

SEPTEMBER 2017

## DRILLING FOR THE MEANING OF WORDS: THE SCA'S INTERPRETATION OF PATENT CLAIMS

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immense contribution of **Nic Swart**

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## FEATURES

### 26 Drilling for the meaning of words: The SCA's interpretation of patent claims

Sometimes lawyers comment on cases where new precedents are set, or new principles espoused, to deal with a set of circumstances not yet faced by the courts. At other times, lawyers report on judgments that reinforce existing law and sets of principles that have even, in some lawyers' minds, become trite. Such is this case. **Ryan Tucker** writes that the dicta from Dambuza JA in *Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd* [2017] 2 All SA 796 (SCA), are far from ground breaking. But they do serve to fortify what patent practitioners understand to be the law in relation to patent construction.

### 29 Washing money: The different forms of money laundering

Money laundering takes many forms and embraces all manner of technologies, from the most basic to the extremely sophisticated. In general, by its very definition, money laundering involves money as its central store of value. However, **Jason de Mink** writes that recent trends have been detected that indicate a worrying trend away from the use of money as a store of value for criminal enterprises, with the shift being to everyday commodities and goods that are legal and can be easily obtained, transported and sold.

### 32 Legal framework for acquisition by a company of its own shares

In this article, **Mlungishi Duncan Tlema** writes that a procedure for acquisition by a company of its own shares is primarily regulated by the provisions of ss 46 and 48 of the Companies Act 71 of 2008 (the Act). The board of directors of a company may authorise a re-acquisition, provided that prior to effecting such re-acquisition the solvency and liquidity test has been applied by the board. However, in terms of s 48(8) of the Act, a proposal by the board for a re-acquisition, if considered alone or together with a whole series of integrated transactions, is more than 5% of the issued shares of any class of shares of the company then the re-acquisition must comply with the requirements of ss 114 and 115 of the Act.

### 34 Is there an onus to prove an impairment of dignity in discrimination cases?

The aim of this article, written by **Kershwyn Bassuday**, is to determine whether the recent amendments to the Employment Equity Act 55 of 1998 (EEA), specifically s 11(2), relate to the impairment of dignity of the employee. The Labour Court dealt with this issue in *Duma v Minister of Correctional Services and Others* (2016) 37 ILJ 1135 (LC).

### 37 Ways to curb expert bias

The expert's function, is an exceptional one: To provide assistance to courts in cases where the court is unable to because of lack of specialised knowledge. **Dr Izette Knoetze-le Roux** writes that the dangers associated with the use of expert evidence is often limited to bias, namely, the risk that the expert, hired by the prosecution or the defendant, will report results that are favourable to the party who instructed him or her and paid his or her fee.

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# Opportunity to comment on medico-legal claims system

**A**midst recent controversial media reports on medico-legal claims, the South African Law Reform Commission (SALRC) recently released Issue Paper 33, which is the first document to be published during the course of Project 141 – Medico-legal Claims for information and comment. The paper announces the SALRC's investigation into medico-legal claims. The investigation was conducted as per the request from the Department of Health and the Minister of Justice, especially on claims against the state.

The main objective of the SALRC in terms of s 4 of its establishing legislation, the South African Law Reform Commission Act 19 of 1973, is to do research with reference to all branches of the law of South Africa and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof.

- A number of concerns have been raised with regard to the current medico-legal claims system. The SALRC requests respondents to consider whether:

- The traditional common law system is still the most appropriate response to dealing with medical negligence in the current environment.

- If the response to the above item is no, there is scope for the development of the common law.

- The adversarial system is the best option for dealing with this particular area of the law, bearing in mind –

- the personal nature of the claim for the persons affected by medical negligence; and

- the highly technical and specialised evidence required to prove both the cause of action as well as the quantum of damages.

- Applying the inquisitorial system or aspects of the inquisitorial system to medical negligence claims would be beneficial.

- Alternative measures for dealing with medical negligence claims other than

through the courts are available in current South African law.

- The only way in which the current state of the law can be changed is by means of legislation.

- If the problem can only be addressed through legislation, options that could be considered in view of the international experience as applied to challenges unique to South Africa.

- The common law – once and for all rule is problematic in the context of medical negligence claims.

- The doctrine of avoidable consequences (the doctrine that places the responsibility of minimising damages on the person who has been injured) has a place in South African law.

- Prescription periods as currently applied in South African law, especially with regard to minors, are satisfactory in the field of medical malpractice legislation.

- The Contingency Fees Act 66 of 1997 and the principle of contingency fees should be reviewed.

Respondents are requested to submit written comment, representations or requests to the SALRC by no later than 30 September. Respondents are not restricted to the questions posed and issues raised in the paper, and are welcome to draw other matters to the SALRC's attention as long as they are related to this topic.

All comments and representations must be sent for the attention of Ronel van Zyl to the following address:

The Secretary  
South African Law Reform  
Commission  
Private Bag X668  
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- E-mail: [Rovanzy1@justice.gov.za](mailto:Rovanzy1@justice.gov.za)
- Issue Paper 33 is available on: <http://salawreform.justice.gov.za>
- Issue Paper 33 can also be obtained free of charge from the SALRC on request. Contact Jacob Kabini at [Jakabini@justice.gov.za](mailto:Jakabini@justice.gov.za) or (012) 622 6327.



Mapula Sedutla – Editor

## Would you like to write for *De Rebus*?

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

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- Please note that the word limit is 2000 words.

- Upcoming deadlines for article submissions: 18 September and 23 October 2017.

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# LETTERS

## TO THE EDITOR

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

### Lack of transformation in the legal system

I bemoan the lack of transformation in the legal system. The legal profession is full of reports of skewed briefing patterns to the exclusion of black lawyers. The root cause of this is the inherent structural inequality that exists from day one of law school, and the paralyzing requirements to serve articles. With the difficulties faced by an average black student pertaining to economic difficulties, among other things, which candidates are often at the receiving end.

Studying towards an LLB degree is always accompanied by a vision of being admitted as a lawyer (through articles with the aim of securing admission as an attorney) or as an advocate (by serving pupillage).

I will first touch on the issue of securing articles. It is a nightmare. Statistics provided by the Law Society of South Africa (LSSA) indicate that there has been a notable surge in black lawyers over the years, however, briefing patterns paint a different picture. An LLB degree without admission is worthless and legally impotent. Most law firms to whom I used to apply to on a daily basis, require an LLB graduate to have their own transport. Most graduates are just out of law school and can barely make ends meet with a study loan they are working to pay off.

I once secured an interview with a firm in Bryanston and the first thing the director asked me was whether I had a car. My answer was a demotivating 'no'. The

disinterest from the director was visible and the interview was only academic, reduced to a few minutes. I submit this is not feasible for disadvantaged graduates and only applies to their detriment. All law firms do not enjoy the same financial power, but an investment in a second hand vehicle for candidate attorneys (CAs) for purposes of court appearances and related activities should be worth considering. If a law firm can afford a vehicle for a driver doing deliveries, the same can be afforded for use by aspiring CAs and thus curb the requirement for a car.

There is also an issue regarding language. Some firms require you to be bilingual (speak both English and Afrikaans fluently). Though I welcome a firm's prerogative to set their own recruitment criteria, the issue with Afrikaans, serves as a means of exclusion to black applicants. I stand corrected, but court practice is now officially conducted in English and thus it raises the question as to why the requirement for Afrikaans? If a law firm's clientele comprises of a majority of Afrikaans speaking individuals, I doubt that it follows that they cannot speak English. The Afrikaans requirement may well be genuine, but it is exclusionary and it effectively throws a vast majority of black applicants off balance.

The meagre salaries offered to CAs can be deemed exploitative at best, with some CAs earning as little as R 3 000 per month. Most CAs can contend with this. I took a massive salary cut myself to serve articles, because the end goal is more compelling than temporary financial

gain. The paralyzing prospect of doing pupillage for a year without any monetary compensation during the course of training is a deterrent for disadvantaged graduates to even apply, given the harsh economic conditions compared to our well off counterparts, who can make do without a salary for that period, owing to a secure financial background.

While CAs wait for articles the clock ticks. CAs come across jobs outside the legal profession and fade into obscurity and all that studying towards an LLB degree, becomes worthless. Now, in the field where black graduates hardly get the nod, it becomes impossible to have a large pool of practicing black lawyers excelling in quality legal work. Thus it will always be dominated by white lawyers if the status quo remains. As it stands, it is a slippery slope for black graduates as not enough black law graduates secure articles. Never mind the skewed briefing patterns. That is just jumping the gun, the crisis is bigger. Start at the bottom. The roots are unstable for the tree to even bear fruit. The reality with black and white graduates is that we are not the same and are not treated equally in the recruitment process. Equal treatment of unequal people heightens inequality. Bemoaning skewed briefing patterns while black graduates can hardly get a foot in the door is barking up the wrong tree. Start at the bottom.

**Jacob Hlongwane**, candidate attorney, Kempton Park





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# The legal profession re-capturing its place in society discussed at PALU conference

**T**he Pan African Lawyers Union (PALU) held its 8th annual conference and 5th general assembly from 5 to 8 July in Durban under the theme: 'The legal profession: Re-capturing its place in society'.

The proceedings of the conference began with an opening ceremony on 5 July. Speaking at the opening ceremony, Co-chairperson of the Law Society of South Africa, Walid Brown, said despite the prevailing mood in South Africa at the time, the silver lining remains that the rule of law is upheld in the country. Mr Brown added: 'There is no suggestion that the rule of law will not be upheld, there are no calls to arms or revolution no matter how upset people are with the president. ... Of course this could change, but South Africa remains an example for Africa.'

Partner at Morrison & Foerster, representing the Cyrus R Vance Center for International Justice, New York City Bar, Carrie Cohen, noted that the Vance Center advances global justice by engaging lawyers to create an ethically active legal profession. Ms Cohen added: 'It is lawyers that have a special responsibility and skills to keep the society civil and ensure that democracy prevails. It is only together that we can share our values and bring about positive change.'



*Co-chairperson of the Law Society of South Africa, Walid Brown, welcomed delegates to the 8th annual PALU conference. Mr Brown, also made a presentation on cross border insolvency and debt recovery in Africa.*



*Minister of Justice and Correctional Services, Michael Masutha, was the guest of honour at the opening ceremony of the PALU conference.*

Delivering the keynote address at the opening ceremony, President of Global Financial Integrity (GFI), Raymond Baker, said that GFI is focusing on corruption and working with governments to address issues that are connected with corruption. Mr Baker added that he worked with former President Thabo Mbeki and other stakeholders across Africa to address illicit financial flows (IFF) challenges.

Mr Baker noted that the panel that Mr Mbeki chaired found that illicit finance transfers hamper development efforts throughout the continent. He said the panel requested the Economic Commission for Africa of the United Nations to estimate the financial impact of IFF. The commission found that between 2001 and 2010 African countries lost up to US\$ 407 billion from trade mispricing alone. At the same time, illicit outflows from Africa were found to range from at least US\$ 30 billion to US\$ 60 billion a year.

Mr Baker said the findings revealed that the illicit flows through commercial channels was at the core of the problem. 'Yes, for 40 years people have been singling out African corruption as the problem. We are saying yes, it is a problem, but it is not the only problem,' he said.

Mr Baker said the GFI has identified

several initiatives that will address the problem. These include the creation of beneficial ownership registries that would see central banks throughout the continent instructing smaller banks to provide lists of all their account holders within six months or close them down. 'We also recommend the adoption of legislation that targets trade-based money laundering,' he added.

Speaking as the guest of honour at the opening ceremony, Minister of Justice and Correctional Services, Michael Masutha, noted that the state has been vulnerable to all forms of exploitations but the legal profession seems to be the exemption. Mr Masutha added that there is a real need for the law to be restructured to ensure it is accessible to everyone. 'We write the rules and very often we tailor them to suit our own peculiar requirements – so much so that some of us cannot make sense of the small print. We need to move towards a society that is inclusive by ensuring that the laws we write and the institutions we create to ensure their implementation are accessible to ordinary people. The law must be as freely accessible as fresh air,' he said.



*Former president of the Gambia Bar Association, Salieu Taal, who was also one of the founders of the #GambiaHasDecided movement said at a broader level, Africans had to embrace technology as one of the most important pillars of development.*





*Speakers of a panel that discussed gender equality in the legal profession from left: Partner at Morrison & Foerster, representing the Cyrus R Vance Center for International Justice, New York City Bar, Carrie Cohen; Corporate Affairs Director at Heineken South Africa, Zodwa Velleman; Managing partner at Goodshare & Maxwells, Okeoma Ibe; and advocate Jemimah Keli.*

## Getting to equal – women in the legal profession

On the second day of the conference, a panel discussion on gender equality in the legal profession was held. Speakers during the panel included Ms Cohen; Corporate Affairs Director at Heineken South Africa, Zodwa Velleman; Managing partner at Goodshare & Maxwells, Okeoma Ibe; and advocate Jemimah Keli. Ms Cohen highlighted the importance of having a network of support. 'As a female lawyer it is important to have a network of people you can turn to for advice, men and women. Build up a board of advisers from different types of people that can help you in different ways,' she said.

Ms Velleman noted that she is a firm believer in having a network of mentors as she is still in contact with her principal, who is her mentor. She said the major difference between men and women is that women fear failure and believe that it is catastrophic and would not recover from it. 'If men fail, they get up and keep going,' she added.

Speaking about gender stereotypes, Ms Keli said: 'There are two attributes a lawyer should have; assertiveness and competence. But a woman who is assertive will often be labelled aggressive, whereas it will be seen as a positive thing in a male lawyer. And women have to prove their competence, but for men it will be assumed.'

Ms Keli also emphasised the importance of mentorship. She noted that in various jurisdictions the majority of senior lawyers are male and may not be available to mentor young female lawyers because of the connotations associated with being seen with young females. 'This then perpetuates the notion of the old boys club because young female lawyers will not be able to advance,' she added.

## Improving regulatory and operating environment for ICT in Africa

Speaking on a panel on the topic of operating ICT in Africa, Managing Partner at A & E Law Partnership and Chairperson of the Board of Public and Private Development Centre in Nigeria, Chibuzo Ekwewuo, said that as the lines between ICT services become increasingly blurred and legislators across the continent find the need to revise existing policy frameworks to respond more efficiently to the changes, the intervention of lawyers in navigating through the resultant multiple challenges becomes critical. 'Lawyers can help demystify the minefield of intersecting technologies for key stakeholders, governments and consumers. ...

New regulatory frameworks also have to take into account a range of other laws relating to copyright, competition, consumer protection, cyber-crime, privacy, etcetera, which will require the intervention of lawyers,' he added.

Former president of the Gambia Bar Association, Salieu Taal, who was also one of the founders of the #GambiaHasDecided movement said at a broader level, Africans had to embrace technology as one of the most important pillars of development. 'Through the use of technology we can change the way services are delivered and how business is done. We need to think of technology beyond our laptops and gadgets; we need a new way of thinking so that from a small cable in a village in Gambia, for example, we can access resources at Harvard University. As lawyers we can help in designing a framework that will empower our governments in achieving these goals and help get Africa onto the technology bandwagon,' he said.

Speaking about the #GambiaHasDecided movement, Mr Taal said the movement was formed to bring Gambia together and make the country reflect on its democracy and its future.

Sarah Mhamilawa, from the Tanzania Network Information Centre, said the creation of internet domain names could lead to disputes over intellectual property rights. Ms Mhamilawa said in Africa, most countries had adopted the American-designed universal dispute resolution mechanisms with regards to domain name usage without consideration of local contexts. 'This presents an opportunity for lawyers to devise an Africa-specific dispute resolution mechanism suitable for the needs of countries on the continent,' she added.



*Former Co-chairperson of the LSSA, Max Boqwana held a roundtable discussion with young lawyers from across Africa.*



**Chief Executive Officer of PALU, Donald Deya, addressed the issue of litigation in African international courts and tribunals.**

### Law practice management

Speaking at a session on law practice management, President of the KwaZulu-Natal Law Society, Umesh Jivan, said that one area of concern for practicing lawyers should be whether they are adequately insured. Mr Jivan added that meeting the regulatory requirements of the jurisdiction a lawyer has chosen to practice in should be another area of concern.

Mr Jivan noted that in the past advertising was taboo for lawyers, however, that is no longer the case. 'We have accepted that lawyers can advertise their skills. If you do not market your skills it will be difficult to secure your income and the reality is that your practice will have to close. ... There are many ways a lawyer can advertise their skills now, for example you could write articles for newspapers. Also, lawyers should not be afraid to use computers and the Internet. Be on social media otherwise you will be considered a dinosaur,' he added.

### Cross border insolvency and debt recovery in Africa

During a presentation on insolvency and debt recovery in Africa, Mr Brown noted that for lawyers, recovering money in a jurisdiction they do not practice in has had limited success. 'That is why it is important to attend conferences, such as the PALU conference, because you might meet a lawyer that might assist you when you have a matter in their country,' he added.

### Young lawyers' roundtable

Former Co-chairperson of the LSSA, Max Boqwana held a roundtable discussion with young lawyers from across Africa.



**Speaking at a session on law practice management, President of the KwaZulu-Natal Law Society, Umesh Jivan, said that one area of concern for practicing lawyers should be whether they are adequately insured.**

Mr Boqwana addressed the important role young lawyers play in insuring that the rule of law is upheld on the continent. He asked where Africans are going wrong as the continent has the potential to dictate and satisfy the energy and feed the needs of the world. 'Why the continent can own so much, yet control

so little? We need to answer these questions honestly and truthfully. Failure by your generation will make you as culpable as those that enslaved our continent, colonised it and the post-colonial leaders who sought to treat our various countries as their personal fiefdoms and the masses of our people as their subjects,' he said to the young lawyers.

Mr Boqwana added that legal professionals are always considered to have questionable ethical standards. 'The attitude doubtless derives from the perception that lawyers are mere self-serving agents of the rich and powerful and that they are motivated by greed and personal ambition. Yet the public and the media often overlook the existence of lawyers who are the exact opposite of this stereotype. This may be discouraging, but those who choose the side of justice to power, privilege and prestige, must understand that theirs is the payment of eternal debt to humanity. These are the lawyers who believe that justice is their calling and that it is their duty to serve the ideals of equality and the cause of the wretched in our society,' he said.

### Litigation in African international courts and tribunals

On the third day of the conference, Chief Executive Officer of PALU, Donald Deya, addressed the issue of litigation in African international courts and tribunals. Mr Deya noted that the first body to suggest that due consideration should be given to an additional international criminal jurisdiction for the African Court was the group of African experts, who were commissioned by the African Union (AU) in 2007 to 2008 to advise it on the merger of the African Court on Human and Peoples' Rights with the African Court of Justice. 'However, the genesis of the current discussion is not the contemporary debate about Africa's relationship with the International Criminal Court or, more specifically, the debate around the arrest warrant for [Omar] Al-Bashir and the subsequent AU request for a deferral. Rather, the current process emanated from three contemporaneous issues: The AU Member States' dialogue on the possible misuse of the Principle of Universal Jurisdiction; the challenges with Senegal's impending prosecution of the former President of Chad, Hissene Habre; and, the need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance, which requires the AU to formulate a novel international crime of "unconstitutional change of government"', he added.

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**From left: President of the General Council of the Bar Tunisia, Ameur Meherzi; and President of the Law Association of Zambia Linda Kasonde at the closing ceremony of the PALU Conference.**



# BLA marches to voice dissatisfaction on legal work distributed by government

**T**he Black Lawyers Association (BLA) called on President Jacob Zuma to establish a judicial commission of inquiry on the root cause of why government departments, government owned enterprises and municipalities continue appointing white male legal practitioners above their black and female counterparts. This according to the BLA, despite the presence of legal framework that requires government entities to prefer women and black legal practitioners.

BLA members staged a protest at the Union Buildings led by BLA President, Lutendo Sigogo, in July, before handing over a memorandum of grievances to the representatives of the president's office. The BLA said President Zuma must facilitate coordination of distribution of all government legal work through one central office, preferably the solicitor general, which will record and keep statistics of all issued instructions or briefs.

The BLA further said President Zuma should give directive to all government departments, government owned enterprises and municipalities, to issue briefs and distribute legal work in line with the provisions of the economic empowerment legal framework. Companies and municipalities should have their own coordinated and distinct methods and mechanisms to award legal work to the legal practitioners.



*Black Lawyers Association (BLA) President, Lutendo Sigogo, addressing the members of the BLA during the organisations protest at the Union Buildings at Pretoria in July.*

Mr Sigogo said the BLA knew that the Office of the State Attorney deals with a limited quantity of state legal work and the instructing of state departments holds the unfettered prerogative to appoint the counsel of their choice. He pointed out that by law the Office of the State Attorney is not designed to give instructions to attorneys but only to

advocates. He added that it is common course that government pays more legal fees to white male legal practitioners, than it does to black and female legal practitioners.

Mr Sigogo pointed out that it seemed that government believed that white legal practitioners are more competent than their black counterparts. 'This is a myth, this belief disregards the fact that black and white legal practitioners receive similar legal training from university level though their profession oriented apprenticeship,' Mr Sigogo said.

The BLA said that as black legal practitioners they draw claim for quality and empowering legal work from, among others, following legislative legal framework namely –

- s 9(2) of the Constitution;
- s 217 of the Constitution;
- the Preferential Procurement Policy Framework Act 5 of 2000 (as amended); and
- the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended.

The BLA submitted a memorandum with the following demands:

- The president is to establish a judicial commission of inquiry on the root cause why state departments, state owned enterprises and municipalities continue to appoint white male legal practitioners above their black and female counterparts notwithstanding the presence of



*Members of the Black Lawyers Association (BLA) during their protest at the Union Buildings in Pretoria. The BLA members staged a protest in July demanding that President Jacob Zuma give direct orders to government departments, government entities and municipalities to issue briefs and distribute legal work to black lawyers and female lawyers.*



legal framework, which requires them to prefer women and black legal practitioners.

- President Zuma to facilitate coordination of distribution of all state legal work through one central office – preferably the solicitor general – which will record and keep statistics of all the issued instructions and/or briefs. Such statistics will record the type of work, value of the instruction or brief, gender and race of the recipient.

- President Zuma to give directive to all state departments, state owned enterprises and municipalities to issue briefs and to distribute legal work in line with the provisions of the economic empowerment legal framework.

- President Zuma to direct all state owned enterprises and municipalities to sign the Law Society of South Africa Briefing Patterns Protocol and direct all

state departments to adhere to the same.

- The State Attorney Act 56 of 1957 be amended in order to empower the state attorney to appoint private law firms to carry out legal services on its behalf.

- All state departments, state owned enterprises and municipalities to provide the BLA with the following information –
  - list of the panel attorneys and date of appointment of such panel; and
  - schedule of the legal work distributed/briefs issued in the ensuing 12 months.This schedule is to reveal the names, gender and race of the legal practitioner, type of legal work and the total fee paid.

Following the BLA's protest, the Presidency issued a statement that said that, President Zuma had directed the Minister of Justice and Correctional Services, Michael Masutha, to attend to the concerns raised by members of the BLA during their protest. 'We take the concerns

raised by the Black Lawyers Association very seriously and we genuinely understand their concerns. In this regard, I have directed the Minister of Justice and Correctional Service to look into the challenges raised by the association and give me a report,' President Zuma said.

'We also encourage all arms of state and all spheres of government to prioritise and empower black lawyers, particularly women. The legal fraternity is one of the key sectors that we are targeting as part of our radical socio-economic transformation programme in order to correct the uneven and unequal racial and gender representation in key sectors of our society and in the economy,' President Zuma added.

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## International Arbitration Bill to attract foreign direct investment

**D**eputy Minister of Justice and Constitutional Development, John Jeffery, said the new International Arbitration Bill B10 of 2017 (the Bill), coupled with the role of South African courts, is not the outsourcing of justice but a way of expanding on the delivery of justice in a manner that ultimately enhances access to justice. Mr Jeffery was discussing the importance of the Bill at the International Arbitration: Opportunities for South Africa (SA) seminar in July.

Mr Jeffery added that the Bill brings with it increased opportunities for the country. 'The reforms contained in the Bill will ensure that arbitration legislation remains at the forefront of international arbitration best practices,' Mr Jeffery said. He pointed out that he was confident that the Bill will assist businesses in resolving their international commercial disputes and will ensure that SA is an attractive venue for parties around the world to resolve their commercial disputes.

Mr Jeffery noted that the Bill will also attract foreign direct investment. 'With this in mind, I have no doubt that we will see SA as a preferred arbitral seat in the very near future,' Mr Jeffery said. He added that arbitration offers many advantages and is typically faster, less formal and more tailored to the particular dispute than court proceedings while, at the same time, retaining the benefits of impartial expert adjudication.

'Possibly the biggest challenge of arbitration is that it is a method of dispute resolution that is chosen and controlled fre-



*Deputy Minister of Justice and Constitutional Development, John Jeffery, giving the keynote address at the International Arbitration: Opportunities for South Africa seminar at the University of the Witwatersrand in Johannesburg.*

quently by the parties themselves. Over time, international arbitration has developed as a practical, efficient and well-established method of settling commercial disputes without resorting to the courts,' Mr Jeffery said.

Mr Jeffery noted that arbitration and the broader administration of justice is not something static, but develops and must keep up with the times. He added: 'Importantly, especially from a South African perspective, respondents' preferences for certain seats for arbitration are

predominantly based on their appraisal of the seat's established formal legal infrastructure – in other words –

- the neutrality and impartiality of the legal system;
- the national arbitration law; and
- its track record for enforcing agreements to arbitrate and arbitral awards.'

Mr Jeffery added that the Bill emanates from an investigation of the South African Law Reform Commission. He said concerns were raised that the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 is not in alignment with international developments and that the Arbitration Act 42 of 1965 is inadequate for purposes of international arbitration. He said South African arbitration law is outdated in many respects and needs revision and updating in order to reflect and serve modern commercial needs.

'The main thrust of the Bill is the adoption of the UNCITRAL [United National Commission on International Trade Law] Model Law as the cornerstone of the international arbitration regime in South Africa,' Mr Jeffery said. He pointed out that the Model Law is the current international benchmark for arbitration laws, as it was developed to address the wide divergence of approaches taken in international arbitration throughout the world and to provide a modern and easily adapted alternative to outdated national regimes.

'It is intended for adoption by individual countries and has been adopted by many Commonwealth and other



**Director and head of Arbitration Practice at Werksmans Attorneys and South African member of the Court of Arbitration of the International Chamber of Commerce (ICC), chairman of the ICC South Africa, Des Williams, discussed the start of a new chapter for international arbitration in South Africa.**

countries, including important trading partners of South Africa, both within the SADC [Southern African Development Community] and beyond,' Mr Jeffery added.

Director and head of Arbitration Practice at Werksmans Attorneys and South African member of the Court of Arbitration of the International Chamber of Commerce (ICC), chairman of the ICC South Africa, Des Williams, said that when the topic of international arbitration is discussed a fundamental point must be kept in mind and that is, that arbitration rises from an agreement to arbitrate. It is that requirement that distinguishes arbitration from legislation.

Mr Williams added that it is a fundamental requirement of equal importance in any discussion of arbitration, whether international or domestic. He pointed out that arbitration is an alternative for the dispute resolution mechanism, but it must be an agreed alternative. Mr Williams touched on a bit of history on why SA took so long to implement legislative reform of arbitration legislation.

Mr Williams said in 1998 the South African Law Commission recognised that SA was increasingly seen as the obvious centre for the resolution of arbitration by arbitration of commercial dispute affecting parties, not only in SA, but also in other African countries. He said it was essential, therefore, that SA arbitration proceedings should be brought into line with those in other developed countries.

Mr Williams noted that in July of 1998 the commission submitted its report on its investigation into international commercial arbitration. He said one of the commission's core recommendations

that were made was a compulsory application of the UNCITRAL Model Law and the embodiment of all SA legislation on international arbitration in a new international arbitration Act. However, Mr Williams said at the time the popularity of arbitration was becoming a political issue.

Mr Williams referred to the report (Racism in the judiciary and the Cape Bar 2004) that was submitted in 2005, where Judge John Hlophe concluded that, black judges continued to be the victims of racism in SA's legal system. He added that one of the targets of the report was arbitration and its place in SA's legal system. Mr Williams said the report suggested that arbitration was inimical to judicial transformation in SA and that legislative measures had to be introduced to control the abuse of the arbitration process.



**Partner in the Dispute Resolution Practice at Webber Wentzel, Priyesh Daya, spoke at the International Arbitration: Opportunities for South Africa seminar in July.**

Mr Williams noted that the issue was also referred to by the commission in its domestic arbitration report (South African Law Commission Project 96 Domestic Arbitration Report (2001)), where reference was made to the danger of perception that 'particularly among black lawyers, that some white members of the legal profession see arbitration as a form of "privatised litigation", enabling them and their corporate clients to avoid courts which decreasingly comprise of black judicial officers,' Mr William quoted.

Mr Williams said the popularity of arbitration continued to be politically contentious until four or five years ago, as it became increasingly apparent that SA was losing a valuable opportunity to become an important arbitration centre like Mauritius. Mr Williams also touched on the topic of the Model Law. He said that Model Law will have no barring whatsoever on domestic arbitration.

He added that the Arbitration Act will, therefore, continue to apply to domestic arbitration, until such time it is replaced by a new Domestic Arbitration Act.

Mr Williams pointed out that it was important to draw a distinction between model law and arbitration rules. He said the Model Law is not a set of arbitration rules. The International Arbitration Act read with the Model Law will replace the Arbitration Act in relation to international arbitration as defined. However, he said that it does not affect the ability of the parties to agree to submit disputes to arbitration under the rules of any specific organisation that they may choose.

Mr Williams noted that on international investment treaty arbitration, one of the recommendations made by the commission, was that SA should follow the example of most other African countries and ratify the Washington Convention, as it would create necessary legal framework to encourage foreign investment and further economic development in the region.

Mr Williams pointed out that the recommendation was not accepted and that SA did not ratify the Washington Convention. 'Arbitration is widely used for resolution of commercial dispute in most African countries. African arbitration laws are modern and meets international standard and benchmarks,' Mr Williams said.

Partner in the Dispute Resolution Practice at Webber Wentzel, Priyesh Daya, spoke about the currently placed legislation of the Protection of Investment Act 22 of 2015. He said the Protection of Investment Act coupled with the draft regulations protocol SA has signed simply sets out processes that will be embarked when resolving disputes. He added that a key part of the legislation is that it advocates that all investor-state disputes be resolved firstly through mediation.

Mr Daya said the Protection of Investment Act goes further to advocate that should mediation not be successful, parties are well within their right to declare a dispute and the dispute has to go through a court process. 'In other words it is advocating that SA judiciary system be exploited before resorting to arbitration,' Mr Daya said. He added that s (13)5 of the Protection of Investment Act stipulates that the government may consent to international arbitration, subject to the exhaustion of domestic remedies and that the consideration of the request for international arbitration is subject to administrative processes set out in s 6.

• See also editorial 'Dialogue on the International Arbitration Bill' 2017 (July) DR 3.

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# International arbitration in Africa discussed at the CIArb conference

**T**he Chartered Institute of Arbitrators (CIArb) President, Nayla Comair-Obeid, said that she believed that the newly drafted International Arbitration Bill B10 of 2017 (the Bill) by the South African government, ready to be considered, will hopefully open doors to a flourishing future of international arbitration. She said that South Africa (SA) will be an example to other African jurisdictions.

Ms Comair-Obeid said this in her welcoming speech at the CIArb International Arbitration Conference held in Johannesburg in July where delegates from all over the world came to discuss international arbitration. She noted that she was pleased that the conference was taking place in Johannesburg, as Johannesburg is a city with opportunities in the arbitration field.

Ms Comair-Obeid pointed out that the CIArb was the leading institution for the promoting of education and training in the profession and in the field of arbitration. She said that capacity building and education were the key to raising awareness about alternative dispute resolution (ADR) and arbitration, and that the CIArb is mandated to globally promote the resolution of private dispute, by litigation through education and training and participating in ADR.

Deputy Minister of Justice and Constitutional Development, John Jeffery, said in his keynote address, that arbitration offers many advantages and is typically



*Chief Judge of the Federal Capital Territory of Nigeria, Justice Ishaq Bello, was one of the speakers at the CIArb International Arbitration conference.*

faster, less formal and more tailored to the particular dispute than court proceedings while, at the same time, retaining the benefits of impartial expert adjudication. Mr Jeffery added that the Bill makes provision for the confidentiality of arbitral proceedings where such proceedings are held in private. He noted that when an organ of state is a party to arbitration proceedings, such proceedings must be held in public due to the public interest in the matter.

Mr Jeffery said that in terms of clause 16, a foreign arbitral award may be recognised in SA as required by the New York Convention.

Furthermore, a foreign arbitral award must, on application, be made an order of court, and be enforced in the same manner as any judgment or order of court, provided it complies with the provisions of the clauses of the Bill dealing with the recognition and enforcement of foreign arbitral awards.

Mr Jeffery said that with regard to the transitional arrangements, Model Law will apply to all international agreements, irrespective of whether the agreement was entered into before or after the commencement of the Bill.

Chief Judge of the Federal Capital Territory of Nigeria, Justice Ishaq Bello, said that there was a systemic problem, which needs intervention and that systemic problem is ADR. He said by perception lawyers and judges who went for training on resolving disputes are hardly amenable to ADR mechanisms. Mr Bello added that particularly, in Nigeria, it is ex-

pressed in the Constitution that it is the duty of the judiciary to address disputes between individuals and institutions.

Mr Bello said a question that must be asked is: What has been done to make lawyers and judges know that they have a social responsibility to go by the alternative means so that peace and tranquillity in the society is attainable. He said it will only be talked about as regime, legislation and practice directives unless minds of lawyers and judges were changed. Mr Bello added that various law schools in his home country, Nigeria, teach dispute resolution. He pointed out that even when law students go to law firms for training, they select law firms that have ADR mechanisms in place, so that students can learn what they have been taught at law schools.

Managing partner at Olawoyin and Olawoyin, Adewale Olawoyin, said that arbitration has been accepted as a generally commercial fair and adequate process to resolve disputes. He said party autonomy is one of the key elements of arbitration, which is the cornerstone principle of arbitration. Mr Olawoyin added that the principle goes with a common saying that arbitration depends on the arbitrator the party has chosen.

Mr Olawoyin said selecting an arbitrator is one of the most important functions that a party to arbitration proceedings would do apart from actually entering into an arbitral agreement. He added that choosing a clear minded, impartial and competent arbitrator is very important. He noted that choosing the right ar-



*President of the Chartered Institute of Arbitration (CIArb), Nayla Comair-Obeid, gave a welcoming speech at the CIArb International Conference held in Johannesburg in July.*



*University of Stellenbosch's Professor, David Butler, was one of the South African delegates discussing international arbitration.*





*Partner at Quin Emanuel Urquhart and Sullivan in Paris, Isabelle Michou, spoke about when dispute arises between foreign investors and host states the investment was made at.*

bitrator should not be limited to choosing an arbitrator based on the worth of their invoice. He said there are certain details that a party has to investigate, such as the background of the arbitrator in terms of the particulars of the dispute at hand.

Mr Olawoyin pointed out that the party

might need to look at the culture of the particular arbitrator they want to choose. He said that generally speaking it has been disappointing that the dispute resolution process is shaped by the culture of those who practice it.

University of Stellenbosch's Professor, David Butler, in his discussion said that when a state owned company has entered into a commercial contract and takes certain actions in terms of the contract, it would seem that in certain circumstances that the action will still be consumed as administrative action. He added that one can have a widely worded arbitration clause in the contract and the dispute relating to the action taken by a state company will be regarded as a commercial action or administrative action when it could possibly not be.

Mr Butler noted that the type of contract he was discussing would normally be as a result of a tender process, but the discussion was not limited to those circumstances. He said that it should be noted that although there is a point of adopting Model Law for International Commercial Law Arbitration, it will not affect the particular issue of the administrative action. He pointed out that s 33

of the Constitution, provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Partner at Quin Emanuel Urquhart and Sullivan in Paris, Isabelle Michou, said when a dispute arises between a foreign investor and a host invest country, the foreign investor is offered to arbitrate. She added that the process requires that an investor fills in a document requesting for arbitration and once the offer is accepted, the offer and the acceptance serves as a binding consent to arbitrate.

Ms Michou noted that the above mentioned method is the reason why treaty based arbitration is called arbitration without priority, because it does not require prior contracting between foreign investor and the host state. She pointed out that consent on investments arbitration has various sources and that African countries still very often include a contract between a foreign investor and the host state of the investment arbitration.

• See also editorial 'Dialogue on the International Arbitration Bill' 2017 (July) DR 3.

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## NMMU formally changes name to Nelson Mandela University

**T**he Nelson Mandela University formerly known as Nelson Mandela Metropolitan University (NMMU), has officially changed its name. The university said in a statement that as from 7 October 2016, in accordance with GN1222 GG40334/7-10-2016, the university will be known as the Nelson Mandela University. The statement added that the university launched the new name on 20 July.

The university said that in the interim, it traded on the old name, hence, the delay in correspondence relating to the name change of the university. In the statement the university pointed out that the new name should be used with all matters related to the university, whether it be for qualifications associated with the university, relationships with the university, agreements entered into with the university, or any other form of association with the university.

The university pointed out that regardless of the name change, the terms and conditions on all contracts, agreements and other instruments, which form the basis of any association with the university, remains unchanged.

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## The BLA pays tribute to the late Judge Moloi

The sad news of the passing of Judge Khalipi Jake Moloi left the members of the Black Lawyers Association (BLA) shocked and devastated. The BLA believes that Judge Moloi left us at a time when he still had much to offer to the judiciary and to the legal profession. He remained a good example of excellence and perseverance. The BLA observed this in the manner in which he applied himself throughout his legal career. After matriculation he attained a diploma iuris and he started his legal career as a court interpreter. He grew within the system until he became a magistrate. Judge Moloi educated himself until he obtained two LLM degrees. He persevered with such determination that after practising on his own account for many years, in 2009, he was elevated to the Bench at the Free State Division of the High Court of South Africa (SA).

Much has been written about the leadership roles and public service of this stalwart through statements released by the office of the Chief Justice and the Co-chairpersons of the Law Society of South Africa (LSSA), among others. The statements mainly covered the life of Judge Moloi as a jurist. Judge Moloi was a fearless human rights activist throughout his adult life. The Free State was a 'no go' area for black and Indian people, as they were regarded as *persona non grata* by the Apartheid government. Against all odds, Judge Moloi opened his legal practice in the Free State and gave dignity to African people as his was the first black law firm in the Free State. All black practitioners who subsequently opened law firms in the Free State were trained by Judge Moloi during their articles of clerkship. Among these are, Judge President Mahube Molemela, Judge Elizabeth Mamoloko Kubushi and Judge Mpina Mathebula. It is through the success of those that he trained that we can now measure appropriately the amount of good work that he did.

After the declaration of the State of Emergency by the Apartheid regime in 1985 Judge Moloi's firmness as a human rights lawyer was observed when his firm represented all the victims of brutality including young children who were detained indefinitely under the emergency regulations and those charged under security legislation, in the then Orange Free State. Judge Moloi was a courageous lawyer who put the interest of his clients above all other considerations. His courage was fully distinguished as he led a delegation of the civic and mass democratic movement to Pretoria to negotiate with the then Minister of Police, Adriaan Vlok, for the release of school children. (This delegation was arranged by TV Matsepe, another BLA stalwart.) This action had the potential to bring heavy-handedness to himself and his

immediate family by the Apartheid security agencies, but he chose to identify himself with school children and other victims of government brutality. Judge Moloi fought against the rule by law for the rule of law. He stood for equality before the law.

Judge Moloi was a visionary. He served two terms as President of the BLA. The LSSA was established under his BLA presidency. He played a pivotal role in transforming the Association of Law Societies into the LSSA and, thereby, paved the way for the beginning of the transformation of the legal profession as a whole. He was the Co-chairperson of the LSSA for the 1999/2000 term. Judge Moloi, as the President of the BLA, relentlessly advocated for replacement of the Attorneys Act 53 of 1979 by the new Act with the objective of changing governance and the manner of regulation of the profession. His efforts resulted in the promulgation of the Legal Practice Act 28 of 2014 (LPA). He is, therefore, the champion of the LPA, who unfortunately did not witness the full implementation thereof.

During his Presidency at the BLA he crisscrossed SA visiting historically disadvantaged universities' law faculties organising law students to form the BLA Student Chapter. This was a successful exercise given the fact that currently there is no university in SA without a BLA Student Chapter. Almost all of the current BLA leadership and chairpersons of provincial branches cut their teeth in the various BLA Student Chapters. As a result of his vision and efforts the BLA today boasts to be the mother body of the largest legal student chapter on the African continent.

Some of Judge Moloi's major contributions in the early days of SA's democracy were his participation in the healing of SA as a member of the Amnesty Committee of the Truth and Reconciliation Commission, as well as the drafting of the Black Economic Empowerment Policy document as a member of the Black Economic Empowerment Commission chaired by Cyril Ramaphosa, the current Deputy President of SA. He proved that given an opportunity, black legal practitioners can compete on the world stage, when he was contracted by the European Union in Brussels to assist in regulating and improving international trade relations. He was the first black Chief State Attorney from 1998 to 2000.

As a sign of true patriotism, in 2009 he reluctantly accepted the appointment to the Bench at the age of 63, an age, when

others are contemplating retirement. This was another contribution on his side to change the South African jurisprudence to reflect its people, in particular the majority within the four corners of the Constitution that empowers the judiciary to develop new law. Some of his seminal judgments in his short stint as a judge reflect this.

As the BLA, we are certain that if Judge Moloi was still a practicing attorney he would have led the BLA march, in July, to the Union Buildings when a memorandum on the plight of black legal practitioners was handed over to the Presidency (see p9). He expressed his support to the BLA march and lamented on the appalling conditions of black legal practitioners 23 years after democracy despite the major contribution of black legal practitioners in our struggle, some of whom also paid the ultimate price with their lives.

The BLA pays homage to this brave leader and stalwart of the BLA who spent his entire life in pursuit of equality and justice for all. In his quest for the realisation of the dreams of a black child, a black lawyer in particular, he either individually or as a member of a collective, disregarded the boundaries of Apartheid, perceived and/or real in order to achieve goals he set for himself. He found ways and solutions in many unmapped and unexplored terrains in the South African legal profession.

The BLA mourns the passing of Judge Moloi and the BLA finds comfort and solace in the knowledge that his life was not in vain. It was a life well-lived and fulfilled by serving the weak. Judge Moloi leaves behind a great legacy to all inherit and help take forward. He laid a foundation on which a stronger BLA of the future shall be built. His leadership defined the BLA in its first 40 years of championing the legacy of black legal practitioners and he is the cornerstone on which the foundation of the next 40 years of the BLA's relevance and struggles shall be laid. Through his deeds Judge Moloi will forever live in our hearts.

The BLA extends our deep profound compassion and condolences to his close relatives, family and friends, his colleagues on the Bench and the entire BLA membership.

Lutendo Benedict Sigogo,  
President of the Black Lawyers Association

**2**017 sees the Cape Town Candidates Attorney Association (CTCAA) go into its sixth year of serving the junior practitioners of the legal fraternity in the greater Cape Town area. The CTCAA has shown a growing influence in the legal industry with its particular focus on addressing various issues facing candidate attorneys (CAs) and assisting them with the first practical hurdle of their formal legal careers, as well as participating in social outreach work.

This year's executive committee boasts a collection of CAs from a diverse range of firms, all with very different backgrounds. While only constituted of five permanent executive members, there is no shortage of enthusiasm to tackle this year's agenda head on. The current committee consists of:

- Jody Blount (chairperson);
- Hondo Swartz (deputy chairperson and treasurer);
- Jenipher Mudenda (executive member);
- Kyle Abrahams (compliance officer); and
- Marieka Nel (general secretary).

From its inception, the CTCAA has taken the lead in a number of social outreach initiatives. Last year the CTCAA put its efforts into expanding its social involvement. This culminated in being able to present its chosen charity, The Homestead, a charitable trust aimed at getting children off the streets of Cape Town, with a large cash donation to be put towards furthering its own objectives. The CTCAA, in partnership with BMW Auto Atlantic, hosted a fun day for the enjoyment of the children participating in The Homestead's programme on Mandela Day 2016.

The CTCAA also hosted and facilitated a number of events in partnership with secondary school institutions, which saw learners taking part in various educational days, career and lifestyle building activities, as well as accompanying CAs to work in the CTCAA's annual 'take a child to a law firm day' to give the prospective future attorneys their very first experience of life in the legal profession. (See news 'Cape Town Candidate Attorneys Association update' 2016 (Sept) DR 10.)

This year's 'take a child to a law firm day', was held on 25 May. The CTCAA, in

partnership with Maitland High School, Schneider Galloon Reef & Co Attorneys, Chris Fink Attorneys, Cliff Dekker Hofmeyr, DSC Attorneys, Webber Wentzel, Ashersons Attorneys, Bailey Haynes Inc, RM Brown Attorneys, Strauss Daly and Old Mutual Legal was enjoyed by learners and a huge success. The programme saw learners enjoy a full day in a law firm experiencing the day-to-day life of a legal professional.

- Should your firm wish to participate in next year's event do not hesitate to make contact with the association in order to confirm your firm's inclusion.

The CTCAA additionally attempts to foster interaction between CAs of various practices in the greater Cape Town area through hosting both informal and formal meets for the purposes of networking, as well as engaging with other young legal minds. This year has already seen two events of this kind, one of them being the CTCAA's much anticipated Pub Quiz night, which proved to be a hotly contested evening.

Without negating its obligation to further its social outreach objectives, the executive committee has decided to put its focus on addressing the various industry based issues faced by CAs entering the legal environment, who in many instances, find themselves in positions of weaker bargaining power, as well as addressing possible issues that law firms may experience when and after hiring their new inductees. In doing so, the CTCAA hopes to add to a more harmonious and effective system of candidacy. If CAs or law firms have any genuine concerns, which they would like to address to the CTCAA for further investigation, e-mail the CTCAA at [thectcaa@gmail.com](mailto:thectcaa@gmail.com).

In 2017 the CTCAA further aims to grow its network of influence in order to build on the success of the past years by assisting a greater number of CAs, as well as charitable causes in line with its social objectives. This can only be done

## Happenings at the Cape Town Candidate Attorney Association

by the CTCAA growing its partnerships with other stakeholders, specifically those within the legal industry.

The CTCAA held its flagship event, the Young Professionals Evening on 7 September. This event was aimed at bringing working professionals, not limited to CAs, together for a relaxed evening of networking and entertainment. The annual event was held with the support of BMW Auto Atlantic and served as an opportunity for CAs new to the profession to branch out and make useful connections.

On 23 September the CTCAA will host its annual education/career training day in partnership with Maitland High School. This day has been created in order to assist Grade 11 learners at the school prepare for upcoming decisions that they have to make with regard to university and ultimately their future careers by facilitating a day of workshopping with a number of experienced professionals from a wide array of fields and allowing them to share their personal experience of what it takes to reach the goals the students aspire to. The details of the event can be found on the CTCAA website.

To close off the year, the CTCAA will be hosting a formal black-tie event, the details of which will be announced closer to the time. The CTCAA would at this time like to extend an open invitation to all who would like to get involved or just learn a little bit more about what the association does and what has been achieved in the year to date.

At this time, the CTCAA is the only association of CAs in South Africa (SA). As such we do extend our assistance, where we can, to candidates not from the greater Cape Town area. We do, however, recommend that CAs in other jurisdiction of the country come together in the achievement of our common aim to continually grow the legal system of SA. The CTCAA would be glad to assist any person hoping to start a similar association in their area of practice and we encourage anyone hoping to do so to make contact with us.

- The CTCAA can be contacted at, [thectcaa@gmail.com](mailto:thectcaa@gmail.com), as well as on Facebook and the associations website can be found at [www.ctcaa.co.za](http://www.ctcaa.co.za).

*Jody Blount is a candidate attorney  
and chairperson of the CTCAA.*





# The profession celebrates the immense contribution of Nic Swart as it mourns his passing

**S**peaking at the memorial service for Law Society of South Africa (LSSA) Chief Executive Officer (CEO) Nic Swart, Chief Justice Mogoeng Mogoeng paid tribute to the role played by Mr Swart in his leadership of the profession, legal education, judicial skills training and in the briefing pattern initiative 'to make sure that South Africa becomes what it is envisioned to be in the Constitution'.

He said: 'Nic so cared about our constitutional order that he was committed to making sure that there is normalcy in the manner in which quality work is distributed to lawyers. He was so committed to equality and to healing the divisions of the past, that he made sure that there was a Briefing Summit in 2016, and he made sure that a protocol was signed so that even women and even black lawyers receive quality work. He did not see himself as distant from the solution.'

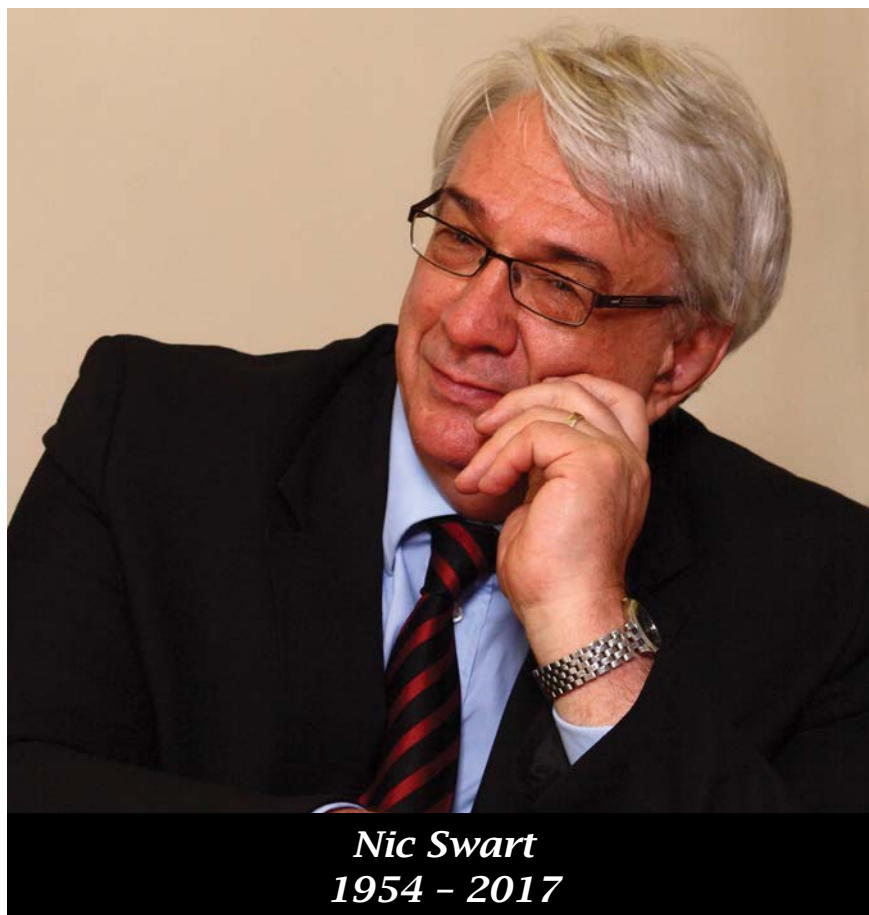
The Chief Justice said Mr Swart fought hard to have the procurement protocols for the legal profession realised so that these would contribute to the normalisation of briefing patterns. 'He wanted to make a contribution to the attainment of a normal situation for meaningful participation by all, black and white, men and women.'

The Chief Justice said: 'Nic Swart was a man who never made you feel small. A true South African who knew that power means nothing; that we are just human beings. We all belong to this land and this land belongs to all of us, united.'

Mr Swart passed away on 10 August in Gaborone, Botswana while attending the SADC Lawyers Association conference. He was 63 years old.

On learning of his unexpected death, the LSSA said it was deeply shocked and saddened to announce the untimely death of its CEO and Director of Legal Education and Development (LEAD). LSSA Co-chairpersons, David Bekker and Walid Brown said in a statement: 'The LSSA council, staff and the profession have lost a colleague, a dear friend, a mentor, a leader and an innovator passionate about the legal profession in general and legal education in particular.'

The Co-chairpersons said: 'Nic has led the LSSA and its various departments ably as CEO since 2011 through times of growth and achievement locally, re-



**Nic Swart**  
**1954 – 2017**

gionally and internationally, but also through the difficult and at times contentious and uncertain processes around the transition to the new dispensation under the Legal Practice Act [28 of 2014 (LPA)]. A consummate educationist, he strove to ensure that practical vocational training and continuing legal education, which he has spearheaded and nurtured since 1989, continue to be accessible and affordable for aspirant legal practitioners and those already in practice. Nic was especially passionate about the empowerment of young lawyers and of the LSSA staff.

'Our profession owes an incalculable debt of gratitude to Nic Swart, as do the thousands of attorneys who have received training, guidance and support from his beloved School for Legal Practice and the LEAD department over nearly three decades.'

Mr Swart joined the LSSA's predecessor, the Association of Law Societies,

in 1989 to start a pilot school for legal practice. That small pilot project, with only 51 candidate attorneys, has grown immensely since 1990 to one of the premier legal education institutions in the country, which has trained over 26 000 candidate attorneys through Mr Swart's vision, unstinting dedication and hard work. There are now nine centres of the school throughout the country and a distance school run in cooperation with Unisa. In 2002, after the death of Renate de Klerk, the practical legal training and continuing legal education sections of the LSSA were combined into the LEAD department, under the leadership of Mr Swart. More than 11 000 practitioners and their support staff receive continuing education training through LEAD every year.

Mr Swart had the BA and LLB degrees from the University of Pretoria and a BCom from Unisa. He was an admitted attorney and an accredited assessor and

moderator. He also served as a member of law faculty boards at Unisa, the University of Fort Hare and the University of KwaZulu-Natal, and was a professor extraordinary at the University of Pretoria.

## From the BLA

In a press release, the Black Lawyers Association (BLA) said it was heartbroken by this loss and that it believed that Mr Swart still had a role to play in the transition to the new dispensation. BLA President, Lutendo Sigogo described Mr Swart as an 'intelligent person, full of vision, with his mind always focused on the future.' He said that Mr Swart applied his mind earnestly on the affairs of the legal profession. Mr Sigogo said: 'Under the leadership of Nic, LEAD developed many educational programmes to empower young lawyers and new entrants to the profession. Continuous legal education was also at the centre of his heart. Nic's efforts and strategic direction made LEAD the world-class legal education service provider it is today.'

Mr Sigogo added that in the pursuit of transforming the legal profession and developing attorneys through practical legal training and continuing legal education, Mr Swart worked closely with the BLA and that on issues where the BLA and he did not agree, they disagreed with respect. 'Nic was a man of good work ethos and was not a procrastinator. His colleagues and subordinates can confirm his high work ethic, for instance the night before his passing, Nic was busy at work giving strategic directions and leadership through e-mails on some of the LSSA projects. He took pride in his work,' he said.

The BLA President added: 'Nic leaves us at a very crucial time in the transformation of the legal profession in South Africa. He was very instrumental in directing the future of legal education under the LPA dispensation. He produced copious, well-researched legal education documents giving expert advice to the LSSA members in the National Forum [NF], a transitional body responsible for the transformation of the legal profession in terms of the LPA. Nic was very eager to see the success of the NF and the ultimate composition of the Legal Practice Council [LPC]. Nic invested a lot of his time and energy doing comparative studies in respect of the regulation of the legal profession in other jurisdictions. He attended all the plenary sessions of the NF in order to have a first-hand account of developments intended to shape the legal profession. At the time of his passing, Nic had just assembled a team of attorneys to visit the Nigerian Bar Association in the last week of August 2017 to conduct a fact-finding mission and for the two Bars to exchange notes on each other's experiences. This

he did to find workable templates which could be applied in South Africa.

'The BLA will miss counsel from Nic who was always available to share his wisdom with whoever wanted to tap therefrom. Nic had great listening skills. He listened with patience and interest without interjecting. He gave respect to all people he interacted with, irrespective of their social and educational standing in the community,' Mr Sigogo concluded.

## From the CLS

The Cape Law Society (CLS) said that Mr Swart would be missed and that he had left a vacuum in the legal profession. In a press release CLS Acting President, Lula-ma Lobi, said that Mr Swart dedicated his life to the legal profession and its structures, and particularly to the education of its membership and prospective membership. Mr Lobi said that Mr Swart never lost sight of the difficulties, particularly financial, experienced by previously disadvantaged students. He added: 'Mr Swart's contribution to the development of the legal profession over his years of devoted service has been profound and he will be remembered for his passion for the profession and as a stalwart of the profession.'

## From the KZNLS

KwaZulu-Natal Law Society President, Umesh Jivan, noted that Mr Swart had served the attorneys' profession for several years as director of LEAD and as CEO of the LSSA. 'He was committed to the improvement of the attorney's profession and especially young attorneys who were entering the profession. His wise counsel will be missed by all who worked with him,' said Mr Jivan. He said that the staff, councillors and members of the KZNLS had learnt of Mr Swart's death with great sadness.

## From the LSFS

The Law Society of the Free State (LSFS) said it had received the sad news of the untimely departure of Mr Swart, with a heavy and sore heart.

President of the LSFS, Cuma Tabo Siyo, said: 'An innovator and trail blazer par excellence, Nic was much respected in the legal fraternity for his visionary leadership and mammoth contribution in the legal education sphere, more in particular in matters of development of young lawyers and vocational training. He departs at a time when the legal profession is in transition and needs his visionary and strategic leadership more than ever. He leaves behind a plethora of innovative projects that he has been working on in the development and advancement of the profession. His untimely death is not a tragic loss to his family only, but also the legal fraternity at large.'

He added: 'We can all take solace from

the fact that Nic did not lead a meaningless life but one well-lived and beneficial to his family and every one of us in the legal fraternity.'

## From the LSNP

The Law Society of the Northern Provinces (LSNP) said it was greatly saddened by the news of Mr Swart's death. LSNP President, Lutendo Sigogo, said 'Nic was highly respected in the legal fraternity for his leadership qualities and specifically for his contribution in the legal education field as well as his proactive involvement in issues such as young lawyers and vocational training.'

Mr Sigogo added: 'Nic showed leadership in assisting with the transitional arrangement relating to the implementation of the new dispensation under the Legal Practice Act. Nic was a friend of the profession and all his colleagues, we will miss him for his many talents, energy and can-do spirit. Nic was truly a very special and unique man. He was one of those extraordinary people that many loved and wanted to be around for his great warmth, grace, integrity and friendship.'

## From NADEL

The National Association of Democratic Lawyers (NADEL) said that Mr Swart was passionate about the transformation and development of the profession, especially the development of female and young lawyers. In a press release, NADEL's Publicity Secretary, Memory Sosibo said: 'NADEL has throughout the years partnered with Nic in various development projects within both the LSSA and LEAD. Our latest joint project was the Judicial Skills Training Project. One recalls, while working on this project, his disappointment at the low number of females who had registered to attend the course. We sat and strategised on ways to improve female attendance. He understood fully and shared our vision that transformation of the profession was going to have to be intentional and that there was still a lot of hard work to be done in order to achieve it.'

His high level of skills, efficiency and compassion made working with him an absolute pleasure. The work he has done in the LSSA and LEAD is truly appreciated. The legal profession is indebted to him for his dedication and sacrifice.'

• The LSSA thanks the numerous practitioners, institutions and organisations, local, regional and international, that Mr Swart had worked, interacted and cooperated with in his three decades of service to the profession, for their messages of condolence and support.

Barbara Whittle and Nomfundo Manyathi-Jele  
Communications Department,  
Law Society of South Africa

# What it means to be a judge tackled at Judicial Skills Training course

**T**he Legal Education and Development (LEAD) division of the Law Society of South Africa (LSSA), together with the National Association of Democratic Lawyers, held this year's first judicial skills training course for attorneys in Pietermaritzburg in late July. The six-day training aims to empower attorneys by introducing them to the skills required of judicial officers. This also assists attorneys in knowing what is expected from them as judicial officers.

Pietermaritzburg High Court Judge, Yvonne Mbatha – a former attorney – delivered an opening address at the training. She acknowledged the significant role played by LSSA Chief Executive Officer, Nic Swart, LEAD and the LSSA in the education of attorneys. 'As a former attorney myself, I extensively relied on the legal resources and educational material provided by LEAD,' she said.

Judge Mbatha spoke about what it means to be a judge and said that this question should always be at the back of the mind of every judge, and more particularly someone aspiring to become a judge. 'Being a judge is not something that should be taken very lightly or merely as some kind of a social status,' she said.

Judge Mbatha said that South African courts and judicial officers are bound by the Constitution and by their oath of office to apply the law impartially and without fear, favour or prejudice. She added that a judge is regarded as a community leader because of those attributes, and also because judges cannot command respect if they do not uphold the rule of law and behave in a manner unbefitting of their office.

According to Judge Mbatha 'dignity and respect does not arise from being feared, but from humility and hard work.



*Practitioners attending the LSSA/NADEL judicial skills training course in Pietermaritzburg in July together with some of the trainers, including Judge President Frans Legodi of the Mpumalanga Division of the High Court. Judge Kate Pillay and Judge Pete Koen from the KwaZulu-Natal High Court also provided training.*

These attributes are earned by giving people an opportunity to state their case before you, in order for you as a judge to weigh both sides of the story first before giving a ruling or judgment.'

Judge Mbatha said that good ethics are paramount and should be second nature to a judicial officer. She noted: 'Ethics do not only relate to how you behave outside the court, but also require that you treat litigants, colleagues and counsel with dignity, respect and impartiality. Matters should not be forejudged, but rather counsels' arguments should first be listened to, as many a time they may have a valid point.'

Judge Mbatha dealt with recusal and explained that a judge should recuse themselves if they have an interest in the matter before them; if it is a matter that they had dealt with before being elevated onto the Bench, or where they have per-

sonal knowledge about the parties or the facts of the case.

Judge Mbatha concluded by saying: 'For a judge to be able to give effect to her or his mandate, she or he must know the law, must keep abreast with the developments in the law, must know what is expected of her or him. Judges read extensively; they research their matters and apply their minds to the facts before them. It is, therefore, important that as aspirant judges, you also update your IT skills as processes will soon be done online. This is part and parcel of your skills.'

The LSSA/NADEL Judicial Skills Training course will also be held in Gauteng in early October.

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



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# LSSA submissions on Sectional Titles and Copyright Amendment Bills

**T**he Law Society of South Africa (LSSA) has submitted comments on the Sectional Titles Amendment Bill, 2017.

In its submissions, the LSSA recommended that some words should be changed in some of the sections. The LSSA stated that it vigorously opposes the provision in s 5 (s 15B(1)(e) of the Sectional Titles Act (the Act)). The provision in this proposed subsection states that a certificate by a conveyancer must be submitted to prove that the title deed for the rights of extension is not available.

The LSSA is of the view that the application contemplated in this subsection must be brought either by the developer or the body corporate, and proposed that the section be changed to require an affidavit by either the developer or the body corporate, 'as the case may be - to the effect that the title deed is not available. If the developer or the body corporate is going to be signing the application anyway, it is advisable to get the signatory to depose to an affidavit at the same time. The conveyancer is in no better position to certify this than these two parties are able to depose to under affidavit.'

Regarding s 6(c) (s 17(4C) of the Act), the LSSA said: 'The last part of this subsection requires "the written consent of the holder thereof" to the cancellation of the real right or a part thereof. As such a cancellation has to be done by bilateral notarial deed it is not clear why the "written consent" of the holder is required. The subsection should simply require cancellation by bilateral notarial deed. (We note that the same wording already

appears under s 17(4)(b)(a), which likewise does not appear to make sense.'

The LSSA fully supported the deletion in s 9(c) (s 22(d) of the Act). It is of the view that the current wording of s 22(2)(d) of the Act is contrary to all the principles of substituted titles. 'The subsection, as it stands, was the subject of much debate at the Registrars' Conference of 2015, where it was pointed out ... that the wording of the subsection had been inserted in error.

As the subsection currently stands, a partition transfer can be effected by the registration of a Certificate of Registered Sectional Titles. This is clearly untenable,' the LSSA stated.

According to the LSSA, regarding the requirement that a conveyancer must certify that, at the date of the application, no unit in the scheme has been sold, donated or exchanged is entirely untenable in s 9(e) (s 22(2A)(a) of the Act) - new subsection. The LSSA said that it should not be expected of a conveyancer to certify this. 'There may be several conveyancers not all acting for the developer, and a conveyancer has no control over what agreements the developer has signed an hour or so earlier,' it said.

The LSSA strongly recommended that any such application contemplated in this subsection must be supported by an affidavit by the developer to the effect that no unit in the scheme has been sold, donated or exchanged. This recommendation also went for s 10(c) (s 23(2A)(a) of the Act) - new subsection and s 11(c) (s 24(3)(eA)(a) of the Act) - new subsection, where the LSSA stated: 'The requirement of a conveyancer's certificate in these circumstances is vigorously opposed by

the LSSA in favour of an affidavit by the developer.'

## Copyright Amendment Bill

The LSSA supported the comments made by the South African Institute of Intellectual Property Law (SAIIPL), as well as the comments made by Copyright Alliance on the Copyright Amendment Bill B13 of 2017.

In its submission, SAIPL stated that the Bill, 'in its present form, is not suitable to be signed into law and that it will have far-reaching consequences, which will lead to the undermining of the principles and objectives of copyright law, legal uncertainty and, most importantly, the undermining of the rights of the authors, creators, songwriters, artists and other individuals whose rights the Amendment Bill is ostensibly aimed at improving and protecting'.

SAIPL recommended that certain clauses be removed and others be redrafted in order to avoid 'very undesirable consequences'.

Copyright Alliance was of the view that 'there are provisions in the Bill which, if not brought to the Committee's attention and rectified, will effectively nullify the intentions of the Department of Trade and Industry and will perpetuate the scourge of South African creators, being among the most vulnerable and under-compensated in our society.'

The full submissions can be accessed on the LSSA website at [www.LSSA.org.za](http://www.LSSA.org.za) under the 'Our initiatives - Advocacy - Comments on legislation' tabs.

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



## LOOKING FOR A CANDIDATE ATTORNEY?

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

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

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

# People and practices

Compiled by Shireen Mahomed

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)

**Nelson Borman & Partners Inc** in Johannesburg has two new appointments.



Abednego Vulingqondo Duma has been appointed as a director in the High Court litigation department. He specialises in delictual matters.



Victor Duncan Zitha has been appointed as a director in the High Court litigation department. He specialises in personal injury claims and commercial affairs.



Sheryl Sarjoo opened her own practice in February practising as **Sarjoo Attorneys** in Durban. She specialises in both civil and criminal litigation.

**Eversheds Sutherland** in Durban has two new appointments and one promotion.



Storm Moore has been appointed as a senior associate in the litigation department.



Lara Jansen van Rensburg has been appointed as an associate in the corporate commercial department.



Heather Marsden has been promoted as a senior associate in the real estate department.



**SAP Dreyer Attorneys** in Somerset West has appointed Clarissa Peacock as an associate.

**Hogan Lovells** in Johannesburg has two new appointments.



Sibongile Solombela has been appointed as a partner in the corporate department.



Bridget Letsholo has been appointed as an associate in the business restructuring and insolvency department.



**Cliffe Dekker Hofmeyr** in Johannesburg has appointed Zaakir Mohamed as a director in the dispute resolution department. He specialises in white collar crime, forensic investigations, cyber-crime and corporate governance.

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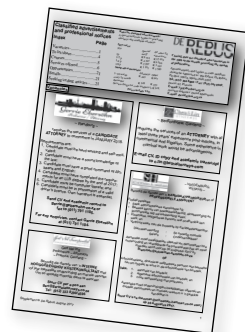
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By the  
Practitioner  
Support Unit of  
the Attorneys  
Fidelity Fund

# The clock is ticking... time to start applying for Fidelity Fund Certificates

**I**t is almost that time of the year when practitioners will start applying for their 2018 Fidelity Fund Certificates (FFC) online. The Attorneys Fidelity Fund (AFF), have in the past two years, had to assist practitioners on a number of areas regarding the issuance of their FFC, using the online system. This article aims to further equip practitioners as they prepare for the next round of applications for the 2018 FFCs. As a reminder, current practitioners are expected to apply for their FFCs between October and December in order to be compliant with the legislative requirement to hold an FFC in order to practice.

The AFF have noted that some practitioners continue to practice without valid certificates, as they only apply for their certificates later in the year, after their certificate has expired. This is a compliance issue that each active practitioner is expected to comply with.

In an attempt to manage the call volumes and assist practitioners in understanding the various criteria used to issue certificates, the AFF will, in detail, deal with the two major areas that the provincial law societies will consider in deciding whether to issue the certificates.

## Firm(s) audit report(s)

Practitioners must ensure that they conclude their firm(s) audits on time, submit their audit reports to the respective provincial law societies, and ensure that the provincial law societies approve the submitted audit reports. Submission of the audit report does not automatically qualify a practitioner for a FFC, but an approved audit by the provincial law societies satisfies one of the criteria that should be met.

The provincial law societies issue certificates to practitioners and not to firms, but they issue to practitioners for specific firms. Practitioners linked to more than one firm – either as a director, a partner or a sole practitioner – should ensure that each of the firms to which

they are linked has an approved audit. Failure to meet this requirement on any one of the firms will prohibit the issuance of a certificate even for the other firms, irrespective of the audit approval status in the other firms.

The provincial law society will consider the following audit approval statuses for the respective year as follows:

- **Yes** – this is the audit approval status acceptable for issuance of a certificate. This status suggests that an audit report was submitted by the firm, reviewed and approved by the provincial law society.
- **No** – this audit approval status will result in a withheld certificate. This status suggests that the firm submitted the audit report, the provincial law society reviewed the report, but did not approve the audit report. There are various reasons why the provincial law society would not approve the audit report, and those reasons can be sourced directly from the affected provincial law society's audit section.
- **None** – this audit approval status will result in a withheld certificate. The status suggests that there is no approval status. This could be as a result of an audit report not submitted to the provincial law society, or the status not captured.
- **Future** – this is another audit approval status acceptable for issuance of a certificate. This status is assigned to new firms who are not yet required to furnish any form of an audit report. However, it should be noted that even for new firms, whose opening audit has already fallen due, the other statuses will apply, and the affected firms will be assessed in terms of the same criteria applied to other firms depending on the assigned status.

In this regard, we urge practitioners to pay special attention to the 'Reporting Requirements' as contained in the Rules for the Attorneys' Profession, r 35.19 up to and including r 35.29.

Practitioners who are not sure of their firm(s) audit report status can log onto the application system and navigate the system as follows:

- Log into the system using existing credentials.
- Go to firm/member administration.
- Go to PCC practice/firm under available participant types.
- Go to practice/firm under select participant type.
- Select the firm's name under maintain firm.
- Select the audit history tab from the listed tabs and view the audit approval status for each year.

## Practice management training

The practice management training (PMT) course provided by the Legal Education and Development unit of the Law Society of South Africa became compulsory to all practitioners who started practising post 14 August 2009. This training, aimed at equipping new practitioners with skills on running a practice, is another criterion that the provincial law societies strictly consider for issuance of FFCs. Practitioners who are expected to conclude this training should do so within the specified timeframes, as failure to do so will result in non-issuance of a certificate. Practitioners, who are unsure of the due dates for completion thereof, are advised to contact their provincial law societies and get clarity in this regard.

The provincial law society will consider the following PMT statuses as follows:

- **Exemption** – this is based on various considerations that the provincial law society will make. Only the provincial law society can exempt a practitioner from doing the course, either based on when the practitioner practised for his or her own account for the very first time, or other criteria as the provincial law society may determine. A practitioner with this status will be eligible for a certificate, if all other requirements are met.
- **Completed** – a practitioner gets this status once the course has been completed and the provincial law society is aware of this fact. A practitioner with this status will be eligible for a certificate.



cate, if all other requirements are met.

- **Future** – this status is assigned to newer practitioners who are expected to complete the course in a future date. A practitioner with this status will be eligible for a certificate, if all other requirements are met.

- **Required** – for practitioners reflecting a status that the course is required, meaning the practitioner should have completed or should complete the course before the provincial law society issues the certificate, a certificate will be withheld until the requirement is met. A practitioner with this status will, therefore, not be eligible for a certificate.

Practitioners who are not sure of their PMT status can log onto the application system and navigate the system as follows:

- Log into the system using existing credentials.
- Go to firm/member administration.
- Go to MEM member under available participant types.
- Go to members under select participant type.
- Select the practitioner's name under members' administration.
- Select the Risks tab from the listed tabs and view your status.

Should a practitioner not agree with the reflected status, on either or both

the audit report and PMT, practitioners should contact their respective provincial law societies to resolve the issue.

If these requirements are met, there are no outstanding amounts due to the provincial law society, and the practitioner and/or the firm(s) are not black listed or red flagged by any of the provincial law societies, the provincial law society may issue a practitioner's certificate.

Practitioners are also required to have their balances and other information required for completion of the application form ready. We dealt with this in detail in 'Applying for a Fidelity Fund Certificate' (2016 (Sept) DR 15) and we urge practitioners to read this article together with that one.

### Conclusion

In conclusion, we urge practitioners to apply for their certificates for 2018 on time. Practitioners must endeavour to have the certificates for 2018, at the latest, by 31 December 2017.

The Practitioner Support Unit of the Attorneys Fidelity Fund is situated in Centurion.

## Contact details for your provincial law society:

- **Cape Law Society:**  
(021) 443 6700
- **Free State Law Society:**  
(051) 447 3237
- **KwaZulu-Natal Law Society:**  
(033) 345 1304
- **Law Society of the Northern Provinces:**  
(012) 338 5800

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# Section 198 of the Criminal Procedure Act: Marital privilege or unfair discrimination on ground of marital status?

While the privilege against disclosing marital communications has long been a topic of debate, the question that has yet to be answered is whether such a privilege amounts to unfair discrimination on the ground of marital status? In a time where the public outcry for criminal courts to establish the truth has become increasingly relevant some issues directly relevant to the question at hand are important to highlight in this regard.

First, in terms of s 198 of the Criminal Procedure Act 51 of 1977 (the CPA), spouses are the only category of witness deserving of a right to refuse to disclose both admissible and even highly relevant evidence when testifying before a court of law. Secondly, given that only married persons can invoke the right to marital privilege, s 198 of the CPA clearly fails to accommodate persons who either reject the institution of marriage or cannot enter into a legally recognised marriage for numerous reasons. One would argue that even these individuals still desire an equivalent legal status in respect of their communications made between each other. Thirdly, while marital communications are regarded as privileged, s 14(d) of the Constitution provides that every person has a right against the infringement of his or her private communications.

When applying s 198 of the CPA to the unfair discrimination test as set out in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), the findings thereof can also be summarised as follows:

- In terms of the first stage of the inquiry the section makes a differentiation between people who are married and people who are not. However, given that the differentiation is one that is based on a rational governmental objective, the section does not necessarily violate s 9(1) of the Constitution.

- In terms of the second stage of the inquiry, it would appear that the differentiation created by s 198 is based on the ground of marital status. As such, discrimination is established. Moreover, given that marital status also qualifies as a specified ground in terms of s 9(3) of the Constitution the effect thereof is arguably that –

- unfairness is presumed; and

- a *prima facie* violation of ss 9(3) and 9(4) of the Constitution is present.

- In terms of the third stage of the inquiry, if one agrees that the *prima facie* unfair discrimination of s 198 also lacks any significant ground of justification in respect of s 36 of the Constitution, it may be accepted that the section should be declared as unconstitutional. In this context, the Constitutional Court (CC) in *Ex Parte Chairperson of the Constitution-*

*al Assembly: In re Certificate of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at 806 also highlights the point that unlike the right to equality, neither the right to marry nor the right to family life is regarded as constitutionally protected rights in terms of the Bill of Rights. It, therefore, follows that, when comparing the right to equality to that of the exclusive right to marital privilege, s 9 of the Constitution clearly dictates that a spousal communication privilege is unconstitutional.

Assuming that these findings are correct not only is it arguable that s 198 of the CPA is inconsistent with the right to equality, but it would also appear that the existence of marital privilege thus becomes problematic. One suggestion that has been raised before is the call for a complete abolition of marital privilege. However, with no real changes being made up until now, I am of the opinion that if the Constitution is to be taken seriously in this regard, it is imperative that such a matter be dealt with without further delay.

Delano Abdollah is a final year LLB student at the University of Pretoria under the supervision of Dr LG Curlewis.

By  
Nkateko  
Nkhwashu

# No two accountable institutions are the same: The Financial Intelligence Centre Amendment Act 2017's risk-based approach for the legal profession

Practicing attorneys, as defined in terms of s 1 of the Attorneys Act 53 of 1979, form part of a list of institutions which are termed 'accountable institutions' (AIs) under sch 1 of the Financial Intelligence Centre Act 38 of 2001 (the Act). The Act places an obligation on AIs to comply with its provisions when carrying out daily business activities or

transactions. Some AIs – due to circumstances peculiar to the sectors within which they operate – are exempted from having to comply with all the provisions (but some) of the Act. The attorneys' profession is one such distinct profession to have been exempted from some of the provisions of the Act, namely, identification, verification and record-keeping of all business and single transactions,

subject to exceptions, namely, listed categories of transactions.

## Brief background

Just to take a step back, South Africa (SA) prides itself on being (or striving to be) compliant with international best practices and standards. Thus its financial regulatory framework draws much from the recommendations of the Finan-

cial Action Task Force (FATF). FATF sets policies and standards aimed at, among others, curbing money laundering and terrorist financing. Pretty much all that is within the Act, as well as the recent Financial Intelligence Centre Amendment Act 1 of 2017 is a 99% resemblance of the FATF Recommendations ([www.fatf-gafi.org](http://www.fatf-gafi.org), accessed 28-7-2017).

For instance, Recommendation 22 (rec 22) deals with customer due diligence for designated non-financial businesses and professions (including attorneys) specifically prescribe for a list of situations (not all situations) wherein designated non-financial businesses and professions are required to go through the entire customer due diligence process, namely, customer identification, verification and record-keeping. For attorneys, rec 22 specifically requires a full customer due diligence process when doing the following:

- Buying and selling of real estate.
- Managing of client money, securities or other assets.
- Management of bank, savings or securities accounts.
- Organisation of contributions for the creation, operation or management of companies.
- Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

All the above is captured very well under Exemption 10(1) of the Act, as it provides that attorneys are exempted 'from compliance with the client identification and record-keeping provisions of FICA in respect of every business relationship or single transaction, except for a business relationship or single transaction in terms of which:

- (a) a client is assisted in the planning or execution of –
  - the buying or selling of immovable property;
  - the buying or selling of any business undertaking;
  - the opening or management of a bank, investment or securities account;
  - the organisation of contributions necessary for the creation, operation or management of a company or close corporation or of a similar structure outside

South Africa' (see Louis de Koker *South African Money Laundering and Terrorist Financing Law* (Durban: LexisNexis 2016) at 264 to 265); and

- others (as listed in the Exemption).

The current Amendment Act seeks to, *inter alia*, introduce a risk-based approach (RBA) to customer identification and verification. Exemption 10(1) is to be withdrawn as was recently evidenced by the publication of 'Draft withdrawal notice of exemptions in terms of Financial Intelligence Centre Act, 2001' ([www.fic.gov.za](http://www.fic.gov.za), accessed 28-7-2017). The implications of this is that 'services performed by an attorney that had previously fallen outside the scope of the FIC Act will now be included in the scope of the Act. This implies that an attorney would have to determine for itself which services pose a lower or higher risk for money laundering and apply the necessary [customer due diligence] requirements in accordance with its [Risk Management and Compliance Programme].'

### What now?

The question for the Law Society of South Africa (LSSA) is whether this is a welcomed development for the profession or not, bearing in mind that 70% or more of the legal firms in SA are run by one or two attorneys. Furthermore, very few of these firms will have resources to perform risk assessments and also document the same within the new risk management and compliance programmes and still be able to comply with what the Financial Intelligence Centre calls the '7 pillars of compliance' ([www.fic.gov.za](http://www.fic.gov.za), accessed 28-7-2017). The '7 pillars of compliance' includes the following, among others:

- Registering with the centre (s 43B of the Act).
- Identification and verification of clients (s 21 of the Act).
- Hiring a senior person as a compliance officer (s 43 of the Act).
- Continuous training of staff (s 43 of the Act).
- Record-keeping (s 22 of the Act).
- Setting of internal rules (s 42 of the Act).

- Submitting of reports to the FIC (ss 28, 28A and 29 of the Act).

Furthermore, in terms of an RBA having assessed a particular product or service to be low, risk does not mean that you do not have to do anything or put in some mitigating controls in place. Lastly, a key question for the LSSA, is whether the withdrawal of Exemption 10(1) and thus as a result the inclusion of all services offered by attorneys within the purview of the regulatory framework (Amendment Act) a proper interpretation or transposition of the FATF recommendations?

### Conclusion

During the consultation period of the Amendment Act, the National Treasury and the Financial Intelligence Centre agreed that an RBA may not best cater for all AIs. The LSSA made submissions to the same effect and also requested that even under the RBA regime some of the exemptions should be kept intact as 'no two accountable institutions are the same' even within the same sector or industry due to size, structure and services offered ([www.fic.gov.za](http://www.fic.gov.za), accessed 28-7-2017). The question then is whether Exemption 10(1) is one of those, and furthermore, will the LSSA in the spirit of or as a matter of principle 'jealously' protect the interests of its members and ensure that the *status quo* remains? There is mention of a future industry specific guidance for the profession, but how 'industry specific' and useful is that guidance going to be compared to the recently generic issued draft guidance note issued by the National Treasury and the Financial Intelligence Centre?

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

[www.salvationarmy.org.za](http://www.salvationarmy.org.za)



# THE AMENDMENTS TO THE FIC ACT PROVIDES INSTITUTIONS FLEXIBILITY WHEN COMPLYING WITH THEIR CUSTOMER DUE DILIGENCE OBLIGATIONS



## THE AMENDMENTS TO THE FIC ACT ARE AIMED AT INCREASING TRANSPARENCY IN THE FINANCIAL SYSTEM IN ORDER TO COMBAT MONEY LAUNDERING AND THE FINANCING OF TERRORISM MORE EFFECTIVELY

**T**he amendments to the FIC Act does not allow anonymous clients. Any accountable institution that enters into a transaction with a client, be it a once off transaction or a business relationship, must know who their client is. This requirement is so much more than just a tick box exercise of providing an "ID book and proof of address". The FIC Act refers to "customer due diligence". This heading is quite detailed if you are reading it from the FIC Act, but simply put, it requires that the accountable institution have a very clear understanding of:

- Who is the client? Is the client a natural person or a company in a very complex structure? If a corporate, who are the actual natural persons controlling or making the decisions for the company?
- The products or services being taken out with the accountable institution.
- The purpose of the relationship. Where did the client get the money from in order to enter into the transaction?

The FIC Act requires additional information to be collected from clients. But at the same time the FIC Act now allows accountable institutions the flexibility to determine for themselves the extent of customer due diligence. This decision must be based on the money laundering and terrorist financing risks posed in relation to the client, the products and services and other relevant factors that may be taken into account by the accountable institution. To put it simply, the higher the money laundering and terrorist financing risk posed when these factors are taken into account, the greater the level of due diligence is required in relation to the client. Essentially, when the risk is higher the accountable institution is going to ask more questions and will require more documents to verify that the client information is correct. On the flip side, the lower the risk involved, the less questions and the less documentation will have to be

provided by the client. What has been demonstrated above is essentially a "risk based approach" to client due diligence.

All decisions made regarding internal policy and procedures regarding FIC Act compliance must be documented in a Risk Management and Compliance Programme (RMCP). All money laundering and terrorist financings risks that have been identified must be documented and detailed, and the institution must be able to explain how they came to rating these risks in relation to certain types of clients, products and other relevant factors. The RMCP and its contents must be reviewed and assessed regularly.

Two new concepts that have been introduced by the amendments to the FIC Act include –

- Beneficial Ownership; and
- Prominent Influential Persons (PIPs).

Beneficial ownership refers simply to understanding the ownership structure of a corporate entity so that you know who the natural person is that ultimately controls and owns the company and makes the decisions on the company's behalf. Why is this necessary? Criminals wish to hide the ownership or control of proceeds of crime by hiding it away in corporate structures and thereby still transact with accountable institutions whilst this person goes undetected. The FIC Act aims to increase transparency in this respect.

Prominent influential persons are persons who are, or have been, entrusted with prominent public or influential functions (and their family members and known close associates). Given the risks associated with such persons, additional customer due diligence measures are required in terms of the FIC Act when transacting with them. It is important to note that it does not mean that these individuals are presumed to be involved in financial crime. Accountable institutions are still able to maintain relationships with such

prominent persons, but will have to ensure that they understand the nature of those relationships to manage potential financial crime risk.

The seven pillars of compliance that arise from the FIC Act may be summarised as:



## REPORTING TO THE FINANCIAL INTELLIGENCE CENTRE

**R**eporting is critical and at the centre of compliance with the FIC Act. Information obtained through regulatory reports submitted to the Financial Intelligence Centre (the FIC), assist in identifying the proceeds of crime and ultimately aid in the combating of crime in South Africa. The concept of a "risk based approach" does not apply to reporting in the sense that there are clearly defined reporting obligations outlined in the FIC Act. The risk based approach will, however, greatly assist an accountable institution in identifying suspicious and unusual behaviour and report accordingly to the FIC.

For more information on registering your business with the FIC, contact (012) 641 6000 and select option 1 or visit [www.fic.gov.za](http://www.fic.gov.za)

# Drilling for the meaning of words: The SCA's interpretation of patent claims

By  
Ryan  
Tucker

Sometimes we, as attorneys, comment on cases where new precedents are set, or new principles espoused, to deal with a set of circumstances not yet faced by the courts. At other times, we report on judgments that reinforce existing law and sets of principles that have even, in some lawyers' minds, become trite. Such is this case.

The dicta from Dambuza JA in *Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd* [2017] 2 All SA 796 (SCA), are far from groundbreaking. But they do serve to fortify what patent practitioners understand to be the law in relation to patent construction. Additionally, patent-related cases so rarely reach the Supreme Court of Appeal (SCA) that it is worth commenting on them in this case.

Additionally, what strikes me from the *Orica* case is the care which patent prosecution attorneys need to take (and all other lawyers, in fact, when drafting any type of document for a client) because in legal proceedings, it can come down to the interpretation of one word (in this case, the word 'between') as to whether the client's claim can stand muster or be dismissed by the courts.

Dambuza JA (for the full Bench) was required to assess the alleged infringement by Elbroc Mining Products (Pty) Ltd of patent number 2001/10382 entitled 'Portable Drilling Apparatus' of Orica Mining Services South Africa (Pty) Ltd (the patent). The invention is known in the industry as a 'roof bolter rig', which enables mine-hole drilling without having to manually support the machine in position.

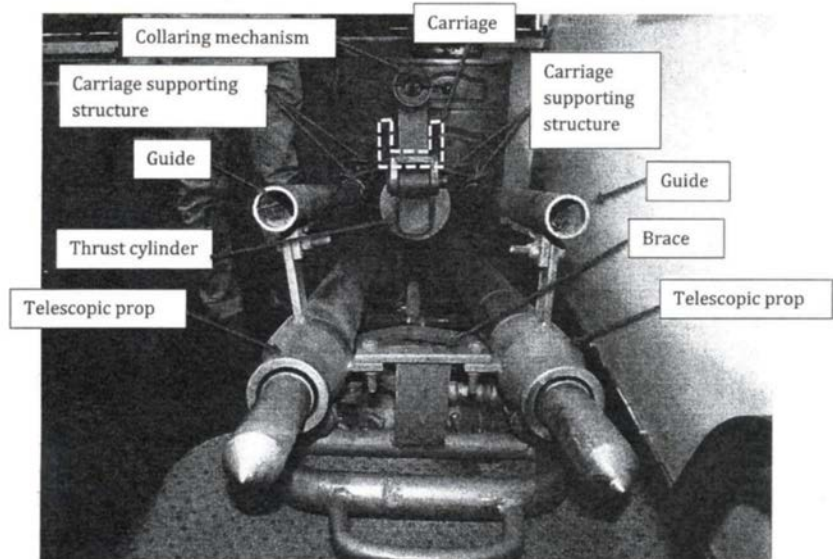
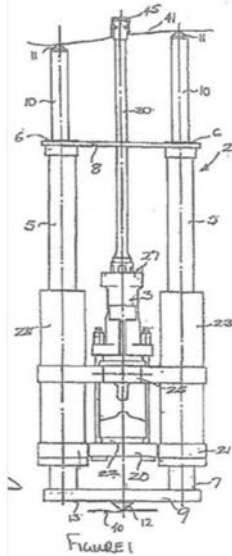
In its 'preferred embodiment', the invention consists of two extendable telescopic props, onto which, a drill carriage is mounted. The props support the surface of the hanging wall during drilling, reducing the risk of the wall collapsing onto the rig user. Each prop has a pair of cylinders joined at either end by a brace and a base. A hydraulically operated piston slides into each cylinder. The free end of the piston forms a point and a conical stud extends centrally from the outer surface of the base.

Elbroc sold roof bolter rigs that perform an identical function to Orica's patented roof bolter rig, causing Orica to sue Elbroc for alleged patent infringement of its patent claims, including claim 1, which is reproduced below:

'1. A portable self-supporting drill rig comprising a pair of



Picture source: *Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd* [2017] 2 All SA 796 (SCA)



The patent (left) and Elbroc's drill rig (right).

spaced apart telescopic props with a carriage *between* them, the carriage moveable along an axis substantially parallel to those of the props and supporting a drill mounted on the carriage ...' (my italics).

If claim 1 was held by the court to be infringed, so would all the other dependent claims.

In defending the action, Elbroc claimed that the word 'between' had to be interpreted as 'linearly between' the props. Elbroc's assertion was that its variant of the invention, not being 'linearly between' the two props, allowed its design around to fall outside the claim.

Above are the diagrams of the patent (left) and Elbroc's drill rig (right).

In the court of the Commissioner of Patents, the court held that because the carriage in Elbroc's drill rig was offset from the linear space between the props, there had been no infringement of the patent. Mabuse J also held that Orica's interpretation of the word 'between' amounted to an impermissible extension of the meaning of the word, because it sought 'to include a carriage which is offset at a right angle to the co-linear line between the pair of telescopic props at an undefined and unspecified distance from the space between the two props'. But Orica appealed to the SCA, and persisted in its contention that on a proper construction, the patent claims required only that the drill carriage be located 'in the space between the two props, even if not in the same linear plane as the props'. Therefore, Elbroc's argument incorrectly equated the word 'space' with the word 'line'.

Dambuza JA, in contrast to the court *a quo*, took a 'contextual' and 'purposive' approach to claim construction, and referred to several supporting judgments, including *Multotec Manufacturing (Pty)*

*Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd* 1983 (1) SA 709 (A) at 721 to 722, where the court held:

'[T]he Court should always guard against too "textual" an approach in the interpretation of claims in a patent specification. It is true that it is in the claims that a patentee stakes out and defines his monopoly; and that the claims must be looked at in order to determine whether an infringement has taken place. But by peering too closely at the language of a claim the Court may overlook an infringement which takes the substance of the invention. ...

In this context it is often said that any infringer who takes the "pith and marrow" of the invention commits an infringement even though he omits an unessential part or substitutes for that part a mechanical equivalent. ...

Where the alleged infringer has deviated in regard to some feature from the invention as literally claimed in the specification, it may often be a matter of considerable difficulty to determine whether the deviation relates to an essential or a non-essential feature of the relevant claim or claims.'

The SCA added that if the meaning of a claim, properly constructed, is sensible, clear and unambiguous, it cannot be restricted or extended by anything else stated in the body and title of the specification. However, the court went on to state that Elbroc forwarded three different dictionary meanings of the word 'between' and that, in selecting 'linearly between', (impliedly) Elbroc itself was not clear about the meaning of the word.

The court went on to state that the dictionary meaning (a purely literal interpretation) of the word is only a guide and the appropriate question is: What is the meaning applicable in the context of the particular document under consider-

ation (in this case, the patent document as a whole)? The SCA held that the definition 'with something on each side' was the most sensible.

The SCA then turned to discuss purposive interpretation, stating that within the context of patent construction, the purposive approach takes into account the practical knowledge and experience of the 'person skilled in the art'. It considers that such a person would understand whether strict compliance with a particular word or phrase was intended, and whether a variant of the word would have an effect on the way the invention works, such that the impugned object would fall outside of the monopoly protected in the claims, and there would therefore be no infringement.

In conclusion, Dambuza JA held that Elbroc's argument could not be sustained:

'Purposive interpretation is not an undue extension of the language of patent claims. In my view to interpret the word "between" as meaning linearly between the props is not in accordance with a purposive interpretation of the specification, as delineated by the claims. The advantage of the invention is that the telescopic props give support not only to the hanging roof of the stope, but also to the drill located "between" them, so that it may be operated remotely. This is precisely what the respondent's drill rig seeks to achieve.'

The SCA has now clearly entrenched in our law that the proper mode of construction of patent claims is a contextual and purposive one (if this was not clear already). Not only should one look to the rest of the patent document when interpreting claims, but also these should be interpreted with the skilled person in mind, and what he or she would see as the meaning of the word(s).



To those disappointed by the outcome of the SCA judgment – those who may feel that a purely literal interpretation should always be used instead of the contextual and purposive interpretation – my view is this: Do not assume that such purposive interpretation provides increased patent protection than would a purely literal one.

Although, usually, a purposive interpretation may lead to claims being read more broadly and to the benefit of the patentee, such constructive style need not do so. All that the contextual and purposive styles require are that –

- the claims should not be looked at in isolation;
- the rest of the patent document should be included in the interpretative exercise; and
- they should be interpreted through the lenses of the 'person skilled in the art', taking cognisance of the purpose and function of the invention.

How broadly such claims will be interpreted depends on the facts and circumstances of each case, and how the skilled person views –

- the claims;
- the purpose and function of the invention; and
- the way the claims are drafted.

This is why it is so important to have

an experienced patent attorney draft patent claims and specifications.

I do not believe that a literal interpretation should be completely excised from our law on the interpretation of patent claims (although a *purely* literal interpretation should be). There may be good reasons why a person skilled in the art would read a patent claim more restrictively; using the literal meaning of the words. These include cases where the patent document includes words that are to be strictly understood, to avoid some closely related piece of prior art, which may anticipate the patent if construed broadly.

Also, where the 'person skilled in the art' would view the choice of words as deliberate, particularly in using technical terms and specific numerical limitations (see R Tucker 'Patent claim construction: Numerical limitations' 2016 (Dec) *DR* 34), this may reduce the scope of the patent claims. As a result, a literal interpretation of certain terms and numerical limitations is used as part of the purposive approach to interpretation, where such is in line with what the skilled person would understand the claims to mean.

In my view, Dambuza JA saw through Elbroc's limited, strict and literal interpretation of the word 'between' as meaning 'linearly between'. He decided not

to play 'dictionary word games' with Elbroc, and simply utilised the contextual and purposive approaches to arrive at his decision. For me, this was a pragmatic and commonsensical way of seeing the meaning of the words contained in the claim (as exemplified by his interpretation of the word 'between' meaning 'with something on each side').

Dambuza JA cut through the analysis provided in evidence given by the expert witnesses of and arguments of counsel for both parties, as to what the skilled person would understand by the word 'between', and dealt sensibly and clearly with the facts and issues in the case (which there is ample precedent for in patent cases – the judge is the ultimate arbiter). His judgment highlights that the contextual and purposive styles are at the apex of the interpretative exercise, and that other principles act merely as guides to assist the court in determining the construction of patent claims.

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# Washing money: The different forms of money laundering

By  
Jason de  
Mink



Picture source: Gallo Images/Stock

**T**he United Nations (UN) estimates that the amount of money laundered in a year is between 2% to 5% of global gross domestic product (GDP), or between US\$ 800 billion to US\$ 2 trillion. That number is staggering when one considers that the entire South African GDP for 2016 was approximately US\$ 329 billion.

Money laundering takes many forms and embraces all manner of technologies, from the most basic to the extremely sophisticated. In general, by its very definition, money laundering involves money as its central store of value.

However, recent trends have been detected that indicate a worrying trend away from the use of money as a store of value for criminal enterprises, with the shift being to everyday commodities and goods that are legal and can be easily obtained, transported and sold.

## The concept of money laundering

The term 'money laundering' vividly describes the process by which the proceeds of criminal activities are sanitised so that they may be introduced into the mainstream economy without retaining any hint of their illegitimate source.

The term 'money laundering' dates back to the days of Prohibition (during 1920 to 1933) in the United States (US). The prohibition on alcohol and a broad restriction on gambling created opportunities to make large amounts of cash for those individuals, known as 'bootleggers', prepared to break the law. Success in these illegal activities created an immediate problem for the 'bootleggers' as to what to do with all the money generated. Opening a cash-intensive business was the obvious thing to do. Laundries were seen as a suitable business and, so the rumour goes, the term 'money laundering' was coined.

However, the phenomenon of money laundering stretches back several thousand years. In China, as far back as 2000 BC, it has been recorded that wealthy merchants would disperse, disguise and hide their wealth from despotic rulers who wanted to appropriate their wealth and simply kill or banish them after taking it.

## Stores of value

Whatever the origins of the term, criminals have progressively moved into businesses where the cash yielded was ever higher – including production and sale of illegal narcotics and drugs. However, for the modern day ‘bootlegger’ there is an ongoing problem, in that success in these types of businesses comes at a price – literally. Cash is bulky and ultimately traceable, difficult and dangerous to transport in volume and of no intrinsic value unless actually spent to acquire an asset or service. So criminals need an alternative or an adjunct to money, as a store of value.

Traditionally gold remains one of the main non-currency means of holding money, including laundered money, with diamonds a close second.

The problem with such stores of value is that they are not always readily attainable, do not lend themselves to being divided into small values or denominations, generally require expertise to transport and exchange and can only be sold on to a limited number of specialists, legitimate and illegitimate, who deal in these commodities.

## Latest trends

A growing trend has, therefore, emerged where readily available and easily exchangeable commodities have replaced cash as a means of payment, especially in the illegal drugs trade. It would appear as if there is something of a move back to the barter system, where criminals are happy to accept payment in goods as opposed to hard currency.

Criminals favour products that are small and expensive because they have a value that is disproportionate to their size and there is generally a steady demand for them, namely, razor blades, infant formula, gift cards, perfumes, cosmetics and over-the-counter medications. As they are commonly pilfered, many of these items are kept behind shop counters, are locked up or are tagged.

## Laundry detergent

One slightly more bizarre example from the US is the widespread use of laundry detergent as a currency. While it is a little bulkier than most of the items on the list above, a bottle of ‘Tide’ laundry detergent would seem to make a good substitute store of value because it is a leading brand, everybody needs it, and it

is pricey. One bottle can cost up to US\$ 20 retail.

This phenomenon was discovered inadvertently when US police forces raiding suspected drug houses found large quantities of ‘Tide’. At first it was suspected that ingredients in the detergent were used to manufacture drugs. However, it soon became apparent that the detergent was being used as currency to buy the drugs themselves. Police then noticed an increase in organised and widespread theft of well-known laundry detergent brands and began to track a trend where bottles of detergent have become *ad hoc* street currency. For example, US\$ 20 bottles of laundry detergent are selling for either US\$ 5 cash or US\$ 10 worth of marijuana or crack cocaine, earning it a new nickname: ‘Liquid gold’.

However, laundry detergent is not just used as a currency in the drug market but has become the ultimate target of the theft, totally distinct from the drugs trade. Criminals have performed a cost-benefit analysis of stealing a bottle of laundry detergent and have identified it as high reward and low risk. The penalty for shoplifting in most jurisdictions is often just a small fine, with no jail time, as opposed to the far more severe penalty for dealing in drugs. The trade in stolen laundry detergent has, therefore, in some ways become more lucrative than the drugs it was originally traded for.

Stolen bottles of laundry detergent are not easily traceable and businesses have a strong incentive to buy the product on the black-market as opposed to the official supplier. While a shop selling legally-sourced laundry detergent for US\$ 20 may make a US\$ 2 profit per bottle, purchasing that same detergent for US\$ 5 from a black-marketer translates into a US\$ 15 profit.

‘Tide’, as a premium and heavily advertised brand, has been recognised as a stable and readily exchangeable store of value, with a healthy resale value. The black-market trade in this substance is so widespread that US law enforcement agencies have recently discovered that large quantities of liquid detergent have been transported to other jurisdictions, particularly in the Far East.

Ironically, black-market trade in this product also has another aspect – it can be copied and fake laundry detergent packaged as the real thing can also be sold at a profit, as another means of utilising and co-mingling illegitimate funds or as a business in itself.

## Ice cream

Another more recent, and just as bizarre example, is the theft of expensive Ben & Jerry’s and Häagen-Dazs ice cream, which the thieves will almost immediately sell to a middle-man or direct to a store-owner in order to turn a quick

profit. Some investigations have revealed syndicates who steal ice-cream, store it and then re-sell it in bulk once a sufficient quantity has been obtained.

As with the laundry detergent, thieves have determined that ice cream is an easy item to steal and re-sell, with many unscrupulous retailers willing to acquire the stolen merchandise for onward sale in their shops.

## Cheese

Finally, strangest of all, the UK Center for Retail Research, has conducted a global survey that has determined that cheese is the most stolen food in the world.

The reasons for individual criminals targeting this particular commodity seem clear, including high demand, easy disposal by thieves and small, mobile formats that make it easy to conceal and transport.

Cheese is an item that one criminologist describes as ‘craved’ – concealable, removable, available, valuable, enjoyable and disposable. Unlike many items that would also fall under the ‘craved’ description like razor blades or electronics, cheese is not usually fitted with any type of security tag. It is small and easy to conceal in clothing, a handbag or a baby buggy and with the price of quality cheese rising, much of the theft is for resale to retailers or to restaurants.

However, it is not just individual shoplifters who are involved. It appears as if crime syndicates have expanded their operations into stealing and then reselling large volumes of cheese or even manufacturing ‘illegal’ cheese.

In Italy for example, robbers have made off with an estimated € 6 million worth of Italy’s prized Parmigiano-Reggiano cheese over the past two years.

Like laundry detergent and ice cream there is also thriving black-market trade in this product in countries like Russia where in 2015 police, acting against a criminal syndicate, seized US\$ 30 million of contraband Cheddar.

Producing fake or adulterated products is also a method to generate illegal profits or to promote illicit activity. A 2013 US Food and Drug Administration investigation, undertaken in conjunction with the US Inland Revenue Service, found that items labeled as ‘100 percent real Parmesan and Romano cheese’ distributed through two national companies contained a combination of Swiss, Mozzarella and white Cheddar cheeses, as well as large amounts of wood pulp ([www.fda.gov](http://www.fda.gov), accessed 7-8-2017). These high-end products generated massive profits at far below normal cost, allowing the companies to appear highly competitive and profitable, while also providing a perfect cover to launder illicit funds.

In countries struggling to combat drug cartels, such as El Salvador, cheese exports have been strong year on year,



despite there being virtually no cheese manufacturing companies within the country. Basing a money laundering operation around cheese is not as far-fetched as one may initially assume. The legal infrastructure (manufacture, transport, export etcetera) allows the criminal gangs to openly integrate their funds into the mainstream and to take advantage of legitimate business ventures as a cover to co-opt and suborn the police, judicial, and immigration systems. The result is a vast, multinational, and multi-dimensional criminal network, disguised as a legitimate business that includes drug-trafficking and human-smuggling.

Criminal syndicates in Italy such as the Camorra (the Neapolitan Mafia) invest large amounts of illegitimate money into legitimate cheese manufacturing businesses. As obtaining maximum profit is of less concern than laundering dirty money, these criminal cheese enterprises can sell their products below market prices, competing unfairly with honest competitors while simultaneously generating seemingly legitimate profits.

What makes cheese production an attractive proposition for the money launderer?

The manufacturing process, from raising cows to investing in the means of production, can be extremely costly. A cheese company is, therefore, a prime opportunity for a money laundering operation to process large sums of money

without raising suspicions. Having acquired the product and its means of production by using 'dirty' money, the launderer can then generate massive amounts of 'clean' money when the cheese is sold.

Cheese sells for relatively high prices compared to other popular foods and it is, therefore, much more efficient to sell a block of cheese compared to high volume products like wheat or rice.

Cheese is a staple around the world and has no clear substitute. The relative stability of cheese demand allows crime syndicates the ability to forecast revenues. While a downturn in the economy may cause the demand for certain other types of 'luxury' foods to fall drastically as consumers switch to cheaper alternatives or abandon these foods altogether, for many cultures in the world, substituting or removing cheese is simply not possible.

Although luxury cheese products and famous brands do exist, most cheese exists as a commodity. Consumers are less concerned about the producer of the cheese they are buying compared to the price of the cheese. This characteristic makes it easier for organised crime to start a cheese business and compete in the market immediately.

### Conclusion

While law enforcement agencies today are on high alert for suspicious transac-

tions involving the traditional assets associated with money launderers, such as property, luxury vehicles, boats and jewellery, one asset that gets far less attention is cheese. It would appear as if ongoing demand for a product that is hard to substitute has created largely unknown links to black markets, criminal activities and money laundering.

It may be possible that the Mozzarella on your pizza or a delicious piece of Camembert may be the vehicle whereby criminals disguise and shift money originating from illicit activity.

Far more concerning than the simple issue of 'criminal' cheese is the number of other foods that share the same characteristics as cheese mentioned above. While one can easily abstain from activities traditionally associated with crime such as drugs, gambling, and stolen or pirated goods, it is far more difficult to avoid or identify illicit food.

In the world of the money-launderer it appears as if nothing is sacred.

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# Legal framework for acquisition by a company of its own shares

By  
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Picture source: Gallo Images/Stock



A procedure for acquisition by a company of its own shares is primarily regulated by the provisions of ss 46 and 48 of the Companies Act 71 of 2008 (the Act). The board of directors of a company may authorise a re-acquisition, provided that prior to effecting such re-acquisition the solvency and liquidity test has been applied by the board.

The board of directors must vote on the decision whether to approve a buyback or re-acquisition of shares by the company of its own shares. Only board approval is, therefore, necessary and shareholder approval is not required for a repurchase in general.

However, in terms of s 48(8) of the Act, a proposal by the board for a re-acquisition, if considered alone or together with a whole series of integrated transactions, is more than 5% of the issued shares of any class of shares of the company then the re-acquisition must comply with the requirements of ss 114 and 115 of the Act.

A buyback falls within the definition of 'distribution' as defined in s 1 of the Act. Since some of the shareholders in the subsidiary (target) company can elect to receive cash as a consideration, the requirements of s 46, therefore, must be complied with (the term 'distribution' is used to refer to payment made to shareholders either as a return on share capital or as a return of share capital. See K van der Linde 'The regulation of distributions to shareholders in the Companies Act 2008' (2009) 3 *TSAR* 484).

Thus, in addition to passing a resolution approving a buyback, the board must, before making a distribution (re-acquisition), apply the solvency and liquidity test. A proposed repurchase will pass the solvency and liquidity test if the board is satisfied that –

- the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and
- it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months following such repurchase.

According to Piet Delpont and Quintus Vorster, (*Henochsberg on the Companies Act 71 of 2008* (Durban: LexisNexis) at 54) 'factual solvency' (when it appears) is 'based on all reasonably foreseeable financial circumstances that assets [of the company] are in excess of its liabilities ... [this] is purely a balance sheet test, ie a particular moment ... while in respect of liquidity it must appear, based on all reasonably foreseeable financial circumstances, that the company will be able to pay its debts as they fall due in the ordinary course of business for 12 months after the test was applied. If the test is in respect of a distribution, the distribution

must be made out of net assets and after the distribution the liquidity test must be complied with for 12 months.'

## Re-acquisition of shares exceeding 5% of the shares in the subsidiary company

If the re-acquisition proposed exceeds 5% of the issued shares in the subsidiary (target) company, the decision for approval shall vest on the shareholders of subsidiary company. In terms of s 48(8)(a), a special resolution approving the proposal by the majority (acquiring) company to acquire its own shares must be passed with a support of at least 75% votes by the shareholders, if the shares are re-acquired from directors or from prescribed officers ('prescribed officer' means a person who, within a company, performs any function that has been designated by the minister in terms of s 66(10). The definition of 'prescribed officer' as substituted by s 1(1)(x) of the Companies Amendment Act 3 of 2011).

In consequence of the above, minority shareholders can be prevented from participating in the decision to approve a buyback by virtue of holding minority voting rights in the ordinary shares of a company.

Section 115 requires approval by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised, or any higher percentage as may be required by

the company's Memorandum of Incorporation.

Provided the acquiring company has given notice to shareholders (including minority shareholders) in the subsidiary company of a meeting to consider adopting a resolution to repurchase its shares in terms of s 115 of the Act, minority shareholders may opt to exercise their appraisal rights in terms of s 164 of the Act. In terms of this section, dissenting shareholders, may give the company a written notice objecting to such resolution and demand that the company pay them 'fair value' for all their shares.

Minority shareholders may invoke the appraisal remedy in terms of s 164 if he or she –

- notified the company in advance of the intention to oppose a special resolution contemplated in this section; and
- were present at the meeting and were entitled to vote, and voted against that special resolution.

However, minorities may only seek relief in terms of s 164 of the Act, if the resolution to approve the re-acquisition has been passed and adopted accordingly.

### When shares within the proposed percentage of the intended re-acquisition are held by directors or prescribed officers of the company

Under this situation a company proposing to re-acquire its own shares (that exceed 5%) and, which shares are to be re-acquired from some of the directors and prescribed officers of company, the procedure set out in s 114 (read with s 117(1) (c)) of the Act, which regulates fundamental transactions, affected transactions, offers and takeovers must be followed. This transaction will trigger the application of s 114(e), which deals with schemes of arrangement.

Schemes of arrangement includes –

- consolidation of different classes of securities;
- a division of securities into different classes;
- an expropriation of securities;
- an exchange of securities; and
- re-acquisition by the company of its own securities.

'Fundamental transactions' includes a scheme of arrangement.

A company may implement the proposed scheme of arrangement with the holders of any class of its securities, provided the required approval under s 115 (*op cit*) have been obtained.

Stephanie M Luiz ('Some comments on the scheme of arrangement as an "affected transaction" as defined in the Companies Act 71 of 2008' (2012) 15 *PER* 101 at 107) says 'the question arises

whether, ... any proposal by a company to re-acquire some of its shares in terms of section 48 would constitute a scheme of arrangement as contemplated in section 114.'

Luiz goes on to say that it is clear that a re-acquisition in terms of s 48, which results in the company re-acquiring more than 5% of the issues shares of any particular class of the company's shares triggers the application of ss 114 and 115 of the Act. However, it will be prudent for such a company to note that re-acquisitions by a company of its own shares does not automatically become a scheme of arrangement as defined.

That said, the company must, before the proposed re-acquisition is put to the shareholders' vote, be required to retain the services of an independent expert who so qualifies to prepare a report. The independent expert must satisfy the qualifications of competence, experience and independence as set out in s 114(2) (a) of the Act.

The independent expert so appointed shall be required to prepare a report to the board of company and cause it to be distributed to all shareholders in the target company concerning the proposed arrangement.

The purpose of the report is obviously to enable minority shareholders to decide whether or not to vote to support the special resolution proposing the scheme of arrangement.

Section 114(3) outlines the following information, which must be included in the report:

- Type and class of securities that would be affected and include the prescribed information relevant to the value of those securities, as well as describe the material effects on the rights of the holder, as well as outlining the advantages and disadvantages of the scheme.
- The effect of the proposed arrangement and the interests of holders of any class of securities.
- Proof in terms of s 164 to the effect that the holders of securities who voted against the proposal were explained their appraisal rights.

### Remedies for dissenting minority shareholders

In terms of ss 163(1)-(3) of the Act, minority shareholders may apply to a court for relief if, *inter alia*, any act or omission of the acquiring company, or a related person to that company, which has resulted in an oppressive or unfairly prejudicial conduct, or that unfairly disregards interests of minority shareholders. Stretch J in *Justpoint Nominees (Pty) Ltd and Others v Sovereign Food Investments Limited and Others* (ECP) (unreported case no 878/16, 26-4-2016) (Stretch J) said: 'Cassim *et al* in *Contemporary Company Law* JUTA, Cape Town

**The board of directors must vote on the decision whether to approve a buyback or re-acquisition of shares by the company of its own**

at 770 opines that it would seem that section 163 has been drafted to include "interests" in order to underline or emphasise the principle that the oppression remedy is not limited to the strict infringement of legal rights, but that it extends also to the protection of the interests of the applicants.'

In the *Justpoint Nominees (Pty) Ltd* case, it was held that: 'Sovereign's conduct and its proposed course of conduct was prejudicial and oppressive of the rights of dissenting and minority shareholders and disregards their interests. It is unfair, in my view, for a board such as Sovereign's to manipulate and create this type of lock-in situation by not allowing minority/dissenting shareholders to enjoy fair participation in its business.'

Alternatively minority shareholders may invoke the derivate action remedy and thereby take steps in terms of s 165 demanding that the acquiring company institute legal proceedings to protect the interests of the target company.

### When the subsidiary company was a regulated company as defined

If a subsidiary company is to fall within a definition of a regulated company, the proposed re-acquisition would have to comply with all the reporting or approval requirement as set out in part B and C of ch 5 and the Takeover Regulation Panel regulations, and can only proceed to give effect to an affected transaction provided the panel has issued a compliance certificate in respect of the transaction or has granted exemption accordingly in terms of s 119(6).

The panel only can exempt an acquiring company from complying with the provisions in the Act regulating affected transactions and the takeover regulations if there is no reasonable potential that the transaction will prejudice the interests of any existing holder of a regulated company's securities, or the cost of compliance is out of proportion to value of the transaction or it is reasonable and justifiable in the circumstances (s 119(6)).

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# Is there an onus to prove an impairment of dignity in discrimination cases?

Picture source: Gallo Images/Stock



By  
Kershwyn  
Bassuday

**T**he purpose of this article is to determine whether the recent amendments to the Employment Equity Act 55 of 1998 (EEA), specifically s 11(2), relate to the impairment of dignity of the employee. The Labour Court (LC) dealt with this issue in *Duma v Minister of Correctional Services and Others* (2016) 37 ILJ 1135 (LC), which will be explored by this article.

## The jurisprudence

In the *Duma* case, Ms Duma referred a dispute on 1 June 2012 to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the grounds of unfair discrimination. Unsuccessful there, the employee then launched an application in the LC in terms of s 6(1) of the EEA in that she was discriminated on the grounds of her geographical location. She claimed that employees in other provinces who performed the same work, with the same

job description were on salary level 9, and she was on salary level 8. In assessing Ms Duma's case, the court looking at the EEA prior to the 2014 amendments, held at para 20 and 21:

'Duma relies on s 6(1) of the EEA and on an unspecified ground therein. Section 6(1) provided that:

"(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth." An applicant bringing a claim in terms of this provision must prove: That there was differentiation which amounted to discrimination. If it is on a ground specified in s 6(1), the discrimination is established. If it is not on a specified ground then whether

or not there has been discrimination will depend on whether, objectively, the grounds are based on attributes and characteristics which have the ability to impair the fundamental human dignity of people in a comparably serious manner.'

The LC agreed with the submission that arbitrariness has long been recognised as one of the hallmarks of discrimination and held that the Employment Equity Amendment Act 47 of 2013 (see also PAK le Roux 'The Employment Equity Act: new amendments set problems and posers' (2014) 24 *Contemporary Labour Law* 1) now reflected this by prohibiting discrimination in s 6(1) on any 'arbitrary ground'. The LC held further –

'I agree that the ground of geographical location as a basis to prejudice an employee, by paying them less for the same work as another employee in a different location, has the ability to impair the dignity of that person in a manner

s 11 of the EEA or for that matter in its regulations.

## The issue of dignity in the workplace

The provenance and applicability of 'dignity' stems from our Constitution and comes from Constitutional Court (CC) cases on discrimination outside the workplace and transported into employment law. For instance in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), the court formulated the now famous *Harksen* test at 325 –

'Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.'

Fast forward some years and in *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 ILJ 2872 (LC) the court made reference to the above mentioned *Harksen* test when discussing dignity (see para 22). The issue of constitutionality of unfair discrimination (see also *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41 for a detailed discussion on discrimination and dignity) in the workplace was brought to the fore in *Hoffmann v South African Airways* 2000 (2) SA 628 (W), where the court held the following at para 25 'the determining factor regarding the unfairness of the discrimination' is its impact on the person discriminated against.

In labour law the dignity requirement relating to arbitrariness could possibly come from *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) (at paras 42 – 43):

'What then are arbitrary grounds? An arbitrary ground is a ground which is capricious or proceeding merely from whim and not based on reason or principle (see L Baxter *Administrative Law* at 521-2 relying on *Beckingham v Boksburg Licensing Court* 1931 TPD 280 at 282).

In my view, without attempting to be exhaustive, unfair discrimination on an arbitrary ground takes place where the discrimination is for no reason or is purposeless. But even if there is a reason, the discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly (as emphasised repeatedly by the Constitutional Court) the dignity of the complainant and a society based

on equality and the absence of discrimination.'

It is plausible that our labour law has also been influenced by judgments emanating from the Equality Court. In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 ILJ 868 (EqC) at para 25 the court held:

'On the other hand, the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination.'

Perhaps the origin of the need for an employee's dignity to be affected comes from the Code of Good Practice on the Handling of Sexual Harassment cases in the workplace (GN1357 GG27865/4-8-2005). Item 5.4 of the current Code says that: 'The conduct should constitute an impairment of the employee's dignity'. However, it is important to note that sexual harassment itself is defined as a form of discrimination in s 6(3) of the EEA, which provides that: 'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)'. Prior to the 2014 amendments, s 11 of the EEA provided that whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must establish that it is fair. The dignity requirement adds a complication to s 11 of the EEA, where now the complainant bears the onus of proof.

## Arbitrary ground seems to be arbitrary

After a brief hiatus the concept of 'arbitrary' grounds was reintroduced to our statutory labour jurisprudence by the Employment Equity Amendment Act (for a detailed discussion on this reintroduction and the effect of the explanatory memorandum see D du Toit 'Protection against unfair discrimination: Cleaning up the Act?' (2014) 35 ILJ 2623). Discussing what an 'arbitrary ground' is, *Pioneer Foods*, (albeit in reference to equal work and equal pay) considered the following at para 59:

'Moreover, length of service with the employer concerned as a factor affecting pay levels is not an "other arbitrary ground", as contemplated in s 6(1) or in the test laid down by the Constitutional Court. Treating people differently in the workplace in accordance with their length of service with the employer does not impair their fundamental human dignity or affect them adversely in a comparably serious manner.'

At para 60 in the *Pioneer Foods* case

comparable to the listed grounds and amounts to discrimination.'

What the LC has appeared to do is accept that where unfair discrimination is alleged on an arbitrary ground, there is a need to establish that the alleged grounds have the ability to impair the fundamental dignity of the person in a comparably serious manner. Several CCMA arbitrators have, since the 2014 EEA amendments came into force, similarly required applicants to establish that differentiation 'impacted on the applicant's human dignity' in order to constitute unfair discrimination (see *Ndlela and Others and Philani Mega Spar* (2016) 37 ILJ 277 (CCMA) at para 21; *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) at para 36). The question that must be asked is – where does the requirement of a 'dignity test' stem from? It is simply not required when assessing an arbitrary ground in

there is a furthering in the discussion of this 'arbitrary ground' Steenkamp J quotes Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6ed (Durban: LexisNexis 2015) at 683:

'And even if the inclusion of an "arbitrary" ground is meant to widen the scope of discrimination in the context of equal pay for work of equal value, the distinction in this case – length of service – is not arbitrary. This wider reading of the new subsection is discussed in these terms by Du Toit:

"[T]he reintroduction of the prohibition of discrimination on 'arbitrary' grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, 'arbitrary' must add something to the meaning of 'unfair discrimination'. Giving it the meaning ascribed to it by Landman J in *Kadiaka* – that is, 'capricious' or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter."

The question that Steenkamp J is trying to answer above is this – what makes an unlisted ground different from an ar-

bitrary ground? According to the CC in *Harksen*, and as quoted above, there will be discrimination on a listed ground if the action has the potential to impair human dignity. The court looks to Du Toit (*op cit*), who writes that 'arbitrary' must add something more to unlisted grounds otherwise it would be merely a repetition by the legislature. What Du Toit does when trying to define 'arbitrary' is infuse it with tones of the *Kadiaka* case. Surely this goes against well-established principles of legislative interpretation?"

In his article, Du Toit (*op cit*), supports his interpretation by showing us that in the new s 11(2) para (a) gives a test for rationality and para (b) disapproves discrimination as we recognise it from constitutional jurisprudence. Du Toit writes at 2627 that the criteria of 'unfair' required by para (c) is problematic and his reading on the issue is that if (a) and (b) are proved then consequently the conduct must be unfair and the requirement in (c), which is an additional 'unfairness' must be left up to the courts to determine.

I submit that to read in 'dignity' is too awkward. The amended s 11(2)(a), which an employee must prove in the case of alleged unfair discrimination on an un-

listed ground, seems to imply that the alleged unfair discrimination, which is not rationally related to a legitimate purpose, will then render the differentiation to be unconstitutional and that further proof that it was unfair in the sense that it is an affront of human dignity or had a similar outcome is not necessary (for further elucidation see IM Rautenbach and E Fourie 'The Constitution and recent amendments to the definition of unfair discrimination and the burden of proof in unfair discrimination disputes in the Employment Equity Act' 2016 TSAR 110.).

## Conclusion

On a plain reading, the conclusion that the LC in *Duma* arrives at is that the application of s 11(2) must find that the discrimination is irrational, unfair *and* affects the employee's dignity. In my view, this simply cannot be correct and is far too onerous.

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# Ways to curb expert bias

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By Dr  
Izette  
Knoetze-le  
Roux

**T**he expert's function, is an exceptional one: To provide assistance to courts in cases where the court is unable to, because of lack of specialised knowledge.

Expert evidence refers to evidence, which is admissible because it is relevant and of probative value in relation to matters in issue in the case and as such is a particular category of admissible evidence (George Barrie and Bertus de Villiers 'Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the state administrative tribunal of Western Australia' (2017) 1 Tydskrif vir Suid-Afrikaanse Reg 59). This type of evidence is permissible if it is relevant and of probative value. Where expert evidence is admitted it is admissible because it has probative value.

It will have probative value because there are issues before the court – which requires specialist knowledge or experience for their resolution – and evidence is being adduced from a person who has specialist knowledge or experience appropriate to those issues.

The dangers associated with the use of expert evidence is often limited to bias, namely, the risk that the expert, hired by the prosecution or the

defendant, will report results that are favourable to the party who instructed him or her and paid his or her fee (Joëlle Vuille 'Admissibility and appraisal of scientific evidence in continental European criminal justice system: Past, present and future' (2013) 45 *Australian Journal of Forensic Sciences* 389).

David Bernstein ('Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution' (2008) 93 *Iowa Law Review* 451) notes that expert testimony is vulnerable to 'adversarial bias', which refers to witness bias that arises because a party to an adversarial proceeding retains experts to advance its cause.

### Three sources of adversarial bias

Adversarial bias has three sources, namely –

- conscious bias;
- unconscious bias; and
- selection bias (Bernstein (*op cit*) at 452).

Conscious bias, is evident when 'hired guns' adapt their opinions to the needs of the client and legal practitioner who hires them. Unconscious bias exists across various categories of expertise, but it is an especially persistent problem with regard to testimony by forensic scientists (Bernstein (*op cit*) at 455 - 456). As a result, the forensic expert's unconscious bias can easily have an impact on the conclusions arrived at. Selection bias, refers to the fact that the experts retained by a party will not represent a random sampling of expert opinions. Rather, they will represent the perspective the legal practitioners want to present at trial.

In order to address the difficulties of adversarial bias, a number of proposals are discussed below.

### Will tighter admissibility requirements of expert witnesses reduce bias?

#### • Position in England

In the matter of *Helical Bar PLC and Another v Armchair Passenger Transport* [2003] EWHC 367 (QB) the High Court in England compiled a list of principles in relation to the independence and impartiality of expert witnesses. The court held that where an expert has an interest in the outcome of the case, the judge must decide 'whether [the] expert should be permitted to give evidence'. The decision on admissibility is a question of 'fact and degree' and depends, in part, on whether the proposed expert 'is aware of their primary duty to the Court ... and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty'. When the expert's evidence is admitted, the court will consider how 'an interest which is

not sufficient to preclude him from giving evidence' will affect the weight to be accorded to the expert's opinion.

#### • Position in Canada

The Canadian Supreme Court's decision of *White Burgess Langille Inman v Abbott and Haliburton Co.* 2015 SCC 23 tightened the admissibility requirements of expert witnesses. The Supreme Court confirmed that expert witnesses owe a special duty of impartiality at common law to provide 'fair, objective and non-partisan assistance' to the trier of fact.

Hunt notes that this duty is underpinned by the three concepts of impartiality, independence and absence of bias (CDL Hunt 'The expert witness's duty of impartiality in Canada: A comment on *White Burgess Langille Inman v Abbott and Haliburton Co.*' (2016) 20 *The International Journal of Evidence and Proof* 73). First the opinion must be 'impartial' in the sense that it reflects an objective assessment of the questions, secondly the opinion must be the 'product of the expert's independent judgment, uninfluenced by who has retained him or the outcome of the litigation' and finally the opinion must be unbiased in the sense that it does not unfairly favour one party over another. On the question of admissibility, a threshold eligibility requirement for the admission of expert evidence was imposed (Hunt (*op cit*) at 72).

It further held that courts should exclude such testimony if the expert lacks sufficient independence and impartiality. An expert will be qualified to testify only if he is aware of and willing to carry out their duty of impartiality to court. In addition, the trier of fact continues to act as gatekeeper as it will assess the probative value of the proposed expert's evidence and weigh it against the potential for prejudice. It will only be admitted where the probative value exceeds the potential for prejudice.

Expert opinion evidence must pass the two-stage *Mohan* framework (*R v Mohan* [1994] 2 SCR 9). The first stage relates to the expert's proper qualifications. This entails that a properly qualified expert must be both aware of and willing to carry out his duty to court to be impartial and independent. The expert's attestation 'recognising and accepting the duty' will generally be sufficient. The opposition might challenge this by showing a 'realistic concern' that the expert is unable or unwilling to comply with this duty. Should this occur, the proponent of the evidence must prove on the balance of probabilities that the expert understands and intends to carry out his duty to the court; failure to do so renders the evidence inadmissible. On assessment, the courts will consider the nature and extent of a party's interest in the litigation. Disqualification should only occur in 'very clear cases in which

the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.'

If this stage of *Mohan* is passed, the proponent of the evidence must satisfy the court that the probative value of the proposed expert's evidence outweighs its potential for prejudice. Here the judge acts as a gatekeeper, holding a 'residual discretion to exclude evidence based on a cost-benefit analysis'.

#### • Position in Australia

In *FGT Custodians (Pty) Ltd v Fagenblat* [2003] VSCA 33 at para 26 the Supreme Court of Victoria, Court of Appeal rejected the argument that an interest in the case could implicate the competency of an expert witness to testify. The court noted that for 'at least 100 years if not far longer', the remedy for the criticism of an expert witness 'has not been seen in denying the right of such witnesses to give evidence; rather it has been seen in devising court rules and protocols which will ensure that experts will try to be independent and that courts will not unnecessarily suffer the opinions of experts who may be thought to be in one camp or the other.' The court expressly declined to lay down a new common law rule that would exclude expert witness evidence unless it passed a threshold assessment of its impartiality.

#### • Position in South Africa

An expert witness should remain objective despite the fact that he or she is called by a party to testify in support of the latter's case. This principle was adopted by South African courts in the matter of *Stock v Stock* 1981 (3) SA 1280 (A) and recently reaffirmed by the Supreme Court of Appeal (SCA) in the matter of *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA). In this matter the SCA had to consider how to approach conflicting expert opinions. Majiedt JA (with Navsa ADP, Saldulker JA, Swain JA and Zondi JA concurring) noted at para 15 as follows:

'It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect. Diemont JA put it thus in *Stock v Stock*: "An expert . . . must be made to understand that he is there to assist the court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this court can test his reasoning and is accordingly to that



extent in as good a position as the trial court was.”

### Is conferral of experts prior to hearing and concurrent evidence by experts during hearing the viable solution to expert bias?

Australian Courts have been experimenting with two principal techniques to better assess expert evidence and to simplify the process of dealing with expert evidence. The techniques are conferral of experts prior to hearings and concurrent evidence by experts during hearings.

The aim is to identify the areas of agreement, reduce the scope of disagreement, identify areas of disagreement and clarify the reasons for disagreement. These processes are viewed as reducing the adversarial nature of expert evidence, reducing time required for expert evidence, creating an immediacy of peer review and ensuring a better informed court or tribunal (Bertus de Villiers ‘Accessibility to law: Adjusting court proceedings to the modern era – novel practices and procedures from down under’ (2016) 14 *New Zealand Journal of Public and International Law* 229).

### Conferral of experts

Expert conferral provides a potential mechanism to better identify issues in dispute, save time and clarify complex issues for clients, lawyers and the courts. Although expert conferral does not necessarily reduce the number of issues in dispute, it can provide a basis

for the reasons for disagreement to be clearly articulated: Thereby assisting the judiciary with examination and weighing of expert opinion.

### Concurrent expert evidence

According to De Villiers (*op cit*) at 242, concurrent expert evidence is a process during a hearing whereby experts, from the same or related disciplines, present evidence to a court or tribunal during a joint session of those experts. In general, the experts are called together, sworn or affirmed and given the opportunity to answer the same questions, to comment on each other’s replies, to enter into a dialogue with each other and to put questions to each other.

The process of concurrent evidence is often preceded by conferral of experts where the joint report produced during a conferral sets the agenda for the concurrent evidence and the examination of experts.

### Conclusion

Courts should reiterate that an expert witness’s professional duty is not to the party that pays him or her, but to the court.

The Australian process of expert conferral entails that experts meet without their clients or legal representatives in attendance and without the experts taking instructions or discussing the content of the joint report with clients or legal representatives prior to it being filed in the court or tribunal. This ensures that experts are treated as witnesses of the court and not advocates of a client,

clients can easily feel alienated since they may lose control of the process. The joint report produced by the experts is usually handed to the court and parties.

The process of concurrent evidence, as noted by De Villiers (*op cit*) at 243 serves to encourage a less adversarial atmosphere during the trial and emphasises actual disagreements and reasons for those disagreements. It further serves to contribute to more collegial interactions between experts and assist the court and parties to focus on the real issues in dispute.

The concurrent giving of evidence by experts tends to highlight that experts have an obligation to assist the court rather than be an advocate for the client. The two processes adopted by the Australian courts provide courts with an opportunity to assess and weigh the opinions more effectively.

These processes have contributed to time being saved, changing the setting of hearing to less adversarial and more collegial and to litigants in person being able to better conduct and manage their cases since the issues are clearly identified and experts give evidence concurrently.

It follows that the abovementioned Australian approach offers a viable mechanism for diminishing expert bias.

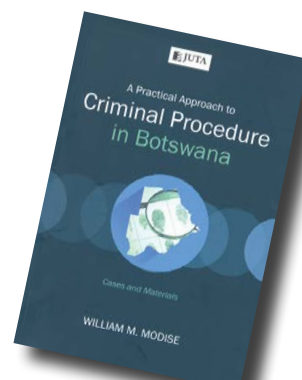
**Dr Izette Knoetze-le Roux LLB LLM (cum laude) LLD (UFS)** is a Legal Researcher at the National Office of Legal Aid South Africa in Johannesburg.

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# THE LAW REPORTS

July 2017 (4) South African Law Reports (pp 1 – 339);  
[2017] 1 All South African Law Reports January (pp 1 – 312);  
[2017] 2 All South African Law Reports April (pp 1 – 334);  
[2017] 2 All South African Law Reports June (pp 677–996)

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  
ECP: Eastern Cape Local Division, Port Elizabeth  
GP: Gauteng Division, Pretoria  
SCA: Supreme Court of Appeal  
WCC: Western Cape Division, Cape Town

## Administration of estates

**Maintenance of surviving spouse:** The issues to be determined in *Friedrich and Others v Smit NO and Others* 2017 (4) SA 144 (SCA) arose from the estate of the late Mr Friedrich (the deceased). The appellants (the applicants in the court *a quo*) were all adult children of the deceased from a previous marriage. The second respondent, Mrs Friedrich, was married to the deceased in 2003 out of community of property without accrual, and their marriage still subsisted at the time of his death in September 2006. The deceased left a Will in which he appointed the appellants as his only heirs. The respondent, one Smit, was appointed as the executor of the deceased's estate.

In November 2006 Mrs Friedrich filed a claim with the executor against the deceased's estate in terms of s 2 of the Maintenance of Surviving Spouses Act 27 of 1990 (the Surviving Spouses Act) in the amount of R 8 454 760, which she subsequently reduced to R 4 468 519,24. The executor allowed Mrs Friedrich's claim in the amount of R 4 468 519,24 and included it in the liquidation and distribution account (the L and D account). It is common

cause that after the amount allocated to Mrs Friedrich in the L and D account, and the other claims of the creditors had been allowed, the remaining amount for distribution among the appellants was R 886 785.

The applicants objected to the inclusion in the L and D account of Mrs Friedrich's claim for maintenance. The master declined to direct its removal, and the applicants applied to set aside his decision under s 35(10) of the Administration of Estates Act 66 of 1965. The court *a quo* dismissed their application.

On appeal to the SCA, the first issue before Tshiqi JA was the nature of the appeal given by s 35(10). The court held that it was an appeal in the wide sense, where the court could consider the matter afresh and make any order it deemed fit.

The second issue was whether Mrs Friedrich had proved she needed maintenance. The court held that Mrs Friedrich's evidence failed to address the factors listed in s 3(b) and (c) of the Surviving Spouses Act. She did not testify that she could not make ends meet and was, therefore, in need of maintenance. She did not provide any documentary proof to show her expenditure, accounts and bank records. The trial court was kept in the dark about her lifestyle and standard of living during the duration of the marriage and after the death of the deceased.

Further, her reasons why she was unemployed were

unconvincing. She had not worked since the deceased's death and she stated that she applied for approximately ten to 12 jobs. However, not a single one of the job applications was in writing. According to her, she was unemployable because of her age. She failed to provide documentary evidence to show that she had indeed applied for employment and was turned down.

The court further reasoned that she offered no explanation on what she meant to do or had done with the amount of approximately R 1,4 million left from the R 3 million she had received from the executor. There was also no documentary evidence to substantiate how the amount of R 1,9 million was spent.

She accordingly failed to prove that she was entitled to reasonable maintenance. The executor of the estate of the deceased was ordered to amend the L and D account by removing the claim of Mrs Friedrich *in toto*.

The appeal was thus upheld with costs.

## Administrative law

**Right of university to change language policy:** In *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA); [2017] 2 All SA 808 (SCA) the facts were as follows: The appellant university, University of the Free State (UFS), adopted a new language policy in terms of which Afrikaans and English as parallel mediums of instruction were replaced by solely English as the primary

medium. The respondent, Afriforum, took UFS' decision on review. The High Court held that UFS' decision was an unlawful administrative action as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and set it aside.

Afriforum's concern turned on the argument that UFS' new language policy, which preferred English over Afrikaans, and the adoption of similar policies at other universities, would erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language.

The High Court and both parties approached the matter on the basis that the impugned decision constituted administrative action as defined in s 1 of PAJA.

On appeal to the SCA, Cachalia JA held that Afriforum's review application was aimed at challenging the decision to adopt the policy, which the UFS council had the authority to decide under s 27(2) of the Higher Education Act 101 of 1997 (HEA). The policy itself was not impugned, nor was it sought to be set aside. It was solely UFS' executive decision to determine its language policy that was attacked and not any of its administrative actions flowing from the adoption of the policy.

The question then was whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given. That is a factual inquiry. The

court pointed out that it had to be careful not to interfere with the exercise of a power simply because they disagreed with the decision or consider that the power was exercised inappropriately. If, therefore, the decision-maker acted within its powers, and considered the relevant material in arriving at a decision so that there was a rational link between the power given, the material before it and the end sought to be achieved, that would have met the requirement of rationality. However, if a decision-maker had misconstrued its power, that would offend the principle of legality and render the decision reviewable.

Afriforum's argument that UFS failed to take into account the requirements of s 29(2) of the Constitution and s 27(2) of the HEA was without merit, because the evidence made it clear that the university had taken both provisions into account. The court *a quo*, therefore, erred in upholding the said argument.

On appeal to the SCA Afriforum advanced another, separate argument. They argued that in abandoning the original dual-medium language policy in order to address the problem of racial segregation, UFS had to consider all reasonable educational alternatives before departing from the original policy. However, Afriforum did not explain what other means were available to UFS.

In response to this argument by Afriforum, UFS pointed out that the right to receive an education in a language of choice hinged on whether the attainment of the right was reasonably practicable, and that the latter element had to take into account constitutional norms. UFS's research

showed that the demographic and language profile of its student population had changed with ever-increasing numbers of black students opting for English-medium language instruction, and correspondingly fewer numbers of white Afrikaans students seeking Afrikaans-medium instruction. UFS' assessment that it was no longer reasonably practicable to continue with the original language policy.

On the issue of costs, Afriforum relied on what has become known as the *Biowatch* principle (which was acknowledged in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)) to avoid a costs order against unsuccessful litigants who seek to vindicate constitutional rights. The SCA upheld that submission.

**Time limit for bringing a review application:** In *ASLA Construction (Pty) Ltd v Buffalo City Metropolitan Municipality (South Africa Civics Organisation as amicus curiae)* [2017] 2 All SA 677 (SCA) the respondent municipality (the municipality) awarded a contract to the appellant (the plaintiff in the court *a quo*). The plaintiff instituted action against the municipality based on payment certificates issued in terms of two contracts between them. The municipality opposed the relief sought. It argued that the payment certificates relied on were predicated on a valid appointment of the engineers who issued the certificates, which in turn depended on the validity of the contract. The municipality alleged that the conclusion of the contracts were unlawful.

The court *a quo* upheld the contentions of the municipality, and declared the relevant

contract invalid, set it aside and declared the payment certificates issued in terms of the contract void *ab initio*. The plaintiff's action for provisional sentence was dismissed with costs.

On appeal to the SCA, Swain JA held that central to the dispute before the court *a quo* was the plaintiff's contention that the municipality had failed to timeously bring the application for the review and setting aside of the relevant contract. Section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that such an application must be brought within 180 days of the award being made. The municipality averred that the application had indeed been brought within the period of 180 days stipulated in s 7, because the municipality (as represented by its council) only became aware of the unlawful administrative action in awarding the relevant contract on 28 October 2015. In the alternative, the municipality averred that the interests of justice justified an extension of the period of 180 days.

The SCA rejected the municipality's contention that the time period only commenced running once the municipality became aware of the unlawful administrative action was unsustainable. The plain wording of s 7 does not support the interpretation that the application must be launched within 180 days after the party seeking a review became aware that the administrative action in issue was tainted by irregularity.

For an extension of the 180-day period, a substantive application had to be made by the municipality when it first approached the court for relief. That was not done.

The SCA further held that the court *a quo* made a number of errors in granting the extension of the 180-day period. Suffice it to mention here that the court *a quo* had incorrectly decided the merits of the review application before considering and determining the application for condonation. In doing so, it effectively precluded any finding that the application for condonation should be refused on its merits, with the result that any unlawful award of the relevant contract would be validated by the delay.

The SCA further considered the plaintiff's appeal against the court *a quo*'s dismissal of its claim for provisional sentence. Before the court *a quo*, the municipality's sole ground of opposition to the provisional sentence claim of the plaintiff was that the payment certificates prepared by the engineer and relied on by the plaintiff, were dependent on his or her valid appointment in terms of a valid underlying contract. The defence was upheld by the court *a quo* and provisional sentence refused, but the conclusion reached on appeal rendered the defence unsustainable.

The appeal (including the plaintiff's claim for provisional sentence) thus succeeded with costs.

## Attorney's fees

**Unlawful to charge contingency fees for non-litigious work:** In *Nash and Another v Mostert and Others* 2017 (4) 80 SA (GP) the court held that that attorneys are not entitled to charge contingency fees for non-litigious work, but may only charge fees for work actually preformed.



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The facts were that Mostert, an attorney, was appointed as the curator of the Sable Industries Pension Fund (Sable) by the High Court. The fund had been stripped of its assets in terms of the infamous 'Ghavalas Option', which is a type of scam, the details of which are not relevant for purposes of the present discussion. Nash (the applicant) had allegedly stolen R 36 million from Sable, which had been left with no assets. The Financial Services Board (FSB) applied to court for Mostert to be appointed as curator of Sable in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001.

The court appointed Mostert as curator to manage the affairs of Sable and to recoup the funds stripped from it (hereafter: the initial court order). The order stipulated that: 'The curator shall be entitled to periodical remuneration in accordance with the norms of the attorneys' profession as agreed with the [FSB], such remuneration to be paid from the assets

owned and administered on behalf of the [Sable] fund.'

An agreement was concluded between Mostert and his firm and the FSB in terms of which a contingency fee was to be paid to Mostert and his firm as there were no assets in Sable to fund any litigation for the recovery of its funds. Remuneration of 33,3% of all funds recovered was agreed to by all the parties.

The applicant (who alleged to be a member of Sable) argued that the contingency fee agreement was void as it exceeded the maximum percentage allowed by the Contingency Fees Act 66 of 1997 (CFA), namely, 25%.

Tuchten J held that the remuneration to be paid on a proper interpretation of the initial court order had to comply with the norms of the attorneys' profession. This placed a restriction on the discretion of the FSB to agree to the amount of the remuneration.

The common-law restrictions on contingency fees, in terms of which charging

such fees was unlawful, arose under circumstances where courts decided on such fees in litigious matters. There is no case law dealing with contingency fees for non-litigious matters and the matter, therefore, had to be decided on general principles.

The court pointed out that the main concern with modern contingency fees agreements is that they may give rise to a conflict of interests between the duties and interests of legal practitioners. Making practitioners partners with their clients tends to subvert the interests of justice.

There is in principle no reason not to subject contingency fees for non-litigious work to the same rules applicable to such fees for litigious work. Contingency fees by attorneys may only be recovered under the CFA and subject to its restrictions.

However, the attorneys' profession does not contemplate within their norms and rules for fees any provision for the charging of contingen-

cy fees for non-litigious work.

The court concluded that contingency fee agreements in respect of non-litigious matters were against public policy, and for broadly the same reasons that agreements in relation to litigious work were, namely, the undertaking of speculative actions for clients could give rise to conflicts of interest as described above.

The agreement in this case is therefore void. The curator and the FSB need to come to a new agreement providing for remuneration in accordance with the work actually done by the curator and based on the general principles applicable to attorneys' fees.

The respondents were ordered to pay the applicants' costs in relation to the present application.

## Company law

**Late proof of claims under winding-up process:** In *Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others* 2017 (4) SA 152 (SCA); [2017]



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1 All SA 90 (SCA) the fourth and fifth appellants sought the High Court's leave under s 44(1) of the Insolvency Act 24 of 1936, to prove a late claim in the winding-up of the second respondent. The respondents, BHP, raised an exception, which was upheld.

On appeal to the SCA, the first issue before Lewis JA was whether the application of s 44(1) of the Insolvency Act, and particularly the proviso to it which deals with fixing a period for the proof of claims, and the late proof with the leave of the master or the court, is excluded by the terms of s 366 of the Companies Act 61 of 1973 (the 1973 Companies Act). Section 366(1) regulates the proof of claims in a winding-up, and s 366(2) gives the master a discretion to fix a time within which creditors are to prove their claims.

In deciding the matter, the court referred with approval to the decision in *Mayo NO and Others v De Montlehu* 2016 (1) SA 36 (SCA) in which the court confirmed that there was no inconsistency between s 44(1) of the Insolvency Act and s 366(2) of the 1973 Companies Act and that the two provisions have different objectives.

The court thus confirmed that that part of s 44(1) of the Insolvency Act, which allows the court or the master to give leave for the late proving of a claim, applied in windings-up.

Accordingly, the exception to the claim for the leave of the court to prove a claim on the terms and conditions set by the master should not have been upheld. The appeal against the order upholding the first exception was thus successful.

The fourth and fifth appellants had also claimed the expungement of a claim in the liquidation and distribution account. The respondents had again successfully excepted in the court *a quo*.

The second issue on appeal was thus whether a party could bypass s 407 of the 1973 Companies Act and approach a court directly to expunge a claim.

Lewis JA held that it could not. Section 407 gave the power of expungement to the

master alone; and only when he had made a decision in its exercise, could a person approach a court to review it.

The first exception to the particulars of claim was dismissed with costs; while the appeal against the order upholding the second exception was dismissed with costs including those of two counsel.

## Constitutional law

**Infringement of rights of privacy by the Drugs and Drug Trafficking Act:** In *Prince v Minister of Justice and Constitutional Development and Others and related matters* [2017] 2 All SA 864 (WCC) the applicants sought a declaration that the legislative prohibition against the use of cannabis and the possession, purchase and cultivation of cannabis for personal or communal consumption was invalid. The specific impugned statutory provisions were ss 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act); s 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (the Medicines Act); and s 40(1)(h) of the Criminal Procedure Act 51 of 1977, insofar as the latter referred to cannabis. The latter provision empowered a peace officer without a warrant to arrest any person who is reasonably suspected of having committed an offence under any law and governing the making, supply, possession or conveyance of cannabis.

The respondent (the minister) raised the doctrine of *res judicata* contending that the issues, which emerged in the present case, had previously been disposed of by the CC in *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231; 2002 (2) SA 794 (CC).

Davis J held that it was clear that the CC did not consider whether any prohibition as contained in ss 4 and 5 of the Drugs Act infringed the right to privacy. The case turned instead on a limited question, namely, an application for a limited exemption for religious reasons from the provisions of a criminal

law of general application. Accordingly, the doctrine of *res judicata* did not apply, because the CC did not decide the dispute before the present court.

The critical question raised by the applicants was whether the state may legitimately dictate what people eat, drink or smoke in the confines of their own homes or in properly designated places. It had to be determined whether the infringement of the right to privacy caused by the impugned legislation could be justified in terms of s 36 of the Constitution.

Section 14 of the Constitution guarantees the right to privacy. There is a connection between an individual's right to privacy and the right to dignity, which is protected in terms of s 10 of the Constitution. There is also a link between privacy and the right to freedom.

Any right guaranteed in ch 2 of the Constitution may be limited by a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account a series of factors which are set out in s 36(1) of the Constitution. As the present case turned on the determination of the factors set out in s 36(1), the burden of justification rested on the minister.

The court had to consider whether the relevant behavior warranted constitutional protection or, expressed differently, whether what the court was dealing with was a genuine and serious violation of a constitutional right protected in ch 2. The court confirmed that the right to privacy not only passed the threshold test, but was clearly deserving of constitutional protection, absent a clear justification to the contrary.

The minister, in turn, was required to show that there was a substantial state interest, which justified the limitation. The minister failed to do so. The present prohibition contained in the impugned legislation did not employ the least restrictive means to deal with a social and health problem for which there were a number of less restrictive options supported by a significant body of expertise. The court, therefore, held that less restrictive means should be employed to deal with the problem.

Explaining the ambit of judicial review, the court held that it was the duty of the legislature and not the court to prescribe alternatives to decriminalisation of the use of cannabis for personal use and consumption.

Sections 4(b) and 5(b) of the Drugs Act and s 22A(10) of the Medicines Act were declared inconsistent with the Constitution only to the ex-

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tent that they prohibited the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis was for personal consumption by an adult. The declaration of invalidity was suspended for a period of 24 months from the date of the judgment in order to allow Parliament to correct the defects.

## Credit law

**Unlawful to collect or reactivate a prescribed debt:** In *Kaknis v ABSA Bank Ltd* 2017 (4) SA 17 (SCA); [2017] 2 All SA 1 (SCA) the court held that s 126B of the National Credit Act 34 of 2005 makes it unlawful to continue to collect or to reactivate a debt that had become prescribed under the Prescription Act 68 of 1969.

The facts were that Kaknis concluded ten instalment sales agreements with the respondent bank (Absa). These agreements concerned motor-vehicles and trailers. It was common cause that the debts prescribed during July 2014. Absa, notwithstanding continued to attempt to recover the amounts that had been unpaid. In October 2014 Kaknis signed an acknowledgment of debt in favour of Absa for R 2,7 million. Kaknis failed to make payments on the acknowledgment of debt and also failed to return any of the assets purchased. In April 2015 Absa issued summons claiming cancellation of the agreement, return of the assets and with damages to be claimed at a later stage.

Kaknis entered appearance to defend and Absa applied for summary judgment. Kaknis raised the defence that the claims had become prescribed, alternatively that Absa was precluded from claiming the amounts by virtue of s 126B(1)(b) of the NCA. The court of first instance rejected the defences and granted summary judgment.

On appeal, Shongwe JA held that s 126B(1)(b), which makes it unlawful to continue to collect or to reactivate a debt that had become prescribed under the Prescription Act, came into operation on 13 March 2015, that is,

well after the acknowledgment of debt, which revived the debt, had been signed.

The court further held that there is a strong presumption that legislation is not intended to be retroactive or retrospective. There must be clear language from the legislature that retroactive or retrospective working was intended.

In this regard the court pointed out that legislation does not invalidate acts which were performed prior to the enactment, nor does it impair existing rights and obligations unless there is a clear indication to that effect.

It further emphasised that there is also a rule that new legislation, even though clearly intended to be retroactive or retrospective, will not affect matters which are subject to pending legal proceedings. This presumption applies in most legal systems and is settled in our law.

It is further common cause that s 126B does not expressly provide that it is intended to apply with retrospective effect.

Finally, it held that there was also no other indication that the legislature intended the retrospective effect of s 126B.

The appeal was accordingly dismissed with costs.

## Delict

**Future medical expenses for bodily injuries:** In *Premier, Western Cape v Kiewitz* 2017 (4) SA 202 (SCA) the respondent, Kiewitz, sued the Western Cape provincial government (the defendant) for damages suffered by her son, J, who became blind because staff at the provincial hospital at which he was born failed to detect an eye disease at birth. All damages apart from a claim in respect of J's future medical expenses were settled. In its 'plea in mitigation' the defendant undertook to provide all future medical care required by J for his sight impairment. The undertaking specified that disputes over treatment would be determined by a third party, which was to be either a health professional agreed on by the parties or, failing that, the Dean of the University of Stellenbosch Faculty

of Health Sciences. The defendant argued that failure to accept the undertaking and thus mitigate the damages would result in a concomitant reduction of the damages.

The High Court dismissed the plea.

In an appeal to the SCA the question was whether plaintiffs in delictual claims against a provincial government are obliged to mitigate their damages by accepting a tender for future medical treatment at a provincial health facility rather than receiving a monetary payment in respect of assessed future medical expenses.

Nicholls AJA held that the effect of the plea in mitigation was to deny Kiewitz any monetary award for future medical treatment. It offended against both the once-and-for-all rule and the rule that compensation in bodily injury matters must comprise a monetary award. In addition, the provision regarding the settlement of disputes appeared to be an attempt to unlawfully exclude judicial oversight over future medical expenses.

The court confirmed the trite rule (laid down in *Cape Town City Council v Jacobs* 1917 AD 615 at 620) that a delictual claim is based on a single, indivisible cause of action and a plaintiff must claim once, and be compensated, for all damage suffered, not only for loss already suffered but future loss as well.

The appeal was dismissed with costs.

## Insolvency law

**Requirement of 'advantage to creditors':** The facts in *Body Corporate of Empire Gardens v Sithole and Another* 2017 (4) SA 161 (SCA) were as follows: The appellant, the body corporate of Empire Gardens (the body corporate), was established in accordance with s 36 of the Sectional Titles Act 95 of 1986.

The first respondent, Ms N Sithole, is the joint registered owner of unit 12 of the sectional title scheme of the body corporate and is accordingly, in terms of s 36(1) of the Sectional Titles Act, one of the members of the body corporate. The other regis-

tered owner of the unit is the first respondent's sister, Ms C Sithole, but she was not cited as a party in the present proceedings. The Sithole sisters, as joint owners of the unit, were obliged to pay their proportionate share of the levies but they defaulted and two default judgments in the amounts of R 13 385,70 and R 99 298,80 were granted against them respectively. In order to satisfy the judgments, their movable assets were attached and sold at an auction but it only realised an amount of R 3 237. In a further attempt to satisfy the judgments, the body corporate obtained a warrant of execution against the sisters' immovable property and the unit was attached and sold at an auction, but the sale had to be abandoned because the second respondent (Nedbank), which had a mortgage bond registered in its favour in respect of the unit, did not accept the selling price of R 170 000. The body corporate then launched an application for Ms Sithole's sequestration.

The court *a quo* dismissed the application. It held that such an order would only benefit the body corporate and not the general body of creditors as required by s 10(1)(c) of the Insolvency Act 34 of 1936.

On appeal to the SCA the body corporate argued that bodies corporate did not merely act to protect their own financial interests but had a statutory obligation to protect the interests of all the members who were prejudiced when a single member failed to pay their arrear levies. A deviation from the trite principle of *concursum creditorum* was, therefore, justified so that it would not be necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors.

Tshiqi JA held that there was no basis for making a distinction between bodies corporate and other creditors. Accordingly, so the court reasoned, a body corporate of a sectional title scheme applying for the compulsory sequestration of its members was required to prove that the

order of sequestration sought would be to the advantage of the general body of creditors, as contemplated in s 10(c) of the Insolvency Act 24 of 1936.

The appeal was dismissed.

## Property

**Removal of variation of title deed restrictions:** The decision in *Ex Parte Whitfield and related matters* [2017] 2 All SA 841 (ECP) concerned seven similar applications, in terms of which the applicants sought the removal of restrictive conditions of title incorporated in the title deeds of their respective properties. At stake was the court's jurisdiction in relation to the removal of a restrictive condition of title in the light of the provisions of the Spatial Planning and Land Use Management Act 16 of 2013, which came into effect on 1 July 2015. Each of the matters was then referred to a Full Court of the Eastern Cape Division in order that the issue of jurisdiction be determined.

The present court began with a consideration of the ambit of its jurisdiction to remove or vary a restrictive condition of title as it had been explained in a long line of cases prior to the commencement of the new legislation. Next, it considered whether the provisions of the Spatial Planning Act had in any manner altered either the ambit of the court's authority, or defined the circumstances

in which it may be exercised.

Goosen J held that it has long been settled that the High Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title to land. The rationale lies in the nature of a restrictive condition which, in its essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferee's *dominium* over the property. Such conditions are in the nature of servitudes. Given the nature of the conditions of title and the rights that are thereby conferred they cannot be removed, varied or suspended except with the consent of all of the parties whose rights and interests are regulated thereby.

The authorities referred to by the court showed that the jurisdiction of the court to authorise a deletion, variation or suspension of a restrictive condition arises from the fact that interested parties are vested with a common law right to waive, vary or abandon their rights coupled with the fact of the exercise of such right by the parties concerned. The court does no more than enquire into and establish that such common law right has been properly exercised by the parties who are entitled to exercise it. Once it is satisfied in this regard, it issues a declarator which authorises the Registrar of Deeds to effect an ap-

propriate endorsement of the title deeds in accordance with the provisions of the Deeds Registries Act 47 of 1937.

The specific question, which arose in relation to the present matter, was whether the provisions of the Spatial Planning Act had in any manner limited the court's authority to give effect to the exercise by interested parties of their common law right to waive, or amend, or vary their rights.

The Spatial Planning Act establishes a new administrative procedure for the removal of a restrictive condition, by placing the authority in the hands of the Municipal Planning Tribunal or designated municipal official as the case may be. The fact that the Spatial Planning Act does not specifically address the ambit of the court's authority, was seen to militate against a finding that the court's authority is in any manner altered. If the legislature had intended to exclude a court from issuing a declaratory to the effect that the rights conferred by a registered condition of title have been extinguished, either by bilateral consent or by unilateral waiver, it would have done so in express terms.

The court further explained the meaning and effect of s 47 of the Spatial Planning Act, which formed the statutory framework regulating the removal of restrictive conditions. The question was

whether the consent of a Municipal Planning Tribunal had to be obtained before a court would grant a declarator authorising such removal. The court held that s 47(1) did not require the consent of a municipal planning tribunal in all circumstances where a court is moved to authorise the removal of a restrictive condition. Therefore, a court's power to grant an order authorising the removal or amendment of a restrictive condition of title on proof that all interested parties have consented thereto is not affected by the provisions of the Spatial Planning Act. In each instance it would be necessary to establish that all interested parties have indeed consented thereto.

Having established the above, the court addressed each case in turn, making appropriate orders against the above principles.

## Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administrative law, appeals, attorneys, business rescue, civil procedure, contempt of court, enforceability of contracts, criminal law, expropriation, human rights, immigration, intellectual property, land reform, local authorities, revenue and sale of land.



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## Promulgation of Acts

**Appropriation Act 6 of 2017.** *Commencement:* 10 July 2017. GN661 GG40971/10-7-2017 (also available in Sepedi).

## Selected list of delegated legislation

### Copyright Act 98 of 1978

Application of the Act to other countries. GN740 GG40996/21-7-2017.

### Criminal Procedure Act 51 of 1977

Determination of persons or category or class of persons who are competent to be appointed as intermediaries. GN R663 GG40976/14-7-2017 (also available in Afrikaans).

### Employment Equity Act 55 of 1998

Register of designated employers that have submitted employment equity reports in terms of s 21. GN715 GG40996/21-7-2017.

### Extradition Act 67 of 1962

Extradition treaty between South Africa and Argentina. GenN519 GG40978/14-7-2017.

### Financial Services Board Act 97 of 1990

Levies on financial institutions. GenN501 GG40965/7-7-2017 (Tshivenda and isi-Zulu versions).

### Gas Regulator Levies Act 75 of 2002

Levy and interest payable on piped-gas industry. GN621 GG40950/30-6-2017.

### Health Professions Act 56 of 1974

Regulations relating to the scope of practice of profession of oral hygiene. GN713 GG40996/21-7-2017.

### Income Tax Act 58 of 1962

Agreement between South Africa and Turkey for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income. GN755 GG41009/28-7-2017 (also available in Afrikaans).

Agreement between South Africa and Samoa for exchange of information relating to tax matters. GN756 GG41009/28-7-2017 (also available in Afrikaans).

# New legislation

Legislation published from  
30 June – 28 July 2017

### International Co-operation in Criminal Matters Act 75 of 1996

Mutual legal assistance in criminal matters treaty between South Africa and Argentina. GenN518 GG40978/14-7-2017.

### Judges' Remuneration and Conditions of Employment Act 47 of 2001

Determination of salaries and allowances of constitutional court judges and judges. GN662 GG40972/11-7-2017.

### Legal Aid South Africa Act 39 of 2014

Regulations in terms of the Act. GN R745 GG41005/26-7-2017.

### Magistrates' Courts Act 32 of 1994

Appointment of a place of sitting of court: Mogale City. GN628 GG40956/2-7-2017.

### Meat Safety Act 40 of 2000

Establishment of a meat inspection scheme. GN634 GG40965/7-7-2017.

### Medicines and Related Substances Act 101 of 1965

Amendment of schedules. GN748 GG41009/28-7-2017.

### National Environmental Management Act 107 of 1998

Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of s 24G. GN R698 GG40994/20-7-2017.

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

Declaration of greenhouse gases as priority air pollutants and persons required to submit pollution prevention plans for approval. GN710 GG40996/21-7-2017.

National Pollution Prevention Plans Regulations. GN712 GG40996/21-7-2017.

### National Environmental Management: Integrated Coastal Management Act 24 of 2008

Dumping at Sea Regulations. GN711 GG40996/21-7-2017.

### National Health Act 61 of 2003

National Health Insurance Policy. GN627 GG40955/30-6-2017.

National Health Insurance: Institutions, bodies and commissions that must be established. GN660 GG40969/7-7-2017.

### Petroleum Pipelines Levies Act 28 of 2004

Levy and interest payable on petroleum pipelines industry. GN622 GG40950/30-6-2017.

### Project and Construction Management

### Professions Act 48 of 2000

Revised Code of Conduct. BN139 GG41009/28-7-2017.

### Promotion of National Unity and Reconciliation Act 34 of 1995

Amendment of regulations relating to assistance to victims in respect of higher education and training. GN R691 GG40988/18-7-2017 (also available in Afrikaans).

### Property Valuers Profession Act 47 of 2000

Fees and charges. BN553 GG41009/28-7-2017.

### Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support to R 262 366,00 with effect from 31 July 2017. BN140 GG41013/28-7-2017 (also available in Afrikaans).

### Superior Courts Act 10 of 2013

Practice directive for North West Division of the High Court, Mahikeng. GenN552 GG41009/28-7-2017.

## Draft Bills

Draft Customary Initiation Bill. GenN528 GG40978/14-7-2017.

Draft Choice on Termination of Pregnancy Amendment Bill. GenN517 GG40970/10-7-2017.

Draft Communal Land Tenure Bill. GenN510 GG40965/7-7-2017.

Draft Sectional Titles Amendment Bill. GN623 GG40951/30-6-2017.

## Draft delegated legislation

Draft third national communication report for South Africa to the United Nations Framework Convention on Climate Changes. GenN497 GG40949/30-6-2017. Proposed regulations to phase-out the use of persistent organic pollutants in terms of the National Environmental Management Act 107 of 1998. GN R626 GG40954/30-6-2017.

Proposed list of particular trees and particular groups of trees as 'champion trees' in terms of the National Forests Act 84 of 1998. GenN482 GG40945/30-6-2017.

Draft regulations regarding infrastructure or activity affecting safe railway operations in terms of the National Railway

Safety Regulator Act 16 of 2002. GN618 GG40945/30-6-2017.

Draft security matters regulations, 2017 in terms of the National Railway Safety Regulator Act 16 of 2002. GN617 GG40945/30-6-2017.

Regulations relating to the surveillance and the control of notifiable medical conditions in terms of the National Health Act 61 of 2003 for comment. GN604 GG40945/30-6-2017.

Draft Mine Water Management Policy Position in terms of the National Water Act 36 of 1998 for comment. GN658 GG40966/7-7-2017, GN657 GG40965/7-7-2017 and GN690 GG40987/14-7-2017. Proposed regulations regarding the classification, packing and marking of

processed meat products intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990 for comment. GN633 GG40965/7-7-2017.

Draft guidelines on the exchange of information between competitors in terms of the Competition Act 89 of 1998. GN684 GG40980/14-7-2017.

Regulations in terms of s 25(7) of the Special Economic Zones Act 16 of 2014 for comment. GN R664 GG40976/14-7-2017.

Amendments to the regulations to the Unemployment Insurance Act 63 of 2001 for comment. GN670 GG40978/14-7-2017.

Restriction of granting of new applica-

tions for prospecting and mining rights in terms of the Mineral and Petroleum Resources Act 28 of 2002 for comment. GN692 GG40989/19-7-2017.

Verification statement 005 of 2017 in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 for comment. GenN545 GG40997/21-7-2017.

Amendments to the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R697 GG40993/21-7-2017.

Regulations relating specifically to the chiropractic and osteopathy profession in terms of the Allied Health Professions Act 63 of 1982 for comment. GN714 GG40996/21-7-2017.



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## Job applicant's duty to disclose

In *Galesitoe v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 7 BLLR 690 (LC), the employee was dismissed for failing to disclose at the earliest opportunity that he was involved in litigation with his former employer. Furthermore, he was charged with misrepresenting his ability to attend to all his employment obligations. In this regard, the employer alleged that the employee had been employed with the specific mandate to win over business from his previous employer due to his prior work experience. The fact that he was embroiled in litigation with his former employer materially impacted on his ability to win business from his previous employer and other public sector clients. The employer argued that during the interview the employee was made aware that his previous employer was a target and that his appointment would be specifically related to winning business from his previous employer.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and argued that he was not un-

der an obligation to disclose the pending litigation with his former employer. Moreover, his new employer should have conducted pre-employment checks to ascertain this information and the litigation was in any event in the public domain. The arbitrator found that it would not have been possible for the employer to find out this information as the employee was litigating under a different name. The arbitrator concluded that in omitting to disclose the litigation the employee's conduct had had a negative impact on the employer and the employer could no longer trust the employee. Thus, dismissal was appropriate in the circumstances.

The employee took the matter on review to the Labour Court and argued that the commissioner did not reach a decision that a reasonable decision maker could reach for the following reasons:

- The employee was not required to disclose his litigation as s 5(1)(c) of the Labour Relations Act 66 of 1995 (LRA) prohibits an employee from being prejudiced for exercising any right under the LRA or engaging in proceedings under the LRA.
- The arbitrator failed to consider that one of the individuals on the interview panel was aware of the litigation and the litigation was in any event in the public domain.
- The employee alleged that the employer should have ascertained this informa-

tion by doing appropriate background checks, which the employer conceded it did not do.

- The arbitrator misconstrued the evidence that the employee's primary focus was to win business from his previous employer, which the employee argued was not the case.

La Grange J found that the employee could not rely on the provisions of the LRA, which preclude an employee from being prejudiced for engaging in proceedings under the LRA. This is because the litigation was not related to his rights under the LRA but instead was a civil matter for amounts allegedly due to him as a director on the board. La Grange J further did not agree that the employee was relieved of his duty to disclose the information because one of the individuals on the interview panel had knowledge of the litigation. This was particularly because the individual had been under the impression that the litigation had been resolved. La Grange J also did not agree that the employer should have determined this information by doing a pre-employment check, particularly in circumstances where the litigation had been instituted under a different name. La Grange J remarked that even if the litigation had been under the same name, the employer would not be under a duty to research what litigation a job applicant is engaged in, although this may be different if the information was

contained in the employee's personnel records at the employer. Thus, an employee cannot assume that such a search has been done by the employer.

Finally, La Grange J acknowledged that another arbitrator might have interpreted the evidence differently and reached a different conclusion. However, it was not unreasonable for the arbitrator to determine that the employee's relationship with his former employer was a material consideration for the new employer and to conclude that the dismissal was fair in the circumstances. The review application was dismissed.

## Alleged discrimination on the basis of an arbitrary ground

In *Ndudula and Others v Metrorail - Prasa (Western Cape)* [2017] 7 BLLR 706 (LC), the applicants were employed as section managers. The employer then appointed two more employees as section managers on a higher salary than the applicants.

The applicants lodged three grievances in this regard and referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation. Thereafter, the unfair discrimination claim was referred to the Labour Court (LC) and the applicants sought an order that they be remunerated on the same terms and conditions as the newly appointed section managers.

The employer admitted that it had paid the newly appointed section managers at a higher salary but denied that in doing so it unfairly discriminated against the applicants as alleged. At the pre-trial conference it became common cause that the salaries of the two section managers had been calculated in error and their salaries were reduced approximately 20 months later. The employees, however, did not refund the employer in respect of the higher salaries that had been paid in error. The applicants then limited their relief to the payment of a lump sum as compensation.

The applicants based their claim on s 6(1) of the Employment Equity Act 55 of 1998 and alleged that they were discriminated against on an arbitrary ground. The applicants alleged that it was not necessary to specify a specific ground as the conduct of the employer inherently constituted arbitrariness. In this regard, they alleged that the wage differentiation was arbitrary and simply because it was arbitrary it constituted unfair discrimination. The employer argued that 'arbitrary' in itself is not a ground and the applicants still needed to specify the ground that was allegedly arbitrary.

The LC per Coetzee AJ considered whether there were three distinct grounds of unfair discrimination, namely –

- a listed ground;
- an analogous ground; and

- an arbitrary ground or whether there were simply two grounds.

Coetzee AJ held that there are only two grounds of unfair discrimination, namely, a listed ground and an arbitrary ground, which are the grounds analogous to the listed grounds. Coetzee AJ held that it was not the intention of the legislature to add a third ground of unfair discrimination by including 'any arbitrary ground.' He held that an arbitrary ground can only be described as any differentiating criterion which forms the basis of a differentiation which is not rationally linked to a legitimate purpose.

Coetzee AJ remarked further that the crux for the test for unfair discrimination is the impairment of human dignity, not the classification of the ground as listed or unlisted. Thus, the differentiation must affect human dignity or must have a similar serious consequence. The effect of the inclusion of 'arbitrary ground' is that discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination provided that the complainant defines the arbitrary ground and discharges the burden of proof.

In this case, the applicants did not plead any ground on which they were allegedly discriminated against. Even if they had alleged that 'error' was the arbitrary ground, Coetzee AJ was of the view that it would be difficult for an error that was subsequently corrected to constitute such a ground. The application was dismissed.



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## Default award – review or rescission?

*Bloem Water Board v Hash* (unreported case no JA83/2016, 28-6-2017) (Landman JA (with Tlaletsi AJP and Phatshoane AJA concurring)) (LAC).

Under what circumstances can an employer launch an application to review and set aside a default award delivered under the auspices of either the Commission for Conciliation, Mediation and

Arbitration (CCMA) or a bargaining council? This was one of the questions before the Labour Appeal Court (LAC).

The employee referred an unfair dismissal dispute to the fourth respondent bargaining council. On the day of the arbitration the representatives of both parties, including the dismissed employee attended, however, the arbitrator had not arrived at the scheduled time. After waiting 45 minutes and with no word from the council as to whether the arbitrator would be attending proceedings or not, the appellant's representative left. The appellant's Chief Executive Officer, on the same day wrote to the council complaining about the arbitrator's tardy conduct and advised that the matter should not continue in the absence of the appellant's representative.

Subsequent to the appellant's representative leaving, the arbitrator arrived and began the arbitration process with only the employee and his representative in attendance. On being advised that the appellant's representative had attended but later left, the arbitrator took the view that because the matter

had been set down for a full day, the appellant's representative had a duty to remain at the venue for the entire day. By leaving the premises, the arbitrator concluded the appellant abandoned its right to defend the employee's claims against it. The arbitrator continued to hear the matter in default and delivered an award finding the employee's dismissal both procedurally and substantively unfair and awarded him reinstatement.

The appellant filed an application to review and set aside the award accompanied by an application for condonation. The Labour Court (LC) refused condonation whereafter the appellant approached the LAC.

The first point raised by the employee was that the appellant's review application was premature in that it should have first applied to the bargaining council to have the award rescinded in terms of s 144 of the Labour Relations Act 66 of 1995. Following this argument, the employee submitted that because it was open for the appellant to apply for rescission, proceedings before the bargaining council remained incomplete



and a reviewing court should not readily intervene in incomplete proceedings.

While the LAC concurred with the view that the conventional approach is that a party should exhaust all internal remedies before approaching a court on review, this does not mean a reviewing court cannot intervene in incomplete proceedings at a tribunal or lower court. Where the interest of justice so demands, a reviewing court can, in exceptional circumstances intervene *in medias res* (in the middle of proceedings), as set out in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A).

Even though the LAC held that a rescission application did, *prima facie* give the appellant a remedy to address the default award, this fact did not exclude the LC from dealing with an application to review and set aside the default award – more so, in circumstances where it would be difficult for the appellant to show ‘absence’ in a rescission application when in fact, its representative attended proceedings and left 45 minutes after the scheduled time.

The LAC found that it was both in the interest of justice and exceptional circumstances, on the facts, which permitted the LC to hear the review application.

The next issue before the LAC was the court *a quo*'s decision to refuse condonation.

The LAC noted that the appellant's delay in bringing the review application delay was ‘slight’ and, therefore, the court *a quo* was obliged to consider the appellant's prospects of success as set out in the condonation application. The LC's failure to do so opened the door for the LAC to consider this issue.

The appellant, in its condonation application and with regard to ‘prospects of success’, bore the onus to demonstrate that the arbitrator's decision to continue in its absence was irregular and that it had a *prima facie* defence to the employee's claim. Beginning with the latter issue, the court found that on the record of the employee's internal disciplinary proceeding as well as that of his appeal hearing, the appellant had a *prima facie* defence to the employee's claim for unfair dismissal.

As to the arbitrator's decision to continue in the absence of the appellant, the LAC held:

‘The arbitrator was confronted with the fact that the appellant's representative had arrived for the arbitration and had waited for the arbitrator without any information as to whether the arbitrator would be arriving late or not at all. This situation required the arbitrator to exercise a discretion to stand the matter down and attempt to secure the return of those absent or to postpone the arbitration or to proceed with the arbitration. In considering the issue, the arbitrator should have been mindful that his failure to attend at the appointed hour (regardless of the reason for this) was the proximate cause of the appellant's representative leaving when they did.

Instead, the arbitrator put the blame on the appellant. He investigated whether the appellant had abandoned the arbitration ie waived its rights and found that it had done so. The fact that the appellant attended the arbitration and waited for the arbitrator even though he had not arrived timeously and also had previously arrived late for an arbitration, does not signify that the appellant abandoned the arbitration.’

The LAC found that the arbitrator had committed a misconduct by continuing to hear the matter in the absence of the appellant and that this fact, together with the defence raised by the appellant against the claim for unfair dismissal, demonstrated the appellant had reasonable prospects of success in its condonation application.

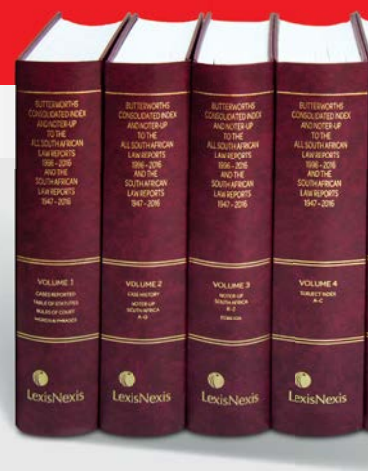
The court *a quo*'s finding was set aside and replaced with an order that the late filing of the appellant's review application be condoned and the default award set aside. The dispute was remitted to the bargaining council for a hearing *de novo* with no order as to costs.

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<i>PLD</i>	Property Law Digest	LexisNexis	(2017) 21.2
<i>SAJELP</i>	South African Journal of Environmental Law and Policy	Juta	(2016) 22
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## Delict

**Potgieter, J** 'Vonnisbespreking: Die nuwe onregmatigheidstoets: 'n Trojaanse perd wat delikteregbeginsels bedreig?' (2017) June *LitNet*.

## Education law

**Kloppers, D and Kloppers, H** 'Caveat magister! Die uitsetting van kosgangers uit koshuise van openbare skole weens

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**Chitimira, H** 'Furnishing employees with the petition for sequestration - constitutional and related issues: *Stratford and Others v Investec Bank and Others* 2015 (3) SA 1 (CC)' (2017) 29.1 *SAMLJ* 153.

**Danka, A, Subramanien, D and Whitear, N** 'Garden Leave: A discussion in the context of *Vodacom (Pty) Ltd v Motsa and Another* (2016) 37 ILJ 1241 (LC)' (2017) 38 *ILJ* 1511.

**Fergus, E** 'Can obviously wrong be right? Notes on *Coega Development Corporation (Pty) Ltd v Commission for Concilia-*

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## Appropriate contact and maintenance guidelines for sperm donors

**T**he South African Law Reform Commission Project 110 Review of the Child Care Act Report (2002) recommended that all legal ties be severed in the case of gamete donors. As a result, the Children's Act 38 of 2005 (the Act), excludes gamete donors, along with biological fathers of children conceived through rape or incest, from the definition of 'parent'. This exclusion refers to gamete donation using artificial fertilisation. Artificial fertilisation includes home insemination, using a syringe. The Act is silent on instances of rape, where the victim is male, as well as whether gamete donors, in instances where intercourse is used, are excluded from the definition. One would imagine that in the latter case, such parties would similarly be excluded, on the grounds that to do otherwise would amount to unfair discrimination according to birth status, as well as not be in the best interests of the child.

Although the Act excludes such parties from the definition of parent, ss 21, 23, and 24 do not preclude such from applying for parental rights and responsibilities, including guardianship, to their biological child.

A report prepared by the Office of the Family Advocate, recommended a known sperm donor be granted full pa-

rental rights and responsibilities, against the child's mother's wishes. The recommended contact exceeded the maximum amount usually recommended by the Family Advocate for a non-resident, divorced parent. It was recommended that contact be twice a week for three hours, and eight hours alternating Saturdays and Sundays. It was further recommended that this progress to weekly overnights, bi-weekly weekend stays, and shared school holidays.

### Paying lip service to fragmented rights

Should the sperm donor not be granted full parental rights, but still be granted the parental right of contact, it in essence still confers the sperm donor with the status of parent. Various sections of the Act are applicable to a 'holder of parental responsibilities and rights', regardless of whether they are not a parent, guardian, or full holder of parental rights and responsibilities.

For instance, should a sperm donor be granted the parental right of contact, the child's mother would need to consult with him on issues such as education, and health care. He would also be entitled to enter into an agreement with a third party that would like to acquire parental rights and responsibilities.

This raises the question of whether it is in the best interests of a child to order the same contact regime for a sperm donor, as ordered for a father that was committed to the child prior to conception, and has lived with the child.

### Invalidating chosen family structures

A further consideration is whether it is in the best interests of the child to override the mother in declaring the sperm donor a holder of parental rights. Surely, one needs to take cognisance of the difference that exists in declaring a divorced father a holder of parental rights, versus declaring a sperm donor a holder of parental rights. In the first instance, the order is declaratory in nature, as the father is the *de facto* parent. In the latter instance, the order effectively seeks to change the parental status of the sperm donor from non-parent to parent, imposing an additional 'third party' parent(s) without the consent of the original parent(s).

Just how devastating the psychological effect of such a declaration can be for a mother, can be understood by reviewing the outcome of the Australian case, *Re Patrick* [2002] FamCA 193. Just as with religion, sex and marriage, parenting is an intimate area of our life, in which



most believe they should hold autonomy and choice. It holds, when one is forced to co-parent against their will, that party will experience a feeling of violation.

Although Guest J held that the sperm donor was not a parent, in May 2001, he granted a contact order of four hours fortnightly, which would increase over time to a contact regime considered standard for a parent. Subsequent to the order, Patrick's mother received psychiatric treatment in a failed attempt to deal with the sperm donor's involvement in Patrick's life. In August 2002, as the prospect of the increased contact of eight hours from September loomed ahead, she killed both herself and 2-year-old Patrick.

The *Patrick* case is a sobering reminder of family law ideals coming up against the reality of the fallout. It would be a challenge for any mother in a heterosexual relationship to accept the behaviour of a third party photographing her child or acquiring property for her child without her knowledge and consent. By subtle means such as these, coupled with an assumption of a right to information about the child's day-to-day activities, the third party attempts to assert parental status. Such are even more challenging, when there is no *de facto* male father figure present, and the assertion presents a very real threat to one's position as parent in future. The *Patrick* case illustrated how a litigating third party's

demands will likely escalate as time progresses. The initially innocuous requests may seem benign, but assume great significance in the long term. What is ostensibly touted as the child's right to a 'relationship' with a third party, obscures a desire to insert oneself as the central figure of importance in the family.

In stark contrast to the *Patrick* case, stands Hedley J's contact order in the United Kingdom case of *TJ v CV & Ors* [2007] EWHC 1952 (Fam). His ordered contact of four times a year, for two hours, was intended to not have a feel of regularity to it.

It would seem apropos when discussing the child's right to contact with a sperm donor, to investigate what an appropriate amount of maintenance would be. One must take care, that as with the parental responsibility of contact, the maintenance is in no way construed as conferring parental status on the sperm donor. One must also consider whether it would be in a child's best interests to maintain contact with a sperm donor that holds parental right(s), but does not hold corresponding parental responsibilities?

### Applying a 'one size fits all' approach

The litmus test for the suitability of the recommendations will be whether they sit well with heterosexual married couples that use a sperm donor (known or

anonymous). The *Patrick* case involved a co-parenting lesbian couple, who conceived using artificial insemination of a gay donor's sperm. Would the same regime have been suggested for a heterosexual couple, or does the gender of the co-parent determine the suitability of a third party contact regime for a child? There is currently no literature that indicates that a child's healthy development requires a male, or even a second, parent.

The child's best interest standard should surely not indiscriminately apply a contact regime of the type voluntarily agreed to by consenting, previously resident parents, in the instance of a litigating third party who specifically opted out of a committed relationship with the child and mother.

But, when considering what alternative contact regime should be suggested for a sperm donor, a much larger question emerges. Ultimately, is the need to create a relationship with a third party so great for the child, that it warrants the many negative consequences on the family of litigation and living in accordance with a court ordered contact regime?

The identity of this author is known to the editor and editorial committee. The author was party to the case.



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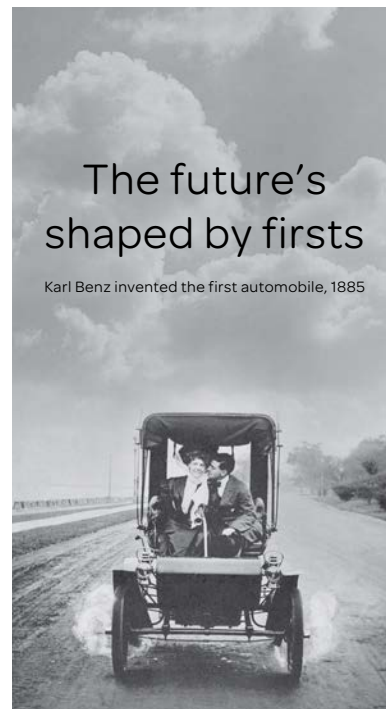
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