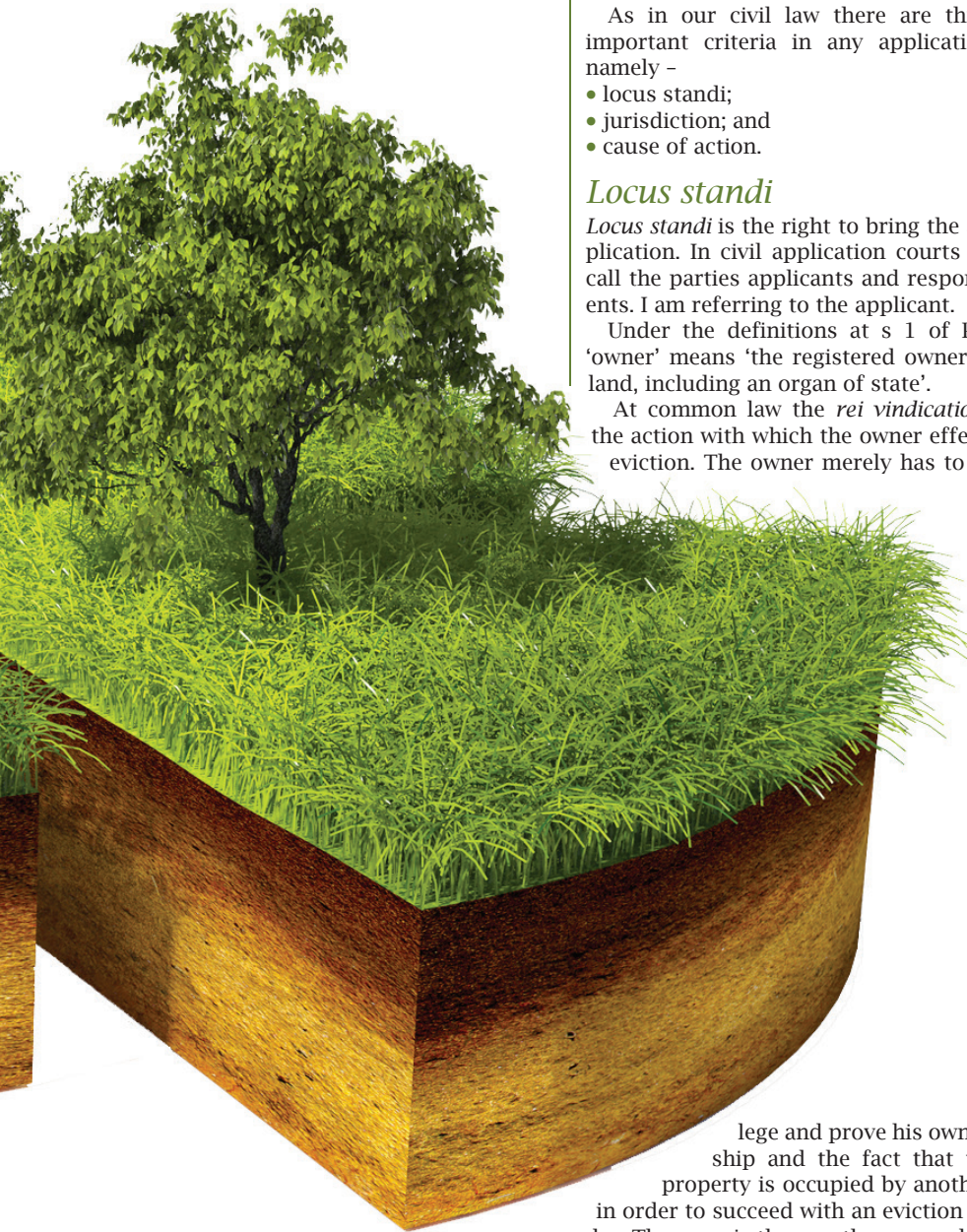
By
Mohammed
Moolla

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) came into operation on 5 June 1998.

PIE was promulgated to provide for the prohibition of unlawful occupation and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without permission of the owner or person in charge of such land.

PIE also provides that no one may have their home demolished or be evicted without a court order after considering all the relevant circumstances.

PIE applies to all evictions from buildings or structures utilised for dwelling



- households headed by women.

As in our civil law there are three important criteria in any application, namely –

- locus standi;
- jurisdiction; and
- cause of action.

Locus standi

Locus standi is the right to bring the application. In civil application courts we call the parties applicants and respondents. I am referring to the applicant.

Under the definitions at s 1 of PIE, 'owner' means 'the registered owner of land, including an organ of state'.

At common law the *rei vindicatio* is the action with which the owner effects eviction. The owner merely has to al-

lege and prove his ownership and the fact that the property is occupied by another, in order to succeed with an eviction order. The onus is then on the respondent to allege and prove a right to stay in possession.

The owner need not, in addition to his ownership allege or prove that the occupiers occupation is unlawful (see *Graham v Ridley* 1931 TPD 476 and *Chetty v Naidoo* 1974 (3) SA 13(A)).

Ownership in the case of the *rei vindicatio* is proved by attaching a copy of the title deed or deeds office search.

PIE defines 'person in charge' as: 'A person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.'

Section 4(1) of PIE states 'an owner or person in charge of land' may apply for eviction of an unlawful occupier.

PIE defines the 'unlawful occupier' as 'a person who occupies land without the express or tacit consent of the owner or

person in charge'.

The following persons have *locus standi* –

- the owner of the land;
- the executor where the owner has died;
- the *curator bonis* of the owner in instances where one has been appointed;
- the person in charge of the property – a person who has or at the relevant time the legal authority to give permission to a person to enter or reside on the property in question;
- a lessee; or
- a person acting as an agent for the owner. This does not automatically include an estate agent. For an estate agent to have *locus standi*, he must have power of attorney (see *Mangaung Local Municipality v Mashale and Another* 2006 (1) SA 269 (O)).

The lessor need not be the owner of the property let and applicants in common law are, therefore, not limited to the owner.

The person, other than the owner must prove *locus standi*.

Jurisdiction

Section 1 under PIE's definitions refers to 'court' and states: 'Any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated'.

The court must ascertain that the property is residential property and whether the structure concerned performs the function of a dwelling.

The High Court and the magistrate's court have jurisdiction and the amount of the rent and/or the value of the occupation is irrelevant (see s 4(1) of PIE and also *Nduna v Absa Bank Ltd and Others* 2004 (4) SA 453 (C) at 457C).

The word 'proceedings' in s 4(1) of PIE includes proceedings by way of application. Applications may therefore be brought in the magistrate's court without the issuing of a summons and a final order may be granted on application.

Cause of action

The procedural requirement for PIE laid down in s 4(2), which provides that at least 14 days before the hearing of the proceedings contemplated in subs (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. This is commonly known as an *ex parte* application (see *Cape Killarney Property Investment (Pty) Ltd v Mahamba and Others* [2001] 4 All SA 479 (SCA)).

Eviction proceedings cannot commence unless the lease has been cancelled. Study the lease to determine the procedure. It may be necessary to deliver a notice to place the tenant *in mora*.

purposes (see *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA)).

Structures that do not form the function of a dwelling do not fall under PIE (see *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) at 506E – 507E and *Kanescho Realtors (Pty) Ltd v Maphumulo and Others and three similar cases* 2006 (5) SA 92 (D) at 94F).

If commercial property is utilised for dwelling purposes, PIE applies, however, holiday homes do not fall under PIE (see *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at 328B – C).

PIE also requires special consideration be given to –

- the rights of the elderly;
- the rights of children;
- the rights of disabled persons; and

A notice of cancellation must be clear and unequivocal and only takes effect from the time it is communicated to the relevant party (see *Morkel v Thornhill* (unreported case no A105/2009, 4-3-2010) (Hancke J)).

If the lease is for a fixed term, determine if the Consumer Protection Act 68 of 2008 (the CPA) applies to the lease. Section 14 of PIE limits the landlords' right of cancellation to the giving of 20 business days written notice of a breach and cancellation may only follow on failure by the tenant to rectify the breach.

If the CPA applies bear in mind that if the lease has expired, it continues automatically on a month to month basis unless specifically cancelled.

Why must the municipality be cited?

Jafta J in the matter of *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] 4 All SA 410 (SCA) at p 411 held that the Municipality is and remains a party with an interest in the outcome of proceedings and therefore needs to be joined as party to the proceedings.

The court will be called on before service of the notice to consider the contents of the notice and the suggested manner of service and to endorse his or her approval or disapproval thereof on the application.

Once the *ex parte* order has been granted the s 4(2) notice may be served on the respondent(s) and the municipality. The service must take place in accordance with the directions of the court and at least 14 days before the hearing takes place. The 14 day period refers to ordinary days and not court days.

What to look for in the s 4(2) notice?

The notice must comply with the requirements of s 4(5), which are set out below:

- (a) state that proceedings are being instituted in terms of subs (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.'

The notice may also advise the recipients that they should inform the court of facts relevant to the impact which an eviction would have on the rights and needs of the occupiers, particularly when the occupiers are elderly persons, children, disabled persons and households headed by women (see s 4(6)). There is

no authority for this but it is advisable.

Procedure after order for service is granted by magistrate

The applicant or their attorneys will ensure that the *ex parte* application together with court's order for service and notice of motion and affidavit with annexures is served personally by the deputy Sheriff on the respondent(s). Service on the local municipality may also be effected by hand.

All the documents are then filed at court.

The applicant is required to place the matter on the roll for hearing by giving the clerk of the court notice of set down five days before the day on which the application is to be heard.

Opposing affidavits and replying affidavits may be exchanged between the parties and served and filed.

Return date

On the day of the hearing of the eviction application, the court will hear evidence on the equity provisions as set out in s 4(6) with regard to elderly people, children, and households headed by women. The court must then in the light of all the facts placed before it make an order as to what it is just and equitable to grant the order for eviction by taking into account the provisions of subss 4(6), 4(7), 4(8) and 4(9) of PIE.

Settlement

In the event of the matter being settled an order may be taken in the form of s 4(8). Refer to the form attached as a precedent to be used, which makes the specific provision that the parties are aware that the order is not appealable (see *Fourie NO v Merchant Investors (Pty) Ltd and Another* 2004 (3) SA 422 (C) 424 H – J and s 83 Magistrates' Courts Act 32 of 1944).

Urgent applications

Only an urgent interim application for eviction may be granted under the PIE Act. Urgent applications for eviction may not be granted. This is governed by s 5(1) of PIE.

The following must be satisfied for such an order of eviction to be granted – '(a) ... real and imminent danger of substantial injury or damage to any person or property ... ;

(b) the likely hardship to the owner or any affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier; and

(c) there is no other effective remedy available.'

General matters of interest

- **Defaulting mortgagors** – a defaulting occupier after the sale of the property in

execution can only be evicted in terms of PIE. Unlawful occupation is not at the fall of the hammer but only after registration of transfer (see *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T)). The Sheriff acts as executive of the law until the transfer is effected. Be wary of the conditions of sale of a Sheriff where properties are sold in execution.

- **Spouses** – where one spouse seeks to evict the other and no principle in law justifies continued occupation, the procedure of PIE should be followed (see *Seaton v First National Trust Asset Management and Trust Company (Pty) Ltd and Others* (D) (unreported case no 3878/2005, 22-5-2008) (Ntshangase J)).

- **Land invaders and informal settlement occupiers** – ensure that all occupiers are identified as far as possible and effect service properly.

In all cases where the right of occupation has not been terminated such as in case of a lease, a reasonable notice to vacate should be given. A period of 30 days is usually regarded as reasonable unless special circumstances apply.

Mandament van spolie is available to unlawful occupiers that are forcefully removed by an owner without a court order (see *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at 519 – 522). The court ordered replacement of destroyed structures. In the case of *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) at para 30 the Constitutional Court confirmed that the *mandament* '... should not serve as the judicial foundation for permanent dispossession ...'.

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If you thought this article was interesting, read the following article:

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Rescission applications and suspension of orders

By Michael
van
Kerckhoven

The law relating to suspension of court orders that are the subject of an application for rescission has historically been mired in confusion. Many civil litigation practitioners may recall their first instruction to bring an application for rescission of an order of the High Court and the comfort that the plain wording of r 49(11) of the Uniform Rules of Court at the time appeared to present to them. The rule reads as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs' (my italics).

On its plain wording the rule clearly provided that once an application for rescission has been made, the order – which is sought to be rescinded – is suspended and cannot be executed on. This was comforting to a practitioner tasked with bringing an application for rescission, as at face value, the rule provided

that the application for rescission itself would automatically suspend the effect of the order and execution thereon. In the event that the party in whose favour the judgment was granted wished to nonetheless execute, the rule provided that it was incumbent on them to bring a substantive application to request the court's leave to do so.

Many such practitioners will hopefully also recall having been diligent enough to read the commentary on r 49, and having been alerted to the decision of *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W).

In short, Roux J held in *United Reflective Converters* that there is no substantive rule of law that an application to vary or rescind an order automatically suspends its operation (at 463J). As such, insofar as r 49(11) sought to create such a substantive rule of law, it had overstepped the mark and was *ultra vires* and of no force or effect. Regarding the automatic suspension of an order on the noting of an appeal, Roux J held that r 49(11) merely restated the already existing substantive law and, was therefore, valid in this respect.

As a result of *United Reflective Converters*, a practice developed that a prac-

itioner representing a client seeking the rescission of an order would urgently seek an undertaking from the party in whose favour the order was granted that they would not execute on this order pending the finalisation of the intended rescission application, and failing such an undertaking would bring an urgent application seeking to suspend the effect of the order and execution thereon pending the determination of a rescission application. Many rescission applications of necessity, therefore evolved to be brought in two parts, namely –

- seeking an urgent suspension of the order pending the hearing of the rescission application; and
- seeking the rescission itself in the ordinary course.

Historically the *United Reflective Converters* matter enjoyed support from its own, as well as other divisions. However, two more recent judgments of the same division (now the Gauteng Local Division, Johannesburg) disagreed with the approach of Roux J.

In *Khoza and Others v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ) Notshe AJ was of the view that r 49(11) did provide for a rule of procedure, as opposed to a substantive rule of law, and

was not satisfied with Roux J's conclusion that there is no common law supporting an automatic suspension of an order on the bringing of an application for rescission. In any event, Notshe AJ held that, if the common law were lacking such a rule, it should be developed by the courts to provide for it. These conclusions are set out in para 16 of Notshe AJ's judgment. In reasoning that such a common law rule should be developed, Notshe AJ stated as follows in para 28 of the judgment:

'An applicant for a rescission of an order would be irreparably prejudiced if the order were allowed to operate despite the application. This is no different from a situation where a notice of application for leave to appeal is delivered. In the circumstances, the rule that applies to the noting of appeals would be extended to noting of the rescission application as well.'

Notshe AJ's sentiments were later echoed by Vally J in *Peniel Development (Pty) Ltd and Another Pietersen and Others* [2014] 2 All SA 219 (GJ). Vally J in para 14 of his judgment also pointed to the additional strain which these urgent stay applications placed on the judiciary's and litigants' resources. Given that these urgent stay applications were, according to Vally J, invariably granted, this strain on resources was in the judge's view unwarranted.

The *United Reflective Converters* case, while previously having been followed in its division and others, was now being questioned in its own division. This obviously caused immense uncertainty in the law, particularly with regards to whether or not an order was automatically stayed by the bringing of a rescission application.

On 23 August 2013 the Superior Courts Act 10 of 2013 (the Act) came into effect. The relevant parts of s 18 read as follows:

'18. Suspension of decision pending appeal. –

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.'

While dealing with exactly the same subject matter as that of r 49(11), s 18

of the Act omits any reference to an application for rescission. Of further note, while s 18 was already in effect at the time of the judgment in *Peniel Development*, it is not mentioned in this judgment.

Later the Rules Board for Courts of Law (the Rules Board) amended r 49 by the repeal of sub-rule (11) in its entirety. This repeal was effective from 22 May 2015 and was published in GN R317 GG38694/17-4-2015.

This significant change in landscape was considered by Meyer J in the case of *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another* (GJ) (unreported case no 17119/15, 10-9-2015) (Meyer J), again being a decision of the Gauteng Local Division.

Meyer J was faced with two questions which were at the core of this case: '... whether there is a substantive rule of law that an application to rescind an order or judgment automatically suspends its operation pending the decision of such application and the proper interpretation of s 18 of the Superior Courts Act ...' (para 9).

Meyer J specifically pointed to the decision in *United Reflective Converters*, as well as the contrary decisions in *Khoza* and *Peniel Developments*. While respectfully stating his agreement with the contention that the decision in *Khoza* was 'not beyond doubt' (para 15), Meyer J stated that a determination of the correctness of these decisions was unnecessary given his finding on the correct interpretation of s 18 of the Act.

Meyer J held that s 18 was to be interpreted in accordance with the established principles of interpretation set out in, among other cases, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) 593 (SCA). Meyer J then stated as follows in para 18: '... I am of the view that had it been the intention of the legislature for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then such decision would have been expressly included in section 18(1).'

I submit that the introduction of s 18 of the Act and the repeal of r 49(11) puts an end to any further argument of the existence of a substantive rule of law that automatically suspends orders that are the subject of a rescission application, whether that substantive rule of law was one which existed historically, or one which was developed in the *Khoza* and *Peniel Developments* cases.

One must assume that the legislature and the Rules Board were acutely aware of the state of the substantive law relative to automatic suspension of orders as it applies to rescission applications.

Being so aware, the legislature drafted s 18 (ultimately the successor to r 49(11)) to exclude reference to rescission applications, and the Rules Board repealed r 49(11) in its entirety. Taken in context, the intention of the legislature could only have been to exclude rescission applications from the ambit of automatic suspensions.

I further submit that distinguishing between appeals and applications for rescission in this manner, the former automatically suspending the order (ignoring for the moment interlocutory orders) and the latter requiring a formal application to suspend, is entirely warranted.

Any appeal first requires a successful application for leave to appeal at which juncture an initial assessment of the prospects of success of the intended appeal is conducted. The determination of an application for leave to appeal should ordinarily also take place on an expedited basis.

An opposed application for rescission in a busy division such as the Gauteng Division, Pretoria or the Gauteng Local Division, Johannesburg would likely only be heard approximately a year after this application is made.

An unmeritorious appeal would therefore be put to an end in a relatively short period of time resulting in only a small delay in execution. If a rescission application automatically suspended the order, an assessment of this application would only take place at the hearing of the matter on the opposed roll in the ordinary course. The result is that an unmeritorious rescission application would result in a significant delay in execution if it automatically suspended the order. Requiring a separate, generally urgent, application for suspension of the order pending the determination of the rescission application introduces an initial assessment on an expedited basis of the prospects of success in the rescission application. While this may introduce further strain on the judiciary's resources, I submit that this is warranted in order to ensure that unmeritorious rescission applications do not unduly delay the right of a successful litigant to execute on an order.

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Virtual evidence in courts – *a concept to be considered in South Africa?*

By Dr
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Picture source: Gallo Images/Stock

Courts are pre-eminently human creations and serve two primary functions in society, namely they resolve disputes and deliver justice to litigants to the degree possible in a system conducted by fallible people (FI Lederer 'The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High Technology Courtrooms' (1999) *Faculty Publication Paper* 212 at 835) (www.scholarship.law.wm.edu, accessed 1-9-2016). A virtual court is the use of technologies that provide for hearing and trials with participants in distant areas, in which the physical location of the courtroom does not dictate the process or the conduct of the proceedings. Communications between the parties are conducted over high-speed, high-quality electronic networks that permit interactive data, voice and visual transmissions. According to Keith Kaplan ('Will Virtual Courts Create Courthouse Relics?' (2013) 52(2) *The Judges' Journal* 32) a virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courtrooms. Remote appearances and testimony are the key elements in virtual trials and virtual courtrooms.

Initially remote witness technology (first, closed circuit television (CCTV) and later videoconferencing) was adopted as a means of taking evidence from children, or other vulnerable parties, such as victims of sexual assault, to shield them from the physical presence of the accused in the courtroom and the risk of intimidation. While it is still most commonly used to enable vulnerable wit-

nesses to give evidence from a location outside the courtroom, videoconferencing could enable other witnesses to give their evidence from a location outside the courtroom for a variety of other reasons, such as cost or convenience.

'Virtual' nature of participation

According to Anne Wallace ("Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law, Information and Science* 5) 'remote witnesses' tend to fall into two categories. Firstly, there are those for whom physical participation in the courtroom may be quite easily possible and convenient in terms of access, but who are isolated from participation in the physical courtroom in their own interests, such as children and other vulnerable witnesses. They are 'remote' in a physical sense, but not necessarily geographically. The remote witness facility from which they give their evidence is most likely in the same building.

On the other hand, witnesses who give evidence on videoconference for reasons of cost or convenience are usually both physically and geographically remote from the courtroom. The remote witness facility from which they give their evidence may be another courtroom (closer to their work or home), or a public or private videoconferencing facility in that location.

Creating and operating technology in the courtroom

High-technology courtrooms are characterised by one core capability, a multi-faceted technology-based evidence presentation system that consists of a television-based document camera and a display system able to display not only what is placed under the camera, but also and critically, computer output. The computer input may stem from one or more installed desktop units, from a notebook computer and connected temporarily to the display system, or a combination of these. The display system may consist of televisions computer monitors, or large front or rear projection systems. A high-technology court record system and the capability for remote witness testimony by two-way, high-quality videoconferencing is also needed.

Legal framework for remote witness testimony

The two major reasons for the use of videoconferencing to take witness testimony have been firstly, the desire to protect vulnerable witnesses from trauma that they may experience in the physical courtroom, and secondly, the need to find ways to bring information and expertise to a courtroom from a witness located at a distance which makes physical attendance expensive, for example, if the witness resides in a rural area or particularly inconvenient, for instance an expert witness employed as an analyst in a DNA laboratory.

The use of technology in litigation requires that the laws of evidence recognise and provide for the various methods of taking and presenting evidence remotely. The taking of evidence by remote witness technology has largely been addressed in Australia by specific legislation and amendments to court rules.

Most Australian jurisdictions have also implemented legal regimes, which require or enable evidence given by vulnerable classes of witnesses for example children, and victims of sexual assault to give evidence remotely.

In South Africa s 158 of the Criminal Procedure Act 51 of 1977 (CPA) provides that criminal proceedings take place in the presence of the accused. An exception is provided for in s 158(2)(a) namely:

‘(2)(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would –

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;

(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

(5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.’

Section 170A of the CPA provides for evidence through intermediaries.

Use of remote witness testimony in courts

This technology is used to conduct vari-

ous types of court hearings in Australia, as an alternative to circuit hearings, directions hearings, pre-trial conferences, chamber applications, and applications for special leave to appeal (Wallace *op cit* at 3). In one example, videoconferencing was used as a temporary expedient to bring a magistrate ‘on-line’ to a country court, when the local magistrate was unexpectedly unavailable to deal with the roll. A magistrate who has finished their local list for the day can also be linked to a busier court elsewhere to assist with its caseload.

Videoconferencing is also being used to provide ancillary services to assist the court process. Thirty four United States (US) district courts, encompassing 60 actual sites, use videoconferencing for prisoner civil-rights-pretrial proceedings. Currently, the US Courts of Appeals for the Second, Tenth and District of Columbia, Circuits use videoconferencing for oral arguments.

The US Supreme Court has accepted, when necessary, child witness testimony via one-way video (*Maryland v Craig* 497 US 836 (1990)). The Florida Supreme Court sustained a robbery conviction based largely on the two-way video testimony of complainants testifying from Argentina (*Harrell v State*, 709 So. 2d 1364 (Fla. 1988)). In determining when the satellite procedure is appropriate, a finding similar to that of r 3.190(J) of the Florida Rules of Criminal Procedure is required. Rule 3.190(J) provides the circumstances under which and procedure by which a party can take a deposition to perpetuate testimony for those witnesses that are unavailable. Thus, in all future criminal cases where one of the parties makes a motion to present testimony via videoconferencing, it is incumbent upon the party bringing the motion to –

- verify or support by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing; and
- establish that the witness’s testimony is material and necessary to prevent a failure of justice.

If all the above requirements have been adhered to, the trial judge shall allow for the satellite procedure.

• Expert witnesses

During the 1998 Australian Institute of Judicial Administration Conference in Melbourne, the State of Victoria demonstrated a two-way connection to its forensic laboratory, illustrating how a forensic chemist, in a laboratory setting, could testify without attending court. I submit that much of expert witness testimony may become remote as it is an effective way to reduce litigation costs.

• Presiding officers

Presiding officers may also utilise videoconferencing effectively during trial. In the matter of *United States v Salazar* 44 M.J. 464 (1996), two of its five judges appeared by separate videoconferencing systems.

• Vulnerable witnesses

The use of technology may also assist people with hearing, vision, mobility, or other problems. Internet-based videoconferencing proved to be critical in one such US case. With reliance on the judgments in the matter of *Harrell (op cit)* and *United States v Gigante* 971 F. Supp. 755, 756 (E.D.N.Y. 1997), a New Jersey Superior Court judge granted a plaintiff’s application to testify and observe the trial from his apartment via videoconferencing link over the Internet. The plaintiff who was paralysed from the neck down and breathed with the aid of a respirator, stated that he was too weak to travel from Chicago to New Jersey for his medical malpractice suit.

The abovementioned scenarios are examples of how the use of technology can effectively improve access to justice.

Advantages and disadvantages of remote witness testimony

Lederer notes that, although videoconferencing is highly effective, such testimony is not perfect (*op cit* at 280). Short audio delays that are inherent in the technology prohibit the instant interruptions common in ordinary conversation. A further disadvantage is that, although video resolution and quality are good, extremely rapid movement may not reproduce properly.

Conclusion

Information and communications technologies play a key role in managing case load, publishing information for court users, managing knowledge within the court, supporting the preparation and conduct of litigation and presenting evidence, providing transcripts and preparing and publishing judgments.

It is proposed that South Africa, like Australia, enact legislation which addresses the issue of virtual courts and the use of technology in assisting remote witness testimony.

Technological changes will improve both access to and the efficiency of the justice system and should be embraced by all.

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POPI and the legal profession: What should you know?

By
Johan
Moorcroft



This article is intended as an introduction to aspects of the Protection of Personal Information Act 4 of 2013 (the Act), which will come into operation (save for ss 39 to 54, 112 and 113 that came into operation in 2014 in anticipation of the establishment of a regulatory framework) on a date to be proclaimed. Chapter VIII of the Electronic Communications and Transactions Act 25 of 2002 will be repealed when the Act comes into operation.

The purpose of the Act is to protect privacy and to regulate the use of personal information. In this article the processing of personal information and related matters are discussed and it is envisaged that other aspects of the Act (such as processing of special personal information, the protection of children, and the supervision of the Act) will be dealt with separately.

Of particular importance to the legal profession is the fact that communications between legal adviser and client are not subject to search and seizure. This is provided for in s 86.

What is personal information?

Unless otherwise indicated the definitions appear in s 1 of the Act.

Parties for whose use information is processed are defined as responsible parties in the Act; those whose information is processed are referred to as data subjects. A responsible party may make use of the services of an operator as defined to process information.

Personal information as defined in s 1 means information relating to a living individual, and an existing juristic person insofar as the Act finds application. De-identified or anonymised data do not fall within the definition of personal information, nor do information relating to the deceased or entities no longer in existence.

Personal information is de-identified, or anonymous, when the data subject is not identifiable from the information and the information cannot be manipulated to identify the subject.

The Act provides for a special category of personal information judged by the legislature to require more comprehen-

sive protection than other personal information. Special personal information defined in s 26 relates to religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information, and to criminal behaviour relating to the alleged commission of an offence or any proceedings in respect of any offence.

The application of the Act: Section 3

The Act applies to the processing of personal information entered in a record by or for a responsible party by making use of automated or non-automated means, but only if the responsible party is domiciled in South Africa (SA), or makes use of means in SA (unless those means are used only to forward personal information through SA).

A 'record' means any recorded information 'in the possession or under the control of a responsible party'.

When the recorded personal information is processed by non-automated means, it must form part of a filing sys-

tem or be intended to form part of a filing system to fall within the definition.

'Automated means' is defined in s 3(4) to mean 'any equipment capable of operating automatically in response to instructions given for the purpose of processing information.' This would be a computer.

A 'filing system' is a structured set of personal information, and would typically consist of filing cabinets and other storage units.

The conditions for the processing of personal information are listed in s 4(1) and detailed in ch 3 of the Act, and are discussed below, but these conditions are not applicable to the processing of personal information to the extent that such processing is –

- excluded, in terms of ss 6 or 7, from the operation of the Act, or
- exempted in terms of ss 36 to 38, from one or more of the conditions.

When is the Act not applicable?

The Act does not apply –

- to information that does not meet the criteria of the definition of personal information;
- where informed consent is given voluntarily for to the use of the information, as in s 11(1) and other sections;
- to the extent that an exemption applies;
- to the use of information solely for journalistic, literary or artistic expression to the extent that such an exclusion is necessary to reconcile the right to privacy with the right to freedom of expression, in terms of s 7; or
- to the processing of personal information in terms of s 6(1)(a)-(e), namely –
 - in the course of a purely personal or household activity;
 - that is anonymised data, namely, data de-identified to the extent that it cannot be re-identified again;
 - by or on behalf of a public body which involves national security or the prevention of unlawful activities to the extent that adequate safeguards have been established in legislation;
 - by the Cabinet or its committees or the executive council of a province; or
 - relating to the judicial functions of a court.

Exemptions from one or more conditions for the processing of personal information:

Exemptions granted by the Regulator in terms of s 37

The Regulator established in terms of

the Act may grant an exemption, when satisfied that –

- '(a) the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject ...; or
- (b) the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.'

The 'public interest' includes the interests of national security, the importance of crime prevention, the economic and financial interests of a public body, the importance of fostering compliance with legal provisions, historical, statistical or research activity, and the special importance of freedom of expression.

The 'improper conduct' exemption in s 38

Processing of personal information is exempt from certain provisions of the Act when done for the purposes of a 'relevant function' of a public body, or for purposes conferred in terms of the law, when the function is performed in order to protect members of the public against financial loss due to improper conduct by, or the unfitness or incompetence of persons authorised to carry on any profession or other activity, or persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate.

The provisions from which exemptions may be granted are –

- the right of a data subject to object to the processing of personal information in subs 11(3) and (4);
- the general obligation to collect personal information directly from the data subject in s 12;
- the condition that further processing of must be compatible with the purpose of collection of the information in s 15; and
- the right of the data subject to be notified when personal information is collected in s 18.

The search and seizure provisions in ss 85 and 86

Information processed in terms of an exemption is not subject to search and seizure. As already intimated above communications between legal adviser and client are similarly exempt.

The conditions for the lawful processing of personal information in s 4(1) and ch 3

The Act stipulates eight conditions for the lawful processing of personal information. These 'conditions' set out in s 4(1) reflect certain principles elaborated on below.

The principle of accountability in s 8: Accepting responsibility

The responsible party must accept responsibility and ensure compliance with the conditions for lawful processing.

The principle of minimality in ss 9 to 11, and 13 to 15: Limiting the scope of processing

The responsible party must not collect and use more information than is needed (s 10) and must not retain it for longer than is necessary (s 14). Processing must not infringe the privacy of the data subject. The further processing of information must be compatible with the purpose of the initial collection of the information (s 15).

Information may only be processed under any one or more of specified circumstances set out in s 11 of the Act. These circumstances are –

- when consent is given;
- when processing is necessary to carry out a contract to which the data subject is party;
- when the processing complies with an obligation imposed by law;
- where the processing protects a legitimate interest of the data subject;
- when processing is necessary for the performance of public duty by a public body; or
- in pursuit of the legitimate interest of the responsible party or of a third party to whom the information is applied.

The principle of quality in ss 12 and 16

The responsible party must take reasonably practicable steps to ensure data quality.

In terms of s 12 information must generally be collected directly from the source, namely, from the data subject. This principle is qualified by a number of exceptions:

- When the processing is done for the purpose of a function of a public body or conferred on any person by law in order to protect members of the public against financial loss or improper conduct the exemption in s 38 applies.
- Information may be obtained from a public record as defined.
- Information may be made public by the data subject.
- Information may be used by consent.
- Information may be collected from another source if such use does not prejudice a legitimate interest of the data subject.
- Collection from another source may be necessary for the conduct of proceedings in any court or tribunal, in the interest of national security, to avoid prejudice in the maintenance of law by a public body, to comply with an obligation imposed by law or to enforce legislation concerning

the collection of revenue, or to maintain the legitimate interest of the responsible party or of a third party to whom the information is supplied.

- Information may also be collected from another source if compliance would prejudice a lawful purpose or is not reasonable practical.

The principle of transparency in ss 17, 18, and 24 to 25

A data subject may require personal information that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully to be corrected or deleted in terms of s 24. Access to information is a prerequisite for the verification of information relating to a data subject and, therefore, for the exercise of this right.

A responsible party is required to inform data subjects of the collection of information in terms of ss 17 and 18.

The duty to inform falls away when –

- the processing is done in terms of s 38 for the purpose of a function of a public body or conferred on any person by law with a view to protecting members of the public against financial loss or improper conduct;
- information is processed with consent (s 18(4)(a));
- there is no prejudice to the data subject (s 18(4)(b));
- non-compliance is necessary to avoid prejudice in the maintenance of law by a public body, to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue, for the conduct of proceedings in any court or tribunal, or in the interest of national security (s 18(4)(c));
- compliance would prejudice a lawful purpose (s 18(4)(d));
- compliance is not reasonably practicable (s 18(4)(e));

- the information is used in such a form that the data subject will remain anonymous (s 18(4)(f)(i)); or
- the information is used for historical, statistical or research purposes (s 18(4)(f)(ii)).

The principle of integrity and security in ss 19 to 22

Section 19 requires a responsible party to take measures to secure the integrity and confidentiality of personal information. The Regulator and the data subject (if identifiable) must in terms of s 22 be informed whenever security has been compromised.

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David Matlala *BProc (University of the North) LLB (Wits) LLM (UCT) LLM (Harvard) LLD (Fort Hare) HDip Tax Law (Wits)* is an adjunct professor of law at the University of Fort Hare.

THE LAW REPORTS

August 2016 (4) *South African Law Reports* (pp 317 – 633); [2016] 3 *All South African Law Reports* July (pp 1 – 344); 2016 (5) *Butterworths Constitutional Law Reports* May (pp 577 – 708); 2016 (8) *Butterworths Constitutional Law Reports* August (pp 987 – 1132)

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
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Review and setting aside of decision to discontinue prosecution: In *Democratic Alliance v Acting National Director of Public Prosecutions and Others (Society for the Protection of our Constitution as amicus curiae)* [2016] 3 All SA 78 (GP) before his election as President of the African National Congress (the ANC), a political party, in 2007 and as President of the country in 2009, Jacob Zuma faced allegations of corruption and was eventually indicted. The view of the prosecution team, the Directorate of Special Operations (before it was disbanded) and the Acting National Director of Public Prosecutions, Mokotedi Mpshe, was that Mr Zuma had to be prosecuted to answer allegations made against him. On 31 March 2009 Mr Mpshe and his deputies listened to a recording of intercepted communications between the head of the Directorate of Special Operations, one Leonard McCarthy and a former National Director of Public Prosecution, Bulelani

Ngcuka, as well as those between McCarthy and various other persons, which were provided by Mr Zuma's legal representatives. The conversations indicated an intent to frustrate Mr Zuma's quest to be President of the country. Because of the content of the recordings Mr Mpshe felt angry and betrayed. Without taking anybody on board, be it the prosecution team, his deputies or any other interested person the following day Mr Mpshe announced his decision to discontinue the criminal prosecution against Mr Zuma. As a result, the applicant, Democratic Alliance, an opposition political party, approached the High Court for an order reviewing and setting aside the decision to discontinue the criminal prosecution. The applicant alleged that such decision was irrational.

In a unanimous decision the court, per Ledwaba DJP, Mothle and Pretorius JJ, held that the impugned decision was irrational and accordingly reviewed and set it aside. The respondents, the Acting National Director of Public Prosecutions and others, excluding the *amicus curiae*, were ordered to pay costs.

The court held that when Mr Mpshe announced his decision on 1 April 2009 no discussion had been held with senior members of the National Prosecuting Authority (NPA) to source their views on the subject. That omis-

sion was critical, considering that up to 31 March 2009, they had been collectively discussing and agreed to continue with the prosecution. Failure to source their views was irrational. Mpshe's sudden inexplicable turnaround on the matter was irrational. He failed to explain how the information he heard on the tape recordings could be said to have affected, compromised or tainted the envisaged trial process and the merits of the intended prosecution. There was thus no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution. In his own words Mr Mpshe stated on 1 April 2009 he felt angry and betrayed. Therefore, his feelings of anger and betrayal caused him to act impulsively and irrationally. For that reason Mr Zuma had to face the charges as outlined in the indictment.

Game animals

Statutory protection of ownership of game animals: Section 2(1) of the Game Theft Act 105 of 1991 (the Act) provides amongst others that: 'A person who keeps or holds game ... on land that is sufficiently enclosed as contemplated in subsection (2), or who keeps game in a pen or kraal or in a vehicle, shall not lose ownership of that game if the game escapes from such enclosed land or from such pen, kraal or vehicle'.

In terms of s 2(2)(a), 'land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, ... it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate'. The certificate is valid for three years. 'Game' refers to wild animals, which are kept or held for commercial or hunting purposes.

In *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd* 2016 (4) SA 457 (ECG) the plaintiff, Eastern Cape Parks Agency, was an organ of state charged with the management and control of a nature reserve situated in the province and on which there was a herd of Cape Buffalo (wild animals). Except for a dam – which formed a boundary between the reserve and the defendant Medbury's property – the reserve was sufficiently fenced off. However, because of severe drought the water level in the dam dropped sufficiently to allow the buffalo to escape onto the defendant's property. When the drought was broken, the animals did not return.

The plaintiff's action to recover the animals from the defendant's land was opposed. As the plaintiff had not obtained a certificate of the Premier confirming that the reserve had been sufficiently enclosed, it contended that such certificate was not

the only prerequisite for recovering the animals, submitting that factual proof of sufficient enclosure, as opposed to a mere certificate, was sufficient. It also argued for the development of the common law to provide that wild animals, which were sufficiently contained in a protected area managed by an organ of state, were *res publicae* (state property) and, therefore, belonged to the state, meaning that in this case they were owned by it as an organ of state.

The action was dismissed with costs. Smith J held that all that was required by the owner (the plaintiff in the instant case) was to obtain a certificate of sufficient enclosure mentioned in s 2(2)(a) of the Act. As the plaintiff had all along contended that the reserve had in fact been sufficiently enclosed to contain the buffalo, all that was required was for it to apply for the certificate. Having failed to avail itself of that statutory protection, it instead impermissibly sought development of the common law to obtain *ex post facto* protection. The intention of the legislature was to limit protection against loss of ownership only to circumstances where a certificate of sufficient enclosure had been issued. The certificate was a practical mechanism to obviate the need for forensic investigation into the adequacy of fencing and thus served to avoid unnecessary disputes between landowners.

Class action

Certification of class action and transmissibility of claims: Gold mining in the Witwatersrand began in 1886 and contributed immensely to what the economy of the country is today. However, it also had a dark side, namely that in the process of mining operations silica dust is released which, if inhaled in large quantities, becomes the sole cause of silicosis, an occupational lung disease which is contracted by mineworkers who work underground in gold mines. Silicosis is a painful disease which is irreversible and incurable. Silica dust is also a contributory factor, but not the sole cause,

in contracting pulmonary tuberculosis (TB), a bacterial lung disease. In *Nkala and Others v Harmony Gold Mining Co Ltd and Others (Treatment Action Campaign NPC and Another as amici curiae)* [2016] 3 All SA 233 (GJ) the applicants, Nkala and others, sought certification of a class action and a declaratory order developing the common law relating to transmission of a claim after the death of the plaintiff. The common law rule is that the plaintiff's claim is transmissible to the successor if at the time of the death the proceedings have reached *litis contestatio*. However, pleadings re-open if an amendment is made. An amendment can be made before any stage until judgment is given. In the instant case certification of class action was sought for present and past underground mineworkers who were alleged to have contracted silicosis or TB in the course of their employment.

For those mineworkers who had passed away, the claims were those of their dependants, mostly the widows. The claims were for mineworkers ranging in number from 17 000 to 500 000 and against all gold mining companies in the country, of which there were a few dozens. The cut-off date for the claims was 12 March 1965, some 51 years ago, when the Mines and Works Act 27 of 1956 came into operation. The purpose of the class action was to avoid the same number of court cases, which would deal with essentially the same facts and legal issues only to reach possibly contradictory decisions.

Mojapelo DJP and Vally J (Windell J dissenting on the transmission issue only) granted with costs certification of class action and further held, as requested, that in respect of deceased mineworkers their claims had been transmitted to their dependants when the certification application was launched in August 2012 and not when *litis contestatio* was reached. The court held that a class action represented a paradigm shift in the South

African legal process. It was a process that permitted one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or 'class' against one or more defendants. The process was utilised to allow parties and the court to manage a litigation that would be unmanageable or uneconomical if each plaintiff was to bring his or her claim individually. It was normally instituted by a representative on behalf of the relevant class of plaintiffs. The class action process was designed to cover situations where the parties, particularly plaintiffs, were so numerous that it would be almost impossible to bring them all before the court in one hearing, and where it would not be in the interest of justice for them to come before court individually.

It was not only for the benefit of plaintiffs that the class action process was conceived as it was also designed to protect a defendant or defendants from facing a multiplicity of actions resulting in

it having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhanced judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of contradictory decisions by different courts on the same issues. On the other hand, a class action allowed for a single finding on the issue or issues, which finding bound all plaintiffs and defendants.

Since the decision of the SCA in *Trustees for the time being of the Children's Resources Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others (Legal Resources Centre as amicus curiae)* 2013 (2) SA 213 (SCA) a class action would only proceed to trial if it has been certified by a court as being an appropriate means of resolving the dispute between the putative class members and the defendant or defendants.

On transmissibility of all claims, and not just class action claims as Windell J would



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have it, the court held that the common law had to be developed as follows –

- a plaintiff who had commenced suing for general damages but who had died whether as a result of harm caused by a wrongful act or omission of a person or otherwise, and whose claim had not yet reached the state of *lis contestatio*, and who would, but for his or her death, be entitled to maintain the action and recover the general damages in respect thereof, would be entitled to continue with such action notwithstanding his or her death;
- the person who would have been liable for general damages if the death of the plaintiff had not ensued remained liable for the said general damages notwithstanding the death of the plaintiff so harmed;
- such action should be for the benefit of the estate of the person whose death had been so caused; and
- a defendant who died while an action against him or her had commenced for general damages arising from harm caused by his or her wrongful act or omission and whose case had not yet reached the stage of *lis contestatio* remained liable for the said general damages notwithstanding his or her death, and the estate of the defendant would continue to bear the liability despite his or her death.

Company law

Access to securities register by third parties: Section 26(2) of the Companies Act 71 of 2008 (the Act) provides that: 'A person not contemplated in subs (1), that is, a person who does not hold or have a beneficial interest in any securities issued by a profit company, or who is not a member of a non-profit company, has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.'

In *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA), [2016] 3 All SA 32 (SCA) the main issue was the right to inspect and copy the securities register of the appellants, Nova Property Group, and two associated companies, namely – its subsidiaries – Frontier Asset Management and Centro Property Group. The other issues in the case were leave to appeal and appealability of an interlocutory order which, for present purposes, are omitted. The facts of the case were that the first respondent, Cobbett, a financial journalist who specialised in investigation of illegal investment schemes,

requested access to securities registers of the appellants, which request was declined. The purpose of the request was to enable him to investigate the shareholding structures of the appellants and write articles on his findings for publication by the second respondent, Moneyweb. The view of the appellants was that the second respondent had a 'sinister agenda'. Because of denial of access, the respondents approached the High Court for an order to compel. Tuchten J granted the respondents the right to inspect and make copies of the requested documents.

The SCA dismissed with costs an appeal against the High Court order. Kathree-Setiloane AJA (Maya AP, Majiedt, Mbha JJA and Plasket AJA concurring) held that s 26(2) of the Act provided for an unqualified right of access to securities registers. If Parliament was of the view that the right should be qualified in some way, because of concerns relating to abuse of the right of access, it could have legislated accordingly but chose not to do so. In conferring an unqualified right of access to a companies' securities register the legislature chose to prioritise the right of access to information over the privacy rights of shareholders and companies. In the absence of an express limitation of the right by the legislature, it was not for the court to limit it because of some nebulous spectre of abuse, particularly where there were built-in safeguards against disclosure of confidential information, more so that the constitutionality of the provision was not challenged.

Constitutional law

Parliamentary process and conduct: The facts in the case of *Chairperson of the National Council of Provinces v Malema and Another* [2016] 3 All SA 1 (SCA) were that on 17 June 2014 the President of South Africa delivered his State of the Nation Address to a joint sitting of the National Assembly (NA) and the National Council of Provinces (NCOP). Debate of the address took place the following day. It was during that debate that the

first respondent, Julius Malema, who was the President of the second respondent, the Economic Freedom Fighters (EFF), an opposition political party, accused the ruling African National Congress (ANC) of having massacred striking miners at Marikana in Rustenburg, North West Province. The appellant, Chairperson of the National Council of Provinces, ruled that the accusation of a massacre was unparliamentary and accordingly requested the first respondent to withdraw it. When no withdrawal was forthcoming she ordered the first respondent to leave, which he did and was thus suspended from the proceedings for the rest of the day. The first and second respondents approached the WCC for an order reviewing and setting aside the rulings of the appellant, which order was granted by Bozalek J (Cloete J concurring).

The SCA dismissed with costs an appeal against the High Court order. Ponnann JA (Leach, Petse, Saldulker and Swain JJA concurring) held that there was nothing unparliamentary about robust, emotive language. The parliamentary standing order, which provided that Members of Parliament should not be allowed to impute improper motives to other members or cast personal reflections on the integrity of members or verbally abuse them in any way had as its purpose to ensure that parliamentary debates were not clouded by personal insults. *Ad hominem* attacks did not contribute to democratic discourse and were not protected. But the standing order did not, and constitutionally could not, go as far as impeding political speech. It did not censor criticism of the government or its ruling party. When regard was had to the first respondent's utterances, it was plain that his primary target was the ruling party, not members of Parliament. He did not target Members of Parliament, either individually or collectively. For the standing order to apply, the first respondent's words had to have targeted Members of Parliament. The first respondent's speech was protected political speech.

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Customary law

Duty of a daughter to support indigent parent under customary law: In *Seleka v Road Accident Fund* 2016 (4) SA 445 (GP) the plaintiff, Ms Seleka, claimed loss of support against the defendant, Road Accident Fund, after her daughter was killed in a motor vehicle collision. At the time of her death the deceased was working and contributing to the family income. The two also had an oral agreement in terms of which, the deceased made a monthly contribution of R 1 300 towards maintenance of the plaintiff until she reached the age of 60 years, at which time she would be eligible for old-age social grant. The only other income of the family was a social grant of R 1 500 per month, which the plaintiff's husband, apparently not the deceased's biological father, collected. The family lived according to customary practices and traditions in an area falling under traditional authority.

The issue before the court was whether in terms of customary law (Tswana law in this case) a child had a duty to support an indigent parent. The court held that there was such duty and granted judgment in favour of the plaintiff in an amount of some R 72 000 as per draft order and also costs on the High Court scale due to the complexities that justified the plaintiff to institute action in the High Court.

Diedericks AJ held that customary law placed an obligation on a child who was financially able to provide maintenance for his or her needy parents. As far as Tswana law and customs were concerned, the principle had in fact also developed from not only a duty on a son to maintain his parents, but also to such duty on a daughter. Furthermore, in the instant case there was a contract between the plaintiff and her deceased daughter that she would maintain her mother by contributing an amount of R 1 300 per month towards household expenses, until such time as the mother would turn 60 years

of age and thus be eligible to receive a government old-age pension. There was no doubt that the two elderly people, the plaintiff and her husband, were indigent.

- See editorial 'RAF loses Constitutional Court case on grants amid fraud allegations' 2015 (May) DR 3.

- See case note 'Considerations for the quantification of damages awards' 2015 (Dec) DR 47.

Education

Validity of provincial regulations relating to admission of learners to public schools:

Basic education is an area in respect of which both the national and provincial governments have concurrent jurisdiction and, therefore, carries a high risk of conflicting laws and policies. Section 5(5) of the South African Schools Act 84 of 1996 (the Schools Act) provides that: '[S]ubject to this [the Schools] Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school'. This provision should be contrasted with s 11(1) of the Gauteng School Education Act 6 of 1995 (Gauteng Act), which provides that: 'Subject to this [the Gauteng] Act, the Member of the Executive Council (MEC) may make regulations as to the admission of learners to public schools' (my italics). It will be noted that in terms of the Schools Act the admission policy of a public school is determined by the school governing body whereas in terms of the Gauteng Act it is determined by the MEC through regulations. That was the nature of the problem in *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another* 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC), where the applicant, Federation of Governing Bodies, challenged the validity of regulations made by the first respondent, the MEC, relating to admission policies. The attitude of the applicant was that school governing bodies, and not the MEC, should determine the policies. The regulations provided that -

- schools were prevented from obtaining a confidential report from the learner's current school before admitting him or her;

- the MEC could ('may') determine a school's feeder zone;

- the district director could place an unplaced learner at any school which was not declared full; and

- the district director could declare a school full.

The GJ upheld the application and declared several of the regulations invalid. The decision was, however, reversed on appeal to the SCA. Thereafter, the CC granted leave to appeal against the decision of the SCA, but dismissed the appeal itself with no order as to costs as the application raised important constitutional issues.

Delivering a unanimous judgment of the court, Moseneke DCJ held that the MEC was correct in taking the view that there was no justification for one school to shift the burden of admission of a troublesome learner onto other schools after looking at a confidential report. It was quite reasonable and justifiable that the Gauteng Department of Education preferred to eliminate the real prospect of unfair discrimination by preventing access to confidential information before admission. The means used by the MEC were properly aligned to the objective of preventing unfair exclusion of a learner at the point of admission to a school.

There was much to be said for the applicant's insistence that the word 'may', as used in relation to the MEC's power to determine a school's feeder zone, should be read to mean 'must' so that a determination would be made to avoid reliance on the default feeder zone principle. Accordingly, the MEC was directed to determine the feeder zones of public schools in Gauteng within a reasonable time but not later than 12 months from the date of the judgment.

The duty to place unplaced learners fell on the MEC who had to ensure that there were enough school places so that every child could attend

school. Similarly, the power to determine learner enrolment capacity and declare a school full or not, in the absence of norms and standards required by the Schools Act that were in force, rightly fell on the Head of the Department (HOD). Absent that power, the statutory task of the MEC and HOD to place unplaced learners would come to naught.

- See case note 'Court orders education MEC to determine public school feeder zones' 2016 (Aug) DR 44.

Extradition

Jurisdiction of foreign state to prosecute a suspect:

In *Carolissen v Director of Public Prosecutions* [2016] 3 All SA 56 (WCC) the appellant, Carolissen, was a resident of Cape Town and an employee of the City of Cape Town. Using his office computer he manufactured videos and photographs, which he uploaded onto the Internet. Through his e-mail account and Facebook he distributed - to interested persons - child pornography material, which he manufactured, indicating in some instances that he molested the minors involved. After sending some material to an undercover agent in Maine, in the United States (US), the authorities there requested his extradition in terms of the Extradition Act 67 of 1962 (the Act) so that he could face prosecution. The magistrate dealing with the matter granted the extradition request. The final stage of the extradition that remained was the approval by the Minister of Justice and Constitutional Development. Pending ministerial approval or disapproval of the extradition the appellant appealed against the decision of the magistrate, which appeal was dismissed by the High Court.

Gamble J and Donen AJ held that the offences with which the appellant was charged, namely, the manufacturing and distribution of child pornography, as well as child sexual molestation, were committed both in South Africa and the US. The appellant's minor victims were sexually exploited

in South Africa, where the pornographic material was produced and subsequently uploaded onto the Internet, and that the US predicated an exercise of jurisdiction on the conduct that occurred outside its sovereign territory, but which had a potential harmful effect within its territory. The essence of the charges against the appellant in the US was that he engaged in sexually explicit conduct outside of the US for the purpose of producing a visual depiction of such conduct and that he later transported such depiction to the US via the Internet.

In regard to the question of the US's extra-territorial jurisdiction, it was established law that it was open to a sovereign state to enact legislation permitting it to prosecute within its own jurisdiction suspects who had committed crimes elsewhere in the world, where those crimes might ultimately have a deleterious effect in the territorial jurisdiction of the requesting state.

Housing

Informal settlement qualifies as dwelling houses: The facts in the case of *Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* [2016] 3 All SA 18 (SCA) were that 'Payneville Extension 3' (Extension 3) was an informal settlement established in the town of Springs, which fell within the jurisdiction of the first respondent Ekurhuleni Metropolitan Municipality (East Rand). The settlement had no potable water supply, refuse removal, sewage reticulation system, electricity or tarred roads. Not far from it was 'Payneville Extension 1' (Extension 1), which was vacant. The first respondent commenced the construction of sewage, water reticulation services and toilets on Extension 1 with a view to relocate some families from Extension 3 to it. The plan was to develop Extension 3 and have the same families returning or remaining on Extension 1 if it was developed in the meantime. The appellants, being Educated Risk Investments and

other property owners in the adjacent township, opposed the establishment of the temporary informal settlement, which was Extension 1. Although many grounds were raised the main one was that 'informal settlement' was not 'dwelling houses' as defined in the relevant Town Planning Scheme (the Scheme). It was the contention of the appellants that 'dwelling houses' referred to conventional brick and mortar houses and not informal settlement shacks made of among others, wood, corrugated iron and fibreglass sheeting.

The GJ per Lamont J granted an interim order prohibiting the development of Extension 1 as a temporary informal settlement. On the extended return day the interim order was discharged by Mabesele J. An appeal against that order was dismissed with costs by the SCA.

Wallis JA (Lewis, Theron, Mathopo JJA and Victor AJA concurring) held that there was no doubt that the type of building contemplated by the appellants, of conventional bricks and mortar, albeit small, would constitute a 'dwelling unit' as defined and therefore a 'dwelling house' for the purposes of the Scheme. However, a rigid interpretation of such schemes, viewing them through the prism of a developed society in which those problems were largely absent, was unsuited to South African circumstances. In accordance with the tenor of the Constitution such an approach would be inappropriate. The Constitution required that construction of the provisions of the Scheme should be done in the light of the rights of citizens to access to adequate housing, dignity and a healthy environment. Both on the ordinary meaning of dwelling house, and on an application of the definitions in the Scheme, there was nothing that would preclude 'informal housing' from being 'dwelling houses' as defined in the Scheme.

Judges

Consent of head of the court before a judge of that divi-

sion can be sued: Section 47(1) of the Superior Court Act 10 of 2013 (the Act) provides among others that: '[N]o civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge ... except with the consent of the head of that court ...'. The consent of the head of the GP was sought in *Engelbrecht v Khumalo* 2016 (4) SA 564 (GP) so that a judge, the respondent Khumalo, could be joined as a party in proceedings in which the applicant, Engelbrecht, was sued. In that case, before becoming a judge the respondent was a co-director of a certain company together with the applicant and a third party. The applicant stood surety for the debts of the company arising from a lease. Thereafter the applicant sold his shares to the respondent and the other director, after which he resigned as a director. The remaining directors indemnified him against liability for company debts but he still remained surety for the company's debts under the lease agreement. When sued as surety, the applicant wanted to join the applicant as a co-defendant and accordingly wrote a letter to the Judge President of the GP for consent in terms of the section. The Judge President advised that a formal motion application should be made so that the parties could make the necessary representation, hence the present case.

Mlambo JP granted the applicant leave to institute an application for joinder of the respondent as a party in proceedings against him relating to his suretyship debts, making no order as to costs. The court held that s 47(1) was a mechanism through which the institution of legal proceedings against judges was regulated and accordingly played a gate-keeping role. In essence the section sought to insulate judges from unwarranted and ill-conceived legal proceedings aimed at them. Therefore, the need to protect judges from uncalled for litigation was not difficult to

fathom. It was integral part of the adjudication function of judges that they should be free from any fear of repercussions for doing their work. It was necessary that judges be protected from the ever present threat of legal proceedings directed at them arising from the execution of their official responsibilities.

In the instant case it appeared fair, just and equitable that consent be granted as the applicant had made out an arguable case requiring an answer from the judge about her own liability in the main case. The application was not vexatious as it was based on the facts on which a justiciable claim was set out. Accordingly, good cause had been demonstrated justifying the granting of consent.

Labour law

Section 32(2) of the Labour Relations Act 66 of 1995 is not inconsistent with the Constitution: Section 32(2) of the Labour Relations Act 66 of 1995 (the LRA) provides among others that the Minister of Labour 'must' extend a collective agreement to apply to non-parties (minority trade unions and other employees not belonging to majority trade unions) if a bargaining council makes a written request that such collective agreement be extended to non-parties. In *Free Market Foundation v Minister of Labour and Others* 2016 (4) SA 496 (GP); [2016] 3 All SA 99 (GP), the applicant Free Market Foundation (FMF), an independent policy research and education organisation promoting the principles of limited government, economic freedom and individual liberty, alleged that the section was inconsistent with the provisions of s 1 of the Constitution regarding the principle of legality. The applicant alleged that by providing that the Minister 'must', rather than 'may' extend the operation of a collective agreement to non-parties, the Minister was deprived of a discretion to do so and that 'must' meant that there was no judicial oversight or state control of the Minister's decision to extend the operation of such

agreement. As a remedy the applicant did not seek an order declaring the section invalid. Instead, it sought some kind of reading-in, namely that 'must' be changed to 'may' with the result that in a proper case the Minister could decline the request.

The application was dismissed, but for the sake of not discouraging civil society activists from pursuing constitutional claims for fear of being mulcted with costs, the court made no order as to costs.

Murphy J (Matojane and Basson JJ concurring) held that the contention of the FMF that the legislative scheme for the extension of bargaining council agreements was unconstitutional because of the absence of adequate state and judicial control was wholly wrong. The respondents were correct in their submissions that the constraints and judicial supervision provided for in the LRA, read with the Promotion of Administrative Justice Act 3 of 2002 (PAJA) or the constitutional principle of legality, gave adequate expression to the constitutional right to administrative justice and in practice could prove more protective than the remedy sought by the FMF. There was a possibility that bargaining council decisions could be reviewed on PAJA or on rationality grounds, but even if they could not, the discretionary power of the Minister to extend minority collective agreements was certainly reviewable on PAJA grounds or for rationality, and the attenuated power to review the extension of majority collective agreements was a reasonable and justifiable limitation on the rights of administrative justice, by reason of the legitimate and rational basis for the application of the majoritarian principle in collective bargaining, the proportional safeguards found in other subsections of s 32, the protection against discrimination found in s 32(3) and the common law. Therefore, s 32 was not inconsistent with the Constitution. For that reason there was no basis for making an order substituting the word 'must' in s 32(2) with the word 'may'.

• See employment law update on p 45.

Prescription

Prescription does not run against a claimant who does not have material facts on which the claim is based: The facts in *Links v Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC), were that on 26 June 2006 the applicant, Links, suffered a dislocation of his left thumb and was treated at a hospital under the control of the respondent, the Department of Health, Northern Cape Province. A plaster of Paris cast was applied, after which he was discharged and advised to come back after ten days. Before the given period elapsed he had to go back to the hospital twice because of increased pain. He was admitted on 3 July 2006 and the thumb was amputated on 5 July 2006 but no explanation was given for the amputation. He was eventually discharged at the end of August 2006. In September 2006 he realised that he had permanently lost the use of his left hand and forearm. In December 2006 he approached the Legal Aid Board and gave instructions to institute a claim against the respondent. For three years nothing was done and with a week or two left before a period of three years would elapse since he was injured, the Legal Aid Board referred the claim to a private law firm, which had a summons served on the respondent on 6 August 2009. The respondent raised two special pleas, namely –

- failure to give it notice as required by s 19 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Legal Proceedings Act); and
- prescription of the claim.

As a result a notice was given in terms of the Legal Proceedings Act and application made for condonation of late service thereof. It was only after consultation with a general surgeon in 2011 that the applicant discovered that the cause of amputation of the thumb was that the plaster of Paris was cast too tight and kept for too long.

At the trial Mamosebo AJ refused condonation only because of a finding that the claim had prescribed at the time of service of summons. The SCA granted leave to appeal to the full Bench where Kgomo DJP (Lacock and Pakati JJ concurring) dismissed the appeal for the same reasons as the trial court.

The CC granted leave to appeal, condoned late service of notice in terms of the Legal Proceedings Act and upheld the appeal with costs. Reading a unanimous judgment of the court Zondo J held that the question was whether on or before 5 August 2006 (three years before service of summons on 6 August 2009) the applicant had knowledge of the facts from which the debt arose. To make a determination on that question it was important to bear in mind that from about 3 July 2006 to the end of August 2006 the applicant was in hospital. Therefore, realistically, before the end of August 2006 he could not have had access to independent medical professionals. Accordingly, he could not have had knowledge of all the material facts he needed to have before he could institute legal proceedings. For that reason prescription could not have begun running before 5 August 2006. That had the result that the applicant's claim did not prescribe. The trial court and full Bench erred in not approaching the matter on the basis that on or before

5 August 2006 the applicant did not know or have reasonable grounds to suspect that his negligent treatment at the hands of the respondent's personnel led to the compartment syndrome. Nor did he know that such treatment in turn caused the amputation of his thumb and loss of function of his left hand.

NB: The name of the case refers to Northern Province, which might be thought to refer to Limpopo Province before the name change. In fact, the correct name is the Northern Cape Province. Also in para 1 the name of the High Court is referred to as the Northern Cape Provincial Division, instead of the Northern Cape Division, as it should be.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Adoption proceedings, amendment of pension fund rules, application for asylum, base cost of asset for purposes of capital gains tax, business rescue, claim for loss of value of shares, compulsory sequestration, copyright infringement, jurisdiction of High Court and Labour Court, maintenance of children from deceased estate, meaning of farming operations, relief from oppressive conduct and status and powers of Advertising Standards Authority.



On the lighter side: A language issue

*Martin v Kiesbeampste, Newcastle Afdeling,
en 'n Ander 1958 (2) SA 649 (N) at 650*

Holmes, J: 'In this case the applicant's affidavits were in English and his counsel addressed the court in English. The first respondent's affidavit was in Afrikaans and counsel for the respondents addressed the court in Afrikaans. In which language

then should the court give judgment? One's experience is that the winner is usually content to know merely that he has won. But the loser likes to know the reasons why he has lost. I proceed therefore to give judgment in the language of the losers.'



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New legislation

Legislation published from
2 – 31 August 2016

Promulgation of Acts

Appropriation Act 6 of 2016. *Commencement:* 5 August 2016. GG40149/5-8-2016.

Selected list of delegated legislation

Financial Advisery and Intermediary Services Act 37 of 2002

Amendment of the exemption in respect of services under supervision rendered by compliance officers. BN149 GG40239/31-8-2016.

Amendment of the qualifications, experience and criteria for approval as a compliance officer. BN148 GG40239/31-8-2016.

International Trade Administration Act 71 of 2002

Automotive Production and Development Programme (APDP) Regulations. GN R960 GG40230/26-8-2016.

Medicines and Related Substances Act 101 of 1965

Interim adjustment of the single exit price of medicines and scheduled substances for the year 2016. GN893 GG40188/5-8-2016.

Information to be provided by manufacturers and or importers of medicines and scheduled substances when applying for the interim single exit price adjustment for 2016. GN894 GG40188/5-8-2016.

National Environmental Management: Waste Act 59 of 2008

Notice to the paper and packaging industry, electrical and electronic industry and the lighting industry to prepare and submit to the Minister industry waste management plans for approval. GN915 GG40207/12-8-2017.

National Regulator for Compulsory Specifications Act 5 of 2008

Amendments to the compulsory specification for hot water storage tanks for domestic use (VC 9006). GN R913 GG40205/12-8-2016.

Amendments to the compulsory specification for live lobsters (VC9104). GN R934 GG40217/19-8-2016.

National Water Act 36 of 1998
General authorisation in terms of s 39 for water uses as defined in subss 21(C) or 21(I). GenN509 GG40229/26-8-2016.

Remuneration of Public Office Bearers Act 20 of 1998

Upper limit of contribution to be made to the pension fund of a premier, member of the executive councils and members of provincial legislatures. Proc49 GG40182/2-8-2016.

Employer contribution to the pension fund of members of the executive councils and provincial legislatures. Proc50 GG40182/2-8-2016.

Gratuity payable to eligible members of the National Assembly. Proc48 GG40182/2-8-2016.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Villiers. GN909 GG40203/12-8-2016.

Establishment of a small claims court for the areas of Idutywa and Willowvale. GN908 GG40203/12-8-2016.

Establishment of a small claims court for the area of Grabouw. GN907 GG40203/12-8-2016.

Establishment of a small claims court for the area of Groot Marico. GN906 GG40203/12-8-2016.

Establishment of a small claims court for the area of Thabamooop. GN905 GG40203/12-8-2016

Draft delegated legislation

Draft National Research Foundation Amendment Bill, 2015. GenN475 GG40188/5-8-2016.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comments. GN R898 GG40189/5-8-2016 and GN R914 GG40206/12-8-2016.

Adoption of Dangerous Goods Standard, 2016 in terms of the National Environmental Management Act 107 of 1998 for comments. GN892 GG40188/5-8-2016.

Activities in terms of the National Environmental Management Act 107 of 1998 that may be excluded from the requirement to obtain an environmental authorisation but that must comply with the Dangerous Goods Standard, 2016. GN891 GG40188/5-8-2016.

Regulations relating to a transparent pricing system for medicines and scheduled substances: Draft dispensing fee for pharmacists in terms of the Medicines and Related Substances Act 101 of 1965. GN895 GG40188/5-8-2016.

Amendments to the Waste Tyre Regulations, 2009 in terms of the National Environmental Management: Waste Act 59 of 2008 for comments. GN903 GG40199/11-8-2016.

Proposed amendments to the JSE interest rate and currency derivatives rules in terms of the Financial Markets Act 19 of 2012. BN142 GG40203/12-8-2016.

Draft declaration of irregular or undesirable practices in terms of the Medical Schemes Act 131 of 1998. GN917 GG40209/15-8-2016.

Regulations relation to the labelling, advertising and composition of cosmetics in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 for comments. GN921 GG40216/19-8-2016.

Norms and standards for the management of damage-causing animals in South African in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comments. GenN512 GG40236/30-8-2016.



Employment law update



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Extension of bargaining council collective agreements to non-parties

In *Free Market Foundation v Minister of Labour and Others* [2016] 8 BLLR 805 (GP), the Free Market Foundation (FMF) challenged the constitutionality of s 32(2) of the Labour Relations Act 66 of 1995. Section 32 (2) provides that the Minister of Labour must extend collective agreements concluded in bargaining councils should their members request such and should certain preconditions be satisfied. The FMF initially challenged the constitutionality of s 32 on the basis that it infringes the rights to equality, freedom of association, administrative justice, dignity and fair labour practices. The FMF subsequently abandoned this point and instead challenged s 32(2) solely on the basis that the grounds of judicial review in respect of the extension of collective agreements were inadequate. In this regard, the FMF argued that s 32 violated the principle of legality as it permitted the extension of collective agreements to non-parties, contrary to public interest. It argued that in order to satisfy the requirement of legality, the governmental power must be exercised in the public interest.

The court was required to consider the scope of judicial review in respect of the extension of collective agreements to non-parties, as well as whether the Minister must act in public interest when extending collective agreements to non-parties.

In determining the scope of judicial review, the court considered whether the exercise of the Minister's power under s 32(2) constitutes administrative action. The court held that the actual conclusion of collective agreements through a collective bargaining process does not constitute administrative action. However, when the Minister exercises power under

s 32 this does constitute administrative action and has significant consequences for non-parties.

The Minister is not afforded discretion in determining whether or not to extend the agreement in the event that the council has complied with the requirements of s 32(2). In such circumstances, the Minister must extend the agreement. The FMF argued that the Minister's duty to extend the agreement is non-discretionary and subject to limited judicial supervision. However, before the Minister extends the collective agreement certain preconditions must be met. Firstly, the Minister must be satisfied that the numerical requirements of majoritarianism have been met. This would be satisfied if the majority of employees who will be covered by the agreement once extended are members of trade unions that are parties to the council. Furthermore, the decision of the bargaining council must comply with legal prerequisites and finally there must be an exemption procedure in place applying fair criteria to be exempted from the extension. It must also not discriminate against non-parties. It is only if all these requirements are satisfied that the Minister must extend the agreement. The court noted that the numerical thresholds for majoritarianism are quite high and in many instances may be difficult to achieve.

Where the majoritarianism requirements are not met then the Minister may extend the collective agreement provided that other jurisdictional conditions are met. For example, the parties to the bargaining council must be sufficiently representative within the registered scope of the council; the Minister must be satisfied that the failure to extend the agreement would undermine collective bargaining at sectoral level or in the public service as a whole; and the Minister must have invited and considered comments on the application to extend.

The FMF proceeded on the assumption that a decision of a bargaining council to request the Minister to extend, a collective agreement, as well as the 'administrative action' as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was for this reason that it argued that the discretion should be limited by a duty to act in public interest. The FMF conceded that if PAJA is indeed applicable then this would be more than the relief that they sought from the court.

No parties led evidence as to whether PAJA applied and thus the court did not make a ruling on the application of PAJA. However, Murphy J stated that he

inclined to agree that PAJA would ordinarily apply to the decision of a bargaining council to request the extension of a collective agreement. On the other hand, Murphy J was of the view that the negotiation and conclusion of a collective agreement would not constitute administrative action. Murphy J held that if the Minister's decision to extend is administrative action then it would be reviewable on the grounds of reasonableness, legality and due process. If it is not administrative action under PAJA then it would still be subject to the rationality and legality review under the rule of law provisions in the Constitution.

Given the fact that there are appropriate review remedies available to the FMF, it was held that s 32 was not unconstitutional – it was based on the principle of majoritarianism – which is consistent with international law. It was accordingly held that there is no requirement that the statutory power to extend a collective agreement must be exercised in the public interest.

The application was dismissed but no costs were ordered against the FMF as it was found that the application had been made in good faith in the interests of small businesses and the unemployed.

• See Law reports 'labour law' on p 41.



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Error in law – reviewable or not

Opperman v CCMA and Others (unreported case no C530/2014, 17-8-2016) (Steenkamp J).

Under what circumstances may an employer impose a harsher sanction at an internal appeal hearing in comparison to the sanction handed down to the employee at the initial disciplinary hearing? This was one of the key questions before the court on review.

The applicant employee was given a 'severe written warning' after she had

failed a breathalyser test. Unhappy with the outcome the employee challenged her sanction at an internal appeal hearing. Having heard the evidence of both parties the internal appeal tribunal changed the employee's sanction to a dismissal.

At the Commission for Conciliation, Mediation and Arbitration (CCMA) the three issues before the second respondent arbitrator were –

- whether or not the employer breached the parity principle – it was common cause that other employees were given final written warnings for the same offence in the past;
- whether the chairperson of the appeal hearing exceeded his powers by imposing a harsher sanction; and
- whether the appeal chairperson should have advised the employee that the sanction she was appealing against could be replaced with a harsher sanction.

On the first issue the arbitrator held the employer had not breached the parity principle. In respect of the second issue the arbitrator found that the employer's disciplinary code was silent on whether an appeal chairperson could impose a harsher sanction or a less harsh sanction to that imposed at the disciplinary inquiry. For this reason the arbitrator concluded he was 'unable to find that the appeal chairperson has exceeded his powers without being pointed as to which powers he exceeded'.

In addressing the third issue the arbitrator referred to the decision of *Rennies Distribution Services (Pty) Ltd v Bierman NO and Others* [2009] 7 BLLR 685 (LC) and held that the employee was not forewarned that a more severe sanction could be imposed on her at the appeal inquiry and furthermore she was not given an opportunity to advance reasons why her sanction should not be changed to dismissal. For these reasons the arbitrator found the employee's dismissal procedurally unfair but substantively fair.

On review the main argument before the court was that the arbitrator committed an error in law by not following the ratio in the *Rennies* judgment which settled the circumstances in which an appeal hearing could deliver a harsher sanction (ie, the second issue before the arbitrator).

Having considered the judgment by Basson J in *Rennies*, the court held:

'Basson J expressly held that, except where express provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Secondly, even if it has such a power the chairperson must adhere to the fundamental principles of natural justice which require that *audi alteram partem* must be afforded to the employee who may be prejudiced by the imposition

of a more severe sanction. In this case, Harmony Gold's disciplinary code did not give the chairperson on appeal the express power to increase the sanction on appeal; and what is more, Ms Opperman was not given the opportunity to make submissions why a harsher penalty should not be imposed.'

While the arbitrator's findings on whether the employee should have been afforded an opportunity to be heard before a harsher sanction was imposed on her, was in keeping with the *Rennies* judgment, he nevertheless committed an error in law by not following the ratio pronounced by Basson J, in particular, the circumstances when a chairperson on appeal can impose a harsher sanction.

In finding the arbitrator committed an error in law, the court thereafter considered whether the arbitrator's error rendered the award reviewable.

Instructive to this question was the judgment of the Labour Appeal Court in *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) where Davis JA held:

'Since the advent of the Constitution of the Republic of South Africa Act 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome.'

Davis JA went further to say: '... it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.'

In considering this judgment and others, the court held that in failing to follow the legal principle in *Rennies*, the arbitrator committed a material error in law. Even if this fact alone was not sufficient to set aside the award on review, the fact that the error ultimately led the arbitrator to arrive at an unreasonable decision; warranted the reviewing court's intervention. For this reason the award was set aside.

Although it was not necessary to consider the issue of parity once the court arrived at the above finding, the court nevertheless found the arbitrator's decision with regard to the parity principle was unreasonable. This was based on the fact that the employer, at arbitration, could not adequately explain why other

employees guilty of the same offence only received a final written warning whereas the employee's misconduct was met with dismissal.

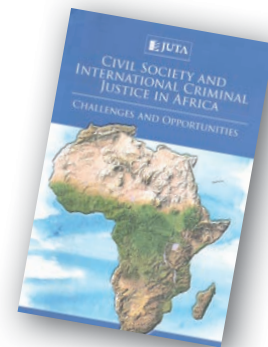
In setting aside the award the court replaced the arbitrator's findings with an order that the employee's dismissal was both procedurally and substantively unfair and that she be retrospectively reinstated subject to the 'severe' final written warning imposed on her by the chairperson of the disciplinary inquiry. The court did, however, limit the employee's back pay to the period from when she was dismissed to the date of the arbitration award. No order as to costs were made.



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Abbreviation	Title	Publisher	Volume/issue
<i>DJ</i>	De Jure	University of Pretoria Law School	(2016) 49.1
<i>EL</i>	Employment law	LexisNexis	
<i>LitNet</i>	Litnet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2016) July (2016) August
<i>PER</i>	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2016) July (2016) August
<i>SAMLJ</i>	SA Mercantile Law Journal	Juta	(2016) 2
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2016) 3

Administrative law

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Medical malpractice: The other side

By
Patrick
van den
Heever

There has been a sharp increase in both the number and value of medical negligence claims in South Africa (SA). Medical malpractice liability is incurred when patients suffer damages, which may be attributed to sub-standard care provided by health practitioners or hospital personnel involved in their treatment. A malpractice claim may be grounded in either contract and/or in delict and is governed by the law of obligations. In medical context liability may, *inter alia*, be incurred for –

- breach of a legal duty;
- professional negligence;
- assault due to a lack of informed consent;
- an invasion of privacy as a result of unwarranted disclosure of details concerning a patient;
- the performance of an unnecessary procedure; and
- breach of contract should health care providers fail to perform the medical intervention agreed on. (See WT Oosthuizen and PA Carstens 'Medical Malpractice: The extent, consequences and causes of the problem' 2015 (78) *THRHR* 269).

Reasons behind the increase in medical negligence claims

In my opinion, the amendments to the Road Accident Fund legislation may have encouraged attorneys to explore alternative types of personal injury litigation such as medical malpractice in an effort to indulge in more financially lucrative litigation. Some commentators have noted that attorneys are purposefully targeting the public and encouraging them to seek legal assistance if they have suffered adverse consequences as a result of sub-standard medical care. Patients who could previously not have afforded to institute proceedings are now assisted by the provisions of the Contingency Fees Act 66 of 1997, which allows for the litigation to be conducted

on a 'no win no fee' basis thus permitting greater access to justice especially for indigent public sector patients. Certain questionable practices have developed, which have perhaps justifiably led to the perception that some lawyers are selfish, greedy and dishonest.

However, the legal profession and the public should take note of the fact that legal practitioners are bound by a wide range of ethical rules and duties to both their clients and the court. 'It is in the injured patient's best interest to have an attorney who will try and get the best possible settlement or reward. Again, if there was no malpractice there would be no need for malpractice litigation. The threat of an adverse order of costs does serve to deter meritless claims. It may be unfair to criticise attorneys, as their practices are determined by the liability and compensation system in which they function' (Oosthuizen and Carstens 'Medical Malpractice: The extent, consequences and causes of the problem' (*op cit*) at 283).

It is important to distinguish between lawful advertising by attorneys and unlawful touting (referred to by the Minister of Health as 'ambulance chasing'). In this regard hospital personnel should be advised to be on the look-out for people visiting patients from bed to bed (who are neither family, medical staff, nor religious leaders) who procure patients to sign powers of attorney so as to enable them to institute proceedings on behalf of such patients. They should be confronted to explain their presence in the wards and if no satisfactory explanation is forthcoming, they should be requested to leave. Hospital personnel have an obligation to exercise the right of admission reserved at the entrance to each hospital. This will assist in reducing unlawful touting (ambulance chasing) as understood by the Minister of Health.

Commentators have also suggested that the increase in claims has been brought on by a decline in medical professionalism and the standard of care. It has been suggested that the fo-

cus should be to put systems in place to avoid preventable mistakes. Health care practitioners should also ensure that they adhere to the standard of care expected of them in their particular branch of medicine. There should also be an increased emphasis on education and the enforcement of practical guidelines. An improvement in the detection of sub-standard care and the institution of appropriate corrective or disciplinary processes could also be constructive. Patients' dissatisfaction may also be a major contributing and critical factor. A perceived lack of caring and a breakdown in communication between the health care practitioner and the patient often precedes the decision to litigate. In this regard, Oosthuizen and Carstens state: 'Merely obtaining money may not be the only objective of injured patients; the reasons for filing suit may be due to the manner in which the practitioner subsequently managed the situation after the occurrence of the adverse event. Practitioners would thus be wise to adjust their behaviour accordingly. Communication is essential. Practitioners need to build a rapport with their patients and, in the case of an adverse event, they need to manage the situation sympathetically, whilst keeping in mind that patients may be immensely affected by such an unfortunate outcome' (Oosthuizen and PA Carstens 'Medical Malpractice: The extent, consequences and causes of the problem' (*op cit*) at 282). 'The devastating consequences of an injury often only become apparent in the long term. Additional surgeries and hospitalisation are likely to be required in more serious cases. The patient may also have to live with chronic pain, disfigurement, disability and depression, which could severely affect his or her quality of life and relationships' (see WT Oosthuizen and PA Carstens 'Re-evaluating medical malpractice: A patient safety approach' 2015 (78) *THRHR* 380 at 382).

A further possible cause for the increase in medical malpractice litigation is the fact that patients are more aware

of their rights. In this regard developments in legislation and case law towards patient autonomy have played a significant role. (See, for example, the Promotion of Access to Information Act 2 of 2000; The Consumer Protection Act 68 of 2008; The National Health Act 61 of 2003; The Children's Act 38 of 2005; the Mental Health Care Act 17 of 2002; The Protection of Personal Information Act 4 of 2013 and the Constitution. With regard to case law see, for example, *Opelt v Department of Health, Western Cape* 2016 (1) SA 325; *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA); *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC); and *Links v MEC Department of Health, Northern Province* 2016 (4) SA 414 (CC)).

Defending medical negligence claims

Oosthuizen and Carstens submit that a number of factors contribute to the dire state of health care in SA. Problems with management and lack of accountability persist while severe human resource constraints caused by poor policy and budget decisions have led to increased workloads causing many medical interventions to be performed by inexperienced personnel without the assistance of more experienced practitioners. Infrastructures and equipment are in a desperate condition and frequent shortages of supplies and medication lead to a reduced standard of care. These factors compromise the standard of care patients receive in the public sector and potentially lead to more litigation. Money disbursed on malpractice claims directly impact on the ability to finance health care which in turn leads to a further decline in the quality of care provided (Oosthuizen and Carstens 'Medical Malpractice: The extent, consequences and causes of the problem' (*op cit*) at 275).

Pillay J in *M v Member of the Executive Council for Health, KwaZulu-Natal* (KZP) (unreported case no 14275/2014, 14-3-2016) says at para 79 that:

'Although they present as a bipolar dispute between a plaintiff and a defendant with the remedy being findings on liability, compensation and costs the problem of malpractice remains institutional. Malpractice suits are retroactive in the sense that they seek to remedy past wrongs. The litigation resolves the dispute but not the institutional problems. Remedies that are forward-looking, that seek to resolve problems for the future should be considered for long-term sustainable solutions. The court cannot initiate such remedies without the co-operation of the litigants.

... [81] The growth of malpractice suits has been sudden. It might have caught the defendant unprepared. With the es-

calation of claims over the past five years the problems may seem overwhelming and insurmountable. These bespoke remedies could assist in fixing the problems. But this case shows that they are fixable if the law is simply obeyed.

... [83] ... This is a non-negotiable absolute requirement non-compliance with which will continue to escalate the costs and claims against the defendant. Given the instrumentality of this institutional deficit to malpractice costs, and for no better reason that it is the law, the defendant must look to holding the custodians of the records personally accountable, if necessary on pain of discipline, criminal prosecution or both. ...

[84] Without compliance of these rules the defendant would not be able to defend itself effectively against escalating malpractice claims. Compliance with both rules is unrelated to either the volume of patients or the number of claims being lodged. They are about having efficient systems in place and law abiding, accountable employees responsive to patient needs.'

(See also *Khoza v Member for Health and Social Development, Gauteng* 2015 (3) SA 266 (GJ); and *Ntsele v MEC for Health, Gauteng Provincial Government* [2013] 2 All SA 356 (GSJ).)

Conventional and fundamental reforms

Three categories of conventional reforms present themselves for consideration, namely –

- reforms that limits access to courts;
- reforms that alter certain liability rules; and
- reforms that directly address the size of the damages awarded (capping).

Reforms that limit access to courts include screening panels that determine and make recommendations before the matter proceeds to court and the shortening of statutes of limitation that limit access to courts. Measures that alter liability rules include the elimination of joint and several liability, the establishment of standards for expert witnesses and establishing additional criteria when proving the absence of informed consent. So-called capping may be applied to the total amount of damages or the non-economic portion of the claim. This would render malpractice claims less lucrative. It could also include periodic payments so that future medical costs are paid as they arise instead of lump sum payments. Although these suggested reforms may result in reducing claims, costs and premiums of indemnity insurance, it will probably not make health care safer. Patient safety and inherent systemic problems will not be addressed. Fundamental reform include enterprise liability, no-fault schemes and

structures and alternative dispute resolution vehicles.

Enterprise liability involves the shifting of the litigation from the individual practitioner to the health care organisation where the patients received treatment. The costs incurred would function as an incentive to implement organisational changes in order to address systemic factors, which contribute towards injuries. No-fault schemes and structures are generally opposed since not assigning blame would result in practitioners not being held accountable and thus may not deter sub-standard care. Proponents hold the view that the costs saved on administrative and legal expenses make these schemes affordable. Alternative dispute resolution reforms seek to avoid litigation altogether. It includes conciliation, structured mediation, administrative tribunals and specialised medical courts.

National health insurance

The proposed National health insurance system is aimed at improving access to quality health care services and the provision of financial risk protection against catastrophic medical expenses for the entire population. In this regard, Oosthuizen and Carstens opine that: 'Whether the [National Health Insurance] as currently proposed would be the best mechanism to achieve these objectives remains to be seen, but there are numerous concerns. Nevertheless, the Green Paper is correct in conceding that the quality of health care provided to a large majority of the public is poor' (Oosthuizen and Carstens 'Re-evaluating medical malpractice: A patient safety approach' (*op cit*) at 394).

Conclusion

Some medical accidents are inevitable and others will always occur as a result of want of care. Medical accidents that are attributable to systemic errors or methods of delivering health care which equate cost cutting with efficiency, which result in overworked personnel, inadequate safety measures, where there is an emphasis on quantity instead of quality of health care provision, should be scrutinised, so that reliable data is acquired with regard to the number of medical malpractice claims that are instituted, the causes for the escalation of such claims, the enormous costs of malpractice litigation and the difficulties involved in obtaining compensation for victims where such compensation is justified.

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Noise in Parliament: The right to make opposition

By
Saul
Leal

I will not cause the arrest of any colleague, no matter the level of my irritation,' said Deputy Chief Justice Dikgang Moseneke, by introducing the debate on the powers of the Speaker of the National Assembly over her colleagues, including the power of arresting them. It was at the hearing of the case *Democratic Alliance v Speaker, National Assembly and Others* 2016 (3) SA 487 (CC).

The Constitutional Court (CC) handed down judgment in this matter, which concerns the constitutional validity of s 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (the Act). This provision allows the Speaker of the National Assembly or Chairperson of the National Council of Provinces to direct the 'security services' to arrest and remove a 'person' creating or taking part in a disturbance within the Parliamentary precinct.

The case's root comes from a shameful image seen all over the world when members of an opposition party, Economic Freedom Fighters (EFF), who are also members of Parliament, were beaten, forcefully dragged and removed from the National Assembly Chamber by security forces secretly positioned inside the chamber. The festival of violence was aired by the live transmission on a national TV channel. The opposition members used the occasion of the State of the Nation to ask questions to the President of South Africa (SA), contrary to the protocol. As a result, all of the EFF members, without exception, were violently expelled from the chamber.

Another opposition party, the Democratic Alliance (DA), went to court to have the right granted of not being arrested in the case of seeming inconvenient to the Speaker.

At the hearing, the Deputy Chief Justice was intrigued by the fact that the freedom of speech is doubly constitutionally protected, being present in the Bill of Rights (s 16 of the Constitution) and in the privileges of the member of

the Parliament (s 58 of the Constitution). When the right to arrest is granted to the Speaker, the court asked if it included a member. Moseneke DCJ explained: 'Regulation must be proportional to the sought object. You have to persuade us the means are proportional.' Moseneke DCJ also raised some points, such as, who will trace the line between disturbance and a bothering speech? When the argument of violation of the separation of powers came to surface, Moseneke DCJ said: 'If it is talked about something peripheral, minimal, it is difficult to raise a real question of separation of powers'. He offered his apologies by using a strong word to describe his fear with regard to the risk suffered by the right into play: 'Emasculated'.

Likewise, Van der Westhuizen J highlighted many aspects. For him, even erasing the word 'arrest', the presence of physical action against members of the Parliament sounded substantial. 'Why does Parliament have police forces whereas courts do not?' Van der Westhuizen J was interested in knowing under which ground the Parliament can arrest a member, 'Is it a rule or a policy?'

The majority judgment by Madlanga J (Moseneke DCJ, Cameron J, Khampepe J, Van der Westhuizen J and Zondo J concurring) took the view that, if the word 'person' in s 11 of the Act includes members of Parliament, the section is constitutionally invalid. The judgment observed that throughout the Act 'person' predominantly includes members and held that when interpreted both contextually and purposefully, 'person' included members of Parliament. It was acknowledged that the limitation of members' free speech may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly members. But the limitation of the members' privilege of free speech by means of an act of Parliament was constitutionally impermissible. This was so, because in terms of the Constitution, parliamentary free speech could only be subject to the rules and orders of Parliament.

Thus the CC found the omission of the words 'other than a member' after the word 'person' in s 11 to be inconsistent with the Constitution. The majority judgment rectified the constitutional defect by reading-in these words (some extracts in this para were taken from the Media Summary released by the CC, as well as from the full decision available at: www.constitutionalcourt.org.za, accessed 2-9-2016).

It is important to draft some notes with regard to the case. In a democracy, parliaments must not be a club of friends. By being a picture of society, motivated by a flame of social passion, political chambers are normally noisy, even odd, frenetic, sometimes irrational and, not rarely, comparable to a big fair. This is not shameful. Contrarily, it is the price to be paid by living in a constitutional democracy. And, quite honestly, it is an affordable price.

Only in dictatorships are calm and obedient opposition members found. In a context of a free market of ideas where the strength of thought circulates freely steeling the pillars of democracy, 400 people speaking loudly – not always behaving as very polite ladies and gentlemen – is a symptom that democracy is working. This includes interrupting the Speaker or trying to catch the attention of the President via childish attitudes. Democracy has its costs.

At the CC, the core provision at stake was the following: 'A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security service' (s 11 of the Act).

In this regard, a Brazilian example might be useful. Joaquim Roriz was a folk governor of the Federal District, where the capital of the country, Brasília, is situated. Marked by a populist discourse, as well as an incredible popular

appeal, Mr Roriz governed the province four times. During his last term, he had an angry opposition party protesting in front of his window every day, he decided that he had had enough. Mr Roriz enacted a decree establishing that the constitutional right to assembly, demonstration and picketing in front of the government headquarter was assured. Nevertheless, included after the right: ‘... provided that [it be] silent’.

How would it be possible to protest without being noisy? Perhaps the governor was trying to implement a more gentle form of manifestation. The case, by being so surreal, ended up at the Brazilian Supreme Court. The court struck down the decree ((ADI 1.969-4/DF, 28-6-2007) (Lewandowski J)).

In SA, the DA case also exposes a surreal situation. How to teach members of the Parliament the right etiquette before the President?

In this regard, it is important to elicit three questions of law and three questions of principle. As a matter of law, the Constitution does not empower the Speaker neither with an absolute power nor with sovereignty. The Speaker has no deliberate vote (s 53(2)(b) of the Constitution) and all questions before the Assembly are decided by a majority of the votes cast (s 53(1)(c) of the Constitution). These are examples of the principles of collegiality that must guide all decisions taken by the Parliament.

Secondly, the Constitution pays special attention to the minority parties. In s 57(2)(b) the rules and orders of the National Assembly must provide for the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy. The Constitution also pays attention to the mission of the opposition party. Section 57(2)(d) proclaims: ‘The recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition.’

From a comparative perspective, Judge José Celso de Mello Filho, at the Brazilian Supreme Court, affirmed that there is a true constitutional statute of parliamentary minorities, ‘whose privileges must be preserved by the Judiciary Power, who is responsible for proclaiming the

elevated meaning that assumes, to the democratic regime, the essentiality of the judicial protection to free the right of opposition, assessed from a perspective of the republican practices of the parliamentary institutions’ (MS 26.441, 25-4-2007). For Celso de Mello Filho J, ‘the offense to the right to parliamentary minorities constitutes, in essence, disrespect to the right of the people that also are represented by the minority groups that act in the Houses of the National Congress’.

Finally, it is of paramount importance to stress the different purposes revealed by ss 58, 59, 71 and 72 of the Constitution.

While ss 58 and 71 are designated to the members of the Parliament, ss 59 and 72 are clearly applicable to the public in general. The first ones speak on privilege. The second ones refer to public access to and involvement in National Council. Where the first ones are provisions to expand rights, the second ones are designed to compress rights. Sections 58 and 71 state that the members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damage. Sections 59 and 72 stipulate with regard to the public ‘the refusal of entry to, or the removal of, any person’. They work complementarily, but are entirely designated for different purposes.

The public, in favour of the better functioning of Parliament, can be prevented from exercising some of these rights. Instead, the members, also in favour of the better functioning of the Parliament, must be free to use all the available privileges precisely because in doing so, they are improving the dignity of Parliament.

There are three questions of principle. Firstly, the Speaker and the Chairperson will be members of the ruling party. On the other hand, the alleged inconvenient and non-cooperative noisy members will be opposition groups. Just to illustrate, from 1924 to 1994, only one party occupied the place of Speaker: The National Party. From 1994 until now, only the ANC has occupied the place of the Speaker. It is always the ruling party.

So, taking an in-depth perception, the right to arrest members of the Parlia-

ment in case of disturbance is actually the right to intimidate the opposition groups. If they cannot oppose the government unreservedly in their own house – Parliament – they will look for another arena, making an inevitable migration occur to the judiciary field, where they can, via their lawyers, make an opposition free of being muzzled by handcuffs and violence.

The second point relates to tolerance. Parliament is full of imperfections, but, thus far, is the best model created. Noisy, controverted, sometimes incongruent, even apparently ridiculous, it is, by conception, the people’s home and, by being like that, need a multitude of rights, privileges and immunities.

The Parliament in SA already has a powerful arsenal to punish those whose behavior is incompatible with the dignity of the House. A member may be suspended, censured or required to leave the precinct of Parliament and in the event of grave disorder, the meeting may be adjourned or suspended for a period of time. There are means to preserve the House.

Parliaments are the temple of democracy. In their floor ought to prevail liberty, instead of oppression. Freedom of voice must flourish, even to what sounds inconvenient. Instead of having disguised security forces prizing violence, it must be a place to give examples of peaceful public dialogue. The figure of Speaker ought to unite, by his or her genuine leadership, those whose presence at the National Assembly derives directly from the people. Inspired by this faith the CC was able to identify some elements which illuminated this landmark.

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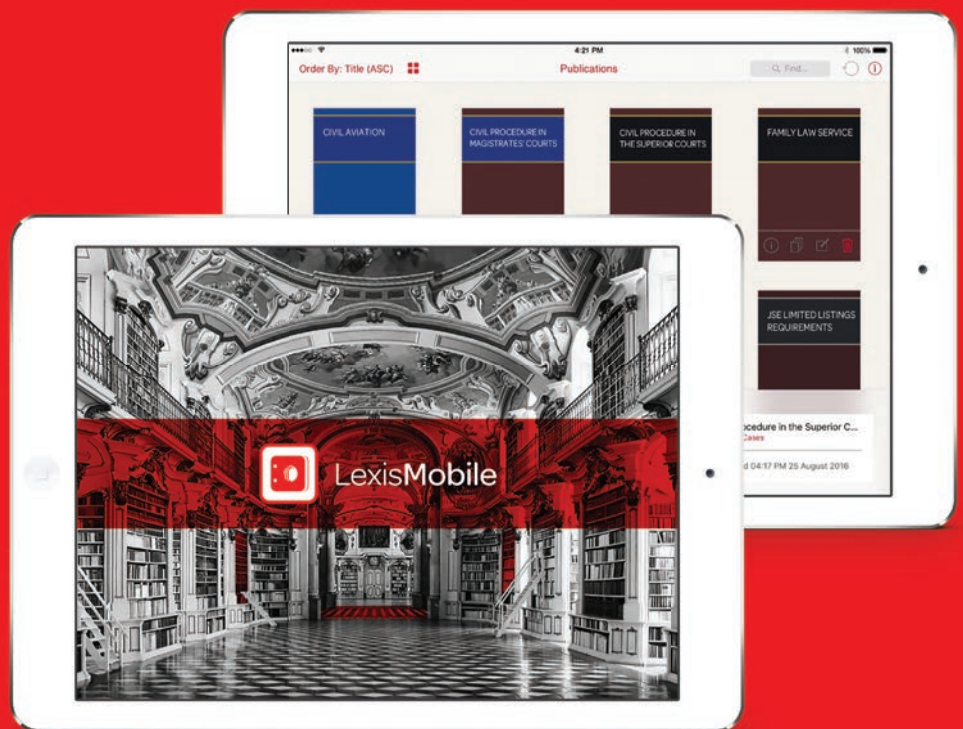
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Payment to Notarial Practice, ABSA, 927-657-2365

Closing date for notarial attendance

Registrations close one week before commencement of a course. An additional **R250** is payable for late registrations at CPT, DBN, BFN & PE.

www.aktepraktik.co.za

Visit our website for more information and online registration.

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E-mail: annemarie@aktepraktik.co.za

Telephone: _____

Cell phone: _____

Nearest Postnet branch: _____

Postal address (compulsory): _____

Postal code (compulsory): _____

Course in Conveyancing Practice (*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (Afrikaans)	7 – 10 Feb	17 Jan
		Cape Town (English)	7 – 10 Feb	17 Jan
		Bloemfontein (Afrikaans)	7 – 10 Feb	17 Jan
		Johannesburg (English)	14 – 17 Feb	24 Jan
		Pretoria (English)	14 – 17 Feb	24 Jan
		Durban (English)	21 – 24 Feb	31 Jan
		Port Elizabeth (English)	21 – 24 Feb	31 Jan

Language preference for conveyancing notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Johannesburg (English)	18 – 21 July	27 June
		Cape Town (English)	18 – 21 July	27 June
		Pretoria (Afrikaans)	18 – 21 July	27 June
		Durban (English)	25 – 28 July	4 July
		Port Elizabeth (English)	25 – 28 July	4 July
		Pretoria (English)	25 – 28 July	4 July
		Bloemfontein (Afrikaans)	1 – 4 Aug	11 July

Course in Notarial Practice (*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (English)	2 – 3 March	9 Feb
		Durban (English)	6 – 7 March	13 Feb
		Cape Town (English)	9 – 10 March	16 Feb
		Johannesburg (English)	13 – 14 March	20 Feb
		Pretoria (Afrikaans)	16 – 17 March	23 Feb

Language preference for notarial notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (Afrikaans)	14 – 15 Aug	24 July
		Johannesburg (English)	17 – 18 Aug	27 July
		Durban (English)	21 – 22 Aug	31 July
		Cape Town (English)	24 – 25 Aug	3 Aug
		Pretoria (English)	28 – 29 Aug	7 Aug

