

## MORE CLARITY ON *PRO BONO* UNDER LEGAL PRACTICE ACT

**Time heals all wounds – the law of  
Prescription in medical negligence**

**Pension interest** – is there  
a need to plead a claim?

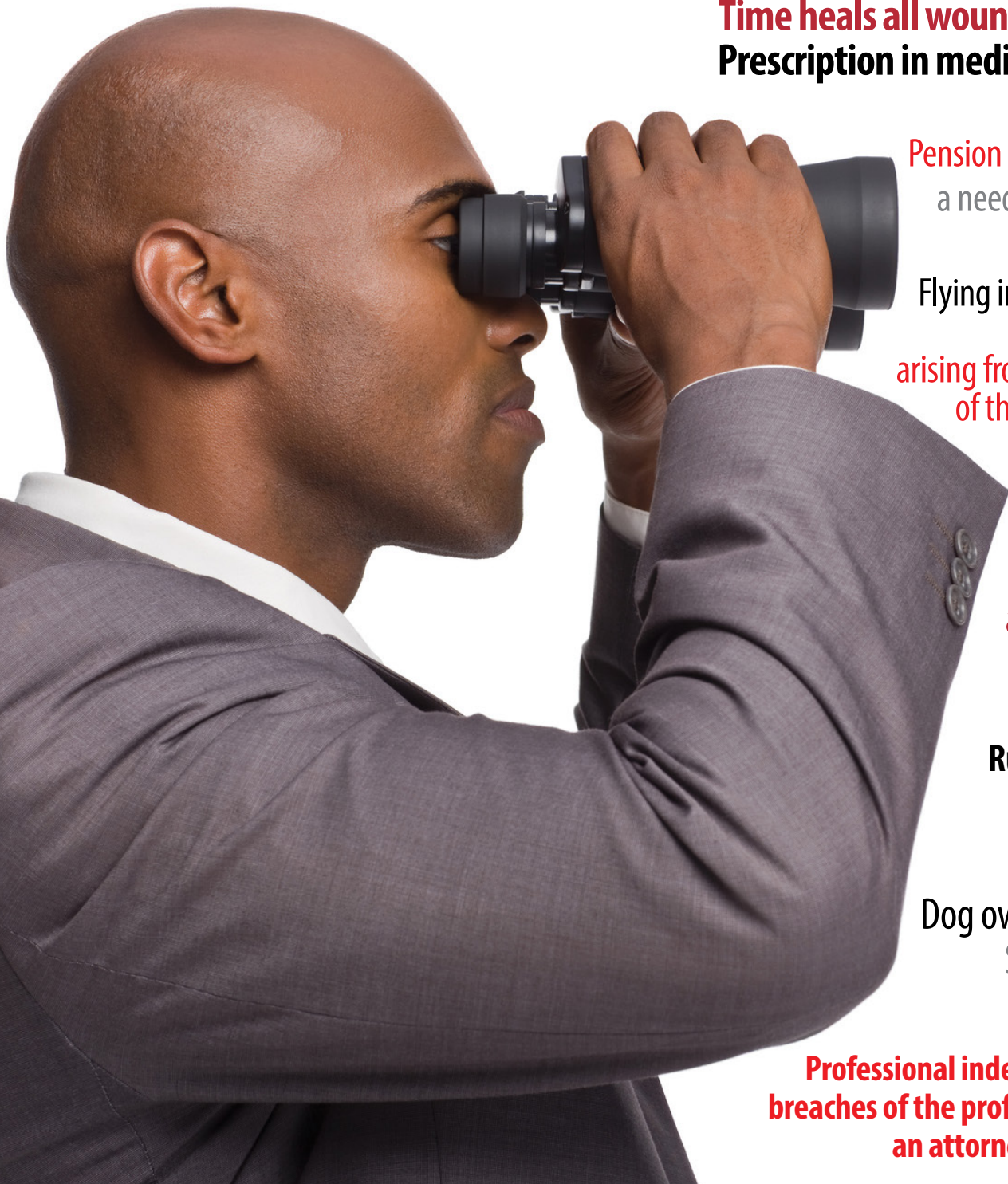
Flying into new heights –  
**damages claims**  
arising from contraventions  
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Letting time  
fly ...  
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**Rule 35(12) of the  
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Be wary**

Dog owners **beware:**  
Strict liability for  
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**Professional indemnity claims and  
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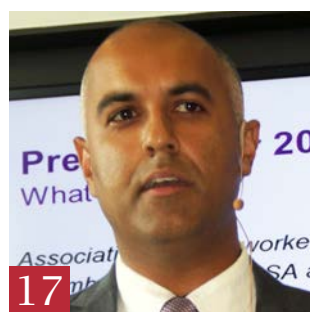
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### 30 Time heals all wounds – The law of Prescription in medical negligence

The purpose of the Prescription Act 68 of 1969 (the Act) is to bring about certainty and finality to disputes. The purpose of the Act is also to penalise creditors who do not take reasonable steps prescribed by the Act. Section 11(d) of the Act provides that a debt shall prescribe within three years from the date that the debt arose. **Lekwalo Jones Ditsela** discusses the recent Constitutional Court judgment in the matter of *Links v Department of Health, Northern [Cape] Province* 2016 (4) SA 414 (CC).

### 32 Letting time fly ... common law and the waiver of prescription

Most textbooks conclude that the waiver of prescription (in the form of an undertaking or term of an agreement not to raise the defence of prescription) is enforceable and not contrary to public policy. However, in view of recent case law anyone confronted with this issue, perhaps when drafting a commercial contract containing such clause, should think twice says author **Johan van der Merwe**. This article takes a brief overview of the case law of the last decade, seen against the common law, and will show that most text books do not properly capture this issue.

### 34 Flying into new heights – damages claims arising from contraventions of the Competition Act

The Competition Tribunal and Competition Appeal Court have exclusive jurisdiction to adjudicate whether conduct is in contravention of the provisions of the Competition Act 89 of 1998. A s 65 certificate serves as irrefutable confirmation of the contravention of the Competition Act by the cited party writes **Malcolm Ratz**. The civil courts are, therefore, not tasked with reconsidering the merits of the conduct and assessing whether such conduct was in contravention of the Competition Act.

In his article he focuses on the matter of *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ).

### 38 Pension interest – is there a need to plead a claim?

In this article, **Clement Marumoagae** addresses the topic of whether or not there is a need to specifically plead a claim for a pension interest in divorce papers in order for the court to order a retirement fund to pay the pension interest to the non-member spouse as some regional magistrates refuse to grant orders relating to pension interests when the name of the retirement fund is not mentioned on the papers.



#### EDITOR:

Mapula Sedutla  
NDip Journ (DUT) BTech (Journ) (TUT)

#### PRODUCTION EDITOR:

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BTech (Journ) (TUT)

#### SUB-EDITOR:

Kevin O'Reilly –  
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#### SUB-EDITOR:

Isabel Joubert –  
BIS Publishing (Hons) (UP)

#### NEWS REPORTER:

Kgomotso Ramotsho –  
Cert Journ (Boston)  
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#### EDITORIAL SECRETARY:

Shireen Mahomed

#### EDITORIAL COMMITTEE:

Mohamed Randera (Chairperson), Denise Lenyai,  
Giusi Harper, Peter Horn, Lutendo Sigogo

**EDITORIAL OFFICE:** 304 Brooks Street, Menlo Park,  
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.

Tel (012) 366 8800 Fax (012) 362 0969.

E-mail: [derebus@derebus.org.za](mailto:derebus@derebus.org.za)

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**ACCOUNT INQUIRIES:** David Madonsela

Tel (012) 366 8800 E-mail: [david@lssa.org.za](mailto:david@lssa.org.za)

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Tel (012) 441 4629 E-mail: [gail@lssalead.org.za](mailto:gail@lssalead.org.za)

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# Legal Practice Act fatigue?

**A**s we usher in the New Year, we should be mindful of the important happenings of the year that was, which will continue to take centre focus in 2017 and undoubtedly change the legal landscape as we know it.

In the year 2016 we saw the full workings of the National Forum on the Legal Profession (NF) take shape. The NF was established by s 96 of the Legal Practice Act 28 of 2014 (LPA), to facilitate the transitional period from the current law society era to the unified regulation of the legal profession. At the end of last year, during the various annual general meetings (AGM) that were held by bodies within the organised profession, the LPA and its implications on the profession was discussed extensively.

At the Cape Law Society (CLS) AGM, outgoing President of the CLS, Ashraf Mahomed, discussed the importance of practitioners embracing the LPA as its primary aim is the creation of a unified body that will regulate the affairs of legal practitioners, transform the legal profession and regulate the legal profession in the interest of the public. Meanwhile, at the Law Society of the Northern Provinces AGM, President of the Black Lawyers Association and member of the NF, Lutendo Sigogo, highlighted the terms of reference of the NF. Mr Sigogo also spoke about the recommendations, which the NF must make to the minister

of justice and other functions the body must perform before the end of its three year period, which is currently set for 1 February 2018 (see p 5 and 8).

Practitioners who are avid readers of *De Rebus* will know that the LPA has been reported on and discussed in many issues and some may be growing tired of this topic. However, there are many issues that the LPA has brought about that still has to be dealt with and discussed, which is the mandate of the NF and the profession at large. One such issue that still needs to be unpacked is the issue of *pro bono* under the LPA. Our cover feature article 'More clarity on *pro bono* under the Legal Practice Act' written by Erica Emdon looks at whether the provisions relating to community services contained in s 29 of the LPA have addressed the issue of *pro bono* service in a manner that is unambiguous and gives clear direction to legal practitioners regarding their responsibility towards *pro bono* service. The article gives two possible solutions on when *pro bono* can be conducted by legal practitioners (see p 26).

The NF has one more year to ensure that once the LPA is fully promulgated the legal profession does not find itself in a worse off position and that all issues that are in the Act are ironed out. *De Rebus* will continue to report on all the developments during the transition period. Practitioners are urged to send through their views on the LPA to [derebus@derebus.org.za](mailto:derebus@derebus.org.za)



Mapula Sedutla – Editor

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*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](mailto:derebus@derebus.org.za).

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# LETTERS

## TO THE EDITOR

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

### Validity of powers of attorney

In January 2004 the South African Law Reform Commission submitted a report entitled, 'Assisted decision-making: Adults with impaired decision-making capacity' Discussion Paper 105 (Project 122) (January 2004), which recommended that legislation should be introduced to recognise the validity of enduring powers of attorney that remain in force despite the mental incapacity of the principal or grantor thereof. It seems that, 12 years later, absolutely nothing has been done to take the matter further.

In modern society we all tend to live longer than the generations before us and in so many instances the incidence of mild to more serious cognitive impairment in individuals has become extremely common. Many of my fellow citizens have come to me to ask whether the power of attorney conferred on a relative or trusted agent will continue if their loss of memory should increase, as is so often the case. Other countries such as the United Kingdom, Canada, the United States, New Zealand and Australia have all introduced appropriate legislation to recognise enduring powers of attorney.

Surely this is a non-contentious matter which, with very little effort, could receive legislative endorsement.

May I suggest that our profession should take immediate steps to urge the authorities to dust off the Law Reform Commission Report and to submit the draft legislation as a Bill for comment and, subsequent, enactment?

*Louis van Zyl*, attorney, Cape Town

### A major who is a minor

I feel like I must raise a concern and opinion to the proposed amendment or enactment of the age of majority of the young person from 18 to 21.

The current status in South Africa is that everyone above the age of 18 years is deemed a major and can be allowed to vote as per universal suffrage.

He or she can enter into a valid marriage without seeking any parental consent as in terms of Children's Act 38 of 2005 or Marriage Act 25 of 1961.

I believe that if such person is deemed a major, he or she can also enter into a valid contracts in terms of the law of contract, and such person can either own a tavern, bar or bottle store.

I visualise the situation whereby an 18 year old will not be allowed to consume, sell or buy alcohol.

In certain circumstances an 18 year old person could be preparing for his or her marriage and need to go to a bar to organise alcohol for invited guests.

If someone is old enough to obtain a driver's licence and drive a car, I can find no reason why he or she will still be declared a major who is a minor when it comes to the alcohol issue.

I feel like the law will be limiting some of his or her rights, which will be unfair and unconstitutional.

I will be pleased if this letter can be published to see opinions from fellow lawyers.

*Andile Alphons Nondabula*, attorney, Verulam



**Do you have something that you would like to share with the readers of *De Rebus*?**

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# Cape Law Society AGM: 20 years of the Constitution – a time for reflection

**T**he Cape Law Society (CLS) held its annual general meeting in November 2016. The conference was held under the theme '20 years of the Constitution – a time for reflection'. The keynote address was delivered by Chief Justice Mogoeng Mogoeng.

Chief Justice Mogoeng began his address by saying that the invitation to address the CLS presented an opportunity for him to participate in reshaping matters of importance in the legal profession and the nation. Commenting on the 20 year anniversary of the Constitution, Chief Justice Mogoeng said: 'We should rather say 22 years because we did not become a constitutional democracy when the 1996 Constitution came into being. We were already a constitutional democracy since 1994. It is a very difficult and challenging topic to reflect on. Twenty years or 22 years afterward because until we make an effort to reconnect with what it is that necessitated the crafting of the Constitution that we now have, we can only have but half a picture. ... South Africans got tired, South Africans black and white got tired. ... Once upon a time some smart people led us to believe that there was "a magic" in the fact of your skin colour being black or white. And somehow that your destiny ought to be tied up with nothing more but the colouration of your skin. And that unfortunate misconception got so internalised and taken so seriously that it culminated into the creation of a system that the United Nations declared a crime against humanity. ... Reflect on how difficult it was those years ago, we could not have gathered in a manner that we are gathered here. ... We need to remind ourselves of our shameful past so that we can do everything in our collective power as South Africans black and white to run away from what we used to be associated with.'

Chief Justice Mogoeng noted that during the Apartheid era some South Africans did not define themselves according to their skin colour. He added: 'One South African who saw himself as a South African not as a white man, met Judge John Hlophe as a small boy. John regularly cleaned up his vehicle. In his



*Chief Justice Mogoeng Mogoeng delivered the keynote address at the Cape Law Society annual general meeting held in October.*

engagement with young Hlophe he identified the hidden potential within. That man was an attorney. ... He decided to fund the studies of John Hlophe from the beginning all the way through to university. John Hlophe ended up being a PHD graduate from the university of Cambridge. ... How many of us as lawyers think of others in line with the spirit of our Constitution? How many of us have embraced the ethos of our Constitution and the preamble to our Constitution?'

Chief Justice Mogoeng said that South Africans must always bear in mind those things that were fundamental to the divisions of the past that now needs to be healed. He asked: 'Why were we so divided? Because if we do not deal with that we are allowing those things that kept us divided to stay as strong as they were before 1994. And for as long as they are strong, the prejudices, the stereotypes the anger the frustration one-way or the other, change will not happen. We have been favoured with incidents that are pointers to what the inability to change and change more meaningfully will give rise to. When things like fees must fall, Rhodes must fall begin to happen in the manner that they did, they remind me of 1976, they remind me of what happened in the 80s. I do not know who of us would know what to do should those

developments blow out fully nationwide and in a sustained way. What has that got to do with 22 years as a constitutional democracy? What has that got to do with the reflections that we need to make. When people are dissatisfied, they look for who appears to have what they don't have and they rise against those people.'

Speaking on unconscious bias, Chief Justice Mogoeng said: 'One can be gender biased or racially biased without realising it. This is the most dangerous form of bias because when you do not know that you are bias then there is nothing to correct. An example of this is that some time back I was with people and we got into a lift there were one or two people with a white pigmentation and others with a black pigmentation. Guess what happened? I only greeted black people. And when we left the lift my conscious was struck so deep. Why did I only greet black people? It means I have unconscious bias against white people and this is not right, it is something that I must deal with. ... The danger of unconscious bias is that you will discriminate against others without realising that what you are doing is in fact discrimination. That will be dangerous for the realisation of the constitutional dream.'

Chief Justice Mogoeng pointed out



*Outgoing President of the Cape Law Society, Ashraf Mahomed, spoke about the Legal Practice Act during conference.*



*Judge President of the Western Cape Division, John Hlophe, gave a presentation on how legal practitioners can become judges.*

that the manner in which big companies give work to attorneys or how briefs are conducted is a form of unconscious bias. 'One of our former Chief Justices, Ismail Mohamed said, that an excellent lawyer that he was, never once did he receive a brief from a big company or a white law firm. The same applies to Pius Langa, Sandile Ngcobo and Dikgang Moseneke. I choose to attribute that not to conscious bias but to unconscious bias. It gets worse, this I say to the Law Society of the Northern Provinces, there can be a deserving woman or black person but they will not get the brief. No, it is a thing of honour to take the brief elsewhere. What am I saying, must they only give black people briefs? I am saying once we accept that we are one big family and that there is enough on the plate for all of us and that we have to embrace our collective and individual constitutional responsibility to help transform South Africa.

This is a time not just for reflections but for deep reflections. We need to transform ourselves, as a law society, as a society of advocates, as the judiciary and we need to transform ourselves as a nation. If there is any country in this continent that has all the potential to turn the fortunes of Africa around, it is South Africa. So we need to differentiate between where criticism needs to be leveled and how and where our collective fortunes need to be nurtured so that we do not destroy as we criticise. We need to be very careful not to be drawn into any self-distractive narratives. ... We are not politicians but politicians also need to be appealed to know that this is the only country we have, a country with immeasurable potential to become not only the economic powerhouse of Africa but of the world.'

## The Legal Practice Act

Speaking about the changes that will be

brought about by the Legal Practice Act 28 of 2014 (LPA), the outgoing president of the CLS, Ashraf Mahomed, said that the primary aim of the LPA is the creation of a unified body to regulate the affairs of legal practitioners, transform the legal profession and regulate the legal profession in the interest of the public. He added: 'Once we fully understand these aims you will finally understand the state of which we are compelled to embrace the eminent changes. We are currently seeing the demise of the current governance structures of the legal profession that has evolved over three centuries in South Africa. The Cape Law Society, as we know it, will cease to exist and most of our assets will be transferred to the new unified body that will be established in its place. The body we refer to in the LPA is the Legal Practice Council and will include attorneys, advocates and representatives of government. The stakeholders of the Legal Practice Council will not enjoy parity in membership in terms of the number of seats that they will occupy.'

Speaking about the jurisdiction of the CLS, Mr Mahomed said: 'Three regional councils will be established, that is one for each province within our current jurisdiction and it is conceivable that there will be a measure of representativity in terms of race, gender and demographic targets both national and regional. ... The legal profession will remain independent, albeit the various key stake-

holders, including government and lay people involved in the governance structures. The way we practice law will remain the same. Existing reserved work and forms of legal practice, as we know it will remain the same. ... We will see a legal services ombudsman established that would have a role in disciplinary matters. The profession of advocates will continue working as an independent specialists but an additional category of legal practitioner has been created, namely, advocates with trust accounts. That might mean that there will be some competition for us as practitioners going forward. The admission and removal of legal practitioners will still be the sole reserve of our courts.'

Mr Mahomed noted that the LPA does not provide for the establishment of a voluntary association to represent the interest of the legal profession. 'At the same time, there is nothing in the LPA that prevents us from recognising a voluntary association with a code of conduct. The current debates are focused on building consensus on the need to form a voluntary association its scope and ambit, the financial base will potentially come from some of the assets of the existing statutory law societies. I am pleased to report, from our extensive consultation with members and the constituencies' circles within our jurisdiction and more recently during the panel discussions. ... We received significant support amongst our members for the



*Co-chairpersons of the Law Society of South Africa Mvuzo Notyesi and Jan van Rensburg were part of a panel that discussed the changing legal landscape during the conference.*



concept of a voluntary association and importantly the fact that such representative body does not need to start from scratch. There is even talk that the existing Law Society of South Africa will serve as a vehicle for the establishment of this new body,' he added.

## How to become a judge

Judge President of the Western Cape Division, John Hlophe, began his address by quoting s 174 of the Constitution. He noted that two years ago, the heads of courts sat and considered what it is that they are looking for in lawyers, for purposes of acting positions. He added: 'The decision that we took was the following: Any woman or man who is not appointable as a permanent judge should not be appointed to act. ... People that have been before the Judicial Service Commission on numerous occasions and were not successful, that ruling applies to them as well. So you will not be considered for an acting position if you have tried on numerous occasions to secure a permanent position without success. In general, apart from that we also look at relevant experience for purposes of acting the cut off point is ten years. You must be at least in the profession for ten years as an attorney, advocate or academic.'

Judge Hlophe went on further to state: 'To those of you who would like to be considered to act, I also want someone whose practice is big and diverse. So clearly if your role in this world is conveyancing, .... judging is not about being a conveyancer. We need relevant experience, you must be active, we want to see you in the courts everyday, and someone whose practice is diverse ranging from matrimonial matters, criminal law and commercial law. With specific reference to attorneys, we want to see attorneys in the High Court, the practice of the law in the lower court, with all due respect, is not the same as the practice of law in the High Court. We all know that magistrates are creators of statutes, whereas in the High Court that is where law is exciting.'

Judge Hlophe noted that he has had instances where criminal attorneys have approached him for an acting position for a criminal case. 'No one is going to be

appointed to come to the Western Cape High Court just to come and preside on criminal cases. Criminal law is 35% of work in this division. 65% is civil work, its commercial law, matrimonial law it is different areas of the law. So clearly then diversity is called for. ... If you want to be considered for an acting position you have to diversify your practice, you have to make sure you have access to other kinds of work, including, constitutional law, administrative law and commercial law. Judges at the end of the day must be real and scholarly.'

## Changing legal landscape

Co-chairperson of the Law Society of South Africa (LSSA) Jan van Rensburg noted that the LSSA has discussed the problems that it foresees with the implementation of the LPA. He added: 'From 1 February 2018, the legal profession will enter into a new era. When the LPC comes into existence all the existing structures will cease to exist. We will then sit with the LPC and provincial councils. The provincial councils will not be as the current provincial law society as they will be nine in terms of the Act. They will not have the powers that the current provincial law societies have. In the new dispensation the provincial councils will have delegated powers from the LPC. Because of financing, it is not clear if all nine provincial councils will be fully fledged, the possibility is still being discussed to have, in the smaller provinces, not all the functions.'

Mr Van Rensburg said the LPA, as it stands, does not provide for the professional interests of lawyers. 'If we look at the implementation journey, the LSSA as far back as in 2015 went back to its constituencies and asked them to consider the possibility of creating such an organisation and there was a resolution to establish an independent association, which will represent, add value to practitioners and speak on behalf of the profession. Now we are in the process of considering how to build this body. We must understand there is no obligation in the LPA to belong to this body so if we want to convince you, our members, to partake in this we must have your full buy in. It is voluntary and there must be

some value in it before we will be able to sell it to you,' he added.

Co-chairperson of the LSSA, Mvuzo Ntyes, noted that when the new council comes in, it will perform regulatory functions. 'Here we are talking about the issues of upholding the rule of law, the issues of the interest of the profession, building our capacity, we want to talk about the issues of human rights, we want to ensure that we capacitate our own members. We will remain an organised profession, so that things that have happened in the past never happen again. We need to be an organised profession to ensure that we preserve our profession. We want lawyers who speak with one voice, we are not interested whether you are an advocate, whether you are an attorney, we say people in the profession must come together.'

• See 'Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM' (2016 (Dec) DR 6); 'Activism with a purpose discussed at BLA AGM' (2016 (Dec) DR 9); and 'A new home for legal practitioners: What's in it for you?' (2016 (Nov) DR 3).

## New CLS council

- Mbulelo Jolwana (President).
- Ettienne Barnard (Vice-President).
- Perino Pama (Vice-President).
- Ncumisa Nongogo (Vice-President).
- Lulama Lobi (Vice-President).
- Koos Alberts.
- Graham Bellairs.
- André de Lange.
- David Geard.
- Peter Horn.
- Rehana Khan Parker.
- Likhaya Makana.
- Ashraf Mahomed.
- Sinawo Makangela.
- Bayethe Maswazi.
- Roland Meyer.
- Janine Myburgh.
- Ben Niehaus.
- Nonoza Potelwa.
- Dumisani Sonamzi.

Mapula Thebe,  
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## 2017 annual general meetings

Province	Date	Venue	Contact person
The National Association of Democratic Lawyers	24 to 26 March 2017.	Protea Hotel in Pietermaritzburg, KwaZulu-Natal.	Fazoe Sydow fazoe@nadel.co.za 078 514 3706.
Law Society of South Africa	21 to 22 April 2017.	Boardwalk International Convention Centre, Port Elizabeth.	Communications Department LSSA@LSSA.org.za or (012) 366 8800.

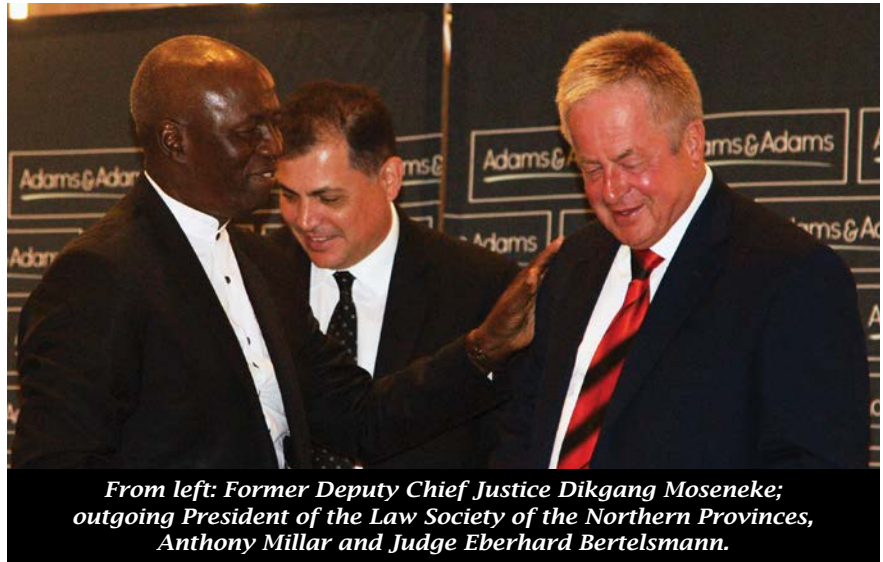
# LSNP AGM: Lawyers are high priests of excellence

**T**he Law Society of the Northern Provinces held its annual general meeting (AGM) in November 2016 at Sun City. Speakers at the AGM included former Deputy Chief Justice Dikgang Moseneke and Judge Eberhard Bertelsmann.

Justice Moseneke noted that he was excited to see the diversity of the people present at the conference. He added: 'We come from a difficult past where people wrongly thought that race matters. Race does not matter it is totally irrelevant how one looks. All that matters is your values, the excellence that you exude and showing compassion to others. ... We need to celebrate our differences and find cohesiveness. We come from a history of conflict caused by Apartheid and exclusion. We are a post conflict nation. This informs the way we behave while we seek to transform society, we want to move forward from the past to a better society. This is also a legitimate goal of our Constitution.'

Justice Moseneke went on further to state that: 'What we committed to in 1994 is that we will not be ruled by law. Apartheid oppressed South Africans by law and ruled by law on the grounds of race, gender, religion, sexual orientation, etcetera. There is a standard of what is good law in our Constitution, it answers to the requirements that we all agreed to. Lawyers sit in the middle of the lives of the nation through mediation, the courts and arbitration. All power is regulated and policed through the law. This process deepens our democracy.'

Speaking about the role of lawyers in society, Justice Moseneke said that lawyers are high priests that observe the law. 'You are the pastors of society; you have to be good for the job. You cannot be a pastor and a sinner at the same time or be a rabbi and not keep to the scriptures. Good lawyers and judges must have high respect for the Constitution. You cannot be a racist and a lawyer and think that you are a good lawyer. There are certain requirements that are imposed on you as a practitioner. ... There are no shortcuts. Lawyers must be hard working and display excellence to those who pay us and those who cannot afford to pay us. We are high priests of excellence. As a judge I owed you the duty of writing excellent judgments that our nation demands,' he added.



*From left: Former Deputy Chief Justice Dikgang Moseneke; outgoing President of the Law Society of the Northern Provinces, Anthony Millar and Judge Eberhard Bertelsmann.*

On the matter of fees, Justice Moseneke said that the legal profession needs to be gentle to its clients. He added: 'I am not suggesting that they should underpay you, rather we should show compassion as we are an honorable profession. It is a calling to be a lawyer; we cannot be seen as fleecing the nation. The nation trusts that from you they will get judges. You are the reservoir from which judges of the nation will be derived from; the nation must continue to trust in those who will decide on their matters.'

## Land Claims Court

Judge Bertelsmann's address was centered on the Land Claims Court (LCC). He narrated a prime example of a case the LCC deals with typically: 'There is a farm in northern KwaZulu-Natal, the farm is run by the Van Der Merwes and it is as beautiful as the Union Buildings. The son of the farm worker went to the Land Claims Court and claimed part of the farm. The son of the farm worker and Mr Van Der Merwe came eye to eye at the court. The veneer of social interaction was reduced to daggers in both men's eyes, in one moment one saw both the blessing and the tremendous challenge South Africa is at. Both men love the land, one has the land that his grandfather gave to him, neither was prepared to compromise.'

Judge Bertelsmann went on further to state that the LCC has been created as part of the Restitution of Land Rights

Act 22 of 1994. 'In the constitution we promised one another that we would redress the wrongs of the past and the restitution of land that was taken by racial oppression. ... Thousands of claims were filed before the court before December 1998. The claims had to be processed by the Commission and some are still being processed to see if the claims are valid. The cases are referred to the



*Co-chairperson of the Law Society of South Africa (LSSA), Jan van Rensburg, gave a presentation on the LSSA Mid-term report see "I-generation" law student discussed at FLS AGM' (2016 (Dec) DR 12).*



**President of the Black Lawyers Association and member of the National Forum on the Legal Profession, Lutendo Sigogo, presented on the workings of the National Forum.**

Land Claims Court and there we deal with claims none of which are younger than 18 years. ... Many thousands of the claimants have gone to the grave without seeing their land. ... The adversarial nature of our court system turns adversaries into enemies. ... The court will receive a further 300 000 claims and they are to follow the same process that we have followed so far.'

## The Legal Practice Act and the National Forum

President of the Black Lawyers Association and member of the National Forum on the Legal Profession (NF), Lutendo Sigogo, addressed the AGM on the Legal Practice Act 28 of 2014 (LPA) and the NF. Giving an introduction, Mr Sigogo said that ch 10 of the LPA came into operation on 1 February 2015. He added: 'Section 96 of the Legal Practice Act established the National Forum on the Legal Profession. This is a structure meant to facilitate the transitional period from the current law society era to the new era of the unified regulation of the legal profession. The National Forum has a life span of three years from 1 February 2015. The Forum is composed of 21 members (8 attorneys, 8 advocates, 1 representative of the Attorneys Fidelity Fund, 1 representative of law teachers, 1 representative of Legal Aid South Africa and 2 members designated by the Minister of Justice).

As the LPA currently stands the NF will cease to exist on 1 February 2018.'

Speaking about the terms of reference of the NF, Mr Sigogo said the terms of reference of the NF are provided for under s 97 of the LPA. He added: 'The NF is required to complete the following tasks within a period of two years:

Make recommendations to the minister on the following issues, namely -

- an election procedure for purposes of constituting the council;
- the establishment of the provincial councils and their areas of jurisdiction;
- the composition, powers and functions of the provincial councils;
- the manner in which the provincial councils must be elected;
- all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as legal practitioners;
- the right of appearance of a candidate legal practitioner in court or any other institution; and
- a mechanism to wind up the affairs of the National Forum.



**Council member of the Law Society of the Northern Provinces, Dave Bennett, gave a presentation on the formation of a voluntary association for legal practitioners. See 'Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM' (2016 (Dec) DR 6); 'Activism with a purpose discussed at BLA AGM' (2016 (Dec) DR 9); and 'A new home for legal practitioners: What's in it for you?' (2016 (Nov) DR 3).**

The National Forum must conduct a cost analysis of the operation of the council and provincial councils and make recommendations to the minister for consideration by Parliament.'

Mr Sigogo went on further to state that: 'Apart from the recommendations to the minister the National Forum must also do the following -

- prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities;
- make rules, as provided for in section 109(2);
- negotiate with and reach an agreement with the law societies and may negotiate with any non-statutory bodies or voluntary associations which are involved in the regulation of legal practitioners or matters dealt with in the LPA, in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Provincial Councils.'

Mr Sigogo noted that the NF has also realised that there could be difficulties in the smooth transition to the Legal Practice Council (LPC) and requested the minister to consider amendment of the Act in order for the following to happen:

- Section 120(3) to come into effect six months earlier so that the LPC should be able to put its systems in place before the full act becomes operational on 1 February 2018 (currently we only know that ch 2 of the Act will come into operation on 1 February 2018, but we do not know when the remainder of the chapters of the Act will come into operation). The NF has been advised that the request has been accepted. If these requested amendments are done then ch 2 of the LPA will come into force on the 1 August 2017 and the remainder chapters will be operational with effect from 1 February 2018.
- Other implications of the requested amendments are that the NF must also do the rules in terms of s 95 of the LPA and recommend to the minister on the regulations provided for under s 94 of the LPA. This only means more work on the same limited space of time.

Mapula Thebe,  
mapula@derebus.org.za

## Erratum – Omission in names of LSSA former Council members

The names of some of the former Law Society of South Africa (LSSA) Council members, who have since retired from Council, were omitted from the list of names published in 2016 (Dec) DR 19. They are:

Judge Willie Seriti and Esmé du Plessis, the first Co-chairpersons of the LSSA when it was established in 1998; Emil Boshoff and Nano Matlala, LSSA Co-chairpersons in 2000 and 2011 respectively, as well as Deputy Judge President

Phineas Mojapelo, Ismail Ayob, Danie Olivier and Johan Fourie who all served on the first LSSA council in 1998.

Their contribution to the profession is recognised and acknowledged, and the omission is deeply regretted.



# Limpopo High Court officially opened

**O**n 29 November 2016 Minister of Justice and Correctional Services, advocate Michael Masutha, officially opened the Limpopo Division of the High Court in Polokwane. Limpopo is the eighth province to have a seat of a High Court. Mr Masutha said the opening of the High Court was important in the history of democracy of South Africa (SA).

Mr Masutha said the establishment of the High Court in the province is a fulfilment of SA's democratic commitment to access to justice for all in the country. He added that the opening of the court defines a new era for the people of Limpopo. He noted that the Apartheid system of homelands resulted in a fragmented justice system and institutions.

Mr Masutha said the Limpopo province previously comprised of three administrations, namely, Venda, Gazankulu and Lebowa, all who were self-governing territories and only Venda had a High Court. The Lebowa and Gazankulu territories fell under the jurisdiction of the Gauteng Division, Pretoria (Transvaal Provincial Division in Pretoria, as it was known) until 25 January 2016, when the jurisdiction of the Gauteng Division, Pretoria extended over the Limpopo, the entire Mpumalanga and parts of the North West provinces, but it changed as a result of the enactment of the Seventeenth Amendment of the Constitution and the Superior Courts Act 10 of 2013.

'Today we bury that past and affirm the future in which an estimated 6 million people in Limpopo no longer have to endure the inconvenience and cost of

commuting to Pretoria for High Court Services' Mr Masutha said. He added that the Superior Courts Act also enables the rationalisation of the High Courts in the former homelands. He said that the old Thohoyandou High Court has now become the local seat of the Limpopo Division of the High Court, and its area of jurisdiction extends beyond the Venda territory.

Mr Masutha said Limpopo now boasts its own office of the Director of Public Prosecutions, offices of the Master and State Attorney, a local Society of Advocates, and Legal Aid South Africa has increased its footprint in the province. He added that the opening of the court has begun to attract legal expertise back into the province. He gave an example that the Judge President of the Limpopo Division and the Director of Public Prosecutions both hail from Limpopo province and in a sense led the campaign of *Re bowa gae* (homecoming), signifying that the people of the province are freed from bondage of the Gauteng Division.

Mr Masutha said on the date of its commencement of operations, the court took over 51 criminal trials and 43 appeal files from the Gauteng Division, he said that cases were already placed on the roll from the date the court commenced functioning and the first murder trial was finalised on 28 January 2016. He added that, since then a total of 116 criminal trials, 73 appeals and 16 reviews have been finalised.

Mr Masutha said there have been some positive outcomes in the civil roll where 1 947 cases out of a total of 2 988 registered had been disposed of. 'This bears

testimony of a court hard at work in dispensing justice,' he added.

Mr Masutha noted that the official opening of the Limpopo High Court was part of the mission to embellish rule of law, one of the founding pillars of SA's constitutional democracy. 'The rule of law and access to justice are inherently intertwined, the presence of one is inconceivable in the absence of the other. Therefore, our efforts to expand courts in the rural areas should ensure equal protection and benefit of the law to all,' he said.

Chief Justice Mogoeng Mogoeng said that the opening of the Limpopo High Court delivered the message that it is within the rights of the Limpopo people to enjoy access to speedy delivery of quality justice that has never been forgotten by the executive arm of the state, by the legislative arm of the state and not by the judicial arm of the state. Chief Justice Mogoeng said issues that were raised at the meeting underscored the importance of ensuring that not only does the department of justice deliver the court, but also make sure that the tools of trade are available to judicial officers and the support staff to make it happen. 'It is also important to make sure these facilities are properly and regularly maintained,' he said.

Kgomotso Ramotsho,  
Kgomotso@derebus.org.za

**S**abinet is to provide small law firms in South Africa (SA) with instant free online access to SA legislation. Via their South African Legislation services (NetLaw), Sabinet provides users with instant online access to SA legislation. Managing director of Sabinet, Rosalind Hattingh, said in a press release that for smaller law firms with limited resources, one of the biggest financial commitments they face is information, moreover keeping up to date with frequent changes to legislation.

The statement added that law firms face challenges of managing cash flow, retaining and growing a client base, navigating the economic climate and staying

up to date with their profession. In addition, they have to spend a lot of money on technology and access to information to enable them to stay abreast of ever-changing legislation in order to continue being able to completely represent their clients.

Sabinet already provides free access to SA legislation to over 300 small law firms nationally, via their Free NetLaw offering - an online system that covers updated and consolidated South African

principal Acts from 1910 to date. Sabinet said their free access website is easy to navigate, quickly to access and contains all legal information any lawyer could need.

Sabinet Product Manager, Lynn Midlane, said it is crucial in the legal industry for lawyers to have access to updated, current and accurate legislation. She said there are many free websites where lawyers previously had access to this information, however, access is not the only

## Free access to legislation for small law firms

important thing, but rather it is the fact that the information they are accessing is accurate and up to date so that they can provide the correct legal advice. 'The free services are generally not updated or accurate, however, the users are not always aware of this and, therefore, they use the information not knowing that the information is outdated,' she said.

Ms Midlane pointed out that legislation is the foundation of the legal profession, she said knowing the importance for lawyers to have access to correct

information was Sabinet's drive to start the initiative.

Ms Midlane said through the free online access, not only will lawyers get accurate and the most updated version of SA legislation, but they will also have access to the historical list of amendments to the Acts throughout the years.

For law firms to have free access to SA legislation through Sabinet, they have to meet the following qualifying criteria:

- Comprise of three or fewer practicing attorneys.

- The law firm's fidelity fund certificates and annual law society subscriptions must be up to date and paid in full.
- The law firm must already have Internet connectivity to be able to make use of this online legislation product.

Information about Sabinet's free access to SA legislation can be found by contacting their client services at: (012) 643 9500 or e-mail: [info@sabinet.co.za](mailto:info@sabinet.co.za).

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*

## A portion of South Africans not aware that freedom of expression is not without limits

**P**artner in the Technology, Media, Telecommunication and Intellectual Property department at Webber Wentzel, Nozipho Mngomezulu, said online and social media comments showed that a number of South Africans are not aware that their right to freedom of expression is not without limits. Ms Mngomezulu discussed hate crimes at the Technology, Media and Telecommunications seminar in Sandton on 16 November 2016.

Ms Mngomezulu said s 16 of the Constitution gives all South Africans the right to freedom of expression, which includes the rights to press and other media, and freedom to receive or impart information or ideas. However, she said the right does not extend to speech that advocates hate based on race, gender, religion and incitement to cause harm. Ms Mngomezulu used the example of the Penny Sparrow case, where in January 2016 Ms Sparrow posted on Facebook: 'These monkeys that are allowed to be released on New Year's eve and New Year's day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others.'

Ms Mngomezulu said comments made by Ms Sparrow and others on social media, led to the Minister of Justice and Correctional Services, Michael Masutha, publishing the Prevention and Combating of Hate Crimes and Hate Speech Bill, commonly known as the Hate Crimes Bill, on 24 October 2016. She said the Bill is based on similar legislation from Kenya and Australia and that the public was given an opportunity to comment before the Bill was put in place. Ms Mngomezulu said the Bill states that speech that is threatening, ridiculing, insulting to a person can amount to hate speech,



*Partner in the Technology, Media, Telecommunication and Intellectual Property department at Webber Wentzel, Nozipho Mngomezulu, gave a presentation on the impact of proposed hate crimes on operators, services providers and website at the Webber Wentzel's key legal development relating to Technology, Media and Telecommunications seminar.*

for example, cartoons making fun of politicians, provocative paintings or Facebook memes. She added that the Bill could also hold social networks at fault for material posted on it. Section 4(1)(c) of the Bill says it is an offence to display or make available any material that constitutes hate speech that is directed at a specific person that is a victim of hate speech. She said this will include material sent in the form of SMS or WhatsApp messages.

Partner and head of corporate practice at Webber Wentzel, Safiyya Patel spoke about the draft of the amended Black Economic Empowerment (BEE) codes of good practice for the information and

communication technology (ICT) sector. She said there are many surprises and controversy around the amended ICT codes. One change being the range of points for one to reach a BEE level contributor, which has increased dramatically. Ms Patel noted that the actual score cards, and the new ICT codes are aligned with the revised generic codes. She said for example, instead of seven elements, there are now only five elements, which are measured under -

- ownership;
  - management control;
  - skills development;
  - enterprise and supplier development; and
  - social economic development.
- Ms Patel noted that there are three priority elements on the score card such as the revised generic codes, namely -
- ownership;
  - skills development; and
  - enterprise and supplier development.

She highlighted that it was important to know that a subminimum must be achieved on all three priority elements in respect of any other elements being preferentially procured. Ms Patel said for example, if a merit entity achieves a level four, it will automatically be discounted to a level five as a result of not achieving a subminimum on any of the priority elements.

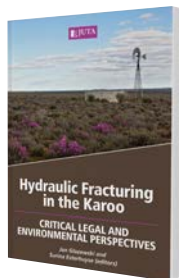
Partner in the Technology, Media, Telecommunication and Intellectual Property at Webber Wentzel, Bernadette Versfeld spoke about the intellectual property (IP) law change. She said there is a concern around the Copy Right Bill. She said the current position is that the state owns copy right to all that it commissions. Ms Versfeld said the Bill is proposing to extend that any copy right funded by the state will be owned by the state. Ms Versfeld said there are no further regulations

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and no provision is given on the copy right that is partially owned by the state on how it will play out. She pointed out copy right cannot be assigned, however, the copy right that may be assigned will only be assigned for a period of 25 years and then be revoked back to its original owner.

Ms Versfeld said that the current position with commissioned work also changes from being that if one commissions a work they would own that work. She noted that now the commissioner of the work would have to have copy right signed by the commissioner.

Partner in the Technology, Media, Telecommunication and Intellectual Property at Webber Wentzel, Peter Grealy spoke about the National Integrated ICT Policy White Paper (GN 1212 GG40325/3-10-2016). Mr Grealy said the paper was published on 3 October 2016 and that the objective of the paper was to set a frame work for government to improve communication infrastructure and services. 'Our understanding was that there was an intention to shift the paradigm to open access over the internet and over the spectrum,' he said.

Mr Grealy said that over access itself will demand that network providers provide their service in line with the principles of effective access to infrastructure, transparency and non-discrimination. He said it will affect network services such as core networks, digital services and applications. He added that in terms of infrastructure sharing in the white paper it was proposed that a regulator would publish a list of what is referred to as open access networks.

Mr Grealy said essentially these are



*Partner in the Technology, Media, Telecommunication and Intellectual Property department at Webber Wentzel, Peter Grealy, was speaking about the ICT Policy White Paper, at Webber Wentzel's key legal development relating to Technology, Media and Telecommunications Seminar.*



*Partner and head of corporate practice at Webber Wentzel, Safiyya Patel, gave a presentation on the draft amended BEE codes of good practice for the ICT sector.*

the networks that service providers control critical resources or have significant power over and can influence functioning of the market. He added that when an access provider is then deemed to be an open access provider they will be required to provide cost space pricing, meaning the pricing will not exceed the minimum cost of the service.

Mr Grealy said that spectrum is a key source resource for many essential communication services, including for example, television and sound broadcasting. He pointed out that it is an increasingly scarce resource especially in light of the development of digital technology. He said that South Africa's (SA) lack of radio spectrum availability went to a number of arrangements between existing stakeholders, trying to find alternatives to provide Long Term Evolution (LTE) coverage in the country. He said that in July 2016 the Independent Communication Authority of South Africa (ICASA) invited applicants to participate in an auction of rights to use certain high demand of frequency.

Mr Grealy said prior to the auction being held, the minister of Telecommunications and postal services, Siyabonga Cwele, brought a successful court interdict against ICASA, on the basis that the auction was irrational and made prematurely. He said the effect of that was that ICASA could not proceed with the auction and the outcome of the case will be heard in 2017. Mr Grealy said that Minister Cwele suggested that SA should adopt the spectrum sharing model and that by adopting the shared spectrum model it would help address concerns raised by the smaller local players.

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*



# Workshop boosted confidence of attorneys to appear in the High Court

**O**n 30 September and 1 October, the Black Lawyers Association Legal Education Center (BLA-LEC) arranged an informative and insightful workshop at the Middelburg Magistrate's Court. The workshop was primarily targeted at equipping attorneys and advocates with skills aimed at assisting them to successfully run High Court litigation. The workshop was introduced at an apt time, with the opening of the Mpumalanga Division of the High Court and the recent establishment of Circuit Courts, in consultation with the Minister of Justice, in accordance with s 6(7) of the Superior Courts Act 10 of 2013.

The workshop was attended by both attorneys and advocates. The majority of attorneys said they wanted to run their High Court litigation on their own, starting off with unopposed motions and slowly moving to opposed motions and eventually, deal with complex legal matters. The judges who facilitated the workshop encouraged attorneys to adopt this approach and start litigating in the High Court. The workshop assisted attendees, particularly those who are attorneys, with the necessary skills required for litigation in the High Court. It further assisted attendees to understand the behavioral patterns of the judges and to act in accordance with their expectations.

The content of the workshop was both educative and informative as it was offered by senior judges and Senior Counsel.

## Ethics and court demeanor

Former Judge President of the Free State High Court, Judge Cagney John Musi, shared a perspective from the Bench and focussed on ethics, court demeanor and etiquette. Judge Musi dealt with the ethical behavior that is expected from practitioners and the manner in which they should always carry themselves in court particularly during litigation. Judge Musi touched on practical aspects of ethical behavior, he gave a practical example on how to advance a client's case without perpetuating their lies. This, to attendees, was important as they were taught how to be persuasive without misleading the court, an aspect which is important and required from an officer of the court. Judge Musi also explained how to avoid arguing with a judge, which if not handled well could lead to unneces-

sary conflicts between practitioners and judges, a situation which must be avoided at all times to preserve the integrity of the court.

## Court rules and practice directives

Gauteng Division High Court, Judge Malesela Francis Legodi, touched on the importance of practitioners familiarising themselves with court rules and practice directives. He encouraged attendees to desist from approaching the courts without having familiarised themselves with a practice directive applicable in the jurisdiction one is appearing. He also gave a detailed discussion on how to draft structured and logical heads of arguments.

## Sequestration applications, default and summary judgments

Gauteng Division High Court, Judge Tati Makgoka dealt with sequestration applications, default judgments, as well as summary judgments. Judge Makgoka's part of the presentation was very helpful to the attendees as the type of matters he dealt with are prevalent within Mpumalanga and are matters which attorneys have to acquaint themselves with, so that they can appear on behalf of their clients.

Judge Makgoka touched on sequestration applications, as well as r 43 applications and explained what the courts are particularly looking for in such applications. He explained that there may be an opposition, which appears to be from the Bench particularly if one's papers are not in order. He stressed the importance of making sure that one's papers, as a practitioner, are always in order and well drafted and structured.

## Urgent applications

Judge Phatudi dealt in detail with urgent applications and a proper approach to r 6(12) of the Uniform Rules of the Court. He shared the proper approach to urgent applications and how attorneys should be careful in assessing the urgency and in presenting urgent applications. This part of the presentation was encouraging, as most attendees have to deal with urgent applications from time to time, and also find it difficult to do so without the assistance of advocates. After this presentation, the approach towards urgent applications seemed to have be-

come clearer and most of the attendees seem to have felt comfortable to be in a position to adequately assess urgency and deal with such applications with less assistance from advocates.

## Opposed motions

Advocate William Mokhari SC dealt with opposed motions, as well as drafting affidavits and what should be contained in the affidavits. He emphasised the importance of reading the law – particularly case law – prior to drafting legal documents to avoid a situation where, at a later stage, heads of argument would be in conflict with founding papers and advised on the proper approach to litigation. Mr Mokhari's approach to drawing legal documents and to litigation in general, assisted attendees – particularly attorneys – to be able to draft their own papers with confidence and to probably appear in High Court and move their own applications. Mr Mokhari also emphasised the importance of hard work in ensuring that attorneys protect their client's rights and interest. He insisted that there is no substitute for hard work in law. The workshop encouraged attorneys to appear in the High Court and move their own applications and also assisted attorneys in preparing to appear in the High Court. The workshop has had an impact in the transformation of the legal profession, and the attorneys who were encouraged by the judges will appear in the High Court and gain invaluable experience, which will make it easier for them to be eligible for judicial appointments.

It is important for a BLA-LEC to conduct a series of these workshops not only in Mpumalanga but across the country in order to prepare particularly black practitioners to appear in the High Court and do their own High Court litigation. Of great interest about the workshop is that it was presented by senior judges and a senior advocate, this has assisted attendees to have a better approach and perspective to litigation.

I, therefore, wish to encourage attorneys in and outside the Province of Mpumalanga to take advantage of such workshops and equip themselves with the necessary skills required by the demands of the legal profession.

*Ivan Ka-Mbonane is an attorney at Ka-Mbonane Inc in Johannesburg and an instructor at LEAD.*

## Press release by the GCB: South Africa's withdrawal from the ICC

**T**he world has borne witness to numerous unspeakable acts of cruelty, brutality and resultant human misery. There are many reasons why human rights abusers get away with genocide, torture, disappearances and other related abuses of human rights. Two reasons stand out –

- the first is a lack of political will on the part of governments to investigate and prosecute people suspected of committing the abuses; and
- the second is weak domestic criminal justice systems in the countries where the abuses occur.

In an effort to deal with human rights abusers, a number of states, including South Africa (SA), worked together to create the International Criminal Court (ICC). It was established in 2002 by an international treaty called the Rome Statute, which gave it jurisdiction over four main crimes. The first is genocide, which is characterised by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group. The second are crimes against humanity, which usually form part of a large-scale government sanctioned attack against a civilian population and include offences such as murder, rape, imprisonment, forced disappearances, enslavement, torture and Apartheid. The third is war crimes, which are breaches of the Geneva Conventions and include the use of child soldiers, the killing or torture of civilians and prisoners of war, and intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charities. The fourth is the crime of aggression, which is the use of armed force by one state against the sovereignty, integrity or independence of another.

The ICC does not have its own police force or enforcement body and, therefore, relies on the cooperation of countries across the globe. Signatory states, such as SA, when they signed the Rome Statute, agreed to assist the international community by arresting those responsible for committing offences that fall under the ICC's jurisdiction. Signatory states are also obliged to transfer persons that have been arrested to the ICC Detention Centre at The Hague. The world's commitment to ridding the planet of these grave abuses of human rights depends on the active participation of countries and their governments.

### SA's position

Approximately 124 states have ratified

the Rome Statute and are part of the ICC, of those signatory states, 34 are African. South Africa was one of the African states to join the ICC. In doing so SA demonstrated its commitment to bringing to justice those who commit genocide, crimes against humanity, war crimes and crimes of aggression. South Africa, in doing so, also became an important part of a new system of international criminal law and governance designed to make the world a safer place.

In 1993, President Nelson Mandela, in outlining what was to become SA's foreign policy, said that 'South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations, and we are ready to play a role in fostering peace and prosperity in the world we share with the community of nations... The time has come for South Africa to take up its rightful and responsible place in the community of nations' ([www.anc.org.za](http://www.anc.org.za), accessed 1-12-2016).

Now, under the current government of President Jacob Zuma, SA has elected to withdraw from the Rome Statute and the ICC. On 19 October, the South African government formally submitted its Instrument of Withdrawal to the United Nations Secretary General. In so doing, SA is abandoning its role as a champion of international human rights and justice. The General Counsel of the Bar (GCB) views SA's decision to withdraw from the ICC as regrettable and deeply concerning.

### The catalyst for SA's decision to leave

For its withdrawal, the South African government points to a perceived conflict between the manner in which the ICC interprets two provisions of the Rome Statute, on the one hand, and the government's peace-keeping endeavours in the continent on the other. It is difficult to accept that as the true basis for such drastic a measure, especially since matters of interpretation are usually resolved by persuasion.

The real catalyst for SA's withdrawal from the ICC appears to be linked to the Omar Al-Bashir incident. Sudanese President Al-Bashir is wanted by The Hague for war crimes, genocide and crimes against humanity committed in Darfur. There are currently two international arrest warrants relating to him. The first was issued in 2009 and the second in 2010. Notwithstanding those arrest war-

rants and notwithstanding SA's commitment given to the international community and its concomitant international law obligation to arrest him should he visit our country, when he did visit our government not only welcomed him but even allowed him to leave with impunity.

South Africa has been heavily criticised by the international community over the Al-Bashir incident. The South African government, in responding to the incident, has made various statements that demonstrate its growing discontent with the ICC's perceived anti-African bias. The media is full of reports from government officials representing this view. One such statement, made by the Chairperson of the Portfolio Committee on International Relations and Co-operation, Moses Siphoswe Amos Masango, said that the ICC was an anti-African institution that provided opportunists with the means to 'pit African leaders against each other in the name of international law'.

The GCB regards such statements as unfortunate. While there is some merit to the perception that the ICC has dedicated most of its resources to pursuing human rights abusers responsible for atrocities on the African continent, it is difficult to understand why those efforts are perceived as anti-African. The GCB welcomes the initiative by the ICC to allocate significant resources to improving the conditions of hundreds of millions of people on our continent. The ICC was created for the victims of atrocities and, viewed from the perspective of victims, what matters is that human rights violators should not be able to act with impunity – whether it be on the African continent or anywhere else.

That being said, the GCB recognises the legitimate view held by some that a disproportionate amount of the ICC's attention is focused on Africa. However, the perception that African leaders are being targeted needs to be placed in its proper context. Cases can reach the ICC in one of three ways –

- a state party to the Rome Statute may itself submit a situation to the ICC for investigation and possible prosecution;
- the United Nations Security Council may, in the exercise of its mandate to maintain international peace and security, mandate an ICC investigation and prosecution; and
- the ICC Prosecutor may initiate a prosecution.

Currently there are eight situations that are being formally investigated,

which involve Africans. Four of these situations were referred to the ICC by the African state parties themselves, namely, Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali; another two African situations were initiated by the UN Security Council (Sudan and Libya); and the last two were initiated by the ICC Prosecutor (Kenya and Côte d'Ivoire). The perception that the West has an anti-African agenda is thus to be approached with caution.

### The GCB's concerns

The GCB is concerned that SA was once a leader in championing international human rights. It did this by actively promoting the need for the ICC. That underlying need has not changed. The world, perhaps now more than ever, needs an international criminal court to assist in combating genocide, crimes against humanity, war crimes and crimes of aggression. These human rights violations should not go unpunished. They will, however, go unpunished if member

states do not demonstrate a political commitment to eradicating them. International criminal law can only work with all state parties cooperating and honoring their international law obligations to the community of nations.

The GCB is concerned that SA's withdrawal from the ICC sends a signal to the international community that we, as a state, are unwilling to participate in a system designed to rid the world of human rights abuses. That is particularly regrettable given SA's own past, which was characterised by considerable human misery and suffering. Apartheid, itself a human rights atrocity, has been characterised by the ICC as a crime against humanity.

Moreover, the GCB is concerned that SA's withdrawal from the ICC is unconstitutional. The Preamble to SA's Constitution states that 'we, the people of South Africa, ... adopt this Constitution as the supreme law of the Republic so as to ... build a united and democratic South Africa able to take its rightful place as a

sovereign state in the family of nations'. Part of SA's international commitments to the international community, as required by international law, is a duty to investigate and prosecute crimes like torture and other crimes against humanity. When SA ratified the Rome Statute, it simultaneously incorporated the provisions of the Rome Statute into our own domestic legal order by enacting a statute known as the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). South Africa's withdrawal from the ICC will necessitate it abolishing the ICC Act as well. The GCB is concerned that if the ICC Act is abolished, this may jeopardise or undermine SA's constitutionally mandated ability to act against international crimes that may occur domestically such as torture, racial discrimination and crimes related to xenophobia.

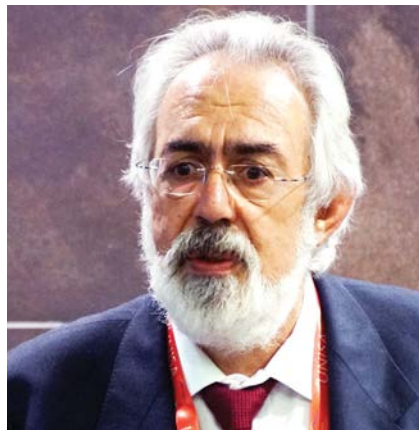
*Issued by the General Council of the Bar,  
South Africa, 28 October 2016.*

## IDRA seeks to promote common good in dispute matters through the harmony model

**H**ead of the Institute for Dispute Resolution in Africa (IDRA), Professor John Faris, said that the dispute resolution harmony model seeks social restoration and also seeks to promote an outcome for the common good and constructive engagements. Prof Faris was giving opening remarks at the IDRA conference under the theme 'The Harmony Model for Dispute Resolution in Africa: Together Towards a Culture of Harmony' that was held on 17 November 2016 in Pretoria.

Prof Faris said since the establishment of IDRA in 2011, there was a vision that directed IDRA's agenda to do research on dispute resolution. He added that IDRA wanted community base participation that would be the driving force of the scholarship. He said the IDRA's objective was to find the 'other' knowledge that is disregarded and generate it to the better. 'Africa has something to offer, Africa has the knowledge,' he added.

Professor Kinfe Abraha of the Mekelle University Ethiopia congratulated the IDRA for conducting what he said was quality research on dispute resolution. He said investigating the root of dispute was the responsibility of traditional leaders, scholars and researchers because politicians and the government may not always agree on certain points. However,



*Head of the Institute for Dispute Resolution in Africa, Professor John Faris, gave a welcoming address at the Institute for Dispute Resolution in Africa conference. Prof Faris discussed the topic of alternative dispute resolution to the African harmony model for dispute resolution.*

he said that politicians and the government can always contribute. He pointed out that disputes claim the lives of many people and also destroy properties.

Prof Abraha noted that as far as relationships are concerned, in the western

model, disputes are seen as normal, but in the African model, disputes are undesirable, violent and distracting. He said there must be a developed mechanism that can resolve disputes in a peaceful manner. He, however, added that there are disputes that are easier to resolve, such as a dispute that is a result of a clash of interest, but he noted that disputes as a result of boundaries that were caused by the colonisers are difficult to resolve. He said that together with IDRA his team is trying to rediscover an African way of dispute resolution.

Professor Nina Mollema of the college of law at the University of South Africa discussed integrating traditional dispute resolution mechanisms with the criminal justice systems. She said there are conflicts in any community, however, the manner in which communities deal with the conflict may result in different conflict resolution practices. She said that it was observable in some communities in South Africa, especially at a place where a traditional court is still functional and imposes sentences.

Prof Mollema highlighted that any traditional court, law or conduct must be consistent with the Constitution of South Africa as supreme law of the country and must adhere to the obligations set in the Constitution. Prof Mollema, however, pointed out that in some cases a situa-



tion arises where a person, after serving a sentence received from a formal court, may again be trialled for the same crime at a traditional court. She said in that regard, the traditional dispute resolution system may conflict with the fundamental human right.

Prof Mollema said the conflict resolution court system is deemed necessary by communities who feel that a formal court system harms relationships within the community, and does not compen-

sate or directly involve the victim or the community in the proceedings or decision making process. She pointed out that relationships between the formal justice system and the traditional court system is complex.

Prof Mollema noted that the lapsed and much criticised Traditional Courts Bill B1 of 2012 aims to affirm traditional justice system and its values on justice and reconciliation. She added that it further intends to provide a structure

functional of traditional courts in line with the imperatives and values and to enhance customary law and customs of community observing a system of customary law.

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*

## An employee's comments on social media can impact on company's reputation

**C**liffe Dekker Hofmeyr (CDH) held its 2016 employment conference on 3 November 2016 under the theme 'Preparing for 2017 what awaits us?'. Speaking on the topic of privacy, Director in Employment Practice at CDH, Fiona Leppan, said that there is a distinction between a person's space privacy and information privacy. She explained that space privacy means the privacy of one's home. She added that when a person interacts in a public domain they choose how much of themselves they want to reveal to the public.

Ms Leppan said in South Africa privacy is recognised in two ways, one is by way of the Constitution and another in common law. She added that common law looks at privacy in relation to special principles, while the Constitution has gone broader than that. Ms Leppan said when determining when it is wrong to invade a person's privacy and when it is not wrong to invade their privacy there is a subjective and objective element to it. She added that the subjective element looks at invasion of privacy as it occurred in a private space of that individual, and that subjective element relates to a person's decision of how much of their private facts they are going to keep private.

### Social media and employers

Director in Employment Practice at CDH, Samiksha Singh, spoke about social media. She noted that what a person writes about a colleague, boss or their workplace on social media goes into the public domain and is not confined to the group of people on the social media platform. She said comments posted on social media can impact on the reputation of the company the person works for. She said that the Internet does not have a policy or an institution to give people complained about an opportunity to clarify or give their side of the story.



*Director in Employment Practice at Cliffe Dekker Hofmeyr (CDH), Fiona Leppan, discussed privacy and social media at the CDH employment conference in November 2016.*

Ms Singh noted that a person might be able to tell their side of the story at a later stage, but by then the damage would have already been done. She pointed out that one must know that it is their duty to understand what they are doing, the implications and how far reaching they are. She said the difficulty that employers face is that employees become brand ambassadors of the company and what an employee might post on social networks may reflect on the company as well.

Ms Singh said that when employees are not equipped with the knowledge and training of the implications of their conduct on social media, they may not understand what they are doing and how it negatively affects them. Ms Singh referred to a case of *Robertson and Value Logistics* (2016) 37 ILJ 286 (BCA), whereby the applicant Lynn Robertson posted on social media that she was retrenched even before the retrenchment was finalised. When her employees, the respond-

ent Value Logistic, became aware of her post she was called into a disciplinary hearing and later dismissed. However, Ms Robertson took the matter to the National Bargaining Council where she stated that she was not technologically savvy. Therefore, the commissioner reasoned that Ms Robertson's post on Facebook appeared to be an expression of hurt that the applicant felt rather than a critical attack of the respondent's integrity and that her dismissal was substantively unfair. The commissioner ordered that Ms Robertson be reinstated under the same terms she was working on before and on conditions of employment that governed her employment before her dismissal and also be paid her retrospective salary.

Ms Singh advised that if employers are going to discipline their employees for social media misconduct, employers must make sure that employees understand the company policy. She said companies who do not have policies must implement them. She added that it was



*Director in Employment Practice at CDH, Samiksha Singh, also discussed the topic of privacy and social media at the employment conference.*



**Director in Employment Practice at Cliffe Dekker Hofmeyr, Professor Hugo Pienaar, discussed the strike law update.**

important to have policies because the clauses in contracts that merely refer to the use of electronic equipment, which is used for communication of the company during office hours.

Ms Singh said that most employees own a cell phone and that they can post comments on Facebook after hours, the problem will be if the company does not have sufficient policies in place, the employee can justify their actions and rely on the issue of privacy.

### Strike law update

Director in Employment Practice at CDH, Professor Hugo Pienaar, said that when dealing with a matter regarding traditional weapons, it is the duty of the employer, under the occupational safety legislation, to protect their employees and to have a safe environment where they work and are safe. He said that when employees picket while carrying traditional weapons, the question that must be asked is whether the gathering is a traditional gathering or a work related picket.

Executive Dean at the Nelson Mandela Metropolitan University, Avinash Govindjee, discussed the challenges relating to the collective bargaining system under the collective labour law. Mr Govindjee referred to the case of *Free Market Foundation v Minister of Labour and Others* 2016 (4) SA 496 (GP) (see 2016 (Oct) DR 45). The applicant argued that the system of sectoral bargaining and the extension of the product of its non-participants constituted an impediment to the growth of small business, resulting in less job creation and a higher rate of unemployment. The applicant initially challenged s 32 of the Labour Relations Act 66 of 1995 (LRA) as infringing constitutional rights to equality, freedom of association, administrative justice, dignity and fair labour practices. Subsequently,

the challenge was narrowed to assess s 32 of the LRA against s 1(c) of the Constitution (the rule of law provision). In the *Free Market* matter the court held that s 32 was found not to be inconsistent with the Constitution.

### Discrimination law update

Director in Employment Practice at CDH, Nicholas Preston, gave an update on discrimination law. Mr Preston discussed whether sexual harassment amounts to unfair discrimination and if the offending employee can still be dismissed, even if the victim and the offender do not work together. He referred to the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* [2016] 1 BLLR 1 (LAC) (see 2016 (March) DR 38).

The employee was sent on a conference to Botswana, where he met Ms M who had been sent by her respective employer, at the conference the offend-



**Executive Dean for faculty of law at the Nelson Mandela Metropolitan University, Avinash Govindjee, discussed the collective labour law at the CDH employment conference.**

ing employee propositioned Ms M, who refused his advances of: 'Do you need a lover tonight?' Despite this, the employee reiterated that if Miss M changed her mind she should let him know.

A disciplinary hearing against the employee took place and the employee was dismissed, however, the dismissed employee referred an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) where the matter was determined at arbitration. The commissioner found the dismissal substantively procedurally fair. On appeal in the Labour Appeal Court (LAC), the LAC confirmed that sexual harassment constitutes a form of unfair discrimination and, if proven, dismissal is an appropriate sanction even if the victim and the offender do not work together.

### Retrenchment law

Regional Practice Head and Director in Employment Practice at CDH, Gillian Lumb, discussed different cases relating to retrenchment law. One of the cases discussed was *Nord v Civicus World Alliance for Citizen Participation Inc* (unreported case no JS 363/12, 21-4-2016) (Ah Shene AJ). An employee employed on a two year fixed term contract of employment was retrenched before the expiry of the contract. The employee alleged that his dismissal was automatically unfair. However, the employer's evidence was that to secure its income it relied on funding and there was a lack of funding for 2012. In accordance with s 189 of the LRA, the employer's witness testified that it offered an alternative to retrenchment to the employee. The Labour Court (LC) found that the retrenchment was due to a lack of funding and was substantively fair.

### Occupational health and safety

Director in Employment Practice at CDH, Michael Yeates, discussed the circumstances under which an employer can compel the transfer of an employee for safety reasons. He referred to *City of Johannesburg v Swanepoel NO and Others* (2016) 37 ILJ 1400 (CC). The employee was a Director of the Alexandra Renewal Project (ARP) aimed at developing Alexandra Township since 2001. Community members were dissatisfied with the lack of progress on the ARP, in a view that the employee, was standing in the way of progress. The community engaged in various demonstrations of their dissatisfaction including protest action. In an attempt to ensure the safety of the employee and his family and to stabilise the situation, the employer decided to



**Director in Employment Practice at CDH, Nicholas Preston, gave an update on discrimination law at the employment conference.**

transfer the employee to Region B on the same conditions of employment. But the employee refused the transfer stating he did not believe his family was in harms way. The employee was later charged with gross insubordination. He then approached LC to review his case. The LC held that the transfer was a reasonable alternative in the employer's attempt to mitigate potential harm.

### Labour law and the interplay with other areas of law

National Practice Head and Director in Employment Practice at CDH Aadil Patel discussed whether the mining right holder, who is not the employer, is required to be part of the retrenchment process – does the failure to involve the mining right holder render the retrenchment process unfair? He referred to the *Association of Mineworkers and Construction Union and Others v Buffalo Coal Dundee (Pty) Ltd and Another* (2016) 37 ILJ 2035 (LAC) case.

In this case, Zinoju Coal (Pty) Ltd (Zinoju) who was the mining right holder, entered into an agreement in terms of which, Buffalo Coal Dundee would operate the mine. In December 2014, Buffalo Coal issued a s 189(3) notice in terms of the LRA to the two unions, namely, Association of Mineworkers and Construction



**Regional Practice Head and Director in the Employment Practice at CDH, Gillian Lumb, spoke about retrenchment law in South Africa.**

and the National Union of Mineworkers, recognised by the mine.

Zinoju informed the Department of Mineral Resources that Buffalo Coal had issued a s 189(3) notice to its employees. The LC found that Buffalo Coal was not required to comply with s 52 of the Mineral and Petroleum Resources Development Act 28 of 2002 as the obligation was on the mining right holder and not the employer. The matter was taken on appeal to the LAC. The LAC found the retrenchment process to be unfair.

### Individual labour law update

Senior associate at CDH's Employment Practice, Ndumiso Zwane, made a presentation on an individual labour law update. Mr Zwane discussed whether an employer can impose a different sanction to that of a chairperson of a disciplinary inquiry to whom final decision making authority has been assigned? He referred to the case of *South African Revenue Service v Commission for Conciliation Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC) (see p 48).

The employee, JJ Kruger, was charged with and dismissed for gross misconduct after he had referred to his direct supervisor using the 'K'-word in the presence of his colleagues. It was alleged that he had used the derogatory term on a previous occasion. Mr Kruger referred an unfair dismissal dispute to the CCMA, and the CCMA held that Mr Kruger's dismissal was unfair. The LAC, therefore, found that the CCMA's decision was reasonable and the court *a quo's* judgment must stand.

*Kgomotso Ramotsho,  
Kgomotso@derebus.org.za*



## PEOPLE & PRACTICES

# People and practices

Compiled by Shireen Mahomed

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**Gildenhuys Malatji** in Pretoria has three promotions.



Anita du Toit has been promoted as a senior associate in the commercial litigation and public law department.

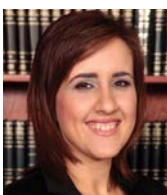


Simon Maelane has been promoted as a senior associate in the general litigation department.



Lungile Swandle has been promoted as an associate in the commercial litigation and public law department.

**Dyason Inc** in Pretoria has three new appointments.



Yolanda Saaiman has been appointed as a director in the conveyancing department.



Marietjie Botes has been appointed as a director in the insurance department.



Helena Pretorius has been appointed as the client liaison.





## LSSA concerned that RAF is short changing accident victims

**T**he Law Society of South Africa (LSSA) issued a press release in December 2016 noting, 'with considerable concern' the unwarranted attacks by the Road Accident Fund (RAF) on the role played by the legal profession in ensuring that claimants receive fair compensation and, in particular, the characterisation of attorneys as mere 'intermediaries' in the claims process. In the press release, the LSSA said that attorneys are never 'intermediaries' as they do not mediate between the victim and the RAF. 'They represent the victim, who is their client, to ensure the most just and fair outcome for their clients', said Co-chairpersons, Mvuzo Ntuyesi and Jan van Rensburg.

'Accident victims who are seriously injured and who make hasty settlements with the Road Accident Fund for what might appear to them to be a significant sum without independent legal advice or before their claims are properly quantified, will have their whole lives to regret this,' warned Mr Ntuyesi and Mr van Rensburg.

In the press release, Mr Ntuyesi and Mr Van Rensburg added: 'Attorneys and other professionals play a vital role in investigating, processing and, if necessary, litigating claims arising from car accidents, as well as in quantifying and advising victims on the actual value of their claims, particularly those who sustain serious injuries that will have a lifelong impact on their quality of life and their ability to earn an income.' According to the press release, not only is the claims process highly technical, complicated and difficult for a lay person to follow, it also requires that the claimants produce medical and police

records and expert reports that many claimants are not able to access or cannot afford.

Mr van Rensburg and Mr Ntuyesi said that the LSSA had also noted that the RAF continues to advertise and lobby aggressively for accident victims to claim direct from the RAF. In a media statement journalists were told that, in many cases, claimants were better off approaching the RAF directly because their claims were settled quickly – in around four months – and they got their full pay out without having to surrender a big chunk to an attorney.

'While that might hold good for minor injuries, it certainly cannot be good for seriously injured victims where it can take as long as two years for injuries to stabilise. It is only at that stage that a proper assessment can take place of the quantum, both with regard to general damages for pain and suffering and for special damages for loss of income, past and future as well as medical and other costs. It may only then become apparent that the claimant's earning capacity has been compromised or destroyed. If the claim was settled within four months it is very unlikely that any amount will be included for future loss of income or that the essential medical and other expert opinion was obtained necessary to quantify the claim properly. Once the claim is settled, then depending on the circumstances, it might not be possible to rectify the under settlement,' explained Mr Ntuyesi and Mr Van Rensburg.

The Co-chairpersons highlighted the point that the LSSA is of the view that the RAF has a conflict of interest when it seeks to act as both a 'functionary' as per the Road Accident Fund Act and to prosecute, advise and process claims on

behalf of direct claimants. 'This has resulted in cases where claimants have had to challenge the RAF in court for under settlement.'

According to the LSSA, the RAF continued to lay the blame for significant delivery costs solely at the door of the legal profession. The reality is that many claims in which the victims are represented by attorneys, should be settled long before the cases reach the court, by which time significant costs have been incurred, which could have been avoided. In these matters, the RAF is, in fact, solely to blame as it does not instruct its attorneys in time so they can use the rules of court to limit costs. The RAF also, in many instances, does not respond to settlement approaches made to them early on in the prosecution of the claim. In conclusion, Mr Ntuyesi and Mr Van Rensburg said: 'The RAF has repeatedly said that it supports fair and equitable compensation for claimants. It should, therefore, welcome the contribution that the legal profession can and does make to achieve this. The RAF should focus on its core function, being the administration of claims in terms of the Road Accident Fund Act, and work with the profession in order to curtail costs and expedite finalisation of claims, rather than seeking to compete for direct claimants. In this process, the RAF risks the possibility to face claims and to incur unnecessary costs for under-settlement or for prescribed claims.'

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

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By  
Thomas  
Harban

# Professional indemnity claims and breaches of the professional duties of an attorney: Is there a link?

**A**t the Attorneys Insurance Indemnity Fund NPC (the AIIF), notifications are often received from practitioners against whom complaints have been lodged with the respective statutory provincial law society having jurisdiction. These practitioners seek the assistance of the AIIF in a variety of forms, ranging from drafting a response to the complaint to inquiring whether or not the AIIF will cover the costs associated with the conduct of the defence of a disciplinary inquiry.

The AIIF also regularly receive queries regarding whether or not the AIIF policy will respond to claims against practitioners who have been suspended or struck from the roll of practitioners.

Practitioners against whom professional indemnity (PI) claims are brought may be reluctant to report claims to the AIIF for fear that their provincial law society will be notified of the claim – this fear is very often misplaced.

At the outset, it is important to note that not every PI claim will constitute the basis for a disciplinary inquiry against the practitioner concerned and, likewise, not every disciplinary action taken by the provincial law society will constitute a basis for a PI claim.

Having considered the statistics for the various types of complaints lodged against attorneys, the AIIF have made a few points on how the Master Policy would generally respond to some of the categories of claims. Space limitations in this column will not allow an examination of each and every complaint category. The comments will be restricted to the three categories where the highest number of complaints are noted. These categories are –

- failing to pay proper attention to matters;
- failing to pay for professional services and/or subscriptions; and
- failing to reply to correspondence.

Naturally, each claim notified to the AIIF will be assessed on its own facts.

It is important that practitioners familiarise themselves and their professional and support staff with the professional duties of an attorney. Professional ethics should be part of the training regime in each firm.

## Failing to pay proper attention to matters

A high number of complaints reported to

the provincial law societies fall into this category. Many of the claims notified to the AIIF similarly arise out of a failure by practitioners to pay attention to matters that they are dealing with. We have previously noted that a large number of the claims arise out of a failure by practitioners to adequately supervise junior and administrative staff. The prescription of claims in the hands of practitioners continues to make up one of the largest categories of claims reported to the AIIF. The reality is that many of these prescription claims could have been avoided had the practitioners concerned paid adequate attention to the matters in their respective offices. The same can be said of the claims based on the failure by practitioners to properly carry out the mandate from the client.

In assessing the claims received from practitioners, we often note from the explanations given by the attorneys that the matter had been dealt with by a staff member who has since left the firm and the matter only came to the attention of the partner or director concerned after the staff member concerned left the firm.

Effective supervision of staff and the implementation of a system of file audits will go a long way towards eliminating (at best) or mitigating (at least) the risk associated with the failure to pay proper attention to matters. Under the Risk Management tab on our website ([www.aiif.co.za](http://www.aiif.co.za)), practitioners can access a comprehensive practical guide to conducting file audits. The AIIF has also produced a comprehensive risk management kit that can be downloaded from our website.

Before accepting an instruction, practitioners should also consider whether or not they have the requisite desire, capacity and expertise to properly carry out the required mandate.

Remember that the proverbial buck will always stop with you.

## Failing to pay for professional services and/or subscriptions

Many of the complaints falling into this category would be trading debts and would thus not fall within the AIIF policy. Should a practitioner face a claim falling within this category, it is important to note that the following claim types are excluded from the AIIF policy:

- Claims arising out of or in connection with the practitioner's trading debts or any legal practice or business managed by the practitioner (clause 16 (a)).
- Arising out of or in connection with a breach of contract unless such breach is a breach of a professional duty by the practitioner (clause 16 (k)).
- Arising from the practitioner having given an unqualified undertaking legally binding on his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party (clause 16 (j)).
- Arising out of or in connection with the receipt or payment of funds, whether into trust or otherwise, where the receipt or payment is unrelated to or unconnected with a particular matter or transaction, which is already in existence or about to come into existence, at the time of the receipt or the payment and in respect of which the practitioner has received a mandate (clause 16 (m)).

A 'trading debt' is defined in the AIIF policy as:

'A debt incurred as a result of the undertaking of the **Insured's** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation.) This exclusion includes (but is not limited to) the following:

- a) a refund of any fee or disbursement charged by the **Insured** to a client;
- b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
- c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client;
- d) any labour dispute or act of an administrative nature in the **Insured's** practice;

For the purposes of this policy, "disbursement" does not include any amount paid to counsel or an expert.'

Claims for refunds of fees or over-reaching will thus not be covered by the policy.

The AIIF policy sets out a full list of the claim types that are excluded. The policy can be accessed via our website.

## Failing to respond to correspondence

The AIIF have also seen the failure of practitioners to respond to correspondence in matters that we are dealing with.

This applies to some insured attorneys who have notified the AIIF of claims and also to certain attorneys who act for plaintiffs. This also talks to common professional courtesy to colleagues, clients and others with an interest in a matter.

Failing to keep the client updated on the progress in a matter may be the trigger for, not only a complaint to the provincial law society, but also for a PI claim against the practitioner. By instituting a system of proper supervision and file audit measures as suggested above, practitioners can ensure that, where applicable, their staff have also responded to all correspondence adequately and timeously.

A failure to respond to correspondence may be a symptom of an underlying potential problem in a matter. It should be a 'red flag' for any practitioner that there might be underlying risks in the manner in which a matter is being attended to. In order to avoid matters 'falling through the cracks', correspondence received must be brought to the attention of the appropriate person within the practice as soon as possible. Encourage staff and your colleagues to proactively escalate matters to the most senior person within the firm, where necessary, and not to adopt a supine attitude, where it is hoped that contentious issues will simply go away.

Where necessary, appropriate instructions must be taken from clients before correspondence is responded to. Should you need time to either take instructions or get advice from counsel or a colleague, advise the writer of the correspondence accordingly. In recent years, we have seen an increase in claims brought by clients who contend that their matters were settled or finalised by practitioners without their (the client's) instructions and thus under settled.

In addition to granting the primary level of PI insurance, the AIIF provides bonds of security to practitioners appointed as executors of deceased estates. In our engagement with the Master of the High Court, it has been noted that a large

number of estates in respect of which we have granted bonds have remained open for many years because the practitioners have not responded to queries raised by the Master. Some of these estates were registered as far back as 16 years ago. This failure to respond to queries from the Master's office causes undue delays, which prejudice all the parties having an interest in the finalisation of the estate – including the beneficiaries, creditors, the Master and the AIIF. Section 36(1) of the Administration of Estates Act 66 of 1965, provides that in the event of a failure by an executor to perform certain functions, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor at least one month's notice, apply to court for an order directing the executor to comply with the requested action. The costs awarded to the Master or to such person shall, unless otherwise ordered by the court, be payable by the executor, *de bonis propriis* (s 36 (2)). An order against a practitioner to pay costs *de bonis propriis* is excluded from cover in the AIIF policy (clause 16 (g)).

### The right of the AIIF to report the conduct of a practitioner to the provincial law society

In terms of the policy, the AIIF reserves the right to report the conduct of an insured attorney (that is the attorney notifying the claim and applying for indemnity) where:

- There is material non-disclosure or misrepresentation in respect of the application for indemnity. The AIIF also reserves the right to recover any amounts that may have been incurred as a result of the insured's conduct (clause 35).
- The insured fails or refuses to provide assistance or cooperation to the AIIF or its appointed agents and remains in breach for a period of ten working days after receipt of written notice (from the AIIF or its appointed agents) to remedy such breach (clause 27).

Naturally, in all other instances, the AIIF has similar rights to any other interested or affected party to report the conduct of a practitioner to the provincial law society having jurisdiction.

### Suspended and/or struck off attorneys

Where a cause of action arose against an attorney while in practice, but the attorney has since been suspended or struck off the roll, the AIIF policy will respond to applications for indemnity from such attorney (subject to the policy provisions). The AIIF policy will respond to claims – falling within the policy – even where the claim is only made after the attorney concerned has been struck off or suspended.

In respect of all PI claims it is important to note that the underlying claim lies against the attorney concerned and not against the AIIF – it is the attorney that should thus be cited as the defendant and not the AIIF. The AIIF policy does not give any rights to third parties, such as claimants (clause 39). Should the attorney wish to apply for indemnity, the responsibility lies with that attorney to notify us of the claim.

### Conclusion

It is important that practitioners conduct themselves in accordance with the rules of the profession at all times. A failure to do so may expose the practitioner to disciplinary action by the provincial law society and also to PI claims. Practitioners are encouraged to contact the AIIF should they have any queries regarding the cover afforded under the policy.

Thomas Harban BA LLB (Wits) is the General Manager of the Attorneys Insurance Indemnity Fund NPC in Centurion.

## 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.



By Mzuvukile  
Sirenya and  
Carl van  
Rooyen

# Rule 35(12) of the Uniform Rules: **Be wary**

**R**ule 35(12) of the Uniform Rules stands alone from the other discovery provisions under r 35 in that the wording does not require that the document concerned must be one 'relating to any matter in question', as required in r 35(1), or that it must be 'relevant to any matter in question', as stated in r 35(3), nor is there a provision similar to r 35(2)(c), which provides for a 'valid objection to produce'. The only requirement on the face of it is that reference should be made to a document or tape recording in the opposing party's pleadings or affidavit. The result of which allows a party to a proceeding, any time before the hearing, on delivery of a notice to inspect and make copies of such documents.

The wording of r 35(12) resulted in the cases dealing with compliance with r 35(12) not being harmonious. However, it would seem that the Supreme Court of Appeal (SCA) in the case of *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) has approved the approach followed by the court *a quo*. That approach being:

- Confidentiality of a document *per se* is not a valid objection to a r 35(12) request for discovery.
- Rule 35(12) should not be literally interpreted and despite the absence of wording indicating that relevance or privilege could form a basis for objecting to discovery, only relevant documents should be subjected to discovery in terms of the rule and privilege could be a valid objection to a request for discovery under the rule.
- The burden to adduce evidence to show that a document is not relevant or privileged is on the party who raises the objection. This burden, however, should not be confused with an onus. The court has a general discretion in terms of which it is required to strike a balance between the conflicting interests of the parties to a case. In the exercise of this discretion a court will decide whether a document is irrelevant or privileged.

It is against this backdrop that de-

ponents to affidavits should be mindful of the potential trap imbedded in r 35(12). Many affidavits are drafted with the standard phrases such as: 'Certain facts are taken from those parts of the properly kept continuous records of the applicant that are under my supervision and control to which I have access' coupled sometimes with: 'Except to the extent that the records are specifically referred to in these proceedings, they are irrelevant'. These phrases are included in affidavits containing some financial and other types of information that the deponent extracted from the records of a company. The first phrase is included normally for two reasons, namely –

- in an attempt to get around the hearsay rule; and
- because the deponent regards the records as confidential as he or she does not want to attach the actual records to the affidavit.

The second phrase is included probably in an attempt to limit discovery if so requested.

The courts have consistently ruled, see for example, *Unilever PLC and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 at (c), that 'records' are documents as contemplated in r 35(12). It follows, therefore, that a reference to 'properly kept continuous records' is a reference to documents and the opposing party can ask for discovery of those records in terms of r 35(12).

Rule 35(12) creates a *prima facie* obligation on a party served with a r 35(12) notice to discover the records. If there is an objection to the r 35(12) notice the party objecting has the burden to adduce evidence that the documents are not relevant or are privileged. 'Records', in the context of the phrases referred to, will not be privileged but relevance could form the basis of an objection to discovery. A litigant, raising relevance as an objection in the context of the standard phrases referred to, faces a somewhat uphill battle. The reason for this is that financial information in an affidavit has been extracted from records and consequently, therefore, the records per-

taining to the financial information will probably always be relevant.

Litigants often attempt to use confidentiality as justification not to discover under r 35(12). Confidentiality requires a value judgement between the public interest in discovery and the interest in protecting confidentiality (see *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677). However, the courts have made it clear that a party is not to be denied r 35 (12) relief merely because the party from whom the documents are requested require protection (see *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W)).

In the Constitutional Court, Moseneke DCJ, in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 27 pointed out that, often there will be times where a claim of confidentiality is sought over information being called to be discovered, other considerations of fairness may arise. It is the right to a fair trial, enshrined in the Bill of Rights, which underpins the discovery procedure which may, as Moseneke DCJ pointed out, arise when confidentiality is claimed.

The courts may impose suitable conditions under which inspection may take place while still affording the party seeking inspection a reasonable opportunity of achieving its purpose (see the *Moulded Components* matter). It, therefore, follows that confidentiality is not *per se* a bar to discovery under r 35(12).

In summary, draftspersons of affidavits should be wary of using precedents containing standard phrases that might result in a party being forced to disclose documents that it might have regarded as confidential and/or irrelevant.

Mzuvukile Sirenya LLB (NMMU) is a candidate attorney and Carl van Rooyen BLR LLB (NWU) is an attorney at Spoor & Fisher in Pretoria. □

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By  
Kristen  
Wagner

# Dog owners beware: Strict liability for dog attacks

**I**ncidences of dog attacks and dog bite injuries are on the rise in South Africa (SA). In the months of August and September, four separate dog attack incidents were reported in national news, in terms of which, these fatal dog attacks left two minor children dead. In instances such as these, it is important for both the victim(s) and for domestic animal owner(s) to understand the principles of liability without fault and the legally recognisable defences available.

## Understanding the principle of 'strict liability'

In terms of the law of delict in SA, a wrongdoer who caused damage can typically only be held delictually liable if there was fault (either in the form of intent or negligence) on his or her part (Neethling & Potgieter *Neethling – Potgieter – Visser Law of Delict* 6ed (Durban: LexisNexis 2010) at 355). Over time, instances of liability without fault emerged and were subsequently recognised in terms of common law, legislation and in terms of judgments handed down by South African courts.

Liability without fault, also known as 'strict liability' denotes a form of liability without fault on the part of the wrongdoer. One such solidified instance of strict liability in South African law pertaining to damage caused by domestic animals is that of the *actio de pauperie*. The *actio de pauperie* has entrenched a form of strict liability as, although the domestic animal is the direct cause of the damage, the domestic animal owner bears sole compensatory responsibility for any such damage.

## Requirements under the *actio de pauperie* and relevant defences

The primarily noxal character of the *actio de pauperie* can be traced back to the Law of the Twelve Tables in terms of which it was first recognised that a prejudiced individual may claim delictual damages from the owner of a domestic animal, where the domestic animal caused damage. Initially restricted to cases concerning cattle (*pecudes*), the *actio* was extended to cover instances concerning domestic animals such as dogs (Milena Polojac 'Actio de pauperie: Anthropomorphism and rationalism' (2012) 18(2) *Fundamina* 119 at 143).

Despite academic criticism, the *actio de pauperie* remains firmly entrenched in South African law (see *O'Callaghan NO v Chaplin* 1927 AD 310).

As delineated in *Fourie v Naranjo and Another* 2008 (1) SA 192 (C) there are said to be four requirements for a claim under the *actio de pauperie* to be successful, namely:

- The wrongdoer/defendant must be the owner of the domestic animal when the damage was inflicted. Merely exercising control over the animal will not ordinarily attract liability under the *actio de pauperie*. If the defendant is able to prove that the animal was under the control of a third party at the time of the incident and the third party negligently failed to prevent the attack, this requirement will not be satisfied and as such this may serve as a valid defence to the *actio de pauperie* (Neethling & Potgieter (*op cit*) at 358).
- The animal must be a domesticated animal. A distinction must be maintained between wild animals, which are presumed to be dangerous or ferocious by nature (*ferae naturae*) and domestic animals which are regarded as being tame in nature. It is important, however, not to afford too narrow an interpretation of the term 'domestic animal' as the *actio* may still be applicable in cases concerning cattle, horses, bees and even (determinable on a case-by-case basis) domesticated meerkats (*Klem v Boshoff* 1931 CPD 188).
- The animal must have acted contrary to its nature (*contra naturam sui generis*) when inflicting the damage. This requirement entails an objective stance being adopted in order to determine whether the animal acted contrary to the behaviour that may reasonably be expected of an animal in the applicable genus (*Loriza Brahman en 'n Ander v Dippenaar* 2002 (2) SA 477 (SCA) at 485). This requirement is qualified further, however, as the animal must have caused the damage spontaneously and as a result of inward vice/excitement (*sponte feritate commota*). This requirement will not be satisfied if the defendant can prove that the animal reacted to external stimuli and not due to internal vice. Defences that may be raised by the defendant pertaining to this requirement and which exclude liability include *vis maior* (an unforeseeable intervening force of nature), provocation or culpable conduct on the part of the prejudiced person/claimant,

provocation or culpable conduct on the part of a third party or provocation by another animal (Neethling & Potgieter (*op cit*) at 358). The onus is placed on the defendant to prove the existence of a valid defence. In addition to the defences listed, the action may also be dismissed if the defendant can successfully prove that the prejudiced party voluntarily assumed risk (the defence of *volenti non fit iniuria*). The defence of *volenti non fit iniuria* considers the plaintiff's subjective state of mind in order to determine whether the danger, which materialised was apparent to and appreciated by the claimant (*Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A)). Assenting to risk may be expressed verbally or may be implicit in the conscious conduct of the claimant. In addition, the defendant may be absolved from liability if he or she is able to adduce evidence of the terms of an existing indemnity between himself or herself and the claimant in terms of which the claimant indemnified the defendant against any damage that may arise as a result of the behaviour of the animal. In circumstances where the defendant adduces evidence of such indemnity, the Consumer Protection Act 68 of 2008 will have to be consulted to ensure that the strict requirements pertaining to disclaimers have been adhered to.

- The victim or prejudiced person or his or her property must have been lawfully present at the location where the damage was inflicted. Courts' interpretation of this requirement differ as some judgments make reference to the claimant having a 'lawful purpose' while others require a 'legal right'. There appears to be a preference for the 'legal right' approach as it may be difficult to ascertain the 'lawful purpose' of property. The defendant may be absolved of liability in this instance if he or she can prove that the claimant had no legal right to be on the property as he or she is, for example, an intruder or a thief.

Both special damages (which may include, for example, damage to property and future medical expenses), as well as general damages (which may include pain and suffering, loss of amenities of life, disability and disfigurement) may be claimed in terms of the *actio de pauperie*.

In addition to seeking relief in terms of the *actio de pauperie*, the plaintiff may plead in the alternative under the *lex Aquilia* based on the negligence of

the defendant. In order for the plaintiff to prove negligence on the part of the defendant, the plaintiff will need to prove the requirements set out in the 'reasonable person test' as articulated in *Kruger v Coetzee* 1966 (2) SA 428 (A), namely:

- Whether a *diligens paterfamilias* in the position of the defendant would –
- foresee the possibility of his or her conduct causing injury to another or to the property of another and leading to subsequent patrimonial loss; and

– take reasonable steps to guard against this occurrence.

- However, the defendant failed to take such steps.

### Summation

Considering that the number of dog bite cases reported has increased rapidly in 2016, it is pertinent for the potential victim(s) and dog owner(s) to have an in-depth understanding of the law applicable to dog bite cases. In addition to the

defences set out above, it may also be advantageous for dog owners to consider taking out personal liability insurance to cover any unfortunate circumstances such as these.

**Kristen Wagner BA Law and Psychology (Rhodes) LLB (UJ) (cum laude) is a candidate attorney at Clyde & Co LLP in Johannesburg.** □

By  
Lebogang  
Raborife-  
Nchabeleng

## Addendum to 'Step-by-step guide to residential housing eviction proceedings in the magistrate's court'

**T**he Magistrates' Courts Rules do not compel a procedure differing from the High Court in eviction proceedings.

*Theart and Another v Minnaar NO; Senekal v Winskor* 174 (Pty) Ltd 2010 (3) SA 327 (SCA) was decided on 3 December 2009 before the amended Magistrates' Court r 55 came into effect on 15 October 2015. Rule 55 is now aligned to High Court Uniform r 6. In his ruling in para 15 Bosielo JA stated as follows:

'In order to avoid any possible confusion, I find it appropriate to encapsulate what I believe to be the import of what we have decided in this case:

A. With regard to evictions under [Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE)] the procedure in the high court is determined by s 4 of PIE and the Uniform Rules of the High Court. The combined effect of these statutory provisions has been explained by this court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba [and Others]* 2001 (4) [SA] 1222 (SCA) ([2001] 4 All SA 479). As far as proceedings in the High Court are concerned, nothing I have said in this case must be understood to detract from that explanation.'

This was said in reference to the following para 12 in the *Cape Killarney* matter: 'Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the man-

ner prescribed by Rule 4 of the Rules of Court. It is clear, in my view, that this notice in terms of the Rules of Court is required in addition to the s 4(2) notice. Any other construction will render the requirement of s 4(3) meaningless.'

Section 4(2) of PIE provides as follows: 'At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.' The procedure regarding when to obtain directions of service of s 4(2) notice in the magistrate's court is not as explained in this article but as appears in the *Cape Killarney* matter and is summarised as follows:

- Notice of motion and summons are issued and served as prescribed in the rules. In the *Cape Killarney* matter at para 14 it states: 'Section 4(5)(b) requires the s 4(2) notice to indicate the date upon which the court will hear the eviction proceedings. In High Court proceedings by way of application *this date of hearing will be determined only after all the papers on both sides have been served*. It follows, in my view, that it is only at that stage that the s 4(2) notice can be authorised and directed by the Court' (my italics).

- Once the period within which to enter a notice to oppose in application proceedings, or within which to enter the notice to defend has expired, and the respondent or defendant has not filed same, applicant or plaintiff approaches court *ex parte* for the s 4(2) PIE directions. The return date of the *rule nisi* will be the date of hearing of the matter on the motion court date for the unopposed roll.

I am of the opinion that it will be pre-

mature to authorise s 4(2) notices before the notice of motion or summons have been served and the *dies* within which to respond has not expired as by that date, it is not yet known if the matter will take the opposed or unopposed route. To be on the safe side and to avoid unnecessary delays, one must when calculating the time period when the matter will be heard if unopposed in Form 1A, calculate it taking into consideration the time periods in the rules, estimated period of service by sheriff of the initial proceedings, time it will take for a hearing date to be allocated, the first hearing (*ex parte* application), service by Sheriff of the order and the 14 day period, which must lapse before the date of hearing (second hearing).

If the application is opposed, a request will be made to be allocated a date of hearing (r 55(1)(j)). In action proceedings, once pleadings have closed, a request can be made to be allocated a trial date. In both instances, the date allocated will make provision for the s 4(2) *ex parte* application, sufficient time for service and the 14 day period to lapse.

Sight must not be lost of the purpose of the s 4(2) notice especially in unopposed matters. Although, in most instances, founding affidavits will contain factors by the applicant, which the court must take into account to arrive at a just and equitable decision, whether or not to grant an eviction order, the directions by court on service of s 4(2) ensure that the hearing is brought to the attention of the other party and all other stakeholders that may assist in it arriving at that decision. This cannot be achieved by notice of set down where the rules provide for other methods of service besides personal service.



Practitioners complain that insisting on service of both the document initiating proceedings and s 4(2) notices separately is costly and time consuming especially in unopposed matters where the date of hearing can be determined as suggested above. There is, in my opinion, merit to the argument but PIE is legislation that was enacted to give effect to s 26(3) of the Constitution. The resultant consequences of granting an eviction order can lead to homelessness or interference with the property rights of the property owner if the order is granted and suspended or refused. As stated in para 20 of the *Cape Killarney* matter: 'Accordingly the purpose of s 4(2) is

clearly to afford the respondents in eviction proceedings a better opportunity than they would have under the Rules to put all the circumstances that they allege to be relevant before the court.'

Mogoeng CJ published 'Norms and standards for the performance of judicial functions' on 28 February 2014 (GN 147 GG37390/28-2-2014) whose objective is to –

- enhance access to quality justice for all;
- affirm the dignity of all users of the court system; and
- ensure effective and expeditious adjudication and resolution of all disputes through the courts.

Attorneys must ensure that all the procedural aspects set out in the rules are adhered to, to avoid unnecessary delays in finalisation of matters.

- See practice note T Klos 'Step-by-step guide to residential housing eviction proceedings in the magistrate's court' 2016 (July) *DR* 26.

Lebogang Roborife-Nchabeleng *BProc (NWU)* is a magistrate in Morebeng.



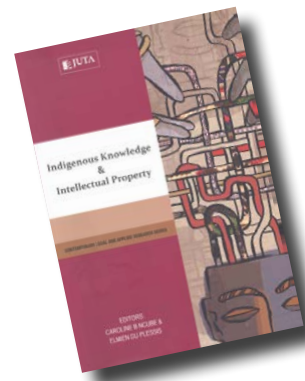
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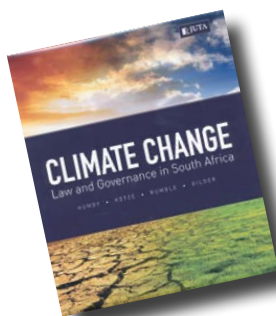
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# More clarity on *pro bono* under Legal Practice Act

By  
Erica  
Emdon

This article looks at whether the provisions relating to community services contained in s 29 of the Legal Practice Act 28 of 2014 (the LPA) have addressed the issue of *pro bono* service by the legal profession in a manner that is unambiguous and that gives clear direction to legal practitioners regarding their responsibility to undertake *pro bono* service.

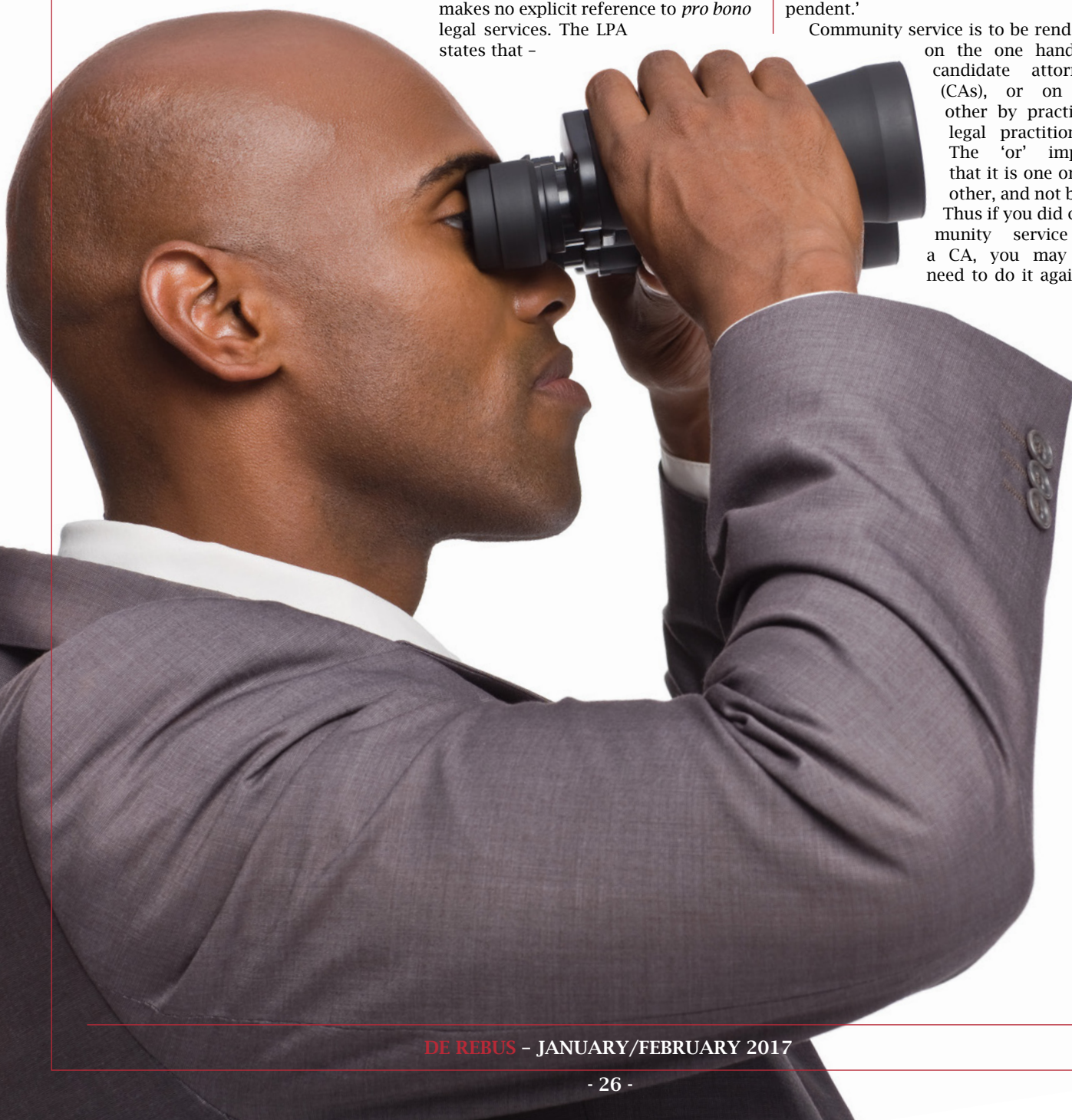
In the first place, s 29 of the LPA makes no explicit reference to *pro bono* legal services. The LPA states that –

‘(1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –

(a) community service as a component of practical vocational training by candidate legal practitioners; or

(b) a minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent.’

Community service is to be rendered on the one hand by candidate attorneys (CAs), or on the other by practising legal practitioners. The ‘or’ implies that it is one or the other, and not both. Thus if you did community service as a CA, you may not need to do it again as



Picture source: Gallo Images/Stock



a practising legal practitioner. Or if you did not do it as a CA you must do it as a practising legal practitioner.

### Pro bono

What we refer to as *pro bono* comes for the Latin *pro bono publico*. This means ‘for the public good.’ It describes legal work undertaken by legal practitioners without remuneration as a public service, and for which *pro bono* clients do not have to pay.

Section 34 of the Constitution provides that everyone has a right to have a dispute resolved by the application of law decided in a fair public hearing before a court. This clause of the Constitution can only be made real for impoverished people living in South Africa if they have access to legal representation, and the private legal profession has acknowledged that it has an obligation to assist. Most bar councils and provincial law societies have adopted *pro bono* rules in the past six years, indicating a commitment to the ideal of providing free legal services ‘for the public good.’

### Current provincial law society and bar council rules

Currently, r 25 of the Rules for the Attorneys’ Profession promulgated in 2016, regulates *pro bono* among attorneys (the Cape Law Society has its own rule) (see r 25 of the ‘Rules for the Attorneys’ Profession’ published under the authority of the Attorneys Act 53 of 1979 GenN2 GG39740/26-2-2016). This rule is similar to the various provincial law society rules that had been adopted by the KwaZulu-Natal Law Society, Free State Law Society, Law Society of the Northern Provinces and Cape Law Society, from around 2010 onwards. The General Council of the Bar, Johannesburg Bar Council, Pretoria Bar Council, Cape Bar Council and Eastern Cape Society of Advocates all have *pro bono* rules that apply to advocates.

It can be argued that these rules do not go far enough to protect the rights of the indigent to have access to *pro bono* legal services and an explicit reference to *pro bono* service provision should have been included in the LPA. The various rules adopted by the profession in its own professional bodies must be strengthened and the best way to do it is through legislation.

### Reading *pro bono* into the LPA

Seeing that there is no clear reference to *pro bono* legal services, the question arises as to whether we can read the concept of *pro bono* legal services into the community service provisions of s 29.

This is not an easy task and requires some imaginative reasoning. Leaving out CAs for the moment, one can see that it

is not clear at all whether recurring legal service by legal practitioners, for which enrolment as a legal practitioner is dependent, is actually what we know as recurring *pro bono* service that law bodies require legal practitioners to fulfil every year.

If one looks at the types of activities that are set out in the LPA as community service activities (although the list is not limited), the drafters of the LPA could easily have had something else in mind. It could be argued that what was intended was that the various activities listed under s 29(2) as community service activities are paid activities. The activities are as follows –

‘(a) service in the State, approved by the Minister, in consultation with the Council;

(b) service at the South African Human Rights Commission [SAHRC];

(c) service, *without remuneration*, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims court;

(d) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation [NGO]; or

(e) any other service which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.’ (My italics.)

One notices that the words ‘without remuneration’ are only used in respect of judicial officers in the small claims courts. By implication one could argue that the other forms of community service listed are ones that would be remunerated. If one adopts this reading of the LPA, then doing a few months (or longer) a year, of paid work for the state, the SAHRC, an academic institution or NGO, might be the community service envisaged by the legislature for legal practitioners (s 29(2)(e) of the LPA allows for the list of services to be extended on approval by the minister).

A different reading is to propose that the intention of the legislature was to see recurring community service rendered by legal practitioners every year referred to in s 29(1)(b), as what we know of as *pro bono* legal service. On this reading the words ‘recurring community service by practising legal practitioners ...’ would mean something similar to what we currently know as *pro bono* services covered by various rules of law societies. As mentioned the LPA states that this recurring community service (now being interpreted as *pro bono*) may be done in service of the state, at the SAHRC, as a judicial officer at a small claims court, providing legal education or any other approved service. The problem still arises, however, with the words ‘without remuneration’ only being stated in regard to ‘small claims court’ service.

On this latter interpretation, there are still further problems. The list makes it possible for the minister to add other approved services, which means for instance, he could add other Chapter 9 institutions, and perhaps a few other options. If the community service provisions in s 29 were aimed at making access to justice more accessible to indigent members of our society, would the LPA not have included a direct and explicit mention to this by stating at s 29(2) that one form of community service could be service for indigent people and the organisations that represent them? The fact that the list of services does not include this type of service is highly problematic and certainly does not ensure that access to justice will be made real for indigent people.

### CAs

CA community service – if we follow the interpretation above – appears to be paid and is a component of practical vocational training. Service as a judicial officer in the small claims court would be excluded for CAs as they would not be qualified to perform this function. But they could undertake service in the state, at the SAHRC (or another Chapter 9 institution), or could provide legal education. There is no clarity regarding the length of time for CA community service, or whether it should be during articles or after articles.

Without any clarity, two options could be looked at, namely –

- CAs undertake their community service during their articles; and
- CAs do it after they have completed their articles, as a condition of admission and that it is considered to be part of their practical vocational training.

The section below is written with CAs in mind, as there is still uncertainty regarding LLB graduate that undertake pupillage. For instance, it is unclear if pupillage will still exist or whether all law graduates will be required to undertake articles and then do pupillage afterwards.

#### • Option one – during articles

There are statutory provisions regulating articles. In particular only certain institutions may offer articles because supervision of CAs is prescribed. In addition to law firms, Legal Aid South Africa (Legal Aid SA), legal clinics at universities, the state attorney’s office and certain NGOs (those that are accredited and certified as legal clinics) can offer articles.

There are only a small number of opportunities for LLB graduates to obtain articles at these institutions, so for the rest, the only option is to undertake articles at a law firm. Some CAs have the opportunity to serve in the *pro bono* departments at these firms, and that time could constitute community service.



However, there are a limited number of firms that can provide this opportunity, and most of these firms cannot accommodate all their own CAs in these departments during their articles.

Thus we can see that currently the opportunity to undertake community service within one's articles remains limited. It must be borne in mind that anywhere that a CA does community service, while doing articles, requires the highest level of supervision, given that the CA has not been admitted. Also, as mentioned the list of services to be regarded as community service is limited not making it clear that community service includes providing legal services to indigent people.

An optimal period of time to undertake community service while serving articles needs to be considered. Should it be 30 days, three months, six months or a year? If the CA were fortunate enough to find articles in a legal NGO, Legal Aid SA or a university clinic, would this by default constitute that person's community service?

Or alternatively, the most practical way to undertake community service during articles would be for CA community service to be *pro bono* service under the supervision of his or her principal. Perhaps for CAs the amount of hours could be higher – maybe 30 hours, or even 100, instead of the 24 hours that the principal would be required to serve in terms of various *pro bono* rules.

#### • Option two – after articles

Another option is that the CAs could undertake a period of community service

after they have completed articles in the institutions mentioned above in s 29(2) (as supplemented). Such post-articles community service could be made a prerequisite for admission. If this form of community service provides a service to the state, albeit indirectly, the state ought to pay for it. Examples that spring to mind are service in courts assisting the public, service in parastatals or Legal Aid SA. There are many other examples, including the legal departments of different state departments. For example, the Department of Labour, Social Development, Health, Rural Development and Land Reform, Cooperative Governance and Traditional Affairs, Home Affairs and, in addition, Land Claims Court. Moreover, there could be opportunities at South African Police Service charge offices, at correctional service institutions, and options at the Competition Commission, the Financial Services Board, various ombuds offices, the SAHRC (which is already listed in s 29(2)), other Chapter 9 institutions, including the Public Protector.

The advantage of placing CAs that have completed articles in these institutions is that there would not need the same high levels of supervision that would be needed if community service were to be done within articles.

Agreement would need to be reached on the time periods for community service if it is done after articles. It has to be realistic and doable, and not become a drudge. Somehow community service should be incentivised not commanded, if possible.

## Conclusion

There are obvious problems with the LPA regarding *pro bono*. If the National Forum on the Legal Profession or any voluntary law associations and bodies formed do not pass *pro bono* rules, the only place to look for the regulation of *pro bono* would be the LPA. If the section on community service does not mention *pro bono* services to make access to justice for the indigent a reality, and it can be interpreted to refer to some form of paid community service, then the situation is extremely problematic to those of us who strive to introduce *pro bono* work as an integral part of legal practice. There might be ways to 'read' *pro bono* into the LPA but this is unsatisfactory. It is not clear, with the current wording of s 29 whether the minister is even empowered to make a *pro bono* rule.

Because of these questions, it is necessary to decide on a way in which to take these concerns forward.

• This article draws on draft comments on the Legal Practice Bill [Bill B20-2012] that were prepared for ProBono.Org in July 2012 by Advocate Piet Louw SC that were not submitted. It also draws on a draft paper prepared for a National Association of Democratic Lawyers working group during 2016 prepared by the writer in consultation with other members of the working group.

Erica Emdon BA (Hons) LLB MA (Wits) is an attorney at ProBono.Org in Johannesburg.

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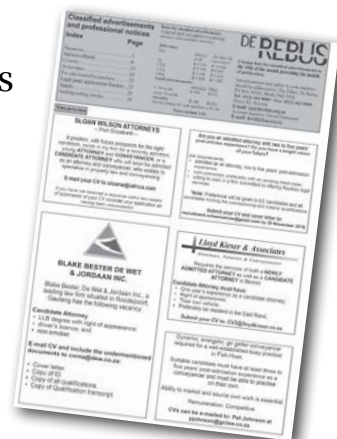
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Time heals all  
wounds –  
the law of  
Prescription in  
medical  
negligence

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By  
Lekwalo  
Jones  
Ditsela

**T**he purpose of the Prescription Act 68 of 1969 (the Act) is to bring about certainty and finality to disputes. The purpose of the Act is also to penalise creditors who do not take reasonable steps prescribed by the Act. Section 11(d) of the Act provides that a debt shall prescribe within three years from the date that the debt arose.

Section 12(1), (2) and 3 of the Act provides that:

'(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall

not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

### Background

In a recent Constitutional Court (CC) judgment delivered by Zondo J on 30 March 2016 in the matter of *Links v Department of Health, Northern [Cape] Province* 2016 (4) SA 414 (CC), the CC unanimously upheld an appeal against a judgment and order of the full Bench of

the Northern Cape Division of the High Court in Kimberley (the full Bench). The full Bench upheld an earlier judgment by Mamosebo AJ dismissing the applicant's (Links) claim with costs on the basis that his claim against the respondent (the MEC) had become prescribed.

Links dislocated his left thumb on 26 June 2006 and went to Kimberley Hospital (the Hospital) for treatment. His left thumb was amputated during an operation on 5 July 2006. He claimed he was never told of the decision to amputate nor the reason for the amputation. He was discharged at the end of August 2006. Links served summons on 6 August 2009. The MEC raised a plea of prescription on the basis that the summons was served after the lapse of three years



from 5 July 2006 when his thumb was amputated.

The CC granted leave to appeal on the basis that the matter, *inter alia*, was about the correct interpretation of s 12(3). In particular, what are the 'facts' that the creditor must know before the debt can be said to be due, and before prescription can start running?

In their interpretation of s 12(3) and evaluation of the evidence before the High Court, the CC found that the MEC said nothing that would bring a defence within the proviso in s 12(3) (namely, 'Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care').

The CC further held that the MEC did not aver that Links had knowledge of the facts that caused his problem. Links did aver in the High Court that he did not know before the end of August 2006 the reason for his condition or the cause of his condition. This averment related to both the issue of negligence and the factual element of causation. The MEC did not deny this averment, and it was found that Links did not know what caused his condition as at 5 August 2006. It could, therefore, not be said that the debt was due before 5 August 2006 (see para 46). The implications of the judgment thus far was that a party needed to allege in pleadings and adduce evidence in order to succeed with a defence based on the proviso provided for in s 12(3). Thus, the judgment had – at this point – not changed the manner in which a creditor may acquire knowledge of the 'facts' from which a claim arises, which was in line with previous judgments.

In previous judgments, it was accepted that a creditor may acquire knowledge of the 'facts' by merely asking one question to the debtor, who would then provide the creditor with such 'facts'. If the debtor refuses, then it was accepted that creditor did not acquire knowledge of the 'facts'. If the creditor does not make any inquiries, then he or she would be deemed to have acquired knowledge of the 'facts'. It was never required that the creditor must obtain an expert medical opinion to acquire knowledge of the 'facts'.

However, the CC's judgment went further and stated at paras 47 to 49 that: '[47] The opinion given by Dr Reyneke was that the amputation of the applicant's thumb and loss of function of the left hand was –

“most probably due to the plaster of Paris that was too tight ... and not removed soon enough ... when ischemia occurred”.

That opinion was given years after the events in issue. Without advice at the time from a professional or expert in the medical profession, the applicant could

not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.

[48] Earlier I rejected the applicant's version that, prior to his discharge from hospital, he had no knowledge that his thumb had been amputated. However, even if he had known, as we find that he had known that he had lost his thumb, he still didn't know what had caused the need for the amputation.

[49] The applicant was in hospital between 4 July 2006 and the end of August 2006. Therefore, realistically, before the end of August 2006 he could not have had access to independent medical professionals. Accordingly, he could not have had knowledge of all the material facts he needed to have before he could institute legal proceedings. Prescription could, therefore, not have begun running before 5 August 2006. Therefore, on this basis too, the respondent failed to show that the applicant had knowledge of all the material facts on or before 5 August 2006. Accordingly, the applicant's claim did not prescribe.'

## Conclusion

The implications of paras 47 to 49 is that in certain cases involving medical negligence matters, a claimant is entitled to first obtain independent medical advice in order for prescription to commence running in circumstances where the claimant is found not to have acquired knowledge of the 'facts'. In the absence of such independent medical advice, a claimant cannot be deemed to have had knowledge of the facts from which a debt arises.

The judgment has not changed the previous position that a creditor must exercise reasonable care to acquire knowledge of the facts, and will be deemed to have such knowledge if he or she could have acquired it by exercising reasonable care. However, what the judgment has changed is that such 'facts' in medical negligence cases may in certain instances require the assistance of an independent medical expert.

The implications of the judgment is not that the operation of s 12(3) will now be dependent on a creditor's subjective evaluation of the presence or absence of knowledge or minimum facts sufficient for institution of a claim. The test for reasonableness has thus not shifted

from an objective test to a subjective one.

The previous judgments on the application of s 12(3), are therefore, still applicable. The *Links* judgment has not changed the application of those previous judgments. It is still the position that a creditor cannot by his or her supine inaction postpone the commencement of prescription.

However, the running of prescription in certain medical negligence cases may now involve obtaining medical advice from an expert on the 'facts' from which a claim arises insofar as a plaintiff may not have direct or constructive knowledge from other sources. These 'facts' should not be confused with the legal conclusions as per the findings in *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA).

In the *Truter* matter the court found that the Act requires knowledge only of material facts from which the debt arises for the prescription period to begin running. It does not require knowledge of the legal conclusions (ie, that the known facts constitute negligence). This position remains unchanged. The time periods as to when the creditor must obtain knowledge of such 'facts', assisted by a medical expert is still subject to an objective test. The creditor must still exercise reasonable care in terms of s 12(3).

The challenge posed by the judgment will be to determine what would be a reasonable time period from when a potential claimant is discharged from hospital or medical facility to obtaining the medical advice of an expert. Some may ask, what if the claimant does not appoint the medical expert within three years from date of discharge or what if the medical expert's opinion is furnished more than three years from the date of discharge of a claimant.

These are probably some of the questions that the courts will have to deal with in subsequent cases in deciding the issue of reasonable care imposed by s 12(3). The courts would probably have to consider each case on its own merits in determining when prescription commenced running in accordance with the objective test of reasonable care.

The judgment will probably also have implications for other professions wherein a creditor may require the assistance of an expert to acquire knowledge of the 'facts' from which a claim arises.

• See p 28 and law reports 'Prescription' 2016 (Oct) DR 42.

Lekwalo Jones Ditsela LLB (UL) is an attorney at Gildenhuys Malatji Inc in Pretoria.



# Letting time fly ... common law and the waiver of prescription

By Johan  
van der  
Merwe

Picture source: Gallo Images/Stock



Most textbooks conclude that the waiver of prescription (in the form of an undertaking or term of an agreement not to raise the defence of prescription) is enforceable and not contrary to public policy (see for instance WA Joubert *The Law of South Africa* 2ed (Durban: LexisNexis 2010) vol 21 at 70; RH Christie and GB Bradfield *Christie's Law of Contract in South Africa* (Durban: LexisNexis 2011) at 511; and S van der Merwe, LF van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4ed (Cape Town: Juta 2012) at 489). However, in view of recent case law anyone confronted with this issue, perhaps when drafting a commercial contract containing such clause, should think twice. This article will undertake a brief overview of the case law of the last decade, seen against the common law, and will show that most text books do not properly capture this issue.

## Common law

It seems evident that one cannot, at the time of the creation of a debt, legally

commit oneself not rely on prescription. If it were to be allowed, the entire institution of prescription could effectively be defeated, at least in debts arising from agreements. An agreement of this nature can be regarded as *contra bonos mores*, and is, therefore, invalid. (JC de Wet en AH van Wyk *De Wet en Yeats Kontraktereg en Handelsreg* 4ed (Durban: Butterworths 1978) at 274) (paraphrased).

## Case law

The common law position was confirmed in the Western Cape High Court in the matter between *Absa Bank h/a Bankfin v Louw en Andere* 1997 (3) SA 1085 (C).

In *Bankfin*, the court 1090 A - B concluded: The part of the agreement between the appellant and the second and third respondents that determined that prescription does not run in favour of the second and third respondents, is thus against public interest. The two respondents could not entirely distance B from the protection of the Prescription Act 68 of 1969 (paraphrased).

The *Bankfin* matter, however, contradicts an earlier decision from the then

Transvaal Bench in *Nedfin Bank* matter (*Nedfin Bank Bpk v Meisenheimer en Andere* 1989 (4) SA 701 (T)).

The issue was thereafter raised in *De Jager and Others v ABSA Bank Bpk* [2000] 4 All SA 481 (A), but left undecided at para 16: The validity of an undertaking that will not raise prescription may depend on the time period it was given. In an instance that judgment refers to case law, where a debtor (including a guarantor) contractually commits himself or herself, usually at the start of the conclusion of the association and before prescription, to renounce and not to rely on the protection of prescription ('an ongoing concern'). There are various decisions in the High Court if such an ongoing concern is valid or not – see, for example, *Nedfin* (*op cit*) (still valid); *Absa Bank* case (invalid). The basis of the latter decision is that such an undertaking undermines the institution of liberating prescription and, therefore, it is contradictory to public policy. Since we are not dealing in this appeal with an ongoing agreement, it is not necessary for us to take a stand (paraphrased).

The common law position as set out in *Bankfin* was eventually confirmed by the Supreme Court of Appeal (SCA) in *Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA).

In the *Classic Sailing* matter the SCA held that a renunciation must be distinguished from a waiver. A renunciation is in effect a new agreement to renew the debt after it had become prescribed. This is an important distinction, because renunciation of a prescribed debt is permissible, but the SCA held that the waiver of prescription is not.

The court thus confirmed the common law position in regard to waiver of prescription:

'Rather than asking whether statutory provisions are prohibitory or dispositive, a better approach to determining whether parties may exclude the operation of statutory provisions by choice of another system of law might be to question whether they can waive the application of the provisions. This question was addressed in *South African Co-Operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* [1997 (3) SA 236 (SCA)], where Harms JA, dealing with procedural statutory provisions, held that they may be renounced by a party (in that case the State) for whose benefit they are enacted. But where public policy and interest would be prejudiced by a waiver, such provisions can-

not be escaped. *Waiver is not possible, said this court, if it affects public policy or interest or a right.* This principle was affirmed in *De Jager en Andere v Absa Bank Bpk*, where this court held that the application of the provisions of the Prescription Act 68 of 1969 may be waived by a debtor under a contract after the prescriptive period has run because *renunciation* did not substantially or materially impact on the public interest' (at para 23) (my italics).

### Constitutional approach to the Prescription Act

The Constitutional Court (CC) recently outlined the proper approach to the Prescription Act in *Links v Department of Health, Northern [Cape] Province* 2016 (4) SA 414 (CC) at para 26:

'The provisions of s 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and on the other the need to *ensure fairness* in those cases in which a rigid application of prescription legislation would result in *injustice*. As already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind' (my italics).

The CC did not amend the prescrip-

tion periods, nor preached a lackadaisical approach or lowered the bar, but did infuse the law of prescription with considerations of justice and fairness.

The effect of the *Links* judgment is that a court must now also ask whether it will be fair, just and equitable to allow a claim to become prescribed or not.

### Conclusion

The common law prevails when it comes to the waiver of prescription: The waiver of prescription (in the form of an undertaking or term of an agreement not to raise the defence of prescription) is not enforceable and is contrary to public policy.

If this particular issue is ever addressed by the CC, it is likely that the common law position will prevail. Given the overriding jurisprudence of fairness and justice dispensed by the CC, it may well lean towards upholding the *bonos mores*, the moral fibre, of our society.

• See feature article p 26 and law reports 'Prescription' 2016 (Oct) DR 42.

Johan van der Merwe BCom BA (Hons) LLB (Stell) LLM (University of Kiel) (Germany)) is an attorney at JD van der Merwe Attorneys in Stellenbosch.

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# Flying into new heights – damages claims arising from contraventions of the Competition Act

By  
Malcolm  
Ratz

**T**he Competition Tribunal and Competition Appeal Court have exclusive jurisdiction to adjudicate whether conduct is in contravention of the provisions of the Competition Act 89 of 1998. Section 65(6)(b) of the Competition Act states that a party seeking to pursue an action for damages requires a certificate from the Chairperson of the Competition Tribunal or the President of the Competition Appeal Court certifying that the conduct forming the basis of the damages claim has been found to be a prohibited practice in terms of the Competition Act. A s 65 certificate serves as irrefutable confirmation of the contravention of the Competition Act by the cited party. The civil courts are, therefore, not tasked with reconsidering the merits of the conduct and assessing whether such conduct was in contravention of the Competition Act. Rather, the civil court will be tasked with assessing the remaining elements necessary for a successful damages action, being the elements of causation and the extent of damage caused by the contravening conduct.

On 8 August, the Gauteng Local Division of the High Court in Johannesburg, gave the first judgment relating to damages arising from contraventions of the Competition Act, in the matter of *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd* 2016 (6)

SA 19 (GJ). After all the excitement and attention generated by the Competition Commission's successful investigation and prosecution of various major players in the construction industry for their participation in anticompetitive conduct in contravention of the Competition Act, the judgment by Nicholls J will undoubtedly herald in a new phase of competition law in South Africa (SA), moving away from a system characterised by only public prosecution of contraventions of the Competition Act, to an environment where the victims of contravening conduct seek to assert their rights to seek civil damages against contravening firms.

The judgment by Nicholls J was the first of its kind in SA and confirmed some important aspects.

The first significant statement made by Nicholls J appears in the very first line of the judgment, where it is stated that: 'This is a delictual claim, the first of its kind, arising out of the anti-competitive practices of our national carrier South African Airways (SAA).'

This seemingly insignificant statement does put to rest a debate raised before the Supreme Court of Appeal (SCA) in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), where the parties debated whether the nature of the damages action aris-

ing from contraventions of the Competition Act should be classified as delictual or statutory. In the case before the SCA, Wallis JA stated that: '[I]t is premature at the stage of this appeal for this court to determine the questions raised by these arguments in view of their novelty, complexity and the fact that they are raised for the first time in this court' (para 75).

Nicholls J has effectively put an end to this debate, confirming that these actions are delictual.

The second important aspect dealt with by Nicholls J, was the quantification of the damages claimed by Nationwide Airlines (in liquidation).

Picture source: Gallo Images/iStock

The South African damages regime is compensatory in nature, therefore, victims are limited to claiming only the actual damage suffered as a result of the unlawful conduct.

The concept of punitive damage, which is the damages system of the United States (US) and so often dramatised on television, is not part of the South African law of damages. Therefore, the courts are required to take great care when assessing the causal connection between the conduct and the actual damage suffered.

Nicholls' J approach to the all-important assessment of damages required a comparison of the actual situation in the relevant markets, with the hypothetical position or the so-called counterfactual scenario in the same market, absent the contravening conduct (in the case of SAA – abuse of dominance) (at para 50).

Given the complexities and numerous variables to be considered when attempting an estimation of damages, particularly in the case of complex matters such as the loss of profit and future earnings, arriving at a precise damages award is impossible. With this in mind, the courts are tasked with attempting to arrive at the best

possible damages award, based on the material it has available.

South African courts have traditionally steered away from rigidly binding itself to a specific method for damages quantification and in this case the experts presented various potential models for the court to consider.

Nicholls J referred to the 'Practical Guide – Quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European Union', favourably stating that: 'It should be stressed that it is only possible to estimate, not to measure with certainty and precision, what the hypothetical non-infringement scenario is likely to have looked like. There is no method that could be singled out as the one that would in all cases be more appropriate than others. Each of the methods described above has particular features, strengths and weaknesses that may make it more or less suitable to estimate the harm suffered in a given set of circumstances' (see [www.ec.europa.eu](http://www.ec.europa.eu), accessed 24-11-2016).

The court eventually settled on the linear interpolation method as the most appropriate method for assessing the damages. This method essentially seeks

could have provided some important insights into the assessment of the elements of a delictual claim of this nature. Nicholls J confirmed that the claim is delictual, however, fails to give a more detailed analysis of how the elements of the delict should be assessed within the context of competition law contraventions, rather merely bypassing over these elements and focussing predominantly on the quantification and the debate between the experts.

Aside from the criticism that the legal aspects may have been dealt with in more detail by Nicholls J, a further criticism is directed at the order insofar as it relates to interest. I submit that Nicholls J erred in the awarding of interest on the damages sum. The order provides for interest on the damages sum as from date of judgment, however, s 65(10) of the Competition Act expressly entitles a claimant to interest as from the date on which the s 65(6) certificate is issued: 'For purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in

to plot two points on a graph, the first representing a point pre-contravention and the second representing post-contravention, with the straight line between the plotted points representing the estimated growth but-for the contravening conduct (at para 132).

While the judgment by Nicholls J will generate much discussion and debate and actions brought within the scope of s 65 of the Competition Act, the debate solicited by the judgment may revolve more around what the judgment does not address, rather than the aspects it does address.

The judgment (albeit not necessary)

terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).'

The judgment, therefore, clearly falls short in some regards, however, despite this, it is expected that this judgment will play a significant role in future litigation of this kind and will undoubtedly serve as the judgment that will get the wheels of private competition damages actions moving in the right direction.

## Conclusion

The judgment of Nicholls J has given some clarity on the nature of a s 65 damages action as being delictual and has confirmed confidence in the approach by the courts to make use of experts

and economic models in order to equip the court in making the best possible estimation for purposes of performing a damages assessment. The *Nationwide Airlines* case (as well as *Comair Ltd v Minister of Public Enterprises and Others* 2016 (1) SA 1 (GP)), does have the benefit of having individual litigants with the financial resources to tackle a major corporate such as SAA. The cases where one is dealing with a smaller claimant or as in the case of *Children's Resource Centre Trust*, one is dealing with a class of individual claimants, then the costs of litigation and the quantification of damages may prove to be significantly more difficult to prove and for the courts to assess.

Should the legislature agree that a system where public enforcement and private enforcement are collectively pursued in order to serve as a deterrent for contraventions of the Competition Act, then it is recommended that the legislature consider statutory interventions in order to develop and promote the actions envisaged in s 65 of the Competition Act.

The US has successfully introduced the concept of treble damages claimable by victims of contraventions of the

United States competition legislation (s 4 of the Clayton Antitrust Act of 1914). Armed with the benefit of possible treble damages litigants are incentivised to pursue private actions against contravening firms. In SA, given the compensatory nature of damages actions, a punitive damages regime is unlikely to be established. Other interventions are, however, available which could facilitate these actions. These interventions include the express governing of class actions in cases of contraventions of the Competition Act, the development of a favourable discovery regime for would-be claimants, thereby allowing potential claimants and legal representatives to timeously assess the merits of a particular action before getting embroiled in costly litigation, conceivably allowing for contingency arrangements to be entered into and thereby give even the claimants not in a financial position to litigate, the opportunity to vindicate their rights to claim damages.

Finally, given the fact that a significant number of South African's do not have the financial means to bring these actions, particularly given that these actions invariably involve large corporates who have contravened the provisions of

the Competition Act, statutory intervention into the costs awards in civil damages actions brought in terms of s 65 of the Competition Act could curb the litigation risks facing potential claimants. Given that the defendant (ie, the firm found to have contravened the Act) has been found to at least have acted unlawfully, a position where each litigant, therefore, the claimant and the defendant, pay their own legal costs, may temper the risks of corporate litigants driving up litigation costs so as to stave off litigation by individuals and also serve to temper private litigants from pursuing wishful damages actions.

South Africa is ripe for private competition enforcement, allowing the real victims of the contraventions of the Competition Act to attain recourse and further serve to punish and deter the firms taking advantage of the public through illegal business practices.

Malcolm Ratz BA LLB LLM (Stell) is an attorney at Roestoff and Kruse Attorneys in Pretoria.



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# Pension interest – is there a need to plead a claim?

**T**his article addresses the topic on which I have received various requests from magistrates, attorneys and advocates to provide legal opinions on several occasions. The question is: Whether or not there is a need to specifically plead a claim for a pension interest in divorce papers in order for the court to order a retirement fund to pay the pension interest to the non-member spouse. In my experience, some regional magistrates refuse to grant orders relating to pension interests when the name of the retirement fund is not mentioned on the papers. The law in this regard has been settled in *Ndaba v Ndaba* (SCA) (unreported case no 600/2015, 4-11-2016) (Petse JA (Mpati AP and Swain JA concurring)). Before this judgment, there was confusion as to whether a pension interest should be specifically pleaded and claimed in divorce papers. This was due to various differing High Court decisions, some of which have held that it should be pleaded, while others held that this need not

be the case because such benefits are deemed to be part of the joint estate and they can be covered by a 'blanket division' of the joint estate order.

## Should the 'pension interest' be pleaded?

The controversy started when Musi J in *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O) at 312, held that:

'It is settled law that the spouse seeking maintenance from the other must do so during the course of the divorce proceedings and obtain the necessary order. She/he cannot do it after dissolution of the marriage. ... Similarly, a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate Court order during the divorce proceedings.'

The essence of this decision was that the pension interest seeking spouse should specifically plead and pray for such an interest in order for the court to make an order in this regard. The reasoning of this case was followed in *ML v*

*JL* (FB) (unreported case no 3981/2010, 25-4-2013) (Rampai J) at para 43, where the court held that '... a spouse claiming an entitlement to the pension interest of another spouse has to plead the necessary facts on which such special relief is founded or can be said to be founded'. It is worth noting that neither the Divorce Act 70 of 1979 (the Act), nor any of the legislation regulating retirement funds, including the Pension Funds Act 24 of 1956 (PFA) requires litigants to specifically plead a pension interest in order for the court to make an order in this regard. Section 7(7) of the Act merely deems a pension interest to be part of the estate of the member of the retirement for the purposes of divorce (C Marumoagae 'A Critical Discussion of a Pension Interest as an Asset in the Joint Estate of Parties Married in Community of Property' (2014) 1 *Speculum Juris* 54). Section 7(8) of the Act simply empowers the court making a divorce order to declare that a portion of the pension interest is due and assigned to the non-member spouse and that it shall be paid

by the member spouse's retirement fund to the non-member spouse. Further, some courts will also direct the registrar of the court to liaise with the concerned retirement fund in order for such a fund to endorse its records to ensure that the non-member spouse is paid. Section 37D(4)(a) of the PFA compliments s 7(8) of the Act by introducing the clean-break principle, in order to ensure that the non-member spouse is able to execute his or her claim regarding the pension interest against the member spouse as at the date of divorce. Thus, ensuring that he or she does not wait until a future date post the divorce when such benefits are due in accordance with the rules of the fund (Marumoagae 'Breaking up is hard to do, or is it? The clean-break principle explained' 2013 (Oct) *DR* 38). While s 7(8) of the Act empowers the court to order the registrar to get the fund to pay the pension interest, s 37D(4)(a) of the PFA directly empowers the non-member spouse to submit the decree of divorce to the member spouse's retirement fund to claim his or her portion of the pension interest as ordered in the divorce decree. In particular, s 37D(4) of the PFA specifically states that:

'(4)(a) For purposes of section 7 (8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce ...

(i) Must be deducted by –

(aa) the pension fund or pension funds named in or identifiable from the decree [of divorce]'.

This section clearly illustrates that it is not a legislative imperative that the precise name of the retirement fund should be inserted in the divorce decree. It would be sufficient if such a fund is identifiable from the decree, and that may be by association due to the citation of the member spouse's place of employment on the divorce papers. The mere fact that the member spouse belongs to a retirement fund should be enough to enable his or her non-member spouse to be able to claim a portion thereof as at the date of divorce, notwithstanding the fact that either the divorce papers or the decree of divorce is silent on the issue. In practice, some presiding officers, more particularly regional magistrates demand that the non-member spouse should in addition to specifically stating the name of the retirement fund in the pleadings, also state the retirement fund number of the member spouse. It is a pity that while most divorces are adjudicated in regional courts, judgments from these decisions are not reported, and most of them do not even get appealed.

In *Kotze v Kotze and Another* (WCC) (unreported case no A 165/2012, 25-1-2013) (Saldanha J) at para 22, the full Bench agreed with the *amicus* that the approach adopted in the *Sempapalele*

matter with regard to the interpretation of ss 7(7) and (8) of the Act was flawed and incorrect. The court also accepted the *amicus* submission that the reasoning in the *Sempapalele* matter that just as in respect of a claim for maintenance by a spouse, a claim to the pension benefit had to be pleaded and ordered by court was incorrect. This is because '[a] right to spousal maintenance does not flow automatically from a decree of divorce whereas subsection 7(7)(a) operated automatically without the need to plead it or to prove such a claim'.

In *Motsetse v Motsetse* [2015] 2 All SA 495 (FB) at 499, the court also disagreed with the *Sempapalele* case that pension interest can only be part of the division when it was pleaded and a specific order in relation to it is made by a court. In particular, the court held that '... when an order of court orders division of a joint estate, the pension interest of such parties who have such interest automatically fall to be divided as part of the joint estate' (para 21). This judgment was quoted with approval in *M v M* (LP) (unreported case no HCA18/2015, 17-6-2016) (Makgoba JP) at para 22, where the court held that:

'In essence the judgment in *Motsetse* is to the effect that where a settlement agreement provides for a blanket division of a joint estate or a Court order orders a blanket division of a joint estate (as in the present case before me), all pension funds to which any of the spouses belong and had an interest in at the date of divorce are involved, in the sense that all such pension interests are deemed to be part of the estate. If after the dissolution of the marriage, the parties dispute the division, a court can be approached to either deal with the matter itself or appoint a liquidator. Furthermore, it is not necessary that the issue of pension interest be specifically applied for or pleaded in the divorce proceedings' (see also *Motsetse* at para 18).

This controversy has finally been settled in the *Ndaba* matter. In this case, the Supreme Court of Appeal (SCA) first held that the criticism of the 'proposition that for the pension interest of a member's spouse to form part of the joint estate upon divorce, it is necessary that it be claimed by the non-member spouse in his or her summons or counter-claim' (para 28) are justified (see MC Marumoagae 'A non-member spouse's entitlement to the member's pension interest' (2014) 17 *PER* 2488 at 2509). In the *Ndaba* matter the court authoritatively further held that: 'In the result those decisions which held that if there is no reference in the divorce order of parties married in community of property to a member spouse's pension interest, the non-member spouse is precluded in perpetuity from benefitting from such pension interest as part of his or her share

of the joint estate, were wrongly decided' (para 31). In the context of this case, the court held it was not necessary for the parties to mention in their settlement agreement, which was silent on the issue of pension interest what 'was obvious, namely that their respective pension interests were part of the joint assets which they had agreed, would be shared equally between them' (para 25). This case is a clear illustration that notwithstanding the fact that the divorce order is silent on the issue of pension interest, the non-member spouse is entitled to be paid the portion of his or her member spouse's pension interest by the member spouse's retirement fund. I submit that if the court order is silent on the issues of the pension interest, then the retirement fund should pay at least 50% of such benefit without first requiring the non-member spouse to apply to court for the variation of the divorce order in order to insert its name thereto. Thus, once the retirement fund has confirmed that it is the relevant retirement fund to which the member spouse belongs, it should pay the pension interest. This simply means that the wording of the divorce decree should not be an issue and pension interests can and should be covered even by the 'blanket division' of the joint estate. As such, there is no need as it was suggested in the *ML v JL* matter that the 'spouse would do well to aver facts relating to the other spouse's employer; the other spouse occupation; the name of the pension fund; the administrator thereof; the underwriter thereof; the other spouse membership number; the agreed retirement date of the other spouse, being the date on which the pension benefits would in the normal course of events, accrue to the member spouse' (para 43).

## Conclusion

In light of the SCA decision, it is hoped that retirement funds and regional magistrates in particular, will no longer burden divorce litigants with the duty to plead and pray for pension interest in order for divorce decrees to order retirement funds to pay pension interests to non-member spouses. Furthermore, retirement funds are advised to desist from a practice of refusing to pay portions of their member's pension interests on the basis that either their names are not reflected on the divorce decree or their names are incorrectly reflected thereon.

Clement Marumoagae LLB LLM (Wits) LLM (NWU) Diploma in Insolvency (UP) is an attorney at Marumoagae Attorneys in Itsoseng. □





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

# THE LAW REPORTS

November 2016 (6) South African Law Reports (pp 1 – 333);  
[2016] 4 All South African Law Reports October (pp 1 – 297)

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

**FB:** Free State Division, Bloemfontein.

**GJ:** Gauteng Local Division, Johannesburg

**GP:** Gauteng Division, Pretoria

**SCA:** Supreme Court of Appeal

**WCC:** Western Cape Division, Cape Town

## Consumer protection

**Sale in execution:** In *Sheriff, Piketberg and Another v Lourens* 2016 (6) SA 110 (WCC); [2016] 4 All SA 239 (WCC) the Sheriff sold an immovable property situated at Piketberg, at an auction pursuant to a court order for the execution of a judgment. The conditions of sale were available for inspection before the sale. The relevant clause provided that the buyer would be liable 'for the payment of all costs and charges necessary to effect transfer, including but not limited to conveyancing costs, transfer duty or value added tax (VAT) attracted by the sale and any Deeds Registration Office levies.'

The purchaser, Lourens, refused to pay the VAT amount of R 88 200 due. The Sheriff was thus unable to have the property registered in Lourens' name. Lourens also failed to respond to the Sheriff's demand for payment of the VAT.

The Sheriff then applied for the cancellation of the sale in terms of r 46(11)(a) of the Uniform Rules of Court (the rules). Lourens launched a counter-application and opposed the sale on the basis that the auction did not com-

ply with reg 22(5)(d) of the Consumer Protection Act 68 of 2008 (CPA) and applied for the sale to be declared null and void. He also applied for the repayment of his deposit. Lourens alleged that the sheriff failed to inform him prior to the sale that VAT would be payable. He also alleged that the Sheriff acted in bad faith because he had failed to establish the VAT status of the trusts whose property was being sold. He also argued that the relevant clause in the contract was unfair and unenforceable under the CPA.

Mahomed AJ confirmed that execution sales and auctions are subject to the CPA in terms of s 45(1), which specifically mentions such sales. Regulation 22(2) stipulates that auctioneers may not sell goods, which are not their property unless they have entered into a written agreement with the owner of the goods. Further, reg 22(5) requires auctioneers to perform their duties 'in accordance with the highest standards applicable to auctions.'

The court confirmed that the sale of fixed property attracts either VAT or transfer duties, but not both. If the seller is a VAT vendor then VAT will be payable. Sales are usually VAT inclusive, unless the contract provides otherwise.

The Sheriff is not obliged to extend his inquiries beyond the extent of any real rights that may exist against the property. There is no duty under the rules to inquire about the VAT status of the judgment debtor whose property is being sold.

The court reasoned that it would be inappropriate for it to invoke an onerous interpretation of the Act and regulations in order to place additional regulatory burdens on the Sheriff's office. Sheriff's offices are already operating with limited capacity and resources within the terrain of increased consumer protections.

It further pointed out that execution sales are regulated by r 46, but also by the regulations under the CPA. It is obvious that reg 22(2) contains a gap as it does not provide for execution auctioneers. There is a need to harmonise the provisions of the CPA regulations with those of the Uniform Rules.

The court concluded that the auction was valid and binding. The sheriff was thus entitled to apply for the cancellation of the agreement due to the repudiation of the buyer and to retain the deposit paid until his own damages could be determined.

## Credit law

**Place of delivery of s 129 notice:** In *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others (National Credit Regulator as Amicus Curiae)* 2016 (6) SA 102 (SCA) the appellant, Blue Chip, was a credit provider in terms of the National Credit Act 34 of 2005 (NCA). It entered into a number of small, unsecured credit agreements with the first respondent, Ryneveldt, as well as with the other respondents. These were all entered into in Bloemfontein. It provided that monthly in-

stalments had to be paid on specified dates into Blue Chip's bank account held in Bloemfontein.

Ryneveldt defaulted on his payments in terms of the agreement and Blue Chip sought payment of the full outstanding amount. On the default, Blue Chip sent a notice in terms of s 129(1)(a) of the NCA to be delivered by registered post to Ryneveldt's elected *domicilium citandi et executandi*, in Kimberley, which fell outside the Bloemfontein Magistrates' Court's jurisdiction. It was common cause that the said notice reached the post office in Kimberley, which notified Ryneveldt to collect it.

Ryneveldt did not react to the notice within the prescribed period and Blue Chip then issued a letter of demand in terms of s 56 of the Magistrates' Courts Act 32 of 1944 (the Act). In response thereto, Ryneveldt gave written consent in Bloemfontein to judgment in respect of the debt, interest thereon and costs in terms of s 58 of the Act.

The magistrates' court refused to grant the judgment in favour of Blue Chip, for lack of jurisdiction. It reasoned that s 28(1)(d) of the Act had not been complied with in that the delivery of the s 129 notice, being an element of the cause of action, did not occur within the area of jurisdiction of the court. As a result the magistrates' court did not have jurisdiction to deal with the matter.

On appeal the FB held that although the s 129 notice 'does not, however, form part

of the cause of action', the delivery of the s 129 notice 'completed' the cause of action and the court, therefore, did not have jurisdiction to deal with the matter.

On appeal to the SCA, Pillay JA pointed out that being a creation of statute, the magistrate's court derives its powers from the Act. Section 28 grants jurisdiction to a magistrate's court 'if the cause of action arose wholly within the district or regional division'.

The SCA pointed out that where it is essential to the successful pursuit of a contractual claim that a letter of demand be sent, the sending of that letter is part of the cause of action. In particular, where a statute provides that before an action can be commenced or a claim enforced against a debtor, a notice be given, the giving of that notice is essential to the successful pursuit of the claim and proving that it was given, is part of the cause of action.

The court concluded that it was clear from s 129(1)(a) and (b) of the NCA that prior to commencing legal proceedings to enforce an agreement, the credit provider must deliver a written notice to the consumer wherein attention is drawn to the default in repayment, setting out various options open to him or her whereby the pressure of the default could be alleviated. It is a mandatory requirement.

A plaintiff credit provider must aver compliance with ss 129 and 130 in the summons or particulars of claim to disclose a cause of action where the suit is based on a credit agreement to which the NCA applies. In the absence of such averment the pleading will be excipiable.

It was common cause that delivery of the s 129 notice took place outside the area of jurisdiction of the Bloemfontein Magistrate's Court. The cause of action did, therefore, not arise 'wholly within the district or regional division' of that court and the appeal was dismissed.

## Delict

**Misrepresentation:** In *Cuba NO and Others v Holoquin*

*Global (Pty) Ltd and Others* [2016] 4 All SA 77 (GJ) the applicants were the trustees in a family trust. The trust claimed payment of R 2 million from three respondents. The second respondent, Ben-Israel, was the sole director of the first respondent, Holoquin. The trust and Ben-Israel had entered into a share subscription agreement. Alleging that it had lawfully cancelled the agreement, the trust sought restitution by Holoquin of what it had received in terms of the agreement. The claim against Ben-Israel and the third respondent, Butkow, was founded on an alleged warranty that all information and documentation provided by them to the trust was true and accurate. They were alleged to be jointly and severally liable to pay the sum of R 2 million to the trust consequent on their breach of the warranty.

Holoquin raised a number of special defences to the claim:

- First, it argued that the trust was not properly before the court as there was no evidence in the founding affidavit that all the trustees had authorised the first applicant (also a trustee) to conduct the litigation on their behalf.
- Secondly, it contended that the share subscription agreement provided for disputes arising from it, to be referred to arbitration.
- Thirdly, it contended that there was no proper resolution or decision by the joint trustees, which authorised the first applicant to address the letter of demand calling on Holoquin to perform its obligations under the agreement or the letter of cancellation.

Rubens AJ confirmed that the general rule is that the trustees of a trust must join in suing. Holoquin's challenge to the first applicant's authority to conduct the litigation was unfounded. The first applicant expressly alleged in the founding affidavit that he was duly authorised by his co-trustees to represent the trust in the litigation. There was no suggestion that his allegations were untrue, and affidavits provided by the

other trustees put paid to Holoquin's submission. The same held true for the first applicant's authorisation to address the letter of cancellation on behalf of the trust.

Turning to the trust's claim for repayment by Holoquin of the R 2 million in terms of the agreement, the court found that –

- Holoquin was in breach of the share subscription agreement;
- the agreement was lawfully cancelled by the trust; and
- Holoquin had not advanced any legitimate defence for repayment of the sum of R 2 million, apart from the alleged arbitration defence to the claim.

The court dismissed trust's claim against Ben-Israel and Butkow, and held it to be an unfounded attempt to bind parties who were not parties to the subscription agreement.

In an alternative claim against Ben-Israel and Butkow, the trust relied on alleged misrepresentations by them to induce the trust to conclude the subscription agreement and effect payment of R 2 million to Ben-Israel when they well knew that the entire authorised share capital had been issued and that Ben-Israel was not in a position to issue the 31 112 shares subscribed for by the trust. The court con-

firmed that the representations made by Ben-Israel and Butkow were false. However, it could not be inferred that they must have fraudulently intended to induce the trust to conclude the subscription agreement and the court could not exclude the possibility of an innocent even if misguided belief on their part that the subscription agreement would be implemented in accordance with its terms. The issue was referred for oral evidence.

On the issue of the arbitration clause, the court held that the dispute was not one which was required to be referred to arbitration. The trust was therefore entitled to approach the court for relief.

Holoquin was ordered to pay the trust R 2 million, plus interest.

## Insolvency

**Voluntary surrender:** In *Ex parte Fuls and Three Similar Matters* 2016 (6) SA 128 (GP) the court held that it will not accept the voluntary surrender of the estate of a debtor with debts arising from credit agreements, unless the debtor explains why a proper application of debt relief measures under the National Credit Act 34 of 2005 (NCA) would not yield a better result for creditors.

The crisp facts in *Ex parte*

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incorporating

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*Fuls* were that the applicants in the four matters before the court applied for the voluntary surrender of their estates. Three of the four applicants were represented by the same firm of attorneys and relied on virtually identical affidavits. The same valuator had been used and the valuations of the furniture and household goods seemed unrealistically optimistic. The applicants' lists of creditors revealed that they had entered into credit agreements.

Van Niekerk AJ confirmed that one of the requirements for voluntary surrender is that the debtor has to show that it will be to the advantage of creditors if their estate is sequestrated. The court had to decide whether this requirement had been satisfied.

The NCA was enacted specifically to deal with consumer credit and consumer over-indebtedness. It contains several remedies for consumers who are unable to pay their debts. One of these is debt review, in terms of which debts may be re-arranged, postponed or restructured. Another possibility is that the consumer may be exonerated if it is found that credit was granted recklessly. These remedies were designed in the interest of consumer debtors and will relieve them from financial strain.

Further, speaking debt review is also more advantageous for creditors, as they can expect to receive all or a substantial part of what they are owed, even if it is over an extended period. In a sequestration creditors often do not even prove claims for fear of having to contribute to the costs.

An applicant for voluntary sequestration thus has to disclose whether or not he applied for debt review prior to applying for voluntary surrender and provide reasons if this was not done. If there was an application for debt review, a comprehensive report of the debt counsellor must be disclosed, setting out what procedures were followed and whether or not the applicant complied with debt restructuring arrangements.

Absent such disclosure, an application for voluntary

surrender would not satisfy a court that the interests of creditors are better served by voluntary surrender than by proper application and adherence to the arrangements in terms of ss 86 to 88 of the NCA.

The court accordingly dismissed the four applications.

## Marriage

**Forfeiture of patrimonial benefits:** The facts in *Thlou v Ralebipi* [2016] 4 All SA 251 (GP) were as follows: At the time of their marriage in 2011, the parties were each successful professionals who were financially secure. Their respective occupations often resulted in one or the other being away from the family home. The parties owned various immovable properties in Gauteng and North West province as well as a number of expensive vehicles. One of the properties was paid for by the plaintiff (the wife) while a number of other properties and the vehicles were paid for by the defendant (the husband). The wife alleged that the breakdown of the marriage was caused by the husband's conduct in staying out late and coming back home often inebriated and at very late hours. Also a contributing factor was the work demands on each of the parties.

In a subsequent divorce action one of the issues in dispute was whether the parties were married in accordance with the tenets of customary law as contemplated in s 3 of the Recognition of Customary Marriages Act 120 of 1998. The court decided that a customary marriage was concluded between the parties in May 2011. The consequence of that order was that the marriage between the parties was regarded as being one in community of property.

It was then agreed by the parties that the issue of whether the defendant was entitled to an order claiming forfeiture of the patrimonial benefits of the marriage, be dealt with and decided as a separate issue.

Of relevance were the provisions contained in s 9(1) of the Divorce Act 70 of 1979. It provides that when a divorce

is granted on the ground of the irretrievable breakdown of the marriage, 'the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited'.

Kollapen AJ referred with approval to the decision in *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C), in which, the court held that: 'Unless the parties (either before or during the marriage) make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered.' It was undisputed that in the absence of an order of forfeiture, the wife would benefit. The court had to consider whether, regard being had to the duration of the marriage, the circumstances giving rise to its breakdown and any substantial misconduct on the part of the parties, such a benefit would be an undue one.

The marriage had endured for approximately 20 months and for most of that time it was characterised by conflict. The court could not find that it was the husband's conduct alone which caused the breakdown of the marriage. Despite the wife's allegations to the contrary, the court was not satisfied that it could be said that there was substantial misconduct on the part of the husband.

In considering what would be an undue benefit, the court noted that the duration of the marriage in this case was short. The longer the marriage the more likely it is that the benefit will be due and proportionate and conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate. In the present case, because of the brevity of the marriage, the wife would

indeed be unduly benefited if an order for forfeiture was not made. In addition, the husband had built up a substantial estate, mostly prior to the marriage. Moreover, the wife had sold her home, and retained the proceeds for herself.

However, the wife's career was interrupted by the birth of her son which affected her work trajectory. In those circumstances, a partial forfeiture was considered justified. The wife was to forfeit all the patrimonial benefits of the marriage entered into between herself and the husband except for the benefits arising out of the property which formed the parties' marital residence.

Each party was to pay its own costs.

**Waiver of maintenance:** The decision in *W v H* [2016] 4 All SA 260 (WCC) concerned the validity of a forfeiture clause in an antenuptial contract (ANC). The parties married in July 1992 in Germany. The marriage was governed by an ANC, incorporating the accrual system. The defendant (the husband) had convinced the plaintiff (the wife) to agree to a clause in the agreement, to the effect that she would under no circumstances be entitled to any maintenance in the event of divorce. At the time of her marriage the wife was 28 years old and the husband was 53. She was already pregnant and the husband was the father.

At the time of their marriage the husband had accumulated substantial wealth, including numerous properties.

Weinkove J held that the waiver of maintenance in the ANC was contrary to public policy and unenforceable. The relevant clause offended against public interest and considering the relative situation of the contracting parties at the time the clause was sought to be enforced, it rendered the enforcement of that clause unreasonable and voidable on the grounds of unfairness. Generally, any purported ouster of the jurisdiction of the court which deprives a party of a legal right or remedy is *per se* against



public policy. The clause depriving the wife of maintenance was, therefore, not binding.

The court pointed to the husband's conduct in concealing assets in his estate and his refusal to make proper disclosure as required by s 7 of the Matrimonial Property Act 88 of 1984. The court took note of the fact that the wife was in a less advantageous position than the husband at the time of entering into the marriage, that she was naïve and had nobody to properly advise her because the so-called legal experts she spoke to were not sufficiently informed, nor did they understand the laws of South Africa. Her main adviser was a business-law expert in Germany. The husband also failed to comply with his obligations in terms of the contract.

The court considered a number of factors in deciding on the quantum of maintenance to be awarded to the wife, including the 24-year duration of the marriage, and the vast disparity between the parties' income earning capacity and their means. Much of the husband's evidence was clouded and rejected by the court. It held that parties to a marriage owe each other a duty of utmost good faith at the time of the conclusion of an ANC and throughout the marriage.

Applying the above considerations to the facts of the present matter, the husband was directed to pay maintenance to the wife personally until her death or remarriage, in the amount of R 30 000 per month. Subject to the husband fully complying with all the terms of the order that amount would be reduced by R 1 000 for every R 285 000 in excess of R 4,4 million, which the wife was paid by the husband in respect of the accrual in his estate.

In deciding on costs, the court held that the husband, a senior advocate, had conducted the present litigation in a manner aimed at making it too expensive for the wife

to litigate against him. It was the fault of the husband that the divorce trial took 50 days of court time. He adopted a 'scorched earth' policy with a total disregard for the costs involved.

The husband was accordingly ordered to pay the wife's costs on an attorney and client scale, which included the cost of two counsel as well as the qualifying costs and their attendance fees of a number of expert witnesses.

## Mortgage bonds

**Rectification of:** In *AfrAsia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd* [2016] 4 All SA 16 (WCC) the court was asked whether mortgage bonds are susceptible to rectification to correct any error and to record the true position.

The salient facts were that AfrAsia instituted action against Royal Anthem (RA) based on bonds registered by RA over RA's immovable property as security for a loan advanced by AfrAsia to Craigan (Pty) Ltd (Craigan), another company in the same group as RA. The bonds were registered after RA signed a 'limited guarantee agreement' for R 22 million payable by Craigan to AfrAsia. Both RA and Craigan were represented by one Paget. Paget provided AfrAsia with a board resolution authorising RA to become a party to the transactions and to register 'a mortgage bond over certain immovable assets of the Company' in favour of AfrAsia. The resolution appeared to be signed by Paget and the other director, Muller. However, Muller denied ever signing such a document and declared his signature to be a forgery.

RA raised several defences against AfrAsia's claim. For space considerations only two of these defences will be discussed here. First, RA argued that the bonds were registered as surety bonds although there was no sure-

tyship agreement. The bonds also incorrectly stated that the main debtor was Scarab Investment Holdings (another member of the group) instead of Craigan. RA thus instituted a counter-claim for a declaration that the mortgage bonds were null and void. AfrAsia then applied for rectification of the bonds to replace 'deed of suretyship' with 'limited guarantee' and to reflect the correct main debtor as Craigan.

Secondly, RA relied on the lack of authority by Paget to represent the company. Paget had acquired all the shares in RA from Muller through a company named Market Demand Trading 620 (Pty) Ltd but the shares and their attendant rights had been pledged and ceded back to Muller as security until the full purchase price for the shares had been paid. Muller remained a director pending full payment, but Paget was also appointed as a director and took over executive management of RA although he was never appointed as managing director. AfrAsia was unaware of all these facts and believed Paget to be the managing director of RA.

In dealing with RA's first defence, Binns-Ward J held that it was not a legal requirement for the validity of a bond that the nature of the underlying obligation must be described, but if it is, rectification of any errors to reflect the true position is possible as with any other contract. Provided there is an underlying obligation, any errors in describing the obligation will not affect the validity of the bond. Since it was understood by all the parties that the bonds were registered as a result of the guarantee agreement and that Craigan was the main debtor, rectification of the bonds would be unobjectionable. However, it would be pointless if the underlying obligation was not valid.

In deciding on RA's second defence, the court pointed out that the fundamental question was whether Paget

had authority to bind RA to the limited guarantee and bonds. The *Turquand* rule could only apply if the person had express, implied or ostensible authority subject to an internal management rule. Section 20(7) of the Companies Act 71 of 2008 (the Act) could also only serve as a defence against non-compliance with certain provisions of the Act if Paget had some form of authority to represent the company.

The court further held that Paget had no express authority, and even if it was accepted that he had implied authority as *de facto* managing director it would only extend to the ordinary scope of a company's day-to-day business. Binding the company to payment of another company's debts and securing the obligation with a bond over a substantial part of its assets was not a 'normal' contract and the company could thus not be bound.

From the evidence it was clear that AfrAsia did not believe Paget had authority to bind RA on his own, since they insisted that both directors had to sign the agreement. There was also no evidence of any misrepresentation by RA that Paget was authorised to convey the board's consent to these transactions.

AfrAsia's claim based on the bonds was dismissed.

## Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative justice, arbitration, civil procedure, company law (business rescue), competition law, constitutional law (housing; human rights; and validity of legislation), criminal law, criminal procedure, delict, immigration, intellectual property, labour law, land reform and mining and minerals.



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

## Abbreviations:

**CC:** Constitutional Court  
**GJ:** Gauteng Local Division, Johannesburg  
**GP:** Gauteng Division, Pretoria  
**KZD:** KwaZulu-Natal Local Division, Durban  
**SCA:** Supreme Court of Appeal  
**WCC:** Western Cape Division, Cape Town

## Advocates

**Striking off the name of a person from the roll of advocates:** Section 7(1) and (2) of the Admission of Advocates Act 74 of 1964 (the Act) provides among others that the General Council of the Bar of South Africa (the GCB) may apply to the High Court for an order striking off the name of any person from the roll of advocates if that person is not fit and proper to practise as an advocate. In *General Council of the Bar of South Africa v Jiba and Others* [2016] 4 All SA 443 (GP) the applicant, GCB, made application for removal of the names of the three respondents from the roll of advocates on the ground that they were not fit and proper to continue practising as advocates. The first respondent, Jiba, was an advocate and Deputy National Director of Public Prosecutions. At some stage she also became the Acting National Director of Public Prosecutions. The second respondent, Mrwebi, was an advocate and Special Director of Public Prosecutions and Head of the Crime Unit within the Na-

tional Prosecuting Authority (NPA). The third respondent, Mzinyathi, was an advocate and Director of Public Prosecutions, North Gauteng. The application was based on the request of the NPA, which was not happy with the conduct of the three respondents in the handling of among others, the case of *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) (the *Mdluli* case). In that case, the applicant Freedom Under Law (FUL), sought and was granted an order setting aside the decision of the second respondent in the present case (Mrwebi), to withdraw fraud and corruption charges against Mdluli, a Lieutenant General in the South African Police Service. Mdluli was arrested and charged with 18 offences including assault, kidnapping, rape, murder, fraud and corruption. While in detention Mdluli wrote to President Zuma promising that if the charges against him were withdrawn, he would see to it that he (Zuma) would be re-elected as President of the African National Congress (the governing political party) and of the country. After his lawyers made representation to the second respondent, Mrwebi, including repeating the promise made to President Zuma, fraud and corruption charges were withdrawn (by the second respondent), while murder and other charges were withdrawn by one advocate Chauke, Director of Public Prosecution, South Gauteng. In withdrawing fraud and corruption charges, the second respondent indicated that such was done after consultation, and therefore, with the consent of the third respondent, Mzinyathi. The GCB further contended that

in her opposition to the *Mdluli* review application, the first respondent conducted herself in a manner which showed that she was not fit and proper to continue as an advocate.

Legodi J (Hughes J concurring) held that the first and second respondents were not fit and proper persons to continue practising as advocates and accordingly ordered that their names be struck from the roll of advocates. The two were ordered to pay the costs. The application against the third respondent was dismissed with costs as it had not been shown that he was a party to the withdrawal of fraud and corruption charges against Mdluli.

The court held that by failing to despatch the record (the docket and other documents) in the *Mdluli* review application as required by r 53 of the Uniform Rules of Court, the first and second respondents did so in bad faith. When the record was eventually despatched, even though incomplete, the first respondent acted contrary to the oath she took when she was admitted as an advocate and also flouted the requirements of her position as Deputy National Director of Public Prosecutions. Furthermore, she also disregarded the directive of the Deputy Judge President of the Gauteng Division, Pretoria, to deliver her answering affidavit by a specified date. Also, she disregarded the advice of her senior counsel on brief and, after getting the services of a new legal team, she acted contrary to the advice of senior counsel. The court further held that the first respondent was lying, was misleading the court, showed no remorse, was dishonest, acted *mala*

*fide* and display an ulterior motive. In brief, she was determined to do everything in her power to ensure that the charges against Mdluli were permanently withdrawn.

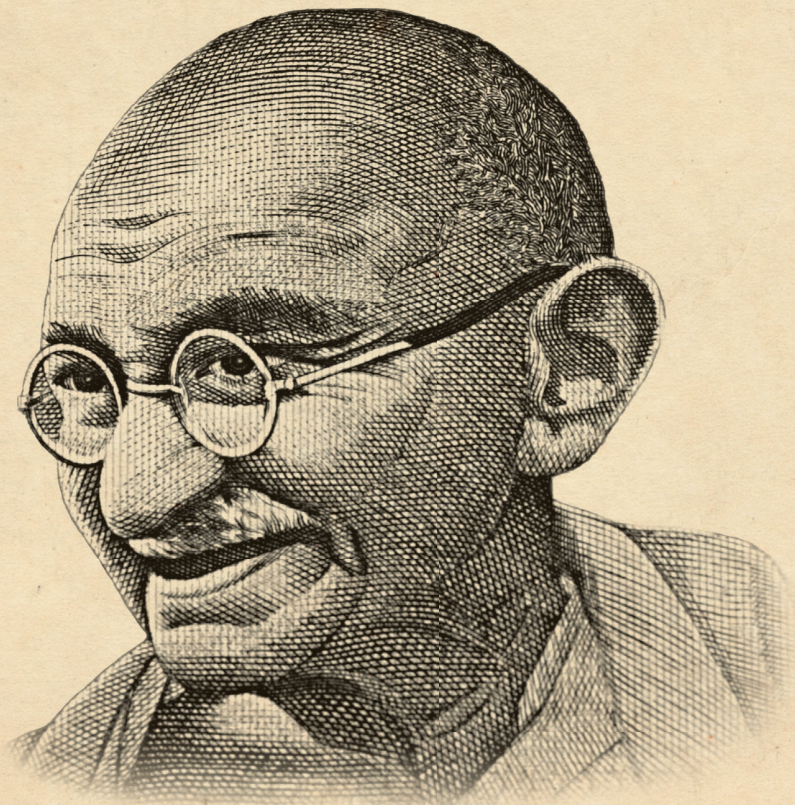
Much of what the court said about the first respondent also applied to the second respondent. But more than anything else, he took the decision to withdraw the fraud and corruption charges against Mdluli on his own rather than in consultation with the third respondent as required by the National Prosecuting Authority Act 32 of 1998 and, thereafter, sought to mislead the court into believing that such was done after consultation and with the concurrence of the third respondent. Moreover, such withdrawal was not justified as there was *prima facie* evidence of commission of the offences as alleged. To add to that the second respondent was not honest and candid with the court.

## Civil procedure

**Application for rescission of judgment does not suspend operation of eviction order:** Section 18(1) of the Superior Courts Act 10 of 2013 (the Act) provide among others that 'unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or the appeal.' It should be noted that the section deals with the effect of leave to appeal or the appeal itself. In *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ) the applicants, who were former occupants of a



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building in Parktown, Johannesburg, sought to extend the operation of the section to applications for rescission of judgment. The facts were that the owners of the property, the respondent Lewray Investments and another, were granted an interim eviction order pending a final eviction order. Thereafter, the applicants launched an application for rescission of the eviction order and contended that its effect was to suspend the operation of the eviction order. They accordingly sought restoration of possession, contending that the eviction order was unlawful. Their application was indicated as *mandament van spolie*. The application was dismissed with costs.

Meyer J held that it had been the intention of the legislature for the operation and execution of a decision, which is the subject of an application for rescission also to be automatically suspended, such decision would have been expressly included in s 18(1). The legislature would have expressed its intention to include such decision in clear and unambiguous language. To hold that the section had such effect would result in the absurdity that the filing of any unmeritorious application for rescission would foil the operation and execution of a decision, which was the subject of such an application. A person against whom the decision was the subject of an application for rescission could always approach the court under r 45A of the Uniform Rules of Court to suspend its execution pending finalisation of an application for rescission.

Section 18 only provided for the automatic suspension of the operation and execution of a decision pending an application for leave to appeal or an appeal. No other section of the Act provided for automatic suspension of the operation and execution of a decision, which was the subject of an application to rescind, correct, review or vary an order of court. There was nothing which indicated an intention on the part of the legislature to broaden

the automatic suspension of the operation and execution of decisions beyond those included in s 18. Accordingly, the eviction of the applicants by execution of the interim eviction order did not amount to an unlawful deprivation of possession of the property. As a result they were not entitled to relief by way of *mandament van spolie*.

## Companies

**Business rescue - moratorium on legal proceedings against a company:** According to s 133(1) of the Companies Act 71 of 2008 (the Act) the general rule is that no legal proceedings, including enforcement action, against the company subject to business rescue proceedings or in relation to any property 'belonging to the company, or lawfully in its possession', may be commenced or proceeded with in any forum. To this general rule there are exceptions in respect of which legal proceedings may commence or proceed such as with the written consent of the business rescue practitioner, with leave of the court or in the case of criminal proceedings.

In *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD); [2016] 3 All SA 813 (KZD) the issue was whether the applicant, JVJ Logistics, was in 'lawful possession' of the property in question, being a motor vehicle, so as to prevent an enforcement action against it, namely immediate return of the vehicle. There the facts of the case were that the applicant bought a motor vehicle (truck) in terms of an instalment sale agreement. The applicant took possession of the vehicle while the first respondent, Standard Bank, retained ownership pending final payment. When the applicant fell into arrears with payment of instalments, the first respondent cancelled the agreement, after which it obtained a court order confirming cancellation and directing immediate return of the vehicle. Thereafter, the applicant was placed under business rescue proceedings and, as it needed the vehicle to con-

duct business, it brought the present application for an interdict restraining the first respondent from recovering the vehicle from it.

Olsen J dismissed the restraint application with costs. The court held that it was plain that an action in relation to property 'not lawfully' in the possession of the company could be maintained notwithstanding the moratorium. A purchaser under a normal bank instalment agreement reserving ownership of the vehicle to the bank acquired *jus possidendi* when put in possession of the property in terms of the agreement and lost it if the agreement was cancelled. From the moment the contract relating to the vehicle between the applicant and the first respondent was cancelled, the former's possession was precarious, dependent as it were on the will of the first respondent as to whether it would or would not exercise its right to dispossess the applicant. Because of cancellation of the contract, the applicant's possession of the vehicle was 'unlawful' and, therefore, not protected.

**Note** - A similar decision was reached in *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC). Other cases reported during the period under review, dealing with business rescue proceedings, were *Arendse and Others v Van der Merwe and Another* NNO 2016 (6) SA 490 (GJ); [2016] 4 All SA 48 (GJ) (leave to institute proceedings against a company in business rescue); *Absa Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA) (challenging a vote approving a business rescue plan); and *Eravin Construction CC v Bekker NO and Others* 2016 (6) SA 589 (SCA) (prohibition against enforcement of pre-business rescue 'debt owed').

## Contingency fees agreement

**Attorney is not entitled to 25% of the capital amount recovered for the client:** In *Masango v Road Accident Fund* 2016 (6) SA 508 (GJ) the

plaintiff, Masango, having instituted a claim for compensation against the defendant, Road Accident Fund, the matter was settled and a draft order handed up to be made an order of court. There was a contingency fees agreement between the plaintiff and his firm of attorneys, clause 8 of which provided that if the plaintiff was successful in the proceedings a fee would be payable to the attorney, calculated at 25% (exclusive of value-added tax (VAT)) of the total amount awarded and/or obtained by the plaintiff in consequence of the proceedings. The clause further provided for the addition of 14% VAT, on top of the 25% fee, as well as for all disbursements (including interest) after which the remaining balance would be paid to the plaintiff. In brief, the clause provided that the attorney's fee was 25% of the capital amount payable to the plaintiff, over and above which would be added 14% VAT. The issue before the court was whether clause 8 in particular, and a few other clauses, rendered the contingency fees agreement invalid and of no force and effect.

Mojapelo DJP made the draft order an order of court but declared the contingency fees agreement invalid and of no force and effect. As a result the attorney's fees were held to be limited to the party and party costs on the High Court scale as agreed or taxed, which taxed or agreed costs would not exceed 25% of the capital amount provided for in the draft order.

It was held that a fee was only payable for professional services, which had been rendered. It was an established principle that charges for work not actually done could not be allowed on taxation. The practitioner's statement for fees had to be specific in respect of the particular business done and for which a fee was charged. In litigious work the normal fees for attorneys were fees for services actually rendered or advice actually given. There was no basis for the practitioner to charge 25% of the client's capital as his or her fees. The 25% of the client's capital was introduced

only as a maximum limit. The agreement in the instant case simply provided for the attorney to charge 25% of the capital amount as fees. There was no basis in the Contingency Fees Act 66 of 1997 (the CFA) that authorised or sanctioned such a provision in fee agreements or such practice by legal practitioners.

An attorney could not charge for anything other than the services he or she actually rendered. The services that an attorney charged for had, of necessity, to be specified in his or her account unless the client, properly informed, waived details of the services for which he or she was charged. There was no basis for an attorney to charge as his or her fees a percentage, be it 25% or even a smaller percentage, of the amount awarded to the client. The CFA did not provide such a basis.

On the issue of VAT the court held that s 65 of the Value-Added Tax Act 89 of 1991 (the VAT Act) made it clear that any price (fee) advertised or quoted (charged) by a vendor (legal practitioner) included VAT. VAT was levied on the supply by a vendor (the legal practitioner) and not on the consumer (the client) of services supplied by the vendor. It was, therefore, a tax on the legal practitioner and not the client. The quoted price (fees) was deemed to include VAT unless it was broken down into its components in terms of s 65 of the VAT Act to show the price without VAT, the amount of VAT and the price inclusive of VAT. What the client paid to the legal practitioner was the price (fee). The client did not pay VAT, although the price could be structured to account for the VAT payable by the legal practitioner to the South African Revenue Service. Regardless of how the price was structured or quoted, the final price charged by the vendor (legal practitioner) was (always) inclusive of VAT. VAT was not a tax, which the legal practitioner incurred on behalf of the client, and, therefore, recoverable from the client. It was a tax levied on the practitioner (as the

supplier) and for which such practitioner was liable.

## Delict

**Liability for negligent misrepresentation and non-disclosure of secret commission:** In *Attorneys Fidelity Fund Board of Control v Intibane Mediates and Others* 2016 (6) SA 415 (GP) the Law Society of South Africa (the LSSA) and the Attorneys Fidelity Fund (the AFF) mandated one Ramothibe, who was trading as the first respondent, Intibane Mediates, to find a suitable property, which could be used as their joint headquarters. Ramothibe found such building, which was owned by the third and fourth defendants, Erf 49-1 and Head Brothers respectively, both of which were represented by their director, Roome. Roome indicated his bottom-line price for the property as R 37,5 million. The contract was finalised and the purchase price duly paid. Thereafter, the AFF found out that the bottom-line price was in fact R 32 million and that Ramothibe and Roome concluded a confidential and secret agreement in terms of which the extra R 5,5 million was Ramothibe's undisclosed commission. As Ramothibe had since passed away and his company Intibane had been deregistered, the plaintiff AFF proceeded against the third and fourth defendants on the basis of their director's negligent misrepresentation and non-disclosure of Ramothibe's secret commission. The claim was upheld with costs and the third and fourth defendants ordered to pay the R 5,5 million secret commission with interest.

Potterill J held that on the common-cause facts it was established that during the negotiation process the AFF had no, and could not have had, any knowledge that Ramothibe, for his services, would also earn an inordinate amount of secret commission. There was no doubt that Ramothibe had a duty to disclose the commission to the AFF. Roome could in law never be entitled to a share of the commission be agreed to

with Ramothibe and should be disgorged thereof. The AFF could reasonably have expected Roome to inform it that Ramothibe, its agent, was aspiring to secret commission that was inflating the purchase price. Roome would lose nothing as his real bottom-line price of R 32 million would still be attained. Yet Roome found it necessary to conclude non-disclosure agreements and addendums, thus making it clear that he knew he was acting untoward. Roome, in the common-cause facts and circumstances of the case, had a legal duty to inform the AFF of the secret commission. Policy considerations would in those circumstances place a legal duty on Roome, as the seller, to inform the AFF that his bottom-line price was R 32 million and that pressure was being placed on the AFF to pay more to accommodate a secret-commission deal being induced by Roome and the AFF's own consultant, Ramothibe.

## Fundamental rights

**Judicial oversight of emoluments attachment order:** Section 65J(2) of the Magistrates' Courts Act 32 of 1944 (the Act), dealing with garnishee orders, provides among others that an emoluments attachment order (EAOs) shall not be issued unless the judgment debtor has consented thereto in writing or the court has so authorised or unless the judgment creditor or his or her attorney has sent a registered letter to the judgment debtor advising of the amount, together with costs, still outstanding and filed with the clerk of the court an affidavit setting forth the amount of the judgment debt, together with costs, still outstanding. The essence of the section is that an emoluments attachment order may be issued with the consent of the judgment debtor, by the clerk of the court or the court. The constitutionality of issuing an emoluments attachment other than by the court, that is, when it is issued with the consent of the judgment debtor or by the clerk of the court, was dealt with in *University of*

*Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC). The facts of the case were that the applicant University of Stellenbosch Legal Aid Clinic acted for a number of low-income earners, the majority of whom were farm-workers, who concluded small loan agreements with credit providers. The agreements provided that in the event of breach of contract legal proceedings would be instituted in a magistrates' court where the debtor was neither resident nor employed. The debtors having failed to make the required repayment, credit providers instituted legal proceedings in those courts and obtained default judgments, which were followed by EAOs. Before the WCC the constitutionality of s 65J(2) and validity of the EAOs were contested. Desai J declared the section unconstitutional and the attachment orders invalid.

As a result the applicant sought a CC order confirming the declaration of invalidity of the section. The credit providers appealed against the order of invalidity of the EAOs. The court dismissed the appeals with costs and declined to confirm the invalidity of the section. Instead, the section was saved from invalidity through severance and reading-in approach. The result was that only EAOs made with the consent of the judgment debtor and those made by the clerk of the court were declared invalid. It was held that in all instances an EAO had to be made by the court.

Reading the majority judgment Zondo J (Cameron J filing a concurring judgment while Jafta J dissented) held that where the court had authorised the issuing of an EAO there was judicial oversight. However, where a judgment debtor had consented thereto in writing there was no judicial oversight. Under the Act there were cases where the court authorised the issue of EAOs, while there were also cases where attachment orders were issued without any court intervention. That

meant that there was judicial oversight in those cases where it was the court that authorised the issuing of an attachment order, while there was no judicial oversight in those cases where EAOs were issued without any prior intervention of the court. To the extent that the Act made provision for the issuing of EAOs without judicial oversight, it was inconsistent with s 34 of the Constitution and constitutionally invalid. To avoid that invalidity, the section had to be read as providing that in all instances EAOs had to be issued by the court.

See also:

- Editorial 'Debt collection system to be changed' 2015 (Aug) DR 3.
- Feature article 'Perspective on EAOs – A problem or abuse?' 2015 (Sept) DR 30.
- Case note 'The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight' 2015 (Oct) DR 59.
- Law reports 'Execution' 2015 (Nov) DR 34.
- Practice note 'Default judgment' 2016 (April) DR 17.

## Medical aid schemes

**Credit balance in members' personal medical savings accounts belongs to members and not the medical aid scheme:** Section 4(4) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FI Act) provides that a financial institution, including a medical aid scheme, 'must keep trust property separate from assets belonging to that institution and must, in its books of account, clearly indicate the trust property as being property belonging to a specified principal.' The section must be read together with s 4(5), which provides that 'trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company, under no circumstances forms part of the assets or funds of the financial institution or such nominee company.'

In *Registrar of Medical Schemes and Another v Gen-*

*esis Medical Scheme* 2016 (6) SA 472 (SCA); [2016] 3 All SA 449 (SCA) the issue was whether credit balance in a medical scheme member's personal medical savings account (PMSA funds) was property held by the medical scheme on behalf of its members or was the property of the medical scheme to be used for its own purposes and would, therefore, form part of its insolvent estate in the event of its liquidation. There the appellant Registrar of Medical Schemes rejected the annual financial statement of the respondent Genesis Medical Scheme as it treated the PMSA funds as its property. The WCC per Davis J held that the approach of the respondent was correct. An appeal against the High Court order was upheld with costs.

Willis JA (Seriti JA and Tsoka AJA concurring while Cachalia and Dambaza JJA dissented) held that it would offend against justice if PMSA funds were available to the predations of the *concursum creditorum* in the event of the insolvency of a medical scheme. There could be no question that funds invested by members of a medical scheme in their savings accounts with that medical scheme constituted incorporeal assets invested, controlled and administered by the scheme for and on behalf of its members. In unmistakable terms, s 4(5) of the FI Act ring-fenced items such as the savings accounts of members of a medical scheme from any *concursum creditorum*. Not only did s 4(4) provide that the savings accounts should be accounted for separately but it also provided the indicator as to how the books of account were to show the amounts standing to the credit of a member's savings account as a liability of the scheme with there being a corresponding asset showing the assets as being separate from those of the scheme. In addition, in terms of reg 10(3) of the Medical Schemes Act 131 of 1998 Regulations, if a member owed a debt to a medical scheme at the termination of his membership

of the medical scheme that member could use PMSA funds standing to his credit to offset such debt. If PMSA funds belonged to a medical scheme, such set-off would not be possible. The issue of set-off could only arise if PMSA funds were assets of members and not of the medical scheme.

## Motor vehicle accidents

**Claim by driver based on negligence of owner of vehicle:** Section 17(1) of the Road Accident Fund 56 of 1996 (the Act) provides among others that the Road Accident Fund (the Fund) shall be obliged to compensate any person (the third party) for any loss or damage, which the third party has suffered as a result of any bodily injury to himself or herself, caused by or arising from the driving of a motor vehicle by any person, if the injury is due to the negligence or other wrongful act of the driver or owner of the motor vehicle. In brief, the section makes provision for compensation to a third party (innocent party) who is injured in a motor vehicle collision caused by the negligence or other wrongful conduct of the driver or owner of such vehicle.

In *Abrahams v Road Accident Fund* 2016 (6) SA 545 (WCC) the plaintiff, Abrahams, was injured in a single-vehicle collision when, as a driver, there was a tyre burst which resulted in him losing control of the vehicle during which it overturned. The defendant, the Fund, resisted the claim and raised a special plea that it was not liable as the injuries suffered by the plaintiff were not caused by the negligent and wrongful conduct of another driver or owner but by the plaintiff himself. On the other hand, the plaintiff contended that the defendant was liable for the negligent and wrongful conduct of the owner of the vehicle who gave him express permission to drive the vehicle, which was not properly maintained and was not road-worthy.

Salie-Hlophe J held that

the provisions of the Act and the liability of the Fund created therein was that a driver of a motor vehicle who was a wrongdoer (the negligent driver) had no claim against the Fund when there was a single-motor vehicle collision and if there was no other driver or owner who was to blame for the collision. However, in the instant case the owner of the vehicle was to blame. At common law a justiciable claim accrued to the plaintiff the moment he was injured and suffered loss or damage as a result of the owner allowing or consenting to him to use the vehicle which was not in proper working order.

## Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Amending broadcasting digital migration without consulting with broadcasters and statutory bodies, approval of residential development scheme, consumer credit agreement, constitutionality of male-only and female-only dormitory rules, contributory negligence, declaration of mortgaged property as executable, disallowing a percentage of income tax deductions, effect of inadequate legal representation of a co-accused, granting of school fee exemption, informal settlement qualifying as housing, infringement of copyright, maintenance of divorced spouse until remarriage or death, marine insurance, meaning of administrative action, medical negligence, oppressive conduct in company law, ownership of copyright in cinematograph film, prescription period of debt owed to municipality, proof of claims in insolvency, refusal of building plans by municipality, rescission of judgment, rights and duties of members of a body corporate, separation of power, set-off by bank of money deposited into customer's account, striking attorney from the roll for misconduct and subdivision of agricultural land.





# UPDATING YOUR REGISTRATION WITH THE FIC

## INFORMATION FOR ATTORNEYS

### EXISTING REGISTRATIONS – HOW TO UPDATE REGISTRATION PROFILE FOR ATTORNEYS REGISTERED ON THE PREVIOUS FIC SYSTEM

Attorneys' firms that were registered with the FIC on the previous system need to update their details on the new system, called goAML. Firms will not be able to file reports with the FIC unless their registration details are updated on the new FIC system and approved by the FIC.

The FIC has e-mailed a new entity registration identity to all previously registered attorneys firms, called an "ORG ID". This was sent to the Compliance Officer of the firm from the address [goamlcommunication@fic.gov.za](mailto:goamlcommunication@fic.gov.za).

The ORG ID replaces the "AI" registration number previously issued to the registered attorneys firm. All attorneys firms must first register a Compliance Officer on goAML. They then need to update their institutions registration details to file reports with the FIC.

To add the Compliance Officer to your institution's profile on goAML, and to update institution information please follow this process:



- The firm's Compliance Officer is the first person to access goAML through the FIC website or using the link: [https://goweb.fic.gov.za/goAMLWeb\\_PRD](https://goweb.fic.gov.za/goAMLWeb_PRD).
- The Compliance Officer must keep the ORG ID handy.
- Click on "Register as a person". Do not click on "Register as an organisation" as this will create a duplicate registration which will be rejected by the FIC.
- Insert the ORG ID and complete the registration form for the Compliance Officer, attach the following documents:
  - Copy of ID/Passport document of the Compliance Officer certified by a Commissioner of Oaths

- Signed authorisation letter containing the details of the Compliance Officer. If this is not attached the registration will be rejected by the FIC.
- Click "Submit". The details will be submitted to the FIC for approval.
- The FIC will send an e-mail to the Compliance Officer confirming successful account registration. The Compliance Officer must then access the system by logging on to goAML and update the institutions details by making changes where necessary.
- Once confirmation has been sent by the FIC confirming the successful updating of the institutions details, the registration is complete. The Compliance Officer will now be able to file reports with the FIC.
- If the attorney requires the registration of further delegated users, then the Compliance Officer must communicate the ORG ID to these delegated users, so they can commence their user registration. ■

### NEW REGISTRATIONS - ATTORNEYS FIRMS NOT YET REGISTERED WITH THE FIC

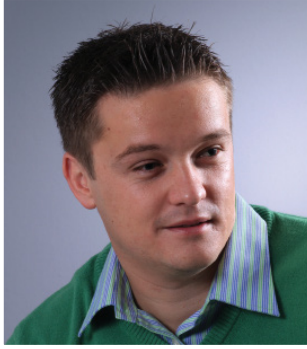
Attorneys firms not yet registered with the FIC cannot file required reports with the FIC. Unregistered attorneys firms can register successfully with the FIC by doing the following:



### PUBLICATIONS

The FIC has published documents to assist institutions with the registration process. Feel free to download the following documents from [www.fic.gov.za](http://www.fic.gov.za):

- Process flow diagram
- Registration guideline for accountable and reporting institutions
- Public Compliance Communication 05A on Registration



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

## Bills introduced

Plant Improvement B8A of 2015.  
 Plant Improvement B8B of 2015.  
 National Veld and Forest Fire Amendment Bill B22 of 2016.  
 Border Management Authority Bill B9A of 2016.  
 Plant Breeders' Rights Bill B11A of 2015.  
 Plant Breeders' Rights Bill B11B of 2015.  
 Mineral and Petroleum Resources Development Bill B15C of 2013.  
 Mineral and Petroleum Resources Development Bill B15D of 2013.  
 Taxations Laws Amendment Bill B17A of 2016.  
 Taxations Laws Amendment Bill B17B of 2016.  
 Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill B20A of 2016.  
 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill B23 of 2016.

## Commencement of Acts

**Criminal Procedure Amendment Act 65 of 2008, s 1 in respect of the subdistrict of New Brighton.** *Commencement:* 15 November 2016. Proc R62 GG40469/2-12-2016.

## Selected list of delegated legislation

### Allied Health Professions Act 63 of 1982

Increase of fees payable to the council. BN173 GG40414/11-11-2016.

### Auditing Professions Act 26 of 2005

Amendments to the Code of Professional Conduct for registered auditors responding to non-compliance with laws and regulations. BN188 GG40480/9-12-2016.

### Broad-Based Black Economic Empowerment Act 53 of 2003

Amended Codes of Good Practice: Information and Communication Technology Sector. GN1387 GG40407/7-11-2016.

# New legislation

Legislation published from  
1 November – 19 December 2016

Threshold for major B-BBEE transactions. GenN748 GG40410/8-11-2016.

### Civilian Secretariat for Police Service Act 2 of 2011

Civilian Secretariat for Police Service Regulations, 2016. GN1389 GG40414/11-11-2016.

### Companies Act 71 of 2008

Electronic filings of documents in relation to all legal matters that are filed or to be filed with the Commission to satisfy the requirements set out in regulations 168. GN1399 GG40414/11-11-2016.

### Compensations for Occupational Injuries and Diseases Act 130 of 1993

Notice on revision of assessments. GN1386 GG40406/7-11-2016.

Increase of the maximum amount of earnings on which the assessment of an employer shall be calculated with effect from 1 April 2017 (R403 500 per annum). GN1577 GG40509/19-12-2016.

### Criminal Procedure Act 51 of 1977

Designation of correctional facilities (available in English and Afrikaans). GN R1492 GG40469/2-12-2016.

### Disaster Management Act 57 of 2002

Establishment of the Intergovernmental Committee on Disaster Management. Proc R61 GG40394/2-11-2016.

Guideline on conducting a comprehensive risk assessment, part 1: Hazard analysis, identification and prioritisation. GN1363 GG40393/2-11-2016.

### Electronic Communications Act 36 of 2005

Regulations on Code of Conduct for Premium Rated Services. GN1376 GG40402/4-11-2016.

### Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Regulations relating to miscellaneous additives in foodstuffs (available in English and Afrikaans). GN1425 GG40432/17-11-2016 and GN1426 GG40434/18-11-2016.

### Health Professions Act 56 of 1974

Regulations defining the scope of practice of clinical associates. GN1390 GG40414/11-11-2016.

Regulations defining the scope of practice of dental therapy. GN1391 GG40414/11-11-2016.

### Income Tax Act 58 of 1962

Agreement between South African and the United Arab Emirates for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (available in English

and Afrikaans). GN1565 GG40496/15-12-2016.

### Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008

Rules of procedure. GN1563 GG40496/15-12-2016.

### Landscape Architectural Profession Act 45 of 2000

Revised registration policy and rules related to registration. BN171 GG40402/4-11-2016.

### Magistrates' Courts Act 32 of 1944

Annexure of certain districts to a regional court in respect of offences committed within the Rustenburg area. GN1428 GG40439/23-11-2016.

### Marine Living Resources Act 18 of 1998

Amendment of regulations. GN1427 GG40437/22-11-2016.

### Medical Schemes Act 131 of 1998

Adjustment of fees payable to brokers. GN1559 GG40496/15-12-2016.

### Medicines and Related Substances Act 101 of 1965

Regulations relating to medical devices and in vitro diagnostic medical devices (available in English and Sepedi). GN1515 GG40480/9-12-2016.

### National Environmental Management: Waste Act 59 of 2008

Amendments to the Waste Tyre Regulations, 2009. GN R1493 GG40470/2-12-2016.

### 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 (available in English, IsiZulu and Sepedi). GN1365 GG40396/2-11-2016.

### National Road Traffic Act 93 of 1996

Amendment of the National Road Traffic Regulations. GN1408 GG40420/11-11-2016.

### Pharmacy Act 53 of 1974

Fees payable to the Council. BN172 GG40405/4-11-2016.

### Sheriff Act 90 of 1986

Re-description of the area of jurisdiction of the Lower and Superior Court Sheriff Area. GN1454 GG40453/29-11-2016 and BN1554 GG40489/12-12-2016.

### Skills Development Act 97 of 1998

Establishment and re-establishment of sector education and training authorities. GN1570 GG40505/15-12-2016.

### South African Police Service Act 88 of 1995

The South African Police Service Disci-

pline Regulations (available in English and Afrikaans). GN R1361 GG40389/1-11-2016.

#### **Small Claims Courts Act 61 of 1984**

Establishment of a small claims court for the Kranskop and Umvoti areas. GN1518 GG40480/9-12-2016.

Establishment of a small claims court for the Hoopstad, Wesselsbron and Bultfontein areas. GN1520 GG40480/9-12-2016.

Establishment of a small claims court for the Ntabethemba area. GN1521 GG40480/9-12-2016.

#### **Veterinary and Para-Veterinary Professions Act 19 of 1982**

Amendment of regulations relating to veterinary and para-veterinary professions. GenN824-826 GG40464/2-12-2016.

### **Draft delegated legislation**

Draft Social Assistance Amendment Bill. GN1362 GG40391/1-11-2016.

Mandatory Audit Firm Rotation in terms of the Auditing Profession Act 26 of 2005 for comment. BN170 GG40392/1-11-2016 and BN186 GG40475/6-12-2016.

Draft distribution maps for certain indigenous species in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN727 GG40398/3-11-2016.

Game Meat Regulations in terms of the Meat Safety Act 40 of 2000 for comment. GN1371 GG40402/4-11-2016.

Declaration of certain printing industry activities as controlled emitters and

establishment of emission standards in terms of the National Environmental Management: Air Quality Act 39 of 2004 for comment. GN1373 GG40402/4-11-2016.

Norms and standards for the inclusion of private nature reserves in the register of protected areas in terms of the National Environmental Management: Protected Areas Act 57 of 2003 for comment. GenN731 GG40402/4-11-2016.

Norms and standards for management of damage-causing animals in South Africa in terms of National Environmental Management: Biodiversity Act 10 of 2004 for comment. GenN749 GG40412/10-11-2016.

Proposed Draft Explosives Regulation, 2014 in terms of the Occupational Health and Safety Act 85 of 1993. GN R1402 GG40415/11-11-2016.

Proposed regulations relating to fertilizers in terms of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. GN1567 GG40498/15-12-2016.

Proposed draft directive on the establishment and implementation of cooperative arrangements between licensed market infrastructures in terms of the Financial Markets Act 19 of 2012. BN178 GG40428/18-11-2016.

Draft National Qualifications Framework Amendment Bill, 2016. GN1423 GG40430/18-11-2016.

Proposed amendment of the Alternative Dispute Resolution Regulations in terms of the Electronic Communications and Transactions Act 25 of 2002. GN1419 GG40428/18-11-2016.

Draft Policy Framework for Disability in the Post-School Education and Training

System in terms of the Higher Education Act 101 of 1997. GN1410 GG40428/18-11-2016.

Proposed amendments to the regulations regarding the planning and management of residue stockpiles and residue deposits, 2015 in terms of the National Environmental Management: Waste Act 59 of 2008. GN1440 GG40447/25-11-2016.

Proposed levies on medical schemes in terms of the Council for Medical Schemes Levies Act 58 of 2000. GenN817 GG40446/25-11-2016.

Proposed National Policing Standard for Municipal Police Services on the Use of Force in Effecting Arrest in terms of the South African Police Services Act 68 of 1995 (available in English and Afrikaans). GN1455 GG40456/30-11-2016.

Draft Liquor Amendment Bill. GN1458 GG40459/30-11-2016.

Draft Licensing Exemption and Registration Notice in terms of the Electricity Regulation Act 4 of 2006. GN1482 GG40464/2-12-2016.

Permit Fee Regulations, 2017 in terms of the Cross-Border Road Transport Act 4 of 1998 for comment. GN1534 GG40480/9-12-2016.

Draft Dental Technology Bill. GenN864 GG40480/9-12-2016.

Proposed amendments to the National Waste Information Regulations in terms of the National Environmental Management: Waste Act 59 of 2008. GN1556 GG40490/12-12-2016.

Proposed replacement of the Policyholder Protection Rules in terms of the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. BN191 GG40501/15-12-2016 and BN192 GG40507/15-12-2016.



# Employment law update



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

## **Defamation in the context of quasi-judicial proceedings**

In *Clover SA (Pty) Limited and Another v Sintwa* (ECG) (unreported case no CA2011/2015, 13-9-2016) (Mbenenge J), the Eastern Cape Division of the High Court was required to consider qualified privilege in the context of defamatory statements made during quasi-judicial proceedings.

In this case, the respondent, Mr Sintwa, was dismissed following a disciplinary inquiry into a charge of fraudulent

conduct. He challenged his dismissal in the Commission for Conciliation, Mediation and Arbitration (CCMA). Mr Bopp was one of the witnesses called by Clover during the arbitration proceedings to give evidence that Mr Sintwa committed fraud by gross negligence. The arbitrator found that Mr Sintwa was not guilty of fraud but rather was guilty of negligence. The dismissal was found to be substantively unfair and the arbitrator ordered compensation equal to four months' remuneration.

Mr Sintwa then instituted proceedings seeking damages equal to R 100 000 on the basis that during the arbitration pro-



ceedings Mr Bopp had wrongfully and unlawfully alleged that he had committed fraud. The appellants argued that the statements made by Mr Bopp were not wrongful and unlawful and in any event enjoyed qualified privilege as the statements were made in quasi-judicial proceedings.

The court *a quo* found that the statement made by Mr Bopp was irrelevant and unconnected to the arbitration proceedings. It was accordingly found that the defamatory statement made by Mr Bopp exceeded the bounds of qualified privilege and the appellants were liable to pay damages to Mr Sintwa. Furthermore, the court *a quo* found that malice could be inferred from the facts.

On appeal, the court, per Mbenenge J and Griffiths J, was required to consider whether the statements by Mr Bopp were covered by qualified privilege. A distinction was drawn between two categories of qualified privilege –

- discharge of a duty or furtherance of an interest; and
- judicial and quasi-judicial proceedings.

In the first category, it must be shown that a person had a legal, moral or social duty or a legitimate interest in making a defamatory statement to another person who had a corresponding duty or interest to learn of the statement. In order for the statement to be within the bounds of privilege, it must be shown that the statements were relevant to or reasonably connected with the discharge of the duty or furtherance of the interest.

As regards defamatory statements during the course of judicial or quasi-judicial proceedings, the defendant only needs to prove that the statements were relevant to the matter. In order to succeed in a claim for damages, the applicant must then prove that the statements were not supported by reasonable grounds or were made in malice. In this case, it was found that the CCMA is quasi-judicial in nature and that Mr Bopp's statements were on a balance of probabilities relevant as Mr Sintwa had been charged with and dismissed for fraudulent conduct.

It was held that although there appeared to be a strained relationship between Mr Bopp and Mr Sintwa, there was no evidence that the allegation of fraud was made in spite. It was also found that there was no evidence of malice as it appeared that Mr Bopp had been acting out of a sense of duty and in order to protect an interest. It was further found that the court *a quo* was illogical in concluding that there was malice because another individual had not been charged for committing similar misconduct. It was noted that if this was in fact the case then Mr Sintwa should have sought relief based on another cause of action for this unequal treatment. The appeal was accordingly upheld.

## Breach of employment contract

In *Kwazulu-Natal Tourism Authority and Others v Wasa* [2016] 11 BLLR 1135 (LAC), the employer appealed the decision of the Labour Court (LC) in which the employer was ordered to pay damages arising out of its breach of the employee's fixed term employment contract.

In this case, the employee was engaged in terms of a fixed term contract of employment for a period of five years. One of the duties of the employee was to provide strategic leadership on marketing and tourism development functions of the employer. The employee requested permission to attend the Two Oceans Marathon in Cape Town in order to do research and promote the Comrades Marathon, which is a major event that takes place under the auspices of the employer. This trip cost the employer approximately R 21 049,31. When the employee returned from The Two Oceans Marathon, the employer conducted an investigation into the work that she had done while on the trip and found that she had participated as an athlete in the marathon and there was no evidence that she had done any research or marketing. The employee was charged with dishonesty and was dismissed. The costs of the Cape Town trip were also deducted from the employee's final salary.

The employee then launched an application for damages in terms of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) on the basis that her dismissal was an unlawful breach of her employment contract. She sought damages equal to the amount that she would have earned had she worked for the balance of the contract term.

The employer argued that the application should be dismissed as it was not appropriate for the matter to be decided by application as there were disputes of fact that needed to be determined by leading oral evidence. Furthermore, the employer alleged that the employee had not proven that she had suffered any loss as a result of the alleged breach by the employer.

The LC was of the view that there were no factual disputes on the papers. It held that the employer had not followed the applicable disciplinary procedures and thus the contract had been unlawfully breached. The employer was ordered to pay the employee the amount that she would have earned had she continued working for the balance of the contract term. Furthermore, the employer was ordered to pay the costs of the Cape Town trip that had been deducted from the employee's salary.

On appeal, the Labour Appeal Court (LAC) held that the employee should have anticipated that the employer would dis-

pute her claim. It was noted that the LC had to accept the averments made by the employer on all the issues relating to the breach as these facts could not be tested by the leading of oral evidence. The LAC held that the LC was wrong in finding that there was no dispute of facts. Thus, the application should have been dismissed on this basis.

It was not necessary for the LAC to make a decision on the damages sought. However, it did go on to deal with the issue of damages as it was of the view that this was a pertinent issue. In this regard, it was held that it was erroneous for the LC to find that the employee did not need to prove her damages. This was not a case of the employee seeking compensation for an unfair dismissal. In this regard, there is a distinction between a civil claim for damages under the BCEA and an unfair dismissal claim in terms of the Labour Relations Act 66 of 1995. In this case, the employee had brought a civil claim for damages and was accordingly required to prove –

- that she had suffered damages;
- the quantum of the damages suffered; and
- that the damages were linked to the breach of the employment contract by the employer.

In this case, the employee did not show any evidence of her loss and thus she was not entitled to damages. The appeal was upheld with costs.



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

## An arbitrator's duty when awarding a remedy

*South Africa Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 1 BLLR 8 (CC).

Is reinstatement an appropriate remedy for an employee who uses the infamous 'k' word when referring to his immediate superior and says: 'I cannot understand how ['k'] think' and 'a ['k'] must not tell me what to do'.

Unsurprisingly a unanimous bench of 11 judges of the Constitutional Court (CC) upheld an appeal launched by the

applicant to have set aside the relevant portion of the Labour Court (LC) and Labour Appeal Court's (LAC) respective orders and substitute the LC's order with a finding that the arbitrator's decision to reinstate the third respondent employee be set aside and replaced with a finding that he be compensated for his unfair dismissal.

## Background

Having been charged for his aforementioned utterances the employee pleaded guilty at his disciplinary hearing. Taking into account the employee's mitigating factors the chairperson found that a ten day unpaid suspension together with a final written warning was an appropriate sanction for the employee's conduct.

The then Commissioner of the South African Revenue Service (Sars) took a contrary view and without first affording the employee an opportunity to be heard, substituted the chairperson's sanction with that of dismissal.

The employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) where arbitration came before the second respondent arbitrator. The issue before the arbitrator was whether Sars could overturn the decision of a chairperson who, in terms of a collective agreement, was solely vested with the authority to deliver a sanction as opposed to merely recommending same.

In her considered view the arbitrator found that the commissioner did not have the authority to replace the chairperson's sanction, especially under circumstances where the employee was not afforded an opportunity to be heard before the decision to dismiss him was taken. For this reason the arbitrator awarded the employee reinstatement.

Sars review application to the LC and subsequent appeal to the LAC proved unsuccessful as both courts took the view that the chairperson's authority in terms of the collective agreement to deliver a sanction could not be revisited or usurped by the Sars Commissioner.

In its petition to the CC, Sars persisted with its argument presented at the lower courts, however, at the hearing only pursued with the argument that reinstatement was not an appropriate remedy.

Before addressing the merits of the matter, the CC in its judgment penned by Mogoeng CJ, set out in detail why the derogative term is the 'worst kind of verbal abuse ever' that could be visited on another person and is used with the intention of being 'disparaging, hurtful and intentionally hateful' to Africans. The Chief Justice went further to say that as a democratic and non-racial society the responsibility is on all races to find a way to end racial hatred.

Turning to the first legal issue raised,

the court considered whether Sars perempted its right to appeal against the LAC judgment as argued by the employee. It was common cause that soon after judgment was delivered by the LAC, Sars formally advised the employee in writing that it would not be appealing the LAC's decision and that he should contact the relevant officials to facilitate his return to work.

A few days later Sars did a roundabout turn and informed the employee of its latest decision to approach the CC and advised him not to return to work.

Dealing firstly with the issue of onus, the court held that when establishing peremption it must be shown that 'the conduct or communication relied on does "point indubitably and necessarily to the conclusion" that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.'

Judged on this standard the court found that peremption had taken place. However, in keeping with past authorities the court held that 'where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal.'

Mogoeng CJ found that the nature of the dispute together with the court's constitutional duty to entrench the values of equality, non-racialism and human dignity, demanded that the application be heard in the interest of society.

On the merits of the application the court began by examining the remedies open to an employee whose dismissal is found to be unfair. In terms of s 193(1) of the Labour Relations Act 66 of 1995 (LRA) an employee whose dismissal is substantively unfair must be reinstated unless, as per s 193(2) the employee –

- does not wish to be reinstated;
- the circumstances surrounding the dismissal are such that continued employment would be intolerable;
- reinstatement is not reasonably practical; or
- the dismissal is procedurally unfair only.

Sars argued that the employee committed an extremely serious offence, which in turn rendered his continued employment intolerable, more so in light of the fact that as an organ of state it was legally obliged to uphold the values enshrined in the Constitution.

The employee argued that Sars failed to demonstrate, that as a result of his conduct, the trust relationship between the parties had broken down and furthermore failed to lead any evidence to prove continued employment would be intolerable.

The court observed that Sars did place

evidence before the arbitrator on why continued employment relationship would be intolerable, yet the arbitrator failed to deal with this in her award.

The court held:

'After concluding that Mr Kruger's dismissal was unfair, the Arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2). She was supposed to consider specifically the provisions of section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering Sars to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger's continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. And those are the key factors she ought to have considered before she ordered Sars to reinstate Mr Kruger.'

Moreover the arbitrator failed to take into account the fact that the employee did not apologise for his actions nor did she (the arbitrator) consider the potential unrest Sars could have faced by other employees in response to an active racist, who considers African people incapable of leading him and are his intellectual inferior based on their race alone, being permitted to return to work.

For these reasons the court found the arbitrator's decision to reinstate the employee was a decision that no reasonable decision maker could have arrived at.

The next issue was whether the employee was deserving of compensation and if so what quantum should Sars be ordered to pay him. Taking into account the employee's gross misconduct conduct weighed against the fact that Sars did breach a workplace regulation when overturning the chairperson's initial sanction, together with the fact that Sars was amenable to compensating the employee; the court found that six months compensation was just and equitable.

The court set aside the portion of the award directing the employee to return to work and replaced it with a finding that Sars pay him six months compensation for his unfair dismissal. No order as to costs was made.



**Do you have a labour law-related question that you would like answered?**

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Moksha Naidoo at:  
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By  
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Federl

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Abbreviation	Title	Publisher	Volume/issue
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2016) October (2016) November
<i>Obiter</i>	Obiter	Faculty of Law, Nelson Mandela Metropolitan University	(2016) 37.2
<i>SACJ</i>	South African Journal of Criminal Justice	Juta	(2016) 29.2
<i>SAPL</i>	Southern African Public Law	Ver Loren Van Themaat Centre/ Unisa Press	(2016) 30.2
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg	LexisNexis	(2016) 79.4
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2016) 4

## Administrative law

**Govender, K and Swanepoel, P** 'Cynicism and the rule of law: A critical analysis of *President of the RSA v M&G Media Limited* 2012 (2) SA 50 (CC) and associated judgments' (2015) 30.2 *SAPL* 580.

## Animal rights

**De Villiers, JH** 'Animal rights theory, animal welfarism and the "new welfarist" amalgamation: A critical perspective' (2015) 30.2 *SAPL* 406.

## Arbitration

**Schlemmer, EC** 'The interaction between public policy, constitutional rights and public-private arbitration (part 2)' (2016) 4 *TSAR* 660.

## Banking law

**Nagel, CJ and Pretorius, JT** 'The bank and customer relationship, combination of accounts and set-off' (2016) 79.4 *THRHR* 660.

## Child law

**Nkosi, G** 'The international evolution of the right of children to social security' (2015) 30.2 *SAPL* 484.

**Songca, R and Karels, M** 'The impact of legislation on childhood sexuality in South Africa' (2016) 37.2 *Obiter* 228.

**Van Der Bijl, C** 'Considering parental alienation under the *aegis* of the criminal law' (2016) 29.2 *SACJ* 140.

## Company law

**Botha, MM** 'Evaluating the social and ethics committee: Is labour the missing link? (1)' (2016) 79.4 *THRHR* 580.

Coetzee, L 'Directors' fiduciary duties and the common law: The courts fitting the pieces together *Mthimunya-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) (4 August 2015)' (2016) 37.2 *Obiter* 401.

**Henning, JJ** 'Opmerkings oor die eenskappe van die maatskappy met persoonlike aanspreeklikheid' (2016) November *LitNet*.

**Loubser, A** 'Nienakoming van die voorgeskrewe prosedures na indiening van 'n direksiebesluit om met onderneemingsredding te begin: Is *Panamo Properties (Pty) Ltd v Nel die* (regte) antwoord?' (2016) October *LitNet*.

**Stevens, R** 'Liability within company groups' (2016) 4 *TSAR* 709.

## Constitutional law

**Okpaluba, C** 'Judicial review of executive power: Legality, rationality and reasonableness (2)' (2015) 30.2 *SAPL* 379.

**Van der Berg, E and Govindjee, A** 'Vul-

tures before the Constitutional Court: The cheque is in the mail *Khohliso v S* [2014] ZACC 33' (2016) 37.2 *Obiter* 369.

## Credit law

**Van Heerden, C and O'Reilly, W** 'Debt restructuring, partisan debt counsellors, costs and other important debt counselling issues. An appraisal of the legal position in view of *Firststrand Bank v Barnard* 2015 JDR 1614 (GP)' (2016) 79.4 *THRHR* 632.

## Criminal law

**Marais, M** 'Does the Constitution call for the criminalisation of hate speech?' (2015) 30.2 *SAPL* 456.

**Naidoo, K** 'Factors which influenced the enactment of hate-crime legislation in the United States of America: *Quo vadis* South Africa?' (2016) *TSAR* 697.

**Naidoo, K** 'The *raison d'être* of hate-crime laws' (2016) 29.2 *SACJ* 158.

**Okpaluba, C** 'Between reasonable and probable cause and malice in the law of malicious prosecution: A Commonwealth update' (2016) 37.2 *Obiter* 265.

**Spies, A** 'Better late than never: Lessons from *S v Jordan* in strengthening women's participation in litigation' (2015) 30.2 *SAPL* 505.

**Watney, M** '*Dolus eventualis* mik in die verkeerde rigting' (2016) 4 *TSAR* 769.



## Customary law

**Barrie, GN** 'The king can do wrong: The imprisonment of the abaThembu king Buyelekhaya Zwelibanzi Dalinyebo – some comments on South African customary law and Australian parallels' (2016) 4 *TSAR* 746.

## Delict

**Neethling, J** 'Delictual liability for an omission: The tragic fishpond incident' (2016) 4 *TSAR* 798.

**Neethling, J** 'The Constitutional Court affirms the potential existence of an action for wrongful suffering through disability (wrongful life) in South African law' (2016) 79.4 *THRHR* 533.

**Scott, J** 'A decision on exclusion clauses avoided by recourse to delictual principles on wrongfulness' (2016) 4 *TSAR* 754.

**Scott, TJ** 'Revisiting the elements of delict – the *Mashongwa* judgments' (2016) 79.4 *THRHR* 551.

## Environmental law

**Blackmore, A** 'Legal and public trust considerations for the Ndumo Game Reserve and South Africa-Mozambique border, following the migration of the Usuthu River' (2015) 30.2 *SAPL* 347.

## Financial services law

**Millard, D and Maholo, CJ** 'Treating customers fairly: A new name for existing principles?' (2016) 79.4 *THRHR* 594.

## Freedom of speech

**Rautenbach, IM** 'Orde, agbare lede, orde! Vryheid van spraak en orde in wetgewende vergaderings' (2016) 4 *TSAR* 807.

## Immigration law

**Subramanien, D** "Pay day" for illegal foreigners *Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92 (29 May 2015) (2016) 37.2 *Obiter* 410.

## Insolvency law

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## International criminal law

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## International law

**Roos, M** 'An updated overview of the international law governing nuclear weapons' (2016) 4 *TSAR* 640.

## Labour law

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**McGregor, M** 'Determining the validity of an employment equity plan: Guidance by the Labour Court – *Solidarity v Minister of Safety & Security (Police & Prisons Civil Rights Union as Amicus Curiae)* (2016) 79.4 *THRHR* 698.

**Olivier, M and Govindjee, A** 'The inter-relationship between administrative law and labour law: Public sector employment perspectives from South Africa' (2015) 30.2 *SAPL* 319.

**Smit, DM and Viviers, D** 'Gender reassignment and the world of work: A comparative perspective on the intersection between transgenderism, trans-sexuality and appearance discrimination in the South African employment arena' (2016) 37.2 *Obiter* 247.

**Van Jaarsveld, F** 'Uber vis-à-vis UTI – onafhanklike kontrakteurs of werknemers: Tempering van artikel 200a van WAV' (2016) 37.2 *Obiter* 362.

## Legal philosophy

**Raath, AWG** 'Regsfilosofiese implikasies van meta-etiese historisme. Kritiese opmerkings oor politokratiese kommunitarisme' (2016) 4 *TSAR* 622.

## Municipal law

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**Ratiba, MM** 'Ghosts of the municipal debts' past: Is *Mitchell* resurrecting the *Mathabathe* spectre? – Not quite *Perregrine Joseph Mitchell v City of Tshwane Metropolitan Municipal Authority* (50816/14) [2014] ZAGPPHC 758' (2016) 37.2 *Obiter* 423.

## Pension law

**Marumoagae, MC** 'Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce?' (2016) 37.2 *Obiter* 312.

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## Personal injury law

**Scott, J** 'Vonniksbespreking: Die aksie van afhanklikes weens die dood van hul broodwinners: Veel lawaai en weinig wol?' (2016) October *LitNet*.

**Scott, J** 'Purported extension of the dependants' action: Much ado about nothing? – *Osman v Road Accident Fund* (2016) 79.4 *THRHR* 678.

## Property law

**Du Plessis, E** 'Can estoppel be raised against an eviction in terms of PIE?' (2015) 30.2 *SAPL* 434.

**Hoops, B** 'The alternative project argument in the context of expropriation law (part 1)' (2016) 4 *TSAR* 680.

**Pienaar, J, Du Plessis, W and Olivier, N** 'Land matters and rural development' (2015) 30.2 *SAPL* 519.

**Van der Walt, AJ** 'Section 25 vortices (part 2)' (2016) 4 *TSAR* 597.

**Van Staden, S and van der Walt, AJ** "Progressive" judicial interpretation of servitudes and ancillary servitude entitlements – *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson* (2016) 79.4 *THRHR* 671.

## Reproductive rights

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## Road traffic law

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## Social assistance law

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## Trusts

**Nel, E** 'Unfettered, but not unbridled: The fiduciary duty of the trustee *Wiid v Wiid* NCHC (unreported) 13-01-2012 Case no 1571/2006' (2016) 37.2 *Obiter* 436.

## Unjust enrichment

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**Seanego, KA** 'A just cause falls away: Which enrichment action to apply? *Shuttleworth v South African Reserve Bank* (2016) 79.4 *THRHR* 690.

**Sonnekus, JC** 'Vermoënsregtelike implikasies van gevonde sake' (2016) 4 *TSAR* 731.

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By  
Nkateko  
Nkhwashi

# The 'intrusive' Financial Intelligence Centre Amendment Bill 2015

Gaps have been noted within the Financial Intelligence Centre Act 38 of 2001 (FICA). This was through a peer review exercise or mutual evaluation done by the Financial Action Task Force (FATF) on South African's anti-money laundering combating the financing of terrorism (AML/CFT). FATF is an inter-governmental body, which sets international standards, policies and procedures to counter money laundering and terrorist financing. Most of what is in FICA currently is derived from these standards, policies and procedures.

FICA is applicable to 'accountable' and 'reporting' institutions as noted in some of its schedules, which includes legal practitioners. Thus the relevance and importance of this article to attorneys. The Financial Intelligence Centre Amendment Bill B33A 2015 (the Bill), has recently been passed by Parliament and awaits presidential signature. According to the Financial Intelligence Centre, the Bill is but one step in the process of strengthen South Africa's (SA) AML/CFT regime. The schedules to FICA will soon be revisited and consequently incorporate new institutions, which are currently not on them.

The Bill and the strengthening process has not been without challenge. Thus the focus of this article is to look at some of these challenges and drawing some comparison with other jurisdictions. The Criminal Finances Bill of the United Kingdom (UK) will be looked at against the Bill. The Bill is currently 'stuck' in the President's office, as there are some objections that it is unconstitutional, too onerous and goes too far compared to international best practices and standards.

These objections seem to be stemming out of one provision in the Bill, which deals with politically exposed persons (PEPs) or what is termed, in the Bill, prominent influential persons (PIPs). PEPs covers people entrusted with prominent public functions, both internationally and domestically. PIPs on the other hand also extends to people in the private sector doing business with the state 'if the company provides goods or services to an organ of state and the annual transactional value of the goods or services ... exceeds an amount determined by the Minister by notice in the *Gazette*'.

The wording of the international best practices and standards does not prohibit the expansion of the PEP regime or definition. The wording thereof encourages member countries or jurisdictions to look at their domestic circumstances when implementing the international standards. For example, the European Union's Fourth Anti-Money Laundering Directive endorses expansion of the PEP regime or definition where necessary. Domestically, in SA, corruption has been rife within the tender procurement space. This is one reason advanced for enhancing the PEP definition as is in the Bill.

As already stated this provision has been marred in controversy and recently led to various court applications. For example, the application of *Minister of Finance v Oakbay (Pty) Ltd Investments and Others* (GP) (unreported case no /2016, 16-10-2016) and the one by *Council for the Advancement of the South African Constitution v President of the Republic of South Africa* (CC) (unreported case no /2016, 4-11-2016).

The PEP/PIP provision is key to have in terms of best international practice and standards, the implications of not having it are dire to any economic interests of any country. Especially SA, which is the only permanent member of FATF within the African region.

In simple terms, PEP/PIP provision within the Bill differentiates between foreign and domestic officials. The former must automatically be deemed high risk by financial institutions and other business. While the latter is not automatically deemed high risk. With respect to the latter, the customer or PIP is treated as any ordinary customer of the institution thus the application of your normal due diligence or 'know-your-customer' requirements. However, the situation will change where a determination has been made by the relevant institution that the customer or PIP is high risk through what is termed, in the Bill, Risk Management and Compliance Programme. In short, a PIP is not automatically deemed high risk but may be so deemed after certain risk factors have been considered. Thus an argument can be made that this provision is not automatically 'intrusive' as alleged.

The UK regime on the other hand proposes to go much further than that of SA. The UK regime is much matured and

various steps have been initiated to fight both money laundering and terrorist financing. The UK has already done its National Risk Assessment of both threats. One can, then persuasively, argue that the UK understands its domestic circumstances very well in terms of threats and risks.

The Criminal Finances Bill introduces, among others, a provision dealing with unexplained wealth orders (UWO). UWO 'will enable a court ... to require an individual or organisation who is suspected of direct involvement in or associated with serious criminality to explain the origin of assets, where their income appear to be disproportionate to their known income. A failure to provide a response would give rise to a presumption that the property [is] recoverable, in order to assist any subsequent civil recovery action' ([www.parliament.uk](http://www.parliament.uk), accessed 9-1-2017).

UWOs will apply to PEPs. In SA they may be equated to the 'infamous' lifestyle audits. The Criminal Finances Bill then goes on further to make provision for 're-visit' orders. Here the Bill allows for law enforcement, after civil forfeiture of assets, to revisit the perpetrator later on and ascertain if he or she is not deriving any benefits from the proceeds of the forfeited proceeds. If found to be then such benefits derived can then be confiscated again.

From the above analysis of the respective Bills and also if international experience is something (or a precedent) to go by, then there is nothing intrusive about the PEP/PIP regime of SA. Risk analysis is an essential function that seats with the financial institutions and cannot be taken away. Further a Risk Management and Compliance Programme is the only essential tool or route to an efficient and effective risk-based approach to customer due diligence.

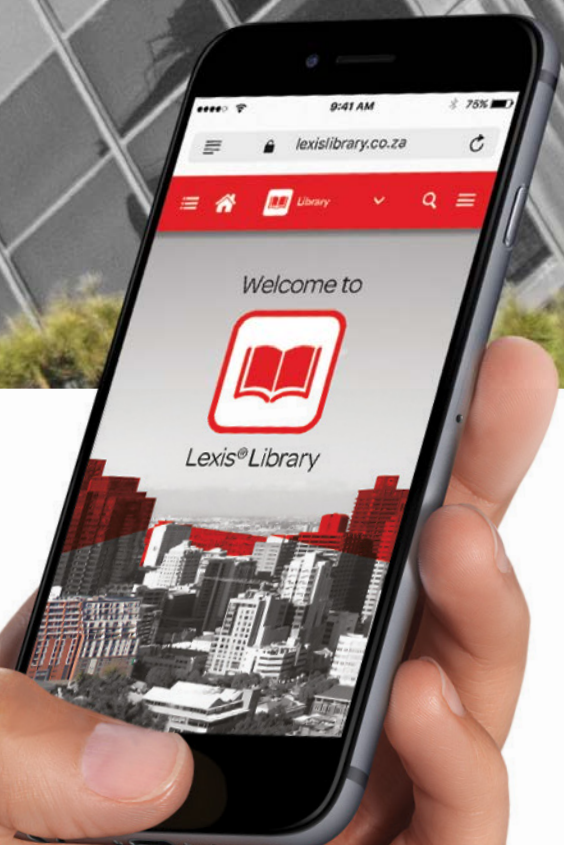
Nkateko Nkhwashi LLB (University of Venda), LLM (UJ) and Certificate in Legislative Drafting (UP) is an advocate in the Directorate: Financial Integrity at the Department of National Treasury.





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# RISK ALERT

FEBRUARY 2017 NO 1/2017

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**AIIF:** Thomas Harban, General Manager, Attorneys Insurance Indemnity Fund, 1256 Heuwel Avenue, Centurion 0127 • PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900  
Website: [www.aiif.co.za](http://www.aiif.co.za) • Twitter handle: @AIIFZA

**Prescription Alert,** 2nd Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 149 • Tel: (021) 422 2830 • Fax: (021) 422 2990  
E-mail: [alert@aiif.co.za](mailto:alert@aiif.co.za) • Website: [www.aiif.co.za](http://www.aiif.co.za)

**Attorneys Fidelity Fund,** 5th Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 154 • Tel: (021) 424 5351 • Fax: (021) 423 4819  
E-mail: [attorneys@fidfund.co.za](mailto:attorneys@fidfund.co.za) • Website: [www.fidfund.co.za](http://www.fidfund.co.za)

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## RISK MANAGER'S COLUMN

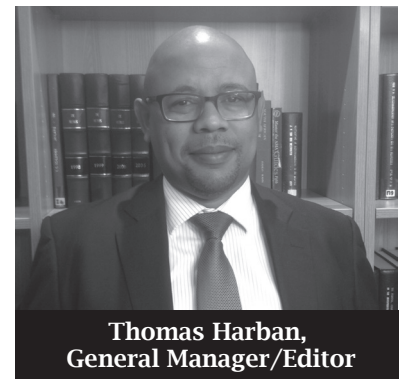
**W**elcome to the first edition of the *Bulletin* for 2017. By the time practitioners read this edition, many would have commenced or completed their planning for the New Year. While wishing the profession all the best in 2017, we trust that issues related to risk management have been included in the strategic planning for the New Year. It is important that the risks associated with the enterprise are considered when planning your milestones for the New Year. The beginning of the year is an opportune time to focus on risk management in your practice and to complete the AIIF's risk management self-assessment questionnaire, if you have not already done so.

As will be noted from the claim statistics published below, the main areas from which professional indemnity claims arise have remained constant in 2016. We, once again, urge practitioners to pay special attention to these areas of practice. Of particular concern is the number of practices still falling victim to scams.

As claims against professionals (including medical professionals) increase, attorneys dealing with these type of claims need to be aware of the risks associated with this line of work. In May 2016, we published an article by Mavundla Mhlambi - an update is published in this edition.

Jonathan Kaiser's article draws practitioners' attention to conflicting decisions relating to the prescription of RAF claims.

Practitioners are urged to have regard to the various documents available under the risk manage-



**Thomas Harban,  
General Manager/Editor**

ment tab on the AIIF website [www.aiif.co.za](http://www.aiif.co.za) for risk management tips. Previous editions of the *Bulletin* and the risk management self-assessment questionnaire can also be accessed via our website. The AIIF team is also available to engage with practitioners and their staff regarding any aspect of risk management- please contact us and we will gladly visit your practice in order to have a risk management discussion with you and your team. It is best to adopt a pro-active approach to risk management and not to wait for a claim against your practice before paying attention to this crucial part of your practice.

A practitioner has suggested that my direct contact details be included in the Bulletin and I have included these below.

We wish you a claim free 2017! We also wish those candidate attorneys who will be writing the attorneys admission exam in February 2017 all the best.

**Thomas Harban**  
Email [thomas.harban@aiif.co.za](mailto:thomas.harban@aiif.co.za)  
Telephone: (012) 622 3928

## RISK MANAGER'S COLUMN continued...

### LATEST AIIF CLAIM STATISTICS

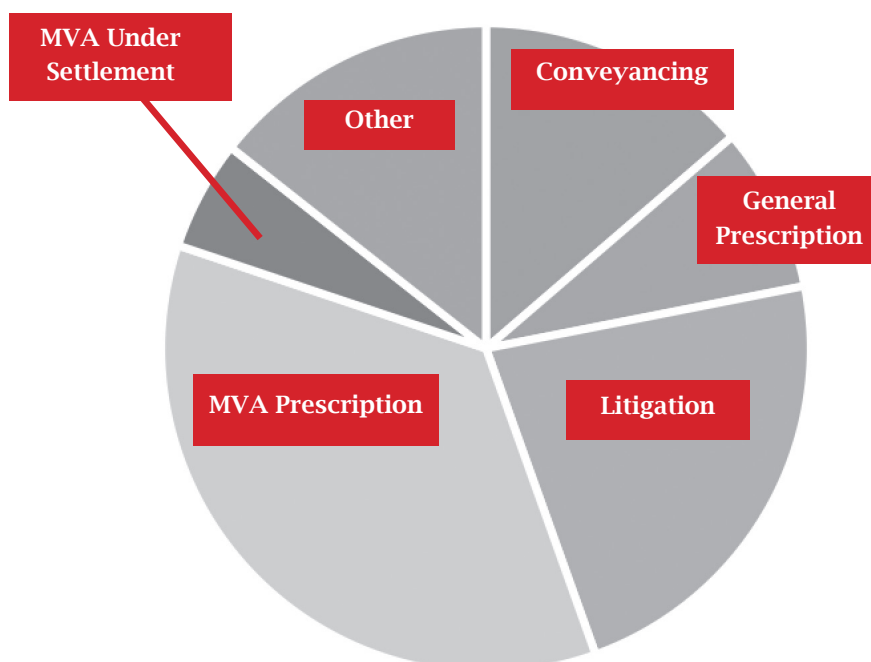
The graph below gives an overview of the type of claims notified to the AIIF as at 30 November 2016.

The three claim types making up the highest number of claims notified in the 2016 insurance year are:

- MVA prescription (35.6%)
- Litigation (22.6%), and
- Conveyancing (13.7%)

Practitioners doing RAF related claims should make use of the Prescription Alert system (see page 6 of the November 2016 edition of the *Bulletin*). We have covered the dangers related to prescribed MVA claims in past editions of the *Bulletin*. The quantum in RAF related matters (prescribed and under-settled) may well exceed a practitioner's available limit under the AIIF policy. **It must also be noted that conveyancing claims and prescribed RAF claims carry a higher deductible (excess)! An additional 20% will be applied to the deductible for prescribed RAF claims where the Prescription Alert system is not used and complied with.** Please contact Lunga Mtiti at the Prescription Alert unit for details on how to register on the system. Lunga's email address is [lunga.mtiti@aiif.co.za](mailto:lunga.mtiti@aiif.co.za) and his telephone number is (021) 422 2830.

Many of the conveyancing related claims are as a result of practitioners falling victim to the various scams being perpetrated on practitioners (see the article below). **Practitioners must note that claims arising out of cybercrime are excluded from the AIIF policy (see clause 16(o)) with effect from 1 July 2016.**



In the last six years, we have written extensively warning practitioners about scams being perpetrated against attorneys. Practitioners are urged to have regard to, for example, the following editions of the *Bulletin* (all of which are available via our website) for details of the scams:

- August 2010 (pages 1 and 8)
- May 2012 (page 3)
- July 2012 (page 1)
- August 2012 (page 1)
- February 2013 (page 1)
- May 2013 (page 3)
- November 2014 (page 5)
- July 2015 (page 1)
- August 2015 (page 1)
- November 2015 (page 1)
- February 2016 (pages 1 and 2)
- May 2016 (page 2)
- July 2016 (page 1)

### CYBER SCAM MATTERS – PRACTITIONERS CONTINUE FALLING VICTIM TO SCAMS

- August 2016 (page 7)
- November 2016 (page 4)

Various other structures in the legal profession, including the LSSA and the Attorneys Fidelity Fund, have also published warnings about the various scams being perpetrated against attorneys.

Since the cybercrime exclusion in the AIIF policy came into effect on 1 July 2016, we have been notified of claims in excess of R15 million from practitioners who have fallen victim to the scams. The practitioners concerned will have to bear these losses themselves, if they do not have

appropriate top-up cover or cybercrime policies in place. Practitioners who have top-up insurance must study the wording of their top-up policies carefully to ensure that they are covered for cyber related claims or any other claim excluded from the AIIF policy- should you have any doubts in this regard, please contact your broker or underwriter.

Cyber related risks are on the increase and attorneys must:

- (i) ensure they have adequate risk mitigation/avoidance measures in place to deal with cyber related risks;



## RISK MANAGER'S COLUMN continued...

- (ii) make staff aware of the various scams;
- (iii) have the appropriate insurance policies in place, should these risks materialise;
- (iv) properly supervise staff;
- (v) be aware of spoof emails;
- (vi) ensuring that proper FICA processes are in place and that the identify and bank account details of all clients are properly verified;
- (vii) contacting clients (using the verified details on record) in order to verify any purported change in banking details;
- (viii) insist that any changes to payee details can only be done by the party to whom funds are due in person at the attorney's office and that original documents are provided;
- (ix) obtain advice from IT experts on the appropriate measures that can be implemented in order to avoid falling victim to cybercrime; and
- (x) keep up to date with the constantly changing risk environment in the commercial world.

The most common cyber risks that attor-

neys are exposed to include:

- (a) falling victim to spoof emails purporting to be from a party to whom funds are due- the emails will include an instruction that the funds must be paid into a fraudulent bank account. The fraudsters may follow this up with a telephone call and/or an email attaching a fraudulent bank statement as proof that the new account details are those of the rightful beneficiary. Over the last four years, conveyancers have mainly been targeted by the scammers. The AIF recently received notification of a claim where the scam was extended to a firm in respect of a pay-out relating to a RAF claim; and
- (b) being duped by purported 'payments' alleged to be from the Attorneys Fidelity Fund ('the Fund')- the fraudsters contact the firm alleging that the Fund has made an overpayment into the bank account of the practice and thus seek a refund of the 'surplus'. This is often in circumstances where the attorney is not entitled to receive any payment from the Fund. The fact that, though there is no liability on the part of the

Fund to make payment to the attorney, the fraudulent communication from the scammers instructs practitioner to withhold part of the 'payment' should be a red flag for attorneys!

A common sense approach can sometimes be the best way to avoid falling victim to the scams. An article by the Risk Management Unit of the Fund (see "*Susceptible to scams?*" on page 22 of the December 2016 edition of *De Rebus*) lists various forms of scams and the considerations that can be taken by firms in order to avoid falling victim thereto. All staff in the practice should be alerted to the *modus operandi* and dangers of the scams.

Beware of scams mimicking communication from the Fund, financial institutions or the South African Revenue Services (SARS). Looking at the warnings posted by professional indemnity insurers and regulatory bodies in other jurisdictions, variations of the cyber scam are targeting legal practitioners internationally.

## GENERAL PRACTICE

### MEDICAL MALPRACTICE CLAIMS

This is a follow up to our article published in the May edition of the *Bulletin* (No 2/2016).

#### Is there possible change on the horizon?

There have been recent developments in the common law as well as the medical profession and insurance industry relating to medical negligence claims which need to be brought to the attention of legal practitioners. Medical negligence claims have also recently received a lot of coverage in the general media and some specialised publications (see, for example, the article entitled "*Who'll deliver our babies*" (*sic*) published in *The Times* on 25 November 2016 and that entitled "*Challenging the cost of clinical negligence*" in *SAMJ*, volume 106, No. 2 (February 2016) (page 141) by Graham Howarth and Emma Hallinan). The gist of many of the published articles is the problems particularly facing certain branches of the medical profession due to increased professional indemnity insurance premiums as a result of an increase in

claims based on medical negligence.

*The Times* article reports that the Society of Obstetricians and Gynaecologists has asked the Health Minister, Aaron Motsoaledi, to intervene "in the crisis in the profession caused by the high cost of medical insurance premiums pushed up by massive medical negligence lawsuits." According to that report, the Society has put four suggestions to the Minister which it believes will save that profession. These are:

- Capping of pay-outs;
- Structuring of pay-outs, monthly or annually;
- If doctors are found not to have been negligent, lawyers must pay the cost of the litigation;
- There must be mediation before a claim goes to court

The writers of the *SAMJ* article propose the following:

#### 1. Complaints process

- The development of a consistent,

efficient, aligned and patient-centred complaints process that allows for local resolution

#### 2. Frequency of claims

- A certificate of merit be introduced
- Further consideration of ways to encourage alternate dispute resolution

#### 3. Pre-litigation resolution framework

- The introduction of a pre-litigation resolution framework

#### 4. Procedural changes

Procedural change to ensure:

- the exchange of factual witness statements
- early exchange of expert notices and summaries
- mandatory early experts meetings.

#### 5. Limiting damages awards (general and special)

- A tariff of general damages is created in statute
- A limit on general damages
- A limit on future care costs
- A limit on the claims for loss on future earnings.

If implemented the proposals will, no doubt, have an effect on the rights of claimants to bring medical negligence claims in

future. Legal practitioners are advised to keep a lookout for any upcoming changes especially to the law on contingency fee agreements which, the Minister of Health has been reported, to have requested the Law Reform Commission to look into.

A client who suffers damages as a result of the conduct of a medical professional (as with any other professional or other party causing such damage) is entitled to bring a claim for appropriate compensation.

### Recent case law

The other developments in this area of practice pertain to decisions which were handed down in 2016.

We will first look at the Constitutional Court judgment handed down on 30 March 2016 in *Links v MEC for Health, Northern Cape* [2016] ZACC 10.

The facts of the case, briefly, were as follows:

The plaintiff dislocated his thumb on 26 June 2006 and went to Kimberly Hospital where a plaster of Paris was put on his left hand and forearm and was asked to return 10 days later. He returned 4 days later due to severe pain and discomfort but was only given pain medication and told to come back after 5 days. He returned 3 days after that as the pain was not dissipating and was, on this occasion, admitted. On 5 July 2006 he was taken to theatre for a fasciotomy and his left thumb was amputated. The reason for the amputation appears to have been complications caused by the plaster of Paris being applied too tightly on 26 June 2006. The plaintiff's version was that he was never informed of the decision to amputate nor the reasons for that decision. The plaintiff was operated on again on 12, 15 and 21 July and was discharged in August 2006.

The plaintiff went to see a firm of attorneys in November 2006 who then referred him to the Legal Aid Board, which he approached in December 2006. The Legal Aid Board referred the plaintiff to a firm of attorneys 3 years later who then sent the required notice to the defendant in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ('the Legal Proceedings Act'). The plaintiff's attorneys served summons on the defendant on 6 August 2009 which was met with two special pleas. The special pleas were that the notice failed to comply with the Legal Proceedings Act and also that the summons was served more than 3 years after the date of amputation of the thumb (5 July 2006).

In response to this the plaintiff delivered an

application for condonation of his failure to comply with the Legal Proceedings Act which also dealt with the prescription aspect as this would overcome section 3(4)(b)(i) of the Legal Proceedings Act. The defendant opposed the application. However, in response to the plaintiff's founding affidavit, the defendant filed two affidavits which did not respond to the averment made by the plaintiff that he did not know the reason or the cause for the amputation. The averment made was thus never denied and it went to the issue of causation. The court *a quo* quoted the following passage from *Truter and another v Deyssel*:

"... 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."

The court *a quo* further went on to say that: "[T]he [applicant's] cause of action was complete and the debt of the [respondent] became due and payable as soon as the first known harm was sustained by the [applicant]. The cause of action arose on 26 June 2006 when the [applicant] first presented himself in hospital for medical treatment."

The court *a quo* and a full-bench of the Northern Cape High Court ruled against the plaintiff and he then approached the Constitutional Court.

The Constitutional Court ruled in favour of the plaintiff. In arriving at its decision, the Constitutional Court looked at the meaning of section 12(3) of the Prescription Act 68 of 1969 in conjunction with section 39(2) of the Constitution (Act 108 of 1996). It must be remembered that the plaintiff had averred that he did not know, and was not informed by the medical staff at the hospital, of the reasons for his condition (which was not denied by the defendant). Furthermore he was hospitalised from 5 July 2006 until the end of August 2006 preventing him from gaining any knowledge about his condition, other than from the hospital staff.

The Constitutional Court stated that:

"Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from

which the debt arises."

The Constitutional Court went further to say that:

"The respondent [defendant] did not aver that the applicant [plaintiff] had knowledge of the facts that caused his problem. The applicant did aver in the High Court that he did not know before the end of August 2006 the reason for his condition or the cause of his condition. This averment related to both the issue of negligence and the factual element of causation. In *Dr Koning's and Mr Ndlovu's* affidavits the respondent did not deny this averment. A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact that a litigant wishing to sue in a case such as this would need to know. This would be the case whether one sued on the basis of a delict or a breach of contract. On this basis, it cannot be said that the debt was due before 5 August 2006."

The Constitutional Court thus upheld the plaintiff's appeal. The crisp point in this decision was that the plaintiff could not have gained knowledge *in this case*, as contemplated in section 12(3) of the Prescription Act, prior to having known the reason for his amputation. In other words the knowledge of the reason for the amputation was a fact and not a legal conclusion. (Section 12 (3) of the Prescription Act states that "a debt shall not be deemed to be due until the creditor has full knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.")

The second case we wish to highlight is that of *Mbhele v MEC for Health for the Gauteng Province* (355/15) [2016] ZASCA 166 (18 November 2016). In this case the court had to consider (i) whether a claim for damages for emotional shock had been proved in the court *a quo*, and (ii) whether our law recognises a claim for constitutional damages for the loss of the right to rear a child. The defendant argued that the plaintiff's counsel had abandoned the claim for emotional shock.

In answering the second question, the SCA noted that:

"The pertinent question in this regard is whether South African law recognises a claim for damages arising from a right to rear a child. In *Pinchin & Another NO v Santam Insurance Co. Ltd*, [this court] said: 'I hold that a child does have an action to

## GENERAL PRACTICE continued...

recover damages for pre-natal injuries. This view is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage.'

It is clear from this dictum that the right is that of a child subsequently born alive. Counsel for the appellant was not able to persuade us on what conceivable basis, a claim based purely on the right to rear a child who was not born alive should succeed. In order to bolster his case counsel sought to refer to foreign jurisprudence, *inter alia* (Stanley v Illionis [1972] USSC 78; 405 US 645(1972); Santosky v Kramer [1982] USSC 63; 455 US 745(1982) but was constrained to concede that none of those matters dealt with this specific issue before this court." [footnotes omitted]

On the issue as to the first question (whether or not the claim for emotional shock was abandoned) the Court looked at the transcript from the court *a quo*:

Court: . . . I am saying what cause of action is stated in the stated case?

...

Counsel: . . . No M 'Lord, there is a reason why that is not stated out . . . the parties are in agreement that if the . . . second plaintiff [Ms Mbhele] establishes causation the defendant [MEC] is liable for the loss of the baby, and that is principally a question of emotional shock M 'Lord although you do not see the word . . . emotional shock.

The debate continued

Counsel: Well it is not defined there clearly M' Lord, but if you go to the stated case, you would see that the plaintiff, the second plaintiff describes what she has gone through.

Court: I have read the stated case. I had difficulty to understand the nature of the cause of action.

Counsel: The nature of the cause of action therefore M 'Lord, there would be emotion shock and associated suffering of the plaintiff or the second plaintiff

Court: And then as a result of emotional shock probably she consulted doctors, she lost money, is that the case?

Counsel: The consulting of doctors and the loss of the money were never part of the case M' Lord. It ends with the pain, psychological and emotional pain of losing a child

Court: And she must be compensated for that?

Counsel: That is correct M' Lord.

Counsel for the respondent did not point us

to any portion of the record which justified the finding by the court that the claim for emotional shock was abandoned. It must thus be accepted that the court erred in making such a finding.

The SCA ruled in favour of the plaintiff on the second question and awarded her damages in the amount of R100,000. The purpose of highlighting this case is also to remind attorneys to claim for emotional shock where appropriate, when acting for plaintiffs in claims arising out of medical negligence. In dealing with personal injury or medical negligence claims, we have often found that this head of damages had not been included in the underlying claim. Many of the risks associated with, and the considerations to be applied in, medical negligence claims apply to other forms of personal injury claims as well.

Practitioners should also have regard to the judgment in *The MEC for Health and Social Development in Gauteng v Zulu* (1020/2015) [2016] ZASCA 185 (30 November 2016). This case arose out of an action instituted against the Gauteng MEC for Health and Social Development ('the MEC') where damages were claimed on behalf of Ms Zulu's minor child. The basis of the claim was that, due to negligence of the staff of the Chris Hani Baragwanath Hospital during her birth, the minor child suffered brain damage.

For present purposes, we will restrict our attention to the following aspects of the judgment:

- (i) The SCA in that case reaffirmed the 'once and for all' rule in claiming damages. In brief, on this point the MEC's contention was that the court develop the common law and that the 'once and for all' rule be modified. Essentially, the MEC argued that she should be directed that instead of paying the monetary compensation sought in respect of future medical expenses, payment instead be made directly to the person/s who will provide services to the minor child within 30 days of presentation of a written quotation to the accounting officer of the department. The court ruled against the MEC on this point; and
- (ii) The MEC sought the amount awarded for future loss of earnings be excluded from the calculation, determination and payment due to the plaintiff's attorney in terms of the contingency fee agreement. The MEC's argument was that as a result of the contingency fee agreement, the amount available for the fu-

ture treatment of the minor child would be reduced, which was prejudicial to the minor child. The SCA rejected the argument on this point as well and held that "[no] power is granted to the court in terms of the [Contingency Fee Act 66 of 1997] to alter [the] amount which forms part of the contingency fee agreement. It should not be overlooked that had it not been for the contingency fee agreement, the respondent [Ms Zulu] would not have been able to obtain the judgement on behalf of [the minor child]."

### Ensuring that the correct parties are cited

All aspects of the matter should be investigated in order to ensure that the correct defendant is cited. This may, in some cases, only be determined after a detailed investigation of the merits of a medical negligence case particularly where a patient has been treated by a number of medical professionals for the same (or related) complaints.

Where, for example, an action against a private healthcare practice is brought, practitioners must investigate whether, in the circumstances of the claim they are dealing with, the defendant will be the healthcare professional or the healthcare facility- do you institute the action against the doctor, the private hospital or both? Was the doctor an 'independent party' and were the nurse/s and other allied healthcare professionals employed by the hospital? These questions can only be answered once a proper investigation into the matter is conducted. Be careful not to sue the incorrect defendant, only to find out later after the claim has prescribed, that a different defendant should have been cited (or added) in the matter.

### Quantification of claims

A proper quantification of your client's claim is imperative. Under-settlement may lead to a professional indemnity claim being brought against you! Proper quantification of the claim will usually involve the procurement of medico-legal and other expert reports. Practitioners are, however, urged to apply caution in this regard and to procure only the relevant expert reports- there is a fine line in this regard and the circumstances in each case must be looked at carefully. The following judgments should be carefully studied- *Motswai v RAF* 2012 SA (GSJ) (case no 2010/17220) (the judgments by Satchwell J delivered on 7 December 2012 and 2 May 2013 respectively) and the SCA judgment on the matter (*Motswai v RAF* (766/13) [2014] ZASCA 104 (29 August 2014))- the



## GENERAL PRACTICE continued...

judgments deal with a court's sanction of parties in a matter for the manner in which the expert evidence was handled.

All offers of settlement must be put to your client and you must obtain proper instructions in relation thereto, even if your recommendation is that your client rejects the offer. Where necessary, use the

services of an interpreter and remember to confirm all instructions in writing! Never settle on the basis of your power of attorney alone, without obtaining proper instructions from your client. You should also be wary of a rushed settlement from a parent/ guardian/ family member/tout that is not in the interests of the injured

party. Remember that you are the expert, and the client thus relies on your expertise in respect of all aspects of the matter, including the quantum of the settlement and that all heads of damages are claimed.

**Mavundla Mhlambi**  
Legal Advisor- AIF

## PRESCRIPTION OF RAF CLAIMS – SOME CONFLICTING DECISIONS

In the last 12 months there have been interesting developments concerning prescription of RAF matters. It is well established that in hit-and-run collisions, claims against the RAF have to be lodged within a period of 2 years and summons issued within 3 years or stated differently or more accurately, within 5 years from the date of the collision/loss arising – a combined total period of 5 years consecutively.

Regulation 2 imposes a definite time period irrespective of **any legal impediment**. More often than we would like to see, attorneys, however, lose sight of these Regulations and fail to lodge within the required period of 2 years or issue summons within 5 years. In terms of Regulation 2, the claimant's age, mental disability or curatorship has no bearing on the period of time within which to lodge the claim and issue summons. The RAF Act prescribes prescriptive periods for **identified** claims as well as exceptions mirroring those of the Prescription Act for when prescription is suspended, such as in the case of minors.

The RAF Act does not prescribe any such periods for **unidentified** claims but, however, 'delegates' powers to the Minister to determine the relevant period by promulgating regulations.

Recently plaintiffs have been challenging the constitutionality of these regulations. In 2001 the SCA held the regulations pertaining to lodgement of unidentified claims within 2 years to be unconstitutional and in 2004 the SCA held them to be constitutional.

In *Moloi and Others v Road Accident Fund* (413/98) [2000] ZASCA 53; 2001 (3) SA 546 (SCA); [2000] 4 All SA 576 (A) (29 September 2000) the court considered the terms under the old regulations where a claim was instituted against the Multilateral Motor Vehicle Accident Fund (the predecessor of the RAF) for a minor's claim that was not

lodged within the required 2 year period. The Court held that Regulation 3(2)(a)(i) was *ultra vires* and relied on sections 13 and 16 of the Prescription Act in justification of that decision.

In short, the court reasoned that the regulations were not Acts of parliament and therefore these regulations were not to the exclusion of the Prescription Act, specifically sections 13 and 16.

Section 16 deals with any law imposing conditions upon the time frames a claimant has to recover a debt, read in conjunction with the rights afforded to those 'under legal impediments' such as minors, mentally insane and those under curatorship.

In the *Moloi* case it was argued by the respondents that no unconditional debt arose and therefore prescription never ran at all. The court rejected this contention nevertheless on the basis that the condition was not a proper suspensive condition and secondly as stated above, the Minister did not have the power to impose such a condition.

In another decision (*Geldenhuis & Joubert v Van Wyk and Another; Van Wyk v Geldenhuis & Joubert and Another* (471/2003, 472/2003) [2004] ZASCA 121; [2005] 2 All SA 460 (SCA) (30 November 2004)) the Court held that there is no debt as a debt only exists if a plaintiff would have had a common law debt and the regulation is a suspensive condition and not a prescriptive period of an existing right. The *Geldenhuis* judgment finds the regulation to be a 'precondition' for the right to come into existence, whereas the *Moloi* case held it to be a prescriptive period of a right already bestowed. On the reasoning in the *Geldenhuis* case, Regulation 2 (3) did not therefore introduce an invasion of any existing right which a claimant or minor may have been constitutionally entitled to. It is important to note that the court in the

*Geldenhuis* decision did not overrule that in the *Moloi* case and only remarked that the judges were doubtful as to whether the court had arrived at the correct outcome. *Moloi* dealt with MMF regulations under the 1989 Act whereas *Geldenhuis* dealt with the regulations under the 1996 Act. The wording of the regulations remain the same in both and even so in the 2008 amendments.

On the application of strictest principles of *stare decisis* then the *Geldenhuis* decision should be followed.

The matters following hereunder relate to the developments alluded to earlier:-

In *Combrink and Another v Road Accident Fund and Another* (31303/2008; 31306/2008) [2015] ZAGPPHC 760 (5 November 2015), the Pretoria High Court held Regulation 2(4) – that is after lodgement a plaintiff has to issue and serve summons within 5 years – to be unconstitutional. It deleted the offending provisions – that is, 'irrespective of any legal disability to which the third party concerned may be subject and notwithstanding anything to the contrary in law'.

In *Combrink*, the plaintiff was a minor. The claim arose out of an accident where an unidentified motor vehicle was involved and was lodged within 2 years. However the plaintiff failed to issue summons within the combined period of 5 years. The court held the Regulation to be unconstitutional and stated that the plaintiff was permitted to issue summons three (3) years after attaining the age of majority.

For present purposes, the main points from the *Combrink* case are that:

- the RAF accepted that the legal disability provision was **constitutionally untenable**; and
- the court held the Regulations are Acts by Parliament.

Section 16 of the Prescription Act regulates

## GENERAL PRACTICE continued...

prescription debts in general, “*save insofar 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.*”

It can thus be noted that:

- the Prescription Act affords a more generous time period to minors;
- the effect of sections 13(1) (a) and (i) of the Prescription Act on ‘debts’ that fall within its purview is thus that the prescriptive period, insofar as minors and legally disabled persons are concerned, will be completed **one year** after the impediment ceases to exist (that is, in the case of a minor, the attainment of the age of majority)
- the approach that a minor, in particular, could have his or her claim prescribe before becoming an adult appeared to be entirely at odds with long entrenched principles of our law; and
- the Regulation would read as follows if the reading as ordered by the Pretoria High Court is accepted: “*Subject to Sections 13(1) (a) and (i) of the Prescription Act 68 of 1969, the liability of the Fund in respect of any claim sent or delivered to it as provided for in sub-regulation (3) shall be extinguished upon expiry of a period of five years from the date upon which the claim arose, unless a summons to commence legal proceedings has been properly served on the Fund before the expiry of the said period.*”

Most concerning, with respect, was that the *Combrink* judgment was marked **unreportable** and **not of interest** to other Judges. Many attorneys are thus still unaware of this judgment.

It was, respectfully, disappointing, in my view, that the court in *Combrink*, did not express any an opinion on the validity of lodging the claim within 2 years.

It is not evident from the judgment whether the court’s ruling should be interpreted to mean that it agreed with the view expressed in *Geldenhuis*, that following lodgement, a ‘debt’ arose and therefore a right to which Regulation 2(4) provided **un**constitutional discrimination **or** whether it implies that it views any discrimination against minors or those suffering from a legal impediment to be inimical to justice. It appears though that the court indirectly agreed with the reasoning in *Geldenhuis*: yet at the same time importing and employing the reasoning followed in *Moloi* (to some extent) to find the Regulation unconstitutional.

In *Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC) the Constitutional Court held that the constitutional invalidity of a Regulation falls outside of the ambit of an “order of constitutional validity”. Therefore the Constitutional Court does not have to confirm the *Combrink* ruling.

Presently then in terms of the *Combrink* decision, under the old Regulations which are identical to Regulation 2(2) of the new Act, the legal position does not require those suffering from legal impediments, as defined by Section 16 the Prescription Act, to issue summons within the combined total period of 5 years and the period of 3 years only commences to run from the date upon which (for example) the minor attains majority.

Following this ruling, the Regulation is now subject to the Prescription Act and therefore the period applicable should technically be majority plus 1 year and not plus 3. The court stated that subjecting the plaintiff to the attainment of majority plus 1 year would be an undesirable approach in that it was not in accordance with the existing prescription scheme set out in section 23 of the Road Accident Fund Act and would not be in accordance with the basic principle applicable to third party legislation. The widest possible protection ought to be given to a claimant.

**Side Note:** One should also bear in mind that the age of majority changed from 21 to 18 in 2007. For accidents prior to 1 July 2007, minors only attain majority at 21.

The Western Cape High Court in *Jethro N.O v Road Accident Fund* (10534/2006) [2015] ZAWCHC 101 (29 July 2015) dealt with a similar issue where the material difference was the Plaintiff being in a vegetative state. The Court held: “*the patient remains in a permanent vegetative state, she therefore similarly enjoys the protection afforded by Moloi v RAF 2001 SCA and completion of statutory prescriptive period remains delayed.*” This matter dealt with the lodgement period of 2 years in unidentified vehicle accidents. The Court took cognisance of the *Geldenhuis* decision and, however, utilised a ‘loop hole’ as such by electing to following *Moloi* as *Geldenhuis* dealt with Regulations issued under 1996 and whereas *Jethro* was concerned with Regulations under 1989 Act.

The main points from the *Jethro* case are:

- a technical approach to the *stare decisis* doctrine;
- the Court said: In *Moloi* the Supreme Court of Appeal considered Regulation 3(2)(a) in light of sections 13 and 16 of the Prescription Act. It held at paragraphs [14] to [17] that the regulation

was invalid as being contrary to section 16 of that Act.

- although the court dealt specifically with the position of a claimant who had been a minor at the date of a collision, the *ratio* applies equally to the patient, being a person ‘*under curatorship or ... prevented by superior force ... from interrupting the running of prescription ...*’ as envisaged by s 13(1)(a) of the Prescription Act and she is thus in the same position as a minor. Given the assumption that, for purposes of these proceedings, the patient remains in a permanent vegetative state, she therefore similarly enjoys the protection afforded by *Moloi* and completion of the statutory prescriptive period remains delayed.
- Although the Supreme Court of Appeal held in *Geldenhuis* that the corresponding provisions in the Road Accident Fund Act 56 of 1996 and its Regulations were valid, and expressed doubt as to the correctness of the decision in *Moloi*, it did not overrule that decision and this court is accordingly bound thereby.
- *Jethro* related to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 and not the legislation which applied in *Geldenhuis*. It is based on this ‘loophole’ that the Court decided that because *Geldenhuis* ruled on the Regulations from Act 56 of 1996 they were not bound thereby. *Moloi* ruled on Act 93 of 1989 and *Geldenhuis* did not overtly set aside that ruling.

A clever sidestep by our judicial system to avoid having to deal with the real issue at hand. And why should they? If the SCA refuses to deal with it then how can we expect the High Courts to do so?

Fortunately for claimants and the profession alike, several matters are now pending before various High Courts to strike out the provisions relating to Regulation 2 (of the new Act) in so far as they fail to afford those suffering from a recognisable legal impediment as defined by section 13 of the Prescription Act a stay in the running of Prescription. It would however be preferable for these matters to be finally adjudicated upon by the Constitutional Court and to provide those suffering from legally recognisable impediments identical protection against prescription and to restore legal certainty in light of the cases discussed above.

Developments in the various relevant cases will be monitored.

**Jonathan Kaiser**  
Legal Advisor - AIIF

## GENERAL PRACTICE continued...

A high number of prescription related claims (RAF claims and litigation in general) continue being notified to the AIIF.

In recent months, a number of judgements have been handed down by the Supreme Court of Appeal dealing with the issue of prescription. These judgements include:

*Fluxmans v Levenson* (523/2015) [2016] ZASCA 183 (29 November 2016)- The respondent had entered into a contingency fee agreement with the appellant on 1 February 2006 in relation to his claim against the RAF. The claim was finalised in May 2008 and the appellant issued him with a statement of account on 20 August 2008 pursuant to the contingency fee agreement. The contingency fee agreement did not comply with the Contingency Fees Act. More than five years later (and after the Constitutional Court judgment in the *De La Guerre v Ronald Bobroff & Partners* matter) the respondent brought an application seeking to set aside the contingency fee agreement and claimed reimbursement of the monies he had been debited. The appellant opposed the application and raised prescription. The SCA found that prescription begins to run as soon as the creditor acquires knowledge of the minimum facts necessary to institute

## RECENT JUDGMENTS DEALING WITH PRESCRIPTION

action- in *casu*, knowledge that the relevant agreement did not comply with the peremptory provisions of the Contingency Fees Act was not found to be a fact needed to complete a cause of action. The court thus ruled in favour of the appellant.

*Deez Realtors v SA Securitisation Programme* (175/2016) [2016] ZASCA 194 (2 December 2016)- In this matter the plaintiff instituted action against the defendant arising out of a breach of contract. The contract afforded the plaintiff two alternate remedies in the event of a breach. The plaintiffs instituted action against the defendants seeking to enforce one of the available remedies. After the defendants had pleaded, the plaintiffs sought to amend their particulars of claim to include the second available remedy. The defendants then raised a special plea of prescription in respect of the proposed amendment. The court considered the meaning of the word 'debt', and referred to the judgment of the Constitutional

Court in *Makate v Vodacom Ltd* [2016] ZACC 13: 2016 (4) SA 121 (CC) where, with reference to the New Shorter Oxford English Dictionary, the following mean of 'debt' was elaborated upon:

'1. Something owed or due: something (money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.'

The SCA found that the amendment sought by the plaintiffs did not affect the essential meaning of the debt and that the word 'debt' is of wider import than 'cause of action'. The court referred to its judgment in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) where it was stated that 'the debt is not the set of material facts' required to sustain the cause of action, but rather 'that which is begotten by the set of material facts.'

## THE LEGAL PRACTICE ACT

In this edition of the *Bulletin* we continue with our series of articles aimed at creating awareness in the profession around the Legal Practice Act. By the time this edition of the *Bulletin* is published, it will be one year before the Legal Practice Act 28 of 2014 is expected to come into full effect on 1 February 2018. The preparatory work by the various stakeholders is ongoing in anticipation of Chapter 2 of the Legal Practice Act coming into effect (see section 120 for the schedule in terms of which the various provisions of the Act will come into effect).

The National Forum ('the National Forum') on the Legal Profession is created in terms of section 96 of the Act. (Section 96 is part of Chapter 10 which came into operation on 1 February 2015). Chapter 10 deals with the transition provisions between the current legislation and the full implementation of

the Act. The terms of reference (section 97) of the National Forum include the preparation and publication of a code of conduct for legal practitioners, candidate legal practitioners and juristic entities (section 97(1)(b) within 24 months after the commencement of Chapter 10- that is, by 1 February 2017.

The National Forum adopted a code of conduct on 26 November 2016. The code of conduct can be accessed via the website of the Law Society of South Africa ([www.lssa.org.za](http://www.lssa.org.za)). The code is wide-ranging and includes provisions relating to:

- Conduct of attorneys
- Approaches and publicity
- Specialisation and expertise
- Sharing of fees
- Sharing of offices
- Payment of commission

- Naming of partners and practice
- Replying to communications
- Naming in deed of alienation
- Specific provisions relating to conduct of attorneys
- Misconduct
- Conduct of advocates contemplated in section 34(2)(a)(i) of the Act (i.e. advocates practising with Fidelity Fund certificates)
- The norm of the reasonable fee
- General work
- Trust account advocates as prosecutors for the State
- Acting judicial appointments
- Interviewing of witnesses of the opposing party in civil proceedings
- Interviewing of prosecution witnesses by defence lawyer practitioner
- Conduct of legal practitioners not in private practice

Practitioners are urged to study the rules of conduct carefully as well as the provisions of the Legal Practice Act in general.