

I DO, I DO, I ALSO DO: EQUAL RIGHT TO MATRIMONIAL PROPERTY

Regional court to district court:
Horizontal and vertical application

Rooted in patriarchy:
Delictual claims in adultery cases

Demanding your interest –
a new era for sectional titles

POPI:
Compliance v defiance

Instituting a PI claim on behalf of a client:
Some considerations to be taken into account

Limiting the scope of the moratorium in business rescue:
Ejectment of unlawful occupier of a leased property

Open letter to candidates sitting for the
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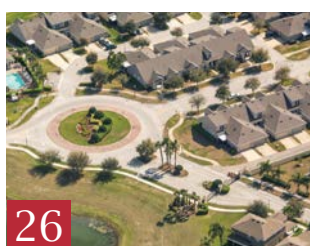
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FEATURES

16 I do, I do, I also do: Equal right to matrimonial property

A rather overdue advancement of womens' right to property ownership took place during women's month at the Limpopo Local Division of the High Court in Thohoyandou in the case of *Ramuhovhi and Another v President of the Republic of South Africa and Others* 2016 (6) SA 210 (LT). The High Court had an application before it challenging the constitutionality of the proprietary consequences in 'old polygamous customary marriages'. **Ndalama Maliseha and Keneilwe Radebe** discuss the case and polygamous customary marriages concluded before the Recognition of Customary Marriages Act 120 of 1998 came into operation.

20 Limiting the scope of the moratorium in business rescue: Ejectment of unlawful occupier of a leased property

Section 133 of the Companies Act 71 of 2008 (the Act) makes provision for a moratorium on legal proceedings and enforcement action against a company, or in relation to any property belonging to a company, or lawfully in its possession, being commenced or proceeded with in any forum, during business rescue proceedings, save for certain exceptions. **Ryan Smith** says that the predominant debate in our courts around the moratorium in s 133(1) of the Act has been on what constitutes a 'legal proceeding' or 'enforcement action' for the purposes of the moratorium.

22 Regional court to district court: Horizontal and vertical application

Section 35 of the Magistrates' Courts Act 32 of 1944 (the Act) regulates the transfer of matters from one magistrate's court to another. The question whether a matter can be transferred from the district court to the regional court for hearing and vice versa has been a bone of contention in recent times, especially after the regional court was given civil jurisdiction in terms of the Jurisdiction of the Regional Courts Amendment Act 31 of 2008. **Dr James Lekhuleni** discusses the two schools of thought on this question.

24 Rooted in patriarchy: Delictual claims in adultery cases

A failing marriage has been likened to a slow, sinking ship. The water starts seeping through the cracks and the ship slowly starts to rot, decompose and eventually sink. Similarly, if there is a rift in a marriage relationship, this relationship will also degrade to a situation where it can no longer sustain itself. This is the point where one of the parties, while the relationship is failing, may jump ship, find comfort and solace on a life boat, in the arms of someone else. Given the situations described above, can the courts continue to intervene as they have done in the past, and provide for a delictual claim against a third party based on adultery and then compensate the non-adulterous partner for the wrongs of the adulterous partner and the third party. In this article, **Tsogo Rampolokeng** discusses the impact of adultery and focuses on the *DE v RH* 2015 (5) SA 83 (CC) matter.

26 Demanding your interest - a new era for sectional titles

A new era for sectional title schemes, in fact for 'community schemes' was introduced on 7 October 2016 with the publication (GN R1231 GG40335/7-10-2016) of the regulations for the Sectional Title Schemes Management Act 8 of 2011 and the Community Schemes Ombud Service Act 9 of 2011 (the Act), signalling also the coming into effect of these two pieces of legislation. To describe the new playing field now created as revolutionary is not entirely inappropriate. In this article, **Tertius Maree** deals with only a very small part of its new demands on trustees, managing agents and attorneys.

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No more free copy of *De Rebus*?

As the profession reads itself for the imminent changes that will be brought about by the Legal Practice Act 28 of 2014 (LPA), we at *De Rebus* have considered what the LPA means for the future existence of the publication. The enactment of the LPA is sure to change the landscape of the legal profession while replacing the Attorneys Act 53 of 1979. The LPA is also set to change the statutory regulation of the legal profession with the establishment of the Legal Practice Council (LPC). This means that the four provincial law societies (Cape Law Society, KwaZulu-Natal Law Society, Law Society of the Free State, and the Law Society of the Northern Provinces) will fall away to form part of the LPC. What then does this mean for the attorneys' journal *De Rebus*?

De Rebus is published by the Law Society of South Africa (LSSA), which is made up of six constituent members. The six constituent members include the current four provincial law societies, the Black Lawyers Association and the National Association of Democratic Lawyers. With the falling away of the four provincial law societies, the publisher of *De Rebus*, the LSSA will be dissolved.

De Rebus has over the past 60 years, been circulated nationally, free of charge 11 times a year to approximately 19 000 attorneys and 3 000 candidate attorneys. Currently the costs of publishing *De Rebus*, which includes, *inter alia*, printing the journal and the classifieds, running the website and app, postage and editorial staff costs are funded by the Attorneys Fidelity Fund (AFF). The AFF funds the journal at a nomi-

nal annual rate under the provisions of s 46(b) of the Attorneys Act. Section 46(b) allows the AFF to provide for funding of programmes that enhance the standards of practice, which includes *De Rebus*.

The LPA does not contain a section similar to s 46(b). However, s 6(2)(f) states:

'(2) The Council, in order to perform its functions properly —

(f) may publish or cause to be published periodicals, pamphlets and other printed material for the benefit of legal practitioners or the public.'

As can be seen above, s 6(2)(f) does not enforce the publication of a journal as it uses the words 'may publish'. This could potentially mean that *De Rebus* may not exist post-LPA if the AFF does not continue to fund it.

De Rebus is published —

- so that attorneys who do not have access to libraries can use it for research;
- as a source to record the happenings of the profession;
- as a platform for attorneys to air their views;
- so that attorneys can showcase their talent to other practitioners in their chosen area of specialisation;
- to assist attorneys to manage their practice; and
- to record developments in the law in terms of cases and legislation.

The journal plays an important educational role that will surely be missed by the profession if it is no longer published. The big question is: How will *De Rebus* be funded in the future so that practitioners can continue to enjoy the benefits of receiving the free journal? Send us your views on the future funding of the journal at mapula@derebus.org.za



Mapula Sedutla – Editor

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2000 words.
- Upcoming deadlines for article submissions: 20 March and 18 April 2017.

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Limpopo gets its own Labour Court and Labour Appeal Court branch

On 6 February a branch of the Labour Court (LC) and the Labour Appeal Court (LAC) was opened at the Limpopo Division of the High Court in Polokwane. In a press release, Chief Justice Mogoeng Mogoeng said the branch is part of ongoing efforts to guarantee access to justice for all South Africans.

Section 156 of the Labour Relations Act 66 of 1995 states that the

LC and LAC has jurisdiction in all provinces of South Africa and, as such, the court has operated as a National Circuit since its establishment in 1996.

According to the press release, the LC has jurisdiction to adjudicate over cases referred from the Commission for Conciliation Mediation and Arbitration and bargaining councils. Litigants also have direct access to the court, including appeals emanating from LC hearings.

The LC and LAC are headed by Judge

President Basheer Wagley, while Judge Pule Lazarus Tlaletsi is the Deputy Judge President. Ten judges are appointed at the division and acting judges are appointed periodically to handle cases during recess periods.

Kgomotso Ramotsho,
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Tax Ombud happy with amendment of the Tax Administration Act

The Office of the Tax Ombud said it was pleased with the amendments to the Tax Administration Act 28 of 2011 (the Act). In a press release it said that the amendment to the Act will strengthen the independence of the organisation from the South African Revenue Service (Sars).

The amendment will also give the Office of the Tax Ombud powers when addressing taxpayer's complaints. The amendment further removed the requirement to consult with the Commissioner of Sars when the Tax Ombud appoints its staff and in addition the expenditure connected to the functions of the office of the Tax Ombud is paid in accordance with the budget approved by the Minister of Finance for the office.

The Tax Ombud's office pointed out that the amendment followed extensive inputs into the Tax Administration Act by the Tax Ombud, who had called for, *inter alia*, changes to sections of the Act that compromised the office's independence. On 19 January the proposed amendments to the Act was promulgated as the Tax Administration Laws Amendment Act 16 of 2016.

The Tax Ombud is now also mandated to review — at the request of the Minister of Finance or at its own initiative with the approval of the Minister of Finance — any systemic and emerging issues related to a service matter or the application of the provisions of the Act or procedural or administrative provisions of the Income Tax Act 58 of 1962. This brings the Office of the Tax Ombud in line with similar entities in other juris-

dictions such as Australia, United States and Canada.

According to the press release, another amendment is where the Ombud makes recommendations to Sars and such recommendations are not accepted by Sars or the taxpayer, reasons for such decision must be provided to the Tax Ombud within 30 days of the notification of the recommendation.

The CEO of the office of the Tax Ombud, advocate Eric Mkhawane said the amendments are encouraging and a step in the right direction in ensuring that the Tax Ombud can fulfil his mandate without a perception that his office is an extension of Sars.

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2016 prize winners for best articles in *De Rebus*



Johannesburg attorney, Dineo Peta, won the 2016 LexisNexis Prize for the best article by a practising attorney, published in De Rebus.



Cape Town candidate attorney, Amy Farish, won the 2016 Juta Law Prize for the best candidate attorney article, published in De Rebus.

Johannesburg attorney, Dineo Peta has won the 2016 LexisNexis Prize for Legal Practitioners for the best article by a practising attorney published in *De Rebus*. Ms Peta won the prize for her article titled 'The effect of the "once empowered always empowered" rule on the mining industry', published in 2016 (Nov) *DR* 32. The article discussed the debate around the 'once empowered always empowered' rule following the publication of the draft Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry on 15 April 2016.

Giving her opinion in the article, Ms Peta said the rule of 'once empowered' can have no legal standing in a constitutional democracy with a founding value of equality. Ms Peta won a Lenovo Tablet, as well as one year's free access to one practice area of Practical Guidance. Ms Peta said she felt humbled to receive a prize of that magnitude from one of the best law journals.

Cape Town candidate attorney Amy

Farish won the 2016 Juta Law Prize for Candidate Attorney for her article titled 'Protection of Investments Act – a balancing Act between policies and investments' published 2016 (May) *DR* 26. In her article Ms Farish discussed matters concerning the Protection Act 22 of 2015. She tackled some questions on whether concerns around the Act were legitimate and if the Act would actually cause any significant difference to the investment climate of South Africa.

Ms Farish won a tablet device and Juta's online Essential Legal Practitioner Bundle worth R 20 000. Ms Farish said it is a privilege to have won the prize and that she felt truly honoured. 'A big thank you to *De Rebus* for publishing the article and to the sponsors for the prize. I am very surprised at the news and feel very proud of my achievement,' she said.

*Kgomotso Ramotsho,
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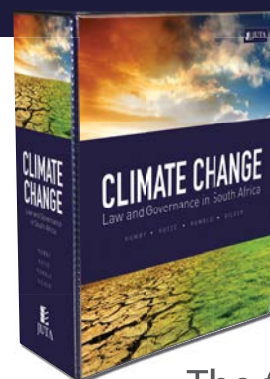
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LSNP shows generosity to shelters of abused women

The Law Society of the Northern Provinces (LSNP) brought festive cheer to victims of abuse. On 14 December 2016 two shelters for abused women and children in Gauteng received handbags filled with much needed items from the LSNP. This comes after the LSNP started its 'Handbag Project with Toiletries' in November 2016. Council member and former Vice President of the LSNP Khanyisa Mogale, said that the initiative came up prior to the high tea event that they had before their past annual general meeting in 2016.

Ms Mogale pointed out that guests were required to bring some toiletries as entrance fee for the high tea event. She said the original idea was to collect toiletries to donate to female prisoners. However, the LSNP thought it would start first by donating to women who stay at shelters for abused women and children in support of the 16 Days of Activism for No Violence Against Women and Children. iKhaya Le Themba (Home of Hope) and the Salvation Army Church that runs the Beth Shan shelter were the two beneficiaries to receive early Christmas present from the LSNP.

Handbags filled with toiletries such as bath soap, body lotion, tooth paste and sanitary pads were handed over to the representatives of both shelters. Ms Mogale noted that the project will continue from where it started. 'We would like to do this quarterly but it will depend on the response we get from those who are interested in participating by donating,' she said.

Both representatives of the women's shelters expressed their gratitude to the LSNP. Manager of the Beth Shan shelter, Major Moya Hay of Salvation Army Church said that their shelter caters for women and children who are abused or have been victims of prostitution and human trafficking. She pointed out that when these women flee to their shelter they arrive with absolutely nothing and



From left: Major Moya Hay of the Salvation Army Church with council member and former Vice President of the Law Society of the Northern Provinces (LSNP), Khanyisa Mogale and Sindisiwa Maseko of the iKhaya Le Themba Women's shelter at the LSNP's 'Handbag Project with Toiletries' event in December 2016.

said that the gifts from the LSNP would go a long way to making the women's Christmas special. 'I am very excited about the handbags and all the gifts, we are grateful for people like you,' she said.

Manager of iKhaya Le Themba (Home of Hope) one stop shelter, Sindisiwa Maseko, said that their shelter cannot give the women and their children everything they need. She said that the do-

nation would help the women and make them feel acknowledged by society. 'We really appreciate that you could come up with this project, our women will be pampered and this project will bring change,' she said.

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What we do for ourselves dies with us. What we do for others and the world remains and is immortal – Albert Pine

www.salvationarmy.org.za

Art depicting Anton Lembede revealed in KZN

A large piece of art representing the late lawyer and founding member of the African National Congress Youth League, Anton Lembede, has been installed in KwaZulu-Natal (KZN). The permanent public art is displayed on the corner of Anton Lembede Street and 6 Durban Club Place, a home of the majority of legal practices and home of the KZN Bar Council, to mark the start of regeneration of the Durban Club Place.

In a press release Urban Lime Properties said the artwork, entitled 'Anton Lembede Bachelor of Law', is the largest privately funded public art piece in KZN and one of the largest in the country, covering just under 600m². Artist Sakhile Mhlongo's art

piece shows Lembede striding purposefully towards the court carrying his briefcase.

Urban Lime Properties commissioned Mr Mhlongo who painted several prominent figures for the city of Durban. The Chief Executive Officer of Urban Lime Properties, Jonny Friedman, said research showed that public art played a very important part in urban regeneration, by making an immediate impact and land-mark statement in the city as, well as offering people a sense of peace, hope and history. Mr Mhlongo said that he was honoured to be a part of the process of regeneration of the city he loves.

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Dance champions awarded gold



East London attorney, Ben Niehaus (right) and his dancing partner Belinda Smith (left), won gold medals in the senior dancers' category for Ballroom and Latin dancing at the South African Dance Sport Federation National Achievers Championships held at Sun City in December 2016.

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Top achievers awarded at the Legal Aid South Africa annual awards

Legal Aid South Africa (Legal Aid SA) honoured its top achievers at its annual achievers awards ceremony. The awards were held last year November at Lilieslief Farm, Rivonia. In a press release, Legal Aid SA said that the awards were to honour high performers throughout the organisation for their contribution for ensuring access to justice.

Lawyers from the district, regional and High Courts were recognised, as well as civil lawyers and paralegals. Legal Aid SA said the hard work of lawyers ensures that more members of the public are able to receive legal assistance, in line with their constitutional rights and their constitutional mandate.

Winners were announced in the following categories:

- Supervisory/programme manager of the year: Gudu Mngomezulu.
- Lawyer of the year – High Courts: Leona Fraser.
- Business unit of the year: Nomsa Nkosi.
- Lawyer of the year – district court: Wayne Hancock.
- Lawyer of the year – civil: Tessa Gopal.
- Lawyer of the year – district courts: Nkateko Ngidi.
- Manager of the year: Stephen Mofokeng.



*The winners of the Legal Aid South Africa Annual Achievers Awards.
Back Row: Gudu Mngomezulu; Leona Fraser; Nomsa Nkosi;
Wayne Hancock; Tessa Gopal; and Nkateko Ngidi. Front Row:
Stephen Mofokeng and Ayanda Silumko.*

- Second runner-up lawyer of the year: Ayanda Silumko.
- Paralegal of the year: Amanda Mdaka.

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PEOPLE & PRACTICES

People and practices

Compiled by Shireen Mahomed

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Stegmanns Inc in Pretoria has appointed Disemelo Tlali as a Professional Assistant in the General Litigation and Labour Law Department.



Jurgens Bekker Attorneys in Johannesburg has appointed Shanne De Klerk as a junior associate.

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

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

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Code of Conduct for the future profession published

The Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities, that will govern the legal profession in the Legal Practice Act dispensation, was gazetted on Friday, 10 February (GenN81 GG40610/10-2-2017).

The code is not in force yet, but will apply to all legal practitioners (attorneys and advocates) as well as candidate legal practitioners and juristic entities when the Legal Practice Act 28 of 2014 (LPA)

comes into operation. This is envisaged to be in 2018.

The National Forum of the Legal Profession adopted the Code of Conduct, prepared by its Rules Subcommittee in terms of s 97(1)(b) of the LPA, at its meeting in November 2016.

The Code of Conduct will be taken up by the Legal Practice Council (LPC) when it comes into operation in 2018. In terms of s 36 of the LPA, the LPC must publish the draft of the Code of Conduct and call for comment in writing. The final code must then be gazetted. The Code of Con-

duct will serve as the prevailing standard of conduct for legal practitioners, candidate legal practitioners and juristic entities under the LPA dispensation. Failure to adhere to the code will constitute misconduct.

The Code of Conduct can be accessed on the LSSA website at www.LSSA.org.za under the 'Legal Practice Act' section.

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LSSA congratulates former Public Protector on Commonwealth Law Conference Rule of Law Award

The Law Society of South Africa (LSSA) congratulated former Public Protector advocate Thuli Madonsela on being selected as the recipient of the 3rd Commonwealth Law Conference Rule of Law Award in a press release in February. According to the press release issued by the LSSA, Ms Madonsela would accept the award at the closing ceremony of the 20th Commonwealth Law Conference in Melbourne, Australia, which will be held from 20 to 24 March.

LSSA Co-chairpersons, Jan van Rensburg and Mvuzo Ntyesesi said: 'The LSSA, which is a member of the Commonwealth Lawyers Association, nominated

Ms Madonsela for the award. We are delighted and proud that this worthy South African lawyer will receive international recognition from her peers across the Commonwealth for her work in protecting our Constitution and promoting the concept of the Rule of Law – that all are equal before the law – to all South Africans'.

According to the LSSA press release, the Commonwealth Lawyers Association (CLA) partners with LexisNexis in presenting the biennial Commonwealth Law Conference Rule of Law Award which recognises an individual, institution or firm or lawyers who have made an outstanding contribution to the rule of law,

which has had an impact, both within their own country, and to the broader Commonwealth. 'The CLA says its judging panel found Ms Madonsela to be a very worthy winner who demonstrates the attributes this award seeks to foster within the Commonwealth', the press release stated.

The two previous winners of the Commonwealth Law Conference Rule of Law Award have been Robin Sully from Canada and Upul Jayasuriya from Sri Lanka.

*Nomfundo Manyathi-Jele, Communications
Officer, Law Society of South Africa,
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LSSA AGM in Port Elizabeth in April

The LSSA conference and annual general meeting (AGM) will be held from 21 to 22 April. The AGM will be held at the Boardwalk International Convention Centre in Port Elizabeth. The theme of the conference this year will be: 'The state of the profession in 2017, looking forward'. Attorneys are welcome to attend at no charge. More information, including the programme, is available on the LSSA website at www.LSSA.org.za under 'Events'.

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

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This popular empowerment and networking programme will be held in Cape Town and Durban this year.

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- Session 1: 25 and 26 May 2017
- Session 2: 20 and 21 July 2017

Durban

- Session 1: 29 and 30 May 2017
- Session 2: 14 and 15 August 2017

The sessions will be followed by networking events.

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**Participation deadline:
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For more information: www.LSSA.org.za or e-mail Dr Jeanne-Mari Retief at retiefj@calibrics.com

By
Examiner,
Gauteng

Open letter to candidates sitting for the notarial examinations

As a member of both the drafting panel and panel of examiners for notarial papers, I must admit to being somewhat alarmed and concerned about the standard of knowledge of the majority of candidate attorneys (CAs). Looking at the poor results, I can only surmise that either the level of knowledge and competence required of a notary is misunderstood, or the examination is totally underestimated.

The office of a notary is a specialised field, an add-on as it were to the profession of an admitted attorney, and the only legal office held by a South African lawyer that is recognised almost universally, without any further questions. As such it is an important part of our legal 'make-up', and its integrity and stature should be protected, in the first instance by keeping the standards for admission to practice as a notary on a level in keeping with the status of the profession and the knowledge and skills expected from a notary.

It may be true that the majority of notaries would for years practice and only attend to ante-nuptial contracts, some authentication of documents and the odd servitude, long-term lease or notarial bond.

Once admitted, however, the notary is authorised to attend to all matters notarial, and he or she should be competent to do so.

Of importance is the weight that our courts not only bestow on, but demand from the office as voiced in a number of court cases.

The purpose of this article is not to extoll the virtues of notaries, but to give some direction to prospective candidates in preparing for the examination. Here are ten points that CAs would do well to remember in preparing for, and sitting for the examination.

- Do not underestimate either the office of a notary nor the skills required to practice as a notary.
- Most notarial deeds require registra-

tion in the Deeds Office. Knowledge of the Deeds Registries Act 47 of 1937 (DRA) and its regulations are essential. Drafting the deed without proper regard to the vesting and property descriptions will do you no good.

- Read the question. Make sure you understand what is required of you before you answer. Questions are mostly drafted with the basic information that your client would provide, without knowing (or caring) what specific document would be required, or the format thereof. The question, therefore, as much tests your knowledge of what would be required as the actual drafting thereof.

- Practice your drafting skills. Although the deeds office will not interfere with your document other than with reference to the DRA regulations or requirements, the document should be unambiguous and capable of easy interpretation. Have your principal, partner or study mate look at your drafting.

- Come to a conclusion. It appears that many candidates remember the melody but forget the words: Whereas ... and whereas ... and whereas ... but, 'no' or 'never'. This is the heart of your document and should clearly explain the impact and intent of the document.

- Correctly identify the document in its heading. This shows that you understand what is required to be done, and helps the examiner to follow your logic to the conclusion/object of your document. You actually get marks for the heading.

- Remember that the law attaches a higher degree of understanding by the parties to a notarial document than an underhand document. This is because it is required of the notary to explain the document and is import to the signatories, and it is assumed that the notary has indeed performed this function.

Some questions are, therefore, bound to be asked to test, not only your drafting skills, but also your understanding of certain legal principles, for instance the difference between personal right and personal servitudes.

- The powers that be have decreed that 50% is all you need to pass and a mark of 40% to 49% allows you the privilege of an oral examination. The oral is not a re-examination, in other words, if you pass the oral, it does not necessarily mean that you pass the exam. It is an opportunity to show that you indeed have a clear understanding and rational thought process, and to prove to the examiners that your failure to achieve 50% in the written paper was but an *obscurum intervallum*, and that had the pressure of writing an exam or the lack of time to think not have numbed your senses, you would have passed the first time. Revisit the questions and answers you gave so that you are able to prove that you know where you went wrong. Do not ignore the written paper in your preparations, although of course questions are not confined to the paper.

- Remember that a notary keeps a protocol in which, *inter alia*, all documents providing proof of authority of signatories to notarial documents are filed. You should, therefore, also have knowledge of what documents are required to prove such authority (obviously with reference to the founding document of the specific party and/or the underlying applicable statute, for instance the Companies Act 71 of 2008) and how to draft such resolutions.

- The office of a notary requires a sound knowledge of the law in general and a specialised knowledge of matters notarial. This includes knowledge of a multitude of legislation –

- the DRA;
- Income Tax Act 58 of 1962;
- Sectional Titles Act 95 of 1986;
- National Credit Act 34 of 2005;
- Matrimonial Property Act 88 of 1984;
- Wills Act 7 of 1953;
- Companies Act; and
- Subdivision of Agricultural Land Act 70 of 1976, etcetera.

Do not ignore this legislation in your preparation. Good luck.



Examination dates for 2017

Conveyancing examination:

- 10 May
- 6 September

Notarial examination:

- 7 June
- 11 October

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

By
Thomas
Harban

Instituting a PI claim on behalf of a client: Some considerations to be taken into account

Certain general areas of concern with professional indemnity (PI) claims

In our previous practice management articles, the Attorneys Insurance Indemnity Fund NPC (the AIIF) have often focussed on alerting attorneys to the common risk areas in practice and have made suggestions with regard to the mitigation of these risks. Our articles have thus focussed on how to avoid being a defendant in a PI claim. In this month's article, the AIIF has opted to address the risks from the opposite side and will focus on the considerations to be taken into account by plaintiff's attorneys in pursuing PI claims on behalf of clients.

In recent years there has been a marked increase in the number of PI claims brought against attorneys and other professionals (medical professionals in particular). It has previously been noted that as other areas of work have seen a decline, some members of the legal profession have seen the pursuit of PI claims as a new area in which work (and fees) can be generated. Naturally, persons who suffer a loss as a result of the negligence of a professional are within their rights to pursue a PI claim against the party concerned. However, practitioners pursuing PI claims on behalf of their clients should be aware of the specific risks associated with this type of work. The pursuit of a PI claim could potentially be a double-edged sword for the practitioner acting for the plaintiff if the risks associated with this specialist type of work are not adequately addressed. The AIIF has been notified of a number of claims where the attorney instructed to act for a plaintiff in a PI claim is, in turn, later sued by the erstwhile client on the basis that the initial PI claim was not properly handled resulting in the client suffering damages. This has particularly been the case with medical malpractice claims but the risks can apply to other PI claims as well.

One of the risk areas is that some members of the profession cite the incorrect defendant. In the *Risk Alert Bulletin* (No.1/2017) (RAB) distributed with the combined January/February 2017 issue of *De Rebus* (see also www.aiif.co.za/riskalert/, accessed 3-2-2017), the AIIF included an article giving an update on some of the considerations to be taken into account in pursuing medical malpractice claims. The considerations that

the AIIF has highlighted in the RAB, include those aimed at ensuring that the correct defendant is cited. Other considerations to be taken into account in all PI claims include the correct quantification of the damages and calculation of prescription periods. Practitioners must be careful not to under-settle professional indemnity claims and must also be aware in order to avoid the prescription of the PI claims in their hands. Prescription runs in PI claims, as with any other type of claim.

Where an attorney is instructed to pursue a claim against, for example, a medical professional or a health care provider, it would be considered unusual that the PI insurer of such party is cited instead of the party concerned. However, with claims against attorneys, plaintiff's attorneys often incorrectly cite the AIIF instead of the party against whom the alleged claim arises. The result is that the AIIF dedicates resources (human and financial) to defending a claim where it should not be cited as a party.

In circumstances where the party against whom the PI claim lies is sequestered, practitioners should examine the facts carefully in order to ascertain whether or not the provisions of s 156 of the Insolvency Act 24 of 1936 will apply. This section reads as follows:

'156. Insurer obliged to pay third party's claim against insolvent

Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.'

The investigation to be carried out before instituting a claim in terms of s 156 of the Insolvency Act should include –

- whether or not there was an insurance policy in place;
- the terms of such policy (including the limit of indemnity available); and
- an assessment of whether or not such policy would have responded to the claim.

Section 156 of the Insolvency Act does not give more rights to the creditor than the insured would have had in the ordinary course.

The AIIF have been notified of a number of claims, where it (as an entity), is cited as a defendant rather than the law firm – which dealt with the underlying matter – and against which the alleged claim lies. In addressing this question, it would be prudent to give an overview of the AIIF and its functions. Unfortunately, there are many practitioners who are still unaware of the existence of the AIIF, its functions, the basis on which it provides indemnity or to whom such indemnity is provided.

The AIIF

The AIIF is a non-profit, short-term insurance company established by the Attorneys Fidelity Fund (the Fund) acting in terms of ss 40A and 40B of the Attorneys Act 53 of 1979. The AIIF protects the profession from losses associated with professional indemnity claims, which indirectly provides a benefit to members of the public. The AIIF provides PI insurance, bonds of security to executors and risk management services to the profession. The AIIF services are provided at no cost to the profession, the funding being provided by way of an annual premium paid by the Fund. (The funding model of the AIIF will change in the near future and the profession will be called on to make a contribution to the premium funding. The Fund and the AIIF will communicate further with the profession in this regard in due course.)

The AIIF issues one Master Policy annually in terms of which all practising attorneys are covered. A copy of the AIIF policy can be accessed on our website www.aiif.co.za.

The Preamble of the AIIF policy reads as follows:

'The Attorneys Fidelity Fund, as permitted by the [Attorneys] Act, has contracted with the **Insurer** [the AIIF] to provide professional indemnity insurance to the **Insured**, in a sustainable manner and with due regard for the interests of the public by:

- a) protecting the integrity, esteem, status and assets of the **Insured** and the legal profession;
- b) protecting the public against indemnifiable and provable losses arising out of the **Legal Services** provided by the **Insured**, on the basis set out in this policy.'

(The words in bold appear as such in the policy and are defined in that document.)

Provided that each sole practitioner,

partner or director in a legal practice or any person who is publicly held out to be a partner or director of the legal practice has, or is obliged to have, a current Fidelity Fund Certificate at the time the claim is made, the AIIF insures such legal practices providing legal services. The AIIF policy covers:

- sole practitioners;
- partnerships; and
- incorporated practices of practitioners.

Former partners, the estates of deceased practitioners and employees of the legal practice are also covered on the terms set out in the policy. Regard must be had to clause 5 of the AIIF policy in order to ascertain who is covered.

The AIIF policy sets out the terms of insurance relationship between the company (as insurer) and legal practitioners covered by the policy (as insureds). The policy does not give any rights against the AIIF to third parties (such as claimants) (see clause 39). The policy sets out the basis on which the AIIF agrees to grant indemnity *to the insured* against professional legal liability to pay compensation to any third party (see clause 1). Only an insured can thus notify the AIIF of a claim or submit an application for indemnity in terms of the policy.

Regard should be had to the *res inter alios acta, aliis nec nocet nec prodest* maxim. A third party (such as a claimant), is not a party to the AIIF insurance

policy and thus cannot claim rights afforded to an insured attorney under the policy.

The AIIF has also had an increasing number of attorneys acting for plaintiffs against insured firms who institute action against the firm concerned, but then also seek (*qua* plaintiff) to notify the AIIF of the claim. These purported applications for indemnity by the plaintiffs will not be entertained by the AIIF.

Where, without legal basis, the AIIF is cited in claims, the actions will be defended and the AIIF will look to the plaintiffs and their legal representatives to refund the costs incurred in pursuing a defence in such matters.

Legal practitioners pursuing actions, where the incorrect defendant is cited, run the risk of the claim against the correct defendant prescribing in their hands.

Practitioners must also familiarise themselves with the differences in the functions and the risks covered by the Fund and the AIIF respectively. The Fund is a creature of statute (s 25 of the Attorneys Act) and its purpose is set out in s 26 of that Act. There are certain limitations to the liability of the Fund (s 47). When acting for a claimant in circumstances where there has been an alleged theft of trust funds, practitioners should have regard to the time limits for the pursuit of such claims (see the

Fund's website www.fidfund.co.za for details). An investigation should also be made into whether or not the alleged defaulting attorney had insurance for misappropriation of trust funds – this will assist in assessing whether the circumstances fall within the ambit of s 156 of the Insolvency Act and also insofar as the Fund's limitations of liability in terms of s 47 are concerned.

In circumstances where the AIIF has issued a bond of security to an attorney appointed as executor of a deceased estate, such bond of security is issued in favour of the Master of the High Court. A party acting for a beneficiary of an estate who alleges that the executor has failed to properly act in any manner will thus have to report the matter to the Master who, as the party in whose favour the bond is issued, will address the matter with the AIIF and seek to trigger the cover in terms of the bond.

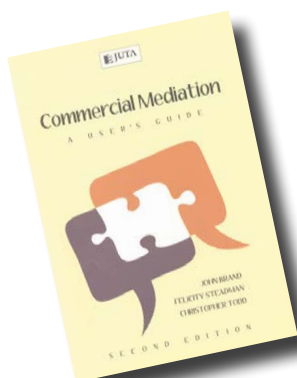
Conclusion

Practitioners are urged to contact the AIIF should they have any queries regarding any of the issues raised in this article.

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

BOOK ANNOUNCEMENTS

Book announcements



Commercial Mediation: A user's guide

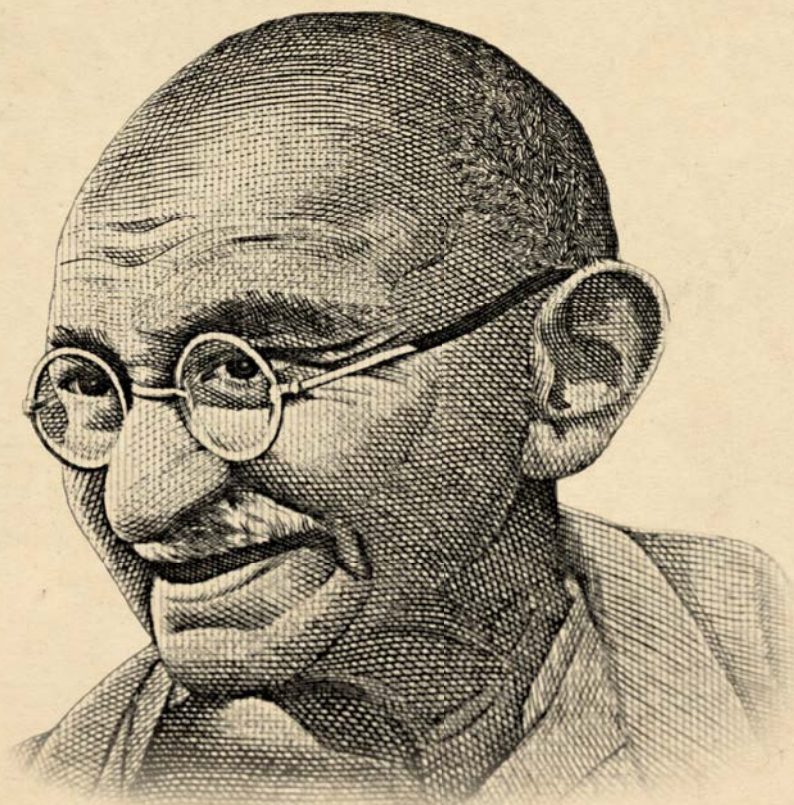
By John Brand, Felicity Steadman and Chris Todd
Cape Town: Juta
(2016) 2nd edition
Price: R 300 (incl VAT)
154 pages (soft cover)



The Medicines Act Old & New: A comparative consolidation

By Juta's Law Editors
Cape Town: Juta
(2016) 1st edition
Price: R 250 (incl VAT)
137 pages (soft cover)

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By
Sasha
Beharilal

POPI: Compliance v defiance

There has been a buzz around the Protection of Personal Information Act 4 of 2013 (POPI), which was promulgated in 2013, but it has not been in full effect, the buzz may seem to be white noise. If you choose to take an active role in becoming compliant, you will not win any award or receive a gold star on your forehead, but you will gain and retain the trust of your clients, customers and employees. If you choose to be defiant and ignore the white noise because 'it is not urgent yet' then it is likely that you will fall into the deep end when it is urgent, and this will result in sloppiness and subsequent legal problems.

Compliance with POPI is not an easy task; the process requires you to consult with lawyers, technology experts and consultants who will identify potential risks. You will then spend money on security measures and training to mitigate those risks, so is it worth it to commence the process, or can you afford to wait?

There are hundreds of articles explaining what POPI is, however, in most cases, POPI is regurgitated and summarised, and many authors are still confused as to what is required to be compliant. To understand what is expected of you in terms of POPI, there are eight conditions that you must be aware of.

Accountability

You, as the responsible party, have the obligation of ensuring that information is processed lawfully. A responsible party is defined as 'a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.'

Regardless if you are the manager of a gym or large corporation, your entity possesses information on your clients, customers, employees and third parties. You are, therefore, responsible for how an individual's information is used.

Processing limitation

Information must be processed for its given purpose. If you require identification for the purpose of entering an office building, for example, it is not necessary for you to process or collect information

related to an individual's health records. That would be irrelevant and excessive and, therefore, unlawful. A gym, however, would require an individual's health information to ensure that if a member has an incident, the appropriate action can be taken. Individuals must consent to the processing of their information (s 11(1)(a)).

Purpose specification

Personal information must be collected for a specific purpose that is clearly defined, and the individuals in question must be aware of this. Information must not be retained for longer than necessary. For example, if you are operating a spaza shop and someone has bought on credit, their information must be deleted on full payment, or when an individual decides to terminate their membership with a gym, the gym must – unless it has a legitimate reason to keep them – remove all records of that individual. Exact terms regarding data retention and destruction should be stipulated in the relevant contracts. Once the purpose of the data collection has been fulfilled, information must be removed or individuals must be de-identified. Another example is the use of camera surveillance. Due to security concerns, many businesses use closed-circuit television (CCTV) cameras. CCTV collects your biometrics. Biometrics is defined as 'a technique of personal identification that is based on physical, physiological or behavioural characterisation including blood typing, fingerprinting, DNA analysis, retinal scanning and voice recognition'. A sign that says 'These premises are under CCTV surveillance' or 'Smile you are on camera' is not POPI compliant. A sign that says 'CCTV in use for the purposes of crime prevention' is compliant as it informs individuals that data is being collected and the reason for collection.

Further processing limitation

The further processing must be compatible with the purpose of the collection of personal information. You must ensure that you do not divert from the reason the information was collected. If your primary reason for collecting personal

information is for statistical purposes, you cannot then sell this information to marketers, with the case of CCTV footage, you will not be allowed to use the footage in a movie, for example, as the object of collection was the collection for security purposes.

Information quality

This one is simple. The information must be accurate, complete and up-to-date. An example of good practice in this regard, is to try to regularly verify information. The South African Revenue Service and commercial banks are particularly good at this, although they may have other reasons for doing so.

Openness

When processing or collecting personal information, the individuals whose information is being collected and processed must be notified and made aware. It is unlawful to process an individual's information behind their back. A good example – which is likely to become more prevalent – is warning visitors to your website that you use cookies (small programs that install themselves on a computer) and obtain the individual's consent.

Security safeguards

You need to take adequate measures to ensure that the personal information is secure and identify all the reasonable foreseeable risks and take proactive measures to prevent them. For example, if your spaza shop is in a crime ridden area, your premises will require fences, a safe and an alarm system in addition to a standard firewall. If you are a large corporation, such as an insurance company, your business has information regarding peoples' income, jobs, age, sex, status, medical records and so forth. Sensitive information such as this must be protected with the adequate level of security. It is your duty to ensure that your partners, who have access to this information, meet the minimum security requirements. This includes firewalls, state of the art antiviruses, strong encryption and POPI training for staff.

Data subject participation

Individuals are the data subjects, and

they have the right to access all their personal information that has been collected, they may request the information be corrected or for the removal of outdated and irrelevant information.

If you chose to be defiant, existing and potential customers and employees will gravitate towards businesses that process their information in a lawful manner. For example, TalkTalk, a UK tel-

ecommunications company, lost 101 000 customers and £ 60 million in revenue after a data breach (Kat Hall 'TalkTalk admits losing £ 60 m and 101 000 customers after that hack' www.theregister.co.uk, accessed 2-2-2017).

Any person convicted of an offence in terms of POPI faces imprisonment of up to ten years and or a fine, not to mention the civil actions instituted by aggrieved

individuals. Defiance could save costs in the short term, but could result in criminal and civil actions being instituted against you in the future, and litigation is not cheap.

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THE SA ATTORNEYS' JOURNAL

DE REBUS

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- Contributions should be useful or of interest to practising attorneys, whose journal *De Rebus* is. Preference is given, all other things being equal, to articles by attorneys. The decision of the editorial committee is final.

- Authors are required to disclose their involvement or interest in any matter discussed in their contributions.

- Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.

- Footnotes should be avoided.

Case references, for instance, should be incorporated into the text.

- When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details must be included.

- All sources in the article should be attributed.

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- Articles should be in a format compatible with Microsoft Word and should either be submitted by e-mail or, together with a printout on a compact disk. Letters to the editor, however, may be submitted in any format.

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I do, I do, I also do: *Equal right to matrimonial property*

By Ndalama
Maliseha and
Keneilwe
Radebe

A rather overdue advancement of women's right to property ownership took place during women's month at the Limpopo Local Division of the High Court in Thohoyandou in the case of *Ramuhovhi and Another v President of the Republic of South Africa and Others* 2016 (6) SA 210 (LT). The High Court had an application before it challenging the constitutionality of the proprietary consequences in 'old polygamous customary marriages'. The term 'old polygamous customary marriages' in this article is used to describe polygamous customary marriages concluded before the Recognition of Customary Marriages Act 120 of 1998 (RCMA) came into operation.

Applicants in this case challenged s 7(1)



Picture source:
Gallo Images/iStock

of the RCMA in that it provided that customary law shall continue to govern proprietary consequences of polygamous marriages entered into prior to the enactment of the RCMA. In the *Ramuhovhi* matter by virtue of s 7(1) and the applicable Venda custom, wives in old polygamous customary marriages acquired no rights in or control over marital property. The High Court in the *Ramuhovhi* matter held that s 7(1) was unconstitutional in that it was discriminatory on the grounds of race, ethnicity and social origin.

This section was also under fire in the case of *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC). The Constitutional Court (CC) in *Gumede* held that s 7(1) was unconstitutional and discriminatory on the grounds of gender in as far as it related to monogamous customary marriages entered into prior to the RCMA. Unfortunately, the situation remained unchanged for old polygamous customary marriages until quite recently.

This article commends the judgment in *Ramuhovhi* for its attempt to cure the injustice 'long suffered' by women in old customary marriages, in particular, polygamous marriages. The next section briefly summarises the facts and findings of the judgment, which highlights the perpetual struggle of wives in old customary marriages. It further exposes a significant loophole found in the RMCA with regard to its failure to protect the 'particularly vulnerable'.

Facts in the *Ramuhovhi* matter

The deceased (husband) had during his lifetime concluded three polygamous customary marriages and two civil marriages (at para 6). The first civil law marriage was terminated by divorce in 1984 (at para 6). The deceased's second civil law marriage was declared null and void by the Supreme Court (SCA) in *Netshituka v Netshituka and Others* 2011 (5) SA 453 (SCA). The said marriage was concluded while the deceased was still a party to subsisting customary law marriages (at para 7).

The applicants are the deceased's surviving children from his two polygamous customary marriages concluded before the enactment of the RCMA (at para 10). The applicants sought old polygamous customary marriages to have the legal consequences of a marriage in community of property (at para 2). The position prior to this judgment was that, in accordance with s 7(1) of the RCMA and applicable Venda custom, such wives of old polygamous customary marriages did not have any rights or control of the matrimonial property (at para 14). Due to this position, the deceased, had managed to unilaterally alienate certain

marital fixed property and further co-own the property with his 'second civil law wife' to the exclusion of his customary law wives (at para 12). This fixed property was the bone of contention in this case. The deceased further in his will bequeathed his 'half share' of the joint estate to his wives and further appointed his 'second civil law wife' as the executrix of his estate (at paras 8 – 9). The deceased's will was held to be legally valid and binding by the SCA in the *Netshituka* matter. The 'second civil law wife' was also referred by the deceased as 'his wife to whom he is married in community of property' (at para 8). Thus the consequence of s 7(1) was that the deceased managed to bequeath a larger portion of the estate in his will. This effectively made it possible for the deceased to bequeath a greater share of the estate to his 'second civil law wife' to the disadvantage of his customary law wives.

The *amicus curiae* made an important submission in that wives in old polygamous customary marriages are 'particularly vulnerable' (at para 15). This submission was further supported by Lamminga AJ wherein she mentioned that, denying such wives equal protection perpetuates their vulnerability as they have for a long time been in need of protection (at para 33). The court further added that: 'Old polygamous customary marriages are a reality and many women and children still live in these types of family relationship' (at para 33). Thus the women and their children were in need of protection. The court also referred to the fact that South Africa is bound by certain international treaties that require party states to protect the fundamental rights of vulnerable women (at para 34). The court ultimately held that s 7(1) was discriminatory on the basis of race, ethnic or social origin and that there was no justification for such discrimination (at para 46). This section was also found to create an unjust differentiation between wives in monogamous and polygamous marriages (at para 46). This particular section defeated the purpose of the RCMA.

The court thus ordered that wives in old polygamous customary marriages should enjoy equal rights in the matrimonial property between each of them and their husband (at para 63). Therefore, these wives will have the right to equally manage and control matrimonial property. The court in its effort to retain the customary concept of polygamous marriage ensured that a distinction is maintained with regard to house property, family property and personal property (at para 63). Since in polygamous marriages separate property comes into being, the court in its judgment ensured that only the husband and the wife of the

property concerned, jointly enjoy equal rights to the benefit of the house (at para 63).

Ending women's perpetual discrimination emanating from customary law

This case brings into focus customary succession laws that discriminate against vulnerable women in customary marriages. Lamminga AJ in *Ramuhovhi* acknowledged the continuing plight and long struggle of such wives in old polygamous customary marriages. The judgment also exposes the irregularity of the RMCA in its failure to protect the most vulnerable women and children in such marriages.

Wives in old polygamous customary marriages are particularly more vulnerable and this comes as a result of them being subjected to discriminatory and codified customary laws. Thus the failure of the RCMA to protect such wives comes as a contradiction of the Act's purpose. The *Ramuhovhi* case followed the footsteps of noteworthy cases such as *Gumede* and *Bhe v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) wherein the CC declared discriminatory customary law rules of succession as invalid and unconstitutional.

These cases also expose how such women were subject to discriminatory codified customary laws preventing them from inheriting and also leaving them susceptible to eviction. In the *Gumede* matter s 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 excluded wives from the managing and controlling matrimonial property (at para 3). While in the *Bhe* matter, s 23 of the Black Administration Act 38 of 1927 provided for the rule of male primogeniture, which prevented women within customary law relations from inheriting property (at para 1). These cases sadly exposed the vulnerability of such women to eviction and in most cases both the women and children suffer. Thus the judgment in *Ramuhovhi* comes a long way in ensuring women's rights to property ownership which in turn protects women's right to dignity and equality.

The contradictory nature of s 7(1) of the RCMA and its failure to protect 'the particularly vulnerable'

In *Gumede*, Moseneke DCJ mentioned the following in regard to the RCMA: 'It represents a belated but welcome and ambitious legislative effect to remedy the historical humiliation and exclusion



meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country' (at para 16).

From the above quote it appears that the RCMA had a noble intention of the protection of the rights of all spouses, women in particular, involved in customary marriages. However, unfortunately s 7(1) of the RCMA hampers the objec-

tive. Section 7(1) further rendered empowering sections such as s 6(1) useless when it comes to protecting the rights of spouses in old polygamous customary marriages. Section 6(1) sought to abolish marital power by granting all spouses equal power in terms of the controlling and management of marital property. Section 7(1), however, defeats this purpose as the applicable customary law in most cases sees the husband as the head of the house who has full control over marital property.

Conclusion: Caution in the application of the RCMA

This judgment clearly highlights that the RCMA unfairly discriminates against women in old customary marriages. It appears that legislators were more concerned with the protection of customary marriages concluded after the enactment of the RCMA. Unfortunately, spouses of new customary marriages are not 'particularly vulnerable'. Sometimes, spouses convert their customary marriages into civil marriages. Therefore, until this judgment the RCMA had its main purpose defeated in that 'particularly vulnerable' spouses were not protected in matters of succession.

Seeing that there appear to be loopholes in the application of the RCMA, one would advocate for a more purposeful interpretation of the RCMA, which –

- is in line with the constitutional right to equality and international instruments, which we are party to; and
- protect and promote the advancement of women and children's rights.

The said purposeful interpretation will alleviate the marginalisation of the most vulnerable spouses involved in customary marriages, which is in fact the purpose of the Act.

Therefore, in the absence of legislative evaluation of the main purpose of the RCMA, this Act could be a mere continuation of the prior codified official customary laws including the Black Administration Act, which fostered the discrimination towards wives in customary marriages or relationships. Although the RCMA has made significant strides with regard to the recognition of customary marriages, its failure to protect those in old customary marriages could cast a dark cloud on the Act's achievements.

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Limiting the scope of the moratorium in business rescue: *Ejectment of unlawful occupier of a leased property*

By
Ryan
Smith



Picture source: Gallo Images/Stock

Section 133 of the Companies Act 71 of 2008 (the Act) makes provision for a moratorium on legal proceedings and enforcement action against a company, or in relation to any property belonging to a company, or lawfully in its possession, being commenced or proceeded with in any forum, during business rescue proceedings, save for certain exceptions. The predominant debate in our courts around the moratorium in s 133(1) of the Act has been on what constitutes a 'legal proceeding' or 'enforcement action' for the purposes of the moratorium.

In *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) the importance of the moratorium was articulated, at para 14 of the judgment, where the court held: 'It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal

importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.'

The court in the *Cloete Murray* matter dealt with the question of whether the cancellation of an agreement constituted enforcement action in terms of s 133(1) of the Act. Ultimately, the court found that it did not.

Is the moratorium absolute?

While the moratorium has, in the past, been considered as an all-encompassing bar against legal proceedings and enforcement action during business rescue, the matter of *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) has clarified that it does not actually apply to all legal proceedings and enforcement actions.

The applicant in the *Kythera* matter brought an urgent application for an order evicting the tenant (the company in business rescue) on the ground that the lease agreement between the parties had been cancelled, alternatively, had expired. In the notice of motion, the applicant sought an order granting it leave in terms of s 133(1)(b) to bring the applications. In light of his findings, Boruchowitz J found that this leave was not necessary.

The judgment specifically addresses the issue of whether and when a landlord may evict a tenant company (and bring proceedings for this purpose), which has instituted business rescue proceedings and is in arrears with its rental (or for that matter, is in breach of the lease in general). In doing so, it provides useful guidance on the rights of landlords (and tenant companies) in business rescue proceedings.

In summary, the judgment found that –

- where a business rescue practitioner has not suspended the obligations of the tenant under a lease (in terms of s 136(2) (a) of the Act), and the landlord has validly cancelled the lease due to non-payment, the landlord can bring ejectment proceedings to evict the tenant, despite being in business rescue, who is an unlawful occupier; and
- the general moratorium contained in s 133(1) of the Act, does not include legal proceedings for ejectment, where the property is in possession of the tenant in business rescue unlawfully (the lease having been lawfully cancelled).

The decision is likely to result in a dash to the line between business rescue practitioners and landlords, the former

seeking to suspend the tenant's obligations in terms of the lease and the latter seeking to cancel it.

Implication of the findings in *Kythera*?

While the judgment deals specifically with the lease of immovable property, the principles set out may be applicable to other arrangements, like hire purchase agreements.

I say so, bearing in mind the following passages in the judgment:

'[8] *But the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue.* It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors. ...

[9] *The phrase "in relation to any property belonging to the company, or lawfully in its possession", which appears in s 133(1), is, in my view, a textual indication that the purpose of the moratorium is to preclude the institution or continuation of legal proceedings or enforcement action in relation to property that belongs to the company in business rescue or is lawfully in its possession.* In its plain meaning the phrase appears to limit the reach of the moratorium and renders it inapplicable to legal proceedings or enforcement action in relation to property belonging to persons or entities other than the company in business rescue, or in relation to property that is unlawfully possessed by the company. Were it the intention of the drafters of the section that the moratorium applies to all actions of whatever nature, there would have been no need to have introduced the italicised phrase. It is an interpretive principle that, when the lawmaker uses particular words to achieve its purpose, they must be given effect. *Based on these considerations I am of the view that vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible.*

[10] ...

[11] *Section 134(1)(c) conditionally proscribes the exercise of any right in respect of property in the "lawful possession of the company," irrespective of whether the property is owned by the company. But, what it does not proscribe is the converse, namely the exercise of a right in respect of property in the unlawful possession of the company.*

[12] The justification for the introduction of the italicised phrases in the aforesaid sections is self-evident. *To apply the moratorium to all legal proceedings of whatever nature, including those brought by persons who legitimately seek to vindicate or protect their property, would be a drastic interference with their common law rights of ownership.* When interpreting a statute, it is presumed that the lawmaker does not intend to alter the common law more than is necessary. It could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings (see in this regard: *Barloworld South Africa and Others v Blue Chip Mining & Drilling (Pty) Ltd* NCK 2015/332 para 15; compare also *Madodza (Pty) Ltd v Absa Bank Ltd* 2012 JDR 1350 (GNP))' (my italics).

The above passages do not deal exclusively with 'immovable' property, but rather refer to 'property' in the general sense, which would, on a plain reading, include moveable property. While the conclusions reached by Boruchowitz J deal specifically with immovable property, I am of the view that the same outcome would be reached in dealing with moveable property.

Bearing the above in mind, as soon as a business rescue practitioner is appointed (or if possible, just shortly prior) an analysis must be done of all the contracts to which the company in business rescue is a party to. A decision must be made, to suspend totally, or in part, various obligations of the company in rescue, arising in terms of any agreement. This will avoid the lessor being in a position to cancel an agreement validly (if there is a breach by the company), which would have the effect that the company is considered an unlawful possessor of the property that is the subject of that agreement. Once this occurs, the company loses the protection of the moratorium. From the lessor's perspective, they will need to take steps to validly cancel the agreement, prior to the practitioner suspending the company's obligations, in order to avoid the reach of the moratorium.

If a business rescue practitioner does not take the steps mentioned above, or is too slow in getting up to speed with the affairs of the company, the company may find itself losing the protection of the moratorium and facing an eviction application or facing its critical machinery/vehicle being vindicated.

While the finding in *Kythera* is only binding in Gauteng, until the Supreme Court of Appeal has ruled definitively on the issue, the judgment is well reasoned and as persuasive authority, is likely to be followed in other high courts throughout South Africa.

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Regional court to district court: Horizontal and vertical application

By Dr
James
Lekhuleni

Section 35 of the Magistrates' Courts Act 32 of 1944 (the Act) regulates the transfer of matters from one magistrate's court to another. A transfer of a matter can be in the form of consent by parties or on application by one of the parties in terms of r 55 of the Magistrates' Court Rules. The question whether a matter can be transferred from the district court to the regional court for hearing and *vice versa* has been a bone of contention in recent times, especially after the regional court was given civil jurisdiction in terms of the Jurisdiction of the Regional Courts Amendment Act 31 of 2008.

There are two schools of thought on this question. The first school of thought believes that s 35 applies both horizontally and vertically (ie, a case can be transferred from the regional court to another regional court and from the regional court to the district court and *vice versa*). The second school of thought believes that s 35 only applies horizontally (ie, from regional court to regional court and from a district court to district court). The views of the two schools of thought are discussed hereunder.

In terms of s 29(1)(g) read with s 29(1A) of the Act, the minister is empowered to determine different jurisdictional amounts in respect of district and regional courts. Such determination

is aimed at delineating the monetary jurisdiction of the two courts respectively. The minister has since determined the minimum and the maximum monetary jurisdiction of the respective courts as R 200 000 for district courts and above R 20 000 up to R 400 000 for regional courts in terms of GG37477/27-3-2014. It will be shown hereunder that the determination of the minimum amount by the minister is of no consequence in so far as the monetary jurisdiction of the regional courts is concerned. To this end, a door has been opened for forum shopping between the regional courts and the district courts.

The first school of thought: Both horizontal and vertical application

In *Matlhasa v Makda and Another* (GJ) (unreported case no 2015/17438, 4-9-2015) (Mphahlele J) the plaintiff sued the defendant for damages in the regional court. The matter was defended. The parties agreed to transfer the matter from the regional court to the Vereeniging District Court. The application was granted by the regional court. The file contents were transferred to the district court. In other words, the regional magistrate believed that there was nothing wrong to transfer the matter from the regional court to the district court (vertical application). When the matter

appeared before the district magistrate, he refused to allocate a trial date as he held the view that there was no provision in our law specifically allowing any matter to be transferred from a regional court to a district court. He found that since the action was already instituted in the regional court, the matter could not be transferred subsequently to a district court. The plaintiff applied to the High Court to review the decision of the magistrate for refusing to allocate a trial date.

The High Court held that the finding of the magistrate - that there is no provision in our law allowing any matter to be transferred from the regional court to the district court - was unfounded and incorrect. The High Court found that the Act defines a court as a magistrate's court for any district or for any regional division. The High Court held that the regional court was correct in transferring the matter to the district court on the consent of the parties. The decision of the district magistrate to refuse to allocate a date was set aside and the plaintiff was allowed to proceed with the matter in the district court.

The implications of this case are that a regional court may transfer a matter to the district court by consent or on application by one of the parties in terms of s 35. If a matter is so transferred, the district court is bound to deal with the matter.

The second school of thought: The vertical application

In *Botha v Singh and Others* (GP) (unreported case no 30761/14, 21-5-2015) (Kganyago AJ) the plaintiff issued summons against the Road Accident Fund (RAF) for damages in the district court. The summons was issued in 2009 before the coming into operation of the Jurisdiction of the Regional Courts Amendment Act giving regional courts civil jurisdiction. Subsequent to the Jurisdiction of the Regional Courts Amendment Act coming into operation, the plaintiff engaged the services of an actuary to calculate damages. After the actuarial report was prepared, it was found that the damages suffered by plaintiff exceeded the jurisdiction of the district court. The plaintiff then amended the summons and the RAF did not object.

The plaintiff and RAF subsequently agreed to transfer the matter from the district court to the regional court as the claim now fell within the monetary jurisdiction of the regional court. Despite the agreement, the plaintiff still filed an application to transfer the matter in terms of s 35. The matter was duly transferred from the district court to the regional court in terms of a court order. At the regional court, the regional magistrate refused to allocate a date for the matter and informed the parties that the regional court did not have jurisdiction to deal with the matter. The applicant instituted an action in the High Court to compel the regional magistrate to allocate a date of trial. The applicant argued that the order transferring a matter to the regional court stood until it was set aside by court.

The High Court held that s 35 does not specify to which court the parties must transfer their action or proceedings to, but refers to any other court. The court held that what is important is that the parties must consent or any other party to the action or proceedings may bring an application for such purpose. The court found that the order granted by the district magistrate to transfer a matter to the regional court was a valid order. The High Court then deprecated the conduct of the regional magistrate for refusing to allocate a date. The court held that the regional magistrate exercised powers of review, which he did not have when he refused to allocate a trial date. The regional magistrate was ordered to allocate a date of hearing within 60 days from date of the court order.

From this case, it is evident that litigants may transfer matters from the district court to the regional court by agreement or on application. In such cases, regional magistrates must comply with such orders of transfer. On receipt of cases from the district court, the regional magistrates must either allocate

a date for the hearing of the matter or challenge the validity of the order of transfer through the right channels. It is, therefore, unmistakably clear that matters can be transferred from the regional courts to the district courts and *vice versa*. However, this will also be dependent on the substantive jurisdiction of the court. Regional magistrates and district magistrate have to respect orders transferring matters to their courts.

The district court or the regional court?

Ever since the coming into operation of the Jurisdiction of the Regional Courts Amendment Act, the view held by a number of regional magistrates was that the regional court does not have jurisdiction in matters falling within the monetary jurisdiction of the district court. This view was overruled by the Western Cape High Court in the case of *Minister of Police v Regional Magistrate Oudtshoorn and Others* (WCC) (unreported case no 15587/2013, 6-11-2014) (Binns-Ward J), in which the court held that parties are at liberty to institute actions in the regional court whether the district court had jurisdiction or not. In this case, the plaintiff instituted summons against the Minister of Police for payment of R 100 000 for unlawful arrest and detention. The plaintiff claimed R 20 000 for malicious prosecution against the Minister of Police. The defendant filed a plea and denied liability and prayed for the dismissal of the plaintiff's claim. After the closure of pleadings, the defendant amended its plea and raised a special plea of jurisdiction to the plaintiff's summons.

In its special plea, the defendant pleaded that the regional court did not have jurisdiction to try the matter as the monetary value of the plaintiff's claim fell within the jurisdiction of the district court and that the plaintiff should have instituted action in the magistrate's court. The regional magistrate found that the minister acted *ultra vires* when he determined the jurisdiction of the regional court in that the notice of the minister provides a minimum, as well as a maximum, which is in conflict with s 29(1)(g) of the Act. In terms of s 29(1)(g), the minister could only determine the maximum of the court's monetary jurisdiction. The regional magistrate dismissed the special plea on those grounds.

The applicant applied to review the decision of the magistrate particularly based on reasons the regional magistrate gave that the Notice of the Minister was in conflict with the Act and that the minister acted *ultra vires*.

The High Court considered s 29(1)(g) of the Act and found that the regional magistrate had to decide whether the claim fell within his monetary jurisdiction. The court held that in determining

his monetary jurisdiction, the regional magistrate was entitled to disregard the words, '[a]bove R 100 000 to' as of no operative effect. The court found that the words '[a]bove R 100 000 to' does not fit into the determination in terms of s 29(1)(g) of the Act. The court found that s 29(1)(g) has nothing to do with the determination of a lower limit to the magistrate's court's jurisdiction but the maximum limit. The court eventually found that an interpretation in terms of the determination by the minister leads to an absurd results.

The High Court eventually dismissed the application for review and also found that there was another reason for dismissing the special plea. The other ground was that the special plea was filed after *litis contestatio*, which is not permissible in law (*Zwelibanzi Utilities (Pty) Ltd Adam Mission Services Centre v TP Electrical Contractors CC* (SCA) (unreported case no 160/10, 25-3-2011) (Cloete, Heher, Snyders, Majiedt and Plasquet AJA)). The court found that by failing to take the point before pleadings had closed, the applicant was taken to have submitted to the court's jurisdiction.

From the decision of the High Court, it follows that a plaintiff has a choice to issue summons in the regional court or in the district court for claims falling within the monetary jurisdiction of the district court. The determination by the minister that the monetary jurisdiction for the regional court is 'above R 200 000 to' has no operative effect.

Conclusion

This decision has a potential of encouraging forum shopping. The plaintiff may choose to issue summons in the regional court for claims falling within the monetary jurisdiction of the district court because the district court's court roll is clogged and the turnaround time for the enrollment of cases for trial is long. In the result, there is a great potential for the regional courts to be clogged with matters, which should have been dealt with by the district court. It remains to be seen how things will unfold in the near future. There is a sizeable number of cases observed in recent times falling within the monetary jurisdiction of the district court, which are instituted in the regional courts. It is doubtful whether it was the intention of the legislature to create a parallel jurisdiction between the regional court and the district court. I submit that in order to discourage forum shopping, regional courts should ensure that costs in those cases are granted in terms of the district court tariffs.

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Rooted in patriarchy: *Delictual claims in adultery cases*

The impact of adultery is like being hit with a huge brick. In township lingo it is said, '*goshapiwa ka setena*', translated to mean 'to be hit with a brick'. It leaves a long lingering pain, and the victim cannot move or do anything for a long time, but suffer the pain and humiliation.

In *DE v RH* 2015 (5) SA 83 (CC) at para 1 the Constitutional Court (CC) stated: 'Undertakings of fidelity - whether in the form of *ho lauwa*, *go laiwa* or *ukuyalwa* [Sesotho, Setswana and Nguni - respectively - for the counselling that takes place at traditional weddings on the do's and don'ts of marriage] or solemn vows or any other form dictated by various cultures or religions - is no guarantee that adultery will not take place in marriage.'

The guarantee referred to by the court

is similar to the requirement of being a 'fit and proper' person to be admitted to practice as an attorney or advocate. Magda Slabbert 'The requirement of being a "Fit and Proper" person for the Legal Profession' (2011) 14 *PER* 209 regards such guarantees as a 'false warranty given to the public' and that it does not guarantee that a lawyer would act in an ethical manner in the future. Slabbert further contends that the test of a 'fit and proper' person to practise law, can be viewed similarly to the 'I do' vows exchanged by marriage partners during a wedding ceremony. This becomes their solemn commitment, even though they know that things do change with the passage of time, changes in circumstances and personalities.

A failing marriage has been likened to a slow, sinking ship. The water starts seeping through the cracks and the ship

slowly starts to rot, decompose and eventually sink. Similarly, if there is a rift in a marriage relationship, this relationship will also degrade to a situation where it can no longer sustain itself. This is the point where one of the parties, while the relationship is failing, may jump ship, find comfort and solace on a life boat, in the arms of someone else. This is what adultery is all about.

Given the situations described above, can the courts continue to intervene as they have done in the past, and provide for a delictual claim against a third party based on adultery and then compensate the non-adulterous partner for the wrongs of the adulterous partner and the third party.

Facts and findings

Mr DE (the applicant) had successfully sued Mr RH (the respondent) in the

Gauteng Division of the High Court in Pretoria on the basis that Mr RH had an extra-marital affair with Ms H. Mr DE had launched an action based on the *actio iniuriarum*, the claim being for loss of consortium (intimacy and society) and *contumelia* (injury or insult to self-esteem).

The CC in the *DE v RH* matter at para 11 identified that the main and only issue to be determined was the continued existence of the delictual claim against a third party based on adultery, the answer to the question being ‘whether nowadays the act of adultery meets the element of wrongfulness for *delictual* liability to attach’ (my italics).

According to B Zitzke ‘A case of anti-constitutional common-law development’ (2015) 48 vol 2 *De Jure* 457, after a lengthy trial the High Court found that Mr RH was delictually liable to Mr DE for both heads of damage, being for loss of consortium and *contumelia*. The court held that Mr DE had a valid claim for *contumelia* based on the law as it stands. This was once again a positivist approach followed by South African courts, which apply the letter of the law as it is. On appeal by Mr RH to the Supreme Court of Appeal (SCA), the court overturned that decision and *mero motu* (of its own accord), raised the question of whether a claim based on adultery should continue to be part of South African law. The court found that adultery should no longer be punished through a civil damages claim against a third party. On appeal by Mr DE to the CC, the court held, at para 63, that the appeal falls to be dismissed, finding that ‘the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia* and loss of consortium; it is not reasonable to attach delictual liability to it. That is what public policy dictates.’

Reasons of the court

According to Lecturers *Law of Delict Only Study Guide for PVL3703* (UNISA Press Pretoria 2011) delictual liability is established when the following elements are present –

- conduct;
- causation;
- wrongfulness;
- culpability; and
- damage or harm.

Wrongfulness is when the conduct is considered unacceptable by the community. The community’s values and morals influence the interpretation and development of the law. Hence, wrongfulness is based on the legal convictions of society (*boni mores* – good morals) and is determined according to the *boni mores* test, which is an objective test, the standard being the morals of society.

The claim based on adultery originates from English law. The SCA duly identified the origin of this private law claim for damages in South African law as

being from English law (*RH v DE* 2014 (6) SA 436 (SCA) at para 24). Patriarchy influenced the origins of this claim, including the influence on society and law. Originally only a man could institute such a claim against another man (the third party) who was involved in an adulterous relationship with his wife (*DE v RH* at para 14). Historically, wives were viewed as ‘chattels’ being someone’s property and women in general had no role in society and in law. According to Zitzke (*op cit*) the Court of Appeal in *Pritchard v Pritchard and Sims* [1966] 3 All ER 601 at 606-610 held that the action was born in a patriarchal society in which men had a proprietary interest in their wives, comparable to that of cattle. I submit that patriarchy resulted in practices where women had to change their surnames to their husband’s surname on marriage because the wife no longer belongs to her maiden family.

The action based on adultery has been abolished in many foreign jurisdictions. Since the action was introduced from England it was interesting that it was abolished starting with England, then followed by other foreign countries – which either abolished or severely restricted the claim (*RH v DE* at para 27). Africa was also not left behind in abolishing the claim. However, Cameroon still retains adultery as a criminal offence. Namibia and Botswana have retained the action for damages for adultery. The court in the *DE v RH* matter at para 36, referring to the Namibian case of *Van Wyk v Van Wyk and Another* [2013] NAHCMD 125 (though retaining the claim) held that there has been a softening of attitudes and it ‘recognised certain core rights of each spouse as an individual ... however ... marriage remains the cornerstone and the basic structure of our society. The law recognises this still today.’

The CC in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 88 held that, even though public policy might be relevant in a case, it cannot be a substitute for the courts’ duty ‘to interpret the Constitution and to uphold its provisions’. The issue is not what the majority believe, but what the Constitution provides. If public opinion was decisive, then we do not need constitutional adjudication. Rights can then be protected by the legislature, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised. However, this would take us back to parliamentary supremacy.

Public opinion is a notion that is informed by our constitutional values. In the *DE v RH* matter at para 52, the court held that the relevant constitutional norms that affect a delictual claim based on adultery are those that balance the rights of the victim (non-adulterous spouse) and those of the perpetrators (adulterous spouse and the third party).

It is common knowledge that South Africa comes from a past characterised by strife, conflict, untold suffering and injustice based on parliamentary supremacy. However, the new constitutional dispensation provides a ‘bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights, democracy and peaceful co-existence ... for all South Africans, irrespective of colour, race, class, belief or sex’ (Preamble to the Constitution of 1993). All laws are now subject to the Constitution and the new constitutional values that includes *ubuntu*.

Conclusion

People around the world regard adultery as being morally wrong. Derogatory names were also given to children born out of adulterous relationships. Over time, the attitudes that actually changed towards adultery were still rooted in sexism and patriarchy. Attitudes to relationships have a direct influence on attitudes towards adultery. However, as seen from the above discussion, these attitudes are biased to and in favour of men. Therefore, it cannot be said in all sincerity that what has been touted as ‘changes in attitudes of society towards adultery’ is in fact in the interests of justice, because these attitudes are still discriminatory in nature. Thus, the determination of wrongfulness based on changes in societal norms in this instance is simply a fallacy, which according to the Critical Legal Studies, is a false consciousness at work in law and in society.

A third party interferes in the marriage relationship that is exclusive and out of bounds. On the other hand, the state should then intervene to protect the ‘right to a sphere of intimacy and autonomy’ from intrusion and invasion. Failure to protect impairs the ability of the partners to honour their obligations to one another as determined in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 62. Without legal recourse or remedies, the victim would at times end up resorting to self-help, to the extent of killing either or both perpetrators. Crimes of passion are plenty and this decision by the court can escalate these killings.

- See also: Law reports ‘Delict’ 2015 (Jan/Feb) *DR* 53; law reports ‘adultery’ 2015 (Aug) *DR* 45; and law reports ‘Delict’ 2015 (Nov) *DR* 34.

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Demanding your interest – *a new era for sectional titles*

By
Tertius Maree

A new era for sectional title schemes, in fact for ‘community schemes’ was introduced on 7 October 2016 with the publication (GN R1231 GG40335/7-10-2016) of the regulations for the Sectional Title Schemes Management Act 8 of 2011 and the Community Schemes Ombud Service Act 9 of 2011 (the Act), signalling also the coming into effect of these two pieces of legislation. To describe the new playing field now created as revolutionary is not entirely inappropriate. In this article, I deal with only a very small part of its new demands on

trustees, managing agents and attorneys.

In terms of the standard set of Management Rules, which henceforth applies to all new sectional title schemes and to a limited extent to all existing schemes, the rate of interest recoverable in respect of unpaid levies is capped:

‘21(3) The body corporate may, on the authority of a written trustee resolution –
(a) ...
(b) ...
(c) charge interest on any overdue amount payable by a member to the body corporate; provided that the interest rate must not exceed the maximum rate of interest payable per annum un-

der the National Credit Act (2005) Act No 34 of 2005), compounded monthly in arrear.’

Prior to the final publication of the Regulations, a draft, published for comment, equated the maximum rate to the rate as per the Prescribed Rate of Interest Act 55 of 1975. Such rate has seldom been adjusted and is currently 10,25% per year. The final provision in the Management Rules provides for a maximum rate (formula rate) calculated not according to the prescribed rate of interest, but to a rate allowed under the National Credit Regulator (NCR).

For trustees to determine what the

maximum rates are – which they are entitled to implement against arrear levies (levies rate) – they need to determine the NCR category. This would be the rate for ‘incidental credit agreements’, being 2% per month. The applicable levies rate may then be compounded monthly in arrear. The formula rate may of course change from time to time.

The question arises what happens when the formula rate changes after the trustees have determined the rate applicable to arrear levies, or even after an action has been instituted against an owner for arrear levies and interest? If the trustees have fixed the levies rate correctly, at the time of determination of the levies, such rate will remain until the rate is again determined by the trustees after the next annual general meeting (AGM).

What is, therefore, important to keep in mind is that:

- Both the levies and the levies rate may only be determined by the trustees at a meeting of the trustees, and not by the members at a general meeting.
- Levies, as well as the levies rate may only be determined once a year, after each AGM.
- When determining the levies rate the trustees must take cognisance of the current provisions of the NCR.

Why do I state that the levies rate may only be determined once per year? Nothing obvious will be found in the Regulations or in the Act itself to support this view. However, it could not have been the intention of the legislature to allow trustees to adjust the levies rate on an ad hoc basis. By allowing the trustees to apportion the levies rate selectively, could lead to results, which may be seen as vindictive in certain circumstances and not in line with constitutional principles.

When action is taken or a demand issued against a levies defaulter, one then only has to take cognisance of the levies rate determined by the trustees in respect of the current year. That is, however, if the arrears to be collected are only in respect of the current (financial) year. I put ‘financial’ between brackets, because as is known by trustees and managing agents, the financial year does not necessarily coincide precisely with the 12 months from the date of determination of the current levies until its recurrence after the next AGM.

Having considered all of the above complications, it would be advisable for the trustees to rather determine a conservative levies rate, which could be re-imposed annually without risk of exceeding the formula rate. In ‘normal’ circumstances this should not be problematic, but it could become a problem if an agreement is entered with a levies financier by whom a specific, higher rate of interest is required.

This issue invites some comment on the legislature’s seeming objective underlying these provisions, namely, to protect levy debtors against excessive interest liabilities, as evidenced by the earlier proposal that the levies rate be equated to the prescribed rate of interest.

The relationship between a sectional title body corporate and a levy defaulter cannot be compared to the relationship between a creditor and a debtor in the ordinary course of commerce. The body corporate consists of an association of unit owners, of which the debtor is one. Financial pressures experienced by the debtor could similarly be endured by his co-owners who nevertheless pay their levies regularly. Non-payment by levy defaulters often result in shortages, which may have to be made up by the regular payers, if necessary by means of special levies. The interest on any loan, which may have to be procured to make up the shortfall will inevitably be at a high rate of interest and any undue indulgence extended to levy defaulters can accordingly not be justified.

In terms of Management r 25(2) the trustees are required to deliver a final demand before they are entitled to take action for recovery of arrear levies.

Are there any additional requirements as to the content and format for such demand with which it must comply and which affects its legality in order to serve as the basis for collection procedures?

A 2013 judgment by Davis J in the Western Cape High Court in *Combined Developers v Arun Holdings and Others* 2015 (3) SA 215 (WCC) illustrates how intricate a matter as simple as a demand for payment could become.

As it happens, this matter, although not involving sectional title law, also involved the calculation of interest with reference to a rate external to the contract, namely the repo rate. In this case the contract between the parties stipulated that failure to pay a due amount within three business days after receipt of a written demand, would constitute an ‘event of default’ entitling the creditor to call up the full loan plus interest. The demand forwarded by the applicant to the respondent by e-mail stated: Please see below and attached. We have not yet received payment. Will you correct the situation and if payment was made, please forward proof of payment (paraphrased).

The respondent reacted to this immediately by paying the capital amount due, however, without the additional *mora* interest, which had accrued from the due date, which amounted to only R 86. The applicant then proceeded to claim the full balance of the loan, being R 7,6 million.

However, the ‘demand had not set out

the exact amount due’. Several further aspects, including constitutional principles were considered, but for present purposes what is important is that the wording of the e-mail message presented as a formal demand could not be regarded as being an unequivocal demand for a specific amount due. The exact amount payable was not mentioned and the text was not unequivocal about payment. Accordingly the action did not succeed.

It is of interest and somewhat perturbing to note that the wording of Management r 25(2) does not specifically require that the amount of the arrears must be stated in the demand, in comparison with very specific requirements regarding the interest due.

Trustees and managing agents, as well as attorneys collecting arrear levies on behalf of bodies corporate, would be well advised to note the principles highlighted in the *Combined Developers* judgment, and also to take care that interest claimed complies with the requirements of Management r 21(3)(c).

Lastly on the theme of recovery of arrear levies, s 3(2) of the Act determines as follows:

‘Liability for contributions levied under any provision of subsection (1), save for special contributions contemplated by subsection (4) accrues from the passing of a resolution to that effect by the trustees of the body corporate, and *may be recovered by the body corporate by an application to an Ombud* from the persons who were owners of units at the time when such resolution was passed: Provided that upon the change of ownership of a unit, the successor in title becomes liable for the pro rata payment of such contributions from the date of change of such ownership’ (my italics).

This is followed by a similar provision in respect of special levies.

The question arises about the phrase in italics. Must all levy recovery actions henceforth be instituted through the office of the Ombud?

There are two views on this, namely that, because no other option is mentioned, all procedures must be initiated via the ombud service. Probably the more correct interpretation is that s 3(2) provides an alternative to court procedures, as indicated by the word ‘may’.

The new legislative environment for community schemes is undoubtedly one in which many questions will still arise and participants will have to ensure that provisions of the Acts and regulations are well understood, in order to avoid the many pitfalls.

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THE LAW REPORTS

January 2017 (1) *South African Law Reports* (pp 1 – 322); [2016] 4 *All South African Law Reports* October (pp 1 – 297); [2016] 4 *All South African Law Reports* December (pp 665 – 980); 2016 (10) *Butterworths Constitutional Law Reports – October* (pp 1253 – 1388); 2017 (2) *Butterworths Constitutional Law Reports – February* (pp 131 – 266)

This column discusses judgments as and when they are published in the *South African Law Reports*, the *All South African Law Reports* and the *South African Criminal Law Reports*. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – *Editor*.

Abbreviations

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
SCA: Supreme Court of Appeal

Administrative law: Application of PAJA

Review of decision by state entity: In *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] 4 All SA 842 (SCA) the appellant, the State Information Technology Agency (SITA), was a state entity, which had contracted over many years with the respondent, Gijima. One such agreement was one in terms of which Gijima was to provide IT services to the South African Police Service (the SAPS agreement).

In January 2012, SITA unlawfully terminated the SAPS agreement as a result of which Gijima stood to suffer R 20 million in lost revenue. That prompted Gijima to institute urgent proceedings to protect its rights under the SAPS agreement. Following negotiations between the parties, SITA suggested that Gijima abandon its claim arising from the termination of the SAPS agreement in return for which it would receive a new service contract to offset its potential losses. Gijima was concerned about SITA's competence to conclude such contract without having gone through a competitive bid-

ding process and raised those reservations with SITA. SITA assured Gijima that it had the authority to conclude the contract. Relying on that assurance, Gijima agreed to settle the dispute on the basis proposed by SITA. The new contractual arrangement was embodied in a settlement agreement.

A payment dispute developed between the parties. The dispute was referred to arbitration for resolution. SITA then informed Gijima of its intention not to extend the agreement any further. Gijima submitted its statement of claim to the arbitrator in the payment dispute in which it claimed R 9,5 million for services rendered under the agreement. In response, SITA pleaded that the agreement was concluded in contravention of the procurement system contemplated in s 217 of the Constitution and was, therefore, invalid and unenforceable against it. Faced with a constitutional challenge to the main agreement, the arbitrator ruled that he had no jurisdiction to determine the issue, and SITA launched the present proceedings in the court *a quo* seeking a declaration that its contract with Gijima was unenforceable for want of compliance with the public procurement requirements of s 217 of the Constitution. The court *a quo* dismissed the application because SITA had relied directly on the constitutional principle of legality, instead of instituting review proceedings under s 6 of the

Promotion of Administrative Justice Act 3 of 2000 (PAJA). It had also not applied under s 9(1)(b) to condone its failure to institute such proceedings within 180 days of the contract having been concluded.

On appeal, Cachalia JA rejected the first submission raised by SITA, namely that PAJA does not apply at all when an organ of state seeks to set aside its own decisions. It held that a decision by a state entity to award a contract for services constitutes an administrative action in terms of s 1 of the PAJA, and there is no good reason for excluding administrative decisions taken by the state from review under the PAJA.

The next question was whether the 180-day delay rule in s 7 was applicable to SITA, who contended that the provision did not apply. The court held that the 180-day rule does apply to organs of state, and to the SITA decision at issue in this case. Nevertheless, SITA maintained that it was entitled to avoid instituting review proceedings under the PAJA – and the procedural requirement under s 7 to institute its proceedings within 180 days – by relying directly on the constitutional principle of legality to obtain declaratory relief against Gijima. The court rejected the notion that the principle of legality may not be used to side-step the PAJA. It reasoned that the proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to

challenge the unlawful exercise of public power.

The appeal was thus dismissed with costs.

Constitutional law

Limitations on right to protest: In *Hotz and Others v University of Cape Town* [2016] 4 All SA 733 (SCA) the court was asked to pronounce on the right to protest. The facts which led to the present appeal occurred in February 2016 when the appellants, who were students of the respondent university, University of Cape Town (UCT), caused extensive damage to the latter's property.

Threats of further plans to damage UCT's property led to UCT making an urgent application to the High Court for an interdict. A final interdict was ultimately handed down against the five appellants, leading to the present appeal.

Wallis JA held that an applicant for a final interdict must show –

- a clear right;
- an injury actually committed or reasonably apprehended; and
- the absence of similar protection by any other ordinary remedy.

The court further held that once the applicant had established the three requisite elements for the granting of an interdict, the scope, if any, for refusing relief was limited. There is no general discretion to refuse relief.

The court considered the factual allegations made by UCT against each of the ap-

pellants (students) and the grounds for saying that it was entitled to a final interdict against each of them. The right to protest against injustice is protected under our Constitution. But the manner in which the right is exercised is the subject of constitutional regulation. Thus, the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm. The right of demonstration is to be exercised peacefully and unarmed. And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people.

The evidence in respect of each of the students disclosed that they were all engaged in the destruction, damage or defacing of UCT's property; they all participated in unlawful conduct and encouraged others to do the same. Those actions had the effect of interfering with the acknowledged rights of UCT.

UCT was thus entitled to a final interdict. However, it was not entitled to an order in the broad terms that it sought and was granted by the High Court. The court, therefore, limited the scope of the interdict to unlawful conduct on UCT's premises.

The parties each had to pay their own costs.

Divorce

Property rights forfeiture: In *KT v MR* 2017 (1) SA 97 (GP) the parties were involved in divorce proceedings. The plaintiff (wife) instituted a divorce action against the defendant (husband), to whom she had been married in terms of customary law, in

community of property. The husband contended that he was entitled to an order that the wife forfeited her patrimonial benefits of the marriage.

In terms of s 9(1) of the Divorce Act 70 of 1979 (the Act) a court may make a forfeiture order if, 'having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, [it] is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited'.

The key issue was whether the benefit was 'undue', the determination of which required the court to investigate the considerations mentioned in s 9(1) of the Act. As to the circumstances giving rise to the breakdown of the marriage, the court found that both parties were at fault.

Kollapen J held that in the present case the factors relating to substantial misconduct and the circumstances giving rise to the breakdown of the marriage were not decisive in determining whether a benefit was undeserved. As a result, so the court reasoned, the consideration of a fault-neutral factor such as the duration of the marriage should be based on considerations of proportionality.

In the determination of whether a benefit was undeserved a court was more likely to make such a determination where the marriage was of short duration, as opposed to circumstances where the marriage was of a long duration. However, each case has to be decided on its own facts as the court was called on to make a value judgment in this regard.

The court concluded that here the wife would be unduly benefited if an order for forfeiture were not made. However, in the circumstances, an order of partial, rather than full, forfeiture against the wife would be appropriate.

Harassment

Nature of: In *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP); [2016] 4 All SA 110 (KZP) the facts were as follows: The appellant, Mnyandu, sent an e-mail to the respondent, Padayachi, and several of their colleagues in which she made false accusation about Padayachi. More specifically, she falsely accused him of verbally abusing her during an earlier meeting where both of them were present. He later obtained a protection order in the magistrates' court under the Protection from Harassment Act 17 of 2011. She appealed against the finding by the magistrate.

In issue here was whether a single act (*in casu*, the sending out of an e-mail containing false accusations) could constitute harassment.

Moodley J held that although the conduct of Mnyandu in sending the e-mail may have been unreasonable, as she allowed her emotions to cloud her perception, the court was not persuaded that her conduct was objectively oppressive or had the gravity to constitute harassment.

Although it is possible for a single act to constitute harassment, that was not the case here.

The appeal was upheld with costs.

Lease

Termination of: The parties in *Airports Company South*

Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books [2016] 4 All SA 665 (SCA) concluded a lease agreement. The respondent bookshop, Exclusive, rented a premises at the OR Tambo International Airport (the airport) in Johannesburg from the appellant, Airports Company South Africa (ACSA), from where it operated a bookshop. The lease was for five years and was to terminate on 31 August 2013.

When, by mid-August 2013, ACSA had still not started the process necessary for the renewal of the lease or the award of a new tender either to Exclusive or anyone else, negotiations commenced and ACSA and Exclusive signed an agreement that renewed the agreement on a month by month basis.

Exclusive remained in occupation of the premises and continued to trade there. When ACSA issued a request for bids in respect of the premises on 4 December 2013, Exclusive submitted a bid, seeking to remain the lessee. In June 2014, ACSA informed Exclusive that its bid had been unsuccessful and that it could request a debriefing within 21 days. Exclusive did make such a request, but before the debriefing, it was given notice to vacate the premises by 31 July 2014. It, therefore, applied for the review and setting aside of the tender award, alleging that it had been made in conflict with a number of the provisions of the Promotion of Administrative Justice Act 3 of 2000.

Despite the pending review application, ACSA brought an urgent application for the eviction of Exclusive. The court *a quo* held that the case ACSA made out in its found-



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ing affidavit was based on its interpretation of the contract as providing that it was entitled to give one month's notice to terminate the lease. The court found against ACSA and decided that the extension agreement included a tacit term that neither party was entitled to terminate the lease on notice until completion of a valid and lawful tender process to identify a new tenant. It was found that Exclusive was entitled to challenge the lawfulness of the tender process by way of a collateral challenge. It was concluded that the tender had been made unlawfully, and that ACSA was thus not entitled to terminate. The dismissal of the application led to the present appeal.

On appeal, ACSA argued that the tacit term was contrary to the express terms of the extension agreement (on its version a monthly tenancy terminable on a month's notice), and that the challenges to the lawfulness of the tender award, being made only in an attachment to the answering affidavit, cannot be sustained.

Lewis JA in a majority judgment held that a factual dispute between the parties centred on the interpretation of the letter recording the extension of the lease. As the eviction order sought was in application proceedings, the court *a quo* was bound to accept those facts averred by ACSA that were not disputed by Exclusive, and Exclusive's version in so far as it was tenable and credible.

The court held that it was not necessary to consider whether there was a tacit term at all. Because ACSA did not deal at all with the challenges raised by Exclusive to the tender award, they fell to be considered on Exclusive's version alone.

In Exclusive's answering affidavit it was alleged that the parties contemplated that the lease would continue until the conclusion of the tender process. If that were not so, and the lease could be terminated by either party on a month's notice, the results would be distinctly contrary to the commercial realities of which the parties were

aware. It would mean that, if Exclusive were ultimately the successful bidder, it might be required to vacate on a month's notice, only to return to the same premises after the award of the bid. That interpretation was not in any way denied by ACSA in its reply. It did not show that the interpretation of the lease for which Exclusive contended was untenable and implausible. And ACSA did not show that its interpretation – that the lease was a monthly tenancy terminable on one month's notice – was correct. ACSA had to prove that the lease extension agreement had been validly terminated on the giving of the required notice. It had failed to do so.

The appeal was thus dismissed by the majority of the court.

National Credit Act

Surrender of goods: Notice to consumer in terms of s 127(2): In two recent cases the courts pronounced on the requirements of the s 127 Notice in terms of the National Credit Act 34 of 2005 (the NCA).

The first of these cases was *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC); 2016 (10) BCLR 1253 (CC).

Section 127 of the NCA provides for the 'surrender of goods' by a consumer under an instalment agreement, secured loan or lease. After the goods have been surrendered in the manner provided for in s 127(1), the credit provider must in terms of s 127(2), within ten days give the consumer a written notice, *inter alia*, setting out the estimated value of the goods. Section 127(3) then affords the consumer an election to 'unconditionally withdraw' their surrender of the goods within ten days of receiving the s 127(2) notice.

In the *Baliso* case the consumer, Baliso, raised an exception that the particulars of claim in action against him – by the credit provider, FirstRand Bank, to collect the shortfall between the consumer's outstanding balance under an instalment agreement and the proceeds of the sale at a public auction

of the relevant surrendered goods – lacked the necessary averment that notice in terms of s 127(2) had been sent to him by registered mail. Baliso further contended that the requirement in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) 142 (CC) case, that notice under s 129 be sent by registered mail, also applied to the s 127(2) notice.

The present case concerned Baliso's application for leave to appeal to the CC, his exception having been dismissed by the High Court and leave to appeal refused. The CC delivered both a majority and a minority judgment. For space considerations I will restrict myself to the majority judgment.

Foneman J held that given the serious consequences of non-compliance with the notice required under s 127(2), there was merit in the submission that no good reason existed to differentiate materially between the method of complying with s 129(1) and s 127(2). A summons may well be excipiable if it did not meet the standard set down in the *Sebola* case as well as in *Kubhanya v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC). However, it was not necessary to make a definitive finding in this regard. The crux of the present matter was the appealability of a dismissal of an exception.

In terms of s 130(3)(a) of the NCA compliance with the notice requirements of, *inter alia*, s 127(2) was a prerequisite for 'determin[ing] the matter'. When a matter was 'determined' depended on whether the matter was unopposed and default judgment was sought, or whether it was opposed and judgment was to follow only upon hearing evidence at a trial. In an opposed matter the consumer may give evidence to contradict the credit provider's evidence.

The court pointed out that the guidance in *Sebola* was restricted to unopposed matters where default judgment was sought, and was not exhaustive of the manner in which notice could probably be brought to the attention of a reasonable consumer. For

the purpose of s 127, what was required before a court may determine a matter was proof that the s 127(2) notice was probably received by, or came to the attention of, a reasonable consumer. This is an issue that in an opposed matter must be determined by way of evidence at the trial.

Leave to appeal was accordingly refused.

The second case was *Edwards v FirstRand Ltd t/a Wesbank* 2017 (1) SA 316 (SCA); [2016] 4 All SA 692 (SCA). In the *Baliso* case the CC gave clear indications in both the majority and minority decisions that there should be no distinction between the ways in which a s 129 notice and a s 127 notice is sent. In *Baliso* the court held that there should be evidence that it was received by the consumer to properly protect the consumer.

The facts in the *Edwards* case were as follows: The appellant, Edwards, and Wesbank concluded an instalment sales agreement for the purchase of a luxury motor vehicle subject to the National Credit Act 34 of 2005 (the NCA). After Edwards had fallen into arrears, the motor vehicle was attached subsequent to the cancellation of the agreement and summary judgment being granted against Edwards. The court rejected a host of fanciful and opportunistic defences raised by Edwards. Wesbank also claimed the shortfall between the amount outstanding and the selling price of the vehicle.

A notice in terms of s 127(2) of the NCA was dispatched by ordinary post to Edwards on 13 June 2012, using the address he furnished in the credit agreement as his *domicilium citandi ex executandi*. Edwards, however, knew that there was no street delivery of post at this address. When the case resumed for the determination of the amount of damages to be paid (the shortfall) Edwards' only defences were that the bank had failed to comply with s 127 of the NCA and that the vehicle had not been sold for the best price possible. The court of first instance held that this conduct was unreasonable

and that the non-receipt of the notices was therefore no defence.

On appeal Cachalia JA pointed out that the provisions of s 127 of the NCA was considered by the CC in the *Baliso* case.

The majority in the *Baliso* case concluded *obiter*, that there is much force in the argument that it is illogical to make a distinction between the manner of giving notice under s 127(2) of the NCA, and that required under s 129(1) of the NCA.

Based on the ordinary grammatical meaning of the words used in s 127(2) registered mail is not what the legislature had in mind when it used the words 'give the consumer written notice.' It may be advisable to send the notice in terms of s 127(2) by registered mail but that is not what the law requires.

From the evidence adduced during the trial, it is clear that the bank did send a notice in terms of s 127(5) to the address furnished by Edwards. He did not receive it, but that was due to his unreasonable conduct in providing an address where such notice would not be delivered.

The risk of non-receipt was on Edwards due to his unreasonable conduct. He has himself to blame by providing an address where he knew no street deliveries would be made.

The appeal was dismissed with costs.

Payment

Fraud – extinguishing debt:

The infamous and fraudulent Brusson scam has recently been pronounced on by the CC in *ABSA Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC). In the *Moore* case the appellant, Absa and the two respondents, Mr and Mrs Moore (the Moores) were victims of the Brusson scam. Brusson preyed on over-indebted consumers who owned fixed properties by offering them a way out of their debt. The scheme consisted of Brusson offering to lend the consumers an amount of money against the security of their home, but the underlying

documents signed by the consumers was not for a loan, but a sales contract for the sale of their home against payment of the money loaned. Brusson and a so-called investor would then obtain a mortgage bond loan from a bank against security of the property so bought. That loan would then be used to pay the consumers' indebtedness to the bank and the rest of the funds they could use for their own purposes.

In the meantime, the property would be transferred to the investor and the consumer's old bond would be cancelled. The first notice of the fraud the unsuspecting consumer would receive would be when the bank applied for their ejection and the sale of the property on auction as the investor invariably failed to make payments on the new bond.

Numerous cases were reported dealing with this scam. Most held that the scheme was fraudulent and that the contracts were either void or voidable. In the *Moore* case the court of first instance held that the agreements were void and that the transfer of ownership was void. The Moores never had the intention to transfer ownership as they believed the transaction involved only a loan. It ordered that the property be retransferred to the Moores, but against reregistration of the original bond.

The SCA held that the agreements were void but that the condition imposed by the High Court was not competent and that the property must be restored to the Moores free of the bond.

In the CC, Absa argued that because all the agreements were void due to the fraud, the cancellation of its bond was also void and had to be undone, alternatively that the Moores were unjustifiably enriched at its expense by having the bond cancelled without having repaid the bond. At the time of the fraud the Moores owed the bank R 145 000, but after the scam they owed the bank nothing.

Cameron J held that Absa, in opposing the application by the Moores, provided very little information about all the transactions involved. As

a result it was not certain that the Moores' bond had been discharged.

The payment of the Moores' indebtedness and the cancellation of their bond were not invalid as both the payor and the creditor agreed to the payment and its effects. There is long-standing authority that a debt can effectively be paid by a third party.

The court further held that even a deposit into an account of a fraudster is effectual to transfer ownership in the money. The victim is left with only a personal claim against the fraudster – and a concurrent claim against the fraudster's curators in the case of a sequestration. In this regard the court referred with approval to the recent case of *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA).

In *Absa Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA) the court held that a thief who pays her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent. Thus, provided the payee/creditor is innocent, payment of another's debt, even by a thief, with stolen funds, operates to extinguish the debt.

The payment of the Moores' debt by Brusson was thus effective in discharging their debt, even if the 'investor' did so fraudulently with funds provided by Absa.

The court further held that a person who was induced to contract by the fraudulent representations of another may either stand by the contract or claim its rescission. The agreement was voidable, not void. Unless the Moores chose to rescind the agreement because of the fraud, Brusson remained bound by it.

The Moores' main obligation, namely the loan owed to Absa, was thus validly cancelled, and so was the accessory obligation, the mortgage agreement. Neither the third party investor nor Brusson would be entitled to claim anything from the Moores as any claim could be met with the *par delictum* defence.

Finally, on the facts, the

court rejected Absa's contention that an enrichment claim should be developed to restore it to the security it previously enjoyed over the Moores' property. However, it held that in different circumstances and facts, such contention may succeed.

The court accordingly refused Absa's appeal with costs.

See:

- Law reports 'Rescission of judgment' 2015 (Aug) *DR* 45; and

- Law reports 'Land' 2016 (July) *DR* 44.

Revenue

Theft of VAT monies: In *Grayston Technology Investments (Pty) Ltd and Another v S* [2016] 4 All SA 908 (GJ) the court was asked to consider the legal nature of the relationship between the South Africa Revenue Services (Sars) on the one hand, and a Value Added Tax (VAT) vendor, on the other hand. It was further asked to consider the nature of the offence where the vendor failed to pay output VAT to Sars.

The facts were as follows: One Pieters was the sole shareholder of Grayston Technology Investment (Pty) Ltd (Grayston), which had, for a period of eight years, failed to pay over to Sars output VAT and pay as you earn (PAYE) it had deducted from employees' remuneration. Grayston was in a dire financial position and the monies due to Sars were used to pay salaries, rent and similar expenses.

In 2010 Pieters sold his interest in Grayston and in September 2011, the company was placed under voluntary winding-up. Grayston and Pieters were convicted in the regional court for failing to submit tax returns, as well as for the common-law crime of theft.

On appeal the main question was whether or not the failure to pay output VAT to Sars and the failure to pay PAYE to Sars amounted to common-law theft.

Spilg J held that the relationship between a VAT vendor and Sars is that of debtor and creditor. No part of any

payment received by a taxpayer on entering the taxpayer's bank account constitutes an amount received on behalf of Sars either by reason of the Value-Added Tax Act 89 of 1991 (the VAT Act), the law of agency, or any trust relationship.

A VAT vendor is not a collecting agent for Sars. Sars has merely a personal claim for outstanding debts against a VAT vendor where the VAT vendor owes output VAT to Sars.

Theft is committed when a person fraudulently and without claim of right made in good faith takes to his use anything capable of being stolen. As the output VAT does not belong to Sars at any time before it is appropriated, a failure to pay output VAT cannot satisfy the element of unlawfulness required for common-law theft.

In contrast to VAT, PAYE is a pre-determinable and specific amount that must be calculated strictly in accordance with the tax tables on the date that the employee's remuneration is paid or payable. Accordingly, the relationship between the employer, employee and Sars is more than that of debtor and creditor.

Where an employer fails to pay PAYE to Sars, it could

amount to the theft of Sars's money. Grayston barely had money to pay its employees. It could not be established that there was an unlawful appropriation to establish common-law theft.

Suretyship

Effect of deregistration of debtor on suretyship: The proceedings in *Thomani and Another v Seboka NO and Others* 2017 (1) SA 51 (GP) concerned an application for rescission of a default judgment and the setting-aside of a sale in execution of the immovable property of the first and the second applicants (the applicants). During 2004 the applicants and the fourth respondent bank, Absa, concluded a home loan and a mortgage bond was registered over the applicants' immovable property.

The bond contained a clause which provided that: 'The bond shall remain in force as continuing covering security for the capital amount, the interest thereon and the additional amount, notwithstanding any intermediate settlement, the bond shall be and remain of full force, virtue and effect as a continuing covering security and covering bond for each and every sum in which the

mortgagor may now or hereafter become indebted to the bank from any cause whatsoever to the amount of the capital amount, interest thereon and the additional amount.'

In 2007 Absa and a company concluded a loan, and as security therefor, Absa and the applicants entered into a suretyship. In 2008 the company defaulted on its payments to Absa. The company was deregistered in 2010. In 2013 Absa summonsed the applicants. It claimed payment under the mortgage bond, of the applicant's (possibly prescribed) debt under the suretyship. In the end nothing hinged on the possible prescription of the debt.

Default judgment was granted, and flowing from it, the applicants' home was sold in execution. This caused the applicants to apply to rescind the judgment, and set aside the sale.

The court was asked to pronounce on the following issues. First, whether the bond covered the applicant's debt under the suretyship; and secondly, whether the sureties (the applicants) could be sued where the principal debtor, the company, was deregistered?

Jansen J held that, first, the bond only covered amounts

owing under the home loan. In this regard the court pointed out that the relevant clause of the surety agreement quoted above refers pertinently to the obligations of the principal debtor.

Secondly, the court held that the sureties could not be sued while the company was deregistered.

Default judgment was rescinded, and the sale in execution was accordingly set aside. Absa was ordered to pay the applicants' costs.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Access to courts, actions by or against the state, administrative justice, civil procedure, contract law, criminal law, criminal procedure, evidence, immigration, interpretation of statutes, land, local authorities, motor-vehicle accidents, national monuments, parliamentary proceedings, pensions, practice, prescription, provisional sentence, revenue, right to protest and shipping.



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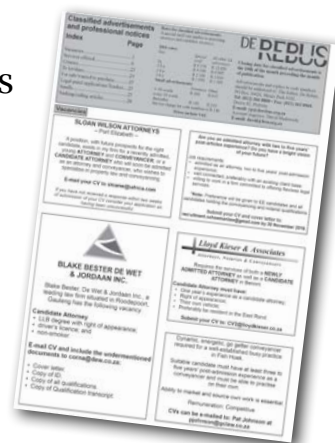
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By
Yashin
Bridgemohan

Unfair labour practice relating to promotion

Sun International Management Pty Ltd v CCMA and Others
(LC) (unreported case no JR 939/14, 18-11-2016) (Lagrange J)

The correct approach for arbitrators to adopt when faced with promotion disputes was set out in *Ndlovu v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1653 (LC) at 1655-6, where the court provided:

'[T]he questions which the commissioner asked in the first paragraph of that quotation were wholly justifiable questions in relation to a dispute over a matter of promotion. It can never suffice in relation to any such question for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed.'

The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational it seems to me that no question of unfairness can arise.'

In addition to the above it is also important for an applicant to show as held by the court in *National Commissioner of the SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2005) 26 ILJ 903 (LC), a causal connection between the unfairness complained of and the prejudice suffered.

Facts

The third respondent applied for a position of an Assistant Mechanical Maintenance Manager in November 2012. His application was, however, unsuccessful. He then challenged the failure to appoint him on various grounds, which he alleged amounted to an unfair labour practice relating to promotion.

At the Commission for Conciliation, Mediation and Arbitration (CCMA), the

arbitrator accepted that in order for the third respondent to succeed, it was not enough for him to merely show that he qualified for the post but that he merited the promotion and that the decision to appoint someone else over him was unfair.

The arbitrator upheld the third respondent's case and awarded him six months remuneration as compensation in light of the fact that no submissions were made why he should award maximum compensation as he had requested.

The applicant then made application to the Labour Court (LC) in Johannesburg to review and set aside an arbitration award.

LC's judgment

Lagrange J noted that in promotion disputes it is not enough to merely show that there was a breach of protocol or procedures in the recruitment process. It is also necessary for a complainant to show that the breach of the procedure had unfairly prejudiced him. As such, the main question was, but for the alleged failure to consider internal candidates first, would the third respondent have been appointed?

Lagrange J noted further that the third respondent had conceded that his curriculum vitae did not disclose any managerial experience as required by the advertisement, though he advanced that his supervisory experience was the same. As a result of this, it was absurd to suggest that the applicant did not contest that the third respondent would have been chosen had he been interviewed. The main point was that the applicant argued that the third respondent would not have been chosen because he would not have been interviewed at all because he did not meet the minimum requirements.

Lagrange J noted further that there was also no evidence before the arbitrator as to why the interview process would necessarily have resulted in third respondent's successful appointment. The arbitrator, having inferred, that the

third respondent did have the minimum qualifications, then concluded that he, therefore, was the best candidate, which is illogical. The arbitrator also overlooked that the third respondent needed to show not only that he was a suitable candidate for consideration, but that he was the best candidate, even if he was only compared with the other internal candidates, who incidentally were also found to be insufficiently qualified.

The court accordingly held:

There was insufficient evidence for the arbitrator to reasonably conclude that the third respondent ought to have been short listed on the basis that he met the minimum requirements of the job.

The arbitrator reached the conclusion that the third respondent was the best candidate for the position without sufficient evidence to support such a finding on the probabilities and that accordingly his finding was unreasonable.

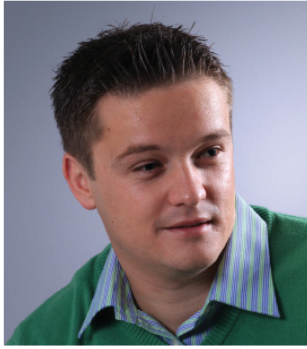
Although the arbitrator was aware of the test he was required to apply, he did not follow the principles he ought to have in terms of the judgment in the *Ndlovu* case, which caused him to misconstrue how he ought to evaluate the evidence before him.

The court accordingly reviewed and set aside the arbitration award.

Conclusion

This judgment is important as it highlights that when an employee raises an unfair labour practice dispute relating to promotion, in order to be successful, it must show that he or she met the inherent requirements of the post in question and that he or she was the best candidate for the post. As well as, that the decision of appointing another individual in preference over said employee was unfair.

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Bills introduced

Traditional Courts Bill B1 of 2017.

Commencement of Acts

Criminal Procedure Amendment Act 65 of 2008, s 1 in respect of various sub-districts. *Commencement:* 31 January 2017. Proc R4 to Proc R7 GG40578/27-1-2017.

Promulgation of Acts

Higher Education Amendment Act 9 of 2016. *Commencement:* To be proclaimed. GN21 GG40548/17-1-2017 (also available in Afrikaans).

Division of Revenue Amendment Act 11 of 2016. *Commencement:* 19 January 2017. GN36 GG40558/19-1-2017 (also available in Sepedi).

Unemployment Insurance Amendment Act 10 of 2016. *Commencement:* 19 January 2017. GN35 GG40557/19-1-2017 (also available in Tshivenda).

Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2016. *Commencement:* Various dates set out in the Act. GN38 GG40560/19-1-2017 (also available in Afrikaans).

Taxation Laws Amendment Act 15 of 2016. *Commencement:* Various dates set out in the Act. GN40 GG40562/19-1-2017 (also available in Afrikaans).

Tax Administration Laws Amendment Act 16 of 2016. *Commencement:* Various dates set out in s 83. GN41 GG40563/19-1-2017 (also available in Afrikaans). (See also p 4.)

Rates and Monetary Amounts and Amendment of Revenue Administration Laws Act 14 of 2016. *Commencement:* Set out in the Act. GN39 GG40561/19-1-2017 (also available in Afrikaans).

Children's Amendment Act 17 of 2016. *Commencement:* To be proclaimed. GN42 GG40564/19-1-2017 (also available in isiZulu).

New legislation

Legislation published from
21 December 2016 – 30 January 2017

Children's Second Amendment Act 18 of 2016. *Commencement:* To be proclaimed. GN43 GG40565/19-1-2017 (also available in isiZulu).

Performing Animals Protection Amendment Act 4 of 2016. *Commencement:* To be proclaimed. GN33 GG40555/19-1-2017 (also available in Afrikaans).

Finance Act 7 of 2016. *Commencement:* 19 January 2017. GN34 GG40556/19-1-2017 (also available in Setswana).

Adjustments Appropriation Act 12 of 2016. *Commencement:* 19 January 2017. GN37 GG40559/19-1-2017 (also available in Sesotho).

Selected list of delegated legislation

Airports Company Act 44 of 1993
Airport charges as from 1 April 2017. GenN961 GG40529/29-12-2016.

Air Traffic and Navigation Services Company Act 45 of 1993

Air traffic service charges as from 1 April 2017. GenN959 GG40526/30-12-2016.

Competition Act 89 of 1998
Designation of the petroleum industry for purposes of s 10(3)(b)(iv). GN1599 GG40517/21-12-2016.

Criminal Procedure Act 51 of 1977
Designation of various correctional facilities in terms of s 159B(2). GN R61 to GN R63 GG40578/27-1-2017.

Defence Act 42 of 2002
Regulations for the Reserve Force Council, 2016. GN1581 GG40515/23-12-2016.

Health Professions Act 56 of 1974
Regulations relating to the qualifications for registration of basic ambulance assistants, ambulance emergency assistants, operational emergency orderlies and paramedics. GN49 GG40577/27-1-2017 (also available in isiZulu).

Income Tax Act 58 of 1962
Agreement between South African and Zimbabwe for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GN58 GG40577/27-1-2017 (also available in Afrikaans).

Agreement between South Africa and Singapore for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GN57 GG40577/27-1-2017.

Local Government: Municipal Finance Management Act 56 of 2003
Amendment of regulations regard-

ing supply chain management. GN R31 GG40553/20-1-2017.

Medicines and Related Substances Act 101 of 1965

Amendment of the Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee to be charged in terms of s 22C(1)(a). GN1589 GG40515/23-12-2016.

Amendment of Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN48 GG40577/27-1-2017.

Mental Health Care Act 17 of 2002
General amendment regulations GN1587 GG40515/23-12-2016 (isiZulu) and GN1590 GG40515/23-12-2016.

Merchant Shipping Act 57 of 1951
Merchant Shipping (Radio Installations) Amendment Regulations, 2016. GN R44 GG40568/23-1-2017 (also available in Afrikaans).

National Forests Act 84 of 1998
List of protected tree species. GN1602 GG40521/23-12-2016.

Pension Funds Act 24 of 1956
Amendment of the Pension Fund Regulations, 2016. GN1584 GG40515/23-12-2016.

Pharmacy Act 53 of 1974
Qualification for pharmacy support personnel. BN196 and BN198 GG40522/23-12-2016.

Preferential Procurement Policy Framework Act 5 of 2000
Preferential Procurement Regulations, 2017. GN R32 GG40553/20-1-2017.

Public Audit Act 25 of 2004
Directive issued by the Auditor General regarding audit functions performed in terms of the Act. GN1580 GG40515/23-12-2016.

Public Service Commission Act 46 of 1997
Rules on conducting investigations. GenN22 GG40552/20-1-2017.

Road Accident Fund Act 56 of 1996
Adjustment of the statutory limit in respect of claims for loss of income and loss of support (R 254 450,00, with effect from 31 January 2017). BN2 GG40577/27-1-2017.

Short-term Insurance Act 53 of 1998
Amendment of Regulations. GN1582 GG40515/23-12-2016.

Tax Administration Act 28 of 2011

Regulations for purposes of para (b) of the definition of 'international tax standard'. GN R1598 GG40516/23-12-2016 (also available in Afrikaans). (See also p 4.)

Draft delegated legislation

Proposed amendment of regulations in terms of the Short-term Insurance Act 53 of 1998. GN1583 GG40515/23-12-2016. Proposed amendment of regulations in terms of the Long-term Insurance Act 52 of 1998. GN1585 GG40515/23-12-2016. Annual adjustment of the single exit

price of medicines and scheduled substances for 2017 in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN1588 GG40515/23-12-2016.

Regulations in terms of the Protection of Investment Act 22 of 2015 for comment. GenN958 GG40526/30-12-2016.

Norms and Standards Regulations applicable to different categories of health establishments in terms of the National Health Act 61 of 2003 for comment. GN10 GG40539/4-1-2017.

Proposed regulations regarding fees for the provision of aviation and meteorological services in terms of the South

African Weather Service Act 8 of 2001. GN45 GG40572/25-1-2017.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R68 GG40581/27-1-2017.

Draft Ergonomics Regulations in terms of the Occupational Health and Safety Act 85 of 1993. GN R64 GG40578/27-1-2017.

Draft General Medicine Regulations in terms of the Medicines and Related Substances Act 101 of 1965. GN50 GG40577/27-1-2017.



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Dismissal for disability

In *Smith v The Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC), the employee alleged that he was unfairly discriminated against when the employer refused to allow him to resume his duties for 'cosmetically unacceptable' reasons. In this regard, the employee had attempted suicide, which resulted in disfigurement to his face, as well as an impairment to his speech. After the suicide attempt the employee was hospitalised and underwent reconstructive surgery. He was allowed some time off by his employer to recover and was told that he could resume work some months later. When the employee expressed his desire to return to work he was told that his facial appearance was not acceptable and that it would remind employees of the unfortunate event. Furthermore, his speech was only 70% to 80% comprehensible. It was accordingly suggested that he should apply for a disability claim from the provident fund.

The employee decided not to pursue the disability claim as he was concerned that it would amount to fraud given the fact that it was a self-inflicted disability. On numerous occasions he informed the employer that he intended to return to work, but his e-mails either went unanswered or he was informed that he could not return to work. Eventually he had a

meeting with the employer. During this meeting he was not formally dismissed but was simply told that he could not resume his duties for cosmetic reasons.

The employee then referred an unfair labour practice to the *Commission for Conciliation, Mediation and Arbitration (CCMA)*. The CCMA found that it did not have jurisdiction as the dispute had been referred late without a condonation application. He then abandoned the unfair labour practice claim and referred an unfair discrimination dispute to the Labour Court (LC).

Snyman J of the LC was of the view that it was clear that the employee had a disability as defined in the Employment Equity Act 55 of 1998 (EEA). Furthermore, the employer was of the view that the employee had a disability and thus the protection for disabled persons applied.

It was found that by not allowing the employee to resume work and stopping the payment of his salary, this amounted to a termination of his employment and thus the employment practice within which the employer discriminated against the employee was dismissal. The onus was on the employer to prove that the discrimination was fair. The employer argued that because of the speech impediment the employee could not fully perform his job. While this may have been true, there was no evidence to this effect. The court also found that the court could not rely on cosmetic reasons for the dismissal as he did not occupy a role such as a fashion model. Snyman J observed that he did not think that the speech impediment was so severe that the employee would not be able to perform his duties and he was of the view

that only minimal accommodation by the employer would have been required. The employer did not carry out an investigation to determine the extent of the impairment nor did it consider whether the employee could be accommodated in another role. The Code of Good Practice: Dismissal expressly provides that employers must reasonably accommodate the needs of persons with disabilities and the employee should be consulted with in this regard. This did not happen.

While the Code of Good Practice: Dismissal provides that an employer need not accommodate an employee with a disability if it would impose unjustifiable hardship, Snyman J was of the view that it would not have constituted unjustifiable hardship to allow the employee to return to work to try and prove that he could perform his duties. If he could not perform them, then the employer could simply proceed with an incapacity process. The fact that it just refused to allow the employee to return to work amounted to discrimination on the grounds of disability.

The court awarded damages equal to 24 months' remuneration, as well as a further six months compensation as *solatium* owing to the fact that the employee had suffered humiliation at the hands of his employer. The employer was also ordered to pay costs.

Note: In terms of the Labour Relations Act 66 of 1995 (LRA), a court can grant a compensation award up to a maximum of 24 months in relation to automatically unfair dismissals. However, in this case, the applicant's claim in relation to discrimination was not brought in terms of the LRA but was brought in terms of s 10 of the EEA. In terms of s 50(2) of the

EEA, a court has the discretion to grant an order that is just and equitable in the circumstances and there is no limit on the amount of compensation and/or damages the court is entitled to grant to an applicant.

Accordingly, the court's award of damages equal to 24 months' remuneration, as well as a further six months compensation as *solatium* was in accordance with its powers as set out in the EEA.

Arbitration of unfair discrimination disputes in the CCMA

In *Famous Brands Management Company (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2016] 12 BLLR 1217 (LC), 632 employees referred

an unfair discrimination dispute to the CCMA on the basis of unequal pay for equal work. The employer raised a point *in limine* that the CCMA did not have jurisdiction to determine the dispute as it was a collective dispute. In this case, the employees all earned below the prescribed annual earnings threshold determined by the Minister of Labour from time to time (the threshold) and thus relied on s 10(6)(aA) of the Employment Equity Act 55 of 1998 (EEA) to refer the dispute to arbitration at the CCMA as opposed to the Labour Court (LC). In this regard, this section allows an employee who earns below the threshold to elect whether to refer the dispute to the LC or to arbitration at the CCMA. The employer argued that the wording in s 10(6) of the EEA is in the singular and thus it

only applies if the dispute involves a single individual. The commissioner ruled that the CCMA did have jurisdiction. The ruling was then taken on review.

Van der Merwe AJ dismissed the review application on the basis that the arbitrator had reached the correct decision. In this regard, Van der Merwe AJ was of the view that the intention of the legislature was to provide an option to all persons earning below the threshold to refer unfair discrimination disputes to the CCMA for arbitration so that the dispute could be adjudicated in a cost-effective manner. It was noted that an equal pay for equal work claim may be just as complex for one individual as for many individuals. Thus, the complexity of the matter does not necessarily increase because of the number of claimants.



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Prescription: The Constitutional Court prescribes the way forward

Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others (CC) (unreported case no CCT232/15,15-12-2016) (Jafta J (Nkabinde ADCJ, Khampepe J and Zondo J concurring)).

In 2016 the Labour Appeal Court (LAC) delivered two judgments, which defined the relationship between disputes under the Labour Relations Act 66 of 1995 (LRA) and the Prescription Act 68 of 1969. In the consolidated matter of *Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd t/a Metrobus/ Mazibuko v Concor Plant Cellucity (Pty) Ltd v Communication Workers Union on behalf of Peters* (2016) 37 ILJ 413 (LAC), the LAC held that arbitration awards are subject to the Prescription Act. In keeping with this principle, the LAC, as recently as 8 September 2016 in *Food and Allied Workers' Union on behalf of Gaoshubelwe and Others v Pieman's Pantry Pty Ltd* (2017) 38 ILJ 132 (LAC) (see 2016 (Dec) DR 49) held that all disputes referred to the

Commission for Conciliation, Mediation and Arbitration (CCMA) or relevant bargaining councils, are also hit by the provisions of the Prescription Act.

On appeal the Constitutional Court (CC), in the first of the two aforementioned judgments weighed in on the issue.

Background

In September 2009 the applicant received an arbitration award in his favour wherein he was awarded retrospective reinstatement following an unfair dismissal.

In October 2009 the respondent filed a review application to set aside the award. Despite the application being opposed, the matter had not been allocated a date for hearing, which prompted the applicant, in 2013, to launch an application to enforce the award. In opposing the enforcement application, the respondent successfully argued that the award was delivered over three years ago and had, as a result thereof, prescribed. As mentioned, the LAC confirmed this argument in 2016, finding that an arbitration award is a simple debt as contemplated in s 10 of the Prescription Act and thus prescribed three years from when it was delivered.

Section 16 of the Prescription Act

Section 16(1) outlines the scope of the Prescription Act and states that the provisions of the Act shall apply to all debts arising after the commencement of the Act, except in circumstances where such provisions are inconsistent with any Act of parliament, which specifies time frames for when a claim can be made.

The question before the CC, as was before the lower courts, was whether there

were any inconsistencies between the LRA and the Prescription Act.

In demonstrating the inconsistencies between the LRA and the Prescription Act the CC made the following observations:

The Prescription Act contemplates civil courts as the only forum disputes are resolved, whereas the LRA provides that disputes be resolved at statutory tribunals (being the CCMA and bargaining councils) in a speedier manner as compared to the normal course of litigation.

Secondly, the prescription periods set out in s 11 of the Prescription Act are at odds with the scheme of the LRA, which provides time lines to ensure labour disputes are resolved speedily. Thus, an employee who in terms of the Prescription Act may lodge an application to enforce an award on the last day of the three year period from when the award was issued, may have his matter dismissed at the Labour Court (LC) for not bringing the application within a reasonable time period.

Thirdly, an arbitration award is final and binding on parties and is delivered after the parties have ventilated their respective arguments, however other than a judgment debt, the Prescription Act extinguishes a claim before it has been determined by a court.

Having set out various other inconsistencies between the LRA and the Prescription Act, the court held:

'All these differences support the proposition that the LRA is not consonant with the Prescription Act. But the inconsistency does not flow from the fact that the LRA and the Prescription Act prescribe different time periods only. It also arises from the fact that section 158 of the LRA empowers the Labour Court to make an award an order of court for purposes of enforcement. The application of the Prescription Act

to such awards effectively achieves the opposite outcome. Once prescribed, an award becomes unenforceable and the Labour Court may not exercise its power to make the award an order of court. In these circumstances the Prescription Act defeats the LRA process that was specifically designed to enforce the right to fair labour practices.'

Considering the fact that the LRA takes precedence over any conflicting legislation, the court upheld the appeal and set aside the order of both the LC and LAC and replaced it with a finding that the arbitration award be made an order of court. The respondent was ordered to pay the costs of proceedings at the LC, LAC and the CC.

In a separate judgment penned by Froneman J (Madlanga J, Mbha AJ and Mhlantla J concurring), the court agreed with the order but for different reasons.

The fundamental difference between the judgments is that unlike the first judgment, the latter judgment did not find inconsistencies between the LRA and the Prescription Act and held that both acts are capable of being interpreted in a manner which protects the right of access to justice while simultaneously ensuring labour disputes are resolved speedily.

What was required, according to the court, was for the Prescription Act to be

re-interpreted to give effect to constitutional imperatives.

The starting point was s 15(1) of the Prescription Act, which states prescription is 'interrupted by the service on the debtor of any *process* whereby the creditor claims payment of the *debt*' (my italics).

In the court's view there was no reason why a referral to the CCMA, which is a statutory body designed to resolve disputes through the application of law, should not be considered a 'process' as envisaged in s 15(1) of the Prescription Act.

As to whether a claim for unfair dismissal constitutes a 'debt' contemplated in s 15(1), the court noted that a claim to enforce a legal obligation qualifies as a debt for purposes of the Prescription Act. A legal obligation includes a positive obligation whereby a party is called on to do something. In an unfair dismissal claim the legal obligation sought is either reinstatement, re-employment or compensation; all three of which are positive obligations. Thus, a claim for unfair dismissal qualifies as a debt.

Following the above findings, the court held that referring an unfair dismissal dispute to the CCMA, interrupts prescription.

Once the dispute is referred – how long thereafter would prescription be interrupted?

In addressing this issue the court referred to s 15(4), which states that prescription is interrupted until the final judgment becomes executable.

A judgment is not executable, in general, if it is subject to an appeal. Therefore, as with instances where an appeal raised against a judgment continues to interrupt prescription, so to should a review application at the LC continue to interrupt prescription. This approach is confirmed by s 145(9) of the LRA, which was introduced in 2015, and states that a review application interrupts prescription.

Therefore, until the review is finalised, the award cannot prescribe.

In distinguishing the two judgments further the court held that unlike the first judgment, which found the shorter time periods set out in the LRA are inconsistent with the time periods in the Prescription Act, the court found that the time periods in the LRA are not prescription periods but rather time bars. Thus, referring an unfair dismissal dispute after the 30-day period does not mean the claim has prescribed but rather that it was referred outside the time bar and can be heard with an application for condonation. The court found that there was no reason why time bars and prescription periods could not co-exist.





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By
Meryl
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Abbreviation	Title	Publisher	Volume/issue
<i>EL</i>	Employment law	LexisNexis	(2016) 32.6
<i>ILJ</i>	Industrial Law Journal	Juta	(2017) 38 January
<i>PER</i>	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2016) 19 August (2016) 19 October (2016) 19 November (2016) 19 December (2017) 20 January
<i>PLD</i>	Property Law Digest	LexisNexis	(2016) 20.4
<i>SAJHR</i>	South African Journal on Human Rights	Taylor and Francis	(2016) 32.3
<i>SAMLJ</i>	South African Mercantile Law Journal	Juta	(2016) 28.3
<i>SALJ</i>	South African Law Journal	Juta	(2016) 133.4
<i>SLR</i>	Stellenbosch Law Review	Juta	(2016) 27.3
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2017) 1

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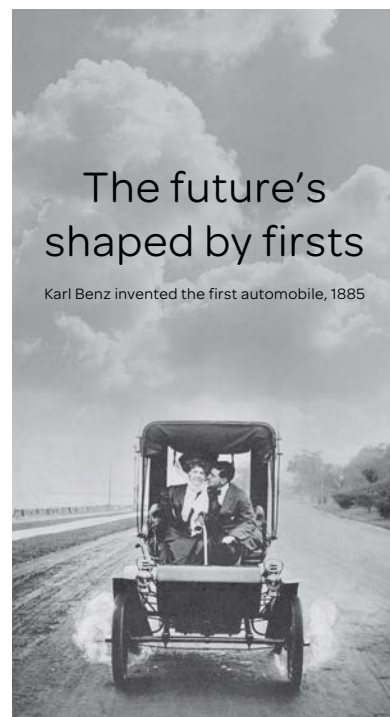
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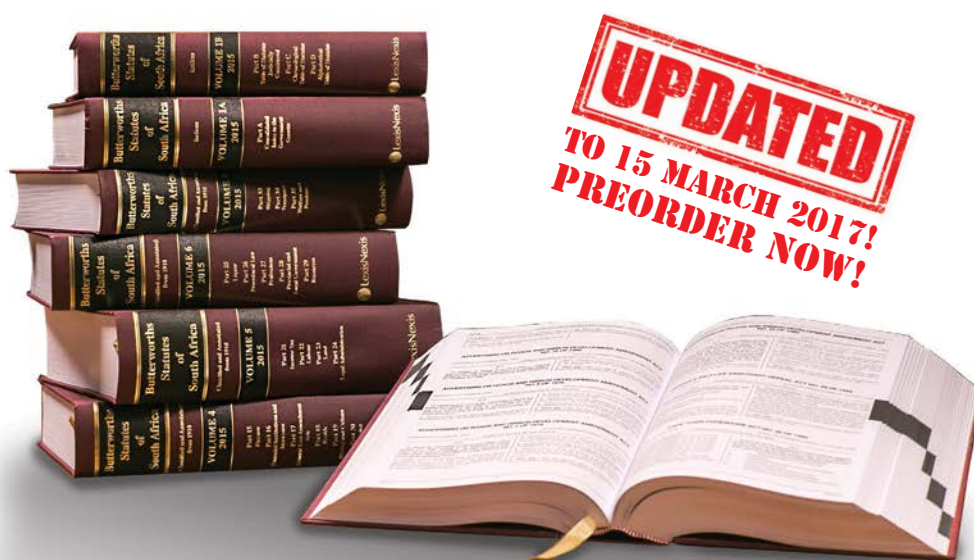
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