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DE REBUS

THE SA ATTORNEYS' JOURNAL

DECEMBER 2016

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THE SA ATTORNEYS' JOURNAL

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DECEMBER 2016 | Issue 569
ISSN 0250-0329

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***DE REBUS* ONLINE:** www.derebus.org.za

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:
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CIRCULATION: *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. It circulates free of charge to all practising attorneys and candidate attorneys and is also available on general subscription.

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SUBSCRIPTIONS:
General, and non-practising attorneys: R 920 p/a
Retired attorneys and full-time law students: R 710 p/a
Cover price: R 95 each
Subscribers from African Postal Union countries (surface mail): R 1 465 (VAT excl)
Overseas subscribers (surface mail): R 1 790 (VAT excl)

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LAW SOCIETY
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Conveyancing work encroached upon

As 2016 draws to an end we ponder on the happenings of the year. This is an opportune time to lament on the many instances the attorneys' profession has been encroached upon. One such instance is the proposed business model by Proxi Smart Services (Pty) Limited (Proxi Smart).

Proxi Smart seeks to render certain conveyancing-related services, which are currently exclusively performed by conveyancers – who are regulated by the statutory, provincial law societies. The view of the Law Society of South Africa (LSSA), the provincial law societies and the Attorneys Fidelity Fund (AFF) is that the proposal by Proxi Smart cannot be supported as the full conveyancing process is regarded as reserved work, and should remain so in the interest of the public. Proxi Smart has been informed accordingly.

An application to the Gauteng Division of the High Court has subsequently been served on the LSSA for an order to the following effect:

Declaring that the steps in the transfer process identified by Proxi Smart do not contravene the Attorneys Act 53 of 1979, the Legal Practice Act 28 of 2014, the Deeds Registries Act 47 of 1957 and the Regulations made under the Deeds Registries Act and that it does also not constitute the performance of conveyancing work reserved to attorneys or conveyancers.

The LSSA is opposing the matter and, by agreement, must submit an answering affidavit by 28 February 2017. The AFF, the Chief Registrar of Deeds and the Justice Minister are also respondents. The AFF has filed its notice to oppose. At this stage, a joinder of the four provincial law societies as regulatory bodies of the attorneys' profession is being considered.

During the annual general meeting of the Free State Law Society, Co-chairperson of the LSSA Jan van Rensburg said that if Proxi Smart manages to split the conveyancing work, then surely any other litigation can be split into reserved and non-reserved work for attorneys, which will mean that there will be very little left for attorneys to do. He added that some attorneys support it, especially those starting out. Mr van Rensburg stressed the fact that if the money does not go into trust accounts and goes to banks instead, the AFF will not have money to protect the public and to assist the profession (see p 12).

The matter is, understandably, of grave concern to the profession and the LSSA is prioritising the matter and is dealing with the interests of both the profession and the public. Attorneys are cautioned against participating in the Proxi Smart initiative and other initiatives of a similar nature and are advised that those who participate in such initiatives may find themselves acting in contravention of the Attorneys Act and the Rules of conduct of the Law Society.

• To read the full notice of motion go to www.lssa.org.za.

Would you like to write for *De Rebus*?

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

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

• Please note that the word limit is 2000 words.

• Upcoming deadlines for article submissions: 23 January and 20 February 2017.

The De Rebus Editorial Committee and staff wish all of our readers compliments of the season and a prosperous new year.
De Rebus will be back in 2017 with its combined January/February edition, which will be sent out at the beginning of February 2017.

LETTERS TO THE EDITOR

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

Interpretation and drafting of domicilium provisions

Domicilium provisions in contracts are largely considered to be standard provisions, which are often copied and pasted from one contract to another. A majority of contracts contain some form of a *domicilium* provision, which in turn sets out the manner in which notices and processes are delivered to the parties to the contract. These provisions can either relate to the service of judicial processes (such as a summons) or contractual notices. Judicial processes and contractual notices can either be dealt with separately or be bundled into a single provision, which the courts have dubbed as a 'double provision' (see for example: *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* [1984] 3 All SA 625 (W) at 641; *Muller v Mulbarton Gardens (Pty) Ltd* [1972] 1 All SA 190 (W) at 197; and *SA Wimpy (Pty) Ltd v Tzouras* 1977 (4) SA 244 (W) at 247). The way in which a provision is drafted will determine whether it is a double provision or not.

The manner in which a *domicilium* provision is drafted will also influence the requirements of the service of a summons. This was confirmed on appeal by *Shepard v Emmerich* 2015 (3) SA 309 (GJ).

In that case, the *domicilium* provision required that the summons should be addressed to a specific person and served on the second floor of the building. It read: 'Routledge Modise Moss Morris, 2 Pybus Road, Sandton (Marked for D Janks 2nd Floor).'

The appellant served the summons on the first floor of the building and was not marked for the attention of D Janks. The service did not strictly comply with the provisions of the *domicilium* provision and the question on appeal was whether the summons was properly served.

The issue pivoted around how the *domicilium* provision was drafted and whether the summons had been properly served. The court *a quo* found that where there was a specific method of service that was contractually agreed, it should be strictly complied with. The court *a quo* cited three foreign cases to support this argument, namely, *McMullen Group Holdings Ltd v Harwood* [2011] CSOH 132; *Anglian Water Services Ltd v Liang O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC); and *Argo Capital Investors Fund SPC for Argo Global Special Situations Fund SP v Essar Steel Ltd* [2005] EWHC 2587 (Comm). The Appeal Court found the court *a quo*'s argument to be persuasive. Also, the court found that there was nothing that prevented the appellant from complying with the requirements of the *domicilium* provision. The appellant did not adhere to the requirements of the contractually agreed method of service and the service of the summons was found to be defective. The appeal was dismissed.

This case illustrates that the way in which a *domicilium* provision is drafted could have an impact in the manner in which the provision is interpreted and ultimately enforced. Not only does this case show that the manner in which the *domicilium* provision is drafted can have far reaching consequences, but it also embodies the presumption of interpretation contracts in that there are no superfluous words in a contract (see: SJ Cornelius *Principles of the Interpretation of Contracts in South Africa* 2ed (Durban: LexisNexis 2007) at 122). Therefore, account must be taken of each word in a contract, even that of a *domicilium* provision. The mere copying and pasting and use of precedence must be cautioned and used with circumspection to ensure that unintended consequences do not occur in the interpretation and enforcement of the contract.

***Michele van Eck*, legal adviser, Johannesburg**

Are court officials adequately protected?

The question to be answered is whether court officials are protected during the criminal proceedings in court? Who has a duty to protect court officials while conducting their scope of employment in court?

The true story is that as an attorney, I was physically attacked by the complainant as I was cross-examining the complainant. The complainant attacked me and was instructed by court to apologise. Indeed she apologised, but I noticed that the complainant was not remorseful and did not see anything wrong with her actions. The question that pops up is: Whether we are protected as court officials during court proceedings and by whom exactly? I feel that we are not protected at all.

***Nokhanyo Makonco*, candidate attorney, Mthatha**

A criminal appeal puzzle

In *S v Ntlanyeni* 2016 (1) SACR 581 (SCA) three accused were convicted in the High Court for, *inter alia*, charges of rape.

The trial judge refused leave to appeal and thereafter the three separately, by petition applied to the President of the Supreme Court of Appeal (SCA) for leave to appeal. (They must have done so in terms of s 316(8)(*a*)(iii) of the Criminal Procedure Act 51 of 1977 (CPA).)

Two of the convicted persons were each granted leave to appeal by four judges in the two separate applications. In the *Ntlanyeni* matter the application was subsequently dismissed by two other judges. The President of the SCA, acting *mero motu*, considered the circumstances as exceptional in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 and referred the decision in the *Ntlanyeni* matter to the court for reconsideration.

The matter was argued and the result was that he was also granted leave to appeal to the full Bench of the High Court.

What is puzzling is how the SCA could have acted in terms of s 17(2)(*f*) of the Superior Courts Act as the case originated from a criminal trial in the High Court sitting as a court of first instance, a process that is regulated by the CPA.

The definition of 'appeal' in the Superior Courts Act is:

'"Appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedure law.'

Appeals in criminal cases heard by a High Court are regulated by ss 315 and 316 of the CPA. Such appeals are, therefore, excluded from Ch 5 of the Superior Courts Act (see A Kruger *Hiemstra's Criminal Procedure* (Durban: LexisNexis 2008) at 31-1 to 31-2). It is not clear how the SCA could have applied s 17(2)(*f*) of the Superior Courts Act to the *Ntlanyeni* matter.

Some criminal law practitioners and even 'clever' offenders serving sentences and whose applications to the President of the SCA in terms of s 316(8)(*a*)(iii) have been refused, now consider that their next step could be in terms of s 17(2)(*f*) of the Superior Courts Act.

I cannot agree and am anxious to learn whether I am missing a point here as the next possible step after a s 316(8)(*a*)(iii) application has been refused, is to approach the Constitutional Court provided a constitutional question is involved. More to the point: Can the SCA decision in the *Ntlanyeni* matter be correct?

JO van Schalkwyk, attorney, Johannesburg

Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM

The KwaZulu-Natal Law Society (KZNLS) held its annual general meeting (AGM) on 14 October in Durban. Former President, Kgalema Motlanthe, delivered the keynote address.

Former President Motlanthe began his address by saying that during the days of the freedom struggle, lawyers helped usher South Africa into democracy. He went on to name a few 'giants in the noble profession', such as Nelson Mandela, Oliver Tambo, Bram Fischer, Robert Sobukwe and Duma Nokwe. 'Oliver Tambo led the team that led a path for democracy in South Africa. He would have celebrated his 99th birthday this year. In 1994 Tambo led the ANC leadership in the deliberations of the future that we hoped for,' he added.

Former President Motlanthe asked: What is the role of a lawyer in the construction of a new society? He attempted to answer the question by saying that the role of a lawyer in society is to be worthy of being called an officer of the court. 'I do not have an answer, but we need to attempt to analyse what it means to practice law during democracy. As we go ahead and formulise our state based on non-racialism, society is still struggling to emerge from the remnants of the Apartheid regime. Against this context, how will the lawyer of this new society practice? As the organised profession, there are a number of ways you can influence legislation and ensure public participation,' he said.

Speaking about the future of the legal fraternity, former President Motlanthe said: 'If we want to invest in the future, the future lawyers should have a culture of fighting for human rights and reinforcing constitutionalism. Lawyers of the future should be equipped with legal skills that will enable them to work towards the realisation of justice for all.'

Words from the LSSA

In the absence of the Co-chairpersons of the Law Society of South Africa (LSSA), immediate past Co-chairperson of the LSSA, Richard Scott, presented the Co-chairpersons Mid-term Report. Mr Scott said that the LSSA has been working towards implementing two resolutions that came from its 2016 AGM, namely, enhancing the role of women in the profession and creating an action group to deal with the past and present discriminatory practices that are experienced by legal practitioners when it comes to the distribution of work and briefing.

Former President Kgalema Motlanthe delivered the keynote address at the KwaZulu-Natal annual general meeting.

Speaking about the National Forum on the Legal Profession (NF) – the transitional body setting in place the new dispensation for the Legal Practice Council (LPC) – Mr Scott said that the NF has met six times since it was set up when ch 10 of the Legal Practice Act 28 of 2014 (LPA) came into effect in February 2015. 'The NF is grappling with the rules for legal practitioners, the staffing and costs relating to the future Legal Practice Council, as well as where provincial councils and committees will be located in the new dispensation, among other aspects,' he added. (To view the full mid-term report visit www.LSSA.org.za.)

Mr Scott noted that the legal landscape is changing due to the changes brought about by the LPA. He said that the profession will be regulated through the LPC. 'Since the four provincial law societies will disappear, it means that the LSSA will also disappear. This will then leave a vacuum, we need a professional association that will represent the interest of practitioners, promote the profession and promote the rule of law. In 2015 a unanimous decision was taken that such a body should be formed. Remember the function of the LPC is to regulate the profession and it will not represent the interest of practitioners,' he added.

Mr Scott went on further to say: 'We need to discuss who will be the members of such a body and ensure the independence of the profession. The organisation will also ensure that practitioners adhere to creating a just society and protect our constitutional values. Through consultation, before the organisation is formed, we will look at the needs of the profession so as to ascertain the best value proposition and ensure that practitioners benefit from such an organisation. Other issues that will be looked at through consultation with the profession are, the leadership, governance, branding and sustainability of the organisation.'

- See editorial 'A new home for legal practitioners: What's in it for you? (2016 (Nov) *DR* 3).

Words from the AFF

In the absence of the Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa, Ebi Moolla presented the Chairperson's report. Mr Moolla said the AFF is a fund set up in terms of the Attorneys Act 53 of 1979 with the primary objective to provide compensation to members of the public against misappropriation of trust funds by practitioners.

Mr Moolla went on further to say: 'In the last financial year the AFF experienced a deterioration in growth of 1,4% and is currently valued at R 4,451 billion, which may seem huge but when

Risk Manager of the Attorneys Insurance Indemnity Fund (NPC) (AIIF), Thomas Harban, said that in the future practitioners would be called on to make a contribution towards their AIIF indemnity insurance.

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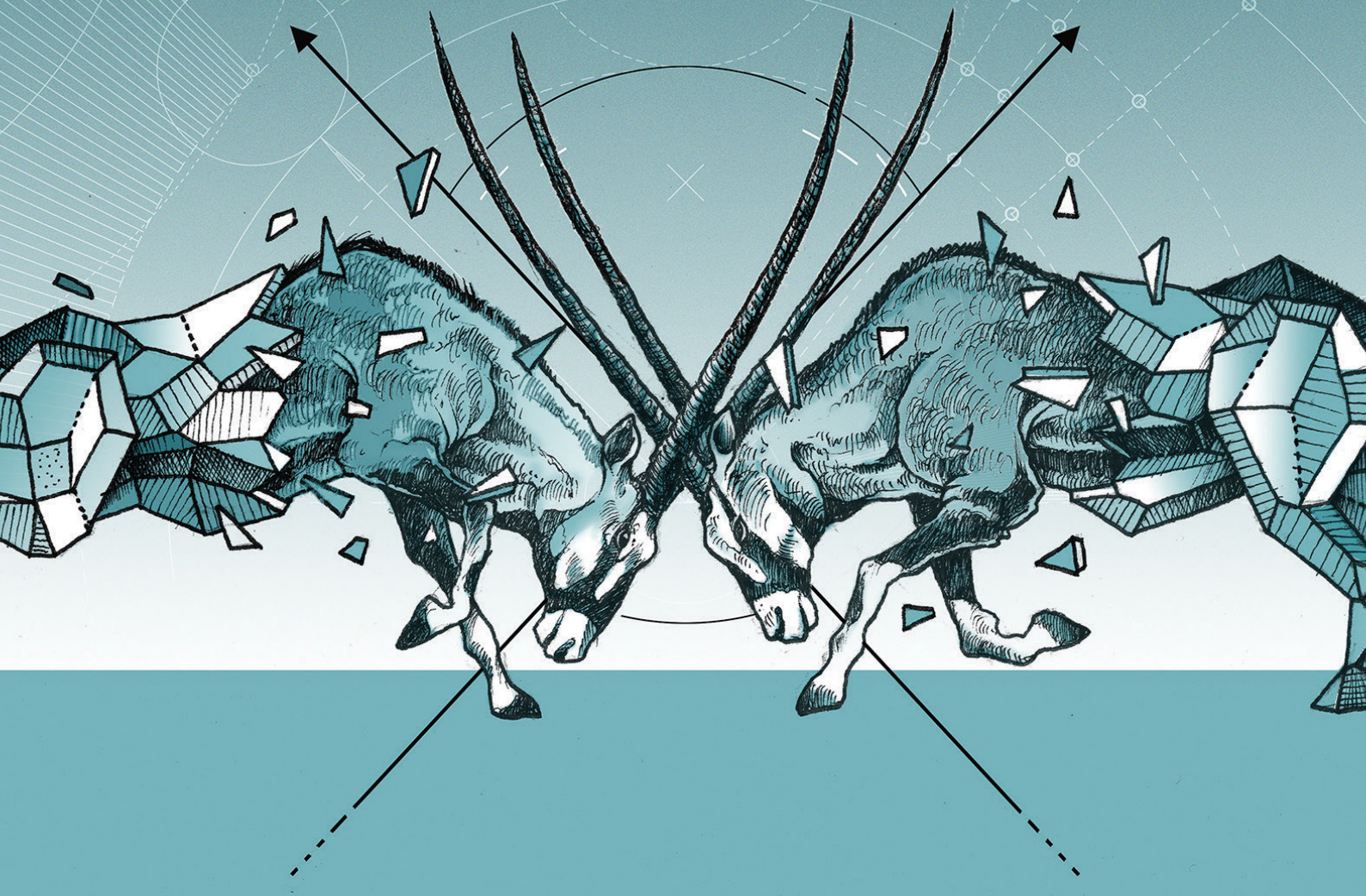

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Outgoing President of the KZNLS, Lunga Peter, presenting his report during the conference.

looked at against the backdrop of its annual spending, the opposite is true. For instance in the last six years the fund spent just over R 1,6 billion on funding the activities of the profession to the exclusion of its own activities.

The LPA has brought with it certain fundamental changes in the regulatory environment of the practitioners. In the current environment, only the law societies have the power to carry out functions such as inspections of books of accounting, applications for the appointment of curators, as well as initiating prosecutions against practitioners guilty of theft although in certain amending legislation the fund has similar powers. The LPA vests these powers in the fund originally including the power to determine the rules associated with inspections, which it might carry out. This has necessitated the fund to adapt its business model to be able to carry out these functions in its own right.'

Words from the AIIF

Risk Manager of the Attorneys Insurance Indemnity Fund (NPC) (AIIF), Thomas Harban, said that in the future practitioners would be called on to make a contribution towards their AIIF indemnity insurance. He stressed that the vast majority of claims are avoidable and are caused by negligence. 'We have seen instances where practitioners are blatantly reckless,' he added.

The AIIF tabled a report written by its Managing Director, Sipho Mbelle. The report stated that the AIIF has seen an annual increase in the number and value of claims. 'The outstanding claims liability was calculated at R 388 million as at the end of March 2016. Professional indemnity claims have increased at a rate in excess of the official inflation rate on an annual basis,' the report states.

The report further states that the sole source of the AIIF's funding remains the annual premium received from the AFF. 'The consideration of the sustainability of the AIIF includes re-looking at the funding model of the company. Practitioners will be called upon to make a contribution to the premium funding in the near future. We have warned the profession of this in our reports to the various structures in the last few years. The rates at which the members of the profession will be expected to contribute are being actuarially calculated. We are sensitive to the fact that the introduction of the payment regime should not create a barrier to entry into the profession,' the report states.

Words from the KZNLS President

Outgoing President of the KZNLS, Lunga Peter, presented his report during the conference. Speaking about the voluntary association for legal practitioners, Mr Peter said that the profession has agreed that it was imperative that a national voluntary association must be established as the unified voice of the profession representing members' interests as the LPA only addresses issues of regulation of the legal profession.

Mr Peter encouraged members of the profession to make use of the facilities offered by the Attorneys Development Fund (ADF) should they qualify to apply for same. 'To this end the society has participated in joint venture workshops with the ADF and the AIIF in promoting the services offered by the ADF and the AIIF,' he added.

Mr Peter said that the National Law Library continues to provide a valuable service to members nationally and has established as a national resource library. 'As part of the awareness campaign around the library's benefits the society has arranged workshops nationally in association with the ADF and the AIIF. The society records its gratitude to the AFF for its funding contribution towards the escalating costs of operating the library,' Mr Peter said.

New councillors 2016/2017

- Umesh Jivan (President)
- John Christie (Vice-President)
- Vernon O'Connell (Vice-President)
- Lunga Peter (Black Lawyers Association (BLA)) (Vice-President)
- Charmane Pillay (National Association of Democratic Lawyers (NADEL)) (Vice-President)
- Dee Takalo (BLA)
- Eric Zaca (BLA)
- Nonduduzo Khanyile-Kheswa (BLA)
- Matodzi Neluheni (BLA)
- Raj Badal (NADEL)
- Asif Essa (NADEL)
- Poobie Govindasamy (NADEL)
- Xolile Ntshulana (NADEL)
- Richard Scott
- Praveen Sham
- Manette Strauss
- Eric Barry
- Saber Jazbhay
- Gavin McLachlan
- Ebi Moolla

Alternate councillors

- Russell Sobey
- Sthembiso Kunene (BLA)
- Ilan Lax (NADEL)

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Examination dates for 2017

Admission examination:
- 14 February
- 15 February
- 22 August
- 23 August

Conveyancing examination:
- 10 May
- 6 September

Notarial examination:
- 7 June
- 11 October

- For the Attorneys' admission examination syllabus, see 2016 (Jan/Feb) *DR* 19.

- For the Notarial examination syllabus, see 2016 (April) *DR* 19.

Registration for the examinations must be done with the relevant provincial law society.

Activism with a purpose discussed at BLA AGM

The Black Lawyers Association (BLA) held its 39th annual general meeting and conference on 21 and 22 October in Kimberley under the theme: 'Urgent need to redress skewed briefing patterns for quality legal work for all'.

Proceedings of the conference began with a gala dinner, which incorporated the Second Annual Godfrey Pitje Memorial Lecture. The lecture was to be delivered by advocate Mojanku Gumbi, in her absence, Judge George Maluleke of the Gauteng Division of the High Court, delivered the address.

Judge Maluleke began his address by welcoming the Pitje family and all those present at the dinner. He went on to say that Mr Pitje was the first director of the BLA Legal Education Center while he was the chairman of the legal education trust at the time. Reading from the speech, Judge Maluleke said:

'The heading of this address is "Activism with a purpose". … We meet today at a time of great uncertainty in the world. The global south is suffering from the negative effect of economies that are growing at a pedestrian rate. Coupled with instances of insecurity, brought about by such activities of those credited out by groups such as Boko Haram and Al-Shabaab. Thrown into that is the slowing down in growth in China, the political and economic difficulties in Brazil, in Russia the disintegration of Serbia and its surrounds.

The global north is also not doing well, with the unknown long-term effects of Brexit, the rise of total authoritarianism represented by the fact that a man such as Donald Trump would even get to the stage where he is … . The countries in the south of Europe are barely surviving with unemployment levels among the youth reaching as high as 43,9% in Spain.

Our country is also facing a myriad of challenges. It is at times like these when we remember that men such as Godfrey Mokgonane Pitje represented the best that this country had to offer. In his lifetime one found many manifestations of both defiance and compliance, non-racialism and anti-racism, anti-sexism and a healthy dose of patriarchal practices, internationalism and African nationalism, and other seemingly contradictory tendencies. … I realised that what I thought were contradictory tendencies were in fact complimentary. …

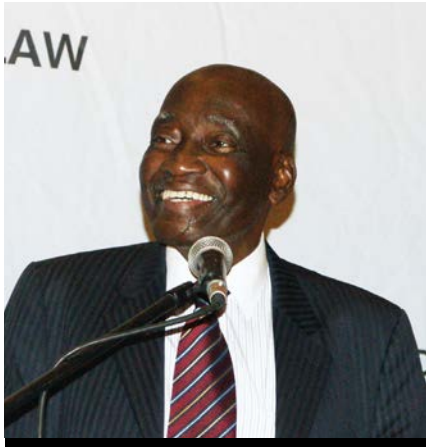
Mr Pitje was an ANC supporter, he believed totally in the principle of non-racialism, but he could have just as well been an African nationalist or an advocate of black consciousness.

…

In the inaugural lecture, then Deputy Chief Justice Dikgang Moseneke referred to the well-known case of *R v Pitje* [1960 (4) SA 709 (A)], which had at its subject the defiance that came to be identified with Mr Pitje. Mr Pitje had refused to sit in a corner reserved for Bantu lawyers in the courtroom in Boksburg, as a result of which he was charged with contempt of court. There are many other instances of defiance associated with Mr Pitje.

I am raising these two characteristics of Mr Pitje, defiance and unity, in an attempt to see if we can learn anything from that to find solutions to one of the most urgent national challenges in the cry of our young people under the banner of "fees must fall". When the "fees must fall" movement started there was a unity of purpose exhibited by students from across party political lines, they identified their common enemy as the unaffordable costs of tertiary education. Soon after the movement started, it became clear that we the adults started trying to pull the students into some political camps. …

I want to suggest that if we may step back a little and allow the students debate the matter of the cost of higher education as a united force, as personified by Mr Pitje, we would have taken an important step towards resolution. …'



The Second Annual Godfrey Pitje Memorial Lecture was to be delivered by advocate Mojanku Gumbi, in her absence, Judge George Maluleke of the Gauteng Division of the High Court delivered the address.

Update on the National Forum

On the second day of the conference, member of the National Forum on the Legal Profession (NF) Kathleen Dlepu gave delegates an update on the workings of the NF. She said that the NF is a body that will pave the way for the Legal Practice Council (LPC). She added that the President of the BLA, Lutendo Sigogo, is chairing one of the committees that is tasked to deal with difficult issues such as employees and the assets. 'There are various other tasks carried out by the various committees to ensure consensus and that what is decided is endorsed by the broader profession,' she added.

Ms Dlepu said that the NF meets almost every Saturday and it hopes to not extend the time frame of its mandate. She noted that no resolution has been reached in terms of the elections for the LPC as some are advocating for quotas as in line with s 7 of the Legal Practice Act 28 of 2014. 'A decision has been made that there will be two voter rolls, one for attorneys and another for advocates,' she added.

Speaking about the funding of the LPC, Ms Dlepu said that after a cost analysis has been done, recommendations will be made to the Justice Minister with the view of efficient implementation of the LPA. 'One of the challenges we have to deal with is that attorneys have clear data in terms of numbers in the profes-

Deputy Minister of Public Enterprises, Bulelani Gratitude Magwanishe, delivered the keynote address at the 39th Black Lawyers Association AGM.

Deputy President of the Black Lawyers Association, Mashudu Kutama (left), and President of the BLA, Lutendo Sigogo at the 39th AGM held in October.

sion, whereas the advocates do not have such,' she added.

Update from AFF

Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa, said that the primary objective of the fund is to provide compensation to members of the public, while its secondary objective is to provide for professional indemnity insurance. 'The AFF also funds the regulators to conduct its activities including education. … With regard to the financial position of the fund, the AFF has to mull over some of the activities that the AFF currently funds such as education and professional indemnity insurance,' she added.

• See also 'Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM' at p 7.

Professional association update

Former President of the BLA, Busani Mabunda, noted that the issue of a professional association was not a new topic. He added: 'There are implications which have arisen out of the LPA, things are not going to be the same. … The LPC creates a new regime, if we do not formulate an association for legal practitioners, we will be in a situation where we are left in a lurch. We have been made to understand that there are certain members of the profession that do not see a need of an association. The new association will not be a perpetuation of the status *quo*.'

• See also 'Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM' at p 7.

Government's commitment to transformation

Deputy Minister of Public Enterprises, Bulelani Gratitude Magwanishe, delivered the keynote address. Mr Magwanishe reiterated government's commitment to the transformation of the legal profession. He added: 'We recognise the critical role of lawyers in the broader transformation of our society. … The emergence of black law firms served to strengthen the fight against race dominance. This was evident in the coming into being of the Mandela and Tambo law firm.

The democratic government has a constitutional responsibility to correct the imbalances created by the past. … In the context of the South African economy dialogue the traditional white companies have for centuries dominated the economic space insofar as procurement of goods and services is concerned.

Out of the six state owned companies reporting to the department of public enterprises, four are being audited by black auditing firms and the remaining two by the auditor general of South Africa. …

An environment is being created where the genius of black legal practitioners can thus forth shine. The framework for the transformation of the state legal services issued by the Department of Justice and the promotion of capacity building by ensuring that historically disadvantaged practitioners have access to legal matters of substantive value [and the] promotion of sufficient flow of instructions to the historically disadvantaged legal practitioners.'

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‘I-generation’ law student discussed at FSLS AGM

The Law Society of the Free State (FSLS) held its annual general meeting (AGM) in Clarens on 21 October.

The AGM was preceded by a gala dinner where the North West University’s (NWU) Professor Pieter du Toit was the guest speaker. Prof du Toit who is a professor in the law faculty of the NWU spoke on the ‘i-generation’ law student.

The ‘i-generation’ law student

Explaining what the ‘i-generation’ law student is, Prof du Toit said it is ‘the student that we find in our university classrooms these days. They know no other world than the world of iPhones, Google, YouTube and the Internet.’ He then went on to provide an overview of the characteristics of ‘i-generation’ students.

According to Prof du Toit, ‘i-generation’ students relate to the world through technology. He added that they have already started to filter through to legal practice and soon they will do so in much larger numbers. ‘These students present huge challenges to legal education and the legal practice. However, I also believe that they have unique attributes and therefore have great potential as legal practitioners,’ he said, adding that information has always just been a click away for the ‘i-generation’. ‘Technology is more than just a tool, it is part of who they are. This has a number of implications for legal education,’ he said.

Prof du Toit said that through their cellphones students have immediate access to legislation and judgments even while the class is being presented. ‘Whenever any uncertainty regarding an aspect of the law arises during a lecture they can be asked to follow it up there and then and in fact they often do so of own accord. Make no mistake they also force us to be better law teachers – we are kept on our toes. We must know the newest developments in the field we are teaching otherwise we may be embarrassed by students who do some research in class whilst we are teaching,’ he said.

Prof du Toit, however, noted that one of the challenges faced is that students often lack the ability to distinguish reliable material from unreliable and outdated material. He added that they may for instance tell you that you are feeding them incorrect information because they cannot find it in the legislation you are referring to. But on closer inspection one might find that they relied on an outdated electronic version.

North West University Professor Pieter du Toit was the guest speaker at the Law Society of the Free State’s annual general meeting in Clarens.

Prof du Toit said: ‘Since they have immediate access to more information than one person could ever know or disseminate they simply do not see the professor as a front of all knowledge. They are often critical of what persons in positions of authority tell them. They see them merely as facilitators in their learning process. Research has found that they want more hands on, inquiry-based approaches to learning and are less willing simply to absorb what is put before them by teachers.’

Prof du Toit said many of the students are indifferent to authority and send communication such as e-mails in informal telegraphic style, adding that they ‘need strong guidance regarding the etiquette of a relatively conservative environment such as the law office and the court room, as well as guidance on certain societal skills.’

According to Prof du Toit, with a world of information at their fingertips, ‘i-generation’ students find memorising senseless. He said: ‘They focus on finding, interpreting and benefitting from information,’ adding that he also finds memorising a waste of time. ‘Very few of us had learnt much by memorising. Let us be honest, these days they are confronted with an overwhelmingly complex legal dispensation. In my view the traditional forms of assessment (which still persist in most law schools) will not achieve much. There should be a reduction of rote learning and memorising of facts. I have experimented with open book assessments and invited the students to bring any material they wish to the assessments. The assessments are problem based. In this manner they really start understanding how legislation works … . It allows for deeper learning and the assessment itself becomes a learning process. They do not necessarily fare better in these types of assessments and they tend to underestimate the extent of research and studying required. However, it also became clear to me that when the responsibility is placed in their hands and they fail to succeed, they tend to accept responsibility for the failure,’ he said.

He suggested that the Law Society of South Africa (LSSA) should also start rethinking the manner in which candidates are assessed in the admissions exams.

He concluded by stating: ‘In this regard it must also be mentioned that they value feedback. They constantly want to know how they are doing and I expect they would also want to know this from their principal when they do their articles. They get impatient if marks are not made available quickly. And they always want to know what the precise answer to a question is and as we all know in law it is not always as simple as that. It is now settled practice at most universities to provide detailed feedback.’

He questioned what the legal profession was doing to understand the ‘i-generation’ and get the best out of them and added that it cannot be business as usual.

How to improve your law firm

The outgoing president of the FSLS, Deirdré Milton reflected on the International Bar Association (IBA) conference that she had attended a few weeks before the FSLS AGM took place. She said that at the conference there was a session on how to increase your fees by 30% in order to stay in the profession. She highlighted a few suggestions that were made that stood out for her. These were:

- Analysing your financial portfolio as firms do not know when they are making money or losing it. Ms Milton said that firms should appoint consultants on an annual basis to analyse their financial portfolio every year and be advised where the problem areas are, so that those areas can be corrected.
- To introduce and include the juniors in your firm to take part in your finan-

Outgoing president of the Law Society of the Free State, Deirdré Milton, speaking at the annual general meeting in October.

cial discussions and that the finances are made open to them so that they can understand early on in their careers what probability means and what must be done to achieve certain goals.

• To investigate the possibility of merging with smaller firms in the fields of expertise that your firm does not have.

She added that to improve billing processes, attendances should be billed immediately while working on a file and that billing should not be left for a later stage. 'As you might forget exactly what you have done,' she said. 'Devise a different fee structure for different matters. For example in certain matters, only have an hour fee and in others, just a success fee, depending on the kind of work you are doing,' she said.

Ms Milton said that another issue that was highlighted at the IBA conference was human trafficking. She said that many countries are generally unable to curtail human trafficking and that it is a crime that is growing daily. She added that at the moment human trafficking – next to drug trafficking – is one of the biggest income generating crimes worldwide. 'Twenty-one million people are currently in forced labour positions, not only sexual practices but also for cheap labour. $ 150 million change hands every year across the borders due to the fact that organised crime cannot take place without the corruption of public officials. In other words, all these crimes are being aided and abated by public officials who will approve passports being passed and allow illegal immigrants to cross borders as legal. Public officials accept bribes because they are low paid for their services and for this reason, this crime has been successfully practiced on an ongoing basis,' she said.

Proxi Smart

On the day of the AGM Ms Milton welcomed delegates to the AGM. Awards were given to the top three highest interest earners in small, medium and large law firms.

Co-chairperson of the LSSA, Jan van Rensburg gave the LSSA's report. He also spoke on the establishment of a Legal Practitioner's Association for South Africa.

Mr van Rensburg also spoke on the *Proxi Smart* case. He explained that Proxi Smart approached the LSSA with a proposal stating that it would like to do the administration work (or non-reserved work) that conveyancers are currently doing, and that it wanted the LSSA's approval. Proxi Smart would, from the purchase agreement, gather all the information from clearance certificates to receiving deposits and arranging finances and issuing of guarantees. They would prepare a pack for the conveyancer, which he or she will check and draft a deed of transfer and sign which is the reserved work. The conveyancer will then get 15%.

Mr van Rensburg said that if Proxi Smart manages to split the work, then surely any other litigation can be split into reserved and non-reserved work for attorneys, which will mean that there will be very little left for attorneys to do. He added that some attorneys support it, especially those starting out. Mr van Rensburg stressed the fact that if the money does not go into trust accounts and goes to banks instead, the Attorneys Fidelity Fund will not have money to protect the public and to assist the profession.

• To read the full notice of motion go to www.lssa.org.za.

• See editorial at p 3.

Law Society of South Africa Co-chairperson, Jan van Rensburg speaking at the Law Society of the Free State annual general meeting in Clarens in October.

Subscription fees

FSLS council member, Vuyo Marabane, spoke on the identification cards for practitioners. He said that the subscription fee for 2017 is R 1 881, which is inclusive of R 50 for the cards. The cards will be issued to all practicing attorneys. Candidate attorneys will not receive them. He said that the cards will serve as proof that that individual is an attorney.

2016/2017 Council:

The council of the FSLS will remain the same. Its new president is Sizane Jonase.

• Sizane Jonase (National Association of Democratic Lawyers (NADEL)) (President)
• Vuyo Morobane (Black Lawyers Association (BLA)) (Vice-President)
• David Bekker
• Johan Fouchè
• Etienne Horn
• Noxolo Maduba (BLA)
• Tsiu Matsepe (BLA)
• Joseph Mhlambi (NADEL)
• Deirdré Milton
• Jan Maree
• Cuma Siyo (NADEL)
• Henri van Rooyen.

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

Office of the Public Protector will not name investigation reports to avoid tension with the state

The new Public Protector (PP), Busisiwe Mkhwebane, took office on 15 October, at her first media briefing at the offices of the PP in Pretoria, Ms Mkhwebane said her office will no longer name investigation reports to avoid unnecessary tension between the PP's office and the state. She also announced that the office of the PP will no longer have use of consultants for investigative work, but will rather invest in building internal capacity to include the expertise that the PP offices do not have, such as forensics and auditing or utilising other government or public institutions as provided for by s 7(3) of the Public Protector Act 23 of 1994.

Ms Mkhwebane further said that the office of the PP will no longer use donor funds because of some of the risk associated with it. She said that she was not comfortable with foreign donors and that led to some of the changes and decisions she made when she took office. Ms Mkhwebane indicated that the matter of foreign donors and other information she presented to the Portfolio Committee on 19 October was already in the Annual Report that the former PP, advocate Thuli Madonsela, prepared.

Ms Mkhwebane added that, among other things, the office of the PP under her leadership, will prioritise aging cases through the establishment of a backlog project team that will be focusing on disposing of all cases older than two years. 'We have a total of 260 cases older than two years under our Good Governance and integrity branch and 47 under Administrative Justice and Services Delivery: We will also prioritise critical posts, including that of a senior security personnel,' she added.

Ms Mkhwebane stressed that it was important that both offices of the PP are secure, as well as the safe-keeping of sensitive information that is handled. She noted that the office of the PP has placed a moratorium on international travel, especially benchmarking exercises: 'We believe that enough exchanging of notes with our counterparts elsewhere in the world has been done and I will be getting reports on the lessons we have learnt from all trips that have been undertaken so that we can assess how we have benefited from the engagements,' she said.

Ms Mkhwebane said she will do her job as the PP without fear or favour. She said she wants to make it possible for an African child in Umhlabuyalingana to also enjoy the fruits of democracy and empower people to be able to hold their leaders to account. However, she said, unfortunately some people in society have mischievously misconstrued her message as meaning she will turn a blind eye on the so-called high profile cases. Ms Mkhwebane said the office of the PP is first to indicate that the 'improper conduct', that the Constitution, in s 182(1)(*a*), states that the office of the PP has the power to investigate allegations or suspicions of, is not limited to service delivery failure.

The new Public Protector, Busisiwe Mkhwebane, at her office in Pretoria where she held her first media briefing in Pretoria on 20 October. She said her office will no longer use consultants for investigative work.

Ms Mkhwebane said it also includes instances of abuse of power and abuse of state resources. 'In any event, when a Member of Parliament requests me to investigate allegations of contraventions of the Executive Ethics Code, I am obliged to investigate and report in 30 days, failing which, I must advise the President that I will not meet the deadline. For the record there is no merit in claims that I am going to turn a blind eye in such cases. It is simply not true,' she said.

Ms Mkhwebane pointed out that the mandate of the office of the PP is not only limited to investigation. She referred to s 182(4) of the Constitution that enjoins the PP to be accessible to all persons and communities. Ms Mkhwebane added that her other priority was to enhance access and visibility of the PP's office among far-flung communities through public awareness programmes. She said that she informed Parliament that in that area she plans to –

- negotiate and enter into a memorandum of understanding with the Department of Justice for the use of magistrates' courts to bring the services of the office of the PP closer to the doorstep of their clients;
- negotiate and enter into a memorandum of understanding with the Public Broadcaster and other media houses for partnership that will enhance public awareness; and
- engage strategic stakeholders such as universities, schools and traditional leaders to assist the office of the PP in whichever way they can to advance its public awareness agenda.

Ms Mkhwebane said the 'how' part of the plans she has for her office will be worked out during the strategic planning session. However, in a nutshell, taking the office of the PP to the grassroots and increasing visibility among peripheral communities are the key aspects of her vision for the office over the next seven years.

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South Africa's new International Arbitration Bill brings new dawn of new area

The Deputy Minister of Justice and Constitutional Development, John Jeffery, said South Africa's (SA) development of a new International Arbitration Bill, brings a new dawn of era in arbitration. Mr Jeffery was speaking at the International Arbitration – the Dawn of a New Era in South Africa Seminar held in Johannesburg on 14 October. He said the new Bill comes at an opportune time for SA, to opt into the international standard for the resolution of commercial dispute. 'Not only does it have the potential to attract foreign direct investment, but also give greater legal protection to South African investments abroad,' he said.

Mr Jeffery said SA was a party to the New York Convention and in 1976, SA acceded to the Convention without reservation. He added that SA enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 in order to give effect to the principles of the Convention. He stated that the Arbitration Act 42 of 1965 governs arbitration proceedings in SA, however, he added that the Act makes no distinction between domestic and international arbitration and the Arbitration Act is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Mr Jeffery said the International Arbitration Bill emanates from a report of South African Law Reform Commission dealing with international arbitration. 'The main thrust of the Bill is the incorporation of the United Nations Commission on International Trade Law Model Law, as the cornerstone of the international arbitration regime in SA.' He said: 'The Model Law defines arbitration as "international" if parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States. This definition is used to determine, which arbitration matters qualify as "international" and are, therefore, subject to the Model Law,' he added.

Mr Jeffery noted that the Bill seeks to incorporate the Model Law into SA law and that the provisions of the Bill reflect many of the provisions of the Model Law. He said provision is made for the Model Law to apply to all international agreements, irrespective of whether the agreement was entered into before or after the commencement of the envisaged legislation. Mr Jeffery, however, said the Bill will not apply to the proceedings for the enforcement of awards under the Recognition and Enforcement of Foreign Arbitral Awards Act or for the enforcement, setting aside or remittal or an award under the Arbitration Act.

Mr Jeffery pointed out that the proposed legislation will not only assist SA businesses in resolving their international commercial disputes, but will ensure that SA is an attractive venue for parties around the world to resolve their commercial disputes. He said that after Cabinet had approved the introduction of the Bill into Parliament, the Department of Justice received advice that the UNCITRAL Model Law could be adapted in order to accommodate local circumstances.

'We are now in the process of going back to Cabinet, with the suggested amendments, for noting and endorsement before proceeding with the introduction of the Bill into Parliament. And we expect that it will be introduced before the end of this year,' he said.

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Government obliged to give accessible quality education

Former Deputy Chief Justice, Dikgang Moseneke, said the demand for access to further education, including higher education and further education and training is legally valid. Justice Moseneke was speaking at the 2016 Founders Lecture held at the University of South Africa on 27 October. He said the plea for the doors of education to open to all has been a core demand of a 'long glorious struggle over centuries'.

Justice Moseneke noted that the Constitution is silent on whether access to further education is subject to available state resources. He said government must prioritise or re-prioritise resources in order to give quality education. Justice Moseneke added that the entitlement of further education is to be contrasted with the right to basic education and adult education, which government must provide universally and without qualification of progressive access or availability of government resources.

Former Deputy Chief Justice, Dikgang Moseneke, speaking at the 2016 Founders Lecture held at the University of South Africa on 27 October. He called for violence connected to the 'fees must fall' movement to end.

Justice Moseneke said since 1994, government must oblige, devise and implement a masterplan that would afford, at the very least, its citizens universal and quality basic and adult education and increase access to higher education. He said government cannot hike fees every year, because the higher the fees the more education will be commoditised.

Justice Moseneke said the debate of 'fees must fall' must start where it should, which is with the Constitution. He said rising student fees, will reduce progressive access in higher education, and that only the rich will afford higher education. He pointed out that the violence that is connected to the 'fees must fall' campaign is totally unacceptable and should stop immediately. He said that the violence bares no justification whatsoever and said it amounts to punishable conduct. 'I urge young university students not lightly to flirt with terms like revolution and violence uprising. A revolution may be apt only when there is

no real prospect for a democratic accommodation,' he added.

Justice Moseneke said that students in tertiary institutions are in a good position to resort to electoral correction if they are unhappy. He pointed out that universities are wrong targets for violent uprising, adding that universities have no effective means to deal with violent protest and disruption. He further said universities were meant to be open spaces to enrich ideas and new knowledge, and that the true counterpart to claim the 'fees must fall' campaign is government and that universities can never give the right to access to free quality education. He stressed that society cannot sit and watch while universities get destroyed.

Justice Moseneke said the question must be asked: What has been done in 22 years for the country to find itself in a fight for education? He said it was not clear on the call for 'fees must fall' if every student irrespective of financial needs must be fully funded by government. Justice Moseneke said young people must be given an opportunity to be heard in an accommodative way. He further said that government has not persuaded students that there is a solution to the fees crisis. 'What we need to collectively do, in my humble view, is convene a negotiating forum a CODESA [Convention for a Democratic South Africa] of education. This should be convened not by the state but by civil society,' he advised.

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Tax master a middle man for reasonable billing between attorney and client

Retired Gauteng Local Division, Pretoria, Judge Eberhard Bertelsmann, said taxing masters are gatekeepers of fairness, between attorneys' and their clients. They are there to see to it that clients are charged reasonably. Mr Bertelsmann was speaking at the first Legal Costs Indaba, on 7 October in Johannesburg.

Judge Bertelsmann said that many years ago, contingency fees were regarded as unacceptable, but in 1997 following a British example, the Contingency Fees Act 66 of 1997 was implemented. He explained that, the existence of the Contingency Fees Act was to facilitate access to justice. He added that the focus of the contingency fees in 1997, was to ensure that people who could not afford to prosecute cases, were given an opportunity to through positively minded practitioners, to enforce claims. However, Judge Bertelsmann said the question remained, whether that motivation of the Contingency Fees Act is still the same.

Retired Gauteng Division High Court Judge Eberhard Bertelsmann was the keynote speaker at the first Legal Cost Indaba on 7 October.

The President of Law Society of the Northern Provinces, Anthony Millar said contingency fees have been a burning issue for many years. Mr Millar posed a question to Judge Bertelsmann asking if lawyers are selling a commodity or selling a bespoke service?

Judge Bertelsmann responded by saying that he did not regard contingency fees as a commodity, but said it is closer to a bespoke service. He said contingency relates to the fact that the client is unable to pay. Therefore, there is a risk in the preparation of the case as there are expenses that need to be negotiated and experts who need to be consulted. He said, in his experience, most experts are prepared to wait to get paid at the end of a case.

Judge Bertelsmann pointed out his concerns, that a huge amount of money has been spent on matters that could have been settled on the first day. He gave an example of Road Accident Fund (RAF) matters where, in his opinion, the moment summons arrive at the RAF, the RAF should have done the assessment of the merits and assessments of the injuries and asked attorneys for a couple of weeks or months to complete all the assessments and not go to court.

He said it was unfortunate that the current cash flow problems experienced by the RAF started because someone decided to virtually oppose all matters.

Mr Millar asked, what influence does the defendants' ability to pay, play in the contingency system? He said in an assessment of the risk the attorney will think before entering in agreement with the client and also consider the prospect that there will be no money at the end. Judge Bertelsmann answered the question by saying that the fact that the defendant cannot pay should not concern the judge.

Mr Millard asked Judge Bertelsmann to comment on how the RAF and other state entities, such as the Department of Health, have been seen as easy targets for attorneys, in order to commoditise litigation. Judge Bertelsmann answered by saying that it was tragic that the standard of the administration of in-

Retired Gauteng Division High Court Judge Eberhard Bertelsmann, discussing contingency fees with the President of the Law Society of the Northern Provinces, Anthony Millar, at the first Legal Cost Indaba on 7 October.

stitutions such as the RAF and Department of Health and legal services they are bound to employ is perceived to be less than effective. He stressed that the issues of contingency fees where the Department of Health is concerned, has to be addressed and that there is a huge number of contingency agreements relating to medical negligence.

Taxation: No tailor made solution

Taxing master at the Gauteng Local Division, Johannesburg, Trudie Zeelie, said there are no easy answers or tailor made solutions, when it comes to taxation. Ms Zeelie was speaking about the generality of taxing client's costs and counsel's fees.

Ms Zeelie said that, the application for a taxation date must be submitted electronically to the taxation clerk. She said the application must include the case number, the citation of the parties, the number of items on the bill and the date the *dies* was completed on. She added that there are taxation principles and that no bill of taxation should be taxed if these principles are not met.

Ms Zeelie stated the following principles –

- the presenter of the bill, must be in possession of the office file of the attorney of record;
- the certificate of r 70 of the Rules Board for Courts of Law Act 107 of 1985, signed by the *de facto* attorney of record in the matter must accompany the bill; and
- a signed original court order has to be attached to the bill.

Ms Zeelie said, in the event of the taxation being unopposed, the attorney on record must send a letter to the taxing master, confirming that the matter is infact unopposed. She added that in the matter of a settlement, the attorney on record must also send a letter confirming the settlement. She also spoke about the appearance of the cost of a tax consultant at the Gauteng Local Division, she said cost consultant appear and present the bill of cost.

Ms Zeelie said in the event of an objection to a cost consultant presenting a bill of cost or opposing it, taxation must be postponed to enable the instructing attorney to appear at taxation. She went on to speak about the dress code when legal practitioners and consultant's present cost bills, she said the presentation and taxation of bills of cost is the culmination of the civil legal process, she said it is expected of legal practitioners and consultants to dress accordingly. 'It goes without saying, that it is unworthy of attorneys and consultants to present the bill, without being properly attired. In general a gentleman must at least wear a coat, a formal shirt and tie, and a lady should wear formal shoes and a jacket,' she said.

Taxing Master at the Johannesburg High Court, Trudie Zeelie, was a guest speaker at the first Legal Cost Indaba on 7 October.

Ms Zeelie also spoke about professionalism and ethics, she said that in the current economic climate, money has been an extremely emotive matter and that taxation can turn into screaming matches. She urged that legal practitioners provide taxing masters with copies of the cases that practitioners will use during taxation and also give the taxing master full judgment on the matter, to enable the taxing master to understand the matter that they are going to deal with.

Ms Zeelie said legal practitioners must also be in a position to briefly address the taxing master on the nature and the merits of the matter, she said practitioners do not have to read the particulars of the plea, but tell the taxing master what it is all about. She noted that it was important that legal practitioners not correct the cost bill during taxation, which they omitted to ask for in open court.

Ms Zeelie said should legal practitioners have a portion of their costs reserved, costs have to be specifically unreserved or practitioners do not have those costs. She said if counsel in an open court did not see fit to raise it with the presiding officer to tell the judge to disallow the affidavit, the taxing master has no power to correct the bill. She added that the taxing master is empowered to interpret the judge's order and give effect. 'A taxing master can only work with what you give them,' she added.

Ms Zeelie said between party and party, the court order does not make provision for the costs of more than one counsel, the practitioner cannot have the costs of more than one counsel. She added that the taxing master has no discretion on such a matter. She said that on liquidation matters, if a legal practitioner does not take an order that does not specifically deal with costs, the practitioner does not have those costs.

Ms Zeelie added that when a taxing master is taking on a review, the legal practitioner must attach the taxing master copy of the marked bill, to the application. She said even when it is not stipulated in r 48 of the Uniform Rules of the High Courts, attaching the copy of the taxing masters marked bill assists the taxing master and will enable the taxing master to deal with the review sensibly and timeously.

Ms Zeelie said in recent years, much has been said about counsel's fees. She added that there is a debate regarding the commercial site of the practice to be balanced with the duty of care and service to the taxing master at the Johannesburg High Court. She stated that access to justice turns to be severely restricted because of astronomical legal fees being charged. Ms Zeelie said it would be helpful if counsel were to specify in their invoice in detail the professional services they have rendered. She said it would help in determination on both reasonableness and fairness of counsel's charges.

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National Schools Moot Court Competition:
Opportunity for learners to understand the Constitution

On 9 October learners, Thembinkosi Msiza (17), Surprise Mahlangu (17) from Gauteng and Aviwe Vilane (16) and Emihle Majikija from KwaZulu-Natal were crowned champions at the sixth National School Moot Court Competition, held at the Constitutional Court. The team argued for the respondent.

Mr Mahlangu said he was shocked when they called out their names to announce his team as the winning team. 'Everyone wanted it badly, I am quite excited that we won, it shows that we went an extra mile,' he said.

The hypothetical case focused on human dignity, equality, supremacy of the Constitution, freedom of expression and assembly, demonstration, picketing and petition. The first leg of the competition, saw an approximate 64 learners, of teams of four from eight provinces. The Mpumalanga province was the only province that did not participate at this year's competition.

The keynote speaker of the day, Deputy Minister of Justice and Constitutional Development, John Jeffery, said the annual competition was established in 2011 to create greater understanding of the Constitution and human rights in South African schools. 'This year is particularly special for us as we celebrate the 20th anniversary of our Constitution. The competition aims to celebrate our Constitution, our constitutional rights and responsibilities, and strive to develop the potential of each participating learner,' he said.

Mr Jeffery said it was always special that the final round of the competition takes place at the Constitutional Court. It reminded him of the words of late President Nelson Mandela when he formally opened the Constitutional Court on 14 February 1995, when he said – 'The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.'

Winners of the sixth National School Moot Court Competition, from left: Emihle Majikija, Aviwe Vilane, Thembinkosi Msiza, Surprise Mahlangu with Justice Nonkosi Mhlantla (middle) and director of the Pro Bono *and Human Rights department at Cliffe Dekker Hofmeyr, Jacquie Cassette (right), at the Constitutional Court.*

Mr Jeffery said, he would argue that the future of democracy is further enhanced by the calibre of learners and their participation in the National Schools Moot Court Competition. He said that having learners knowing the Constitution and human rights is of importance to his department. He announced that the Justice Department created a slimline version of the Constitution, and distributed over 500 000 copies to grade 11 and 12 learners in schools countrywide.

Mr Jeffery said for most learners it was the very first time they had ever read or had a copy of their own Constitution, as well as the Bill of Rights. He said during a dialogue the Justice Department held at Uitenhage, a leaner from Phaphane High School, Ntombizanele Klaas, said the Constitution will help her with her school projects. 'This competition aims to create greater awareness in schools and communities in South Africa, and the values that it embodies through active participation,' he said.

Mr Jeffery said that the moot competition has many benefits and allows learners to improve their public speaking skills, learn to structure a legal argument, analyse cases and develop writing skills.

Acting Chief Justice of the day, Justice Nonkosi Mhlantla, thanked the learners for entering the competition, she further thanked them for having interest in the legal fraternity. 'Hopefully some of you would consider law as a career,' she said.

Winners received prizes that included bursaries from Cliffe Dekker Hofmeyr to study law.

Thando Mtombeni (17), Catelyn Cumberiege (17), Nompendulo Cele (15) and Kwanele Shange (15), who argued for the applicant, walked away with the runner-up prizes.

From left: Former Constitutional Court Judge, Justice Joseph Goldstone with the runner-up team, Thando Mtombeni, Nompendulo Cele, Kwanele Shange, Catelyn Cumberiege and University of Pretoria's Professor, Dire Tladi, at the Constitutional Court.

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LSSA speaks out against withdrawal from ICC; welcomes withdrawal of charges against Finance Minister and release of *State of Capture* report

At the end of October and early in November 2016, the Law Society of South Africa (LSSA) spoke out publically against the government's decision to withdraw from the Rome Statute of the International Criminal Court (ICC); then welcomed the decision by the National Director of Public Prosecutions (NDPP) to withdraw charges against the Minister of Finance, Pravin Gordhan, and then also welcomed the Gauteng Division of the High Court order that the Public Protector's *State of Capture* report should be published.

In welcoming the order by the Gauteng Division of the High Court that the Public Protector's report on the *State of Capture* had to be released by the Office of the Public Protector, on 2 November, the LSSA urged the court to consider punitive costs against the President for bringing what was patently an unfounded application to interdict the release of the report and then withdrawing it. 'The cost of all the teams of counsel should not be borne by the taxpayer,' said LSSA Co-chairpersons Mvuzo Notyesi and Jan van Rensburg.

The LSSA also welcomed the remedial action by the previous Public Protector, advocate Thuli Madonsela, that the President was to appoint a commission of inquiry within 30 days headed by a judge solely selected by Chief Justice Mogoeng Mogoeng.

In addition, the LSSA welcomed the fact that the Portfolio Committee on Justice and Correctional Services had called National Director of Public Prosecutions (NDPP), advocate Shaun Abrahams, to brief it on the developments in the National Prosecuting Authority and specifically the withdrawal of charges against Finance Minister Gordhan.

On 31 October, the LSSA welcomed the belated decision by the NDPP, Mr Abrahams, to withdraw charges against Finance Minister Gordhan, Oupa Magashula and Ivan Pillay. 'The LSSA, however, remains gravely disappointed that a matter of this magnitude and implications was decided clearly without first obtaining all the necessary information and that the charges were instituted in the first place. The action of bringing the charges and then dropping them appears to be consistent with the public perception that there is a politically motivated link,' said Mr Notyesi and Mr van Rensburg.

The LSSA urges Mr Abrahams to consider his position in the light of the severe consequences his actions had on South Africa's (SA) economy.

The Co-chairpersons added: 'Mr Abrahams seems oblivious to and unrepentant for the damage – both at home and internationally – caused by the unsubstantiated charge of fraud brought against the country's sitting Minister of Finance by the country's prosecution services. Mr Abrahams himself announced the intention to institute charges at a public press conference. It would be fair to assume that the NDPP would have gone out of his way in this matter, but also in all matters – be they high profile or routine matters – to ensure that all relevant information had been reviewed and that criminal intent had been established. However, when the charges relate to fraud or theft by a high profile individual such as the Minister of Finance, the NDPP should have made doubly certain of the facts before inflicting the trauma he has on the economy, the image of the country as well as on the public. Mr Abrahams made the public announcement, he should take responsibility for bringing the National Prosecuting Authority, the criminal justice system and the country into disrepute.'

The LSSA called on Parliament to initiate an investigation into the actions of the Directorate for Priority Crime Investigation – the Hawks – in this matter, as well as in other cases involving high-profile persons. Alternatively, the LSSA said the President should consider a judicial commission of inquiry into the actions of the Hawks. 'Failing that, and as it stands, it is doubtful whether the Hawks, as an institution, have the public trust,' said the Co-chairpersons.

ICC

On 25 October, the LSSA added its voice to those calling on the South African government to reconsider its withdrawal from the ICC. The LSSA said it was gravely disappointed at the unilateral decision by the government to initiate SA's withdrawal process from the Rome Statute of the ICC by executive act. 'This raises serious concerns about our government's interpretation of its commitment to fighting impunity and providing accessible forums for victims of crimes against humanity and human rights abuses by those in power,' said Mr van Rensburg and Mr Notyesi.

They added: 'As we have said previously, we are currently in the fortunate position of having a strong and independent judiciary and other institutions supporting democracy. We can turn to these to challenge abuses of power by the state. However, this may not always be the case in future. Our Government appears hell-bent on closing and impeding access to regional, continental and international courts should a time come when South Africans can no longer rely on domestic remedies.'

The LSSA aligned itself with the statement by the International Bar Association that, 'South Africa was one of the leading African countries in establishing the permanent court with a mandate to address atrocity crimes, yet it may be one of the earliest to walk away. If this decision holds, it would be an extraordinary and detrimental development for both international justice and for South Africa.'

In considering the preamble to our local Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 –

'Mindful that –

- throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law:
- the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
- the Republic of South Africa is committed to – bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so,

in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court … .'

The LSSA asked what had changed in our government's commitment to the fight against impunity?

Mr van Rensburg and Mr Notyesi pointed out that the withdrawal from the ICC followed our government's agreement to changes brought about in 2014 to the Southern African Development Community (SADC) Summit Protocol. As it now stands, the SADC Protocol deprives citizens in the SADC region – including South Africans – of the right to refer a dispute between citizens and their government to the SADC Tribunal if they fail to find relief in their own courts. Only states can refer disputes to the SADC Tribunal. 'The LSSA is challenging this in the Gauteng High Court,' they said.

The LSSA also stressed that the African Court on Human and Peoples' Rights (AfCHPR) had the potential to enforce human rights through proper judicial processes and has relative independence from political leaders. However, although SA had ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights on 3 July 2002, it has yet to submit a declaration accepting the competence of the AfCHPR to receive cases under art 5(3) of the protocol. At least two cases from SA had been brought before the AfCHPR, but the court had to dismiss these cases due to lack of jurisdiction in the absence of the declaration by our government, as the AfCHPR may not receive any petition under art 5(3) involving a state party, which has not made such a declaration.

Barbara Whittle,
Communication Manager, Law Society of South Africa, barbara@lssa.org.za

LSSA recognises service to the profession by former council members

The council of the Law Society of South Africa (LSSA) resolved earlier this year to present certificates to council members who had served on council and completed their term of service. The certificates are to recognise the contribution to the attorneys' profession made by attorneys – many of who are now judges – who have served as council members of the LSSA. It was also resolved that to present the certificates to former councillors attending the annual general meetings of their relevant provincial law society during October and November this year.

Service by the following councillors (who are no longer on the LSSA's council) was recognised:

- Susan Abro (former Co-chairperson)
- Koos Alberts
- Allison Alexander
- John Anderson
- Eric Barry
- William Booth
- Daryl Burman
- Peter Chidi
- Llewelyn Curlewis
- Mara de Klerk
- CP Fourie
- Iqbal Ganie

Former Co-chairperson of the Law Society of South Africa (LSSA), Krish Govender, (pictured with former Co-chairperson of the LSSA, Richard Scott (right)) received a certificate of recognition for serving on the LSSA council.

- Krish Govender (former Co-chairperson)
- Judge David Gush (former Co-chairperson)
- Etienne Horn (former Co-chairperson)
- Mohamed Husain
- Judge Maake Kganyago
- Judge Elizabeth Kubushi
- Lulama Lobi
- Busani Mabunda (former Co-chairperson)
- David MacDonald (former Co-chairperson)
- Strike Madiba
- Pumzile Majeke
- Judge Babalwa Mantame
- Clayton Manxiwa
- Jan Maree (former Co-chairperson)
- Percival Maseti
- Kathleen Matolo-Dlepu (former Co-chairperson)
- Judge Yvonne Mbatha
- Davies Mculu
- Sithembele Mgxaji
- Judge Atkins Moleko
- Judge Jake Moloi (former Co-chairperson)
- Saloshna Moodley
- the late George Moolman
- McDonald Moroka
- Judge Segopotje Sheila Mphahlele
- Henry Msimang (former Co-chairperson)
- Janine Myburgh
- Nosidima Ndlovu (former Co-chairperson)
- the late Edward Mvuseni Ngubane (former Co-chairperson)
- Silas Nkanunu (former Co-chairperson)
- Judge Lister Nuku
- Christoff Pauw
- Judge Thoba Poyo-Dlwati (former Co-chairperson)
- David Randles
- Judge Vincent Saldanha (former Co-chairperson)
- Praveen Sham (former Co-chairperson)
- Lesane Sesele
- Judge Zukiswa Tshiqi
- Henri van Rooyen (former Co-chairperson)
- Julian von Klemperer (former Co-chairperson)
- Adrian Watermeyer.

Judge Lister Nuku (centre) and Judge Vincent Saldanha ((right) former Co-chairperson) receiving their certificates from LSSA Co-Chairperson Jan van Rensburg.

Barbara Whittle,
Communication Manager, Law Society of South Africa, barbara@lssa.org.za

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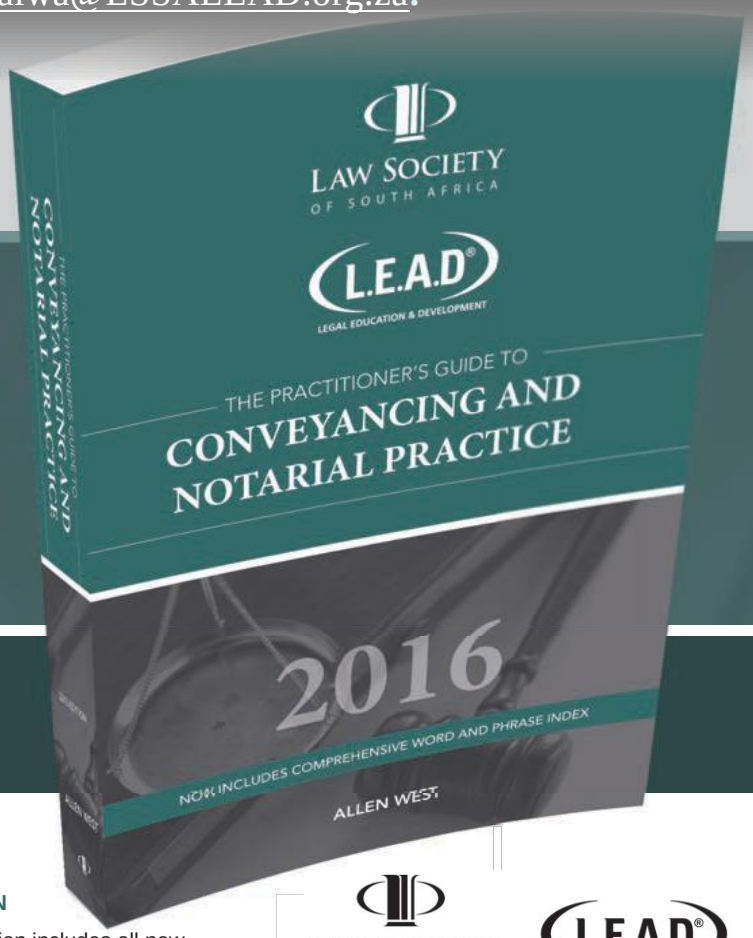

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ABOUT THE AUTHOR: ALLEN WEST

Allen West was the Chief of Deeds Train- ing from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred articles in leading law journals.

Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.

2016 EDITION

The 2016 edition includes all new updates for the past year and now also has an index to assist both the student and professional alike.

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- more than 130 Conference Resolutions;
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- the last two years new legislation and amended legislation
- the last two years Chief Registrars
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LAW SOCIETY OF SOUTH AFRICA

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People and practices

Compiled by Shireen Mahomed

New boutique law firm **Nicqui Galaktiou Inc** in Bryanston has new appointments and promotions.

Nicqui Galaktiou is the founder and director of NGInc.

Kameshni Naidoo has been appointed as a senior associate at NGInc.

Megan Ross has been promoted to a senior associate at NGInc.

Bowman in Johannesburg has two promotions.

Lefentse Bodibe has been promoted as a senior associate in the banking and finance department.

Dominique Saayman has been promoted as a senior associate in the corporate department.

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

All People and practices submissions are converted to the *De Rebus* house style.

Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za ❑

By the Risk Management Unit of the Attorneys Fidelity Fund

Susceptible to scams?

Running a business opens one to susceptibility to fraudsters who are continuously looking for new ways to make money. Scams against legal firms have been, and continue to be, on the rise. No firm is immune and should be on the lookout for potential scams attempted against them.

In order to position yourself and limit the probability of being scammed and – ultimately losing money to fraudsters – it is important that you have a good understanding of how your stakeholders operate, what their service offering is and how they would interact with you. Some of the attempts made by the fraudsters may appear to be obvious, but these may not be so obvious to everyone, and continue to be experienced by some legal firms. In this article, the Attorneys Fidelity Fund (AFF) will, in an attempt to raise awareness, share some of the scams perpetrated against attorneys.

It is recommended that this article is read together with the following articles –

- 'Are you losing money through EFTs?' (2014 (June) *DR* 18); and
- 'Scam fraudsters: Beware' (2014 (Nov) *DR* 14).

Fraudsters often purport to be a stakeholder, for example, the AFF. It, therefore, becomes very important for the legal firm to take note of the following:

Forms of scams	Considerations to be made by the legal firm
The perpetrator will call the firm and advise that they mistakenly deposited an amount into the firm's trust or business account when it was meant for another firm and would like a refund.	Depending on the form of the attempted scam, a legal firm should consider the following: • Know your clients and check any and all provided details against the details that you already have in your records. • Ascertain if your firm is expecting any refunds, whether for audit fees or bank charges and what the amounts applied for are. • Check if the letterhead used is that of the purported stakeholder. This necessitates knowledge of the correct name of the stakeholder, the current logo of the stakeholder and the directors or senior personnel of the stakeholder, which would be reflected on the letterhead. • Check if the e-mail address used is that of the purported stakeholder. It is important to know the extension of the e-mail addresses of the purported stakeholder. For instance, the e-mail addresses of the AFF have the extension fidfund.co.za after the @ sign, fraudsters would perhaps use an e-mail address with an extension fidelityfund.co.za after the @ sign.
The perpetrator will advise the firm that an incorrect amount was refunded in respect of a refund application for audit fees and/or bank charges. They will then ask for a refund of a portion of the amount.	
The perpetrator will call the firm purporting to be a client of the firm and ask for banking details of the firm in order to make a deposit. A few days later, the perpetrator will make another call suggesting that they incorrectly paid money into the account.	• Check if the quoted amount was received in your trust or business account as claimed. • Check on the bank statement if the amount was paid in cash or cheque. • If the amount was received as a cheque deposit, do not be pressured to make a refund until the cheque has been cleared and confirmed as such with the bank. The perpetrator will apply pressure on you to refund them, do not succumb to the pressure. • Inform the person requesting a refund that you will process a refund of the money as soon as it is cleared on your account and ask for proof of the deposit. • Ask the person requiring a refund to provide you with their banking details. It is important to know your stakeholders' bankers and perhaps their bank details. Remember, the banking system recognises an account number and not an account name. The perpetrator can, therefore, give you an account name of your stakeholder that they are purportedly representing, but the account number will not be that of the stakeholder. • Inform the stakeholder affected before you even consider a refund. • When informing the purported stakeholder, do not use any of the contact details provided by the purported stakeholder representative, check the legitimate contact details on the stakeholder's website or inquire with your provincial law society.
The perpetrator will send an e-mail to the firm advising that an amount was incorrectly paid into the firm's trust or business account when it was meant for another firm.	
The perpetrator will send post mail to the firm advising that an amount was incorrectly paid into the firm's trust or business account when it was meant for another firm.	
Fraudsters may purport to be an existing client and provide a different account number into which money due to them should be paid.	Whenever a client that you are providing legal services to provides or changes an account number to pay into, insist on a bank stamped proof of that account.

Forms of scams	Considerations to be made by the legal firm
A fraudster may hijack the identity of a senior partner in the practice, and send an e-mail to the bookkeeper containing a payment instruction.	Carefully check the sender's e-mail address to establish its veracity, and if there is any doubt, obtain confirmation that the e-mail is genuine.

As a general rule, the AFF would never advise attorneys to retain a portion of an amount that was erroneously paid into your account. If this should happen, it is guaranteed to be attempted fraud. Be on the lookout.

It is important to realise that should you fall victim of a fraudulent scam, specifically on your trust account, you will end up with a trust deficit position, and that has a number of negative implications for you as a practitioner and for your firm. Stay alert and do not fall victim.

The Risk Management Unit of the Attorneys Fidelity Fund in Centurion. ❑

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Picture source: Gallo Images/iStock

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This free of charge service operates as follows:

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- Prospective principals contact Legal Education and Development (LEAD) if they need to appoint a candidate attorney.
- The data service will provide the prospective principal with the information required.
- The prospective principal then contacts the candidates of his/her preference to arrange interviews.

This project is made possible through the subvention by the Attorneys Fidelity Fund.

Should you wish to participate in this project, please feel free to contact: Dianne Angelopulo at (012) 441 4622 or e-mail: dianne@LSSALEAD.org.za

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By
Kris
Harmse

Reckless credit – both sides of the story

One of the purposes of the National Credit Act 34 of 2005 (as amended) (the Act) as set out in its preamble, is 'to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting.' It is, therefore, clear that, in the prevention of reckless credit, obligations exist not only for a credit provider, but also for a prospective consumer.

When does reckless credit occur?

When making a determination whether a credit agreement is reckless, one must focus one's attention on the period when the consumer applied for credit (s 80 (1) of the Act).

If, during this period, a credit provider failed to conduct an assessment in terms of s 81(2) of the Act or if, having conducted such an assessment, a credit provider entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not understand or appreciate the risks, costs or obligations under the proposed credit agreement or entering into that credit agreement would make the consumer over-indebted, the credit agreement is reckless in terms of s 80(1).

What are a credit provider's obligations and when are these obligations created?

The obligations of a credit provider are set out in s 81(2), which states that a credit provider must not enter into a reckless credit agreement, and requires 'reasonable steps' to be taken to first assess the proposed consumer's general understanding and appreciation of the risks, costs, rights and obligations under the credit agreement, the proposed consumer's debt repayment history, and the existing financial means, prospects and obligations of the proposed consumer.

Thus, a credit provider's obligations come into existence when a consumer applies for credit.

The requirement that a credit provider must take 'reasonable steps' in its assessment was described by Louw J at para 60 in the judgment of *Absa Bank Ltd v De Beer and Others* 2016 (3) SA 432 (GP) as an assessment which is done 'reasonably, ie not irrationally.'

A credit provider's obligation to conduct an assessment in terms of s 81(2) was discussed at some length by Satchwell J at paras 24 to 28 in the judgment of *Absa Bank Limited v Kganakga* (GJ) (unreported case no 26467/2012, 18-3-16) (Satchwell J). The issues to be covered by the assessment are –

- a consumer's state of mind as it relates to his or her understanding of the risks and costs of the proposed credit and the consumer's right and obligations under a credit agreement;
- a consumer's previous experience and behaviour as a consumer under a credit agreement; and
- the finances of a prospective consumer at the time of the application must be disclosed to ensure that the consumer can afford to pay the instalments in terms of the credit agreement.

A further assessment is required in terms whereof, a credit provider must assess whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement. The commercial purpose must, therefore, relate directly to the application for credit and, as appears at para 31 of the *Kganakga* judgment, the 'commercial purpose does not pertain to any other or underlying agreement with other persons.'

For purposes of conducting the assessment contemplated in s 81, the credit provider may in terms of s 82(1) of the Act, determine for itself the evaluative mechanisms or models and procedures to be used, provided that this will result in a fair and objective assessment. It is interesting to note that the wording of s 82(1) does not place an obligation on the credit provider insofar as determining its own evaluative mechanisms or models and procedures. However, a credit provider is ultimately not left with any alternative if it wishes to comply with its obligations in terms of the s 82(1).

This was illustrated in the *Kganakga* judgment, where it was found that no proper assessment was done by the credit provider even though 'reasonable steps' were in place to conduct the necessary assessment.

The obligations of a credit provider are, however, not limited to the requirements of s 81(2). In what can almost be described as a verbatim repetition of s 81(2) (and perhaps a further reminder to credit providers not to enter into reckless credit agreements with consumers). Section 81(3) spells out that the credit provider must not enter into a reckless credit agreement with a prospective consumer. It is unlikely that the legislature ever intended to unintentionally repeat itself and this peremptory provision creates a further obligation for credit providers.

What are a consumer's obligations and when are these obligations created?

Before examining the nature and duration of a prospective consumer's obligations, one must consider their underlying purpose – to assist a credit provider with its assessment as contemplated in s 81(2).

The obligations of a prospective consumer in the prevention of reckless credit are set out in s 81(1), which states that: '[W]hen applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment… .'

A prospective consumer's obligations therefore come into existence at the moment when applying for credit, and continue to exist while the application for

credit is being considered by the credit provider. During this time, a prospective consumer must fully and truthfully disclose the information required by the credit provider in making its assessment.

What remedies are available to a consumer when a credit agreement is believed to be reckless?

Depending on the circumstances, a consumer may either raise reckless credit as a defence, or make application to court or to the National Consumer Tribunal (the tribunal) to have a credit agreement declared reckless.

If a consumer alleges that a credit agreement was concluded recklessly, sufficient facts must be presented in support of such an allegation. Our courts have not been inclined to declare credit agreements reckless in the absence of substantiated and detailed allegations. This was clearly illustrated in the judgment of *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 (1) SA 310 (GSJ). At para 26 of this judgment, Levenberg AJ noted with some concern that there is a tendency for defendants to make bland allegations that they are 'over-indebted' or that there has been 'reckless credit'. He continued by saying that a bald allegation that there was 'reckless credit' will not suffice.

Should a consumer be successful in proving that a credit agreement was concluded recklessly, the court or tribunal may make an order in terms of s 83(2) of the Act whereby all or part of the consumer's rights and obligations under the agreement are set aside, or suspend the force and effect of the agreement.

Again with reference to the *De Beer* judgment, the court or tribunal should be mindful that the remedy must be 'just and equitable', taking into account factors such as the 'extent of the recklessness'.

What defences are available to the credit provider?

Although the Act clearly creates more obligations for a credit provider than for a consumer, it does provide a credit provider with a complete defence to an allegation of reckless credit.

The defence is set out in s 81(4) and states that, if a consumer failed to fully and truthfully answer any requests for information made by a credit provider as part of its assessment, and such failure materially affected the ability of the credit provider to make a proper assessment, the credit provider will have a complete defence to the consumer's allegation of reckless credit.

Despite the provisions of s 81(4), a credit provider may still have a defence regardless of whether a consumer made a full and truthful disclosure.

To illustrate this point, one can refer to the judgment by Ebrahim J in *Standard Bank of South Africa Ltd v Herselman* (FB) (unreported case no 328/2015, 3-3-2016) (Ebrahim J), where the consumer was found to have made a full and truthful disclosure. However, the credit provider complied with its obligations in that it conducted the required assessment. It was, therefore, held that the defence of reckless credit was without merit.

A consumer must, therefore, be very careful in circumstances where he or she may, in fact, be the one throwing stones in a glass house.

Conclusion

Reckless credit is not a one-way street. The Act creates obligations for both the consumer and the credit provider, and each party is therefore, in its own way, equally responsible for preventing the conclusion of a reckless credit agreement.

Kris Harmse *LLB (UJ)* is an attorney at Smit Sewgoolam Inc in Johannesburg. ❑

By Kgomotso Ramotsho

No more delays on criminal trials

The office of the Judge President Gauteng Division of the High Courts of South Africa, released a new Practice Note that intends to remove unnecessary delays in criminal trails and introduce necessary enhancements, as well as trial dates.

The Practice Note states that amendments to the process and procedures set out in it will be considered on an ongoing basis in light of the experience gained by all participants in the course of the application of the Practice Note. All criminal trials shall be preceded by a pre-trial conference to be held in terms of the Practice Note.

The Practice Note also states that all trials transferred from the magistrates' courts to the High Court roll for the first time shall be subject to a pre-trial conference. In terms of the Practice Note all notifications regarding the holding of pre-trail conferences, as well as other related matters, where necessary will be issued by the Chief Registrar.

Furthermore, pre-trial conferences held in terms of the new Practice Note will be presided over by judges designated by the Judge President and the pre-trial conference in all cases must be attended by –

- the accused;
- the legal representative of the accused; and
- a representative of the Director of Public Prosecutions.

It also states that all parties may seek directives from the judge presiding in any pre-trial conference in regard to the implementation of any pre-trial procedures.

The new Practice Note applies to all criminal trials to be heard in the Gauteng Division, Gauteng Local Division, and Gauteng Division Acting as the Mpumalanga Division of the High Court. The Practice Note took effect on 7 October.

Kgomotso Ramotsho *Cert Journ (Boston) Cert Photography (Vega)* is the news reporter at *De Rebus*. ❑

Zoning matters: A 'SPLUMA' score-card one year on

By Peter Murray

Picture source: Gallo Images/iStock

Planning law shapes and determines our daily activities in important and pervasive ways. The buildings in which we work and live; the roads on which we drive; the reservoirs and substations that supply water and electricity, were all planned, authorised, and continue to exist within a complex legal system of interlinked Acts, ordinances, regulations and town planning schemes.

Many participants in the property industry have, for some time believed, that a systemic overhaul of planning law was needed. In 2001 the White Paper on Spatial Planning and Land Use Management described as part of its findings 'an extraordinarily complex and inefficient legal framework, with planning officials in all spheres of government having to deal with numerous different systems within the jurisdiction of each province, and indeed within most municipalities.'

Pursuant to the White Paper, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was passed into law on 1 July 2015. SPLUMA refers in its preamble to the fragmentation, duplication and unfair discrimination, which characterised pre-existing planning law. One of the main aims of the legislation is, therefore, to create a uniform, recognisable and comprehensive system of spatial planning and land use management throughout South Africa (SA).

This article examines whether – one year since its commencement – SPLUMA has changed our understanding of and approaches to spatial planning and land use management, and whether it has succeeded – from the perspective of planning practice – in its stated aim of ushering in a unified and coherent system of planning law.

Pre-existing legislation

Prior to SPLUMA planning legislation consisted principally of provincial ordinances and Acts. Only two provinces (Northern Cape and KwaZulu-Natal) adopted post-1994 legislation to deal with planning matters; the other provinces continue to utilise ordinances that pre-date democratic constitutionalism. Although SPLUMA now applies nationally, pre-existing provincial legislation has not been repealed and it remains in force. A more coordinated approach would have been to enact SPLUMA only when the provinces were in a position to repeal their planning legislation. SPLUMA is, therefore, an overlay to – rather than a replacement of – existing provincial acts and ordinances. It is not clear how long it will take to phase out the existing provincial legislation.

The existence of coinciding national and provincial planning regimes inevi-

tably causes practical difficulties. Both sets of legislation must be read and applied in conjunction and at present rezoning and township applications are simultaneously advertised, motivated, and decided in terms of SPLUMA and the applicable provincial enactment.

SPLUMA attempts to address this difficulty in s 2(2), which provides that legislation other than SPLUMA may not prescribe 'an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act'. In practice, deciding whether an alternative or parallel mechanism is inconsistent with SPLUMA presents considerable interpretive difficulties, and conflicting legal interpretations.

Rather than introducing a uniform system, SPLUMA has added another legislative layer to the already complex myriad of legislation which it sought to replace.

Development principles, norms and standards

One of SPLUMA's innovations is the introduction of a set of five nationally applicable development principles (s 7), namely –

- spatial justice;
- spatial sustainability;
- efficiency;
- spatial resilience; and
- good administration.

Although the modernisation provided by an overarching, nationally applicable set of normative standards is sound, the legislature has not provided concrete and practical definitions of these concepts and this will inevitably lead to a proliferation of interpretive difficulties and disputes. However, practitioners should be aware that all land use applications must be motivated in terms of the five principles.

Furthermore, the Minister of Rural Development and Land Reform, must in terms of s 8 of SPLUMA prescribe a set of norms and standards for land use management and land development. These must reflect national policy and promote social inclusion and spatial equity. The norms and standards have not yet been published; it is also not clear how they will relate to and intersect with the development principles.

Spatial development frameworks

In terms of s 12 of SPLUMA each sphere of government must prepare its own spatial development framework (SDF). The framework interprets and represents the spatial development vision of that sphere of government. SPLUMA sets out extensive checklists for the contents of an SDF.

Three conceptual difficulties arise, namely:

- The courts have held that planning is, constitutionally, an exclusive area of municipal competence (see, for example, *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC)). The role and function of national and provincial SDFs is, therefore, not clear, and SPLUMA provides no guidance. This apparent conflict between the constitution and SPLUMA's reference to SDFs is still to be resolved.
- The Local Government: Municipal Systems Act 32 of 2000 already deals with SDFs. It is not clear why the mechanism has been repeated in SPLUMA and how conflicts between the two enactments must be understood.
- Section 18 of SPLUMA provides that the Minister may publish an SDF for 'any region of the Republic', however, a region is not defined and it is not clear how this will work in practice.

An intractable problem, which causes practical difficulties on a daily basis, arises from s 22 of SPLUMA, which determines the legal status of SDFs. Section 22(1) provides that neither a planning tribunal nor any other authority may make a decision 'which is inconsistent with a municipal spatial development framework'; in terms of s 22(2) decision-makers may depart from the provisions of an SDF 'only if site-specific circumstances justify a departure'.

Although this formulation gives significant flexibility to decision-makers, the sub-sections appear contradictory. In their written motivations, and in oral arguments before the tribunal, practi-

tioners will have to set out clearly and with appropriate evidence the site specific circumstances, which justify a decision which departs from the SDF.

Land use change

Chapter 6 of SPLUMA sets out a procedural framework for land use change. In terms of s 33 all land development applications must be submitted to a municipality as the authority of first instance.

Municipalities are required to establish a municipal planning tribunal (s 35), and they may authorise that certain land use and land development applications may be considered and determined by either an official in the employ of the municipality or by the tribunal. The tribunal consists of at least five members who are either municipal officials or council appointees who have knowledge and experience of spatial planning and land use management. The SPLUMA mechanisms for co-opting experts and expertise are innovative and will hopefully be utilised extensively in practice.

Tribunals have powers to –

- approve or refuse land use applications;
- impose reasonable conditions;
- conduct investigations;
- give directions relevant to their functions to any person in the service of a municipality; and
- decide questions of their own jurisdiction.

Various different types of applications are mentioned in s 41, namely –

- township establishment;
- subdivision of land;
- consolidation of land;
- the amendment of a town planning scheme; or
- the removal amendment, or suspension of a restrictive condition.

Section 42 sets out the factors, which a tribunal must take into consideration in deciding applications. Previously decision-makers would take into consideration the need for and desirability of proposed land use change. In terms of SPLUMA these factors have been replaced with –

- public interest;
- constitutional transformation imperatives;
- facts and circumstances relative to the application;
- respective rights and obligations of all those affected;
- the state of and impact on engineering services, social infrastructure, and open space requirements; or
- any factors that may be prescribed.

The nature and extent of factors that must be taken into consideration in deciding land use applications has, therefore, been considerably widened and modernised.

In terms of s 45 of SPLUMA applications may be submitted by an owner, an agent, or any person in terms of a land availability agreement. An innovation is that a service provider responsible for the provision of infrastructure to the land may also apply for the rezoning of land.

One of the most notable omissions from SPLUMA is that in providing land use change procedures it does not mention that interested and affected parties may object to applications. This has been a key feature of planning procedures for many decades, and it has provided a valuable procedural remedy to neighbouring property owners, residents, activists, and even competitors who oppose proposed land use change. Regulation 14(1)(d) of the SPLUMA regulations (GN R239 *GG*38594/23-3-2015) provides that municipalities must provide – in terms of by-laws – for 'the manner and extent of the public participation process for each type of land development and land use application.' Some by-laws provide for an objection procedure. It is not inconceivable, however, that some by-laws might not provide one. Practitioners will have to consider the by-laws of the municipality concerned before deciding how best to oppose a land use application or to resist an objection.

Although SPLUMA does not provide a uniform objection remedy across SA it does introduce a new intervener petition process (s 45(2)). Any person who is interested in or affected by proposed land use change may apply for intervener status. The intervener petition may seemingly be launched at any time, even if the window period for objections (in terms of the applicable by-laws) has closed.

Any person whose rights are affected by a decision taken by a tribunal may, within 21 days, lodge an appeal. This is a wider formulation than previous ones where only objectors could lodge appeals.

Appeals are heard either by the executive authority of the municipality (the executive committee or the executive mayor) or by a body or institution outside of the municipality. In terms of reg 23 the appeal authority may hear the appeal by means of a 'written hearing' or an 'oral hearing'. I submit that both formulations are unfortunate. Firstly, in some municipalities the executive authority will serve as the appeal authority. In others, an outside body will be designated. A greater degree of objectivity can, naturally, be expected from outside bodies. Secondly, the decision to hold a hearing or not is discretionary and no objective criteria are set out for purposes of exercising the discretion. In practice, very few appeal hearings are held. In the previous planning paradigm most provinces convened a Townships Board for purposes of hearing appeals. Large amounts of institutional expertise developed within the boards, as well as a high degree of objectivity. This might now have been lost.

Land use management systems

Chapter 5 of SPLUMA deals with land use management.

Section 24 of SPLUMA is a welcome innovation in terms of which every municipality must, after public consultation, and within five years from the commencement of SPLUMA, approve a single land use scheme for its entire area of jurisdiction. At present some municipalities have more than one scheme. Many areas within SA fall outside of the area of a scheme. Areas, which previously did not fall under a town planning scheme, will in the future fall within a unified scheme area.

SPLUMA sets out a checklist of important matters, which must be included in any new land use scheme. Furthermore, s 25 modernises the purpose of a land use scheme and now refers to economic growth, social inclusion, efficient land development and minimum impact on public health, the environment and natural resources. A further innovation is that a municipality must review its land use scheme at least every five years. Previously land use schemes were not reviewed for years or even decades.

Conclusion

Prior to the advent of SPLUMA planning law was severely fragmented, consisting as it did of levels and layers of confusing, disparate legislation. There was a dire need for reform.

SPLUMA constitutes an important step towards a uniform system, which is nationally applicable and more modern in its approach to planning. However, given the central role of planning in guiding and regulating the manner in which our cities, towns and rural areas develop and change, a valuable opportunity has been missed. SPLUMA should have replaced the provincial planning regimes; the time lapse between SPLUMA and the new by-laws is problematic in practice; and the new schemes should have been ready for simultaneous implementation. This is particularly regrettable given the lapse of 15 years between the White Paper and the SPLUMA effective date. Furthermore, some of the procedures in and substance of SPLUMA appear not to have been conceived having sufficient regard for the practice of planning law, and with a clear vision of the systemic change that was and is required. It will remain, unfortunately, for the courts, and future legislative amendments, to iron out the creases.

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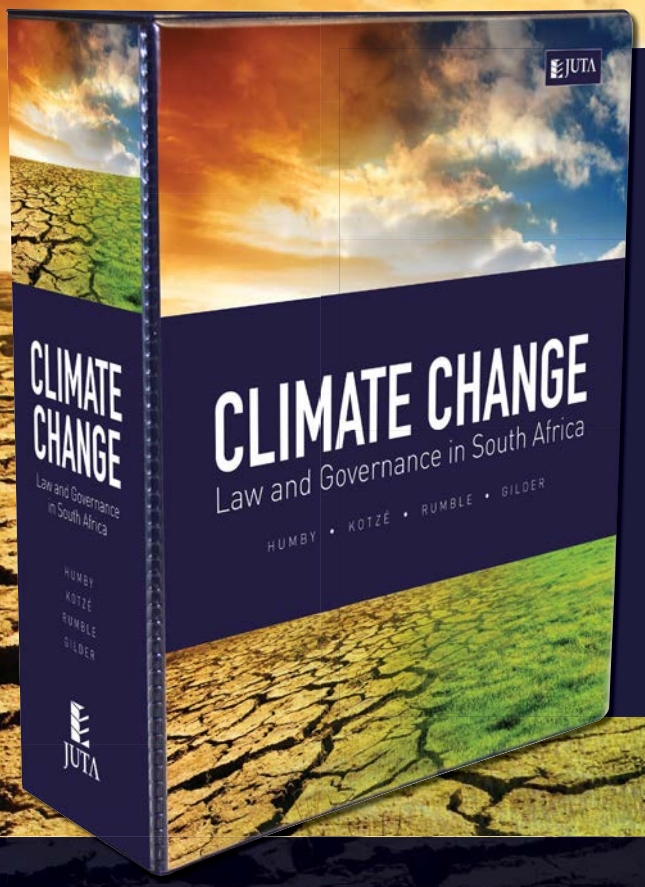

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Appraisal rights and protection of minority shareholders

By
Basil
Mashabane

The purpose of this article is to briefly introduce a discussion around appraisal rights, their history and background, how they find application under our Companies Act 71 of 2008 (the Companies Act) and the impact they have had so far in our company law regime as far as the protection of minority shareholders is concerned.

The article is written in a contextual manner and focuses on appraisal rights and how they apply to fundamental transactions and, also includes a brief discussion of a recent High Court judgment, where the court was approached to make a ruling on a case involving the question of appraisal rights raised by shareholders.

History and background

The concept of appraisal rights according to available literature on the subject, originated in the United States of America (US) under a law known as the Model Business Corporation Act, 1984 (MBCA) and the idea behind it was to enable shareholders who disagree and/or dissent from a corporate decision of a company to be provided with a right to exit the company by having the company pay them for the fair value of their shares to enable them to exit.

Viewed from a different perspective an argument has been made that the rationale for the development of appraisal rights is to ensure that the 'minority shareholder should not stand in the way of a transaction approved by the majority shareholders, and second, appraisal rights should assist the dissenters without creating a great burden for the corporation,' (Julián J Garza Castañeda 'Appraisal Rights: The "Fair" Valuation Of Shares In Case Of Dissent' (1999) September – December *The University of Mexico Law Journal* 809 at 814).

The appraisal rights under the MBCA are available only under limited circumstances that result in a change of control of a company and involve –

- implementation of a proposed merger involving the company;
- a share exchange agreement resulting in a control acquisition of the company shares;
- a sale of all or a substantial part of the company's property other than in the usual and regular course of business; and
- an amendment to the company's articles that has a material and/or adverse effect on the rights of the dissenter's shares.

From the above, it is clear that the US lawmakers – in enacting this law – sought to strike a balance between the rights and powers that the majority have in running the affairs of a company, including making decisions that could fundamentally change the nature and character of a company, while at the same time, providing minority shareholders with an opportunity to –

- express their dissent to the decisions adopted; and
- also to be allowed to exit the company by being paid a fair value for their shares should they be uncomfortable with the changes.

The concept of 'fair value' and how it is determined has been and continues to be a source of contention in the US but the overall and accepted premise is that 'fair value of the shares paid to the dissenters must compensate shareholders for their investments, expectations, and results in a corporation' (Garza Castañeda (*op cit*) at 821) taking into account the inherent risks involved in running a business including the highs and lows and the lack of luck involved sometimes.

Application of appraisal rights in South Africa

The Companies Act came into effect in May 2011 and the Act has, as one of its main aims and purposes, the provision of appropriate redress for investors and third parties involved in companies and in particular, minority shareholders. To that end, the Companies Act has established entities that have the responsibility of interpreting and applying the provisions designed to achieve this purpose, one of them being the Takeover Regulation Panel, which has, as its main purpose, the protection of the rights of minority shareholders during offers to ensure that the shareholders are provided with sufficient information and adequate time to make informed decisions about offers and transactions undertaken by a company.

The Companies Tribunal is also established as an alternative dispute resolution body to deal with mainly shareholders' and other company law-related in a relatively quick and less costly manner.

The main provisions of the Companies Act created to serve the above purposes is s 163, which seeks to provide relief to shareholders or directors from oppressive or prejudicial conduct enabling a

shareholder to apply to court for relief where he or she believes that conduct by the company is unfairly prejudicial to his or her rights and interests as a shareholder, or that the business of the company is being run in an unfair or prejudicial manner to his or her rights and/or interests as a shareholder.

The second major provision is s 164, which deals with appraisal rights available to dissenting shareholders. The provision and the manner in which it is written borrows extensively from the MBCA under the US laws.

It enables a dissenting shareholder during an offer and under very limited circumstances –

- to inform the company of his or her intention to vote against a special resolution; and
- within a prescribed time to require that the company pay him or her the fair value for all the shares he or she holds in the company.

As with the MBCA, the provision also makes reference to 'fair value' but takes it a step further by stating under s 164(15) that the court will determine 'fair value' and may use its discretion to appoint one or more appraisers to assist in determining same and very interestingly, the court has a discretion to allow reasonable interest to be added to the amount payable to a dissenting shareholder from date of the adoption of the special resolution to date of payment.

The Companies Act does not, however, provide guidance as to how the court needs to go about in determining 'fair value'. Therefore, one foresees a similar situation as in the US, in terms of which, the courts will rely on to determine what constitutes 'fair value' and the appropriate mechanics of determining same.

As is also the case under the MBCA, the appraisal rights enabling a dissenting shareholder to exit by being paid the fair value are limited to a company effecting material amendments to its Memorandum of Incorporation or a company involved in a fundamental transaction that involves –

- a company effecting a disposal of a majority of its assets or major part of its business;
- a scheme of arrangement whose purpose is mainly to expropriate shareholders; or
- a proposed amalgamation or merger in terms of s 113 of the Companies Act.

A company proposing any of the above corporate actions is further required under s 164(2)(*b*) to include a statement in the transaction document informing shareholders of their rights in terms of the provision and it is important that the statement be provided without any interpretation and merely as a summary of the provision with a copy of the s 164 part of the Companies Act also attached to the transaction document.

Case law

The case of *Justpoint Nominees (Pty) Ltd and Others v Sovereign Food Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening)* (ECP) (unreported case no 878/16, 26-4-2016) (Stretch J) is one of the first cases heard on appraisal rights.

The brief facts of the case are that Justpoint Nominees (Pty) Ltd (Justpoint) were the registered shareholders in Sovereign Foods Investments Limited (Sovereign Foods) and the latter proposed a fundamental transaction, in terms of which, it sought to have a scheme of arrangement proposed between itself and its shareholders enabling it to repurchase its own shares in Sovereign Foods using the provisions of s 48(8) of the Companies Act read with s 114 requiring that the transaction be effected in terms of a scheme of arrangement, which among others, requires that a special resolution approving the transaction be adopted and passed at a properly constituted meeting of shareholders before it could be implemented.

Justpoint expressed unhappiness with the proposed resolution and sent their written demand in terms of s 164(6) to be paid fair value for their shares in order to exit the company.

Sovereign Foods had included in its transaction documents, a condition precedent, to the effect that the transaction would not be implemented if it had received objections in the aggregate of 5% of its shares from shareholders exercising their appraisal rights. Sovereign Foods sent notices to shareholders in terms of ss 164(5) and 164(8) unless it decided to waive the condition precedent within 25 days from the date on which the notices had been sent to the shareholders by the company.

Justpoint and an intervening party to the case, BNS Nominees (Pty) Ltd objected to the resolutions in terms of s 164(4) and the objections received amounted to more than 5%, which meant that Sovereign Foods would have had to make a decision on whether the condition precedent had been fulfilled or have same waived in terms of the provisions indicated above.

Sovereign Foods failed to waive the condition precedent within the stipulated time, but instead it conjured up a new transaction (revised transaction) in terms of which it intended to repurchase less than 5% of its shares, which would mean that the revised transaction would not fall under s 48(8) read with s 114 and that the appraisal rights would be excluded and could not apply to the transaction.

The revised transaction also sought to exclude dissenting shareholders from voting on it on the basis that they had, by exercising their rights in the initial transaction, lost their normal shareholder rights in terms of s 164(9) except for receiving fair value for their shares and, therefore, could not vote on the resolutions of the revised transaction.

The court flatly rejected the argument by holding that the failure to waive or fulfil the condition precedent meant that the initial transaction could not be operative, therefore, the shareholders could not be prevented from voting on the revised transaction on this basis and that their rights as shareholders including the right to vote as protected under s 37 must be respected.

The court also accepted the argument of BNS based on s 163 of the Companies Act, that the conduct of Sovereign Foods was both oppressive and unfairly prejudicial to its rights and interests and the court determined that the conduct of Sovereign Foods in denying the shareholders to vote on the revised transaction on the basis that they must first withdraw their appraisal rights on a transaction that was not operative was manifestly unjust, unfair and 'denies the dissenting shareholders fair participation in the affairs of Sovereign', being the company.

The important outcome of this case in my view is on its interpretation of s 164(9) by arguing that non-waiver or fulfilment of a condition precedent effectively means that a transaction has failed, and therefore, cannot be used to rely on s 164(9) in order to deny shareholders their right to vote on a separate transaction unless if they withdrew their appraisal rights.

Conclusion

The remedy of appraisal rights is an interesting inclusion in our company law and as seen above also a very strong weapon that shareholders can use to protect their rights and to withdraw from a company that has experienced a profound change from the one they had initially invested in.

Further that and as seen from the *Justpoint* case, the courts will adopt an equity-based approach when deciding on matters such as these which means effectively that companies cannot use technical arguments to deny minority shareholders the right to participate in the affairs of a company including exercising or withdrawing their appraisal rights.

A question has been asked on the role of the Takeover Regulation Panel in this process. Reading through the provisions of the Act, it is clear that the legislature deemed it appropriate that matters relating to appraisal rights must be primarily and directly handled by the courts.

Therefore, the panel does not have a significant role to play and whether this is correct or not remains to be seen taking into account the role and function of the regulatory body.

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Picture source: Gallo Images/iStock

Creating trusts – *what should your client know?*

By Edrick Roux and Bindiya Desai

When performing any given task, using the right tool for the job will make the task significantly easier to accomplish and will also ensure that the quality of the task is superior. The same holds true for estate planning exercises and there are few tools that are on par with a trust in this regard.

A trust is a unique vehicle, which involves the exchange of assets for a complete separation of ownership and enjoyment of these assets from the personal estate of an estate planner, which in turn leads to enhanced protection from creditors. Flexibility when making use of the funds held in trust and of course the removal of assets will also reduce estate duty payable by an estate planner in future as these assets can no longer be attributed to him.

As with all things in life, there are some key elements that must be present before a trust will be able to serve the needs of the estate planner effectively, among others:

- The trust deed must be drafted meticulously and it is crucial that it be drafted specifically with the needs of the estate planner in mind. Making use of a template could lead to undesired, and sometimes disastrous, consequences such as the situation which arose in the case of *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA).
- The parties to the trust should be identified – not only with convenience in mind – but also in respect of potential benefits, which may be available.
- The tax consequences surrounding the use of a trust must be considered. This discussion should not confine itself to a tactical discussion, but should instead extend to a strategic discussion, particularly in light of the recent proposals made by the Davis Tax Committee.

Each party involved in the creation of a trust deed is exceptionally important, and each has their own unique considerations to take into account.

The parties involved in the creation of the trust, and those who are later involved in the administration of the trust, are of critical importance.

It should be noted that not all of the parties who are involved in the trust deed will necessarily be involved in the administration of the trust. What follows is a brief discussion of the significance of the respective parties at the relevant stages.

Parties to a trust

The parties involved with a trust deed can generally be divided into three categories:

- The founder of the trust – this is the individual who has created the trust and makes the initial donation of funds to the trust. This is usually, but not always, the estate planner.
- The trustees of the trust – these are those individuals or entities who take responsibility for the effective administration of the trust and will ultimately handle the day to day activities of the trust.
- The beneficiaries of a trust – these are those individuals or entities, which may benefit from the trust.

Of the above, only the founder and the trustees will have a role in the creation of the trust and the conclusion of the agreement to create the trust will make the parties enter into an agreement, which is essentially a *stipulatio alteri*.

The founder

The identity of the founder merits some consideration, particularly since the founder of a trust can never be amended or replaced in any way and will likely continually play a role in the trust.

The founder may be involved with the trust as a trustee, a beneficiary or could even be required to take part in decisions in respect of any future amendment of the trust. Where the founder of a trust is chosen carelessly or simply based on convenience, far reaching consequences could arise.

These consequences could range from unnecessarily incurring transfer duty, which could be limited to some degree by careful planning, or could even render the amendment of the trust deed next to impossible in the event where the founder is required for the amendment and can no longer be traced.

Trustees of the trust

In South African law a trust is not a legal person, save in terms of certain pieces of legislation, but is regarded as a *sui generis* entity – which can only operate through the trustees – which must be appointed by the Master of the High Court, who has jurisdiction over the area where the trust is created.

Arguably, this makes the appointment

of the trustees of the trust the most important decision that needs to be made when creating a trust. The individuals appointed as trustees must act in a fiduciary capacity, in accordance with the provisions of the trust deed and must ensure that the best interests of the beneficiaries are paramount when taking any action in their capacity as trustee.

Who can, and for that matter who should, act as trustees of a trust is a matter of great importance, yet from a practical point of view it is often treated almost casually.

The question is often raised as to how the following individuals fit into the scope of trusteeship, namely –

- the estate planner;
- an independent trustee; and
- a protector.

What follows is a brief discussion of the above.

Estate planner as trustee and the concept of a 'sham trust'

In the past it was regarded as a risk for the estate planner to be intricately involved in the trust administration.

It was seen as creating the impression of control over the trust assets, which could later be used against him or her should creditors, or even a spouse in the process of instituting divorce proceedings, wish to lay a claim on the assets held in trust.

This would be done on the basis of such a trust being an alter ego of the estate planner.

This is often referred to, incorrectly, as a claim that the trust is a so-called 'sham trust' and, therefore, the assets should be regarded as being that of the estate planner. Although the terms 'sham' and 'alter ego' are often used interchangeably, from a legal technical point of view this is incorrect and could theoretically lead to pleadings being excipiable.

The term 'sham trust' refers to a trust which is created incorrectly, thus due to a failure to ensure that one or more of the *essentiallia* of a trust are present, the trust never validly came into existence and is, therefore, void *ab initio.*

It is for this reason that an investigation surrounding a 'sham trust' will involve an investigation of the trust deed to determine whether all of the *essentiallia* are present, whereas an alter ego investigation will revolve around the use of the trust assets and the measure of control, which is afforded to an estate planner.

Although there is no prohibition on an estate planner being a trustee of his or her own trust, such an appointment must be done with the proper checks and balances taken into account to minimise the risk that a trust may be found to be the *alter ego* of an estate planner.

The independent trustee

The designation of a trustee as an 'independent trustee' has become relatively common in practice and the norm has become that a trust will have an independent trustee appointed. An independent trustee is essentially a trustee that will act in the best interests of the beneficiaries at all times.

By the very nature of the designation, an independent trustee should not be a beneficiary of the trust. Where a trust does not contain an independent trustee, the measure of control afforded to the trustees of the trust, provided that they are also beneficiaries of the trust, is substantial and accordingly the risk factor of the trust increases.

The concept originally came into the limelight as a result of the case of *Parker* (*Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA); *Parker NO and Others v Land and Agricultural Bank of SA* [2003] 1 All SA 258 (T)). An aspect which is often overlooked, however, is that the mention of the independent trustee does not form part of the *ratio dicadendi* at all, but was in fact only mentioned as an *obiter dictum.*

Quite often it is misconstrued as being a legal requirement to have an independent trustee appointed to a trust deed, but this is simply not the case. Failure to appoint an independent trustee will not have any effect on the validity of the trust, however, it may affect the level of control of the estate planner.

Thus it is always preferable, but strictly speaking not necessary from a legal perspective, to have an independent trustee appointed.

A protector

A concept which is foreign to our law, the protector, is the ultimate guardian of the trust and although the protector has no authority to actively administer the trust, as such power always remains with the trustees, the protector does possess the authority to dismiss trustees should they fail to adhere to their duties.

Similar powers could easily be drafted into a trust deed by a skilled drafter, however, great care should be taken to ensure that the estate planner is not exposed to unnecessary risks.

The appointment of a protector could also lead to unintended tax consequences as the effective management of the trust may then be deemed to follow the location of the protector and not the trustees.

The beneficiaries

One of the cornerstones of trust law is that there must be identifiable, or clearly ascertainable, individuals who are to receive the benefit of the trust, colloquially known as the beneficiaries of the trust.

These beneficiaries, who must be defined in the trust deed itself, can comprise of natural persons, juristic persons or even in some instances further trusts that are created as part of an estate planning process.

Practically the difference between an identified beneficiary and identifiable beneficiaries can be illustrated as follows –

- an identified beneficiary is one who is specifically mentioned in the trust deed for example, John Doe (ID No: XXX); or
- an identifiable beneficiary generally refers to a specific class of beneficiaries for example, the children of John Doe.

What is important to note, however, is that a group of beneficiaries must not be too widely defined, as a lack of identifiable beneficiaries could lead to the trust being invalid and could lead to unintentional consequences.

Although the beneficiaries are part of the trust deed, they have no control over the trust or the management thereof and unless they are in possession of a vested interest in the trust assets, which can only occur in certain circumstances, they only have a hope to be benefitted, known as a '*spes*' and thus can have no claim on performance by the trustees.

Conclusion

The importance of ensuring that one obtains expert advice when dealing with an estate planning exercise cannot be emphasised enough. Every step taken in the process, beginning with the first consultation with your client through to the delivery of the final draft of a trust deed needs to be tailored to cater for the specific needs of each individual client at hand.

There is only one way to achieve this level of personal service and that is by ensuring that you have a skilled and trusted adviser who can assist you throughout the entire process. If such an expert is not involved in the process, the risk of having ones estate planning resulting in unwanted costs, which could likely have been avoided, becomes much higher.

Importantly it is necessary to take into account that such an adviser must not only be versed in the laws surrounding trusts and estates, but should ideally be skilled in virtually all areas of law, with particular emphasis on the laws of taxation.

These advisers, although generally few and far between, are well worth seeking out as they can ensure that the wishes of the estate planner are catered for as far as possible while also adding value to any discussions surrounding estate planning.

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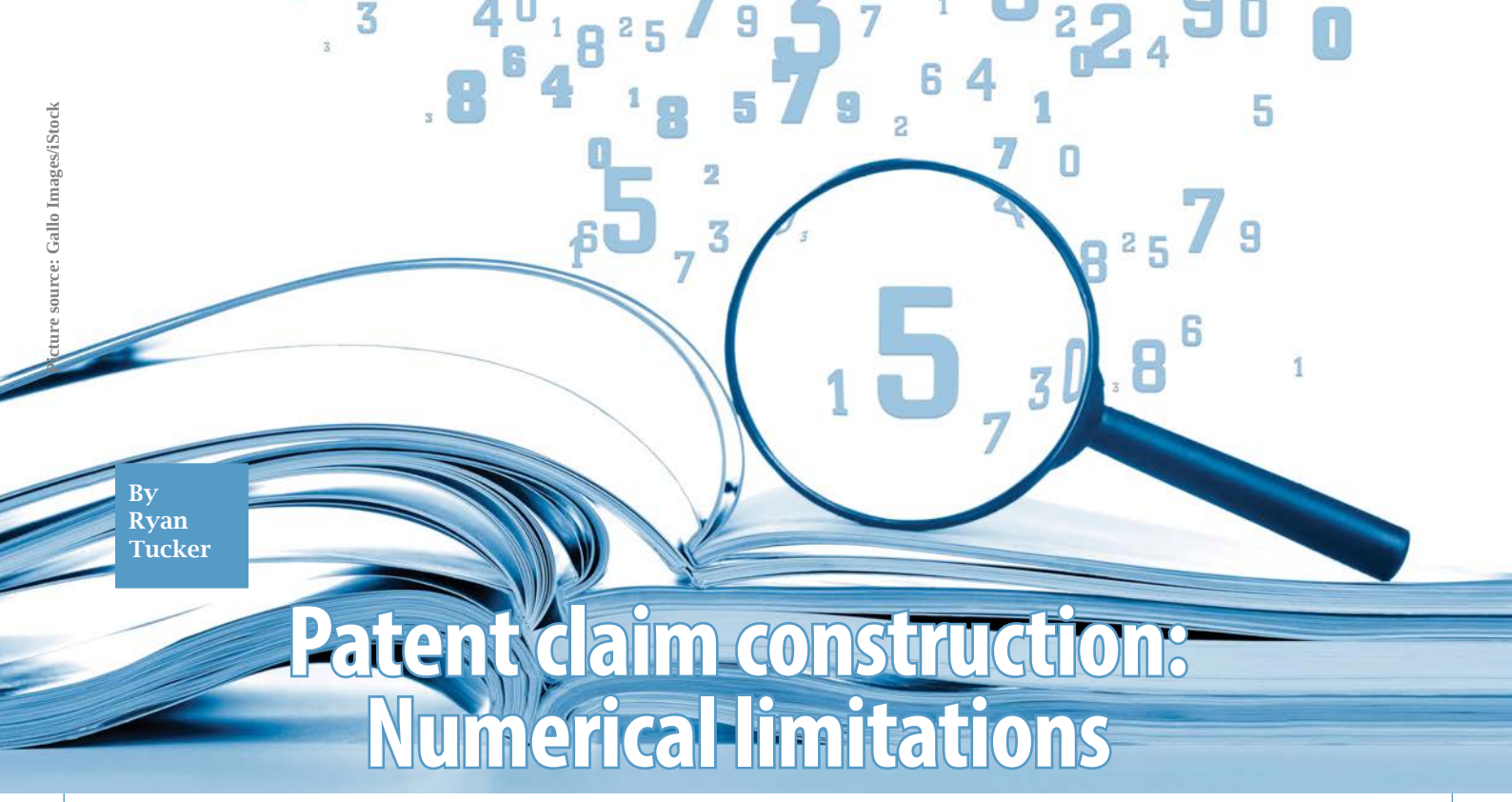

Picture source: Gallo Images/iStock

By Ryan Tucker

Patent claim construction: Numerical limitations

Patent attorneys spend a great deal of time trying to find the 'perfect' word for a technical element of an apparatus or method in patent applications. They are required to conduct the same analysis for numerical limitations, including, numerical ranges. The construction of both words and numerals needs to take place in patent attorneys' daily practices; with the latter equally applying to all fields of technology: Electrical, chemical, mechanical, biotechnological, etcetera.

Using *Smith & Nephew Plc v ConvaTec Technologies Inc* [2015] EWCA Civ 607, this article will examine numerical limitations in patent claims in the United Kingdom (UK) (and by implication, South Africa (SA)), given their impact on patent drafting and prosecution, as well as on patent enforcement/litigation.

Facts of the case

The critical issue for the court was deciding the numerical limits of the first claim of ConvaTec's UK method Patent No. 1, 343, 510, entitled 'Light Stabilized Antimicrobial Materials' (the patent). This contained a third integer, which read –

'(c) subjecting said polymer, during or after step (b) to one or more agents selected from the group consisting of ammonium salts, thiosulphates, chlorides and peroxides which facilitate the binding of said silver on said polymer [the agent being present in a concentration between 1% and 25% of the total volume of treatment], which material is substantially photostable upon drying, but which will dissociate to release said silver upon rehydration of said material.'

Smith & Nephew had developed a process that it thought would not infringe the patent, by changing the concentration of binding agent to no more than 0,77%, and this required an interpretation of the numerical limitations of the bracketed phrase in the above integer.

In a nutshell: Did Smith & Nephew's 'modified process' infringe on NovaTec's patent, which allowed for a range, namely, between 1% and 25%?

Court of Appeal's judgment

The Court of Appeal dealt, ultimately, with one principal issue: The correct construction of the phrase 'the agent being present in a concentration of between 1% and 25%.'

The court began its assessment by restating the approach to interpretation of patent claims as considered by Lord Hoffman in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd & Ors* [2004] UKHL 46.

As explained, interpretation of claims is objective and the question is always 'what would a skilled person have understood the patentee's words (or numerals) to mean?'

Furthermore, Lord Hoffman's principles were summarised by Jacob L.J. in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2009] EWCA Civ 1062 at para 5 as follows:

- The first overarching principle is that contained in art 69 of the European Patent Convention, which provides that the monopoly conferred by the patent must be determined by the claims. However, the description and drawings may be used to interpret the claims. In short the claims are to be construed in context. It follows that the claims are to be construed purposively – the inventor's purpose being ascertained from the description and drawings. The question to ask is what a skilled person having the necessary skill and expertise would have understood from the patent, including the description and drawings?
- It follows that the claims must not be construed as if they stood alone – the drawings and description only being used to resolve any ambiguity. Purpose is vital to the construction of claims.
- When ascertaining the inventor's purpose, it must be remembered that he or she may have several purposes depending on the level of generality of his or her invention. Purpose and meaning are different concepts. The patentee may have several purposes depending on the generality of his or her invention. Generally, a patentee may have one or more specific embodiments of his or her invention, as well as a generalised concept. However, there is no presumption that the patentee intended the widest possible meaning consistent with the purpose to be given to the wording he or she used in the patent.
- Thus purpose is not the be-all and end-all. One is still at the end of the day concerned with the meaning of the language used. Hence the other extreme of protocol – a mere guideline – is also ruled out by art 69 itself. It is the words or terms of the claims that delineate the patentee's monopoly.
- It follows that if the patentee has included what is obviously a deliberate limitation in these claims, it must have a meaning. One cannot disregard obviously intentional elements or limitations.
- It also follows that where a patentee has used a word or phrase that, acontextually, might have a particular meaning (narrow or wide), it does not necessarily have that meaning in context.
- It further follows that there is no 'doctrine of equivalents'.
- On the other hand, purposive con-

struction can lead to the conclusion that a technically trivial or minor difference between an element of a claim and the corresponding elements of the alleged infringement nonetheless falls within the meaning of the element when read purposively. This is not because there is a doctrine of equivalents: It is because that is a fair way to read the claims in context.

- Finally, purposive construction needs one to eschew the kind of meticulous verbal analysis, which lawyers are too often tempted by their training to indulge.

The Court of Appeal went on to add two further principles to the above principles:

- First, the reader comes to the specification with the benefit of the common general knowledge of the art and on the assumption that its purpose is to describe and demarcate an invention.
- Second, the patentee is likely to have chosen the words appearing in the claim with the benefit of skilled advice and, insofar as he or she has cast his or her claim in specific rather than general terms, is likely to have done so deliberately.

The court went on to say that the above principles are just as applicable to a claim containing a numerical range or limitation as they are to one containing words or phrases. In the UK (as in SA), the objective of art 69 is achieved by 'contextual interpretation' or 'purposive construction', namely, what would a skilled person have understood the words (or numerals) to mean?

The court emphasised three possible ways to construe numerical values in a claim:

- an 'exact values' approach, where anything below '1' or above '25' (exactly ie, absolute numerical values) does not infringe;
- a 'significant figures' approach, where '1' to one significant figure or value, which includes all values greater than or equal to 0,95 and less than 1,5, such that 0,77 does not infringe; and
- a 'number rounding' approach, where '1' includes all values greater or equal to 0,5 and less than 1,5, such that 0,77 infringes.

Discussing several previous judgments on numerical limitations, the Court of Appeal distilled certain points of particular relevance to these types of claims:

- Whether one is considering infringement or validity, the scope of any such claim must be exactly the same.
- There can be no justification for using rounding or any other kind of approximation to change the disclosure of the prior art or modify the alleged infringement.
- The meaning and scope of a numerical range in the patent claim must be ascertained in light of common general knowledge and in the context of the specification as a whole.
- It may be that a skilled person would understand that the patentee has chosen to express the numerals in the claim to a particular but limited degree of precision, and so intends it to include all values within the claimed range when stated with the same degree of precision.
- Finally, whether this is so will depend on all of the circumstances, including the number of decimal places to which the numerals in the claim have been expressed.

The critical phrase in the patent claim is 'the agent being present in a concentration between 1% and 25% of the total volume of treatment', which raised two questions for the court:

- Would a skilled person believe that the patentee intended the values of 1% and 25% to be taken as exact/absolute values, or would this person understand that the patentee used a standard number convention to express the limits of the claim to a lesser degree of accuracy?
- On the assumption that the numerical limits in the claim did not define exact/absolute values, would a skilled person understand the numbers to be expressed in terms of whole numbers (zero decimal places) or in terms of significant figures?

The court affirmed the court *a quo*'s rejection of Smith & Nephew's primary case, that the limits of the claim be the range exactly between 1% and 25%. This left the court in no doubt that a skilled reader would not believe that this is how the patentee intended the claim limits to be understood. Instead, a skilled reader would believe that the patentee intended the limits to be understood in a less precise way.

Number rounding vs significant figures approaches

The court went on to discuss the 'number rounding' or 'whole number' approach.

At the bottom of the range, 1% includes all those values, which round to 1% when expressed to the nearest whole number. At the top of the range, 25% includes all those values, which round to 25% when expressed to the nearest whole number. Looking at the claimed range as a whole, it embraces all values greater than or equal to 0,5% and less than 25,5%.

The court held the 'significant figures' approach to be a little more complex, summarising the relevant rules as follows –

'i) non-zero digits are always significant;

ii) zeros between non-zero digits are always significant;

iii) leading zeros are never significant …; and

iv) in the absence of a decimal point, trailing zeros are not generally significant unless stated otherwise … .'

Taking first the bottom of the range, 1%, and the top of the range, 25%, there is asymmetry around these numbers (in relation to '1' – greater than or equal to 0,95% and less than 1,5%; and '25' – greater than or equal to 24,5% and less than 25,5%).

The court opined that the 'significant figures' approach gives rise to 'very strange results if applied to the teaching in the body of specification', citing examples from ConvaTec's diagrams. On the contrary, the 'number rounding' approach produces a symmetrical distribution of random errors around a number (namely, '1' incorporates all values greater than or equal to 0,5% and less than 1,5%).

The court stated that there can be no logical basis for preferring the 'significant figures' approach over the 'whole number' (or zero decimal place) approach in interpreting numerals in claims, ultimately siding with ConvaTech's view that it is not the number of significant figures that is important in this context, but the precision with which the number is written.

Comments

In this judgment the UK Court of Appeal has shown a preference for the 'number rounding' approach over the 'exact values' and 'significant figures' approaches, unless the description of the specification indicates expressly otherwise.

However, the 'number rounding' approach, although simple to apply when construing numerical limitations and ranges, is not without its weaknesses. In this case, the result lead to 0,5% being the lowest value to be below (relative to the number '1') in order to overcome the patent, which is a relatively large margin to overcome (0,5%), in my view.

Other foreign jurisdictions may interpret numerical ranges and limitations differently. Therefore, there is the possibility for variation in solutions on the same inquiry – territory by territory. This is important to take into account, as South African courts, driven by the constitutional imperative, may refer to any foreign judgments in its own assessment of a particular case. This is of particular relevance in intellectual property (including patent) matters.

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A smokey issue – the law relating to the distribution of e-cigarettes

By
Yda van
Aartsen

Picture source: Gallo Images/iStock

Will electronic-cigarettes or e-cigarettes prevent people from smoking cigarettes? Are we just replacing one harmful device, namely, regular tobacco cigarettes, with another harmful and toxic device?

These questions make legal minds struggle all around the world. In recent years the e-cigarette industry became a 3 billion dollar industry, with approximately 466 different brands of e-cigarettes on the market worldwide (Olivia Rose-Innes 'E-cigarettes – the slow way to poison yourself?' www.news24.com, accessed 26-7-2016).

I will summarise the general impact and views of e-cigarettes, the health implications thereof, the regulation by legislation, the regulatory struggle and recent developments in legislation.

Composition of e-cigarettes

The one major difference between the two alternatives is that cigarettes contain tar, while e-cigarettes do not. This, however, does not mean that e-cigarettes are not harmful. The smoking of an e-cigarette will cause the heating of a liquid, which consists of nicotine, tobacco-specific nitrosamines, tobacco alkaloids, aldehydes, propylene glycol and/or glycerine, metals, volatile organic compounds and flavouring agents (Lauren K Lempert, Rachel Grana and Stanton A Glantz 'The importance of product definitions in US E-cigarette laws and regulations' https://tobacco.ucsf.edu, accessed 4-11-2016).

The similarities between e-cigarettes and regular tobacco cigarettes are that both contain nicotine, which is addictive and also a harmful toxin. Although different brands of e-cigarettes contain different amounts of nicotine when consumed, more surprising is that e-cigarettes also contain the toxic compound, which is found in anti-freeze ('Summary of results: Laboratory analysis of electronic-cigarettes conducted by FDA' www.fda.gov, accessed18-7-2016). Another problem is that the labels on e-cigarettes are very misleading as to the levels of nicotine actually contained in the product (see table on the next page):

Study conducted by:	Matrix:	Deviation from label:
Goniewics	Refill solution	-75% to 28%
Kirscner	Refill solution	-50% to 40%
Cameron	Refill solution	-66% to 42%
Cheah	Cartridge	-89% to 105%
Trehy	Refill solution	-100% to 100%
	Cartridge	-100% to 100%
Cobb	Cartridge	-80% to 77%

(Tianrong Cheng 'Chemical evaluation of Electronic-cigarettes' www.tobaccocontrol.bmj.com, accessed 2-8-2016).

Health outcomes

E-cigarettes have an inflammatory effect on the epithelial cells lining the inside of the lungs. Even without the nicotine in the e-cigarettes, the other substances in e-cigarettes cause harm to these cells and make them more susceptible to infections, especially in younger persons ('Link between e-cigarettes and respiratory infections' www.health24.com, accessed 19-7-2016).

The carcinogen formaldehyde, contained in e-cigarettes, can be up to 15 times more toxic and cancer causing when consumed with higher voltages vapour released in e-cigarettes ('Watch out for cancer-causing formaldehyde in new generation e-cigarettes' www.health24.com, accessed on 19-7-2016).

Other health issues is that nicotine has a stimulating effect on the cardiovascular system, increasing the blood pressure and heart rate and it carries risk of negative effect on foetal development. There is no research showing that a regular inhalation of vapour into our lungs can have any long term benefits to our health (Rose-Innes (*op cit*)).

We should consequently not substitute tobacco containing cigarettes with e-cigarettes for the reason that they are healthier to smoke. They may cause more harm than regular tobacco cigarettes.

Regulations and legislation

While the smoking of tobacco products are prohibited in any public area, the smoking of e-cigarettes are not specifically prohibited by legislation. Linda Curling, a pharmacist from the Poison Information Centre at Red Cross Children's Hospital said that there seems to be a 'fairly high use' in the young adult population of South Africa, which is a severe concern for them (Rose-Innes (*op cit*)).

Smokers use e-cigarettes as a device to assist them to quit smoking regular tobacco cigarettes. There is, however, no long term study showing that this is true. The only studies done so far, shows that after six to 12 months on e-cigarettes, smokers could not be cured from their tobacco cravings and were still smoking regular tobacco cigarettes (Brandel France de Bravo, Sarah Miller, Jessica Becker and Laura Gottschalk 'Are e-cigarettes safer than regular cigarettes?' www.stopcancerfund.org, accessed on 18-7-2016). The result is that e-cigarettes have created a population of dual-smokers, and access to smoking to the younger population, who cannot purchase regular tobacco cigarettes. Mark van der Heever, Deputy Director of Communication for the Western Cape Department of Health, stated that e-cigarettes renormalised smoking. Resultantly, the province is seriously looking at amendment to the current tobacco legislation to prevent this trend from continuing (Rose-Innes (*op cit*)).

E-cigarettes should thus not be excluded from tobacco products legislation, as this will undermine the intention of the legislator of tobacco legislation (Lempert *et al* (*op cit*)).

E-cigarettes in the United States (US)

After several years of uncertainty, the District of Columbia Circuit Court assisted with this dilemma when it gave judgment in the matter of *Sottera Inc v US Food & Drug Administration* 627 F.3d 891 (D.C Cir 2010). The question was whether e-cigarettes should be regulated by the same regulations as tobacco products by the Food and Drug Administration (FDA) or under the Tobacco Act.

The e-cigarette manufacturers argued that their products were promoted as being for 'smoking pleasure', rather than therapeutic or for smoking cessation. Because the product was not promoted to be falling in the 'therapeutic' category, it does not fall within the ambit of the group of products, which the FDA could regulate.

The court decided that e-cigarettes could not be regulated under the FDA's drugs/devices authority unless they are 'marketed for therapeutic purposes,' and also not regulated under FDA's tobacco product authority, unless FDA deems them to be 'tobacco products'. This was affirmed by the Appeal Court.

Congress already promulgated Family Smoking Prevention and Tobacco Control Act in 2009 to regulate all tobacco products, as well as e-cigarettes containing tobacco derivatives ('Family Smoking Prevention and Tobacco Control Act of 2009' www.govtrack.us, accessed 4-11-2016).

Regulation and legislation of e-cigarettes in the US

Imperative to the solution to regulate e-cigarettes and keep intact the anti-smoking legislation, is to include e-cigarettes in the definition of 'tobacco products', or to include in the definition of 'smoking' the smoking of e-cigarettes. This will automatically subject e-cigarettes under the same anti-smoking legislation, regulations and tax. By June 2014 there were already 46 laws in 40 states of the US, which established a proper definition for e-cigarettes and the health advocates in the US are fighting to include e-cigarettes in all 'clean air and tax laws' as a 'tobacco product' or 'product derived from tobacco'. The onus will then fall on the tax payer to demonstrate that their products do not contain a tobacco derivative to be excluded from tobacco taxes (Lempert *et al* (*op cit*)).

Other parts of the world on e-cigarettes

The World Health Organisation (WHO) described the uncertainty about the regulation of e-cigarettes as a 'loophole' to legally use nicotine, a tobacco derivative. Switzerland, Brazil and Singapore have banned indoor smoking altogether, while Canada and France have regulated their use (Sheree Bega and Kashiefa Ajam 'Bid to stub out all smoking' www.iol.co.za, accessed 19-7-2016). The WHO also indicated that e-cigarettes should be categorised either as tobacco products, or used for prescribed medicinal purposes. The American Heart Association and the European Respiratory Society concurred herewith.

Britain is the only country (so far) to take a different approach towards e-cigarettes. During 2015 the British have welcomed the use of e-cigarette as a healthier and safer alternative to regular tobacco cigarettes, which does not carry the health risks associated with regular tobacco cigarette smoking. They would like to get it licensed to be used as a cure for smoking ('UK health officials endorse e-cigarettes' www.health24.com, accessed 19-7-2016).

Certainly, this worldwide dilemma is causing the opposing views on e-cigarettes, will only be resolved after the long effects of e-cigarettes are studied.

E-cigarettes in South Africa (SA)

Due to the nicotine composition of different e-cigarettes of the same brand and batch differing from cigarette to cigarette, complicates the process of defining e-cigarettes in a single 'all including' category or group (Lempert *et al* (*op cit*)).

Twisp, SA's largest e-cigarette distributor promotes their product as available in 'all major shopping centres' in SA. Their glamorisation of their product certainly attract more e-cigarette consumers. Interesting to note is that their product is not advertised as an anti-smoking device, neither to assist smokers to quit smoking. *Twisp* promote their 'unique' product to be available in different flavours to 'tantalises all your senses' (www.twisp.co.za, accessed on 26-7-2016). It might be argued that this suggests the product is marketed for enjoyment purposes.

The Medicines and Substances Related Act 101 of 1965 was amended in 2012 to state that e-cigarettes are scheduled devices that should be bought only from a pharmacy with a doctor's prescription. Unfortunately, the e-cigarette distributors found a loophole around this, by selling e-cigarettes over the counter in any shopping mall by not mentioning that e-cigarettes can be a therapeutic device, have health benefits, or help with smoking cessation (Rose-Innes (*op cit*)).

With these controversial views, SA's Minister of Health, Aaron Motsoaledi, has taken a firm stand against e-cigarettes and indicated that he will push for new legislation against all forms of smoking of e-cigarettes in 2016 (Bega and Ajam (*op cit*)).

The Tobacco Products Control Act 83 of 1993 (the Act) does not include any specific reference to e-cigarettes, and currently reads as follows:

'…a product containing tobacco that is intended for human consumption, and includes, but is not limited to, any device, pipe, water pipe, papers, tubes, filters, portion pouches or similar objects manufactured for use in the consumption of tobacco… .'

The promotion of e-cigarettes also relates to s 3(1)(*a*) of the Act:

'No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.'

It can be assumed that e-cigarette advertisements, promoting e-cigarette smoking, will cause the public to have an increased tendency to have a more positive attitude towards buying of tobacco products as well (SE Adkison, RJ O'Connor, M Bansal-Travers, A Hyland, R Borland, HH Yong, KM Cummings, A McNeill, JF Thrasher, D Hammond and GT Fong 'Electronic nicotine delivery systems: International tobacco control four-country survey' www.ncbi.nlm.nih.gov, accessed 19-7-2016).

Effects of e-cigarettes on non-smokers

E-cigarette smoke cause a visible vapour that is able to be smelled by non-smokers depending on the flavours and other contents of the fluid. The vapour is discharged into the air only when the user exhales. This is in contrast to regular cigarettes that discharge smoke continuously while kept alight, and when the user exhales. Research shows that e-cigarette smoke can cause a 20% increase in the concentration of polycyclic aromatic hydrocarbons in the air of a ventilated room, after volunteers smoked e-cigarettes for two hours in the room ('E-cigarette vapour exposes people sharing a room with an e-cigarette user to contaminants, including nicotine, particulates and hydrocarbons' www.treatobacco.net, accessed 27-10-16). The new trend to smoke e-cigarettes due to their advantages, causes more people to smoke them indoors, for example, in shopping malls, churches, offices and their own homes. Although e-cigarettes do not contain the harmful smoke of regular cigarettes, there are still very harmful emissions, which can cause health issues to non-smokers. The vapour, or aerosol, contains different concentrations of nicotine, ultrafine particles and low levels of toxins that are known to cause cancer ('Electronic Smoking Devices and Secondhand Aerosol' www.no-smoke.org, accessed 27-10-2016).

There is currently no research at all that proves that second hand smoke of e-cigarettes emissions are safe for non-users (Ingrid Torjesen 'E-cigarette vapour could damage health of non-smokers' www.bmj.com, accessed 27-10-2016).

Discussion and conclusion

Not all e-cigarettes contain nicotine or the same concentrations of nicotine, making it difficult to regulate all e-cigarettes under one 'all inclusive' ban. The issue with e-cigarettes is that the absence of tar causes it to be less harmful in certain instances but it is more harmful if smoked at high voltages ('Watch out for cancer-causing formaldehyde in new generation e-cigarettes' (*op cit*)).

My opinion of the only feasible solution to this dilemma is to regulate e-cigarettes on two levels:

- Firstly, prescribed as medicinal treatment in specific quantities and voltages according to specific medicinal requirements to stop and/or cure smoking regular tobacco cigarettes.
- Secondly and together herewith, to include all other consumption of e-cigarettes in the tobacco products regulation legislation ('Watch out for cancer-causing formaldehyde in new generation E-cigarettes' (*op cit*)).

The reality is, that all tobacco and tobacco-related product consumption contain risks to develop cancer and other health issues. Simply put, it causes the same harm as regular tobacco cigarettes and should be regulated accordingly.

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October 2016 (5) South African Law Reports (pp 335 – 667); [2016] 3 All South African Law Reports August (pp 345 – 667); [2016] 3 All South African Law Reports September (pp 669 – 959); and 2016 (10) Butterworths Constitutional Law Reports – October (pp 1253 – 1388)

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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
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu-Natal Division, Pietermaritzburg
LAC: Labour Appeal Court
LC: Labour Court
LCC: Land Claims Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Constitutional law

Invalidity of legislation for failure to facilitate adequate public involvement in the legislative process: The Restitution of Land Rights Act 22 of 1994, which deals with restitution of land rights or compensation for individuals and communities deprived of rights in land as a result of racially discriminatory laws or practices, set the cut-off date for lodging claims for restitution as 31 December 1998. Desirous of extending the cut-off date to a new date Parliament passed the Restitution of Land Rights Amendment Act 15 of 2014 (the Amendment Act) that came into operation on 1 July 2014 and extended the cut-off date for lodging claims to 30 June 2019.

The issue in *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC), was not about the substance but the process by which the Amendment Act was brought about. The applicants, the Land Access Movement of South Africa and others, sought in the main, a CC order declaring the Amendment Act unlawful for having been passed by the National Council of Provinces (NCOP) contrary to s 72(1)(*a*) of the Constitution, which requires the NCOP to facilitate public involvement in its legislative and other processes, as well as those of its committees. The gist of the complaint was that there was 'unexplained rush' in the manner in which the first respondent, the NCOP and its select committee, passed the Amendment Act, which was done in a very short period of one month. The main reason for the 'unexplained rush' was the desire to have it passed before dissolution of Parliament and holding of general elections in May 2014. In that rush a lot of rough justice was manifested. For example, after delegating the task of facilitating public involvement to provincial legislatures, as it was entitled to do, rather than facilitating public involvement itself, on being briefed by the Department of Land Affairs and Rural Development at the end of February 2014, the Select Committee (the Committee) of the NCOP had to brief all provincial legislatures the following week, within a very short period of three days. In the week that followed and over a period of five days public hearings were to be held in all provinces, after which on the fourth day after such hearings, provinces were to hold their negotiating mandate meetings to discuss their position regarding the Amendment Act and seven days thereafter, hold a final mandate meeting and prepare a report. Because of a very tight time-frame the envisaged public hearings were not well-advertised, attendance was poor, some public hearings were very short while at some hearings no questions were entertained. For example, in the Northern Cape only one municipality was involved and held a single public hearing while in the Western Cape one public hearing was held, attended by 30 people and lasted 90 minutes. In Gauteng one meeting was held and lasted three hours but no questions were allowed. In the North West all public hearings were addressed in Setswana only, while in the Free State all hearings were conducted predominantly in Sesotho. The list of deficiencies in the planning and conduct of public hearings was simply endless.

The CC held that in terms of s 167(4)(*e*) of the Constitution it had exclusive jurisdiction in respect of matters in which it was alleged that the President or Parliament had failed to fulfil a constitutional obligation. After careful analysis of all the deficiencies attendant on the public hearings concerned, it was held that Parliament, through NCOP, had failed to satisfy its obligation to facilitate public involvement in accordance with s 72(1)(*a*). As a result the Amendment Act was declared invalid, effective from the date of the judgment. The purpose of prospective operation of the order of invalidity was to save some 80 000 new claims, which had since been lodged after the Amendment Act came into operation on 1 July 2014. However, the Chief Land Claims Commissioner (the Commissioner) was interdicted from processing those new claims. If Parliament were to fail to re-enact a properly done Amendment Act within two years of the court order, the Commissioner or any other interested party, was given leave to approach the court, within two months after the expiration of the two-year period, for an appropriate order on the processing of claims lodged from 1 July 2014. The NCOP was ordered to pay costs.

Delivering a unanimous judgment of the court, Madlanga J held that the Constitution demanded that the public should be afforded a meaningful chance of participating in the legislative process. The standard to be applied in determining whether Parliament had met its obligation of facilitating public participation was one of reasonableness and depended on the circumstances, as well as the facts of each case. In the instant

matter the NCOP adopted a truncated time line for itself and provincial legislatures to facilitate the involvement of the public in the legislative process. That time line was the root cause of all the deficiencies in the process. Given the gravitas of the legislation and the thoroughgoing public participation process that was warranted, the truncated time line was inherently unreasonable. Objectively, on the terms stipulated by the time line, it was simply impossible for the NCOP, and by extension the provincial legislatures, to afford the public a meaningful opportunity to participate.

Consumer credit agreements – execution against primary residence

Primary home should not be declared executable if there are good prospects of reinstatement of the credit agreement: Before its amendment in 2014, and which came into effect in March 2015, s 129(3) of the National Credit Act 34 of 2005 (the NCA) provided among others that at any time before the credit provider had cancelled the agreement, the consumer could reinstate it by paying all amounts that were overdue together with default charges and reasonable costs of enforcing the agreement up to the time of reinstatement. Subsection (4) provided that a consumer could not reinstate a credit agreement after the sale of any property in terms of an attachment order or in the execution of any other court order enforcing that agreement.

In *Firstrand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD) the applicant, Firstrand Bank, applied for default judgment in which it sought against the respondents, Mr and Mrs Mdletye, payment of the total contract amount outstanding, as provided for in the acceleration clause, interest and costs on attorney and client scale. Furthermore, it sought an order declaring the property, which was the respondents' primary residence, executable. The court granted the order relating to payment of the outstanding contract amount, interest and costs but adjourned *sine die* the issue relating to executability of the property.

Gorven J held that if the arrears could be eliminated and the amounts referred to in s 129(3) paid (default charges and reasonable costs of enforcing the agreement up to the time of reinstatement) the agreement would be reinstated. From the date of reinstatement the default judgment would have no legal force. If the property was sold by virtue of an attachment following a declaration of executability, the agreement would not be capable of being reinstated and the respondents would lose their home. The potential for that to occur had to be a factor to be taken into account in an application to declare the property executable. The significance thereof was that, unlike many of the other factors that relate to alternative ways of satisfying the entire judgment debt, reinstatement did not require payment of the full contract amount but only the arrears and other specified charges. In the instant case there was a reasonable prospect that the agreement was capable of being reinstated within a relatively short period.

Delict

Doctrine of abuse of rights: In *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA); [2016] 3 All SA 398 (SCA), the first respondent, Abrina, was the owner of property situated in Centurion, City of Tshwane Municipality (Pretoria), which was zoned 'agricultural'. As the first respondent wanted to develop it into a shopping centre and conduct a steakhouse business there, it applied for its rezoning into a township. The first appellant, Koukoudis (K), lodged an objection against the rezoning and thus started a long delay caused by the appeal process that followed, which also included litigation and court orders. The reasons given by K for his objection, included failure by the respondent to address fundamental issues such as environment impact assessments, traffic issues and requirements of statutes such as the National Environmental Affairs Act 107 of 1998 and the like. However, as it later transpired, the real reason for the objection was to prevent the establishment of a shopping centre in the vicinity of a shopping mall, which was only some 600 metres away and was owned by companies in which K had an interest as a director and shareholder. In brief, the purpose of the objection was to protect the commercial interests of K and his companies.

Eventually approval to establish a shopping centre was granted. Thereafter, the first respondent instituted a claim for damages against the first appellant and one of his companies, alleging that their objection to its rezoning was an abuse of the right to object and resulted in financial loss by delaying commencement of its business activities. It was alleged that K had acted with the specific intention of frustrating development of the shopping centre and causing financial harm. The GP, per Tolmay J, upheld the claim for damages.

An appeal against the High Court order was upheld with costs by the SCA. Leach JA (Majiedt, Pillay JJA, Victor and Baartman AJJA concurring) held that the weight of academic opinion was to the effect that conduct should not be regarded as being unlawful where it advanced a legitimate right of the person exercising it, even if in doing so another could be prejudiced. In order to constitute an abuse of right both the subjective requirement that an act be done with the sole or predominant intention to harm another and the objective requirement that the act serve no appreciable or legitimate interest should be present. In considering the question of the appellant's liability one had to have regard, first, to the subjective requirement, namely whether the objection to the development was done with the sole or predominant intention to harm the respondents; and then second, the objective requirement, namely whether the objection served no appreciable or legitimate interest of the appellants. Such was not the case in the present matter as the appellants sought to protect their commercial interest in the nearby shopping mall. The respondents had thus failed to prove an abuse of the right to object to rezoning of the property.

Intentional interference by third party with contractual

relationship is actionable: In *Shoprite Checkers (Pty) Ltd v Masstores (Pty) Ltd and Another* [2016] 3 All SA 926 (ECG) the applicant, Shoprite, had a lease agreement with the second respondent, Whirlprops, which gave it the exclusive right to operate a supermarket at the Mthatha Mall in the Eastern Cape. The first respondent, Masstores (Game), also had a lease agreement with the second respondent, which gave it the right to conduct the business of a general merchandiser, which did not include selling fresh fruit and vegetables or fresh meat and poultry products, all of which formed part of the exclusive business of a supermarket operated by the applicant. The first respondent started expanding its business to that of a supermarket and in 2014 the old lease agreement was cancelled and a new one concluded, which gave the first respondent the right to operate a supermarket business in the mall, notwithstanding the exclusive right that had been granted to the applicant. As a result the applicant sought by way of urgent application an interim interdict restraining the first respondent from operating a supermarket business. It also sought an interim interdict directing the second respondent to take all necessary reasonable steps to prevent the first respondent from operating a supermarket business in the mall. Both orders were granted with costs.

Lowe J held that the *Aquilian* action was available against a third party for the intentional interference with contractual relationship, which had the effect that a contracting party was deprived of the opportunity of obtaining the performance to which he was entitled, arising from the contract or where the contracting parties' contractual obligations were increased. The requisites of a delict had to be satisfied in each case. Once such requisites were satisfied, liability would arise. Provided the requirements for the interdict had also been met, the wronged party would be entitled to an order restraining unlawful conduct.

Dolus eventualis was sufficient as far as intent was concerned. Concerning wrongfulness, the first respondent had acted unlawfully and wrongfully by at least usurping the applicant's exclusivity entitlement to conduct the business of a supermarket. As a result, a *prima facie* right had been established by an unlawful act of the first respondent, which constituted interference in the contractual relationship between the applicant and the second respondent and which had been committed with the necessary form of intent. That satisfied the requirements to be met for a successful claim based on the interference in contractual relationship in the context of the usurpation of a right.

Expropriation

Calculation of compensation: Section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (the Land Reform Act) gives the LCC the power to award a part of the farm to a labour tenant, meaning a farm worker who lives on the farm, to use as his homestead, for grazing his livestock and sowing crops. As that is obviously expropriation, the Land Reform Act provides that the owner of the land so expropriated should be awarded compensation as provided for in s 25 of the Constitution, which deals with the issue. Section 25(3) provides that the amount of compensation, the time and manner of payment has to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

'(*a*) the current use of the property;

(*b*) the history of the acquisition and use of the property;

(*c*) the market value of the property;

(*d*) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(*e*) the purpose of the expropriation.'

In *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) the LCC having awarded Msiza a portion of the farm for residential, cropping and grazing purposes, the issue was the amount of just and equitable compensation to be paid for that portion. The parties, the Department of Rural Development and Land Reform (the Department) and the owner of the farm, the Dee Cee Trust, agreed that the market value would be just and equitable compensation. However, the Department contended that the market value should be determined on the basis of use of the land, namely, as agricultural land, the value of which was R 1,8 million, while the owner contended that the market value of the property should be looked at in terms of its potential for development as a township, which value was R 4,36 million. The LCC rejected both contentions and held that the just and equitable compensation was an amount that was adjusted downwards to R 1,5 million. No order as costs was made.

Ngcukaitobi AJ (Canca AJ concurring) held that the market value was not the basis for the determination of compensation under s 25 of the Constitution where property or land had been acquired by the state in a compulsory fashion, as was the case in the instant matter. The point of departure for determination of compensation was justice and equity. Market value was simply one of the considerations to be borne in mind when a court assessed the just and equitable compensation. Market value was, therefore, not a pre-eminent consideration. The object was always to determine compensation which was just and equitable, not to determine the market value of the property. In determining what was just and equitable, a balance had to be struck between the interests of the private landowner and the public interest. Therefore, compensation which was below the market value could be compliant with the Constitution, if it qualified as just and equitable.

The development potential of the property, as a factor in the calculation of market value, was far-fetched and speculative as there were no development plans in place but only a remote hope. Following that approach, would distort the real value of the land and produce outcomes, which were inconsistent with the purposes of compensation. That approach could also create a perverse incentive for landowners to artificially raise the potential value of their land if they knew that by the simple device of generating interest in the land, its market value could be significantly altered. The purpose of s 25 of the Constitution was not to reward property speculators but to serve public in-

terest. Accordingly, it would be unfair to the national fiscus to reward the landowner on the scale sought in the instant case, with no discernible public benefit.

Fundamental rights

Right of media to access to disciplinary proceedings of state employees: In *Media 24 (Pty) Ltd and Others v Department of Public Works and Others* [2016] 3 All SA 870 (KZP) the first respondent, the Department of Public Works, instituted disciplinary proceedings against 11 of its employees, regarding involvement in unauthorised expenditure relating to President Zuma's private residence, Nkandla, in KwaZulu-Natal. Because of massive public interest in the debacle, the applicants, three media houses, wanted to have their reporters attend the hearings and report thereon. The hearings proceeding separately rather than in a consolidated form, the chairperson in one hearing granting access, in respect of which the applicants wanted a court order confirming this. The order was denied by the court, which held that the decision to grant access was an administrative action, which remained valid until it was challenged.

In the case of those chairpersons who had not made a ruling on whether to grant access, the applicants sought a declaratory order to the effect that the ruling should be made within ten days of the court order. The court granted an order directing the decision of the chairpersons to be made within a month, and not ten days, of the court order. In those cases where the chairpersons had denied access, the rulings were reviewed and set aside, with the applicants granted access to the hearings. The respondents, excluding the first respondent, which abided by the decision of the court and did not oppose the application, were ordered to pay the costs of one, and not two, counsel.

Koen J held that the right to freedom of expression, which the applicants sought to enforce, was not one for the benefit of the media but rather for the benefit of all citizens. As a general rule disciplinary disputes relating to employees of the state might not attract public attention but that did not mean that because they could be regulated in terms of a contract, they were all private and confidential with the result that the media was not entitled to access. The discretion whether or not to grant media access vested in the presiding chairperson. Such discretion had to be exercised independently. Openness and transparency demanded the hearings should not be held behind closed doors, as much as publicity would not be welcomed by the employees or for that matter witnesses who would be required to give evidence. In brief, public interest favoured that proceedings, including disciplinary proceedings generally, should be open (to the public and the media).

Whether the constitutional right to adequate housing is infringed by defective construction of houses for low-income group: In *City of Cape Town v Khaya Projects (Pty) Ltd and Others* 2016 (5) SA 579 (SCA) the appellant, City of Cape Town (the City), entered into an agreement in terms of which the second respondent, Peer Africa, was to oversee development of an informal settlement in Atlantis, a small coastal town outside Cape Town, into a formal residential area. Construction work was done by the first respondent, Khaya, with whom Peer Africa concluded an agreement to do so. There was no contract between the City and Khaya. After completion of construction work the second respondent issued certificates signifying acceptance of the houses. Shortly thereafter it turned out that a number of the houses built had severe defects. As a result the City, seeking to put a stop to the alleged widespread problem of contractors building government-funded low-cost

houses, which were defective, sought a court order declaring that the first respondent failed to comply with a constitutional obligation to construct adequate houses in terms of s 26 of the Constitution. The WCC, per Mantame J, dismissed the application. An appeal against that order was dismissed with costs by the SCA.

Victor AJA (Maya DP, Majiedt, Seriti and Willis JJA concurring) held that the second respondent undertook to make sure that the buildings would comply with all legal requirements and regulations. However, there was no contractual nexus between the City and the first respondent. Also, there was no reference at all to any constitutional obligation on the part of the first respondent when it concluded the agreement with the second respondent. That being the case there was, therefore, no basis for a finding that the first respondent, a construction company, which was neither controlled by the appellant nor performed a nationwide public function, was an entity in the position of an organ of state. The first respondent agreed with the second respondent, and not the appellant, to construct houses. It did not enter into any contract with the appellant, and also did not undertake that the appellant's constitutional obligations would be effectively achieved in regard to the housing project. Accordingly, it would be wrong to impose a constitutional obligation *ex post facto* the procurement event. Doing so would be inconsistent with the principles of fairness. It would also not be equitable or transparent. In light of a finding that there was no constitutional obligation on the first respondent, the declaration sought could not be granted.

• See law reports 'Fundamental rights' 2015 (April) *DR* 41.

Government procurement

A tender bid is required to comply with all the specifications, prescripts, requirements or conditions specified in a tender document: In *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform and Another; Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Land Reform and Another* [2016] 3 All SA 686 (WCC) the first respondent, the Department of Rural Development and Land Reform (the Department), invited tenders for construction of bulk irrigation revitalisation in the Western Cape. The tender documents specified the requirements, which the tenderers had to meet, which included, among others, a valid tax clearance certificate issued by the South African Revenue Service and valid registration as a contractor with the Construction Industry Development Board (CIDB). If a tenderer were to make use of a sub-contractor the name thereof had to be specified, each sub-contractor in turn having to comply with the requirements of tax clearance certificate and registration with the CIDB. The tender bid of Afriline Civils (Afriline) was rejected as it did not attach the tax clearance certificate of one of its sub-contractors, namely TT Innovations (TT). Furthermore, Afriline's registration with the CIDB lapsed before the tenders could be considered. In the case of Asla, its tender bid also failed to attach the tax clearance certificate of TT. The tender was awarded to Exeo because it was able to attach the tax clearance certificate of TT, which the other two tenderers did not do. As a result Afriline and Asla applied for an order reviewing and setting aside the award of the tender to Exeo. The application was dismissed with costs.

Dlodlo J held that the award of a tender by an organ of state constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000 and had to be lawful, procedurally fair and justifiable. It was an established principle that non-compliance with specifications, requirements or conditions included in the tender documents would render a tender bid unacceptable or non-responsive and liable to be disqualified. If unacceptable or non-responsive tenders were to be further considered despite failing to comply with the mandatory requirements, the consequences would be that the tender process as a whole would not be transparent as required by the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 and s 217(1) of the Constitution. Non-compliance with the specifications as stated in the tender document could be condoned only if the document conferred a discretion on the administrative authority to condone such non-compliance with a mandatory requirement, which was not the case in the instant matter.

Decision to cancel a tender is non-reviewable executive action and not administrative action: The facts in *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* [2016] 3 All SA 669 (SCA) were that in 2009 the first respondent, the South African Police Service (SAPS), acting through the second respondent, the State Information Technology Agency (SITA), invited tenders for the supply of mobile vehicle data command and control solution (command solution). The validity period of the tender bid was to expire in January 2011. The appellant, SAAB Grintek (SAAB), together with another company, Britehouse, were shortlisted. However, the tender was never awarded. After the expiry date of the tender period an extension was granted, followed by further extensions. The appellant's tender bid was recommended by the Procurement Committee but no award was made. In August 2012 the first respondent advised SAAB that the tender had been cancelled as a long period had elapsed, this rendering the technology offered out of date in relation to its business needs. As a result the appellant approached the High Court for an order reviewing and setting aside the decision of the first respondent to cancel the tender, as well as an order directing that the tender be awarded to it and a contract between the parties be concluded. The GP, per Makgoba J, dismissed the application, holding that extension of the tender period was invalid as it was done after lapse of the tender in January 2011. An appeal to the SCA was dismissed with costs.

Mpati P (Cachalia, Theron, Wallis JJA and Victor AJA concurring) held that when the SAPS, as an organ of state, took the decision to procure the command solution and later cancel the tender relating thereto, it did so in the exercise of executive authority. Therefore, its decision to cancel the tender was not susceptible to review in terms of the Promotion of Administrative Justice Act 3 of 2000. As a result, the submission that SAPS's decision to cancel the tender constituted an administrative action was not correct. It was inconceivable that the decision of SAPS to cancel the tender, which would otherwise have been taken in the exercise of executive authority could suddenly change character and become one of an administrative nature. A decision as to procurement of goods and services by an organ of state was one that lay within the heartland of the exercise of executive authority by that organ of state.

Labour law

Affirmative action – legality of exclusion of adequately represented or overrepresented groups from appointment: Before its amendment by the Employment Equity Amendment Act 47 of 2013 the Employment Equity Act 55 of 1998 (the EE Act) provided that when assessing whether a designated employer was implementing employment equity in compliance with the EE Act, one of the factors that 'must' be taken into account was the extent to which suitably qualified people from different designated groups were equitably represented within each occupational group level in that employer's workforce in relation to the demographic profile of the national and regional profile

of the 'national' and 'regional' economically active population. After the amendment the word 'must' was changed to 'may', thus making taking the relevant factors into account a discretionary rather than obligatory function.

In *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC); 2016 (10) BCLR 1349 (CC), members of the first applicant trade union, Solidarity, and who were coloured persons, applied for certain positions in the respondent Department of Correctional Services (the Department). Although they were suitably qualified for the positions and were recommended by the interviewing panels, the Department rejected their appointment on the ground that coloured persons were overrepresented in the occupational levels for which they sought appointment. In reaching that decision the Department took into account the 'national' profile of the economically active population to the exclusion of the 'regional' profile, the region being the Western Cape where coloured persons were in the majority.

The LC held that the Department had discriminated against the job applicants unfairly and had also engaged in unfair labour practice. However, it did not declare the decision of the Department unlawful so as to set it aside. Moreover, it did not grant the applicants the relief sought but instead left it to the Department to take necessary measures. The LAC dismissed an appeal to it.

The CC granted leave to appeal and upheld the appeal, making no order as to costs. The decision of the Department not to appoint the applicants was declared unlawful and set aside. The court denied, by word only, that it was granting the applicants a 'protective promotion' (but of course did exactly so). In the case of applicants who sought posts which were still vacant, they were appointed with retrospective effect to the date when they should have been appointed in the first place. In the case of the positions which had since been filled, the applicants were ordered to keep their current lower positions but were entitled to receive, with retrospective effect, the remuneration and other benefits which they would have received had they been appointed.

Delivering the majority judgment, Zondo J (Nugent AJ dissenting and Cameron J concurring in that dissenting judgment) held that the *Barnard* principle, namely the case of *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195, was not limited to overrepresentation of White candidates only. Black candidates, whether they were African, Coloured or Indian people, were also subject to the overrepresentation principle. That had to be so as transformation of the workplace entailed that the workforce of a designated employer had to be broadly representative of the people of South Africa. The level of representation of each group had to be broadly in accordance with its level of representation among the people of the country. Therefore, a designated employer was entitled, as a matter of law, to deny an African, Coloured or Indian person appointment to a certain occupational level on the basis that African, Coloured or Indian people, as the case might be, were already overrepresented or adequately represented in that occupational level. Equally, an employer was entitled to refuse to appoint a man or woman to a particular level on the basis that men or women, as the case might be, were already overrepresented or adequately represented at that occupational level.

However, the Department used a wrong benchmark to determine the overrepresentation, namely by taking into account the national profile, to the exclusion of the regional profile, of the economically active population. In doing so the Department acted in breach of its obligations in terms of s 42(*a*) and accordingly acted unlawfully.

• See 'Employment law update' 2015 (July) *DR* 55.

Land reform

Calculation of equitable redress in the form of financial compensation for loss of land: The facts in *Jacobs v Department of Land Affairs and Others* 2016 (5) SA 382 (LCC) were that by 1889 the Gordonia area (now Upington in the Northern Cape) was under control of British Government and administered as part of British Bechuanaland (now Botswana) and occupied by a Coloured community known as Basters (NB Although the name may seem derogatory, the community nevertheless called themselves such). One Abraham September was granted permanent quit-rent rights (rights of occupation, use and enjoyment) over a farm in the area. Thereafter, Gordonia was annexed, with the consent of the British Government, by the Cape Colonial Government and became part of the Cape Colony. Because of the Orange River the area offered great potential for irrigation. For that reason commercial farmers came up with several strategies to dispossess the Coloured people of their land. After the death of September, his sons – who had inherited the farm – 'sold' it to a commercial farmer, one Thorne, in 1906 in what turned out to have been a fraudulent sale as Thorne took advantage of the illiteracy of the sellers. Moreover, afterwards Thorne confessed that he bought the land for nothing as he did not pay anything. An attorney acting for the sellers was also attorney for the buyer Thorne and became an accomplice to the fraud perpetuated by Thorne. As if that was not enough an officer in the Deeds Registry turned a blind eye to the fraud, reporting that everything appeared normal. Thorne having in turn sold the farm to a new owner at a market value of 5 000 pounds sterling, the lat-

ter evicted September's sons from the land in 1921.

In the present case the claimants, Jacobs and 393 others, all being direct descendants of Abraham September and his wife Elizabeth, sought compensation for the lost farm, from the defendant, Department of Land Affairs and Rural Development, and not from past or present owners of the farm, in terms of s 2(1)(*c*) of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Restitution of the farm not being feasible, they sought an order which was just and equitable in the form of financial compensation. The value of the farm at the time of dispossession was 5000 pounds sterling, which translated into R 2 423 000 in current monetary terms. However, apart from that amount the claimants sought a further R 36 454 000 for loss of the land and additional R 58 330 000 for loss of use of the land. Their approach was based on the 'fiction' of undisturbed perpetual ownership and commercial exploitation of the land.

The LCC held, per Ngcukaitobi and Mpshe AJJ, that the 'fiction' approach was at odds with the views endorsed by the CC with regard to the object of compensation under the Restitution Act. If the court were to follow that approach it would not only be acting contrary to the CC authority as decided in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137, but would also open a vortex of speculative claims premised on unknown variables of the trajectory of the land and its use absent the dispossession.

The law was clear, that the object of just and equitable compensation was to place the dispossessed persons in the same financial position they would have been in immediately after the dispossession. There was logic in that approach as nobody knew what would have happened to the land had it not been for the racially motivated dispossession. Furthermore, it was not known in what manner the value of the land would have been affected over time.

The starting point was that the claimants were entitled to the amount of R 2 423 000, which was the current equivalent of the actual financial loss suffered as a result of uncompensated racial dispossession. However, that amount failed to have regard to the particular hardship visited upon the Septembers as a result of their dispossession and ejectment from the land. Accordingly, the amount was adjusted upwards to R 10 million since the market value of the property lost, was a factor and not a goal in itself. The adjusted amount of R 10 million determined as just and equitable applied to the value of the land and its use. The Department was ordered to pay costs, less payments already made to the claimants.

Prescription

When without prejudice offer of settlement does not interrupt prescription: In *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) 485 (WCC); [2016] 3 All SA 832 (WCC) the plaintiff, KLD, sued the defendant, Empire Earth, for commission earned after selling certain erven in a development project and transferring ownership to buyers. The commission was earned between October 2008 and November 2009 when the transfers took place. The summons claiming commission was issued and served in June 2013, being a period that was more than three years after the last commission was earned, which meant that the claim had prescribed. However, the plaintiff alleged that the running of prescription had been interrupted when, in July 2011, the defendant's attorneys, acting as the defendant's authorised representatives, wrote a letter to the plaintiff's attorneys in which they acknowledged that, after taking into account certain deductions, the plaintiff was entitled to a certain amount in respect of which a cheque was attached. Rogers J held that the acknowledgment of debt, and the offer of settlement made to the plaintiff in a without prejudice offer, did not interrupt prescription. As a result the plaintiff's claim had prescribed and was, therefore, dismissed with costs.

The court held that the without prejudice rule was based on public policy. Parties to disputes were to be encouraged to avoid litigation, with the expense, delay, hostility and inconvenience it usually entailed, by resolving their differences amicably in full and frank discussions, without the fear that any admissions made by them during such discussions could be used against them in the ensuing litigation. The law allowed some exceptions to the without prejudice rule. One such exception was where a party alleged that the settlement discussions resulted in a compromise agreement. Certain other exceptions based on public policy have also been recognised. If the without prejudice communication contained a threat or constituted an act of insolvency, and if the making of the threat or the commission of an act of insolvency was relevant to particular proceedings, evidence of the communication could be adduced despite its without prejudice character. A further exception was an admission by a company of its commercial insolvency. An admission of part of a liability was sufficient to interrupt prescription. Before a creditor could rely on an acknowledgment of part of the liability as an interruption of prescription there had to be admissible evidence of the partial acknowledgment. In many without prejudice negotiations the alleged debtor would not make any admission of liability. Although such negotiations could appear to be worth pursuing, the running of prescription was not suspended. The three-year period of prescription was not an ungenerous allowance of time. If the parties needed more time, the creditor could make further talks conditional on agreement to hold prescription in abeyance. That was often done in practice.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Abuse of process of enquiry into the affairs of a company, business rescue, contempt of court, derivative action, destruction of sectional title scheme and certain exclusive use areas, effect of delay in serving sentence, fraud and money laundering, granting of bail pending application for direct access to the Constitutional Court, interruption of extinctive prescription, jurisdiction of Advertising Standards Authority on non-members, jurisdiction of Consumer Affairs Court, loss of earnings in personal injury claims, member of Parliament not allowed to impugn integrity of other members, recognition of foreign court order, prescribed minimum sentence for rape, right of farm worker to bury family members on the farm and sale of insolvent estate's property prior to second meeting of creditors.

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On the lighter side:

'It was Benjamin Franklin who first gave voice to the quip "Necessity knows no law; I know some attorneys of the same", in its modern form calling a judge Old Necessity.'

Prof Ellison Kahn 'The seven lamps of legal humour' 1984 (June) *DR* 251.

❑

New legislation

Legislation published from 3 – 28 October 2016

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

Bills introduced

Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill B20 of 2016.
Finance Bill B21 of 2016.
Division of Revenue Bill B15 of 2016.
Adjustment Appropriation Bill B16 of 2016.
Taxations Laws Amendment Bill B17 of 2016.
Tax Administration Laws Amendment Bill B18 of 2016.
Rates and Monetary Amounts and Amendment of Revenue Laws Bill B19 of 2016.
Judicial Matters Amendment Bill B14 of 2016.
Red Tape Impact Assessment Bill B13 of 2016.

Commencement of Acts

Community Schemes Ombud Services Act 9 of 2011. *Commencement:* 7 October 2016. Proc55 *GG*40334/7-10-2016.
Criminal Procedure Amendment Act 65 of 2008, s 1, in respect of the subdistrict of Alexandra. *Commencement:* 30 September 2016. Proc R53 *GG*40322/3-10-2016.
Sectional Titles Schemes Management Act 8 of 2011. *Commencement:* 7 October 2016. Proc54 *GG*40334/7-10-2016.

Selected list of delegated legislation

Civil Aviation Act 13 of 2009
Fourteenth Amendment of the Civil Aviation Regulations, 2016. GN R1349 *GG*40376/28-10-2016.
Community Schemes Ombud Service Act 9 of 2011
Regulations on community schemes ombud service. GN R1233 *GG*40335/7-10-2016.
Levies and fees payable. GN R1232 *GG*40335/7-10-2016.
Criminal Procedure Act 51 of 1977
Designation of correctional facilities in terms of s 159B(2). GN R1209 *GG*40322/3-10-2016.
Defence Act 42 of 2002
Individual Grievances Regulations. GN R1263 *GG*40347/14-10-2016.
Development Bank of Southern Africa Act 13 of 1997
Amendment of regulations. GenN643 *GG*40334/7-10-2016.
Liquor Act 60 of 1989
Prohibition of the use of geographical indications of the European Union in connection with the sale of liquor products. GenN722 *GG*40382/28-10-2016.
Military Pensions Act 84 of 1976
Determination of amounts. GN R1234 *GG*40335/7-10-2016.
National Environmental Management Act 107 of 1998
Amendments to the Financial Provisioning Regulations, 2015. GN1314 *GG*40371/26-10-2016.
National Health Act 61 of 2003
Procedural regulations pertaining to the functioning of the Office of Health Standards Compliance and handling of complaints by the ombud. GN1275 *GG*40350/13-10-2016.
Promotion of National Unity and Reconciliation Act 34 of 1995
Amendment to the regulations on exhumation, reburial or symbolic burial of deceased victims. GN R1305 *GG*40362/21-10-2016.
Property Valuers Profession Act 47 of 2000
Amendment of the rules for the property valuers profession. BN166 *GG*40359/21-10-2016.
Public Service Act 103 of 1994
Amendment of sch 1 (Secretary for the Police Service). Proc 56 *GG*40334/7-10-2016.
Public Service Commission Act 46 of 1997
Rules on referral and investigation of grievances of employees in public service. GenN682 *GG*40359/21-10-2016.
Road Accident Fund Act 56 of 1996
Adjustment of the statutory limit in respect of claims for loss of income and loss of support to R 251 990 with effect from 31 October 2016. BN167 *GG*40375/28-10-2016.
Sectional Titles Schemes Management Act 8 of 2011
Sectional Titles Schemes Management Regulations. GN R1231 *GG*40335/7-10-2016.
Small Claims Courts Act 61 of 1984
Establishment of a small claims court for the area of Soweto. GN1248 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Mookgophong. GN1249 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Atamelang. GN1250 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Makwane. GN1251 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Ottosdal. GN1252 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Hewu. GN1253 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Tarkastad. GN1254 *GG*40346/14-10-2016.
Establishment of a small claims court for the area of Wepener. GN1321 *GG*40375/28-10-2016.
Establishment of a small claims court for the area of Galeshewe. GN1322 *GG*40375/28-10-2016.
Establishment of a small claims court for the area of Tsomo. GN1323 *GG*40375/28-10-2016.
Social Assistance Act 13 of 2004
Increase in respect of social grants. GN R1210 *GG*40323/3-10-2016.
Tax Administration Act 28 of 2011
Duty to keep records, books of account or documents. GN1334 *GG*40375/28-10-2016.
Water Research Act 34 of 1971
Water Research Fund: Increase of rates and charges. GN1341 *GG*40375/28-10-2016.

Draft delegated legislation

Regulations relating to the registration of a speciality in forensic social work in terms of the Social Service Professions Act 110 of 1978 for comments. GN R1274 *GG*40349/14-10-2016.
Declaration of certain substances as Group I or II hazardous substances in terms of the Hazardous Substances Act 15 of 1973 for comments. GN1242 and GN1243 *GG*40346/14-10-2016, GN1291 and GN1292 *GG*40359/21-10-2016.
Regulations relating to the registration of a speciality in clinical social work in terms of the Social Service Professions Act 110 of 1978 for comments. GN R1304 *GG*40361/21-10-2016.
Draft Prevention and Combating of Hate Crimes and Hate Speech Bill. GenN698 *GG*40367/24-10-2016.
Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comments. GN R1354 *GG*40380/28-10-2016. ❑

Employment law update

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Section 197 transfers: Can the new employer be joined to proceedings subsequent to the conciliation process?

In *Temba Big Save CC v Kunyuza and Others* [2016] 10 BLLR 1016 (LAC), the respondent employees alleged that their dismissals were automatically unfair as Big Save had not complied with s 197 of the Labour Relations Act 66 of 1995 (the LRA) when it purchased the business of ACE Wholesalers. Big Save had not been a party to the conciliation proceedings and the respondent employees then sought to join Big Save to the proceedings in the Labour Court (LC). Big Save filed an answering affidavit out of time. The LC, per Steenkamp J, joined Big Save to the proceedings and refused to allow Big Save's answering affidavit on the basis that it was filed out of time. Big Save then appealed the decision of the LC.

Big Save argued that the LC should not have granted the joinder because the respondent employees had not referred the automatically unfair dispute against Big Save for conciliation. Instead, the referral had only been made in respect of the 'old employer', ACE Wholesalers. In this regard, Big Save relied on the Constitutional Court (CC) decision in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) (see employment law update 'Joinder v Jurisdiction' 2015 (March) *DR* 39), in which it was held that referral for conciliation is a prerequisite to the LC having jurisdiction over unfair dismissal disputes and thus the LC was not permitted to join a party to the proceedings when that party had not been a party to the conciliation process.

The LC considered the judgments in *Intervalve* and agreed that a party cannot be joined to proceedings if it was not a party to the conciliation process. However, it interpreted the CC's decision in *Intervalve* to mean that in disputes involving s 197 of the LRA it was not necessary to refer both the old employer and the new employer to conciliation and the new employer could in fact be subsequently joined to proceedings.

The Labour Appeal Court (LAC), per Waglay JP, held that the general principle is that a referral to conciliation is a precondition to the LC having jurisdiction to determine a dispute about an unfair dismissal and thus, it is not permissible to join a party that was not party to the conciliation proceedings at a later stage. However, the LAC held that this principle is not applicable where a dismissed employee refers an unfair dismissal dispute against his or her employer and then subsequently discovers that the business has changed hands and thus their relief lies against a new employer in terms of s 197 of the LRA.

This is because the consequences of s 197 are that the new employer steps into the shoes of the old employer in respect of all rights and obligations of the old employer, including pending litigation. Thus, if the dispute is referred to conciliation in respect of the old employer, it would not be necessary to refer the dispute to conciliation in respect of the new employer as the new employer would simply step into the shoes of the old employer.

The LAC found that there was no basis to interfere with the LC's decision regarding joinder as it was up to the trial court to determine whether or not s 197 applied. The appeal was accordingly dismissed with costs.

Reconstruction of record in review proceedings

In *Francis Baard District Municipality v Rex NO and Others* [2016] 10 BLLR 1009 (LAC), the municipality instituted review proceedings in respect of an arbitration award in which reinstatement was ordered. The record of the arbitration proceedings was only partially complete in that the testimonies of some of the witnesses were not transcribed. Furthermore, the evidence of the employee was only partly transcribed. The employee objected to the record and suggested to the municipality that the parties attempt to reconstruct the record.

A few months later, the attorneys for the municipality responded that it would not be possible to reconstruct the record as no notes of the evidence lead at the arbitration had been taken. It advised the employee that the municipality would stand and fall by the partial record and invited the employee to file an answering affidavit based on the partial record.

The LC, per Morgan AJ, refused to determine the review based on the partial record as there were missing parts that were material to the dispute. In determining whether to dismiss the review application or remit it to the bargaining council, Morgan AJ found that a diligent attempt had not been made to reconstruct the record. The review application was accordingly dismissed.

The municipality appealed against the decision of the LC on the basis that the LC's decision was incorrect as the matter could have been determined based on the partial record, failing which, the matter should have been remitted to the bargaining council for a fresh hearing. It was also argued that sufficient weight had not been given to the municipality's right to institute review proceedings.

The LAC, per Musi JA, held that it is the duty of the applicant in review proceedings to take all reasonable steps to ensure that the record placed before the court is as complete as possible. In circumstances where there is an incomplete record before the court, the court must determine whether the missing parts of the record are material to the dispute. The next inquiry is whether the applicant took all reasonable steps to reconstruct the record. This must be determined by the facts on a case by case basis. In this case, the municipality had refused to try and reconstruct the record as per the employee's suggestion.

As regards the right to review proceedings, Musi AJ held that review proceedings should not be dismissed lightly. However, after considering the facts of this case, Musi AJ was of the view that the other factors outweighed the right to review proceedings and the municipality only had itself to blame for the situation it found itself in. The appeal was accordingly dismissed with costs.

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The Prescription Act: Consistent or inconsistent with the LRA?

FAWU obo Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd (unreported case no: JA20/15, 8-9-2016) (Sutherland JA (Ndlovu JA and Murphy AJA concurring)).

Does the Prescription Act 68 of 1969 apply to unfair dismissal disputes referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and if so, is prescription interrupted when a dispute is referred to the CCMA in terms of s 191(1) of the Labour Relations Act 66 of 1995 (the LRA)?

These were the questions before the Labour Appeal Court (LAC).

Prior to the hearing of this appeal, the LAC, in three consolidated matters of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters (2016)* 37 ILJ 413 (LAC) had recently held that the Prescription Act did apply to arbitration awards. This decision, however, did not dispose of the aforestated questions, which sought to determine whether litigation under the LRA, prior to rendering an award or judgment, is subject to the Prescription Act.

Background

The appellant union, Food and Allied Workers Union (FAWU) referred an unfair dismissal dispute to the CCMA on behalf of its members on 7 August 2001. An arbitrator found that the CCMA did not have jurisdiction to hear the dispute and directed the parties to the Labour Court (LC). FAWU's application to review the arbitrator's ruling was dismissed by the LC on 9 December 2003, whereafter FAWU filed a statement of claim at the LC in March 2005 in pursuit of its members unfair dismissal claim.

The respondent pleaded prescription of the claim, which was eventually upheld by the LC at trial, in May 2014.

FAWU turned to the LAC.

Material to this appeal was s 16(1) of the Prescription Act, as well as s 210 of the LRA.

Section 16(1) reads:

'Subject to the provisions of subsection (2)(*b*), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.'

Section 210 reads:

'If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.'

Among FAWU's arguments on appeal was that an extinction of a labour dispute by way of prescription runs contrary to the aims and purpose of the LRA, which is to promote labour stability and peace. Hence in light of the public interest placed on labour peace, due weight should be given to the effect of s 210 of the LRA, which – as a result thereof – ought to exclude the Prescription Act in matters dealt with under the LRA.

The LAC noted that the argument based on public policy and equity were rejected in *Myathaza* where the LAC held that once the requirements for a plea of prescription have been met, a court is bound to uphold such a plea without having regard to the considerations of equity and public policy. The LAC *in casu* saw no need to disturb the legal position as set out in *Myathaza*.

A further argument advanced by FAWU was that the LRA sets out specific time frames for disputes to be referred to the CCMA, for conciliation to take place and for adjudication thereafter. Thus the LRA created its own time frames for when claims are made and actions instituted and in addition, gives a court or an arbitrator the power to condone a party for not adhering to such time frames. Not only was this an inconsistency, between the two statutes as contemplated in s 16(1) of the Prescription Act, this inconsistency further meant that neither the LC nor an arbitrator could condone a period longer than three years even if the party applying for condonation could establish good cause.

In addressing this argument the court began by stating that inconsistency between statutes is not borne out of a mere difference in procedure between the two statutes. 'What is required is an examination of the relevant provisions to determine whether the two statutory regimes are functionally "inconsistent"; if they can be reconciled, there cannot be an inconsistency'. Put differently, do the relevant sections in the LRA and that of the Prescription Act share the same purposes; if so there would be no inconsistency between the two statutes.

The employer argued that the LRA and the Prescription Act are not inconsistent with one another. In arguing this point the employer gave the following interpretation:

'An appropriate and useful approach to the interpretation of the two statutes is to imagine each as constructing a regime which may be overlaid upon one another as a pair of concentric circles. The outer circle is the Prescription Act which extinguishes debts upon the expiry of three years. The inner circle is the LRA which requires of parties to refer a dispute within 30 or 90 days during which conciliation may occur, and upon expiry and the failure of conciliation efforts, a party has 90 more days to refer the matter to the Labour Court or go to arbitration as the case may. In the present case, that next step was to the Labour Court by the filing of statement of case. The discretion of the Labour Court to condone late filing operates within, and not in competition with, the scope of the periods stipulated by the Prescription Act.'

Therefore according to the employer, s 191 creates time bars and not an alternative to the Prescription Act, and thus there was no inconsistency between the two statutes.

In accepting this argument the LAC held that the powers of a court to grant condonation is not a substitution or alternative to prescription.

The court further rejected the argument that a claim for reinstatement, as was the claim made by FAWU on behalf of its members at the LC, was not a debt as envisaged in the Prescription Act.

Having made these findings and in answering the first question posed, the court found that the Prescription Act applied to all litigation conducted under the LRA including disputes referred under s 191.

The next issue was whether FAWU's referral to the CCMA on 7 August 2001, interrupted prescription in terms of s 15(1) of the Prescription Act which reads:

'The running of prescription shall, subject to the provisions of subsection (2), be interrupted *by the service on the debtor of any process whereby the creditor claims payment of the debt*' (my italics).

Section 15(6) defines the word 'process' as:

'… includes a petition, a notice of motion, a rule *nisi*, … a third party notice referred to in any rule of court, and any document *whereby legal proceedings are commenced*' (my italics).

FAWU argued that the debt arose on

dismissal and that the referral to the CCMA interrupted prescription in terms of s 15(1) of the Prescription Act.

While the LAC agreed with the submission that the debt arose on dismissal, it nevertheless rejected the argument that a referral to the CCMA interrupts prescription. The court held:

'What section 15(1) of the Prescription Act requires to interrupt prescription is a "process … whereby legal proceedings are commenced". A referral does not do so because a referral does not commence legal proceedings. … A referral is no more than a condition to be fulfilled to obtain access to a forum that can adjudicate a dispute.

In the case of a matter that must, like the present one, be ventilated in the Labour Court, the referring party must after the referral and exhaustion of conciliation in terms of section 191(5)(*b*) "refer the dispute to the Labour Court for adjudication", which involves, in accordance with Rule 6(1) of the Labour Court Rules, the filing of a statement of case, which, in terms of section 191(11)(a), must be done within 90 days of the certificate of non-resolution. This is the act [which] initiates, as the text expressly states, "adjudication" (as distinct from conciliation) and which, for that reason constitutes the "process" which interrupts prescription.'

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

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By Meryl Federl

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Abbreviation	Title	Publisher	Volume/issue
EL	Employment law	LexisNexis	(2016) 32.5
ILJ	Industrial Law Journal	Juta	(2016) 37 October
LDD	Law, Democracy and Development	University of the Western Cape	(2016) 20
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2016) 13(3) September
PER	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2016) September
SALJ	South African Law Journal	Juta	(2016) 133.3
SLR	Stellenbosch Law Review	Juta	(2016) 27.2

Administrative law

Konstant, A 'Administrative action and procedural fairness – *Minister of Defence and Military Veterans v Motau*' (2016) 133.3 *SALJ* 491.

Marais, EJ 'A common-law presumption, statutory interpretation and s 25(2) of the Constitution – a tale of three fallacies. A critical analysis of the Constitutional Court's *Arun* judgment – *Arun Property Development (Pty) Ltd v Cape Town City*' (2016) 133.3 *SALJ* 629.

Cession

Hutchison, D 'Agreements in restraint of cession: Time for a new approach' (2016) 27.2 *SLR* 273.

Commercial law

Wallis, M 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133.3 *SALJ* 545.

Company law

Cassim, R 'Delinquent Directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' (2016) September *PER*.

Jacobs, L and Neethling, J 'Die sorgsame ondernemingsreddingspraktisyn: 'n Ondersoek na die gepaste maatstaf' (2016) 13(3) September *LitNet*.

Consumer law

Lim Tung, OJ 'Genetically modified food and feed in South Africa: Labelling and the right to disclosure of information' (2016) 133.3 *SALJ* 600.

Constitutional law

French, D '"Brexit": A constitutional, diplomatic and democratic crisis. A view from the trenches' (2016) September *PER*.

Rautenbach, IM 'Vonnisbespreking: Teenmaatreëls vir die uitvoerende gesag se kaping van wetgewende kontrolefunksies in 'n parlementêre uitvoerende stelsel – *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (KH)' (2016) 13(3) September *LitNet*.

Contract law

Brand, FDJ 'The role of good faith, equity and fairness in the South African law of contract: A further instalment' (2016) 27.2 *SLR* 238.

Naudé, T 'The principle of reciprocity in continuous contracts like lease: What is and should be the role of the *exceptio non adimpleti contractus* (defence of the unfulfilled contract)?' (2016) 27.2 *SLR* 323.

Nienaber, PM 'Toegepaste kontraktereg oor arbitrasies en dies meer' (2016) 27.2 *SLR* 393.

Reinecke, MFB 'Die aard en indeling van kontrakbreuk' (2016) 27.2 *SLR* 309.

Smits, JM 'The expanding circle of contract law' (2016) 27.2 *SLR* 227.

Zimmermann, R 'Right to damages in European contract law' (2016) 27.2 *SLR* 354.

Costs

Du Plessis, J 'The right of an attorney to claim payment of costs from a third party' (2016) 27.2 *SLR* 292.

Customary law

Chigwata, T 'The role of traditional leaders in Zimbabwe: Are they still relevant?' (2016) 20 *LDD* 69.

Estoppel

Myburgh, F 'On constitutive formalities, estoppel and breaking the rules' (2016) 27.2 *SLR* 254.

Harmonisation of laws

Lehloenya, PM and Mpya, MN 'Exploring the citizen inclusiveness and micro-economic empowerment aspects of regional integration in Africa' (2016) 20 *LDD* 91.

Health law

Pieterse, M 'Geography, marginalisation and the performance of the right to have access to health care services in Johannesburg' (2016) 20 *LDD* 1.

Human rights

Stevens, C and Ntlama, N 'An overview of South Africa's institutional framework in promoting women's right to development' (2016) 20 *LDD* 40.

International trade

Vinti, C 'A spring without water: The conundrum of anti-dumping duties in South African law' (2016) September *PER*.

Judicial reasoning

Olivier, P 'Deriving the ratio of an overdetermined judgment: The law after *Turnbull-Jackson v Hibiscus Coast Municipality*' (2016) 133.3 *SALJ* 522.

Judiciary

Masengu, T 'Gender transformation as a means of enhancing perceptions of impartiality on the Bench' (2016) 133.3 *SALJ* 475.

Labour law

Bassuday, K 'Disciplinary sanctions in the alternative' (2016) 37 October *ILJ* 2251.

Cohen T and Gosai, N 'Making a case for work life balances for the South African employee' (2016) 37 October *ILJ* 2237.

Ebrahim, S 'Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom' 2016 September *PER*.

Fergus, E and Godfrey, S 'Organising and bargaining across sectors in South Africa: Recent developments and potential problems' (2016) 37 October *ILJ* 2211.

Grogan, J 'Levelling the playing fields who can be locked out, and when?' (2016) 32.5 *EL*.

Grogan, J 'Watch the boss – strict liability for harassment' (2016) 32.5 *EL*.

Myburgh, A 'Reviewing CCMA rewards: Undecided and controversial issues' (2016) 37 October *ILJ* 2193.

Nkhumise, RW 'Dismissal of an employee at the instance of a client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the context of the Labour Relations Amendment Act 6 of 2014' (2016) 20 *LDD* 106.

Rycroft, A 'Is evidence of the breakdown in the trust relationship always necessary?' (2016) 37 October *ILJ* 2260.

Pension law

Marumoagae, MC 'Concern Regarding the "debt" created by rule 14.10.9 of the Government Employees' Pension Fund Rules' (2016) September *PER*.

Mhango, M 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?' (2016) 20 *LDD* 20.

Prescription law

Loubser, M 'The prescription period applicable to a debt secured by notarial bond' (2016) 27.2 *SLR* 374.

Property law

Erlank, W 'Don't touch my virtual property: Justifications for the recognition of virtual property' (2016) 133.3 *SALJ* 664.

Sentencing law

Du Toit, PG 'Publisiteitsbevele as vonnisopsie vir regspersone – publicity orders as sentencing option for juristic persons' (2016) September *PER*.

Sporting law

Plasket, C 'The fundamental principles of justice and legal vacuums: The regulatory powers of national sporting bodies' (2016) 133.3 *SALJ* 569.

Tax law

Titus, A 'May an investment in interest-bearing securities constitute a trade for the purposes of the Income Tax Act?' (2016) 133.3 *SALJ 504*.

Unjust enrichment

Sonnekus, JC 'Subsidiêriteit as kernbegrip by verrykingseise, sekerheidsregte én statutêr nie-uitwinbare vorderings' (2016) 27.2 *SLR 415*.

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