

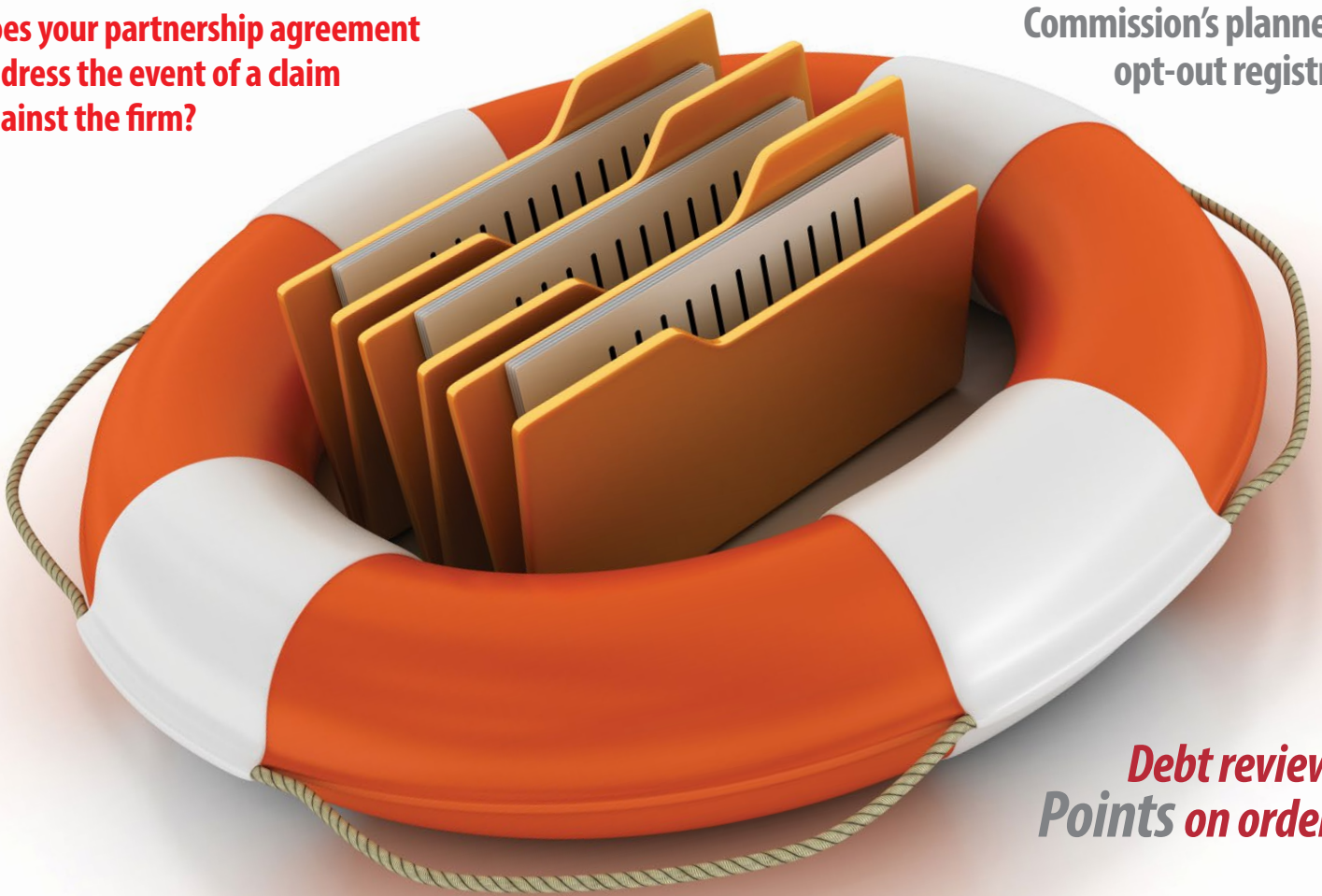
POSSIBLE CONSEQUENCES OF THE 'FAILURE' OF AN ADOPTED BUSINESS RESCUE PLAN

*Does the electorate have
effective remedies under the
South African Electoral System?*

*Does your partnership agreement
address the event of a claim
against the firm?*

*Identifying the
beneficial owner*

*The National Consumer
Commission's planned
opt-out registry*



*From LLB to admission –
are there any **guarantees**?*

***Debt review:**
Points on orders*

*The effect of cancelling
collective agreement's
regulating ancillary duties*

Society should play a role in women empowerment



ENSafrica | Africa's largest law firm

ENSafrica.com

ens AFRICA

CONTENTS

OCTOBER 2017 | Issue 578

ISSN 0250-0329

20	POSSIBLE CONSEQUENCES OF THE 'FAILURE' OF AN ADOPTED BUSINESS RESCUE PLAN	22
24	Does the electorate have effective remedies under the South African Electoral System?	17
14	Does your partnership agreement address the event of a claim against the firm?	33
43	From LLB to admission – are there any guarantees?	34
6	Society should play a role in women empowerment	



Regular columns

Editorial	4
News	
• Society should play a role in women empowerment	6
• Past lessons and future challenges discussed at Labour Law Conference	8
• Advisers must be accurate when giving clients advice on foreign investments	11
• Judicial skills training project aimed to equip attorneys with skills required of a judicial officer	12
• 2017 annual general meetings	12
People and practices	13
Practice management	
• Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?	14
Practice note	
• The National Consumer Commission's planned opt-out registry	17
The law reports	27
Case notes	
• Debt review: Points on orders	33
• The effect of cancelling collective agreement's regulating ancillary duties	34
New legislation	36
Employment law update	39
Recent articles and research	41
Opinion	
• From LLB to admission – are there any guarantees?	43

FEATURES

20 Possible consequences of the 'failure' of an adopted business rescue plan



The new Companies Act 71 of 2008 (the Companies Act) has introduced a regulatory regime aimed at providing an opportunity for companies struggling financially to obtain a reprieve necessary for possible resuscitation. Literature on the purpose of business rescue and what the regime sets out to achieve has grown tremendously since the enactment of the Companies Act. The new regime has been viewed by the legislature as a critical policy objective necessary to facilitate a thriving economy, as

well as the achievement of socio-economic imperatives. It is in the light of the above that this article, written by **Zolani Buba**, sets about to discuss briefly the manner in which the current legislative framework not only limits a creditor's ability to have recourse against a company that has availed itself of the protective mechanisms of business rescue, but to further highlight uncertainty surrounding applicable legal consequences where an adopted rescue plan has failed (whether in part or in full) in terms of its implementation.

22 Identifying the beneficial owner

Traditional methods of trying to hide or introduce illicit proceeds to the formal financial system(s) are fairly easy to detect and dealt with by the relevant authorities. However, **Nkateko Nkhwashu** writes that the corrupt, took it a step further and came up with new complex and sophisticated methods to achieve the same ends. Among the methods used, is the misuse of corporate vehicles or legal structures, aimed at hiding the true identities of those who actually own, control and benefit from these structures. This challenge is not jurisdiction specific but cuts across borders. On this note the international community through various fora took an interest in this and came up with various ways of curbing the challenge. One such way is the need to identify the 'beneficial owners' of legal entities and legal arrangements, including trusts.

24 Does the electorate have effective remedies under the South African Electoral System?

Makhosi Poyo writes that the recent service delivery protests, characterised by the destruction of public property, as well as occasional loss of lives by some protestors have left some gasping with astonishment and feeling overwhelmed by a plethora of unanswered questions pertaining to such incidents. Given the fact that our society is founded on the values of constitutional democracy with an entrenched Bill of Rights, which guarantees human dignity, equality and freedom (s 7 of the Constitution), how is it that the social behaviour of some citizens, in pursuit of the same rights and freedoms as guaranteed in the Constitution, is increasingly expressed in the manner that is diametrically opposite to its spirit and tone? Mr Poyo analyses the *maxim ubi ius ibi remedium* (whenever there is a right, there is a remedy), the state according to social contract, two dimensions identified in the right to vote, the right to recall, the unconstitutionality of the South African electoral system and possible reforms.

EDITOR:

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

PRODUCTION EDITOR:

Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:

Kevin O'Reilly
MA (NMMU)

SUB-EDITOR:

Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:

Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

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

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park,
Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

DE REBUS ONLINE: www.derebus.org.za

CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

De Rebus editorial staff use online products from:

- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta.** Go to: www.jutalaw.co.za.

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

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

ADVERTISEMENTS:

Main magazine: Ince Custom Publishing

Contact: Dean Cumberlege • Tel (011) 305 7334
Cell: 082 805 1257 • E-mail: deanc@ince.co.za

Classifieds supplement: Contact: Isabel Joubert

Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: yp@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela

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

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

ATTORNEYS' MAILING LIST INQUIRIES: Gail Mason

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

All inquiries and notifications by practising attorneys and candidate attorneys should be addressed to the relevant law society which, in turn, will notify the Law Society of SA.

SUBSCRIPTIONS:

General, and non-practising attorneys: R 968 p/a

Retired attorneys and full-time law students: R 743 p/a

Cover price: R 102 each

Subscribers from African Postal Union countries (surface mail):

R 1 538 (VAT excl)

Overseas subscribers (surface mail): R 1 878 (VAT excl)

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela

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



LAW SOCIETY

OF SOUTH AFRICA

© Copyright 2017:

Law Society of South Africa 021-21-NPO
Tel: (012) 366 8800



Member of
The Audit Bureau of
Circulations of Southern Africa



Conveniently placed with a breathtaking office view

If you're looking for spacious, well-lit office space then 155 5th Street, Sandton may be your firm's new forever home. It's also only 400 metres away from Sandton City and a 13-minute walk from the Gautrain station, giving it a remarkable score on the convenience scale.

For more information call

Roddy Watson on 071 351 5437.



On 29 August the Constitutional Court (CC) handed down a unanimous judgment, which affirms that new property owners are not responsible for settling municipal debt accumulated by previous owners. In *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* (CC) (unreported case no CCT283/16, 293/16 and 294/16, 29-8-2017) (Cameron J), the court handed down judgment on an order by the Gauteng Division of the High Court in Pretoria, that declared s 118(3) of the Local Government: Municipal Systems Act 32 of 2000 constitutionally invalid.

Section 118(3) of the Local Government: Municipal Systems Act provides that an amount due for the municipal services rendered on any property is a charge on that property and enjoys preference over any mortgage bond registered against the property.

The matter came before the High Court after the City of Tshwane and Ekurhuleni municipalities suspended, or refused to contract for the supply of municipal services to the applicants' properties. This was on the basis that the applicants, who are relatively recent transferees of municipal properties, owed the municipalities for municipal services rendered to these properties before transfer. The High Court found s 118(3) constitutionally invalid, to the extent only that it has the effect of transferring to new owners municipal debts incurred before transfer. The High Court found this to be an arbitrary deprivation of property in terms of s 25 of the Constitution. It said that new owners of property are not liable for municipal debts incurred by previous owners. Therefore, municipalities may not sell the property in execution to recover the debt or refuse to supply municipal services on account of outstanding historical debts.

In considering whether to confirm the High Court's declaration of constitutional invalidity, the CC had to determine whether the provision, when properly interpreted, in fact means that, when a new owner takes transfer of a property, the property remains burdened with the debts a previous owner incurred. If the provision was capable of an interpretation that did not impose constitutionally invalid consequences, the High Court's declaration of constitutional invalidity would be unnecessary.

The municipalities of Tshwane, Ekurhuleni and eThekweni, which was admitted as *amici curiae*, contended that a proper construction of s 118(3) was that the charge survives transfer. They argued that for municipalities to properly fulfil their constitutional duties of service delivery, they needed extraordinary debt collecting measures. This

New property owners not liable for historical debt

meant burdening new owners with the responsibility for historical debts. The municipalities conceded that nothing prevented them from enforcing their claims for historical debts against those who incurred them, namely the previous owners. The municipalities conceded further that their powers included interdicting any impending transfer to a new owner by obtaining an interdict against the old, indebted owner, until the debts were paid.

Also admitted as *amici curiae* were the social housing organisation, TUHF Ltd (TUHF); The Banking Association of South Africa (BASA), an association with thirty-two member banks and the Johannesburg Attorneys Association (JAA). TUHF and BASA associated themselves with the applicants in challenging the meaning the municipalities ascribed to s 118(3). They advanced further arguments including that s 118(3) permitted arbitrary deprivation of not just the new owner's property rights, but of real security rights the new owner confers on any mortgagee who extends a fresh loan on the security of the property post-transfer. The JAA focused on a conveyancer's duties and ethical position should this CC hold that the s 118(3) right survives transfer.

In a unanimous judgment, written by Cameron J, the court weighed the historical, linguistic and common law factors bearing on how the provision should be understood, plus the need to interpret it compatibly with the Bill of Rights. The court held that the provision is well capable of being interpreted so that the charge does not survive transfer. The court held that a mere statutory provision, without more, that a claim for a specified debt is a 'charge' on immovable property does not make that charge transmissible to successors in title of the property. Public formalisation of the charge is required (for example, registration in the Deeds Registry) so as to give notice of its creation.

Section 118 does not require this public formalisation process. The Bill of Rights prohibits arbitrary deprivation of property, which would happen if debts without historical limit are imposed on a new owner of municipal property. Therefore, to avoid unjustified arbitrariness in violation of 25(1) of the Bill of Rights, the court held that s 118(3) must be interpreted so that the charge it imposes does not survive transfer to a new owner.

As a result, the court held that, because s 118(3) can properly and reasonably



Mapula Sedutla - Editor

be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. The court, however, granted the applicants a declaration that the charge does not survive transfer.



Would you like to write for *De Rebus*?

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

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

• Please note that the word limit is 2000 words.

• Upcoming deadlines for article submissions: 23 October and 20 November 2017.

PROOF | BEST SEATS IN THE HOUSE

"There is no doubt about Adams & Adams' dominance in the South African IP market. Its trade mark department, which is arguably the largest, is home to some of the country's leading practitioners." **IP STARS**

Although our attorneys are Tier 1-ranked for trade mark and patent prosecution and litigation, it's our clients who sit in the pound seats. We are leaders in all fields of IP law.

**Managing
Intellectual
Property**

**AFRICA FIRM OF THE YEAR
2015 | 2016 | 2017**

Society should play a role in women empowerment

The South African Chapter of International Association of Women Judges (SAC-IAWJ), held its 13th Annual Conference in Polokwane. The conference themed 'Wrap the wide arms of the law around those who need it,' was a platform for the members of the association to discuss unsettling matters that affected ordinary society members and to talk about transformation within the judiciary.

The president of the SAC-IAWJ, Judge Anna Shane Kgoele, in her opening remarks said the conference was an opportunity for the association to take stock and audit their progress with regards to women empowerment. Judge Kgoele added that the aim of the SAC-IAWJ, was to champion the rights of women and children and that the association's aspirational goal as stated in the preamble of the Constitution, was that of building a non-racist and non-sexist South Africa (SA) and it still is the association's lodestar.

Judge Kgoele pointed out that it was an undisputed fact that women judges have contributed to progressive jurisprudence of SA. She said that there are many policies and laws, but the question that remains to be answered, is how do those policies and laws benefit society? Judge Kgoele noted that one of the association's goals, goal 5 of the 17 developments goals, talks about achievement of gender equality and empowerment of all women and girls.

'The South African chapter platform has helped to strengthen the qualitative participation of women in the judiciary. We acknowledge that transformation this far has occurred in the judiciary,' Judge Kgoele said. However, she said the transformation was not enough and the biggest challenge is whether ordinary people felt the transformation that has



President of the South African Chapter of International Associations of Women Judges (SAC-IAWJ), Judge Anna Shane Kgoele, opened the 13th Annual Conference of the association. Judge Kgoele said the aim of the SAC-IAWJ was to champion the rights of women and children.

happened in the judiciary thus far. Judge Kgoele added that great strides have been made, but there are still unsettling realities of poverty, inequality, rape and violence against women in society.

Judge Kgoele acknowledged that society promotes women judges, however, she posed a question whether women judges give back to society and contribute to conditions of change. 'This conference must provide an opportunity for an introspection for us women judges, to talk about transformation of society as a whole. We must make women who feel like they are not protected by our laws, feel like there is hope and we must take away their resentments,' Judge Kgoele added.

Judge Kgoele said that the association

must make sure that young women are inspired, however, she pointed out that women cannot do it on their own. She added that for women empowerment to succeed, men must be involved and help in the empowering of women.

Vice-President of the SAC-IAWJ, Judge Margie Victor, while outlining the goals of the conference, said that all the themes and programmes of the associations are always guided by the Constitution. She added that the association was worried about all the corruption that is taking place. She said that corruption meant that the poor and vulnerable get less and less.

Experiences from the Regional Judges Forum

Supreme Court of Appeal, Justice Zukisa Tshiqi, discussed experiences from the Regional Judges Forum. Justice Tshiqi said the arms of the law were indeed as wide as the theme of the conference sug-



Supreme Court of Appeal, Justice Zukisa Tshiqi, spoke about experiences from the Regional Judges Forum.



WHY ARE SOME OF THE LEADING LAW FIRMS SWITCHING TO LEGALSUITE?

LegalSuite is one of the leading suppliers of software to the legal industry in South Africa. We have been developing legal software for over 25 years and currently 8 000 legal practitioners use our program on a daily basis.

If you have never looked at LegalSuite or have never considered it as an alternative to your current software, we would encourage you to invest some time in getting to know the program better because we strongly believe it will not only save you money, but could also provide a far better solution than your existing system.

Some of the leading firms in South Africa are changing over to LegalSuite. If you can afford an hour of your time, we would like to show you why.



"MAKING COMPUTERS WORK FOR YOU"

0861 711150

FOR A FREE DEMONSTRATION,
www.legalsuite.co.za



Deputy Chief Justice, Raymond Zondo, opened the SAC-IAWJ's 13th Annual Conference at Limpopo in August.

gested. She added that the Bill of Rights in the Constitution is the cornerstone of democracy. 'It enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. It binds the legislature, judiciary and all organs of state,' Justice Tshiqi said.

Justice Tshiqi pointed out that the fundamental human rights of all people are also protected in the regional and international agreements countries have signed, including the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. Justice Tshiqi said the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, stated that it is a duty of the state regardless of the political, economic and cultural system to promote and protect all human rights and fundamental freedom.

Justice Tshiqi, referred to the case of *Republic v Kenya National Examination Council* [2009], she said that the court described human dignity as that intangible element that makes a human being complete. She added that human dignity goes to the heart of human identity and that human dignity is the cornerstone of other human rights, as it can be violated through humiliation, deprivation or dehumanisation. Justice Tshiqi said if we as a society rejected certain people because their identity did not conform to our understanding of what they should be, we would be dehumanising them.

Deputy Chief Justice, Raymond Zondo, said that the question that needed to be asked was: What is meant to wrap the wide arm around those who need it? He said that the theme had many meanings and one of them meant the provision of legal protection to those in need of legal protection. Deputy Chief Justice Zondo added that the theme was an interpretation that promotes the spirit, purport and objects of the Bill of Rights as required by s 39(2) of the Constitution.

Deputy Chief Justice Zondo said the 'arms of the law', that the theme referred to, are the arms that can bring relief to those who are aggrieved, vulnerable, discriminated against and those who are marginalised in society. 'It could not be that it contemplates the arms of the law that seeks to protect only a few. It could not be that it contemplates a law that seeks to displace large sections of the population from their land,' Deputy Chief Justice Zondo said.

Deputy Chief Justice Zondo pointed out those who needed the protection of the law under the Apartheid regime, were prevented from being wrapped by the arms of the then legal system. He said this was because the system was the enemy of the majority of the people. However, Deputy Chief Justice Zondo said looking at the current legal system SA has, one can see the difference between the interim legal system and the legal system of the then Apartheid regime. Deputy Chief Justice Zondo noted that under the Apartheid legal system, SA was under parliamentary sovereign, but now under the current legal system the Constitution is the supreme law of the land.

Deputy Chief Justice Zondo referred back to the day women marched to the Union Buildings against the pass laws. He said the women were disgusted and had had enough with the Apartheid legal system. 'Those brave and courageous women marched to the Union Building and said to Strijdom's government. You strike a women, you strike a rock,' Justice Zondo said. He added that after the women had made their mark, which is crucial in history, men also got into action and were prepared to face the soldiers and police.

Deputy Chief Justice Zondo thanked



Constitutional Court's Justice Leona Theron, spoke at the SAC-IAWJ. Justice Theron said transformation must be looked at differently and the judiciary must transform itself first, before transforming society.

The most up to date authority on delictual and contractual damages



Damages explains those aspects of the law that are important in quantifying liability and recovery of damages.

It covers principles of and matters affecting quantification. It also deals with practical aspects influencing recovery of damages such as apportionment of damages, recovery of damages from the State, principles relating to pleadings and practice, as well as contingency fee agreements.

LexisNexis®

Order now!

☎ 0860 765 432

✉ orders@lexisnexis.co.za

🌐 www.lexisnexis.co.za/store

and acknowledged the role the SAC-IAWJ played in him being appointed as Deputy Chief Justice. He said the recommendation that the association submitted carried a lot of weight. He said that he appreciated support from all who supported him, but singled out the support of the association, because they provided the best motivation as to why he was to be Deputy Chief Justice of the country, by referencing as motivation the work he did as the then Deputy President of the Labour Appeal Court and the Labour Court, to increase the representation of women.

Deputy Chief Justice Zondo, praised and acknowledged, Justice Mandisa Maya as the first female President of the Supreme Court of Appeal. He said there was a need for transformation of the judiciary to ensure that as many women as possible are represented in the various courts of SA.

Transformation of the judiciary

The Constitutional Court's, Justice Leona Theron, spoke about the transformation of the judiciary. Justice Theron said that transformation must be looked at differently and the judiciary must transform itself first. Justice Theron pointed out that transformation is not only about magistrates being appointed as judges. She said it was about transforming the entire society, the community and the workplace in order to live up to the ideals of the Constitution and in order to be true to the oath of office.

'Transformation starts by what you do outside of your job, as a lecture, as a magistrate and as a judge,' Justice Theron said. She said some of the fruits of transformation was seeing more women judges in the judiciary. 'We want to see more upward mobility of women in the judiciary. We want to see transformation at grass root level, we want to see transformation at our courts,' Justice Theron added. She pointed out that there are challenges at courts, and asked what has been done about the challenges.

Justice Theron said transformation



Minister of Justice and Correctional Services, Michael Masutha was a guest speaker at the SAC-IAWJ's Conference. Mr Masutha said the country needed to reflect on exploitation and abuse of women.

does not start with promotions, but starts with making a comfortable and clean environment for the people who go to courts to be served.

Minister of Justice and Correctional Services, Michael Masutha, was a guest speaker at the SAC-IAWJ. Mr Masutha said SA was prudent in declaring August a women's month, acknowledging the contribution in the struggle of the country. Mr Masutha added that the country had many challenges and while it is appropriate to celebrate women's achievements, the country needed to reflect on many women that have been victims of exploitation and abuse as a results of the ills in society filled with chauvinism and many other factors.

Mr Masutha said the SAC-IAWJ's conference was to acknowledge women judges who made it to the legal profession despite having to overcome many challenges. He said women's formal exclusion from practising law should have been ended by now and yet many years later there are still talks about exclusion of women, despite the fall of Apartheid.

'I think it is going to take an effort by not only women, because overcoming this challenge is going to take the society as a whole, men and women, because the

struggle of women should be the struggle of society,' Mr Masutha said. He added that it did not make sense that men left the struggle of equality to women themselves. He said it should be a collective effort. He noted that there must be leadership dedicated to the cause of mobilising women practitioners.

Mr Masutha said that he had given a directive to women attorneys in all government work that falls in his portfolio, that black women practitioners should be given preference. He added that he received many complaints that black women practitioners are not getting work and urged that women practitioners direct the complaints to him. Mr Masutha noted that he had pleaded with legal practitioners, especially the ones who are historically excluded. 'We are a profession that thrives on its excellence, anything less will make us perish, because there is no client that will tolerate a legal practitioner that is not only incompetent but simply do not do their work,' Mr Masutha said. He said it was not just about talent but also the effort one makes.

Mr Masutha pointed out how female legal practitioners or female magistrates get criticised for their work or judgments handed out in court, just because they are women. He said that in instances where white male practitioners make bad judgments, they get overlooked because they have been in the industry for long. He noted that a legal practitioner is as good as their case.

Mr Masutha thanked the judiciary, legal profession, but particularly women practitioners and women judges, who despite many social challenges have opted to take up the daunting tasks to ensure that SA has a thriving judicial system, justice system and legal system that ensures that all people find the promises in the Constitution and the Bill of Rights a reality in their everyday life.

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

Past lessons and future challenges discussed at Labour Law Conference

The 30th annual Labour Law Conference, themed 'past lessons, future challenges' was held at Emperors Palace in August. Partner at Bradley Conradie Halton Cheadle, Bradley Conradie, discussed recent developments in strike law. Mr

Conradie, said that when the Labour Relations Act 66 of 1995 (LRA) was drafted, it was done on the basis that a new system be introduced to avoid strikes. He added that it was genuinely believed at the time that all that was required was just to have a proper system in place, such as a proper structure for collective

bargaining that would be able to avoid all bad and messy situations.

Mr Conradie pointed out that a big part of that was the genuine belief that all the struggle workers faced during Apartheid would end. He added that since South Africa (SA) was a democratic country with a Constitution, workers be-

lieved that they would have rights. He noted that the only worry the country had was how the economy was going to be built and how everyone was going to benefit from it.

Mr Conradie said after the LRA was implemented strikes had begun to reduce from 4 million strikes to 650 000 in 1997. However, he said wage disputes has continued to be the reason for many strikes, as well as other matters such as housing, medical care and so on. He added that the main achievement of the LRA, was to introduce a system whereby, there would be no need for unprotected strikes.

Mr Conradie noted that if a simple procedure was put in place that trade unions would follow the procedure, strikes would be protected, while workers enjoyed the benefits of protection. He, however, explained that the mining sector led to the increase of unprotected strikes that saw the loss of wages during 2005 and 2015. He said this was because of the 'no work no pay' policy. He pointed out that this then affected the families of the workers who depended on the workers' wages.

Senior Commissioner at the Commission for Conciliation, Mediation and Arbitration (CCMA), Rene Huyser, said that there are 721 cases that are referred to the CCMA on a daily basis and 188 000 estimated cases are received at the CCMA monthly. She added that the CCMA had to look at strategies, on where they were going and how to respond to cases the CCMA received. She pointed out that the CCMA takes 23 days on average to deal with conciliation cases and about 60 days for arbitration cases.

Ms Huyser said pre-2010 the CCMA came up with the 'Renewal' strategy that was aimed at transforming relations in the labour market. Ms Huyser noted that in 2007 to 2010 the Renewal strategy was followed by the 'Tsoso' (to uplift)



Partner at Bradley Conradie Halton Cheadle, Bradley Conradie, spoke about development in strike law at the 30th Annual Labour Law Conference in August.

strategy, which was aimed at transforming the workplace in terms of the LRA and to promote justice and fairness in the work. Followed by the 'Siyaphambili' (we are going forward) strategy in 2011 to 2014 that was adopted to look at premier dispute prevention, management and dispute resolution and to make sure all cases the CCMA receives are dealt with effectively and professionally.

Ms Huyser added that in 2015 the CCMA adopted the 'Senz'umehluko' (we are making a difference) strategy that was aimed at making a difference by changing working life and workplace relations. 'We want to capacitate all employees and all employers to make sure that they are able to deal with their difference on their own,' Ms Huyser said. She pointed out that the CCMA wants to play a more proactive role and look at prevention and management of skills, rather than just looking at the dispute resolution.

Social security

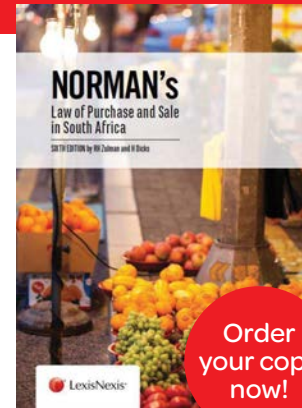
Executive Dean of the Faculty of Law at the University of Johannesburg, Professor Letlhokwa George Mpedi, discussed the past lessons and future changes of social security. Prof Mpedi said that social security system in the Apartheid regime was characterised by racial, gender and geographical inequality. He added that there was a lot of exclusion and marginalisation. He said all that changed when the current Constitution came into place. He pointed out that in the Constitution there was a number of Constitutional values that are relevant for a social security system.

Prof Mpedi said the values included human dignity, equality, non-racism and non-sexism. He pointed out that the social security system was entrenched as a human right in the Constitution and s 27(1)(c) of the Constitution states that everyone has a right to access social se-



Senior Commissioner at the Commission for Conciliation Mediation and Arbitration, Rene Huyser, was a guest speaker at the Conference.

Your trusted guide to the law of purchase and sale



Norman's Law of Purchase and Sale in South Africa

Sixth Edition

By R Zulman and H Dicks

For almost 100 years Norman's Law of Purchase and Sale in South Africa has guided lawyers, students and business executives through the intricacies of the law of sale.

This new edition includes:

- leading reported cases decided up to 31 December 2016
- a new chapter covering the Consumer Protection Act 68 of 2008
- a dedicated chapter on the formalities in respect of the Alienation of Land Act 68 of 1981

 LexisNexis®

Order now!

☎ 0860 765 432

orders@lexisnexis.co.za

www.lexisnexis.co.za/store



Executive Dean of the Faculty of Law at the University of Johannesburg, Professor Letlhokwa George Mpedi, discussed the past lessons and future changes of social security, at the 30th Annual Labour Law Conference in August.

curity. However, he noted that the right can be limited by means of internal limitation, which is about the availability of resources. He said there was an acknowledgement that SA is not a rich country that has resources to provide social security to all persons overnight.

Prof Mpedi said SA made provision for international labour law risks. He noted that the risks were contained in the ILO Social Security (Minimum Standard) convention 102 of 1952. He mentioned the classical risks as follows –

- medical care;
- sickness benefit;
- unemployment benefit;
- old age benefits;
- occupational, injuries, diseases benefit;
- family responsibility benefit;
- maternity benefit;
- invalidity benefit; and
- survivor benefit.

Prof Mpedi said SA is one of the countries on the continent that covers all those risks, but said one must point out that as much as the government covers those risk, the coverage is not perfect. Prof Mpedi said that there are three main schemes, namely –

- a non-contributory scheme;
- a contributory scheme; and
- a private scheme.

He said for people who fall in the non-contributory scheme to benefit, must either be 'too young, too old or disabled'. Prof Mpedi said if a person does not fall in any of the above mentioned categories, despite the fact that they are poor, they will still not qualify for social security.

Prof Mpedi said a contributory scheme includes –

- Unemployed Insurance Fund; and

- a compensation fund.

While the private scheme includes –

- a medical aid;
- a provident fund; and
- a pension fund.

Prof Mpedi pointed out that to participate in the contributory and private schemes, a person has to be in a formal labour market. He said people who are not involved or engaged in the formal labour market are excluded, because for one to be in the contributory and private schemes one has to be in an employer/employee relationship. He noted that a lot of people who are excluded in the labour market, relied on informal strategies such as stokvels, burial societies and support from relatives.

Prof Mpedi said that there were interventions that have been implemented since 1994, and added that along the way the social security assistance such as old age grants have experienced some changes, which have enhanced access to social security benefits. He pointed out that initially the old age grants were available to women from the age of 60 and to men from the age of 75. Prof Mpedi said it was found to be unfair discrimination, and the age for men to qualify for an old age grant was reduced from 75 to 60 as per their female counterparts.

Prof Mpedi noted that the child sup-



Partner in the dispute resolution department at Bowmans, Khomotso Makapane, discussed the future of trade unions. Mr Makapane emphasised that unions had to understand the new entrants to the labour market.

port grant was progressed from 0 to 18, while in the past years it was only given to children between 0 to 6 years. He added that non-permanent citizens, even when they had permanent status, would not qualify for grants but this has since changed as they now have access to social grants.

Executive Dean of the faculty of Law

at the Nelson Mandela University and consulting attorney at Cliffe Dekker Hofmeyr, Professor Avinash Govindjee, added that 17 million people are currently obtaining social assistance in the country. He said when one weighs it against the 15 and a half million people in employment, it becomes social and political chaos. He noted that this allows the economy to become slow, tax revenue also slows down and the demand for social assistant grants increase.

Prof Govindjee said statistics showed there was a high number of unemployed people and a million more could be unemployed by 2018. He pointed out that overall unemployment in SA had not fallen below 20% in the past 20 years. He noted that when the demand for social grants increases and the economy is slow, then the government goes into the expenditure of other areas of social assistance such as housing, education and health care, however, he pointed out that this move by government could create a recipe for chaos that would lead to an increase of violent protest actions.

Prof Govindjee pointed out that there has been tension between treasury and the affordability of social grants on the one hand and social development and the positive impact of social grants on the other hand. He said available research suggested the positive effect of social grants far outweighed the negative. However, he added that there has been an uncomfortable tension over the past few years, with questions raised, one in particular, if SA can afford to expand the social grant assistance access. He gave an example of the age of the child support grant being increased from 18 to 21.

Future of trade unions

Partner in the dispute resolution department at Bowmans, Khomotso Makapane, said that trade unions have not recognised the need to understand the new entrants in the job market. Mr Makapane added that people who get in the job market now are different and they are referred to as the 'microwave' generation, because they want things to 'pop and to pop quickly'. He pointed out that if trade unions continue to go to the new generation work force with old slogans and services they offered in the past, it shows that the trade unions are not willing to recognise how much lives have changed.

Mr Makapane said as a result there is tension between trade unions and its members. He pointed out one other fundamental issue is that South African people overtime have not created the habit of being informed, but often accept what they read in media and what they see on their televisions as absolute fact. However, he noted that people are starting to ask difficult questions about

trade unions, questions such as, if and why they need to join trade unions, what will trade unions do for them, if trade unions are relevant, what have they done in the past and what they are planning to do going forward?

Mr Makapane pointed out that a lot

of trade unions have, however, not answered these questions. He said from a legal practitioners point, unions have to sit down with their members and devise strategies on how to handle matters or to solve problems when they occur. He said one cannot service a work force when

they do not understand their needs.

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

Advisers must be accurate when giving clients advice on foreign investments

Oliver Phipps of Lester Aldridge Solicitors in the United Kingdom, said there was no right or wrong answer as to whether a second Will is needed. Mr Phipps was discussing multi-jurisdictional estate planning and administration at the 7th annual Fiduciary Institute of Southern Africa (FISA) conference at the Sandton Convention Centre in August. He said that people have become internationally diverse with the ability to work or study in foreign countries, and pointed out that individuals holding assets in a foreign country, needed to consider if a separate Will is required for those assets.

Mr Phipps noted that legal practitioners who have clients with international property had to consider if having offshore assets was appropriate and to look at the fact that if a client dies, how best the legal practitioner is going to administer the client's estate. He said having more than one Will depended on the value of the assets and jurisdiction in which the assets are located. Mr Phipps added that the rules that apply in some European countries allowed an individual to elect for the law of their nationality to apply to the succession of assets in order to avoid the forced heirship rules. He



Managing director of the Accuro Fiduciary in Mauritius, Gordon Stuart, discussed multi-jurisdictional estate planning. Mr Stuart said complications may occur when one has different assets across the world.

said that it was recommended that a professional with the knowledge of the rules in a specific country, where a client has assets, be consulted for advice.

Managing director of the Accuro Fiduciary in Mauritius, Gordon Stuart, discussed multi-jurisdictional estate planning. Mr Stuart said it can become complicated when looking at multiple jurisdictions and the holding of different assets in different investments across the world. He pointed out that clients look for advisers and planners who can guide and assist them in structuring and arranging both their local and international affairs. He added that this places advisers under pressure, because they have to make sure that the advice they are giving clients is accurate.

Mr Stuart noted that many South Africans are in a bid to hedge against geopolitical risks, as well as uncertain currency, which means they are investing a large percentage of their wealth offshore. Mr Stuart noted that clients have to decide whether they are going to invest assets in their own name, such as, bank accounts, immovable property and listed shares. He said with the particular choice of clients investing in their own name, there are choices that a client has to make.

Mr Stuart noted that when clients invest assets offshore in their own name, the assets will form a part of their deceased estate and a client has to look at the consequences that comes with that. He said a Will would be the best way for a client to ensure that the Will deals with the estate when they are deceased, that succession and continuity of their assets is what the client wanted.

Mathys du Preez of Sanlam, Namibia discussed cross-border estate planning in Southern Africa. Mr du Preez said that as much as there are similarities in formalities for Will drafting, estate planning tools and the administration of deceased estates in Namibia and South Africa (SA), there are also small differences that clients must be aware of. He noted an important difference relating to Wills is that the courts in Namibia cannot condone non-compliance with the formalities for a Will, which means that if the formalities were not complied with, the Will is invalid. He added that it was also notable that Namibia does not levy estate duty, donations tax or capital gains tax.

Mr du Preez referred to legislation in Namibia that gives the state a preferential right to acquire agricultural land whenever the owner of such land in-



Oliver Phipps of Lester Aldridge Solicitors in the United Kingdom, was a guest speaker at the 7th annual Fiduciary Institute of Southern Africa (FISA) conference in August.



Mathys du Preez of Sanlam, Namibia, spoke about cross-border estate planning in Southern Africa, at the FISA conference.



Professor Piet Naudé of the University of Stellenbosch Business School spoke about ethical behaviour in an unethical environment.

tends to alienate the land and cautioned that this also applies when the owner of the land dies. He added that another difference between SA and Namibia, when a deceased estate is administered, is that the Master of the High Court in Namibia requires that the executor of the estate must be Namibian or have a Namibian agent. He said Namibia has a source-based income tax system and trusts are taxed according to the tax tables that apply to individual taxpayers.

Professor Piet Naudé of the University of Stellenbosch Business School spoke about ethical behaviour in an unethical environment. He said that ethics is crucial in the financial industry as there is a fundamental power imbalance between a client and his or her agent, where the

client has to trust the agent. He noted phases in which there is a move away from ethical leadership and cautioned that this often starts unintentionally but, if allowed to continue, will eventually become unconscious behaviour. Prof Naudé added that this would result in blaming and shaming for what is right and what is considered bad and the abnormal, therefore, becomes normal.

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

Judicial skills training project aimed to equip attorneys with skills required of a judicial officer

The National Association of Democratic Lawyers (NADEL) in partnership with the Law Society of South Africa's (LSSA), Legal Education and Development division, launched its Judicial Skills Training Project on 23 of July in Pietermaritzburg, KwaZulu-Natal.

In a statement released, NADEL said the training was an intensive five day programme, which was facilitated by members of the judiciary. NADEL add-

ed that training is set to be presented in Gauteng, from 1 to 6 October.

NADEL noted that the project was part of its long term vision of transformation and access to the legal profession, which also included the judiciary. The organisation pointed out that the legal profession needed to be transformed in order for it to reflect the diversity of the South African society to enable it to adequately respond to the needs of society.

NADEL said the project is aimed at equipping attorneys, especially those

from a previously disadvantaged background, with the skills required of a judicial officer. The statement added that NADEL and the LSSA understand that attorneys are valued potential candidates for appointment as judicial officers.

• See LSSA news 'What it means to be a judge tackled at Judicial Skills Training course' 2017 (Sept) DR 18.

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

2017 annual general meetings

The six constituent members of the Law Society of South Africa will have their annual general meetings on the following dates:

Province	Date	Venue
KwaZulu-Natal Law Society	20 October	Durban – Coastlands Umhlanga Hotel
Free State Law Society	26 – 27 October	Bloemfontein – Monte Bello
Black Lawyers Association	20 – 21 October	Bloemfontein – Ilanga Estate, Frans Kleynhans Road, Groenvlei
Cape Law Society	10 – 11 November	East London – Hemingways
Law Society of the Northern Provinces	17 – 19 November	Rustenburg – Sun City

The National Association of Democratic Lawyers has set its meeting for February 2018. Venue still pending.



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

Clyde & Co in Johannesburg has seven new appointments.



Deon Francis has been appointed as a partner.



Reshana Pillay has been appointed as a partner.



Christopher Webster has been appointed as an associate.



Shane de Winnaar has been appointed as an associate.



Esihle Kobese has been appointed as an associate.



Lisa Baird has been appointed as a consultant.



Tarryn Venter has been appointed as an associate.

Shepstone & Wylie has two new appointments.



Andrew Parsons has been appointed as a partner in the corporate and commercial department in Durban. He specialises in mergers and acquisitions, shareholder structures, general corporate law, banking and finance transactions.



Gwen Mathebula has been appointed as an associate in the mining and mineral department in Johannesburg.

Allen & Overy in Johannesburg has two new appointments.



Goncalo Noronha Andrade has been appointed as an associate.



Filipa Serra has been appointed as a senior associate.

Van Wyk Fouchée Attorneys in Paarl has two new appointments.



Charl Ackermann has been appointed as an associate in the litigation department. He specialises in general litigation and family law.



Leonette Ackermann has been appointed as an associate in the debt recovery department. She specialises in debt recovery, collections and debt reviews.



Abrahams & Gross in Cape Town has appointed Wesley Scheepers as a director. He specialises in litigation, labour, regulatory and immigration law.



Eversheds Sutherland in Durban has appointed Carl Meyer as an associate in the corporate commercial department.



Jurgens Bekker Attorneys in Johannesburg has appointed Stefne van Tonder as a junior associate.

By
Thomas
Harban

Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?

In the article by the Prosecutions Unit of the Attorneys Fidelity Fund 'Liability of directors of an incorporated law practice' (2017 (July) *DR* 18), a number of questions arose regarding the extent to which the risks associated with more than one practitioner practicing in partnership (whether in an incorporated entity or not) are appreciated and addressed by attorneys. Of particular interest for current purposes is the extent that these risks can be addressed by attorneys in either their partnership agreements or other founding documents of a law firm. (In this article, I use the term 'partnership' in the generic sense to refer to a firm where more than one attorney practice together as partners or directors, this will include those attorneys practicing in incorporated practices.)

A partnership of practitioners (as with any other partnership) is based, *inter alia*, on good faith between the participants in that relationship to the achievements of the objects of the partnership. In addressing attorneys in various forums, I have often likened the partnership agreement entered into by practitioners to an antenuptial contract (ANC) entered into by parties about to enter a marital relationship. All the terms of the relationship should be carefully set out so that, in the unfortunate event of a dissolution, the rights and obligations of the respective parties to the 'fruits and the spoils of the union' are clearly recorded. I surmise that for so long as the partnership relationship peacefully persists and all the parties thereto are deriving the associated benefits, it would be improbable that any of the participants would feel the need to regularly have regard to the contents of the underlying agreement. (I suppose that, similarly, a married couple would hardly find a need to refer to their ANC contract while their union is a happy one.) However, when the relationship ends, or faces the threat of termination (whether, for example, in the unfortunate event of the demise of one of the partners or the threat of a claim against the partnership), the parties may suddenly then find a need to have careful regard to the contents of

the agreement. At that stage it may be too late to seek to address any gaps in the agreement.

The cases referred to in the article by the Prosecution Unit of the Attorneys Fidelity Fund raise a number of questions, which practitioners should consider addressing.

What if, for example –

- a claim against the partnership arises only after the partnership has been dissolved;
- a claim is made against the partnership, but the underlying circumstances of the claim arose when the practitioner concerned was part of a previous entity; or
- one partner, facing a claim, either joins the other(s) or institutes action against them for a contribution?

A response that 'we simply did not consider these questions' may not assist when the partnership is faced with a claim.

My suggestion to practitioners is that it would be prudent to address issues relating to professional indemnity (PI) claims and other forms of potential liability in the partnership agreement. A claim for PI, misappropriation of funds or some other liability may arise after the partnership has been dissolved. In many instances, practitioners moving between firms may take the files they have worked on (or are currently working on) with them. What will happen in the event that there was breach of mandate, while the practitioner was still with the previous firm? Against which firm will the claim lie? In many partnership agreements, substantial emphasis is placed on how the financial rewards will be shared between the partners/directors but little (if any) attention is paid to how liabilities will be addressed.

The Attorneys Insurance Indemnity Fund NPC (the AIIF) is often notified of claims against firms, which no longer exist in the form they had existed, when the circumstances giving rise to the claim arose. In some instances, the relationship between the former partners has degenerated to the extent that they are belligerent towards each other.

The applicable legislation

It is trite that the partners in a firm of practitioners are jointly and severally liable for the debts of the firm. In the case of an incorporated practice, the provisions of s 23 of the Attorneys Act 53 of 1979 will apply. The applicable provisions of s 23 provide that:

'Juristic person may conduct a practice –

(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if –

(a) such company is incorporated and registered as a private company under the Companies Act, ..., with a share capital, and its memorandum of association provides that all present and past directors of the company shall be jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office;

(b) only natural persons who are in possession of current fidelity fund certificates are members of the company or persons having any interest in the shares of the company;

(c)

(2) Every shareholder of the company shall be a director of the company, and only a shareholder shall be a director thereof.'

(The references in the Attorneys Act are still to the repealed Companies Act 61 of 1973 and thus still refer to a Memorandum of Association rather than to a Memorandum of Incorporation (MOI) as provided for in Companies Act 71 of 2008 (the 2008 Companies Act)).

The corresponding section in the Legal Practice Act 28 of 2014 (LPA) (s 34(7)) provides that:

'(7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –

(a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;

(b) provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys; and

(c) all present and past shareholders, partners or members, as the case may be,



Ever considered doing your LLM or LLD at the Faculty of Law of the North-West University?

Choose between our programmes offered at Mahikeng (MC) or Potchefstroom (PC):

LLM Comparative Child Law (PC)

Disputes concerning children increasingly involve multiple legal jurisdictions and international law. This LLM is unique as it analyses Child and Family Law, Social Justice, Human Rights and Juvenile Justice from an international context.

LLM Environmental Governance Law (PC)

Core modules are South African or International and African Regional Environmental Law. A broad selection of electives is offered, including South African Mining Law and Local Government and Environmental Law. This highly rated programme suits candidates in the public or private sector or academia. An MPhil in Environmental Governance Law is offered for non-lawyers.

LLM Labour Law (MC & PC)

This programme will benefit labour enthusiasts, employees and employers alike. Modules cover current South African and International Labour Law and proposed amendments. Topics include dismissals, unfair labour practices, discrimination, employment equity, strike law, social security and dispute resolution.

LLM International Trade Law (PC)

Globalisation and the increase in international trade led to the development of this LLM for those who wish to specialise in this rapidly expanding field. A balance is maintained between the necessary academic background and the practical application of law.

LLM Estate Law (PC)

This unique programme offers modules in Tax Law, Financial Planning Law, Estate Planning Law and selected topics in

Private Law. These fields are critical to the drafting of comprehensive estate plans. The programme also covers trusts and other legal entities as part of estate planning.

LLM Criminal Law and Procedure (PC)

Students in this professional LLM will be required to complete a single research or technical project or series of smaller projects demonstrating innovation and professional expertise, instead of writing a traditional mini-dissertation. The curriculum is fixed and consists of modules in Criminal Law, Criminal Procedure, Evidence and Combating Corruption.

LLM Public Law and Legal Philosophy (MC)

The Public Law section of this programme consists of modules in Constitutional and Human Rights Law, Administrative Law and Public International Law. The Legal Theory sections cover the Origins and Structure of Southern African Legal Systems, Jurisprudential Approaches in Southern Africa, Legal Education and the Legal Profession in Southern Africa and Interdisciplinary Legal Studies in Southern Africa.

Research LLM or LLD (MC & PC)

The student chooses a research topic under guidance of a study leader, submits a research proposal and reading list, sits for an oral examination and then drafts a research report. Candidates are expected to do independent research under guidance of their study leader/s. A dissertation (for LLM) is approximately 40 000 words long, while a thesis (for LLD) is approximately 100 000 words.

We offer comprehensive structured research methodology sessions to support all postgraduate students. Seminars in the coursework LLMs are presented in block sessions and on Fridays and Saturdays.

Enquiries:

LLM@nwu.ac.za or LLD@nwu.ac.za

Closing date for applications and bursary applications: 31 October

are liable jointly and severally together with the commercial juristic entity for –

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during the period of office; and

(ii) in respect of any theft committed during their period of office.’

It will be noted that the LPA expressly provides that there will be joint and several liability by the shareholders, partners or members with the commercial juristic entity for any theft committed during their term of office.

Section 8(2)(c) of the 2008 Companies Act provides that a profit company is ‘a personal liability company if –

(i) it meets the criteria for a private company; and

(ii) its Memorandum of Incorporation states that it is a personal liability company.’

Who is a partner/director of the firm?

It is the prerogative of the practitioner(s) in a firm to decide who to appoint as a partner/director and this will be dealt with in terms of the internal arrangements and founding documents of the firm. It is, however, important to note that holding a person out to the public as a partner/director will have implications for the PI cover afforded under the AIIF policy. The AIIF policy defines a ‘Principal’ as a ‘sole practitioner, partner

or director of a Legal Practice or any person who is publicly held out to be a partner or director of a Legal Practice’ (clause XXIII). The level of cover (limit of indemnity) available under the AIIF policy and the applicable deductible are calculated with reference to the number of principals (partners/directors) that made up the Legal Practice on the date that the cause of action giving rise to the claim arose. Queries have been made with the AIIF whether, insofar as the policy is concerned, there is any difference between a ‘salaried partner’ and an ‘equity partner’. No such distinction between partners is applied in the AIIF policy provisions.

The deductible is the first amount payable in respect of a claim under the AIIF policy. Attorneys may also consider addressing the issues around the payment of the deductible in their partnership agreements.

In the event of the claim amount exceeding the available limit under the AIIF cover and there is no top-up policy in place to cover this amount, the partners/directors will be liable for the amount in excess of the AIIF cover available. Practitioners should also consider addressing these circumstances in their partnership agreements.

Insurance cover

Firms may also consider purchasing appropriate insurance cover in the open market to cover themselves in the event

of claims. In addition to purchasing top-up PI cover, firms must also consider purchasing other types of cover such as –

- misappropriation of trust fund insurance;
- fidelity guarantee cover;
- directors and officers liability insurance (for incorporated practices see also ss 77 and 78 of the 2008 Companies Act); and
- what is also commonly referred to as ‘key-man cover’.

The partnership agreement could also include provisions addressing the payment of the premium for the insurance cover(s) taken out by the firm.

Conclusion

While some may consider the questions raised in this article rather uncomfortable, it may be best to deal with these questions as partners while the relationship between the principals is cordial. Attempting to deal with these questions after the relationship has broken down or where the firm is already faced with a claim may be difficult, if not impossible.

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



“Optimism is true moral courage”
Sir Ernest Shackleton

WE SEE IT!

THE RISK SPECIALISTS

A niche market insurance broker

for liquidators, business rescue practitioners and attorneys

At Shackleton Risk we specialise in...

- Security Bonds for Deceased and Curator Estates
- Security Bonds for Liquidators
- Security Bonds for Trustees
- Professional Indemnity Insurance for Attorneys and Liquidators
- Business Rescue Professional Indemnity Insurance



FSB Number 33621

Tel +27 33 264 8500 | info@srisk.co.za | www.shackletonrisk.co.za

Represented throughout South Africa

By
Madeleine
Truter

The National Consumer Commission's planned opt-out registry

Section 11(3) of the Consumer Protection Act 68 of 2008 (CPA), read together with reg 4(3)(g) of the regulations gazetted in terms of s 120(1) of the CPA (GN R293 GG34180/1-4-2011), contemplate the establishment of an Opt-Out Registry. The National Consumer Commission (the NCC) was established in terms of s 85 of the CPA, and is currently busy ironing out the details of how the Opt-Out Registry will be implemented. All direct marketers will be required to 'spool' their databases against the Opt-Out Registry before engaging in direct marketing with a consumer.

There has been considerable debate among policy makers regarding an appropriate mechanism to protect persons against the unsolicited electronic communications and spam that are associated with direct marketing. The wide definition of 'direct marketing' in s 1 of the CPA means that any communication, regardless of form or format, directed at a consumer personally, is subject to the provisions of the CPA.

Section 11 of the CPA confirms the consumer's right to restrict unwanted direct marketing, by providing that the right of every person to privacy includes the right to –

- refuse to accept;
- require another person to discontinue; or
- in the case of an approach other than in person, to pre-emptively block, any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.

Section 11(2) of the CPA provides that to facilitate the realisation of each consumer's right to privacy, and to enable consumers to protect themselves efficiently against the activities contemplated in s 11(1), a person who has received a direct marketing approach may demand (during or within a reasonable time after that communication has been received) that the person responsible for initiating the communication desist from initiating any further communication. A person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of demands contemplated in s 11(2).

Section 11(3) provides that except in respect of those existing clients where the direct marketer has proof that the

existing client has after the commencement of the regulations expressly consented to receiving direct marketing from the direct marketer, a direct marketer must assume that a comprehensive pre-emptive block has been registered by a consumer, unless the administrator of the Opt-Out Registry has in writing confirmed that a pre-emptive block has not been registered in respect of a particular name, identity number, fixed line telephone number, cellular telephone number, facsimile number, pager number, physical address, postal address, e-mail address, website uniform resource locator (URL) global positioning system co-ordinates or other identifier, which the operator of the Opt-Out Registry makes provision for. If the direct marketer has made use of a opt in provision, it should be relatively simple to provide proof that the consumer expressly consented to receiving direct marketing from the direct marketer. If the direct marketer cannot show express consent, the operator of the Opt-Out Registry is required to confirm in writing that no pre-emptive block has been registered by the consumer.

In order to assess the effectiveness and appropriateness of the Opt-Out Registry mechanism chosen by the NCC to protect South African consumers' right to privacy, it is helpful to refer to what the approach has been in other western and Southern African Development Community (SADC) jurisdictions.

Opt-out registry mechanisms from Western jurisdictions:

- **Australia** administers a 'national do not call register', in terms of which a telephone number must be used or maintained primarily for private or domestic purposes, or exclusively for transmitting and/or receiving faxes, provided that numbers can be removed at any time.
- **Canada** operates an opt-out list, which allows consumers to register their election not to receive telemarketing calls. Charities, newspapers and pollsters are exempted, although they are required to keep their own do not call lists, to which consumers can request to be added to.
- In the **European Union (EU)** the opt-out approach (ie, where consumers are automatically put on a list, and then have the option to request to be taken off the list) is illegal, and a system of opt-in is required by law.

- The **United Kingdom (UK)** has a 'Robinson list', which is operated by the UK's Direct Marketing Association, which reduces unsolicited calls. However, it has not stopped market research calls, silent calls or overseas calls.

- The **United States (US)** has a 'suppression list', which requires that senders of commercial e-mails provide a functioning opt-out mechanism by which e-mail recipients can unsubscribe their e-mail addresses from future e-mail messages. The unsubscribed e-mail addresses are placed into the suppression list, which is used to 'suppress' future e-mail messages to that e-mail address.

Opt-out registry mechanisms from the SADC jurisdictions:

- The relevant data privacy legislation in **Angola** is the Personal Data Protection Law (Law Number 22/11 of 17 June) and the Electronic Communications and Information Society Services Law (Law Number 23/11, of 20 June 2011). The Angolan regulator is the Agência de Protecção de Dados (APD). In Angola, the sending of electronic communications for the purposes of advertising is generally subject to the prior express consent of its recipient (namely, 'opt in') and to prior notification to the APD. The processing of personal data for this purpose may be conducted without data, subject consent in specific circumstances, notably:

- when the advertising is addressed to the data subject as representative, employee of a corporate person; and
- when the advertising communications are sent to an individual with whom the supplier of a product or a service has already concluded transactions, provided the opportunity to refuse was expressly provided to the customer at the time of the transaction, and this does not involve an additional cost. In this case, the data subject has the right to oppose to his personal data processing for advertising or direct marketing purposes.
- In **Lesotho** the right to privacy is recognised and protected in the Constitution of the Kingdom of Lesotho. Lesotho established a Data Protection Commission in terms of their Data Protection Act. The Lesotho Data Protection Act provides principles for the regulation of the processing of any personal information in order to protect and reconcile

the fundamental and competing values of personal information privacy. In Lesotho, 'direct marketing' is defined in s 50 of the Data Protection Act as 'communication by whatever means of any advertising or marketing material which is directed to particular data subjects'. A data subject is entitled, at any time, by notice to a data controller, to require the data controller to cease, or not to begin, processing of personal data in respect of which he or she is the data subject for the purposes of direct marketing.

- In **Madagascar**, the Data Protection Law, 2014 relates to the protection of personal data. The Madagascar Data Protection Law does not provide specific restrictions on the use of electronic marketing. However, the data subject has a right to opt-out of allowing their personal data to be used for marketing purposes without providing any reason.

- In **Mauritius**, the Mauritian Data Protection Act 13 of 2004, is largely based on the Directive 95/46/EC of the European Parliament relating to the protection of individuals with regard to the processing of personal data and on the free movement of such data. The use of personal data for the purposes of electronic marketing is not prohibited in Mauritius. However, at any time, an individual may by way of written notice, request a data controller to either stop, or not to begin, the processing of personal data in respect of which he or she is a data subject, for the purposes of direct marketing.

- In **Zimbabwe** the protection of privacy is a principal enshrined in Zimbabwe's Constitution. While there is no designated national legislation dealing with data protection for private persons in Zimbabwe yet, there are existing laws that have a bearing on the right to privacy and protection of personal information for specified types of data, or in relation to specific activities. The Access to Information and Protection of Privacy Act (Chapter 10:27) is the law which contains the most provisions on data protection. However, this generally only regulates the use of personal data by public bodies. In August 2016 the Zimbabwean Cabinet, which is the highest government approval body, approved the National Policy for Information and Communication Technology. According to the Revised ICT policy, the establishment of an institutional framework for enacting legislation dealing specifically with digital data protection matters and cyber security is anticipated. The Zimbabwean Government is currently working on a Consumer Protection Bill 2014, which seeks to protect consumers from unfair trade practices. The draft Consumer Protection Bill does not make reference to electronic marketing, nor does it provide for consumer privacy rights in respect of personal data.

Opt-out versus opt in

The inverse of the opt-out system, is the opt in approach, which requires express consent before a communication is sent to a consumer, and before the consumer's personal information is used for direct marketing. Insofar as the opt in approach is concerned, e-mail address authentication is the minimum degree necessary for any e-mail advertising or other ongoing e-mail communication. E-mail address authentication is a technique for validating that a consumer claiming to possess a particular e-mail address actually does so. This is normally done by sending an e-mail containing a token to the address, and requiring that the party being authenticated supply that token before the authentication proceeds. The e-mail containing the token is usually worded so as to explain the situation to the recipient and discourage them from supplying the token (often via visiting a URL), unless they are attempting to authenticate.

As a general point of departure, consumers are more reluctant to tick an 'opt in' box, than they are to tick an 'opt-out' box. The conclusion is, therefore, that the adoption of an opt in requirement for South Africa (SA) would bring about a massive change for direct marketers, and will be a game-changer for all data-driven organisations. It stands to be reasoned that the aforementioned change is exactly the type of reform that SA needs when it comes to the protection of consumers' right to privacy. The question that then poses itself, is why is an opt in system not rather being pursued by the NCC, instead of the operation of the Opt-Out Registry. The administration of the Opt-Out Registry will no doubt be a costly exercise. There is a real possibility that the Opt-Out Registry will become another bureaucratic institution, which does not provide good regulation, it being understood that 'good regulation' would be a regulatory mechanism which is cost effective and which does not overlap or contradict any other regulators or legislation. There is consensus among data privacy advocates that opt in systems provide better protection than opt-out provisions. While opt-out systems are being used by countries such as the US, the UK, Canada and Australia, the establishment of an Opt-Out Registry might not necessarily be the most suitable solution for SA.

In terms of the Protection of Personal Information Act 4 of 2013 (POPI), an opt in system is introduced in SA. POPI's opt in system means that a business is not allowed to conduct direct marketing unless prior consent is obtained from a consumer. The business may contact a new customer once to obtain this consent. In terms of POPI, you do not have

to ask for consent if you want to market to existing customers if –

- the business obtained the customer's contact details in the context of a transaction;
- the contact details are used for the purpose of marketing similar products or services to the customer;
- the customer was given a reasonable opportunity to object to receiving direct marketing, free of charge and without having to go through too much red tape; and
- every time thereafter that marketing material is sent to that customer (in other words, the customer must be given the opportunity to opt-out or unsubscribe every time).

POPI also has rules regarding consent and how to obtain it for the processing of personal information, which apply to direct marketing. In essence, consent must be –

- explicit;
- voluntary;
- specific; and
- informed.

The consent to receive direct marketing will have to be in the form prescribed by the Information Regulator, which must still be established in terms of POPI, the details of which will be provided by the regulations to be published under POPI. The POPI regulations have not yet been released for public comment.

Because both POPI and the CPA will apply to direct marketing, it is anticipated that these pieces of legislation will apply concurrently where possible, or, if concurrent application is not possible, the Act which provides the best protection to consumers will apply. It is unclear how the mandate of the Information Regulator will differ from the mandate of the NCC. The establishment of two regulators for the protection of data privacy is reminiscent of the proposed Twin Peaks model (namely, a Prudential Authority and a Market Conduct Authority) for the regulation of banking and insurance. Twin Peaks has already been referred to as the 'twin daggers' due to the fact it is feared that the new regime will compound complexity, red tape and costs, by multiplying regulators and staff. In keeping with the reference to bladed weaponry, it remains to be seen whether the Opt-Out Registry will become the proverbial sword of Damocles, presenting an ever present peril for the effective protection of South African consumers' right to data privacy.

Madeleine Truter BLC LLM (UP) BA (Hons) Political Science (UP) Advanced Certificate in Company Law (Wits) Advanced Certificate Law of Banking and Financial Markets (cum laude) (Wits) is a legal adviser at Setso Property Fund in Johannesburg.



LABOUR

festival

Juta Labour Law & HR Solutions
Promotional Offers.

Matching the power of technology with authoritative content.

FREE ebook

With selected cutting-edge
online subscriptions

Experience the power of Juta's technology-
enabled online legal research solutions.

25% off

selected commentaries

Access expert legal and regulatory
commentary, available in print and
electronic formats.

25% off

selected posters

Comply with mandatory display of
legislation at the workplace.

20% off

selected pocket statutes
books & box sets

Keep the most up-to-date labour legislation
at your fingertips with these accessible
pocket-sized books and libraries.

1-month FREE access

Legalbrief Workplace

Have the latest relevant labour legislation,
case law, and parliamentary news delivered
to your inbox every week.

Email legalbrief@legalbrief.co.za.

Register NOW

Juta's Annual Labour
Law Seminar

Trust our panel to expertly analyse the year's
labour developments at our
CPD accredited event.

SHOP
THE

LABOUR
festival

ONLINE
sale

*Books & eBooks.

VISIT OUR WEBSITE FOR
**ALL PROMOTIONAL
OFFER DETAILS**

Ends 31 October 2017.

Terms and conditions apply.

Possible consequences of the 'failure' of an adopted business rescue plan

By
Zolani
Buba

Picture source: Gallo Images/iStock



The new Companies Act 71 of 2008 (the Companies Act) has introduced a regulatory regime aimed at providing an opportunity for companies struggling financially to obtain a reprieve necessary for possible resuscitation. Literature on the purpose of business rescue and what the regime sets out to achieve has grown tremendously since the enactment of the Companies Act. (The purpose of business rescue is captured in s 128(1)(b) of the Companies Act. For an outline of the literature and case law, see – *Redpath Mining South Africa (Pty) Ltd v Marsden NO and Others* (GSJ) (unreported case no 18486/2013, 14-6-2013) (Kgomo J) at para 42-44; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (GSJ) (unreported case no 13/12406, 10-5-2013) (Kgomo J); *Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) at paras 14-15; *Van Niekerk v Seriso 321 CC and Another* (WCC) (unreported case no 952/11, 23929/11, 20-3-2012) (Ganggen AJ); and *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) at para 42.) Further, the new regime has been viewed by the legislature as a critical policy

objective necessary to facilitate a thriving economy, as well as the achievement of socio-economic imperatives. (Department of Trade and Industry 'South African company law for the 21st century: Guidelines for corporate law reform' (GenN1183 GG26493/23-6-2004). See also s 7 of the Companies Act.)

It is in the light of the above that this article sets about to discuss briefly the manner in which the current legislative framework not only limits a creditor's ability to have recourse against a company that has availed itself of the protective mechanisms of business rescue, but to further highlight uncertainty surrounding applicable legal consequences where an adopted rescue plan has failed (whether in part or in full) in terms of its implementation. This is particularly relevant where an appointed rescue practitioner, notwithstanding the above mentioned circumstance, continues (perhaps unreasonably) to believe that the company continues to have a reasonable prospect of being rescued and, therefore, does not file for termination and liquidation of the company. In light of the business rescue regime's ability to effect a discharge of debt (effectively a 'write-off' or a 'permanent suspension on enforcement' as articulated by our courts), the effect of this uncertainty for creditors is one worth exploring.

The business rescue provisions of the Companies Act envisage what may for our purposes be broadly described as a three-phased process, which begins with the commencement of proceedings (either in terms of a director resolution, termed the s 129 process or through recourse to court in terms of s 131), appointment of a nominated business rescue practitioner who is responsible for drafting a proposed business rescue plan (the purpose of such a plan would be the achievement of any of the primary or secondary purposes highlighted in s 128(1)(b)), as well as provisions that outline the procedure and applicable thresholds to proposed plan adoption by creditors.

Prior to convening a meeting of creditors for the purpose of voting on the proposed plan, the practitioner must comply with certain procedural requirements. He or she is required to convene a meeting to consider the proposed business rescue plan within ten business days of having published it (s 151(1)). Affected persons must, at minimum, be given five business-days' notice setting out, among others, the date, venue and time of the proposed meeting (s 151(2)).

Section 152(5) requires the practitioner to not only take all necessary steps to attempt to satisfy conditions on which the adopted plan is contingent but also to implement the plan as adopted.

The provisions of ss 151 and 152 are to be viewed in light of the discharge of debt and claim provision in s 154, which stipulates that provided certain conditions in relation to the adopted plan have been met; a creditor is barred from enforcing its claim against the debtor company. While this may not result in a significant concern where the plan is adopted and implemented in accordance with its terms and conditions, practical challenges often arise within the context of plans that have been adopted but are not implemented in full.

Due to a moratorium coming into force and significantly limiting the ability of creditors to enforce their claims, the absence of full plan implementation presents a unique set of challenges for an unpaid creditor (or perhaps one not having received full payment) seeking recourse (excluding instances highlighted in s 133 of the Companies Act). First, the creditor is unable to apply to court for the purpose of setting the resolution commencing proceedings aside. Second, while an affected person may apply to court to compel a practitioner to implement an adopted plan as per the terms and conditions of implementation, neither the provisions relating to termination of proceedings nor discharge provisions in s 154 specifically refer to 'full implementation' as a basis for terminating proceedings or discharging pre-commencement debt.

Where does this leave the creditor? In this regard two scenarios may be posited. The first is that due to ch 6 providing for proceedings to end on the basis of 'substantial implementation' – which is a subjective test that considers the practitioner's discretion to be sufficient – and the discharge provision referring broadly to a plan being 'implemented in accordance with this Chapter...', it may be argued that s 154 finds application once a notice of substantial implementation has been filed, notwithstanding the fact that all creditors may not have been paid in full as envisaged in the adopted plan. I submit that this would be a fragmented and rather contrived approach to interpreting ch 6.

A contrary, and perhaps more sensible alternative to the first, is to read the discharge provision consistently with the wording finding application within that section. It is to be observed that s 154(1) contains an implicit condition that an adopted plan be implemented in accordance with its terms and conditions in order for a discharge of debt to take place. Section 154(2)

further amplifies this position by requiring a plan to be 'approved and implemented in accordance with this Chapter...', which is to be understood as a reference to provisions referring to plan implementation within the context of ch 6. Section 152, therefore, becomes particularly relevant to understanding the possible context within which discharge provisions are to be understood.

Section 152(5) requires the practitioner to not only take all necessary steps to attempt to satisfy conditions on which the adopted plan is contingent but also to implement the plan as adopted. This may be understood to mean that should the practitioner fail to ensure that a creditor is paid according to the provisions of the adopted plan, the plan would not have been implemented as required by s 154 and in the light thereof, a creditor should be able to enforce the balance of its claim even where a notice of substantial implementation has been filed. This approach is further consistent with observations made by the Supreme Court of Appeal in *New Port Finance Company (Pty) Ltd and Audler v Nedbank Limited; Mostert and Another v Nedbank Limited* [2015] 2 All SA 1 (SCA) (albeit within the context of sureties) to the effect that plan adoption does not affect a sterilization of a creditor's claim but merely suspends that creditor's right to enforce on its claim.

In conclusion, I submit that an adopted plan is a necessary but not a sufficient condition for the application of the discharge provision in s 154. In the light of the wording of ch 6 provisions read together, it is further necessary for the adopted plan to be implemented in accordance with its terms and conditions in order for a permanent suspension of a creditor's right to enforce on its pre-commencement claim, to take effect. While the premature filing of substantial implementation may be perceived as a proverbial nail in the coffin for creditors (and their ability to enforce on unpaid or partially paid compromised amount), it may in fact present a unique opportunity for enforcement without the legal hurdles attendant on the existence of a moratorium, which by virtue of the filing, no longer has effect. In such instance, and for the sake of practicality, the ordinary principles of the law of contract may provide recourse.

Zolani Buba BSocSci LLB LLM (Tax) (UCT) is a business rescue specialist in Pretoria. Mr Buba writes in his personal capacity.

Cyril Muller Attorneys

incorporating

**Willie Wandrag
Costs Consultants**

Economic reality dictates that few, if any, are in a position to disregard the expense of litigation and attempts to maximise costs recovery on behalf of successful litigants or to limit the exposure of the less successful have served to highlight the degree of speciality required in this field. To assist attorneys in this regard, Cyril Muller Attorneys offer professional and efficient solutions to these aspects of litigation.

Should you require assistance with any of the following, be it between parties to litigation or as between the attorney and his client, we would be pleased to oblige:

- the drawing, taxing, opposing of bills of costs;
- the fixing of security for costs; or
- any advice regarding aspects of costs and charges.



Contact: Cyril or Willie

Tel: (011) 326 4722 - Fax: (011) 781 8338

info@cmattorneys.com



Identifying the beneficial owner

Beneficial owner

By
Nkateko
Nkhwashu

Picture source: Gallo Images/Stock

Coming to the realisation that the traditional methods of trying to hide or introduce illicit proceeds to the formal financial system(s) were fairly easy to detect and dealt with by the relevant authorities. The corrupt, however, took it a step further and came up with new complex and sophisticated methods to achieve the same ends. Among the methods used, is the misuse of corporate vehicles or legal structures, aimed at hiding the true identities of those who actually own, control and benefit from these structures. This challenge is not jurisdiction specific but cuts across borders.

Aside from this misuse or abuse of corporate vehicles, it is also noted – within the illicit financial flow space – that companies or big corporates were instrumental in being used to transfer ill-

gotten gains abroad. On this note the international community through various *fora* took an interest in this and came up with various ways of curbing the challenge. One such way is the need to identify the ‘beneficial owners’ of legal entities and legal arrangements, including trusts. A ‘beneficial owner’ is defined as ‘the natural person who ultimately owns, controls, or benefits from a company or trust and the income it generates’ (Maíra Martini *Combating Illicit Financial Flows: The role of the international community* www.u4.no/publications, accessed 11-9-2017).

International efforts on beneficial ownership transparency

The G20 and the Financial Action Task Force (FATF) are working together in trying to address the misuse of corporate

vehicles. The FATF sets standards to counter money laundering and terrorist financing. Both the G20 and the FATF agreed that Recommendation 24 (legal persons) and 25 (legal arrangements) of the FATF Recommendation were broad and good enough to address this issue. Thus the G20 further encourages its member jurisdictions to adopt these recommendations on beneficial ownership transparency. The G20 went on further to come up with principles on the same issue. These are the G20 High-Level Principles on Beneficial Ownership Transparency. All G20 members are committed to implementing these principles and South Africa (SA) is one of them. South Africa was also the only African representative at the previous G20 meetings on beneficial ownership.

Through a cabinet decision, SA established an inter-departmental committee on the same issue. This committee aims

to address some of the short-comings noted by among others, Transparency International. One concern noted was the fact that in South African law there is no definition of a 'beneficial owner' *per se* and this is required by principle 1 of the G20. South Africa always received a 0% rating when assessed on this principle. In SA the Financial Intelligence Centre Amendment Bill B33D of 2015 (the Bill) was always viewed as a significant piece of legislation that was going to close this *lacuna* as it would be aligned with international best practice and standards. The Bill draws from the FATF Recommendations and although these recommendations were initially aimed at addressing money laundering and terrorist funding, there was huge consensus that the definition of beneficial ownership in them can be better used for other purposes as they are broad enough for such.

Financial Intelligence Centre Amendment Act 1 of 2017 (the Act)

On 26 April 2017, the President of SA signed the Bill into law. Although the Act has yet to come into effect (and issues around industry guidance, regulations and possibly exemptions still have to be dealt with) this is a huge win for the country for various reasons. Firstly, SA's financial system remains resilient to money laundering and terrorist funding risks and will be viewed positively by international counterparts. Secondly, the FATF will not issue an 'adverse statement' against SA, which may have dire consequences for the country given the current climate characterised by downgrades. Thirdly, the Act makes provision for a risk-based approach to customer identification and verification, which will ensure flexibility for financial institutions and other business and thus cut costs and possibly promote financial inclusion. Fourthly and most importantly of all for this article is that the Act makes provision for a definition of a 'beneficial owner', as well as how one will go about identifying the same (beneficial owner) through what is colloquially termed the 'cascading regime' under s 21B (additional due diligence measures relating to legal persons, trusts and partnerships). I submit that this is also a huge win for the purposes of the work undertaken by the G20 inter-departmental committee and the country as a whole, as SA will now be assessed positively by the likes of Transparency International.

The 'cascading regime' under s 21B closely resembles the one within the FATF's recommendations. However, it is much clearer and more progressive than the recommendations as it does not only broadly or generally state that institutions should use a 'mere' risk-based

Though regarded as a milestone for SA – to have a working definition of the concept within its statute books – it is going to be interesting to see how this will be implemented in practice. The Financial Action Task Force for instance, is also grappling with the same difficulty.

approach when identifying 'beneficial owners' but also makes provision for a mechanism through which that can be achieved. This is called the 'Risk Management and Compliance Programme' in the Act.

In short, s 21B requires institutions to establish the following (as a first step) –

- the nature of the client's business;
- the ownership and control structure of the business;
- the identity of the beneficial owner of the client and take reasonable steps to verify such client's identity; and
- establish the identity of each natural person who, independently or together with another, has a controlling ownership interest in the legal person, among others.

Should there be a failure by an institution to establish the identity of a natural person who is a beneficial owner above, then the institution must –

- establish the identity of each natural person who exercises control of the legal person through other means and take reasonable steps to verify the same; or
- establish the identity of each natural person who otherwise exercises control over the management of the legal person and further verify such identity.

Implementation challenges

Though regarded as a milestone for SA – to have a working definition of the concept within its statute books – it is going to be interesting to see how this will be implemented in practice. The FATF, for instance, is also grappling with the same difficulty. The definition is too broad and it is very difficult to ascertain the meaning of (or parts of) certain concepts within it, namely, 'ownership', 'effective

control' and 'identify each natural person who exercise control through other means'. This results from the fact that the definition does not attach a threshold to the share capital of an entity similar to other regulatory obligations, namely, the Foreign Account Tax Compliance Act (10%), the FATF (25%) etcetera. It will be helpful if this is provided for in the new sets of guidance, which are going to be issued by the regulator.

The FATF places an obligation on countries (not financial institutions) to make beneficial ownership information available to all including relevant authorities. This information should be accurate, up-to-date and accessible in a timely manner. Unfortunately, SA does not have such a registry, which conforms to these standards. Currently this obligation lies with the Companies and Intellectual Property Commission (CIPC). Unfortunately not much reliance can be placed on the CIPC either as their efforts do not conform to what is required by the FATF. Currently there are efforts underway to amend the Companies Act 71 of 2008 (and regulations) to cater for this.

One other important challenge is the fact that SA has not yet done a country risk assessment as it pertains specifically to beneficial ownership transparency. This is required by G20 principle 2 (identifying and mitigating risk).

Conclusion

In a nutshell, the signing of the Bill into law is a significant milestone for SA. Efforts aimed at addressing some of the implementation challenges noted above are very welcome and should not lose momentum. Furthermore, it is imperative to note that most countries fail to meet this obligation and others are in a process of trying to address it, namely, within the Organisation for Economic Cooperation and Development countries only 9% complies with this requirement. In the 'United States, two pieces of relevant legislation have been introduced in Congress, but have not yet been approved' (Martini *op cit*). Finally, the signing of the Bill into law should be applauded as a significant first step to addressing issues around the misuse of corporate structures.

Nkateko Nkhwashi LLB (University of Venda) LLM (UJ) Cert in Legislative Drafting (UP) Cert in Compliance Management (UJ) Cert in Money Laundering Controls (UJ) is an advocate at the Banking Association of South Africa. Mr Nkhwashi writes in his personal capacity.



Does the electorate have effective remedies under the South African Electoral System?

By
Makhosi
Poyo

YOUR
VOTE
COUNTS



Picture source: Gallo Images/Stock

The recent service delivery protests, characterised by the destruction of public property, as well as occasional loss of lives by some protestors have left some gasping with astonishment and feeling overwhelmed by a plethora of unanswered questions pertaining to such incidents. Given the fact that our society is founded on the values of constitutional democracy with an entrenched Bill of Rights, which guarantees human dignity, equality and freedom (s 7 of the Constitution), how is it that the social behaviour of some citizens, in pursuit of the same rights and freedoms as guaranteed in the Constitution, is in-

creasingly expressed in the manner that is diametrically opposite to its spirit and tone? Is the Constitution not affording the citizens of South Africa (SA) enough effective remedial mechanisms in line with the ethos of a democratic society, to defend and advance their constitutional rights and freedoms in such circumstances? Or could it be that the Constitution of SA, which has been suggested by many as among the best in the world, if not the best, was erroneously overrated and thereby is gradually proving to be an integral part of what some lately believe is the sunset shades of a 'fairy tale' rainbow nation? If not, as I believe, what is the legal explanation of what appears to be the *lacuna* between rights the Con-

stitution guarantees on paper and what practically becomes attainable as rights and freedoms on a daily basis to ordinary South Africans?

To interrogate these questions, I have analysed the maxim *ubi ius ibi remedium* (whenever there is a right, there is a remedy), the state according to social contract, two dimensions identified in the right to vote, the right to recall, the unconstitutionality of the South African electoral system and possible reforms as sub themes in this article.

The main argument

As one of its sources, South African law includes common law, which consists of English and Roman Dutch law. Both

these legal systems have as one of their maxims *ubi ius ibi remedium* principle. Enunciating this principle in the seminal case of *Ashby v White* (1703) 92 ER 126, Lord Holt CJ remarked that ‘indeed it is a vain thing to imagine a right without a remedy; ... of right and want of remedy are reciprocal ... Where a man has but one remedy to come to his right, if he loses that he loses his right.’ Practically, it means whenever there is a legal regime dressing an individual with a right, inherent in that regime should be remedies to protect that right.

This maxim still constitutes an integral part of our legal system with this recognised in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A) at 781 wherein Centlivres CJ confirmed that ‘remedy is indeed, part and parcel of the right. *Ubi ius, ibi remedium.*’

The Constitutional Court subsequently expressed recognition of this principle in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69 by noting that: ‘In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.’

This principle enjoys recognition internationally with the Canadian court having held in *Doucet v Canada* [2005] 1 FCR 671 at 674, that: ‘The purpose of the remedy must be to provide an effective solution to the problem or, as the Supreme Court has said, to give “modern vitality to the ancient maxim *ubi ius, ibi remedium*: where there is a right, there must be a remedy”’ (see also *Nelles v Ontario* [1989] 2 SCR 170 at 196).

The critical question is: In what sense does this principle, as it is still recognised in our law, remain a missing part of the South African Electoral system? To ponder this question, I have looked at the concept of the state from the social contract theory point of view and I have asked whether South African state resembles a modern form of social contract.

The theory of state as a by-product of social contract is premised on the idea that citizens agree among themselves to form an institution called a state, as a supreme authority to which they will obey in all matters in return for the protection of individual rights like private property, freedom of speech and thought, as well as guarantee of peace and security among others.

Various philosophers have interpreted the social contract theory including Thomas Hobbes, John Locke and Jean-Jacques Rousseau among others. Thomas Hobbes *Hobbes's Leviathan* (Oxford: Clarendon Press 1909) (<http://oll.liberty.org/leviathan/1909>, accessed 25-

8-2017) notes that the ‘essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defense.’ Though they differ among themselves as to the reason behind the formation of the state, common cause is that people concord among themselves to form this supreme being with an obligation in return to guarantee their individual rights.

Given this enunciation, the curious question is whether our Constitution does embody elements of the social contract as a foundation of our democratic state? It unequivocally does. A closer scrutiny of the Constitution reveals traces of the social contract. The broader concerns of various philosophers are embellished in our Constitution.

The preamble proclaims that: ‘We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

... Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.’ Worthy to note is that in as much as there is no government without the will of the people, equally, no people can force a party to be their government. Thus consent by both parties gives birth to a contract for formation of a democratic government.

The obligation the Constitution places on the state to respect, protect, promote and fulfil the rights in the Bill of Rights (s 7(1)) is performance from social contract anticipated by citizens. Further clauses in the Bill of Rights speaks to this concern, including the guarantee of freedom and security of person.

The Constitution at ch 8 further dedicates on how to deal specifically with courts and administration of justice. It affirms the independence of the courts, as well as the fact that they are subject to the Constitution.

This comparative analysis reveals no dichotomy between the two except that the South African Constitution embodies a list of the rights to be guaranteed by the state, which were not recognised then. This phenomenon germinates from the differing historical periods within which the two find themselves, the first being during the early modern society while our Constitution resides in a post-modern one.

Yet despite this meticulous effort to unpack the social contract theory as the framework defining the South African democratic state, the question still begs:

The two innate legal dimensions assailing the right to vote is the freedom of choice and the formation of a contract of mandate.

Who becomes the functionary of the Democratic Republic to fulfil the realisation and the protection of constitutional rights and how does that functionary come into existence?

These questions are of prime importance because from their answers flow an understanding of how government comes into existence as the proxy for the people or the state to fulfil their constitutionally stated will (s 1(d)). This brings us to the next question of the legal significance of the right to vote.

The two innate legal dimensions assailing the right to vote is the freedom of choice and the formation of a contract of mandate. Whenever a citizen votes for its representative, it invariably exercises a freedom of choice. Simultaneously, the voting process ushers in a contractual relationship between the two, with the citizen undertaking to pay and indemnify the representative for all the effort of fulfilling the mandate in return, for the representative to perform by fulfilling the broader objectives of the social contract which are contained in government programs like the Integrated Development Plan and others for practical purposes. This is a contractual relationship of mandate (see BX De Wet and BG Rogers (ed) *Pothier's Treatise on contract of Mandate* (Lex Patria Publishers, Johannesburg 1979) at 3).

This sentiment was expressed in *Manson v Vacuum Oil Co SA Ltd* 1936 CPD 219 at 223 with the court remarking that ‘*Van der Linden* seems to me to put the matter much more satisfactorily. “He defines mandate as a transaction by which a person commits the management of one or more of his affairs in *his stead and on his account* to another person who charges himself to gratuitously therewith and binds himself to render an account.”’

Acknowledging these dimensions belies the nub of these theses. The Local Government: Municipal Electoral Act 27 of 2000, as well as the Electoral Act 73 of 1998 both breathe life to the right to vote in respective tiers of government. Yet, they fall foul of the *ubi ius ibi remedium* principle, because they do not

address the voter with remedy against the representative. The voter does not have an effective remedy to undo the choice that it initially did in the event that it no longer needs it. Secondly, the right by the voter to cancel, which is a common law right wielded by parties to a contract is absent. Representatives wield this right under the constitution (see ss 50; 102; 109; 139(1)(c) among others). In *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) at 142 the court held that recognising purchaser's right to cancel was an interpretation 'consistent with the object of our Constitution that contracting parties are treated with equal worth and concern.' At para 38 it states: 'Cancellation is a remedy that exists at common law.'

In the context of parliamentary democracy, cancellation by citizens is to recall public representatives. '[R]ecall is a legal mechanism by which a specified percentage of voters can petition for an election to remove a particular elected official' (TE Cronin *Direct Democracy: The Politics of initiative, Referendum and Recall* (Harvard University Press 1989)). This definition is not universal as the citizens can do this through a referendum giving citizens equal opportunity to pronounce on the issue. The right to vote to the extent that it does not embody remedial provisions to cater for the above remains understated and thus

The Bill of Rights is a gateway to recognise the existence of any other rights or freedoms that are recognised or conferred by common law or legislation, to the extent that they are consistent with the Bill (s 39(3)).

unconstitutional. This postulation tallies with the view in *Masiya v Director of Public Prosecutions, Pretoria and Another* (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (5) SA 30 (CC) at para 39 wherein the court had to deal with the constitutionality of an understated definition of rape as it excluded anal penetration. In dealing with this anomaly, Nkabinde J held that: 'The inclusion of penetration of the anus of a female by a penis in the definition will increase the extent to which the traditionally vulnerable and disadvantaged

group will be protected by and benefit from the law. Adopting this approach would therefore harmonise the common law with the spirit, purport and objects of the Bill of Rights.'

Conclusion

The Bill of Rights is a gateway to recognise the existence of any other rights or freedoms that are recognised or conferred by common law or legislation, to the extent that they are consistent with the Bill (s 39(3)). *Ubi ius ibi remedium* is a gateway to create the necessary balance in the South African electoral system. The available remedies as they obtain in Municipal Systems Act 32 of 2000 and other Acts fail to meet the standard of effectiveness as highlighted in the *Fose* case. It is in the interest of justice therefore, that a direct application to the Constitutional Court in terms of s 167(6)(a) of the Constitution to have the electoral acts declared unconstitutional and order the inclusion of remedy clause to the voter.

Makhosi Poyo BProc (UWC) is an attorney and Assistant Master at the Gauteng Division of the High Court in Pretoria.



SHORT COURSES IN LAW AT WITS UNIVERSITY

Now is the time to start thinking about the future of your career!

The Mandela Institute at Wits School of Law offers short courses in many different aspects of law that will add value to your CV and prepare you for the opportunities ahead. If you do not have a law degree you may be considered for these postgraduate certificate courses in law based on your tertiary qualification/s and relevant work experience.

The Mandela Institute is accepting applications until **30 November 2017** for the following 2018 first semester short courses:

- | | |
|--|---|
| <ul style="list-style-type: none"> • Advanced Company Law I • Collective Labour Law Practice and Jurisdiction (LRDP) • Competition Law • Cyber Law • Economics for Law • Environmental and Sustainable Development Law • Human Rights and the Marketplace • Human Rights Advocacy & Litigation • Individual Labour Law • Individual Labour Law Practice (LRDP) • International Business Transactions Law • Introduction to Law for Non-Lawyers | <ul style="list-style-type: none"> • Labour Arbitration (LRDP) • Labour Dispute Resolution Practice • Law & Sustainability I • Law of Banking and Financial Markets • Local Government Law • Media Law • Mediation and Conciliation (LRDP) • Mining Tax Law • Private Security Services Law • Research Methodology • Risk, Compliance and Governance |
|--|---|

Entry requirements, course details and application process can be found on the Short Courses pages of the Mandela Institute website at www.wits.ac.za/mandelainstitute/short-courses



MANDELA INSTITUTE

Enquiries: Please email mandela.institute@wits.ac.za or phone 011 717 8438/8435.



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

THE LAW REPORTS

August 2017 (4) South African Law Reports (pp 341 – 677); [2016] 4 All South African Law Reports November (pp 299 – 664); July [2017] 3 All South African Law Reports (pp 1 – 364); 2017 (8) Butterworths Constitutional Law Reports – August (pp 949 – 1087)

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
ECB: Eastern Cape Local Division, Bhisho
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu-Natal Division, Pietermaritzburg
LCC: Land Claims Court
LT: Limpopo Local Division, Thohoyandou
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeal

Purging irregular step of making application for execution of judgment before leave to appeal is sought: Section 18(1) of the Superior Courts Act 13 of 2013 (the Act) provides among others that ‘unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal’. In terms of subs (3): ‘A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities

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

The application of the above provisions was dealt with in *Mogale City Municipality and Others v Fidelity Security Services* 2017 (4) SA 516 (GJ) where in one of the many judgments between the first appellant Mogale City Municipality (Krugersdorp) and the respondent Fidelity Security, the court *a quo*, per Du Toit AJ, granted an order in favour of the respondent, which provided that pending the lawful conclusion of a new contract pursuant a competitive bidding process, the first appellant was directed to reinstate the previous month-to-month contract with the respondent on the same terms. Acting through its attorneys, apparently on the instigation of the second appellant (who was the alleged troublemaker), the first appellant informed the respondent that it was not going to obey the court order and further that it was going to seek leave to appeal. Before the application for leave to appeal was made the respondent applied for execution of the court order in terms of s 18(3) pending application for leave to appeal and if granted, the appeal itself. The execution order was granted by Kathree-Seti-

loane J. In due course the application for leave to appeal against the order of Du Toit AJ was duly made. The instant case was an appeal in terms of s 18(4) against the execution order granted by Kathree-Setiloane J. The appeal was dismissed with costs.

Sutherland J (Windell and Modiba JJ concurring) held that in the instant case the application for leave to appeal was lodged before the execution hearing. At the time of the execution hearing there had indeed been both an application for leave to appeal and an application for execution of the order had also been lodged. All that was necessary in order to entertain the execution application was present, albeit that the application to execute was the earlier event of the two.

When the respondent lodged an application to execute before an application for leave to appeal had been lodged, it took an irregular step. What the first appellant could have done was to invoke r 30 of the Uniform Rules of Court in terms of which it could have applied to have the irregular step set aside. However, it did not. Instead it embarked on two parallel courses of action by responding with an answering affidavit, which addressed the premature lodgement of the execution application and the

merits thereof. Also, it lodged the application for leave to appeal. By doing so the first appellant took ‘further steps’ as contemplated by r 30(2) (a), which had the effect of advancing the proceedings one step nearer completion. By taking such further steps the first appellant, in effect, forfeited a right to complain about the premature lodging of the application to execute. The non-compliance with r 18, which the respondent committed, was in effect purged. The irregularity was wholly of form and not of substance and once the application for leave to appeal was lodged, the irregularity was no longer susceptible to complaint. If an application for leave to appeal had not been lodged, the issue of nullity of the execution application would have warranted examination but that was not the case in the instant matter.

The court further held that independently of r 30, dismissal of the application to execute would have been obviously wasteful and the delay in the respondent coming to court again later on fresh identical papers so inimical to the aims of s 18 that a court exercising its inherent power to regulate its process effectively ought to have allowed the execution application to proceed and *mero motu* condoned the irregularity.

NB ‘Exceptional circum-

stances' were found to exist in *Helen Suzman Foundation and Another v Minister of Police and Others* [2017] 3 All SA 253 (GP) to justify a judgment to remain effective notwithstanding the possibility of petitioning the SCA for leave to appeal against it.

Civil procedure

Duty to provide reasons as well as all documents and records relating to executive decision: Rule 53(1)(b) of the Uniform Rules of Court provides among others that: 'Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings ...

... (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after the receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.'

It cannot be overemphasised that the rule deals with a review of the decision or proceedings of any inferior court and any tribunal, board or officer performing judicial, quasi-judicial or administrative functions. It does not include reviewing the decision of the President of the country performing executive functions. However, in *Democratic Alliance v President of the Republic of SA; In re Democratic Alliance v President of the Republic of SA and Others* [2017] 3 All SA 124 (GP) the applicant Democratic Alliance, a political party, sought to apply the rule to the President. That was after the President made a major reshuffle of the National Executive (Cabinet) in April. Among the Ministers and Deputy Minis-

ters who were dismissed from Cabinet were the Minister and Deputy Minister of Finance. In the main application, which was brought on an urgent basis, the applicant sought an order reviewing and setting aside the decision of the President to dismiss the Minister and Deputy Minister of Finance. Acting in terms of the rule the applicant requested in the notice of motion that the President should provide reasons for the dismissal, as well as all documents and electronic records including correspondence, contracts, memoranda, advices, recommendations, evaluations and reports relating to the making of the challenged decisions. As the president failed to despatch same an interlocutory order was launched, again on an urgent basis, to compel him to do so. The president opposed both applications on the grounds that they were not urgent and also that the rule did not apply to executive decisions. The interlocutory application was granted with costs.

Vally J held that the executive power to appoint and dismiss Ministers and Deputy Ministers was wide-ranging but not as unfettered as its predecessor, the royal prerogative. The executive power conferred on the office of the president by s 91(1) of the Constitution was circumscribed by the bounds of rationality and subs 83(b) and (c) of the Constitution. The president's executive decisions had to comply with the doctrine of legality by being rational. Should an executive decision not comply with the doctrine of legality, it would be unlawful.

Rule 53 was promulgated at a time when executive decisions were not subject to review. With the enactment of the Constitution and the development of the common law since then, executive decisions had become reviewable. Given that r 53 had not been amended to cater for review of executive decisions, it was necessary to subject it to a purposive interpretation. Relying on that interpretation there was no logical reason not to utilise the rule in

an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such review was no different from the one undertaken in review applications of an inferior court, a tribunal, a board or an officer performing judicial, quasi-judicial or administrative functions. Accordingly, the provisions of r 53 applied with the necessary adjustments to an application for the review and setting aside of an executive order or decision. For that reason the applicant was entitled to call the president to furnish the reasons for his decisions as well as the relevant part of the record that formed the basis on which the decisions were taken.

Education

Attachment of the primary dwelling of a parent of a learner at an independent school to recover tuition fees: Section 41(6) of the South African Schools Act 84 of 1996 (the Act) provides that a public school may not attach the dwelling in which a parent resides. The Act does not have a similar provision prohibiting an independent (private) school from attaching a parent's residential dwelling. In *St Charles College v Du Hecquet De Rauville and Others* [2017] 3 All SA 358 (KZP) the applicant, St Charles College, was an independent school, which was granted summary judgment against the first and second respondent, H and G Du Rauville (the respondents), in an amount of some R 428 000. Thereafter, the applicant also obtained default judgment against the respondents in an amount of some R 198 000, bringing the total indebtedness to some R 627 000. Summary judgment was granted in respect of tuition fees and other charges that the respondents owed regarding their two sons who attended school at the applicant. As the respondents were unable to satisfy the judgment debt the applicant approached the court for an order declaring their residence executable so that it could be sold in execu-

tion of judgment. The property was registered in the name of the second respondent, the wife. The application was opposed on a number of grounds but the main one was that it was unconstitutional to subject the residence of parents with learners at an independent school to attachment while leaving out that of parents with learners at public schools. Accordingly, the respondents sought an order declaring that the residence of parents with learners at independent schools was equally protected by the section but did not seek an order declaring the section unconstitutional. The court granted an order declaring the residence executable with costs on an attorney and client scale, presumably because of the contract in terms of which the respondent's children were admitted to the applicant school.

Jappie JP held that in deciding whether or not a court should declare the primary residence of a judgment debtor who is a natural person executable the court had to consider all circumstances relevant to the particular case. In the present case the judgment debt was substantial. Moreover, the respondents made an informed choice of enrolling their sons at an independent school knowing that they would incur the cost of tuition fees and did so voluntarily. They had a choice, if they so wished, to enrol their sons at a public school and thus avoid their current predicament. There was, therefore, no evidence before the court to persuade it to exercise its discretion if their favour to avoid the attachment and execution of the immovable property.

In seeking to execute judgment against the second respondent's immovable property, the applicant did not actually or potentially fundamentally impair the dignity of the respondents. It was the respondents' choice to send their sons to an independent school because they enjoyed a higher economic status. The exercise of a choice that was based on economic or financial considerations did not fundamentally impair the

dignity of a parent who chose to enrol his child at an independent school. The differentiation between parents with learners at a public school and those at independent school did not constitute discrimination, let alone unfair discrimination, as contended by the respondents.

Joint liability of divorced or separated parents for fees at fee-paying public school:

Section 40(1) of the South African Schools Act 84 of 1996 (the Act) provides among others that: A parent is liable to pay school fees at fee-paying public schools unless or to the extent that he or she has been exempted from payment. One of the requirements for exemption from payment of fees as contained in reg 6(2) is that the applicant must provide 'combined annual gross income of parents'. In *MS v Head of Department, Western Cape Education Department and Others* 2017 (4) SA 465 (WCC); [2016] 4 All SA 578 (WCC) the applicant MS, a divorced mother of the learner at a fee-paying public school, was refused exemption by the school governing body (SGB) of the local school as her application was incomplete in that it did not include the financial position of her former husband that she had since divorced. He was very uncooperative and did not provide his financial position. The first respondent, the Head of the Department of Education in the Western Cape, rejected the applicant's appeal against the decision of the SGB.

Contending that her liability to pay school fees was joint rather than joint and several, the applicant approached the court for an order reviewing and setting aside the first respondent's decision regarding her appeal. In other words, her stance was that her application for exemption from payment of fees should be determined on the basis of her financial position alone concerning her share of liability for fees. That meant that for the balance the SGB would have to deal with her divorced husband separately.

Le Grange J granted with costs an order reviewing and

setting aside the decision of the first respondent. The matter was remitted to the first respondent for determination of the exemption as the court itself was not a better place to do so. Moreover, doing so would encroach on the doctrine of separation of power between the judiciary and the executive.

It was held that on a proper construction of the provisions of s 40(1) of the Act, liability of a parent to pay school fees had to be regarded as joint and not joint and several. That was reference to the liability of the parent to the school in terms of s 40(1), not the liability for school fees between parents, which could be effected by private arrangement, as was the case in the present matter. Given that back in 2010 both parents undertook to remain involved in all aspects of the learner's life, including her schooling and general welfare, the suggestion by the applicant that she was offended by the respondents to regard the divorced husband as part of her family and to insist that she requested financial information from him in order to complete the application forms for the school fees was unjustified. In fact she accepted and agreed that she was under a legal obligation to forward correspondence relating to the learner to the divorced husband. Moreover, both parents accepted to remain co-holders of parental responsibilities and rights in terms of the Children's Act 38 of 2005. Therefore, the relief sought by the applicant for a declaration to the effect that by requesting her to also submit financial information of her divorced husband, the SGB infringed her right to human dignity by degrading and humiliating her, as alleged, was unsustainable and legally untenable.

Fundamental rights

Right of access to information held by a public body is not absolute: Section 45 of the Promotion of Access to Information Act 2 of 2000 (PAIA) provides that: 'The information officer of a public body may refuse a request for

access to a record of the body if –

(a) the request is manifestly frivolous or vexatious; or

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.'

In *Belwana v Eastern Cape MEC for Education and Another; Langeveldt v Eastern Cape MEC for Education and Another* [2017] 3 All SA 32 (ECB) two applications for access to information held by the Eastern Cape Department of Education were consolidated and heard together. The first application was that of Belwana who had applied for two positions as head of department at a local primary school in Port Elizabeth. She was not shortlisted. Initially she requested reasons for failure to shortlist her, as well as the criteria used for shortlisting. However, in court proceedings she sought disclosure of information on the interviews, which took place although she was not a party thereto.

Stretch J dismissed her application with costs, holding that her application was frivolous and vexatious. The information which the applicant sought did not relate to her as a requester. It related to meetings where she was not the subject of discussion. It related to opinions about and recommendations with respect to candidates who were shortlisted and those who were interviewed. The applicant was not one of them. There was no valid reason why the applicant would be entitled to information regarding a process that she was not a part of. Her case was not that she considered herself to be more suited for the position than any other applicant or that she considered herself to have been unfairly prejudiced by her early exclusion. She was but one of the many unsuccessful candidates.

However, the position of the second applicant, namely Langeveldt, stood on a different footing. In her case she was shortlisted, was invited to the interview, which she attended but the position was given to another candidate.

For that reason she was entitled to the information she sought regarding among others minutes of meetings of the school governing body, minutes of shortlistings, panellists' preference lists, correspondence with other candidates for the position, memoranda and other documents. Nevertheless, because of the confidentiality clause on the basis of which panellists were appointed and which they signed, the applicant was not entitled to those aspects of her application, which sought the provision of evaluative material prepared by panellists for the purpose of determining the suitability, eligibility or qualifications of the other applicants for the post, including the identities of the persons who furnished and obtained such evaluative material, since it was protected by s 44(1) of PAIA. Because of limited success achieved by each side party in the second application, each party had to pay own costs.

Land reform

Appointment of special master to process claims of labour tenants: Section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (the Act) enables a labour tenant (farm worker) to apply for an award of a piece of the land, which he or she is entitled to occupy or use. To that end the Director-General of the Department of Rural Development and Land Reform (the department) is mandated by the Act to play a pivotal role in the processing of applications by labour tenants while the minister grants advances or subsidies for the acquisition of land by labour tenants. In *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Others* 2017 (4) SA 422 (LCC) the applicants were labour tenants who approached the LCC for appointment of a 'special master' to facilitate the process of awarding land to labour tenants countrywide. That was after the department conceded that it was not able to process the claims and finalise them. The position was that after 20 years of the Act coming into

operation some 11 000 applications were still pending, many lodged claims had files that disappeared while the department was not able to collate information, provide statistics and report on progress made. It was estimated that it would take another 40 years to finalise the outstanding 11 000 applications.

Ncube AJ granted with costs an order authorising the appointment of a special master and gave parties the opportunity to name preferred candidates for the job. Once appointed the special master was required to come up with an implementation plan to ensure that the applications of labour tenants were processed and finalised. To avoid confusion with other masters, the special master was designated 'Special Master of Labour Tenants'.

The court held that the size and complexity of the task alone justified the appointment of a special master to, *inter alia*, assist the court to meaningfully monitor implementation of the Act. The department acknowledged the complexity and enormity of the task and demonstrated that it was unable to process the applications with the haste and scale that was required. Frequent returns by the parties to the LCC also demonstrated that the court, the department and applicants required help in implementing the Act.

A special master was an independent person who was appointed by and reported to the court. His or her duty was to assist the court and in the instant case, the duty was to assist in the manner determined by the court. He or she was not an advocate for the claimants or the government, but was an agent of the court and as such was given limited decision-making powers. His or her powers were always subject to oversight by the court as he or she provided additional resources to the court and could also engage more informally with the parties than a judge would. While the concept of a special master was a relatively novel one in South African law, the role and function thereof was no

different from that of a court appointed *amicus curiae* or a family advocate whose powers were determined by the court to assist where specialist skills or capacity was needed.

Right of occupier of land to effect improvements without the consent of the owner or person in charge of the land: Section 6 of the Extension of Security of Tenure Act 62 of 1997 (ESTA) gives 'occupiers' of land, defined in s 1(1) as persons residing on land belonging to another person with consent or another right in law to do so, a number of rights. However, the right to make improvements to property without the consent of the owner or person in charge of the land is not one of them. In *Daniels v Scribante and Another* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) the applicant, Daniels, was a domestic worker on a farm where she, together with her three minor children, was given a cottage to live in. When the person in charge of the farm, the first respondent and farm manager Scribante, failed to maintain the cottage, the condition thereof deteriorated making it a problem in rainy conditions. As a result the applicant informed the first respondent by a letter that she intended to do certain essential improvements to the cottage to make it suitable for human habitation. The purpose of the letter was simply to inform the first respondent of the applicant's intention and was not a request for permission. After commencement of the improvements the first respondent ordered them to cease, as a result of which litigation commenced. The Stellenbosch Magistrates' Court held that ESTA did not give the applicant the right to make improvements to the property without the consent of the owner or person in charge. The LCC reached a similar decision and denied the applicant leave to appeal. Such leave was also denied by the SCA.

On appeal to the CC for leave to appeal was granted and the appeal upheld. The

court granted an order directing the parties to enter into meaningful engagement regarding the 'mechanics' of effecting those improvements. If those negotiations were to fail, after thirty days either party could approach the Stellenbosch Magistrates' Court for appropriate relief.

Reading the main judgment of the court Madlanga J held that s 6 had no provision that explicitly provided that an occupier had a right to make improvements meant to bring his or her dwelling to a standard suitable for human habitation. However, that was not the end of the matter. Whether that right existed depended on what an interpretative exercise yielded. Section 5 of ESTA decreed that occupiers enjoyed certain fundamental rights, including the right to human dignity. The occupier's right to reside on another person's property had to be consonant with the fundamental rights contained in s 5 and in particular, the right to human dignity. Occupation was not simply about a roof over the occupier's head. It was about occupation that was conducive to human dignity and the other fundamental rights itemised in s 5. That much was plain from a reading of s 6 together with s 5. Like 'residence', the notion 'security of tenure' meant that the dwelling had to be habitable. That in turn meant making whatever improvements, which were reasonably necessary to achieve that objective. Permitting an occupier living in circumstances of the instant case to make improvements to his or her dwelling would serve the twin purpose of bringing the dwelling to a standard that befitted human dignity and averting the indignity that the occupier could suffer as a result of possible departure from unacceptable living conditions.

An owner or a person in charge's consent was not a prerequisite when the occupier wanted to bring the dwelling to a standard that conformed to conditions of human dignity. Although consent was not a requirement, meaningful engagement of

an owner or person in charge by an occupier was still necessary. Therefore, it was necessary that an occupier should approach the owner or person in charge to raise the question of the proposed improvements. However, the need for meaningful engagement did not detract from the conclusion that the existence of the occupier's right to make improvements was not dependent on the owner or person in charge's consent.

Medicine

Medical malpractice: Legal duty to exercise care irrespective of doctor/patient relationship: In *TS and Another v Life Healthcare Group (Pty) Ltd and Another* 2017 (4) SA 580 (KZP) the plaintiffs, Mrs S and her husband, sued the first respondent, Life Healthcare Group, together with the second respondent Dr Suliman jointly and severally. The plaintiffs sued for loss suffered by them in their personal capacity, as well as in a representative capacity for their minor child who suffered birth asphyxia (deprivation of oxygen) while the mother was in labour. As a result the child developed cerebral palsy. The first defendant was the owner of the hospital where Mrs S was admitted and gave birth, while Dr Suliman, a specialist obstetrician, acted as cover for Dr Maise who was not available to attend to Mrs S. Mrs S was admitted at 10:00 am, went through the challenges of labour through the day, during which the foetus showed signs of distress, that is to say needed delivery but that did not happen until 10:10 pm, which proved to have been too late. Right through the day Dr Suliman had telephonic conversations with the nursing staff who updated him on developments but significantly, did not verify the condition of the patient himself. His attitude was that he did not want to interfere with the relationship between Ms S and her doctor, namely Dr Maise and that he would only intervene in the event of emergency or imminent delivery. During the course of the

day the nursing staff failed to pick up an important warning signal, namely, deceleration when the heart rate went down significantly. A further deceleration was picked up but its importance was not realised as they failed to report it to Dr Suliman. As it turned out the nurses did not even know of a necessary instrument such as a vacuum and when it was brought to them they did not know how to use it.

The claim was settled in the amount of R 20 million, after which the first defendant sought contribution from Dr Suliman in terms of the Apportionment of Damages Act 34 of 1956. Dr Suliman denied liability on the basis that as Mrs S was not his patient and, therefore, there being no doctor-patient relationship between them he did not owe her a duty of care (there was no wrongfulness). He also denied negligence, as well as causation on his part.

Ploos van Amstel J held that there was wrongfulness and negligence on the part of Dr Suliman but that the requirement of causation had not been satisfied and accordingly dismissed the claim with costs. The court held that it was generally accepted that a doctor who managed, treated or performed a procedure on a patient was under an obligation to do so with the degree of care and skill that could reasonably be expected of a doctor in his position. That was so whether or not there was a contract between them. The question was not whether there was a doctor-patient relationship between the two. Instead, it was whether public policy considerations required that the doctor owed the patient and her unborn baby a legal duty and whether he should be held liable to compensate them for the damage caused by negligence on his part.

The process of labour was inherently dangerous and called for expert monitoring and management of both mother and foetus. Considerations of reasonableness and public policy required that the doctor should be held liable for the consequences of any negligent omissions on

his part. In other words, Dr Suliman had a legal duty to exercise the required degree of care and skill which arose at 10:30 am when he was informed of the patient's admission and gave telephonic instructions to the nursing staff with regard to her care.

The court concluded that as expert testimony could not confirm when brain damage occurred or whether the baby would have been saved by a caesarean section at about 7:30 pm or 8:00 pm, causation had not been proved.

NB It will be noted that causation was the only issue that does not seem to have been dealt with correctly in this matter. Brain damage or caesarean section did not have to have taken place at 7:30 pm or 8:00 pm. The duty of Dr Suliman to intervene started at 10:30 am when he was notified of the patient's admission. As the court indicated, from that time Dr Suliman, by his own admission, should have gone to the hospital to see the patient and satisfy himself that the information given to him by the nursing staff was correct and to verify for himself that everything was in order. However, he did not do so as Mrs S was not his patient but that of Dr Maise. As the court also pointed out the process of labour is inherently dangerous and calls for expert monitoring and management of both mother and foetus, something which Dr Suliman did not do. Therefore, it was obviously his fault that the child was not delivered earlier to avoid birth asphyxia.

Road Accident Fund claims

Serious injury assessment report (RAF 4 form) may be lodged after five years: In terms of s 23(1) of the Road Accident Fund Act 56 of 1996 (the Act) a claim for compensation for injuries arising from the driving of a motor vehicle (RAF 1 form) is required to be lodged with the Road Accident Fund (RAF) within three years from the date on which the cause of action arose, that is after the motor vehicle collision took place. If the claim is not

lodged within that period, it prescribes. In terms of subs (2), once the claim is lodged a summons can be issued and served on the RAF at any time up to a period of five years from the date on which the cause of action arose, failing which the claim would prescribe. However, there is a complicating factor which started on 1 August 2008 when reg 3(3)(b)(i) of the Road Accident Fund Regulations dated 21 July 2008 came into operation. The regulation introduced the requirement of a 'serious injury assessment report', which is presented on RAF 4 form that has to be completed by a medical practitioner and confirm that the injuries suffered by the claimant are 'serious' to justify compensation for non-pecuniary loss, that being commonly referred to as 'general damages' and covers compensation for pain and suffering, as well as loss of amenities of life. The regulation provides that the 'serious injury assessment report' (RAF 4 form) may be submitted 'separately' after submission of the claim and at any time 'before' the expiry of the periods for the lodgement of the claim provided for in the Act and the regulations.

In *Manukha v Road Accident Fund* 2017 (4) SA 453 (SCA) the claim was lodged within the period of three years after the cause of action arose and the summons served within a period of five years as required by s 23. However, the problem lay with the 'serious injury assessment report', which was submitted to the RAF after the expiration of a period of five years – the prescription period. The RAF raised a special plea to the claim, contending that the claim for general damages had prescribed for late submission of the RAF 4 form. The LT per Kganyago AJ upheld the special plea and dismissed the appellant's claim for general damages. As the rest of the claim was not affected by the special plea, liability for same was subsequently conceded by the RAF.

The SCA upheld the appeal with costs. Petse JA (Leach, Tshiqi, Theron JJA and Mole-

mela AJA concurring) held that the appellant had but one unitary claim for compensation against the RAF arising from the motor vehicle collision that took place. On a proper reading of the Act and the regulations, the RAF's contentions could not be sustained. First, s 17 of the Act made reference to 'a claim for compensation' and not multiple claims. In addition, the section provided that the RAF was obliged to compensate a third party for non-pecuniary loss in respect of serious injury only, which was required to be assessed as provided for in the regulations. Second, s 24 in turn provided for the lodgement of a 'claim' and the requirements that the third party should meet in lodging 'the claim'. Third, s 23(1) which pertinently dealt with prescription referred to a right to claim compensation under s 17 from the Fund. In particular, s 23(3) provided that no claim (in singular) lodged in terms of s 17(4) or s 24 would prescribe before the expiry of a period of five years from the date on which the cause of action arose. In the instant case the appellant instituted the action within that period. Fourth, reg 3(3)(b)(i) provided that the serious injury assessment report could be submitted separately from the submission of the claim itself. Implicit in this was that 'the claim' existed independently of the 'assessment report'. Accordingly the claim, inclusive of the claim for non-pecuniary loss, could be submitted in terms of s 24 of the Act without the 'serious injury assessment report'. There was nothing in the regulations dealing with prescription, an issue that was otherwise dealt with exclusively by the Act. At best for the RAF it was entitled to a stay of that part of the appellant's claim relating to compensation for non-pecuniary loss until the process set out in reg 3 had been complied with by the appellant.

NB This is good news for claimants whose RAF 4 forms may from time to time be submitted late. However, the court did not deal at all with that part of the regulation requiring the RAF 4 form to be

submitted 'before' the expiry of the period for the lodgement of the claim prescribed in the Act. The key word is 'before', there being no reference to 'after' in the regulation.

Spoliation

Mandament van spolie not available solely to protect right of access arising from contract if there is no loss of occupation or physical control: In *Jigger Properties CC v Maynard NO and Others* 2017 (4) SA 569 (KZP) the facts were that the Mycrochem Trust (the Trust), through its trustees, the first to third respondents, was owner of underground storage tanks installed in a sectional title scheme. To access the tanks the Trust used the 'exclusive use area' in respect of unit 16 in the scheme, which was owned by Marbla CC. Thereafter Marbla CC sold the unit to the appellant Jigger Properties. Subsequently, the appellant demanded payment of monthly rental from the Trust for using its 'exclusive use area' in order to access the tanks. As such payment was not forthcoming the appellant threatened to prevent the Trust's right of access to the tanks by denying it passage over its 'exclusive use area'. For that reason the Trust sought and was granted a spoliation order (*mandament van spolie*) by the KZD per Norman AJ. An appeal against the order was granted with costs by the full court.

Seegobin J (Jappie JP and Van Zyl J concurring) held that an essential requirement that should be satisfied for spoliation relief was that there should have been spoliation. Put differently, there should have been a wrongful deprivation of another's right of possession. It was well-established that mere personal rights were not protected by the *mandament van spolie* and that only rights to use or occupy property or incidents of occupation warranted protection by a spoliation order.

In the instant case the Trust's right to access the tanks flowed from a contractual agreement, which the

parties had with each other over the years. That was the right which the Trust was exercising and which the appellant threatened to stop. Therefore, the Trust's claim in the court *a quo* amounted to nothing more than a claim for specific performance of its contractual rights. That could not be effected by way of *mandament van spolie*. All that the Trust enjoyed was a right of access as it neither occupied the premises nor exercised any physical control over it. Without an actual and wrongful deprivation of purported right of possession, the remedy of *mandament van spolie* was not justified. A mere threat of dispossession would find no ground for relief through a *mandament van spolie* but final interdict.

Unlawful occupation of land

Just and equitable date of eviction and significance of report by local authority: In the case of *Jacobs v Communicare NPC and Another* 2017 (4) SA 412 (WCC) the appellant Jacobs was a tenant of affordable, effectively subsidised, accommodation provided by the first respondent Communicare, a non-profit company whose aim was to provide affordable accommodation to residents of the Western Cape. When the appellant fell into arrears with rental payment he was given notice and eventually the lease was cancelled. Thereafter, the first respondent approached the magistrates' court for an eviction order. Although eviction was sought in terms of s 4(6) and not s 4(7) of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) in that the appellant's unlawful occupation of the premises, after cancellation of the lease, was less than six months, the first respondent nevertheless joined the responsible local authority, the second respondent City of Cape Town (the City), as a party. However, it did not appear that the City had been served with the papers. Moreover, it did not participate in the magistrates' court

proceedings. As a result the magistrate did not have the benefit of a report prepared by the City as to available alternative accommodation or emergency accommodation. That notwithstanding, the eviction order was granted, hence the present appeal to the High Court.

Gamble J (Kose AJ concurring) dismissed the appeal, making no order as to costs. Although the matter could have been remitted to the magistrate for determination after consideration of a report by the City, given that the appellant had been treated sympathetically by everybody, namely the first respondent, the magistrate and the High Court itself when the appeal was reinstated after striking off for lack of expeditious prosecution and acceptance of heads of argument after late filing, the court was of the opinion that in view of the prejudice already suffered by the first respondent, the better approach was to bring the matter to finality by dismissing the appeal. The appellant was ordered to vacate the premises by a date agreed on by the parties as reasonable, failing which he would be evicted by the Sheriff a few days thereafter.

It was held that given that the appellant's current accommodation was expressly provided by the first respondent for the benefit of economically disadvantaged citizens and further that the appellant fell into arrears because of short payment rather than non-payment of rental, it was reasonable to infer that the eviction of the appellant would lead to him being without a roof over his head, at least in the short term. In such circumstances, the case called out for a report from the local authority in relation to the availability of at least emergency accommodation.

The first respondent bore the onus of persuading the court that eviction from its premises on the terms sought was just and equitable in the circumstances. It should, therefore, have ensured that a report by the City was furnished to inform the court of the relevant circumstances

relating to the appellant's prospects of finding alternative accommodation and in the absence thereof, the availability of emergency accommodation. The steps which the first respondent was required to take were not onerous. As it had joined the City as a party in the proceedings all that it had to do was to ensure that the papers were served on it and, thereafter, request it to report to the court, something it did not do. The failure of the magistrate to consider a report by the City was a procedural defect in the proceedings in the court below, which had the effect that the magistrate did not properly discharge his constitutional obligations. The magistrate had a duty to respond proactively and call for a local authority report in a matter such as this.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Application to lead further evidence in a criminal trial, assessment of evidence in a criminal trial, business rescue, defamatory statement on social media, delay in gazetting intergovernmental agreement, Fidelity Fund Certificate for an estate agent, interruption of prescription by joinder application, leave to appeal, meaning of administrative action, motherhood surrogacy agreement, no extension of asylum seeker permit after lapsing, period of prescription of a special notarial bond, provision of temporary emergency accommodation, provisional authorisation of temporary buildings, remedy against oppressive or unfairly prejudicial conduct of the affairs of a company, striking attorney from the roll, vindictory (spoliation) claim not sustainable where items not properly identified, widow's physical appearance and nature not to be considered when looking at remarriage contingency in loss of support claims and zoning of property for amusement not encompassing use as place of gambling.



By Bouwer
van Niekerk
and Ashley
Seckel

Debt review: Points on orders

Nedbank Ltd v Jones and Others 2017 (2) SA 473 (WCC)

The South African economy has predominantly been spared from the horrible truths of reckless and abundant credit based on derivatives and speculation without value. Thankfully the South African regulatory systems made sure of that, and we should be grateful for these systems that have been put in place by legislation and have been overseen by the Reserve Bank (notwithstanding the recent misguided attempt by the Public Protector of all institutions to alter its primary function), the Ministry of Finance and credit providers themselves.

From a legislative point of view, the main driver of these systems is the National Credit Act 34 of 2005 (the Act), a piece of legislation that was promulgated in 2007 and that significantly and forever changed the way consumers and credit providers approach the applying for, and granting of, credit in South Africa (SA). The Act promotes (among others) the development of a credit market that is accessible to all South Africans, the consistent treatment of different credit products and different credit providers, responsibility in the credit market by encouraging responsible borrowing and avoiding over-indebtedness, and discouraging the granting of reckless credit and contractual defaults by consumers (s 3 of the Act).

As noble as the promotion of these notions are, it remains inevitable that consumers will run into financial difficulty, and when they do, they invariably default on their monthly credit repayments. For this eventuality the Act introduced us to the concept of debt review – an application that is (as a rule) brought by a debt counsellor (DC) after a consumer has applied to have his or her debts that exist in terms of a credit agreement reviewed in terms of s 86 of the Act. Such an application is brought after the DC has satisfied himself or herself that the consumer is over-indebted, namely, that based on the preponderance of available information available at the time, the consumer is/will be unable to satisfy his or her obligations under all credit agree-

ments to which he or she is a party in a timely manner after considering the consumer's financial means, prospects and obligations (s 79 of the Act).

After considering such an application, a magistrate's court may (among others) make an order rearranging the consumer's obligations in any manner contemplated in s 86(7)(c)(ii) (s 87(1)(b)(ii)). Simply put, the magistrate may make an order –

- extending the period of the credit agreement and reducing the amount of each payment due;
- postponing the dates of which payments are due under the credit agreement; and/or
- recalculating the consumer's obligations because of contraventions of certain parts of the Act.

So what happens if a magistrate's court makes orders it is not empowered to make by the Act? The judgment of *Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC) dealt specifically with this question.

Brief summary of the facts

In this case, the first and second respondents (the consumers) were in dire financial straits, they being indebted to more than ten different creditor providers, including the applicant (the bank).

The bank had concluded a home loan agreement with the respondents for the amount of R 1,1 million, which had to be repaid over a period of 336 months in instalments of R 10 491 at a variable interest rate of 10,9% per annum.

Having considered their financial predicaments, the consumers' DC brought an application to the magistrate's court to review their debts.

After finding that the consumers are indeed over-indebted, the magistrate, ostensibly relying on s 87, proceeded to re-arrange their debt owed to the bank by varying the monthly instalments (to R 4 007,06) and the fixed interest rate (to 10,4%), and made provision for an open-ended repayment period.

Perturbed, the bank (some five years later) applied to have the magistrate's court order rescinded on the basis that

the magistrate exceeded the scope of his powers in re-arranging the consumers' debt.

The High Court was not persuaded by the bank's application for condonation for the late launching of the rescission application; it held that it would not be in the interest of justice to do so, as doing so would create a commercial nightmare and be prejudicial to the consumers.

However, the High Court did entertain the raised issue of *ultra vires* insofar as the magistrate's courts application of s 87 of the Act is concerned, and whether the magistrate exceeded the scope of his powers.

The following orders were made:

- A magistrate's court hearing a matter in terms of s 87(1) of the Act, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and order containing such a provision is null and void.
- A re-arrangement proposal in terms of s 86(7)(c) of the Act that contemplates a monthly instalment, which is less than the monthly interest, which accrues on the outstanding balance does not meet the purpose of the Act. A re-arrangement order incorporating such a proposal is *ultra vires* the Act and the magistrate's court has no jurisdiction to grant such an order.

Observational remarks

Many attorneys when launching actions or applications for the foreclosure on immovable properties or the repossession of motor vehicles have been confronted with the defence by consumers in either applications opposing summary judgment or in opposing papers that the credit agreement relied on is under debt review. Invariably, this defence has been upheld. No more. The effect of this judgment is that such a defence will not pass muster. Great news for credit providers?

Maybe, and maybe not. Many credit providers, especially commercial banks, take greater pride in their reputation than in their success rate in foreclosing on immovable properties or their ability

to repossess vehicles. For it is not the business of credit providers – and specifically commercial banks – to sell immovable properties in execution or store vehicles for the purpose and the *spes* of auctioning them off.

So what must credit providers do? We suggest that credit providers give consumers an option: Either the consumer consents to a variation of the order,

thereby increasing the interest rate and monthly instalments to the satisfaction of the credit provider, or the credit provider collects on the credit agreements in the manner it sees fit. In doing so, the credit provider upholds the moral high ground without coming over as weak. Because consumers should have a sense of security and comfort when dealing with credit providers, but in the same vein,

credit providers should feel comfortable in exerting their security

Bouwer van Niekerk BA (Law) LLB (Stell) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (UNISA & LEAD) is an attorney and Ashley Seckel LLB (UJ) is a candidate attorney at Smit Sewgoolam Inc in Johannesburg. □

By
Yashin
Bridgemohan

The effect of cancelling collective agreement's regulating ancillary duties

Imperial Cargo Solutions v Satawu and Others (LAC)
(unreported case no JA63/2016, 1-8-2017) (Tlatelsi AJP)
(Davis JA and Kathree-Setiloane AJA concurring)

In *SA Municipal Workers Union v City of Tshwane and Another* (2014) 35 ILJ 241 (LC) at para 18, the court noted that the terms of a collective agreement are not only binding on individual employees, but are incorporated into the employees contract of employment. The terms and conditions set out in a collective agreement remains in force after the lapse of the collective agreement and would remain as such, until another collective agreement is entered into, changing the provisions that had been incorporated into employees contracts.

Facts

The appellant's relationship with the respondents is within the jurisdiction of the National Bargaining Council for the road freight and logistics industry. Wages of drivers employed by the appellant are regulated in terms of a collective agreement reached in the bargaining council (main collective agreement) and extends across the road freight and logistics industry. The main collective agreement determines, in detail, all aspects of driver's remuneration.

The drivers that are employed by the appellant are all members of the first re-

spondent, a registered trade union. The transportation of freight cargo by truck requires safety precautions to ensure that cargo does not fall off the trucks. Tarpaulins, straps and ropes – depending on the goods transported – are needed to secure the safety of the cargo.

The appellant previously employed drivers' assistants who carried out ancillary duties by assisting drivers to load and offload the cargo, and also perform the tarping duties. In 2007, the appellant had done away with the drivers' assistant's posts.

As a result a decision had to be taken as to who would perform the duties previously done by the drivers' assistants. The appellant and first respondent concluded a collective agreement (the Guard Fee Agreement) in 2007. In terms of this collective agreement, the drivers had a choice to either perform the ancillary duties themselves or to appoint assistants. An agreed amount of money was paid to drivers *in lieu* of the ancillary duties, in addition to their salaries. Drivers were allowed to keep the money for themselves if they personally attended to the ancillary duties or they could pay assistants they employed. The agreed amount was subject to an annual increase.

The first respondent in 2015, tried to

negotiate an increased Guard Fee above the agreed annual increase rate. When the appellant refused to comply to the demand, the first respondent informed the appellant that it was cancelling the collective agreement with one month's notice. The first respondent further informed the appellant that as from 1 February 2015, the drivers would no longer perform the ancillary duties as provided in the collective agreement. The appellant was then advised to ensure that necessary arrangements were made to ensure the ancillary duties be performed by individuals other than the drivers.

The appellant considered the cancellation of the collective agreement and refusal to perform ancillary duties as unprotected strike action. The appellant filed and obtained an urgent interim relief directing the drivers to perform all ancillary duties on the basis that their refusal to do the work amounted to unprotected strike action.

The Labour Court (LC) concluded that refusal to perform the ancillary duties did not constitute strike action as the collective agreement in terms of which it was performed was cancelled and that the duty to perform those duties ended. In addition there was no general refusal to work, but only a refusal to work in

compliance with the terms of the cancelled collective agreement.

The LC discharged the *rule nisi* earlier granted to the appellant. On the appellant's application, the LC then issued an interim order preserving the *rule nisi*, pending the appeal to the Labour Appeals Court (LAC).

Issue

The main issue before the LAC was whether the court *a quo* was correct in finding that the ancillary duties terminated at the cancellation of the collective agreement.

LAC's judgment

The court noted that from the papers it was evident that there was no written or verbal contract of employment that provided the employees were obliged to perform ancillary duties as their normal duties. The only agreement providing for the performance of the ancillary duties was the collective agreement, which allowed employees to perform the duties on their own or to employ assistants. In both circumstances, the appellant was required to pay for whomever carried out the ancillary functions.

The court noted further in the absence of any other agreement creating a duty on the employees to perform the ancillary functions, and as they were entitled to cancel the collective agreement on notice, the duty ended on cancellation of the agreement. Likewise, the duty of the employer to pay the employees *in lieu* of ancillary functions as provided for in the collective agreement also ended. It would not be logical to argue that the appellant's duty to pay for the ancillary functions fell away on cancellation of the agreement by the respondents but that the duty to perform the ancillary functions survived the termination. The facts and circumstances of the *SA Municipal Workers Union* case was very distinguishable from the matter.

The court held the obligation relating to the drivers ancillary duties was based only on the Guard Fee collective agreement and not the main collective agreement. As such it was not necessary to determine whether the main collective agreement obliged the respondents to carry out the ancillary duties. It was never a practice at the respondent's workplace that the employees performed the ancillary functions in terms of the main collective agreement.

The LAC accordingly dismissed the appeal.

Conclusion

This judgment is important as it highlights that where an employer enters into a separate collective agreement, solely to remunerate employees for ancillary duties not part of their normal duties and which were previously performed by other employees, lawful termination of the collective agreement results in the termination of obligations on the part of both the employer and employee created in said collective agreement. In these circumstances employers cannot expect employees to continue performing ancillary duties provided for in the cancelled collective agreement and the refusal of employees to perform the ancillary duties cannot be considered unlawful strike action.

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

WIN a Lenovo Tablet

and one year's free access to LexisNexis Practical Guidance

The winner of the 2017 LexisNexis Prize for the best article contributed to *De Rebus* by a practicing attorney will receive a Lenovo Tablet, as well as 12 months free access to one practice area of Practical Guidance.

Practical Guidance is the first of its kind in the South African market. Designed by practice area, the modules provide access to a broad collection of guidance notes, commentary, case law, forms, precedents, checklists and other resources across the topics you need.

With intuitive search features, regular content updates and quick links to deeper research tools. Practical Guidance improves efficiency, reduces outsourcing costs, and manages legal risk. This valuable tool will help you focus on what you do best by improving your productivity and helping you move confidently into new areas of law.

The following conditions apply to entries.

The article should not exceed 2 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.

- The article must be published between 1 January 2017 and 31 December 2017
- The Editorial Committee of *De Rebus* will consider contributions for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

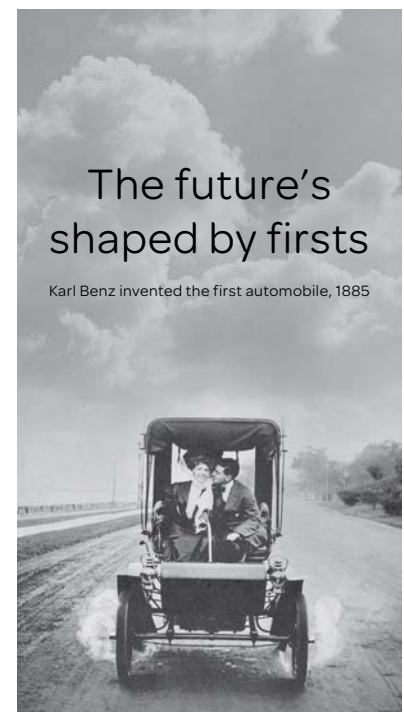
Any queries and correspondence should be addressed to:

The Editor, *De Rebus*, PO Box 36626, Manlô Park, 0102.

Tel: 012 366 8800, Fax: 012 362 0969, Email: derebus@derebus.org.za



For more information on LexisNexis Practical Guidance visit our website on www.practicalguidance.lexisnexis.co.za



LexisNexis has a legacy of pioneering firsts. We have a history of transforming industry by being the first to market with ground-breaking innovations that have the world following. We are proud of our following, but we are more excited about being first with information that gives you a competitive edge!



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

New legislation

Legislation published from
3 – 30 August 2017

* Items marked with an asterisk are discussed later in the column.

Bills

Restitution of Land Rights Amendment Bill B19 of 2017.

South African National Roads Agency Limited and National Roads Amendment Bill B20 of 2017.

Administrative Adjudication of Road Traffic Offences Amendment Bill B38A of 2015.

Administrative Adjudication of Road Traffic Offences Amendment Bill B38B of 2015.

Commencement of Acts

Performing Animals Protection Amendment Act 4 of 2016. *Commencement:* 28 July 2017. GN772 GG41019/3-8-2017.

Promulgation of Acts

Judicial Matters Amendment Act 8 of 2017. *Commencement:* To be proclaimed. GN770 GG41018/2-8-2017 (also available in Afrikaans).

Protected Disclosures Amendment Act 5 of 2017. *Commencement:* 2 August 2017. GN768 GG41016/2-8-2017 (also available in Afrikaans).

Courts of Law Amendment Act 7 of 2017. *Commencement:* To be proclaimed. GN769 GG41017/2-8-2017 (also available in Afrikaans).

* **Financial Sector Regulation Act 9 of 2017.** *Commencement:* To be proclaimed. GN853 GG 41060/22-8-2017 (also available in Sepedi).

Selected list of delegated legislation

Auditing Profession Act 26 of 2005
Registration of registered auditors and candidate auditors: Processes and documents required. BN146 GG41064/25-8-2017.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Increase of maximum amount of earn-

ings on which assessment of employer shall be calculated (R 403 500 per annum with effect from 1 April 2017). GN814 GG41026/4-8-2017.

Amendment of sch 4: Manner of calculating compensation. GN816 GG41026/4-8-2017.

Increase in monthly pensions (with 6% from 1 April 2017). GN815 GG41026/4-8-2017.

Competition Act 89 of 1998

Memorandum of understanding between the Competition Commission and the Broad-Based Black Economic Empowerment Commission. GN857 GG41064/25-8-2017.

Medicines and Related Substances Act 101 of 1965

General regulations. GN859 GG41064/25-8-2017.

Mine Health and Safety Act 29 of 1996

Amendment of regulations: Machinery and equipment. GN R894 GG41065/25-8-2017.

Regulations relating to forms. GN R893 GG41065/25-8-2017.

Repeal of the Electrical Regulations. GN R895 GG41065/25-8-2017.

Repeal of the regulations relating to electrical definitions. GN R898 GG41065/25-8-2017.

Regulations relating to lifts and chairlifts. GN R896 GG41065/25-8-2017.

Minerals Act 50 of 1991

Repeal of certain definitions. GN R897 GG41065/25-8-2017.

National Education Policy Act 27 of 1996

Department of Basic Education National Policy on HIV, STIs and TB. GN777 GG41024/4-8-2017.

National Land Transport Act 5 of 2009

Regulations on colour coding and branding for minibuses and midibuses used for minibus taxi-type services. Proc R26 GG41046/18-8-2017 (also available in isiZulu).

Occupational Health and Safety Act 85 of 1993

Notice of direction in terms of the General Safety Regulations: Applications to provide first aid training must be accompanied by valid accreditation certificate. GN827 GG41037/11-8-2017.

Inclusion of noise monitoring by means of personal dosimetry in reg 7 of the Noise Induced Hearing Loss Regulations. GN R889 GG41065/25-8-2017.

Pension Funds Act 24 of 1956

Amendments to the regulations issued in terms of s 36. GN863 GG41064/25-8-2017.

Performing Animals Protection Amendment Act 4 of 2016

Performing Animals Protection Regulations, 2016. GN771 GG41019/3-8-2017 and GN776 GG41024/4-8-2017.

Public Finance Management Act 1 of 1999

Statement revenue and expenditure for 2017/2018 financial year. GenN645 GG41076/30-8-2017.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the Petrus Steyn area. GN782 GG41024/4-8-2017.

Establishment of a small claims court for the Memel area. GN783 GG41024/4-8-2017.

Establishment of a small claims court for the area of Edenville. GN781 GG41024/4-8-2017.

Traditional Leadership and Governance Framework Act 41 of 2003

Guidelines for determination of number of members of traditional councils. GN908 GG41072/28-8-2017.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Amendment of regulations relating to the veterinary and para-veterinary professions. GenN564 GG41024/4-8-2017.

Draft Bills

Draft Deeds Registries Amendment Bill. GenN589 GG41041/15-8-2017.

Draft delegated legislation

Amendment of the Civil Aviation Regulations, 2011 (sch 1 and 2) in terms of the Civil Aviation Act 13 of 2009 for comment. GN R775 GG41023/4-8-2017.

Categorisation of nuclear installations, level of financial security to be provided by licence holders and manner in which financial security is to be provided in terms of the National Nuclear Regulator Act 47 of 1999 for comment. GN R773 GG41023/4-8-2017.

Amendment of the End-user and Subscriber Service Charter Regulations in terms of the Electronic Communications Act 36 of 2005 for comment. GN822 GG41030/7-8-2017.

Exposure Draft of the Proposed Transitional Provisions for the Initial Adoption of the Standards of GRAP on Interests in

Other Entities (ED 157) issued by the Accounting Standards Board for comment. BN141 GG41037/11-8-2017.

Competency standards for pharmacists in terms of the Pharmacy Act 53 of 1974 for comment. GenN590 GG41043/16-8-2017.

Additional minimum standards to be added to Annexure A of the rules relating to good pharmacy practice: Additional minimum standards in terms of the Pharmacy Act 53 of 1974 for comment. GenN591 GG41043/16-8-2017.

Proposed Waste Tyre Regulations in terms of the National Environmental Management: Waste Act 59 of 2008 for comment. GN847 GG41049/17-8-2017.

Draft amendments to the Municipal Regulations on Minimum Competency Levels, 2007 in terms of the Local Government: Municipal Finance Management

Act 56 of 2003. GN838 GG41047/18-8-2017.

Amendment of reg 14(2) of the SETA Standard Constitution Regulations in terms of the Skills Development Act 97 of 1998. GN852 GG41058/22-8-2017.

Draft Intellectual Property Policy of the Republic of South Africa, Phase 1, 2017. GenN636 GG41064/25-8-2017.

Regulations relating to conduct of inquiries into alleged unprofessional conduct in terms of the Health Professions Act 56 of 1974 for comment. GN861 GG41064/25-8-2017.

Draft Amendment to regulations and draft withdrawal notice of exemptions in terms of the Financial Intelligence Centre Act 38 of 2001. GN R909 GG41077/30-8-2017.

Selected aspects of the Financial Sector Regulation Act 9 of 2017

Commencement

The Financial Sector Regulation Act 9 of 2017 (also available in Sepedi) was published in GN853 GG41060/22-8-2017 and will commence on dates to be proclaimed in the *Government Gazette*.

Purposes of the Act

The purposes of the Act set out in the long title include to –

- establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority;
- preserve and enhance financial stability;
- regulate and supervised financial product providers and financial service providers;
- improve market conduct in order to protect financial customers;
- provide for coordination, cooperation collaboration and consultation between the Reserve Bank, the Prudential Authority, the Financial Sector Conduct Authority, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in relation to financial stability and the functions of these entities;
- provide for making regulatory instruments and standards;
- make provision for licensing of financial institutions;
- provide for powers to enforce financial sector laws and imposition of administrative penalties; and
- to create offences.

Object of the Act

Section 7 provides that the object of the Act is to achieve a stable financial system that works in the interest of financial customers and supports balanced and sustainable economic growth by establishing in conjunction with specific financial sector laws a regulatory and

supervisory framework that promotes –

- financial stability;
- safety and soundness of financial institutions;
- fair treatment and protection of financial customers;
- efficiency and integrity of the financial system;
- prevention of financial crime;
- financial inclusion;
- transformation of the financial sector; and
- confidence in the financial system.

What is a financial sector regulator and a financial sector law?

A 'financial sector regulator' is defined in s 1 as –

- the Prudential Authority (established in terms of s 32 within the administration of the Reserve Bank);
- the Financial Sector Conduct Authority (established in terms of s 56);
- the National Credit Regulator; or
- the Financial Intelligence Centre.

A 'financial sector law' is defined in s 1 as –

- the Financial Sector Regulation Act 9 of 2017;
- a law listed in sch 1 and regulations made in terms of it: These laws are the Pension Funds Act 24 of 1956, Friendly Societies Act 25 of 1956, Banks Act 94 of 1990, Financial Services Board Act 97 of 1990, Financial Supervision of the Road Accident Fund Act 8 of 1993, Mutual Banks Act 124 of 1993, Long-term Insurance Act 52 of 1998, Short-term Insurance Act 53 of 1998, Financial Institutions (Protection of Funds) Act 28 of 2001, Financial Advisory and Intermediary Services Act 37 of 2002, Collective Investment Schemes Control Act 45 of 2002, Co-operative Banks Act 40 of 2007, Financial Markets Act 19 of 2012 and the Credit Rating Services Act 24 of 2012; or

- and a regulatory instrument made in terms of the Financial Sector Regulation Act 9 of 2017 or a law listed in sch 1 (listed above).

Who will be the responsible authority?

Section 5 provides that the responsible authority for a financial sector law is the financial sector regulator identified in sch 2. However, in terms of s 77 financial sector regulators may delegate its functions and powers in relation to a financial sector law to another financial sector regulator in a memorandum of understanding.

Cooperation and collaboration between financial sector regulators and the Reserve Bank

Chapter 5 of the Act regulates cooperation and collaboration between financial sector regulators and the Reserve Bank.

Section 76 regulates cooperation and collaboration between the financial sector regulators and the Reserve Bank in terms of the financial sector laws and the National Credit Act 34 of 2005 and the Financial Intelligence Centre Act 38 of 2001. Section 76 places a duty on them to –

- assist and support each other in pursuing their objectives in terms of the financial sector laws, the National Credit Act 34 of 2005 and the Financial Intelligence Centre Act 38 of 2001;
- inform each other about, and share information about, matters of common interest;
- strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges;
- coordinate actions in terms of the financial sector laws, the National Credit Act and the Financial Intelligence Centre Act 38 of 2001;
- minimise duplication of effort and

expense by, among others, establishing where appropriate, common or shared databases and other facilities;

- agree on attendance of international forums; and
- develop consistent policy positions, among others, for the purpose of presentation and negotiation at relevant South African and international forums.

To give effect to their obligations in terms of s 76, the financial sector regulators and the Reserve Bank must as soon as practicable, but not later than six months after the date on which ch 4 of the Act comes into effect, enter into one or more memoranda of understanding.

Overview of the Act: Selected aspects

• *Financial stability*

Chapter 2 of the Act regulates financial stability. The Reserve Bank is responsible for financial stability, monitoring of risks and financial stability reviews (ss 11-13). Systemic events and risks in relation to systemic events are regulated in terms of ss 14-19. The responsibilities of financial sector regulators in the event of systemic event are set out in s 17. The Financial Stability Oversight Committee is established in terms of s 20 and regulated by ss 20-24. The primary objectives of the Financial Stability Oversight Committee are to support the Reserve Bank in its functions in relation to financial stability and facilitate co-operation and collaboration between the financial sector regulators and the Reserve Bank in respect of matters relating to financial stability.

• *Prudential Authority*

Chapter 3 of the Act regulates the Prudential Authority. The Prudential Authority is established in terms of s 32 (within the administration of the Reserve Bank), and its objective and functions are set out in ss 33 and 34. The objective of the Prudential Authority is to –

- promote and enhance the safety and soundness of financial institutions that provide financial products and securities services and of market infrastructures;
- protect financial customers against the risk that financial institutions may fail to meet their obligations; and
- assist in maintaining financial stability.

The governance of the Prudential Authority is regulated in terms of ss 35-49, while the staff, resources and financial management of the Prudential Authority are regulated in terms of ss 50-55.

• *Financial Sector Conduct Authority*

Chapter 4 of the Act regulates the Financial Sector Conduct Authority. The Financial Sector Conduct Authority is established in terms of s 56, and its objectives and functions are set out in ss 57 and 58. The objective of the Financial

Sector Conduct Authority is to –

- enhance and support the efficiency and integrity of financial markets;
- protect financial customers by promoting fair treatment of financial customers by financial institutions and by providing financial customers and potential financial customers with financial education programs and by promoting financial literacy, and
- assist in maintaining financial stability.

The governance of the Financial Sector Conduct Authority is regulated in terms of ss 59-72, while the staff and resources of the Financial Sector Conduct Authority are regulated in terms of ss 73-75.

• *Cooperation and collaboration*

Chapter 5 of the Act regulates cooperation and collaboration between financial sector regulators and the Reserve Bank (see above ‘Cooperation and collaboration between financial sector regulators and the Reserve Bank’).

• *Administrative actions*

Chapter 6 of the Act regulates administrative actions.

• *Regulatory instruments*

Chapter 7 of the Act regulates regulatory instruments and prudential, conduct and joint standards.

• *Licensing*

Chapter 8 of the Act regulates licensing. Section 111 sets out licensing requirements for providers of financial products and financial services and market infrastructures. Section 111, among others, provides that a person may not provide a financial product or services or market infrastructure except in accordance with a licence in terms of a specific financial sector law, the National Credit Act 34 of 2005 or the National Payment System Act 78 of 1998. If no specific financial sector law provides for a licence, a person may not provide a financial product or services or market infrastructure except in accordance with a licence in terms of the Financial Sector Regulation Act 9 of 2017. Sections 112-124 sets out miscellaneous aspects in relation to licences required in terms of ss 111(1)(b) or (2) or 162. General provisions relating to all licences under the financial sector laws are set out in ss 125-128.

• *Information gathering, supervisory on-site inspections and investigations*

Chapter 9 of the Act regulates information gathering, supervisory on-site inspections and investigations.

• *Enforcement*

Chapter 10 of the Act regulates enforcement of the Act. Section 141-142 makes provision for guidance notices and interpretation rulings. Directives by financial sector regulators are regulated in terms of ss 143-150. Section 151 makes provision of enforceable undertakings. Chap-

ter 13 of the Act regulates administrative penalties.

• *Financial conglomerates*

Aspects related to financial conglomerates are regulated in ch 12 of the Act.

• *Ombuds*

Chapter 14 of the Act regulates ombuds. The Ombud Council is regulated in terms of ss 175-193. Aspects such as the its objective, functions, governance, aspects related to board members, meetings are regulated in ch 175-193.

Section 176 provides that the objective of the Ombud Council is to assist in ensuring that financial customers have access to, and are able to use, affordable, effective, independent and fair alternative dispute resolution processes for complaints about financial institutions in relation to financial products, financial services, and services provided by market infrastructures. Sections 194-200 makes provision for the recognition of industry ombuds and ss 201-208 set out the powers of the Ombud Council. General provisions related to ombuds are contained in ss 209-217.

• *Financial Services Tribunal*

Chapter 15 of the Act regulates the Financial Services Tribunal. The Tribunal is established in terms of s 219, which also sets out the functions of the Tribunal.

The members of the Tribunal, their term of office, staff and resources, duties, panels and general rules are regulated in terms of ss 220-227. Sections 228 and 229 makes provision for a right to be informed and a right to reasons for decisions. Sections 230 to 236 regulates the reconsiderations of the Tribunal's decisions.

• *Fees, levies and finances*

Chapter 16 of the Act regulates fees, levies, and the finances of sector bodies.

• *Miscellaneous aspects and the establishment of a Financial Sector Information Register*

Chapter 17 of the Act regulates miscellaneous aspects. These aspects include information sharing and reporting (ss 250-255), the establishment of a Financial Sector Information Register (ss 256-264), offences and penalties (ss 265-276) and general matters (ss 277-287). Section 288 makes provisions for the publication of guidelines and regulations and ss 289-304 regulate amendments to current laws, repeals and transitional provisions. Section 256 provides that the National Treasury must establish and maintain the Financial Sector Information Register (referred to above).

The purpose of the Register is to provide reliable access to accurate, authoritative and up to date information relating to financial sector laws, regulations, regulatory instruments and their implementation.





Nadine Mather BA LLB (*cum laude*) (Rhodes) is an attorney at Bowmans in Johannesburg.

Employment law update

Use of race to describe a person may not be derogatory or offensive

In *South African Equity Workers Association obo Bester v Rustenburg Platinum Mine and Another* [2017] 8 BLLR 764 (LAC), Mr Bester, a senior training officer, became irritated when he discovered that a co-worker was parking a large 4X4 vehicle in a parking bay adjacent to the one allocated to him, making parking difficult. He decided to take the matter up with the chief safety officer, who was responsible for allocating parking, in an

effort to arrange for the vehicle to be parked in another bay. He was, however, brushed off by the chief safety officer despite numerous efforts to resolve the problem. Finally, Bester confronted him during a meeting and demanded that the 'swartman' (black man) remove his vehicle from the parking bay. The chief safety officer accused Bester of not wanting to park next to a 'swartman', and Bester was dismissed for insubordination and for making certain racial remarks. Bester referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA commissioner ruled that

Bester's dismissal was unfair and reinstated him. On review, the Labour Court (LC) held that there was no conceivable reason as to why race may justifiably be used as an identifier and that Bester's reference to his co-worker as a 'swartman' was derogatory and racist. The LC found further that the commissioner had failed to appreciate the significance of the employer's zero-tolerance approach to racism in the workplace, set aside the award and ruled that the dismissal was in fact fair. Bester appealed the LC's decision.

The Labour Appeal Court (the LAC) took cognisance of the fact that racism

Together, we can fight leukaemia and other life-threatening blood disorders

The Sunflower Fund creates awareness around the need for blood stem cell donors and provides education as to the process of registering. We raise funds to cover the tissue-typing costs involved in adding donors onto the South African Bone Marrow Registry.

Be somebody's hope for life and...

SHARE. GIVE. REGISTER

#IamHope



Call us toll-free on **0800 12 10 82**
For more info visit www.sunflowerfund.org.za



The Sunflower Fund
Hope begins with you

is particularly pervasive in the workplace and our courts have rightly condemned it. However, the employer bore the onus of proving that the terminology used by Bester was objectively derogatory. If it was, the onus shifted to Bester to show that the remark was not made with the intent to demean. The LAC accepted that to identify people by their race is not in itself derogatory, even if the person referred to or those present are offended. The test is whether, on a balance of probabilities, the person had intended to use the term in a derogatory and offensive manner.

While Bester was angry with the chief security officer and wanted the parking problem to be resolved, he did not know the name of the owner of the vehicle parked adjacent to him. The mere fact that Bester was white and the owner of the offending vehicle happened to be black was insufficient to warrant the inference that Bester intended to offend. It was clear from the evidence that the issue in dispute had nothing to do with race or that Bester had objected to parking next to a 'swartman'. The real issue was whether the use of the descriptor 'swartman' to identify the owner of the vehicle was derogatory and racist.

The LAC had found that the LC had ignored the following facts when it remarked that there was no conceivable reason for Bester to use the term 'swartman' that –

- Bester did not know the person he was trying to identify and, therefore, had no reason to offend him;
- Bester had a close working relationship with the chief security officer; and
- Bester was fully aware of the implications of racism in the workplace.

The main issue was that Bester was required to identify the owner of the vehicle, whose name was unknown to him and he used race as a descriptor to do so. This was the conclusion drawn by the commissioner, and could not be said to be unreasonable.

The LAC noted that the use of race descriptors to identify people is akin to racial stereotyping and should be discouraged. However, given South Africa's history, it would be remiss to overlook

the tendency to identify people by their race. If doing so carried the stigma of racism, organisations seeking to perpetuate black consciousness would be condemned. Our society has not adopted so absolute a stance. The LAC also noted that, ironically, during the proceedings, one of the employer's witnesses had described a fellow employee whose name he could not recall as a 'swart mannetjie'. It is thus imperative that one scrutinises the context in which a race descriptor is used and not to presume that the mere use of a race descriptor will be derogatory and offensive. The appeal was accordingly upheld.

The requirement that psychological tests be certified has been found to be irrational

The Employment Equity Amendment Act 47 of 2013 (the Act) and accompanying regulations came into force on 1 August 2014. Prior to the Act, s 8 of the Employment Equity Act 55 of 1998 (the EEA) prohibited psychological testing and similar assessments of an employee if it could not be shown that the test or assessment being used was valid and reliable, could be applied fairly to all employees, and was not biased against any employee or group. The Act amended s 8 of the EEA by introducing an additional requirement that psychological testing and similar assessments be prohibited if they have also not been certified by the Health Professions Council of South Africa (HPCSA) or any other body authorised by law to certify such tests or assessments.

In *Association of Test Publishers of South Africa v President of the Republic of South Africa and Others* [2017] 8 BLLR 850 (GP), the applicant, a voluntary non-profit association representing persons who apply such tests and assessment tools, made an application to the High Court for an order declaring the amendment to s 8 of the EEA to be of no force and effect. The applicant contended that the amendment was premature as there was currently no framework in place reg-

ulating the certification of psychological testing and other similar assessments and, accordingly, there was nothing to be certified by the HPCSA. The issue to be determined by the court was thus whether there was in fact a framework in place for the certification of psychological testing.

The court noted that the law requires the exercise of public power to be lawful and rationally connected to the purpose for which the power was given. The rationale behind the amendment to s 8 of the EEA was to ensure that certain individuals were not excluded from employment by the use of inappropriate psychological tests that had not been adapted to the cultural diversity of South Africa. The applicant was concerned that no provision had been made in the amendment to indicate the type of test that needed to be certified or the objective criteria for the certification of tests or similar assessments. Significantly, the amendment had the effect of immediately prohibiting the current use of psychological testing without first having established procedures and criteria to obtain certification of such tests.

In response, the president and Minister of Labour claimed that the system and policy currently in place at the HPCSA was still applicable. However, they had not addressed the distinction between psychological and non-psychological tests and the HPCSA itself had conceded that it was still developing new regulations relating to the control of psychological tests. It was also apparent that the current policy in place dealt with the classification of psychological testing, not with their certification.

The court held that classification and certification are different concepts and s 8 of the EEA only uses the word 'certify'. In terms of the amendment, if a psychological test is not certified, it is prohibited. A regulatory structure dealing with the certification of psychological testing was, therefore, a necessity. Accordingly, the amendment was set aside and the previous version of s 8 of the EEA was revived.



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

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

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

By
Meryl
Federl

Recent articles and research

Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the *De Rebus* website at www.derebus.org.za.

Accessing articles from publishers

- For LexisNexis articles contact: customercare@lexisnexis.co.za for the publication details.
- For individual journal articles pricing and orders from Juta contact Michelle Govender at mgovender@juta.co.za.
- For journal articles not published by LexisNexis or Juta, contact the Kwa-Zulu-Natal Law Society Library through their helpdesk at help@lawlibrary.co.za (their terms and conditions can be viewed at www.lawlibrary.co.za).

Abbreviation	Title	Publisher	Volume/issue
AHRLJ	African Human Rights Law Journal	Pretoria University Law Press	(2017) 17.1
DJ	De Jure	Pretoria University Law Press	(2017) 50.1
CCR	Constitutional Court Review	Juta	(2017) Vol VI
Litnet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2017) July
Obiter	Obiter	Faculty of Law, Nelson Mandela University	(2017) 38.1
PER	Potchefstroom Electronic Journal	Faculty of Law, University of North West	(2017) July
SACJ	South African Journal of Criminal Justice	Juta	(2017) 30.1

Administrative law

Mathenjwa, MJ 'Judicial review of decisions of disciplinary tribunals of voluntary association: The post-1994 interpretation' (2017) 38.1 *Obiter* 1.

Business and human rights

Adeola, R 'The responsibility of businesses to prevent development-induced displacement in Africa' (2017) 17.1 *AHRLJ* 245.

Child law

Karels, M 'Financial liability and child offenders in South Africa' (2017) 38.1 *Obiter* 74.

Civil practice

Bekker, T 'The late amendment of pleadings – time for a new approach? *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ)' (2017) 38.1 *Obiter* 181.

Class actions

Hurter, E 'Opting in or opting out in class action proceedings: From principles to pragmatism?' (2017) 50.1 *DJ* 60.

Jephson, G 'A false start in the development of class action law: *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others*' (2017) VI CCR 286.

Constitutional law

Borgström, D and Naidoo, UK 'Playing with power: The competing competencies of provincial and local government' (2017) VI CCR 57.

Botha, J 'The state of parliamentary free speech: *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC)' (2017) 38.1 *Obiter* 193.

Finn, M 'AllPay Remedy: Dissecting the Constitutional Court's approach to Organs of State' (2017) VI CCR 258.

De Visser, J and Steytler, N 'Confronting the state of local government: The 2013 Constitutional Court decisions' (2017) VI CCR 1.

Klaasen, A 'Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane*' (2017) 50.1 *DJ* 1.

Kummeling, H 'Britannia Beach and Lagoonbay: The Constitutional Court in muddy waters? Some comparative reflections on the benefits of an active judiciary' (2017) VI CCR 24.

Ntliziywana, P 'Adding injury to insult: Intrusive laws on top of a weak system' (2017) VI CCR 32.

Okpaluba, C and Mhango, M 'Between separation of powers and justiciability: Rationalising the Constitutional Court's judgment in the Gauteng E-tolling litigation in South Africa' (2017) 21 *LDD* 1.

Price, A 'Search and seizure without warrant' (2017) VI CCR 245.

Wolf, L 'The remedial action of the "State of Capture" Report in perspective' (2017) *PER* July.

Company law

Esser, IM and Delpoit, P 'The protection of stakeholders: The South African social and ethics committee and the United

Kingdom's enlightened shareholder value approach: Part 1' (2017) 50.1 *DJ* 97.

Subramanien, D 'Ground-breaking judgment as court clarifies the procedural requirements in section 129 of the Companies Act 71 of 2008: *Panamo Properties v Nel NNO* 2015 (5) SA 63 (SCA)' (2017) 38.1 *Obiter* 210.

Competition law

Munyai, PS 'Claims for damages arising from conduct prohibited under the Competition Act, 1998' (2017) 50.1 *DJ* 18.

Consumer law

Sibanda, O 'The ramifications of the Appellate Body Ruling in United States – measures affecting the production and sale of clove cigarettes on consumer protection measures at international trade level' (2017) 50.1 *DJ* 156.

Criminal law

Botha, R 'Putatiewe noodweer as verweer in die Suid-Afrikaanse strafreg: 'n Krietiese oorsig van die onseker pad tot by Pistorius en daarná' (2017) July *LitNet*.

Du Toit, A 'Minister of Justice and Constitutional Development and Another v Masingili and Others' (2017) VI CCR 273.

Kavuro, C 'Gacaca courts, reconciliation and the politics of apology in post-genocide Rwanda' (2017) 30.1 *SACJ* 38.

Khumalo, K 'Towards resuscitating the ailing public violence jurisprudence – lessons from history' (2017) 30.1 *SACJ* 23.

Okpaluba, C 'The end of the search for a fifth jurisdictional fact on arrest on reasonable suspicion: A review of contemporary developments' (2017) 30.1 *SACJ* 1.

Pete, SA 'The end of the honeymoon: Penal discourse and the human rights of prisoners in the aftermath of South Africa's second democratic election - part 2' (2017) 38.1 *Obiter* 49.

Customary law

Bekker, JC and Buchner-Eveleigh, M 'The legal character of ancillary customary marriages' (2017) 50.1 *DJ* 80.

Claassens, A and Budlender, G 'Transformative constitutionalism and customary law' (2017) VI *CCR* 75.

Ndima, DD 'The shape and content of post-Apartheid African law: Academic scholars in conversation' (2017) 38.1 *Obiter* 15.

Nhlapo, T 'Homicide in traditional African societies: Customary law and the question of accountability' (2017) 17.1 *AHRLJ* 1.

Mwambene, L 'The essence vindicated? Courts and customary marriages in South Africa' (2017) 17.1 *AHRLJ* 35.

O'Regan, K 'Tradition and modernity: Adjudicating a constitutional paradox' (2017) VI *CCR* 105.

Ozoemena, R 'Living customary law: A truly transformative tool?' (2017) VI *CCR* 147.

Wicomb, W 'The exceptionalism and identity of customary law under the Constitution' (2017) VI *CCR* 127.

Education law

Fredman, S 'Procedure or principle: The role of adjudication in achieving the right to education' (2017) VI *CCR* 165.

Mugume, T 'Higher education access in South Africa for students with criminal records' (2017) 21 *LDD* 25.

Van Leeve, Y 'Executive heavy handedness and the right to basic education - A reply to Sandra Fredman' (2017) VI *CCR* 199.

Family law

Marumoagae, C "Protecting" assets through a discretionary trust in anticipation of divorce' (2017) 38.1 *Obiter* 34.

Van Niekerk, C 'When a relationship has reached its expiration date, does the same apply to the embryos under South African law?' (2017) 38.1 *Obiter* 165.

Human rights

Basson, Y 'State obligations in international law related to the right to an adequate standard of living for persons with disabilities' (2017) 21 *LDD* 68.

Gyur  cz, V 'Domestic servitude and ritual slavery in West Africa from a human rights perspective' (2017) 17.1 *AHRLJ* 89.

Jones, A 'Form over substance: The Afri-

can Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17.1 *AHRLJ* 321.

Kondo, T 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence' (2017) 17.1 *AHRLJ* 163.

Mswela, M 'Violent attacks against persons with albinism in South Africa: A human rights perspective' (2017) 17.1 *AHRLJ* 114.

Ntlama, N 'The foundations of "peace" as a value for the promotion of human rights in Africa' (2017) 17.1 *AHRLJ* 55.

Nyarko, MG and Jegede, AO 'Human rights developments in the African Union during 2016' (2017) 17.1 *AHRLJ* 295.

Oduwale, J and Akintayo, A 'The rights to life, health and development: The Ebola virus and Nigeria' (2017) 17.1 *AHRLJ* 194.

Okpaluba, C 'Establishing state liability for personal liberty violations arising from arrest, detention and malicious prosecution in Lesotho' (2017) 17.1 *AHRLJ* 134.

Small, A 'An unintended legacy: Kwame Nkrumah and the domestication of national self-determination in Africa' (2017) 17.1 *AHRLJ* 68.

Insolvency law

Meheret, T 'An appraisal of the Ethiopian bankruptcy regime' (2017) 50.1 *DJ* 111.

Insurance law

Huneberg, S 'Preventative measures of insurers against insurance fraud with particular regard to motor insurance' (2017) 38.1 *Obiter* 148.

International criminal law

Asaala, EO 'Rule of law or *realpolitik*? The role of the United Nations Security Council in the International Criminal Court processes in Africa' (2017) 17.1 *AHRLJ* 266.

Labour law

Devenish, G 'A great triumph par excellence for non-racism in our jurisprudence: *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)' (2017) 38.1 *Obiter* 222.

Law of evidence

Bekink, M '*Minister of Police v M* 2017 38 IJL 402 (LC)' (2017) 50.1 *DJ* 186.

Law of succession

Schoeman-Malan, L 'Comparative analysis of *commorientes* - a South African perspective: Part 1' (2017) 50.1 *DJ* 36.

Legal education

Snyman-Van Deventer, E and Swanepoel, CF (Neels) 'Teaching the theory and skills of legal ethics to South African LLB students' (2017) 38.1 *Obiter* 127.

Pension law

Marumoagae, C 'Recognition of the concept of Contempt of "Determination" of the Pension Fund Adjudicator's Determination: A missed opportunity - with particular reference to *Mantscho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (26 June 2015)' (2017) 50.1 *DJ* 175.

Property law

Njotini, M 'Examining the "objects of property rights" - lessons from the Roman, Germanic and Dutch legal history' (2017) 50.1 *DJ* 136.

Public international law

Woolaver, H 'Domestic enforcement of international judicial decisions against foreign states in South Africa: *Government of the Republic of Zimbabwe v Fick*' (2017) VI *CCR* 217.

Refugee law

Addaney, M 'A step forward in the protection of urban refugees: The legal protection of the rights of urban refugees in Uganda' (2017) 17.1 *AHRLJ* 219.

Nanima, RD 'An evaluation of Kenya's parallel legal regime on refugees, and the courts' guarantee of their rights' (2017) 21 *LDD* 42.

Social security

Seema, R 'Social security survivors' benefits in South Africa: Towards legislative reform concerning posthumously conceived children' (2017) 38.1 *Obiter* 89.

Suretyship law

Kawadza, H 'Reconsidering "emotionally transmitted debt" in Zimbabwe and proposals for the reform of surety law based on English and South African experiences' (2017) 50.1 *DJ* 194.

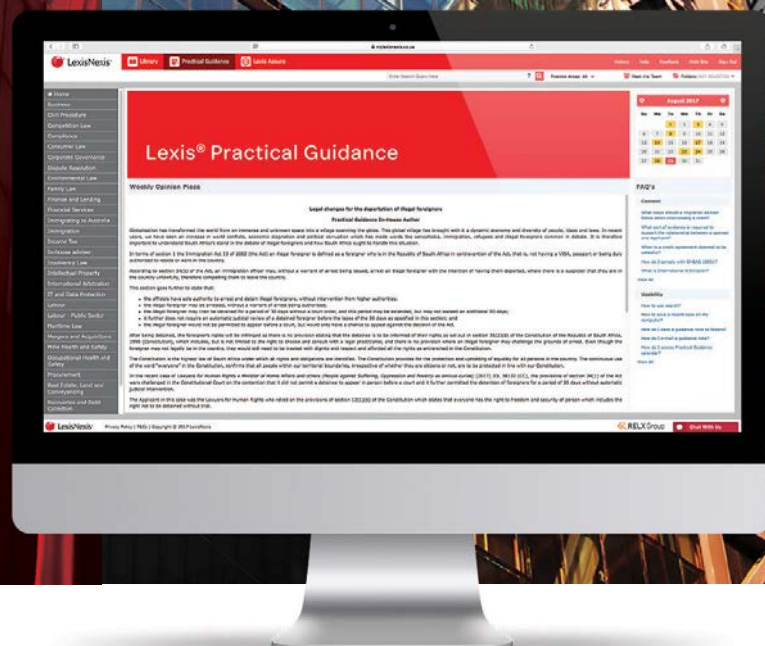
Meryl Federl BA HDip Lib (Wits) is an archivist at the Johannesburg Society of Advocates Library. E-mail: merylfederl@yahoo.co.uk □

For the URL links
to open access law
journals visit the
De Rebus website at
www.derebus.org.za

Lexis® Practical Guidance

YOUR PROFESSIONAL LEGAL HOW-TO GUIDE

The first of its kind in South Africa, Lexis® Practical Guidance allows you to navigate the complexities of the legal landscape with easy-to-use practical aids that are conveniently accessible from a single digital platform. It's smart guidance for professionals.



Call us on 0860 765 432 or email customer@lexisnexis.co.za

<https://store.lexisnexis.co.za/practical-guidance>

Contact us now for a **FREE TRIAL**

We help make managing trust fund investments simple, not ordinary.

The Investec Corporate Cash Manager (CCM) is a secure online platform that offers you:

- Superior System
- Competitive Rates
- Free online guarantees
- Personalised Services
- Unique Products
- No charges

With Investec Corporate Cash Manager, you can manage your client's trust funds easily and effectively online. This free, secure online cash management system offers highly competitive interest rates on a unique set of products to ensure that your clients continue to have access to personalised service.



Out of the Ordinary®

 **Investec**
Specialist Bank

Corporate Cash Manager



CENTRE FOR CONVEYANCING PRACTICE

2018



Courses in conveyancing and notarial practice to prepare for these examinations

Trusted courses

The conveyancing course has been used with great success for more than twenty four years and the notarial course for more than eleven years by legal practitioners throughout the country and in Namibia to prepare for the conveyancing and notarial exams.

Characteristics of the courses

- The study notes are available in either English or Afrikaans and the courses can be done through home study or by the attendance of formal lectures.
- Logical exposition and explanation of concepts.
- They were written for learners who have had no exposure to a conveyancing or notarial practice.
- The prescribed syllabuses for the examinations are covered.
- The study notes are made up of explanatory notes and a set of practical examples.
- The notes are marketed in loose-leaf format and supplements are available so that the notes can be updated with the latest amendments.

Registration form

- 1) Indicate your preferences, as well as your language preference for the notes, in the option boxes.
- 2) Complete all your details below.
- 3) Indicate your nearest Postnet branch as our 1st choice for mailing.
- 4) Send this page with proof of payment to us (use your name and surname as reference for the payment).

Name and surname: _____

ID number: _____

Firm: _____

VAT number: _____

E-mail: _____

Course fees (VAT incl.)

Course in Conveyancing Practice

☐ **Attendance - R6,800 or R6,200 for early registration***
Payment to Centre for Conveyancing Practice, ABSA, 917-264-9440

☐ **Self-study - R4,900**
Payment to Self-study Deeds Course, ABSA, 933-177-3527

Closing date for conveyancing attendance

Registrations close one week before commencement of a course. An additional **R390** is payable for late registrations at CPT, DBN, BFN & PE.

Course in Notarial Practice

☐ **Attendance - R4,500 or R4,100 for early registration***
Payment to Notarial Practice, ABSA, 927-657-2365

☐ **Self-study - R3,600**
Payment to Notarial Practice, ABSA, 927-657-2365

Closing date for notarial attendance

Registrations close one week before commencement of a course. An additional **R290** is payable for late registrations at Cape Town & Durban.

www.aktepraktijk.co.za

Visit our website for more information and online registration.

Tel: (012)361-1715 | Fax: 086-660-0463

E-mail: annemarie@aktepraktijk.co.za

Telephone: _____

Cell phone: _____

Nearest Postnet branch: _____

Postal address (compulsory): _____

Postal code (compulsory): _____

Course in Conveyancing Practice (*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Cape Town (English)	6 – 9 Feb	16 Jan
		Pretoria (English)	6 – 9 Feb	16 Jan
		Johannesburg (English)	13 – 16 Feb	23 Jan
		Pretoria (Afrikaans)	13 – 16 Feb	23 Jan
		Durban (English)	20 – 23 Feb	30 Jan
		Port Elizabeth (English)	20 – 23 Feb	30 Jan

Language preference for conveyancing notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Cape Town (English)	17 – 20 July	26 June
		Pretoria (Afrikaans)	17 – 20 July	26 June
		Johannesburg (English)	24 – 27 July	3 July
		Pretoria (English)	24 – 27 July	3 July
		Durban (English)	31 Jul – 3 Aug	10 July
		Bloemfontein (Afrikaans)	31 Jul – 3 Aug	10 July

Course in Notarial Practice (*Closing dates for early registration)

First Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (English)	1 – 2 March	8 Feb
		Durban (English)	5 – 6 March	12 Feb
		Cape Town (English)	8 – 9 March	15 Feb
		Johannesburg (English)	12 – 13 March	19 Feb
		Pretoria (Afrikaans)	15 – 16 March	22 Feb

Language preference for notarial notes

Afrikaans ☐ English ☐

Second Semester	✓	Venue and Language	Dates	*Early reg.
		Pretoria (Afrikaans)	6 – 7 Aug	16 July
		Durban (English)	13 – 14 Aug	23 July
		Cape Town (English)	16 – 17 Aug	26 July
		Johannesburg (English)	20 – 21 Aug	30 July
		Pretoria (English)	23 – 24 Aug	2 Aug





SENTRUM VIR AKTEPRAKTYK

2018



Kursusse in akte- en notariële praktyk om vir dié eksamens voor te berei

Beproefde kursusse

Die aktekursus word reeds vir meer as vier en twintig jaar en die notariële kursus vir meer as elf jaar landswyd en in Namibië met groot sukses deur regspraktisyns gebruik om vir die akte- en notariële eksamens voor te berei.

Kenmerke van die kursusse

- Die studiemateriaal is in Engels of Afrikaans beskikbaar en die kursusse kan by wyse van selfstudie gedoen word, of deur die bywoning van lesings.
- Logiese uiteensetting en verduideliking van konsepte.
- Dit is geskryf vir persone wat geen blootstelling aan 'n akte- of notariële praktyk het nie.
- Die voorgeskrewe sillabusse vir die eksamens word gedek.
- Die studiemateriaal bestaan uit verduidelikende notas asook 'n stel praktiese voorbeelde.
- Die notas word in losbladformaat bemark, met 'n byvoegseldiens vir diegene wat die notas met die nuutste wysigings op datum wil hou.

Registrasievorm

- 1) Dui u registrasievooreure, sowel as taalvoorkeur van die notas, in al die keuseblokkies aan. 2) Vul al u besonderhede hieronder in.
- 3) Dui u naaste Postnet-tak aan as ons voorkeurkeuse vir versending. 4) Stuur hierdie bladsy met bewys van betaling aan ons (gebruik u naam en van as verwysing vir die betaling).

Naam en van: _____
 ID nommer: _____
 Firma: _____
 BTW nommer: _____
 E-pos adres: _____

Kursusgelde (BTW ing.)

Kursus in Aktepraktyk

- ☐ **Bywoning - R6,800 of R6,200 vir vroeë registrasie***
 Betaling aan Sentrum vir Aktepraktyk, ABSA, 917-264-9440
- ☐ **Selfstudie - R4,900**
 Betaling aan Selfstudie Aktekursus, ABSA, 933-177-3527

Sluitingsdatum vir aktes-bywoning

Registrasie sluit een week voor die aanvang van 'n kursus. 'n Addisionele **R390** is betaalbaar vir laat registrasies by Kaapstad, DBN, BFN & PE.

Kursus in Notariële Praktyk

- ☐ **Bywoning - R4,500 of R4,100 vir vroeë registrasie***
 Betaling aan Notariële Praktyk, ABSA, 927-657-2365
- ☐ **Selfstudie - R3,600**
 Betaling aan Notariële Praktyk, ABSA, 927-657-2365

Sluitingsdatum vir notariële-bywoning

Registrasie sluit een week voor die aanvang van 'n kursus. 'n Addisionele **R290** is betaalbaar vir laat registrasies by Kaapstad & Durban.

www.aktepraktyk.co.za

Besoek ons webwerf vir meer inligting en aanlyn registrasie.

Tel:(012)361-1715 | Faks: 086-660-0463

E-pos: annemarie@aktepraktyk.co.za

Telefoon: _____
 Selfoon: _____
 Naaste Postnet-tak: _____
 Posadres (verpligtend): _____
 Poskode (verpligtend): _____

Kursus in Aktepraktyk (*Sperdatums vir vroeë registrasie)

Eerste Semester	✓	Plek en Taal	Datums	*Sperdatums
		Kaapstad (Engels)	6 – 9 Feb	16 Jan
		Pretoria (Engels)	6 – 9 Feb	16 Jan
		Johannesburg (Engels)	13 – 16 Feb	23 Jan
		Pretoria (Afrikaans)	13 – 16 Feb	23 Jan
		Durban (Engels)	20 – 23 Feb	30 Jan
		Port Elizabeth (Engels)	20 – 23 Feb	30 Jan

Taalvoorkeur vir aktenotas

Afrikaans ☐ Engels ☐

Tweede Semester	✓	Plek en Taal	Datums	*Sperdatums
		Kaapstad (Engels)	17 – 20 Julie	26 Junie
		Pretoria (Afrikaans)	17 – 20 Julie	26 Junie
		Johannesburg (Engels)	24 – 27 Julie	3 Julie
		Pretoria (Engels)	24 – 27 Julie	3 Julie
		Durban (Engels)	31 Jul – 3 Aug	10 Julie
		Bloemfontein (Afrikaans)	31 Jul – 3 Aug	10 Julie

Kursus in Notariële Praktyk (*Sperdatums vir vroeë registrasie)

Eerste Semester	✓	Plek en Taal	Datums	*Sperdatums
		Pretoria (Engels)	1 – 2 Maart	8 Feb
		Durban (Engels)	5 – 6 Maart	12 Feb
		Kaapstad (Engels)	8 – 9 Maart	15 Feb
		Johannesburg (Engels)	12 – 13 Maart	19 Feb
		Pretoria (Afrikaans)	15 – 16 Maart	22 Feb

Taalvoorkeur vir notariële notas

Afrikaans ☐ Engels ☐

Tweede Semester	✓	Plek en Taal	Datums	*Sperdatums
		Pretoria (Afrikaans)	6 – 7 Aug	16 Julie
		Durban (Engels)	13 – 14 Aug	23 Julie
		Kaapstad (Engels)	16 – 17 Aug	26 Julie
		Johannesburg (Engels)	20 – 21 Aug	30 Julie
		Pretoria (Engels)	23 – 24 Aug	2 Aug

Registrasie is onderhewig aan die "Registrasiereëls" soos op ons webwerf www.aktepraktyk.co.za uiteengesit.

