LAW SOCIETY OF SOUTH AFRICA

DE REBUS

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OCTOBER 2018

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Law Society of South Africa

Realistic timelines needed for the full implementation of the LPA

In the September guest editorial ('Is the profession ready for the full implementation of the LPA' (2018 (Sept) *DR* 3)), I expressed the view that if the first Legal Practice Council (LPC) can be elected before the National Forum on the Legal Profession (NF) ceases to exist on 31 October, the transitional arrangements remaining at that stage, including the election of the Provincial Councils (PCs), can then be finalised by the LPC in cooperation with the law societies, Bar councils and associations. If all role players cooperate, a fairly smooth transfer can be achieved by the end of the year.

In contrast to this, the timelines imposed on the NF by the Department of Justice and Constitutional Development provide for the full implementation of the Legal Practice Act 28 of 2014 (LPA) by 31 October. The election of the LPC commenced on 4 September and, if all goes according to plan, the process should be completed by 5 October; but the PCs still need to be elected and established. The Department nevertheless wants the provincial law societies to be dissolved by 31 October and the LPC and PCs to commence regulating the profession the following day.

Some members of the NF regard these timelines as unrealistic. They warn that it will not be possible to finalise the transitional arrangements required to render the LPC and PCs functional in the 26-day period from 5 to 31 October for the following reasons:

- Dissolving the provincial law societies before the LPC and PCs are capable of regulating the profession, will not be in the interest of the public or the profession.
- The process of electing the attorneys and advocates to serve on the PCs in terms of the new r 16, will be of similar duration as that of the LPC, which is 30 days if there are no hiccups. This alone will exceed the 26 days available before 31 October.
- If the outcome of the election of the LPC is announced on 5 October, it will take a few days to get the 16 newly elected practitioners and the seven other designated council members to convene for its first meeting.
- Before the election of the PCs can commence, the LPC will, at its first meeting, have to –
  - elect a chairperson, a deputy chairperson and the executive committee;
  - appoint an executive officer, financial officer and essential staff members;
  - appoint an election committee and service provider to help run the provincial election;
  - appoint a referee and scrutineers; and
  - compile or approve the provincial voters' rolls, the election timetable and invitation for nominations.
- At the same time, the fledgling LPC will need to attend to many other tasks at its first and subsequent meetings to prepare for the full implementation of the LPA: Find premises to rent for the offices of the PCs, enter into contracts, accredit practical vocational training (PVT) service providers, appoint essential staff for the PCs, obtain infrastructure, equipment, information technology and communication systems, arrange finances, etcetera.
- Depending on the date of the first meeting and time required to finalise these arrangements, the 26 days left for the election of the PCs can further be reduced.
- After the PCs have been elected and convened, a host of practical arrangements will need to be made before they can be capable of performing the comprehensive list of functions delegated to them in the new reg 5. In addition to electing their office bearers, appointing operational committees and making all the arrangements relating to staff, the PCs will need to be ready to –
  - receive and process applications for admission for legal practitioners (attorneys and advocates);
  - enrol admitted legal practitioners;
  - register and administer PVT contracts;
  - process applications by attorneys for certificates to appear in the High Court etcetera;
  - process applications by candidate legal practitioners for certificates for the right of appearance;
  - process applications for conversion of enrolment;
  - inspect accounting records of trust account practices;
  - establish investigating and disciplinary committees;
  - finalise pending disciplinary processes;
  - handle new and pending applications to the High Court to suspend errant legal practitioners and for the appointments of *curator bonii* to administer trust accounts; and
  - process applications for Fidelity Fund Certificates, due to commence on 1 November.

The situation calls for flexibility on the issue of the timeframes. It will be in the best interest of the public and the profession to allow sufficient time for a smooth transfer, rather than to abolish the existing law societies before the new structures are capable of functioning as required.

Jan Stemmett is a member of the National Forum on the Legal Profession. ❑

LETTERS TO THE EDITOR

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

Response to Grumpy Attorney

I loved this article! ('Ramblings of a Grumpy Attorney' 2018 (July) *DR* 52.)

I am sure that similar problems are experienced all over South Africa.

When we began our law careers, as bright-eyed law students, we believed that we could change the world. We believed in the law, regulations and the system that ran it. Sadly, when we reached the real world a stark reality hit us right between the eyes. The very people that are supposed to make the gears turn are the ones who are making it all come to a grinding halt.

I had on many occasions been left waiting for hours, because someone was too busy chatting to their co-worker or having a two-hour lunch, which was preceded by a one-hour tea time.

I have since left the daily grind and am now very happy at my cushy corporate job. I do still hold on to the hope that some of those ideals that I had as a law student will be realised. I truly hope that the system starts to work again, because at the end of the day the people that suffer the most are the ones who are underprivileged.

Zandré Kinghorn, non-practicing attorney, Johannesburg

SADC LA promotes rule of law and protects human rights

The Southern African Development Community Lawyers Association (SADC LA) held its 19th elective annual general meeting (AGM) and conference from 15 to 17 August in Maputo, Mozambique. The well-attended conference was held under the theme: 'Promoting inclusive legal policy frameworks for sustainable socio-economic development in SADC'.

On 15 August the conference kick-started with the inaugural *Pro Bono* Conference (PBC) with the launch of the #BeyondBilling campaign. The PBC began with an explanation of why a *pro bono* network was necessary in the SADC region. A discussion was held on the role of law societies and Bar associations in promoting *pro bono* in the region. Delegates were afforded the opportunity to discuss and share their experiences and challenges while doing *pro bono* work. For the full report see p 8.

On the night of 15 August, a welcome cocktail event was held to welcome delegates to the AGM. Ombudsman and former Minister of Justice, Constitutional and Religious Affairs, Dr Isaque Chande, delivered the keynote address. Dr Chande spoke about the importance of lawyers in the region. The cocktail event was an opportune time for delegates to network before the conference began.

SADC LA promotes rule of law and protects human rights

On 16 August the President of the Republic of Mozambique, Filipe Nyusi, delivered the official opening address of the conference. President Nyusi remarked that the continued existence of the SADC LA is an indication of the legal profession's commitment to the promotion of rule of law and protection of human rights. He said there should be defining of policies aimed at strengthening public and private institutions that promote development.

Former President of the SADC LA and Judge of the KwaZulu-Natal Division of the High Court in Pietermaritzburg Thoba Poyo-Dlwati, spoke about the reinstatement of the SADC Tribunal.

The SADC LA council took place in the afternoon of 17 August where the outgoing President James Banda presented his annual report, which was approved together with the audited financial statements. Front row from left: Fumwathu Guilherme (Councillor), Sashi Nchito Kateka (Treasurer), Vimbai Nyemba (Vice President), Max Boqwana (Incoming President). Back row from left: Stanley Nyamanhindi (SADC LA Chief Exectutive Officer), and Zimasa Mvuzo Mtwecu (SADC LA Management Accountant).

President Nyusi noted that Africa, particularly the SADC region, was a reservoir of natural resources, which have over the years been a source of conflict in the region. He urged lawyers to be the problem solvers in instances when there are problems arising from conflicts for natural resources in the continent. 'Most of our problems have solutions. The resources demand added responsibility, that's where lawyers come in, your intervention is key. All citizens of the continent should be able to enjoy the benefits of the natural resources, there is enough for all of us,' he added.

On the second day of the conference, after the delivery of the opening address a plenary session was held to discuss and unpack the theme of the conference, after which two parallel sessions were held. In the one session 'State of rule of law in the SADC region and the role of the legal profession' was discussed while 'Redefining public interest law/litigation and the rising role of paralegal work as tools for promoting and protecting human rights and the rule of law: Opportunities for the legal profession' was discussed in the second session.

Rule of law in the region and the role of the profession

During a panel discussion on human rights and rule of law, former President of the SADC LA and Judge of the KwaZulu-Natal Division of the High Court in Pietermaritzburg, Thoba Poyo-Dlwati, spoke about the reinstatement of the SADC Tribunal. Judge Poyo-Dlwati noted that the tribunal, which was suspended in 2010 after making several significant decisions that made the then Zimbabwean authorities unhappy, was to be replaced by a new tribunal with a far more limited mandate. She questioned whether the political leaders in the region would still see any need for the reformatted tribunal. She added that there was an interpretation that the solidarity among the region's former political leaders had triumphed over the rule of law in the effective dismantling of the SADC Tribunal.

In her view, Judge Poyo-Dlwati, noted that there was a need to revive the SADC Tribunal into the state it was before. She added: 'The tribunal operated as a crucial institution that gave effectiveness and even legitimacy to SADC govern-

During the singing of the Mozambican National anthem at the SADC LA conference, front from left: Outgoing President of SADC LA, James Banda; President of Mozambique, Filipe Nyusi; and President of the Ordem dos Advogados de Mozambique (Mozambican Bar Association), Flávio Menete.

ments. In my view, SADC is not complete without it.'

• See 'LSSA welcomes SADC Tribunal judgment as a victory for all South Africans' (2018 (April) *DR* 12) and 'LSSA launches court bid against the President and Ministers to stop ratification of 2014 SADC protocol on SADC Tribunal' (2015 (June) *DR* 11).

Another panellist, President of the Mozambican National Human Rights Commission, Dr Luis Bitone Nahe, said that it should be borne in mind that the SADC is formulated by countries with different laws and this brings an opportunity for lawyers who want to protect human rights. He added that countries in the region have a legal framework that is good but can be improved on.

Dr Nahe remarked that criminal law in the SADC region does not include the protection of human rights and this is another area lawyers should look into. He added: 'There are many challenges related to this issue. In some instances, human rights are protected, but the protection is weak. … We have high rates of poverty and human rights violations in the region and it is the duty of lawyers to promote human rights at the highest level.'

The events of the second day of the conference concluded with a SADC LA Women Lawyers Forum, which focused on Mozambican female lawyers working in the energy sector. The Mozambican female lawyers highlighted how they were not discriminated against because of their gender.

Challenges in access to justice in the region

On 17 August, the proceedings of the day began with a keynote address by philosopher and Rector of the Technical University of Mozambique, Severino Ngoenha, who spoke about the challenges in access to justice in the SADC region. Mr Ngoenha noted that lawyers in the region have the capacity to transform the economies of the countries in the region.

Mr Ngoenha said that after the fall of Apartheid, all countries in the SADC region should have been afforded the opportunity for reconciliation, because Apartheid did not only impact South Africa. He added: 'Reconciliation was necessary and important so that the region could move towards a situation where all the economies in the region can thrive. The region should not be competing amongst itself economically. … If reconciliation had happened within the region, SADC which started as a political organisation, would now be looking at ensuring that the region functions as a community. … How can we ensure that we live together as a political community that has access to justice? How do we take our different threads and make a common cloth that is beneficial for all in the region?'

Mr Ngoenha noted that it is possible for all in the region to be able to live together as a community so that the region can have stability. 'A common goal can allow for a common vision for all,' he added.

Two breakaway sessions were held. One session discussed 'international commercial arbitration and litigation', while in the other session 'electoral legal reform opportunities' was discussed. Two other breakaway session were held where 'artificial intelligence' was discussed in the one; and the 'role of legal counsel in structuring public private partnerships and infrastructure development deals' was discussed in the other. In the third and final breakaway sessions 'judicial independence' was discussed in the one, and the 'role of lawyers in sustainable natural resource management' was discussed in the other.

International commercial arbitration and commercial litigation

Former President of the Mozambique Bar Association and member of the International Chamber of Commerce International Court of Arbitration, Dr Tomas Timbane, said that during arbitration, it is important to note that not all countries in the SADC region are English speaking. Dr Timbane added that there

Senior Legal Counsel at Google Sub-Sahara Africa Office, Ife Osaga-Ondondo, said that artificial intelligence cannot match human intellect for accuracy in daily fundamental legal work. Ms Osaga-Ondondo highlighted the fact that search engines are not the curators of the information they present, therefore, the public cannot blame search engines for the information that is retrieved. 'This is like blaming the post office because it sent you a defamatory letter, it makes more sense to take the issue up with the person who sent you the letter,' she added.

President of the Mozambican National Human Rights Commission, Dr Luis Bitone Nahe, said that it should be borne in mind that the SADC is formulated by countries with different laws and this brings an opportunity for lawyers who want to protect human rights.

have been important developments that have been made with regard to arbitration and that lawyers need to have new strategies to make it in the arbitration world. 'Lawyers need to develop better clauses so that when they negotiate they start on a better footing,' he said.

Dr Timbane said that there will be instances when arbitration will be conducted in three different languages. 'If you are an English-speaking lawyer and have to conduct arbitration in Portuguese the translation during that session will be very important,' he added.

Barrister, Andrew Moran QC, made a presentation, which focused on the private international law of 16 Anglophone African countries. Mr Moran noted that it is important for legal advisers and litigants to know what interim remedies are available in a particular jurisdiction, to ensure protection for themselves and their clients as the litigation proceeds.

Mr Moran said that when a court is confronted with an interim injunction application in Common Law countries, in order to grant the injunction, the court will consider whether –

- there is a serious question or issue to be tried;
- the applicant will be adequately compensated in damages; and
- the balance of convenience favours the grant of the injunction or not.

Speaking about Roman-Dutch Law countries, Mr Moran noted that in order to obtain an interdict, the applicant has to show that –

- the right, which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to him if the interim relief is not granted and he ultimately succeeds in establishing his right;
- the balance of convenience favours the granting of interim relief; and
- the applicant has no other satisfactory remedy.

Philosopher and Rector of the Technical University of Mozambique, Severino Ngoenha, who spoke about the challenges in access to justice in the SADC region.

SADC LA AGM

After the SADC LA council meeting, giving his first speech as newly elected SADC LA President, Max Boqwana, questioned why so many people in the region were poor while they lived on the richest piece of land. 'We know for a fact that there are major projects happening in the region and that money should be going to the people in the region, but that is not the case. As lawyers in the region we need to make an intervention where necessary to ensure that this does not happen anymore,' he added.

Former President of the Mozambique Bar Association and member of the International Chamber of Commerce International Court of Arbitration, Dr Tomas Timbane, said that during arbitration, it is important to note that not all countries in the SADC region are English speaking.

Mr Boqwana noted that, in future, the work of the SADC LA will not be done by committees, but rather, countries will be assigned projects to deal with. He added: 'We need to pass the baton to the next generation of passionate lawyers and develop them so that they focus on issues of human rights in the region. We need to raise funds for the organisation to ensure that it is sustainable and that we continue to have a community of lawyers in the region.'

To close off the conference a gala dinner was held. Samora Machel, received a Lifetime Contribution to the Development of the SADC Region Award, while Posthumous Outstanding Achievement Awards were awarded to Binta Hazel Tobedza (SADC-LA Exco Treasurer) and Nic Swart (Law Society of South Africa's previous Chief Executive Officer).

The next SADC LA conference will be held in Zimbabwe.

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#BeyondBilling – promoting *pro bono* in the SADC region

On 15 August, the Southern African Development Community Lawyers' Association (SADC LA) held a *Pro Bono* Forum in Maputo, Mozambique. The Forum was attended by lawyers, non-governmental organisations (NGOs) and legal aid officials from across the SADC region. The objectives of the Forum were to launch the SADC *Pro Bono* Lawyers' Network (SADC PLaN) and spread awareness through the #BeyondBilling campaign. The Forum had both regional and international presenters, which covered issues such as defining *pro bono*, *pro bono* needs in the SADC, challenges and opportunities and practical examples of *pro bono* throughout the region.

The Forum encouraged lawyers to be creative and strategic in how they undertake *pro bono* and move beyond the traditional ideas of litigation. The Forum also encouraged lawyers to use their transactional skills, such as negotiation in *pro bono* issues and treat human rights issues as they would commercialise transactions. The issue was raised that lawyers may want to litigate certain *pro bono* cases as it could bring them publicity. A further issue was that lawyers tend to take on 'safe cases' and that they are encouraged to take on, for example, discrimination and civil claim damages for sexual violence cases. The Forum also identified key areas that require *pro bono* services in the SADC region, especially sexual violence, violation of women's rights and political and electoral violence cases. Emphasis was placed on the need to train lawyers on human rights and constitutional law as there is currently a general lack of knowledge, especially on how to use international and regional human rights bodies. At the Forum, it was clearly demonstrated that throughout the SADC it is the law societies and Bar associations that are driving and defining the scope of *pro bono*. As a result, law societies and Bar associations will play an integral part in the SADC PLaN. The Forum also encouraged non-practicing attorneys to undertake *pro bono* and that issues of liability may be addressed by clients signing disclaimer forms.

Specific examples of *pro bono* were also discussed. The organisation, China Impact Watch, is currently undertaking legal work on behalf of communities in Africa who have experienced human rights violations by Chinese owned companies. Violations include pollution, expropriation of land without compensation and loss of access to safe drinking water. The organisation does research on human rights violations committed by Chinese owned companies and acts as *amicus curiae* in human rights cases. The Bar Association of Mozambique has also taken on an active role in promoting the human rights of communities, as more natural resources are discovered in Mozambique. They have, to date, instituted ten cases against the government and companies who have committed human rights violations, such as expropriation of land and houses without compensation. The intention is that during the litigation proceedings against the government, the details of contracts for natural resources such as oil and gas will be made public. To date, the details and values of these contracts have been kept secret and have not benefitted communities.

The Forum also held an interactive *Dragons' Den* style session whereby representatives of NGOs could pitch their *pro bono* needs to lawyers. This session highlighted that NGOs need to think beyond litigation to address issues, such as, creating stronger and larger organisations to lobby for change. Furthermore, that those issues – such as the right of women to inherit land in Zimbabwe – will require strategic litigation, and that NGOs need to remain resilient as litigation takes time and will also require further advocacy, such as campaigning.

The SADC PLaN has formed a committee that will be responsible for creating the terms of reference for the Network. The SADC LA will also create a database of lawyers and NGOs who can offer and who need *pro bono* services. The SADC LA will also promote *pro bono* in the region by running the #BeyondBilling campaign, which will include advocacy to encourage *pro bono* throughout the SADC and training on different *pro bono* strategies.

For more information on how to get involved in this project contact Stanley Nyamanhindi, the SADC LA Chief Executive Officer at stanely@sadcla.org

Southern African Development Community Lawyers' Association

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People and practices

Compiled by Shireen Mahomed

Garlicke & Bousfield Inc in Durban has appointed Chuma Vabaza as a director in the employment law department.

Abrahams & Gross in Cape Town has promoted Vera Kruger as a senior associate in the general litigation and family law department.

Hogan Lovells in Johannesburg has appointed Lauren Green as an associate in the banking and finance department. She specialises in transactional and acquisition finance.

All People and practices submissions are converted to the *De Rebus* house style. Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za

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BLA and NADEL announce their nominees for the LPC

A joint press statement by the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL) states that the announcement by the Minister of Justice and Correctional Services, Michael Masutha, on 3 September, that the election process of the South African Legal Practice Council (LPC) by all practising legal practitioners, commencing with the nomination of election candidates on 5 September, marked the beginning of the new era in the legal profession. The entire profession (both practising or non-practising attorneys and advocates) will henceforth be regulated by a one unitary regulatory body, namely, the LPC.

The press statement further notes that the BLA and NADEL are conscious that because of the injustice of the past, black and female legal practitioners are in the minority in the legal profession and that the regulation of the legal profession was mainly in the hands of white practitioners. The two organisations have agreed to conduct the election jointly in order to present black and women candidates who will champion the interest of the South African public. These candidates will transform the legal profession, promote the objects of the LPC and reflect the demographics of South Africa.

According to the press statement in this election, attorneys will vote for attorneys and advocates will be voted for by advocates. Section 7(1) of the Legal Practice Act 28 of 2014 (LPA) allocates ten positions for attorneys and six for advocates. Together the BLA and NADEL have jointly nominated the following attorneys to compete for the ten positions –

- Lutendo Sigogo;
- Nolitha Jali;
- Bayethe Maswazi;
- Ugeshnee Naicker;
- Noxolo Maduba;
- Krish Govender;
- Kathleen Matolo-Dlepu; and
- Leonia Smith.

NADEL has nominated the following advocates –

- Gcina Malindi SC;
- Vershen Moodley;
- Lawrence Manye;
- Muzi Sikhakhane SC; and
- Philip Zilwa SC.

Nominations closed Friday, 14 September. The list of candidates standing for election was published on Monday, 17 September. Voting opened on 19 September and closed on 30 September. Practising attorneys voted for the ten practising attorneys on the LPC and practising advocates voted for the six practising advocates on the LPC.

The names of the successful candidates elected to the LPC will be published on 5 October.

The BLA and NADEL called on all practising legal practitioners to vote for their nominated candidates.

- The full list of nominated candidates can be found at www.derebus.org.za.

LSSA responds to statements made by ministers

The Co-chairpersons of the Law Society of South Africa (LSSA), Mvuzo Notyesi and Ettienne Barnard held a media briefing on 21 August in Johannesburg. The purpose of the briefing was to deal with allegations against the attorneys' profession by the Minister of Justice and Correctional Services, Michael Masutha; Minister of Police, Bheki Cele; Minister of Health, Dr Aaron Motsoaledi; and Special Investigation Unit (SIU) Head, Andy Mothibi.

In a statement published by the Department of Justice and Constitutional Development on 14 August, Mr Masutha elaborated on the reason for President Cyril Ramaphosa's proclamation authorising the SIU's probe into the affairs of the Office of the State Attorney.

In the statement, Mr Masutha stated: 'I have visited several public and private entities within the Justice portfolio – including meeting with relevant professional bodies – to appraise myself of various matters affecting the administration of justice in South Africa. In the course of wide-ranging conversations, I held with these entities, it became apparent that a number of challenges exist that inhibit the effective administration of justice.'

Co-chairperson of the Law Society of South Africa, Mvuzo Notyesi, at the LSSA media briefing on 21 August in Johannesburg. The purpose of the briefing was to deal with allegations against the attorneys' profession.

The statement added that the concerns raised, included –

- alleged malpractice;
- lack of professionalism; and
- suspicion of abuse of office.

Additional concerns also included the way some officials at the Office of the State Attorney handled their matters, which resulted in unnecessary financial loss.

In a summary of the press conference held on 14 August, Mr Masutha said: 'The allegations as articulated in the proclamation, include serious maladministration in the Office of the State Attorney. It is calculated to bring a halt to the alleged practices in the provision of state legal services, particularly in conducting litigation for and against the state, and apparent collusion between officials within the Office of the State Attorney, private legal practitioners and real or fictitious litigants to defraud and conduct other acts or irregular and corrupt activities against the state.'

Mr Mothibi stated that the proclama-

tion authorising the SIU to investigate these allegations has been gazetted and added that the investigation would determine which Offices of the State Attorney would be prioritised. He added that the investigation would take no more than 12 months.

Mr Motsoaledi said that the scope of the investigation covered an approximate R 56 billion, however, not all of it related to fraudulent claims. Mr Motsoaledi added that there were private lawyers in the Eastern Cape 'who must be arrested. Why is it taking so long? We need to break this cartel'. Mr Motsoaledi also claimed that doctors were involved in the alleged collusion.

Mr Masutha said that the investigation would not just look at financial loss, but at the issue of how many law firms are involved. How many law firms who were operating, were active participants. 'We will leave no stone unturned to eliminate this scourge'.

LSSA press briefing

At the press briefing held by the LSSA, Mr Notyesi referred to an article that was published, where the Minister of Health stated that an approximate R 80 billion had been spent on litigation where corrupt activities and collusion between attorneys, State Attorneys and other officials from the state took place. 'The suggestion, in essence, was that the legal profession was involved in those corrupt activities,' Mr Notyesi said.

Mr Notyesi said that these allegations – if left unattended – are harmful to the legal profession and portray the legal profession as being complicit in criminal activities and corruption. He said the legal profession, among other things, is tasked to uphold the Constitution and to inform the citizens of the country about their constitutional rights, which are guaranteed in the Constitution. 'If it is suggested that the legal profession is involved in corruption, or in corrupt activities, it has a negative impact on the public confidence in the legal profession,' he said.

Mr Notyesi said that all the 'sweeping statements' made by the ministers 'are surprisingly not supported by any form of evidence.'

Mr Notyesi added that the LSSA serves with the Minister of Justice on two forums, namely:

- The National Efficiency Enhancement Committee, a structure that was established by Chief Justice, Mogoeng Mogoeng. In this forum all issues pertinent to the profession are dealt with. Mr Notyesi said that the Minister of Justice and the Minister of Health is presented in this forum, but the matter of collusion was never raised.
- The National Forum on the Legal Profession is a forum where the negotiations of the future of the legal profession are being discussed; when the Legal Practice Act 28 of 2014 comes into effect in November. Mr Notyesi said that the Minister of Justice interacts with the LSSA in this forum from time-to-time and added that the matter was never raised there either.

LSSA Council member, Mfana Gwala, said lawyers are an integral part of our Constitution and democracy and people are entitled to use lawyers.

Mr Notyesi said that this was nothing else but a 'grandstanding on the part of the ministers, who seek to avoid the real issues'.

Mr Notyesi focussed on the work of the LSSA and the four statutory law societies (the Cape Law Society, the Free State Law Society, the KwaZulu-Natal Law Society and the Law Society of the Northern Provinces), including the Black Lawyers Association and the National Association of Democratic Lawyers. He added that the LSSA is the voice for approximately 26 000 lawyers in the country and the LSSA stands as a voice for all in the country. He added that the LSSA deals with attorneys' interests, as well as the public interest. Mr Notyesi noted that any corrupt act from a member of the legal profession, surely goes against the rule of law. He said provincial law societies regulate attorneys and complaints that are received have to be investigated. He added that there is a procedure that has to be followed and, in the past, where corrupt actions have been reported and the attorney has been found guilty, those attorneys have been struck from the roll.

Mr Notyesi referred to the Ronald Bobroff matter. He explained that the matter has taken so long, as a process of investigation had to be followed. Once the investigation process was completed, it was taken to court to strike Mr Bobroff from the roll, he then fled the country. He said the provincial law society assisted other institutions, such as the Hawks, to make sure that Mr Bobroff was brought to account. He added that Mr Bobroff was struck from the roll in December 2016. Mr Notyesi stated that the provincial law society was now liaising with the Australian regulatory body. 'We want to have Mr Bobroff brought to book, the law society has taken steps to ensure that he is taken to task'.

Mr Notyesi gave a short summary of the Attorneys Fidelity Fund, which compensates members of the public who have been victims of the unprofessional conduct from attorneys. Systems have been put in place – by the profession – who have acted swiftly in dealing with unscrupulous attorneys and who are involved in unlawful conduct. Mr Notyesi said: 'We have acted on various times and successfully, we have investigated all the complaints that have been brought to us. It takes us by surprise that the minister [of Justice] – who at least understands our system – would come out and make [a] generalised statement. … That conduct was disingenuous, it was unacceptable.'

Mr Notyesi said that this was not the first time that the Minister of Health made allegations against the profession. In a press release from the LSSA on 11 March 2015, the LSSA voiced serious concerns at statements made by Dr Motsoaledi regarding the possible limitation of the right to fair compensation of medical malpractice victims and the role of lawyers in these claims. In the press release issues by then Co-chairpersons Mr Barnard and Max Boqwana they stated: 'We would have expected the minister to raise his concerns with the LSSA before going to the media and to include the le-

LSSA Council member, Anthony Millar, said that one should not lose sight of the fact that every complaint is initiated by somebody and the provincial law society waits for members of the public or the aggrieved party to come forward to make a complaint.

gal profession in recent discussions and in the way forward.'

Mr Notyesi again referred to a press release from the LSSA on 27 March 2017 regarding similar matters. He added that the minister was invited to a meeting with the LSSA to deal with these issues, and he did not attend.

Mr Notyesi said the LSSA is committed to upholding the rule of law and protecting the Constitution. 'We stand firm and undertake to act and ensure that actions are taken against members of the profession who defraud members of the public or who engage themselves in unprofessional conduct, we request members of the public to report such instances to the provincial law societies. … We would like to clean the profession. We know that the state capture inquiry is ongoing. We know that state capture was facilitated, in many instances, by the involvement of practitioners and where it can be demonstrated that there were legal practitioners who knowingly involved themselves in corrupt activities, let us receive those reports. If somebody complains, we will investigate. We also invite the minister if he has any cases, … they will be investigated.'

LSSA Council member, Anthony Millar, said that one should not lose sight of the fact that every complaint is initiated by somebody and the provincial law society can only investigate a case when members of the public or the aggrieved party comes forward to make a complaint. Mr Millar added that the various ministers were invited to come forward with specific complaints that could have been investigated. When an attorney in their employ is identified to be involved in improper conduct, the ministers should be aware of the processes and procedures to follow. He added that the entire R 80 billion cannot be attributed to fraudulent or illegitimate claims. 'We do not have that information and the ministers are talking in terms of a global figure and not identifying where the specific problems are to enable the proper investigation. … We need these departments to come forward with specific complaints and identify specific individuals and specific instances. … We are committed to the investigation process, as was mentioned, in 2015 an open invitation was extended to bring instances forward so that it can be investigated. It does not help to sit silent for three years and, then somewhat opportunistically, as and when the political climate suits the call, to then start complaining about the behaviour of errant attorneys. It does not help the profession,' he said.

LSSA Council member, Mfana Gwala, said the major problems are politicians as they use some of these issues 'as a political weapon for political expediency. It is our considered view that any practitioner who does wrong must be punished. Lawyers are not immune from being punished.'

Mr Gwala added that there is a problem with regard to the claims that have been made through the State Attorneys in particular regarding malpractice, but to simply soil the entire profession without having the practical evidence to show is irresponsible. 'We are not trying to avoid the situation … . Lawyers are an integral part of our Constitution and democracy and people are entitled to use lawyers. … If you say R 80 billion has been stolen, tell us who stole the money and bring them before the regulatory board, let them be struck off and let them go to jail. We are not trying to prevent that from happening,' Mr Gwala said.

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Judge President Mlambo challenges attorneys to join the fight on fixing the courts at GAA inaugural meeting

Judge President of the Gauteng Division of the High Court in Pretoria, Dunstan Mlambo, told legal practitioners that they have a better voice when they merge their thoughts into one organisation. Judge President Mlambo was speaking at the Gauteng Attorneys' Association (GAA), inaugural meeting, which was held in Johannesburg on 29 August.

The GAA compromises of the Pretoria Attorneys Association and the Johannesburg Attorneys Association. The GAA is a voluntary association not for gain and represents the interests of attorneys practising in Gauteng.

He congratulated the legal practitioners who are based in different cities in Gauteng for forming the GAA. He added the association was a way for legal practitioners to strengthen their numbers, particularly with the changes that the legal profession is currently undergoing.

Judge President Mlambo spoke about digitising courts, he said that in August the judiciary conducted workshops for judges, which showcased a digital platform that judges will be operating. He added that they started a pilot phase in Gauteng during September. He pointed out that legal practitioners have been operating on digital platforms in their law firms, but when they go to court they still had to work on hard copies, which did not make sense. He noted that the judiciary will also have workshops for legal practitioners to show them how to acquire the digital court systems and how to operate them.

Judge President of the Gauteng Division of the High Court in Pretoria, Dunstan Mlambo. He spoke at the first inaugural meeting of the Gauteng Attorneys Association held in Johannesburg on 29 August.

Judge President Mlambo said that Chief Justice, Mogoeng Mogoeng, identified the Gauteng Division to introduce mediation in court. He added that the judiciary has the same common interest with the legal profession and pointed out that society expects legal practitioners to represent them efficiently and expects the judiciary to treat cases swiftly. Judge President Mlambo said he was trying to re-introduce the commercial court. He added that he wanted commercial work to be referred to the High Court and for

the court to have a proper meaning as a court of justice for everyone.

Judge President Mlambo said that there were people who argued that the City Centre of Johannesburg was dangerous for them to go to the Johannesburg Local Division. He suggested that there be restrictions of vehicles and pedestrian access around the Johannesburg Local Division. He pointed out that there were individuals who thought the idea would work and said they would rather use the Gautrain services. They suggested that there be a shuttle or taxi service from the Johannesburg Gautrain station to the Johannesburg Local Division.

Judge President Mlambo said legal practitioners cannot sit and watch the judiciary fight this battle of making the Johannesburg Local Division an efficient place of work alone. He added that legal practitioners are in a far better position to fix the court. Legal practitioners can petition the area and control who comes and goes in around the court. 'It is your court, you own it, that is where you litigate. Help us, join hands with us,' Judge President Mlambo said.

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The fourth industrial revolution changing the world of work

The 31st annual Labour Law Conference, themed 'The Fourth Industrial Revolution: Challenges and Opportunities' was held in Johannesburg on 16 and 17 August. Acting Judge President of the Labour Court and the Labour Appeal Court, Judge Violet Phatshoane, said the fourth industrial revolution has a positive and negative effect in the workplace. She added that as the fourth industrial revolution sets in, job security in South Africa remains a key aspect to be jealously protected. She pointed out that the job security of the indigent, unemployed and the marginalised members in the country is continuously under threat as a result of the slow economic growth.

Judge Phatshoane said business, labour and government should continue to strive in finding sustainable ways of building the economy, through job creation. She added that another worrying aspect was that as the fourth industrial revolution sets in, poor countries lose their work force to developing countries and some economies become stranded as a result of the abundance of skilled work force.

How does South Africa prepare for the fourth industrial revolution?

International Labour Organisation, Director, Doctor Joni Musabayana, said the fourth industrial revolution means the working world is changing. He added that the labour laws and labour institutions must change to accommodate the fourth industrial revolution. Dr Musabayana pointed out that his organisation was engaged in a worldwide process, which is called the 'National Dialogue on the Future of Work.' He said research was done through the University of Cape Town, to look at what is going on at enterprise level in communities and the implications for labour law, labour institutions and the labour administration in general.

Dr Musabayana said the informal economy was coming into the formal economy. He added that what is becoming an exception was becoming a rule. He pointed out that the employment relationships were changing, and the world has informalised of formal jobs and that is not an exception but a standard worldwide. Dr Musabayana noted that the ability for government to make policy decisions is absolutely imperative. He said robots do not make decisions, but human beings do. He added that governments have a choice on which projects to fund.

Does the law really encourage and protect whistle-blowers in fight to combat corruption

Programme Manager at whistle-blowing unit and non-government organisation (NGO), Open Democracy Advice Centre, Lorraine Martin, said when people speak about whistle-blowing, the first thing that comes to mind is corruption. However, she pointed out that whistle-blowing is much wider than just exposing corruption. She added that whistle-blowing, in many countries, deals with issues of fraud, corruption and other wrong doings, which are not recognised as some fundamental human rights.

Ms Martin said the laws of whistle-blowing were limited and that employees cannot blow the whistle on just anything at a workplace. She pointed out that with regards to the protection of whistle-blowers in the workplace, there are currently two pieces of legislation in South Africa, which are –

- the Protected Disclosures Amendment Act of 5 of 2017 (Amendment Act); and
- the Companies Act 71 of 2008.

Ms Martin noted that both Acts have whistle-blowing provisions, but that the Protected Disclosures Act, is specifically about whistle-blowing.

Ms Martin said the thinking behind the Amendment Act was to create a contract, to facilitate the disclosure of information by employees, as the Amendment Act only protects employees. She added that employees must blow the whistle in a responsible manner, by adhering to comprehensive statutory guidelines to the disclosure of the information they are disclosing.

Ms Martin said employees may disclose the following –

- a criminal offence;
- the failure to comply with the legal obligation;
- a miscarriage of justice;
- the endangerment of the health and safety of an individual;

Acting Judge President of the Labour Court and the Labour Appeal Court, Judge Violet Phatshoane, spoke at the 31st annual Labour Law conference on 16 August.

International Labour Organisation, Director, Doctor Joni Musabayana, said labour laws and labour institutions must change to accommodate the fourth industrial revolution.

- damaging the environment; or
- unfair discrimination.

She added that the highest protection of whistle-blowing is when an employee discloses internal happenings within the organisation. She pointed out that the employee does not need to disclose the issue to the line manager, but instead they can go to the top management in the organisation. She said if an employee works for government, the employee could disclose the information to the office of the Public Protector or the Auditor General.

Ms Martin added that s 9 in the Amendment Act, allows an employee to blow the whistle outside of the organisation, but with conditions attached. She said this option is called, 'general disclosure'. She pointed out that if the disclosure was made internally and nothing was done about it, then an employee can report the incident outside the organisation.

Ms Martin said if an organisation has a whistle-blowing policy an employee has to follow that organisation's policy. She added that employees who blow the whistle are protected in a case where, should they blow the whistle on some form of criminal conduct, and they have followed all the correct procedures they could suffer occupational detriment. Ms Martin listed forms of occupational detriment, such as –

- demotion;
- harassment;
- intimidation;
- transfer against your will;
- disciplinary hearings;
- suspension;
- poor work performance claims;
- refusal of a transfer; or
- refusal of a reference or anything that an employee can prove that has a negative impact on their employment, because of the disclosure that the employee had made.

Ms Martin said that an employee in such case, can seek a redress through the Commission for Conciliation, Mediation and Arbitration (CCMA), the Bargaining Council or the Labour Court. She added that such treatment towards an employee is regarded as unfair labour practice and is written in the Labour Relations Act 66 of 1995.

Programme Manager at whistle-blowing unit non-government organisation, Open Democracy Advice Centre, Lorraine Martin, said employees needed to follow correct procedures on whistle-blowing. She spoke at the 31st annual Labour Law Conference held in Johannesburg on 16 and 17 August.

The developing jurisprudence in 'equal pay for equal work' claims

Partner at Bowmans, Employment Practice and Benefits Department, Talita Laubscher, said on 1 August 2014 the amendment to the Employment Equity Act 55 of 1998 the (EEA) came to force, however, she added that there were mixed reactions to it. She noted that s 6 of the EEA prior to the amendment said 'no person should discriminate against unfairly, either direct or indirectly against the other.' She pointed out that in 2014 this was amended by the inclusion of the phrase 'or any arbitrary ground.'

Ms Laubscher said s 6(4) speaks about, the difference in terms and conditions of employment, not just remuneration but any terms and condition of employment between employees of the same employer. She added that the section did not concern itself with the wage gap of the chief executive officer and a secretory, but with employees doing the same work that can be attributed to the same value.

Partner at Bowmans, Employment Practice and Benefits Department, Talita Laubscher, spoke at the 31st annual Labour Law Conference in Johannesburg.

Interventions for businesses in trouble

University of South Africa (Unisa) professor in corporate law and CCMA facilitator, Anneli Loubser, discussed whether business rescue was the only answer to companies suffering difficulties. She said South African corporate law, currently provides four interventions for a business in financial difficulty, namely –

- business rescue;
- insolvent liquidation;
- compromise for creditors; or
- composition for close corporation.

Ms Loubser pointed out the four procedures appear to be completely differ-

University of South Africa professor in corporate law and Commission for Conciliation, Mediation and Arbitration facilitator, Anneli Loubser, discussed whether business rescue was the only answer to companies suffering difficulties.

ent with various outcomes or purposes, which are applicable to different entities. She added that in fact the separation between the four is not that wide. She said that business rescue, which under certain circumstances could fail and leave a business in a much worse off state than it was before. She added that what disturbed her was that some judges appeared to have the belief that business rescue was always the answer for a business in financial distress.

Ms Loubser said it was worrying for businesses to rush into business rescue. She added that the courts were confusing the purpose of business rescue, which is to rescue the business, not to save jobs. She noted that jobs are only saved when there is a successful business rescue plan and a failure to rescue will not save a single job.

Ms Loubser said business rescue is regulated by the Companies Act and applies to companies and close corporations. She added that the requirements for business rescue, included financial distress for the company and pointed out that there must be a reasonable prospect for a rescue. She noted that the first option a company can take to rescue the company is to return the company to a solvent state and enable it to continue on a solvent basis.

Ms Loubser said the second option to rescue a business is that the company will result in better return for credit, although the Act does not spell it out. It is assumed that the sale in liquidation would be the sale of loose assets. While a sale from the business rescue idea is that a company must be kept afloat long enough that the business can be sold and get a better price than one would get for selling individual assets. She added that this assumption was not true.

Ms Loubser asked if business rescue achieved its stated purpose as defined. She said statistics showed that since 2011, 28% of the business rescue cases since ended with a notice of substantial implementation of an approved rescue plan, but others went into liquidation. She added that a small percentage was recovered from that 28% and 20% was still in business rescue at the end of March 2018.

Ms Loubser said it was clear that most of businesses in business rescue end up in liquidation. She pointed out that often the business rescue of a company was intended to avoid the consequences of a formal liquidation. She added that there were issues of abuse surrounding business rescue, because some companies simply wanted to avoid liquidation. Ms Loubser said insolvent liquidation was still regulated by the Companies Act 61 of 1973. She added that it applied to companies, close corporations and external companies. She noted that a requirement for this procedure must be that the company must be commercially insolvent. She pointed out that not many companies use the compromise creditors' procedure even though it is a very useful procedure. Ms Loubser said what makes this procedure useful is that it may be used in liquidation.

Ms Loubser said the composition under s 72 of the Close Corporations Act 69 of 1984, is only available to close corporations under liquidation. She pointed out that business rescue is supposed to be a short procedure, however, statistics have revealed it can sometimes take a lot longer.

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Children must be taught about their rights

The South African Association of Mediators (SAAM) held a conference on mediation on 1 and 2 August in Johannesburg. Researcher and Ambassador of the Teddy Bear Clinic, Doctor Tanya Robinson, said violent crimes are a serious problem for the South African society. She added that the media often reports on crimes against children and in many interviews people express their worry about children and crimes done to them. She pointed out that children were brutally hurt through practices that adults inflict on them.

Dr Robinson said it was the responsibility of professionals in industries, such as the mediation industry, to hold dialogues with other adults in a multi-disciplinary context to discuss how children's vulnerabilities were being exploited. She added that another problem was that children did not know their rights or the Children's Act 38 of 2005. She pointed out that in most of the schools she goes to give talks, the first thing she does is ask children if they know they have rights. The responses she receives are that they did not know their rights or even know about the Children's Act.

Researcher and Ambassador of the Teddy Bear Clinic, Doctor Tanya Robinson, spoke about crimes against children at the South African Association of Mediators conference held on 1 and 2 August in Johannesburg.

Dr Robinson said if children do not know about the Children's Act, how would they know about their rights? She pointed out that children need to be taught about the Children's Act and about their rights, so that they know how to protect themselves. She added that the reporting of maltreatment and abuse of children was underestimated and that some of the perpetrators who commit crimes against children are people that the children depend on, such as a parent, and if they report the crime, the parent or adult will stop taking care of them.

Dr Robinson said that there must be a shift in the way of reporting maltreatment of children but it must be done, in such a way that children know it is okay to report maltreatment and abuse. She added that children are confronted with violent crimes, which include –

- conventional crime, such as robbery, kidnapping, hate crime, or threats of attack;
- sexual victimisation or abuse, such as rape or, pornography;
- child maltreatment, such as physical abuse, emotional abuse, neglect or abduction by parents and care givers; and
- digital victimisation such as, bullying on social networks.

Dr Robinson added that the justice

system has failed many people when they have reported cases of sexual abuse. She said it was not easy for children to report sexual abuse, because often those cases do not get prosecuted, due to faulty information on the case and then the case is thrown out of court. She pointed out that it is very important that when mediator's cross paths with sexual abuse cases, that they are experts in that area. She encouraged mediators who deal with such cases, to familiarise themselves in that field and get training.

Dr Robinson said it is important for mediators who deal with such cases to follow correct protocol and correct court process and added that mediators needed to understand how to handle the situation, that in the end the children get the justice they deserve.

Allegations of abuse during divorce

Family and divorce mediator, Nicola Arend, discussed allegations of abuse during divorce proceedings. She said that according to statistics released in 2016 by Statistics South Africa, there were 25 326 divorces in South Africa (SA) and 13 922 of those cases involved children under the age of 18. She added another study, the 'Optimus Study South Africa: Technical report,' in which 10 000 teenagers took part from schools and communities, where it was revealed that one in three children had been sexually abused by the age of 17, this included children who had been exposed to child pornography or had been used in child pornography – without their knowledge – in terms of sending their naked photo to someone.

Family and Divorce Mediator, Nicola Arend, discussed allegations of abuse during divorce proceedings at the conference.

Ms Arend pointed out that as many boys were sexually abused as girls. She said in early 2000 it was not considered that there were as many boys who were being sexually abused. She added that in a research study, in which she was involved in, there was a campaign where children were encouraged to confide in a trusted adult and it was in that study that it was revealed that as many boys were also sexually abused. She pointed out that a statistic by the South African Police Service (SAPS) showed that between 14 000 and 18 000 sexual abuse cases are opened per year. She said SA had a high level of abuse.

Ms Arend said the reason why abuse was revealed pre-divorce was that, it is often the most 'appropriate' time. She added that it was not predominately women who were allegedly accused, but rather men. She used a woman as an example and said that the mother may have turned a blind eye during the marriage to any kind of abuse that was happening. She said it may have been due to fear, disbelief, or due to the weighing up of an option of a roof over her head or her child's innocence. She pointed out that, unfortunately most mothers choose a roof over their head.

Mr Arend added that abuse may also be revealed during the divorce, because the child might feel free from being out of the same house as the alleged abuser

Magistrate Marelene Lamprecht, said mediation plays an important role for troubled families during divorce proceedings.

and that they may be able to now disclose the information to a trusted adult, such as other family members, relatives, a teacher or a social worker. She said that sometimes the report of abuse post-divorce, could elicit false allegations and the reason for that may be that one parent would not want the child to see or visit the other parent.

Ms Arend said the Constitution and the Bill of Rights, clearly states that children need to be protected from maltreatment, abuse and neglect. She added that the Children's Act, stated that crimes against children can be reported to child protection organisations, the Department of Social Development or the SAPS. She pointed out that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 states that children being sexually abused must be reported to the police, and not only to the child protection organisations and that all citizens should report allegations of sexual abuse.

Ms Arend said when there is a suspicion of abuse mediators should successfully identify the abused child and exclude the child that was not abused if there is more than one child in the household. She noted that when there are only two witnesses on the abuse matter, namely the child and the perpetrator and there is no corroborating evidence, then the child's recollection of events would be relied on. Ms Arend said in such cases the mediator's task is a critical one.

Ms Arend added it was important for mediators that the correct protocols of gathering facts in all-purposes are used to ensure the correct information is received. She said that when gathering information – for court purposes – talking to children about any crime or sexual abuse should not just be about taking in their words, but mediators should rather do intensive research to put into the report. She added that mediators – when dealing with abuse cases – should consider the timing and circumstances, how the children disclose the information and consider the existence of the motive to fabricate false allegations.

Ms Arend said when dealing with abuse cases mediators should look at the language used by the children to determine whether they were programmed to give information and added that mediators should look at the quantity and quality of the information the children give, the consistency when they continue to speak about the abuse, the description of the perpetrator's behaviour and the emotional reaction of the children during the interview. She added that false allegations and fabricated allegations can be broken up as unsubstantiated allegations. She pointed out that unsubstantiated allegations of the alleged abuse, which is reported can be legally defined as abuse. She warned against children being questioned by either a parent or teacher with leading questions as this may lead to other unsubstantiated false allegations.

Ms Arend pointed out that fabricated false allegations can have implications such as –

- distress for the children;
- the accused parent may not see their child/children for years; and
- the accused parent may have supervised access to the child/children or no access at all.

Practical information on how to use the Children's Act in mediation

Family Life Centre facilitator, Claire Penfold, said the United Nation's Convention on the Rights of Child in art 3, speaks about the best interest of the child and added that art 12, includes the child's participation. It also provides for the children's right to be heard. She pointed out that SA's Constitution has a provision stipulating what children have a right to, which includes family or parental care. She said people will talk about the Child Care Act 74 of 1984 as opposed to the Children's Act. She said one must be clear when referring to the legislation, on which one they are referring to.

South African Council of Churches', Reverend Gift Moerane, said SA is a fractured society and families were characterised by conflicts.

Ms Penfold pointed out that if a mediator referred to the wrong legislation, the legal profession will not be pleased when they receive the memorandum, or if it goes to court, the case might get thrown out. She added that the Child Care Act was repealed by the Children's Act. She said it was important for mediators to clearly understand the objectives of the Children's Act. She said the Children's Act promotes the preservation of families, to give effect to the constitutional right of children, to give effect to South Africa's obligation in terms of the international instruments.

Ms Penfold said ch 2 deals with general principles, ch 3 deals with parental responsibilities and ch 4 deals with children's courts. She further discussed chapters that mediators can refer to when dealing with cases involving children and explained in summary what they talked to.

Magistrate Marlene Lamprecht, told mediators not to be intimidated by the logistics, legislation and many other things they come across. She said the format and forms are not complicated and added that a parenting plan can be amended if there is something in the plan that does not work for the parties involved. She pointed out that when some parties go to court they would not even look at each other and their body language would show that the parties have not been communicating for several years. She said in a situation like that, parties would be sent to a family advocate for mediation and added that in most cases when they returned, she would not recognise some of the parties, because they returned happier and, in some instances, the parties decide to fix their marriages. She said sending parties to mediators who are going to help them and parties agreeing to simple things is very important.

South African Council of Churches', Reverend Gift Moerane, said SA is a fractured society and families were characterised by conflicts. He added that society was 'groaning in pain for help'. He noted the good work SAAM did, but challenged the organisation to interact more with families and communities at grassroots level to respond to challenges that could lead to conflict and domestic violence.

Rev Moerane, said SAAM should always be ready to intervene when problems arise. He added that for those mediators who need to be paid before they could assist a poor woman, he asked them what their social responsibility was? He added that SAAM should respond to conflict in a form of social responsibilities in communities and suggested that SAAM, as part of the organisation's social responsibility, provide skill training in communities for the community leaders in conflict resolution. He pointed out that by doing this SAAM will be branding itself in communities and people will know that SAAM provides good services. He added that SAAM could also raise money and inject it into the *pro bono* services to offer to poor communities.

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South Africa must work on collecting accurate statistics on human trafficking

The University of South Africa's College of Law in association with Media Monitoring Africa held a seminar themed 'Trafficking in Persons (TIP) Talk: Dispelling the myths around trafficking in South Africa' on 21 August in Pretoria. Human Rights Officer at the United States (US) Embassy in Pretoria, JJ Harder, said South Africa (SA) is still on a tier two ranking on the US department of State Trafficking in Persons Report watch list. This is as a result of not meeting the minimum standards of elimination of human trafficking, however, he said SA was now making significant efforts to meet those standards through the Department of Justice and Correctional Services.

Mr Harder added that the South African Department of Home Affairs, should improve its human trafficking regulations and have efficient training for their officials who are going to conduct interviews for travellers, who might potentially be victims of trafficking. He said the South African government must also increase its human trafficking conviction rate. He pointed out that in 2017 there were only eight human trafficking convictions in the country. According to Mr Harder, there has never been one conviction in the Limpopo province, which he said is the home to the largest border crossing.

Human Rights Officer at the United States Embassy in Pretoria, JJ Harder, said South Africa needed to conduct a study that will give accurate human trafficking statistics. He was speaking at the Trafficking in Persons seminar, held by the University of South Africa's College of Law in association with Media Monitoring Africa on 21 August in Pretoria.

Mr Harder pointed out that another serious issue was that SA did not have accurate statistics on human trafficking. He said a comprehensive study was needed, which would provide accurate numbers on human trafficking. He added that SA needed to create more awareness on human trafficking, and noted that the US government was eager to work together with other countries, including SA to fight human trafficking. Mr Harder said sharing information and collaborating data was needed in the fight against human trafficking.

Legal frame work and position

Advocate Zelda Swanepoel said SA did not have an offence on human trafficking or slavery. However, she pointed out that SA has an offence on trafficking in persons. She added that the offence was created by the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the Act). She said the reason for the Act was to address the problem of human trafficking and deal with the criminalisation of trafficking in persons, prosecution of offenders in trafficking in persons, protection and assistance to the victims of trafficking and the return of victims of trafficking.

Ms Swanepoel said the definition of 'trafficking in persons' has been assigned to s 4(1) states that:

Advocate Zelda Swanepoel spoke at the Trafficking in Persons seminar at the University of South Africa in Pretoria.

'Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of –
(*a*) a threat of harm;
(*b*) the threat or use of force or other forms of coercion;
(*c*) the abuse of vulnerability;
(*d*) fraud;
(*e*) deception;
(*f*) abduction;
(*g*) kidnapping;
(*h*) the abuse of power;
(*i*) the direct or indirect giving or receiving of payment or benefits to obtain the consent of a person having control or authority over another person; or
(*j*) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.'

Ms Swanepoel said looking at the traf-

ficking in persons definition is important, and one has to determine the three elements of trafficking, namely –

- the act;
- the means; and
- the purpose for trafficking.

She added that trafficking was also committed in a process and some people refer to it as the different phases of the offence. She pointed out that prosecutors can prosecute a whole chain of people in the process of trafficking, if they considered the trafficking in persons definition.

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MARCH – a nation's history told by its people

The Museum and Archive of the Constitution at the Hill (MARCH) is a new institution currently being established in the soon-to-be-built Visitor Centre at Constitution Hill, which is home to three former prisons and the Constitutional Court.

MARCH will tell the remarkable story of the making of the Constitution, which spans over a century. The information collected will be sourced from the viewpoint of South Africans from all walks of life. MARCH seeks to tell a uniquely African story regarding the development of human rights with a focus on the contributions of marginalised or unknown South Africans and lesser known significant events, which contributed to the making of the Constitution.

MARCH is calling on all South Africans to share their objects – little things that tell a big story in a personal way, namely –

- a letter;
- a snapshot;
- something written at the time in a community newspaper;

A render of the new Visitor Centre at Constitution Hill designed by Mashabane Rose Architects.

- a leaflet distributed in a neighbourhood; or
- anything that tells the story of the impact of Apartheid and the making of the Constitution.

MARCH especially seeks objects that tell ordinary and everyday stories and that will allow visitors to 'touch and feel' history.

Contact Katie Mooney at +27 (066) 441 0417 or e-mail marchjhb@gmail.com for more information and the curators will get back to you.

The Museum Archive of the Constitution at the Hill

Former Mr South Africa uses his law degree to reach out to those in need

Johannesburg attorney and former Mr South Africa, Armand du Plessis, said he entered the Mr South Africa competition to use the platform to reach out to people in need. Du Plessis (29) was crowned Mr South Africa in 2015/16, while he was completing his final year for his LLB degree at the University of Pretoria.

Mr du Plessis said he had always had a desire to make a difference in the lives of the South African people and entered the competition to help him do so. He added that the Mr South Africa title afforded him the opportunity to travel and meet South Africans, that he thought he would never meet. 'The people I have met through my time as Mr South Africa, have now become my clients in my career as an attorney, for that I am so thankful,' Mr du Plessis said.

Johannesburg attorney and former Mr South Africa, Armand du Plessis, has put his modelling career on hold to give his full attention to his legal career.

Mr du Plessis was admitted as an attorney in July and is currently working at Wynand du Plessis Attorneys. He said he was currently putting his modelling career on hold to give his full attention to the legal profession. He added that he was studying towards his LLM degree specialising in Labour Law through the Nelson Mandela University. 'I have always wanted to make a difference in other people's lives, for a while I have done so though my title and the Mr South Africa platform, but I now believe that I am making a difference in other people's lives through my career as an attorney,' Mr du Plessis added.

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By Brian Agar

Maintenance of common property in sectional title schemes

This article takes a critical look at recent legislation regarding the maintenance of common property in sectional title schemes. It draws attention to some faults and offers practical solutions. The words 'maintenance' and 'maintain' will be used for 'maintenance, repair and replacement' and the equivalent verbs. The article also takes a brief look at 'safety'.

The Sectional Titles Schemes Management Act

The Sectional Titles Schemes Management Act 8 of 2011 (the Act) took effect on 7 October 2016. This legislation repealed previous laws, which required a body corporate to maintain common property, essentially the land and all improvements other than the owners' sections shown on the sectional plans. At the same time it introduced a new provision, which required a body corporate to establish a reserve fund in addition to the administrative fund 'to cover the cost of future maintenance and repair of common property' (see s 3(1)(*b*) of the Act).

Major maintenance and maintenance plan

The Act gives no further details of the reserve fund. It was left to the regulations, which includes a new set of Management Rules to work out. Management r 22 requires a body corporate to prepare a maintenance plan for 'major capital items' over the next ten years. The plan is to be tabled at each annual general meeting (AGM) and owners are required to approve contributions to the reserve fund.

Prescribed contributions to reserve fund

Section 3(1)(*b*) of the Act provides for minimum amounts to be paid to the reserve fund as prescribed by the Minister of Human Settlements. Regulation 2 sets up a formula for this but this formula is immediately contradicted by another formula in Management r 22.2. The first formula will be referred to as 'formula A' and, the second, as 'formula B'. Which formula applies?

Formula A is complicated, starting with a contribution of 15% of the total budget for the administrative fund for the current financial year. Thereafter, it depends solely on the amount of money held in the reserve fund at the end of the previous financial year. Contributions vary between zero and top out at the equivalent to be spent on ordinary maintenance as budgeted for the administrative fund. Formula A takes no account of the estimated costs of major capital items and can have no relevance whatsoever to budgeted amounts for the administrative fund. The formula is arbitrary, impracticable, vague and embarrassing.

Formula B, in contrast, is unduly cryptic. It bases the minimum annual contributions on '(estimated cost minus past contributions) divided by expected life'. This is simple to apply and provides a business-like result. This should be the preferred formula employed.

Constraints on imposition of contributions

Attention must be given to two constraints against the imposition of prescribed contributions.

Firstly, the proposed annual contributions to the reserve fund are voted on by owners at the AGM. If the majority of the owners do not accept or cannot afford the amounts to be contributed there is nothing that can be done to enforce payment. Trustees who have done their best to introduce a budget will have discharged their fiduciary responsibility. As Schutz JA in *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* [2003] 2 All SA 179 (SCA) noted:

'Again ignoring the legal technicalities of how a sectional title scheme is structured, the substance of the matter is that the body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say.'

Secondly, while schemes registered after 7 October 2016 must observe the Act and its Regulations, schemes registered under the Sectional Tiles Act 95 of 1986 retain most of their Management Rules and these do not require a maintenance plan. See s 10(12) of the Act, which states:

'Any rules made under the Sectional Titles Act are deemed to have been made under this Act'.

It is noteworthy that the Act did not attempt to integrate old and new Management Rules, as was the case in s 60(8) of the Sectional Tiles Act. There is, however, an alternative view in the legal profession that the old rules remain in force except to the extent that they are irreconcilable with the new, and that old rules are also supplemented by new rules not previously existing. This clashes head on with s 10(12) of the Act.

Trustees dilemma

Schemes registered under the Sectional Tiles Act (and these probably make up by far the majority) are thus not legally obliged to prepare a maintenance plan. At the same time their trustees are faced with a dilemma by the commands of the Act to establish a reserve fund for future maintenance. I submit that trustees should establish a reserve fund and draw up an inventory of major capital items, which may require maintenance within a ten-year cycle. This should be submitted with an approximate estimate of costs at each AGM and it should be left to the owners to decide if and how much funds should be set aside. If they do not do so the ill of the body corporate will be their ill.

Major capital items

'Major capital item' is defined in Management r 2(l)(i) of the Act. It mentions 20 items and also includes 'any other community and recreational facilities'. The definition applies to almost everything that may need to be maintained. It makes each of these items a 'major capital item', whereas that may not be the case. An example is 'carpeting and furnishings'. The definition is unduly ambitious and misleading. There is also one glaring omission, namely, the replacement of external doors and windows. This is discussed below.

The demands of Management r 22(1) are also unduly onerous on trustee responsibility and on the pockets of the owners. Trustees must report on the present condition and state of repair of those items, the time when those repairs or replacements will take place, the estimated costs, and the expected life of repaired or replaced items. Much of this information will require professional assistance and will come at a cost, which certain schemes will not be able to afford. When these laws were drawn up the South African economy was in better shape than it is now. A lot of first entry owners bought into sectional title schemes. It is now self-evident that many of these buyers had not anticipated tougher times and escalating maintenance costs. Levy payments fall into arrears, buildings fall into disrepair and administration is no panacea. The unusually idealistic and unrealistic provisions in the Act should be administered sympathetically and circumspectly. In

practice major capital items in the report should be restricted and estimated costs approximated. The most important aspect of this legislation is to bring to the attention of owners the need to make provision for the future.

Maintenance of closures

External doors, windows and other closures of sections, present borderline responsibility for maintenance between owners and a body corporate. Are they common property, owners' property or both? The issues have never been clearly dealt with. A half-baked amendment to s 5(5)(*a*) of the Sectional Titles Act 95 of 1986 (pertaining to the boundaries of a section) left questions unanswered.

The Act needs to be repaired. Whether the owners or the body corporate does the maintenance is irrelevant, because the owners end up paying. On balance it would be preferable for the body corporate to do so. Prejudice creeps into this maintenance, where it benefits only a segment of owners, such as the 50% or so who own lock up garages, the doors of which need maintenance. The answer is to allow the body corporate to impose selective special levies where the maintenance or any expense, for that matter, does not apply universally.

Safety of common property

The horrific fire in Grenfell Tower in London a year ago gutted a high rise residential building, which was apparently well maintained. It seems the fire was caused accidentally and that it spread to external cladding on the building that was unsafe. This illustrates that while safety is usually bound up with maintenance, there are occasions where this is not so. The subject is broad and I have only dealt with it incidentally and briefly.

The often-overlooked s 3(1)(*p*) of the Act obliges a body corporate 'to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property.'

This does not go far enough. The word 'safety' should find a way into the Act either in this section or in s 3(1)(*l*) in conjunction with 'maintenance'. It is also disturbing to note that prescribed conduct in r 6, which regulates the storage of flammable materials, does not apply to gas kept for domestic purposes. This is not consistent with current safety regulations, which limit the capacity of a gas cylinder stored in residences.

Brian Agar *BA (UCT) LLB (UKZN)* **is an attorney and consultant to John Hudson & Company in Durban.** ❑

By Joel Zinhumwe

The value of continuing personal development of legal practitioners

It is imperative to state that personal development is a personal responsibility. It takes an individual to cultivate a seed of self-driven goals and ambitions in order to grow and adapt to an ever-changing environment. Continuing personal development is not merely about the accumulation of continuing personal development points and ensuring that one's membership is secured in any profession. It is also about progressive personal advancement and internal growth resulting in outstanding professionals in the legal industry. All legal practitioners want their firms to be successful, but only a few are willing to invest the necessary time for ongoing personal development to attain their goals. Making the commitment to grow one's personal development is the first step in the journey to personal fulfilment.

Personal development can be defined as an 'ongoing process of self-improvement either in your career, in your education, in your personal life, or in all these areas. It is about setting goals for yourself and putting plans in place to reach those goals' (Lungiswa Nyatyowa '4 reasons why personal development should be a priority' (www.oxbridgeacademy.edu.za, accessed 28-8-2018)). Personal development is a way to better understand yourself and your –

- unique personality and potential;
- strengths and weaknesses;
- aspirations; and
- talents to become an improved version of yourself.

Personal development applies to everyone, including professionals, which includes the legal profession. As important as it is for practising firms to ensure that the candidate legal practitioners are mentored and guided through the process of their articles, the onus is on the candidate legal practitioners to have the inner will to learn and better themselves. The candidate legal practitioner should drive the process of learning and ensure that they get the most out of their mentors and role models. The same applies to new and existing legal practitioners. In a market filled with legal practitioners with the same academic and professional qualifications, it takes the willingness of legal practitioners to continue learning and improve their skills, namely, people management skills, business management skills and so on. This will determine the difference between success and failure of legal practitioners when compared to counterparts in the industry. In other words, if you do not continue to learn new things, you will become out-dated.

Legal practitioners should take advantage of all the resources available to them to improve themselves and their firms. The Attorneys Fidelity Fund (AFF) has introduced a Compliance Support Programme, currently available to new legal practitioners in the Free State and KwaZulu-Natal Provinces. This programme aims to equip new legal practitioners with knowledge … ensure that they have the necessary systems and processes in place for their firms. It also helps legal practitioners to have the understanding and appreciation of the preparation of trust accounting records. With such programmes in place, the onus is on new legal practitioners to take full advantage of the opportunity and improve themselves. Legal practitioners are free to contact the Practitioner Support Team at the AFF to seek the guidance and knowledge about any challenges that they may be facing.

Many benefits that can be derived from engaging in personal development and the website for Coaching Positive Performance (www.coachingpositiveperformance.com, accessed 28/8/2018) listed six core benefits of personal development mindset in detail as follows:

1 'Self-awareness'

Personal development begins with self-awareness. As a legal practitioner you get to know and understand who you really are by your values, beliefs and the purpose you wish to pursue. True fulfilment comes from chasing own goals and objectives. When you are chasing your own goals, there is as much pleasure to be derived from the journey as there is to be derived from reaching your destination. Self-awareness is the first fundamental step in the personal development process.

'If you are not committed to your own personal development and, you lack self-awareness [and] you just give [up on] every problem you see. But when you are aware, you use the power of contrast to determine areas for personal development which will help you improve your life.'

2 'A sense of direction'

As a legal practitioner, '[w]hen you have a clear sense of direction, you can eliminate anything [that] does not take you in that direction. When you have done that, you can use the 80/20 principle to identify the vital few things which [will] take you in that direction with the greatest speed and least effort. … Personal development and a sense of direction allows you to shift your focus from quantity to quality.'

3 'Improved focus and effectiveness'

'Improved focus and effectiveness comes with knowing and playing to your strengths. One of the biggest obstacles to [face] is distraction. Distraction mostly happens because you don't see the great difference between the benefit you will derive from the activity you should be doing and the one you are distracting yourself with. Therefore, you work better when there is a deadline looming [namely] the benefit of meeting the deadline becomes much clearer and the problems caused by the distraction become just as apparent.

Being committed to personal development helps you to become more focused. It helps you to resist distractions without needing to have deadlines constantly looming. Because having too many deadlines can lead to too much pressure and stress. … When you see each task, project and activity for what it is [namely] a step along a continuous journey, you feel less desire to be distracted.'

4 'More motivation'

'Once you accept that personal development is a continuous journey and, you commit to that journey [as a legal practitioner] you realise that each day you will become a little clearer about what you want. As you become clearer about what you want, you start to see how achieving your goal will improve your life. You can visualise the benefits you will experience. This is what builds the will to accomplish the goal. This is where your most powerful motivation comes from.'

5 'Greater resilience'

'There will be tough times in life. When these tough times occur, you need to have the skills and attributes to deal effectively with them. Personal development cannot prevent bad things from occurring, but it will help you deal with them when they do. You will have greater confidence, resilience, personal and interpersonal skills to cope with any eventuality.

…

When you understand personal development, you learn that you can change just about any circumstance in your life. If you can't change the circumstance, you can change your attitude towards the experience which makes it less unpleasant. Knowing all this allows you to stay calm, composed and in control when a crisis strikes. You can then determine the best course of action to take.'

6 'More fulfilling relationships'

'When you improve your personal development, you are better able to see which relationships are worth investing in and which need to be cut loose. You also develop the skills to make the most of those relationships which have the most positive impact on your life. When you give no thought to your personal development, you give little thought to the value of your relationships.

…

When personal development is important to you, you ensure that your friendships are mutually beneficial, enabling both people to be the best they can be. You give as much time as possible to your family, friends and loved ones.'

Conclusion

Personal development involves your transformation as a person, which means becoming the best you can be in reaching your goals and your potential. When you become a better person – than you were yesterday – your life and its circumstances improve. This is usually attained by looking internally and then changing the way you act externally.

Joel Zinhumwe *(FP) SA Bcompt (Hons) Accounting Science/CTA (Unisa) BCom (Hons) Accounting (MSU)* is a Practitioner Support Supervisor at the Attorneys Fidelity Fund in Centurion.

By Kgomotso Ramotsho

Apps that help legal practitioners

The Internet is one of the instruments that has taken over the world as technology continues to evolve. Like many other professions, the legal profession and legal practitioners, must change with the times. New innovations, new features and new functions in a small gadget, such as a smartphone, can make it more than just a device to speak on. It can change the smartphone into a powerful and useful device.

With only a click on a smartphone, one can do many things on it, such as sharing or accessing information quickly. One of the exciting features found on smartphones are apps (applications). With the right app one can get information quickly and easily, as well as and many other things one may require.

Mobile apps provide faster access to information – instead of having to use mobile web browsing. Legal practitioners can download apps that will enable them to access information faster and more easily. There are apps that can make the work of a legal practitioner much easier. Below is a list of apps to assist legal practitioners.

- ***De Rebus*** is updated monthly with all the latest articles and content from all legal sectors. The archive goes back to 2012 and the app is free to download.
- **Saflii** is an app with all the latest judgments from the African Continent. The app is free to download.
- **Legal Talk SA** is an app by a group who focuses on South African law. The platform is an archive of most of the articles and files written and posted for easy access per category.
- **SA Labour Guide** is a guide to all the labour law in South Africa. This app is only available on Android.
- **Case Law Journal** offers latest judgments consisting of all reportable judgments of the Supreme Court and the High Courts of the state along with headnotes.
- **Sabinet** provides current NetLaw users with access to South African Acts.
- **Lexis Mobile** is a practical and convenient way to gain access to loose-leaf content on the go. The app allows for users to carry and reference loose-leaf content both on and offline.
- Visit the *De Rebus* website for all the links to the above mentioned apps.
- See also Roy Bregman 'Must-have apps for iPads and other devices' 2013 (March) *DR* 19.

Kgomotso Ramotsho *Cert Journ (Boston) Cert Photography (Vega)* is the news reporter at *De Rebus*.

Legalisation and Apostillisation: *A guide for the authentication of public documents for use abroad*

Picture source: Gallo Images/Getty

By
Riaan
de Jager

A large number of South Africans regularly travel overseas, either temporarily or on a permanent basis where they will have to produce various public documents abroad. This is required in a multitude of cross-border situations, such as –

- international marriages and relocations;
- applications for study;
- residency or citizenship abroad;
- intercountry adoption procedures;
- international business transactions and foreign investment procedures; and
- foreign legal proceedings, etcetera.

These types of public documents are essentially documents executed by an authority or a person acting in an official capacity. They thus require authentication before they will be accepted in the country of destination. The purpose of this article

is to explain what the authentication of public documents entails and to clarify when and how such documents need to be legalised or apostillised. It is important to note that I will only refer here to the authentication of public documents in the Republic of South Africa (SA) for use outside of SA and not *vice versa*.

Authentication

In SA a public document may generally be produced and accepted without the need for its origin to be verified. This is based on the common law maxim *acta probant sese ipsa*, which means 'documents prove themselves'. This confirms the principle that the origin of the document lies in the document itself without the need for additional verification of its origin. When a public document is produced abroad, however, its origin may require verification. It is unfair to require the person who receives the document to judge the authenticity of the document merely on face value, as the recipient may not be familiar with the identity or official capacity of the person signing the document, or the identity of the authority whose seal and/or stamp it bears. As a result, states require that the origin of a foreign public document must be certified by an official who is familiar with the document. It is against that background that the procedure known as 'legalisation' was developed.

Authentication generally refers to the process of verifying or 'authenticating' the origin of a public document. It is worth noting that 'authentication' is defined in r 63(1) of the Uniform Rules of Court as the verification of any signature on a document.

It seems that the terms 'authentication' and 'legalisation' are used synonymously or interchangeably and are both utilised to refer to the apostillisation process as well. I submit, however, that authentication is the overarching act of verification, which could be executed by either legalising the document or by apostillising it. As will be explained in more detail below, public documents need to be legalised if either the state where the document originates (ie, the state of origin) or the state where it has to be produced (ie, the state of destination) are not contracting states of the Apostille Convention. If both these states, on the other hand, have either ratified or acceded to the Apostille Convention, the document will have to be apostillised.

Legalisation

Legalisation describes the procedures whereby the signature, seal and/or stamp on a public document is certified as authentic by a series of public officials in SA along a 'chain' to a point where the ultimate authentication is readily recognised by an official of the state of destination and can be given legal effect there.

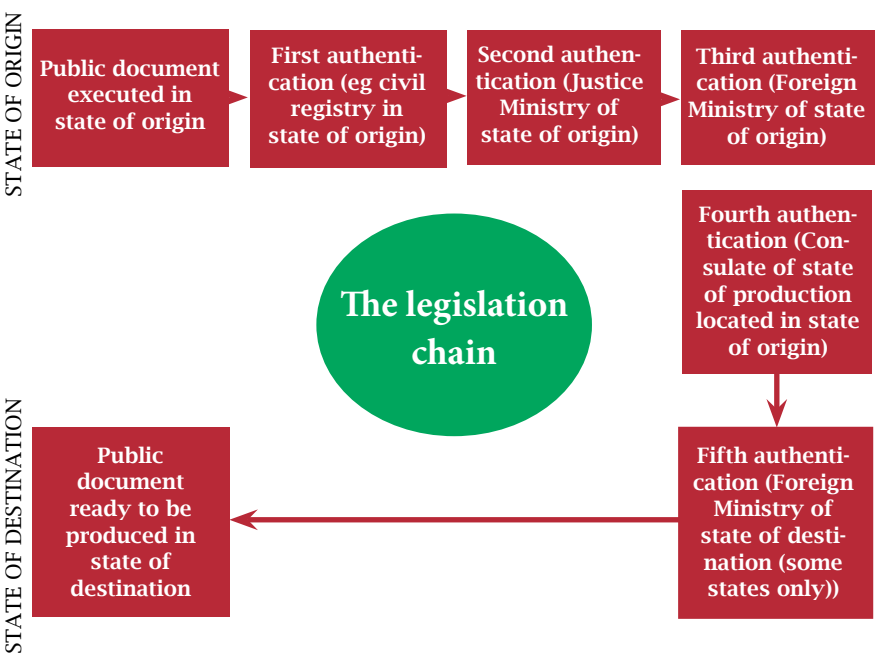

Figure 1 (© Apostille Handbook)

As a practical matter, diplomatic and consular missions of the state of destination located in SA or accredited to the Republic of SA, as the state of origin from which a public document emanates, are ideally situated to facilitate this process. However, such missions do not maintain samples of the signatures, seals and/or stamps of every authority or public official in SA. As a result, an intermediate authentication between the authority or public official that executed the public document in SA and the mission is often required. In most cases, this involves an authentication by the Department of International Relations and Cooperation (DIRCO) and, in particular, its Chief Directorate: Consular Services, who will attach a 'Certificate of Authentication' to the public documents.

Depending on the law of the state of destination, a series of authentications may be required before the document can be presented to the mission for authentication. Then, depending on the law of the state of destination, the seal and/or stamp of the mission may be recognised directly by the official in that state, or may need to be presented to the Ministry of Foreign Affairs of that state first for a final authentication.

It is evident that, while differences exist among states, the legalisation 'chain' typically involves a number of links that results in a cumbersome, time-consuming and costly process for members of the public who have to produce the relevant documents in the state of destination.

As stated above, a Certificate of Authentication is attached to the public document when a public document is legalised to verify the origin thereof.

I will explain the process by using the following practical example:

Person X intends to relocate to the United Arab Emirates (UAE) and is required by the authorities there to provide proof of their marital status. Since X is divorced, the public document that must be submitted is the divorce order.

- **Step 1:** Establish whether the divorce order needs to be legalised or apostillised. Since the UAE is not a contracting state of the Apostille Convention, X's divorce order must be authenticated by way of legalisation.
- **Step 2:** X must contact the relevant division of the High Court where the divorce was granted directly and make the necessary arrangements for a current Registrar or Assistant Registrar of that Division to sign and stamp the divorce order.
- **Step 3:** The signed and stamped divorce order must be submitted to the Chief Directorate: Consular Services at DIRCO in order for the Registrar or Assistant Registrar's signature and stamp to be authenticated. A Certificate of Authentication will be placed on top of the divorce order where after it will be bound by a green ribbon, sealed and signed.
- **Step 4:** The authenticated document must be submitted to the Embassy of the UAE in Pretoria for the signature and stamp of the DIRCO official to be authenticated.
- In some countries a **fifth step** is required where the signature of the foreign

diplomat in Pretoria needs to be authenticated by the Ministry of Foreign Affairs of that state.

The process can be as shown in figure 1 on the previous page.

Apostillisation

Since the legalisation process was increasingly seen as a cause of inconvenience for persons and businesses needing to use public documents from one state in situations or transactions taking place in other states, the Council of Europe raised the need for a convention early in the 1950s.

The Hague Conference on Private International Law (HC) then became involved. The HC is a permanent intergovernmental organisation situated in The Hague, Kingdom of the Netherlands, whose purpose it is to work for the progressive unification of the rules of private international law. The HC regularly sets up special commissions that are convened by its secretary-general to develop and negotiate new conventions, known as 'Hague Conventions', or to review the practical operation of existing conventions. A special commission is composed of experts designated by members of the HC and by contracting states to a convention. It may also be attended by representatives of other non-member states and relevant international organisations in an observer capacity.

The HC 'decided to develop a convention that would facilitate the authentication of public documents to be produced abroad' (*Apostille Handbook: A handbook on the practical operations of the Apostille Convention* (The Netherlands: The Hague 2013) at I). The final text thereof was approved at the Ninth Session of the HC on 26 October 1960. The Apostille Convention was first signed on 5 October 1961 – hence the date in its full title: 'The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.' In accordance with art 11(1) thereof, it entered into force on 21 January 1965, 60 days after the deposit of the third instrument of ratification.

'The Apostille Convention is [currently] the most widely ratified and acceded to of all the conventions adopted under the auspices of the Hague Convention. It is [currently] in force in over 100 States from all major regions representing all major legal systems of the world, making it one of the most successful international treaties in the area of international legal and administrative co-operation' (Apostille Handbook (op cit) at 1). A list of the contracting states of the Apostille Convention is obtainable on the website of the HC at www.hcch.net under the Apostille Section.

'With the rise in cross-border movements and activities as a result of globalisation, the Apostille Convention is expected to continue to grow' (*Apostille Handbook* (*op cit*) at 2). South Africa acceded to the Apostille Convention on 3 August 1994 and it entered into force on 30 April 1995 and thus became a contracting state thereof. It only became a full member of the HC on 14 February 2002.

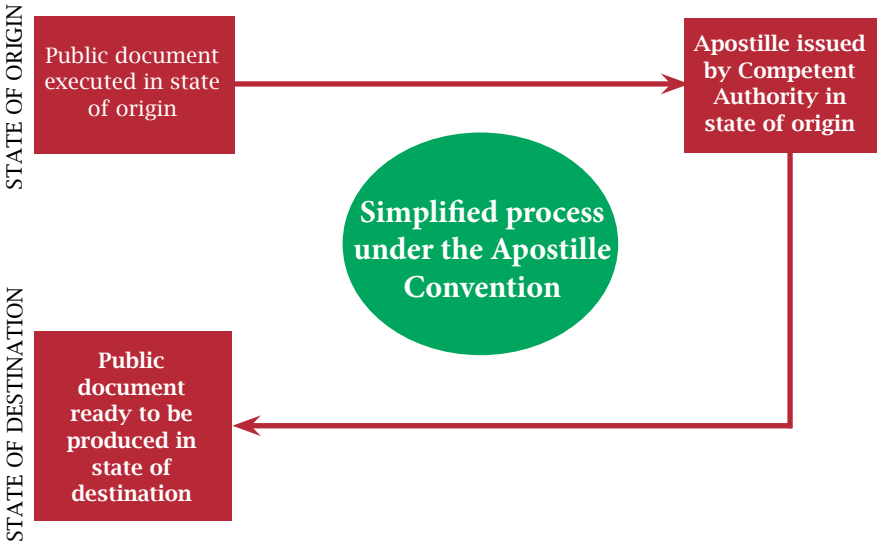

Figure 2 (© Apostille Handbook)

The purpose of 'the Apostille Convention abolishes the legalisation process and replaces it with a single formality: The issuance of an authentication certificate, called an "Apostille", by an authority designated by the State of origin called the "Competent Authority"' (*Apostille Handbook* (*op cit*) at 5). In SA the following has been designated as competent authorities for purposes of the Apostille Convention: Any magistrate or additional magistrate; any registrar or assistant registrar of the High Court and the Chief Directorate: Consular Services at DIRCO.

Again, I will explain the apostillisation process by using the same facts as before, except that Person X will now need to produce the divorce order in Kiev, the capital of Ukraine.

- **Step 1:** Establish whether the divorce order needs to be legalised or apostillised. Since the Ukraine is a contracting state of the Apostille Convention, the divorce decree only needs to be apostillised.
- **Step 2:** With the Registrar or Deputy Registrar of the High Court being a designated competent authority, the Registrar or Deputy Registrar can attach an Apostille to the divorce order by way of a pink ribbon. The public document is now sufficiently authenticated for production thereof in Kiev.

The simplified process established by the Apostille Convention can be illustrated in figure 2 above.

The Apostille Convention simultaneously serves and upholds the same important end result of legalisation: The authentication of the origin of a public document executed in one state and to be used in another state. By introducing a simplified authentication process, the convention facilitates the use of public documents abroad.

The *Apostille Handbook* (*op cit*) is designed to assist competent authorities in performing their functions under the Apostille Convention and to address issues that arise in the contemporary operation thereof.

Role of DIRCO

The Chief Directorate: Consular Services at DIRCO is able to authenticate public documents executed within SA for use abroad by means of an Apostille or a Certificate of Authentication. It can also provide clients with guidelines to obtain the correct signatures or documents if documents submitted are incorrect or incomplete. It is, however, important to note that the document that needs to be authenticated should be determined by clients themselves, since DIRCO cannot advise them which documents they need to submit for their particular purposes in the states of destination. More information in this respect can be obtained on DIRCO's website at www.dirco.gov.za.

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The rescission of divorce orders: *A note of caution to courts*

By
James D
Lekhuleni

There is no doubt that the rescission and variation of divorce orders in our courts has not been easy. One important question that our courts have grappled with is whether or not a court can rescind a divorce order, which has been granted in default. This question has been a bone of contention in the High Courts and recently in the regional courts.

This article briefly investigates the manner in which our courts and in particular, the High Court has dealt with these questions and will explore the principles that will serve as a guide for the judiciary and the wider legal fraternity in dealing with applications of this nature. There is a plethora of cases on this topic decided by the various High Courts. However, a discussion of all those cases goes beyond the scope of this article.

Can a divorce order be rescinded?

In common law, an order of the court, once pronounced, is final and immutable. 'The guiding principle of the common law is certainty of judgments' (see *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) at para 4). Once an order is pronounced it may not, thereafter, be altered by the court that granted it. The presiding officer becomes *functus officio* and may not ordinarily vary or rescind their own judgment (*Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)). That is a function of the court of appeal.

However, there are exceptions to the

immutability of judgments (see the *Colyn* case (*op cit*)). First, after evidence has been led and the merits of the dispute have been determined, rescission is permissible in limited cases of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, the rescission of judgment obtained by default can be rescinded – where the applicant can show good cause or good reason – why such an order should be rescinded. Thirdly, a court may correct, alter or supplement its judgment to give content and meaning to its order. In divorce cases, I submit that a fourth exception to the general rule is created by s 8(1) of the Divorce Act 70 of 1979, which deals with custody, guardianship, or access to and maintenance of minor children. Orders in respect of s 8(1) do not assume the character of a final judgment as they are always subject to variation.

The rescission of orders in the magistrate's court is regulated by s 36 of the Magistrates' Courts Act 32 of 1944 (the Act). Section 36(*a*) of the Act, permits a magistrate's court to rescind a judgment granted in default. The procedural requirements are governed by sub rules 49(1) to (6) of the magistrates' courts rules. Rule 49(1) provides that a court may rescind or vary a default judgment on such terms as it may deem fit on good cause shown; or if the court is satisfied that there is good reason to do so. The applicant must provide a reasonable explanation for their default and must show that they have a *bona fide* defence and that the application made was *bona fide* (see *D v D* (GJ) (unreported case no A3079/15, 12-2-2016) (Wepener J and Crutchfield A)). The rescission and variation of orders in the High Court is regulated by r 42 of the Uniform Rules of Court.

The question whether a court can rescind a divorce order where good cause has been shown and restore the *status quo ante* matrimony of the parties, after they have been divorced, has been a grey area in the family law spectra. For example, in the case of *M v M* (FB) (unreported case no 5710/2010, 15-9-2014) (Motloung AJ), the plaintiff and the defendant where divorced in the Free State Division of the High Court. When the divorce order was granted, the defendant (wife) was in default. She was served with summons and she did not defend. A final order of divorce was granted in favour of her husband, including a prayer for forfeiture, as well as custody of their minor child. Aggrieved by the order, she applied for the rescission of the divorce order, the order for forfeiture, as well as the order granting custody of their minor child to her husband. It was argued on behalf of the respondent that after the decree of divorce was granted, he remarried and that a rescission of the court order will have far-reaching and complicating results.

The court considered the application and found that the applicant had shown good cause for the rescission of the order. However, the court found that both parties had agreed on the irretrievable breakdown of the marriage. The court considered the potential prejudice that would be suffered by the respondent's new spouse if the decree of divorce was interfered with. In the view of the court, if the divorce order was set aside, it would have the effect of setting aside the new marriage of the respondent. Consequently, the court rescinded the order dealing with patrimonial consequences and custody of the minor child. The court left the final order of divorce intact.

In *JJ v KJ and Another* (FB) (unreported case no 5035/2012, 11-7-2013) (Mhlambi AJ), the applicant sought an order for the rescission of the divorce order, which was granted in his absence. He wanted to contest the divorce and in particular the rights of primary care and residence of their minor children. He admitted that the marriage between them had broken down irretrievably, but denied the reasons advanced by his wife. After considering the facts of the case, the arguments of both parties and the law the court found that the applicant gave a reasonable explanation of him default and granted the rescission of the divorce order, as well as the ancillary orders. The state of matrimony of the parties was re-established as the final divorce order was set aside.

In *D v D*, the respondent (husband) issued summons for divorce against his wife (appellant) in the regional court. The appellant defended the matter and filed a plea and counterclaim. When the matter was enrolled for trial, the appellant failed to attend court as she had prior trip arrangements. The attorney for the appellant, who was instructed to apply for a postponement of the matter, went to the wrong court and a final order of divorce was granted in the absence of the appellant. The appellant subsequently applied for the rescission of the divorce order. The regional court refused the appellant's application for rescission.

On appeal to the High Court, the court found that the explanation of default raised by the appellant was sound and reasonable. The court stated that the effect of setting aside the divorce order would, in the eyes of the law, automatically result in the parties returning to a state of matrimony. Moreover, the automatic consequences attendant on a marriage in community of property would operate with immediate effect. The court found that to set aside the divorce between the parties *per se*, and return them to a state of matrimony pursuant to an automatic consequence of the legal process, and, not as a result of a personal choice purposely made by each of them, would be to undermine, even deny, their respective rights of dignity, including their right to privacy. The court eventually rescinded the order dealing with patrimonial consequences and left the decree of divorce intact.

I submit that the decision of the court in this matter and in the case of *M* is preferable. Where the parties have

been divorced, the court should be slow to rescind the divorce order, especially where the parties are *ad idem* that their marriage has broken down irretrievably. Where an application for rescission is sought together with other ancillary orders and good cause is shown, the court should rather consider varying the ancillary orders and leave the decree of divorce intact. A rescission of the divorce order has far-reaching consequences. It has a potential of complicating the lives of the parties on multiple aspects especially where they have been divorced for a long period. It invalidates a marriage, which one spouse might have innocently entered into after the divorce was granted. I submit that the decision in *JJ* (*op cit*) was wrong in rescinding the whole divorce order, as from the affidavits before court, it was clear that both parties wanted a divorce and admitted to the irretrievable break down of their marriage.

Can a regional court vary a divorce order from the High Court?

Section 29(1B)(*a*) of the Act provides that '[a] court for a regional division hearing a matter referred to in paragraph (*a*) [a suit relating to nullity of marriage] shall have the same jurisdiction as any High Court in relation to such matter'. This section makes it clear that the regional courts and the High Courts have concurrent jurisdiction in relation to divorce matters. The question, therefore is, can a regional court vary a divorce order granted in the High Court especially where the parties can no longer afford the costs of litigating in the High Court? The regional court was faced with this question in the case of *Miller v Miller* (WCC) (unreported case no A168/2013, 7-3-2013) (Ndita J). In this case, the parties were divorced by the Western Cape Division of the High Court in Cape Town. A consent paper was signed and incorporated into the final order of divorce. After the matter was finalised, the plaintiff issued summons in the Somerset West Regional Court seeking an order against the defendant for specific performance in terms of the consent paper for the payment of one half of the respondent's annuity. She alleged that she received less of the defendant's retirement annuity than what was agreed on in terms of the consent paper. The regional court dealt with the matter labouring under the impression that it had jurisdiction in terms of s 29(1B)(*a*) of the Act and dismissed the appellant's case, finding among others, that the respondent had not breached the terms of the consent paper.

On appeal to the Western Cape Division of the High Court, the court *mero motu* raised the question whether a regional court had jurisdiction to amend a divorce order of the High Court. The court held that on a closer examination of the papers, the appellant sought a variation, rectification or rescission of the High Court order. The court found that it was not open for the regional court to adjudicate on a matter in respect of which a final pronouncement was made by the High Court. The court found that this is so because even the judge who made the order was *functus officio* and the right of recourse for the appellant was to lodge an appeal against the judgment or order, alternatively, the appellant ought instead to return to the court that made the order to obtain a further order clarifying their rights and or obligations. The court found that the regional court did not have jurisdiction to rectify, vary or set aside an order of the High Court. The appeal was dismissed with costs. The appellant was not satisfied with the decision of the High Court and she applied for leave to appeal to the Supreme Court of Appeal (SCA) (see *Miller v Miller* (SCA) (unreported case no 20865/14, 6-5-2015)). The SCA dismissed the application for leave to appeal on the grounds that there were no reasonable prospects of success and that there was no other compelling reason why the appeal should be heard.

Conclusion

From the above discussion, I submit that South African courts should be slow to rescind final divorce orders unless those orders were obtained through fraudulent means. Regional courts should be careful when approached with applications for rescission of divorce orders. At the same time, I submit that those who draft the applications should bear in mind the fact that the rescission of a divorce order has the potential to complicate the lives of the parties on multiple aspects especially where they have been divorced for a long time. It raises constitutional problems and it infringes on the parties' entrenched rights to dignity, as well as the right to privacy.

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Joint estates: Clarification on the alienation of assets

Picture source: Gallo Images/Getty

By Jerome Veldsman and Roxanne Ker

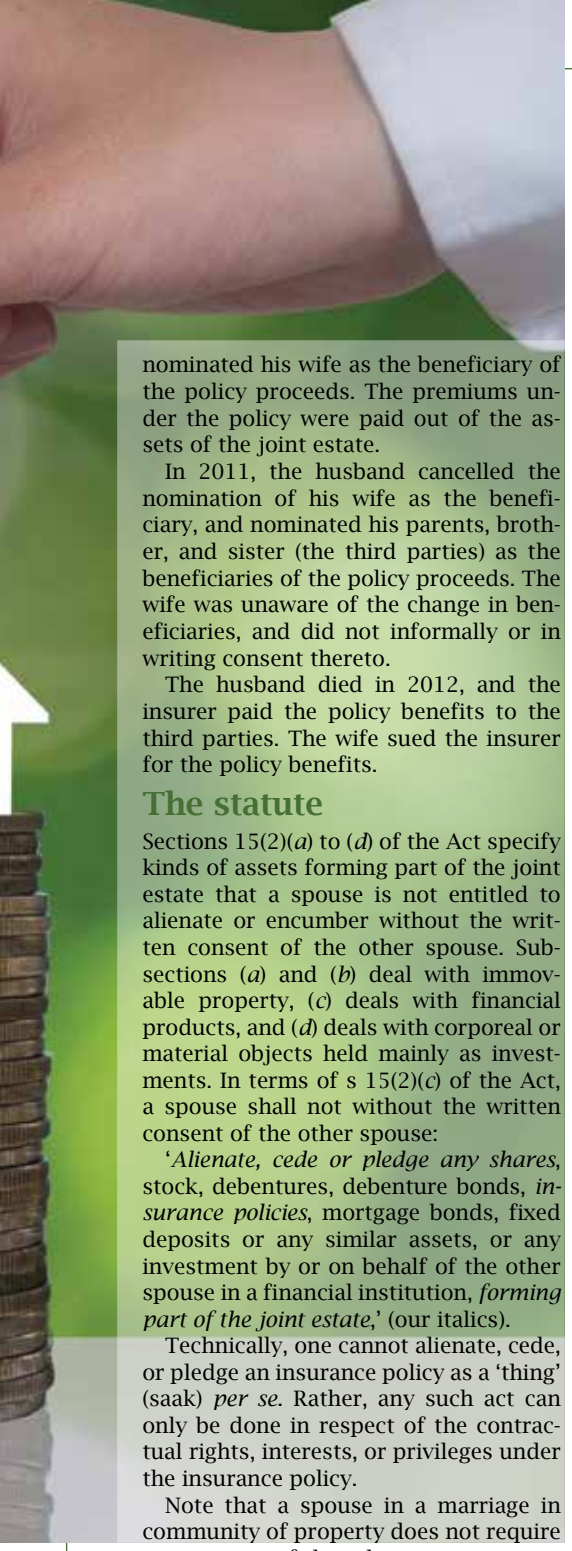
Section 11(1) of the Matrimonial Property Act 88 of 1984 (the Act) repealed the marital power that included the right of a husband in a marriage in community of property to alienate assets forming part of the joint estate to the prejudice of his wife. Section 14 of the Act introduced equal powers of the spouses with regard to the alienation of the assets of the joint estate, subject to s 15 requiring mutual consent for the alienation of the 'big ticket' items (including insurance policies) in the joint estate.

In the insurance industry, especially in respect of risk only life policies (also known as 'term policies'), s 15 of the Act has caused challenges. Ostensibly *Naidoo v Discovery Life Limited and Others* (SCA) (unreported case no 202/2017, 31-5-2018) (Mbha JA) (Shongwe ADP, Willis JA, Hughes and Schippers AJJA concurring) has clarified the position, but the Constitutional Court (CC) may adopt a different approach.

The facts

Mr Naidoo (the husband) and Mrs Naidoo (the wife) were married in community of property in 1996.

In 2002, the husband purchased a term policy, with himself as the life insured. Policy benefits would only be payable on the life of the husband ending. The husband



nominated his wife as the beneficiary of the policy proceeds. The premiums under the policy were paid out of the assets of the joint estate.

In 2011, the husband cancelled the nomination of his wife as the beneficiary, and nominated his parents, brother, and sister (the third parties) as the beneficiaries of the policy proceeds. The wife was unaware of the change in beneficiaries, and did not informally or in writing consent thereto.

The husband died in 2012, and the insurer paid the policy benefits to the third parties. The wife sued the insurer for the policy benefits.

The statute

Sections 15(2)(*a*) to (*d*) of the Act specify kinds of assets forming part of the joint estate that a spouse is not entitled to alienate or encumber without the written consent of the other spouse. Subsections (*a*) and (*b*) deal with immovable property, (*c*) deals with financial products, and (*d*) deals with corporeal or material objects held mainly as investments. In terms of s 15(2)(*c*) of the Act, a spouse shall not without the written consent of the other spouse:

'*Alienate, cede or pledge any shares*, stock, debentures, debenture bonds, *insurance policies*, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, *forming part of the joint estate*,' (our italics).

Technically, one cannot alienate, cede, or pledge an insurance policy as a 'thing' (saak) *per se*. Rather, any such act can only be done in respect of the contractual rights, interests, or privileges under the insurance policy.

Note that a spouse in a marriage in community of property does not require any consent of the other spouse to purchase an insurance policy with assets forming part of the joint estate.

The wife's argument

The wife argued that the aggregate of rights and obligations under the policy vested in the joint estate, which included the right to nominate a beneficiary, receive payment of the policy benefits, and revoke a nominated beneficiary. Therefore, the late husband was not entitled to nominate the third parties as beneficiaries without her written consent.

The court, in a unanimous judgment, disagreed, and held the nomination of the third parties as beneficiaries did not constitute an alienation of the policy within the meaning of s 15(2)(*c*) of the Act.

What went wrong?

In the real world:

- The premiums under the policy were paid out of the assets of the joint estate, but, without the wife's consent, the policy benefits were paid to the third parties. It seems obvious that, from the wife's perspective, she had been impoverished, and this is an oppressive consequence that is inconsistent with the broader operation of s 15.
- Many couples, whatever their exact marital regime, especially with children, purchase term policies: One policy with one spouse as the life insured and the other spouse nominated as the beneficiary, and the other policy with the spouses the other way around. And each spouse regards the rights, interests, or privileges under the policy of which that spouse is the nominated beneficiary as a valuable hedge (an asset) against the adverse financial consequences of the life of the other spouse untimely ending.

The court quoted the famous passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), and ended the quotations with (from para 26):

'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

The court in *Naidoo* considered the purpose of the Act, and concluded (in para 17):

'... it follows that when examining whether a spouse is prohibited in terms of s 15(2)(*c*) of the Act from dealing with impugned property without the written consent of the other spouse, the crucial enquiry is whether such property forms part of the joint estate.'

We submit that the purpose of s 15 is more accurately described in *Visser v Hull and Others* 2010 (1) SA 521 (WCC) at para 5:

'The ambit of s 15 should be interpreted as intended, to protect the one spouse against the illicit selling or alienation of property forming part of the joint estate by the other spouse who does that without the knowledge and/or consent of the innocent spouse.'

The *Visser* case is also consistent with s 15(3) of the Act.

In para 19 of the *Naidoo* case, the court defined an 'asset' as 'property that could be applied to the payment of debts'. We submit that such a narrow definition is inconsistent with South African law in general, and specifically with the broader operation of s 15 of the Act.

The term 'asset' is defined as follows in s 1 of the Tax Administration Act 28 of 2011, which includes:

'(*a*) property of whatever nature, whether movable or immovable, corporeal or incorporeal; and

(*b*) a right or interest of whatever nature to or in the property.'

The term 'property' is defined as follows in s 1 of the Prevention of Organised Crime Act 121 of 1998:

'"property" means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof'.

In *Commissioner for Inland Revenue v Estate Crewe and Another* 1943 AD 656 at 667 'property' is defined as follows:

'One would expect that when the estate of a person is described as consisting of property, what is meant by property is all rights vested in him which have a pecuniary or economic value. Such rights can conveniently be referred to as proprietary rights and they include *jura in rem*, real rights, such as rights of ownership in both immovable and movable property, and also *jura in personam* such as debts and rights of action.'

We submit that all or many of the respective contractual and other rights under the policy constituted 'assets' or 'property'. Notwithstanding the policy proceeds not being payable while the joint estate subsisted –

- the husband retained the contractual right to nominate the beneficiary, which right was a right, interest, or privilege to or in the policy, and had a pecuniary or economic value; and
- while nominated as the beneficiary of the policy benefits, the wife's entitlement to the policy proceeds on the life of the husband ending was a right, interest, or privilege to or in the policy, and had a pecuniary or economic value.

And such rights, interests, or privileges formed part of their joint estate, at least sufficiently so for s 15(2)(*c*) to apply to such rights, interests, or privileges.

Sadly, interrogation of the future consequences of a particular interpretation of a statute is not part of our judicial tradition. Pursuant to the interpretation of s 15(2)(*c*) in the *Naidoo* case, one spouse can legitimately denude the joint estate of value by unilaterally paying premiums for term policies with external parties as beneficiaries from the assets forming part of the joint estate. And if the delinquent spouse pays substantial single lump sum premiums from the joint estate, the innocent spouse will really get a surprise, with no apparent legal recourse.

Through the prism of constitutional norms

'A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights' (*Phumelela Gaming and Leisure Ltd v*

Gründlingh and Others 2007 (6) SA 350 (CC) from para 27).

It is arguable that the wife has suffered arbitrary deprivation of property and/or that her dignity has not been respected and protected.

We submit that a broader definition of an 'asset' in s 15(2)(*c*) of the Act, as argued for above, would be more consistent with constitutional norms.

International law

In *Jones v Skinner* (1835) 5 LJ Ch 87 at 90 (also cited in *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) at 494) it was held:

'It is well known that the word property is the most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have.'

In the *Marriage of Duff* (1977) 15 ALR 476 at para 26, the High Court of Australia approved of *Jones*, and continued:

'This is a definition which commends itself to us as being descriptive of the nature of the concept of "property" to which it is intended that the Family Law Act 1975 should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.'

In *AIG Capital Partners, Inc and Another v The Republic of Kazakhstan (National Bank of Kazakhstan Intervening)* [2005] EWHC 2239 (Comm), the Queen's Bench of England held at para 45:

'So, in my view, "property" will include all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held'.

Conclusion

In terms of s 15(3)(*c*) of the Act, a spouse shall not without the written consent of the other spouse:

'Donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate'.

In the *Naidoo* case, the court did not discuss s 15(3), but it seems arguable that, at the very least, as of the husband nominating the third parties as the beneficiaries of the policy, the joint estate paying the premiums under the policy was in contravention of s 15(3) in that it would be a donation as contemplated in that section.

The majority of marriages in terms of the Act are in community of property. In terms of s 7 of the Recognition of Customary Marriages Act 120 of 1998, s 15 of the Act also applies to monogamous customary marriages, unless the spouses agree to the contrary in an antenuptial contract. A marriage under the Civil Union Act 17 of 2006 can also be in community of property. Accordingly, in millions of South African marriages, the interpretation of s 15(2)(*c*) in the *Naidoo* case creates scope for a delinquent spouse to abuse term policies to the detriment of the innocent spouse. It is hoped that the Legislator, the CC, or the Supreme Court of Appeal will revisit this matter.

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Prosecute or we will!
Is the single prosecuting authority under threat?

By
Clement
Marumoagae

This article evaluates circumstances under which private organisations can institute private prosecutions in South Africa (SA), using AfriForum as a case study.

Section 179 of the Constitution provides that '[t]here is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament'. This presupposes that only the National Prosecuting Authority

(NPA) has the power to prosecute alleged criminals. However, the Criminal Procedure Act 51 of 1977 (CPA) does allow for instances where persons other than the NPA can institute private prosecutions. 'In South African law there are three categories of private prosecutions: private prosecutions by individuals on the basis of a certificate *nolle prosequi* … private prosecutions by statutory bodies; and private prosecutions conferred on individuals by certain legislation' (Jamil Ddamulira Mujuzi 'Private prosecutions and discrimination against juristic persons in South Africa: A comment on *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*' (2015) 15(2) *AHRLJ* 580 at 582). Section 7(1) of the CPA provides four instances where persons other than the NPA can privately prosecute in SA. This section specifically provides that:

'In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence –

(*a*) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;

(*b*) a husband, if the said offence was committed in respect of his wife;

(*c*) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

(*d*) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, [75 of 2008], either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.'

Only persons identified in s 7 can institute private prosecutions when the NPA has declined to prosecute and has granted a certificate *nolle prosequi,* which is basically a declaration that the NPA will no longer pursue the case against the accused. Initially, there was confusion as to whether the phrase 'any private person' included both natural and juristic persons. However, in 1990, *Barclays Zimbabwe Nominees (PVT) Ltd v Black* [1990] 2 All SA 576 (A) at 580 clarified that s 7 applies only to natural persons. In particular, the court held that '[n]or does the wider context of the Act read as a whole contain any indication that the Legislature intended that those words should include an artificial person such as a company'. The word company should be read to include non-governmental organisations, which style themselves as champions of civil rights and constitutionalism in SA.

It is public record that AfriForum has established a private prosecution unit. Discussing the prospects of this unit, Mujuzi argues that:

'[I]t would first have to challenge the constitutionality of section 7 of the Criminal Procedure Act and argue that it unfairly discriminates against juristic persons and is therefore contrary to section 9 of the Constitution. The Constitutional Court declined to deal with this argument in the NSPCA's [National Society for the Prevention of Cruelty to Animals] case. If AfriForum is successful on this front, it will be able to institute private prosecutions when offences are committed against it (when it is the victim of crime)' or 'AfriForum may offer legal support to victims of crime who have a right to institute private prosecutions under section 7 of the Criminal Procedure Act. In this case, their lawyers could offer free legal representation to a victim of crime. Private prosecutions are very expensive and this would be a big aid (of course, in the case of a conviction the private prosecutor may get his money back from the offender or from the Department of Justice) (Jamil Mujuzi 'What the law says about AfriForum's private prosecutions unit' (www.news24.com, accessed 29-8-2018)).

Nonetheless, as the law stands, it appears that AfriForum can only initiate private prosecutions if it purports to assist any of the persons listed in s 7. I submit that the existence of established private prosecution units may directly or indirectly interfere with the constitutional mandate of the NPA by unduly pressurising it to make prosecutorial decisions on the basis that should it fail to prosecute, then such institutions will be readily available to prosecute. I further submit that this interferes with the NPA's mandate of prosecuting without fear, favour and prejudice, despite the challenges faced by the NPA. What is needed is to strengthen the NPA in order to execute its mandate fairly and effectively and not to have civil rights institutions readily available to prosecute if and when the NPA declines to do so.

It is possible for any interested party to challenge the NPA's decision either to prosecute or refuse to prosecute. For example, in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (Corruption Watch as* amicus curiae*)* 2017 (4) BCLR 517 (CC), the NSPCA challenged the constitutionality of s 7(1) of the CPA, because it wished to institute private prosecutions pursuant to the NPA not only refusing to prosecute a matter regarding a ritual involving the slaughtering of camels, but also declining to issue the certificate *nolle prosequi.* The NPA's response was that 'NSPCA could not prosecute under section 7(1)(*a*) of the CPA as it is a juristic person and not a natural person, as required by the section' (para 7). The NSPCA argued that there was no rational basis for treating juristic persons differently to natural persons for the purposes of private prosecutions under s 7 of the CPA (para 10). The Constitutional Court (CC) refused to deal with whether or not s 7(1) was unconstitutional and opted to resolve the matter by looking at the statute that established the NSPCA, which provides:

'In order to perform its functions and to achieve the objects of the Council the board may –

…

(*e*) defend legal proceedings instituted against the Councils and institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the

commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it' (s 6(2)(*e*) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993).

The NSPCA is specifically established by legislation to perform specific functions and it is empowered to legislatively institute legal proceedings – not for its own benefit – but in its fight against animal cruelty. As such, while the above provision did not expressly provide it with the right to institute criminal prosecutions, it was nonetheless, wide enough to be read in such a way, which enabled the NSPCA to institute statutory private prosecutions against people who perpetuate cruelty against animals in terms of s 8 of the CPA. Thus, at para 65, the CC formally 'declared that the National Society for the Prevention of Cruelty to Animals has the statutory power of private prosecution conferred upon it by section 6(2)(*e*) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read with section 8 of the Criminal Procedure Act 51 of 1977'.

The right to institute statutory private prosecutions is well-established in SA. For example, s 46A of the Attorneys Act 53 of 1979 provides that: 'The board of control may, by any person authorised thereto in writing by the chairperson, and upon written notice to the society of the province concerned, institute a private prosecution for the misappropriation or theft of property or trust money, and the provisions of section 8 of the [CPA], and any other law relating to private prosecutions shall apply to such prosecution as if the board of control is a public body'. Equally so, s 33(1)(*a*) – (*b*) of the National Environmental Management Act 107 of 1998 provides that: '(1) Any person may –

(*a*) in the public interest; or

(*b*) in the interest of the protection of the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence'. Unlike, the NSPCA and other institutions, which are legislatively empowered to institute private prosecutions, organisations such as AfriForum do not enjoy that privilege.

The problems surrounding the NPA, which range from failure to prosecute, selective prosecution and political interference are well-documented. These are problems, which may justify organisations, such as AfriForum, establishing their own prosecution units in order to ensure that justice is fairly distributed and everyone who does wrong is brought to book more particularly where the NPA refuses to prosecute. However, such an initiative – no matter how well intentioned – is also vulnerable to an accusation of targeting opponents of such organisations. For instance, AfriForum can be accused of not showing interest in the alleged corruption relating to Steinhoff International and only focussing on well-known public figures (Iavan Pijoos 'PPF to lay criminal charges against Steinhoff's Markus Jooste' (www.news24.com, accessed 29-8-2018)). The AfriForum unit has also announced its intention to institute private prosecution against –

- Grace Mugabe ('Gerrie Nel sets sights on Grace Mugabe' (www.timeslive.co.za, accessed 29-8-2018));
- Duduzane Zuma (Iavan Pijoos 'Duduzane Zuma to be prosecuted by Gerrie Nel' (www.news24.com, accessed 29-8-2018)); and
- Julius Malema (Barry Bateman 'AfriForum plans to prosecute Julius Malema for fraud, corruption' (www.ewn.co.za, accessed 29-8-2018)).

In all these instances, AfriForum's message to the NPA has always been: Prosecute or we will. On its website, AfriForum stated that: 'Gerrie Nel, Head of AfriForum's Private Prosecuting Unit, will privately prosecute Julius Malema and co-accused for fraud and tender corruption should the National Prosecuting Authority (NPA) not yield to AfriForum's demand that the case against Malema, regarding the then [alleged] corrupt activities of the company On-Point Engineering in Limpopo, be reinstated' (Marie Greeff 'Gerrie Nel and AfriForum plan to privately prosecute Malema for corruption' (www.afriforum.co.za, accessed 29-8-2018)). With regard to the Julius Malema case, AfriForum, on its website, makes it clear that it is the complainant in the matter, in that it laid a charge against Mr Malema at the Brooklyn police station in Pretoria on 24 July 2011 (Greeff (*op cit*)).

Since AfriForum is a juristic person, the legal question is: On what basis is it instituting private prosecution against Mr Malema? This organisation does not fit any of the descriptions under s 7, neither can it rely on s 8 of the CPA because there is no statute, which empowers it to institute private prosecutions. This is a clear illustration of the unwarranted pressure that such organisations seek to place on the NPA, which has a potential of interfering with its work. In order to protect SA's democracy, it is ideal that there should be a single prosecuting authority. The establishment of parallel prosecuting authorities has the potential to lead to anarchy wherein political opponents might be targeted for self-serving interests. Another real danger of these parallel institutions if not properly handled, is that they have the potential of raising racial tensions in the country. I submit that our courts should be extra vigilant and guard against being used as tools, which will effectively and constitutionally create parallel prosecuting authorities in SA.

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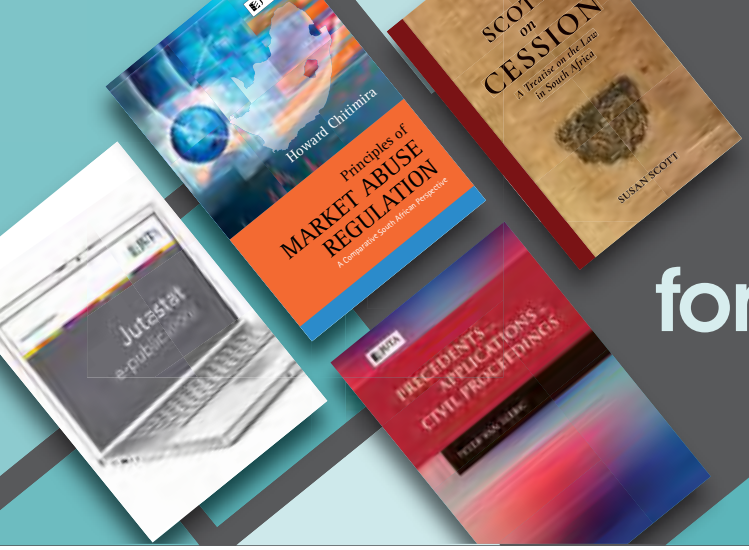
Mr Marumoagae writes in his personal capacity.



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August 2018 (4) South African Law Reports (pp 333 – 658);
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2018 (7) Butterworths Constitutional Law Reports - July (pp 757 – 880)

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

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
KZP: KwaZulu-Natal Division, Pietermaritzburg
LCC: Land Claims Court, Randburg
NWM: North West Division, Mahikeng
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeal

Proposed appeal becoming moot during pending of application in the SCA: Section 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 (the Act) provides that: 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone'. The s 16(2)(*a*)(ii) further provides that: 'Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

The application of the section was dealt with in *John Walker Pools v Consolidated Aone Trade and Invest 6 (Pty) Ltd (in Liquidation) and Another* 2018 (4) SA 433 (SCA) where the first respondent, Consolidated Aone Trade (CAT) sought and was granted an eviction order against the applicant (John Walker Pools). After granting the eviction order the KZP, per Steyn J, denied CAT leave to appeal. Thereafter, in March 2017 the first respondent CAT launched the present application in the SCA seeking leave to appeal the decision of the High Court. While the application was still pending, the lease, which the applicant relied on to occupy the premises expired in September 2017. The hearing of the application, regarding the lease, which had since expired, was held in February 2018. The application was dismissed with costs.

Rogers AJA (Shongwe ADP, Willis, Mocumie JJA and Mothle AJA concurring) held that save in relation to costs a decision on appeal would have no practical effect or result because, at best for the applicant, an appeal court could find that it was entitled to occupy the premises until the end of September 2017, a question which at the hearing of the application for leave to appeal in February 2018 had become academic.

The costs referred to in s 16(2) of the Act to which reference should not be made to determine if the issues to be decided have any practical effect or result, were those incurred in the court against whose decision the party was seeking leave to appeal and not the costs in the appellate court. The section was concerned with the decision of the court *a quo* and the circumstances in which an appeal against the decision of that court could be dismissed without an inquiry into the merits. If the costs incurred in the court *a quo* were very substantial that could constitute exceptional circumstance leading to the conclusion that a reversal of the court's decision would have practical effect. In the present case there were no exceptional circumstances, which made it just for the appellate court to reassess the court order made by the court *a quo* against the applicant.

Regarding the costs incurred in the appellate court it was held that where an appeal or proposed appeal had become moot by the time leave to appeal was first sought, it would generally be appropriate to order that the appellant or would-be appellant should pay the costs since the proposed appeal would have been stillborn from the outset. However, different considerations applied where the appeal or proposed appeal became moot at a later stage. As a general rule litigants and their legal representatives were under a duty where the appeal or proposed appeal became moot during the pending appellate proceedings to contribute to efficient use of judicial resources by making sensible proposals so that an appellate court's intervention was not needed. If a reasonable proposal by one of the parties was rejected by the other, that would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants had to take into account, among other factors, the extent of the costs already incurred; the additional costs that would be incurred if the appellate proceedings were not promptly ended; the size of the appeal record and the likely time it would take an appellate court to form a view on the merits of the moot appeal. There had to be a proper sense of proportion when incurring costs and calling on judicial resources.

Attorneys

Attendance at practical training course may take place before registration of articles: Section 15(1)(*b*)(ivA) of the Attorneys Act 53 of 1979 (the Act) provides that the court shall admit and enrol any person as an attorney if such a person has during or after their term of service under articles or contract of service, attended a training course approved by the provincial law society in which they completed their service under the articles or contract of service. Contrary to the provisions of the section, which requires attendance of a training course during or after service under articles or contract of service, the applicant in *Ex parte Mdyesha* 2018 (4) SA 468 (GP) attended the training course

before commencement, which started in February 2014 while her articles of clerkship started two months later in April 2014. Effectively she did the two concurrently. After completion of everything, namely the practical training course, articles of clerkship and attorneys admission board examination, the question before the court was whether notwithstanding lack of strict compliance with the requirements of the section, her non-compliance could be condoned so that she could be admitted as an attorney. The condonation was granted and Ms Mdyesha was admitted as an attorney.

Makgoka J (Molefe J concurring) held that strict compliance with the peremptory language of the section was not required. To insist on strict compliance with the provisions of the section would mean that the applicant, and many other candidate attorneys in her position, had to repeat attendance of practical training course, an absurdity that could not have been contemplated by the legislature.

The section was clearly peremptory in that a candidate attorney had to attend the legal practical training course during or after the expiry of their articles of clerkship and not before. However, a finding that a legislative provision was peremptory was not the end of the matter. Once it was established that a legislative provision was peremptory and the question arose whether exact compliance therewith was required, the answer was to be found in the purpose of the statutory requirement as ascertained from its language, read in the context of the statute as a whole.

The purpose of the section was, to ensure that candidate attorneys were adequately equipped in the practical aspects of attorneys' work before they were admitted to the profession, which was achieved through serving articles of clerkship and the practical training course. If both were satisfactorily completed, the object of the legislation was achieved despite the fact that the sequence in which they were completed, was not in the order decreed in the section. The sequence in which the two were completed did not have a bearing on the competence of the candidate.

Consumer credit agreements

Right of debtor to pay arrears under a consumer credit agreement and have it reinstated: When the applicant (Duma) failed to meet her commitments in terms of a loan secured by a mortgage bond over her residential property in *Duma v Absa Bank* 2018 (4) SA 463 (GP), the respondent (Absa Bank) obtained summary judgment against her, during which the property was declared executable. In the present application the applicant sought rescission of that judgment. The application was dismissed with costs as the applicant had no basis for seeking rescission of summary judgment that had been properly obtained, there being nothing irregular about the process of service of the notice of set down and enrolment of the application.

Rautenbach AJ held *obiter* that in *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC) the CC concluded that execution of the property meant when the proceeds of the sale were realised. Such interpretation enabled a debtor in respect of a house to pay the arrears up and until that stage. That meant that the agreement, if it was not cancelled, was reinstated by the defendant and the parties were placed in the position they were in before the arrears eventuated, which meant that the debtor could proceed to pay monthly instalments in terms of the bond. In terms of the National Credit Act 34 of 2005 and the *Nkata* case the defendant would be liable for the agreed or taxed costs emanating from the proceedings to obtain judgment in execution against the debtor. The owner of a primary residence not only enjoyed judicial oversight when the property was declared executable, but in fact had the further remedy available to them by paying the arrears before the property was sold in execution.

The court would be paying lip service to the Constitution if it did not in its order either make an order or some note to the effect that, should the arrears be paid before the sale in execution, the parties would be in the position they were before the debtor fell into arrears, provided that a debtor would be liable to pay all the costs incurred by the creditor in terms of the processes it followed to collect the debt. It was the duty of the court, where lay people appeared before it, to advise them of that important right they had which had serious consequences for people affected if they were not so informed.

Contracts

Interpretation of contracts: The facts in the case of *Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd* 2018 (4) SA 358 (SCA) were that Mophela Project (Mophela) bought property with the financial assistance of the Department of Housing of KwaZulu-Natal and used it as an AIDS treatment centre. At a later stage, Mophela sold the property to the respondent (Wade Park) at an auction conducted by appellant (Auction Alliance), the agreement was subject to suspensive condition that the Department of Housing should give written approval and consent to the sale within 30 days. The Department duly provided the consent letter in which it indicated that it had no objection to the sale on condition that the subsidy amount was recovered on transfer. Subsequently Mophela purported to cancel the sale agreement on the ground that the respondent was in default of its financial obligations. The position of the respondent was that the sale agreement remained valid and was not capable of cancellation. Ultimately the sale agreement was cancelled and as a result the respondent sought to recover the commission and deposit, which it paid to the appellant on conclusion of the agreement.

The KZD held, per Olsen J, that the sale contract between Mophela and the respondent was valid and binding and accordingly dismissed the respondent's claim. It was held that the 'condition' contained in the Department's consent letter was not a condition in the true sense but only an 'understanding', that is, the 'basis' of consent that on transfer of the property, it would get its money back. The Full Court of the KZP per Sishi, Seegobin JJ and Masipa AJ upheld the appeal against the High Court decision.

An appeal against the decision of the Full Court was upheld with costs by the SCA. Majiedt JA (Ponnan, Swain, Dambuza JJA and Mothle AJA concurring) held that an important factor in the back-

ground context against which the meaning of the words 'on condition' had to be considered was that the Department wanted its subsidy money back and knew very well that without its consent the sale would not go through. The Department, therefore, furnished the letter of consent to allow the sale to proceed so that it could get its money back. To interpret the words 'on condition' as introducing a conditional consent by the Department, which could be withdrawn should the subsidy amount not be paid once the immovable property was transferred and the purchase price paid would defeat that objective.

A thing did not become a 'condition' merely because it had been given that name. The commercially sensible and reasonable interpretation of the words 'on condition', taking into a court the objective underlying purpose of the relevant clause and having regard to all relevant background facts and circumstances was an 'undertaking' or 'basis upon'. The words did not denote a condition in the true sense of the word for if they did, it would have been a condition incapable of fulfilment. The approach to interpretation of documents was firmly established in the law. It was not sufficient to merely regurgitate the relevant principles and cite the leading authorities without actually applying them. It had to be evident from the interpretive process itself that the principles had been applied. Merely paying lip service to them undermined the entire exercise.

Customary law

Duty of the Supreme Council of a traditional community to consult broadly with the community before taking a major decision: In the case of *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation* [2018] 3 All SA 92 (NWM) the Supreme Council of Royal Bafokeng Nation (RBN) in the North West Province instituted proceedings against the national Minister of Land Affairs in which an order was sought for a declaration that the Bafokeng community was the registered owner of land held by the Minister 'in trust' for the community. That was so as the land in question – consisting of some 60 farms – was registered in the name of the Minister 'in trust for' the RBN. The RBN was a traditional community of some 300 000 people and was recognised as such in terms of the Traditional Leadership and Governance Framework Act 41 of 2003. The Supreme Council was a joint sitting of the Executive Council (elected statutory traditional council) and the Council of *Dikgosana* (hereditary village leaders). The appellant Bafokeng Land Buyers Association and others represented people who claimed that some of the affected land belonged to them in terms of the common law and were accordingly opposed to its transfer to the RBN. The issue was whether the Supreme Council had the power under customary law to take the decision to institute proceedings against the Minister without consulting broadly (the *Kgotha Kgothe* – an all-inclusive consultation process involving all village councils, of which the RBN had 29). The appellants contended that important matters affecting the community as a whole had to go to the general meeting (*Kgotha Kgothe*) as sovereignty resided with the people and not the Supreme Council.

The NWM, per Landman J, held that the Supreme Council did not have the power to take the impugned decision and that the RBN failed to demonstrate that the Supreme Council had that power. That power lay with the Executive Council. As the latter was part of the Supreme Council, the decision it took was considered to be the decision of the Supreme Council duly endorsed by the Council of *Dikgosana*.

An appeal against the decision of the High Court to the Full Court was upheld with costs. Gutta J (Djaje and Kgoele JJ concurring) held that major decisions on fundamental matters such as changes to systems of government and the status of land could only be effected

with the consent of the community. Those values were consistent with the Constitution, the rule of law, *ubuntu* (human kindness) and the right to fair administrative justice. The nature of litigation initiated by the RBN affected land rights of members of the community and the RBN as a whole and was not a routine litigation. When considering the evidence and importance of litigation affecting the traditional community as a whole, which had the potential to divide the nation the probability was that the power to authorise litigation of that nature did not lie with the Supreme Council, whether or not it had other decision-making powers. Accordingly, neither the Executive Council nor the Supreme Council had the power to take the impugned decision without referring the matter to a general meeting. The case concerned the rights of the community and its members to be consulted before litigation was instituted on their behalf in a case, which could have far reaching consequences for the community in respect of land ownership. It was imperative for the community to be consulted before the RBN launched the affected proceedings.

Divorce

No forfeiture of share of accrual or deferment of payment of pension benefits: In *BS v PS* 2018 (4) SA 400 (SCA) the appellant BS (wife) and the respondent PS (husband) were married out of community of property subject to accrual system. After irretrievable breakdown of the marriage the High Court granted a decree of divorce, ordering that the appellant would forfeit 80% of the accrual benefits in the form of the matrimonial home (owned by the respondent), as well as his pension benefits. Furthermore, payment of the appellant's 20% share in the respondent's pension benefits was deferred. An appeal against the decision of the ECG, per Bloem J, was upheld by the SCA with costs.

Swain JA (Lewis, Willis, Mathopo and Mocumie JJA concurring) held that the High Court erred in concluding that the appellant caused the breakdown in the marriage and further erred in concluding that the appellant contributed to a lesser degree in the accrual of the respondent's estate. No forfeiture order should have been granted when sufficient weight was also accorded to the duration of the marriage of approximately 28 years and the evidence that the appellant did not own a home. In addition, no evidence was led on whether the appellant possessed a pension for her old age.

The clear object of the amendment introduced by s 24A of the Government Employees Pension Law, 1996 (the GEPL) was to ensure that the non-member spouse received payment of the amount assigned from the member's pension interest in terms of a decree of divorce without delay and within the statutorily defined periods after the grant of the order. The clear intention of the legislature in enacting s 24A of GEPL was to oust the jurisdiction of a court to grant deferment of satisfaction of an accrual claim in the form of payment of the amount assigned from the member's pension interest in terms of a decree of divorce.

Land reform

Long-term lease versus land restitution claim: In *Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association and Others* [2018] 3 All SA 123 (LCC) the lessor and lessee did not like each other and wanted the lease terminated, albeit for different reasons. That was after the applicant (Eastern Produce Estates) entered into a long-term lease with the South African Development Trust in June 1990 in respect of state-owned land in the Bushbuck Ridge area (in Mpumalanga province). The applicant exercised its right under the lease to renew it for a further period of 15 years, which was to expire in March 2020 after giving notice to all relevant State Departments, the Regional Land Claims Commissioner (the RLCC) and representatives of land claimants. Subsequently and in terms of a settlement agreement between the Minister of Rural Development and Land Reform (the minister) and the first respondent Wales Community the leased property was awarded to the first respondent. The applicant was not aware of the settlement agreement and continued to comply with its obligations in terms of lease agreement only to become aware of such agreement after receiving a letter from the first respondent threatening eviction.

As a result the applicant approached the court for a number of orders including the review and setting aside of decisions to approve transfer of the leased property to the first respondent, as well as a declaratory order that the settlement agreement entered into between the RLCC and the first respondent was null and void to the extent that it purported to settle land claims to the leased property. The first respondent in turn disputed the validity of the lease on several grounds, including one that in terms of the Formalities in Respect of Leases of Land Act 18 of 1969 the principle of *huur gaat voor koop* did not apply to unregistered long-term leases, such as one in the instant case.

The LCC held per Canca AJ that it was not disputed that the attorney representing the first respondent had knowledge of the existence of the lease agreement and that the deponent to the first respondent's various affidavits was present when a representative of the RLCC confirmed that the lease agreement would be transferred to the claimant community and further that the benefits of that lease would be deposited into the first respondent's banking account on transfer of the leased property to it. The lease was binding on the first respondent because it, through its attorney, had knowledge thereof at the time of settlement of the land restitution claim. The

first respondent stepped into the shoes of the state on registration of the property into its name. From that time it became entitled to the rental due under the lease agreement which did not deprive it of any rights. The land restitution claim settlement agreement neither extinguished the applicant's lease in respect of the leased property nor affected its legal rights.

The first respondent and the minister, the second respondent, were ordered to pay costs due to their unsatisfactory conduct in the course of the proceedings.

Pension funds

Curator of a pension fund may only recover a fee that is consistent with the court order appointing them: In *Mostert and Others v Nash and Another* [2018] 3 All SA 1 (SCA) the first appellant (Mostert), a practising attorney, was appointed a curator of the third appellant (Sable Fund), which had been placed under curatorship in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001. The court order appointing Mostert as curator provided in para 9 that the curator would be entitled to periodical remuneration in accordance with the norms of the attorneys' profession as agreed with the Chief Executive Officer (CEO) of the Financial Services Board (FSB), the body that was in charge of financial institutions, such as the third appellant. Thereafter, Mostert and the CEO of the FSB concluded an agreement in terms of which Mostert would be paid as remuneration a percentage of the amount recovered on behalf of the Sable Fund, this being an arrangement in the nature of a contingency fee agreement. The first respondent Nash, a member of Sable Fund, together with accompany under his control, Midmacor, and whose employees were also members of the Sable Fund, approached the High Court for an order declaring the remuneration agreement between the Mostert and the FSB invalid for non-compliance with para 9 of the court order as the agreement was not in accordance with the norms of the attorney's profession. The GP per Tuchten J granted the order sought.

On appeal to the SCA both sides achieved limited success in that the challenged remuneration agreement was held invalid but the request that Mostert be ordered to return money overpaid was dismissed. Each party was ordered to pay own costs of appeal, while the costs order in the High Court was left intact.

Wallis JA (Ponnan, Swain JJA and Pillay AJA concurring) held that an arrangement in terms of which a curator was to be remunerated on a periodical basis in accordance with the norms of the attorney's profession was one under which the attorney was paid a fee calculated at an hourly rate, together with an amount to cover any disbursements. Remuneration of an attorney in accordance with the norms of the attorney's profession was to be understood as a fee calculated on a time basis at an hourly rate. A declaration that the fee agreement was not in accordance with para 9 of the court order and should be set aside did not alter the position that Mostert was properly appointed as curator of the Sable Fund and was entitled to be remunerated for his services. The precise basis on which he was to be remunerated remained to be determined. If an hourly rate was not thought to be appropriate or could not be calculated because records had not been kept of the hours spent on the curatorship, a different basis for remuneration had to be determined between Mostert and the FSB. That did not exclude a fee determined as a percentage of the amounts recovered for the benefit of the Sable Fund, provided that the fee so determined was reasonable, heaving regard to the risks undertaken, the work involved, the uncompensated costs of Mostert and his firm in performing the work and the like. A percentage fee subject to an appropriate cap or sliding scale was a possibility. As a fee arrangement in the instant case would involve a departure from the terms of the court order, it required the sanction of the court.

In a dissenting judgment Willis JA held that the appeal had to be dismissed with costs as the claim for relief sought by the respondent had been lodged way outside the 180-day time limit provided for the Promotion of Administrative Justice Act 3 of 2000. In any event, agreements for contingency fees of the kind in question were not unlawful, even though unsettling questions could arise as to the rate of remuneration and the quantum of fees.

• See law reports 'Attorneys fees' 2017 (Sept) *DR* 40 for the GP judgment and 'Attorneys' 2017 (Dec) *DR* 44.

Refugees

Power of refugee reception officer to extend asylum seeker permit pending judicial review: Section 22(3) of the Refugees Act 130 of 1998 (the Act) provides that 'A Refugee Reception Officer [RRO] may from time to time extend the period for which a permit has been issued in terms of subsection (1)'. In *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) the applicants were asylum seekers, who were denied extension of permits after they exhausted internal remedies of review and appeal against rejection of their applications for permit. They sought extension of permits during the process of judicial view of rejection of their applications. Before the High Court, the applicants sought an order compelling the Acting Manager of Cape Town Refugee Facility, acting on behalf of the RRO, to renew their permit during the period of judicial review application. The High Court held that the RRO had the power and discretion to renew permits during the period of judicial review and accordingly remitted the matter to her. The respondent minister and others appealed against the finding that the RRO had power to extend permits during the judicial review period, while the applicants cross-appealed against remittal of the matter to the Acting Manager. In the main judgment, the SCA upheld the High Court decision. As a result the applicants approached the CC for leave to appeal, while the respondents sought leave to cross-appeal. The court granted leave to appeal and cross-appeal, upheld the appeal with costs and dismissed the cross-appeal.

Reading the main judgment Madlanga J held that the word 'may' as used in s 22(3) of the Act did not grant the RRO any discretion over issuing permits. There was an obligation to extend the permit pending the outcome of a judicial application for refugee status. That interpretation better afforded an asylum seeker constitutional protection while awaiting the outcome of the application. The asylum seeker was in that way not exposed to the possibility of undue disruption of a life of human dignity. The respondents' interpretation of the section exposed asylum seekers to the real risk of *refoulement* (return to the country of origin) in the interim while the outcome of judicial review was pending. Without a temporary permit there was no protection and the asylum seeker was exposed to the risk of return to the country of origin. The principle of *non-refoulement* had an overarching effect that, at the very least, endured until judicial review proceedings had been finalised or it had become plain that none would be instituted.

In a dissenting judgment Jafta J (Kollapen AJ concurring) held that s 22(3) granted the RRO a discretionary power to do two things, namely to extend permits and amend conditions attached to them. As a result the declaration that the RRO had no discretion and, was therefore, obliged to automatically extend every permit on launching of judicial review application could not be supported.

Road Accident Fund claims

Benevolent pay not to be taken into account in calculation of future loss of income: In *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) the appellant (Bee) was injured in

a motor vehicle collision in which he suffered severe injuries, including brain damage which was characterised as severe traumatic brain injury. As a result of the injuries suffered, he instituted a claim for compensation against the respondent Road Accident Fund (RAF). At the trial the merits were conceded, the trial proceeding to determine the amount of compensation, against the background that the appellant and his brother were 50% joint owners of a close corporation, the BPW, of which the appellant was the Chief Executive Officer (CEO) and driving force. After the collision the effectiveness of the appellant as a driving force behind BPW was seriously compromised. However, as a family member he retained his title and salary, effectively as a gratuity. The issue was whether that benevolent pay excluded the appellant's claim for loss of future earnings. The High Court awarded an amount in respect of general damages, medical expenses, past and future loss of earnings. The respondent appealed to the Full Court against the amount awarded in respect of past and future loss of earnings where the WCC per Nuku J (Hlophe JP and Steyn J concurring) upheld the appeal. The present matter before the SCA was an appeal against the decision of the Full Court. The appeal was upheld with costs.

Rogers AJA (Mathopo JA, Hughes and Schippers AJJA concurring) held that there was ample evidence, quite apart from the forensic accountants' joint minute, that the appellant's reduced abilities had negatively affected BPW's operations. Because he held a 50% membership of BPW, and because he and his brother shared BPW's nett profits, a decrease in BPW's nett profits would translate into a loss of income for the appellant. If, out of benevolence, an employer allowed an injured employee to return to work and to perform such limited tasks as he was able to do, and continued to pay him a salary, the injured employee was not obliged to deduct such salary when quantifying his loss of earnings. The fact that a 'salary' of the foregoing kind, paid to an injured employee out of benevolence, was recorded in a company's financial records as a salary rather than a donation did not change the position.

On the question of the significance of a joint minute it was held that where, as was the case in the instant matter, the court had directed experts to meet and file a joint minute and where the experts had done so, the joint minute would correctly be understood as limiting the issues on which evidence was needed. If a litigant for any reason did not wish to be bound by the limitation, fair warning had to be given. In the absence of repudiation, that is fair warning, the other litigant was entitled to run the case on the basis that the matters agreed between the experts were not in issue.

In a dissenting judgment Seriti JA held that there was no evidence to show that BPW actually suffered loss of turnover due to the appellant's injuries. The performance of BPW remained almost constant before and post the injuries sustained by the appellant. The sales generated by the appellant both before and after the collision were consistent and he received almost constant payments throughout the relevant period. Therefore, the appellant failed to prove that BPW actually suffered a loss of income due to his injuries and that his patrimony was, as a result, diminished. The appeal could not, therefore, succeed.

Civil procedure – appointment of *curator ad litem* to represent a person in legal proceedings: Rule 57 of the Uniform Rules of Court, which governs appointment of *curators ad litem* provides in r 57(3) that the application shall, as far as possible, be supported by an affidavit by at least one person to whom the patient is well known and containing such facts and information as are within the deponent's own knowledge concerning the patient's mental condition. Furthermore, there shall also be affidavits by at least two medical practitioners, one of whom shall, where practicable, be an alienist, who had conducted recent examinations of the patient with a view to ascertaining and reporting on his mental condition.

In *Ex parte Stoffberg; In re: Xaba v Road Accident Fund and two related matters* [2018] 3 All SA 145 (GP) three applications for appointment of a *curator ad litem* were heard together as they raised similar issues. In two of them, the patients, Xaba and Matshidi, sustained serious mental conditions, which arose out of a motor vehicle collision, in respect of which, they were claiming compensation from the Road Accident Fund (RAF). In the third case, namely *Miambo*, a *curator ad litem* was sought to represent a minor whose parents were still alive, without explanation as to how they were not able to act for her as her natural guardians. Although it appeared from the onset that due to serious head injuries suffered the patients' cases called for appointment of *curator ad litem*, such was not done until an offer of settlement was made conditionally on appointment of a curator. That raised a number of questions regarding, among others, the ability of the patients to give instructions, the validity of contingency fee agreements, the patients' ability to understand the offer of settlement made and giving instruction to accept same.

In the case of *Miambo* the court dismissed the application. The attorneys of record were prohibited from charging a fee and ordered to refund any fee they might have received. The attorneys were ordered to pay counsel's costs *de bonis propriis*. In the other two cases, namely *Xaba* and *Matshidi*, the court ordered the chairperson of the Bar Council of Pretoria Society of Advocates to nominate counsel of sufficient expertise and who had no connection with the patients' attorneys of record, to be appointed as *curator ad litem*.

Haupt AJ held that the manner in which the applicants approached the court gave the impression that the court was expected to act as a rubber stamp and ignore the applicable judgment, r 57 and the practice directives. In the case of *Modiba obo Ruca; In Re Ruca v Road Accident Fund* (unreported case no 12610/2013; 27-1-2014) (Bertelsmann J) the court meticulously evaluated the provisions of r 57, the importance of the independence of *curators ad litem*, the importance of timeously approaching the court in terms of the rule to appoint a curator to investigate and report back to court, the important function of the office of the Master of the High Court, as well as misgivings regarding certain proposed trusts and policies, which sought to circumvent the role of the *curator bonis* and involvement of the office of the Master.

Whether a client had the legal capacity to litigate was a basic and fundamental procedural question an attorney had to consider before continuing with the judicial process. None of the matters in the instant case provided an explanation whether there were indications already at the early stages of the action that the plaintiff could be significantly mentally impaired due to the seriousness of their head and/or brain injuries, an application for appointment of a *curator ad litem* had not been made earlier. It was important that the court be placed in a position to ascertain whether the plaintiffs were able to make rational decisions regarding the litigation that was about to be embarked on and that they understood the issues at the time of instructing the attorney, including considering and accepting settlements. It was trite that an application for appointment of a *curator ad litem* should be sought at the earliest moment after it had become clear that a party might be unable to manage their own affairs.

Evidence – joint minutes of overlapping experts: In *Ntombela v Road Accident Fund* 2018 (4) SA 486 (GJ) the plaintiff (Ntombela) was involved in a motor vehicle collision in which he suffered a mild head injury, a bruised sternum and broken left clav-

icle. As a result he claimed compensation from the defendant Road Accident Fund (RAF), which conceded liability and provided an undertaking for future medical expenses. The questions of general damages and past medical expenses were deferred. The trial proceeded on the issues of past loss of earnings and loss of future earning capacity in respect of both of which the court awarded an amount of R 33 500. The plaintiff was awarded costs of the first day of trial, while the defendant was awarded those of the other three days. The attorneys for both sides were barred from charging their clients any fees relating to industrial psychologist reports and in respect of any joint minute, save that of neurosurgeons. That was so because of the 'scandal of unprofessionalism' by expert professionals.

Sutherland J held that the medico-legal expert witnesses uniformly did not present their joint minutes in accordance with the Gauteng Local Division Practice Manual prescripts. The directive was plain, namely the experts had to tabulate what was agreed, tabulate what was disputed, stating whether the difference of opinion rested on factual findings or opinion and explain why the difference existed. The purpose of the joint minutes was to serve as a tool to clarify the issues for a court by capturing the intellectual input of two experts who interrogated each other's views and laid out for a court what the issue was that had to be decided. To fudge, hedge and generally obfuscate was counter-productive.

The Practice Manual required opposing expert witnesses to meet and reduce their agreements and disagreements to writing and, thereafter, have the minutes signed. In the instant case the preparation of joint minutes was treated as a clerical chore. All the experts communicated by e-mail while one claimed to have had a telephone conversation. Save for the neurosurgeons, every other pair of experts was in default of compliance. Variously, the joint minutes were padded with quotations and other waffle, failed to engage on critical issues while merely stating in circumlocutory terms a difference of view and ignored the counterpart's view without interrogating it.

Wills – fiduciary ownership

Right of ownership of fiduciary terminates automatically on their death: The facts in *Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another* 2018 (4) SA 425 (SCA) were that in terms of a will the testator, bequeathed his farm to his wife, the first respondent Bragge, who was not allowed to dispose of it. The will further provided that on the death of the first respondent ownership would pass to the testator's sons, the second appellant and the second respondent. In terms of a lease agreement the first appellant company, Douglasdale Dairy, carried on its dairy business on the farm. The shareholders of the company were the testator's two sons. Because of a family feud the second respondent was granted a High Court order evicting the first appellant from the farm while the application by the second appellant and the second respondent for intervention in the eviction application was dismissed. While the appeal against the High Court order was pending before the SCA the first respondent died. The issue before the SCA was the effect of the death of the first respondent (the fiduciary) on the appeal. The court dismissed the appeal with no order as to costs.

Davis AJA (Shongwe ADP, Willis, Swain JJA and Hughes AJA concurring) held that once the first respondent (fiduciary) died, ownership passed in undivided shares to the second appellant and the second respondent (fideicommissaries) and hence no obligations were left for the executor to fulfil in this regard. That had the consequence that the order obtained in the court *a quo* by the first respondent was unenforceable and could not have any practical effect. The evictee had become an owner of the property. The executor, being the representative of the estate of the first respondent, no longer had any entitlement to the property. There was not even a lease in existence which the executor could enforce.

The case fell within the scope of s 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013, namely the issue before the SCA, being an order granting the first respondent the right to evict the first appellant from the property, would have no practical effect or result, nor were there any exceptional circumstances, which would justify an appeal. Accordingly, the appeal could and had to be dismissed.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Appeal to the High Court against adjudicator's order made in terms of Community Schemes Ombud Service Act 9 of 2011, application for leave to sell arrested vessel, application to set aside resolution placing company under business rescue, appointment by court of facilitator to help resolve disputes concerning children, compensation for pain and suffering, competing claims for restitution of land rights, damages for unlawful arrest and detention, decisions of private associations such as sporting bodies being reviewable administrative actions, determination of methodology to establish price in terms of Gas Act 48 of 2001, legal effect of charters made in terms of Mineral and Petroleum Resources Development Act 28 of 2002, notice by supplier to consumer before termination of consumer agreement, payment in terms of consumer credit agreement to be made by or on behalf of consumer, removal of claim and counter-claim from magistrates' court to High Court, subpoena of witness during winding-up of company, use of identical affidavits in different cases making applications defective, validity of regulation prohibiting person holding visitor's or medical treatment visa from changing status while in the country and whether creditor or minority shareholder can intervene to oppose winding-up application.

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By
Unathi
Jukuda

Not all restraints of trade fall foul of the Competition Act

Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission (CAC) (unreported case no 155/CACOct2017, 4-5-2018) (Rogers JA) (Davis JP and Boqwana JA concurring)

Restraints of trade have been a contentious issue for competition law. For example, the significant concern about restraints of trade, is the possibility that such arrangements can lead to the creation of a cartel and attract liability for all those involved. In a recent Competition Appeal Court case, the matter of restraints was once again considered with interesting implications for competition law.

In *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission* (CAC) (unreported case no 155/CACOct2017, 4-5-2018) (Rogers JA) (Davis JP and Boqwana JA concurring) the case dealt with a merger transaction where Dawn, which held 49% in a joint-venture company called Sangio, wished to increase its shareholding to 100%. The Competition Commission (the Commission) initially approved the transaction without conditions, however, on investigation, the Commission found that the shareholders' agreement between Dawn and Sangio contained a 'non-compete clause'. The non-compete clause provided that Dawn and its subsidiaries would not manufacture high density polyethylene piping (HDPE) in South Africa (SA) in competition with Sangio, and that the restriction would prevail for as long as Dawn continued to hold shares in Sangio.

The Commission alleged that the clause sought to allocate the market as contemplated in s 4(1)(*b*)(ii) of the Competition Act 89 of 1998 (the Competition Act) by preventing Dawn from entering the relevant market. In essence s 4(1)(*b*)(ii) provides that:

'An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(*b*) …

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services'.

Section 4(1)(*b*), provides for a *per se* prohibition against agreements between competitors to fix prices, divide markets or engage in collusive tendering. Dawn advanced that, if properly characterised, the non-compete clause did not amount to a *per se* prohibition but was rather a restraint in the normal course of a business transaction, intended to protect its underlying investment in Sangio.

The Competition Tribunal (the Tribunal) in considering whether the restraint of trade was reasonable, decided that the restraint was not one of commercial necessity. Other factors that the Tribunal considered when making its decision was the extent of the duration of the non-compete clause, which the Tribunal concluded was too lengthy and that the restraint operated against the buyer (Dawn) as opposed to the seller.

There has been uncertainty in South African competition law as to whether restraints of trade constitute a contravention of the Competition Act. On the one hand, in *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd/Waco International Ltd/CBC Fasteners (Pty) Ltd/Avlock International (Pty) Ltd* (CT) (unreported case no 95/IR/Oct05, 1-2-2006) (N Maniom) the Tribunal found the restraint of trade to be disproportionate, in that it operated against the purchaser in favour of a party that was not a party to the transaction and in addition the restraint was for an extensive duration. On the other hand, in *Replication Technology Group (Pty) Ltd v Gallo Africa Limited* (CT) (unreported case no 92/IR/Sep07, 10-12-2007) (D Lewis) at para 32, the Competition Tribunal found the restraint to be proportionate due to its limited nature.

The Competition Appeal Court in considering the appeal from the Tribunal in the *Dawn* case noted that, in principle, when dealing with cases where the parties to the agreement are potential competitors, the only legal basis on which non-compete clauses can be held not to contravene s 4(1)(*b*)(ii), is if regard is had to the principle of characterisation (at para 28). This principle was succinctly defined in the case of *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) at para 47, wherein the court held that the essential inquiry for characterisation is about establishing 'whether the character of the conduct complained of coincides with the character of the prohibited conduct'. The court went further and noted that the process embodies two elements, one being the scope of prohibition, which is a matter of statutory construction and the other being the nature of the conduct complained of, which is a factual inquiry (*American Natural Soda* at para 47).

One of the issues that the Competition Appeal Court had to grapple with was whether the Tribunal was correct in finding that the restraint of trade was not a clause inserted in the ordinary cause of commercial necessity, because it did not follow on a joint venture. The shareholders' agreement unequivocally stated that the agreement between parties was not a joint venture. The Competition Appeal Court took a distinct view from that of the Tribunal. The Competition Appeal Court went further than just solely basing its finding on what the relationship was called in the shareholders agreement (literal interpretation), but rather focused on what the true nature of the relationship was (purposive interpretation). The Competition Appeal Court applied the principle of characterisation and arrived at a different conclusion to that of the Tribunal. The Competition Appeal Court found that a restraint, which is commercially reasonable in the context of the transaction is not characterised as violating s 4(1)(*b*)(ii) (*Dawn* at para 28).

The second issue that the Competition Appeal Court had to decide was the length or duration of the restraint. The Tribunal previously expressed its concern about the fact that the restraint of trade was for a long period of time and not the usual short period. Again, the Competition Appeal Court disagreed with this proposition adopted by the Tribunal. The Competition Appeal Court found the duration of the restraint to be reasonable and necessary to protect

the underlying investment. Dawn was only restrained insofar as it continued to hold shares in Sangio.

The Competition Appeal Court delineated an appropriate test for assessing ancillary conduct, holding that the character of a non-compete clause is not to be assessed as if it stood on its own. It must be viewed in the context of the transaction as a whole and the circumstances of the parties when they concluded the agreement. The court went on further and stated that the requirement that the restraint should be objectively necessary may, however, be too strict. The appropriate test, according to the court, was the following:

- Is the main agreement (ie, disregarding the impugned restraint) unobjectionable from a competition law perspective?
- If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement?
- If so, is the particular restraint reasonable proportionate to the requirement served? (*Dawn* at para 32).

Ultimately, since the Commission did not suggest that the shareholders agreement in itself was objectionable, the Competition Appeal Court concluded that the restraint was in the ordinary course of business, as it was necessary to protect proprietary confidential information of Sangio, as Dawn would have access to information and know-how of the business of Sangio. The ancillary restraint was found to be proportionate as it operated as long as Dawn was a shareholder in Sangio.

The Competition Appeal Court judgment is welcomed for bringing much needed clarity on some of the issues surrounding restraints of trade in competition law. This judgment underscores that not all agreements, which on the face appear to violate s 4(1)(*b*) of the Competition Act will *per se* amount to a prohibited conduct. The test for ancillary conduct developed in this case is significant as it is one of the first cases that sets out how one ought to apply it within the context of characterisation. It flows from this judgment that restraint of trade clauses contained in a sale of business or shareholders agreement will not necessarily be considered anti-competitive, provided that it is designed to protect the value of the investment and not designed to limit competition.

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By Khomotso Maja and Vilimile Gumede

Ungubani: The non-consensual surname change of a minor child

NAV v MVM and The Minister of Home Affairs (GP) (unreported case no 15664/2017, 16-2-2018) (Thobane AJ)

The question *ungubani*? features in one of the latest Marvel films. It is an old question, which derives its roots from the *Nguni* language and translates to 'who are you?' For many cultures around the world, the naming of a child is a sacred rite, as it is one of the first exercises undertaken by those who presuppose the child's existence to ascribe identity to the child. This notion seems absurd and yet it was the perception of one of the parties in the case of *NAV v MVM and The Minister of Home Affairs* (GP) (unreported case no 15664/2017, 16-2-2018) (Thobane AJ).

The position of fathers of children born out of wedlock has evolved since the Births and Deaths Registration Act 51 of 1992 (the Act) came into effect. It is interesting to note that according to the Recorded live births, 2016 Report, which was released by Statistics South Africa, no comparable or reliable information on fathers could be provided due to a high proportion of births registered (more than 60%) without details of fathers (www.statssa.gov.za, accessed 1-9-2018).

The Act makes provision for instances where the parent of a minor child intends to alter the surname of the child. The type of scenario discussed in this article, however, is one where the father of a child born out of wedlock approached the court for an order setting aside the change of the minor child's surname, which was done without his consent.

In the above-mentioned case, the minor child was born to the parties at a time when they enjoyed cordial relations and were intent on getting married. Prior to that, *lobola* negotiations had commenced, resulting in the conclusion of a *lobola* pact, which incorporated a portion of payment of damages for the unborn child.

The parties agreed that the child's name would be registered with the surname of the applicant (the father) and this was done. Not long after the partial payment of *lobola*, the parties' relationship came to an end, yet they remained in contact for the sake of the child after the birth.

At some point during the child's early, minor years, the first respondent (the mother) succeeded in changing the child's surname to her own without the consent of the father. Soon after the father became aware of the non-consensual change, he and the mother approached a social worker to assist them in the conclusion of a parenting plan, wherein it was concluded, *inter alia*, that the child's name would contain a double-barrel surname, which incorporated the surnames of both parents. The validity of the parenting plan was disputed by the mother, however, the court was of the view that it did not have to pronounce on the status of the parenting plan.

The court stated that the crisp issue for determination was whether or not it could direct the Minister of Home Affairs to restore the surname of the child from that of the mother to that of the father. In considering the matter, the court had regard to s 25 of the Act and ss 18 to 22 of the Children's Act 38 of 2005, as well as High Court and Supreme Court of Appeal case law.

Thobane AJ, in his judgment stated at

para 20 that: 'The question of whether the natural father who is neither married to the natural mother of the minor child nor in a permanent life relationship with her is answered by considering the provisions of section 21(1) of the Children's Act. The question therefore is whether the applicant had full parental rights and responsibilities in respect of the minor child as envisaged by section 18(2)(*c*), prior to the change of surname.'

The court set out the qualities and requirements expected from the father of the minor child in terms of s 21(1)(*b*) as follows –

'(*i*) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(*ii*) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(*iii*) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.'

The court further held at para 23 that: 'When the requirements are looked at individually, the picture, set out below, emerges. Firstly, the applicant undoubtedly aligned or identified himself as the father of the minor child. In addition, [the] applicant paid over, to the defendant's family, in accordance with customary law, a portion of *lobola*. Undoubtedly, the requirement set out in section 21(1)(*b*)(i) has been met. The contention by the first respondent that the applicant did not consent to be identified as the father of the child is not supported by objective facts, even on the version of the first respondent. Secondly, the applicant and the first respondent put together a parenting plan. On the version of the first respondent the applicant became involved in the upbringing of the minor child after the parenting plan was obtained. While it is not clear when the parenting plan was obtained, it seems undisputed that it is in place. The provision of section 21(1)(*b*)(ii) require of the father to be involved in the upbringing of the child. [There] can be no better indication that the applicant is involved in the upbringing of the minor child than the fact that there is a parenting plan in place. Lastly, it is required of the applicant to show that he contributes or has attempted to contribute towards expenses in relation to the minor child. It is my view that even though the applicant is said to be in arrears with payment of maintenance for the minor child that is not the only measure to weigh the question of maintenance. … I am satisfied that the applicant meets the requirements of section 21(1)(*b*)(ii).'

The court, therefore, concluded that the father had indeed acquired full parental responsibility as envisaged in s 18(2)(*c*) and that the mother was, therefore, obliged to consult the father before changing the minor child's surname. The court also commented that parties should not use the minor child as a tool to fight issues of their broken-down relationship. It was ordered that the mother's non-consensual change of the minor child's surname be set aside; that the Minister of Home Affairs restore the minor child's surname to that of the father and that the mother pay the costs.

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The authors were directly involved with the litigation of this matter for the applicant. ❑

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The parenting plan as legal instrument

The concept of a parenting plan is arguably one of the most useful legal instruments introduced by the Children's Act 38 of 2005, purposely designed to lead parents through the emotionally charged quagmire of a messy breakup of a previously trustful relationship. Such a plan becomes pivotal to govern expectations and delineate rights and responsibilities, especially in the critical first 18 months after separation when nerves are exposed, egos are triggered, and communication may well have deteriorated to a point of complete standstill.

The parenting plan is the subject of regulation in ss 33 to 35 of the Children's Act and the legal milestone that brought much needed clarity to this somewhat fractured section of South Africa's (SA's) family law. The Children's Act was instrumental in incorporating and replacing an array of separate legal mechanisms, including –

- the Children's Act 33 of 1960;
- the Age of Majority Act 57 of 1972;
- the Child Care Act 74 of 1983;
- Children's Status Act 82 of 1987; as well as
- the Guardianship Act 192 of 1993.

The Children's Act also incorporated s 4 of the Prevention of Family Violence Act 133 of 1993 and the Natural Fathers of Children born out of Wedlock Act 86 of 1997.

The completion of the Children's Act has turned out to be a ten-year endeavour, which remains a continuous work in progress. The golden thread that runs throughout the project is giving a legal platform to the best interests of the child. It is one of the principle law responsibilities entrusted on SA's legal justice system, which has historically culminated in the notion of the High Court acting as the upper guardian of all children.

The implementation of certain sections of the Children's Act only came into effect as late as July 2007, and others, including those pertaining to the practical implications of drawing up a parenting plan, was only promulgated in April 2010.

From a constitutional law perspective, the Children's Act could be seen as the natural legal manifestation of what is circumscribed by the Bill of Human Rights, specifically as it pertains to the best interests of the child, as set out in ch 28 of the Constitution. The Children's Act endeavours to expand on the ambit of the previous regime relating to 'custody and access,' to actuate a more comprehensive regulatory system – one that could incorporate the complete range of parental rights and responsibilities, as they relate to the care of, as well as contact with, all affected minor children.

It should be evident that the requirements of the Children's Act will commonly be scrutinised at times of agitation, separation and/or divorce, of either married or unmarried couples, where children are involved. This prompts the second golden rule that could be delineative of the Children's Act, namely that both parents, bar any extraordinary disqualifying circumstances, will remain holders of full parental responsibilities and rights with regard to the children under the age of 18.

In this regard ss 18(1) and 31(1) and (2) lays emphasis on the parental right and responsibility of both parents regarding the care and contact of the child and to have input in the major decisions regarding the child's future, as well as the pivotal daily decisions pertaining to the care, contact, welfare, and personal development of the child. By law, parents are obliged to confer and cooperate, on mostly all important decisions, including those pertaining to living arrangements, namely, health, education, financial obligations, legal matters and discipline.

To this end, it could be regarded as the primary objective of the parenting plan to regulate how parents will exercise their respective rights and responsibilities under the changed set of circumstances – or to be more precise – a parenting plan can be defined as a unique document, which is compiled for a specific family, and represents the best possible solutions to avoid future litigation, and to ensure the optimal participation of both parents and their minor child/children. Developed by means of a mediated process prescribed by legislation to address the ever-changing needs of the minor child/children involved taking into account the inputs made by the minor child/children given their age, maturity and developmental stage, always complying to the best interest of the minor child/children standard.

It should be noted that the Children's Act does not compel parents, that are in agreement on co-parenting measures, to present a parenting plan, but it does necessitate that, in the event of disagreements and to avoid the risk of further litigation (s 7(*n*) of the Children's Act), they first 'seek to agree' on a parenting plan, prior to approaching the court for a determination on these rights and responsibilities. Also, these rights and responsibilities are not stated as a numerus clauses of competencies and the parties are free to include whatever agreements they may see fit.

From a legal perspective though, there are certain fundamentals that would characterise such an agreement. These are, if not limited to, the following:

- The plan needs to be unique to a particular family.
- Optimal participation of both parents will be essential.
- Child participation (s 10 of the Children's Act). A minor child with consideration to their developmental stage and level of maturity, will be of vital importance.

The Children's Act clearly states that the participation of the minor relates to their right to be heard, and does not extend to a right of veto or ultimately, of a right of consent. The child is still a minor and decision making is deferred to the parents, who act as legal guardians by law.

The law does allow for both parents to jointly cede some of these rights to a third party, for instance a grandparent (in a Parental Rights and Responsibilities Agreement) where the parents are for some reason incapacitated, for instance, where the separating spouses are both addicted to debilitating substances.

At the outset a number of benefits associated with a mediated parenting plan would be immediately evident:

- When rules are negotiated in a safe environment and set out in writing, it could alleviate some of the animosity associated with vulnerable egos in contest, dealing with the trauma of separation.
- The pitfalls of unnecessary litigation could be better navigated.
- The constantly changing needs of the minors will be easier to address.

It should be clear that the concept of a parenting plan and the role of both parents in the developmental process, has the supplementary benefit of offsetting the focus from the antagonism between the parents to their respective proactive roles in the wellbeing of the child. This is also where a skilled professional may act as subtle guide to impress on the parents the positive value of parenting skills development – to communicate the truism that no one is an effective educator by nature – and that all may benefit from expanding their skillset in the form of a parent effectiveness training programme.

Parents could be enthused by reframing those well-rehearsed rhetorical questions that they probably already contemplate in their own quiet time – where they ponder on issues like cementing the relationship with their child, improving communication and understanding, fostering mutual respect, and also, how to constantly hone their skills in handling conflict situations without running the risk of alienating the child or ultimately damaging the relationship.

Practical and procedural implications

The parenting plan as a fundamental agreement in respect of co-parenting arrangements, as defined by the Children's Act and plays an essential role in divorce proceedings where minors are involved. It is a focus in collaborative child focused mediation in divorce where, in practical terms the plan will first be mediated and attached as an addendum to the settlement agreement, therefore, rendering it the status of an order of the court. In this instance it is also important to note that this remedy is not exclusive to divorce proceedings.

In cases where a divorce has already been granted, mediation plays an important role wherein the parenting plan could be drafted and registered with the Family Advocate's Office. It is important to adhere to Form 10 titled 'Statement of social worker or other suitably qualified person and that the parenting plan was prepared after mediation'. Readers are urged to also focus on reg 10 and s 34(3) of the Children's Act, as well as GNR 261 *GG*33076/1-4-2010 at p 176.

In your application for registration of a parenting plan it is important to use form 8 titled 'Application for registration of a parenting plan or for a parenting plan to be made an order of court'. Regulation 9 and s 34(2) of the Children's Act, as well as GNR 261 *GG*33076/1-4-2010 at p 172 should also be focussed on.

It is important to note that a parenting plan has greater enforceability in law when it has been made an order of the court than when it has only been registered with the Family Advocate's Office.

At first glance, compliance with the Children's Act deals with the issues of living arrangements, maintenance and parental contact, and to this end there is a prescribed list of concerns that need to be addressed in the plan, namely –

- where and with whom the child is to live;
- how responsibility for the maintenance of the minor is to be divided;
- contact arrangements between the child and other associated individuals; and
- stipulations pertaining to the schooling and religious upbringing of the child.

Once the plan is finalised and signed by both parents, it becomes a legally binding agreement. When additionally filed with the Family Advocate's Office, the latter will peruse the agreement to determine conformity with the Children's Act and may recommend amendments if appropriate and then as stated, the parties could apply for the plan to be made an order of the court.

It is also important to note that the parties to the agreement are allowed by the Children's Act to reassess the parenting plan from time to time to adapt to changing circumstances. In fact, the prudent mediator will advise the parents to commit to at least a yearly reappraisal of the plan in a formal mediation session.

Reflecting on the significance of a parenting plan

Children tend to act as an emotional barometer with regard to the health of the family unit, which would also imply that any measure of tension that exists or may persist, could reflect in their personal conduct. Parents are often ignorant of this reality and mistakenly assume that the tensions created behind closed doors do not affect the emotional wellbeing of the children, until they are suddenly confronted by the intervention of a school principal observing antisocial behaviour.

It is within this context that a parenting plan gains significance, since it assists in managing pressure situations before they could become emotionally toxic. When boundaries are delineated, more certainty is created, and actions tend to become more predictable – with the added benefit that experience has shown that the earlier these boundaries are clarified, the easier it becomes for parents in potentially toxic situations to navigate the pitfalls.

The skilled mediator will assist parents to explore the new realm of co-parenting and guide them in compiling a family-specific parenting plan that could provide for the children's essential needs pertaining to residence, maintenance, structure (scheduling) and contact. In this regard, the mediation process may be viewed as a potentially creative opportunity for parents despite the difficult circumstances to reaffirm their commitment as devoted guardians, and to start redefining their respective roles as co-parents, where they were previously use to act as a couple.

The mediator will ensure that the plan has both structure and flexibility structure, to remove uncertainties and allow the child to adjust to what will inevitably be experienced as a disrupted family environment, and flexibility, to allow the parents to accommodate each other's possibly changing daily schedules. A principle objective of the process will be to establish trust and open basic communication lines, even if only cordial, to facilitate an environment conducive to collaborative co-parenting.

Experience has shown that a skilfully drafted parenting plan has some success in reducing the legal quandary of parental alienation, namely where the controlling parent is now obliged to adhere to prior scheduling arrangements that would enforce parental access, but may also remove some of the triggers.

With this goal in mind, the mediation process and parenting plan is purposely designed to allow parents the opportunity to gradually adjust to the often-unfathomable realities of a post-separation or divorce environment, where the children run the danger of becoming reluctant bargaining chips in the parents' attempts to settle personal scores. This is where the assistance of an objective third party with the necessary expertise regarding child focussed mediation and children's developmental needs becomes invaluable.

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New legislation

Legislation published from 3 – 31 August 2018

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

Bills

South African Reserve Bank Amendment Bill B26 of 2018.
National Gambling Amendment Bill B27 of 2018.

Promulgation of Acts

Appropriation Act 4 of 2018. *Commencement:* 2 August 2018. GN796 *GG*41816/2-8-2018.

Selected list of delegated legislation

Broad-Based Black Economic Empowerment Act 53 of 2003
Codes of Good Practice on Broad Based Black Economic Empowerment: Statement 000: Youth Employment Service. GenN502 *GG*41866/28-8-2018.
Companies Act 71 of 2008
Introduction of the online filing method for financial accountability supplements (FASs) as per form COR30.2 with effect from 1 July 2018. GN789 *GG*41811/3-8-2018.
Introduction of the new electronic filing method by way of mobile application (app) for company and close corporations forms with effect from 1 August 2018. GN788 *GG*41811/3-8-2018.
Compensation for Occupational and Diseases Act 130 of 1993
Directive: Definitions of 'active employer' and 'inactive employer'. GN894 *GG*41861/23-8-2018.
Counterfeit Goods Act 37 of 1997
Designation of warehouse facilities as counterfeit goods depots and appointment of persons in charge. GN801 *GG*41823/6-8-2018.
Financial Markets Act 19 of 2012
Amendment of the A2X trading rules. BN95 *GG*41827/10-8-2018.
Gas Regulator Levies Act 75 of 2002
Levy and interest payable by the piped-gas industry. GN920 *GG*41872/29-8-2018.
Independent Communications Authority of South Africa Act 13 of 2000
Guidelines for confidentiality in terms of s 4D. GN849 *GG*41839/17-8-2018.
Legal Metrology Act 9 of 2014
Legal Metrology Regulations, 2017. GN877 *GG*41854/24-8-2018.
Mine Health and Safety Act 29 of 1996
Guidance note for management and control programme for tuberculosis in South African mining industry. GN851 *GG*41839/17-8-2018.
Occupational Health and Safety Act 85 of 1993
Notice regarding applications for construction work permits under the Construction Regulations, 2014. GN850 *GG*41839/17-8-2018.
Petroleum Pipelines Levies Act 28 of 2004
Levy and interest payable by petroleum pipelines industry. GN919 *GG*41872/29-8-2018.
Small Claims Courts Act 61 of 1984
Establishment of small claims court for the area of Mkhuhlu. GN799 *GG*41819/3-8-2018.
Tourism Act 3 of 2014
Regulations on the manner and procedure for lodging and dealing with tourism complaints. GenN438 *GG*41811/3-8-2018 (also available in Sepedi).

Draft delegated legislation

Draft National Policy on Comprehensive Producer Development Support of the Department of Agriculture, Forestry and Fisheries. GenN429 *GG*41811/3-8-2018.
Draft Amendment Regulations on Governance and Composition of Specific Economic Zones in terms of s 41 of the Special Economic Zones Act 16 of 2014. GN790 *GG*41811/3-8-2018.
Draft Climate Smart Agriculture Strategic Framework for Agriculture, Forestry and Fisheries. GenN428 *GG*41811/3-8-2018.
Amendment of the regulations pertaining to the conduct, administration and management of the assessment for the National Senior Certificate in terms of the South African Schools Act 84 of 1996 for comment. GN803 *GG*41824/6-8-2018 and GN802 *GG*41284/13-8-2018.
Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comment. GN R823 *GG*41828/10-8-2018.
Draft amendment of the Civil Aviation Regulations, 2011 (part 114, sch 1) under the Civil Aviation Act 13 of 2009. GN R893 *GG*41860/23-8-2018.
Draft list of types of heritage objects in terms of the National Heritage Resources Act 25 of 1999 for comment. GN869 *GG*41854/24-8-2018.
Revised classification guidelines in terms of the Film and Publication Act 65 of 1996 for comment. GN R887 *GG*41855/24-8-2018.
Regulations on the restitution of heritage objects in terms of the National Heritage Resources Act 25 of 1999 for comment. GN868 *GG*41854/24-8-2018.
Amendment of the disciplinary rules made under the Auditing Professions Act 26 of 2005 for comment. BN98 *GG*41870/31-8-2018.
Draft amendment to the National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, 2014 in terms of the Electronic Communications Act 36 of 2005. GN905 *GG*41870/31-8-2018.
Rules relating to good pharmacy practice in terms of the Pharmacy Act 53 of 1974 for comment. BN99 *GG*41870/31-8-2018.
Proposed amendments to the National Gambling Regulations, 2004 in terms of the National Gambling Act 7 of 2004. GN R917 *GG*41871/31-8-2018. ❑

Employment law update

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Does the perfection of a notarial bond amount to a transfer of a business as a going concern?

In *Spar Group Ltd v Sea Spirit Trading 162 CC t/a Paledi and Others* (2018) 39 ILJ 1990 (LAC), Mr and Mrs Vermaak were employed by Paledi Superspar and Paledi Tops, respectively, to manage the businesses (the Paledi Businesses). The Paledi Businesses obtained trading stock on credit from Spar. As security for their indebtedness to Spar, two general notarial covering bonds were registered over the movable property of the Paledi Businesses in favour of Spar. On default, Spar was entitled to take possession of, and retain, all and any moveable property, and sell and dispose of it. This included Spar's right to conduct the Paledi Businesses in their name, to purchase goods, and to dispose of the Paledi Businesses.

In June 2015, the Paledi Businesses informed Spar that they were no longer in a position to meet their expense and wage obligations. Consequently, Spar obtained an order from the High Court perfecting the notarial bonds. The court order granted Spar the right to manage the Paledi Businesses temporarily for purposes of recovering its debts.

Spar then presented the Vermaaks with a draft management agreement in terms of which they would continue as store managers for an initial three-month period at a lower salary. The Vermaaks declined the offer and as a result, Spar appointed a new store manager and informed the Vermaaks that they were released from their duties. The Vermaaks subsequently contended that the perfection of the notarial bonds by Spar led to a transfer of business as a going concern from Paledi Businesses to Spar in terms of s 197 of the Labour Relations Act 66 of 1995 (the LRA) and, consequently, that their dismissals were automatically unfair in terms of s 187(1)(*g*) of the LRA. This section provides that if the reason for a dismissal is a transfer, or a reason related to a transfer, contemplated in s 197 of the LRA, the dismissal is automatically unfair.

The Labour Court (LC) held that Spar's perfection of its notarial bonds and its taking control of the businesses was a transfer of a business as a going concern in terms of s 197 of LRA and accordingly, that the subsequent dismissals of the Vermaaks were automatically unfair. Spar took the matter on appeal to the Labour Appeal Court (LAC) and argued that the LC had failed to recognise that the court order had authorised Spar to take control of the Paledi Businesses for a specific and limited purpose, namely to sell movable property to customers in order to realise their indebtedness.

In determining whether the perfecting of the notarial bonds in the present circumstances constituted a transfer of a business as a going concern, the LAC had regard to the following:

- Spar only assumed responsibility of the Paledi Businesses for a limited purpose of recovering its debts.
- Spar was not authorised to dispose of the Paledi Businesses' movable property in its own name.
- Spar was not authorised to sell the Paledi Businesses' immovable property or to retain movable or immovable property belonging to them after its debt had been realised.
- The leases in the names of the Paledi Businesses were not transferred to Spar.
- It was common cause that if the debt was settled, the responsibility for running the Paledi Businesses would have been returned and that any revenue generated in excess of the amount due to Spar would have been for the benefit and account of the Paledi Businesses.

The LAC held that a creditor perfecting a notarial bond over movable property does not ordinarily intend to acquire responsibility for conducting the business of the debtor to make a profit on an ongoing basis. Requiring a creditor perfecting a notarial bond to assume responsibility for the employment contracts of a debtor would thus render this form of security unduly burdensome and ineffective.

In this matter, Spar had acted as a creditor and not as an employer. Similarly, to a sale of shares, the perfection of the notarial bond did not result in a transfer from one legal entity (the Paledi Businesses) to another legal entity (Spar) as envisaged by s 197 of the LRA. The LAC held that the perfecting of the notarial bonds by Spar taking possession of the Paledi Businesses to recover monies due does not trigger the application of s 197 and there was thus no basis for the Vermaaks' claim that they were automatically dismissed by Spar.

The failure to provide a qualified interpreter for an employee during a disciplinary hearing

In *Mmola v Commission for Conciliation, Mediation and Arbitration and Others* [2018] 8 BLLR 822 (LC), the employee was dismissed by the employer for misconduct after he refused to obey a reasonable instruction from his manager and failed to report to work. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The arbitrating commissioner found the employee's dismissal to be substantively unfair and he was awarded compensation equal to three months' salary.

The employee sought a review of the award on the grounds that the commissioner should have found that his dismissal was procedurally unfair and that he should have been reinstated.

The court noted that the employee's claim that his dismissal was procedurally unfair was based on the failure of the employer to provide a Sepedi interpreter for him at the disciplinary hearing, although he had requested one. The employer had provided an interpreter capable of interpreting only Sesotho and Tswana. The commissioner rejected the employee's claim on the basis that the employer conducted its business in English and that the employee was proficient enough in English to understand the allegations of misconduct against him. The court held that this was an error in law. The employee and his representative had raised the need for a Sepedi interpreter on a number of occasions during the disciplinary hearing. The court held that the

right to have an interpreter at the hearing is a cardinal right, which cannot be easily waived. Accordingly, the lack of a qualified interpreter in this case rendered the dismissal procedurally unfair.

As regards the issue of reinstatement, the court found that despite the clear indication from the employee that he did not wish to be reinstated, the commissioner still considered the issue. This was a mistake in law. Section 193(2) of the Labour Relations Act 66 of 1995 expressly provides that reinstatement cannot be granted if the employee does not wish to be reinstated, which was the case here. The court held that in spite of the commissioner incorrectly entertaining the issue, the final award of compensation was correct.

Having regard to the above, the court upheld that employee's review application and substituted the commissioner's award for an order that the employee's dismissal was both procedurally and substantively unfair. Since the commissioner had also taken into account a number of irrelevant factors in assessing the substantive fairness of the dismissal, the compensation awarded to the employee was increased from three to seven months' salary.

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The Constitutional Court brings finality on the interpretation of an amendment to the LRA

Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae*)* (2018) 39 ILJ 1911 (CC)

Section 198(2) of the Labour Relations Act 66 of 1995 (LRA) provides that a worker who is placed by a temporary employment service (TES) to render services at a client of the TES, is an employee of the TES.

Section 198A(3)(*b*) states that a worker who is placed at a client of the TES, but who is not performing a temporary service – as defined and earns below the minimal threshold – is deemed to be the employee of the client on an indefinite basis, if the person works at the client for more than three months.

Does the application of s 198A(3)(*b*) mean both the TES and the client become dual employers of the worker, or does the client become the sole employer, which consequentially brings an end to the employment relationship between the TES and worker?

This formed the central question before the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court (LC), the Labour Appeal Court (LAC) and more recently, the Constitutional Court (CC).

Assign Services, a registered TES, placed 22 workers at its client's workforce on a full-time basis for more than three consecutive months. This sparked an interpretation dispute between National Union of Metalworkers of South Africa (NUMSA) and Assign where the former argued that the workers, in terms of s 198A(3)(*b*), became full-time employees of Assign's client, whereas Assign argued that the section gave rise to a dual employer relationship, that being both the client and Assign became the workers employers.

Assign referred the dispute to the CCMA.

The commissioner preferred NUMSA's argument and found that the application of s 198A(3)(*b*) meant that Assign's client became the workers sole employer.

On review the LC favoured Assign's interpretation and in setting aside the award, held that the section created a dual employment relationship. The court found that although the provisions of s 198A(3)(*b*) created a statutory employment relationship between employee and client, it did not bring to an end the common law employment contract between the TES and employee.

The LAC differed with the LC, finding that not only did the sole employer interpretation protect the rights of placed employees, but in addition, promoted the purpose and objectives of the LRA.

Before the CC among Assign's arguments in support of the dual employer interpretation were:

- Section 198(2) had not been amended after the introduction of s 198(3)(*b*), which supports the legal notion that the LRA foresaw two employers under these circumstances.
- A worker's rights are better protected by having two employers as opposed to a situation where the worker's employment contract ends with the TES whereafter and without the worker's consent; they enter into a new employment relationship with the client on new terms and conditions.

NUMSA on the other hand argued that:

- Section 198 and s 198A should not be read in conjunction – each section contemplates different realities; s 198 applies to employees placed by a TES and who earn above the annual threshold while s 198A applies only to placed workers earning below the threshold. Thus, there is no need to reconcile s 198 with s 198A.
- On the sole employer interpretation, once the employee becomes an employee of the client, their working conditions could only improve by virtue of s 198A(5).

The court went into an extensive analysis of how legislation and in particular s 198A(3)(*b*), should be interpreted and found that from a contextual and purposive interpretation, the sole employer approach gained support.

Having done so the court addressed the 'triangular relationship' between the TES, worker and client and found that the TES's duties as employer, were generally limited to placing a worker at a client and paying the worker from proceeds received by the client. It is the client who exercises authority over the worker by determining their working conditions, duties, performance assessments and who has the authority to discontinue the worker's services. Therefore, the TES merely delivers the worker to the client. On this basis the court rejected the argument that a sole employer interpretation forces the worker, without their consent, into a new employment contract with new terms and conditions. The change in employment from the TES to the client is not a transfer of a new employment relationship, but rather a statutory change in respect of the designation of employer within the same triangular relationship, which continues as long as the commercial contract between the client and TES remains in force. This change in employer does not adversely affect the worker who continues to perform the same work under the same or similar working conditions.

In dismissing the argument that a dual employer relationship offered better protection for a worker, the court held that the sole employer interpretation provided certainty and job security. In addition, and from a practical point, the dual employer interpretation created potential problems, such as the employee being subjected to two disciplinary codes, which may categorise misconduct and poor performance differently. If dismissed, which employer dismissed the

employee, which employer must reinstate the employee should the dismissal be deemed unfair. Moreover, while employees might have a legitimate interest dispute against the TES, which would enable them to embark on protected strike action, the same dispute might not be a legitimate reason to strike against the client, which leaves the employees vulnerable to dismissal.

In conclusion the court held:

'(a) Section 198 deals with the general position with regard to TESs, while section 198(2) is a deeming provision creating a statutory employment contract between the TES and a temporarily placed employee.

(b) Section 198A deals with the application of section 198 to a specific category of workers, being marginal employees employed below the BCEA [Basic Conditions of Employment Act 75 of 1997] threshold.

(c) Section 198A(3)(*a*) provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in section 198(2).

(d) Section 198A(3)(*b*)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.

(e) The deeming provisions in sections 198(2) and 198A(3)(*b*)(i) cannot operate at the same time.

(f) When marginal employees are not performing a temporary service as defined, then section 198A(3)(*b*)(ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer.'

The appeal was dismissed with costs.

In a dissenting judgment Cachalia AJ concurred with the dual employer interpretation. ❑

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By Meryl Federl

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Abbreviation	Title	Publisher	Volume/issue
AHRLJ	African Human Rights Law Journal	University of Pretoria Law School	(2018) 18.1
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2018) 15.2 July (2018) 15.3 August
Obiter	Obiter	Nelson Mandela University, Faculty of Law	(2018) 39.1
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2018) August
SAJEJ	South African Judicial Education Journal	South African Judicial Education Institute, Office of the Chief Justice	(2018) 1.1
SJ	Speculum Juris	University of Fort Hare, Faculty of Law	(2017) 31.2
THRHR	Tydskrif vir Hedendaagse Romeinse-Hollandse Reg	LexisNexis	(2018) 81.3

Administrative law

Wallis, M 'Do we need deference?' (2018) 1.1 *SAJEJ* 97.

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Subramanien, D 'NSPCA has statutory power to institute private prosecutions – a triumph for animals and human morality – *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46' (2018) 39.1 *Obiter* 230.

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Gordon, B 'Regulering van Nulgradering-Internetdienste in Suid-Afrika: *Quo vadis*?' (2018) 15.2 July *LitNet*.

Consumer law

Roestoff, M 'Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective' (2018) 81.3 *THRHR* 393.

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Mokoena, UC; Mopai, Z and Lubaale, EC 'The custodial role of the Constitutional Court at play: A critical analysis of the case of *Black Sash Trust v Minister of Social Development* [2017] ZACC 8' (2018) 39.1 *Obiter* 249.

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Gerber, GA and Curlewis, LG 'Criminal liability requirements of the new Broad-Based Black Economic Empowerment (B-BBEE) statutory fronting offence' (2018) 81.3 *THRHR* 355.

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Scott, J 'The *actio de feris* – Phoenix from the ashes or vain chimera? – *Van der Westhuizen v Burger*' (2018) 81.3 *THRHR* 510.

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Müller-Van der Westhuizen, C and Streso, R '*Ukuthwala* – gebruik of misbruik?' (2018) 15.3 August *LitNet*.

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Mbazira, C and Namatovu, T 'Civic

space and human rights advocacy in the extractive industry in Uganda: Implications of the 2016 Non-Governmental Organisations Act for oil and gas civil society organisations' (2018) 18.1 *AHRLJ* 75.
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Van Niekerk, H and Mpinga, S 'A Biblical Lazarus: Deregistration of a company and the revival of right to minerals – a discussion of *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA)' (2018) 39.1 *Obiter* 203.

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Neels, JL 'The role of the Hague Principles on Choice of Law in International Commercial Contracts in the revision of the preliminary Draft Uniform Act on the Law of Obligations in the OHADA region' (2018) 81.3 *THRHR* 464.

Property law

Van der Merwe, CG 'The duty of the body corporate to make adequate financial provision for the proper maintenance of the common property of a sectional titles scheme: Lessons to be learnt from the provisions of the strata legislation of New South Wales and New Zealand' (2018) 81.3 *THRHR* 451.

Refugee law

Kavuro, C 'Exploring the full legal protection of refugees and its limitations with reference to natural and positive law' (2018) 39.1 *Obiter* 17.

Reproductive rights law

Agaba, DK 'Implementing legal accountability to reduce maternal mortality and morbidity in Uganda' (2018) 18.1 *AHRLJ* 123.
Pickles, C 'Sounding the alarm: *Government of the Republic of Namibia v LM* and women's rights during childbirth in South Africa Constitutional Court' (2018) August *PER*.

Right to education

Bakare, SS 'Boko Haram and the child's right to education in Africa: Examining the accountability of non-state armed groups' (2018) 18.1 *AHRLJ* 146.
Simbo, C 'A hexagon right: The six dimensions of the South African right to basic education' (2018) 39.1 *Obiter* 126.

Right to health

Maimela, C 'Does the right to access to health care services in terms of s 27 of the Constitution of South Africa, 1996 cater for cancer patients?' (2018) 39.1 *Obiter* 1.

Right to privacy

Gebreegziabher, HW 'The right to privacy in the age of surveillance to counter terrorism in Ethiopia' (2018) 18.1 *AHRLJ* 392.
Mahadew, R 'Does the Mauritian Constitution protect the right to privacy? An insight from *Madhewoo v The State of Mauritius*' (2018) 18.1 *AHRLJ* 189.

Rule of law

Abdulrauf, LA 'The challenges for the rule of law posed by the increasing use of electronic surveillance in sub-Saharan Africa' (2018) 18.1 *AHRLJ* 365.
Fombad, CM 'An overview of the crisis of the rule of law in Africa' (2018) 18.1 *AHRLJ* 213.
Fombad, CM and Kibet, E 'Editorial introduction to special focus: The rule of law in sub-Saharan Africa: Reflections on promises, progress, pitfalls and prospects' (2018) 18.1 *AHRLJ* 205.
Frimpong, K and Agyeman-Budu, K 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' (2018) 18.1 *AHRLJ* 244.
Hindeya, TW 'Large-scale agricultural land acquisitions and Ethiopia's ethnic minorities: A test for the rule of law' (2018) 18.1 *AHRLJ* 346.
Inman, D and Magadju, PM 'Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity' (2018) 18.1 *AHRLJ* 293.
Moyo, A 'Standing, access to justice and the rule of law in Zimbabwe' (2018) 18.1 *AHRLJ* 266.

Succession

Wood-Bodley, MC 'Intestate succession and the survivor of an unformalised same-sex conjugal relationship: *Laubscher NO v Duplan* 2017 (2) SA 264 (CC)' (2018) 39.1 *Obiter* 276.

Taxation law

Fritz, C 'Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria' (2018) 18.1 *AHRLJ* 171.
Idris, NM 'Some comparisons between the Nigerian and South African fiscal regimes regarding an individual's tax residence' (2018) 39.1 *Obiter* 76.
Van Zyl, SP and Carney, TR 'A cry for certainty as to the application of "accrued to" for purposes of s 1 of the Income Tax Act 58 of 1962 – *M v CSARS*' (2018) 81.3 *THRHR* 484.

Trade law

Vinti, C 'A critical appraisal of the Plant Health (Phytosanitary) Bill's Compliance

with the salient aspects of the World Trade Organisation (WTO) agreement on the application of sanitary and phytosanitary measures' (2018) 39.1 *Obiter* 98.

Vinti, C 'A critical analysis of the frozen chips saga between the Southern African Customs Union and Belgium and the Netherlands' (2017) 31.2 *SJ* 151.

Warikandwa, TV and Osode, PC 'Trade liberalisation, developing countries and the discipline of trade-impacting measures related to environmental conservation: An appraisal of United States – measures concerning importation, marketing and sale of tuna products' (2017) 31.2 *SJ* 179.

Women's rights

Budoo, A 'Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union' (2018) 18.1 *AHRLJ* 58.

Rudman, A 'Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol' (2018) 18.1 *AHRLJ* 319.

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By Cora van der Merwe

May the Bar Council interfere in the taxation of a party-and-party bill of costs?

Noseweek editor, Martin Welz, and Chaucer Publications (Pty) Ltd trading as Noseweek (the defendants) were sued for defamation in the Western Cape Division of the High Court in Cape Town by the plaintiff (Leonard Katz) (see *Katz v Welz and Another* (WCC) (unreported case no 22440/2014, 7-11-2017) (Davis J)).

The defendants sought discovery of certain documents from the plaintiff. The plaintiff resisted the demand and the matter came before Davis J late last year.

The defendants were substantially successful in the matter and were awarded costs.

Challenging the bill of costs

The plaintiff gave notice that he was opposing certain items contained in the bill of costs. In particular, he disputed the amount charged to the defendants by their own advocate and decided to complain to the Cape Bar Council. Having received the notice of taxation, he laid a similar complaint with the Cape Law Society against the defendants' attorney.

Litigants sometimes hope that the opponent's legal team will bankrupt them with attorney and own client costs to bring a speedy end to the jurisprudential battle. In all my years as a legal costs consultant, this was the first time that I came across a loser in litigation, who required his opponent's attorney and own client account to be taxed down to a 'reasonable fee'.

Limiting the damage

The plaintiff's complaints gained no traction with the regulatory bodies and taxation day was looming.

The plaintiff then appointed counsel to appear at the taxation in order to secure a postponement. The purported purpose was so that the Bar Council would first have an opportunity to tax counsel's attorney and own client account in the hope of reducing it, so as to place a cap on the amount that the taxing master would allow.

There is a principle in law that no litigant may profit from the litigation through fees recovered. By way of example, if an attorney (and counsel) collectively charge their client R 100 000 for a matter then the client may not recover more than that on taxation – even though it may be objectively possible.

Uniform Rules of court

High Court taxations are governed by rules 69 and 70 of the Uniform Rules of Court.

In respect of counsel's account, r 69(5) stipulates: 'The taxation of advocates' fees as between party and party shall be effected by the taxing master in accordance with this rule and … he shall allow such fees … as he considers reasonable.'

Rule 70 governs the Taxation and Tariff of Fees of Attorneys.

Bills of cost are presented at taxation by attorneys and the bill includes the accounts of counsel, and any other disbursements that arise from the matter.

There can only ever be one impediment to the taxing master proceeding with a taxation. Rule 70(4) provides that: 'The taxing master shall not proceed to the taxation of any bill of costs unless he is satisfied that the party liable to pay the same has received due notice as to the time and place of such taxation and notice that he is entitled to be present thereat.'

Advocates never render two accounts on differing scales

The function of the various Bar councils and statutory law societies is to – on request of an aggrieved client of an advocate or attorney – assess whether the client has been overreached.

The plaintiff, a litigator with over 30 years' experience, lost sight of the fact that counsel never renders two separate accounts relating to the same matter: One on an attorney and own client scale and another on a party-and-party scale. The taxing master always looks at counsel's attorney and own client account in a party-and-party taxation and then decides what is fair and reasonable for the losing party to pay.

The 1942 Cape High Court case of *Barnett v Isemonger* 1942 CPD 325 regarding the function of the taxing master is as true today as it was back then:

'The costs to be allowed need not be necessary – still less "absolutely necessary": If they are, though not strictly speaking necessary, yet proper in the sense of being reasonably incurred, and are not incurred or increased … "through overcaution, negligence or mistake," … or, are not, in the words of *Gail*, "*delicate, noodeloose en voluntaire of vrywillige*," then they should be allowed. I repeat that "the true position is that the taxing master has still to steer his difficult course between the Scylla of liberality and the Charybdis of niggardliness".'

The taxing master has a wide discretion, which is exercised by applying his mind to the Uniform Rules of Court, judicial precedent, the principles of the law of costs, and the practice that prevails in the court in which they sit. The remedy for an aggrieved party is not to attempt to delay a taxation, but to take a matter on review. Judicial decisions have demonstrated time and again that this is the only way.

Cora van der Merwe *BA (UJ) BA (Hons) (cum laude) (UP)* is the proprietor of Legally Accurate Cost Consultants in Pretoria.

Mrs Van der Merwe acted on behalf of the defendants with regard to the bill of costs and taxation. ❑

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