

## TWO VIEWS ON NDABA, PENSION INTEREST AND ENFORCEABLE ORDERS



Is it still necessary to obtain a  
court order against a fund?

*A rebuttal*

Enforceable orders against  
retirement funds after divorce:

*A rejoinder*

Who is responsible for *mishaps*  
in the *operating theatre*  
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Chief Justice to be **more vigilant**  
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### 28 Is it still necessary to obtain a court order against a fund? A rebuttal



In response to an article written by Clement Marumoagae 'Pension interest - is there a need to plead a claim?' (2017 (Jan/Feb) *DR* 38), **Naleen Jeram** disagrees with the notion that the ruling in *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA) clarified the position and concludes that the court ruled that it is not necessary for the pension fund to be identified and ordered to pay the benefit in order for such a fund to pay the non-member spouse.

### 34 Enforceable orders against retirement funds after divorce: A rejoinder



In response to the Naleen Jeram article above, **Clement Marumoagae** writes that Mr Jeram misinterpreted his argument on the *Ndaba* case. Mr Marumoagae explains further that he did not write that the *Ndaba* matter clarified the intense debates relating to pension interests by lower courts nor did he write that the case ruled that it is not necessary for the pension fund to be identified and ordered to pay the benefit in order for such a fund to pay the non-member spouse.

### 38 Who is responsible for mishaps in the operating theatre at a private hospital?



From the role that the head surgeon plays in theatre, many observers, including lawyers, will assume that the head surgeon legally, takes responsibility for the individual's, even the team's mistakes. In this article, **Dr Henry Lerm**, investigates whether the so-called 'captain of the ship' doctrine forms part of our law. An answer to that is of paramount importance in medical malpractice litigation. Identifying the correct party(ies) will result in the correct defendant(s) being sued. A misjoinder can be financially very costly to a client and add to the woes of the attorney making that decision.

### 42 When constitutional guarantees meet reality in health care

No other consumer/provider relationship in South Africa starts off on a more unbalanced level as the relationship between the consumer of health services and the provider thereof. Often and specifically when making use of public healthcare services, the consumer has no other option but to trust the provider as there may not be any other resources available in the nearby vicinity and to make matters worse, the consumer is often not in a position to debate or challenge the quality of the service as he or she is physically in a poor state. Author, **Wihann Joubert**, discusses case law pertaining to medical negligence and discusses why it is, therefore, imperative that these services, whether rendered in the private or public sector, are rendered while having the utmost regard for the values enshrined in the Constitution.

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# CHE releases full LLB review

**T**he Council on Higher Education (CHE) has released the full report on the National Review of the Bachelor of Laws programme. The 358 page report, which was circulated by Parliament, details the mechanism used to review the 17 institutions that offer the LLB degree in South Africa. The report, *inter alia*, provides reasoning behind the CHE's decision to furnish four universities with a notice of withdrawal of accreditation if the quality of their LLB programme does not improve.

The four universities – North-West University, Walter Sisulu University, University of South Africa and University of the Free State – were given until early October to report on progress made and to explain what plans will be made for the future (see p 10). Below are the reasons specified by the CHE for the notice of withdrawal of accreditations.

## North-West University

- There is significant evidence of inequity between the two sites of delivery, in terms of access; provision of curriculum delivery, teaching, learning and assessment; the profiles of staff in respect of seniority, qualifications and scholarly reputation; the quality assurance of the programme; articulation between the sites; infrastructure; and other learning resources. Institutional restructuring aimed at addressing such issues has not yet manifested itself in the faculty of law.
- There is a lack of substantive integration, in the programme as a whole as well as on the Potchefstroom campus, between students of different racial groups, and a sense of alienation felt by students of particular groups.
- Relatively low admission requirements are not, throughout the programme, supplemented with adequate student support.

## Walter Sisulu University

- The programme fails to demonstrate adequate vertical alignment across years of study, or progression through advancing levels of complexity. The content of many modules is not fit for the purpose of educating a well-rounded law graduate, and there is little evidence of any recent updating of content and related case law.
- There is a lack in the programme of adequate senior staff members to provide it with academic leadership and ensure quality. The majority of staff members have the LLB as highest qualification. The programme lacks an adequate workload model to ensure equitable and ef-

fective teaching and assessment across the programme.

- There are few development opportunities available for administrative staff in the faculty.
- Teaching and learning resources are inadequate, impacting negatively on the achievement of the intended outcomes of the qualification.
- There is inadequate alignment between the curriculum, teaching, learning and assessment. Evidence of assessment provides little indication of attention to the development of critical engagement, analysis and problem-solving skills. Formative assessment feedback is irregular, and student course evaluations are not done consistently.
- The programme lacks formal structures that would enable effective programme coordination and leadership. There is little evidence of collaboration in the development and delivery of the programme. This affects staff morale, indicated by non-delivery or re-scheduling of lectures that disrupts students' planning and organisation.
- Student attrition rate is high, and the on-time graduation rate is low, yet there is little evidence of formal tracking and monitoring of student performance with a view to improvement.

## University of South Africa

- There are fundamental flaws in curriculum design. The flaws include problems relating to modular sequence, its alignment with the required vertical progression and logical increase in complexity in terms of the National Qualification Framework (NQF) levels, the credit allocation, the distinctive demands of a distance mode of tuition, and the purpose of the qualification and required graduate attributes as set out in the LLB Standard (including the need for inclusion of sufficient non-law modules).
- There is a lack of clarity on how policies for teaching, learning and assessment are aligned with the distance mode of tuition, and what mechanisms exist for quality assurance of assessment and feedback to students.
- There are instances of study guides that are poorly composed, and do not adequately meet the needs of students and the expected level of the modules.
- The flexible admission policy is not augmented by adequate student support, and identification and monitoring of at-risk students.

## University of the Free State

- There needs to be evidence indicating how the curriculum will be modified to ensure coherence, adequate vertical pro-



Mapula Sedutla – Editor

gression, achievement of the NQF exit level, and alignment with the principles and graduate attributes established in the LLB Standard. At the same time, the number and allocation of credits need to be reviewed.

- The faculty needs a strategic plan, aligned with the institutional plan that includes its relationship with a teaching and learning plan that is aligned with the aim of achieving the graduate attributes.
- A staff development plan is required that addresses the need for greater staff diversity. There should also be a plan for adequate allocation of administrative staffing resources.
- Systems need to be in place to ensure effective academic, as opposed or in addition to administrative, leadership and coordination of the programme.
- The faculty should provide evidence of equitable provision of teaching, learning and assessment for students enrolled for the distance mode of tuition.
- The faculty must produce a teach-out plan for students enrolled with Varsity College. It should include the institution's plan for supervision of quality assurance as it affects those students.

Meanwhile, the Law Society of South Africa (LSSA) expressed serious concerns that it has not been consulted on the process since 2015, although the LSSA was asked for input in the standards-drafting process of the review. The LSSA questioned the CHE's decision not to include the legal profession in its review. The LSSA has offered its support and its commitment to law faculties, which may require input and assistance from the attorneys' profession to ensure their LLB degrees achieve full accreditation by the CHE (see p 19).

# LETTERS

## TO THE EDITOR

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

### Where do we go from here South Africa, can we defeat corruption?

'He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee' (Friedrich Nietzsche (translated by Helen Zimmern) *Beyond Good and Evil* (Create Space Independent Publishing Platform 2016)). These words expressed by Friedrich Nietzsche, echo with an abundance of might in relation to the current position South Africa (SA) finds itself in regarding corruption. It is no secret that SA as a nation has its roots heavily laden in a history of disproportion and inequality. A history that needed to be overcome, and as a result, has seen to it that various laws have been implemented to assist in addressing existing past inequitable disproportions in society. The issue though, is that SA currently faces the threat of losing its new identity of opportunity, and resembling that of the past – that which saw to it that a minor few benefit, at the peril of the rest.

In the wake of the latest acts by the South African government (ranging from various issues such as contentious cabinet reshuffles, to inadequacy in delivery of basic services such as the payment of social grants), a question has to be asked: Are we doing enough as a nation to curb corruption? The in-

roduction of the Protected Disclosures Amendment Bill (the Bill) promises some hope in this respect. The Bill attempts to extend the application of its principal Act, the Protected Disclosures Act 26 of 2000, beyond the employer and employee relationship. One has to realise that the country currently faces corruption at both public and private sector levels, and an immediate eradication in its entirety is what should be the objective. It is for this reason that we need to protect and encourage individuals to come to the fore and expose dealings that have an adverse effect on business as a whole.

The Bill serves the purpose of strengthening its application to any person who works or has in the past worked for the state, by protecting employees in both public and private sectors from being subjected to 'occupational detriment' as a result of making a 'protected disclosure'. The occupational detriment an individual can encounter includes: Being subjected to disciplinary action; dismissal; suspension; harassment; intimidation; demotion; transfers; refusal of references; as well as being subjected to any civil and criminal claim for an alleged breach of confidentiality as a result of the disclosure of a criminal offence. The Bill also places a legal obligation on individuals in terms of which a protected disclosure, has been made (within 21 days) to investigate the matter or refer the matter to another person or appropriate body that can adequately deal with that protected

disclosure. Conversely, the Bill seeks to also act as a deterrent to individuals disclosing false information.

The impact that the Bill will have is colossal. Individuals in the private and public sector would then be encouraged to voice their concerns about the conduct that they have witnessed without fear of reprisal. The power position that the state and private entities have over individuals will thus be diminished, and we can call for greater transparency in the manner in which the affairs of business and the state are administered. This diminished perceived power will be greatly assisted by the legal obligation to investigate reported disclosures in that individuals do not have to fear that their concerns will fall to unresponsive ears, or that the wheel of corruption will continue rotating indefinitely.

This is what the country needs, what it should strive for and what it deserves. These are the words that should be the mantra that echoes through every South Africans' subconscious. Ultimately, accountability will be a realisable outcome and SA can return its focus to achieving its deserved zenith of greatness.

To reiterate the postulated question of whether we are doing enough as a country to curb the disease of corruption? I say we definitely have the mental prowess, now let us execute.

**Thabo Mahlare**, candidate attorney,  
Pretoria.



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# The state of the profession discussed at LSSA AGM

**T**he Law Society of South Africa (LSSA) held its annual general meeting (AGM) on 21 and 22 April in Port Elizabeth under the theme: 'The state of the profession - looking forward'.

Acting President of the Cape Law Society, Lulama Lobi welcomed delegates to Port Elizabeth, while former Co-chairperson of the LSSA, Jan van Rensburg, welcomed delegates to the AGM. After which a Council Meeting of the LSSA was held. During the Council Meeting, Chairperson of the Board of Control of the Attorneys Fidelity Fund (AFF), Strike Madiba; Chairperson of the Attorneys Development Fund (ADF), Nomahlubi Khwinana; Chairperson of the Briefing Patterns Task Team, Busani Mabunda (see LSSA news 'Procurement protocols for the legal profession adopted' on p 18); and Chairperson of the Women's Task Team, Mimie Memka, presented reports.

## AFF report

Mr Madiba said the AFF was established at the initiatives of attorneys in terms of s 8 of the Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act 19 of 1941 as amended. 'The Fund is obliged to reimburse members of the public who may suffer pecuniary loss as the result of the theft by practicing attorneys and/or their employees. It is administered by a Board of Control consisting of 16 members, made up of four members from each of the provincial law societies,' he added.

Speaking about the contribution made towards audit costs, Mr Madiba said: 'The AFF introduced a minimum contribution towards audit cost of the law firms in order to assist, specifically, smaller firms with the meaningful contributions towards the cost of their trust audits. The Fund has of late increased the minimum contribution from R 3 500 to R 4 000 with effect from 31 March 2016.'

Mr Madiba noted that the AFF has been looking at its sustainability for the future. He said almost all of the AFF's income is interest rate and investment return dependent. 'The trust balances are positively influenced by higher levels of business confidence and economic activity. A weak investment, low interest rate and a low business and consumer confidence negatively impacts on the fund's financial position. Theft claims, the PI [professional indemnity] premiums and



*Chairperson of the Board of Control of the Attorneys Fidelity Fund, Strike Madiba, said that attorneys should be aware that in the future they would be required to pay for professional indemnity cover.*

section 46(b) expenses constitute almost 60% of the fund's total expenses. A major concern remains the high level of claims, which show no sign of abatement. Most affected areas of practice is conveyancing and the Road Accident Fund related work,' he added.

Mr Madiba said the AFF continues to pay the annual premium to the Attorneys Insurance Indemnity Fund (AIIF). He added: 'In 2016 the premium was R 147 million, excluding VAT. The AIIF's outstanding claims liability as at 31 December 2016, as actuarially assessed, is the amount of R 391 million. This amount increases on a daily basis as new claims are notified to the AIIF. The liability in respect of bonds of security issued by the AIIF in favour of attorneys appointed as executors of deceased estate is valued at approximately R 11 billion. The AIIF, once again, made an underwriting loss in 2016 as the value of claims notified has exceeded the premium. In 2016 there was a 16% increase in claims, when compared to the corresponding year in 2015. In the last few years the Fund has consistently warned members of the profession of the implication of the growth in indemnity claims notified to the AIIF. The profession has also been alerted to the fact that the current funding model is unsustainable both for the Fund and the AIIF. ... Members should be made aware that with effect from 2018 or going forward at a date to be determined by the Board, members would be expected to make contributions towards the PI cover. The operating premiums to the AIIF will still be covered by the Fund.'

## ADF report

Ms Khwinana said the ADF was established in 2011 as an independent non-profit organisation that focuses on the development of attorneys. She noted that in 2016 the ADF broke its 50 beneficiary mark. 'These beneficiaries exclude those that the ADF assist with technical business requirements, such as drafting business plans and the creation of financial projections, with the view of sourcing funding,' she added.

Ms Khwinana reported that the ADF has made agreements with numerous service providers to give a facelift to the loan it provides to beneficiaries. 'An agreement has been concluded with LEAD [Legal Education and Development] for the ADF to extend loans to practitioners who require an amount of R 3 100 to register for practice management training. The repayment of the loan is 12 months payment holiday and repaid over a specific period thereafter,' she added.

## Women's Task Team report

Ms Memka noted that one of the great injustices that have been committed against women in this country and in particular in the legal profession, is that everybody else has gone upfront and progressed, but the women in the legal profession, in particular those in practice, have been left to fend for themselves. 'And so it is for this purpose that the women have seen it fit to take their destiny upon themselves in their hands and engage in programmes and activities that will see to it that they progress,' she added.

Ms Memka reported that the task team had decided to focus on three areas. 'Mentorship for female legal practitioners, identifying opportunities for learnership for young female candidate attorneys and the third one is supporting the already existing significant leadership programme, which focuses on the more senior women lawyers to develop them in their business, to create networks among themselves and other practitioners and as well as to develop their leadership skills,' she said.

Speaking about what the task team has achieved thus far, Ms Memka said that the task team engaged with the South African National Space Agency and the National Energy Regulator of South Africa to explore opportunities for the organisations to mentor young female





**Judge of the Eastern Cape Local Division of the High Court in Mthatha, Justice Buyiswa Majiki, delivered an address on behalf of Judge President of the Eastern Cape Division of the High Court, Themba Sangoni. She said: 'You must make up your mind whether you want to propel the winds of the unstable society that we find ourselves in, or you want to remain giving a proper direction and quieting the winds.'**

legal practitioners. 'Surprisingly, these organisations were very enthusiastic about working with our task team for the purposes of identifying and participating in female mentorship initiatives and there is ongoing engagements with these establishments,' she added.

### Message from the judiciary

Judge of the Eastern Cape Local Division of the High Court in Mthatha, Justice Buyiswa Majiki, delivered an address on behalf of Judge President of the Eastern Cape Division of the High Court, Themba Sangoni.

Speaking about the Legal Practice Act 28 of 2014 (LPA), Judge Majiki asked, where does the existence of the Legal Practice Council (LPC) place practitioners? 'What would you like to see going on in the profession? Do you still see any

parallel structures existing together with the Council? The issue about legal education, the fees, code of conduct, cancellation of enrolment.'

Judge Majiki said that lawyers have the ability to 'quieten winds'. 'The society, is very stormy. South Africa is facing very turbulent times. And I think I would not be lying when I say the society looks up to us as lawyers as their hope. And what does that mean or what does this require? It requires that we ensure that we sharpen our minds, we continue to skill ourselves to be alert so that we are appropriately responsive to the needs of the society,' she added.

Judge Majiki noted that the legal profession is placed in an advantage of having the last word. 'Whatever profession issue, there will always be the last question: What does the law say? So, I think that is what I mean when I say we are the hope of the society. We are the people who have to interpret whatever is said to them. We are the people who have to direct their thoughts in whatever they are confronted with. So we must remain that voice of reason,' she said.

Judge Majiki added: 'I want to call on you never to compromise your independence. You are charged with the very important task of taking up issues on behalf of the voiceless. And for proper dispensation of justice, we need well formulated and well-presented submissions. So, if you are going to have a lawyer who represents someone who has an important issue, but comes unprepared, I think we would be failing and would not be assisting the dispensation of justice. It really does not depend on judges. We decide the issues as they are presented to us. You must make up your mind whether you want to propel the winds of the unstable society that we find ourselves in, or you want to remain giving a proper direction and quieting the winds.'

### Keynote address

Human rights lawyer and President of the People's Democratic Party in Zimbabwe, Tendai Biti delivered the keynote



**From left: Former Co-chairperson of the LSSA, Mvuzo Ntyesii; Deputy Chairperson of the South African Human Rights Commission (SAHRC), Priscilla Jana; Commissioner of the SAHRC, Mohamed Shafie Ameerma; and Commissioner of the SAHRC, Jonas Sibanyoni, during the MoU signing between the LSSA and the SAHRC.**

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**Human rights lawyer and President of the People's Democratic Party in Zimbabwe, Tendai Biti, delivered the keynote address.**

address. Mr Biti's topic was motivated by the reality that South Africa (SA) is a society in another transition. Mr Biti said that SA finds itself at a cross-road. 'I beg you and the authorities in this country that while you may physically cross the Limpopo, do not metaphorically cross the Limpopo, because north of the Limpopo are terrible experiences that we would not want to see in the promise and the hope that your society is and represents to the majority of democracy and democrats across the continent. So, I labelled my topic, "Law in a Turbulent Society. A Personal Journey from North of Limpopo".'

Mr Biti said: 'In the case of Zimbabwe the ruling party will ask you, why should we respect the Constitution when we spent 15 years in the bush? Why should we, for instance, lose power on the back of a pen that cost ten cents? So the source of legitimacy is a war that was fought 30/40 years ago and in Zimbabwe we are still fighting a war that finished 40 years ago. Your source of legitimacy now, if you are a citizen, is your location and your relation with the liberation struggle. If like most of us you were too young to go to the war, then you have no standing.'

Mr Biti said that Zimbabwe has a ruling elite that is very hostile to the concept and the doctrine of separation of powers. 'The executive must emasculate and capture the other two departments of the state, the judiciary, in particular. ... The biggest judicial battle we had was the battle over who succeeds the outgoing chief justice. So, we adopted a new Constitution in May of 2013, which is a tribute to your Constitution, because we largely cut and pasted your own Constitution and made it our Constitution and for legitimacy, of course, we went to a referendum. So one of the things we did in our Constitution, in section 288, was that we said the executive should

no longer have carte blanche power of appointing members of the judiciary. So we introduced the concept of public interviews.' The fight over the control of ZANUPF [Zimbabwe African National Union Patriotic Front] will somehow spill to the courts, that is why controlling and capturing the next chief justice is important,' he added.

Mr Biti believes that in a turbulent changing society, the law is an instrument of change, however, the law can also be an instrument of the retention of the status quo. 'I prefer to believe that law is an instrument of social change. I believe in the philosophy of the critical legal school in America. I believe in the work of people like Roscoe Pound, who consciously accept that we have to use the law to achieve change. I am a great



**Member of the National Forum for Legal Practice (NF), Jan Stemmett presented an overview of the progress of the NF.**

admirer of the great Judge Benjamin Cardozo and his work, because he understood from the beginning that we have to use law as an instrument of social change,' he said.

## Discussion on the LPA

Member of the National Forum on the Legal Profession (NF), Jan Stemmett, presented an overview of the progress of the NF. The NF has recommended nine fully functional provincial councils in the nine provinces of the country. 'Their areas of jurisdiction will be within the provincial boundaries of the provinces. That is the new governing structure that we will have in the new dispensation with the centre of power being in the national level, at the Legal Practice Council and below that the nine provincial councils,' Mr Stemmett said.

Speaking about funding of the LPC, Mr Stemmett said that the funding issue is still ongoing as the NF is in discussions with the AFF on various issues. He said the new structure will cost R 213 million in the first year and the levies that will be

payable by legal practitioners, will be -

- R 2 500 per year for practicing legal practitioners, excluding VAT; and
- R 500 for those on the non-practicing roll.

Mr Stemmett added that unfortunately, there will be a shortfall after taking into account the levies to be paid and the possible funding from the AFF. He said the shortfall will be approximately R 32 million. 'Now, what are we going to do about it? There are two choices. Either we can try and get the funding from the government. We will, in our proposals to the minister, suggest that the minister ask Parliament to make a contribution. If that does not succeed, then we will have another round of discussions with the Fidelity Fund about the issue. But if all else fails, we will have to recover that from practitioners. ... So the levies will likely increase. We are trying our best to curb that,' he added.

Another member of the NF, Krish Govender described the work of the NF as attempting to fix an aeroplane while it is in flight. 'That's what we are doing with the legal profession. So you can imagine the trouble, the disputes, who decides to pilot the plane while the other one is doing some repairs,' he added.

- See LSSA news 'National Forum races against time to submit recommendations to minister' at p 17.

- To view the full presentation by Mr Stemmett visit: [www.lssa.org.za](http://www.lssa.org.za).

## SADC Lawyers Association and Pan African Lawyers Union

President of the Southern Africa Development Community Lawyers Association (SADC LA), James Banda, said that SADC LA has joined the LSSA in calling for a stop to the unwarranted attempts by government to decrease the capacity



**President of the SADC Lawyers Association (SADC LA), James Banda, said that SADC LA has joined the LSSA in calling for a stop to the unwarranted attempts by government to decrease the capacity of citizens to hold their government to account.**



of citizens to hold their government to account. 'The attempt by South Africa to pull out of the ICC is a direct assault on the rule of law as it reduces the probity of government in the eyes of citizens and we have joined voices in pushing for the preservation of the ICC as an institution dedicated to enabling countries to uphold the rule of law. I would like to also take this opportunity to applaud you, our colleagues, for the efforts of the LSSA in taking the government to court over the disbanding of the SADC Tribunal. It is our duty as lawyers to remind our governments that the road to the rule of law and democracy is straight and narrow,' he added.

The next SADC LA AGM will be held in Gaborone, in Botswana from 9 to 12 August under the theme 'A skilled and Competent Legal Profession, a Catalyst for a Prosperous SADC'.

• For more information pertaining to the SADC LA AGM, e-mail: Prudence@SADCLA.org.

President of the Pan African Lawyers Union (PALU), Elijah Banda, said that the organisation was founded in 2002 in Ethiopia. He added that the profession on the continent was divided along a linguistic divide of either Francophone or Anglophone and that the Anglophone were represented by the African Bar Association, while the Francophone had their own professional associations. 'The Pan African Lawyers Union has brought together all these divides across linguistic divides, across common law, civil law, jurisdictions. It brings together 55 national lawyers associations and over a 1 000 individual members and is growing,' he said.

Mr E Banda said that the vision of PALU is to see a united, just and prosperous Africa built on the rule of law and good governance. 'PALU's governance consists of three bodies, the General Assembly, the Council and the Executive Committee. The General Assembly consists of its corporate and individual members and meets at least once every year. The

Council is made up of presidents of the five regional associations and all the lawyers associations and Bar societies on the continent. The General Assembly elects an executive committee to lead and represent the organisation and this is the secretariat. Our secretariat, is situated at Arusha and this was strategically placed on account of it being the seat of the African Court on Human and Peoples' Rights,' he said.

Speaking about the activities of PALU, Mr E Banda said: 'PALU has undertaken a lot of activities in the last couple of years and in accordance with our current strategic plan. These are institutional development started with the creation of a secretariat at Arusha. The development of the legal profession, this has dominated our activities and are centred on annual conferences in various aspects and various regions of the continent. ... I wish to invite you to our conference that is going to take place in Durban in July this year. It will be an opportunity for you to meet lawyers from various parts of Africa.'

• See LSSA news 'PALU conference to take place in July' at p 18.

## Taking practice and case management to a higher level

The second day of the AGM kicked off with a case management session. Speakers of the session was attorney and LSSA Council member, Ettienne Barnard and e-Law Committee member, Brendan Hughes.

Mr Barnard spoke about why case management is necessary and what the 'forces' are telling attorneys and how attorneys should respond to this. He also touched on how attorneys can grow a litigation practice by systems, client and court satisfaction as these were some of the important 'forces'. 'So what are we talking about when we talk about case management systems? ... Who are the important role-players? Obviously cli-



*From left: Justice Willie Seriti, Esmé du Plessis and Silas Nkanunu during a gala dinner that discussed the inception of the LSSA. The trio received certificates in recognition of their contribution to the attorneys profession as Council members and Co-chairpersons of the LSSA.*

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*Attorney and e-Law Committee member Brendan Hughes spoke on new developments in information technology for legal practitioners.*

ents will always be one of the role players, but judges also play a much more active role in managing cases. And then of course lawyers are supposed to be less adversarial, you are supposed to try and solve problems for clients. ... Settlement is supposed to be considered much earlier. Need I tell you about the judges who have complained about us not settling matters before we get to the doors of the court of the actual trial?,' he added.

Speaking about guidance from the courts, Mr Barnard said: 'Judges are already applying case management, we appear at the rule 37 conferences and the judges are involved. Some are more tolerant at this stage, some are less tolerant but we are getting the picture, there is a diary that we must abide to, which means we must get our matters sorted out.'

To demonstrate that judges are aware when lawyers waste time during court proceedings, Mr Barnard quoted the judgment of *W v H* [2016] 4 All SA 260 (WCC) (see law reports 'Marriage - waiver of maintenance' 2017 (Jan/Feb) DR 42). 'This was a divorce trial which ran for 50 days. So you can imagine the bill there. The judge said "in my view it is the fault of the husband that the divorce trial has taken 50 days of court time, which I have set out in the first part of this judgment. He adopted a 'scorched earth' policy with a total disregard for the costs involved". The husband was a Silk,' Mr Barnard added. (For the full presentation see: [www.lssa.org.za](http://www.lssa.org.za).)

Mr Hughes noted that the rate of change in business and in industry is fast and seems to be accelerating. Technology is speeding up the change and the law is not exempt. 'The law perhaps is slightly later to the party in terms of being changed by technology, but we are now really at the beginning of an era where I think we are going to see fun-

damental transformation in the legal industry. ... The most recognised legal brand in the world is a company called LegalZoom. It was started by a bunch of people in the States; one of them is Robert Shapiro, who was quite famous for being one of OJ Simpson's dream team of trial lawyers. LegalZoom is a web-based service, which has access to legal precedents and documents but one can also receive advice online and it literally has tens of millions of clients. It has more clients than your traditional type law firm and it is run as a website,' Mr Hughes said. (For the full presentation see: [www.lssa.org.za](http://www.lssa.org.za).)

## Legal education

Executive Dean of the School of Law of Unisa, Professor Rushiella Songca, asked if there is a need to decolonise and what is it that needs to be decolonised? Professor Songca added: 'What is the problem that we are trying to solve by decolonis-



*Executive Dean of the School of Law of Unisa, Professor Rushiella Songca, discussed the meaning and impact of decolonisation on the profession.*

ing? And when we say decolonising, what is the role of higher education, because we are the ones that start the training of lawyers who might go out into the world either to be lawyers or to be legal advisers or to be academics, ... The most tricky one is how do we go about this project of decolonisation. How do we go about it in as far as it relates to the curriculum and the content that we are giving to our students and to what end? What will be the end product of this whole enterprise and what will be the impact of course for the profession?

Prof Songca went on further to state: 'The first point of call will be of course to look at our epistemologies. We all know, we have read many a times and we are aware of the criticisms that have been labeled against our programmes. And the main one is that they are too Eurocentric and the majority of the people cannot find themselves in that space, that some systems like African law are

not regarded as highly as common law. So the question, therefore is: How do we begin to ensure that we integrate those other epistemologies, especially African epistemologies, in ways that are meaningful into our programmes? But also as we are doing that we are keenly aware of the fact that we in the process will be disrupting the hierarchy of knowledge because there is a view that is justified that knowledge is not seen as equal. We have been for a very long time in the legal profession side lining African epistemologies and African systems. And we are saying that they should be integrated meaningfully into our knowledge. And also we, because of the Constitution and the values embedded in the Constitution, are saying as we interpret the law, as we interpret phenomena we should move away from legal domination to a law of justification as part of our transformative constitutionalism.' (For the full presentation see: [www.lssa.org.za](http://www.lssa.org.za).)

South African Law Dean's Association, Professor Rosaan Kruger, said that the four universities, which were given a notice of deaccreditation are all in the process of drafting improvement plans, and these improvement plans must be submitted to the Council for Higher Education by October of this year. Prof Kruger added: 'From these individual institutional reports the Council for Higher Education has drawn together a committee that will draft a national report and this national report will be out in the public domain. The national report, which is based on an academic peer review exercise, will form the basis of a national discussion about legal education, in which all of us have a stake. Once this national report is out I would encourage the profession to engage quite seriously with the report and make submissions that will be relevant for us in considering in conjunction with the Department of Justice, in conjunction with the Department of Higher Education where we as co-stakeholders and different complementary stakeholders in legal education and legal training can take the discussion about legal education further.'

- See LSSA news 'LSSA calls on CHE to consult legal profession on LLB degree issues' at p 19 and editorial 'Legal education in crisis?' 2017 (May) DR 3.

Administrator at the Safety and Security, Sector Education and Training Authority, Jennifer Irish-Qhobosheane, also made a presentation (see [www.lssa.org.za](http://www.lssa.org.za)).

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# Chief Justice to be more vigilant on courts performances

**C**hief Justice, Mogoeng Mogoeng, said that the National Efficiency Enhancement Committee had set up a committee of judges in February, which includes members of the Office of the Chief Justice, who will be tasked with identifying measures that can be implemented to ensure that court delays can be reduced. Chief Justice Mogoeng was briefing the media at his office in Midrand in March, after his annual meeting with the heads of courts.

Chief Justice Mogoeng said one of the crucial topics on the agenda, discussed at the meeting with the heads of courts, was on court performances. He said they had to look at how the judiciary was performing on a regular basis. He added that he received reports from the heads of courts on matters such as reserved judgments. The committee will intervene when such matters arise, to ensure that the public or litigants do not suffer unnecessarily.

Chief Justice Mogoeng noted that sometimes there is no need for unnecessary reserved judgments, as some cases are straight forward. He said that without adjournment or the benefit of a very short adjournment it must be possible for any competent judge to render judgment on the same day. He pointed out that at the meeting the committee reflected on the proposal that urgent applications must be resolved by way of an order and judgment at the same time as the matter of cause.

Chief Justice Mogoeng said that the



*Chief Justice Mogoeng Mogoeng, briefing media at his offices in Midrand after his heads of superior courts meeting in March. Chief Justice Mogoeng was outlining the judicial plans regarding matters concerning the courts and the delivery of access to justice.*

practice of giving an order with reasons to follow must become a thing of the past. He added that if it becomes necessary for a case to be postponed, either in a civil or criminal matter, the adjournment should only take seven days. He said that the committee had identified a need to collaborate with the South African Police Services and the National Prosecuting Authority to cut down on a

number of cases that come before a magistrate without prior investigation.

Chief Justice Mogoeng noted: 'We touched on a need that all matters at the High Court level, civil or criminal to be worked on for trial through necessary facilitation of a judge.' He added that no case should be set down for hearing as a matter of principle unless a judge has had a meeting or engagement with the parties involved and that he or she has satisfied themselves that the case, be it civil or criminal, is ready and will not be postponed for further investigation.

Chief Justice Mogoeng also spoke about the Road Accident Fund (RAF) and medical negligence claims. He said the National Efficiency Enhancement Committee was worried that some experts – who examine the victims of road accidents – charge and put in claims that are so high that have left RAF in a far less satisfying state. He added that the committee reflected on many issues relating to medical negligence claims, that it has given the committee, the departments and entities involved reason to be worried.

Chief Justice Mogoeng, said the nature of some of the claims and the regularities that arise and settlement amounts that are agreed to by those representing the departments or entities involved, have given the committee reason for them to be on their toes.

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## Judge Mabel Jansen resigned amid disciplinary process by the JSC

**I**n a statement released by the Department of Justice and Constitutional Development, the department said Judge Mabel Jansen wrote to President Jacob Zuma and the Minister of Justice and Correctional Services, Michael Masutha, informing them of her resignation with immediate effect. The statement said Minister Masutha acknowledged the letter and thanked Judge Jansen for her valuable service and was processing the letter.

Judge Jansen was on special leave following remarks she had made suggesting that rape was a part of the culture of black men. Her comments led to many people on social media calling for her to be removed from the Bench. Prior to her resigning, Judge Jansen's comments gave rise to a complaint to the Judicial Services Commission (JSC).

The JSC was still busy processing the complaint when Judge Jansen tendered her resignation. The statement said Judge Jansen's resignation will obviate a

protracted disciplinary process. The Department of Justice said that the escalating rate of racial incidents in the country has required government to take steps to prevent this, including the development of the Draft Prevention and Combating of Hate Crimes and Speech Bill GenN698 GG40367/24-10-2016.

The department said it was aware that legislation in itself may not end racism but will deter people from racist behaviour. The department has also developed a draft National Action Plan to Combat

Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP), which was subjected to an intensive public participation process in 2016. The department noted that the revised NAP will be submitted to Cabinet for approval during 2017.

Prior to Judge Jansen's resignation, the Black Lawyers Association (BLA)

welcomed the announcement by the JSC that it had accepted the recommendations of the Judicial Conduct Committee. The BLA strongly held that remarks made by Judge Jansen were racist and discriminatory. The organisation added that the decision by the JSC was going to set an example to all judges who might have discriminatory tendencies.

- See also LSSA news 'LSSA urges JSC to scrutinise judicial candidates for racist tendencies' on p 19.

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## ProBono.Org shows appreciation to legal practitioners who dedicate their time to do good

**P**roBono.Org held an Appreciation Awards ceremony to thank and show gratitude to legal practitioners and law firms who commit their time to do *pro bono* work. The awards ceremony took place in April in Pretoria. ProBono.Org's National Director, Erica Emdon said the awards ceremony was held to simply show appreciation to legal practitioners who help in making sure people get access to justice.

Ms Emdon said ProBono.Org has been going strong for 11 years and that it relies on the private legal profession to donate their time and skills to people who cannot afford to pay their own legal fees. She added that it was still challenging to find attorneys and advocates to do *pro bono* work, because some of them are reluctant to commit themselves, but when ProBono.Org do find legal practitioners who are willing to do the work they are extremely grateful.



**Black Lawyers Association  
General Secretary and Chief  
Executive Officer of Maponya Inc,  
Baitseng Rangata, speaking  
at the Lawyers Appreciation  
awards ceremony, hosted by  
ProBono.Org in April.**

rewarded you can never say no. Ms Rangata on behalf of all the legal practitioners who received the awards, accepted the appreciation ProBono.Org has shown the legal practitioners who did *pro bono* work.

Ms Rangata said the President of the BLA, Lutendo Sigogo, stressed the message that the BLA is hard at work with its members, to encourage them and making sure that those who need legal practitioners can get them and receive quality access to justice. She pointed out that senior practitioners must also be committed and not just pass the *pro bono* work to candidate attorneys. She said senior practitioners must commit and make it their point to know what is happening with matters regarding *pro bono* cases.

Ms Rangata appealed to the legal practitioners to go out and give quality access to justice, to people who need it. 'We have the capacity, we have the resources and let us do it,' Ms Rangata said.

Some of the recipients of the awards were -

- Maponya Inc;
- Adams and Adams Attorneys;
- Hahn and Hahn Attorneys;
- Gildenhuys Malatji Inc;
- University of Pretoria's Law Clinic;
- University of South Africa's Law Clinic;
- Advocate Sfiso Masina;
- Advocate Amos Sithole;
- Leso Attorneys;
- Bleloch Attorneys
- Spoor and Fisher Attorneys;
- MacRobert Attorneys;
- Rooth Wessels Inc; and
- Ndimma Legal Consultants.

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**National Director of the ProBono.Org, Erica Emdon, called out for more lawyers to do pro bono work. Ms Emdon was speaking at the Lawyers Appreciation awards ceremony in April.**

Ms Emdon noted that legal practitioners who do *pro bono* work, should realise how important they are to South Africa and they should be proud of themselves. Ms Emdon also pointed out that a lot more can still be done and asked legal practitioners who were at the awards ceremony to spread the word to their colleagues to join in doing *pro bono* work. She noted legal practitioners must not do *pro bono* work just because it is mandatory to do so, but they must do it willingly, because it is the essence of being a legal practitioners.

The General Secretary of the Black Lawyers Association (BLA), and Chief Executive Officer of Maponya Inc, Baitseng Rangata, assured ProBono.Org that legal practitioners who already do *pro bono* work will spread the word and do more *pro bono* work. Ms Rangata said when one does a good thing they never expect anything in return, but when you do get



## Attorneys Association of the South Eastern Cape increases number of bursaries

**T**he Attorneys Association of the South Eastern Cape (AASEC) has joined in helping students achieve their dreams of being able to get a tertiary education. In a statement released, the AASEC said for a number of years they have awarded a well deserving student with a bursary worth R 20 000 towards their law studies. However, in light of the Fees Must Fall movement that took place last year and the ongoing hardships experienced by many students, AASEC convened a special general meeting of its members at which it was resolved to increase the number of bursaries awarded to a maximum of three annually and increase the individual amounts from R 20 000 to R 25 000 each. The candidates for this year's bursaries were put forward by the law faculty of the Nelson Mandela Metropolitan University (NMMU).

AASEC said interviews were conducted with each of the nominated candidates and, the three recipients who were found to be the most deserving were selected. AASEC pointed out that all recipients of the bursaries are in their second year of



*Attorneys Association of the Eastern Cape's (AASEC) treasurer, Zolile Ngeza; AASEC Chairperson, Kailash Karsan; the recipient of the AASEC bursary, Helenique Grootboom; AASEC's Lee-Anne Groener; AASEC secretary, Shakira Ahmed; and AASEC's Tasneem Fredericks.*

studies towards their LLB degrees. The recipients have attained good academic results, notwithstanding the unrest around universities during their first year of study, as well as some trying personal circumstances.

The recipients Helenique Grootboom, Sanele Dlamini and Sinthemba Kepu

were handed bursaries at an annual law faculty awards dinner held by the NMMU law faculty in April.

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# The judiciary mourns the loss of Judge Louw and Judge Ndlovu

**T**he Judge President of the Gauteng Division of the High Court, Judge President Dunstan Mlambo, extended a message of condolences to the family and friends of Judge André Louw. In a statement, Judge President Mlambo expressed his sadness over the passing of Judge Louw who passed away on 20 April.

Judge Louw was elected to the Pretoria Bar Council on several occasions, and acted as a judge in the division on a regular basis, before his permanent appointment. He was actively involved in pupil training at the General Council of the Bar and was also a lecturer in ethics.

The statement also said Judge Louw was a champion of human rights, as is

evident by among other things, his membership of Lawyers for Human Rights until the dissolution of the Pretoria branch in 1997. Judge Louw acted as a substitute lecturer in human rights at the University of Pretoria and as collaborator with the centre for Human Rights at the University of Pretoria on a United Nations (UN) study of the UN Human Rights Treaty System.

Meanwhile, Judge President of the Labour and Labour Appeal Court, Judge President Basheer Waglay, and the Judge President of the KwaZulu-Natal High Court, Judge President Achmat Jappie, released a statement expressing sadness to the family and friends of Judge Simon Ndlovu of the Labour Appeal Court and of the High Court of KwaZulu-Natal.

Judge Ndlovu joined the Department of Justice in 1972, and worked his way up through the ranks as interpreter, clerk of court, prosecutor, magistrate and senior magistrate. In 1995 Judge Ndlovu was appointed as a regional magistrate. He joined the Durban Bar in 2000, passing his pupillage with honours and obtaining the highest marks in the country.

Judge Ndlovu's extra-legal activities included serving on various committees and boards, and part-time lecturing at the University of Zululand. He passed away on 18 April.

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## Tribute to Imrann Moosa – an advocate and devoted member of the BLA

**T**his is the story of one of the unsung heroes of our time. The uncompromising protagonist of socio-economic transformation in general and in the legal profession in particular. A man of great intellectual ability and a giant in the legal sphere, but yet a very humble and grounded individual. A shrewd lawyer of high political consciousness who remained true to his beliefs and calling, until his last days in this world. This tribute is to advocate Imrann Moosa for a life lived to advance the course of others.

Mr Moosa was born on 7 January 1959. He was born a leader as his leadership ability showed itself at a tender age as he became Vice-Chairperson of the Students' Representative Council and editor of its magazine, the *Oracle*, while still at high school level of his education. At University, he continued to display leadership ability when he became the Chairperson of Black Students Society, the organisation he co-founded with other black students.

He matriculated in 1976. A telling year in as far as student politics are concerned in our history. It is believed that the 1976 student uprisings had an everlasting impact on Mr Moosa with regard to how he embraced politics and his respect to human rights and the rule of law.

In 1979 Mr Moosa obtained a Bachelor of Arts degree at the University of South Africa and later on he passed his LLB degree through the University of Natal in 1982. After his graduation he was called to the Bar on 16 May 1983. He practiced as a private advocate from December 1983 to March 1992. As an advocate he could have had a thriving practice some years after he was admitted, but like other politically conscious prominent people who came before him, he chose the course of the people above his own indulgence. He joined the Black Lawyers Association Legal Education Centre (BLA LEC) where he worked as a litigation officer and later as the Director of Professional Affairs. This was as a result of the realisation that alone his impact on the fight against inequality and unjust laws would be negligible than when he worked with other like-minded people. It is when he was a litigation officer at the BLA LEC that he sharpened his skills as a people's litigator. This is where he discovered his love for trial advocacy. A subject that he taught until he passed away.

Teaching was in Mr Moosa's blood. This is the other contribution that he gave to the community. He lectured at different institutions of higher learning, for instance he held a position of lecturer 'A' at the Vista University for a period of seven months, then a Senior Lecturer

position at the University of Fort Hare for a period of just more than six years. He was also a Vice-Dean of the Faculty of Law at the University of Fort Hare for approximately three years.

After serving in various structures at different positions, Mr Moosa returned to his private practice on 6 December 2006 until his death. He participated in a number of professional organisations, either as an ordinary member or in a leadership position. We recognise that he was a founding member of the National Association of Democratic Lawyers (NADEL) where he served as its first Deputy Secretary under the presidency of Dumisa Ntsebeza (SC); and later the founding chairperson of the BLA Durban Branch. He was a member of the Advocates for Transformation.

Mr Moosa was bred in the Black Consciousness philosophy and later on became a prominent member of Azanian People's Organisation, the organisation that he defended many times and served on its structures with distinction.

Mr Moosa was a prolific writer, author and editor and above all he was an intellectual. He is the quintessential example of black excellence. His love of writing showed itself at a very early age through his participation in the *Oracle*. The skills he later used to full potential when he became the editor of the *African Law*

*Review*, the BLA law journal, at the time that he was with the BLA LEC. He also published a number of his articles with *Frank Talk* the publication of which he was also the editor.

In his publications and court cases he dealt with topical issues, which affected the lives of the ordinary people, and contemporary issues in both national and legal profession discourse.

At the time of his passing he was the secretary of the Durban Branch of the BLA.

Mr Moosa believed in doing what is good for others rather than to serve himself. Satisfaction for Mr Moosa was not based on monetary value but on exerting himself for the benefit of others. He earned his respect from colleagues, peers, clients and his detractors for his outstanding values and the respect for the rule of law. He truly applied himself to the task at hand. He always had encouraging and positive feedback from his clients. It was difficult to be the same person after Mr Moosa engaged with you. He had the extraordinary power of persuasion, he would change your world view and political understanding. His strength was honesty and always telling the truth. The BLA is honoured and privileged to have had Mr Moosa as one of its members. He gave himself to the course and objectives of the BLA. He would never keep quiet when people showed signs of forgetting what the organisation stood for.

The passing of Mr Moosa is a serious loss to the BLA as an organisation. We do not have an answer on why we al-

lowed Mr Moosa to depart us without collecting all his writings – in a volume – to mark the positive intellectual contribution to the BLA through its members in the national knowledge development discourse. Mr Moosa is a great example through which we can disprove our disparagers, those who claim that we are only consumers of knowledge but fail to produce our own. This great yet humble man played his part in this regard. Apart from producing many lawyers and other leaders, he also helped hone their legal skills. Trial advocacy was his passion that he lived to impart to those who presented themselves to him to learn.

Mr Moosa lived and died doing good for others. This is how some people who he came into contact with viewed him: 'Imrann is an astute deep thinker who will give more than monetary value for any brief given to him. He is one of the few robust intellectuals serving the profession' (Jay Surju – Mr Moosa's client who is a lawyer himself (www.linkedin.com, accessed 15-5-2017)).

The well-known Durban businessman, Dumisani Nene, said that while studying towards his LLB degree from the former University of Durban – Westville he was inspired by Mr Moosa to be a political lawyer. He further said that:

'I spent a lot of time in (Moosa's) chambers as a student and I learnt of litigation strategies that were very inspiring' (Xolile Bhengu 'Sharing success' (www.sowetanlive.co.za, accessed 15-5-2017)).

These are a few examples of what impact Mr Moosa left in the lives of many South Africans. We know that Mr Moo-

sa's chambers were the peoples' chambers and at the time of his passing arrangements were being made to open BLA offices in his chambers.

The special place occupied by Mr Moosa in the BLA will be difficult to fill. With his extensive knowledge, Mr Moosa had a big role to play in the shaping of the legal profession in the new dispensation. In recognition of the role he played in the BLA when we commemorate the 40th anniversary of the BLA in October 2017, the BLA will also be celebrating Mr Moosa's life and the contribution he made to the legal profession and to the BLA in particular.

The BLA sends its deepest sympathy and condolences to the Moosa family (particularly his two sons, brother and sister), relatives and colleagues in the legal and political spheres of life. As the BLA we will forever be indebted to the Moosa family who agreed to share this extraordinary person with us. They did not privatise him, but agreed that he must be a national asset to be of value to all.

Mr Moosa's contribution to our cause is priceless. The BLA does not see any other fitting way to say thank you to Mr Moosa for his selflessness than by collecting and collating all his known writings and cases in a volume under his name and thereby immortalising him.

*Lutendo Benedict Sigogo,  
President of the Black Lawyers Association*

## New LSNP President

The Law Society of the Northern Provinces announced a new President. Lutendo Sigogo (President of the Black Lawyers Association) has replaced Anthony Millar.



## New KZNLS President

The KwaZulu-Natal Law Society announced a new President. Umesh Jivan has replaced Lunga Peter.



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

*De Rebus* welcomes letters of 500 words or less. Letters that are considered by the Editorial Committee deal with topical and relevant issues that have a direct impact on the profession and on the public.

**Send your letter to:  
derebus@derebus.org.za**



# New co-chairpersons for the LSSA elected

**C**ape Town attorney, Walid Brown, and Harrismith attorney, David Bekker, were elected co-chairpersons of the Law Society of South Africa (LSSA) at its annual general meeting (AGM) in Port Elizabeth on 22 April (see also AGM news 'The state of the profession discussed at LSSA AGM' on p 6).

According to the LSSA press release, Mr Brown says his objective for the coming year would be to utilise the momentum of transforming the legal profession, through the Legal Practice Act 28 of 2014 (LPA), to implement structures that will lead to a change in the demographics of this profession, a change in the power dynamic within the profession and ultimately to a more equal wealth distribution among the lawyers of this country. 'However, within this context it will always be necessary for us to ensure that we maintain a culture of excellence as a profession in whatever we do,' he stressed.

Similarly, Mr Bekker noted that a smooth transfer to the Legal Practice Council (LPC) and the continued existence of a representative body for all legal practitioners are important. 'I would also like to get young practitioners more involved in professional affairs, as well as enhance mediation and arbitration by attorneys,' he said.

The LPA is expected to be fully implemented in 2018, bringing the LPC – the new, national regulatory body for attorneys and advocates – into effect (see also 'National Forum races against time to submit recommendations to Minister' on p 17).

## About the co-chairpersons

Walid Brown is a director at the Cape Town office of Werksmans Attorneys where he focuses on litigation and dispute resolution, as well as insolvency, business rescue and restructuring.

He has the BA (UCT) and LLB (UWC) degrees as well as an Advanced Certificate in Insolvency Litigation (UP) and a



*Harrismith attorney, David Bekker, and Cape Town attorney, Walid Brown, were elected co-chairpersons of the Law Society of South Africa at its annual general meeting in Port Elizabeth on 22 April.*

Certificate in Advanced Business Rescue (Unisa).

He is an executive member of the Western Cape Branch of the Black Lawyers Association (BLA) and has represented the BLA on the LSSA Council since 2016.

David Bekker is serving his second term as co-chairperson, having been co-chairperson for the period 2013/2014.

Mr Bekker has been an attorney for 40 years this year. He was admitted as an attorney and conveyancer in 1977 after having completed the BLUR degree at the University of the Free State. He practiced for his own account until he joined Cloete & Neveling in 1982.

Mr Bekker has been a Council member of the LSSA since 2009 and has been a member of its Management Committee

since 2010. He is currently chairperson of the LSSA's Financial Intelligence Centre Act Committee; serves on the Deceased Estates, Trusts and Planning Committee; and the Competition Committee. Mr Bekker has been a trustee of the Legal Provident Fund since April 2009.

At international level, Mr Bekker represents the LSSA on the Council of the Commonwealth Lawyers Association. At provincial level, Mr Bekker has been a Council member of the Law Society of the Free State since 1989 and was its President from 1994 to 1996.

*Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, [nomfundom@lssa.org.za](mailto:nomfundom@lssa.org.za)*

## Examination dates for 2017

### Admission examination:

- 22 August
- 23 August

### Conveyancing examination:

- 6 September

### Notarial examination:

- 7 June
- 11 October

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

# National Forum races against time to submit recommendations to minister

**T**he National Forum on the Legal Profession (NF) held its eighth meeting in Kempton Park on 6 May. Having received a six-month extension from Justice Minister Michael Masutha to submit its recommendations to him, the NF is racing against time to finalise its recommendations before the extended deadline of 1 August.

Although it has finalised most of the rules and regulations required, irreconcilable differences between attorneys and advocates with regard to practical vocational training (PVT) are holding back some of the education-related rules, and thus the entire set from being gazetted for comment. NF Chairperson and Deputy Chairperson, Kgomoiso Moroka SC and Max Boqwana, were to seek to break the deadlock on the PVT issues in order to finalise matters before the deadline.

Before the rules and regulations made by the NF in terms of s 109 of the Legal Practice Act 28 of 2014 (LPA) can be presented to the Minister, they must be gazetted for public comment. These relate to –

- a competency-based examination or assessment for candidate legal practitioners, conveyancers and notaries;
- the minimum conditions and procedures for the registration and administration of PVT;
- the procedure and directions pertaining to the assessment of persons undergoing PVT;
- the criteria for a person, institution, organisation or association to qualify to conduct an assessment;
- the procedures to be followed by disciplinary bodies;
- the manner and form in which complaints of misconduct relating to legal practitioners, candidate legal practitioners or juristic entities must be lodged with the Council; and
- any other matter in respect of which rules must be made in terms of ch 10.

Once the rules have been gazetted there will be 30 days to submit comments to the NF.

In addition, the Legal Practice Amendment Bill B11 of 2017, which was submitted to Parliament at the end of April, empowers the NF to make rules in terms of s 95, which must also be gazetted for comment. An amendment also empowers the NF to draft regulations in terms of s 94 for consideration by the minister.

As regards the Bill, the NF was to make submissions to Parliament on some omissions that still created technical anomalies.

At its plenary meeting, the NF considered the recommendation that the Legal Practice Council (LPC) should convene an annual general meeting (AGM) of legal practitioners. However, the general view was that the LPC is a regulatory body with the primary function of protecting the public. It will communicate with legal practitioners (attorneys and advocates), but the LPA does not provide for an AGM to engage with them.

Besides some of the education-related issues, the NF has already finalised and approved for submission to the minister:

- The regulations relating to election procedures for the LPC and the ballot paper: The NF envisages that elections for the first LPC will be held soon after ch 2 of the LPA – bringing the LPC into operation – comes into effect. In terms of the current timeframes, this is due to happen in February 2018. The Amendment Bill provides that the existing provincial law societies will continue to regulate attorneys for six months, while the LPC is being set up before being abolished six months after ch 2 comes into effect. The LPC will then take over regulation of all legal practitioners.
- The composition of the nine provincial councils (PCs): It is recommended that each PC should consist of six attorneys and four advocates, except the Gauteng PC, which should consist of eight attorneys and four advocates.
- The powers and functions of the PCs.

- The seat of the LPC to be in Midrand.
- The seats of the PCs as follows:
  - Eastern Cape – East London;
  - Free State – Bloemfontein;
  - Gauteng – Pretoria;
  - KwaZulu-Natal – Durban;
  - Limpopo – Polokwane;
  - Mpumalanga – Nelspruit;
  - North West – Mahikeng;
  - Northern Cape – Kimberley; and
  - Western Cape – Cape Town.
- The staffing requirements for the national and provincial offices.
- The draft funding requirements and sources of funding for the LPC: Once all the education aspects have been finalised, the funding model will be completed and it would then be possible to set realistic annual levies for legal practitioners.

As regards the certificate of right of appearance in the higher courts for attorneys in s 25(3) of the LPA, the NF's Rules and Governance Committee was requested to discuss this requirement, which could be regarded as an unfair discriminatory burden for attorneys.

## New NF members

Two new members joined the NF in 2017: Johannesburg attorney, Mashudu Kutama, replaced Lutendo Sigogo who resigned at the beginning of the year after becoming President of the Law Society of the Northern Provinces. Mr Kutama is a nominee of the LSSA (Black Lawyers Association). Advocate Matthew Klein replaced Mark Hawyes as the representative of the National Bar Council of South Africa.

Developments on the Legal Practice Act can be accessed on the LSSA website at [www.LSSA.org.za](http://www.LSSA.org.za) under the 'Legal Practice Act' tab.

*Barbara Whittle,  
Communication Manager, Law Society of  
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## New conveyancing fees guideline

**T**he Law Society of South Africa has published the new Conveyancing Fees Guideline. The guideline applies to instructions received as from 1 May.

The new guideline includes sections on:

- Conveyancing fees: Conventional deeds.
- Conveyancing fees: Sectional titles.

- Interprovincial apportionment of fees: Conventional deeds.
- Interprovincial apportionment of fees: Sectional titles.
- Apportionment of fees: Wasted costs.
- Alienation Land Act: Conveyancing fees and apportionment of fees.

The provincial law societies must provide for their own internal (or intra) provincial apportionment of fees for:

- Conventional deeds inside their own province.
- Sectional title deeds inside their own province.

The full guideline is available at [www.LSSA.org.za](http://www.LSSA.org.za).

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Officer, Law Society of South Africa,  
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## Procurement protocols for the legal profession adopted

**T**he Procurement Protocols, as finalised by the Action Group on Briefing Patterns in the Legal Profession, have been adopted by the profession.

### Procurement protocols

**Recognising** the pernicious and repugnant legacy of Apartheid; race and gender based marginalisation exclusion of black and women legal practitioners; unfair privilege enjoyed by white male legal practitioners; assault and affront to the dignity of black and women legal practitioners; and the structural distortions created in the skill sets of black and women practitioners.

**Embracing** the constitutional imperative to realise the freedom and equality of everyone and accepting that our inequitable past has produced the economic and skills distortions overwhelmingly favouring white male practitioners to the prejudice of black and female practitioners in the legal profession and now committed to correct that history.

**Acknowledging** that, objectively measured, the efforts of the legal profession to reverse the imbalances flowing from our past have failed to yield the desired transformation of the legal profession.

**Accepting**, in particular, that, generally speaking, the transformation initiatives have been met with some reluctance and resistance, on the part of some of members of the legal profession and industry broadly, to empower black and

women practitioners. That in line with the foundational constitutional values of equality; the right to equal access; the right for everyone to choose and practise their profession freely.

**Decrying** the fact that government's stated objectives structurally to transform the legal profession to reflect, broadly, the demographics of our country, have not yielded the desired outcomes.

**Now commit** to this protocol and to positively promote the procurement of legal services of black and women practitioners; to actively create better access for black and women practitioners; bridge the skill set deficits, if any, among black and female practitioners; expose black and female practitioners to all areas of the law; help broaden the pool of black and women practitioners; ensuring the fair selection criteria of black and women practitioners; promote change in the attitude so as to include black and women practitioners in the mainstream of practice; in order to progressively realise the achievement of the transformation of the legal profession; to rendering bi-annual reports for the monitoring of compliance with the aims of the protocols, to hold signatories to the protocol accountable, to widen the pool of practitioners and ultimately affect the transformation of the judiciary.

### Signatories

**Commit your firm to changing briefing patterns and the allocation of legal**

**work in the profession.**

**The Action Group on Briefing Patterns in the Legal Profession** - which comprises representatives of the Law Society of South Africa, the General Council of the Bar, Advocates for Transformation and the Department of Justice and Constitutional Development - **invites law firms to align themselves with the procurement protocol on briefing, which has been adopted by the legal profession.**

Representatives of law firms with a mandate to sign their firms' commitment to the protocol will be invited to an official signing ceremony to be held in June. Alternatively, you can download, complete and return the form to us and your firm will be included in the list of law firms that have committed to the protocol on the LSSA website.

For a copy of the protocol and to signal your commitment to changing briefing patterns and the allocation of legal work, **please e-mail: [briefing@LSSA.org.za](mailto:briefing@LSSA.org.za) before 9 June 2017.**

The protocol and 'expression of interest' form can also be accessed on the LSSA website at [www.LSSA.org.za](http://www.LSSA.org.za).

For more information e-mail [briefing@LSSA.org.za](mailto:briefing@LSSA.org.za)

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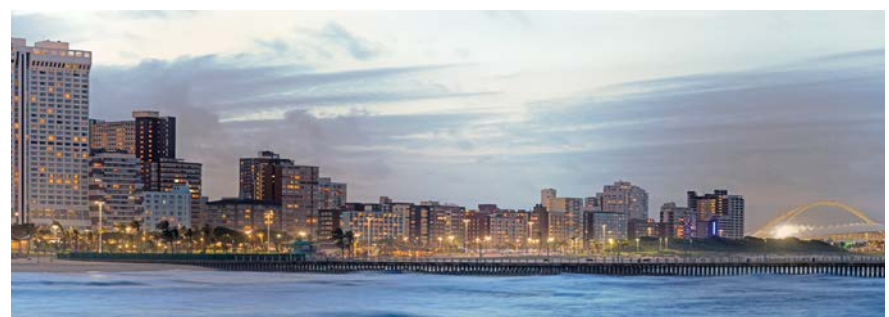
## PALU conference to take place in July

**T**he Pan African Lawyers Union will host its annual conference and triennial general assembly at the Elangeni and Maharani Hotel in Durban from 5 to 8 July. The Law Society of South Africa will co-host the conference.

The conference will discuss matters relevant to the practice of law, as well as economic, political and social development of the continent.

There will be three parallel streams at the conference, namely:

- Business law, which will discuss the most pertinent issues in corporate and commercial law on the continent.
- Legal practice, which will analyse the growing opportunities in the legal field for African lawyers and foreign lawyers practising in Africa.



- Public interest and development law, which will discuss emerging strategies for protecting lawyers, journalists and human rights defenders, as well as recent developments and opportunities for the rule of law on the continent.

For more information and to register

to attend the conference, see <http://lawyersofafrica.wixsite.com/palu2017>

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# LSSA calls on CHE to consult legal profession on LLB degree issues

**T**he Law Society of South Africa (LSSA) has questioned the decision by the Council on Higher Education (CHE) not to include the legal profession in its review of the LLB degree.

On 12 April the CHE published the outcomes of its review of the LLB degree. In a press release, the LSSA stated that it has invited the CHE to consult the legal profession on issues relating to the LLB curriculum. Also, it has offered its support and its commitment to law faculties, which may require input and assistance from the attorneys' profession to ensure their LLB degrees achieve full accreditation by the CHE.

In the press release, LSSA Co-chairpersons, Walid Brown and David Bekker, said: 'We deem it critical to the attorneys' profession to ensure that law graduates

are effectively prepared to enter the profession and to serve the public professionally and efficiently. It is also critical that law students currently in the system are assured of the relevance and practicality of their degrees.'

The LSSA expressed serious concerns that it has not been consulted on the process since 2015, although the LSSA was asked for input in the standards-drafting process aspect of the review. 'The legal profession is a material stakeholder and represents the largest group of employers of law graduates, with up to 60% of law graduates joining the attorneys' profession,' said Mr Brown and Mr Bekker.

According to the press release, the LSSA, together with the South Africa Law Deans Association and the General Council of the Bar of South Africa, initiated the LLB review process following a summit they hosted on the LLB degree,

held on 29 May 2013. This was after concern was expressed at the skills gap presented by law graduates when entering the legal profession. Following that summit, the stakeholders resolved to request the CHE to conduct a standard-setting process for the LLB degree. In conducting this exercise, the CHE was requested to consult widely with the LLB Summit Steering Committee of the profession established after the summit.

In conclusion, Mr Brown and Mr Bekker noted: 'It is accordingly difficult to understand how the profession can be sidelined by the CHE at this critical juncture in the process.'

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

## LSSA urges JSC to scrutinise judicial candidates for racist tendencies

**T**he Law Society of South Africa (LSSA) once again condemned any form of racism in society and particularly within the judiciary. This comes after the LSSA noted the resignation of High Court Judge Mabel Jansen, as announced by the Department of Justice and Constitutional Development in early May.

In a press release, the LSSA said that as a profession and a country we rightly look on our independent judiciary with pride. 'The now infamous comments by Judge Jansen on social media have been

correctly condemned in all sectors of our society,' said LSSA Co-chairpersons Walid Brown and David Bekker.

'However, there is no place for any undercurrent of racism in judges appointed to the Bench. In this regard the recent revelations at the Judicial Service Commission (JSC) interviews about alleged institutional racism in some of our courts, are also noted. Should these allegations be based on any semblance of fact, it is also condemned unconditionally,' the co-chairpersons stated in the press release.

They went on to encourage the JSC to continue interrogating any potential judicial appointees on any history of racist tendencies. 'In order for us to move forward as a society we need to start respecting each individual as an equal, as enshrined in our Constitution,' the LSSA said.

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**T**he Law Society of South Africa (LSSA) has submitted comments on the Property Practitioners Bill (B-2016) earlier this year.

In its submissions, the LSSA recommended that words should be added in some of the sections, and that the requirement in s 49(a)(vii) for a valid tax clearance certificate in order for a property practitioner to practise, may discriminate against or impede on the constitutional rights of property practitioners. 'Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. An error on the part of the South African Revenue Service (Sars)

may result in a practitioner's tax clearance being suspended, resulting in a Fidelity Fund Certificate not being issued, which will either preclude an otherwise qualified person from practising as [a] property practitioner or turn him or her into a criminal for practising without a Fidelity Fund Certificate,' the LSSA stated in its submissions.

The LSSA said that a further category (d) should also be included in s 65 to include specialist reports on the condition of the property. The LSSA submitted: 'Although Section 66 requires the manda-

tory disclosure form, many purchasers require, and sellers offer, an independent specialist report on the condition of the property. This practice is likely to spread. The purchaser strongly relies on such specialist report, which becomes very important when any defects or problems manifest. For obvious reasons, it will be undesirable if property practitioners influence such reports and/or demand hidden kickbacks from the specialist.'

In the submissions, the LSSA also stated that s 67 required serious recon-

## Submissions by the LSSA

sideration as 'it should replicate Section 83(8)(a) of the Attorneys Act 53 of 1979, which essentially prohibits any person, except a practising legal practitioner, in expectation of any fee, gain or reward, direct or indirect, to himself or to any other person, from drawing up, preparing or causing to be drawn any agreement, deed or writing relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes.'

The LSSA states: 'Firstly, it is not clear why the Bill requires the seller (and not the property practitioner) to "draft" the agreement to sell in any of eleven official languages when by definition it is the property practitioner who introduces the purchaser (with its particular language requirements) to the seller, almost invariably with a pre-printed offer to purchase in English under the practitioner's brand.'

Secondly, how is a valid written "offer to purchase" constituted unless first drafted in a language different from what the seller can write and understand? What happens if another purchaser in the meantime offers to purchase in a document that the seller can understand?

Thirdly, the Bill appears not to take into account Section 83(8)(a) of the Attorneys Act 53 of 1979, which section prohibits any non-attorney from drawing up or preparing any agreement relating to immovable property (except leases not exceeding five years).'

## Magistrate's Courts Rule 63

The LSSA has made comments to the Rules Board for Courts of Law on the proposed amendments to the Magistrate's Courts Rule 63 – filing, preparation and inspection of documents.

In its comments the LSSA agreed that

the Magistrate's Court Rules, providing for the indexing and pagination of court files, should be aligned with High Court Rule 62(4) thus the compliance with this obligation will be reduced from ten to five days.

The LSSA is also of the firm view that not all matters, which come before court should be indexed and paginated. It recommended that the requirement be harmonised with that which is followed in the High Court, which is that any matter before court, where the papers are in excess of 50 pages, be paginated and indexed.

To view the full submissions go to [www.LSSA.org.za](http://www.LSSA.org.za)

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**T**he Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act), was published in GG40821/2-5-2017.

Attorneys, as accounting institutions, are required to comply with the new provisions introduced by the Amendment Act and must familiarise themselves with the relevant provisions, in particular, the insertion of ss 21A to 21H.

Section 21A relates to understanding and obtaining information on business relationships. It states that:

'When an accountable institution engages with a prospective client to establish a business relationship as contemplated in section 21, the institution must, in addition to the steps required under section 21 and in accordance with its Risk Management and Compliance Programme, obtain information to reasonably enable the accountable institution to determine whether future transactions that will be performed in the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client, including information describing –

(a) the nature of the business relationship concerned;

(b) the intended purpose of the business relationship concerned; and

(c) the source of the funds which that prospective client expects to use in concluding transactions in the course of the business relationship concerned.'

Section 21C relates to ongoing due diligence and states that every accountable institution must conduct ongoing due

diligence regarding a business relationship which includes –

- monitoring of transactions undertaken throughout the course of the relationship, including, where necessary –
- the source of funds, to ensure that the transactions are consistent with the accountable institution's knowledge of the client and the client's business and risk profile; and
- the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent business or lawful purpose; and
- keeping information obtained for the purpose of establishing and verifying the identities of clients pursuant to ss 21, 21A and 21B, up to date.

The Amendment Act also introduces additional requirements in relation to foreign prominent public officials and domestic prominent influential persons. It now requires accountable institutions, among others, to –

- obtain senior management approval for establishing the business relationship;
- take reasonable measures to establish the source of wealth and source of funds of the client; and
- conduct enhanced ongoing monitoring of the business relationship.

# FIC Amendment Act published

Practitioners should also be aware of the implications of the change from a rules-based to a risk management approach in s 42(2). This section states:

'(2) A Risk Management and Compliance Programme must –

(a) enable the accountable institution to –

- (i) identify;
- (ii) assess;
- (iii) monitor;
- (iv) mitigate; and
- (v) manage,

the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities.'

It is anticipated that a separate contextualised industry-specific approach guideline prepared by the Financial Intelligence Centre in cooperation with the profession will be published and provided to attorneys in due course.

To view the full Amendment Act visit [www.LSSA.org.za](http://www.LSSA.org.za).

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# International Bar Association's Human Rights Institute visit to Geneva

**T**he Law Society of South Africa (LSSA), Lawyers for Human Rights and the Southern African Litigation Centre (SALC) formed part of a delegation that attended the United Nations (UN) Universal Periodic Review (UPR) pre-session in Geneva, Switzerland. The visit took place from 3 to 7 April and included an intensive training programme. The delegation, together with a Syrian delegation, were hosted by the International Bar Association Human Rights Institute (IBAHRI), who also funded the entire trip.

The IBAHRI provides human rights training to legal practitioners and institutions; conducts fact-finding missions and produces expert reports with key recommendations; intervenes where persons involved in the operation of legal systems have been arbitrarily threatened, detained or abused; and participates in advocacy programmes and trial monitoring. The IBAHRI works with lawyers, law associations and bar associations around the world in submitting reports to the UN on human rights relating to the legal profession.

In September 2016, the LSSA submitted a joint shadow report with the IBAHRI and the SALC to the UPR. The report, *inter alia*, dealt with South Africa's national obligation in domesticating international human rights treaties; the weakening of the Southern African Development Community (SADC) Tribunal; and the role of the legal profession in ensuring access to justice.

The UPR was implemented by the UN



*The South African and Syrian delegation in front of the United Nations Palais de Nations.*

in 2007 as a peer review mechanism. It involves a review of the human rights records of all UN member states. States have the opportunity to declare what actions they have taken to improve human rights issues in their countries and to fulfil their human rights obligations.

The UPR works in cycles, with approximately 48 of the UN's 193 member states reviewed each year. The first cycle was from 2008 to 2011, the second from 2012 to 2016 and the third from 2017 to 2021. (South Africa submitted country reports for the first cycle (2008) and second cycle (2012), which can be accessed at [www.ohchr.org](http://www.ohchr.org). The shadow reports submitted at the time are also available on the website.) Prior to the review of a country, organisations and institutions are able to submit information, namely, the shadow report, regarding the human rights issues and recommendations they would like to be considered.

South Africa will be reviewed during the third cycle (in September), hence the delegation's shadow report submission and attendance of the pre-session. Pre-sessions provide an opportunity for civil society and institutions to present their concerns raised in the shadow reports to a room of diplomats and lobby them to take up the concerns.

The delegation participated in the

UPR-Info pre-session and the presentation was well received.

The delegation received training on UN mechanisms and how they function, the role and function of treaty bodies, special procedures and the Human Rights Council. Future opportunities for human rights mechanisms were also discussed, and meetings took place with various permanent missions with the aim to advocate for key recommendations to be raised by states in the UN Human Rights Forums.

Meetings also took place with Special Rapporteurs, the Office of the High Commissioner for Human Rights and the South African Ambassador to Geneva, Nozipho Mxakato-Diseko. There was also an inter-professional exchange with the Genève Bar Association Human Rights Commission, where it was agreed that the LSSA will foster a relationship with them.

Legal practitioners are encouraged to make use of UN systems, particularly in respect of human rights issues.

Further information on the UN mechanisms can be obtained from the Professional Affairs Department by e-mailing [kris@lssa.org.za](mailto:kris@lssa.org.za)



*Busani Mabunda at the UPR-Info pre-session on South Africa at the Palais de Nations.*

*Lizette Burger,  
Professional Affairs Manager,  
[Lizette@lssa.org.za](mailto:Lizette@lssa.org.za)*



# People and practices

Compiled by Shireen Mahomed

**Hogan Lovells** in Johannesburg has two promotions and three new appointments.



Jean Ewang has been promoted as a partner in the employment law department.



Melissa Leibowitz has been promoted as a partner in the real estate department.



Vivien Chaplin has been appointed as a partner in the corporate and commercial law department.



Rachel Kelly has been appointed as a partner in the corporate and commercial law department.



Amy Wilson has been appointed as a senior associate in the corporate and commercial law department.



**Abrahams & Gross** in Cape Town has appointed Nicholas Hayes as a director in the conveyancing and property law department.

**VFV Attorneys** in Pretoria has two new appointments.



Bertus Louw has been appointed as a managing partner. He specialises in civil litigation matters and corporate law.



Hemisha Gihwala has been appointed as a partner.

**Marlon Shevelew and Associates Inc** in Cape Town has two new promotions.



Xenophon Jegels has been promoted as an associate in the rental property, compliance and commercial department.



Sidney Kimar has been promoted as an associate in the rental property, compliance and commercial department.



**Sefalafala Inc** has appointed Stanley Makula as an associate in the Johannesburg office.



**Jurgens Bekker Attorneys** in Johannesburg has appointed Louis Poriazis as a junior associate.

**Poswa Inc** in Sandton has promotions and one new appointment.



Luyolo Poswa has moved into the role of Chairman. He previously held the position of Chief Executive Officer.



Nima Gagjee has been promoted to the position of Chief Executive Officer.



Hailey Dittberner has been promoted as a senior associate in the conveyancing and notarial practice department.



Siyonwaba Mviko has been promoted as a senior associate in the banking and finance and corporate and commercial department.



Chris Ntuta has been appointed as a director in the corporate and commercial law department.

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

Advertise for free in the People and practices column. E-mail: [shireen@derebus.org.za](mailto:shireen@derebus.org.za)

By  
Thomas  
Harban

# Some important considerations to be taken into account in verifying your mandate

**W**hen accepting instructions from a client it is important to verify all aspects of the mandate. In case of doubt, it is best to canvass this with the client, rather than assume that there is a meeting of minds between the client and yourself, this prudent approach will protect both you and the client's interests. While some may consider this approach rather tedious, a proper explanation of the rationale behind the verification will assure the client that every aspect of the matter is being properly interrogated. A potential client who is not playing open cards with you and who is not being completely honest will soon realise that you will not be easily duped and desist from any dishonest scheme. Many of the professional indemnity (PI) claims notified to the Attorneys Insurance Indemnity Fund NPC (the AIIF) turn on the question that a crucial element of mandate was not properly verified. The aspects of the matter that need to be verified, include verifying the following in respect of the clients instructing you –

- the identity of the client;
- whether the client is instructing you in a personal or representative capacity; and
- where the client is acting in a representative capacity, whether or not the client has the appropriate authority to instruct you.

At face value, the considerations listed above may appear trite but, as will be demonstrated below, the non-adherence to any of these considerations could lead to a PI claim against a practitioner.

## The identity of the client

The importance of implementing a proper Finance Intelligence Centre Act 38 of 2001 (FICA) procedure in your firm cannot be over emphasised. The FICA verification procedure needs to be documented and communicated to all staff in the firm. The client identification procedure can also be included in the minimum operating standards (MOS) in your firm and adherence thereto must be strictly monitored. The identification of the client needs to be more than just a 'tick box' exercise, closely examine all documents submitted by the client purporting to be submitted in confirmation of identity.

Under no circumstances whatsoever are documents to be certified as true copies of the originals when, in fact, the practitioner has not actually had sight of the original documents concerned, this is against the law and a breach of the professional duties of the attorney. It must also be noted that conduct of this nature is considered as dishonest in terms of the AIIF policy and clause 20 thereof provides that:

'Where the Dishonest conduct includes:

a) the witnessing (or purported witnessing) of the signing or execution of a document without seeing the actual signing or execution; or

b) the making of a representation (including, but not limited to, a representation by way of a certificate, acknowledgement or other document) which was known at the time it was made to be false.'

The applicable excess in claims of this nature will be increased by an additional 20%.

In addressing practitioners in various forums, the AIIF has often remarked on the unfortunate practice by some conveyancers, in particular, where a member of the support staff meets with clients, gets the clients to sign the relevant documents including and required affidavits and that the signatures of the witnesses are appended later together with the certification of the affidavit by the practitioner. Such egregious conduct practice is unlawful and may have serious consequences for the practitioners concerned.

Most of the claims arising out of circumstances where attorneys fall victim to cyberscams (and other phishing scams) could have been avoided had the practitioners concerned properly verified the identity of the parties communicating with them. It is important that the bank account details of all parties to whom funds are to be paid are also verified.

The proper identification of clients should also be applied to the identification of the depositors of funds into the practitioner's trust account. The Supreme Court of Appeal has found that a practitioner has a duty to act without negligence when dealing with money held in a trust account, even where the identity of the depositor or the purpose of the deposit is unclear (see *Hirschowitz*

*Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) and *Du Preez and Others v Zwieggers* 2008 (4) SA 627 (SCA)). In the *Du Preez* case, the SCA stated (at para 19) that: 'An attorney is under a legal duty to deal with trust account money in such a way that loss is not negligently caused, *inter alia*, to the depositor.' As pointed out in the *Hirschowitz Flionis* case, a practitioner may be able to trace the origin of funds by starting an inquiry with his or her own bank. This could assist in identifying the depositor of the funds. Do not accept the word of a client (or other third party) in respect of a deposit without verifying this with your bank. It is also important that the instructions of the depositor are obtained and before payments of the funds are made.

## Is the client instructing you in a personal or representative capacity?

Where the party instructing your firm purports to be acting on behalf of a juristic entity, always verify that the party concerned has the relevant authority to instruct you as such. The nature and extent of such an authority should also be clarified and confirmed. The entity on whose behalf the party consulting with you is purportedly acting may refuse to pay your fees and disbursements in circumstances where they dispute that person's mandate to act on their behalf. That entity may also institute legal proceedings against you if they have suffered damages as a result of the actions you have taken on the basis of the disputed mandate.

The AIIF has had a claim arising out of the following circumstances:

A conveyancer was instructed to transfer a property from a company (represented by Mr A) to a close corporation. The conveyancer had been provided with what purported to be a resolution of the company authorising Mr A to act on its behalf. The resolution specifically stated that Mr A's authority was to be limited to the signature of the deed of transfer and that the execution of any other documents should receive prior approval from the director of the company. Registration was subsequently effected and the nett proceeds were paid into a bank account nominated by Mr A. Thereafter, the conveyancer received a call from Ms

D (of the company) inquiring where the proceeds of the sale were. The conveyancer had never before had contact with Ms D. He had taken all instructions from Mr A and had not been given the company's banking details. Mr A could not be contacted thereafter.

In Road Accident Fund (RAF) related matters where a parent or guardian and a minor child/children have been injured, clarify at the initial stages whether your instructions are to pursue claims on behalf of all the injured parties. Do not assume that your instructions are only to pursue the claim on behalf of the parent or guardian and not on behalf on the minor(s). In many instances, the AIF is notified of claims where the plaintiff, who was a minor at the time the cause of action arose, alleges that the practitioner concerned was instructed to pursue a claim on his or her behalf by a parent or guardian and that the claim was under-settled. The practitioners concerned often argue that they acted on the instructions of the parent or guardian in settling the claim. The duty of the practitioner extends to advising the client on the adequacy of the settlement offer. Remember that the client has instructed you as a professional and expert. Your duty in pursuing the claim extends to advising the client on all aspects of the matter, including the quantum of the

claim and the appropriate amount of damages to be awarded. In appropriate circumstances, practitioners acting for parents or guardians, bringing claims on behalf of minors should request that a curator be appointed to guard the interests of the minor(s). Do not allow yourself to be pressurised into settlements, which are potentially prejudicial to the interests of the injured minor. The *restitutio in integrum* maxim has successfully been raised by the AIF in many of the cases of this nature as the initial settlement of the matter was prejudicial to the plaintiff (who as a minor at the time the settlement was entered into). The considerations listed above do not only apply to RAF related claims but are applicable to all claims brought on behalf of a minor.

Where both of the minor's parents are available, it is best practice that both be consulted in respect to a claim. There have been instances where a practitioner has taken instructions from one parent, only for the other parent to later claim to be the primary (or sole) provider of support to the minor child and that, in the circumstances, the parent who initially instructed the attorney did so by making untrue allegations and has since used the funds awarded to the minor for their personal needs rather than for those of the child. We have also had claims where

it has later emerged, after an investigation, that the person alleging to be the parent or guardian of the minor child is, in fact, not the parent or guardian. In this regard, practitioners should, for example, seek original documents in order to verify the relationship, if any, between the plaintiff and the minor(s) on whose behalf they are purporting to claim.

Verifying the capacity in which the party instructing you is acting will also protect you against the actions of touts and intermediaries. In the *Hirschowitz Flionis* case, one of the protagonists was an intermediary. Had the respective parties in that case properly investigated the information given to them, the circumstances that ultimately gave rise to the claim would have been avoided. Touts will pursue their own interests in respect of the matter rather than those of the client.

It is hoped that practitioners will take the considerations highlighted above into account and that the appropriate risk mitigation measures will be implemented in their practices.

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



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By Sipho  
Tumelo  
Mdhuli

# Your life, your decision?

## The Constitution and euthanasia

**T**he Constitution of South Africa (SA) is the supreme law of the Republic. All laws or conducts, which are inconsistent with it are invalid, and the obligations which are imposed by it must be fulfilled.

Currently assisted suicide has no legal ground to stand as codified legislation and is not protected by the Constitution. Euthanasia is a very scary and sensitive topic to comment on since it has a way of challenging our moral values, beliefs and religions. Hence why Parliament is also silent about it. (See Daniel Ncayiyana 'Euthanasia – no dignity in death in the absence of an ethos of respect of human life' (2012) *SAMJ* 102 no 6.) Everyone has the right to life and this is a right that is deeply entrenched in our Constitution (see s 11 and ch 2 of the Bill of Rights). Yet, we have no right, nor option to decide whether we should die. Suicide is equally wrong as an individual takes their own life, yet it is legal. In other words the right to decide on our own death should follow from our right to life.

It is absurd that we can enjoy rights, but have no option to waive their application. Some rights co-exist with duties on the part of the right-holder in respect of the same subject matter. The right to life should also be treated as a waivable right just like other rights, which are waivable. Active euthanasia amounts to suicide and suicide is not illegal (John Milton *South African Criminal Law and Procedure: Common-law crimes* 3ed (Cape Town: Juta 1996) at pp 353 – 354).

It is illegal for a doctor or a health care professional to assist a patient in ending his or her life. A doctor who assists a patient to die can face the consequence of being imprisoned for a long period of time.

When the health of a patient can no longer be restored there is only one thing left for doctors to do. They have an ethical duty to alleviate the pain, which is experienced by their patients. In this process doctors often prescribe high doses of morphine, which hastens or speeds up the death of the patient. They do this well knowing the side effects. It is safe to conclude that although euthanasia is not legalised in our country, doctors may be practising it on a daily basis.

The Constitution speaks of the right to life and not a duty to live, and this is evident in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC). The facts of this case were as follows: The appellant was suffering from

renal failure. To survive, he needed renal dialysis treatment. After exhausting his funds he turned to a public hospital for renal dialysis. They refused to give him treatment stating that his condition did not meet the grounds for eligibility; that he would be curable within a short space of time and that he was eligible for a kidney transplant. He claimed entitlement to emergency treatment given the constitutional right to life.

The Constitutional Court (CC) held that the right to life did not impose a positive obligation on the state to provide lifesaving treatment to a critically ill patient. Hence the right to life is not an unqualified obligation to continue living, and therefore, people can waive their right depending on circumstances.

The Choice of Termination of Pregnancy Act 92 of 1996 has provisions as to when a mother can terminate the unborn child's life. This invokes the question, whether this procedure still protects the sanctity of life or not?

The debate of legalising active euthanasia is one which should not be viewed from a religious perspective, but it should be dealt with in terms of the Constitution. It is only then that a morally correct judgment will be reached.

Another disturbing factor is that it is considered humane to euthanise an animal, which is seriously ill or which is seriously injured. This is in terms of ss 2(1)(e), 5(1) and 8(1) of the Animals Protection Act 71 of 1962. On the otherhand it is considered inhumane to euthanise a patient who is severely ill and suffering from severe pain.

It is obvious from the aforementioned provisions that the owner of such an animal is entitled to euthanise an animal, which is seriously injured or ill, so as not to prolong its life, as it would be a life of pain and suffering. And this is a practice, which is universally accepted, to allow an injured animal to suffer is not only cruel but illegal. Why can the same dignity not be afforded to humans?

Is euthanasia morally justifiable? This is a question to which most of us fail to get an answer. Whether euthanasia is morally justifiable or not is a matter for an individual. Legal directives give effect to democracy and social policy, and this requires that people take responsibility for their actions. The anti-euthanasia lobby group will argue that those who request euthanasia are in the minority. We are in a democratic era, which also provides for acknowledgement of the minority's views.

*'Project 86 of the South African Law*

*Commission Report, Euthanasia and the Artificial Preservation of Life'* ([www.salawreform.justice.gov.za](http://www.salawreform.justice.gov.za), accessed 4-5-2017) at p 18 notes that legislation dealing with euthanasia – that is in line with the fundamental values entrenched in the Constitution – would bring about a certain measure of legal certainty. Medical personnel would be able to raise issues of advance directives, because they would be doing so in terms of the law as opposed to the fear of doing something illegal since there is no formal regulation by law.

The most supportive argument in favour of euthanasia is that of patient autonomy. In many democratic societies, an individual's freedom to choose is considered a fundamental civil right. Patient autonomy includes the right to have a full disclosure of the patient's illness and the extent of the illness, treatment recommended and its consequences.

In a case where a doctor concludes that treatment would be in vain and death inevitable, the patient must be allowed time to make an informed choice. This allows the patient and the family to have time for closure. Loss of a loved one is not an easy matter to handle but being prepared for it makes it more bearable.

Refusal by the legislature to provide for active euthanasia is based on the same reasoning as the criminalisation of suicide in the past years. If a patient would rather die than endure any pain as a result of an incurable illness, the request should be granted. Just as everyone has the right to live, we should also have the right to die. This would be promoting the rights enshrined in The Bill of Rights of our Constitution.

Sybrand Strauss in *Doctor, Patient and the Law* 2ed (Van Schaik 1984) at p 387 states that 'in principle every person is legally entitled to refuse medical attention, even if it has the effect of expediting his death. In this sense the individual has a right to die. All that is required is that the declarant at the time in making his refusal known is *compos mentis*. The declaration remains valid even though the declarant may at a later stage become *non compos mentis* as a result of physical or mental illness or for any other reason.'

In the case of *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 329 it was mentioned that 'recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'

Justice delayed to the call of legalis-

ing euthanasia may be a Justice denied to the citizens of SA.

In *Stransham-Ford v Minister Of Justice And Constitutional Services and Others* 2015 (4) SA 50 (GP), Frabricsius J stated that the development of the law was required. Therefore, the CC and Parliament should reconsider the issue of legalising assisted suicide in support of the court application to give effect to the fundamental right to human dignity, not to be treated in a cruel inhuman or degrading way – bodily and physically.

## Conclusion

South Africa only needs sustainable measures to safeguard the effect of practicing euthanasia not to be subjected to abuse, and the Constitution will also have to protect medical practitioners not to be held

criminally liable for complying with the strict measures in assisting to alleviate all the unbearable pains of terminally ill patients with dignity. One can learn from other countries practicing euthanasia such as Belgium and the Netherlands where euthanasia is being practiced voluntarily.

Doctors have the responsibility to act in the best interest of their patients and that includes: Respecting their human dignity, privacy (confidentiality) and the (freedom) to make their choices and that is entrenched in the Bill of Rights. The question that some of us still fail to answer, is denying human rights, privacy and freedom to terminally ill patient wishing to resort to euthanasia not in contravention of the Constitution?

Clearly a development of the law is required to uphold the fundamental values

of the Constitution. They say every right includes a choice. The right to speech does not remove the option to remain silent; the right to vote brings with it, the right to abstain. In the same way, the right to choose to die is implicit in the right to life. The Constitutional court and the Parliament should review and reconsider any loopholes in certain pieces of Acts which do not purport to promote, defend and recognise the freedom of making individual decisions.

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By  
Edrick  
Roux

# Practitioner – love thy staff (and yourself)

The legal profession, one of the oldest professions known to man and arguably one of the most prestigious, has always been one of the stalwart guardians of society. Being regulated by a governing body, it is one of the few professions in the world that requires not only a tertiary qualification, but also admission via a court application. The standards required of the individuals who wish to join the legal profession are exceptionally high, and understandably so, as legal practitioners are effectively the defenders of the public trust and are duty bound to uphold the law in all aspects.

It is a profession that entails long hours, a keen intellect and a desire to deal with exceptionally complicated legal matters effectively on a daily basis, facts which are known to each and every member of the profession intrinsically.

Unfortunately as opposed to only being required in an exceptional circumstance, the legal profession has reached the point in society where intense working hours and a high on unforgiving work environment have become the norm. Even more shocking, this is often the standard by which professionals measure the performance of the staff working under them – some taking the stance that if a staff member does not work long hours they are not bringing their 'A game' to the table or that they are not taking their career seriously.

Of course this leads to stress levels experienced by such staff to rise exponentially – especially those staff who are relatively new to a legal practice. It is from this perspective that this article seeks to investigate –

- the causes of this stress;

- the effects that such stress has on individuals, their practice and ultimately their careers; as well as
- providing some practical insight on how to deal with such stress.

## Sources of stress to practitioners

The first step in dealing with any problem is identifying the root cause, for once the problem has been identified a solution can be found. In this context, the likely source of most stress is the very nature of the legal profession.

Make no mistake, despite the lofty ideals to which all legal practitioners should aspire, work in the legal field usually takes place in a gruelling work place, which requires exceptional competence and dedication. Due to this, practitioners often ignore the delicate balance between their professional and personal life.

The following factors contribute significantly to the mounting tension of professionals in such a work environment –

- the perceived lack of personal and professional growth by the individual;
- inadequate professional training or support;
- the constant awareness of potential risks relating to reputational damage;
- mounting, and numerous, deadlines which come in seemingly unending waves;
- fee targets;
- lack of time for recreational activities;
- lack of social interaction with individuals outside the circle of immediate co-workers; and
- personal circumstances, ranging from

death in the family to run of the mill family conflicts.

Although the above-mentioned are not the only drivers of stress, they are likely the primary factors. The presence of any of the above-mentioned are nothing new, and each and every individual has dealt with at least some of these at some point in their lives, however, with advances in technology in recent years it has become much harder for professionals to shut off from work in order to find a measure of peace and quiet to recover.

As Aldous Huxley said: 'They must intoxicate themselves with work. ... No wonder they daren't stop working. They might find out what they really are or rather aren't' *Point Counter Point* (London: Vintage 2004).

## Effects of stress on the practitioner and their practice

With probable causes identified, the effects must be analysed – from the moment an individual enters into practice, whether for their own account or working as a legal practitioner for a firm or corporate entity – they are almost immediately assailed by all of the above.

For some, like those hardened veterans who are effectively Methuselahs of legal practice, dealing with these issues has become a mere matter of course, it is only a matter of time before they manage to hit their stride and adapt to their circumstances.

But for others, especially Millennials and newly admitted attorneys, the process is not nearly so easy. Torn between trying to prove their worth and increasing their contributions to the business,

these individuals often find that they feel like they are drowning and unable to cope.

This can in turn lead to, *inter alia* –

- lack of sleep and increasing levels of fatigue;
- irritability and aggression;
- a growing sense of despondency;
- difficulty with concentration on even simple tasks;
- reduction in productivity;
- decreasing quality of professional performance; and

• increasing the likelihood of ‘burnout’ by the individual. (‘Burnout is a type of psychological stress. Occupational burnout or job burnout is characterised by exhaustion, lack of enthusiasm and motivation, feelings of ineffectiveness, and also may have the dimension of frustration or cynicism, and as a result reduced efficacy within the workplace’ (www.en.wikipedia.org, accessed 25-4-2017).

The presence of any, or all of these, can have exceptionally far reaching and potentially devastating consequences. These range from the damage to their professional reputation, and thus to their career, to damage of a more personal nature – many an individual suffering from such stress has professionally, and with near military precision, ruined relationships with friends, family and in some cases even their significant others due to lack of a method to cope.

Burnouts are equally severe, requiring many months of recovery before the individual will be able to function on the same level as they did previously, let alone improve their performance.

Yet even with the above in mind, the far more serious risk – something which each and every professional should be aware of in respect of those individuals who work under their supervision – is an increased risk of suicide, which may accompany severe cases of anxiety and stress.

If one was to think that suicide is not a significant problem in South Africa (SA) – think again. According to Health24 the information and statistics from the *Crime, Violence and Injury Prevention Review*, between 8% and 11% of all of the non-natural deaths in SA are due to suicides. Shockingly this number translates into a staggering 21 suicides per day (www.health24.com, accessed 25-4-2017). According to the review (*op cit*) some of the warning signs, although it must be noted that the signs are not always as obvious as these, which should never be ignored are as follows –

- if the individual begins to talk more about suicide and death (admittedly this line is blurred a bit in a trust and estate practice);
- if the individual has made an active decision on a suicide method and started making the necessary preparations;
- the individual has withdrawn from friends and family;

- there are clear signs of mood swings; it has been expressed that the individual feels hopeless or trapped;
- a clear differentiation in their normal routine;
- an increase in the use of alcohol and drugs (substance abuse);
- a drive to getting their affairs in order;
- the individual has started saying farewells to people; and
- the individual has high anxiety levels.

It would be a truly disheartening if anybody was to ignore any of these signs in any of their staff and in my opinion such careless disregard would be a violation of the very principles, which the legal profession enshrines.

## Dealing with stress

Ultimately how each individual deals with their stress is largely a personal matter and will have to be approached very delicately, however, there are a few things which employers can do in order to assist them in this regard, such as –

- the creation of mentorship programs to guide staff through past experience of seniors;
- the implementation of active health and wellness checks;
- regular discussion with superiors in the workplace;
- professional assistance should be made available to staff should cases, which justify same be identified (for a referral to a psychologist, psychiatrist or support group, the South African Depression and Anxiety Group can be contacted at (011) 234 4837 or 0800 20 50 26);
- a cultural shift in the mindset of the individual to not only strive to provide quality services to clients, but also to find a clear ‘work and life’ balance;
- encouraging individuals to make use of their friends and family as confidantes and thereby ensuring that there is a ‘release-valve’ for pent up tension and stress;
- encouraging an increased emphasis on personal happiness by advising staff to make clear goals for themselves, both professionally and on a personal basis;
- a simple mindset shift to try and encourage a more jovial work environment;
- perhaps the simplest of all – acknowledgement of the achievements of staff from time to time; and
- an increased emphasis on spreading awareness of World Suicide Prevention Day (10 September).

## Conclusion

The legal profession is much more than just a career or a business, it is a calling. As a result the legal profession is filled with stoic and (often overly) serious individuals who have forgotten what it is like to break the veneer for even a moment to just have a laugh. It is usually these selfsame individuals who believe that the only truly important thing about the legal profession is making a profit.

This stoic demeanor is then carried over to the next generation of legal professionals, thinking that the stress, frustration, exhaustion, anxiety, fatigue, anger and growing isolation they are confronted with daily are the norm. Even worse they quite often feel they cannot approach anybody to discuss these issues because it may be perceived as weakness.

Furthermore, this problem is not unique to SA. In 2012 a survey of the legal profession in the United Kingdom (UK) found that more than 50% of the profession felt stressed and that more than 19% of the profession was suffering from clinical depression (www.lawsociety.org.uk, accessed 25-4-2017). In 2013 the Law Society in the UK interviewed 2 226 legal professionals and found that more than 95% of the candidates interviewed said their stress was extreme or severe (www.lawsociety.org.uk (*op cit*)).

So perhaps it is time for us all to admit that it is okay to drop the veneer for a moment and to take some time to live our lives and acknowledge the stresses that assail us. It might just do us all some good to follow the advice from the preface to the 1855 edition of Walt Whitman’s *Leaves of Grass: The Original 1855 Edition* (New York: Dover Publications Inc 2007):

‘This is what you should do: Love the earth and sun and the animals, despise riches, give alms to everyone that asks, stand up for the stupid and the crazy, devote your income and labor to others, hate tyrants, argue not concerning God, have patience and indulgence toward the people, take off your hat to nothing known or unknown or to any man or number of men ... re-examine all you have been told at school or church or in any book, dismiss whatever insults your own soul, and your very flesh shall be a great poem.’

So my challenge to all practitioners is this – take some time for your staff. Break your seriousness and solemn demeanor for a moment or a day just to speak to your staff and your juniors to gauge their state of mind. You never know – a moment of genuine concern shown to a staff member might just make all the difference in the world – both to the business and the individual.

Let me leave you with the following –

“Unmitigated seriousness is always out of place in human affairs” counsels the philosopher George Santayana, adding “Let not the unwary reader think me flippant for saying so; it was Plato, in his solemn old age, who said it.” (Michael Dirda *Book by Book* (New York: A Holt Paperback 2005)).

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# Is it still necessary to obtain a court order against a fund?

## *A rebuttal*

By  
Naleen  
Jeram

**T**he payment of pension interest benefits to non-member spouses on the dissolution of a marriage has been the subject of intense debate and has recently received judicial attention in several ground-breaking judgments. In Clement Marumoagae 'Pension interest – is there a need to plead a claim?' (2017 (Jan/Feb) DR 38), the author avers that the ruling in *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA) clarified the position and concludes that the court ruled that it is not necessary for the pension fund to be identified and ordered to pay the benefit in order for such a fund to pay the non-member spouse. It is this conclusion that I respectfully disagree with, as in my view, this was not the court's ruling, nor does it reflect the current position in law.

The key issue for consideration in the *Ndaba* matter, was whether the pension interest automatically forms part of the joint estate (where parties are married in community of property). Both the majority and minority judgments of the Supreme Court of Appeal (SCA) accepted that the pension interest automatically forms part of the joint estate, regardless of whether it is pleaded or not and whether or not an order to that effect is issued. Put differently, the effect thereof is that the pension interest value of the member as at date of divorce is regarded as an asset in the estate and a rand value may be ascribed thereto, notwithstanding the fact that the benefit itself has not yet been paid. On the facts of this matter, it means that the liquidator appointed to divide the estate, could take that value into account.

However, although the value of the pension interest must be taken into account in the division of the estate, it is still necessary to obtain an order in terms of s 7(8) of the Divorce Act 70 of 1979 (the Divorce Act), if the fund is to be co-opted into payment of any assigned pension interest and the SCA ruling does not alter that position. The court ruled that pension interest automatically forms part of the joint estate by virtue of s 7(7)(a) and does not have to be pleaded and held that such an order would be echoing the provisions of s 7(7)(a). Hereafter, the SCA drew a distinction between ss 7(7)(a) and 7(8) and concluded that s 7(7)(a) is self-contained and is not subject to s 7(8). Moreover, s 7(7)(a) is a per-



Picture source: Gallo Images/Stock



emptory provision, which increases the value of the joint estate by vesting in the joint estate, the pension interest, which parties married in community of property are entitled to. Section 7(8), on the other hand, provides a mechanism to co-opt the fund concerned into payment of any allocation of such pension interest to the non-member spouse. Such payment to bind the fund can only occur by order of the court. The majority judgment comments as follows on the requirement (at para 27):

‘Section 7(8), on the other hand, creates a mechanism in terms of which the pension fund of the member spouse is statutorily bound to effect payment of the portion of the pension interest (as at the date of divorce) directly to the non-member spouse as provided for in s 37D(1)(d)(i) of the Pension Funds Act 24 of 1956 and s 21(1) of the Government Pension Law, 1996. This is as far as s 7(8) goes and no further. The non-member spouse is thereby relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest with all its attendant risks. The remarks by this court in relation to s 7(8)(a), in *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) are instructive. It said the following (para 20):

“Once a part of the pension interest of the member spouse becomes due or is assigned to the non-member spouse in the course of the divorce proceedings, the Court may order that such part of the pension interest must be paid by the pension fund concerned to the non-member spouse when any pension benefits accrue in respect of the member spouse.”

Therefore, the court acknowledged that once the fund has been ordered to pay the benefit, then the member spouse is relieved of the duty to make payment. Thus, in the absence of such an order, the fund cannot pay and the member spouse may become liable to the non-member spouse in respect of that claim. The minority judgment agreed with the main conclusions of the majority judgment, but differed in the application of the law to the facts of the case. On the issue of whether the fund must be ordered to pay, the minority judgment also adopted a similar position and ruled (at paras 69 and 70):

‘This does not help the appellant much, because, absent an order in terms of s 7(8)(a), the declaratory order in terms of s 7(7) remains enforceable only between the parties. The pension fund to which they both belong, the GEPF [Government Employees Pension Fund], is empowered by law to give effect only to an order made in terms of s 7(8)(a).



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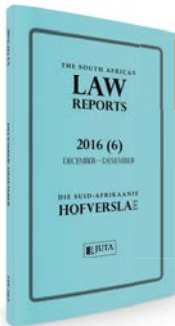
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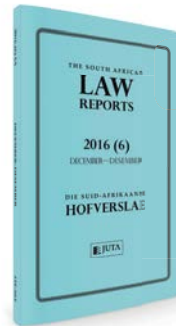
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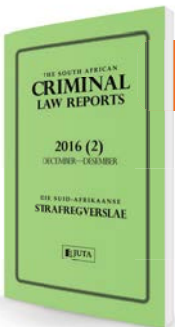
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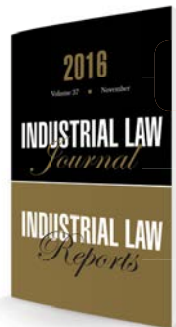
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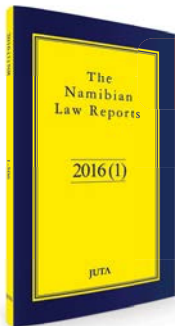
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[70] *Such an order must direct the pension fund to make payment of a member's pension interest to a non-member spouse, and endorse its records accordingly.* A declaratory order such as the one made by my colleague, is not sufficient. The upshot of this is that, unless and until one of the parties approaches the regional court for an order in terms of s 7(8)(a) of the Divorce Act, the appellant's victory in this court would remain hollow and a *brutum fulmen* as far as the GEPF is concerned' (my italics).

Hence, the minority judgment clearly expressed concern that the majority judgment did not order the fund to pay as this meant that the order was not binding on the fund. On the facts of this case, it may mean that the non-member spouse's claim may not be fulfilled. Be that as it may, both judgments confirmed that the order may only be enforceable against the fund if the divorce order made a specific order against the fund and in the absence thereof, the order will only be binding between the divorcing parties.

The final order issued by the court appointed a liquidator with specific powers and a declaratory order was issued to the effect that the non-member spouse was entitled to an amount equal to 50% of the members' nett pension interest in the GEPF as at date of divorce. Thus, notwithstanding the request for an order against the fund, the court did not make such an order in the form of an allocation of pension interest in terms of s 7(8) such that it might form a direct claim against the fund. Instead, the court clarified the entitlement of each spouse to an *inter partes* claim flowing from the deeming provision in s 7(7)(a).

There are a number of reasons as to why the fund must be identified and ordered to pay and they are briefly discussed below. Firstly, the fund itself is ordinarily not a party to the divorce proceedings. It is an independent third party holding benefits on behalf of the member that forms part of the joint estate (where the parties are married in community of property). Hence, while it is not necessary to join the fund as a party to the proceedings, a clear order directing the fund to pay a portion of the benefit to the non-member spouse is necessary. The absence of such an order would mean that the fund by paying would be acting *ultra vires* the rules read together with the legislation regulating the transfer of pension interest benefits.

Secondly, in terms of the definition of pension interest, for occupational pension and provident funds, the benefit represents the resignation benefit the member would have received as at date of divorce had he or she notionally resigned from service. While this entire benefit forms part of the joint estate, the parties may well agree or the court

may determine that only a portion of the benefit (for instance, 33% or 40% or 66% of the benefit) is to be assigned or transferred to the non-member spouse. In the absence of any order against the fund, the fund will not be in a position to determine what amount is payable to the non-member spouse.

Thirdly, the member may belong to multiple funds (pension fund, provident fund, retirement annuity fund, and/or preservation fund), and in the absence of any order, it will be unclear whether the order is directed against all or some of the funds. Thus, it would be unlawful and unwise for a fund to guess whether it should pay and what portion of the benefit should be paid.

Fourthly, there have been several statutory amendments dealing with the requirement that the fund be ordered to pay the benefit. Section 7(a)(i) of the Divorce Act permits the court granting the divorce to order the said fund to pay the benefit to the non-member spouse.

*'Any order simply stating the 'equal division or joint division of the estate' would not identify the fund from the order nor is there any order requiring the fund to pay and thus would not be enforceable against the fund/s'*

Moreover, s 7(a)(ii) requires the Registrar of the court to notify the fund that part of the pension interest is payable to the non-member spouse. With effect from 1 November 2008, s 37D(4)(a) was inserted into the Pension Funds Act (only dealing with funds registered under this Act), which reads:

'For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse –

- (i) must be deducted by –
- (aa) the pension fund or pension funds named in or identifiable from the decree; ...'

The above amendment, in line with s 8

of the Divorce Act, makes it clear that the fund must be named in the order or be identifiable from the order. Accordingly, should a fund not be identifiable from the order, it would not comply with the amended provision. In *M v M* (LP) (unreported case no HCA18/2015, 17-6-2016) (Makgoba JP), the High Court expressed this principle as follows (at para 30):

'Thus, even though the pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specified to be part of the joint estate, *an order in terms of section 7(8)(a) is required in order to enable the non-member to compel the pension fund to pay his or her portion of the member's pension interest to him or her.* In the absence of an order in terms of section 7(8)(a), the pension fund would refuse to pay any portion to the non-member. In such event, the non-member spouse would have to claim his or her portion of the pension interest from the member personally' (my italics).

See also *Sayster v SABC Pension Fund and Another* [2016] 3 BPLR 446 (PFA); *Lubbe v Central Retirement Annuity Fund* [2015] 1 BPLR 39 (PFA); *Rampa v Sentinel Mining Industry Retirement Fund* [2014] 1 BPLR 106 (PFA); *Kapot v Liberty Group Ltd* [2012] 1 BPLR 41 (PFA); *Maqubela v Municipal Employees Pension Fund* [2012] 1 BPLR 65 (PFA); *Pillay v Pioneer Foods Provident Fund* [2008] 3 BPLR 248 (PFA); and *Dosson v Cape Municipal Pension Fund* [2009] 1 BPLR 12 (PFA). In all of these matters, it was held that the fund must be identified and/or ordered to pay the benefit.

Furthermore, any order simply stating the 'equal division or joint division of the estate' would not identify the fund from the order nor is there any order requiring the fund to pay and thus would not be enforceable against the fund/s (ss 7(7) and 7(8) of the Divorce Act, read together with s 37D(4)(a) of the Pension Fund Act).

In light of all of the above, while the pension interest benefit automatically forms part of the joint estate, in order for the fund to pay the non-member spouse directly, it will need a specific order from the court requiring it to do so, and the order will need to specify the percentage or rand amount of the pension interest allocated. In the absence of such an order, the payment of the pension interest obligation will remain a personal claim between the divorcing parties.

Naleen Jeram BA LLB LLM (UCT) is a Legal Manager at MMI Group Limited and an Adjunct Professor at the University of Cape Town.

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# Enforceable orders against retirement funds after divorce:

## *A rejoinder*

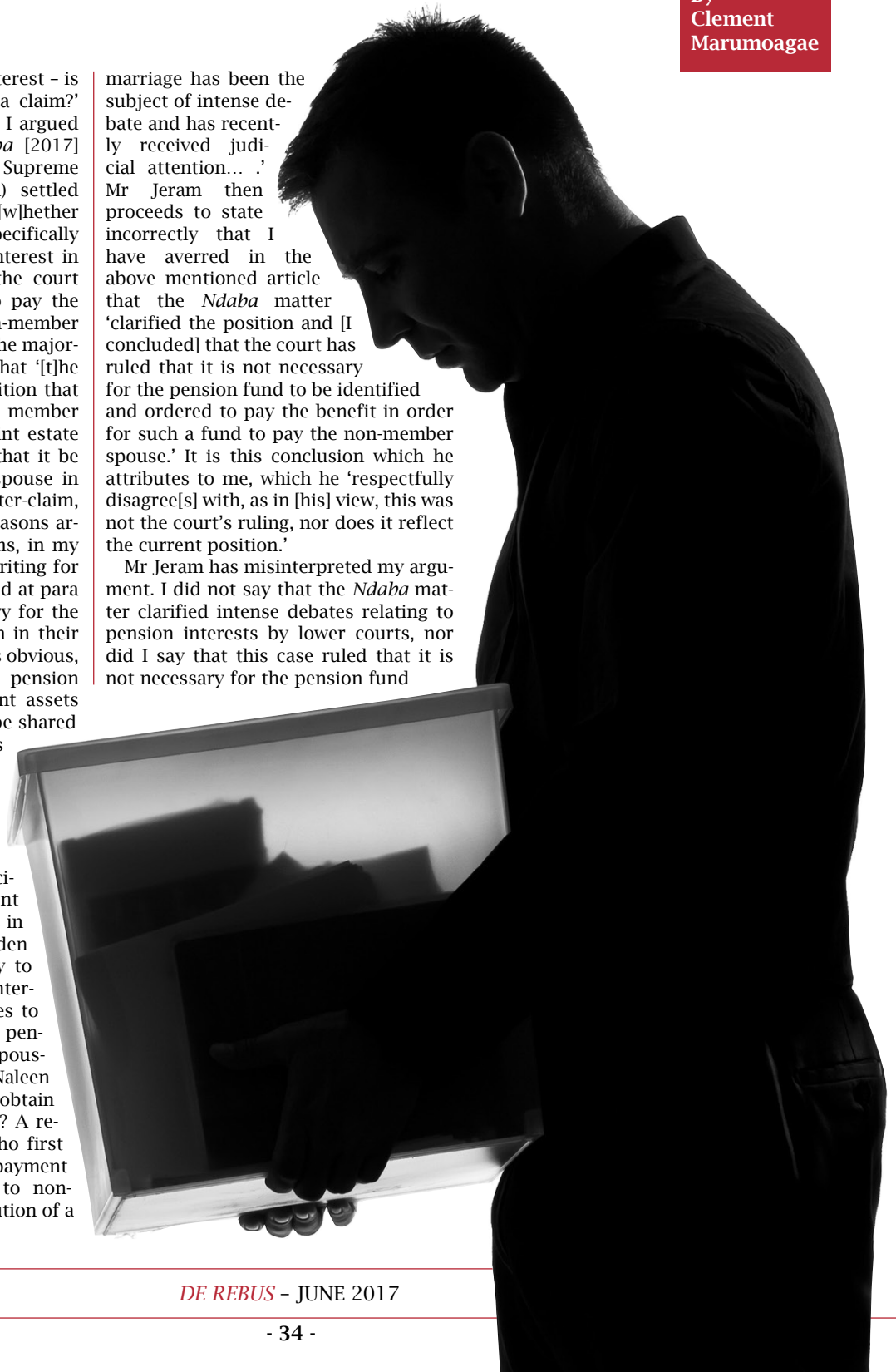
By  
Clement  
Marumoagae

**I**n the article 'Pension interest - is there a need to plead a claim?' (2017 (Jan/Feb) *DR* 38), I argued that in *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA), the Supreme Court of Appeal (SCA) settled the law in relation to '[w]hether or not there is a need to specifically plead a claim for a pension interest in divorce papers in order for the court to order a retirement fund to pay the pension interest to the non-member spouse.' In the *Ndaba* matter, the majority correctly held at para 28 that '[t]he cases that espouse the proposition that for the pension interest of a member spouse to form part of the joint estate upon divorce, it is necessary that it be claimed by the non-member spouse in his or her summons or counter-claim, have been criticised. For the reasons articulated above, those criticisms, in my view, are justified.' Petse JA, writing for the majority authoritatively held at para 25 that '... it was not necessary for the parties in this case to mention in their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed would be shared equally between them.' In this case, the settlement agreement did not make provision for the pension interest.

In view of these paragraphs, I then 'concluded' in the article that '[i]n light of the SCA decision, it is hoped that retirement funds and regional magistrates in particular, will no longer burden divorce litigants with the duty to plead and pray for pension interest in order for divorce decrees to order retirement funds to pay pension interests to non-member spouses.' This incited a reply from Naleen Jeram 'Is it still necessary to obtain a court order against the fund? A rebuttal' (2017 (June) *DR* 28), who first correctly argues that '[t]he payment of pension interest benefits to non-member spouses on the dissolution of a

marriage has been the subject of intense debate and has recently received judicial attention...'. Mr Jeram then proceeds to state incorrectly that I have averred in the above mentioned article that the *Ndaba* matter 'clarified the position and [I concluded] that the court has ruled that it is not necessary for the pension fund to be identified and ordered to pay the benefit in order for such a fund to pay the non-member spouse.' It is this conclusion which he attributes to me, which he 'respectfully disagree[s] with, as in [his] view, this was not the court's ruling, nor does it reflect the current position.'

Mr Jeram has misinterpreted my argument. I did not say that the *Ndaba* matter clarified intense debates relating to pension interests by lower courts, nor did I say that this case ruled that it is not necessary for the pension fund



to be identified and ordered to pay the benefit in order for such a fund to pay the non-member spouse. In actual fact, I have extensively discussed elsewhere aspects of the law in relation to pension interest, which the *Ndaba* matter has clarified and those which remains points of contention (see Marumoagae 'The Law Regarding Pension Interest in South Africa has been settled! Or has It? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' 2017 (20) *PELJ* 1). In other words, the *Ndaba* matter did not clarify the entire law relating to pension interests in South Africa.

### Pleading pension interest

Unfortunately, Mr Jeram did not reply to my argument but opted to use my article as a vehicle for introducing his argument, which points out the importance of s 7(8) of the Divorce Act. Mr Jeram's argument is basically that in order for retirement funds to pay out pension interest shares to non-member spouses, they must receive an order directing them to make such payments. My primary argument, which Mr Jeram ought to have engaged, relates to praying and pleading pension interests when preparing divorce papers, given the fact that the majority in the *Ndaba* matter held that in the context of that case, there was no need for the parties to include a pension interest in their settlement agreement (para 25). My submission is that where there is no settlement agreement, it is then equally not necessary for the parties to plead and pray for a joint estate, particularly when they are married in community of property. This is because on the date of divorce, in terms of s 7(7) of the Divorce Act 70 of 1979 (the Divorce Act), the pension interest will be deemed to be part of the member spouse's estate. It is worth noting that neither the *Ndaba* matter, nor any other case dealing with pension interest has clarified how the pension interest becomes part of the joint estate, because s 7(7) of the Divorce Act merely vests it in the member's personal estate and the Act does not go further than that. It can be argued, however, that since the contributions that were paid to the member spouse's pension fund were derived from the member's salary, which itself can be regarded as a patrimonial benefit of the marriage, it then follows, therefore, that 'somehow' once deemed to be part of the member's estate, such pension interest will automatically also be part of the joint estate as a patrimonial benefit. Thus, because ultimately, the pension interest will be deemed to be part of the joint estate in terms of s 7(7) of the Divorce Act, then it should follow

nonetheless, engage his argument.

### The significance of s 7(8) of the Divorce Act

The *Ndaba* decision did not affect the application of s 7(8) of the Divorce Act in relation to payment of pension interests by retirement funds. The current legal position is indeed that in order for retirement funds to make payment of portions of their members' pension interest to non-member spouses, they should be served with court orders, which direct them to make such payment. While this cannot be contested as the current law, it does not follow that it cannot be questioned or even criticised, more particularly if it places unnecessary burden on non-member spouses. I agree with Mr Jeram that the majority in the *Ndaba* matter held that s 7(7)(a) is self-contained and not made subject to s 7(8) of the Divorce Act (at para 25). However, it is important to understand the context within which this statement was made. Petse JA was responding to a view that 'absent a court order in terms of s 7(8), the non-member spouse effectively forfeits his or her entitlement to a share in the pension interest of the member spouse', with which view he disagreed with (para 25). In the *Ndaba* matter, Petse JA sought to explain the difference between s 7(7) and s 7(8) of the Act, in my view he nonetheless, did not deal with the impact of s 7(8) on non-member spouses. All that Petse JA did was to clarify that s 7(8) is a statutory vehicle, which allows retirement funds to release portions of their members' retirement benefits to such members' spouses at the time of divorce (para 27). That is the law, and cannot be disputed, however, my argument goes further than that.

I am more concerned with the real impact of s 7(8) of the Divorce Act. Even though s 7(7) is self-standing and not dependant on s 7(8), the reality is that without an order which complies with s 7(8) of the Divorce Act, retirement funds would refuse to make payment. Once a non-member spouse is entitled to a benefit, he or she should be paid that benefit, but he or she will not be paid such benefit until he or she can prove that s 7(8) of the Divorce Act has been complied with. This is a fundamental debate, which Petse JA did not engage with. My understanding of Petse JA's remarks is that whether or not s 7(8) has been complied with, that is immaterial in relation to the entitlement, which the non-member spouse has towards his member spouse's retirement benefits. I take the debate further, and I propose a focused engagement with the real impact of s 7(8) of the Divorce Act. As the law stands, failure to comply with s 7(8)

that it is pointless for the non-member spouse to plead and pray for a benefit, which the law already regards as an asset in the joint estate at the time of divorce. Unfortunately, Mr Jeram, does not engage this argument, but I will

delays the ability of s 7(7) of the Divorce Act. In other words, if there is no order in terms of s 7(8), then a non-member spouse would be forced to seek variation of the divorce order at great cost before he or she can be paid what he or she is entitled to. This is despite the fact that the retirement fund concerned has acknowledged that one of the parties to the divorce is indeed their member. In other words, retirement funds do not dispute the entitlement, they only question statutory non-compliance. Thus I am of the view that the statutory requirement in s 7(8) is an unnecessary legal burden on non-member spouses, who may not have the financial resources to make applications to vary their divorce orders.

In making an argument for the importance of s 7(8), Mr Jeram advances several reasons as to why the fund must be identified and ordered to pay the pension interest in the divorce decree. His first reason relates to the fund not being a party to the proceedings, but he correctly conceded that it is unnecessary to join the fund as a party. On this point, the fact that one of the parties is a member of a pension fund and that pension fund holds an asset, which such a member built through the proceeds of the patrimonial benefits of the marriage in the form of the contribution from his salary, in my view should be enough for the non-member spouse to be able to seek payment of the portion thereof if the parties are married in community of property (or where the accrual system is applicable), notwithstanding the fact that s 7(8) has been complied with. The second reason Mr Jeram advances

relates to the difficulty of apportioning a percentage, which the non-member spouse would be entitled to if there is no order to this effect. In my view, this is a non-issue, because any divorce practitioner can inform you that in a blanket division, parties to the divorce will be regarded as entitled to half of every asset contained in the joint estate. In other words, if there is no order relating to the percentage the non-member spouse is entitled to, then such a non-member spouse would then be entitled to receive 50% of his or her member's pension interest. The third reason that Mr Jeram advances relates to members spouses who are members of multiple retirement funds, hence in the absence of an order it will not be clear as to whether the order is directed against all or some of the funds. In my view, this should not be a problem at all. Section 7(7)(a) of the Divorce Act is clear that the member's pension interest is deemed to be part of 'his' estate as at the date of divorce. As such, a member who is part of multiple retirement funds, where there is no settlement agreement providing otherwise, his or her pension interest in all the retirement funds will be part of his or her estate, and subsequently part of the joint estate making them vulnerable for division.

Finally, it is worth noting that it is possible to identify the retirement fund to which the member belongs without mentioning it anywhere in the divorce papers. For instance, in terms of s 37D(4)(a)(i) (aa) of the Pension Funds Act 24 of 1956, a pension interest must be deducted by the pension fund named in or identifiable from the decree. If the pension fund

is not named, it can be identifiable from the citation of parties in the pleadings, wherein the workplace or even occupation generally of the member spouse is provided for. From such information a non-member spouse may have an idea of which fund the member spouse may belong to or can approach the member's workplace to seek such information. As such, post the divorce, details of the member's retirement fund can be obtained from his or her workplace and his or her fund can be served with a divorce decree to make payment as part of the division of the parties' joint estate.

## Conclusion

Mr Jeram's concerns would be welcomed by various retirement funds, however, they do not take into account the practical difficulties which non-member spouses have to go through to comply with s 7(8) once retirement funds have refused to pay. In my view, s 7(8) is an unnecessary statutory provision, which should be repealed. In particular, necessary amendments should be made, which remove deeming provision from s 7(7) of the Divorce Act in order to treat pension interest as ordinary assets in the joint estate, which can be disposed of even with blanket divorce orders.

**Clement Marumoagae LLB LLM (Wits) LLM (NWU) Diploma in Insolvency (UP)** is an attorney at Marumoagae Attorneys in Itsoseng and a senior lecturer at Wits.



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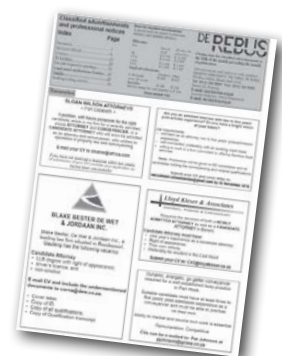
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# Who is responsible for mishaps in the operating theatre at a private hospital?

By  
Dr Henry  
Lerm



Picture the typical set-up in an operating theatre in the eighteenth century. There, he was, the lone medical man, scalpel in hand, hunched over the patient in a dark, stuffy room with a nurse on his side. In all likelihood, she would have been in his employ and the doctor was responsible for her conduct, thus legally liable. In contrast, today, you will find a fully ventilated operating room, with lights brighter than those at a sports stadium. Gathered around the table you will observe a multidisciplinary team comprising of a head surgeon, the assistant surgeon, anaesthetist, theatre nurse and the scrub nurse. On closer look, you will notice that they are all going about their task independently and with great urgency under the watchful eye of the head surgeon. Like a captain in command of a ship, he gives instructions and all seem to respond to his commands. He directs the course of the procedure, and takes critical decisions, while the operating team looks to him for guidance.

Ironically, in this private hospital set-up, none of the team, save for the assistant surgeon, is employed by the head surgeon. They are all in private practice and the nurses are employed by the hospital where the head surgeon hires the theatre. If then, it can be deduced that the head surgeon is in charge of the operating theatre, does it necessarily follow that the head surgeon as a captain of a ship, is legally responsible for the actions of those under his guidance, especially where something goes wrong and the patient suffers damages?

From the role that the head surgeon plays in theatre, many observers, including lawyers, will assume that the head surgeon legally, takes responsibility for the individual's, even the team's mistakes. This article investigates whether the so-called 'captain of the ship' doctrine forms part of our law.

An answer to that is of paramount importance in medical malpractice litigation. Identifying the correct party(ies) will result in the correct defendant(s) being sued. A misjoinder can be financially very costly to a client and add to the woes of the attorney making that decision.

## Background

The idea that a surgeon was responsible for everything that happened in the operation theatre - just as the captain of the ship was responsible for everything that happened on the ship - had its origin in the United States (US). The genesis for recognising the concept, emerged from the surgeon's education and the leading role he played in making decisions and

assuming responsibility in theatre. That, gave rise to the metaphor 'captain of the ship'. The welfare of the patient was also premium. So, the surgeon became morally and legally responsible for mishaps during surgery and treatment. (Søren Holm 'Final responsibility for treatment choice: the proper role of medical doctors?' (2011) 14 *Health Expectations* 201 (<http://onlinelibrary.wiley.com>, accessed 4-5-2017)).

The 'captain of the ship' idea, was also influenced by the fact that hospitals, traditionally, had immunity from malpractice claims in that they could not be sued by virtue of the fact that they were established through charitable trust funds. That applied to members of the surgical team directly employed by the hospital, as well. (John Grassman 'The Doctrine of Charitable Immunity and its Impact on Medical Malpractice Litigation in the United States' (2014) 5 *JCCC Honors Journal* (<http://scholarspace.jccc.edu>, accessed 4-5-2017)).

### The legal position in the US

The fiction 'captain of the ship' was recognised in the state of Pennsylvania for the first time, when their Court of Appeals imputed liability to the physician for the act of an assistant under his control, but not directly employed by him (*McConnell v Williams*, 361 Pa 355, 65 A.2d 243 (1949)). In this case, an obstetrician in control of the delivery, had selected an intern to assist him. The obstetrician was in private practice, visiting the hospital, whereas, the intern was employed there. After the delivery, the obstetrician assigned the care of the baby over to the intern. The latter applied too much silver nitrate into the infant's eyes, without sufficient irrigation. That resulted in the child losing sight in his right eye. There was no evidence that the obstetrician was negligent in any way. The only question was whether the surgeon was responsible for the negligence of the intern? The court *a quo* found that, as the obstetrician did not employ the intern, he could not be held liable for the action of the intern, who was found to be negligent.

The Court of Appeal reversed the decision, finding that the obstetrician could be held liable, though, the damage was not directly caused by him. It was also found that until the surgeon leaves the operating theatre, he, like the captain of a ship, is in complete charge of those present and assisting him. Relying on the principle of agency, the court found there was a temporary relationship between the obstetrician and the intern akin to that of master and servant. Consequently, legal liability could be imputed to him for the harm caused by any negligence on the part of the intern. The

visiting surgeon thus became the 'borrowed servant' and his liability was analogous to the 'captain of the ship' parallel (Sybrand Strauss *Doctor, Patient and the Law* 2ed (Van Schaik 1984) at 346).

The decision was followed for a number of decades in the US until *Franklin v Gupta* 81 Md. App 345, 567 A.2d 524 (1990) when the Court of Special Appeals of Maryland, after re-assessing the doctrine of 'the captain of the ship', found, *inter alia*, that there was no sound reason in law, why legal liability should as a general rule, be imputed to a physician or surgeon, just because he has a special skill and finds himself in the same operating theatre, regardless of him not employing the nurses or interns present. The court also found that there was no reason to extend the vicarious liability of a surgeon for the negligence of hospital employees simply to create a fund for victims of malpractice.

*From the role that the head surgeon plays in theatre, many observers, including lawyers, will assume that the head surgeon legally, takes responsibility for the individual's, even the team's mistakes.*

### The United Kingdom's (UK's) position

The UK's position with regard to the liability of hospitals in early years appeared to be the following: Because hospitals were charitable institutions for the sick and needy, all medical staff employed by the hospital, as well as those medical practitioners who visited and treated patients without payment, were immune to civil liability. The rationale was to protect the funds made available for patients to be treated in hospitals (*Feoffees of Heriot's Hospital v Ross* 12 CI 8F 507, 8 Eng Rep 1508 (HL1846)).

But, when hospitals became national institutions, a new approach to the imputation of liability of hospitals emerged. That started with the case of *Gold v Essex County Council* [1942] 2 KD 293, wherein the court held that a hospital authority was liable to a patient on account of a radiographer who was in full-time employ of the hospital (Strauss (*op cit*) at 344). In a succeeding English decision of *Cassidy*

*v Minister of Health (Fahrni, Third Party)* [1951] 1 All ER 574, the court emphasised the fact that any nurse, resident medical officer, intern, part-time anaesthetist or doctor in full-time employ of a hospital, will cause the hospital liability if they were negligent. But, the same could not be said about a visiting or consulting doctor. Here, the court found, there was no master and servant relationship, as can be found in a ship's master and the crew members' association.

Although UK courts have occasionally compared the position of a surgeon in relation to the instructions he gives to the other members of his team in theatre, as that akin to 'a captain who navigates a ship', the doctrine of 'the captain of the ship' has never received fully-fledged recognition by the British courts.

### The legal position in South Africa (SA)

South African courts, following the decisions of older UK authorities, at first decided that the hospital authorities could not be held liable for the negligent conduct of, especially the nursing staff (*Hartl v Pretoria Hospital Committee* 1915 TPD 336; *Byrne v East London Hospital Board* 1926 EDL 128 at 142 and 158; *Lower Umfolozi District War Memorial Hospital v Lowe* 1937 NPD 31).

But that position changed in later years when the courts started applying the doctrine of vicarious liability to impute liability to hospital authorities for the unskillful professional acts or omissions of doctors in the service of hospitals (*Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Dube v Administrator, Transvaal* 1963 (4) SA 260 (W)).

In SA, for a surgeon to incur liability for the conduct of another in theatre, there has to be a relationship of employment, namely, a master-servant relationship, wherein, the surgeon (master) is usually capable of exercising control over say, an assistant surgeon in his employ (servant) (see *Van Wyk v Lewis* 1924 AD 438 at 458; RG McKerron *Law of Delict* 7ed (Cape Town: Juta 1971) at 91, repeated in Pieter Carstens and Debbie Pearmain *Foundational Principles of South African Medical Law* (Durban: LexisNexis 2007) at 548; and Strauss (*op cit*)). Insofar as the application of the 'captain of the ship' doctrine in SA is concerned, the principle was recognised in the *Hartl* case albeit for only a fleeting moment. The doctrine was, however, rejected in 1924 in the *Van Wyk* matter. Here, the Appellate Division refused to accept the contention that the visiting surgeon in private practice, was legally liable for the negligent conduct of a nurse who was employed by the hospital where he was operating. The court found, although a nurse is generally under the control of a



surgeon when he performs an operation, she remains an independent assistant of the surgeon. Their relationship was not that of a master and servant, for she is from an allied profession and performs her own duties. Unlike a master who is responsible for the acts of his servant, the surgeon is not responsible for her conduct before or after the operation. Nor was any relationship of employment shown (*Van Wyk (op cit)* at p 458 – 459).

The principle that vicarious liability does not apply to the so-called 'independent contractor' who undertakes a specific job and acts with his own judgment in carrying out a procedure, thus seems to be firmly entrenched (Strauss (*op cit*) at 343 and 346; MA Dada and DJ McQuoid-Mason *Introduction to Medico-legal Practice* (Durban: LexisNexis 2001) at 24 – 25). In this regard, the case of *S v Kramer and Another* 1987 (1) SA 887 (W) at 895 is also very instructive.

The principle established by our courts and legal writers amount to this: All those in a multidisciplinary team in theatre, are all independent agents. From the nurse to the anaesthetist to the other specialists present, they are all their own masters and act as independent contrac-

tors. They are as a general rule, not liable for the other's negligence. There is, therefore, generally no duty on one to check that the others had correctly acted. It should, however, be borne in mind, where the nurse is a member of the staff of the hospital ie, occupies a stable and permanent position, the nurse is a servant of the hospital authority. The hospital, by virtue of its relationship with the nurse, will in law, assume delictual liability for the acts of professional negligence committed by that servant, provided, the latter acts within the course and scope of his or her employment. Under those circumstances the hospital can be sued based on the principle of vicarious liability.

Although a physician is generally not liable for the negligent actions of hospital employees and staff who are not employed by the physician, there may be instances where liability may be imputed, for example, the surgeon discovers a non-employee's negligence during the course of surgery or ordinary care and fails to act to prevent the ill effects. His failure to act, may become the surgeon's own negligence (The Medical Law Society of the Commonwealth of Nations

*The Medical Malpractice Compendium* (www.medicallawsociety.co.za, accessed 15-5-2017).

## Conclusion

Most of the functionaries who make up the team, headed by the head surgeon, are not employed by him or her. Save for the nurses who may be employed by the private hospital where the operation takes place, all the others are independent contractors, who each have their own independent duties. Teamwork, however, remains an integral part of their mission to provide client care. Although the head surgeon like a captain on a ship, may direct the proceedings in the theatre and make critical decisions, there is no master and servant relationship. Save for the exception highlighted in the text, they are generally not liable for the other's negligence. The 'captain of the ship' doctrine, is therefore, not recognised in SA.

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# When constitutional guarantees meet reality in health care

By  
Wihann  
Joubert

No other consumer/provider relationship in South Africa (SA) starts off on a more unbalanced level as the relationship between the consumer of health services and the provider thereof. Often and specifically when making use of public healthcare services, the consumer has no other option but to trust the provider as there may not be any other resources available in the nearby vicinity (financial constraints may further limit choice in this regard) and to make things worse, the consumer is often not in a position to debate or challenge the quality of the service as he or she is physically in a poor state. It is, therefore, imperative that these services, whether rendered in the private or public sector, are rendered while having the utmost regard for the values enshrined in the Constitution such as the right to –

- dignity;
- life;
- security of the person;
- bodily and psychological integrity;
- privacy; and
- access to healthcare.

The new constitutional order has given new impetus to the law of delict; the legal duty of a person is not only tested against the convictions of a typical community, but the convictions of a community aware of their socio-economic rights more than ever. This has no doubt raised the proverbial bar with regard to a test for negligence. In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) matter, the court found that specific circumstances such as being a member of a vulnerable group plays a significant role and again emphasised the importance of judging each matter on its own merit. Various matters have contributed to the understanding that a person's right to dignity does not fall away the moment he or she is a victim of medical negligence, their constitutionally guaranteed rights become more important because of their vulnerability.

Medical negligence occurs when a reasonable healthcare practitioner could foresee that his conduct could potentially injure, compounded by the absence of reasonable steps that could prevent the possibility of this. It is therefore, wise to apply a test for medical negligence. The

matter of *Mitchell v Dixon* 1914 AD 519 conceptualised the test for medical negligence as:

'A medical practitioner is not expected to bring to bear on a case entrusted to him the highest possible degree of professional skill but is bound to employ reasonable skill and care.'

What, in the context of medical negligence, can be seen as reasonable skill and care? In the matter of *Van Wyk v Lewis* 1924 AD 438 the court defined what reasonableness means – '... in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs'.

The standard is the reasonable care, skill and diligence, which are ordinarily exercised in the profession generally.

In the *Van Wyk* matter, Wessels JA further held at p 461 – 462 that: 'We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the skill, care and judgment of the average surgeon in similar circumstances? If he falls short he is negligent'.

From the previous cases one accepts that the test for medical negligence is applied more subjectively compared to the test of 'normal' negligence. The medical practitioner's or healthcare



Picture source: Gallo Images/Stock



workers' conduct is compared to a significantly smaller group namely, specialists with the same qualifications. In other words, general practitioners' conduct is assessed and compared to the conduct of the reasonable general practitioners and specialist surgeon's conduct is tested against other specialist surgeons' conduct. The *imperitia culpa adnumeratur* rule applies, which means that a practitioner who undertakes work knowing that he or she lacks the skill or experience required to do a proper job will be liable if he or she causes damages due to his inability or inexperience. The court in *Coppen v Impey* 1916 CPD 309 confirmed this when Kotzé J stated: 'Unskilfulness on his [the medical practitioner's] part is equivalent to negligence and renders him liable to a plaintiff, who has sustained injury therefrom, the maxim of the law being *imperitia culpa adnumeratur*.'

The rationale for financial compensation due to damages suffered originates from Roman law where Pomponius stated that '*plus cautionis in re est quam in persona*' or 'goods are better sureties than the debtor's person'. The tools developed to claim compensation originated from the *actio legis Aquiliae*, which is the action used to claim damages for patrimonial damage, the *actio iniuriarum*, which is used to claim damage when dignity and reputation is harmed, and a third unique action in which damage for harm due to shock, loss of amenities of life and loss of life expectancy can be claimed. South African common law developed to a point where the damages that were claimed had to be claimed in one single action. In the matter of *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 585 and 586 it was ruled that –

'when once some damage has resulted from the wrongful act, or even if it is probable that damage will result, time begins to run and the plaintiff must bring his action within three years for all his damage and must claim for all damage once and for all ...'

and

'a cause of action and the damages recoverable are an entirety and not divisible.'

The court in *Casely, NO v Minister of Defence* 1973 (1) SA 630 (A) confirmed this when Trollip JA ruled: 'Under the common law a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful act causing his disablement or death'. In the matter of *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) Wessels AR interpreted the common law as:

'In an action for damages it is normally expected that at the end of the case, on the basis of the evidence, a finding will be made, once and for all, of the amount of money that the defendant has to pay to the plaintiff for compensation' (translated and paraphrased).

This implies that in actions for damages it is expected of the court to come to a conclusion, once and for all, as to the extent of damages that were sustained, according to the evidence placed before it. These dictums describe what we know today as the 'once and for all rule'. Perhaps Johannes Voet was wise before his time when he said that the rationale for the once and for all rule was 'to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings' (Johannes Voet (Translated by Sir Percival Gane) *The selective Voet being the Commentary on the Pandects* (Durban: LexisNexis 1989)).

Does the 'once and for all' rule imply that the award has to be paid in a lump sum? In the matter of *AD and Another v MEC for Health and Social Development Western Cape Provincial Government* (WCC) (unreported case no 27428/10, 7-9-2016) (Rogers J) the defendant requested the court to develop the common law, so as to relieve the state of the financial burden, which lump sum awards create and which lump sum awards hamper organs of state in progressively realising everyone's right to have access to health care services. The

gist of its argument being that awards in favour of the few are said to harm the rights of many. In this case the quantum of damages regarding a new-born baby who was negligently discharged with jaundice from hospital was in dispute. In essence the defendant alleged that the existing rule (the 'once and for all' rule) should be changed so that an award of damages may not be made 'in such a manner that the amount ultimately to be paid is dependent on when future events take place, or whether they take place'. It suggested the implementation of claw back provisions, which require that money that was paid via the lump sum rule should be paid back when the person to whom the money was paid dies, or it is found that the money was too much. The defendant conceded that a top-up (if the

**Various matters have contributed to the understanding that a person's right to dignity does not fall away the moment he or she is a victim of medical negligence, their constitutionally guaranteed rights become more important because of their vulnerability.**

money awarded via the lump sum rule runs out sooner than expected) provision should also be added if a claw back provision should be implemented. The defendant relied on its constitutional obligations but did not convince the court. The court did, however, concede that a move away from the lump sum rule towards a system where future medical expenses are met as and when they arise would match current needs but that: 'A radical departure of that kind should be left to the legislature'.

In the matter of *The Premier of the Western Cape Provincial Government NO v Rochelle Madalyn Kiewitz obo Jaydin Kiewitz* (WCC) (unreported case no 158/2016, 30-3-2017) (Nicholls AJA (Leach, Tshiqi, Majiedt and Swain JJA concurring), another attempt to limit the way in which damages the state had to pay a victim of medical negligence was launched. The defendant submitted a plea in mitigation in which it undertook to provide all relevant future medical treatment in any of its hospitals and

clinics in the relevant province, free of charge and for life. The defendant aimed to implement this undertaking by appointing a person within its employ to liaise with the plaintiff on all aspects that relate to the treatment specified in its offer. In the event of a dispute an objective third party would be appointed to intervene. Future medical costs submitted by the plaintiff were based on the rates applicable in private healthcare facilities and the court declared that the defendant had to ascertain that the level of medical care in public hospitals compare favourably to care in private healthcare facilities. The defendant omitted to establish this and it seems that the court favoured the plaintiff's view that the defendant's plea was a poorly disguised attempt to avoid the payment of a lump sum delictual damages in monetary terms. The court dismissed the defendant's plea.

A report by Algorithm Consultants & Actuaries dated 20 February 2017 stated that the National Department of Health in SA faces claims amounting to R 40 billion. It further stated that the surge in medical negligence claims was not unique to SA, but comparable to countries such as the United States and the United Kingdom. In the last-mentioned countries, this surge has led to certain legal reforms more specifically a limitation or cap on amounts that plaintiffs

can claim. It, however, warned against the uncontrolled and untested of capping of awards in medical negligence claims and based this warning, in part, on the effects of capping claims introduced by the Road Accident Fund Amendment Act 19 of 2005 (the Act) had on the Road Accident Fund (RAF). The report confirmed that the 2008 amendment to the Act had not in fact achieved the goal of reducing the amounts or frequency of claims but that 'it appears as if both claim severity and claim frequency has increased significantly post Amendment Act'. The RAF paid out R 8,7 billion in general damages in the year ending March 2016, compared to R 3,9 billion in the year ending March 2008. The average payment for loss of income increased from R 264 337 in the year ending March 2008 to R 739 214 in the year ending 31 March 2016.

A recent case study (Johann Wilhelm Joubert 'A case study of the Constitutionality of proposed financial limitations on medical negligence claims' (unpublished MPhil thesis, University of Pretoria 2016) on the effects birth asphyxia (caused negligently) had on the victim and his family showed that the victim's constitutional rights had been directly infringed upon 23 times, his mother's constitutional guaranteed rights had been infringed upon 19 times and his grandmother's (who had to help

care for him) rights had been infringed upon five times. One has to bear in mind that rights such as dignity, if violated once, remain violated for life.

The above clearly indicates that proposed limitations imposed on financial compensation due to medical negligence demands scrutiny in various forms but most importantly from a constitutional perspective. The importance of considering the interaction between the rights guaranteed in the Constitution and other mechanisms cannot be underestimated. Unfortunately, and this has been found to be prevailing in recent times, the Constitutional Court remains ambivalent on several issues including the issue of dignity in that it has never given a comprehensive definition of this important construct. When a healthcare practitioner or provider treats members of the public it is the patient's right to dignity that should be held in highest regard. The current state of affairs undeniably begs the question whether the practitioner or provider's understanding of dignity is sufficient.

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# THE LAW REPORTS

April 2017 (2) *South African Law Reports* (pp 337 – 684);  
November [2016] 4 *All South African Law Reports* (pp 299 – 664);  
January [2017] *All South African Law Reports* (pp 1 – 312);  
March [2017] 1 *All South African Law Reports* (pp 669 – 973);  
January 2017 (1) *Butterworths Constitutional Law Reports* (pp 1 – 129)

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

## Abbreviations

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

## Administrative law

### Administrative action setting aside own decision:

The facts in *Department of Transport and Others v Tasma (Pty) Ltd* 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) were that in December 2001 the first applicant, the Department of Transport (the Department), entered into a turnkey agreement in terms of which the respondent, Tasma, provided services in relation to the electronic National Information System (eNaTIS). The contract was for five years and came into effect in June 2002 and was to end in May 2007. It further provided that disputes would be referred to arbitration and that at its end the parties would negotiate its transfer

to the Department. The contract was not renewed and accordingly came to an end after five years. However, since the Department needed the service – which the respondent provided – the contract was continued on a monthly basis. Thereafter, in 2010 the Department's Director-General (DG) simply extended the contract for another five years. That extension was in flagrant violation of procurement rules as no tenders were invited. Allegedly because of the obstructive behaviour of the DG no proceedings were launched to set aside extension of the contract. When the Department refused to make payment, the respondent approached the GP for an interim order enforcing payment and compliance with the extended contract pending final determination by the arbitrator of disputes between the parties. The interim order was granted and later made final by Mabuse J. As a result of the order a number of contempt of court orders were to later follow. In 2015 the respondent approached the High Court, once again,

seeking a contempt of court order. On that occasion the Department launched a counter-application seeking an order setting aside extension of the contract. The counter-application was granted by Hughes J but set aside on appeal to the SCA.

In a further appeal the CC granted leave to appeal, set aside the order of the SCA and upheld the Department's counter-application. Contempt of court findings of the SCA, for the period before the counter-application succeeded were upheld, but were held to lapse thereafter. Each party was ordered to pay own costs.

The majority judgment was delivered by Khampepe J (Froneman, Madlanga, Mhlantla and Nkabinde J concurring), while Jafta J (Mogoeng CJ, Bosielo AJ and Zondo J concurring) read the minority judgment. Two additional separate judgments were also given in this case, namely, Froneman J who concurred with the majority judgment of Khampepe J and Zondo J who concurred with the minority judgment of Jafta J.

Khampepe J held that state

functionaries were entitled to challenge the exercise of public power, including their own. It was both a logical and pragmatic consequence of the development in South African jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive (counter) challenges in appropriate circumstances. Accordingly, the SCA was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it was a state functionary.

The Constitution conferred on the courts the role of arbiter of legality. Therefore, until a court was appropriately approached and an allegedly unlawful exercise of public power was adjudicated on, it had the binding effect merely because of its factual existence. In the interests of certainty and the rule of law, an allegedly unlawful exercise of public power retained the fascia of legal authority until the decision was set aside by a court. Therefore, an administrative act remained legally effective despite the fact that



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it could be objectively invalid.

It was a feature of the rule of law that undue delay in enforcing rights should not be tolerated. However, the flouting of ordinary procurement and tender procedures by the DG, when extending the contract, was blatant. His decision to override the decision of the previous DG was telling. The merits of the Department's challenge were nonetheless compelling as a web of maladministration surrounded the granting of the extension. Moreover, the respondent had been significantly enriched on the basis of the unlawful extension. The effect of the extension on state resources could not be overlooked as substantial expenditure had occurred as a result. Therefore, in the unusual context of the case, the Department's undue delay of some five years in bringing the counter-application had to be overlooked (condoned) and the reactive challenge succeed.

• See law reports 'contact law' 2016 (May) DR 34 for the SCA judgment.

## Civil procedure

**Appeal against order for execution pending appeal:** Section 18(1) of the Superior Courts Act 10 of 2013 (the Act) provides among others that: '[U]nless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.' This is the default position and briefly provides that lodgement of application for leave to appeal or of the appeal itself, suspends operation of the order being challenged. To reverse the default position, the successful litigant is required to apply to court for an order directing that notwithstanding the application for leave to appeal or the appeal itself, the affected judgment shall be executed. To secure an order authorising execution of judgment notwithstanding lodgement of application for leave to appeal or the appeal itself, the applicant is

required by s 18(3) to show –

- exceptional circumstances;
- that he or she will suffer irreparable harm if the court does not so order; and
- that the other party will not suffer irreparable harm if the court so orders.

The application of the above provisions was dealt with in *MEC for Co-operative Governance and Others v Mogalakwena Municipality and Another* 2017 (2) SA 464 (GP) where the second respondent, Kekana, a municipal manager of the first respondent, Mogalakwena Municipality (Potgietersrus), alleged that he had been unlawfully ousted from his position. As a result he obtained a High Court order reinstating him. The appellants, the MEC and others, appealed to the SCA against the reinstatement order, which appeal suspended execution of that order. Alleging that there were exceptional circumstances, namely that by the time of the hearing of the appeal by the SCA his term of office as municipal manager would have lapsed, Kekana applied for an order of execution, that is, resumption of his duties. The execution order was granted. The appellants responded by appealing to the SCA against the execution order, in respect of which s 18(4)(ii) of the Act gave them an automatic right of appeal, which did not require leave to do so. Thereafter, Kekana's attorneys wrote a letter to the registrar of the SCA, indicating that the appeal against the execution order was defective as it should have been lodged with the full Bench of the High Court and not the SCA. As a result the Acting President of the SCA directed that the matter should be heard by the 'full Court' of the High Court, which agreed it would hear it.

The High Court upheld with costs the appeal against the execution order. Ranchod J (Louw and Fabricius JJ concurring) held that subss 18(1) and (3) of the Act in essence provided for a twofold inquiry in that the following requirements should be met before an order appealed against can be put into operation pending outcome of the appeal, namely:

- Exceptional circumstances must exist.
- Proof, on a balance of probabilities, by the applicant that –
  - the applicant will suffer irreparable harm if the order is not put into operation; and
  - the other party will not suffer irreparable harm if the order is put into operation.

Kekana satisfied the requirement of exceptional circumstances in that since his term of office was likely to lapse pending determination of the appeal, he was left in a predicament with no relief. However, he would not suffer irreparable harm since he had an action for damages if his ouster were to be found by the SCA to have been unlawful. Furthermore, he had not shown that the first respondent would not suffer irreparable harm. If the SCA were to find against him the probabilities were that the first respondent would not be able to recover any money paid to him from the time of his reinstatement as municipal manager.

The court also dealt with the question of the 'next highest court' to which an appeal lies, holding that the primary court of appeal from the decision of a single judge of the High Court was the 'full Court' unless questions of law or fact or other considerations involved dictated that the matter should be decided by the SCA, thus allowing for a deviation from the norm. In the event of an order in terms of s 18(1) being made by a court consisting of more than one judge, an automatic right of appeal lay to the SCA, being the 'next highest court'.

On the question of the difference between 'full Bench' and 'full Court', which phrases were often used interchangeably, the court held *obiter* that 'full Bench', in relation to any division of the High Court, meant a court consisting of two judges while 'full Court' referred to a court consisting of three judges.

## Company law

**Court order declaring a director delinquent cannot be sought by way of derivative action:** Section 162(2) of the

Companies Act 71 of 2008 (the Act) provides among others that a company, shareholder or director of a company may apply to a court for an order declaring a person delinquent. The various grounds on which a delinquency order may be sought are specified in subs 162 (5). The issue in *Lewis Group Ltd v Woollam and Others* 2017 (2) SA 547 (WCC); [2017] 1 All SA 192 (WCC) was whether, given that the section specifically grants a shareholder the right to seek a delinquency order, it was permissible for a shareholder to seek such an order through derivative action proceedings, taking the s 165 route, instead of just proceeding directly in terms of s 162. That was after the first respondent, Woollam, served a demand on the applicant, Lewis Group Ltd, requiring it to institute proceedings for an order declaring four of its directors to be delinquent. The present application was launched by the applicant to set aside the demand, on the ground that it was frivolous, vexatious or without merit, as it was entitled to do so in terms of s 165(3). The setting aside order was granted with costs.

Binns-Ward J held that a shareholder's right to seek a declaration against a director or former director in terms of s 162 did not derive from the company. The right vested directly and personally in the shareholder by the section itself. The shareholder's right coexisted with the identical right separately vested in the company by the very same provision. The modern derivative action was effectively litigation conducted for a company by a representative litigant under the court's authority. It was not a vehicle for a litigant to assert or protect his or her own legal interests using the company's name and legal personality.

It would be paradoxical that a shareholder could put a company to the trouble and expense of commissioning an investigation and, thereafter, be refused leave by a court in terms of s 165(5) to proceed derivatively, only to be able to proceed personally for the relief regardless.

It was not within the scheme of the Act that shareholders should ordinarily seek to proceed derivatively to obtain the remedy available in terms of s 162. There was nothing in the nature of the first respondent's complaints or the content of his demand to indicate why he should be allowed to proceed derivatively for relief that he was able to claim personally. That was indicative that his resort to s 165 was vexatious in the circumstances.

## Consumer credit agreements

**Ultra vires and invalid debt rearrangement:** In the case of *Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC) in 2007 the first and second respondents, Mr and Mrs Jones (the Joneses) obtained a home-loan from the applicant Nedbank in the amount of R 1,1 million. By 2010 the loan had doubled to R 2,2 million. Apart from that loan, the Joneses had other debts. The terms of repayment of the home-loan were a monthly instalment of an approximate R 10 000 repayable over a period of 336 months with interest at the rate of 10,9% per annum. As the Joneses were over-indebted they approached a debt counsellor who made application to a magistrates' court for debt relief. The order granted by the magistrate reduced the monthly instalment to some R 4 000 at the annual interest rate of 10,4% while the repayment period was left open-ended on the basis that the instalment would be payable 'till debt settled'.

However, the monthly instalment was less than the interest due with the result that the debt would never be settled. As a matter of fact the Joneses, without debt rearrangement, had to pay a monthly instalment of an approximate R 17 000. After a delay of over five years the applicant approached the High Court for a declaratory relief, and if considered necessary, also a review of the debt rearrangement order granted by the magistrate. The main complaint was that the magistrate was not empowered by

the National Credit Act 34 of 2005 (the NCA) to vary the interest rate.

Gamble J (Hack AJ concurring) held that the order made by the magistrate was *ultra vires* and accordingly of no force and effect as he permanently fixed the interest rate at a level, which would render the debt incapable of ever being settled by the Joneses. To clarify the position and assist debt counsellors and magistrates, both of whom were under the impression that varying the interest rate payable under the contract between the parties was permissible during debt rearrangement, the court declared that a magistrates' court hearing a matter regarding debt rearrangement did not enjoy jurisdiction to vary, by reduction or otherwise, a contractually agreed interest rate determined by a credit agreement. Any order containing such a provision was null and void. A rearrangement proposal that contemplated a monthly instalment that was less than the monthly interest, which accrued on the outstanding balance did not meet the purposes of the NCA. A rearrangement order incorporating such a proposal was *ultra vires* the NCA with the result that the magistrates' court had no jurisdiction to grant it.

## Contempt of court (spousal maintenance)

**Warrant of arrest for contempt of court:** In the course of protracted divorce proceedings between the parties in *AG v DG* 2017 (2) SA 409 (GJ) the applicant wife (AG) applied for and was granted interim maintenance for herself and two minor children. The maintenance order was subsequently varied to an amount of R 35 000 per month, exclusive of other expenses such as medical, educational and other related expenses. The respondent husband, DG, did not pay maintenance as ordered, alleging poverty and, therefore, inability to do so. However, that was not the true state of affairs as he was a multimillionaire and a director of

seven companies, his lifestyle showing that he was affluent. A number of court orders were granted against him, including a contempt order, relating to his failure to pay maintenance, attachment of his immovable property, as well as that of his savings banking account. Attachment orders were not executed as he either contested them or withdrew funds from the attached accounts before execution. In the present urgent application the wife sought payment of arrear maintenance, an order holding the respondent in contempt of court and issuance of a warrant of arrest for committal to prison if arrear maintenance was not paid within twenty four hours of the granting of the order.

Spilg J granted the application, holding that it was urgent, that the respondent was in contempt of court for non-payment of arrear maintenance as previously ordered and further that a warrant of arrest was to be issued forthwith committing the respondent to imprisonment for contempt of court for a period of five days, the warrant of arrest to be effected on the seventh day after granting of the order if by then the respondent had not made payment. Nothing was said about payment of costs.

The court held that a failure to pay maintenance entitled an applicant to issue a warrant of execution immediately or to enforce an order immediately through the maintenance court. In the present case the applicant was unable to do so because either attachments made pursuant to writs were challenged or the balance of funds located in an account were simply withdrawn by the respondent before the next writ was served. While not all applications for arrear maintenance founded on the contempt of a court order were urgent, the application became self-evidently urgent in the present case as the applicant's assets were being depleted while the respondent was frustrating the ordinary enforcement of court orders resulting in the build-up of already significant arrears. The fact that the respondent

had neglected his obligations to pay maintenance for a substantial period and that the ordinary process of execution was being frustrated were relevant to the urgency and that part of the order relating to contempt.

## Contracts

**Damages as surrogate for specific performance:** In *Basson and Others v Hanna* [2017] 1 All SA 669 (SCA) the first appellant, Basson, was the sole member of a close corporation which owned immovable property. Basson entered into an oral agreement with the respondent, Hanna, and the second respondent, Dreyer, in terms of which he would develop the property by building three residential units for occupation by each of them. In return, the respondent and Dreyer, would each buy a third of a member's interest in the close corporation, the purchase price in respect of which would be paid in instalments over a period of 20 years. In addition the respondent would also pay a third of monthly costs and operating expenses. A few years down the line relations between the respondent and Basson soured, as a result of which Basson repudiated the agreement by treating it as null and void on the ground that it did not specify whether interest to be paid by the respondent was fixed or fluctuating. Having accepted repudiation the respondent sued Basson for specific performance, that is, for delivery of a third of member's interest in the close corporation against payment of the outstanding balance. As it turned out Basson had in the meantime, and during the course of proceedings against him, sold a third of his member's interest in the close corporation to third parties (his brothers). For that reason the respondent amended his plea to claim in the alternative damages as a surrogate (*in lieu of*) for specific performance. Basson contended that a claim for damages as surrogate for specific performance was not competent in law.

The GJ per Cilliers AJ upheld the respondent's claim for dam-

ages as surrogate for specific performance, hence the present appeal to the SCA. The appeal was dismissed with costs. Zondi JA (Shongwe, Dambuzza and Mathopo JJA concurring and Willis JA dissenting in part) held that the parties' failure to agree on the interest rate at which the amount payable under the agreement was to be calculated did not render the agreement invalid. If no rate had been agreed on, expressly or impliedly, and the rate was not governed by any other law, the rate of interest applicable was that prescribed from time to time by notice in the Gazette by the relevant minister in terms of the Prescribed Rate of Interest Act 55 of 1975.

The principle that the party who was *prima facie* entitled to specific performance could claim in the alternative damages as a surrogate for specific performance had been consistently followed by the courts until the majority decision in *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* [1981] 4 All SA 455 (A). However, that case was different and, therefore, distinguishable from the present one. In this case the respondent was ready to carry out his own obligation under the agreement and, therefore, had a right to demand either the literal performance or monetary value of the performance, from Basson. The respondent's claim for damages, to the extent that he sought the monetary value of the performance, was akin to a claim for replacement value of lost property.

A creditor's right to demand performance from the debtor could not be at the mercy of the debtor. The exercise of that right could not depend on what the debtor chose to do with the asset to which the creditor's right related. To say that a claim for damages as a surrogate for specific performance was not recognised in law would be to deprive the creditor of that right where he or she had elected to enforce the contract, to be placed as much as possible, in the position that he or she would have been in if the performance was made *in forma specifica*. In this case

the respondent was entitled to the relief he sought.

• See law reports 'Contracts – specific performance' 2016 (April) DR 30 for the GJ judgment.

## Fundamental rights

### Right to receive tertiary education in the official language of one's choice where reasonably practicable:

When the Pretoria branch of the Transvaal University College, which was to later become the University of Pretoria (UP), commenced its activities in the year 1908, English was its only medium of instruction. In 1917, UP started bilingual medium instruction and offered subjects in English and Afrikaans where such was warranted and/or requested. In 1932 the Council of UP resolved that Afrikaans would be the only medium of instruction. That arrangement continued up until 1994 when UP adopted a bilingual language policy offering instruction in English and Afrikaans. In 2010 the policy was amended with the result that while the practice of bilingualism continued, UP recognised Sepedi as a third language of communication, although not of instruction. The circle was completed in June 2016 when the Senate and Council of UP resolved to change the language policy to provide for English as the main (not the only) language of learning and teaching. However, in practice the 'main language' translated into the 'only language' of instruction. The language policy change was motivated by changing demographics in student population. While in the years before 1994 UP was essentially a white university with Afrikaans as the only medium of instruction, 88% of its students were Afrikaans-speaking. However, the demographics in student population changed drastically with the result that by 2016, Afrikaans-speaking students constituted 25% of the total enrolment.

The change in language policy was challenged by the applicants in *Afriforum and Another v Chairperson of the Council of the University of Pretoria and Others* [2017] 1 All SA 832 (GP) on the grounds that

it was in violation of s 29(2) of the Constitution which provides that: 'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.'

The applicants alleged that –

- in the case of UP it was reasonably practicable to offer tuition in Afrikaans;
- the changed language policy discriminated against Afrikaans-speaking students on the basis of language; and
- the policy constituted a withdrawal of extant rights of students currently seeking instruction in Afrikaans and those who might wish to do so in the future.

For the above reasons the applicants sought a court order reviewing and setting aside the decision of UP to introduce the new language policy. The application was dismissed with costs.

Kollapen J (Baqwa and Mabuse JJ concurring) held that both Senate and Council of UP applied their minds to a number of relevant and often competing considerations and properly considered what was before them. The weight that they afforded to different considerations that were before them was not a matter for the court to prescribe. The conclusion that providing tuition in Afrikaans was not reasonably practicable was supported by data and unassailable. In the light of available data collected by UP, the position was that it would not be practicable and sustainable in the medium to long term to provide tuition in Afrikaans. That conclusion was buttressed by data that indicated a steady decline in the demand for Afrikaans as a language of tuition, as well as a steady decline in the number of white students at UP. The data suggested that the decline was likely to continue and under such circumstances UP was justified in having regard to the medium and long term implications in its policy making and planning processes.

## Income tax

### Delayed deduction of expenditure incurred in the

### acquisition of trading stock:

Section 23F(2) of the Income Tax Act 58 of 1962 (the ITA) limits the amount of deductions, which a taxpayer may take in relation to disposal of trading stock to such amount as accrues to the taxpayer during the year of assessment. The balance of the deductions is delayed to the year/s in which the income accrues to the taxpayer. The application of the section arose in *Commissioner, South African Revenue Service v Marula Platinum Mines Ltd* 2017 (2) SA 398 (SCA); [2016] 4 All SA 299 (SCA) where the taxpayer, Marula Platinum Mines, mined mineral-bearing ore and processed it into mineral-bearing concentrate, which it sold to a third party. The contract of sale made provision for deferred payment of five months. That had the result that any sales of the concentrate made during the last four months of the tax year only accrued in the following year and income tax paid accordingly. However, full deductions were taken in the year in which expenses were incurred and not in the following year when income accrued, that is, when payment was made. The appellant Commissioner invoked s 23F(2) to limit the deductions to income, which accrued during the tax years 2007, 2008 and 2009. The taxpayer contended that the section was not applicable as the ore and concentrate were not 'trading stock'. Instead, the taxpayer was conducting 'mining operation', it was alleged.

The tax court in Gauteng, held that production of mineral-bearing ore amounted to mining operation. As a result, s 23F(2) was not applicable. However, because of the process of converting it the final product, the mineral-bearing concentrate was trading stock with the result that the section applied. An appeal to the SCA against that decision was upheld with costs and the taxpayer's cross-appeal dismissed. The assessments for the relevant tax years were referred back to the Commissioner for determination on the basis of the section being applicable.



Fourie AJA (Navsa, Cachalia, Tshiqi and Mathopo JJA concurring) held that s 23F(2) was an anti-avoidance provision that catered for the situation where a taxpayer had disposed of trading stock in the ordinary course of its trade during the year of assessment for a consideration, the full amount of which would not accrue to the taxpayer during that year, but in respect of which expenses incurred on the acquisition of that trading stock had in that year or in any previous year of assessment been allowed as a deduction under s 11(a) of the ITA. Any amount that would otherwise have been deductible under s 11(a) would, to the extent that it exceeded the amount received or accrued from the disposal of that trading stock, be disregarded during that year of assessment. Therefore, the purpose and function of s 23F(2) was to delay the s 11(a) deduction of the cost of trading stock until the income from the disposal of that trading stock had been included in the taxpayer's gross income.

Income derived by the taxpayer from the sale of the concentrate (in respect of the last four months of each of the years of assessment) was excluded from its gross income, to be included in the following years when it became quantifiable. Therefore, if the taxpayer's activities constituted the disposal of trading stock, s 23F(2) would find application and prevent the 'mismatch' of the deduction of the cost of the trading stock with the taxation of the income from the disposal of that trading stock, by delaying the s 11(a) deduction until the year of assessment in which the corresponding income was taxed. It was not a prerequisite that, to qualify for trading stock, what the taxpayer acquired was to be immediately saleable or realisable. It was sufficient if that which was acquired was intended to be used for the manufacture of something else, such as mineral-bearing concentrate, which would eventually be sold.

## Marriage

### Invalidity of antenuptial contract means that marriage is in community of property:

In *RM v BM* 2017 (2) SA 538 (ECG) the parties RM and BM were married out of community of property with no community of profit and loss but subject to the accrual system as provided for in the antenuptial contract (the ANC). Clause 4 of the ANC specified a list of assets to be taken into account when dealing with accrual. However, clause 5 provided that the very same assets were not to be taken into account in determining the accrual value of the parties' assets. At the time of divorce the wife (RM) sought an order declaring the ANC invalid for vagueness with the result that the marriage would be in community of property. In the alternative she sought rectification of the ANC to the effect that the listed assets were to be taken into account in the determination of the accrual values of the parties' assets. On the other hand the husband (BM) sought rectification of the ANC to the effect that the listed assets were not to be taken into account in determining accrual values.

Plasket J dismissed the husband's counter-claim on the basis that there was no common intention of the parties that the ANC did not capture correctly. The husband (the defendant) was ordered to pay costs. It was held that clauses 4 and 5 of the ANC were contradictory and irrevocably so and as they were material terms they were incapable of severance from the rest of the ANC. The result was that the ANC was void on account of its vagueness. As it was void at its inception that meant that the parties were in fact married in community of property.

## Property law

### Statutory power to lay pipeline across private land

**lawfulness:** The facts in the case of *Rand Water Board v Big Cedar 22 (Pty) Ltd* [2017] 1 All SA 698 (SCA) were that the respondent, Big Cedar, became the owner of property in 2003 after buying it

and taking transfer from the previous owner. At that time the respondent was not aware that the appellant, Rand Water, had constructed two pipelines across the property, one in 1971/1972 and the other in 1997. On discovery of the pipelines the respondent sought from the appellant their removal or compensation for their continued presence. Accordingly, it instituted proceedings against the appellant, raising two claims. The first claim was vindicatory in nature and required the appellant to remove the pipelines or alternatively that it register a servitude in respect of the affected portion of the property or take transfer thereof against payment of the amount of R 6,6 million. In the second claim the respondent sought an order for payment of a reasonable rental, alternatively compensation in the amount of R 38 500. In a further alternative the respondent sought payment of that amount by way of constitutional damages.

The GJ per Tsoka J upheld the first claim on the alternative basis and ordered the appellant to register a servitude over the property, as well as pay the respondent an amount of R 32,8 million as fair, just and equitable compensation for the servitude. An appeal against the High Court order was upheld with costs by the SCA.

On appeal, Wallis JA (Cachalia, Pillay, Seriti JJA and Schippers AJA concurring) held that if in terms of s 84(6) of the Water Services Act 108 of 1997 (the 1997 Act) laying the two pipelines was lawful at the time it was done, it remained lawful after the 1997 Act came into operation, provided that it was something that could be done under the 1997 Act. There could be no doubt that the appellant still had power to lay pipelines pursuant to its obligation to supply water services to water services institutions in terms of the 1997 Act. The appellant was entitled to do under the 1997 Act what it was entitled to do in 1971/1972 and 1997 under the Rand Water Board Statutes (Private) Act 17 of 1950

(the 1950 Act). Section 84(6) of the 1997 Act served to preserve the validity of anything done under the repealed 1950 Act that was 'capable of being done' under the 1997 Act. Provided that the appellant's original actions (of laying the two pipelines) were lawful their validity was preserved by s 84(6). That view was reinforced by s 79(1) of the 1997 Act, which protected its ownership of the two pipelines. The conclusion that the appellant acted lawfully put paid to the claim for removal of the pipelines and also disposed of the cross-appeal regarding the High Court's refusal to order removal of the pipelines and rejection of the claim for constitutional damages.

## Unlawful competition

### Actionable non-disclosure in passing-off:

In *De Freitas v Jonopro (Pty) Ltd and Others* 2017 (2) SA 450 (GJ) the applicant, De Freitas, and the second respondent, Bettencourt, ran an adult-entertainment business called Cheeky Tiger from two premises located in separate towns, being Kempton Park and Midrand, both in Gauteng. After a fall out the two decided to part ways and agreed that the applicant would change the name of his business from Cheeky Tiger to Manhattan Nights. Soon thereafter the second respondent, together with his friend Pandazis, using their company, the first respondent, Jonopro (Pty) Ltd (Jonopro), opened a new similar business a few meters away from that of the respondent. Although the name of the business was different, namely the first respondent Jonopro, the logo and get-up were similar to those of Cheeky Tiger. As a matter of fact when the parties agreed that the applicant would change the name of his business from Cheeky Tiger to Manhattan Nights, the second respondent did not disclose that he planned to take over the logo and get-up of Cheeky Tiger.

Aggrieved by what was happening the applicant launched an urgent application for contempt of court and interim

interdict preventing the respondents from passing-off the logo and get-up of the business, Cheeky Tiger, which he had established over the years. The contempt of court application failed as Spilg J held that in an earlier judgment, which the respondents were alleged to be in contempt, Georgiadis AJ granted an order preventing the respondents from using the name and style of Cheeky Tiger rather than the logo and get-up. Accordingly, the issue decided in the earlier judgment was different.

However, the court granted an interdict restraining the respondents from passing-off the logo and get-up of Cheeky Tiger, with costs limited to two-thirds of the total costs on an attorney and client scale. It was held that the second respondent obtained the applicant's consent to convert his operation from Cheeky Tiger to Manhattan Nights without disclosing that he intended opening a similar entertainment operation (irrespective of name) that would

draw on the applicant's customer base. That was a material and actionable non-disclosure. It was reasonable to conclude, having regard to the timing, that the second respondent intended to capture the customers who frequented the applicant's Cheeky Tiger establishment and take the applicant's goodwill in that business, including the customer base, without compensation. As there was an agreement between the parties that the applicant would stop trading as Cheeky Tiger, the second respondent deliberately concealed from the applicant his plans to open up a Cheeky Tiger operation close to the applicant's establishment. There was a legal duty to disclose because the second respondent knew that if he informed the applicant of his plans to open a Cheeky Tiger establishment immediately after the respondent removed the last vestige of his Cheeky Tiger operation after which he would rename and reconfigure it to a Manhat-

tan Nights bar, his customers would go to what was familiar to them.

Under the agreement between the parties there was to be no physical-proximity competition as each Cheeky Tiger establishment (irrespective of membership composition) would have to be a significant distance from the other. It was an actionable non-disclosure not to have disclosed that the moment the applicant abandoned the trading name and get-up of Cheeky Tiger the second respondent would take them up in an establishment that would be effectively alongside the applicant's rebranded one.

### Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Action for damages by shareholder against directors and fellow shareholders, asylum seeker being allowed to apply for visa

under Immigration Act 13 of 2002, commencement of extinctive prescription, freedom of expression does not include protection of hate speech, general moratorium on legal proceedings against a company in business rescue, infringement of trademark, national energy supplier being empowered to contract with consumer directly - to the exclusion of municipality - for the supply of electricity, obligation of animal breeder to submit relevant data of its registered animals to national data bank, power of Judicial Service Commission to determine its own procedure to deal with complaints about judicial officers, power of public protector to investigate unfair labour complaints of employee of state, restitution of land rights, review of building plan approval, threat of criminal prosecution not constituting undue influence or being *contra bonos mores* and unlawfully built shacks may not be demolished without a court order.



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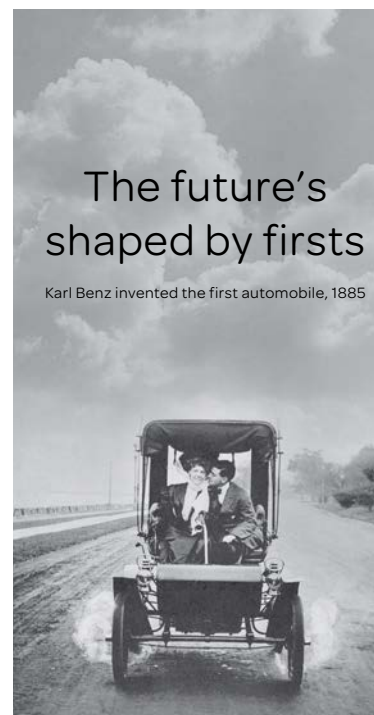
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By  
Makhado R  
Ramabulana

# Ndaba v Ndaba – reconciling the irreconcilable

*Ndaba v Ndaba* [2017] 1 All SA 33 (SCA)

In the recent decision of *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA) the Supreme Court of Appeal (SCA) had the opportunity to resolve an issue regarding the limits of the deeming provision contained in s 7(7)(a) of the Divorce Act 70 of 1979 (the Act) in marriages in community of property. The issue has been niggling in that, except for contradictory findings in the lower courts, the SCA itself had prior to the *Ndaba* matter decided on the issue twice, namely, in *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) and *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA), and yet the issue remained clouded. When the *Ndaba* matter was decided, the expectation was that clarity would be achieved and the issue raised in the earlier cases would be put to rest.

The *Ndaba* matter concerned the distribution of pension interest, which was not expressly included in the settlement agreement when the divorce was granted. The appellant approached the court and sought to appoint a liquidator to divide the estate and to issue a declarator to declare the parties pension interests part of the estate, even though the pension interest did not appear in the settlement agreement.

## The deeming provision in s 7(7) of the Act

At the heart of the debate is the sharing of a divorcing couple's (who are married in community of property) pension benefits during the divorce proceedings. The Act defines such pension benefit to be shared as 'pension interest'. The basic rule regarding the payment of unaccrued pension benefits, is that, it does not form part of the member's estate. The legislature sought to include these benefits into the members' estates in terms of s 7(7)(a) of the Act which reads:

'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.'

The issue at the center of the debate in the *Ndaba* matter and the previous similar cases was: What is the effect of the deeming provision in s 7(7)(a)? That is, do parties to a divorce still need to expressly include pension interest in their settlement agreement when they divide the matrimonial estate or is the pension interest automatically included without the parties expressly mentioning it?

The previous cases, in particular *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O); *YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC); *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D) and the SCA's *Swemmer* and *Krugel* matters had been split regarding whether the deeming provision required pension interest to be expressly included in the settlement agreement to be divided.

In the *Ndaba* matter, both the majority judgment per Petse JA (with Mpati AP and Swain JA concurring) and the minority judgment per Makgoka AJA (with Seriti JA concurring) agree that no declaration is necessary for the pension interest to form part of the estate, as the Act deems it. However, the two sides differ in whether this automatic inclusion remains even after a settlement agreement is entered into. The majority, in their *ratio decidendi*, are of the view that the deeming provision keeps the window open until the estate is divided (and in an *obiter dictum*, that this window stays open until a claim is made). Whereas, the minority are of the view that if the parties decide to reduce their terms to writing in a settlement agreement, as was the case in the *Ndaba* matter, then the deeming window closes and the pension interest will be excluded if it is not an item in the list of the divided property in the agreement. The debate goes to the essence of what a settlement agreement is. Thus, does a deeming provision in the Act overrule the parties rights to agree on the division of their assets, in that pension interest can always be added at a later stage.

## The legal basis of the findings

The majority appears to disagree with the minority's reasoning, where the latter reason that the classification of assets as immovables and movables as listed in the (disputed) settlement agreement, implied that pension interest, which according to the latter is neither, was excluded in terms of the maxim *expressio unius est exclusio alterius*. The majority are of the view that, pension interest, having been correctly classified in the *Swemmer* matter as a notional asset, is an incorporeal asset and, therefore, a movable asset. They conclude that, regardless of the fact that there is no contradiction between the headings and the contents of the assets in the settlement agreement and despite the fact that pension interest is not among the items listed under the movables, it re-

mains an asset if not expressly excluded. Petse JA concludes that '[s]een in this light, the maxim *expressio unius est exclusio alterius* is therefore unavailing'. In as much as the SCA had to tailor-make its coat according to its cloth, it is admitted that perhaps the facts in the *Ndaba* matter were restrictive as compared to previous cases, in that, the settlement agreement itself was being disputed by the applicant. The peculiar circumstances raises an issue of whether the majority would still have arrived at the same conclusion if the facts had been slightly different, as in the *Swemmer* and *Krugel* matters, where the estates had already been divided. Petse JA at para 31 leaves no doubt how those matters should have been decided, when he stated: 'In the result those decisions which held that, if there is no reference in the divorce order of parties married in community of property to a member spouse's pension interest, the non-member spouse is precluded in perpetuity from benefiting from such pension interest as part of his or her share of the joint estate, were wrongly decided.'

## Opinion

The finding of the majority is not as flawless as it could have been. Even if the majority disagreed with the minority on the incorrect classification of pension interest as neither an immovable or a movable asset, there was nothing preventing the parties from including the third heading of incorporeals under which pension interest could be counted. Thus, the reasoning of the majority in this aspect contradicts the maxim *expressio unius est exclusio alterius* and confirms the suggestion by the minority that the majority may have adopted a sympathy approach, which under the circumstances was woefully inappropriate as the judgment on this issue was still unenforceable against the fund.

## Conclusion

If the majority in the *Ndaba* matter had intended its decision to be the final word on the matter, the well-reasoned minority judgment is the fly in the ointment and it does not appear that the SCA has succeeded in permanently putting this issue to bed.

• See also p 28 and 34.

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By  
Yashin  
Bridgemohan

# Land restitution: Lawful occupiers right to just and equitable compensation

*South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others (CC)* (unreported case no CCT 172/16, 23-2-2017) (Jafta J) (Nkabinde ACJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring)

Section 35(9) of the Restitution of Land Rights Act 22 of 1994 (the Act) provides:

‘Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of subsection (1)(a): Provided that, if the Court orders the restoration of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court.’

Section 35(11) of the Act provides:

‘The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it –

(a) in the absence of the person against whom that order or judgment was granted;

(b) which was void from its inception or was obtained by fraud or mistake common to the parties;

(c) in respect of which no appeal lies; or

(d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.’

## Facts

The applicant in this case, has been occupying Erf 142 Constantia owned by the state, under a lease for 34 years. In terms of the amended order of the Land Claims Court (LCC) it was directed that the property be transferred to the second and third respondent (the Sadiens) as compensation for the land they lost as a result of discriminatory practices of the past Apartheid order.

The claim for restoration was determined by the LCC in December 2012. The LCC ordered the transfer of Erf 1783 Constantia to the second respondent, a descendant of the owner of whom the land was dispossessed of. However, this erf was smaller than the dispossessed

piece of land. The LCC then varied its order to replace the smaller land with Erf 142 Constantia on 8 February 2013.

The variation was, however, made without the knowledge of the applicant who had allegedly made improvements valued at R 7,5 million during its tenancy. In addition no offer was made by any party to compensate the applicant and the LCC had not made an order on the issue of compensation.

Dissatisfied, the applicant made application to the LCC for leave to intervene. In addition, the applicant applied for rescission of the amended order in terms of s 35(11) of the Act. It sought to have the varied order set aside, including the order made on 7 December 2012, in terms of which, the smaller land was awarded to the Sadiens.

The LCC held that the applicant had no direct and substantial interest in the relief sought by the Sadiens. The LCC concluded that on the facts the applicant had no interest in the subject-matter of the case, which was the restoration of land to the Sadiens.

The applicant then sought relief from the Constitutional Court (CC).

## CC's judgment

Jafta J noted that an application for intervention must meet the direct and substantial interest test in order to be successful. What makes up a direct and substantial interest is the legal interest in the subject-matter of the case, which could be prejudicially affected by an order of court. This requires that an applicant must display that it has a right adversely affected or likely to be affected by the order sought. However, the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is enough for an applicant to make allegations, which, if proved, would warrant relief.

Jafta J further noted that if an applicant shows that it has some right, which is affected by the order issued, permission to intervene needs to be granted. This is due to the fact that it is a fundamental principle of our law that no order should be granted against a party

without giving said party a pre-decision hearing.

The CC held that it was clear from the papers that the applicant misconceived the length of its interest and sought the rescission of the varied order. It had no legal interest in the transfer of the land. As such the LCC was correct in deciding that the applicant had no direct and substantial interest in the property. However, the LCC erred by overlooking the statutory right to compensation conferred on a lawful occupier and that the transfer of the property was subject to the determination of just and equitable compensation. In light of this it was not necessary to rescind the varied order. What was needed was to allow the applicant to intervene only for the purpose of determining compensation.

The CC further held the fact that a final order had already been issued at the time of the application for intervention was not material. Once it was proved that the applicant was a lawful occupier of Erf 142, the LCC should have granted it leave to intervene for purposes of considering the issue of compensation only.

The CC accordingly upheld the applicant's appeal and set aside the order made by the LCC. The CC further ordered the matter be remitted to the LCC for determination of compensation payable to the applicant.

## Conclusion

This judgment is important as it highlights that lawful occupiers of state land – as envisaged in terms of s 35(9) of the Act – are entitled to just and equitable compensation when said land is to be transferred to a claimant for restitution of land rights. Where a lawful occupier is left out of proceedings application can be made to intervene solely based on the occupier's statutory right to just and equitable compensation.

**Yashin Bridgemohan LLB (UKZN) PG DIP Labour Law (NWU) is an attorney at Yashin Bridgemohan Attorney in Pietermaritzburg.** □

By  
Pallans  
Vuma

# Value Added Tax: Are you rendering actual or deemed services?

*Commissioner, South African Revenue Service v  
Marshall NO and Others 2017 (1) SA 114 (SCA)*

**V**alue Added Tax (VAT) is a form of tax that is incurred when participating in a commercial transaction and its primary difference from income tax, is that the latter is part of direct tax and the former is part of indirect tax. It is the major source of revenue for the government and it is under the custodianship of the fiscal policy, and headed by the Minister of Finance. For a taxpayer to be entitled to a VAT refund from the South African Revenue Services (Sars) or to make additional payments to Sars, the taxpayer must first be a registered VAT vendor after meeting specific requirements, *inter alia*, they must deal with taxable supplies in the furtherance or course of an enterprise for a consideration, in terms of Value Added Tax Act 89 of 1991 (the Act).

The Act prescribes that any transaction that involves taxable supplies, attracts an obligation to pay VAT at the standard rate of 14% or 0% when the supplies are zero rated. In some cases, supplies that are not taxable supplies in their crude nature are deemed to be taxable supplies, provided the requirements of the Act are met. When a transaction involves a zero rated taxable supplies it is usually to the benefit of the VAT vendor as Sars would be obligated to refund the VAT vendor.

## Parties

The appellant was the Commissioner for the Sars (the Commissioner), and the respondents were seven trustees of the South African Red Cross Air Mercy Service (the Trust), who were involved in supplying aero-medical services to the provincial health department. The Trust was a non-profit organisation that met the requirements of s 30 of the Income Tax Act 58 of 1962, hence, it was an approved public benefit organisation. All receipts and accruals in favour of the Trust were exempt from income tax in terms of s 10(1)(cN) of the Income Tax Act. Furthermore, the Trust was also a

registered VAT vendor in terms of the Act.

## The dispute

The Trust provided services to the provincial health department and then asserted before the Commissioner that payments for such services are a 'deemed supply' in terms of s 8(5) of the Act, which opened the door to the Trust to invoke s 11(2)(n). Section 11(2)(n) rendered the 'deemed supply' to be zero rated, which favoured the Trust. The Commissioner was unsatisfied with the Trust's assertions, thus the matter was taken to the Gauteng Division of the High Court in Pretoria, where Pretorius J, granted an order declaring that such payments qualified for a zero rating, in favour of the Trust.

## Argument: Are the services rendered actual or deemed?

The legal arguments advanced before the Supreme Court of Appeal (SCA), and discussed in paras 11 and 12 are as follows:

- The Commissioner submitted that s 8(5) is only applicable where unrequited or gratuitous payments are made by a public authority or municipality to a designated entity. These would be payments received as donations, subsidies and grants; the aforementioned provisions do not apply in respect of services actually rendered by a designated entity and that payments received by a designated entity from a public authority or municipality for such services constitute 'consideration' for taxable supplies in terms of s 7(1)(a) of the Act, and VAT was, therefore, payable at the standard rate.
- The Trust submitted that the Commissioner's submissions militated against the clear wording of s 8(5), particularly the words 'any payment' and more specifically the word 'any' as a word of 'wide and unqualified generality'. The Trust argued that the legislature must have intended that the deeming provision be

applicable in respect of all payments received by a designated entity from a public authority or municipality and that the Commissioner misconstrued the definition of 'consideration', because if the legislature had intended to limit the application of s 8(5) to grants and subsidies, which are defined in the Act, it would have expressed itself accordingly. Underpinning its submissions the Trust further argued that the purpose of s 8(5) was to enable public authorities to claim input tax under s 16(3)(a) of the Act and if the Commissioner's argument is upheld, the purpose would be undermined.

## The judgment

The SCA upheld the appeal with costs and ordered that the court *a quo* order be set aside and replaced with the following: 'The application is dismissed with costs'. The reasons for the judgment, among others, were aptly provided in paras 15 and 26. The supply of goods and services by the Trust constituted 'performance' in terms of the written agreement, which also specified the fees to be paid by the provincial health department; and as correctly submitted by the Commissioner, it is only where a payment cannot be linked to any performance it is necessary to 'deem' it in terms of s 8(5). So, services actually supplied are not deemed to be anything other than what they are, and can therefore, not be zero-rated in terms of s 11(2)(n).

## Conclusion

The SCA judgment provides clarity regarding the appropriate treatment of a VAT transaction where a designated entity is involved in commerce with other public entities, and most importantly the distinction between actual and deemed services.

Pallans Vuma BCom Accounting Science (Law) LLB (NMMU) is situated in Port Elizabeth. Mr Vuma is currently seeking employment. □



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

# New legislation

Legislation published from  
3 – 28 April 2017

## Promulgation of Acts

**Justice Administered Fund Act 2 of 2017.** Commencement: To be proclaimed. GN344 GG40773/6-4-2017.

## Selected list of delegated legislation

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

Amended Forest Sector Code. GN378 GG40803/21-4-2017.

### Child Justice Act 75 of 2008

Accredited diversion service providers and diversion programmes. GN369 GG40793/21-4-2017.

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

Increase the salary ceiling and compensation benefits. GN349 GG40782/10-4-2017.

### Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes. GenN310 GG40800/21-4-2017.

### Deeds Registries Act 47 of 1937

Amendment of the definition of the areas of the deeds registry: Pretoria and Polokwane. GN311-312 GG40761/3-4-2017 (also available in Afrikaans).

### Employment Equity Act 55 of 1998

Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan. GN393 GG40817/28-4-2017.

### Financial Advisory and Intermediary Services Act 37 of 2002

Amendment of the determination of recognised qualifications for financial service providers and compliance officers. BN51 GG40785/13-4-2017.

### Health Professions Act 56 of 1974

Regulations relating to the registration of audiology students. GN329 GG40772/7-4-2017 (also available in Sepedi, isiZulu and Setswana).

Amendment of the regulations relating to the qualifications for registration of dental assistants. GN332 GG40772/7-4-2017 (also available in isiZulu).

Addendum to the list of approved facilities for the purposes of performing community service by environmental health practitioners. GN380 GG40807/24-4-2017.

### Income Tax Act 58 of 1962

Agreement between governments of South Africa and Grenada for the exchange of information relating to tax matters. GN355 GG40785/13-4-2017 (also available in Afrikaans).

### Magistrates' Courts Act 32 of 1944

Withdrawal of the annexure of the main seat of the magisterial district in Rustenburg to the sub-district of Tlhabane. GN379 GG40806/24-4-2017.

### National Environmental Management: Air Quality Act 39 of 2004

National Greenhouse Gas Emission Reporting Regulations. GenN275 GG40762/3-4-2017.

### National Environmental Management Act 107 of 1998

Amendment of the Environmental Impact Assessment Regulations 2014. GN326 GG40772/7-4-2017.

Amendment of the Environmental Impact Assessment Regulations Listing Notice 1, 2 and 3 of 2014. GN324-325 and 327 GG40772/7-4-2017.

### National Health Act 61 of 2003

Amendment of the regulations regarding the general control of human bodies, tissue, blood products and gametes. GN392 GG40816/26-4-2017.

### Remuneration of Public Office Bearers Act 20 of 1998

Determination of the upper limits of salaries, allowances and benefits of different members of municipal councils. GN313 GG40763/3-4-2017.

### Road Accident Fund Act 56 of 1996

Adjustment of the statutory limit in re-

spect of claims for loss of income and loss of support to R 259 810 with effect from 30 April 2017. BN56 GG40815/28-4-2017 (also available in Afrikaans).

### South African Schools Act 84 of 1996

Amended national norms and standards for school funding. GN394 GG40818/28-4-2017.

## Draft Bills

Draft Restitution of Land Rights Amendment Bill. GenN288 GG40774/7-4-2017 and GenN296 GG40785/13-4-2017.

## Draft delegated legislation

Draft regulations regarding fees for the provision of meteorological services in terms of the South African Weather Service Act 8 of 2001. GN315 GG40765/4-4-2017.

Draft amendment of the Regulations governing the maximum limits for pesticides residues that may be present in foodstuffs in terms of the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972. GN334 GG40772/7-4-2017.

Draft regulations on the use of television white spaces in terms of the Electronic Communications Act 36 of 2005. GenN283 GG40772/7-4-2017.

The procedure to be followed in applying for environmental authorisation for large scale wind and solar photovoltaic development activities in terms of the National Environmental Management Act 107 of 1998 for comments. GN350 GG40785/13-4-2017.

Draft regulations in terms of the Property Valuation Act 17 of 2014. GN365 GG40793/21-4-2017.







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

## Conditions in employment contracts providing for automatic termination of employment

In *Nogcantsi v Mquma Local Municipality and Others* [2017] 4 BLLR 358 (LAC), an employee was offered a position as a protection officer in terms of a three year fixed term contract subject to the outcome of a positive vetting process. In this regard, the employment contract contained a resolute condition, which provided that the offer was subject to a vetting and screening process and that the employment contract would automatically terminate should the employer become aware of any negative information pertaining to the employee.

The municipality was subsequently informed that the employee had displayed dishonesty at his previous employer and it then terminated the employment contract. The employee alleged that he had been unfairly dismissed and referred an unfair dismissal dispute to the bargaining council seeking reinstatement. The arbitrator found that the employee had not been dismissed. The employee then took the matter on review to the Labour Court (LC) and argued that parties to an employment contract cannot contract out of the provisions of the Labour Relations Act 66 of 1995 (LRA) regarding dismissals. Van Niekerk J considered the case law and found that this case was distinguishable. He held that for an employment contract to provide that it is conditional on a positive vetting process and to provide for automatic termination should the outcome of the vetting process not be positive did not deprive an employee of the right to security of employment. Furthermore, the employee had agreed to the condition in the employment contract and understood the consequences of a negative outcome to the vetting process. The vetting process was also not in the hands of the employer and was material to his suitability for the position. As regards the employee's argument that he was not given an opportunity to put his version across in respect of the negative information that was disclosed to the employer, Van Niekerk J commented that the employee had had the opportunity to put his version across by making a full disclosure at the time of his appointment. Van Niekerk J said that the circumstances of this case were similar to a situation where a pilot was required to produce proof of a pilot's licence. This arbitrator's ruling was accordingly upheld by the LC.

The employee then appealed to the Labour Appeal Court (LAC) arguing that the arbitrator had erred by finding that the employment contract had terminated automatically as the termination provisions in the employment contract were invalid or void for vagueness. The employee further argued that he was denied the right to a hearing before the termination clause was invoked. The LAC held that this was not a matter which involved misconduct that entitled the employee to a hearing. Instead, it involved an employment contract that was subject to a condition. It was held that a contract of employment that is subject to a condition is not in conflict with the LRA and it is a commercial reality. Furthermore, the LAC did not agree with the employee that there should be a distinction between resolute and suspensive conditions.

In the case of a resolute condition, the employment contract comes to an end on fulfilment of the condition and the employment contract is treated as if it never came into existence. This was not found to be in conflict with the LRA. The appeal was accordingly dismissed with costs.

In the case of a suspensive condition, the employment contract continues to exist until the condition is fulfilled. This was not found to be in conflict with the LRA. The appeal was accordingly dismissed with costs.

## Protective promotions

In *Ncane v R Lyster NO and Others* [2017] 4 BLLR 350 (LAC), an employee applied for an advertised post with the rank of captain. The selection panel rated the employee with a score of 17, while the successful candidate obtained a rating of 18 from the selection panel. The employee referred an unfair labour practice dispute to the bargaining council.

The arbitrator held that there had been no unfair labour practice. The employee then took the matter on review to the Labour Court (LC), which found that the employee should have received a score of 18 points as he was in possession of an LLB degree. The LC did not, however, rule that the employee should have been appointed to the position. Instead, the employee was awarded compensation equal to five months' remuneration. The employee argued that he should have been granted 'protective promotion' as the LC had found fault with the selection process that had been followed in that the employee had not received the correct amount of points.

The employer argued that the LC had erred by focusing exclusively on the points that were allocated to the candidates.

The LAC held that employers must follow a fair procedure when considering candidates for promotions by adhering to the law and applying objective criteria. However, the LAC acknowledged that promotion is not a mechanical process and that an element of discretion and subjectivity should be allowed when making the appointment. In circumstances where the employer has a rule that it appoints the candidate with the highest scorecard if the candidates are of the same race or gender, as was the case in these circumstances, then it must adhere to that rule. If the candidate disputes the scores and complains about not being promoted then the candidate is required to show that the process and outcome was unfair. The employer explained that experience was a significant factor that was taken into account in ranking the candidates. This experience was not merely based on the length of the service, but also on the relevance of the experience. The LAC held that interference with a promotion is only permissible if the decision is irrational, grossly unreasonable or *mala fide*. It was held that in this case it had not been unreasonable of the arbitrator not to interfere with the appointment decision. Thus, the appeal was dismissed.



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

## Does a suspensive condition in employment contract apply to offer of employment?

*Du Preez v SALGBC and Others* (unreported case no C147/15, 29-3-2017) (La-grange J)

While an employer may rely on a suspensive condition in an employment contract to terminate the employment relationship, can an employer rely on the same suspensive condition to withdraw an offer of employment, after an employment relationship had been concluded, but before the employee commences work with his or her employer?

The applicant applied for a position at the Eden District Municipality in 2013. On the application form he signed a clause which read:

'I hereby declare that the information given on this form is true and correct. I accept that, in the event of my application been successful, any information to the contrary will lead to immediate dismissal.'

After considering the applicant the most suitable candidate, the municipality, on 16 September 2014 formally offered him the post he applied for.

In accepting the offer, the applicant indicated to the municipality that he would be in a position to commence work on 13 October 2014.

However, before the applicant started work and prior to the parties entering into a formal written contract, the municipality became aware of certain discrepancies in the applicant's employment history. The applicant indicated he held the position of Head of Supply Chain Management at his previous em-

ployment and had left because of a labour dispute, whereas the municipality ascertained he was an administrative officer who had been dismissed by his erstwhile employer. In a letter dated 10 October 2014 the municipality requested the applicant to furnish it with the necessary proof substantiating his assertions in respect of his prior employment within seven days. In the same letter the municipality advised the applicant that failure to provide this proof would lead to the job offer being withdrawn.

In a further letter dated 28 October 2014 and headed: 'Withdrawn: Offer of employment...' the municipality informed the applicant that due to his dishonesty and on the strength of the clause he signed when applying for the post, it was withdrawing its job offer made to him.

The applicant referred an unfair dismissal dispute to the bargaining council and in a jurisdictional ruling, the arbitrator found that the applicant was never an employee of the municipality.

It was this ruling that served before the court on review.

The applicant argued that when he accepted the offer on 16 September 2014, he effectively entered into a contract of employment with the municipality. The municipality agreed with the fact that the parties entered into a contractual relationship on 16 September, however, argued that the contract contained a suspensive condition that allowed the municipality to withdraw the offer before the applicant started work if the information he provided when applying for the position, turned out to be incorrect.

While the court accepted that the applicant's employment was subject to a suspensive condition, the argument raised by the municipality sought to ask the question of whether or not the offer itself, was subject to the suspensive condition. If so found then the municipality would be within its rights to withdraw the offer as it so did.

Initially the court considered the municipality's argument an appealing one – if the employment contract could be terminated because the applicant tendered inaccurate information, then it would be more of a reason to agree with the proposition that the offer itself could be withdrawn before the applicant commenced his duties.

However, on further consideration in

respect of the wording of the suspensive condition and the sequence of events that followed, the court adopted a different view and held:

'The difficulty this argument presents is that, the offer was not withdrawn before the applicant had formally accepted it and it would appear that in invoking the suspensive condition contained in the application form, the municipality could only have done so on the basis that the applicant had been employed as a buyer. That provision clearly envisaged a situation where the application for employment had been successful and the applicant had consequently been employed. I have little doubt on the facts as they appear that the municipality would have been contractually entitled to invoke the suspensive condition but that contractual entitlement was the right to terminate an appointment, which had already been made. In my view, it would be an artificial reading of the factual situation to suggest that the parties had not agreed on the applicant's appointment and that the termination in terms of the suspensive condition was the termination of an appointment not the withdrawal of a still pending offer of employment. It would also be an interpretation of the suspensive condition which the language of that provision would have to be severely strained to sustain.'

Following this the court concurred with the applicant when finding his employment relationship with the municipality had been terminated and the alleged withdrawal of the offer by the municipality was tantamount to a dismissal.

In setting aside the jurisdictional ruling the court remitted the matter to the bargaining council to be heard on the merits of his dismissal dispute. The court did note that the applicant's victory may well be short lived having regard to the facts of the case. The municipality was ordered to pay the applicant's costs.



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

**Send your question to  
Moksha Naidoo at:  
derebus@derebus.org.za**



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# Employment law update

## Conditions in employment contracts providing for automatic termination of employment

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However, on further consideration in

respect of the wording of the suspensive condition and the sequence of events that followed, the court adopted a different view and held:

'The difficulty this argument presents is that, the offer was not withdrawn before the applicant had formally accepted it and it would appear that in invoking the suspensive condition contained in the application form, the municipality could only have done so on the basis that the applicant had been employed as a buyer. That provision clearly envisaged a situation where the application for employment had been successful and the applicant had consequently been employed. I have little doubt on the facts as they appear that the municipality would have been contractually entitled to invoke the suspensive condition but that contractual entitlement was the right to terminate an appointment, which had already been made. In my view, it would be an artificial reading of the factual situation to suggest that the parties had not agreed on the applicant's appointment and that the termination in terms of the suspensive condition was the termination of an appointment not the withdrawal of a still pending offer of employment. It would also be an interpretation of the suspensive condition which the language of that provision would have to be severely strained to sustain.'

Following this the court concurred with the applicant when finding his employment relationship with the municipality had been terminated and the alleged withdrawal of the offer by the municipality was tantamount to a dismissal.

In setting aside the jurisdictional ruling the court remitted the matter to the bargaining council to be heard on the merits of his dismissal dispute. The court did note that the applicant's victory may well be short lived having regard to the facts of the case. The municipality was ordered to pay the applicant's costs.



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Abbreviation	Title	Publisher	Volume/issue
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<i>ILJ</i>	Industrial Law Journal	Juta	(2017) 38
<i>JJS</i>	Journal for Juridical Science	Free State University	(2016) 41.2
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaans Onderwys	(2017) April
<i>PER</i>	Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2017) April
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2017) 2
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By  
Bouwer  
van  
Niekerk

# Being a South African attorney in a conservative world

**W**e live in a weird world. A world where a man that has never previously held political office is now the commander-in-chief of the most powerful military on the planet. A world, where the once most powerful and educated country on earth has decided to leave the European Union, seemingly without fully understanding what such a bold decision will entail, and ostensibly without contemplating the dire economic repercussions that followed immediately on having taken that decision. A world where more and more European countries are being swept up by Nationalistic views, apparently being powered by the winds of change that blew across from the superpower on the eastern side of the Atlantic Ocean. A world where, notwithstanding the desperate outcries of refugees wanting, nay begging to find solace and peace outside the borders of their war torn countries where they are forced to behold and be subjected to horrifying atrocities and violations of human rights, countries are looking inwards to protect their own way of life. At the time of writing, we find ourselves in a country where the scourge of xenophobia has once again reared its ugly head, this time starting in the capital of Pretoria. In short, we are living in a world that is becoming more and more conservative and one where nationalism and self-preservation trumps empathy and compassion towards those who are different.

South Africa (SA) is self-evidently not immune hereto. On the contrary, the lack of empathy towards foreigners' plight has spilled over into disturbingly violent clashes between South Africans and fellow citizens of this continent on more than one occasion in our recent history. We have heard calls from the so-called 'populist' that white South Africans should be forcibly removed from their land without any compensation, and even the thinly veiled threats that they should not be murdered 'for now'. On the other side of the spectrum we have heard calls that a delegation consisting of some of the most racist elements of the far right-winged supposed 'Afrikaners' should meet with the President of the United States (US) to facilitate the creation of a 'volkstaat' for white people within the boundaries of (all of) our land.

A weird (and often scary) world indeed.

## A liberal approach?

So how should we as South African at-

torneys react to this ever-changing world and country that we live in? Is it possible to keep the dream of Nelson Mandela's rainbow nation alive?

A knee-jerk reaction would be to pick up the liberal torch. For liberals and liberal thinking made the rainbow nation possible, not so? Such thinking is governed by the most progressive Constitution in the western world, not so? By parity of this reasoning, liberal thinking is infallible, not so? Those that differ from such a way of thinking are incongruous, even indecorous, not so?

Not so, not these days anyway. Or at least, not the liberal thinking, and more importantly, the liberal approach adopted in recent times, which is far from the approach originally contemplated by the likes of John Locke and John Stuart Mill. I would argue that this kind of approach is what has brought this world to where it is today. Such arguments appear to have played a significant role in many people starting to empathise with nationalistic views, and even to openly support it. The notion of 'if you do not think the way I think you are obviously a bigot, nay a troglodyte stuck in the Middle Ages' clearly does not pass popular current day thinking muster.

## Constitutionally thinking

So what to do? An old adage is if you want to change what they do, find out why they do it. Differently put, apply the *audi alteram partem* rule. Consider other people's views, and (insofar as such views do not propagate violence, hate speech, unfair discrimination of any kind or other human rights abuses) engage with them. For we as attorneys are all sworn to protect the Constitution. This presupposes a respect of the right to life and dignity, rights that outweigh the right to retribution (*S v Makwanyane and Another* 1995 (3) SA 391 (CC)). It entails that we both obey the law of the land and our conscience (*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)). It dictates that we prevent gender-based discrimination and to protect dignity, freedom and security of women (*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)). It gives us the freedom to worship any deity we choose, but also teaches us that ancillary religious rights can also under certain circumstances be limited (*Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC)). It commands that we respect the right to

bodily integrity (*Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC)). It prohibits us from unfair discrimination on the grounds of sexual orientation and marital status (*Satchwell v President of Republic of South Africa and Another* 2002 (6) SA 1 (CC)), and it teaches us that everyone has the right to social security, permanent residents included (*Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)).

## Conclusion

- 'The victor will never be asked if he told the truth.'
- 'I believe today that my conduct is the will of the almighty creator.'
- 'The broad masses of a population are more amenable to the appeal of rhetoric than to any other force.'
- 'The art of leadership consists in the consolidating of the attention of the people against a single adversary and taking care that nothing will split up that attention.'
- 'Struggle is the father of all things. It is not the principles of humanity that man lives or is able to preserve himself above the animal world, but solely by means of the most brutal struggle.'

Similar sentiments and approaches to political success have been echoed and followed by US President Donald Trump, France's Marine Le Pen, Holland's Geert Wilders and our very own Julius Malema and Steve Hofmeyr. However, it needs to be pointed out that the above quotes are all attributed to Adolf Hitler, whose relentless pursuit to power, fuelled by (among others) nationalism, gave rise to a state that started a war and concomitant unspeakable atrocities that should never be repeated.

We as attorneys are the first point of call for those who cannot defend themselves. And we are the last port of call to protect our Constitution. It is our responsibility to act accordingly. Not only for the sake of those who need us to act thusly, but for all South Africans, and everyone else for that matter.

**Bouwer van Niekerk BA (Law) LLB (SU) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (UNISA & LEAD) is an attorney at Smit Sewgoolam Inc in Johannesburg.**

# Procedural Timetables and Prescription Periods

**T**his handbook is no lofty tome on the jurisprudence around prescription and civil procedure. It is a handbook that is just short of 200 pages and is packed with information regarding two issues that are of daily concern to litigation and commercial attorneys, namely, prescription and the time limits provided for in the court rules and statutes subject to which attorneys practice. Its usefulness extends beyond the practice of the attorney practicing in the High or lower courts as the content includes timetables and procedures in the areas of law within which commercial law attorneys and advocates practice as well.

The author of this handbook, advocate Derek Harms SC, holds a BA LLB degree (Unisa) and a Diploma in Intellectual Property (London). The author practices in the field of general commercial and intellectual property law at the Cape Bar and he has authored books dealing more substantively with procedure in the courts, but as indicated the extent of this work is limited to the subjects indicated above.

The content page gives the reader an indication of how logically and well set out the subject matter of the book is dealt with. It affords the practitioner quick and easy access to the procedural timetables applicable in the numerous institutions covered by the book. The work commences with the procedural timetables applicable in the High Court, magistrate's and regional courts, the Supreme Court of Appeal and the Constitutional Court. It also covers the procedural timetables of the Labour Court, the Land Claims Court, Commission for Conciliation, Mediation and Arbitration and the Tax Court. It also covers the institutions created in the Competition Act 89 of 1998 and also Patent and Trademark legislation.

Having dealt with those rules and regulations the work then covers the procedural timetables of the practice directives and rules applicable in the various divisions of the High Courts in South Africa.

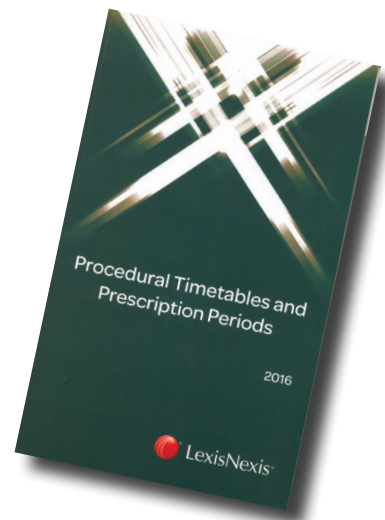
The procedural timetables are dealt with in three columns headed 'Nature of Act', 'Time Allowed' and 'Section or Rule or Directive'. The different procedures, be they actions or applications, opposed or unopposed, are all dealt with sepa-

By Derek Harms SC  
Durban: LexisNexis  
(2016) 1st edition  
Price R 296.49 (incl VAT)  
198 pages (soft cover)

rately and this allows for easy reference to determine the steps in the process and the time periods to be complied with, as well as a reference to the relevant rule or regulation governing the steps.

The last few pages cover the topics of prescription periods defined in the Prescription Act 68 of 1969 and the limitations for the institution of proceedings placed on litigants by the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and the Promotion of Administrative Justice Act 3 of 2000. It deals with the subject of condonation under the last two mentioned Acts. Superannuation of judgments granted in the magistrate's court is also referred to.

Consistent with the accuracy and thoroughness of the work, the author indicates in his foreword that the work will be updated annually to keep in step with legislation and rule amendments. The 2016 edition under review is an update of the 2014/2015 legislation and bears out the author's commitment to this stated intent.



This handbook is an essential aid to those who practice in the fields mentioned above and it is worthy of a place on every practitioner's desk.

After the writing of the review the 2017 edition of *Procedural Timetables and Prescription Periods* was published. In essence the court terms of the various Superior Courts have been updated and the procedural timetables of the High Court and those of the regional and magistrate's courts affected by recent rule changes have been amended.

Graham Bellairs is an attorney at Graham Bellairs & Solomons in Cape Town. □

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